

ABORTION AND RIGHT TO FAMILY PLANNING UNDER INTERNATIONAL LAW: A CRITICAL APPRAISAL *

Abstract

Abortion is a procedure to end a pregnancy. It can be achieved by two different ways, that is, either by medical abortion or procedural abortion. Medical abortion entails the termination of pregnancy by the use of medicines, while procedural abortion means the termination of pregnancy through a procedure that is sometimes called surgical abortion. Abortion stands as a contentious matter that starkly divides leaders and policymakers, igniting intense political, religious, legal and philosophical debates. Despite its historical prevalence, numerous states opt to ban or criminalize abortion. One of the most controversial debates on this issue is whether or not women are entitled to abortion rights under human rights law because, lately, supporters of abortion have been pushing for the recognition of an international legal foundation for the right to abortion, urging countries to modify their laws to uphold this right. They have presented this argument in international treaty compliance committees, national constitutional courts, and legislatures, experiencing a mix of achievements and challenges in their efforts. This article sought to critically examine whether or not a right to abortion is guaranteed in public international law. As a result, many nations have altered their national legislation in order to make abortion legal so as to align with the notion that abortion is guaranteed in public international law. To address this inquiry, this article adopted doctrinal research methodology by scrutinizing the position of abortion based on the provisions of international legal instruments. The findings stem from a comprehensive analysis of the preparatory materials (travaux préparatoires), preambles, annexes, and reservations associated with international treaties, alongside documentation from international and regional treaty bodies. The study's conclusion asserts the absence of an explicitly defined human right to abortion, nor is the right to family planning as, guaranteed in public international law, expansive enough to incorporate the right to abortion. It is suggested among other things that the United Nations treaty bodies should exercise precaution in advancing right to abortion as part of right to family planning.

Keywords: Abortion, Family Planning, International Law

1. Introduction

Public discourse is a reflection of public opinion, while discourse itself is a collection of ideas on any given subject that are circulated by politicians, think tanks, academia and the mass media. Nevertheless, on occasions, conflicting discourses may concurrently exist, representing the most contentious topics of the day, each discourse being supported by widely circulated and accepted justifications. In the modern global context, abortion stands as an arena where contrasting viewpoints collide. On one hand, it pertains to a woman's autonomy and privacy in controlling her body, while on the other, it grapples with the profound ethical question of the life or death of an innocent being.¹ Clearly, both of these narratives are strongly supported, evident in the nature of public sentiment regarding abortion. Abortion has been a very contentious issue, and as a reproductive health concern, it has created a deep dichotomy among policy makers more than any other reproductive health issue. One of the major arguments has been that access to abortion is an aspect of human rights, and as a result, there has been a call for countries to liberalize their abortion laws. According to Tozzi, 'in recent years, abortion advocates have sought to advance the idea that a right to abortion, based in international human rights law, exists, and that sovereign nations should therefore amend their laws to permit the exercise of this right'.²

Reproductive right was proclaimed a human right in 1962 at the UN Conference on Human Rights in Teheran and as a consequence, that parents have the right to decide freely and responsibly the number and spacing of their children.³ Reproductive health was also declared a human right in 1994 at the International Conference on Population and Development (ICPD) in Cairo.⁴ In the Cairo Conference, a Programme of Action was developed that also recognized reproductive rights in which it was stated that prevention of unplanned pregnancy is very much encouraged but whenever abortion is legal, it must be safe. It is true that human rights are established by public international law, but treaties can only be binding on the states which have ratified them apart from peremptory norms of general international law also known as jus cogens,⁵ and customary international law.⁶ Even at the point of ratifying a treaty, states are allowed to make reservations concerning certain provisions of the treaty. For example, article 16.1 (e) of CEDAW made provision for the reproductive right to family planning but during ratification Malta and Monaco made reservations that article 16.1 should not be interpreted as imposing an obligation on them to legalise abortion.⁷

This article amongst other things, will examine whether there is a right to abortion specifically provided in any of the international or regional treaties.

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¹ C H Foster, 'The Welfare Queen: Race, Gender, Class and Public Opinion' [2008]15 (34) *Race Gender & Class*. 162.

