Navigating Rough Seas: Women on Waves’ Legal Options for Overcoming Resistant States

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Cover Page Footnote
J.D. Candidate, 2020, The University of Chicago Law School. I would like to thank Jordanna and Emma Dulaney for first telling me about Women on Waves. Thank you as well to the CJIL board and Professor Claudia M. Flores, for providing me with invaluable feedback on this Comment.
Navigating Rough Seas: Women on Waves’ Legal Options for Overcoming Resistant States
Jennifer Bisgaier *

Abstract

Women on Waves is a Dutch nonprofit that seeks to provide women with safe abortion services and health information, as well as to raise public awareness of countries with restrictive abortion laws. One of the means through which the group achieves these goals is its ship campaigns, in which Women on Waves sails a ship to the harbor of a country with restrictive laws, and then brings local women out to international waters to give them medical abortion pills. In 2017, Guatemala expelled the group’s ship from its dock before it had the chance to fulfill its mission, claiming that Women on Waves represented a threat to public order and security. This Comment examines possible legal actions that Women on Waves and/or Guatemalan women could pursue against Guatemala following this incident, including claims based on violations of the International Covenant on Civil and Political Rights and/or the American Convention on Human Rights, as well as the right to innocent passage in the law of the sea.

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I. INTRODUCTION

The morning of Wednesday, February 22, 2017, a 36-foot sailboat docked at the Marina Pez Vela harbor in San Jose, Guatemala. The boat was navigated by Women on Waves, a nonprofit dedicated to preventing unsafe abortions.1 Founded in 1999 by Dutch physician Dr. Rebecca Gomperts, Women on Waves seeks to provide abortion services to women living in countries with restrictive abortion laws.2 Women on Waves achieves this goal in part through its ship campaigns. During a ship campaign, the group sails women twelve miles off the coastline to international waters to give them medical abortion pills. Because the ship is registered in the Netherlands and has a permit from the Dutch Ministry of Health,3 Dutch law applies when the ship is in international waters.4

During Women on Waves’ trip to Guatemala, however, impediments quickly emerged. Within twenty-four hours of the ship’s docking, the Guatemalan army blocked the pier, preventing ships from entering or leaving the port. At a press conference, the military stated that President Jimmy Morales had instructed it to prevent Women on Waves from entering international waters.5 Over the next few days, the army forbade the ship’s crew members from leaving the pier for any reason, even to obtain additional food and water. The army ultimately allowed crew members to use the bathroom (only if escorted by ten guards) after outcry from human rights organizations.6 Around midnight on Friday, Guatemalan Immigration informed Women on Waves that it would expel the ship for violating public order, national interest, and state security.7 The ship departed the following evening on Saturday, February 25, 2017.

Guatemala is not the first country to challenge Women on Waves. Since its founding, the group has faced backlash on several of its ship campaigns. To date, the group has sent its boats to seven countries: Ireland, Poland, Portugal, Spain, Morocco, Guatemala, and Mexico.8 In its initial voyage to Ireland in 2001, Women on Waves was forced to cut the mission short for failure to obtain proper Dutch

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2 Restrictive abortion laws include laws that either ban abortion entirely or permit abortion only in cases such as rape, incest, risk to the woman, and /or fetal problems.
6 Id.
7 Id.
8 Abortion Ship Campaigns, WOMEN ON WAVES, http://perma.cc/7LVC-NF5Q.
In 2004, Portuguese naval warships blocked Women on Waves from entering the country’s territorial waters. Five years later, the European Court of Human Rights (ECtHR) ruled that Portugal violated Article 10 of the European Convention of Human Rights (ECHR), freedom of expression, by interfering with Women on Waves’ mission.10 In 2012, Morocco’s navy prevented Women on Waves from docking.11

To gain visibility on an international scale, Women on Waves must have the ability to enter countries’ territorial waters. If states were able to get ahead of Women on Waves’ strategy and prevent its ship from docking at all, the results could be devastating for the nonprofit. This Comment analyzes whether states have the authority to restrict Women on Waves from entering their national waters. This Comment will also assess whether states have the authority to prevent Guatemalan women from accessing the group’s resources and information. This issue is relevant today as numerous countries continue to limit women’s access to abortion, and Women on Waves offers a highly creative solution to provide women with care and raise awareness. Given Women on Waves’ recent trips to Guatemala and Mexico, as well as the persistence of restrictive abortion laws throughout Latin America, this Comment focuses on that region in assessing Women on Waves’ legal options. This Comment will explore if Women on Waves’ legal battles are best fought by focusing on the organization’s rights to freedom of expression and innocent passage, rather than women’s rights in general.

