A Feminist Reinterpretation of Access to Abortion Under the European Convention on Human Rights

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Abstract

This article outlines the jurisprudence of the European Court of Human Rights on access to abortion and underlines the points of criticism that feminist scholars have raised in this regard. Against this background, the article explores whether the customary interpretative rules enable a feminist interpretation of the relevant provisions of the European Convention on Human Rights, i. e. whether the customary interpretative tools can lead to an interpretation that addresses the points of feminist criticism and meets the standards that feminist scholars have argued for. The article contends that such a feminist interpretation of the provisions of the European Convention on Human Rights on access to abortion can be realised through the same interpretative technique that the Court has already used in its abortion-

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related jurisprudence. However, in doing so, the Court will need to aim at a feminist rather than a restrictive interpretative outcome.

Keywords

feminist approaches to international law – treaty interpretation – access to abortion – European Court of Human Rights

I. Introduction

Considering the dire and even deadly impact of restrictive abortion policies,[1] it comes as no surprise that abortion as a human rights issue is garnering considerable attention worldwide.[2] Following the introduction of strict legislative abortion policies in various countries[3] and the overturning of acknowledgements of the right to access abortion,[4] reports on the matter have attracted widespread media coverage.[5] In academic circles, these developments were preceded by analyses of abortion, as even earlier decisions by human rights fora had drawn academic attention to the impact of abortion legislation on human rights.[6] This academic attention remains steadfast, as the impacts of restrictive abortion policies are affecting an increasing number of people[7] and have led to a large number of disputes pending before human rights fora.[8]

1 Weronika Strzyżyńska, 'Polish State Has "Blood on Its Hands" After Death of Woman Refused an Abortion', The Guardian, 26 January 2022.

2 Rebecca Smyth, 'Abortion in International Human Rights Law at a Crossroads: Some Thoughts on Beatriz v El Salvador', Katsoni, 29 May 2023, doi: 10.17176/20230529-110940-0.

3 Michael Goodier, 'How Many Countries Have Tightened Abortion Laws? The US is One of Only Four Countries to Impose Stricter Abortion Laws Since the 1990s', The New Statesman, 27 June 2022.

4 Nina Totenberg and Sarah McCammon, 'Supreme Court Overturns Roe v. Wade, Ending Right to Abortion Upheld for Decades', National Public Radio (NPR), 24 June 2022.

5 Mira Ptacin, 'After Poland Issued a Near-Total Ban on Abortions, Marta Lempart Has Been on the Front Line of the Protests', Vogue, 11 February 2021.

6 Gregor Puppinck, 'Abortion on Demand and the European Convention on Human Rights', EJIL:Talk!, 23 February 2013; Rumyana Panepinto, Alice Grozdanova and Konstantina Tzouvala, 'In Defence of a More Sophisticated and Nuanced Approach to Abortion: A Response to Gregor Puppinck', EJIL:Talk!, 22 March 2013.

7 Patrick Adams, 'Why Poland's Restrictive Abortion Laws Could be Problematic for Ukrainian Refugees', National Public Radio (NPR), 17 March 2022.

8 There are approximately 1,000 applications relating to Poland's restrictive abortion policy pending before the Court. See Spyridoula (Sissy) Katsoni, '"Dangerous" Abortion Cases and the Dangers of Misportraying ECtHR's Inadmissibility Decisions', EJIL:Talk!, 20 June 2023.

Against this background, this article explores the potential for the feministisation of the jurisprudence of the European Court of Human Rights ('the Court') by exploring how the European Convention on Human Rights ('the Convention')[9] could be interpreted in a fashion that both addresses the criticisms and meets the standards that feminist scholars have set. Such an interpretation will here be referred to as a feminist interpretation of the Convention. To that end, the article first provides a brief overview of the Court's jurisprudence on access to abortion. Subsequently, it reveals the interpretative technique the Court has employed to reach a restrictive interpretation of the provisions of the Convention concerning access to abortion and underlines the main points of feminist criticism directed towards the Court's jurisprudence.

Against this backdrop, the analysis then asks whether the customary rules on treaty interpretation enshrined in the Vienna Convention on the Law of Treaties ('the VCLT')[10] can lead to a feminist interpretative outcome. The article concludes that these customary interpretative tools could allow the Court to interpret the Convention in a feminist fashion, requiring the Court to utilise an interpretative technique it is already familiar with and to pay more attention to those tools that enable a preferrable conclusion. To reach a feminist conclusion, the Court will have to place more emphasis on the tools that can lead to a feminist instead of a conservative conclusion. Rather than leading the Court to adopt a more subjective interpretative methodology (i. e. one that relies more heavily on the judges' wish to refrain from addressing the morally and politically sensitive issue of access to abortion rather than on objective criteria established in the VCLT and the customary rules on treaty interpretation), this means the Court will simply need to replace its restrictive interpretative objective with a feminist one.

II. Overview of the Court's Jurisprudence on Access to Abortion

This section outlines the Court's jurisprudence on access to abortion and highlights the Court's hesitancy to explicitly acknowledge the obligation the State Parties to the Convention are under to grant access to abortion in certain circumstances. In doing so, this section provides the backdrop to the subsequent analyses on the interpretative method employed by the Court in

9 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 UNTS 221.

10 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

its judgments on access to abortion, the feminist criticism these judgments have attracted and the potential as regards the feministisation of the Court's jurisprudence on the matter.

The Convention does not include any explicit provisions on access to abortion. Nonetheless, since its early jurisprudence, the Court has accepted that access to abortion falls within the scope of Art. 8 of the Convention (Right to respect for private and family life),[11] which includes the right to personal autonomy and physical and psychological integrity.[12] The Court has further clarified that Art. 8 'cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother'.[13] Instead, 'the issue [is] determined by weighing up various, and sometimes conflicting rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child',[14] in line with the limitations clause in Art. 8 (2) of the Convention.

The Court has been called upon to assess whether States have managed to properly weigh up these competing interests in various cases. In this context, it has emphasised that national legislation strikes a fair balance if it authorises abortion within the first twelve weeks of pregnancy where there is a risk to the woman's physical or mental health and beyond that point if the pregnancy or childbirth puts the woman's life at risk, or if the child would be born with a condition of such gravity as to endanger the woman's physical or mental health.[15] Against this background, the Court has indicated – as the European Commission on Human Rights has previously done[16] – that when the life or physical or mental health of the person bearing the child is at risk, national laws enabling access to abortion do not 'go beyond' the States' discretion in regulating access to abortion and strike a fair balance with the foetus's interests.[17] In this vein, the Court has never found a violation of Art. 2 of the Convention (Right to life) in cases where it was argued that a State failed to protect the foetus by granting the person bearing it access to an abortion, and it has never acknowledged a right of the foetus's 'father' or

11 ECtHR, *Brüggemann and Scheuten v. Germany*, judgment of 19 May 1976, no. 6959/75, para. 61; ECtHR (Grand Chamber), *Vo v. France*, judgment of 8 July 2004, no. 53924/00, para. 80.