² P A Tozzi, 'International Law and the Right to Abortion' [2010] *Catholic Family and Human Rights Institute New York*, 1.

³ A/CONF. 32/41, Final act of the International Conference on Human Rights, Proclamation 16, Teheran, 4.

⁴ A/CONF.171/13. Programme of Action adopted at the Conference on ICPD, Cairo 1994, Chapter VII, para. 16.

⁵ Vienna Convention on the Law of Treaties (VCLT) adopted by UN General Assembly in 1969, article 53.

⁶ United Nations, Statute of the International Court of Justice, adopted in 1946, article 38(b).

⁷ CEDAW/SP/2006/2, 20-21 CEDAW/SP2006/2. Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination against Women <<https://www.un.org>> accessed on the 8th October 2023.

2. Conceptual Clarifications

Abortion

Abortion has various definitions as there is always controversy defining what it means. The definitions of abortion not only reflect scientific knowledge but also reveals social and political opinions.⁸ According to Medlineplus, ‘an abortion is a procedure to end a pregnancy’. It can be achieved by two different ways, that is, either by medical abortion or procedural abortion. Medical abortion means the termination of pregnancy by the use of medicines, while by procedural abortions is meant the termination of pregnancy through a procedure that is sometimes called surgical abortion.⁹ Abortion, according to British Pregnancy Advisory Service (BPAS) is when a pregnancy is ended so that it doesn’t result in the birth of a child. Sometimes it is called termination of pregnancy.¹⁰ The World Health Organization (WHO) defines abortion as ‘pregnancy termination prior to 20 weeks ‘gestation’.¹¹ The Term ‘abortion’ is generally used to refer to the termination of pregnancy, whether it occurs with medical intervention such as medications or surgical procedures or whether it occurs on its own, such as miscarriage.¹² Abortion is also defined as removal of a foetus or embryo from the uterus before the stage of viability.¹³ One type of abortion is induced abortion which is defined as the termination of pregnancy using drugs or surgical intervention after implantation and before the embryo or foetus has become independently viable.¹⁴ One of the most common of gynecological procedures is induced abortion and evidence of induced abortion has been found in every known culture, according to Anthropologists. Throughout centuries, there has always been a controversy surrounding induced abortion regarding laws and regulations permitting or restricting abortion due to a variety of religious, social and political forces, and depending on the abortion laws of a country, induced abortion may be legal or severely restricted. The other type of abortion is spontaneous abortion which means the loss of pregnancy naturally before twenty weeks of gestation’.¹⁵ In order to avoid being association with induced abortion, spontaneous abortion is also referred to as a ‘miscarriage’.¹⁶ Spontaneous abortion can be caused by rapid conception after delivery, and infections such as HIV, syphilis and malaria are also common risk factors as well as exposure to environmental contaminants.¹⁷

Family Planning

Family planning empowers individuals to make informed choices about the timing and possibility of having children by providing access to the necessary information, resources, and techniques. This includes various contraceptive options like pills, implants and condoms.¹⁸ ‘In the last two decades, the percentage of women accessing contraceptives in both developed and developing countries has increased’.¹⁹

Right to Family Planning

The right to family planning is a fundamental human right recognized under international law. It is the right allowing everyone to decide freely and responsibly the number and spacing of their children.²⁰

International Law

This pertains to the legal framework that oversees the interactions between countries. It encompasses the contemporary regulations governing international relations, extending beyond nations to include international organisations and individuals as participants.²¹ According to Jessup, international law or the law of nations should be defined as the legal system that applies to states in their inherent interactions and to individuals in their interactions with the state.²²

3. International Legal Instruments on Right to Life and Right to Family Planning

Universal Declaration of Human Rights (UDHR) 1948

The Universal Declaration of Human Rights²³ serves as the precursor and inspiration for the ICCPR in the effort to establish a universal human rights bill. Additionally, it holds its esteemed position independently, having inspired numerous laws and constitutional provisions globally. According to United Nations Human Rights Committee Office of the United Nations High Commissioner for Human Rights, several states have even formally committed themselves to the UDHR through legal obligations.²⁴ United Nations Human rights Office UDHR article 3 proclaims ‘everyone has the right to life’²⁵ Article 1 affirms that ‘every person is born free and possesses equal dignity and rights’²⁶. This unequivocal use of ‘everyone’ acknowledges an unqualified entitlement for all individuals to these rights.²⁷ Several countries proposed an amendment to remove the term ‘born’

⁸ What Is Abortion According to WHO? <<https://www.emedicine health.com>> accessed 15th august 2023.

