

LEGAL STANDARDS TOOLKIT

Access to safe abortion, which is not only a human rights concern but also a public health issue, is not a stand-alone issue. It encompasses other fundamental human rights, including the right to life, freedom from cruel, inhuman, and degrading treatment, liberty and security of the person, privacy, human dignity, health, equality, and non-discrimination [0]. Therefore, although international human rights instruments have not expressly categorised abortion as a fundamental human right, an interpretation of the various instruments safeguarding human rights, including sexual and reproductive health and rights (SRHR), show that abortion is indeed a human right [1].

Human Rights principles and standards have an integral role to play with regard to the protection, promotion and realisation of SRHR including access to safe abortion services. Through the international human rights framework, the regional mechanisms and national laws and policies, access to safe abortion services can be safeguarded.

CONTENT WARNING

Please be aware this aspect of the toolkit will discuss details of legal cases that include rape, abuse, and other forms of violence.

African Human Rights System

The legal regime governing access to safe abortion services in Africa, like many parts of the world is patrilineal [2]. These regimes, which predominantly have western Christian roots, have fuelled the moral policing of sexual and reproductive health and rights (SRHR) in Africa to the detriment of many [3]. Unsafe abortions are preventable. However millions of pregnant persons continue to suffer great health risks including death due to lack of access [4].

[0] United Nations Human Rights- Office of the High Commissioner 'Information Series On Sexual And Reproductive Health And Rights Abortion' (2020)

[1] C Ngwena 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa'(2010) Vol. 32, No. 4 Human Rights Quarterly pp. 783-864

[2] C Ngwena & E Durojaye (2014) Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region Through Human Rights Pretoria University Law Press (PULP) 263.

[3] As above

[4] World Health Organization (2011) Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008 Geneva: World Health Organization

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In many African countries, colonial ethos, practices and laws persist including those that criminalise abortion [5]. These restrictive laws, policies, ethos and practices are remnants of colonial powers, whose laws and criminal codes defined the conditions for accessing abortion, and the associated penalties [6]. Suffice it to say that, as a result of this historical criminalisation, the moral stigmatisation of abortion in Africa is high thereby affecting access even in instances where abortion is permissible [7]. Additionally, because many people do not differentiate between restricted and illegal, there is ubiquitous belief that abortion is illegal in many jurisdictions [8]. Criminalisation is therefore both a barrier and a deterrent to safe abortion.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Maputo Protocol, ratified in majority of the African states, is the only regional human rights treaty that explicitly provides for the right to abortion on several grounds [9].

Article 14 2 (c), the Protocol expressly requires governments to “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest” and when the pregnancy threatens the life or mental or physical health of the woman, and in cases where there is a threat to the life of the foetus [10].

Statistics on Abortion laws in Sub-Saharan Africa as of 2019

**16
countries**



Highly restrictive abortion laws—six prohibit abortion altogether 10 permit it when a woman's life is in danger [11].

[5] C Ngwena (2013) 'Access To Safe Abortion As A Human Right In The African Region: Lessons From Emerging Jurisprudence Of Un Treaty monitoring Bodies' 29 SAJHR

