The status of abortion in public international law and its effect on domestic legislation

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“I cannot understand anti-abortion arguments that center on the sanctity of life. As a species we’ve fairly comprehensively demonstrated that we don’t believe in the sanctity of life. The shrugging acceptance of war, famine, epidemic, pain and life-long poverty shows us that, whatever we tell ourselves, we’ve made only the most feeble of efforts to really treat human life as sacred.”

– Caitlin Moran
Abstract

Few issues divide leaders and policy-makers as much as abortion, which regularly sparks heated political, religious and philosophical debates. Numerous states choose to prohibit or criminalize abortion, despite the fact that it has been practiced throughout recorded history. In many of these states, women turn to unsafe abortion methods, such as consuming bleach or inserting a coat hanger, which may cause long-term damage or death. In the light of this tragic reality, one could ask whether these women have a right to safe abortion in human rights law or not. In order to answer this question, the author analyzes the status of abortion in public international law. The results are based on a thorough examination of the preparatory works (travaux préparatoires) and reservations to CEDAW, CRC, ECHR, and ICCPR, as well as documents by international and regional treaty bodies. The author applies a treaty-based international law methodology, analyzes the results through Hilary Charlesworth and Christine Chinkin’s theory of the public and private distinction in public international law and discusses the juridical-political context. The author concludes that there is neither an explicitly formulated human right to abortion, nor is abortion included within the right to family planning. However, she finds that domestic legislation which criminalizes or restrict access to safe abortions may be in violation of other fundamental human rights.
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### Abbreviations

<table>
<thead>
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<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>2030 Agenda</td>
<td>The 2030 Agenda for Sustainable Development</td>
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<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<tr>
<td>ACHPR</td>
<td>African Commission on Human and Peoples’ rights</td>
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<tr>
<td>Beijing Conference</td>
<td>Fourth World Conference on Women, held in Beijing 1995. It resulted in the Beijing Declaration and Platform for Action</td>
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<tr>
<td>Banjul Charter</td>
<td>African Charter on Human and People’s Rights</td>
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<tr>
<td>CAT</td>
<td>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of all Forms of Discrimination against Women</td>
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<td>CEDAW Committee</td>
<td>Committee on the Elimination of Discrimination Against Women</td>
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<tr>
<td>CERD</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>CPPCG</td>
<td>Convention on the Prevention and Punishment of the Crime of Genocide</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>ESC committee</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>General Assembly</td>
<td>The General Assembly of the United Nations</td>
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<tr>
<td>Human Rights Committee</td>
<td>The Human Rights Committee monitoring the implementation of ICCPR</td>
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<tr>
<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICPD, Cairo Conference</td>
<td>International Conference on Population and Development held in Cairo 1994, resulted in a Programme of Action</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICJ Statute</td>
<td>Statute of the International Court of Justice</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>Maputo Protocol</td>
<td>Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa</td>
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<tr>
<td>Montevideo Convention</td>
<td>The Montevideo Convention on the Rights and Duties of States</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WHO</td>
<td>World Health Organization</td>
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<tr>
<td>Secretary-General</td>
<td>The Secretary-General of the United Nations</td>
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<td>SDGs</td>
<td>Sustainable Development Goals</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UN Charter</td>
<td>Charter of the United Nations</td>
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<tr>
<td>UNFPA</td>
<td>United Nations Population Fund</td>
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<tr>
<td>UK</td>
<td>The United Kingdom of Great Britain and Northern Ireland</td>
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<td>USA</td>
<td>The United States of America</td>
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1 Introduction

1.1 Introductory remarks

This spring, the CEDAW committee found Northern Ireland in a grave and systematic violation of women’s human rights by unduly restricting access to safe and legal abortions. By criminalizing abortion, Northern Ireland had failed to respect women’s right to family planning, health, and privacy. According to the CEDAW committee, “criminalizing abortion deprives women of any real choice in influencing circumstances affecting their mental and physical health.” Lastly, the committee noted that forcing women to carry almost every pregnancy to full term constitutes violence against women, potentially amounting to torture.

In general, there is a trend towards liberalization of national abortion laws, with the Irish referendum in May 2018 as one of the most recent examples. On the other hand, there are tendencies towards more restrictive laws as well. Needless to say, abortion advocates have experienced both success and setback. Despite major advancement in medical technologies and practices, death and disability as a result of unsafe abortions continue to pose a serious threat to public health and human rights. Scientists have described unsafe abortion as a preventable pandemic: at least 47,000 women die from complications and roughly five million women contract disabilities that require medical attention every year.

Despite these facts, the discussion whether or not access to safe abortions constitutes a human right continues to be intensely disputed on global, regional and national levels.

2 Ibid, para. 72(b)–(d).
3 Ibid, para. 42.
4 Ibid, para. 65 and 72(a).
5 Ireland held a referendum concerning whether or not to repeal article 40.3.3 in the Irish constitution (commonly known as the eighth amendment), in May 2018. The eight amendment restricts access to abortion by recognizing the right to life of the unborn child and has contributed to Ireland having one of the world’s strictest abortion laws. The result showed an overwhelming support in favor of the repeal, with 67 percent of the votes. Source: Rothwell, Landslide Yes vote as Ireland referendum repeals tough abortion laws – what happens next?, The Telegraph, 26/5 2018.
No reproductive health issue divides policymakers as much as abortion, thus countless state policies are not evidence-based and legal reforms towards permitting abortion are continuously hindered by political barriers.\textsuperscript{7} Former staffers at the World Health Organization (WHO) and the United Nations Population Fund (UNFPA) have concluded that organized opposition has increased over the last decades, impeding the efforts to prevent unsafe abortion.\textsuperscript{8}

1.2 Purpose and research questions

The purpose of this thesis is to assess the legal status of abortion in public international law and the consequences thereof, mainly through an analysis of the public and private distinction in international law based on the theories of Hilary Charlesworth and Christine Chinkin. In order to answer this question, the following sub-questions need to be answered:

a) Is there a direct reproductive right to abortion?

b) Is there an indirect right to abortion included within the right to family planning in CEDAW?

c) Is there an indirect right to abortion included within the scope of other human rights, such as the right to health, privacy, and freedom from torture, inhuman or degrading treatment?

d) How has the juridical-political context, namely the inherent tension between women’s autonomy and unborn children’s lives, affected the legal status of abortion?

1.3 Limitations

When discussing the issue of abortion in international law, it is natural to approach the International Covenant on Civil and Political Rights (ICCPR) since it is the most generally accepted human rights treaty on civil and political rights, the Convention on the Rights of the Child (CRC) due to children’s interests and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) considering women’s autonomy, the last two often portrayed as antipoles. The European Convention on Human Rights (ECHR) is used as a regional example, in contrast to the


\textsuperscript{8} Ibid, p. 5.

1.4 Method, sources and materials
This thesis embraces a treaty-based positivistic international law methodology, as established in the Vienna Convention on the Law of Treaties (VCLT) article 31–32. It examines obligations deriving from international law, rather than discussing natural law theories, values and philosophical views, such as when life is considered to begin.

The theoretical approach of this thesis rests upon a critical perspective based on the writings of Hilary Charlesworth and Christine Chinkin, operating on the assumption that there is a tension between sovereignty and human rights, and a distinction between public and private worlds in international law.

This thesis mainly builds upon a study of the preparatory works (travaux préparatoires) and reservations to CEDAW, CRC, ECHR and ICCPR, the Concluding Observations of the CEDAW committee in 2017 and 2018, Country Inquiries and General Recommendations of treaty bodies, as well as jurisprudence of relevant courts and commissions. In accordance with my study, this thesis focuses on these supplementary means of interpretation. In order to reflect the original sources in a just and accurate manner, it includes many quotations.

1.5 Definitions
Definitions of key terminology: Human rights are defined as rights deriving from international, regional or national human rights law. In other words, legal rights validated in recognized sources, which creates entitlements and freedoms.

Reproductive health was described at the International Conference on Population and Development held in Cairo 1994 (ICPD) as having the capability to reproduce and the freedom to decide if, when, and how often to do so. It includes access to information and safe, effective and affordable methods of family planning. A few other parts of reproductive rights were also mentioned at the ICPD, such as prenatal care, sexual
health, and prevention of sexually transmitted diseases, however, these are not discussed in depth in this thesis.\textsuperscript{9} As for reproductive rights, what is considered to be included in this term varies in different states and may or may not include above mentioned services, as well as access to sexual education, contraceptives, safe abortions, post-abortion care, treatment of cancer of the reproductive system, HIV treatment, and protection from harmful practices such as sexual violence and female genital mutilation. It may or may not include the whole spectrum of sexual health and fertility, abortion is just one part of it.

Abortion is a deliberate termination of pregnancy, either self-induced or by a provider. Abortions can be either safe or unsafe depending on the conditions before, under and after the process. WHO defines an unsafe abortion as a terminated pregnancy by persons lacking necessary skills or it is performed in an environment not conforming to minimal medical standards.\textsuperscript{10} An unsafe abortion may, for example, be performed by an unskilled provider, in unhygienic conditions, by self-induced ingestion of hazardous substances or be provoked by an insertion of objects into the uterus.\textsuperscript{11}

Finally, in this thesis, the terms fetus and unborn child are used synonymously.

1.6 Outline
This thesis examines the status of abortion in public international law, first of all as a direct or indirect reproductive right, and secondly as indirectly included within other human rights. Finally, the status of abortion is discussed in the light of the inherent tension between women’s autonomy and unborn children’s lives in legal history and juridical-political considerations. Hence, the thesis first examines the status of abortion in public international law, then analyzes the reasons behind it.

\textsuperscript{11} WHO, Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008, p. 2.
2 The emergence of reproductive rights and the consequences of prohibiting abortion

2.1 A brief history of reproductive rights in international law

Today and in modern history, abortion has clearly remained the most controversial issue in the context of reproductive rights, easily noticeable when debates are taking place within the international community, among policy-makers and legal scholars. The status of abortion in human rights law has been highly disputed in decades. To give a historical example, the debate is found in the preparatory works to ICCPR, in which women’s reproductive rights were placed against the rights of unborn children. One of the initial drafts of ICCPR contained a provision acknowledging a right to life from the moment of conception, which became heavily debated. The Polish and Danish delegates plead that life should be protected from the moment of birth, a positive obligation for states to protect unborn children was described as a declaratory statement not belonging in a legal instrument. They met great resistance by delegates from Belgium, Brazil, Columbia, El Salvador, Mexico, Morocco, Panama, and Uruguay, who argued that life was sacred and thereby should be protected from the moment of conception. In order to protect the unborn, a general prohibition of abortion was proposed. This draft proposal is discussed in further detail in chapter 6.2. However, generally speaking, these sorts of debates have set the tone in treaty negotiations of human rights conventions, favoring unborn children’s interests rather than women’s.

Reproductive rights, such as the right to family planning, has been brought up at international conferences on several occasions. In 1968, the UN conference on Human Rights in Teheran proclaimed reproductive rights as a part of human rights and declared that parents had the right to freely and responsibly decide the number and spacing of their children. In 1994, at the ICPD in Cairo, reproductive health was described as a basic human right, and there was an aim to achieve universal access to reproductive

health services by 2015, including family planning.\textsuperscript{18} The Cairo conference resulted in a Program of Action, which recognized reproductive rights as one of the cornerstones of population and development programs. It also mentioned that in situations when abortions were legal they ought to be safe, although the prevention of unplanned pregnancies was important.\textsuperscript{19} Despite the legal status of abortion in domestic legislation, it was of utmost importance to deal with the impacts of unsafe abortions, recognized as a major public health concern.\textsuperscript{20} In 1995, the Beijing Declaration and Platform for Action identified unsafe abortions as a grave public health concern, causing devastating consequences for women’s health.\textsuperscript{21} These conferences bear witness to the difficulties of agreeing in questions concerning reproductive rights, in a manner that is acceptable for the majority of states.

In 2000, the United Nations General Assembly adopted the Millennium Development Goals, which contain the obligation to reduce maternal mortality by three quarters.\textsuperscript{22} In 2015 at the time of the adoption of the 2030 Agenda for Sustainable Development (the 2030 Agenda), it was noted that progress of some Millennium Development Goals had been uneven or even off-track, particularly those relating to reproductive health.\textsuperscript{23} Thereby the 2030 Agenda contains a few goals specifically addressing this issue: Goal 3.1 is to reduce the global maternal mortality ratio, Goal 3.7 is to ensure universal access to sexual and reproductive health care services, including family planning, and Goal 5.6 is to guarantee access to reproductive rights in accordance with the ICPD and the Beijing Platform for Action.

In a report by the United Nations Secretary-General in 2017 regarding progress towards the goals in the 2030 Agenda, he declared universal access to reproductive health care as crucial in order to prevent unintended pregnancies, to lower birth rates among adolescents and to improve the health and well-being of women, adolescents, and children in general.\textsuperscript{24} He described all 17 goals as interlinked: positive results in one goal would have positive effects on other goals, and vice versa. The CEDAW

\textsuperscript{18} A/CONF.171/13, Programme of Action adopted at the conference on ICPD in Cairo 1994, chapter VII para. 16.
\textsuperscript{19} Ibid, chapter VIII para. 25.
\textsuperscript{20} Ibid.
\textsuperscript{21} A/CONF.177/20, Beijing Declaration and Platform for Action: Fourth World Conference on Women, para. 97.
\textsuperscript{22} A/RES/55/2, United Nations Millennium Declaration, para. 19.
\textsuperscript{23} A/RES/70/1, Transforming our world: the 2030 Agenda for Sustainable Development, para. 16.
\textsuperscript{24} E/2017/66, Progress towards the Sustainable Development Goals.
committee has drawn similar conclusions. For example, in many states, it has noted a connection between restricted access to contraceptives or safe abortions and high drop-out rates among girls from school owing to early pregnancy, which negatively affect the general level of education among girls and women. The CEDAW committee noted similar patterns in cases when domestic legislation permitted child marriages, which often resulted in early pregnancies. These examples show how women and girls’ lack of full reproductive rights negatively affect their human right to education and hinder Goal 4.5, which is equal access to education.

