"The Legitimacy Gap: International Dimensions of Norm Contestation, in the Debate about the Legal Status of Abortion".

Clara Franco Yáñez

clara.franco@giga-hamburg.de

Research Fellow / Doctoral Student

German Institute of Global and Area Studies (GIGA) / University of Hamburg

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Abstract: This paper focuses on the legality of abortion as a case of international norms contestation. Women's rights have gained recognition as a globally relevant matter; sexual and reproductive rights, however, remain controversial. Few issues are as highly contested as the legality of abortion: there is no global consensus on what its precise legal status ought to be, or what should states' role be in relation to abortion. International legal documents from the United Nations and Inter-American Rights systems are easily interpreted and invoked by advocates on both "sides" of the debate as promoting or opposing legal abortion. Advocates, in local and global forums, display widely differing – and often, fundamentally incompatible – normative viewpoints.

This paper analyzes three instances of norm contestation within the context of colliding rights and principles, focusing on abortion as the substantive matter and providing observations on what is undoubtedly one of the most controversial legal issues of our time. It is based on the analysis of international Human Rights texts, current literature, and the documented engagements of stakeholders (such as policy makers, legislators and advocates) on the debate and contestation about the legitimacy of abortion as a legal choice. It stems from ongoing research for the doctoral dissertation: *"Bridging the Legitimacy Gap: International Dimensions of Norm Contestation in Advocacy for and Against Legal Abortion in Mexico and Global Forums",* which links the issue to the particular case of Mexico. Here, however, the focus shall be placed on international dimension of this debate, proposing observations about abortion as a legal and Human Rights matter, while taking international legal documents as a focal point and framework. I focus on the varying – often competing and clashing – interpretations of international human rights norms and of organizing principles of justice (as put forward both by the advocates who speak *for* as well as *against* the legalization of abortion), in their struggle to find workable, on-the-ground solutions and second-best policy agreements, to fill the legitimacy gap encountered in such a contentious matter as that of the legality of abortion. I thus present a case study of norm contestation and competing notions of human rights, in relation to globally accepted laws and principles. I rely conceptually on *norm contestation, internationally recognized human rights,* and briefly also on *advocacy* – all of them through a critical social constructivist framework – for the analysis of such meaning-making processes.

Introduction: Abortion, human rights and norm contestation. The endlessly contested issue.

Throughout recent decades, women's rights have gained recognition as a globally relevant matter – one that concerns justice, human rights and nations' socio-political development. Since the first major steps towards an equal right to participation in the public and political spheres – beginning with rights to vote in some countries, in the late 19th century –, the advancement of women's equal rights has had a

diverse and multi-faceted history, advancing at different paces depending on nation-state contexts as well as within nations, racial, ethnic and other differences. Voices of opposition and contestation have been raised throughout every step of attaining equal rights; invoking arguments such as tradition, religious belief, moral conviction, "natural" gender roles or the necessity of differentiated rights in order to "*protect the family*". Surprisingly similar arguments have been used in the contestation – and opposition – to matters as seemingly diverse as women's right to work outside the home and to equal pay, their right to political participation, and the issue in focus in the present study: sexual and reproductive rights, specifically the issue of abortion. Yet such ways of opposing and contesting rights, norms and principles, are hardly exclusive to *women's* rights and indeed hardly new at all. In some ways, the history of Human Rights has been a history of expansion and inclusion, redefining *who* should be considered a holder of *which kind* of rights, *why* should such rights be granted, *by whom*; and very importantly, *how should the state government act* as an upholder and guarantor of rights. The history of equal inclusion of African-Americans within the legal rights system of the United States, the recognition of children and minors as rights holders in the Declaration of the Rights of the Child, and the re-definition of terms like "self-determination" and "sovereignty" in the context of indigenous rights, have been examples of contestation as a process of questioning and re-imagining laws, norms and principles of justice… and in the process, creating and re-creating modes of governance.

International legal documents from both the United Nations and the Inter-American Human Rights Systems (Declarations, Pacts, Covenants, etc.) are interpreted and invoked by advocates on both sides of the debate as promoting or opposing legal abortion. I engage with the concept of norm contestation, within the context of colliding interpretations of international human rights and of principles of justice; using examples of some advocates for and against legal abortion who have aimed to fill the *"legitimacy gap"* of abortion norms in order to propose workable policies and compromises. I refer, writ large, to "advocates" as either individual persons or institutions who have had a known role in, for example, presenting a particular reform or proposing a specific policy, or sending written communications to international institutions when they have debated the legality of abortion, as happened recently at the UN Office of the High Commissioner for Human Rights (OHCHR) with the creation of the Draft Comment No. 36 on the Right to Life.

In order to understand the way in which the main concepts around the abortion debate and human rights are constructed, contested and negotiated by advocates, a critical interpretive constructivist approach helps to analyze discourses, understanding the way in which meanings are built in societies through intersubjective understandings. This "intersubjectivity" is a useful approach to contestation; as norm contestation in itself is taken to be a result and a reflection of intersubjective meanings – varying or

clashing interpretations of norms being a prime example of intersubjective developments[1]. Through this approach I analyze the way in which organizations and individual advocates have understood and constructed the meaning of ideas such as *human rights*, *moral codes*, *sexual and reproductive rights and obligations*, or the *meanings of social experiences* that build relationships between concepts, such as for example the link between abortion and women's health. Many of these constructed concepts can refer, for example, to motherhood and the cultural constructions around it, gender roles and transgressions to them, who is "a rights holder", or who is entitled to a specific right in a specific society – and who has "given up" rights due to transgressions of social norms. Such an approach is useful, for example, in order to understand the way in which a particular society or group constructs and contests the idea of abortion being "a right" for women or "a health-related right". Or, in order to understand how women's rights activists constructed access to abortion as a "right to choose", or how pro-life activists portray abortion as "murder". Whom do they perceive, in each case, as a victim or a transgressor?... The subjective nature of all these meanings regarding abortion and rights will be analyzed through a theoretical basis of critical constructivism.

Through this endeavor, I showcase the issue of abortion as a very clear example of a "clash of rights", as an instance of competing norms and interests, and as the contested and unresolved legal issue by excellence; providing some analytical observations on core ideas and principles that are useful to keep in mind in any attempt to create national policy in relation to the legality and specific legal status of abortion. I analyze diverse dimensions of the abortion debate, as well as elaborate on some ideas already detected throughout the literature on abortion, international human rights, sexual and reproductive rights and women's rights.

I argue that the fundamentally irreconcilable normative viewpoints on abortion are likely to stay irreconcilable, as abortion presents a uniquely "odd" case, not only within Human Rights ontology, but even within women's issues and women's rights in a narrower sense. However, some concepts that are still in early stages of development – at least in their application in this case – such as that of *"suspensive rights"* can serve as an organizing principle in this case of a most contested norm. Contestation of norms regarding abortion and its legal status, however, is likely to continue whatever those norms may be, whether they are strictly prohibitive of abortion or whether they grant liberalized access; and even the middle-ground compromises achieved in some contexts are likely to still encounter everlasting questioning and reform attempts – often according to the political sways of the day.

Three illustrative examples of this contestation are examined: firstly, the Draft Comment No. 36 on the Right to Life, recently published by the UN's Office of the High Commissioner for Human Rights

[1] Wiener 2014, p. 37.

(OHCHR), as well as the numerous comments received by States parties and civil society thereafter. Secondly, comments and reservations presented by States parties to Declarations and Treaties such as the Cairo Declaration on Population and Development (ICPD Cairo), its Programme of Action, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). And thirdly, varying interpretations of rights observed between advocates who invoke differing – and often opposed – concepts and principles of rights and justice in order to advance specific abortion policy: for example, those who use the UN's legal documents on Human Rights, versus those who invoke the American Convention on Human Rights or *Pact of San José*; which unlike the equivalent UN documents, does contain a provision to protect life from the moment of *conception*. These differing interpretations will be analyzed; focusing on contested dimensions of the abortion debate, framings of international norms, global organizing principles put forward by institutions and advocates on this debate, and discourses given by various voices in international forums, in their attempt to fill the endlessly contested "legitimacy gap" of abortion-related norms and policies.