[6] As above

[7] As above

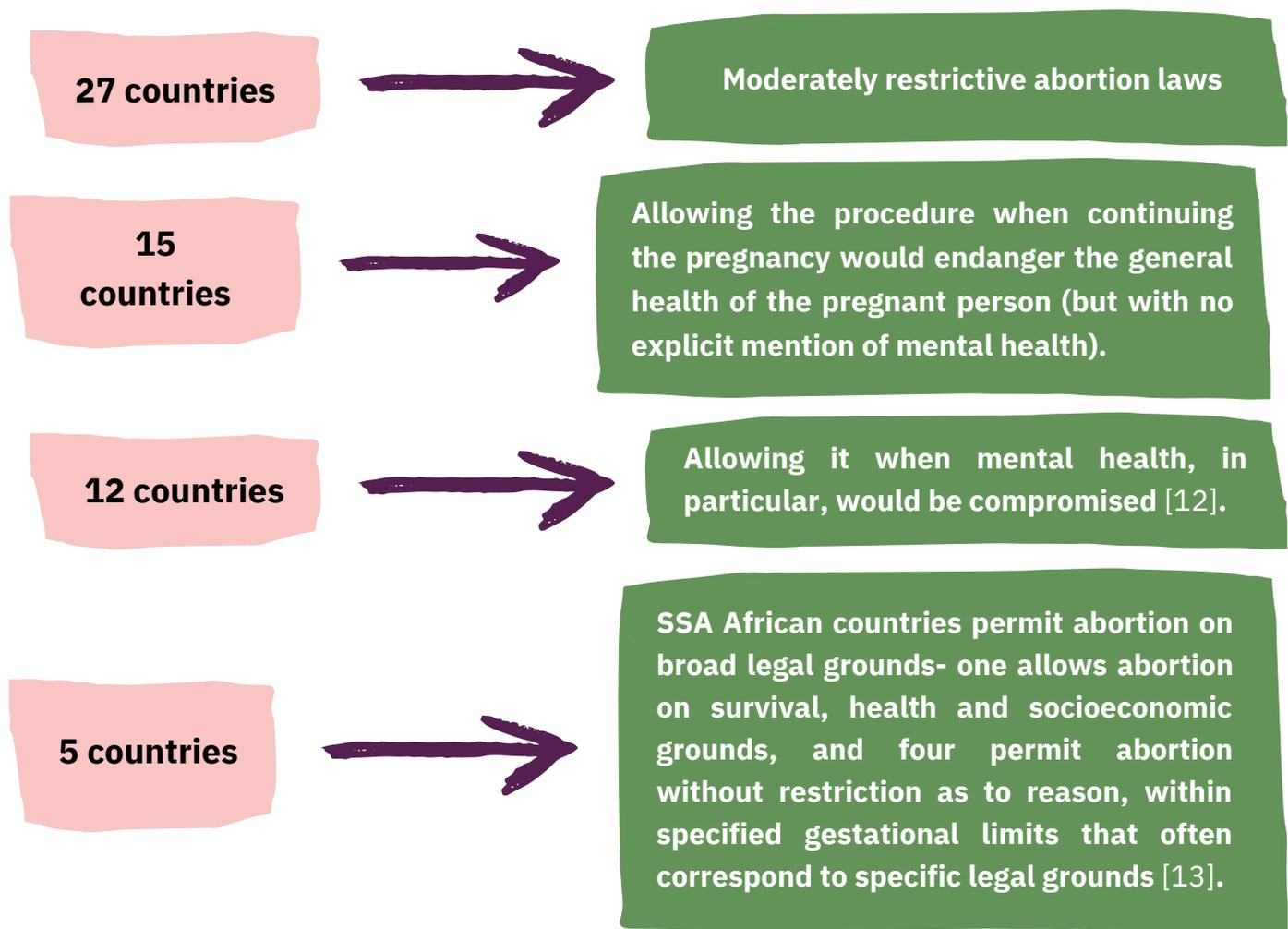
[8] As above

[9] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, entered into force 25 November 2005

<https://www.ohchr.org/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf>

[10] As above

[11] A Bankole and Others 'From Unsafe to Safe Abortion in Sub-Saharan Africa: Slow but Steady Progress' (2020) Guttmacher Institute <https://www.guttmacher.org/report/from-unsafe-to-safe-abortion-in-subsaharan-africa>



Grounds for abortion have been broadened beyond saving the life of the pregnant person to allowing abortion when there is a threat to the health of the pregnant person [14]. Several countries have also acknowledged rape, incest and foetal health or life as abortion grounds as grounds for procuring an abortion [15].

In 2014, African Commission on Human and Peoples’ Rights adopted General Comments No 2 on provisions of article 14 of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa. This GC addresses, amongst other things, family African planning, contraception and, also recognises abortion as a leading cause of death and illness among women in the African region [16].

[12] As above

[13] As above

[14] A Guillaume and C Rossier (2018) ‘Abortion around the world. An overview of legislation, measures, trends, and consequences’ 73 Population 217-306 <https://doi.org/10.3917/popu.1802.0225>

[15] As above

[16] African Commission on Human and People’s Rights (ACHPR) (2014) 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 <https://www.achpr.org/legalinstruments/detail?id=13>

Other initiatives

In 2013, African Commission on Human and People's Rights Member States made various commitments with regard to improving maternal health in Africa including, improving access to family planning and other health services such as safe abortions [17]. Following this meeting, in 2015, the ACHPR issued a communiqué to increase accountability for women's reproductive health and rights [18]. One of the commitments made in the communiqué was to initiate a continental campaign to decriminalize abortion in Africa [19]. The goal of this campaign is to end unsafe abortions, which result in the numerous injuries and deaths of women in Africa every year [20].