12 ECtHR (Grand Chamber), *A, B and C v. Ireland*, judgment of 16 December 2010, no. 25579/05, paras 216-218.

13 ECtHR, *Brüggemann and Scheuten* (n. 11), para. 61; ECtHR, *Vo* (n. 11), para. 80.

14 ECtHR, *Vo* (n. 11), para. 80.

15 ECtHR, *Boso v. Italy*, judgment of 5 September 2002, no. 50490/99, para. 1.

16 16 ECommHR, *H. v Norway*, Decision of 19 May 1992, no. 17004/90, 155.

17 ECtHR, *Boso* (n. 15), para. 1. See also Panepinto, Grozdanova and Tzouvala (n. 6).

'relatives' to be consulted before a pregnant person pursues and accesses abortion.[18]

The Grand Chamber of the Court further clarified its stance on when a State strikes a fair balance between the competing interests in *A, B and C v. Ireland*.[19] The case concerned three applicants who during their first trimester of pregnancy travelled from Ireland to England to receive an abortion as they believed they were not entitled to receive one under Ireland's domestic law. At the time, the Irish Constitution acknowledged the right to life of the unborn and allowed abortions only when there was a real and substantial risk to the life of the pregnant person that could only be avoided by terminating the pregnancy.[20] Regarding the first and second applicants' complaint that the domestic law did not allow abortion for reasons of health and/or well-being,[21] the Court acknowledged an interference with the applicants' right to privacy and with the negative obligations under Art. 8 of the Convention.[22] Furthermore, it found that this interference was in accordance with a foreseeable and accessible law[23] and that it pursued the legitimate aim of the protection of morals in Ireland, of which the foetus's right to life was one aspect.[24]

Assessing the necessity of this interference in a democratic society,[25] the Court emphasised that due to the acute sensitivity of the moral and ethical issues raised by the question of abortion, a broad margin of appreciation was to be accorded to the State.[26] This broad margin could be narrowed by the existence of a European consensus on the matter, which could enable a dynamic interpretation of the Convention.[27] Indeed, as the Court underlined, such a consensus had arisen among the substantial majority of the State Parties, which allowed abortion on broader grounds than Ireland did.[28] Nevertheless, given the absence of an additional consensus on when the right to life begins,[29] the Court concluded that the State's broad margin of appreciation was not narrowed, notwithstanding the evolutive interpretation of the

18 ECtHR, *Boso* (n. 15), para. 2. See also Katsoni, 'Dangerous Abortion Cases' (n. 8).
19 ECtHR, *A, B and C* (n. 12).
20 ECtHR, *A, B and C* (n. 12), paras 39-44.
21 ECtHR, *A, B and C* (n. 12), para. 139.
22 ECtHR, *A, B and C* (n. 12), paras 216-218.
23 ECtHR, *A, B and C* (n. 12), paras 219-221.
24 ECtHR, *A, B and C* (n. 12), para. 227.
25 ECtHR, *A, B and C* (n. 12), para. 230.
26 ECtHR, *A, B and C* (n. 12), para. 233.
27 ECtHR, *A, B and C* (n. 12), para. 234.
28 ECtHR, *A, B and C* (n. 12), para. 235.
29 ECtHR, *A, B and C* (n. 12), para. 237.

Convention.[30] To further support its conclusion, the Court referred to the lengthy, complex and sensitive debate in Ireland regarding its abortion laws and highlighted the fact that persons who wished to have an abortion that was not accessible in Ireland had the alternative of abortion travelling, which was not prohibited.[31] Hence, it concluded that there had been no violation of Art. 8 of the Convention.[32]

In other words, although the Court has acknowledged that access to abortion for reasons of protecting the pregnant person's life, health, or well-being strikes a fair balance with any competing interests of the pregnant person's partner or any safeguards that may be extended to the foetus, the prohibition of access to abortion for reasons of the pregnant person's health and well-being is also justifiable in order to protect conflicting moral perceptions in a given State. Contrary to this restrictive and rather confusing interpretative conclusion, the Court has been more eloquent when it comes to acknowledging procedural abortion-related obligations on the basis of the positive obligations under Art. 8 of the Convention.

Specifically, the third applicant in the *A, B and C v. Ireland* case complained that there was no procedure through which she could have established that the pregnancy posed a risk to her health.[33] The Grand Chamber assessed this claim from the angle of the positive obligations under Art. 8 of the Convention[34] and found that no criteria or procedures were laid down in Irish law for verifying whether a person qualifies for lawful access to an abortion.[35] The uncertainty caused by this omission and the criminal provisions on the prohibition of abortion, which were a significant chilling factor for both pregnant persons and doctors in the medical consultation process, had resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland and the reality of its practical implementation.[36] Thus, the Court concluded that there had been a violation of the State's positive obligations under Art. 8 of the Convention.

The Court had already adopted this interpretative conclusion in *Tysiąc v. Poland*, where it found that there had been a failure to comply with the positive obligations under Art. 8 of the Convention owing to the lack of a procedure whereby pregnant persons could verify whether they are eligible for lawful access to abortion under domestic law and whereby any disagree-

30 ECtHR, *A, B and C* (n. 12), paras 236-237.
31 ECtHR, *A, B and C* (n. 12), paras 239-240.
32 ECtHR, *A, B and C* (n. 12), para. 241.
33 ECtHR, *A, B and C* (n. 12), para. 140.
34 ECtHR, *A, B and C* (n. 12), paras 244-246.
35 ECtHR, *A, B and C* (n. 12), para. 253.
36 ECtHR, *A, B and C* (n. 12), paras 254-265.

ments on the matter between doctors could be resolved.[37] These procedures include diagnostic services regarding the foetus's abnormality, which may be decisive for a pregnant person's informed decision on whether to seek a legal abortion.[38] In the post-*A, B and C v. Ireland* era, the Court's analyses of States' procedural abortion-related obligations further indicated that, under the Convention, if a State has legalised abortion on certain grounds in its domestic legal system, it has to ensure that abortion on these grounds will be accessible in practice. If the relevant conditions for access to abortion are met but a health provider refuses to provide the abortion, then the patient's access to lawful services will be ensured if the health provider objecting on the grounds of conscience issues a written refusal indicating their refusal to provide abortion services and if the patient is referred to non-objecting providers.[39]

Finally, the Court has found violations of Art. 3 of the Convention (Prohibition of torture) in some of its abortion-related judgments. This was the case in its most recent cases concerning forced abortions[40] as well as in two cases that referred to infringements of access to legal abortion (according to domestic law). Specifically, in *R. R. v. Poland*, the applicant was deliberately refused prenatal genetic tests by doctors who suspected a severe genetic abnormality in the foetus but opposed abortions.[41] The applicant was only informed of the foetus's genetic abnormality after the timeframe for legal access to abortion had elapsed,[42] and she gave birth to a child affected with Turner syndrome.[43] In its judgment, the Court emphasised that due to the health professionals' procrastination regarding prenatal tests, the applicant had been very vulnerable, as she had to endure weeks of anguish and painful uncertainty about the foetus's health, her own and her family's future and the prospect of raising a child suffering from an incurable ailment.[44] Thus, the Court concluded that the applicant's suffering met the minimum threshold of severity under Art. 3 of the Convention.[45] Since the prohibition of inhuman and degrading treatment under Art. 3 is abso-

37 ECtHR, *Tysiąc v. Poland*, judgment of 20 March 2007, no. 5410/03, paras 128-129. See also ECtHR, *P. and S. v. Poland*, judgment of 30 October 2012, no. 57375/08, paras 111-112.