Debates about abortion at a more abstract level are likely to continue. Ponderings on life, personhood and abortion might never be fully resolved, but what is ultimately interesting for most advocates and for scholars on International Relations and Law is the actual policy creation that unfolds as a result of the norm-generation process of contestation. I do not attempt to answer to the question of who stands to reason in *their* interpretation of international norms, but rather to present how various stakeholders have attempted to fill the everlasting "legitimacy gap" of abortion-related norms; and what constructions of potential solutions do they present for the creation of actual on-the-ground policy, how they find middle-grounds within the conflicting norms at stake, or craft second-best solutions to what is still perceived as a most fundamental clash of rights and principles of justice. I present observations on those varying – and often, opposed – interpretations and framings of international norms, the global organizing principles put forward by institutions and advocates, and their perceived policy solutions to this clash.

Existing literature has addressed the legality of abortion – and the advocacy, for and against, that surrounds it – as an issue of women's reproductive rights; generally through either a legalistic lens of internationally recognized Human Rights, or a sociological one which treats the legal status of access to abortion as one of the many dimensions of gender inequality, gender roles and expectations, and the legitimacy of women's individual choices[2] [3]. Most often, the abortion debate has been addressed as

[2] Blofield, 2006.

[3] Lamas, 2009.

either an exclusively feminist issue that ponders on women's *"right to choose"*[4] [5] and where its boundaries should be; or it has attempted to call on the medical sciences to help explain and make clarity of hard philosophical questions about "life", and where it begins and why. Yet by their very nature, the medical and biological sciences are not likely to provide final or even satisfactory answers to abstract and philosophical matters. Not enough focus has been placed on abortion as a case of competing norms and clashes of rights, instead of allowing the debate to flourish *only* within gender literature and *only* through a feminist lens. There is insufficient research as to how the advocacy for and against legal access to abortion, and the process of constant meaning-making, negotiation and contestation has shaped the normative environment regarding access to legal abortion as a matter of global and public health.

An adequate conceptual place to begin linking the abortion debate to International Relations theory is in relation to norms and norm contestation; looking at a context of meaning-making in a larger normative sense (meanings and frameworks which become norms, norms which become practice and vice-versa). Within this context of the analysis of norms, types of norms, and the generation of normative meaning; my current work is situated conceptually within the current literature, providing an analysis of the *contestation of international human rights norms in relation to abortion,* analyzing also the "framework shift" through which some advocates have aimed for compromise: the idea that abortion is a public health issue rather than a human rights issue. This shift advanced the cause for abortion legalization within several national and supra-national normative arenas, but saw backlash or failure or very limited success in others. The contestation in this particular topic, and in these particular local and global contexts, often has the aim of placing the issue of the legality of abortion as a matter of health rather than human rights, and making this a global organizing principle. The focus on justice and on public health can be conceptually studied as not only a "successful frame" for advocacy as was used in some Latin American cases; but also, in a larger sense, how can contestation lead to compromise and a second-best agreement in policy-making. This is, however, one of only very few proposed organizing principles that can help make sense or "hierarchize" rights in the abortion debate. In the next section, I will briefly introduce the analytical tool of norm contestation as the main conceptual cornerstone of this paper.

International Norms, Types of Norms, and Contestation as an analytical tool.

Wiener defines *contestation* as a "*social practice [that] entails objection to specific issues that matter to people*"[6]. It "*involves the range of social practices which discursively express disapproval of norms*"[7]. It is therefore, a practice of critical engagement. Increasingly, in democratic states with a strong presence

[4] Wildung Harrison, 2011.

[5] Pollack Petchesky, 1980.

[6] Wiener, 2014, p.1

[7] *ibid*, p.1

of civil society, citizens realize their capacity to question and critically engage with the rules and norms governing them, and many advocates show their increasing willingness to be engaged in the process of creating norms, or bring into question the legitimacy of the normative *statu quo*. As our ideas about what the meaning of concepts such as *justice, rights, obligations, ethics* or *morality* is – or ought to be – is subject to constant change over time, the possibility to contest a certain norm is, indeed, a basic constitutive and regulatory element of legitimate governance: it is a process with the power to define and re-create meanings; and rules can properly work only when it is possible to contest them. Contestation "*both indicates and generates legitimacy*"[8]. Political philosopher James Tully refers to contestation of norms through a practice-based approach, where contestation lies at the core of the creation of normativity, especially within diverse contexts[9].

The analytical utility of "contestation" as a concept lies in understanding its distinct meanings as both a social practice of merely objecting to or challenging norms (principles, rules, or values) by rejecting them or refusing to implement them, and also as a manner of critical engagement in a discourse about norms. It is both "*a social activity and a mode of critique*"[10]. As laws and norms are not fixed in time but rather, as expressed by Finnemore and Sikkink[11], display transformations and often a "life cycle", the legitimacy of any law or norm is upheld by a constant process of challenge, and contestation is a part of ongoing conversations about norms, practices, and the ways in which they influence each other. Contestation is also "a gap between general rules and specific situations"[12], the place where abstract ideals are met with reality. A law can be without widely accepted legitimacy in a particular society; or conversely, a widely accepted social practice may be deemed illegal. There is often a difference between the formal validation of a norm, and its social recognition. Norms emerge through practice, and the interaction between a changing or continuing practice and an existing norm is rarely stable in the long term, but rather in an ongoing process of challenge. Whereas advocates or stakeholders often want to seek for "immutable" principles, norms are in fact fluid and subject to change, their legitimacy contested as part of the process of global governance, where change is ever-present. Yet contestation must also be normatively substantial. When it is not, and used only to signal mere "controversy", it loses its analytical "teeth". To counter this tendency, a bifocal approach is needed where contestation is taken to bear both a constitutive and normative role[13].

[8] Wiener 2014, p.6
[9] Tully, 1995.
[10] Wiener 2014, p.2
[11] Finnemore and Sikkink, 1998.
[12] Wiener, 2014, p. 4.
[13] *Ibid,* 2014, p. 17.

Abortion, and *what* its legal status ought to be, has been a contentious and contested topic by excellence, across many societies across the globe. We must also not forget that norms are intimately related to practice: they can be a source of contested practice, or they can regulate already existing practice. A separating line between these two is especially hard to draw in a debate such as that of legal abortion. Also, within this conversation, it is also useful to remember at all times that legality is *not* equal to legitimacy. In his analysis of laws, international laws, politics and states; Koskenniemi reflects on how norms and laws ought to balance between – yet also, distance themselves from – both claims to natural justice (a feeling that such law helps to further human life in an undisturbed manner) and state behavior, so as not to be "mere politics"[14].

Types of Norms and the "legitimacy gap".

Wiener classifies international norms in three types. **Type I** norms concern the most universally accepted global principles. Concepts and ideas such as *"democracy"*, *"rule of law"* or *"sovereignty"* are examples of Type I norms, and are often situated at such an abstract level of the international legal order that they almost risk falling into the category of broad ideals, subject to widely varying interpretations at the local arena. **Type II** norms are located "one level below", where global organizing principles are situated, and it is here that the "legitimacy gap" is found. *Organizing principles* are core assumptions, central reference points, from which other proximate elements can be classified or derive value. A good example of an organizing principle is "common but differentiated responsibility", for instance in environmental protection where larger entities such as transnational corporations or more developed states have a larger responsibility than less developed ones. Such organizing principles provide room for analysis as well as case-by-case contextualization. They can also be referred to as an "intermediary type of norm"; the bridge which connects larger moral claims and principles to the actual, on-the-ground practical enactment of norms. They are developed through the very policy-making, as a result of interaction and norm-generative practice[15]. It is also here that we find the *legitimacy gap*; for such a gap exists between the abstract ideals and the reality of practice. **Type III** norms, at the micro-level of normative organization, generally concern standards, procedures and regulations of a very narrow moral reach, often with the highest level of contestation.