Inter-American Human Rights System

The Inter-American Court has held in its case law that the States must protect and guarantee sexual and reproductive rights in the following cases:

Artarvia Murillo and others v. Costa Rica:

Costa Rica banned in vitro fertilization in 2000 arguing that it was unconstitutional given it violated the right to life. The Court held that Costa Rica violated the rights to privacy and family life, and concluded that "the right to life of an unfertilized ovum did not supersede these rights" [21].

I.V. vs Bolivia:

The court found Bolivia responsible for the violation of the rights to personal integrity, freedom, dignity, private and family life because I.V. was forced sterilized in a Bolivian public hospital in 2000.

[17] The International Justice Resource Center (2016) 'African Human Rights Commission Launches Campaign To Decriminalize Abortion'<https://ijrcenter.org/2016/02/02/african-human-rights-commission-launches-campaign-to-decriminalize-abortion/>

[18] Press Release: Launch Of The Campaign For The Decriminalization Of Abortion In Africa: Women And Girls In Africa Are Counting On Us To Save Their Lives!

[19] As above

[20] As above

[21] O'Connell, C. (2014), Litigating Reproductive Health Rights In The Inter-American System: What Does A Winning Case Look Like?, Health and Human Rights Journal, <https://www.hhrjournal.org/2014/12/litigating-reproductive-health-rights-in-the-inter-american-system-what-does-a-winning-case-look-like/>

Additionally, the Court has pronounced only once about abortion in the provisional measures. The provisional measures are stipulated by the Court in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons [22].

Provisional measures with regard el Salvador in the matter of "B":

"B" was pregnant and the fetus had serious anencephaly. Also, the pregnancy endangered her life and health. In El Salvador, abortion is completely criminalized and doctors are prevented to conduct abortions. In 2013, the Court required El Salvador to guarantee all the medical actions "opportune and desirable" for "B".

In the Inter-American Commission on Human Rights, the Commission has urged the States to adopt comprehensive measures to protect sexual and reproductive rights by adopting regulatory framework design to ensure sexual and reproductive rights, and understanding that "denying the voluntary interruption of pregnancy in certain circumstances does constitute a violation of the fundamental rights" [23]. Also, the Commission has held in its case law that States have to guarantee the access to abortion:

Friendly settlement Paulina Ramirez v. Mexico.

In this friendly settlement, the Mexican government fully recognized the human violations that Paulina suffered given the State failed to conduct an abortion after she was raped when she was 14 years old. Mexico committed to accomplishing reparation measures to prevent the recurrence of this type of situation in the future [24].

Petition "B" v. El Salvador

The Commission admitted a petition against El Salvador to analyze if the state violated "B" human rights . In 2011, "B" faced a high-risk pregnancy and she could not access to an abortion because of the total ban in El Salvador [25]. This petition is related to the provisional measures adopted by the Inter-American Court in 2013.

[22] Inter-American Court of Human Rights (2013), Provisional measures with regard el Salvador Case B, https://www.corteidh.or.cr/docs/medidas/B_se_02_ing.pdf

[23] Inter-American Commission on Human Rights, (2017) , IACHR Urges All States to Adopt Comprehensive, Immediate Measures to Respect and Protect Women's Sexual and Reproductive Rights, Press release, https://www.oas.org/en/iachr/media_center/PReleases/2017/165.asp

[24] Inter-American Commission on Human Rights, (2007) , Informe 21/07, Friendly Settlement, <https://www.cidh.oas.org/annualrep/2007sp/Mexico161.02sp.htm>

[25] Inter-American Commission on Human Rights (2017), Petition 2003-13, <http://oea.org/en/iachr/decisions/2017/ESAD2003-13EN.pdf>

European Human Rights System

The European Human Rights System is the most established regional human rights system in the world grounded in the European Convention on Human Rights [26]. Over the years, the European Court jurisprudence has established several standards in sexual and reproductive rights, impacting Europe and the rest of the world, human rights bodies, and legal domestic systems generally observe the Court narratives [27]. In recent years, the European Court has analyzed abortion from the right to privacy perspective arguing that "legislation regulating the interruption of pregnancy touches upon the sphere of private life since whenever a woman is pregnant her private life becomes closely connected with the developing foetus" [28].