38 ECtHR, *Tysiąc* (n. 37), paras 119-124; ECtHR, *P. and S.* (n. 37), para. 100.

39 Johanna Westeson, 'P and S v. Poland: Adolescence, Vulnerability, and Reproductive Autonomy', Strasbourg Observers, 5 November 2012.

40 ECtHR, *S. F. K. v. Russia*, judgment of 11 October 2022, no. 5578/12; ECtHR, *G. M. and others v. The Republic of Moldova*, judgment of 22 November 2022, no. 44394/15.

41 ECtHR, *R. R. v. Poland*, judgment of 26 May 2011, no. 27617/04, paras 9-34.

42 ECtHR, *R. R. v. Poland* (n. 41), paras 35-36.

43 ECtHR, *R. R. v. Poland* (n. 41), para. 37.

44 ECtHR, *R. R. v. Poland* (n. 41), para. 159.

45 ECtHR, *R. R. v. Poland* (n. 41), para. 161.

lute and thus cannot be restricted or derogated from, the Court did not have to balance any conflicting interests. Instead, it found that by causing such serious suffering to the applicant the State had breached Art. 3 of the Convention.[46]

The Court also found a violation of Art. 3 of the Convention in *P. and S. v. Poland*,[47] which concerned a fourteen-year-old Polish teenager, P., whose pregnancy was the result of rape.[48] Even though, at the time, abortion was legal in Poland when the pregnancy was the result of a criminal act[49] and although the applicant had obtained a certificate from the prosecutor certifying that her pregnancy had resulted from rape, she was repeatedly harassed and hindered by various actors (doctors, anti-abortion groups, and representatives of the Catholic Church)[50] from accessing one.[51] Assessing P.'s claim under Art. 3 of the Convention, the Court emphasised that it was of 'cardinal importance' that she was only fourteen years old and had suffered sexual abuse.[52] The Court further underlined the fact that while she was in a state of great vulnerability she was additionally subjected to pressure, coercion, and manipulation by health providers, was not protected from third parties that harassed her and had to witness her mother being verbally attacked and humiliated by doctors before being forcibly separated from her mother and detained.[53] Additionally, the Court was 'particularly struck' by the fact that a criminal investigation was initiated against the teenager for having engaged in unlawful intercourse when it was clear from the submitted documents that she was in fact the victim of sexual abuse.[54] Hence, the minimum threshold of severity under Art. 3 of the Convention had been met and its violation was acknowledged in the judgment.[55]

Most recently, the Court was required to assess the applicability of Art. 3 of the Convention to complaints regarding the inaccessibility of abortions in an application concerning the ban on access to abortion in Poland even in cases of foetal abnormalities following the legislative amendments occasioned by the Polish Constitutional Court's judgment of 22 October 2020.[56] In

46 ECtHR, *R. R. v. Poland* (n. 41), paras 157, 162.
47 ECtHR, *P. and S.* (n. 37).
48 ECtHR, *P. and S.* (n. 37), para. 6.
49 ECtHR, *P. and S.* (n. 37), para. 54.
50 ECtHR, *P. and S.* (n. 37), paras 23-24, 26.
51 ECtHR, *P. and S.* (n. 37), paras 7-10, 25-28.
52 ECtHR, *P. and S.* (n. 37), para. 161.
53 ECtHR, *P. and S.* (n. 37), paras 161-164.
54 ECtHR, *P. and S.* (n. 37), para. 165.
55 ECtHR, *P. and S.* (n. 37), paras 168-169.
56 Polish Constitutional Court (Constitutional Tribunal), judgment of 22 October 2020, case no. K1/20.

M. L. v. Poland,[57] the applicant argued that she had been the victim of a breach of Art. 3 of the Convention, as the Constitutional Court's judgment had deprived her of the opportunity to terminate her pregnancy on the ground of foetal defects and had, thus, caused her serious and real emotional suffering and unimaginable fear and anguish.[58] She further alleged that there had been a breach of Art. 8 as, following the Constitutional Court's judgment, she was obliged either to maintain her pregnancy and give birth to a seriously ill child or to travel abroad to a private clinic at considerable financial and psychological expense.[59]

The Court accepted that travelling abroad for an abortion was psychologically arduous for the applicant but concluded that the emotional and mental pain she suffered did not reach the level of severity required under Art. 3 of the Convention and did not, thus, fall within its material scope.[60] In doing so, the Court showed once again that, when deciding on Art. 3-based claims in its abortion jurisprudence it pays primary attention to the applicant's vulnerability, which it identifies on the basis of a variety of qualities that are not explicitly established and coherently applied in its jurisprudence but which the Court identifies on a case-by-case basis and in a 'cryptic' fashion.[61]

In light of the above, the Court proceeded with an assessment of the applicant's claim under Art. 8 of the Convention and reiterated that the prohibition of abortion for reasons of health and well-being on the ground of foetal impairment amounts to an interference with the right to respect for private life.[62] It then examined whether this interference was 'in accordance with the law' and concluded that the irregularities in the election of the judges at the Polish Constitutional Court compromised the legitimacy of the court's bench, whose rulings thus fell short of what the rule of law required.[63] Hence, the Court did not find it necessary to examine in detail the remaining shortcomings alleged by the applicant.[64] In this sense, by focusing on the

57 ECtHR, *M. L. v. Poland*, judgment of 14 December 2023, application no. 40119/21.

58 ECtHR, *M. L. v. Poland* (n. 57), paras 73, 80.

59 ECtHR, *M. L. v. Poland* (n. 57), para. 73.

60 ECtHR, *M. L. v. Poland* (n. 57), paras 83-85.

61 For a thorough analysis of the Court's vulnerability assessment in its Art. 3-related case-law, see Corina Heri, *Responsive Human Rights* (Hart Publishing 2021), 36, 145. For an overview of the vulnerability assessment of Art. 3-based claims in the context of the Court's abortion case-law, see Spyridoula (Sissy) Katsoni, 'Access to Abortion Under the European Convention of Human Rights: Overcoming the Boundaries of Treaty Interpretation' in: Philip Czech, Lisa Heschl, Karin Lukas, Manfred Nowak and Gerd Oberleitner, *European Yearbook on Human Rights 2023* (Intersentia 2023), 315-352 (325-328). For a feminist critique of this approach, see section IV. below.