While previous scholarly work has analyzed Women on Waves’ ship campaigns, these articles focused on earlier campaigns in Europe and emphasized recourse that the group could take through the law of the sea.12 This Comment explores issues that have yet to be addressed by the scholarship, such as how the

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Inter-American System would treat Women on Waves, and whether invoking the human rights of local women—in addition to those of the organization—would impact litigation.

This Comment is divided into six Sections. Section II discusses background information on Women on Waves, including its mission and various campaigns to get women access to abortion pills and information. Next, Section III describes potential human rights that Guatemalan women could invoke to gain access to Women on Waves’ services and information, in particular rights related to reproduction, the right to access information, and the right to freedom of movement. Section IV analyzes two possible rights that Women on Waves itself could rely upon: the right to freedom of expression under international human rights legal instruments and the right of innocent passage under the U.N. Convention on the Law of the Sea (UNCLOS). Lastly, Section V outlines potential causes of action that local women and Women on Waves could bring against Guatemala. The Comment concludes by noting the nonprofit’s best options and highlighting the importance of forum selection in ensuring Women on Waves can continue to make these sorts of trips.

II. WOMEN ON WAVES’ MISSION

Women on Waves’ mission is twofold: 1) to provide women with information (through trainings, workshops, hotlines, and apps) as well as access to safe early-term abortions; and 2) to raise public awareness regarding countries’ restrictive abortion laws.13 Women on Waves’ legal problems may not be entirely negative for the group.

The group has been extremely creative in its approach to the first goal. In addition to its ship campaigns, Women on Waves has also employed advanced technology, including drones and robots, to deliver abortion pills to women in countries with restrictive abortion laws. In 2015, the nonprofit successfully completed its first “Abortion Drone” campaign in Poland, near the German border. Though German police quickly confiscated the drone controllers, two Polish women were able to access the pills.14 In 2018, Women on Waves used a robot, operated remotely from the Netherlands, to deliver pills in Northern Ireland, enabling three women to swallow the pill before Irish police “arrested” the robots.15

13 Who Are We?, supra note 3 (“Women on Waves wants to respond to an urgent medical need and draw public attention to the consequences of unwanted pregnancy and illegal abortion.”).
15 Abortion Robot Delivered Abortion Pills to 3 Women in Belfast, WOMEN ON WAVES (May 31, 2018), http://perma.cc/CGE5-VHWK.
Beyond the dramatic ship, drone, and robot campaigns, which garner the most media attention, Women on Waves also provides healthcare information to women. It often operates hotlines for the women in countries that it visits, as well as many other countries. The group has also conducted on-site trainings on using the drug misoprostol to safely induce abortion in a number of countries. Additionally, Women on Waves’ website features numerous resources, and the group founded a separate organization, Women on Web, devoted specifically to providing information online about how to safely access abortion. Several countries, including Turkey and Saudi Arabia, have blocked the website. States’ refusal to allow Women on Waves to dock its boat, operate its technology, and run its hotlines and websites within their borders is clearly hurting these efforts.

However, while countries’ resistance to the ship and technology campaigns are detrimental for Women on Waves’ first objective, the backlash very much supports the group’s second objective. In fact, in recapping its trip to Guatemala, Women on Waves noted the extensive international press coverage as a major accomplishment. Additionally, the local press coverage almost certainly helped Women on Waves to better advertise its hotline services; over sixty women called the hotline in just two days.

Several countries have changed their abortion laws following Women on Waves campaigns combined with other political and social organizing efforts. For example, Portugal legalized abortion two and half years after Women on Waves’ mission, while Spain liberalized its abortion laws two years after Women on Waves’ visit. In March 2018, Dr. Gomperts told Politico, “[t]o change people’s opinions, you have to make visible the legal realities.”

### III. RIGHTS OF GUATEMALAN WOMEN

This Section focuses on three types of rights under international law that Guatemalan women could raise in bringing claims against Guatemala: reproductive rights, the right to access information, and the right to leave. Guatemalan women could pursue legal action either through the U.N. or the
Inter-American System (the human rights system of the Organization of American States (OAS)). The U.N. has a wide array of legal instruments pertaining to these rights, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the U.N. Convention on the Elimination of All Forms of Discrimination (CEDAW), and the International Covenant on Economic, Social and Cultural Rights (ICESCR)). 24

The Inter-American System features two predominant human rights agreements: the American Declaration of the Rights and Duties of Man (American Declaration) and the American Convention on Human Rights (American Convention).