⁹ Abortion-Also called Induced Abortion <<https://www.medlinePlus.gov>> accessed on the 15th August 2023.

¹⁰ British pregnancy Advisory Service British Pregnancy Advisory Service. What is Abortion? <<https://www.bpas.org>> accessed on the 15th August 2023.

¹¹ What Is Abortion According to WHO? *op cit.* (note 8)

¹² *Ibid.*

¹³ Abortion, *BMJ* 2014;348:f7553 <<https://www.bmj.com>> accessed on 9th July 2022.

¹⁴ A Faundes, and L Miranda, ‘Unsafe Abortion’ [2017] *International Encyclopedia of Public Health* (2nd edn).

¹⁵ C Alves, and S M Jenkins, and A Rapp, ‘Early Pregnancy Loss (Spontaneous Abortion)’ [2023] *National Library of Medicine*.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Family Planning-UNFPA ESARO <<https://esaro.unfpa.org>> accessed on 29th November 2023.

¹⁹ Contraception and Family Planning. Information Series on Sexual and Reproductive Health and Rights (2020), 1 <<https://www.ohchr.org>> accessed on 2nd December 2023.

²⁰ Convention on the Elimination of All Forms of discrimination Against Women (CEDAW) article 16 (1) (e).

²¹ B A Garner, Black’s Law Dictionary, (US; Thompson West Publishing Co, 2004), 835.

²² P C Jessup, *A Modern Law of Nations* 17 (1949).

²³ UDHR, adopted in 1948.

²⁴ OHCHR, 2017.

²⁵ Universal Declaration of Human Rights, G.A. Res 217 (iii) A, U.N. Doc. A/RES/217 (III).

²⁶ *Ibid.*

²⁷ OCHCR, 2017 *op cit.*

from article 1 due to concerns that it might negate the rights of the unborn. Nevertheless, ‘born’ remained in the text since there was a consensus among the delegates that ‘born’ did not imply exclusion of the unborn²⁸. The preamble of the UDHR acknowledges the ‘Intrinsic dignity ‘of each individual and the ‘inalienable rights’ of all human beings.’ UDHR proclaims that no individual should endure torture or any form of cruel, inhuman or degrading treatment or punishment,²⁹ as similarly reiterated in International Government on Civil and Political Rights³⁰. This encompasses the inhuman and cruel treatment, as well as the torture experienced by the unborn child during an abortion.³¹

International Covenant on Civil and Political Rights (ICCPR) 1966

The International Covenant on Civil and Political Rights (ICCPR) is a global agreement that safeguards the civil and political rights outlined in the UDHR, established by the UN General Assembly on December 16, 1966, and effective from March, 1976, serving as the primary international law governing these rights comprehensively.³² ICCPR states ‘every human being has the inherent right to life.’³³

International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966

The United Nations General Assembly through Resolution 2200 A (XXI) on 16 December 1966, endorsed the ICESCR as one of the two key treaties forming the ‘International Bill of Human Rights’ alongside the UDHR. This treaty established the legal framework aimed at safeguarding fundamental economic, social, and cultural rights, encompassing aspects such as fair working conditions, social security, decent living standards, optimal physical and mental health, education, and the ability to enjoy cultural freedom and scientific advancement.³⁴ This instrument acknowledges the entitlement of the unborn child to ‘the highest achievable level of physical and mental health.’³⁵ This International instrument specifically provides for states to take necessary steps for ‘the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child.’³⁶

Child’s Rights Convention (CRC) 1989

This treaty, focused on childhood internationally, stands as the most extensively ratified human rights agreement in history, significantly impacting and improving the lives of children globally.³⁷ The preamble to the convention indicates that ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’. Article one of the convention defines a child as every human being below the age of 18 years of age (there is no indication of the starting point of childhood but there is a cap). Article 6.1 recognizes that every child has inherent right to life.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979