Case Tysiak in 2007 and P. and S.

The Court held that Poland violated Article 8 of the European Convention on Human Rights, the right to respect private life and family life because the Polish authorities denied the applicants access to an effective mechanism to interrupt their pregnancy legally [29].

Case of A.B. and C. v. Ireland

Three women living in Ireland had to travel to England to access an abortion. The court found that Ireland violated the right to respect for private and family life given the state failed to guarantee access to legal abortion to the victims [30]. Also, these cases address the responsibilities of health professionals in context with restrictive abortion laws [31].

Case P. and S. v. Poland.

P. had become pregnant as a result of rape when she was 14 years old. She sought a legal abortion; however, she faced multiple barriers due to the lack of a clear legal framework, and harassment from different actors. The Court held that Poland violated her right to liberty and contradicted the right to freedom from inhuman and degrading treatment [32].

[26] Oja, L., & Yamin, A. (2016). Woman in the European human rights system: How is the reproductive rights jurisprudence of the European Court of Human Rights constructing narratives of women's citizenship. *Columbia Journal of Gender and Law*, 32(1), 62-95.

[27] As above

[28] European Court of Human Rights (2007) *Tysiak v. Poland*, par. 66.

[29] European Court of Human Rights (2021), *Reproductive rights factsheet*, https://www.echr.coe.int/Documents/FS_Reproductive_ENG.pdf

[30] European Court of Human Rights (2010) *A, B and C v. Ireland*.

[31] Westeson, J. (2013) *Reproductive health information and abortion services: Standards developed by the European Court of Human Rights*, *International Journal of Gynecology & Obstetrics*, Volume 122, Issue 2, pages 173-176

[32] European Court of Human Rights (2012) *P and S v. Poland*.

Case of R.R. v. Poland

RR, who was pregnant with a fetus suffering from severe malformation, was denied prompt medical services in order to access to a legal abortion under the Polish Law [33]. Arising from these facts, the Court found a violation of the prohibition of inhuman and degrading treatment, because the victim faced several mistreatments, humiliations, and lack of information. Also, the Court found a violation of Article 8 given RR was unable to access effective diagnostic mechanism services to make an informed decision regarding the termination of her pregnancy [34].

European Union

European Union Law protects sexual and reproductive rights by the founding values: human dignity, freedom, equality, and respect for human rights, and the Charter of Fundamental Rights of the European Union, which establishes the right to physical and mental integrity and the right to private and family life, home and communications [35]. However, the Charter can be applied only when the Member States are implementing Union Law [36]. Additionally, in 2002 the European Parliament voted to adopt the Van Lackner report on sexual and reproductive rights as the "best practice" for women's reproductive rights and health [37], including abortion [38].

In this order of ideas, the Treaty on the Functioning of the European Union (TFEU) establishes in its Article 168 (1) [39] that European Union member states must provide “a high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.” [40]. This regulation is a Member State’s matter, and the European Union has no competence to interfere.

[33] Oja, L., & Yamin, A. (2016). Woman in the european human rights system: How is the reproductive rights jurisprudence of the european court of human rights constructing narratives of women's citizenship. *Columbia Journal of Gender and Law*, 32(1), 62-95.

[34] European Court of Human Rights (2011) RR v. Poland

[35] Meyer-resende M. (2018) Is Europe’s Problem Illiberal Majoritarianism Or Creeping Authoritarianism? *Carnegie Europe*, available Online: <https://Carnegieeurope.Eu/2018/06/13/Is-europe-s-problem-illiberal-majoritarianism-or-creeping-authoritarianism-pub-76587>

[36] Charter of Fundamental Rights of the European Union, Article 51.