A. Reproductive Rights

Reproductive rights are entangled in complex legal issues, in particular determining when life begins. Reproductive rights also connect to a wide range of other rights including the right to privacy, health, human dignity, access to information, and life. The legal definition of the beginning of life varies depending on the international organization and international agreement. This subsection will cover legal instruments in both the U.N. and the Inter-American System. Within the U.N., the UDHR serves as the foundational document for human rights standards, and several subsequent treaties—detailed below—have elaborated on those standards. Within the Inter-American System, the American Declaration and the American Convention both describe human rights standards for the region. While the two agreements are generally consistent, there are some notable discrepancies pertaining to the start of life.

1. The U.N.’s approach to reproductive rights has expanded, but the right to abortion remains qualified.

The UDHR, adopted by the U.N. in 1948, states, “All human beings are born free and equal.” 25 Though the UDHR is not legally binding, it does establish internationally recognizable values pertaining to human rights. 26

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24 The UDHR, ICCPR, and ICESCR together form the International Bill of Human Rights. While the UDHR sets forth general aspirational principles, some of which are considered customary law, the ICCPR and ICESCR each define specific rights and limitations. CEDAW, which was adopted over a decade after the ICCPR and ICESCR, is considered to be an international bill of rights for women. While a large number of states have ratified all four agreements, there is some variation.


a) The International Covenant on Civil and Political Rights (ICCPR) grants rights that are tied to reproductive health.

The U.N. Human Rights Committee (UNHRC), which interprets and enforces the International Covenant on Civil and Political Rights (ICCPR), found a human right to abortion when the pregnancy endangers the life of the woman or there is a fatal fetal defect.27 For instance, in 2005, the UNHRC held that Peru violated the ICCPR by denying a seventeen-year-old girl (named K.L.) an abortion when she was found to have a life-threatening pregnancy due to the fetus possessing a fetal anomaly.28 Unlike the UDHR, the ICCPR legally binds the states that ratify it.29 The UNHRC held that Peru violated Articles 2 (state obligations to ensure citizens’ rights), 3 (equal rights of men and women), 6 (right to life), 7 (prohibition against cruel and inhuman treatment), 17 (right to privacy), 24 (rights of children), and 26 (prohibition against discrimination) of the ICCPR.30

In 2016, the UNHRC ruled in Mellet v. Ireland31 that Ireland’s abortion law violated the ICCPR because it banned abortion in cases of fatal fetal abnormalities.32 The opinion emphasized women’s right to obtain information. Ireland had passed the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act in 1995.33 This Act provided very particular circumstances in which counselors and health providers could give women information on abortion. For example, the Act prohibited the provision of any written materials unless specifically requested by the woman. The plaintiff, an Irish citizen named Amanda Jane Mellet, found out twenty-one weeks into her pregnancy that her fetus had congenital heart defects and would die shortly before or after birth. Both the doctor and the midwife in the Irish hospital simply told Mellet that she would have to travel for an abortion. They did not provide any referral services. Mellet travelled to the U.K. to terminate her pregnancy and was unable to receive aftercare or bereavement counseling upon her return to Ireland. The UNHRC found that Ireland’s law violated Article 19 of the ICCPR, concerning freedom of opinion and expression, stating:

27 These types of abortions, in which the procedure is performed only out of medical necessity due to either potential harm to the woman or unviability of the fetus, are known as therapeutic abortions.
29 Most Central and South American states, including Guatemala, have ratified the ICCPR.
32 See id.
The violation of her right to access sexual and reproductive health information was inflicted because she was a woman in need of terminating her pregnancy. Male patients in Ireland are not similarly denied critical health information and are not pushed out and abandoned by the health care system when requiring such information.34

Most prominently, on October 30, 2018, the UNHRC issued the General Comment No. 36 on Article 6 of the ICCPR, the Right to Life. This Comment was the culmination of a lengthy three-year drafting process. It employs language similar to the terms used in the Mellet case, stating in paragraph 9:

Although States parties may adopt measures designed to regulate terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman. . . . States parties must provide safe access to abortion to protect the life and health of pregnant women, and in situations in which carrying a pregnancy to term would cause the woman substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or when the fetus suffers from fatal impairment. . . . States parties [may not] introduce humiliating or unreasonably burdensome requirements on women seeking to undergo abortion. The duty to protect the lives of women against the health risks associated with unsafe abortions requires States parties to ensure access for women and men, and, in particular, adolescents, to information and education about reproductive options, and to a wide range of contraceptive methods.35

General Comment No. 36 is meant to provide guidelines for states so that they can comply fully with the rights listed in Article 6.36 In paragraph 9, the UNHRC greatly expanded state obligations to protect reproductive rights. Thus far, countries’ reactions have been predictably mixed. Several countries had submitted feedback on the 2017 draft. Malta, Poland, and Russia all rejected the findings of the General Comment, claiming there is no right to abortion under the ICCPR.37 The U.S. stated that the “committee provides little or no authoritative legal support or treaty analysis grounded in established rules of treaty interpretation under international law to support many of its positions.”38 Other