CEDAW was the first international human rights treaty to specifically recognize family planning as human rights. Articles 5(b), 12.1, 14.2(b) and 16.1(e) contain the right to family planning.³⁸ Because majority of states have ratified CEDAW, the right to family planning has been well established albeit with different interpretations by different states because there is no definition of the term ‘family planning’ in public international law. However, in CEDAW, there are different articles that touch on family planning, and these are, article 5(b) which talks about family education, articles 10(h) 12.1 and 14.2(b) which mention family planning, article 12.2 which deals with pregnancy, confinement and the postnatal period, and article 16.1 (e) which guarantees to everyone ‘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’.³⁹ Because article 16.1(e) mentions the number and spacing of children, it seems to be used more in international law to support the right to family planning, and because abortion is simply a way for women to control the number and spacing of their children, article 16.1(e) of CEDAW has enjoyed the interpretation that abortion is included in the term ‘family planning’ as part of reproductive right which enjoys the protection of human rights law.

4. Regional Legal Instruments On Right to Life and Right to Family Planning

American Convention on Human Rights (ACHR) 1969

The ACHR serves as a human rights framework built upon the consensus of the nations across the Americas. It created both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to guarantee the enforcement of the human rights outlined in the Convention.⁴⁰ The ACHR guarantees the right to life and states that, ‘every person has the right to have his life respected. This right shall be protected by law and in general, from the moment of conception. No one shall be arbitrarily deprived of his life’.⁴¹ In the Baby Boy case,⁴² the Inter-American commission on Human Rights (IACHR) accepted that life, in general, started at the moment of conception but that under certain circumstances,

²⁸ The Mexican delegation backed the removal of the term “born” from article 1. Additionally, it endorsed the Lebanese proposal (A/C. 3/235) to replace “are born” with “are” emphasizing that freedom and equality constituted fundamental aspects of humanity and were not contingent on the circumstances of birth.

²⁹ UDHR article 5.

³⁰ ICCPR article 7.

³¹ OCHCR, 2017 *op cit*.

³² International Covenant on Civil and Political Rights–Guide for Ratification and Implementation, *Centre for Civil and Political Rights*, 2017,

³³ ICCPR article 6 (1).

³⁴ LSC-Centre for Women, Peace and security <<https://www.lsc.ac.uk>> accessed on 1st December 2023.

³⁵ ICESCR, 1966.

³⁶ ICESCR article 12 (2) (a).

³⁷ Convention on the Rights of the Child (1989).

³⁸ Convention on All Forms of Discrimination Against Women (CEDAW) 1979.

³⁹ United Nations Human Rights Office of the High Commissioner <<https://www.ohchr.org>> accessed 2nd December 2023.

⁴⁰ American Convention on Human Rights (1969).

⁴¹ *Ibid*, article 4(1).

⁴² United States, Case 2141, Inter-Am.Comm’n. H.R., Res. No. 23/81, OAS/Ser.L/V/II.52, doc. 48 (1981).

domestic legislation could permit abortion without being in violation of article 4 of the Convention in situations where the right to life of the mother weighed against the right to life of the foetus. Nevertheless, the IACHR noted that the preparatory works of the ACHR reveals that the intention of the drafters was not to make it obligatory for member states to prohibit abortion. This is an indication that the issue of abortion should be a national concern of State Parties.

European Convention on Human Rights (ECHR) 1950

This Convention adopted in 1950 was the first Council of Europe's Convention and the cornerstone of all its activities.⁴³ There is no definite position taken on abortion by ECHR, but the European Court of Human Rights (ECtHR) has scrutinized it in a few situations. According to ECHR article 46, the Court's decision is binding on member states. However, the ECtHR applies the doctrine of margin of appreciation in its dealings with member states because it acknowledges the diversity in both culture and legal traditions within member states.⁴⁴ For example, in the case of *V.O v France*,⁴⁵ the right to life guaranteed by article 2 was deliberated on with regard to the unborn child. In that case, the Court had difficulty accepting that an unborn child was a person enjoying protection in article 2, and held that there had been no violation of article 2.⁴⁶ Likewise, the ECHR found violation of the prohibition of inhuman or degrading treatment in article 3 in the case of *R.R v Poland*,⁴⁷ and also violations of the right to private and family life in article 8 in the cases of *Tysiac v Poland*,⁴⁸ *A, B, and C v Ireland*,⁴⁹ *R.R v Poland*,⁵⁰ and *P and S v Poland*.⁵¹