62 ECtHR, *M. L. v. Poland* (n. 57), para. 154.

63 ECtHR, *M. L. v. Poland* (n. 57), para. 174.

64 ECtHR, *M. L. v. Poland* (n. 57), paras 174-176.

rule-of-law crisis in Poland, the Court avoided carrying out an assessment of the State's obligation to grant access to abortion and missed the opportunity to develop its abortion-related jurisprudence and to grant stronger protection under the Convention.[65]

As the above analysis shows, the Court has so far avoided identifying a right to access abortion and has abstained from acknowledging the existence of a state obligation to grant access to abortion. This hesitant approach is in line with the Court's overall 'delineatory character' in cases concerning politically or morally sensitive issues.[66] The Court has drawn the line by stressing that if the pregnant person's life or physical or mental health is at risk, then access to abortion will strike a fair balance with the foetus's interests,[67] and by refusing to acknowledge any right of the pregnant person's partner to be consulted before that person receives an abortion.[68] However, it has not taken the step of identifying occasions when a person is to be granted access to an abortion under the Convention.[69]

This hesitant approach is complemented by the Court's tendency to view restrictions on access to abortion as procedural rather than substantive human rights violations.[70] The Court has been much more eloquent in this regard and has clarified that once a State has granted the right to abortion under its domestic law, it must ensure that the enjoyment of this right is not merely theoretical and that abortion is accessible in practice.[71] In fact, if a person meets the requirements for accessing abortion under domestic law but is still prevented from doing so, then this person's vulnerability might lead to suffering that meets the threshold of inhuman or degrading treatment under Art. 3 of the Convention. Other than that, the Court has only engaged in an

65 Spyridoula (Sissy) Katsoni, 'How to Maneuver Around Acknowledging the Right to Access Abortion: Some Thoughts on the ECtHR's Judgment in M. L. v. Poland', EJIL: Talk!, 11 January 2024.

66 Ezgi Yildiz, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights', EJIL 31 (2020), 73-99 (86); See also Zoe L. Tongue and Lewis Graham, 'Y.P. v Russia: Sterilisation Without Consent, Article 3, and Weak Reproductive Rights at the ECtHR', Strasbourg Observers, 30 September 2022; Daniel Fenwick, 'Abortion Jurisprudence at Strasbourg: Deferential, Avoidant and Normatively Neutral?', LS 34 (2014) 34(2), 214-241 (239-241).

67 ECtHR, *Boso* (n. 15), para. 1. See also Panepinto, Grozdanova and Tzouvala (n. 6).

68 ECtHR, *Boso* (n. 15), para. 2. See also Katsoni, 'Dangerous Abortion Cases' (n. 8).

69 For a view that this step can be expected in the near future, see Chiara Cosentino, 'Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence', HRLR 15 (2015), 569-589 (586-589).

70 Joanna N. Erdman, 'The Procedural Turn: Abortion at the European Court of Human Rights' in: Rebecca J. Cook, Joanna N. Erdman and Bernard M. Dickens (eds), *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press 2014), 121-142 (139-141).

71 ECtHR, *R. R. v. Poland* (n. 41), para. 210; ECtHR, *A, B and C* (n. 12), paras 254-265.

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analysis of whether a State has to broaden the grounds on which it grants access to abortion in *A, B and C v. Ireland*, where it acknowledged that allowing abortions only where there is a real and substantial risk to the pregnant person's life that can only be avoided by terminating the pregnancy is compatible with Art. 8 of the Convention.

III. Unveiling the Court's Interpretative Technique for a Restrictive Interpretation of the Provisions of the Convention on Access to Abortion

As an international treaty that was adopted before the VCLT, the Convention is to be interpreted in accordance with the customary rules on treaty interpretation.[72] These customary rules are broadly acknowledged as being identical in terms of content to Arts 31 to 33 of the VCLT.[73] This section zooms in on the interpretative approach the Court has adopted in its case-law on access to abortion and assesses whether it followed the interpretative guidance provided by the relevant customary rules. As this analysis emphasises, the Court has utilised the discretion the customary rules grant to those interpreting the law and has purposely employed a creative interpretative technique to reach a restrictive interpretation of the relevant provisions of the Convention even though it could have provided a much broader interpretation while still following the customary rules.

First, the Court's finding in *A, B and C v. Ireland* – according to which Member States enjoy a broad margin of appreciation with regard to the regulation of abortions – has raised vivid criticism.[74] This is because the Court explicitly disregarded the States' consensus in this field,[75] even though the State Parties' subsequent practice is a valuable interpretative tool according to Art. 31 (3) (b) of the VCLT. This subsequent practice evinces a trend among the State Parties to the Convention which have legalised access to abortion on broad grounds. Forty of the forty-seven State Parties have legalised access to abortion during at least the first ten to twenty-four weeks of pregnancy for reasons relating to the pregnant person's (physical or men-

72 Ulf Linderfalk, On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties (Springer 2007), 7.

73 Linderfalk (n. 72).

74 Spyridoula (Sissy) Katsoni, 'The Right to Abortion and the European Convention on Human Rights: In Search of Consensus among Member-States', Völkerrechtsblog, 19 March 2021, doi: 10.17176/20210319-085654-0.

75 ECtHR, *A, B and C* (n. 12), para 237.

tal) health, rape or incest as the source of the pregnancy and for reasons relating to foetal impairment.[76]

This consensus could have sufficed for the Court to conclude that the States enjoy a narrow margin of appreciation regarding the grounds for which they can prohibit access to abortion.[77] However, as the subsequent practice of the remaining seven Member States demonstrates an intentionally differentiated and restrictive attitude towards abortion,[78] the Court's decision not to acknowledge a narrow margin of appreciation does not seem entirely unfounded. Indeed, this explicitly divergent practice precludes uniform subsequent state practice (or at least a convergent practice in the majority of State Parties, to which the other State Parties assent or that they do not oppose) as the one envisaged by the customary rule in Art. 31 (3) (b) of the VCLT.[79] Although the majority of the State Parties allows abortion on demand[80] in quite broad circumstances, a persistent minority retains prohibitions of abortion on demand. Admittedly, the practice of the persistent States that contradicts the Court's jurisprudence (i. e. Andorra and Malta, where abortion is illegal even if the pregnancy endangers the pregnant person's life) will not have an equal impact in the interpretative exercise as that which the State Parties' lawful practice would have. This considering that, according to the *ex injuria, jus non oritur* principle, unlawful practice is not to have an impact on the assessment of what is to be deemed as lawful.[81] Hence, even if the States' practice is not a coherent subsequent practice that would qualify as an interpretative tool under Art. 31 (3) (b) of the VCLT, if unlawful policies are neglected, the remaining ones indicate that access to lawful abortion is granted overall in

76 For an overview of this practice, see Katsoni, 'Access to Abortion' (n. 61), 330-333. See also Bríd Ní Ghráinne and Aisling McMahon, 'Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?', HRLR 19 (2019), 561-584 (581-583).

77 ECtHR, *A, B and C* (n. 12), Dissenting Opinion, paras 8-9; Katsoni, 'Right to Abortion' (n. 74).

78 For an overview of the remaining seven States' practice, see Katsoni, 'Access to Abortion' (n. 61), 331-332.

79 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009), 431-432.

80 The terms 'abortion on demand' and 'elective abortion' are used in connection with policies that permit a pregnant person to request an abortion without justification within a certain period of the pregnancy and on certain grounds.