34 Regulation of Information Act, supra note 33, at 6.
37 See Permanent Mission of the Republic of Malta, Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to Life (2017); see also Republic of Poland, Remarks of Poland to the General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (2017); see also Russian Federation, Preliminary Comments on the Draft General Comment No. 36 on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights, ¶ 7 (2017).
38 United States of America, Observations of the United States of America on the Human Rights Committee’s Draft General Comment No. 36 on Article 6 – Right to Life, ¶ 3 (Oct. 6, 2017).
countries were more positive about the General Comment and its groundbreaking perspective on reproductive rights. For example, the U.K. wrote that it is “generally supportive of paragraph 9.”\textsuperscript{39} Even more enthusiastic, the Netherlands wrote that it “welcomes” the views stated in paragraph 9.\textsuperscript{40} Ultimately, General Comment No. 36 serves solely as a guiding document; each state and region is still permitted to enact its own rules. While the UNHRC has used the ICCPR to create increasingly supportive documents on abortion rights, it has yet to enforce these rights beyond extreme cases posing serious health dangers to the woman.

\textit{b) The U.N. Convention on the Elimination of All Forms of Discrimination (CEDAW) recognizes reproductive rights.}

Beyond the UDHR and the ICCPR, other international instruments have addressed women’s human rights. The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a legally binding treaty adopted in 1979 as an international bill of rights for women,\textsuperscript{41} specifically recognizes women’s reproductive rights.\textsuperscript{42} All but five states have signed CEDAW. Two states, including the U.S., have signed but not ratified the treaty. CEDAW states:

\begin{quote}
State Parties shall . . . ensure, on a basis of equality of men and women . . . [t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.\textsuperscript{43}
\end{quote}

The CEDAW Committee, which interprets CEDAW’s mandates and monitors countries to ensure they properly implement the agreement, consists of twenty-three women’s rights experts from countries across the world.\textsuperscript{44} In 2011, the CEDAW committee first analyzed abortion in \textit{L.C. v. Peru}.\textsuperscript{45} L.C., a thirteen-


\textsuperscript{40} Kingdom of the Netherlands, Comments of the Netherlands to the Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, ¶ 7.


\textsuperscript{43} Id.


year-old girl, became pregnant after being raped by a thirty-four-year-old man. L.C. attempted suicide, and her subsequent injuries left her at risk of becoming permanently disabled if she continued her pregnancy. The hospital’s medical board denied L.C.’s request for an abortion. L.C. ultimately miscarried and became a permanent paraplegic. The committee found that Peru violated L.C.’s right to health, integrity, bodily autonomy, and equal treatment. The committee stated that Peru “should [] review its legislation with a view to decriminalizing abortion when the pregnancy results from rape or sexual abuse.”

The CEDAW Committee has also issued inquiries to specific members states restricting access to abortion in violation of CEDAW. However, while these inquiries are critical of such restrictive laws, they continue to focus on therapeutic abortions, as well as abortions in cases of rape and incest, as most critical. In its observations of the Dominican Republic in 2013, the Committee recommended that the state “[e]nsure that the draft amendment to the Criminal Code, which decriminalizes abortion in cases in which the mother’s life is threatened, will be expeditiously adopted and extended to cover other circumstances, such as rape, incest and serious malformation of the foetus.” Other committee reports make similar specifications, including its observations on Angola, Peru, and (most recently) Northern Ireland. Thus, while the Committee interprets CEDAW to

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46 L.C. v. Peru, supra note 45, at ¶ 2.1.
47 Id. at ¶ 2.3.
48 Id. at ¶ 2.6.
49 Id. at ¶¶ 2.9, 2.11.
50 See generally id.
51 Id. at ¶ 9(b)(iii).
52 Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of the Dominican Republic, ¶ 37(c), U.N. Doc. CEDAW/C/DOM/CO/6-7 (July 30, 2013).
53 “Consider removing punitive legislative provisions imposed on women who undergo abortion, in line with the Committee’s general recommendation 24 (1999) on women and health, and broadening the conditions under which abortion can be legally available, including when pregnancy is harmful to the mother’s health and in instances of rape and incest.” Comm. on the Elimination of Discrimination against Women, Concluding observations on the sixth periodic report of Angola adopted by the Committee at its fifty fourth session, ¶ 32(g), U.N. Doc. CEDAW/C/AGO/CO/6 (Mar. 1, 2013) (emphasis added).
54 “[T]he Committee recommends that the State party: (a) Extend the grounds for legalization of abortion to cases of rape, incest and severe fetal impairment; (b) Ensure the availability of abortion services and provide women with access to high-quality post-abortion care, especially in cases of complications resulting from unsafe abortions . . .” Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Peru, ¶ 36, U.N. Doc. CEDAW/C/PER/CO/7-8 (July 24, 2014) (emphasis added).
55 “[The Committee] notes the great harm and suffering resulting from the physical and mental anguish of carrying an unwanted pregnancy to full term, especially in cases of rape, incest and severe fetal
grant broad rights to women in terms of reproductive health, it continues to emphasize extreme scenarios such as rape, incest, and harm to woman or fetus.