It is the *legitimacy gap* and the *organizing principles*, situated at the "meso" level (that is, at the **Type II** level) of this classification, where the interest of policy makers lie. These intermediary organizing principles situate themselves in a gap in-between, where there is often agreement about the need to uphold a greater public good (for example: "*health and well-being*"), while acknowledging the existence of

[14] Koskenniemi, 2011.

[15] Wiener 2014, p. 36.

room for varying interpretations as well as the ultimate need to compromise on viable solutions and on principles accepted by the involved parties. Global organizing principles are thus the link between the larger and most all-encompassing abstract principles (for example, the “right to life” or “right to choice” in the case of the present work), and the regulations at the micro level (for instance, medical standards of adequate care for pregnant women, or for women who had an abortion). It is between those two levels that the real, on-the-ground policies and agreements will attempt to find plausible, commonly accepted solutions and compromise in order to bridge the legitimacy gap.

It is at this “meso” level that the harder questions lay: What should the boundaries be, of a “right to life” or a “right to choice”? What role should the state play in balancing a woman’s right to personal and private decisions over her own life, and the rights of her children or an unborn child? Should the state merely adopt a non-penalization policy, or should it play an active role in either prohibiting or providing?

1. First Case: The OHCHR and the Draft General Comment 36 on the Right to Life. Human Rights in a global contestation arena.

A detailed history of the concept of “human rights” is outside the scope and length of this paper, yet it is still an important conceptual cornerstone. The most relevant Declarations, Covenants, Pacts, Conventions and other treaties – binding and nonbinding –, of both the United Nations System and the Inter-American Human Rights System, will be understood as the “international human rights law”. The most important such texts are, within the UN system: the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Beijing Declaration and Platform for Action of the Fourth World Conference on Women, the Declaration of the Rights of the Child, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Declaration of the International Conference on Population and Development in 1994 (ICPD Cairo 94) as well as the follow-up text, the Framework of Actions for the Follow-up to the Programme of Action of the International Conference on Population and Development (ICPD beyond 2014), and the American Convention of Human Rights (*Pact of San José*).

In engaging with *“Human Rights”* as a concept, it is mostly two notable and inter-related observations which are relevant and interesting to analyze, in their relation to the abortion debate. The first is the historical path of Human Rights as a continuously broadening concept. The first conceptions about “rights of citizens” or “rights of man” were indeed not only confined to men, as a gender, but also very specific types of men: owners of land or property, men of a certain national and ethnic background, of a certain age, etc. The history of “human rights” has been constantly evolving from the very first

notions of a "*rather narrow set of mostly political liberties*" as defined by Clapham[16], into a much broader and much more nebulous concept applicable to every human being by virtue of their humanity. Human Rights have had a history of expansion and inclusion of not only ever more kinds of people (women, children, the disabled, indigenous peoples, people of African descent, etc., many of those groups represented by their own declaration), but also ever more and varied kinds of rights: the so-called "third generation" human rights include such seemingly modern concepts as the right to a healthy environment, to self-determination within group and collective rights, or to participation in cultural heritage. Yet all of this conceptual expansion, which in a strict sense is taken to signify great human and social progress within civilization, also comes at a risk of complete loss of meaning, clarity or legal "teeth" of the *human rights* concept, if every desirable feature of human life is now everybody's "human right".

The second observation, connected to the previous one, is that as the realm of "human rights" expands to include a constantly increasing amount of groups and of rights themselves, potentially losing the concept's very significance in law, we are all the more likely to encounter cases of "collisions" or "clashes" or rights. With the exception of the internationally accepted absolute ban on torture, no other human right is understood to be "absolute": there is always some degree of bounded-ness, of limitation, and of potential conflict with another right of another individual. Abortion presents, within contemporary human rights debates, one of the most fundamental cases of "collisions of rights".

1.1 The Irreconcilable Viewpoints: abortion within Human Rights debates.

It was during the International Conference on Population and Development, in Cairo, Egypt, 1994 (ICPD Cairo '94), when abortion was first addressed by international institutions as an issue of public health rather than "human rights" or an individual "right to choice", or merely gender equality for women. Abortion was then recognized by states as "*a major public health concern*". Illegality of abortion rarely keeps abortions from happening: in countries where it is illegal; many abortions are still carried out, however the illegality of the procedure means that illegal abortions are often unsafe, with risks to the pregnant woman's health and life. In almost all countries where abortion is banned, complications from unsafe abortion are a leading cause of maternal mortality[17]. Unsafe abortion remains one of the leading causes of maternal mortality and morbidity, and legal prohibitions on abortion often have little to no effect on the number of abortions carried out in a given setting[18] [19]. Using this argument along with other "pro-choice" discursive framings, advocates and organizations have, in recent decades, fought for the legal recognition of a right to access abortion as a medical service. Such framings and discourses, however,

[16] Clapham, 2007.

[17] Blofield, 2006, p.4.

[18] Guttmacher Institute and World Health Organization. "*Abortion in Brief*". 2012.

[19] Johnson *et al* and World Health Organization., 2017.

are opposed by conservative political factions as well as practically all major religious institutions, which often reject the very notion that discussions on abortion should be related to public health at all.

Abortion is also embedded in a global normative environment of major historical shifts in ideas and concepts regarding Human Rights. As was briefly explained earlier, the history of human rights as a philosophical and legal concept has been a history of an ever-enlarging concept of rights, having come a long way since its inception as a narrow set of mostly political liberties for a select kind of individuals. Since then, the path of human rights has been one of progressive inclusion of groups, as well as "newer" rights. The future is likely to bring newer conceptions and "generations" of human rights, in accordance to newly appearing global concerns, or by presenting new solutions to older problems.

Abortion presents a case where not only two distinct subjects' rights are at odds with each other, but also a case where the human rights norms themselves are subject to varying interpretations and where, in this context of the ever-more encompassing concept of "human rights", any talk of "protecting human rights" risks losing any meaning. *Both sides* of the abortion debate claim to be defending internationally recognized human rights: in the pro-life side, the right to life of the unborn; and in the pro-choice side, varying interpretations of the rights to reproductive health, to gender equality, to privacy and bodily autonomy, and to choice over a person's own life, in a more general sense. In some contexts – as has been seen in Latin American cases – the abortion debate has tended to stall when framed only in simplistic "human rights" terms, as both sides claim to be defending rights. Compromises have been rather attained when the "rights" framework is complemented by other notions – and organizing principles – such as public health (in attempting to prevent deaths from unsafe abortions), or the construction of a carefully nuanced discourse where the woman's rights are proven to trump those of the unborn, at least during the earlier stage of a pregnancy.

Re-visiting the notion of "the ever-expanding human rights", this is precisely the argument put forward by some advocates on the "pro-life" side, who argue that the rights of the unborn ought to be included, too, in the ever-widening recognition of human rights for specific individuals. They invoke a notion of "fetal rights" or "fetal protections", arguing that human life is a continuum that begins at the moment of conception and contesting the notion that any "threshold" other than conception can reasonably be established as a beginning of personhood, that is, legally protected human life. However, there is no consensus in international legal documents to fully support this notion, but some experts consider that it also cannot be outright rejected, as several international legal documents do lay out some protections – vague as though they are – to life before birth. There is no international consensus on what should the precise boundaries of "the right to life" be, nor on what position states should adopt in regard to abortion. Especially at the international legal stage; abortion is the prime example of a case where: *"in*

the absence of social recognition, where nothing seems intuitively appropriate, individuals will turn to their individually held normative baggage for reference"[20].