81 Katsoni, 'Right to Abortion' (n. 74). For the use of this principle in the process of interpretation, see Alain Pellet, 'Canons of Interpretation under the Vienna Convention' in: Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention?: Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019), 1-12 (7-9).

the Convention States for reasons relating at least to the life or health of the person bearing the child and in situations where rape or incest was the cause of the pregnancy.

Leaving the States' subsequent practice aside and turning to the systemic interpretation as one of the remaining customary interpretative tools set out in Art. 31 (3) (c) of the VCLT, attention should be shifted to the relevant rules of international law and their interpretation in human rights fora.[82] The relevant rules of international law as interpreted in these human rights fora's jurisprudence is important for a *lege artis* holistic interpretation of the Convention in line with all the interpretative tools reflected in the VCLT. Moreover, it is essential for avoiding fragmentation in international (human rights) law.[83] Hence, it is particularly important to take into substantive consideration the relevant rules of other human rights treaties and the interpretation of these rules in wider human rights jurisprudence in the context of the Court's interpretation of the Convention.

In this regard, General Comment No. 2 of the African Commission on Human and Peoples' Rights has emphasised that pregnant persons should enjoy the right to make decisions about their fertility, whether to have children, the number of children, the spacing of children and methods of contraception without interference from the State or non-State actors.[84] While also recognising that the most significant barriers to access to reproductive services are traditions and cultural or religious practices,[85] said Commission proceeded with directing States to remove impediments to health services for women.[86] Similarly, the Inter-American Commission on Human Rights ('the IACHR') has urged States to safeguard reproductive rights,[87] while the IACHR's Rapporteur on the Rights of Women has invited States to legalise abortions at least where the pregnancy was a result of sexual assault, rape, and incest and where continuing the pregnancy endangers a person's

82 Art. 31 (3) (c) of the VCLT.

83 For an analysis of the significance of systemic interpretation and of judicial dialogue as a de-fragmentation technique, see Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization', I.CON 15 (2017), 671-704 (692-698).

84 African Commission on Human and Peoples' Rights, 'General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' of 28 November 2014, paras 22-27.

85 African Commission on Human and Peoples' Rights (n. 84), para. 12.

86 African Commission on Human and Peoples' Rights (n. 84, paras 23-24.

87 Organization of American States, 'IACHR Urges All States to Adopt Comprehensive, Immediate Measures to Respect and Protect Women's Sexual and Reproductive Rights', OAS Press Release No. 165/17, 23 October 2017.

mental and physical health.[88] As the Court focuses on the thematic proximity of the conventions that it takes into consideration while interpreting the Convention, regardless of whether these have been ratified by the State Parties to the Convention, taking the above interpretations into consideration while interpreting the Convention is in line with the Court's standard interpretative practice.[89]

Furthermore, the decisions of the United Nations Human Rights Committee ('the HRC') could be of interpretative influence for Art. 3 of the Convention, as the HRC has repeatedly stressed that regulations restricting a person's access to abortion in cases of rape or incest or in cases of fatal foetal abnormality breach Art. 7 of the International Covenant on Civil and Political Rights (on the freedom from torture or cruel, inhuman or degrading treatment or punishment).[90] More specifically, the HRC has underlined that the alternative of abortion travelling in such cases does not absolve States from their responsibility for the breach.[91] Taking the HRC's jurisprudence into account may have allowed the Court to conclude that when a pregnancy has resulted from a criminal act, or in cases of foetal abnormality, infringements of access to abortion meet the minimum threshold of severity for a violation of Art. 3 of the Convention.[92] The Committee on the Rights of the Child's most recent decision, in which it explicitly acknowledged that the denial of access to therapeutic abortion is a form of gender-based violence against women and may constitute cruel, inhuman, or degrading treatment, additionally supports this conclusion.[93]

Moreover, the Court could draw valuable interpretative influence from the jurisprudence of the Committee on the Elimination of Discrimination

88 United Nations Human Rights Office of the High Commissioner, 'Joint Statement by UN Human Rights Experts, the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples' Rights', OHCHR, 24 September 2015.

89 ECtHR (Grand Chamber), *Demir and Baykara v. Turkey*, judgment of 12 November 2008, no. 34503/97, paras 68, 78.

90 HRC, *Mellet v. Ireland*, views adopted on 17 November 2016, CCPR/C/116/D/2324/2013, paras 7.4-7.6; HRC, *Whelan v. Ireland*, views adopted on 12 June 2017, CCPR/C/119/D/2425/2014, paras 7.4-7.6. See also Alyson Zureick, '(En)Gendering Suffering: Denial of Abortion as A Form of Cruel, Inhuman, or Degrading Treatment', Fordham Int'l L.J. 38 (2015), 99-140 (125-130).

91 HRC, *Mellet* (n. 90), para. 9; HRC, *Whelan (n. 90),* para. 9.

92 For criticism of the Court's failure to substantively consider and meaningfully engage with the HRC's case-law while interpreting Art. 3 of the Convention in its recent judgment on *M. L. v. Poland*, see Katsoni, 'How To Maneuver' (n. 65).

93 Committee on the Rights of the Child, *Camila v.* Peru, views adopted on 13 June 2023, CRC/C/93/D/136/2021, para. 8.11.

Against Women ('the CEDAW Committee'), as it has done in the past in other contexts involving reproductive rights.[94] The CEDAW Committee has not only called on states to allow abortion beyond cases where pregnancy threatens a person's life,[95] it has further recognised that restricting access to reproductive health services (including abortion services) may amount to discrimination based on sex due to women's reproductive capabilities.[96] This is also the conclusion drawn by the Committee on Economic, Social and Cultural Rights ('the CESCR').[97] The Court could have reached the same conclusion if it had interpreted Art. 14 of the Convention taking into account the sexist, classist, and racist impacts of and reasons for the criminalisation of abortion.[98] Nonetheless, it missed the opportunity to engage in an analysis of the discriminatory impacts of and the background to restrictive abortion policies, although relevant cases have been brought before it.[99]

In line with the above analysis and the customary rules on treaty interpretation, it seems that the contextual and systemic interpretation of the Convention could and should have led the Court to a much broader interpretation of it. It is precisely the *lege artis* interpretation of Art. 8 of the Convention that would have led the Court to conclude that said provision requires States to grant pregnant persons access to abortion during at least the first twelve weeks of pregnancy for reasons relating to their health, or in cases of foetal abnormality, or in cases where the pregnancy was caused by rape or incest. Notably, a systemic interpretation of Art. 3 of the Convention further leads the Court to conclude that if access to abortion in the latter two cases is not granted, then the State will have also subjected the pregnant

94 As regards the influence the Court drew from the CEDAW Committee in the context of forced sterilisation, see ECtHR, *V. C. v. Slovakia*, judgment of 8 November 2011, no. 18968/07, para. 148.

95 CEDAW, Concluding Observations on the Seventh Periodic Report of Chile, adopted on 21 February 2018, CEDAW/C/CHL/CO/7, para. 38.