c) International Covenant on Economic, Social and Cultural Rights (ICESCR) interpretations recognize reproductive rights but fail to offer viable recourse.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the U.N. in 1966. It is a legally binding document that is implemented by the Committee on Economic, Social and Cultural Rights (CESCR), which consists of eighteen independent experts. The CESCR performs a number of functions, including examining countries’ reports; assessing communications from individuals claiming their ICESCR rights have been violated; investigating grave and/or systematic violations of rights; and publishing interpretations on ICESCR provisions (general comments).

Article 12 of the ICESCR states that everyone has a right “to the enjoyment of the highest attainable standard of physical and mental health.” This article has been interpreted by the CESCR to include reproductive rights. In 2016, in General Comment No. 22 on the Right to Sexual and Reproductive Health, the CESCR asserted that “[e]ssential medicines should be available, including . . . medicines for abortion and for post-abortion care.” The comment also calls for

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“information accessibility” for all types of sexual and reproductive health, including abortion care.62

While the most recent General Comment is a major advancement for international reproductive rights, it still provides little recourse for individuals seeking justice. Unlike the ICCPR, many rights under the ICESCR are progressively realized, meaning states are not required to demonstrate immediate compliance, but must show meaningful progress. The “fluid” nature of these ICESCR rights makes them unsuitable for quasi-judicial oversight.63 This difference was largely due to the fact that—at the time of adoption—ICESCR rights were considered to be novel and uncodified by member states, while ICCPR rights were widely recognized by states’ preexisting laws.64 In 2008, the U.N. General Assembly adopted the Optional Protocol to the ICESCR, which provides an individual complaint mechanism.65 However, the CESC has yet to consider an individual complaint pertaining to abortion. Additionally, while several of the CESC’s concluding observations on state reports have been critical of states’ abortion laws, the criticism tends to focus on extreme cases of “when pregnancies are life threatening or a result of rape or incest.”66 Thus, the non-judicial oversight provided by the CESC, along with the quasi-judicial oversight of the CEDAW committee and the UNHRC, demonstrate the U.N. is still unwilling to enforce an expansive view of reproductive rights, even if treaties’ interpretations are pushing in that direction.

2. The Inter-American System’s recognition of reproductive rights remains limited.

The Inter-American System for protecting human rights is more constrictive than the U.N. in terms of reproductive rights. The system, created by the Organization of American States (OAS) and its thirty-five members, has two

64 See  id.
central documents that pertain to these rights. The first, the American Declaration of the Rights and Duties of Man (American Declaration), was adopted in 1948 and set up principles that all OAS member states agreed to follow. The American Declaration was the world’s first-ever human rights agreement, adopted just eight months before the U.N.’s UDHR. The Declaration states, “All men are born free and equal.”67 The second agreement is the American Convention on Human Rights (also known as the Pact of San José) (American Convention), which was adopted in 1969 and entered into force in 1978. The Convention’s provisions are legally enforceable by the Inter-American Court of Human Rights (IACHR). The American Convention states that “[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”68 The American Convention is unique among other international human rights agreements in its explicit recognition of life at conception.69 While all OAS members follow the American Declaration, only twenty-four out of the thirty-five member states have ratified the American Convention. Most countries in Central and South America, including Guatemala, recognize the American Convention.70

The Inter-American System features two judicial bodies that implement these human rights agreements: the Inter-American Commission on Human Rights and the IACHR. Created by the OAS in 1959, the Inter-American Commission is a quasi-judicial body—not a court—that releases non-binding resolutions and reports.71 It consists of seven independent members. The Commission aims to observe and protect human rights by monitoring OAS member states and calling attention to human rights violations. It cannot, however, compel state action.72

The IACHR, on the other hand, is a court that can issue judgments involving both monetary damages and injunctive relief. Established in 1979, the IACHR serves both adjudicatory purposes, by hearing cases about state violations of human rights, and advisory functions, by issuing advisory opinions on a range of topics. The court may serve in its role as adjudicator only for countries that have