The development goals and documents resulting from the above-mentioned conferences are not legally binding. However, they have driven the growth of soft law in the field, bear great authority and has been adopted by the majority of states.

2.2 Legal and de facto limitations of access to abortion

Today, often due to religion, ideology, and economical aspects, there are great discrepancies among national abortion laws. In some states, abortion is legal and available upon request, while in others penalized with prison sentences. In 2011, most states (189 of 194) permitted abortion in order to save the woman’s life. A majority permitted abortion to preserve the physical health (132), and mental health (126) of the woman. Less than half of all states also permitted abortion on other grounds, such as economic or social reasons (69), in case of rape or incest (99) and fetal impairment (98). About a third of all states (58) permitted abortion upon request, and five states did not permit abortion under any circumstances, namely Chile, the Dominican Republic, El Salvador, Malta, and Nicaragua.

Besides legal barriers, many other de facto barriers exist, even in states with generous abortion laws. Noteworthy examples can be found in the CEDAW committee’s

26 The committee noted this connection in the Concluding Observations of: Montenegro, CEDAW/C/MNE/CO/2, Nauru, CEDAW/C/NRU/CO/1-2, Niger, CEDAW/C/NER/CO/3-4, and Surinam, CEDAW/C/SUR/CO/4-6.
28 Ibid.
29 Ibid.
30 Ibid.
Concluding Observations of 2017 and 2018. First of all, there are barriers such as access to, availability of and quality of abortion services.\textsuperscript{31} Secondly, there are barriers such as conflicting attitudes among medical personnel and refusal to perform an abortion due to conscience or religious belief. At times, there is confusion or unawareness among medical personnel and women regarding in which situations domestic legislation actually permits abortion. This results in medical personnel refusing to provide abortions, and women not seeking abortions in public health care even if they are legally entitled.\textsuperscript{32} Thirdly, there are financial and logistical barriers such as high costs and/or travel arrangements;\textsuperscript{33} and finally, there is fear of stigma.\textsuperscript{34} These are just a few of many \textit{de facto} barriers that women seeking abortion may face, though the main focus of this thesis rests on the status of abortion in public international law and legal barriers. Nevertheless, it is of great necessity to bear in mind that although abortion may be legal according to domestic legislation, the state may not automatically accommodate this entitled right of its citizens.

\section*{2.3 The effects of unsafe abortions}

The question concerning whether or not abortion has the status of a human right continues to be intensely disputed at global, regional and national levels. Opinions still differ greatly as to whether abortion should be permitted or prohibited, and proposed legal reforms to permit abortion are continuously hindered by political barriers. Abortion is practiced globally by women who face undesired pregnancies and has been used throughout recorded history.\textsuperscript{35} When the practice is forbidden by law, women turn to self-induced or backstreet abortion, which may cause long-term damage or death.\textsuperscript{36} Despite these risks, abortions are more common in societies where the practice is restricted or criminalized, in comparison with societies where it is provided on certain

\textsuperscript{32} See the Concluding Observations of: Chile, CEDAW/C/CHL/CO/7, Ireland, CEDAW/C/IRL/CO/6-7, Italy, CEDAW/C/ITA/CO/7, Paraguay, CEDAW/C/PRY/CO/7, and Romania, CEDAW/C/ROU/CO/7-8.
\textsuperscript{33} See the Concluding Observations of: Ireland, CEDAW/C/IRL/CO/6-7, and Northern Ireland, CEDAW/C/OP.8/GBR/1.
\textsuperscript{34} See the Concluding Observations of Fiji, CEDAW/C/FJI/CO/5, and Northern Ireland, CEDAW/C/OP.8/GBR/1.
\textsuperscript{36} WHO, \textit{Safe abortion: technical and policy guidance for health systems}, p. 17.
grounds or upon request.  Although, with a significant difference in the numbers of unsafe abortions and following complications, which result in higher rates of maternal morbidity and mortality. Almost all abortion-related deaths or disabilities could be prevented by sexual education, modern contraceptives, safe and legal abortions as well as by adequate and timely care for complications. To summarize, it is scientifically proven that restrictive abortion laws affect how safe the abortions are, but they do not lower the numbers.

Furthermore, unsafe abortions lead to great economic and societal consequences. The treatment and medical attention required after unsafe abortions are expensive and can place a huge burden on public healthcare, while providing access to safe abortion would lower these costs. There is also a substantial societal cost through the enormous loss of productivity and contribution to the economy caused by abortion-related morbidity and mortality. Moreover, unsafe abortions cause unspeakable traumas for families. It is estimated that 220,000 children lose their mothers every year due to unsafe abortions. Also, these children are more likely to die in comparison with children who have two parents, as a result of receiving less education, health care, and social care. Obviously, unsafe abortions also affect women’s physical and mental health through injuries, permanent bodily complications, stigma and social sanctions.

In a wider perspective, restricting women’s access to safe abortions may have devastating effects for whole societies, as shown by the Romanian experience in 1966. In Romania, far-reaching restrictions on abortion created a whole generation of unwanted children, and an estimated number of 100,000 abandoned children were left at state orphanages with terrible living conditions.

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38 Ibid.
40 Grimes et al., Unsafe abortion: the preventable pandemic.
41 Ibid.
42 Ibid.
43 Ibid.
44 In 1966, the Romanian government were worried about declining fertility, low birth rates and the absence of population growth and thus imposed abortion restrictions with few eligibility criteria. In practice, it outlawed abortion for women under 40 with less than four children. In 1985, the criteria were narrowed even further and abortion-related deaths accounted for 87% of all maternal deaths. The Ceaușescu government announced that the fetus was the property of the entire society and motherhood became a state duty. The system was enforced by a secret police and medical personnel who performed abortions were imprisoned. Women who became pregnant but did not give birth risked prosecution. The policy, named Decree 770, created a generation of unwanted children, leaving estimated
When progress towards a progressive domestic abortion law is reached, it is often contested and needs to be defended. For instance, nowadays Sweden has one of the most generous abortion policies in the world, but between 1960 and 1970 Swedish women traveled to Poland to have abortions.\textsuperscript{45} In Poland, abortions became legal in 1956, but after the fall of communism, social pressure from church groups led to an erosion of reproductive rights, and Poland now has one of Europe’s most restrictive abortion laws and lowest access to modern contraceptives.\textsuperscript{46} Now the tables have turned and Polish women are often forced abroad to have abortions. This example shows how the upholding of reproductive rights are under a constant threat, with progress and pushbacks.

\textbf{2.4 Summary}

To summarize this chapter, the enforcement of reproductive rights is inherently interlinked with the upholding of other human rights and denied access to safe and legal abortions cause great damages to individuals and societies. Despite these facts, whether or not abortion should be classified as a human right remains a profoundly controversial topic. The great discrepancy between scientific findings and political action imply that access to safe and legal abortion is viewed mainly as a political question, rather than a legal and human rights issue, which may be good to bear in mind throughout this thesis.

\section{The inherent tension between national sovereignty and human rights}

\subsection{Statehood and sovereignty}

In the traditional interpretation of public international law, the main subjects are states. The criteria for being defined as a state is regulated in the Montevideo Convention on

\begin{flushright}
\textsuperscript{45} Mårtensson, Polen kan införa hårdare abortlag – stora protester i landet, SVT, 23/3 2018.
\textsuperscript{46} Cocotas, How Poland’s far-right government is pushing abortion underground, The Guardian, 30/11 2017.
\end{flushright}
Statehood of 1933, an American treaty which is more or less considered codified customary international law.\textsuperscript{47} Jan Klabbers describes the idea of the state as a relatively recent phenomenon.\textsuperscript{48} In comparison with other reigning options, states were able to guarantee that their authority over their territory would be uninterrupted when collaborating with other states, thus it became the main form of political organization.\textsuperscript{49} Statehood is a socially constructed concept rather than a natural one, as explained by Charlesworth and Chinkin.\textsuperscript{50} They describe statehood as political control over state territory, held by a group of individuals compromising its decision-making elite, hence the state’s international commitments and strategies are aligned with their interests.\textsuperscript{51} To elaborate, one could say that states are artificial entities containing all of the strains of its societies and the actions taken by a state are usually the result of compromises in the parliament or government. Even so, the decision-making elite does not necessarily represent or share the interests of the whole population. For instance, despite women making up half the world’s population, only 22.8 percent of all parliamentarians in 2016 and only 11 serving as Head of State in 2017 were women.\textsuperscript{52} Bearing this in mind, women’s interests may not be fully considered in every policy or law affecting their lives.

States generally enjoy sovereignty, which indicates autonomy and no requirement to accept authority from above unless the state chooses to do so.\textsuperscript{53} An example of a positivistic manifestation of sovereignty is to be found in article 2.7 in the Charter of the United Nations (UN Charter), which grants sovereign states the right to non-interference in domestic affairs, thereby allowing political control over its territory. Another positivistic manifestation is the \textit{Lotus case} in the International Court of Justice (ICJ), which recognized a wide measure of discretion for states.\textsuperscript{54} The case established that a state may exercise its jurisdiction within its territory in every matter, as long as it does not overstep the limits which international law place on its jurisdiction.\textsuperscript{55} Thus treatment of its citizens falls within the state’s exclusive prerogative, which

\textsuperscript{47} Klabbers, \textit{International law}, p. 70.
\textsuperscript{48} Ibid, p. 69.
\textsuperscript{49} Ibid p. 69–70.
\textsuperscript{50} Charlesworth & Chinkin, \textit{The boundaries of international law}, p. 124.
\textsuperscript{51} Ibid.
\textsuperscript{52} UN Women, \textit{Facts and figures: Leadership and political participation}.
\textsuperscript{53} Klabbers, \textit{International law}, p. 69.
\textsuperscript{54} ICJ, \textit{The Case of the S.S. Lotus}, France v. Turkey, 1927.
\textsuperscript{55} Ibid, para 46–47.
Charlesworth and Chinkin do not necessarily find given since statehood is not a natural concept, it is man-made and positivistic, thereby possible to deconstruct. The concept of sovereignty has changed throughout history by political developments and has partly dissolved through a consolidated human rights framework, which challenges the concept of state sovereignty and statehood by slowly dissolving the distinction between public and private.

3.2 The public/private distinction in public international law

A significant part of Charlesworth and Chinkin’s critique of public international law lies within the distinction between public and private worlds, which serve as a base for an analysis of the tension between human rights and sovereignty on the issue of abortion throughout this paper. Claire Cutler describes the distinction between public and private as central to legal and political theory.\(^{56}\) In simplified terms, this distinction is visible on two different levels. First of all, the distribution between what is regulated in public international law (the public sphere) and in domestic law (the private sphere), as a consequence of sovereignty.\(^{57}\) Conventionally, public international law has centered around the public “male” sphere.\(^{58}\) Second, in respect to which relations that are regulated in human rights law. Traditionally, mostly the vertical relationship between the state and its citizens has been regulated in human rights law (the public sphere), while the horizontal relationship between citizens (the private sphere) has been subject to domestic legislation.\(^{59}\) Thus, the human rights discourse largely exclude abuses committed in the private sphere.\(^{60}\) In other words, the public sphere could be described as politics, law, economics or at the workplace in general, while the private sphere could be described as domestic work, childcare or taking care of the household.\(^{61}\) As explained by Magdalena Bexell, the private sphere is often given an apolitical character, in comparison with the public sphere.\(^{62}\) According to Charlesworth and Chinkin, national legislation more often takes religious, cultural and ideological factors into

\(^{56}\) Cutler, Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy, p. 138.
\(^{57}\) Radacic, Human Rights of women and the public/private divide in international human rights law, p. 450, and Charlesworth, Chinkin & Wright, Feminist Approaches to International Law, p. 625.
\(^{59}\) Radacic, Human Rights of women and the public/private divide in international human rights law, p. 450.
\(^{60}\) Chinkin, A Critique of the Public/Private Distinction, p. 389.
account, which impacts the domestic regulation of family life. They are not alone in drawing this conclusion, Rupa Reddy present similar arguments and highlight the detrimental effects the distinction has on women’s rights since the majority of violations occur in the private sphere. To conclude, direct intervention by international law or by the state in the home or in the family life has long been regarded as inappropriate.

As identified by Charlesworth and Chinkin, the emphasis on the family as the natural foundation in society, for instance mentioned in the preamble of CRC, ICCPR article 23(1), the International Covenant on Economic, Social and Cultural Rights (ICESCR) article 10(1), and the Universal Declaration of Human Rights (UDHR) article 16(3), discourage human rights intervention in this field, which negatively affects women’s human rights. Needless to say, Charlesworth and Chinkin criticize the abovementioned public/private distinction. Presumably, abortion and women’s reproductive autonomy in general is placed as deep within the private sphere as possible, highly discouraging intervention by international law. According to my knowledge, no literature analyze abortion in the light of the public/private distinction in public international law to a greater extent, not even Charlesworth and Chinkin. Thus, the arguments and conclusions on this issue are my own.

Naturally, the theory of the public/private dichotomy has received critique. Firstly, the line between public and private worlds may be blurry and differ in each state. Secondly, it touches upon a complicated political and philosophical question concerning the optimal level of state influence in personal affairs. Thirdly, since the theory was first introduced a couple of decades ago, the attitudes towards women’s role in society have changed in many parts of the world. Lastly, José E. Alvarez criticizes Charlesworth and Chinkin for not discussing how to challenge international instruments and still use these to advance women’s rights. That aside, there are weaknesses and

63 Charlesworth & Chinkin, *The boundaries of international law*, p. 56–57.
65 Charlesworth, Chinkin & Wright, *Feminist Approaches to International Law*, p. 627.
68 Ibid.
69 Ibid.
70 Alvarez, J.E, Reviewed Work: The Boundaries of International Law: A Feminist Analysis by Hilary Charlesworth, Christine Chinkin, p. 462
strengths of all critical theories and even though this theory is old, some of the most fundamental power structures which negatively affect women still remain in place.