96 CEDAW, *Alyne da Silva Pimentel v. Brazil*, views adopted on 10 August 2011, CEDAW/C/49/D/17/2008, para 7.7; CEDAW, *SFM v. Spain*, views adopted on 28 February 2020, CEDAW/C/75/D/138/2018, para 7.5; Eva Maria Bredler, 'A Womb of One's Own? How the ECtHR Fails Reproductive Justice by Treating Reproduction as a Strictly Private Matter', Völkerrechtsblog, 8 March 2022, doi: 10.17176/20220308-120935-0; Rebecca Smyth, 'S.F. K. v. Russia and G. M. and others v. Moldova: The Promise and Pitfalls of ECtHR Forced Abortion Jurisprudence', Strasbourg Observers, 17 February 2023.

97 CESCR, 'General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)', adopted on 2 May 2016, E/C.12/GC/22, paras 7-8.

98 Reva B. Siegel, 'Abortion as a Sex Equality Right: Its Basis in Feminist Theory' in: Martha Albertson Fineman and Isabel Karpin (eds), *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (Columbia University Press 1995), 43-72 (45-59). These interpretative means constitute supplementary interpretative means under Art. 32 of the VCLT.

99 ECtHR, *Tysiąc* (n. 37), paras 136-144.

person to inhuman or degrading treatment. Ultimately, a systemic interpretation of Art. 14 of the Convention could have also led the Court to conclude that prohibiting access to abortion may amount to discrimination on the basis of the pregnant person's reproductive capabilities. Nonetheless, the Court has refrained from reaching the above interpretative conclusions.

Although conclusions as to the precise reasons why it has done so would require thorough empirical research into the Court's jurisprudential approach, the Court's deviation from its standard approach to identifying the margin of appreciation in the implementation of Art. 8 of the Convention in *A, B and C v. Ireland* confirms that the dynamism the Court wishes to attribute to the Convention is selective. This dynamism does not extend to morally and politically sensitive issues, in relation to which the Court persistently abstains from taking an explicit stance.[100] To avoid narrowing the margin of appreciation enjoyed by Ireland, the Court placed the primary focus on some interpretative tools (i. e. the States' inconsistent practice regarding the beginning of life) while neglecting others (i. e. the relevant rules of international law and their interpretations in other fora's jurisprudence), even though a hierarchy among interpretative tools, at least the ones enshrined in Art. 31 of the VCLT, is not suggested in the customary rules of treaty interpretation.[101]

In other words, the Court has made use of the interpretative discretion the customary rules provide with regard to the emphasis they may place on each interpretative tool.[102] By placing more emphasis on those tools that enable a restrictive interpretation, the Court has managed to sidestep its standard approach to identifying the margin of appreciation and refrained from further addressing a matter that remains politically and morally sensitive. As the following section shows, the Court's interpretative approach can and has given rise to serious feminist criticism. Furthermore, this interpretative approach can enable it to reach conclusions that meet these feminist criticisms.

IV. Utilising the Court's Interpretative Technique to Reach a Feminism-Informed Interpretation of the Convention

Feminist legal scholars have repeatedly stressed the patriarchal bias in law and case-law, noting that sexuality, biology, and reproductivity have been

100 Yildiz (n. 66), 86; see also Tongue and Graham (n. 66).

101 Eleni Methymaki and Antonios Tzanakopoulos, 'Masters of Puppets? Reassertion of Control Through Joint-Investment Treaty Interpretation' in: Andreas Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2016), 155-181 (169).

102 Jingjing Wu, 'A Perspective of Objectivity in International Human Rights Treaties', International Journal for the Semiotics of Law 35 (2020), 369-390 (369-370).

parameters that have affected the positioning of individuals in the eyes of the law.[103] As this section highlights, these parameters have similarly affected the Court's case-law on access to abortion. More specifically, this section highlights the main points of feminist criticism the Court has attracted with regard to its case-law on access to abortion. Moreover, it emphasises that the Court could primarily pay attention to certain interpretative tools that can lead to a feminism-informed interpretation of the Convention, i. e. one that addresses the points of feminist criticism the Court's case-law has raised. This technique of selecting and focusing on certain interpretative tools while performing the interpretative exercise has already been employed in the Court's abortion-related jurisprudence. However, the tools the Court chose to place more emphasis on were those that enabled it to reach a more restrictive interpretation of the provisions of the Convention related to abortion and, thus, not a feminism-informed conclusion. Using this technique to reach a feminist interpretation would not only allow the Court to address the concerns of feminist scholars, it would also strengthen the legitimacy of the Court's judgments, which would then be of a consistently progressive interpretative nature rather than inconsistently progressive, depending on whether a politically or morally sensitive matter is at issue.

First, from a socialist and intersectional feminist perspective, the emphasis the Court placed on abortion travelling in *A, B and C v. Ireland*[104] seems highly problematic. Indeed, although the Court has seen abortion travelling as an accessible alternative for those who cannot, for health-related reasons, have an abortion in their country of residence, accessibility to abortion travelling is limited for many. In other words, regarding abortion travelling as an accessible alternative to the inaccessibility of abortions ignores multiple intersecting forms of inequality and discrimination that prevent various pregnant persons from choosing this alternative. Specifically, pregnant persons lacking the socioeconomic means to travel abroad to receive an abortion are excluded from this 'alternative',[105] as are pregnant persons who face travel restrictions, such as those seeking protection.[106]

Although these socioeconomic factors exacerbate the fear pregnant persons experience when they wish to receive an abortion for health-related

103 Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law', AJIL 85 (1991), 613-645 (613-615).

104 ECtHR, *A, B and C* (n. 12), paras 239-240.

105 Vanessa Sauls Avolio, 'Rewriting Reproductive Rights: Applying Feminist Methodology to the European Court of Human Rights' Abortion Jurisprudence', Feminists@Law 6 (2017), 1-32 (24-28).

106 Nicola Dannenbring and Chiara Rimkus, 'The Violation of Ukrainian Refugees' Right to Reproductive Self-Determination in Poland', Völkerrechtsblog, 28 November 2022, doi: 10.17176/20221128-121443-0.

reasons but cannot do so in their country of residence, they are entirely neglected in the Court's assessment of the necessity of strict abortion policies in a democratic society. However, the Court could easily rebut this point of feminist criticism by paying attention to all the customary interpretative tools in a holistic fashion in line with the analysis in section III. above. Considering the inter-State consensus on the matter, this approach would allow the Court to conclude that the Convention requires Member States to not only grant access to abortion when there is a foetal impairment, a risk to the pregnant person's life or when the pregnancy was the result of a crime but also for reasons relating to the person's health or well-being during at least the first twelve weeks of pregnancy.[107] In such a scenario, all the State Parties would be required to grant access to abortion on these grounds and the enjoyment of pregnant persons' right to private life, and bodily autonomy would not be dependent on whether they are affected by socioeconomic factors exacerbating the sex-dependent restrictions imposed on them by the state. After all, the inaccessibility of abortions usually goes hand in hand with gender-related or racial discrimination.[108] Hence, the contextual interpretation of access to abortion under Art. 8 of the Convention against the backdrop of the prohibition of discrimination under Art. 14 of the Convention and considering the discriminatory impacts of strict abortion policies on the pregnant person could further support this broader interpretative outcome.