67 American Declaration of the Rights and Duties of Man, Preamble, May 2, 1948, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.
71 See De Jesus, supra note 69, at 224–25.
72 See id. at 225–26.
voluntarily submitted to its jurisdiction by ratifying the American Convention. Thus, countries like the U.S. and Canada that have not recognized the Convention are not within the IACHR’s jurisdiction. However, the court may issue advisory opinions about any OAS member state, regardless of whether or not it has ratified the American Convention. To bring a case before the IACHR, individuals, groups, and non-governmental organizations (NGOs) must first file a petition with the Inter-American Commission.73

Both the Inter-American Commission on Human Rights and the IACHR have ruled that the American Declaration should not be construed to mean that life begins at conception. In 1981, the Inter-American Commission ruled in *White v. United States*74 (also known as the “Baby Boy case”) that legalization of voluntary abortion is consistent with both the American Declaration and the American Convention.75 In this case, a seventeen-year-old girl voluntarily underwent a procedure to abort her approximately six-month-old fetus. A jury convicted the doctor of manslaughter, and the Massachusetts Supreme Court subsequently reversed the jury verdict. Following the reversal, Catholics for Christian Political Action filed a petition against the U.S. and the Commonwealth of Massachusetts before the Inter-American Commission.76 Though the Commission ruled that neither the American Declaration nor the American Convention forbid the legalization of abortion, the decision did not by any means create a legal right to abortion within the Inter-American System.77

In the years since the Baby Boy case, neither human rights body has explicitly ruled on an unlimited right to abortion. Many abortion cases have involved extreme scenarios featuring rape or danger to the woman. For example, in 2007, the Inter-American Commission oversaw a settlement in which the Mexican government admitted to violating a thirteen-year-old girl’s right to health by denying her an abortion after she was raped.78

The IACHR recently reaffirmed Baby Boy in 2012 in a case brought by nine infertile Costa Rican couples seeking in vitro fertilization (IVF) treatment. The IACHR struck down Costa Rica’s ban on IVF and reaffirmed the Baby Boy case,

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73 *See* American Convention on Human Rights, *supra* note 68, at art. 44.
75 The resolution maintained that the use of the phrase “in general” in Article 4(1) of the American Convention demonstrates that unborn children do not have an “absolute” right to life. *Id* at ¶¶ 19(e), 25.
76 *See id.; see also* De Jesus, *supra* note 69, at 231.
77 *See De Jesus, supra* note 69, at 274.
holding that life does not begin at conception. Specifically, the court stated that “the regulatory trends in international law do not lead to the conclusion that the embryo should be treated in the same way as a person, or that it has a right to life.” The decision focused on women’s right to privacy, stating, “The right to private life is related to: (i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right.” Still, as this case focused on IVF, it did not further elaborate on women’s abortion rights.

B. The Right to Access Information

In blocking Women on Waves’ ship, Guatemala not only stopped women from accessing the group’s services, but also prevented them from accessing the information that Women on Waves offered on reproduction, health, and safety. Thus, the right to access information is relevant. Scholars often view the right to access information as naturally connected to the right to freedom of expression. After all, there is little point to expressing oneself if no one is capable of witnessing the expression. Therefore, the rights of the audience (or the public at large) to listen and to receive information are a crucial component of freedom of speech and expression.

U.N. member states recognize the right to access information in several principal documents. In 1946, the U.N. General Assembly adopted Resolution 59(1), which states, “Freedom of information is a fundamental human right and . . . the touchstone of all the freedoms to which the UN is consecrated.” Article 19 of the Universal Declaration of Human Rights (UDHR) states that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart

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80 Id. at ¶ 253.
81 Id. at ¶ 146.
82 See, for example, Susan Nevelow Mart, The Right to Receive Information, 95 LAW LIBR. J. 175 (2003). Numerous U.S. Supreme Court cases grant the right to access information as an implicit part of the First Amendment’s free speech clause. See, for example, Martin v. Struthers, 319 U.S. 141 (1943) (granting Jehovah’s Witnesses the right to solicit door-to-door in part due to the homeowners’ right to receive the pamphlets); Red Lion Broad. v. FCC, 395 U.S. 367 (1969) (emphasizing the rights of radio listeners to hear a diversity of views); Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (holding that consumers have a right to receive information on drug prices). The Court has also explicitly tied the First Amendment to the right to receive information within the context of reproductive rights. See Griswold v. Connecticut, 381 U.S. 479 (1965) (noting the right to receive information about contraception).
information and ideas through any media and regardless of frontiers.”