In 2015, the United Nations Office of the High Commissioner for Human Rights began the creation of Draft General Comment No. 36 on the Right to Life, as a General Comment to the International Covenant on Civil and Political Rights (ICCPR)[21]. This General Comment, in its Article 9, encourages States to "adopt measures designed to regulate terminations of pregnancy", with a general view of protecting women's life and health, and to stop the criminalization of certain pregnancies as well as the criminalization of abortion. Written comments and statements by States' delegations, civil society, UN organizations, experts, specialized agencies, national Human Rights Institutions and NGO's were received until October 2017. More than 180 written statements were received, a substantial amount of them contesting – and very often opposing – Article 9, and expressing viewpoints on abortion, both for and against. This is a very straightforward example of contestation at the global level, where advocates who usually work at the domestic level can, and do address a global organization to express a viewpoint and propose change in a legal text. Many advocacy organizations sent comments too, some individually and some within coalitions of organizations[22]. There were also official statements and communications sent by national governments. Roughly, something between one-third and half of *all* the received statements that addressed the issue of abortion, expressed their opposition to its legalization – or at least presented some concerns about rights violations and risks, making the case for the undesirability of abortion as a legally protected practice.

What is interesting is that in these communications, the NGO's, individuals and other "contesters" were constantly alluding to other documents from the international legal and human rights system such as the Universal Declaration of Human Rights, the Declaration on the Rights of the Child, or the Convention on the Elimination of Violence Against Women. This shows that there is a perceived legitimacy to such documents, even when the contester is attempting to discredit a notion of a particular right by a particular rights-holder. Most of the comments and statements were drafted by the legal experts of the concerned organizations, and are generally well written, showing knowledge of international rights documents and systems, invoking them to advance their claims. When opposing legal abortion, most of the comments sent by North American and Latin American institutions quote the Inter-American Convention on Human Rights, or "Pact of San José", and its Article 4 provision to protect life "from the

[20] Wiener 2014, p. 41.

[21] OHCHR Draft General Comment No. 36 on the Right to Life. http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx

[22] OHCHR Draft General Comment No. 36 on the Right to Life. Communications. http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx

moment of conception" as their main legal basis, though they also frequently cite the Declaration on the Rights of the Child, their own national constitutions, or simply an abstract and absolute notion of a sacred and absolute "right to life". Only few of the communications make statements that are religious in nature and *not* substantiated through other legal texts. It is unprecedented that a human rights issue would present such a strong division of interpretations and opinions from legal experts – especially while also quoting and invoking other international legal documents.

In light of these clashes and collisions of principles, I argue that neither a prohibition nor an endorsement of legal abortion could be turned into a "Type I" fundamental or universal norm. "*Right to life*" and "*Freedom of individual choice*" are both taken to be fundamental, Type I principles; yet neither is an unbounded or unlimited principle, nor is there full clarity on which interpretation should prevail when the two collide. Likely, the incompatible viewpoints will stay incompatible, and the efforts to bridge the legitimacy gap will perhaps be subjected to everlasting contestation. It is precisely the contestedness and irreconcilableness of fundamental norms competing in debates over abortion, like the right to life versus women's rights to her own self-determination, which has caused a frequent dead-end in the legalization debate. The clash in viewpoints will occur at the level of the organizing principles; where a compromise must be achieved that is situated between the two extremes of the "total ban on abortion with no recognized legal exceptions", and the "total freedom of abortion on-demand and with no constraints as to gestational period". It is important to point out that the majority of advocates either for or against abortion advocate for something in the middle. Only the rare, fringe minorities on both sides defend either of those two extremes.

2. Second Case: Declarations, Reservations and comments: contestation in relevant international legal documents.

In the international Human Rights Systems, no right is taken to be absolute or unbounded – with the accepted exception of the prohibition to torture – and the international legal documents generally accept that nation states can sign them with reservations, comments and interpretive observations; a process which allows states enough room to interpret articles to fit their specific local context. Even as basic and fundamental right as the right to life is not taken to be "unlimited" and sees contestation with issues at both of its "*ends*": concerning, when abortion can be legally permitted; also the legality of euthanasia or the death penalty for serious crimes.

2.1. The odd legal case: colliding rights and norms. Lack of consensus, reservations.

As women's rights have gained recognition, the specific dimension of sexual and reproductive health and rights (SRHR) has remained controversial. And few aspects remain as controversial as that of abortion. It is a unique case where we find two potentially recognizable rights holders – the pregnant

woman and the unborn – in a situation of fundamental and unique rights collision… and within the physical body of one of them. Stating the obvious, it is by nature a gendered issue, as there is no similar case which involves the body of an adult male – thus it is impossible to draw comparisons within a discussion on gender equality, as it could be done for example when debating men and women's equal right to work or equal political participation. Abortion presents, in that sense, a strikingly unique kind of "rights collision".

At the times when international legal documents have been adopted, most especially those which touch upon issues of women's sexual and reproductive health and rights such as the Beijing Declaration and Platform for Action of the Fourth World Conference on Women of 1995, or the text adopted at the International Conference on Population and Development (ICPD) in Cairo 1994, or the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the United Nations system's record of the negotiation processes for these documents is telling evidence of the contested nature of such issues in the international arena. There are detailed descriptions of the negotiations themselves, recording not only each country's signature and ratification date, but also its observations, remarks, interpretive statements and reservations to the documents. In that sense, international legal documents are made vague on purpose, in order to get the most states to agree to them. States are given much room to interpret as they see fit. Oftentimes, the sections on interpretive statements and reservations are as lengthy as the Declarations themselves, with numerous countries presenting objections to different aspects of sexual rights, gender equality provisions, and reproductive rights in general with a particular focus on abortion.

No consensus on the legal status of abortion exists even within the various international rights institutions, documents and mechanisms. No international document refers to abortion as "a human right"; yet the "right to life" is also not boundless and allows for exceptions such as, for instance, many countries' insistence in maintaining the legality of the death penalty. I signal the absence of precise legal boundaries to the "right to life" *and* also the absence of any such thing as a "legal right to abortion". I will also point out at some of the most telling reservations to international legal documents that bear some relation to the abortion debate, as well as other important comments made by states' delegations, legal experts, or the international organizations themselves, at the times of drafting official documents of the international legal systems.

Universal Declaration of Human Rights (UDHR): The cornerstone and foundational document of the entire international system of Human Rights, it is perhaps the most intentionally vague legal text – which stands to reason, so as to encourage universal signing[23]. Article 3 on the right to life is eleven

[23] United Nations General Assembly. "*Universal Declaration of Human Rights*", 1948.

words long: "*Everyone has the right to life, liberty and security of person*". Article 1 states: "All human beings are born free and equal in dignity and rights". It does not mention the word "conception"; mentions "birth" and "born" only in the context of non-discrimination and equality; and does not attempt to define a precise point where life or rights begin.

International Covenant on Civil and Political Rights (ICCPR), and **International Covenant on Economic, Social and Cultural Rights (ICESCR)**: The ICCPR's article on the right to life is almost as vague as that of the UDHR, mentions "birth" and "born" only in the context of non-discrimination and equality, and also does not attempt to define a precise point where life or rights begin. The ICESCR does not contain an article on right to life, nor does it attempt to define life's beginning. Its only vague references to protections before birth are for the mother: "*Special protection should be accorded to mothers during a reasonable period before and after childbirth*".

Declaration on the Rights of the Child (DRC): The Declaration of the Rights of the Child mentions in its preamble that a child "*by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth*"[24], a vague reference however which does not clarify at what specific point should a legal obligation to protect life begin.