The Court's practice regarding the application of Art. 3 of the Convention to abortion cases is also problematic from a feminist perspective. To determine whether the required threshold of necessity is met for an Art. 3 violation to be acknowledged, the Court relies heavily on the applicant's vulnerability, which it determines on the basis of factors that are beyond the pregnant person's control (e. g. their age, the act giving rise to the pregnancy, or the foetus's disability).[109] This approach and abortion laws that allow abortions where a pregnancy is the result of a crime or on grounds of the foetus's abnormality essentially victimise pregnant persons, who are viewed as 'blameless' and, therefore, their will to receive an abortion is excused and respected by the legislature.[110] Conversely, if the pregnancy has resulted from personal sexual choices, then these same persons seem to be perceived as

107 See the analysis in section III. above. See also Katsoni, 'Right to Abortion' (n. 74).

108 Keeanga-Yamahtta Taylor, 'How Black Feminists Defined Abortion Rights', The New Yorker, 22 February 2022.

109 Avolio (n. 105), 15.

110 Christiane Ryan, 'The Margin of Appreciation in A, B and C v Ireland: A Disproportionate Response to The Violation of Women's Reproductive Freedom', UCL Journal of Law and Jurisprudence 3 (2014), 237-261 (251-253); Alison M. Jaggar, 'Regendering the U. S. Abortion Debate', in: Rickie Solinger (ed.), *Abortion Wars: A Half Century of Struggle, 1950-2000* (University of California Press 1998), 339-355 (354); Avolio (n. 105), 15.

blameworthy and, thus, as not deserving access to abortion.[111] In other words, infringing a pregnant person's bodily autonomy for reasons that are exclusively related to their reproductive capability is not sufficient for the Court to acknowledge the inhuman or degrading treatment they suffer, unless additional intersectional factors exacerbate this treatment and render them 'blameless' enough for their access to abortion to be excused.

The Court could also avoid this criticism if it were to employ the customary interpretative tools in a holistic manner. By taking into substantive consideration the systemic interpretation of the Convention against the background of the relevant rules in international law, as interpreted in other human rights jurisprudence, it can avoid revictimising pregnant persons in its judgments. In fact, the Committee on the Rights of the Child has already paved the way for such a non-victimising interpretation of human rights provisions on the prohibition of inhuman or degrading treatment by holding that factors of vulnerability should not be taken into account as decisive factors of whether a pregnant person has been subjected to inhuman or degrading treatment but as factors that exacerbate that suffering.[112] In this vein, the denial of access to abortion is itself a form of gender-based violence against women that may amount to cruel, inhuman, or degrading treatment, and this suffering may be further heightened on account of vulnerability.[113]

This interpretative conclusion is additionally supported in the contextual interpretation of Art. 3 of the Convention against the background of Art. 14 (Prohibition of discrimination). Acknowledging a foetus's disability as a sufficient reason to justify an abortion perpetuates notions of stereotyping disability as incompatible with a good life, while focusing on the criminal acts giving rise to the abortion victimises pregnant persons.[114] Against this backdrop, interpreting the Convention such that it leads to these conclusions cannot be seen as compatible with the anti-discriminatory context of the Court or the evolutive interpretation of the Convention.[115] In this vein, these anti-discriminatory considerations also point to the need to focus on the impact requiring pregnant persons to continue their pregnancy to term has on them, even where there is foetal impairment, instead of making accessibility of abortion dependent on such foetal impairment. By following this approach, the Court would not only counter feminist criticisms of the need to avoid victimising pregnant persons seeking abortions, it would also avoid

111 Jaggar (n. 110), 354.

112 Committee on the Rights of the Child, *Camila v Peru* (n. 93), paras 8.11-8.12.

113 Committee on the Rights of the Child, *Camila v Peru* (n. 93), paras 8.11-8.12.

114 Nadine Grünhagen and Vanessa Bliecke, '"Genetic Cleansing" Under the Guise of Women's Rights?', Völkerrechtsblog, 16 July 2021, doi: 10.17176/20210716-135718-0.

115 Grünhagen and Bliecke (n. 114).

making pronouncements that have been viewed as perpetuating the perception of disability as incompatible with a good life.

Ultimately, the very balancing exercise the Court engages in in its judgments while applying the limitations clause of Art. 8 of the Convention annihilates pregnant persons' selfhood.[116] In the context of this balancing exercise, a pregnant person's rights are weighed 'against other competing rights and freedoms invoked including those of the unborn child',[117] or even the freedoms of the foetus's 'father',[118] or 'grandparents'.[119] In her analysis, Vanessa Sauls Avolio rightly underlined the following paradox in this context: The foetus's – and even the father's or the grandparents' – interests are included in this balancing exercise only if domestic law and the State's morality standards acknowledge those interests as an element of the protection of morals.[120] If the State's domestic law protects and ensures an individual's access to abortion on broad terms, then no such balancing exercise is required. The Court's case-law has shown that liberal abortion laws themselves are compatible with the Convention and that it deems the regulation of abortion to be a matter that falls within the States' margin of appreciation.[121] As a result, pregnant persons' access to abortion is entirely dependent on the relevant domestic law, while the Court has become a fourth-instance court that assesses whether the domestic authorities have implemented that domestic legislation correctly.[122]

As the right to private life is not absolute under the Convention but may be limited pursuant to the limitations clause in Art. 8 (2), this weighing of competing interests cannot be easily avoided. Even Avolio, who embraced this point of criticism while rewriting some of the Court's judgments from a feminist perspective, could not help but engage in this balancing exercise and end by concluding that the scales tilt in favour of the pregnant person whenever the impacts of any denial of access to abortion are weighed against the protection of others' interests or the protection of morals.[123] To avoid having to conduct such a balancing of interests (which is annihilating overall),

116 Avolio (n. 105), 11; Rosemary Nossiff, 'Gendered Citizenship: Women, Equality, and Abortion Policy', New Political Science 29 (2007), 61-76 (62); Ryan (n. 110), 248-249.

117 ECtHR, *A. B. and C.* (n. 12), para. 213.

118 ECtHR, *Boso* (n. 15), para. 2; ECtHR, *Vo* (n. 11), para. 80.

119 Puppinck (n. 6).

120 Avolio (n. 105), 12. See also Helen Fenwick, Wendy Guns and Ben Warwick, 'A, B and C v Ireland' in: Loveday Hodson and Troy Lavers (eds), *Feminist Judgments in International Law,* (Hart Publishing 2019), 279-302.

121 See the analysis in section II. above. See, in particular, ECtHR, *Boso* (n. 15), para. 1; ECtHR, *A, B and C* (n. 12), para. 213.

122 Avolio (n. 105), 12-15.

123 Avolio (n. 105), 24.

one would have to reach the conclusion that restrictive abortion policies do not pursue a legitimate aim. Hence, attention will now turn to the question of whether there is an interpretation of the saving clause in Art. 8 (2) of the Convention that could exclude from its scope perceptions of the foetus as a child whose 'rights' are to be protected, or the 'rights' of the foetus's 'father' or 'grandparents' to save it, or generally any predominant morals in a given State according to which abortion should be illegal.