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (The Maputo Protocol) 2003

The African Charter on Human and People's Rights in its article 66 provides for special protocols and agreements, if necessary, to supplement the provision of the African charter. On this basis, the Assembly of Heads of State and Government of the Organization of African Unity in its thirty-first ordinary session in Addis Ababa, Ethiopia, in June 1995, endorsed by Resolution AHG/Res. 240 (XXXI) the Recommendation of the African Commission on Human and Peoples Rights to elaborate a Protocol on the rights of women in Africa.⁵² The relevant provision of the Maputo Protocol for the purpose of this paper is article 14.2(c) which deals with a right to medical abortion in cases of rape, incest, sexual assault, and to protect the physical and mental health of the mother or the life of the mother or the foetus. This provision explicitly provides for abortion in specific instances of rape, incest, sexual assault, and for the protection of the physical and mental health of the mother or the life of the mother or the foetus.

5. Discussion

According to Tozzi, the argument that access to abortion is a human right is elaborated upon most systematically in a 2008 article that appeared in the human rights law review authored by Christiana Zampas and Jamie. M. Gher, though they admit that no binding treaty law provides for it except one regional treaty, the Maputo Protocol.⁵³ But rather the right to abortion exists by implication, inferred from a number of international instruments as articulated in the interpretations of treaties made by the UN Treaty compliance committee members. They argued that, in the first place, it can be inferred from the right to life and health found in numerous treaties. With the assumption that lack of access to abortion threatens women's lives and health. In light of the above, the right to family planning subsumed in reproductive health provisions has been a recurring subject at international conferences because it has always been claimed that the right to abortion is part of family but 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 Vienna Convention of the Law of Treaties (VCLT)⁵⁴ of 1969 and the *Grisbadarna case*.⁵⁵ The VCLT is the major treaty for the interpretation of International treaties adopted by the United Nations in 1969. According to VCLT articles 31 and 32, the first method of treaty interpretation is to determine the ordinary meaning of a term in the treaty, and according to *Grisbadarna case*,⁵⁶ interpretation of a treaty provisions should be in the light of their ordinary meaning at the time of adoption, not at the time of potential dispute.⁵⁷ The second method is to look at the context which in addition to the text includes its preamble and annexes. The third method is the supplementary means which includes the use of preparatory works of the treaty but this last method can only be employed when the other two methods leave the meaning ambiguous or obscure, or when they lead to a result which is manifestly absurd or unreasonable.⁵⁸ According to Bantekas and Oette,⁵⁹ studying the preparatory works helps in understanding the historical context and political motives, as well as clarifying interpretations put forward by states, groups of experts, international organisations and civil society. From the first method of treaty interpretation established by the VCLT which is to determine the ordinary meaning of the term in the treaty, it does not seem that abortion is considered part of the right to family planning. Also, according to the *Grisbadarna case*, interpretation of a treaty provision should be in the light of their ordinary meaning at the time of adoption, not at the time of the potential dispute. Based on the authority of *Grisbadarna*,

⁴³ European Convention on Human Rights: A Convention to Protect Your Rights and Liberties <<https://www.coe.int>> accessed on 2nd December 2023.

⁴⁴ C Ovey, and R White, *The European Convention on Human Rights* (14th edn, Oxford: Oxford University Press 2006), 52.

⁴⁵ 53924/00 [2004] ECHR 326 European Court of Human Rights.

⁴⁶ *Ibid*, paras. 80-95.

⁴⁷ [2011]– HUDOC – The Council of Europe.

⁴⁸ [2007] App. No. 5410/03, 2007-IV Eur.CT.H.R.

⁴⁹ [2010] – HUDOC – The Council of Europe.

⁵⁰ [2011] *supra note* 48.

⁵¹ ECtHR [2012] App. No.57375/08.