ICPD Cairo 1994: The text of the Cairo Declaration on Population and Development, following the International Conference on Population and Development (ICPD '94) states that: "*In no case should abortion be promoted as a method of family planning. All Governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family-planning services. (…). Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortion should be safe (…)".*

The Records of Proceedings written at the time of the adoption of the Programme of Action of ICPD Cairo 1994 contain the numerous written statements and reservations that various nations presented as the negotiations took place[25]. There is strong overrepresentation of African, Middle Eastern and Latin American countries among those who presented reservations to specific articles and paragraphs to the text. Most of the objections refer to sexual and reproductive health and rights, with an emphasis on abortion; with various countries' delegations reaffirming their official stance that life is to be legally

[24] United Nations General Assembly. "*Declaration of the Rights of the Child*", 1989.

[25] United Nations Population Fund. "*Programme of Action, Adopted at the International Conference on Population and Development, Cairo 1994*".

protected from the moment of conception and that abortion is not recognized as a part of legitimate reproductive choices. A remarkable number of countries object to the word "*individual*" when expressed as part of a statement about reproductive health and fertility, emphasizing the more collective nature of such decisions (meaning, belonging to a traditional married couple), and often stressing that only a married couple of one man and one woman can claim a right to make reproductive decisions (but never after conception has occurred). The Holy See submitted lengthy comments and reservations, rejecting any notion that abortion should ever constitute a legitimate choice, as well as challenging any "individualistic understanding" of sexuality and reproductive rights.

Beijing Declaration and Platform for Action Fourth World Conference on Women, Comments and reservations: For the Beijing Declaration, sixty-four countries – out of a total of 190 attending states – presented observations, reservations, and interpretive statements[26]. Fourteen of them were Latin American countries, the rest being mostly African, Southeast Asian and Middle-Eastern states. Most of such statements express challenges to the notions present in the Declaration and Platform of Action, on which rights and actions are "acceptable" as individual choices of reproductive rights. Five of the fourteen Latin American countries present specific reservations to the articles that mention abortion, challenging the notion that it should be legally permissible, and reaffirming their interpretation that life shall be legally protected from the moment of conception. It is also noteworthy that the Vatican State presented a lengthy written statement, reaffirming the Catholic Church's official stance of rejection not only of abortion in all cases, but also of "*contraception or the use of condoms, either as a family planning measure or in HIV/AIDS prevention programmes (…)*"[27]. One paragraph of their statement is remarkable in its interpretation of human rights: "*My delegation regrets to note in the text an exaggerated individualism, in which key, relevant, provisions of the Universal Declaration of Human Rights are slighted – for example, the obligation to provide "special care and assistance" to motherhood. This selectivity thus marks another step in the colonization of the broad and rich discourse of universal rights by an impoverished, libertarian rights dialect. Surely this international gathering could have done more for women and girls than to leave them alone with their rights!*" Given the marked influence of the Catholic Church and its teachings in Latin American countries, such paragraph in particular and the statement by the Holy See in general are an indication of the Catholic Church's strong influence on reproductive matters and their interpretation thereof.

[26] UN WOMEN, Fourth World Conference on Women. "*Adoption of the Beijing Declaration and Platform of Action*". Informative Document. 1995.

[27] UN WOMEN, Fourth World Conference on Women. "*Adoption of the Beijing Declaration and Platform of Action*". Informative Document. 1995.

Cairo Post-2014, and **Informative Documents of the United Nations' Office of the High Commissioner for Human Rights *(non-binding documents)***: The 2014 "Framework of Actions for the Follow-Up to the Programme of Action, of the International Conference of Population and Development" (known as Cairo Post-2014), does make a more pressing case for the advantages of safe and legal abortion than the document of Cairo 1994, yet it does not openly say that states "should" legalize or liberalize access to abortion. Besides, as a "Framework of Actions", it is not considered a binding legal document. It reaffirms that: *"Since 1994, human rights standards have evolved to strengthen and expand States' obligations regarding abortion. In a series of concluding observations, treaty monitoring bodies have highlighted the relationship between restrictive abortion laws, maternal mortality and unsafe abortion; condemned absolute bans on abortion; and urged States to eliminate punitive measures against women and girls who undergo abortions and providers who deliver abortion services. Further, treaty monitoring bodies have emphasized that, at a minimum,* States should decriminalize abortion *and ensure access to abortion when the pregnancy poses a risk to a woman's health or life, where there is severe foetal abnormality, and where the pregnancy is the result of rape or incest. However, the Human Rights Committee noted that such exceptions might be insufficient to ensure women's human rights, and that* where abortion is legal *it must be accessible, available, acceptable and of good quality (…)"*[28].

The above paragraph shows the linkage made, in international negotiations, between abortion and human rights, while also hinting that the human rights approach may be insufficient to guarantee women's rights, health, and in general, an access to justice in their reproductive lives. But no explicit "push" is made towards a total liberalization of abortion, nor towards any obligation to provide it as a public health service. This is also stated in informative documents of the United Nations' Office of the High Commissioner for Human Rights, showing that even when the issue of abortion is tackled by international Human Rights institutions and by the international legal system of Human Rights, the focus has had to be placed on *health* rather than private individual choice[29], showing that a framework of only individual human rights has not been helpful to the negotiations for more liberal abortion laws.

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW): Lengthy comments and reservations were also presented by signatory countries[30]. CEDAW, however, is less focused on reproductive rights than the Cairo or Beijing Documents, elaborates less on such rights, and does not mention the word "abortion". Only two countries – remarkably, two European ones: Malta and Monaco – specifically object in their reservations to some articles which they interpret as a potential

[28] Shah, Ahman and Ortayli. *ICPD Beyond 2014 Expert Meeting*, 2014.

[29] United Nations Office of the High Commissioner for Human Rights, "*Abortion. Information Series on Sexual and Reproductive Health and Rights*".

[30] UN WOMEN. "*Declarations, Reservations and Objections to CEDAW*". 1979.

imposition to legalize abortion. Most of the reservations to CEDAW are rather objections to laws that directly or indirectly discriminate against women, and most of such objections came from countries with predominantly Muslim populations. Still, the existence of so long and numerous reservations and interpretive statements show the contested nature of issues related to women's equality in legal practice.

States' Universal Periodic Reviews (UPRs) at the OHCHR: In some Universal Periodic Review (UPR) cycles, comments are presented by the delegations of states parties, which often make recommendations to grant legal access to abortion. States, however, have the choice to accept or reject any recommendation, and of course there is no mechanism of enforcement of any such recommendations.

OHCHR and the Committee on the Rights of Persons with Disabilities: On some occasions, other bodies of the international legal rights system have argued against abortion in specific contexts or circumstances. At the UPR of Austria in 2013, the Committee on the Rights of Persons with Disabilities criticized Austria's policy of allowing abortion at any stage of pregnancy, if it was discovered that the fetus had a disability[31]. This was regarded by the Committee as potentially discriminatory against persons with disabilities, as well as potentially unethical especially in cases where an abortion could be carried out at very late stages of pregnancy.

Inter-American Convention on Human Rights (Pact of San José): The legal existence of a specific right to life before birth is a contested concept in national legal systems, also in international ones. In the Inter-American Human Rights system, the Pact of San José *does* mention such specific right– the Universal Declaration does not; nor does any other UN Rights Treaty. The Pact states in its Article 4, Right to Life: "*Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception*". In the UN Treaties, protection of life before birth appears only as assumed to be encompassed within the special care that must be given to motherhood and childhood in general, and in vague terms. The American Convention on Human Rights, or *Pact of San José*; is unique in its more clear provision to protect life "*in general, from the moment of conception*". Debates that quote this specific article of the Pact tend to focus – and ponder extensively – on the exact meaning of the words "in general", arguing whether it means that some cases can be considered valid exceptions, and why[32].

This recognition of a right to life before birth, "from the moment of conception", in the American Convention is remarkable, and sometimes deemed as "fetal rights". It highlights the controversial nature

[31] United Nations Office of the High Commissioner for Human Rights. "*Austria, Universal Periodic Review*", CRPD/C/AUT/CO/1, paragraphs. 14-15, 2013.