In addition to the right to freedom of opinion and expression, Article 20 of the UDHR also grants the right to freedom of peaceful assembly and association. The right to access information relates to the right to equality and reproductive rights, as “it is widely recognized that women cannot exercise basic rights on an equal basis with men unless they have the information and means by which to control their fertility.” As noted above, the UNHCR has made this connection between the right to access information and women’s reproductive rights, ruling in Mellet that Ireland’s law limiting healthcare providers’ ability to talk openly with patients infringed upon Irish women’s right to access information. CEDAW also specifically mentions access to information as crucial for gender equality.

Within the Inter-American System, Article 13 of the American Convention grants the right to freedom of expression. Though the provision does not explicitly mention a right to access information, the IACHR has recognized such a right as an inherent part of Article 13. In a 1985 advisory opinion, the court emphasized how freedom of expression has a unique dual character that is both individual and collective: individuals have the right to express themselves, while the general public has a right to receive information and ideas. The opinion highlighted how “expression and dissemination of ideas and information are indivisible concepts.” The IACHR stated, “[f]or the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion.” Further, it linked freedom of information with freedom in general: “a society that is not well informed is not a society that is truly free.”

85 See id. at art. 20.
87 See Mellet v. Ireland, supra note 31, at ¶ 3.12.
88 See id. at ¶¶ 3.15, 3.18.
89 See American Convention of Human Rights, supra note 68, at art. 13.
92 Id. at ¶ 32.
93 Id. at ¶ 70.
In 1994, over thirty countries from across the Western Hemisphere signed the Declaration of Chapultepec, which elaborated on Article 13 by listing ten fundamental principles needed to sustain a free press in a democratic society.\textsuperscript{94} The Declaration was adopted at the Inter-American Press Association’s Hemispheric Conference on Free Speech in Mexico City. It stated, “\textit{every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.}”\textsuperscript{95} While the agreement is not legally binding for its signatories, it has received growing recognition over the past several decades since it was signed.

C. The Right to Leave

Preventing Women on Waves’ boat from fulfilling its mission also implicates Guatemalan women’s right to leave their own country, as the state is preventing its citizens from sailing out to international waters. The right to travel dates back to the Magna Carta, which states in Article 42 that “[i]t shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water.”\textsuperscript{96} More recently UDHR granted the right to leave one’s country and return in Article 13(2).\textsuperscript{97} Binding international documents contain similar language, including the ICCPR in Article 12(2),\textsuperscript{98} the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in Article 8(1),\textsuperscript{99} and the International Convention on the Elimination of All Forms of Racial Discrimination in Article 5(d)(ii).\textsuperscript{100} For the Inter-American System specifically, Article 22(2) of the American Convention states that “[e]very person has the right to leave any country freely, including his own.”\textsuperscript{101}

\textsuperscript{94} Press Release, Inter-American Press Association (IAPA), \textit{Declaration of Chapultepec is 20 Years Old Today but It Continues as Valid as Ever, IAPA Declares} (Dec. 15, 2015), http://perma.cc/BQB5-HEP5.

\textsuperscript{95} Declaration of Chapultepec, Mar. 11, 1994.

\textsuperscript{96} Magna Carta art. 42, June 15, 1215.

\textsuperscript{97} \textit{See} G.A. Res. 217 (III) A, \textit{supra} note 25, at art. 13(2).

\textsuperscript{98} \textit{See} International Covenant on Civil and Political Rights art. 12(2), 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) \textit{[Hereinafter ICCPR].}


\textsuperscript{101} American Convention on Human Rights, \textit{supra} note 68, at art. 22(2).
The UNHRC is the only international body that has expansively analyzed the right to leave within the frame of the ICCPR. While this right is often viewed in the context of the right to emigrate to another country, it also clearly applies to any citizen’s desire to leave his or her country for any period of time, however brief. Official commentary for the ICCPR states, “Freedom to leave the territory of a state may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus, travelling abroad is covered, as well as departure for permanent emigration.”

Typically, the right to emigrate is seen as more crucial to human liberty than the right to take shorter trips. Many countries have historically deprived emigrants—particularly minority emigrants—of their nationality. For example, between 1955 and 1998, Greek law de-nationalized all citizens of non-Greek descent if they left Greece “with no intent to return.” In both developing and developed countries, states have restricted people with particular skills from leaving. Countries have gone to drastic measures to restrict the right to permanently leave a country, including passport procedures, currency regulations, and physical barriers (most notably the Berlin Wall). Thus, Women on Waves’ trips provide a unique scenario in which a very temporary travel period is essential to realizing one’s rights.