Human rights are a part of the normative public international law framework with, as abovementioned, states as the main subjects. In other words, states are not only the main carriers of rights and duties, they are also the ones that develop and apply public international law. Hence they decide which human right treaties they are bound to follow, since a treaty is only binding for states which have ratified it, with the exception of customary international law and \textit{jus cogens} norms according to the ICJ Statute provision 38(b) and VCLT article 53. They may choose to make reservations to treaties upon ratification towards specific rights or declare how they will interpret certain provisions. For instance, Malta and Monaco made reservations to the reproductive right to family planning contained in CEDAW article 16.1(e). Malta did not consider itself bound to the extent that it “\textit{may be interpreted as imposing an obligation on Malta to legalize abortion}” and Monaco “\textit{to the extent that the latter can be interpreted as forcing the legalization of abortion or sterilization}”.\footnote{The reservations of Malta (8/3 1992) and Monaco (18/3 2005) to CEDAW.}

### 3.3 CEDAW challenging the public/private dichotomy

The adoption of CEDAW was an important step towards advancing women’s rights in the international human rights regime. Reddy concludes that CEDAW challenges the hierarchal generational paradigm in broader human right treaties in order to adapt human rights to women’s diverse realities.\footnote{Reddy, \textit{The human rights of women}, p. 456.} Similarly, Sari Kouvo claims that CEDAW pushes the human rights framework into the private sphere, which opens up for discussing violations of women’s rights not only in the public sphere.\footnote{Kouvo, \textit{Making just rights? Mainstreaming Women’s Human Rights and a Gender Perspective}, p. 109.} Subsequently, the private sphere traditionally considered as internal affairs or as the sole business of the family beyond the control of states’ is slowly shrinking. On the other hand, the general commitment to CEDAW may be subject to debate.

\footnote{Charlesworth & Chinkin makes a similar statement in \textit{The boundaries of international law}, p. 217.}
3.4 The status of CEDAW – reservations and preparatory works in short

With 80 declarations and reservations, CEDAW is the most well-reserved and possibly the most political universal human right convention. Even though CEDAW article 28.2 and VCLT article 19 prohibit reservations that are incompatible with the object and purpose of the treaty, multiple far-reaching reservations were made upon ratification. A particularly interesting reservation was the one by Niger, declaring that the right to family planning in article 16.1(e) and equality in family relations: “…cannot be applied immediately, as they are contrary to existing customs and practices which, by their nature, can be modified only with the passage of time and the evolution of society and cannot, therefore, be abolished by an act of authority.” Maja Eriksson emphasizes that the far-reaching reservations may undermine the ratification of CEDAW in its member states. As displayed by Charlesworth and Chinkin, the rules surrounding reservations to treaties display the general difficulties in creating international binding norms in a system based on consent. Especially concerning women’s rights, for which reservations have been used by some states to effectively hollow out the core of the legal obligations.

During the drafting process, issues concerning gender equality in practice provoked heated debates, which leads us to the preparatory works of CEDAW. For instance, the Soviet Union proposed a preamble containing the following paragraph: “Bearing in mind the great contribution made by women to (...) the social significance of motherhood and the role of women in the family and, in particular, in the rearing of children” In the same spirit, a Moroccan amendment suggested that after the contribution of women, insert: “to the welfare of the family”.

74 This can be compared to the Convention on the Prevention and Punishment of the Crime of Genocide with 32 reservations, the Convention on the Rights of Persons with Disabilities with 36 reservations, ICESCR with 51 reservations, CAT with 53 reservations, International Convention on the Elimination of All Forms of Racial Discrimination with 61 reservations, ICCPR with 67 reservations and CRC with 75 reservations. These numbers include reservations which were later withdrawn.

75 Reservation to CEDAW by Tunisia, 20/11, 1985.

76 Eriksson, Reproductive Freedome in the Context of International Human Rights and Humanitarian Law, chapter 3.3.2.

77 Charlesworth & Chinkin, The boundaries of international law, p. 113.

78 Ibid.


International Federation of University Women suggested that the convention should emphasize women “being born equal and not on the role they play in the family”.

Despite the difference of opinion, constructive discussions were held regarding combining motherhood with a work-life and the prohibition of discrimination of pregnant women, as demonstrated by the Soviet Union. It proposed a requirement for states to establish special institutions, such as kindergartens and extended-day groups for school children, as well as special assistance to unwed mothers or mothers with large families. Another example is Pakistan, which proposed a right to paid maternity leave, vocational training, opportunities for part-time work and for states to provide necessary social services, including child care facilities. Nevertheless, the subject concerning women’s reproductive autonomy, especially abortion, was too controversial. Not only in CEDAW, during the drafting processes to CRC and ICCPR, states expressed that taking a side in this contentious issue would adventure ratification of the entire conventions.

3.5 Summary
To summarize, there is an inherent tension between human rights on one hand, which have the purpose of regulating the behavior of states to protects individuals, and the state sovereignty on the other, by which states consensually enter treaty obligations. Another inherent tension is to be found in the traditional distinction in human rights between public and private worlds, which Charlesworth and Chinkin argue negatively affect women. This dichotomy was challenged by CEDAW, though it is the most well reserved international human rights treaty which risks undermining states commitment to it. Despite being a proactive women’s rights treaty, issues concerning abortion were too contentious to agree upon. In order to not adventure the ratification of CEDAW as a whole, it was required to not take a side concerning abortion.

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4 The right to abortion

4.1 Human right conventions within the UN human rights regime

In order to determine whether or not there is a direct right to abortion in public international law, it is necessary to study the existing human rights framework. The word abortion or a synonymous formulation are not to be found in any human rights conventions within the UN human rights regime, it can thereby be ascertained that there is no direct universal right to (or prohibition of) abortion. Although, there are a few provisions which are usually discussed when approaching this topic. As earlier mentioned, the main focus of this thesis lays on CEDAW, CRC, and ICCPR, thus provisions in these instruments are primarily used. Especially the following articles are discussed in further detail:

- **The CEDAW**: Article 5(b), 12.1, 14.2(b) and 16.1(e) contains the right to family planning.
- **The CRC**: The preamble acknowledges children’s need for special safeguards and care, including appropriate legal protection, before as well as after birth. Article 1 defines a child as every human being below 18 years of age (without mentioning the starting point of childhood), and article 6.1 recognize every child’s inherent right to life.
- **The ICCPR**: Article 6.1 recognizes every human being’s inherent right to life, and article 17.1 prohibits arbitrary or unlawful interference with one’s privacy, home, and correspondence.

The articles in CEDAW are mainly used for determining whether the right to family planning includes abortion. As for the provisions in CRC and ICCPR, these provoked relevant discussions concerning abortion in their drafting processes and reservations, and are mainly used in section 6.2 and 7.2, when discussing the legal-political debate surrounding abortion, historically and today.

4.2 Regional human right regimes

In addition to international human right treaties, a few regional instruments and compliance mechanisms directly touch upon the issue of abortion. For instance, article 4 of the American Convention on Human Rights (ACHR) protects the right to life, in
general, from the moment of conception. At first sight, one could think that the ACHR gives legal support to national laws limiting or criminalizing abortion, but the wording in article 4 proved to be ambiguous in the Baby boy case. In brief, the interpretation of the Inter-American Commission on Human Rights (IACHR) concluded that life, in general, started at the moment of conception. However, domestic legislation permitting abortion under certain circumstances did not constitute a violation of article 4, in those cases, the right to life of the mother should be weight against the right to life of the fetus. Through a study of the preparatory works to ACHR, the IACHR identified that the intention of the drafters was not to create an obligation for member states to prohibit abortion, it was rather supposed to not affect domestic legislation in this area.

Another relevant regional human rights provision is article 14.2(c) of the 2003 Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol), which constitute a right to medical abortion in cases of rape, incest, sexual assault, and to protect the physical and mental health or the life of the woman. Similarly to the Inter-American system, it is left to the discretion of individual member states to balance the interests of the woman with those of the fetus. In its General Comment No. 2, the African Commission on Human and Peoples’ Rights (ACHPR) notes that many member states are yet to undertake necessary legal reforms towards domesticating article 14.2(c). Hence, the Maputo protocol has not been implemented in domestic courts in most African states. To my knowledge, the African Court on Human and People’s Rights have not yet ruled in a case concerning abortion.

The European Convention on Human Rights (ECHR) is not as explicit on the issue of abortion as its regional peers, but it has been discussed quite a few times in the case-law of the European Court of Human Rights (ECtHR), in comparison with ICJ which rarely address human rights issues. The case-law of ECtHR illustrate how abortion has been handled in this regional human rights court which, according to Klabbers, has the most

85 IACHR, White and Potter (Baby Boy) v. the United States, 1981.
87 Ibid, para. 18.
89 African Commission on Human and Peoples’ rights, General Comment No. 2 on Article 14.1 (a), (b), (c) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, p. 1.
developed system to protect human rights.\textsuperscript{91}

The jurisdiction of the ECtHR extends to all matters concerning interpretation and application of the ECHR, and it rules on allegations regarding potential violations of the convention.\textsuperscript{92} As identified in article 46 of ECHR, the Court’s decisions are binding for member states, which has led to governments altering national legislation. Given the diverse cultural and legal traditions of the member states, the ECtHR has developed the margin of appreciation doctrine, in order to balance the individual rights of the convention with sovereignty and national interests of state parties.\textsuperscript{93} The doctrine enables the ECtHR to not take sides on moral or controversial issues, such as abortion.\textsuperscript{94}

In the case-law of ECtHR, abortion has been approached from two perspectives: the unborn child and the women’s. The issue of the unborn child and its right to life in article 2 of the convention was deliberated in \textit{Vo v. France} (2004) in the Grand Chamber.\textsuperscript{95} Two women with the same surname were scheduled for different medical procedures at a hospital, and when the doctor called out the name “\textit{Mrs. Vo}” the applicant answered.\textsuperscript{96} She was six months pregnant, of Vietnamese origin and had difficulties understanding French.\textsuperscript{97} Due to this mix-up, the applicant’s amniotic sack was punctured, making a therapeutic abortion necessary.\textsuperscript{98} The applicant claimed the unintentional killing of her unborn child to qualify as a homicide, infringing the child’s right to life.\textsuperscript{99} The court found it neither suitable nor possible to take stands on whether an unborn child was a person enjoying protection in article 2 of ECHR, and ruled by fourteen votes to three, that there had been no violation of article 2.\textsuperscript{100}

Correspondingly, the issue regarding women’s access to lawful abortions has been raised in a few cases as well, which resulted in the ECtHR finding violations of the prohibition of inhuman or degrading treatment in article 3 and of the right to private and

\textsuperscript{91} Klabbers, \textit{International law}, p. 111.
\textsuperscript{92} Article 32 of the ECHR.
\textsuperscript{94} Klabbers, \textit{International law}, p. 115.
\textsuperscript{95} ECHR, \textit{Vo. v. France}, 2004.
\textsuperscript{96} Ibid, para. 11.
\textsuperscript{97} Ibid, para. 10–11.
\textsuperscript{98} Ibid, para. 11–12.
\textsuperscript{99} Ibid para. 48.
\textsuperscript{100} Ibid, para. 80 and 95.
family life in article 8. However, the focus of these cases was the lack of effective mechanisms in order to receive abortions, in other words, women who were legally entitled to have an abortion according to domestic legislation were unable to access abortion services and thereby exercise their rights. The Court has not yet ruled a case in which women, living in a member state not allowing abortion under any circumstances, have claimed national legislation itself to constitute a violation of the ECHR. Thus the ECtHR has not established legal access to abortion as a human right in its case law. Although, it is worth noting the Court’s statement in A, B and C v. Ireland para. 238:

“A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of prenatal life or on the basis that the expectant mother’s right to respect for her private life is of a lesser stature. Nor is the regulation of abortion rights solely a matter for the Contracting States.”

In other words, abortion is seen as a part of internal affairs included within the national sovereignty. Thus it is left to the discretion of individual member states to decide how these interpret ECHR on the issue of abortion, and how the states choose to balance women’s and unborn children’s rights. Consequently, abortion can be criminalized in European states such as Ireland and Malta, heavily restricted in states such as Monaco and Poland, and available without restrictions states in states such as France and Sweden, without violating the ECHR. However, as indicated in A, B and C v. Ireland, contracting states cannot justify an unconditional prohibition of abortion without any exceptions, by defending the fetus unreserved right to life.

Due to the dynamic interpretation and the margin of appreciation, the importance of the preparatory works of the ECHR is fairly limited for the Court. Although, after examining the eight official volumes of the preparatory works to the ECHR, it can be concluded that the issue of women’s autonomy versus the unborn child’s right to life was not mentioned at all in the drafting process. The only discussion surrounding fertility was a debate initiated by Scandinavian states, who argued that sterilization of

102 My study was conducted on the official version of the preparatory works to the ECHR, Council of Europe, Collected edition of the “Travaux preparatoires” of the European Convention on Human Rights, Vol. I–VIII.
inter alia sexual offenders should not be classified as torture, inhuman or degrading treatment in article 3.\textsuperscript{103} Neither was it mentioned in any of the reservations to ECHR. Perhaps the negotiating states did not find it necessary to discuss abortion, or they had already dealt with an excessive discussion on the matter during the negotiations to the UDHR, which also contained political rights. Although one thing is certain: in general, female perspectives were missing in the drafting process. The few times women were mentioned, they were often being portrayed as mothers, wives or victims – not as autonomous human beings.\textsuperscript{104} It is possible that the issue of abortion, which by its nature is closely interlinked to women’s autonomy and with exercising political rights, simply was forgotten or not prioritized.