At first glance, these aims may appear to be influenced by morality. Taking a closer look, however, reveals that the restrictions on access to abortion do not actually aim to preserve foetal viability. In fact, as Alison M. Jaggar has rightly noted, if the supporters of restrictive abortion policies were actually motivated by the belief that foetal life is sacrosanct, then it should not matter whether that foetal life has resulted from a criminal act or whether, once born, the child would be disabled.[124] Yet, most restrictive abortion policies provide for exceptions in such cases. This confirms the idea that the rationale behind such laws is actually the will to control individuals' sexual life,[125] the intention to ensure the systemic preservation of women's (particularly poor women's) oppression and the enforcement of traditional gender-biased roles on pregnant persons.[126] Thus, a historic interpretation of the 'protection of morals' or of 'the rights of others' limitations clauses that takes into thorough account the historical background, the true aims of these policies and the contextual interpretation of these clauses in line with Art. 14 of the Convention (Prohibition of discrimination), could lead to the conclusion that the actual aims of restrictive abortion policies should not be seen as falling within the ambit of Art. 8 (2) of the Convention.

As the above analysis shows, the customary interpretative tools could lead to an interpretation of the Convention that meets the standards that feminist scholars have called for. However, to this end, the Court would have to utilise the interpretative technique of paying nuanced attention to the customary interpretative tools. Specifically, to achieve this outcome, the Court would have to pay less attention to a textual interpretation of the Convention in which the term 'protection of morals' may be seen as encompassing any moral views that are predominant in a given State and to pay more attention

124 Jaggar (n. 110), 354. See also Kathryn McNeilly, 'From the Right to Life to the Right to Livability: Radically Reapproaching 'Life' in Human Rights Politics', Australian Feminist Law Journal 41 (2015), 141-159.

125 Jaggar (n. 110), 354. See also Spyridoula (Sissy) Katsoni, 'Is the Feministisation of the ECtHR's Abortion-Related Jurisprudence a Realistic Expectation? Putting the ECtHR's Interpretation of the "Right to Abortion" Under the Feminist Microscope', Völkerrechtsblog, 28 January 2022, doi: 10.17176/20220128-180054-0.

126 Siegel (n. 98), 64-65.

to its contextual interpretation and to the actual purposes of restrictive abortion laws in light of their historical background. In fact, as this historical background constitutes an interpretative tool that falls under the supplementary interpretative means set out in Art. 32 of the VCLT, a feminist interpretation of the Convention would require the Court to interpret – and apply – the customary rule in Art. 32 of the VCLT as not having only determinative or confirmative function but a corrective one, too.[127]

This, however, is not as groundbreaking as it seems, not only because this interpretative technique has already been employed by other fora[128] but also because the Court itself has already paid more attention to certain means of treaty interpretation (those that could lead to a restrictive interpretation) in its abortion-related jurisprudence.[129] Hence, a feminist interpretation of the Convention would not require the Court to deviate from its practice; it would simply require it to depart from its conservative starting point (that is apparent in the intended restrictive interpretation of the Convention) and to utilise its interpretative technique to achieve a feminist interpretative outcome.

V. Concluding Remarks

This article highlighted the potential for the feministisation of the Court's jurisprudence on access to abortion by showing that the abortion-related provisions of the Convention could be interpreted in a manner that addresses those feminist criticisms that have been raised. It provided a brief overview of the Court's abortion-related jurisprudence and noted that the Court has left States a wide margin of appreciation with regard to the grounds on which they grant access to abortion in their domestic laws. However, the Court has required that the Member States grant access to abortion when the pregnant person's life is at risk and has stressed that, when a State has granted access to abortion on certain grounds under its domestic legal system, abortions on these grounds must be genuinely available in that State in practice.

127 Art. 32 of the VCLT provides that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order *to confirm* the meaning resulting from the application of article 31, or to *determine* the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.' [emphasis added]

128 See Panos Merkouris, 'Interpreting the Customary Rules on Interpretation', International Community Law Review 19 (2017), 126-155 (153-154).

129 See section III. above.

To reach such a restrictive interpretation of the Convention and to allow the States a wide margin of appreciation, the Court has employed an interpretative technique that prioritises the tools that afford the States broad discretion and it has paid less attention to interpretative tools that could have allowed it to require that Member States grant access to abortion on certain grounds. In this vein, emphasis was here placed on the persistence of a minority of States to restrictive abortion policies, on the moral perceptions in these States and on the accessibility of abortion travelling to those who cannot get access to an abortion in their country of residence.

The Court's jurisprudence on access to abortion can be and has been criticised on various grounds from a feminist perspective. More specifically, although abortion travelling is presented as an alternative in the Court's case-law, it is not in fact an effective solution for those who do not have the socioeconomic means to travel. Similarly, the Court's reasoning on the question of whether denial of access to abortion constitutes inhuman or degrading treatment can be seen as victimising pregnant persons, who need to be presented as victims in order to justify their access to abortion. Finally, the Court's test for assessing whether the infringement of a pregnant person's right to bodily autonomy is necessary to protect the interests and freedoms of others or to protect morals erases pregnant persons' selfhood. The deliberately restrictive interpretation reached by the Court – which on account of the interpretative technique applied has avoided addressing the politically and morally sensitive issue of when abortion is to be accessible – can justifiably be criticised as sexist.

The Court's avoidant attitude towards the politically and morally sensitive issue of when abortion is to be accessible is indicative of its conservative attitude towards morally and politically sensitive issues that are brought before it as well as of the selective dynamism it channels into its interpretation of the Convention.[130] In this vein, although the Court has dynamically interpreted the Convention and has criticised the paternalistic laws of States that have enabled forcible abortions, it has also restrictively interpreted the Convention and has allowed the States to decide themselves the circumstances under which they enable the forced continuation of a pregnancy.[131] Thus, depending on whether and how politically or morally sensitive the subject-matter of the dispute is, this nuanced attitude on the part of the Court in its abortion-related judgments not only provides a basis for feminist criticism, it further raises concerns about the legitimacy of the interpretative method applied by the Court.

130 Yildiz (n. 66), 86.

131 ECtHR, *G. M. and others* (n. 40), paras 123-125.

The question is whether the customary rules on treaty interpretation can lead to an interpretative outcome that meets feminist standards. The Court can reach such a conclusion if it employs the same interpretative technique it has already employed while aiming to reach a restrictive interpretation of the Convention. It will simply need to use this interpretative technique with the aim of reaching a feminist conclusion rather than a restrictive one, as it has done so far. More specifically, the Court will be able to interpret the Convention in a manner that meets the standards of feminist criticism if it focuses on the customary interpretative tools that allow a broader interpretation of the Convention's abortion-related provisions (such as its systemic and contextual interpretation) and focuses less on the tools that hinder such an outcome (such as the Convention's textual interpretation or the subsequent practice of a minority of Member States that persist in their restrictive abortion policies). In other words, to achieve a feminist interpretation of the Convention, the Court would not have to adopt a more subjective interpretative approach than it previously has; it would simply have to replace its conservative starting point with a feminist one.

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