[37] Czerwinski A. (2020), Sex, Politics, and Religion: The Clash between Poland and the European Union over Abortion, *Denver Journal of International Law Policy*, Volume 3, page 658

[38] Edite E., Committee on Women’s Rights and Gender Equality (2013), Report on sexual and reproductive health rights, European Parliament, available online: https://www.europarl.europa.eu/doceo/document/A-7-2013-0426_EN.html

[39] Treaty on the Functioning of the European Union (2007), Article 168

[40] Treaty on the Functioning of the European Union (2007), Article 168

The Court of Justice of the European Union analysed a case related to abortion:

Society to protect Unborn Children Ltd v. Grogan.

Student unions in Ireland were accused of publishing pamphlets with information on abortion clinics in the United Kingdom. In the judgment, the Court considered abortion a service and that Member States cannot prohibit access to information to this service. This is a relevant case in the European jurisprudence, but the ECJ avoided pronouncing if the EU law protects the right to abortion [41].

Universal Human Rights System

The need for legal abortion to be safe and accessible was supported by States at the International Conference on Population and Development, held in Cairo in 1994 and in the Beijing Platform for Action, in 1995 during the Fourth World Conference on Women [42].

Additionally, the United Nations Human Rights bodies have set up several human rights standards on sexual and reproductive rights [43].

The Human Rights Committee has pronounced that denying access to abortion can be linked to discrimination, torture, and gender-based violence:

Mallet v. Ireland and Whelan v. Ireland

In both cases the victims were forced to travel from Ireland to United Kingdom to terminate their nonviable pregnancies due to abortion restrictions in Ireland. The victims were subject to physical suffering and mental anguish given the State actions and omissions; in consequence, the Committee held that Ireland violated the prohibition against cruel, inhuman or degrading treatment found in article 7 of the Covenant. Besides, the human rights body mentioned that the criminalization of abortion stigmatizes women's actions constituting a source of emotional pain [46].

[41] Court of Justice of the European Union, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, Case C-159/90

[42] Office of the High Commissioner, United Nations (2020) Information series on sexual and reproductive rights, https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf.

[43] Office of the High Commissioner, United Nations (2020) Information series on sexual and reproductive rights, https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf.

[44] Human Rights Committee (2013) *Mellet v. Ireland*, par. 3.4

K.L. v. Peru and L.M.R. v. Argentina

The Committee analyzed the case of a 17 years old adolescent who demanded access to an abortion given she was carrying an anencephalic foetus and the pregnancy exposed her to life-threatening. However, the medical authorities did not provide the medical service to the adolescent. Eventually, she gave birth “to an anencephalic baby girl, who survived for four days, during which the mother had to breastfeed her” [45]. The Committee observed that Peru violated i) the article 7 of the Covenant given the mental suffering faced by K.L.; ii) the right to private life (article 17 of the Covenant) because the State denied her the opportunity to terminate her pregnancy; iii) children’s rights (article 24 of the Covenant) since she did not receive special care as a minor; and iv) finally, the right to access an adequate legal remedy due to lack of information from the authorities to the victim. Likewise, the Committee pronounced in the case L.M.R. vs. Argentina. In this case a 14 years girl with a disability experienced difficulties to access to a legal abortion in Argentina. Thus, the Committee declared that Argentina was responsible for the violation of articles 2, 3, 7 and 17 of the Covenant [46].

L.C. v. Peru.

L.C. was raped, and eventually got pregnant at the age of 13. She attempted to suicide by jumping from a building. She survived and she was diagnosed with several injuries, including paraplegia. The victim required an emergency surgery to prevent further injury; however, given her pregnancy the hospital postponed the surgery. Her mother demanded an abortion on the basis of the Peruvian Law given the right of their daughter was on danger; nevertheless, the hospital medical board considered L.C. life was not in danger. It was until the L.C. had a miscarriage that she could access to the medical procedure, several months after it was recommended. L.C. remained paralyzed from the neck down [47]. As a result, the CEDAW Committee found that Peru violated the right to equal protection (article 2 CEDAW), the obligation to guarantee of basic human rights and fundamental freedoms (article 3 CEDAW), the right to be freedom from sex role stereotyping and prejudice (article 5 CEDAW), and the right to health (article 12 CEDAW) together with the right to non-discrimination (article 1 CEDAW) [48].