4.3 Summary

Based on the findings in this chapter, there is no direct right to abortion in any convention within the UN human rights regime, nor in the regional human right treaties, with the exception of the Maputo Protocol. On the one hand, it can be positive for women in some regards to place abortion within the private domestic sphere. In doing so, national legislation may provide a greater protection for women’s right to reproductive autonomy in the private sphere through generous abortion laws. For example, when asked during an interview Gabriel Wikström, the Minister of Public Health in Sweden, was pleased that the issue of abortion falls within domestic affairs, since he did not want to compromise on an international or regional level towards more conservative policies. As explained by Wikström, if progressive states such as Sweden would have to adapt to conservative states like Poland and vice versa, it would

\textsuperscript{103} Ibid, Vol. II p. 238–245. This position of the Scandinavian states may have had little to do with defending women’s reproductive autonomy, considering their current national laws. As for Sweden, the domestic sterilization laws of 1934 and 1941 allowed sterilization under certain circumstances such as eugenics, social and medical factors. In practice, many of these procedures lacked consent and 93% were women. Between 1935–1975, an estimated number of 63,000 sterilizations were performed as a result of this legislation. In 1976 a new sterilization law was introduced, which only allowed the procedure upon request, which resulted in 166,000 sterilizations between 1976 and 1996. In general, these sterilization laws mostly affected weak and underprivileged groups, such as mentally handicapped. As for ethnic minorities, sterilization of so-called “travelers” has been noted, and a small percent were Gypsies and Sami people. (Source: SOU 2000:20, Steriliseringsfrågan i Sverige 1935–1975 – historisk belysning, kartläggning, intervjuer, p. 15–17) Based on these findings, the objection of Sweden to the proposed formulation of ECHR article 3, may derive from an unwillingness to repeal its sterilization laws, rather than defending women’s reproductive autonomy. Another law worth noting is the Swedish Gender Identity Law of 1972 (1972:119) that required transsexual people to be sterilized, which was repealed in 2013. (Source: SOU 2014:91, Juridiskt kön och medicinsk könskorrigering, p. 154). The Gender Identity Law may have been incompatible with the initially proposed formulation of ECHR article 3.

\textsuperscript{104} To give a few examples of how women were portrayed, see Council of Europe, Collected edition of the “Travaux préparatoires” of the European Convention on Human Rights, Vol. I, p. 98 and 114, Vol. II, p. 120, and Vol. III, p. 92.
inevitably lead to an impaired right to abortion for Swedish women. In other words, the private sphere may even be a refuge for some women, shielding them from unwanted interference in their privacy.

On the other hand, not mentioning abortion in universal and regional human rights treaties may lead to negative implications for women as well. As a result, women’s interest in reproductive autonomy in terms of ending pregnancies is not directly protected through a common human rights standard. By placing the issue within the private domestic sphere, sovereign states may decide to prohibit or even criminalize abortion in their national legislation. As shown in the abovementioned statistics, restrictive abortion laws are interlinked with higher numbers of unsafe abortions, maternal morbidity, and mortality. Thereby, placing abortion within the private sphere have detrimental effects on women as well.

As already mentioned, there is no direct right to abortion. Nevertheless, there is a right to family planning in CEDAW, which calls for an interpretation regarding whether or not abortion is included within this term in the next chapter.

5 The right to abortion as a part of family planning

5.1 Treaty interpretation through the VCLT provisions

The Vienna Convention on the Law of Treaties adopted in 1969 is the main treaty for interpretation of public international law instruments. Despite being non-retroactive and having entered into effect after a few of the international human right treaties, it is generally accepted as codified customary international law. In line with the order in article 31–32 of the VCLT, the methods of interpretation used in this chapter are as follows:

The first method of interpretation is to determine the ordinary meaning of a term in the treaty. In accordance with the Island of Palmas case of 1928 and the Grisbådarna case

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105 Konflikt, Aborter, Bistånd och lobbyister, [Radio show], the statement is made between 47:45–49:30 in the show.
106 Fellmeth, Feminism and International Law: Theory, Methodology, and Substantive Reform, p. 676.
of 1909, juridical provisions should be interpreted in the light of their ordinary meaning at the time of adoption, not at the time of a potential dispute.\textsuperscript{108}

The second method of interpretation is to determine the context, object, and purpose of the treaty. In order to study the context, it is necessary to take the entire text of the convention into account and means extrinsic to the treaty itself may be used.\textsuperscript{109} Article 31.2 of the VCLT determine that agreements or instruments related to the treaty can form part of the context, as external material. Oliver Dörr describes these as documents related to a treaty’s development outside the treaty consensus, which may take the form of commentaries, explanatory reports, final acts, protocols of signatures and understandings, adopted simultaneously with the text of the treaty.\textsuperscript{110} Interpretive declarations by states upon ratification of a treaty may also constitute a part of the context.\textsuperscript{111} As for the object and purpose, neither does the VCLT nor the commentary of the International Law Commission (ILC) to the draft articles elaborate on how to apply this teleological interpretation, except for a reference to the preamble.\textsuperscript{112} Isabelle Buffard and Karl Zemanek describe the object and purpose of a treaty as something of an enigma, generally found in the preambles or by interpreting the provisions of the treaty as a whole.\textsuperscript{113} In addition, Dörr recommends studying the title of the treaty, as well as using common sense and intuition in order to identify the object and purpose.\textsuperscript{114}

The third and last method is to use supplementary means of interpretation, which includes preparatory works. These are only supposed to be used when the first two means of interpretation leave the meaning ambiguous or obscure, or when the result is absurd or unreasonable, according to article 32. Klabbers notes a few obvious difficulties with this historical method. He points out that not all state parties participated or even existed at the time of negotiations of many international treaties, the preparatory works are not always available, and there is no end as for which

\begin{footnotes}
\footnotetext{108}{Arbitration Award, Island of Palmas case, 1928, and Permanent Court of Arbitration, the Grishbdarna case, Norway v. Sweden, 1909, p. 4. This is also mentioned in other cases of territorial disputes, such as the Baie de Delagoa case of 1875, the Clipperton Island case of 1932 and the Minquiers and Ecrehos case of 1953.}
\footnotetext{109}{Dörr, Vienna Convention on the Law of Treaties –A Commentary, p. 543.}
\footnotetext{110}{Ibid, p. 549–551.}
\footnotetext{111}{Ibid, p. 549–552.}
\footnotetext{112}{A/6309, Report of the ILC, para. 12.}
\footnotetext{114}{Dörr, Vienna Convention on the Law of Treaties –A Commentary, p. 546}
\end{footnotes}
material could be used. Gerald Fitzmaurice expresses criticism towards using preparatory work for treaty interpretation as well, since the most important decisions often are taken at private meetings between delegations, and thereby are not transcribed into the records of the official meetings. That aside, there are many reasons to study the preparatory works in order to form a better understanding of the treaty-making process. Ilias Bantekas and Lutz Oette list a few, such as understanding the historical context and political motives, as well as clarifying interpretations put forward by states, group of experts, international organizations and civil society. It also provides an insight to which subjects and formulations were the most debated and perceived as controversial among the negotiating states. In the light of these methods, the next step is to apply them in order to interpret whether or not abortion is included within the right to family planning in CEDAW.

### 5.2 The ordinary meaning of family planning

The first international human right treaty to specifically recognize family planning as a human right was CEDAW, and including abortion within the term family planning would indicate that it is considered a part of reproductive rights protected by human rights law. The right to family planning is universal since the vast majority of states have ratified CEDAW, however, the interpretation and application of this right vary remarkably among states.

The term family planning is not clearly defined within public international law, and when mentioned there is no common definition. In CEDAW, four different formulations are used. The first definition is *family education* (article 5(b)), the second one is *family planning* (article 10(h), 12.1 and 14.2(b)), the third one is *appropriate services in connection with pregnancy* (article 12.2), and the fourth formulation is “*the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights*” (article 16.1(e)). In this thesis, the term family planning is used to describe all of the aforementioned formulations but focus on article 16.1(e), since it is

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the most detailed definition in international law. The wide spectrum of definitions has fostered skepticism whether the right to family planning actually exists. Although, whereas it may be difficult reaching agreement on its exact content, it does not deprive the right of its legal character, as argued by Eriksson.118

In practice, abortion is by definition a method for women to control the number and spacing of their children as mentioned in article 16.1(e), nevertheless the term family planning needs to be interpreted in the light of the ordinary meaning at the time of adoption of CEDAW, in accordance with the Island of Palmas case et al. Before and after the adoption of CEDAW, the reproductive right to family planning has been discussed at a few international conferences as mentioned in chapter 2.1. The Program of Action of the ICPD, section 8:25 declared that “in no case should abortion be promoted as a method of family planning” and concluded that the national legislative process should decide on measures or changes related to the status of abortion in domestic legislation.119 The Beijing Declaration and Platform of Action recited this statement and elaborated further on the issue in section 106(k). Regarding family planning, the Platform of Action highlights that every attempt should be made to eliminate the need for abortions and to reduce the numbers of abortions through expanded and improved family planning services.120 Based on these findings it can be argued that the common understanding during these conferences was that the concept of family planning did not include abortion, conversely, family planning was seen as a method to prevent abortions. In order to determine the ordinary meaning of family planning at the time of the adoption of CEDAW, it is natural to study its preparatory works of article 16.1(e). Correspondingly, the concept “family planning services” provoked heated debates in the drafting process, which were mainly discussed concerning article 10 regarding the right to education and article 12 regarding the right to health.

As for article 10, Denmark suggested including access to “family planning services”, which immediately met resistance.121 The Soviet Union and Argentina opposed the

118 Eriksson, Abortion and reproductive health: Making international law more responsive to women’s needs, p. 16.
120 A/CONF.177/20, Beijing Declaration and Platform for Action: Fourth World Conference on Women, para. 106(k).
amendment, with the argument that it could result in a refusal to ratify the whole convention, thus the text should be left as universally acceptable as possible. The mentioning of services was completely unacceptable to Colombia since it concerned family matters. As a result of the discussion, Denmark withdrew its proposal.

In the initial draft of article 12, “family planning advice and services” were mentioned and India proposed the amendment “information, counseling and services in family planning”. Afterwards, Denmark and the Netherlands proposed a few changes to the article, which were discussed at length, since many delegations objected to mentioning family planning services based on the argument that these did not exist in some states, which could lead to a refusal to ratify the whole convention. In the end, the following phrase was adopted: “access to health care services, including those related to family planning”.

With respect to article 16.1(e), India proposed what later became the most detailed definition of reproductive rights in public international law, namely the equal rights of men and women to “decide freely the number and spacing of their children and to have access to the information, education and means to enable them to exercise this right”. Denmark, Egypt, Germany, Guinea, Indonesia, Iran, Mexico, Pakistan, the Soviet Union, Sweden, and Thailand supported the proposal, and in the absence of objections, the subparagraph was adopted by consensus. It goes without saying, that this subparagraph most likely is the result of extensive bargaining behind the scenes, considering how quick and easy the negotiation went in comparison with article 10 and 12, as well as the provisions which indirectly touch upon the issue of abortion in CRC and ICCPR, to which we return later.

As demonstrated by the preparatory works, family planning was a generally accepted concept, even by states traditionally opposing abortion. But every attempt to expand this reproductive right, for instance by adding “services”, met with great resistance. This

122 Ibid, para. 46, 60 and 62.
123 Ibid, para. 48 and 51.
124 Ibid, para. 67.
indicates that the right to family planning was commonly understood to not include abortion, which was crucial for a universal adoption of CEDAW.

In the reservations and declarations following the ratification of the convention, family planning was specifically mentioned in four of them. As already mentioned, Malta and Monaco expressed that they did not consider article 16.1(e) to impose a commitment for their states to legalize abortion. With respect to article 5(b), France and Niger interpreted “family education” as public education concerning the family, which should be applied in respect with the prohibition of unlawful interference in one’s family life, in accordance with article 14 in ICCPR and article 8 in ECHR. Although, France lifted its reservation upon ratification.

Article 16, which concerns equality in marriage, is the article with most reservations in CEDAW. The reservations claim the article to be incompatible with the states’ religious laws, domestic policies, and non-interference in internal affairs. These were subject to quite a few objections, especially noting the general nature and unlimited scope of the reservations, which is incompatible with the object and purpose of CEDAW. These are not permitted according to VCLT article 19(c) and CEDAW article 28.2, and create doubt of the states’ general commitment to the convention. In comparison, none of the aforementioned four reservations concerning family planning provoked any objections. The only comment was a declaration by Norway, pronouncing article 5(b) to cover both public and private family education. This demonstrates that states are given an unchallenged wide scope of interpretation of the term family planning in domestic legislation. In conclusion, the international conferences, the preparatory work, and reservations to CEDAW all suggest that the ordinary meaning of the term family planning did not include abortion at the time of the adoption of CEDAW.

130 The reservations of Malta (8/3 1992) and Monaco (18/3 2005) to CEDAW.
131 The reservations of France (14/12 1983) and Niger (8/10 1999) to CEDAW.
132 There is a total number of 18 reservations to CEDAW article 16, made by: Algeria (22/5 1996), Bahrain (18/6 2002), Egypt (18/9 1981), India (9/7 1993), Iraq (13/8 1986), Israel (3/10 1991), Jordan (1/7 1992), Lebanon (16/4 1997), Libya (16/5 1989), Malaysia (5/7 1995), Maldives (1/7 1993), Mauritania (10/5 2001), Micronesia (1/9 2004), Oman (7/2 2006), Qatar (29/4 2009), Saudi Arabia (7/11 2000), the Syrian Arab Republic (28/3 2003) and the United Arab Emirates (6/10 2004).
133 Ibid.
134 Objection by Norway on a reservation to CEDAW (21/5 1981).
Lastly, follows a brief study on how the CEDAW committee has used the term family planning in its General Recommendations and Concluding Observations over the years. In this case, these documents are not used as legal sources, but rather as a helpful indicator to confirm the result of the interpretation above. In its General Recommendation No. 24 from 1999, the CEDAW committee turns family planning into a reporting criterion, by which the states’ compliance with CEDAW may be measured. Moreover, the recommendation urge member states to “prioritize the prevention of unwanted pregnancy through family planning and sex education”. Since abortion is a method used to interrupt a pregnancy, rather than to prevent it, the language used in this sentence demonstrates that the committee views family planning as separate from abortion, mentioned in the second part of the paragraph, which is discussed in further detail in next chapter. Similarly, it is easily noticeable that the CEDAW committee uses the terms family planning and abortion separately in the Concluding Observations of 2017 and 2018. When the committee mention family planning, its mostly in connection with either an impeded access to affordable or modern contraception, a lack of comprehensive education on sexual and reproductive health in the school curricula, or the prevention of sexually transmitted infections. To summarize, the language use of the CEDAW committee confirms my earlier conclusion that the ordinary meaning of the term family planning in CEDAW does not include abortion. Thereby, we move on to the second method of interpretation, which is to study the context, object, and purpose.