[32] Paul Díaz, 2012.

of abortion in the Americas, especially in most Latin American countries. Rather than such countries' opposition to abortion stemming from a document such as the Pact of San José, it is most likely the opposite: that such a provision was made reflects strong local anti-abortion advocacy, and the contested legal meaning of "life" with regards to its legally protected beginning, a consequence rather than a cause. It also showcases that opposition to abortion, worldwide and in the Americas, does not only stem from ideological positions based on religious principles, appeals to moral tradition or blind conservatism – though such positions certainly do exist –; but rather, they are often carefully constructed on what are perceived to be solid international legal foundations, norms and principles. Mexico, at the time of ratification of the Pact of San José, delivered two interpretive declarations and one reservation. The first declaration reads as follows: "*With respect to Article 4, paragraph 1, the Government of Mexico considers that the expression "in general" does not constitute an obligation to adopt, or keep in force, legislation to protect life "from the moment of conception," since this matter falls within the domain reserved to the States*"[33].

Inter-American Court of Human Rights (IACHR): ambiguity, no consensus: Cases have been presented to the IACHR where individuals attempt to sue their respective governments for failing to respect a particular woman's right to abortion. However, such cases do not focus on abortion as "a right" of "all women". The cases that make it to the IACHR (and that are taken by the institution and followed up on) tend to be extreme cases, for example concerning very high-risk pregnancies where the woman is being denied an abortion that is necessary to her life or health, or pregnancies resulting from rape of very young girls. Such cases are not representative of claims to a more "general" liberalization of abortion, and the Court's jurisprudence rather highlights the absence of an international consensus on abortion rights.

Other Rights Systems: The **European Court of Human Rights** declined to adopt a general position on abortion, as there is no regional consensus. Remarkably, though, the **Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**, is the first international human rights legal document, of a binding nature, to recognize cases where abortion is "a right", mentioning that states shall take appropriate measures to "*protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus*".

The fact remains that there is no international consensus on what exactly the status of abortion *"should"* be. Despite occasional alarmist views by some conservative pro-life sectors that the United

[33] Inter-American Court of Human Rights. "*American Convention on Human Rights. Pact of San Jose, Costa Rica. Informative Document*", 1969.

Nations pushes "an abortionist agenda", in reality the U.N. legal system is far from recommending universal legalization of abortion. The U.N. Human Rights and Health systems – specifically through its specialized agency, the United Nations Population Fund (UNFPA) – do *not* advocate for abortion to be legal everywhere, and especially not for abortion to be used as a common contraceptive measure. They rather call on countries to consider the relationship between illegal abortion and maternal mortality, in contexts where abortions are in high demand and unsafely performed. Abortions should be as safe and rare as countries can possibly make them – but mainly prevented through education and contraceptives[34].

3. Third Case: Abortion, Advocates and Discourses: Brief Examples from the Americas and other States.

In an analysis of abortion and human rights, Zuniga admits both the legal difficulties of attributing personhood – and thus meaningful human – to an unborn foetus, while also acknowledging the judicial interest of protecting its individually independent life[35]. The opposing sides of this debate are opposed, in a very general sense, because they each focus on one of the two potential rights holders: the so-called "pro-life" side places its discursive focus on a defence of "the rights of the unborn" in full equality to the woman's rights, while the so-called "pro-choice" side is concerned with the woman's rights as trumping any potential rights of the unborn person. Most advocates, however, do *not* put forward extreme positions with no exceptions where the rights of one should always and invariably trump those of the other: most aim for something in between; recognizing exceptions, limits, peculiarities, the need to act differently in "extreme cases", and at least *some* degree of case-by-case consideration. Their positions are often more nuanced than they appear at first sight.

I highlighted the lack of an international consensus on either the specific boundaries of the "right to life" as well as the absence of a "right to abortion". It is often the case that advocates make of the UN's documents, statements and provisions what they want in order to advance a specific agenda. This is of interest also because the advocacy carried out by particular stakeholders with particular discursive frameworks, and the political "pulls and pushes" of specific places and periods play a large role in shaping the proposed abortion policies and the attempts to find global organizing principles.

3.1 The fickle legal history: constant changes in the legal status of abortion.

Abortion is also a highly complex legal issue. One can never simply state that abortion in a certain country is "legal" or "illegal": most national laws are situated somewhere in the middle of a spectrum

[34] UNFPA Frequently Asked Questions: "*Does UNFPA Promote Abortion?". Consulted September 2017.*

[35] Zuniga, 2011.

ranging from completely banned in all circumstances with no exceptions, to completely legal on request and with no gestational limits. Very few states are located in either extreme: most countries in the world allow for at least *some* cases where abortion is considered legal; the most common such cases being rape, fatal abnormalities in the unborn, or risks to the mother's life if the pregnancy is continued. And wherever abortion is legal, there is almost always a *gestational limit*: a certain number of weeks of pregnancy where it is considered legitimate to practice an abortion. The history of its legality throughout various times and places is much less straightforward than some advocates would want to simplify it into. In many historical contexts, the issue has fallen into normative "grey areas", legal loopholes, or a status of vagueness and lack of legal precision.

Latin American countries display a notably wide range of "legality statuses", with some banning it with no exceptions (such as El Salvador, Nicaragua, or Chile until very recent years)[36], while others allow only for specific exceptions (most countries accept at least exceptions in the cases of rape, risk to the mother's life if the pregnancy is continued, or fatal abnormalities in the unborn), and a few have adopted liberalized access (Uruguay, Cuba, Mexico only in the case of the capital, Mexico City). Most countries fall somewhere in the middle ground of legally banning abortion, but with the aforementioned exceptions[37]. This is the most frequent compromise; where most often the opponents of legal abortion tend to agree that, if anything, it may be permitted on those specific cases.

Legal statuses often change, too. This issue stands in contrast to other aspects of women's rights where there has been steady historical progress, and generally with no later "rolling back". No contemporary nation-state that has granted women the right to vote has later suppressed it, at least not in a lasting or permanent manner (and outside rare cases of countries experiencing extraordinary circumstances). Nor has there been, in general terms, an ongoing re-contestation of whether women should be legally allowed to seek a divorce, work with equal pay, attend higher education, etc. There is of course an ongoing process of "polishing" the details around equality, and much remains to be done in many areas, but there is usually no constant "going back and forth" in terms of general progress in gender equality. Abortion, on the other hand, is a frequent object of what could be called "legislative oscillation". In the Americas especially, but also in some European contexts, reforms or proposals of reforms which "roll back", restrict and re-criminalize abortion are relatively frequent. Chile and El Salvador had more permissive abortion laws until the late eighties, when the respective governments eliminated exceptions and enforced a full legal ban on abortion. Chile only lifted again the full ban in 2017, allowing

[36] Unless it is specifically stated otherwise, throughout this paper whenever I quote the legal status of abortion in one particular country, I use the information provided by the Center for Reproductive Rights' "*Map of the World's Abortion Laws*" (most current version, 2018. See reference in "Bibliography" section).

[37] Center for Reproductive Rights. "*The World's Abortion Laws*", 2014.

for the exceptions of rape, risk to the woman's life and fetal impairment. Nicaragua, too, reinstated a full abortion ban in 2006, with no exceptions. Within Mexico, access to abortion was liberalized in Mexico City in 2007, which prompted backlash in other states, several of which ended up passing more restrictive abortion laws. And recently, in European countries such as Spain and Poland, legislators have attempted to enforce some restrictions to the existing laws, even proposing the reimplementation of a full ban (in Poland, 2016). Quite notable is also the case of Germany, where the recently ascending right-wing party "*Alternative für Deutschland*" proposed to reinstate a ban on abortion, constructing a narrative that points to "protection of the family" within nationalistic discourses. This year, Argentina was the most recent arena of debate about a potential liberalization of access to abortion, which was ultimately rejected at the Senate. And indeed, Argentinian legislators advocating against legalization made mentions of the Pact of San José and its protection of life *"from the moment of conception"*, too[38]. So did Mexican legislators in 2016, when debates were held for the creation of the new local Constitution of Mexico City[39].