[45] Human Rights Committee (2003) K.L. v. Peru, par. 2.6

[46] Human Rights Committee (2011) LMR v. Argentina

[47] Global Health and Human Rights Database (2011) L.C. v. Peru Summary, <https://www.globalhealthrights.org/pdf.php?ID=4924>

[48] Committee CEDAW (2011) L.C. v. Peru, https://www2.ohchr.org/english/law/docs/CEDAW-C-50-D-22-2009_sp.pdf

Summary Table of Human Rights Mechanisms

Universal System of Human Rights

Treaty	Article	Case Law
International Covenant on Civil and Political Rights (ICCPR)	<ul style="list-style-type: none"> • Article 3: Right to non-discrimination • Article 6: Right to life • Article 7: Right to freedom of torture and ill-treatment • Article 17: Right to privacy 	Human Rights Committee <ul style="list-style-type: none"> • LMR v. Argentina • Mallet v. Ireland • K.L. v. Peru • Whelan v. Ireland
International Covenant on Economic, Social and Cultural Rights	<ul style="list-style-type: none"> • Article 3: Right to non-discrimination • Article 12: Right to health • Article 15(b): Right to benefit from scientific progress 	-----
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	<ul style="list-style-type: none"> • Article 1 and 2: Right to life • Article 1 and 2: Right to freedom of torture and ill-treatment • Article 12: Right to health • Article 16: Right to family 	<ul style="list-style-type: none"> • L.C. v. Peru
United Nations Convention on the Rights of the Child	<ul style="list-style-type: none"> • Article 14: Right to health 	-----
Convention on the Rights of Persons with Disabilities	<ul style="list-style-type: none"> • Article 25: Right to health 	-----

United Nations
Convention
against Torture

- Article 2 and 16: Right to freedom of torture and ill-treatment

European Human Rights System

Treaty

Article

Case Law

Revised
European Social
Charter

- Article 12: Right to health

European
Convention on
Human Rights

- Article 2: Right to life
- Article 3: Right to freedom of torture and ill-treatment
- Article 8: Right to privacy
- Article 10: Right to receive information
- Article 14: Right to non-discrimination

European Court of Human Rights

- [Tysiac v Poland 2007](#)
- [R.R. vs Poland 2011](#)
- [P. and S. v Poland 2012](#)
- [A.,B., and C., v Irland 2010](#)
- [K.V. v Poland, 2021](#)
- [A.K. v Poland, 2021](#)
- [E.P.](#)
- [M.O.-M v. Poland, 2021](#)
- [B. v Poland, 2021](#)

Convention on
Preventing and
Combating
Violence Against
Women and
Domestic
Violence

European Union

Treaty	Article	Case Law
<p>Charter of Fundamental Rights</p>	<ul style="list-style-type: none"> • Article 2: the right to life • Article 3: the right to personal integrity • Article 4: the Right to freedom of torture and ill-treatment • Article 7: the Right to private life 	<p>Court of Justice of the European Union</p> <ul style="list-style-type: none"> • <u>Unborn Children Ltd v. Grogan</u>

Inter-American Human Rights System

Treaty	Article	Case Law
<p>American Convention on Human Rights</p>	<ul style="list-style-type: none"> • Article 4: the right to life • Article 5: the right to personal integrity • Article 5: the Right to freedom of torture and ill-treatment • Article 11: the right to private life 	<p>Inter-American Court of Human Rights</p> <ul style="list-style-type: none"> • <u>Provisional measures with regard to el Salvador, Case B</u> <p>Inter-American Commission on Human Rights</p> <ul style="list-style-type: none"> • <u>Paulina Ramírez v Mexico</u> (Friendly settlement) • <u>B. v. El Salvador</u> (Admissibility report)
<p>Additional Protocol to the American Convention on</p>	<ul style="list-style-type: none"> • Article 2 and 16: Right to freedom of torture and ill-treatment 	<p>-----</p>

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)

- Article 3: Obligation of non-discrimination
- Article 10: Right to health

Inter-American Convention for the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará)

- Article 4: Right to life
- Article 4: Right to personal integrity
- Article 4: Right not to be subjected to torture
- Article 7: Duties of the states

B. v. El Salvador (Admissibility report)

African Human Rights System

Treaty

Article

Case Law

African Charter on Human and Peoples' Rights

- Article 12: Right to health

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

- Article 14 (2): Right to the protection of reproductive rights