5.3 The context, object and purpose of CEDAW

The preamble of CEDAW verified that the existing international human rights regime, which acknowledged equal rights of women and men, had not proved sufficient to end the extensive discrimination towards women, including within the field of family planning. It was in this context that CEDAW was born. Despite the clear intent to end gender discrimination, the convention as a whole does not per se shed a light on the contextual interpretation of the term family planning in article 16.1(e). Nor does the

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136 Ibid, para. 31.
137 The following Concluding Observations exemplifies the language use of the CEDAW committee regarding family planning: Barbados, CEDAW/C/BRB/CO/5-8, para. 36(b), Burkina Faso, CEDAW/C/BFA/CO/7, para. 36(b), Chile, CEDAW/C/CHL/CO/7, para. 38(d), Guatemala, CEDAW/C/GTM/CO/8-9, para. 36(c), Nauru, CEDAW/C/NRU/CO/1-2, para. 33(b), Niger, CEDAW/C/NER/CO/3-4, para. 33(a), Romania, CEDAW/C/ROU/CO/7-8, para. 33(b), and Surinam, CEDAW/C/SUR/CO/4-6, para. 38(d).
external material with most relevance for the contextual interpretation which, according to my knowledge, is the declarations and reservations to CEDAW already mentioned above.

In CEDAW, the purpose is to be found in a few parts of the preamble and even in the name of the convention, which is to eliminate all forms of discrimination against women to achieve full equality between the sexes.138 The object is expressed in article 2 and 3, namely to condemn discrimination of women through the adoption of appropriate measures, including altering domestic legislation. The object and purpose are reconfirmed in article 5–8, 10–14 and 16 of the convention, all beginning with different phrases requiring state-parties to take appropriate measures, in order to eliminate discrimination against women in a specific field, to ensure that women have equal rights to men. Article 16.1(e) confirms that this applies within the field of family planning as well. For instance, women should have the same rights as men to contraceptives.

There are contemporary elements of interpreting human rights, and the significance of certain terms may evolve with time to differ from the original significance at the time of adoption. For instance, the Internet was neither invented nor available for individuals at the time of the adoption of some of the most important human right treaties. The drafters could not predict the future, but it could not have been their intention to exclude such space from the application of human rights law. Through a teleological approach, human rights such as the right to privacy apply online as well. Although, it is important to notice that the teleological method should not result in an interpretation which extends beyond the ordinary meaning of the word.139 In comparison with the Internet, abortion has been used throughout recorded history and, as my study shows, the intention of the drafters to CEDAW was to not include abortion within the right to family planning. Thus, this is still the case until a new convention tells differently. In summary, the second method of interpretation confirms my earlier conclusion that the term family planning does not include abortion.

5.4 Supplementary means of interpretation

In accordance with article 32 of VCLT, this third mean of interpretation is only supposed to be used when the first two means of interpretation leave the meaning ambiguous or obscure, or when the result is absurd or unreasonable. As demonstrated, there is little evidence for this to be the case in this situation. Thus, there is no reason to continue the interpretation further into this step.

5.5 Summary

To summarize, the different methods of interpretation used in this chapter gives no legal support for a right to abortion to be included within the reproductive right to family planning in CEDAW. The effect of the abovementioned interpretation is that the issue of abortion falls within the scope of national sovereignty. It reconfirms that abortion is an issue of national politics, rather than an integrated part of reproductive rights requiring enforcement according to international law. In the light of the discussion concerning the public/private distinction, this interpretation strengthens my earlier hypothesis that the issue of abortion might be placed as far into the private sphere it can possibly get.

6 The right to abortion as a part of other human rights

6.1 The indirect right to abortion

Even though there is limited evidence for abortion to be included within the reproductive right to family planning, there are indications that denial of access to safe abortion may constitute a violation of other human rights. For instance, the right to life, health, privacy and the prohibition of gender discrimination, torture, inhumane and degrading treatment. Thus, generating an indirect right to abortion.

My intention is not to conduct a comprehensive study in accordance with the rules of interpretations in the VCLT on each separate right. The purpose is rather to summarize the views from and of preparatory works, reservations, UN treaty bodies, regional courts and commissions, international organizations, and doctrine. The center of attention in this chapter lies with the violations of human rights of women, even though the subject of abortion is often approached from another perspective, namely as a
violation of the unborn child’s right to life, which is discussed further in the next chapter.

### 6.2 Preparatory works and reservations

At the time of the negotiations of CEDAW, CRC, ECHR, and ICCPR, no detailed discussions were held concerning whether or not an indirect right to abortion should be included within the scope of other human rights. As briefly mentioned in chapter 4.2, abortion was not brought up at all in the entire drafting process of ECHR. Additionally, it was scarcely debated in the drafting process to CEDAW, through implicit discussions surrounding family planning. In contrast, abortion was explicitly discussed to a large extent in the drafting processes to CRC and ICCPR, although seldom as a response to women’s needs and interests, which is illustrated by these three examples.

The first example derives from a detailed examination of the preparatory works of CRC. The debates concerning abortion began early in the negotiations, even before reaching the operative provisions. Initially, the wording of the preambular paragraph of CRC did not mention any legal protection for the child “before as well as after birth”. This phrase was added as a result of a proposal by the Holy See, Ireland, Malta and the Philippines, inspired by the Declaration of the Rights of the Child. The proposal did not specify the length of the period before birth that was covered, thus the initiators considered the wording sufficiently neutral. According to them, the purpose of the amendment was not to preclude the possibility of abortion, since it was legal in many states under certain circumstances. Moreover, all national legislation already contained some sort of protection of the unborn child such as inheritance rights, they argued.

Their opponents were dubious about the proposed amendment and expressed that the preambular text should be completely neutral on issues such as abortion. In their opinion, the entire convention was at risk to not be ratified if the text gave legal support to either permitting or prohibiting abortion, since national legislation differed

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141 Ibid, para. 11.
142 Ibid para. 6.
significantly on the issue. Those in favor of the amendment were not satisfied with keeping the text completely neutral, fearing the draft convention to be biased in favor of legalizing abortion. In reply, the American delegate made the following statement:

“… any attempt to institutionalize a particular point of view on abortion in the draft Convention would make the Convention unacceptable from the outset to countries espousing a different point of view. Accordingly, he insisted that the draft Convention must be worded in such a manner that neither proponents nor opponents of abortion can find legal support for their respective positions.”

The issue was postponed a few times to a later stage of the negotiations, in order to reach an acceptable compromise after further informal consultations. Nevertheless, suggestions to include the abovementioned amendment in the preamble were proposed several times, as long as nine years into the drafting process, which once again resulted in prolonged negotiations. The delegations that disapproved of the amendment, namely Australia, Canada, China, Denmark, Germany, India, the Netherlands, Norway, the Soviet Union and Sweden, opposed re-opening the debate on this controversial matter. A few delegations even pointed out that an unborn child is not literally a person, therefore it had no rights to protect. The delegations in favor of the amendment disagreed and insisted that the convention should not ignore the rights of the unborn child. For instance, Italy considered the protection of the unborn child’s right to life to constitute a *jus cogens* norm. At the end of the drafting process, a compromise was reached to included the phrase “before as well as after birth” in the preamble, on one condition: the preparatory works should clarify that the phrase was not intended to have an impact on the interpretation of provision 1, nor any other paragraphs of the convention. To put it mildly, the Legal Council was dubious about

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145 Ibid, para. 10.
146 Ibid, para. 18.
147 Ibid.
148 Ibid, para. 8 and 14.
149 Ibid.
150 Ibid, para. 38.
151 Ibid, para. 40.
152 Ibid, para. 43.
this solution, considering the limited significance of preparatory works according to VCLT.\textsuperscript{154}

The second example derives from a study of the preparatory works to ICCPR. As soon as the discussion began concerning the right to life in ICCPR article 6, it was proposed by the working group composed of Chile, China, Egypt, Lebanon, the United Kingdom of Great Britain and Northern Ireland (UK) and Yugoslavia to add a subparagraph. It declared abortion to be unlawful, only allowed under three predetermined exceptions which had to be regulated by domestic law: when saving the woman’s life, when the pregnancy was a result of rape, and when the parents of the unborn suffered from mental diseases.\textsuperscript{155} In other words, the proposed subparagraph suggested a general prohibition of abortion, for the reason that it contravened the right to life of the unborn child.

The International Federation of Christian Trade Unions view on this matter was that there should be no exception at all from the prohibition of abortion, and the suggested exceptions should be deleted from the provision.\textsuperscript{156} The Chilean delegate agreed and described the provision as shameful. In his opinion, abortion was as a reminiscent of the Hitler-regime and the exception of rape was mainly used as a pretext by a majority of women.\textsuperscript{157} Representatives from the Commission on the Status of Women and the UK opposed this deletion since numerous states already permitted abortion in well-defined cases, not providing any exceptions would make it difficult for those states to ratify the convention.\textsuperscript{158} The earlier mentioned working group explained that it did not seek to define cases in which abortion should be permitted, the application the provision would primarily be a matter for each individual member state.\textsuperscript{159} During the drafting process, it was apparent that national legislation varied significantly on the issue of abortion, thus a few states considered it inappropriate to take a stand on this matter in an international human rights convention. These negotiations ended after a vote, and the whole suggested subparagraph was removed by ten votes to three.\textsuperscript{160} Panama was the only

\textsuperscript{154} Ibid, Annex, p. 144.
\textsuperscript{155} E/CN.4/56, Commission on Human Rights, 2\textsuperscript{nd} session, 1947, p. 6.
\textsuperscript{156} E/CN.4/SR.35, Commission on Human Rights, 2\textsuperscript{nd} session, 1947, p. 12.
\textsuperscript{157} Ibid, p. 12–13.
\textsuperscript{158} Ibid, p. 13 and 15.
\textsuperscript{159} Ibid, p. 15.
\textsuperscript{160} Ibid, p. 16.
state to comment the vote. It had voted for the deletion simply because it did not want to be obligated to provide the earlier mentioned exceptions. In other words, rather than defending the right to abortion, Panama condemned it.\textsuperscript{161}

In the third and last example, we return to the heavily debated draft proposal of ICCPR article 6 mentioned in chapter 2.1, which acknowledged protection of the right life from the moment of conception. An agreement was reached concerning the unborn child’s right to life in situations when its mother had been sentenced to death. In accepting this, some delegates argued that the protection should be extended to all unborn children.\textsuperscript{162} Additionally, a few delegations argued for imposing a positive obligation on states to protect the right to life of the unborn.\textsuperscript{163} The delegations opposing the inclusion of the phrase “\textit{from the moment of conception}” considered it to be a declaratory statement not belonging in a legal instrument, although they agreed on the issue in principle.\textsuperscript{164} The UK noted the difficulties with determining the exact moment of conception, as well as a clash with another group’s rights and duties, namely the medical personnel.\textsuperscript{165} The proposed wording would require extensive work by doctors and nurses, which would be practically impossible for most states to implement. Also, once again states found it inappropriate to take a stand on this issue in a legal instrument since national legislation varied significantly.\textsuperscript{166} In the end, the proposal was rejected by 31 votes to 20, with 17 abstentions.\textsuperscript{167} My initial thought was to perceive the vote as a success for abortion advocates and states defending women’s reproductive autonomy, however, there is limited evidence proving this hypothesis. Especially since the main pronounced arguments for opposing the proposal was lack of sufficient legal clarity and sovereignty, as expressed by the Byelorussian Soviet Socialist Republic, Canada, the UK, Saudi Arabia, Sri Lanka and Ukraine.\textsuperscript{168}

What these three examples have in common, is showing that women’s perspective on the issue of abortion and their interests of reproductive autonomy was not mentioned in

\textsuperscript{161} Ibid.


\textsuperscript{163} A/C.3/SR.810, para. 10, and A/C.3/SR.813, para. 35, Third Committee, 12\textsuperscript{th} session, 1957.


\textsuperscript{165} A/C.3/SR.815, Third Committee, 12\textsuperscript{th} session, 1957, para. 37.

\textsuperscript{166} A/C.3/SR.818, para. 6, and A/C.3/SR.819, para. 13, Third Committee, 12\textsuperscript{th} session, 1957.

\textsuperscript{167} A/C.3/SR.820, Third Committee, 12\textsuperscript{th} session, 1957, para. 9.

\textsuperscript{168} A/C.3/SR.815, Third Committee,12\textsuperscript{th} session, 1957, p. 268–294.
these drafting processes either. Despite considering perspectives of medical personnel and unborn children, that does not even exist yet. Based on my study, the preparatory works of CEDAW, CRC, ECHR, and ICCPR stay silent on the matter whether or not denied access to safe abortion potentially could amount to a violation of other human rights. For instance, the right to life, health, privacy, prohibition of gender discrimination, torture, inhumane and degrading treatment. Perhaps the negotiating states of CRC assumed the issue to already be settled in the ongoing debate on the limited scope of family planning, or by clearly expressing their opposition towards giving direct legal support for abortion in an international convention such as ICCPR. Maybe no one foresaw that interpretations of other human rights could affect the status of abortion in international law. Either way, nothing in the preparatory works indicates any intentions of the negotiating states to create an indirect right to abortion within the scope of other human rights. Although, I find it hard to believe that there was no presence of advocates for women’s rights and access to safe abortions in these drafting processes. A personal guess is that abortion advocacy primarily was expressed during informal consultations or meetings with Non-Governmental Organizations, and thereby not transcribed into the official meeting records.

After the adoption of ICCPR, no declarations, reservations or objections specifically targeted abortion. Although, with religious motives and an interest in preserving domestic legislation, Bahrain, Israel, Kuwait, Mauritania, Ukraine and the UK submitted reservations to article 23, which covers equality in marriage. In comparison, after the adoption of CRC, France, Luxembourg, and Tunisia declared article 6 (the child’s inherent right to life) to not pose an obstacle to their domestic legislation, which allowed abortion. Likewise, China declared article 6 compatible with its one-child policy. Lastly, nine states expressed general reservations towards provisions incompatible with national or religious laws.