⁵² Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2023.

⁵⁴ P A Tozzi, 'International Law and the Right to Abortion' [2010] 1 *Legal Studies Series*,

⁵³ *Ibid*.

⁵⁴ VCLT 1969.

⁵⁵ *Norway v Sweden*, Award, [1909] XI RIAA 155.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*, 4.

⁵⁸ VCLT, article 32(a) and (b).

⁵⁹ I Bantekas, and L Qette, *International Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2013), 53.

the ordinary meaning of family planning at the time of its adoption does not seem to include the right to abortion. The second method of treaty interpretation according to VCLT is to study the context, object, and purpose. Looking at CEDAW articles 2 and 3, the object is to condemn discrimination of women through the adoption of appropriate measures, including altering domestic legislation. Articles 5 and 8, 10-14, 16 also reveal the object and purpose of the Convention which is to eliminate discrimination against women in different areas of life, while article 16.1(e) covers discrimination against women in the area of family planning, whereby women should have the same rights as men, for example, equal right to contraceptives. It is also clear that abortion was not intended to be part of family planning based on this second method of interpretation. The third method of interpretation of treaties is the supplementary means which is only applicable, according to VCLT article 32 when the first two means of interpretation leave the meaning ambiguous or obscure, or when the result is absurd or unreasonable, but it doesn't seem necessary to explore this third method because the first two methods have properly done justice to the issue. Even if the third method is to be employed. When it comes to the term 'family planning' with regard to CEDAW, examination of its preparatory works on article 16.1(e) will reveal the debates and controversy during the drafting process, and a look at article 10 concerning the right to education and article 12 concerning the right to health will be instructive. Denmark was of the opinion that article 10 should include access to 'family planning services' which was opposed by the Soviet Union and Argentina on the basis that it could lead to non-ratification of the entire Convention.⁶⁰ In paragraph 46, Mrs. Nikolaeva from the Union of Soviet Socialist Republic shared the view that the term 'psycho-sexual education' was not clear. She further emphasized that there was also the risk that the idea of family planning services would gain general support and she recalled in that connection that in the working Group, the USSR delegation had called for a Convention which would be as universal as possible. Accordingly, she felt it would be better to keep to the original text. In paragraph 60, Mrs. Stabilede Machinandiarena, an observer from Argentina stressed that:

the future Convention must be such as to encourage the greatest possible number of states to accede to and ratify it. It must not be a mere theoretical enumeration of the rights to which women aspired, but must also reflect some of the conclusions of the world Plan of Action adopted at Mexico City, for the initial draft Convention had been circulated to governments prior to the Mexico City conference and hence prior to the approval of this world Plan of Action. However, the inclusion in the Convention of provisions concerning advice and services in respect of family planning could prevent its approval and subsequent ratification by many countries which could otherwise be able to accept its contents in their entirety.

Columbia also expressed disapproval of the proposal because of the mentioning of services in a matter of family concern.⁶¹ And consequently, Mrs. Danlerup (Denmark) withdrew the part of her amendment which concerned the provision of family planning services.⁶² With regard to initial draft of article 12, the term 'family planning advice and services' were mentioned, but India suggested that it be amended with the term 'information, counselling and services in family planning'.⁶³ After much deliberations, based on the proposal by Denmark and Netherlands that many delegates objected to the term 'family planning services' on grounds that it did not exist in many states, and could lead to the refusal to ratify the entire convention, the phrase 'access to health care services, including those related to family planning' was adopted.⁶⁴ Concerning article 16.1(e) of CEDAW, India proposed the phrase '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',⁶⁵ and this phrase has been the well accepted definition of reproductive rights at the sphere of international law due to the fact that it was adopted by consensus because of lack of objection by delegates from other countries.