In the USA it is frequent that Republican governments attempt to pass restrictions on abortion; also notable is the US's "Global Gag Rule" or "Mexico City Policy", a restriction on the provision of abortion services – or even information on abortion– by recipient institutions of US financial aid. The Global Gag Rule, almost as if it were a matter of routine, is reinstated whenever a Republican government is in Office, and withdrawn when a Democrat governs in the White House. In an exceptional way, abortion is a political flashpoint in the United States and other American countries, where it has become almost a political tradition that right-leaning governments attempt to restrict access while left-leaning governments aim to liberalize it, a constant pendulum oscillating back and forth and around the ever-present legitimacy gap: the disjoint between moral discourse and achievable policy. Thus, throughout the globe, any agreement on legal abortion has a "temporary" feel to it, subject to potential change at the next blow of opposing political winds.

This contentious issue is often used as a political mobilization point by advocacy groups and religious organizations (the Catholic Church being the most relevant one), often in order to advance political agendas. Such political contentiousness in the abortion issue is not an exclusively American or Latin American phenomenon; however, these regions are still unconventional in how frequently the issue is part of public conversation, the intensity with which it is debated, and the degree of political polarization that it entails. Advocates for and against abortion in Latin America have resorted to a wide array of arguments, through different conceptual frameworks, in order to influence public and political debates,

[38] Senate of the Argentinian Nation. Debate on the legalization of abortion, 2018.

[39] Asamblea Constituyente de la Ciudad de México, 2016.

attempting to change or maintain the legal status of abortion in a given region or country. They often claim to speak on behalf of larger constituencies, groups or populations. Abortion has been framed as an issue of religious morality, women's human rights, children and the unborn's human rights, as well as public health and maternal mortality; touching as well upon dimensions of class, sexual and reproductive mores, family planning practices and of course, gender roles. Institutions ranging from religious, to political parties, to governmental and non-governmental organizations, as well as prominent individuals from many walks of life; carry out strong advocacy either for or against its legalization, often with clear objectives of policy change and legislation. The influential Catholic Church has not shied away from trying to influence debates, consciences and votes; using abortion as a major cornerstone of debates on family and social life.

In public protests and debates, one finds a strong tendency towards moral reductionism, where both sides summarize their ideas in simplistic and context-devoid manners, using emotionally charged terms: "*Killing babies is wrong, period*", "*We will never allow this in Chile / Brazil / El Salvador, here we protect children and the family*". Both sides appropriate morality. The pro-legalization side, in its push for more liberal abortion laws, has not been exempt from moral reductionism and "sloganism", also attempting to capture what is a complex and context-sensitive issue into short catchphrases: "*My body, my rights*", "*I give birth, so I decide*", or "*Stop the rosaries in my ovaries!*"[40]. Contestation, especially in the context of political polarization such as this in Latin America, often also involves de-legitimizing discourses about current laws: "this doesn't represent me / us, as an individual / a community / a religious group / a people", or "this law was imposed by spurious authorities / by foreign powers / through a flawed procedure", etc.

Every such change tends to be highly contested, and the debates tend to stall when addressed through frameworks of morality, human rights in a general sense, or even gender equality. In what could be considered recent "successful" cases of legalization (Mexico City in 2007, Chile in 2017, when abortion was legalized only in the case of the particular exceptions), advocates relied on a framework of public health in order to advance their cause. Blofield had analyzed the Chilean case in 2006, mentioning the necessity of framing abortion as a public health or women's rights issue, for policy reform, and indeed women's health was the strongest argument in advocating for the reform which finally passed in 2017[41]. In the Mexican case, only when the debate was rather framed as an issue of *public health* – specifically, the prevention of maternal mortality for the women who did not have access to expensive, private and safer illegal abortions –, was the agenda of legalization successfully advanced in Mexico City. However,

[40] Seen in various images of public protests in Guanajuato and other Mexican cities.

[41] Blofield, 2006, p.10.

rapid progress in the capital came at a cost country-wide: many other Mexican states toughened their local anti-abortion laws after 2007. In this case, the opposing advocates (pro-life activists) developed their own strategies, also through meaning-making and contestation of concepts and principles.

Lamas points at a relatively new development in the contestation scene. In various states, women who "*feel negatively affected by the (anti-abortion) reforms have resorted to national and international judicial instruments (…); and 860 female citizens from seven Mexican states (…) have sued their state before the Inter-American Commission of Human Rights (IACHR) in Washington, for having affected their Human Rights*"[42]. She mentions that these women based their claims on the American Convention on Human Rights (the very same document containing the Article so often used by the pro-life advocates), which guarantees "*freedom to choose one's life project, life in dignity and personal integrity, the right to private life, freedom of thought and conscience and equal protection before the law with no discrimination*". Lamas sees such developments as encouraging – despite the fact that most complaints did not prosper before the Commission –, as they are indicative of new precedents and paradigms where consideration is given to international legal instruments. Unfortunately, it may well be the case that the Inter-American legal system is in fact less likely than the UN's legal system to provide clarity in matters related to abortion because of the Pact of San José being precisely the one international rights treaty that mentions "conception" as the beginning of legally protected human life. The endless contestation likely to emerge between the Article that protects life "*in general, from the moment of conception*" and those which protect other public goods such as privacy, freedom of choice for one's life, or non-discrimination, are likely to remain right where they are now: firmly entrenched in legal stalemate.

Subject to contestation are many different concepts: even such basic and foundational ones such as *life, health, reproductive health*, or what constitutes an acceptable and unacceptable *family planning practice*. Some advocates tackle also what they perceive as larger issues that influence women's decisions to have legal or illegal abortions*:* also subject to contestation in this debate are, for example, the "*patriarchal systems of oppression*", which in the eyes of pro-legalization advocates, creates such gendered inequalities that many poor and disempowered women risk their lives in unsafe abortions because they have lacked options. On the other hand, for the conservative "pro-life" side, the "global liberal order" is worthy of contestation and rejection: in their understanding, this "*global liberal order*" overprivileges values of individualism and hedonism, and underprivileges "family values" or a certain "collective sense" where women and men play traditional gender roles that are strongly related to tradition[43]. Numerous advocates on the "pro-life" side contest the consideration of abortion as a health

[42] Lamas 2014, p. 93-116.

[43] National Pro-Life Committee, Mexico. "*Perspectiva de Género: Sus Peligros y Alcances*". 2003.

related issue[44], seeing it only as a moral issue – one where allowing for exceptions to the abortion ban will lead to a slippery slope of complete liberalization and to the use of abortion as a common contraceptive[45]. They also attempt to appropriate for themselves the claims to protection of women's health. In their Webpages and communications, many pro-life advocacy groups claim – often citing no sources – that legalizing abortion damages women's health by increasing their risk of numerous diseases (including cancer)[46], failing completely to prevent maternal deaths[47], or leading to mental illness, (all of which is disproven by medical associations and the World Health Organization). Their framing of individual women is complex, as the individual responsibility and agency of their action tends to be framed in a morally isolated way, in almost total abstraction from societal structures; yet at the same time portraying their individual agency as either morally questionable ("*Women should not be able to make that decision*"), divided among two beings and not only one ("*It is not only 'your' body!*"), or questionable in terms of the woman's capacity to make such a choice ("*All women who abort will regret it later*", "*It is their partners who pressure them into it*"). "Pro-life" advocates tend to rarely mention institutions; "pro-choice" advocates tend to delve deeper into structural issues than the former. Some of the most extreme pro-life voices attempt to paint the U.N. legal system in quite negative lights, as defenders of things like "*the legalized murder of children*", "*the big international death lobby*" or "*big abortion business*" – to which they stand in moral opposition. Their discourse gives the impression that a consensus on legal abortion *does* exist at the UN, they thus have an easy time framing international agencies as the *big*, *powerful*, *profit-oriented* and especially, *foreign* lobby of "death", against which they stand in an almost revolutionary manner. With such a narrative, it is easy for them to engage many in their local communities in a rejection of those perceived "foreign interests", and fairly easy to contest the legitimacy of any abortion-related norm as coming "from abroad". But advocates from a pro-choice side, too, often believe that there is a consensus on abortion which indeed has decided that nation states have some obligation to fully liberalize access to abortion; or that *all feminist groups* / *only feminist groups* support legal abortion.