169 The reservations of Bahrain (20/11 2006), Israel (3/10 1991), Kuwait (21/5 1996), Mauritania (17/11 2004), Ukraine (12/11 1973), and the UK (20/5 1976) to ICCPR.
170 The reservations of France (7/8 1990), Luxembourg (7/3 1994), and Tunisia (30/1 1992) to CRC.
171 The reservation of China (2/3 1992) to CRC.
172 The reservations of Afghanistan (28/3 1994), Botswana (14/3 1995), Iran (13/7 1994), Ireland (28/11 1992), Kuwait (21/10 1991), Mauritania (16/5 1991), Qatar (3/4 1995), Saudi Arabia (26/1 1996), and the Syrian Arab Republic (15/7 1993) to CRC.
Considering the lack of pro-abortion advocacy in the history of international human rights negotiations, the declarations of China, France, Luxembourg and Tunisia explicitly interpreting abortion to not contravene article 6 of CRC are simply unique. Especially the declaration by Luxembourg, which mentions the prevention of back-street abortion, most likely originating from health considerations. In other words, legal abortion is used as a method of reducing the number of unsafe abortions in Luxembourg.\textsuperscript{173} On the other hand, the declarations only address national interpretations. To this date, there are no objections towards reservations or declarations specifically addressing abortion-related issues, such as unborn children’s right to life. This illustration confirms the idea of abortion as a national policy issue, rather than belonging to foreign policy or human rights law.

To summarize, neither the preparatory work nor the declarations, reservations, and objections imply any intention of states to include an indirect right to abortion within the scope of other human rights.

\textbf{6.3 The International Court of Justice}

As opposed to regional human rights instruments, none of the core international human right treaties have established their own court as a tool to guarantee compliance. Though some, such as CEDAW article 29, provides the opportunity to refer disputes between state parties regarding the interpretation of the convention to the International Court of Justice (ICJ) if negotiation or arbitration has failed. However, state parties may opt out of this procedure by reservations to the convention, and this tool has only been used on two occasions. The first case concerned armed activities in the Democratic Republic of Congo (DRC), between the DRC and Rwanda.\textsuperscript{174} The DRC based the jurisdiction of ICJ on a few international treaties, including CEDAW article 29.1, CERD article 22, the CPPCG article IX and CAT article 30.1.\textsuperscript{175} As for CEDAW, the Court found that it could not serve as jurisdiction in the present case due to the fact that the DRC failed to prove any attempts to initiate arbitration with Rwanda, a precondition in article 29.1.\textsuperscript{176} The second case involved a conflict between Georgia and

\textsuperscript{173} The reservation of Luxembourg (7/3 1994) to CRC.
\textsuperscript{174} See ICJ, \textit{Armed Activities on the Territory of the Congo}, DRC v. Rwanda, 2006
\textsuperscript{175} Ibid, para. 15.
\textsuperscript{176} Ibid, para. 87–93.
Russia regarding CERD.\textsuperscript{177} Subsequently, CEDAW, CRC, and ICCPR have never been used successfully to refer a case to ICJ and no judgment by the Court concern women’s rights or reproductive rights. As a result, it is not possible to analyze the views of ICJ on the subject of abortion.

### 6.4 UN Treaty bodies

Core international human right treaties such as CEDAW, CRC, and ICCPR have established treaty bodies, namely committees, which have the status of international quasi-judicial organs. The committees monitor the member states’ implementation of its treaties and perform a number of functions, such as examining state parties’ periodical reports, publishing General Recommendations, considering individual complaints and conducting Country Inquiries. This section examines a few of the UN treaty bodies’ approaches to abortion within the framework of these four different proceedings.

Firstly, CEDAW, CRC, and ICCPR require member states to report periodically to their respective committees on measures taken to give effect to these conventions.\textsuperscript{178} The committees examine the state parties’ reports, taking into account information received from the civil society concerning the member states’ human rights situation. Afterwards, the committees publish their concerns and recommendations as Concluding Observations.

For this thesis, 35 Concluding Observations of the CEDAW committee from 2017 and 2018 were examined. In more than 20 of these reports the committee recommended the state party to decriminalize and/or legalize abortion, especially in cases of rape, incest, severe fetal impairment and in order to save the woman’s life.\textsuperscript{179} The Committee on the Rights of the Child (the treaty body of CRC) has also urged its member states to decriminalize abortion in its Concluding Observations to Chad, Chile, and Uruguay.

\textsuperscript{177} See ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia v. Russian Federation, 2011

\textsuperscript{178} In accordance with CEDAW part V, CRC part II, and ICCPR part IV.

with the argument that criminalization of abortion highly restricts adolescent girls right to health and cause teenage pregnancies. \textsuperscript{180} Furthermore, the Human Rights committee (the treaty body of ICCPR) have criticized the Peruvian penal code for criminalizing abortion, even in cases of rape, in a Concluding Observation. The Human Rights committee found the penal code incompatible with ICCPR article 3, the equal enjoyment of rights, article 6, the right to life, and article 7, freedom from torture and cruel, inhuman or degrading treatment and recommended Peru to establish exceptions to its general prohibition of abortion. \textsuperscript{181} Something worth noticing is that countless states have received critique by UN treaty bodies for their restrictive abortion laws, but never for having too progressive abortion laws.

Secondly, each UN treaty body publishes General Recommendations, namely interpretations of different treaty provisions in their respective human rights convention. Moreover, the General Recommendations create criteria by which the states’ compliance with a convention may be measured, and works as guidance regarding which information should be submitted in the periodical reports of member states. For instance, the General Comment No. 28 of the Human Rights committee require states to provide data on pregnancy and childbirth-related deaths of women. \textsuperscript{182}

In General Recommendation No. 21 from 1994, the CEDAW committee reaffirms that women must be guaranteed deciding the number and spacing of their children, particularly because it affects their and their children’s physical and mental health. \textsuperscript{183} It also underlines that women’s access to family planning services improves the general quality of life and health of the population, and is crucial for achieving sustainable economic and social development. \textsuperscript{184} In 1999, the CEDAW committee published its General Recommendation No. 24, which obliges state parties to report on measures taken to ensure adequate information and services related to family planning and reproductive health. \textsuperscript{185} According to the committee, state parties should prioritize

\textsuperscript{180} See the Committee on the Rights of the Child’s Concluding Observations of Chad, CRC/C/15/Add.107, para. 30, Chile, CRC/C/CHL/CO/3, para. 56, and Uruguay, CRC/C/URY/CO/2, para. 52.

\textsuperscript{181} See the Human Rights Committee’s Concluding Observations of Peru, CCPR/CO/70/PUR, para. 20.

\textsuperscript{182} Human Rights Committee, CCPR/C.21/Rev.1/Add.10, General Comment No. 28, Article 3: The Equality of Rights Between Men and Women, para. 10.

\textsuperscript{183} The CEDAW committee, General Recommendation No. 21, Equality in marriage and family relations, para. 21.

\textsuperscript{184} Ibid, para. 22–23.

\textsuperscript{185} The CEDAW committee, General Recommendation No. 24: Article 12 of the Convention (women and health), para. 23.
prevention of unwanted pregnancies through sex education and family planning, and when possible amend legislation criminalizing abortion.\textsuperscript{186} In General Recommendation No. 35 from 2017, the CEDAW committee acknowledges that criminalization of abortion constitutes a form of gender-based violence, which may amount to torture, cruel, inhumane or degrading treatment.\textsuperscript{187} As illustrated, by international standards the CEDAW committee has embraced a very progressive approach towards decriminalization and legalization of abortion.

As a matter of fact, another UN treaty body has published a detailed General Recommendation concerning abortion as well. The ESC committee (the treaty body of ICESCR) published its General Recommendation No. 22 in 2016, which identified sexual and reproductive health as an integrative part of the right to health, intimately linked with civil and political rights.\textsuperscript{188} It recognized the right of every person to scientifically accurate and up-to-date information concerning abortion and acknowledged that medicine to procure abortion, as well as post-abortion care, should be available.\textsuperscript{189} According to the ESC committee, denial of legal and safe abortions often cause maternal morbidity and mortality, which constitutes a violation of the right to life, and in certain cases even amounting to torture, inhuman or degrading treatment.\textsuperscript{190} The committee also describes domestic laws which criminalize abortion as a violation of the right to health.\textsuperscript{191} Subsequently, the General Recommendation requires state parties to respect women’s right to make autonomous decisions concerning their sexual and reproductive health and to immediately liberalize restrictive domestic abortion laws, in order to guarantee women’s access to safe abortions and post-abortion care.\textsuperscript{192} At last, in its General Recommendation No. 22, the ESC committee acknowledge denied access to safe abortions as gender discrimination:

\textit{“Due to women’s reproductive capacities, the realization of the right of women to sexual and reproductive health is essential to the realization of the full range of their human rights. The right of women to sexual and reproductive health is...”}

\textsuperscript{186} Ibid para. 31(c).
\textsuperscript{187} The CEDAW committee, General Recommendation No. 35, \textit{Gender-based violence against women}, para. 18.
\textsuperscript{188} The ESC committee, General Comment No. 22, \textit{The right to sexual and reproductive health (article 12 of ICESCR)}, para. 1 and 10.
\textsuperscript{189} Ibid. para. 13, 18 and 21.
\textsuperscript{190} Ibid, para. 10.
\textsuperscript{191} Ibid, para. 57.
\textsuperscript{192} Ibid, para. 28 and 34.
indispensable to their autonomy and their right to make meaningful decisions about their lives and health. Gender equality requires that the health needs of women, different from those of men, be taken into account and appropriate services provided for women in accordance with their life cycles.”

Thirdly, UN treaty bodies may under certain conditions receive individual complaints from citizens, provided that domestic remedies have been exhausted and that the state party recognizes the competence of the committee. There are quite a few examples of individual complaints concerning abortion. First of all, the case of *K.L v. Peru* in the Human Rights Committee. In 2001, the 17-year-old petitioner became pregnant and a scan showed that her fetus was anencephalic, a diagnosis fatal for an unborn child. The petitioner’s gynecologist advised her to terminate the pregnancy since it put her life at risk, which is a valid legal exception of the general criminalization of abortion in Peru. However, the medical personnel refused to perform the abortion, and the petitioner was forced to give birth to a child with marked deformities she also had to breastfeed, who passed away four days after birth. The traumatic experience caused a depression and an inflammation in the petitioner’s vulva. In 2005, the Human Rights Committee found the Peruvian government guilty of violating ICCPR article 2 in combination with article 7 (torture, cruel, inhuman or degrading treatment), article 17 (unlawful interference with one’s privacy), and article 24 (measures of protection of minors), since it failed to ensure the petitioners access to a legal therapeutic abortion.

In 2011, the Human Rights Committee found Argentina’s government guilty of violating the same provisions in a similar case, *LMR v. Argentina*, which concerned a petitioner with a mental disability who became pregnant following a suspected rape. To give a third example, there is the case of *Mellet v. Ireland* in the Human Rights

193 Ibid, para. 25.
194 The Optional Protocol to CEDAW art. 2, the First Optional Protocol to ICCPR art. 1–2, and the Optional Protocol to CRC on a Communications Procedure art. 5.
196 Ibid para. 2.1.
197 Ibid para. 2.2–2.3.
198 Ibid para. 2.6.
199 Ibid.
200 Ibid para. 6.3–6.6.
Committee in 2016. The individual complaint concerned an Irish woman who traveled to the UK to have an abortion since her baby would die in utero or shortly after birth due to severe fetal impairment. She had to return to Ireland twelve hours after her abortion, still weak and bleeding, because she could not afford to stay any longer in the UK. The petitioner experienced a lack of sufficient post-abortion care in Ireland after her return and argued that as a result, she suffered from a complicated grief and an unresolved trauma. The Human Rights committee considered, among other things, her experience of being forced to travel to another state while carrying a dying fetus to procure an abortion amounting to cruel, inhuman or degrading treatment in violation of ICCPR article 7, as well as an arbitrary interference in her right to privacy in article 17, and discrimination in accordance with article 26. Lastly, in the same spirit, the CEDAW committee found the Peruvian government violating CEDAW in 2011 in LC v. Peru, especially article 12 concerning non-discriminatory access to health care. In this case, a 13-year-old petitioner had become pregnant following a rape and attempted suicide.

Forth and last, the committees of CEDAW and CRC are entitled to initiate Country Inquiries if they receive reliable and legitimate information of severe or systematic violations of their convention in a member state. In accordance with article 8 of the Optional Protocol to CEDAW, there are two Country Inquiries covering reproductive rights, Northern Ireland and the Philippines, which deserves being explained in further detail.