Having critically looked at the preparatory works, it is clear that the term 'family planning' was not meant to include abortion in order to be universally adopted. This is obvious because the term was commonly accepted even by states with strict abortion laws but the intention to expand reproductive right to include 'services' was registered. For example, Malta and Monaco expressed that they did not consider article 16.1(e) to impose a commitment for their states to legalise abortion.⁶⁶ Article 16 of CEDAW witnessed most reservations because about eighteen countries had objections. The reservations stemmed from its conflict with religious affairs. From the forgoing, it could be rightly concluded that there was no intention to include abortion as part of family planning at the time of adoption of CEDAW as can be evident in the ICPD, Beijing platform of Action (international conferences), the preparatory works and reservations to CEDAW. More so, the way CEDAW Committee has treated the term 'family planning' in its General Recommendations and Concluding Observations is very instructive for the purpose of the subject matter under examination. For example, General Recommendation 24 from 1999 urged member states to prioritize the prevention of unwanted pregnancy through family planning and sex education.⁶⁷ Also, in its Concluding Observations to Chile, the CEDAW Committee stated in paragraph 38: 'the committee welcomes Law No. 21.030 (2017) that legalizes voluntary termination of pregnancy on three grounds, namely rape, threats to life of the pregnant woman and fatal foetal impairment...' Paragraph 38 (d) also reads: 'the Committee is concerned about the continued gaps in the implementation of law No. 20.418 (2010) which permits the use, sale and distribution of emergency contraception, and women's difficulties in accessing modern contraceptives and family planning services.'⁶⁸ It could be seen from the paragraph 38 mentioned above that the Committee acknowledges that abortion is allowed on three grounds and not merely on request.

6. Conclusion and Recommendations

From the examination of the international treaties, abortion was not explicitly discussed except at the regional level by the Maputo Protocol. Even the Maputo Protocol does not guarantee abortion on request because article 14.2 (c) which is the

⁶⁰ E/CN.6/SR. 642, Commission on the status of women, 26th Session 1976, paras. 44, 46, 60 and 62.

⁶¹ E/CN.6/SR. 642, Commission on the status of women, 26th Session 1976, paras. 48 and 51.

⁶² *ibid*, para. 67.

⁶³ A/C. 3/33/W.G.1/CRP.5/Add.6. Third Committee, 33rd session.

⁶⁴ A/C.3/33/L.47, Third Committee, 33rd session 1978, para.116.

⁶⁵ E/CN.6/SR/650 Commission on the Status of Women, 26th Session, 1976, para. 104.

⁶⁶ The Reservations of Malta (8/3.1992) and Monaco (18/3 2005) to CEDAW.

⁶⁷ General Recommendation No. 24: Article 12 of the Convention (Women and Health) 1999.

⁶⁸ Concluding Observations: Chile, CEDAW/C/CHL/CO/7, para.38.

relevant article that deals with abortion, provides: ‘State Parties shall take all appropriate measures to . . . protect the reproductive rights of women by authorizing 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’⁶⁹. Moreover, it could be problematic to say that the right to abortion stems from customary international law⁷⁰. A sovereign state may, therefore, object to being bound by a customary rule by consistently maintaining it is not bound by it, and it is this rule of customary international law not binding on any state which indicates its dissent during the development of the rule that forms the basis of the traditional principle that international law essentially depends on consent of states, and in the case of abortion, there is no customary norm, neither is there any general and consistent practice of states. Therefore, based on the critical assessment of the relevant international and regional legal instruments on the right to family planning, it is quite clear that there is no explicit nor implicit right to abortion. This article has critically evaluated the relevant international and regional legal instruments on the right to family planning, and it is clearly obvious that the right to abortion is not part of right to family planning. Based on this, the following is recommended: The treaty bodies of the United Nations should show restraint in embracing a very progressive approach towards abortion. This could be achieved by desisting from reading the right to abortion into other human rights provisions such as right to health and prohibition of torture, degrading or inhuman treatment, right to bodily autonomy, etc. The treaty bodies should always apply the doctrine of margin of appreciation when it comes to sensitive and controversial issues which are caught in a web of cultural, religious and moral ethics of which, abortion is one of the most controversial of such issues. The treaty bodies should desist from developing, deleting or adding to the provisions of their respective treaties as they do not have such a jurisdiction.

⁶⁹ Concluding Observations: Chile, CEDAW/C/CHL/CO/7, para.38.

⁷² (This a general and consistent practice of states followed by them from a sense of legal obligations; and such a belief by states that certain practices are legally binding upon them is known as opinion juris).

⁷³ *Ibid.*, 8.