All this shows the fluidity of concepts related to human rights, as well as their construction through struggle and through meaning negotiation and meaning-making. In various human rights debates – and especially those related to gender roles and roles within the traditional family – oftentimes rights can be framed as obligations, obligations can be framed as rights, oppression can be framed as a privilege, and a privilege as oppression. As such, many advocates that oppose abortion and declare that it should

[44] Balbontín, 2016. "*Minister of Health Provides Key: Abortion is Not a Public Health Issue*".

[45] Balbontín. 2015. "*The Government Does Not Solve Any Social Problem by Legalizing Abortion*".

[46] DeSíde Organization. "*Abortion Doubles Risk of Breast Cancer*".

[47] National Pro-Life Committee, Mexico. "*Legalizing Abortion Does Not Reduce Maternal Mortality*", 2005.

remain illegal, claim to not be affecting women but rather protecting them from a decision that is "evil", "unhealthy", "emotionally scarring", "potentially fatal" and "always regrettable".

Concluding Considerations. An assessment of potential organizing principles.

The analysis points at several interesting observations. To further add to its complexity, abortion is a highly multi-faceted issue which also touches upon many other issues, if at least tangentially (sexual violence, disability rights, conscientious objection…). Though it is impossible to predict what may happen in future decades without getting into merely speculative claims, it is likely that future scientific and technological advancements could change the landscape of this debate. Scientific and medical discoveries have the potential to add new insights into a debate that ponders about human development pre-birth; in similar ways as to how other debates pertaining to the realm of global health may change after the development of new medical treatments or technologies. Many pro-choice advocates, for instance, use fetal viability outside the womb as the threshold to indicate when an abortion should no longer be lawful, and modern developments in medical technology have been able to lower the viability threshold. Pairing this observation with the earlier assessment that Human Rights have had a history of progressive inclusion of diverse groups once considered not to have such rights, it is not clear that the "progressive" path will always invariably be towards liberalized – or more unrestrained – access to abortion. We shouldn't assume that such is an established, teleological path of human rights laws and principles having to do with abortion. Progressiveness in laws and in local politics is generally associated to liberalization of abortion rights, but it is not clear whether medical or technological advancements might change the debate in the future, or whether "unborn rights" might one day gain strength as an established legal concept and a category of internationally protected human rights. It is an unsafe bet to speculate that state-nations will all eventually follow a path leaning towards legalization. Time will tell if this has more to do with current conservative tendencies and backlashes throughout the Western and Northern "worlds", or whether in the future the inclusion of "unborn rights" could be witnessed as part of the ever-widening definition of internationally recognized rights. Ever-enlarging definitions of human rights, aiming to include "everything and everyone", could however water down any jurisdictional potential of the concept. These reflections should serve as a reminder that contestation is a process which precisely allows for the shaping and re-shaping of legitimate governing norms, allowing for the inclusion of new developments.

The search for an organizing principle that allows us to "hierarchize" the rights of the woman and the unborn has not yet yielded a principle that "ends" the debate in a way that is satisfactory to most peoples. The attempt at reaching an agreement that access to abortion is an issue of public health – arguing that legal access to safe abortion improves women's health and lives – rather than one of morality or even

human rights, tends to become a more successful framework in advocates' attempts to liberalize access to abortion – it is thus one possible organizing principle, but one that still leaves many unconvinced and which does not really address the question of where exactly a legal right to life should begin. It is, for now, a fragile compromise – one that has only been successfully considered in *some* contexts. The results achieved by such "successful framework" could be subject to change, reform and "roll-back", as access to legal abortion remains a contentious issue by excellence, and policy on the ground often seems to be more responsive to the national and global political sways of the moment, than to actual expertise by lawyers, doctors and specialists. As of now, no framework shift is definitive in terms of getting to a consensus, and no "winning narrative" is sure to stay "winning" for very long. The irreconcilable normative viewpoints – even leaving aside religious norms or traditional gender mores – are likely to stay irreconcilable. Abortion's legitimacy is in constant and ongoing contestation, a never filled legitimacy gap. It is the only case where the rights of two differently recognized individuals clash in such a unique way, since the body of one of those individuals is entirely within and dependent on the other individual's body.

Based on current medical knowledge of aspects such as foetal viability, foetal consciousness or lack thereof, the non-existence of pain before a certain gestational age, etc., some experts attempt to shed clarity on the debate by proposing parameters of a certain "prioritization of rights", where the woman is considered to have full rights whereas as a foetus has "suspensive", "future" or "potential" rights. Another potential organizing principle could be the consideration that the unborn person has only "suspensive rights" or "potential rights", so long as it is still inviable outside the woman's body as well as incapable of feeling pain. "Potential rights", however, remains an unconvincing notion to pro-life advocates. "Future rights" could become a dangerously discriminatory notion if it were applied in *any* other context or to *any* other individual than an unborn person. "Suspensive rights" is a concept that still has potential for further development and analysis. The notion of "suspensive rights" might be an adequate organizing principle in this contested topic, where such "temporal" notion of Human Rights might act as a principle of precedence, whereby the woman's rights – to health, to privacy, or life choices – take precedence over the unborn's rights. However, current literature mentions "suspensive rights" only scarcely and in the context of contractual law, asylum application, civil disobedience; and other areas far removed from issues of public health or gender equality. The right to life itself being "suspensive" is not a common notion anywhere in the current rights literature, and by its very nature it could not be considered suspensive in any other case.

At a more "meta" level of the debate, one cannot ignore important power components, at the family level as well as the state-wide scale and also the international scale, concerning *who* is really "an agent" that has the capacity to define, contest, decide, have options and raise a voice that will be heard.

Contestation itself is a matter of access. It cannot be assumed that the affected entities always have access to it – vulnerable groups are often *invisibilized*. It is worth noticing that the two actually affected individuals – woman and unborn – tend not to have a voice: not at all, in the case of the unborn; but overwhelmingly none, in the case of women, and especially if we are looking at the debate from the pro-legalization side. At least in the Latin American context, there are still strong elements of taboo around the subject of abortion, particularly being in favor of its legalization. And it is extremely rare for a woman to admit publicly that she has had, or even desired, an abortion; and such women (who maybe lacked access and want to advocate for expanded access) overwhelmingly tend *not* to become advocates themselves. Curiously enough, everybody else speaks for the actual stakeholders, as the agent – woman – is often not fully an agent, or not properly represented but it is rather the others who speak on her behalf: a clash of rights of two differently recognized individuals, but both without a voice that is publicly heard. At most, it's some of the doctors who provide abortion services who – from their position of expertise – often have a higher degree of agency than the woman herself: many are involved in advocacy either for or against legalizing abortion. The two affected entities – the unborn as well as the woman who needs or desires access to abortion – face an almost absolute impossibility of self-representation and agency: impossible in the case of the unborn; highly difficult and discouraged for the affected woman due to abortion being a "taboo" topic, to social stigma and pressure, to socioeconomic disadvantage, and to concerns about privacy.

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