6.5 Country Inquiries of Northern Ireland and the Philippines

In Northern Ireland, abortion is criminalized and may result in life imprisonment for women and healthcare personnel. Even though abortion is legal when saving the woman’s life and when a pregnancy causes serious effects on the woman’s long-term health, access to abortion is severely restricted. The UK 1967 Abortion Act permits

203 Ibid, para 2.1–2.2.
204 Ibid, para 2.4.
205 Ibid, para 2.4–2.5.
206 Ibid, para 7.4–7.7 and 7.11.
208 Optional Protocol to CEDAW art. 8 (inquiry procedure), and CRC Optional Protocol communications procedure art. 13 (inquiry procedure).
209 CEDAW/C/OP.8/GBR/1, Report of the inquiry concerning the United Kingdom of Great Britain and Northern
abortion in England, Wales, and Scotland, but the Northern Irish Infant Life (Preservation) Act section 1–2 criminalize “child destruction”: the act of killing a child that is capable of being born alive. There is also a religious characterization of abortion as a sin.\textsuperscript{210} Recently, the Northern Ireland Court of Appeal reconfirmed that abortion in cases of incest, pedophilia, rape, and severe fetal impairment still remain a criminal act.\textsuperscript{211} Aside from legal restrictions, numerous \textit{de facto} limitations exist which make access to a legal abortion practically impossible in Northern Ireland.\textsuperscript{212} Thereby, women are forced to carry almost every pregnancy to full term.\textsuperscript{213} Needless to say, it is difficult to access modern forms of contraception as well.\textsuperscript{214} The criminalization of abortion has resulted in victims of incest and rape being treated as criminals, contributing to the prevailing culture of silence and underreporting of sexual violence.\textsuperscript{215} Also, the CEDAW committee has noted a connection between Northern Irish women’s lack of control over their fertility and poverty.\textsuperscript{216}

In 2015–2016, only 46 abortions were procured in public hospitals, and there is a rising trend of self-administrated abortions.\textsuperscript{217} Between 1970 and 2015, a total number of 61314 Northern Irish women traveled to England to procure an abortion. Many of them have faced an emotional, financial and logistical burden, experienced mental anguish as well as feared community stigma and prosecution, which have severely impacted their health.\textsuperscript{218} For various reasons such as DNA-testing, burial, and evidence in rape cases, there is sometimes a need to transport the aborted fetus back to Northern Ireland. This has forced women to undignified transport practices such as cooling boxes or hand luggage, through mercy by the airline personnel.\textsuperscript{219}

In the Country Inquiry of Northern Ireland, the committee found grave and systematic violations of CEDAW, including the prohibition of gender discrimination in article 2, the right to health in article 12, and the right to sexual health and family planning in

\textsuperscript{Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, para. 4.}
\textsuperscript{210} Ibid, para. 48.
\textsuperscript{211} Ibid, para. 8 and 36.
\textsuperscript{212} Ibid, para. 13–20.
\textsuperscript{213} Ibid, para. 65.
\textsuperscript{214} Ibid, para. 46.
\textsuperscript{215} Ibid, para. 38.
\textsuperscript{216} Ibid, para. 34–35.
\textsuperscript{217} Ibid, para. 22.
\textsuperscript{218} Ibid, para. 9 and 25–30.
\textsuperscript{219} Ibid, para. 32.
article 14.2(b) and 16.1(e). Women’s right to determine the number and spacing of their children, freedom of autonomy and the right to self-determination were mentioned as well. In general, laws criminalizing abortion violates women’s access to health care and constitute gender discrimination, since abortion is a health service that only women needs since only women can become pregnant, according to the committee. It argued that denial of safe abortion also causes physical and mental suffering which constitutes violence against women, possibly amounting to torture, inhuman or degrading treatment. The committee recommended decriminalization of abortion in all situations and required Northern Ireland to legalize abortion at least in cases of incest, rape, fetal impairment and when there is a threat to the life or health of the woman. Lastly, it noted that post-abortion services always should be available. To summarize, in the Country Inquiry of Northern Ireland the CEDAW committee formulated a positive obligation for member states to decriminalize abortion and to provide safe and legal abortion under certain circumstances, based on the right to health and the prohibition of gender discrimination.

In the Country Inquiry of the Philippines, an executive order by local government units in Manila encouraged natural family planning, such as abstinence and cervical mucus controls, and discouraged artificial methods of contraception, such as condoms or birth control pills. The executive order resulted in a ban of modern contraceptives in the city of Manila, despite the strict criminalization of abortion with no exceptions. This compelled women to give birth to more children than they wanted or that their health allowed. Complications arising from unsafe and illegal abortions constituted a great cause of maternal death in the Philippines. Women witnessed of experiencing great difficulties with only using natural family planning, which caused tensions with partners and sometimes resulted in domestic violence. There were other consequences as well, for example, an increased exposure of HIV and sexually transmitted diseases, as well as

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220 Ibid, para. 72.
222 Ibid, para. 65.
223 Ibid, para 58–60.
224 Ibid, para. 61.
225 Ibid, para. 60.
226 CEDAW/C/OP.8/PHL/1, Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, para. 2.
227 Ibid, para. 33–34.
228 Ibid, para. 33.
229 Ibid.
being left with no choice other than carrying almost every pregnancy to an end, which mentally and physically damaged women.\textsuperscript{231} The CEDAW committee reached the conclusion that since only women can become pregnant, a ban on modern contraceptives affects their health disproportionally.\textsuperscript{232} It also linked women’s inability to control their fertility with poverty in Manila.\textsuperscript{233} In conclusion, the committee found grave and systematic violations of the right to family planning in CEDAW article 16.1(e), the right to health in article 12, as well as the prohibition of discrimination against women in article 2.\textsuperscript{234} Similarly to the Northern Ireland Country Inquiry, the reasoning was based upon a right to health-approach, rather than just invoking a violation of the right to family planning.

In summary, UN treaty bodies have, with international standards, embraced a very progressive approach towards abortion. Especially by linking abortion to violations of other human rights, such as the right to health and prohibition of torture, degrading or inhuman treatment. A few committees have even repeatedly called upon states to decriminalize or legalize abortion in domestic legislation, at least under certain circumstances, and no state has received critique for having too progressive abortion laws.

\textbf{6.6 Regional courts and commissions}

In the same way, the link between abortion and women’s exercise of other human rights has developed within regional compliance mechanisms as well, in particular within the case law of ECtHR as shown in chapter 4.2. The Court has found violations of the prohibition of inhuman or degrading treatment in article 3, and of the right to private and family life in article 8 in cases concerning women’s access to lawful abortions.\textsuperscript{235} Though, the Court has not yet ruled a case in which a strict abortion law itself constituted a violation of the ECHR, thus it has not established legal access to abortion as a human right within its case law. The Inter-American Commission on Human Rights has not established an indirect right to abortion in this manner either, as declared in the

\textsuperscript{231} Ibid.
\textsuperscript{232} Ibid, para. 32.
\textsuperscript{233} Ibid, para. 13, 34 and 47.
\textsuperscript{234} Ibid, para. 46.
In summary, neither ECtHR nor IACHR requires member states to legalize abortion under certain circumstances, although when abortion is permitted in domestic legislation, women should be able to exercise this right.

In contrast, the Maputo Protocol article 14.2(c) expresses a direct right to abortion under certain circumstances, and the African Commission on Human and Peoples’ Rights has explicitly expressed the link between abortion and women’s exercise of other fundamental human rights in its General Comment No. 2. According to ACHPR, forcing a woman to carry a pregnancy to full term following a sexual assault, rape or incest negatively affect her physical and mental health. Additionally, unavailability or refusal of access to safe abortion may itself cause mental suffering. Lastly, being forced to carry a pregnancy with severe fetal impairment (when the fetus is incapable of surviving), constitute cruel and inhuman treatment. In comparison with ECtHR and IACHR, ACHPR requires national laws, policies, and administrative procedures, aimed at ensuring safe abortion services, to be respected and implemented in member states.

6.7 International organizations within the UN regime

Among different UN organizations, the approaches towards abortion vary. To illustrate, UNFPA neither promotes abortion nor changes in domestic legislation, with sovereignty as the main pronounced argument for its position. UNFPA does, however, advocate for voluntary family planning and access to post-abortion services, in order to prevent complications arising from unsafe abortions. In comparison, others express more progressive approaches. For example, WHO has implied that full abortion services should be legal, available and accessible to all women. Additionally, the ICPD Secretariat has advocated for abortion to be legal in all states, on the ground that the societal return would be indubitably high. The ICPD Secretariat also argue that

236 IACHR, White and Potter (Baby Boy) v. The United States, 1981.
237 African Commission on Human and Peoples’ rights, General Comment No. 2 on Article 14.1 (a), (b), (c) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.
238 Ibid, para. 37.
239 Ibid, para. 38.
240 Ibid, para 40.
241 Ibid, para. 48.
242 UNFPA, Does UNFPA promote abortion?.
243 Ibid.
244 WHO, Safe abortion: technical and policy guidance for health systems, p. 17.
legal abortions improve women’s health in general, as well as the wellbeing of their families and communities. 246 Another actor which has called upon states to decriminalize abortion through a right-to-health approach is the Special Rapporteur of the Human Rights Council Anand Grover.247 In a report, he criticizes domestic legislation criminalizing or restricting abortion for severely infringing women’s dignity and autonomy which may amount to a violation of women’s right to health.248

As shown, it appears more common among treaty bodies and international organizations to view abortion as included within the scope of other human rights, especially the right to health, and advocate for change in domestic legislation, in comparison to what is observed in preparatory works and reservations, as well as in regional courts and commissions. Evidently, the positions of UNFPA, WHO, the ICPD Secretariat, and the Special Rapporteur are not legally binding for member states, though, they bear great authority in their respective fields.

6.8 Doctrine

In legal doctrine, different scholars’ standpoints on abortion more or less depend on how they approach international human rights law – as a developing instrument interpreted through teleological approaches on one side, and through the principles of sovereignty and non-intervention on the other. Obviously, there are tensions between these different interpretations. While quite a few scholars claim abortion to be integrated into human rights law, others see it as an attempt to turn progressive interpretations into de lege lata. In this thesis, I have deliberately chosen to focus on original sources, such as preparatory works, reservations, and treaty body reports, due to the fact that the most literature on this topic may have an agenda, although the debate among academics deserves to be briefly mentioned.

Needless to say, the subject of abortion can provoke intense emotions, even among scholars. To illustrate, the author behind “Human Rights and the Unborn Child” Rita Joseph equates progressive abortion policies with the Nazi abortion programs, claiming that they are merely repeating the atrocities of mass murders during the World Wars.

246 Ibid.
247 United Nations Secretary-General, A/66/254, Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, para. 65(h).
248 Ibid, para. 16.
She suggests that progressive abortion policies constitute a Nazi-style excuse to violate the right to life of one of the most vulnerable groups of human beings, and finds it unthinkable that the intention of the drafters of human rights instruments was to formulate human rights provisions that would be used for justifying “the scale of abortion violence we have today”. 249

Among scholars opposing the existence of a right to abortion, a few express criticisms towards the UN treaty bodies progressive approaches. Piero Tozzi accuses them of fabricating a right to abortion where none exist and describe it as a part of a coordinated legal attack against the unborn child, sovereignty and towards the genuine understanding of the human rights framework. 250 According to Tozzi, the committees exceed their mandates and challenge the legitimacy of the treaty body system. 251 With regard to sovereignty, he argues that not just the territorial limits should be considered, the cultural norms and traditions should be respected as well. Otherwise, states may consider de-ratifying human rights conventions in order to be able to exercise their sovereignty. 252

Tomas Finnegan agrees with Tozzi that the treaty bodies do not have the jurisdiction to develop, delete or add to the provisions of their respective treaties. 253 He emphasizes that neither the Concluding Observations nor the General Recommendations are part of a legally binding human rights law. 254 Finnegan further criticizes the Human Rights committee and the CEDAW committee for regularly challenging states with restrictive abortion laws, by applying an unanchored teleological interpretation with no resemblance to the VCLT methodology, in an attempt to justify abortion as a human right beyond or even against the provisions of their respective instruments. 255

On the one hand, I find the comments of Tozzi and Finnegan legitimate. One can certainly discuss whether or not the treaty body documents form unanchored progressive interpretations, which create new obligations for state parties not intended

250 Tozzi, International Law and the Right to Abortion, p. i–1 and 9.
252 Ibid, p. 17.
by the drafters. On the other hand, no state has so far de-ratified CEDAW, CRC or ICCPR, as a consequence of far-reaching interpretations made by their treaty bodies. In practice, state parties are the implementers of these conventions, and also the main interpreters since the treaty body documents are not legally binding, thus states may not feel as threatened by these treaty bodies as Tozzi and Finnegan portrays. In the light of their accusation regarding treaty bodies creating a right to abortion where none exist, one must not forget that most states already allow abortion under certain circumstances, such as saving a woman’s life. In other words, the vast majority of states allow abortion in order to maintain women’s human right to life, and domestic abortion bans without any legal exceptions are highly unusual. Thereby, one could argue that, indirectly, most states acknowledge access to safe and legal abortion as a method to not violate a few other human rights of women.

Among legal scholars in favor of viewing abortion as inextricable from other human rights, one of the most common arguments is to simply emphasize that abortion follows from other human rights.256 To illustrate, a woman’s right to life and health may require a woman to procure an abortion, in order to save her life or to protect her health. In the same manner, a woman’s right to privacy and freedom of torture, degrading or inhumane treatment may require a woman to procure an abortion following rape, incest or severe fetal abnormality.257 When arguing for an indirect right to abortion in this manner, many scholars refer to the treaty body documents mentioned above, as criticized by scholars that oppose the existence of a right to abortion.258

Rebecca Cook and Bernard Dickens underline the life-preserving and health-preserving functions of abortion, especially considering the high rates of maternal morbidity and mortality.259 They also consider safe and dignified health care as a human right which legitimizes abortion and reproductive autonomy.260 Another scholar using a right to health-approach, Lance Gable, also reference to treaty body reports and decisions,


257 Ibid.


259 Cook & Dickens, Human Rights Dynamics of Abortion Law Reform, p. 3.

260 Ibid.
which frames reproductive health within the sphere of the right to health and articulate detailed norms in this area.\textsuperscript{261} According to Gable, treaty bodies strongly increase the connection between reproductive health and other human rights and creates an enforceable obligation for states which have recognized the right to health.\textsuperscript{262}

In accordance with their mandates, treaty bodies are the official interpreters of their respective conventions, and these interpretations should be taken into account by state parties. Although, in my opinion, due to the legally non-binding character of treaty body documents, Gable’s statement concerning treaty bodies themselves creating an enforceable right goes too far. However, the overall picture of my study indicates that the development is moving towards viewing abortion as inextricable from other human rights.

To summarize, there are scholars who consider abortion as included within the sphere of other fundamental human rights of women, and there are those disagreeing. These different opinions most likely depend on the scholars’ different agendas and approach towards international law.

6.9 Summary

To summarize this chapter, women’s their interests in reproductive autonomy concerning abortion was not mentioned in the preparatory works to either CEDAW, CRC, nor ICCPR. Although, there is an increasing trend to view abortion as an indirect right included within the sphere of other already existing human rights, especially among treaty bodies, international organizations and legal scholars. In other words, there are indications that denied access to safe and legal abortions may constitute violations of the right to life, health, privacy and the prohibition of gender discrimination, torture, inhumane and degrading treatment. Especially a few treaty monitoring bodies have embraced progressive approaches towards abortion, some of which have repeatedly called upon states to decriminalize or legalize abortion, which has generated critique among a few scholars. The criticism partially addresses that including abortion within the sphere of human rights would undermine state sovereignty, which confirms that many still view abortion as a domestic policy issue. In other words, those who oppose including abortion in foreign policy or human rights law

\textsuperscript{261} Gable, \textit{Reproductive health as a human right}, p. 992.

\textsuperscript{262} Ibid.
are also against moving abortion from the unregulated private sphere to the regulated public sphere. By their nature, human rights limit the scope of state sovereignty and transfer issues from the private sphere to the public sphere, and various human right conventions have been adopted and ratified by a majority of states. In this regard, it is worth discussing why many states invoke sovereignty on this matter and refuse to transfer abortion to the public sphere or to accept it as a human right.

7 The legal-political context

7.1 A woman’s rights vs. the unborn child’s right to life

Based on my findings there is neither a direct right to abortion in public international law, nor is abortion included in the reproductive right to family planning, but there may possibly be an indirect right to abortion included through interpretations of other fundamental human rights. As clearly demonstrated in this thesis, certain factors have contributed to the status of abortion in public international law. In order to understand the unwillingness of states to create a direct right, abortion must be placed in its legal-political context, which first and foremost is to invoke the unborn children’s right to life. In this debate, women’s and children’s interests are often portrayed as antipoles, as highlighted in the following and last example from preparatory works and reservations.

7.2 Preparatory works and reservations on the unborn child’s rights

A common argument against a right to abortion is to invoke unborn children’s potential right to life, although, only one provision in an international convention directly mention unborn children’s rights, which is the preambular paragraph of CRC. It acknowledges children’s need for special safeguards and care, including appropriate legal protection, before as well as after birth. States and legal scholars who advocate for unborn children’s right to life usually invoke ICCPR article 6.1, which recognize every human being’s inherent right to life, and CRC article 1, which defines a child as every human being below 18 years of age (without mentioning the starting point of childhood), which they claim provides an indirect right to life of the fetus.263

The unborn child’s right to life was extensively discussed in the drafting process to CRC, especially concerning the abovementioned preambular paragraph and the definition of the term child in article 1, which does not identify the starting point of childhood. In a way, article 1 represents a compromise between states that consider life to start at the moment of conception and states that claim life to begin following a live birth. After negotiating the preambular paragraph, it was decided to not re-open the debate regarding at which moment life is considered to begin. A few states argued that no beginning point of childhood should be established, in order for the wording of article 1 to be compatible with the wide variety of domestic legislation.  

Nevertheless, a proposal by Morocco to delete “from the moment of birth”, was adopted. Nine years later into the drafting process, the debate resumed once again after two proposed amendments to article 1, by Malta and Senegal. These suggested clarifying that child meant “every human being from the moment of conception”. When the negotiations reached article 6, the right to life, the issue had already been deliberated more than enough. Thereby, after an extensive discussion, it was once again decided to not re-open the debate, simply and solely in order to enable the work to go forward with the rest of the convention.

In their reservations and declarations to CRC, a few states expressed how they interpreted the beginning point of life: either from conception or after a live birth. In its reservation, the Holy See took the opportunity to declare children to be a “precious treasure given to each generation as a challenge to its wisdom and humanity”.

A recurring theme of the discussions among states during the drafting processes to CEDAW, CRC, and ICCPR, was that any attempts to institutionalize a specific approach towards either permitting or prohibiting abortion were completely unacceptable. Thereby, the intent of most states was probably to not provide legal support for either side, which demonstrates that the studied provisions are the result of a

265 Ibid, para. 30.
268 See the following reservations and declarations to the CRC. From the moment of conception: Argentina (4/12 1990), Ecuador (23/3 1990), Guatemala (6/6 1990), and the Holy See (20/4 1990). Following a live birth: The UK (16/12 1991).
269 See the reservation to the CRC by the Holy See (20/4 1990).
political compromise: to not transfer the issue of abortion from national legislation and politics to human rights and foreign policy. Nevertheless, abortion remains a politically sensitive topic, frequently debated in international relations and human rights fora, especially concerning foreign aid.

### 7.3 The current political climate and abortion

Senior Adviser in reproductive health at UNFPA, Nuriye Ortayli, and former staff members at the Department of Reproductive Health and Research at WHO, Iqbal H. Shah and Elisabeth Åhman conclude that the organized opposition against abortion has increased the last decades.\(^{270}\) In their opinion, without the growing opposition, progress towards decreasing the number of unsafe abortions could have been achieved faster and more effectively.\(^{271}\)

Zooming out of the public international law context, the rise of organized opposition against abortion is clear. In January 2018, on his fourth day in office, the American president Donald Trump reintroduced the Mexico City policy, also known as the Global gag rule. It is an anti-abortion policy, which prohibits Non-Governmental Organizations’ use of American foreign assistance funds to provide or promote abortion services, sexual education, and family planning.\(^{272}\) In general, it is getting harder to receive foreign aid to fund reproductive projects, which is the case for domestic organizations as well. In April 2018, Cecile Richards, the president of Planned Parenthood, the largest provider of reproductive health services in the United States of America (USA), accused the Trump administration of bribing her, as an attempt to force Planned Parenthood to stop providing abortion services.\(^{273}\)

Similar rhetoric is noticeable among a few heads of state and government parties concerning domestic abortion policies. In 2016, the party leader of the Polish Law and Justice party (PiS) Jarosław Kaczyński, implied the party’s continued attempts to further restrict domestic abortion laws, through the following statement: "We will strive to ensure that even in pregnancies which are very difficult, when a child is sure to die,

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\(^{271}\) Ibid.

\(^{272}\) Starrs, *The Trump global gag rule: an attack on US family planning and global health aid*.

strongly deformed, women end up giving birth so that the child can be baptized, buried, and have a name.”

In 2017, president Vladimir Putin passed a new law in Russia decriminalizing some forms of domestic violence, despite the fact that more than 600 Russian women are killed in their homes every month, and 36,000 Russian women are victims to domestic violence every day. In Hungary, Prime Minister Viktor Orbán has declared himself the defender of Europe’s traditional Christian identity and want to focus on “family-friendly policies” to increase Hungary’s population to solve its demographic problems. In Iran, leaders are now trying to reverse its historically progressive laws on family planning, in order to increase the population. In 2014 at a women’s conference in Istanbul, the Turkish president Recep Tayyip Erdoğan declared in a speech that feminists reject the idea of motherhood and that women are not equal to men. According to Erdoğan, choosing career over family should be unacceptable for women and they should have at least three children each. He also mentioned that to reject motherhood is to give up on humanity. At a population conference, Erdoğan claimed abortion to be murder, stating that there is no difference between killing a baby in the stomach and after it is born, and compared abortion with aerial bombardment of civilians. Others share his views, the Turkish parliamentarian and chairman of the Turkish Human Rights Committee Ayhan Sefer Ustun wants to ban abortion on the ground that it constitutes a crime against humanity.

Last year, I spent five months at the Swedish Delegation to the UN in New York. I clearly remember my colleagues discussing the current backlash of women’s rights, and how difficult it would be to adopt an instrument as progressive as CEDAW today. According to the Swedish ambassador Olof Skoog, those who support women’s sexual and reproductive rights currently find it undesirable to initiate another legally binding instrument, due to the immediate risk of further restricting these rights.

274 Davies, Polish MPs back even tougher restrictions on abortion, The Guardian, 11/1 2018.
277 Dehghan, Iran aims to ban vasectomies and cut access to contraceptives to boost births, The Guardian, 11/3 2015.
278 Agence France-Presse, Recep Tayyip Erdogan: ‘women not equal to men’, The Guardian, 24/11 2014, and Malm, President Erdogan urges Turkish women to have at least three children and tells them their lives are ‘incomplete’ without babies, Daily Mail, 6/6 2016.
279 Ahmadi, Turkey PM Erdogan sparks row over abortion, BBC, 1/6 2012.
280 Ibid.
281 Ibid.
Speaking personally, I am under the impression that this recent trend concerning negative attitudes towards abortion springs from political parties increased alliances with religious entities, which result in an increased electoral support for populist parties and leaders. Since conservative family values are essential in some religions, and the group of individuals compromising the decision-making elite typically are not greatly affected by imposing restrictions in this area, reproductive rights, and women’s rights in general, are usually the first thing to be sacrificed. Perhaps, this is one of many reasons for the general setback of progressive values, which includes legal access to safe abortions. At the same time, there is also progress for reproductive rights in some states, with the Irish referendum as one of the most recent examples.

In a report published by the Lancet, seven scientists describe some of the underlying reasons for not providing safe abortion as apathy and disdain for women, whom suffer and die because they are not valued.282 Similar conclusions are drawn by scientists in another Lancet report. They accuse political leaders who further restrict access to safe abortion for the worst kind of value signaling, especially since those leaders are not personally affected by the consequences of their changes in legislation due to economics, geography, and gender.283 In other words, the most vulnerable women, in poverty and in rural areas, suffer the most.284

7.4 The legal status of abortion – a political compromise

Preparatory works, reservations and current political debates clearly show the historic and ongoing controversy surrounding the legal status of abortion. In order to enable ratification of CRC, CEDAW, and ICCPR, these instruments were deliberately designed to not give legal support for either side. On one hand, this solution represents a necessary political compromise, on the other hand, it reconfirms that women’s reproductive autonomy in terms of abortion is excluded from the general protection of human rights since states decide how to balance women’s and unborn children’s rights. This solution may be beneficial for women living in states choosing progressive abortion policies, not forced to implement restrictions by international law. However,

282 Grimes et al, Unsafe abortion: the preventable pandemic.
284 Ibid.
for women living in states heavily restricting or criminalizing abortion, this political compromise in public international law may result in disability or even their death.

In debates, abortion is often portrayed as a dichotomy between unborn children’s right to life on one hand, and women’s right to life, health, privacy, and the prohibition of discrimination, torture, inhumane and degrading treatment on the other. In practice, the unborn child’s interests and women’s reproductive autonomy are not necessarily opposites, because the survival and well-being of a child are imperatively interlinked with it not having an impaired or deceased mother, as mentioned in chapter 2.3.

After all, abortion is often described as a moral issue rather than a health concern or human rights matter. For example, in 2016 abortion was defined as an unethical medical practice in South Korea and medical personnel conducting abortion were subjected to suspension and criminal punishment.285 In a few states such as Northern Ireland, there is also a religious characterization of abortion as a sin.286 States opposing abortion often have the interests of the unborn child in mind and balance their domestic abortion laws in favor of the fetus’s rights, due to religion or national values.

7.5 Summary
To conclude, the unborn child’s potential right to life is the main argument towards restricting women’s access to safe abortions, and debates concerning how to balance these rights are far from new. Attitudes towards abortion have varied in different times and societies, and right now there is a new rising wave of opposition in states with formerly progressive abortion laws. Due to the current legal-political context, moral and religion sometimes outweigh health aspects and human rights of women. The reality is not that dichotomous, and there are clear benefits of legal abortions for families and societies in general. In general, the current status of abortion in public international law could be described as a political compromise, which reconfirms abortion to be an issue within the private sphere and belonging to the sovereign state, rather than being transferred to the public sphere and covered by human rights protection.

285 CEDAW/C/KOR/CO/8, Concluding Observation of the Republic of Korea, para. 42.
286 CEDAW/C/OP.8/GBR/1, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, para. 48–50. Another commonly used argument by Northern Irish political parties is that a legalization of abortion would risk destabilizing the peace process, see para. 48.
8 Concluding remarks

8.1 Summary of findings and conclusion

Through the application of Charlesworth and Chinkin’s theory of the public/private distinction in international law, it has been shown that women’s reproductive autonomy in terms of abortion traditionally has belonged to the private sphere, perhaps as deep within it as possible. Due to sovereignty, intervention by international regulation or human rights law has long been regarded as inappropriate in the private sphere. Thereby, women’s interest in reproductive autonomy has rarely, perhaps not at all, been mentioned while developing international human rights conventions. As a consequence of the public/private distinction and the political context, abortion has not been clearly regulated in human rights law, and the issue is considered to belong to national politics and domestic legislation. This solution represents a political and realistic compromise since it would currently be impossible for states to reach a legally binding agreement on this issue. In light of its own perceptions and values, each state may decide how to balance the perceived conflicting rights and interests of women and fetuses within its territory. As a result, it is common with domestic abortion laws based on ideology, religion or morals, even though it is scientifically proven that restrictive abortion policies have detrimental effects on women’s lives.

To conclude this thesis, the status of abortion in public international law is a complex matter. It has been shown that there is neither a direct right to abortion nor is abortion included within the reproductive right to family planning. Although, there are indications that denial of access to safe abortions may constitute a violation of other human rights and thus generate an indirect right to abortion. Subsequently, domestic legislation that criminalizes or restrict access to safe abortions may be in violation of basic human rights, according to case-law, treaty body documents, views of international organizations, and doctrine.

8.2 Final reflections

Without a doubt, abortion appears to be one of the most contentious human rights issues in modern history. Even though attitudes towards abortion varies greatly among states, only a few have a total prohibition without any exceptions. Since the perceived balancing of women’s and unborn children’s rights takes place in the national arena, the
primary legal change must come from within states. Perhaps as in Ireland, through a
democratically conducted referendum generated by citizens demanding reproductive
rights. Although, whether states like it or not, the interpretation and application of
human rights may continue to evolve in order to stay relevant in today’s society. In the
future, we could expect additional international and regional treaty body documents
interpreting abortion to be included within the scope of other fundamental human rights,
which risks increasing the already existing tension between sovereignty and human
rights.
Reference list

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A/RES/21/2200 A Annex 3, Optional Protocol to the International Covenant on Civil and Political Rights, 1966

A/RES/54/4, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999

A/RES/55/2, United Nations Millennium Declaration, 2000


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ICJ, Armed Activities on the Territory of the Congo, DRC v. Rwanda, 2006

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2.2 Regional courts and commissions

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### 2.3 Arbitration

Arbitration Award, *Baie de Delagoa*, the United Kingdom v. Portugal, 1875

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