The right to leave one’s country has a dual nature when applied to the state’s obligations. The state has both a negative duty to not hinder departure, as well as a positive duty to ensure its citizens are fully capable of leaving. Typically the latter obligation becomes problematic if the state fails to issue proper travel documents, such as passports.

Article 12(3) of the ICCPR provides states with the authority to restrict citizens’ right to leave in exceptional circumstances, including national security,

103 See Dimitry Kochenov, The Right to Leave Any Country Including Your Own in International Law, 28 CONN. J. INT’L L. 43, 59–60 (2012) (“Concerning the distinctions between temporary stays abroad and expatriation, sound consensus has emerged in the literature and official commentary that Article 12(2) ICCPR protects both equally, making no distinction between the two.”).
105 See Kochenov, supra note 103, at 60.
108 See id. at 354–55.
109 See Kochenov, supra note 103, at 61.
public order, and public health and morals. However, while there are cases in which states may justifiably limit a national’s right to leave, ICCPR commentary emphasizes that “restrictions must not impair the essence of the right.” A common example is denying a national this right for failure to perform military service. In *Lauri Peltonen v. Finland*, the UNHRC ruled that citizens could not invoke the right to leave as a means to avoiding military service. Another popular justification is preventing flight when a trial is pending.

Still, the potential for abuse is high, especially for political dissidents. In *Samuel Lichtensztejn v. Uruguay*, the UNHRC ruled that Uruguay violated Article 12 by failing to renew the passport of a Uruguayan dissident living in Mexico. However, this case focuses on reentering a country, rather than leaving. The ICCPR contains a safeguard to protect against abuses, but it similarly focuses on reentry. In Article 12(4), the provision only states that “[n]one shall be arbitrarily deprived of the right to enter his own country.”

**IV. RIGHTS OF WOMEN ON WAVES**

Women on Waves could pursue legal action based on its own rights as an organization. The nonprofit successfully followed this approach in Europe. However, litigating in the Americas would pose different challenges. This Section explores two possible rights that Women on Waves could invoke to bring a lawsuit against Guatemala: the human right to freedom of expression and the right to “innocent passage” under the UNCLOS.

110 See ICCPR, supra note 98, at art. 12(3). National security is concerning as a justification, because it is difficult to limit its abuse in today’s age of terrorism and global threats. The public health and morals justification is also highly concerning, as it enables the majority to impose its personal viewpoints on minorities. “Principles which are not always legally enforceable but which are accepted by a great majority of the citizens as general guidelines” could suddenly be invoked as justification for preventing one’s freedom of movement. Kochenov, supra note 103, at 67 (quoting Alexandre Charles Kiss, *Permissible Limitations on Rights*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 190 (Louis Henkin ed., 1981)).

111 Human Rights Comm., General Comment No. 27, supra note 104, at ¶ 8.


113 See id. at ¶¶ 1–2.


116 See id. at ¶ 8.3.

117 ICCPR, supra note 98, at art. 12(4).
A. The Right to Freedom of Expression

Numerous international human rights instruments recognize a right to freedom of expression. The UDHR states in Article 19 that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” The ICCPR contains similar language. The European Convention on Human Rights (ECHR) articulates a right to freedom of expression in Article 10 and a right to freedom of assembly and association in Article 11. Article 10 repeats the language of Article 19 from the UDHR verbatim and also adds:

The exercise of these freedoms may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 provides the same caveat for the rights to freedom of peaceful assembly and to freedom of association.

1. Women on Waves successfully sued Portugal for violating its right to freedom of expression.

Women on Waves first raised its right to freedom of expression within the legal system of the European Community, in a legal battle with Portugal following escalated tensions between the nonprofit and the coastal state. On August 27, 2004, Women on Waves’ ship, the *Borndiep*, entered the Portuguese harbor of Figueira da Foz and requested permission to dock. When the harbormaster refused, Women on Waves faxed an official request to the Portuguese government, which in turn denied the request. Portugal’s far-right Minister of Defense Paulo Portas defended Portugal’s response by claiming that the ship was a threat to national security. The next day, the Portuguese government sent out

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120 European Convention on Human Rights, art. 10(2), Apr. 11, 1950, E.T.S. No. 005.
121 See id. at art. 11(2).
two warships to ensure the *Borndiep* did not cross into national waters. \(^{125}\) Harbor authorities continued to refuse to allow the ship to enter the port, even for the purposes of refueling. \(^{126}\)

Women on Waves, along with two Portuguese associations (Clube Safo and Não te Prives), attempted to sue Portugal in national courts. On the morning of September 6, the Administrative and Fiscal Court of Coimbra heard the case. The organizations’ lawyers argued that the Portuguese government had violated their freedom of movement, information, and expression. \(^{127}\) They maintained that Portugal, in refusing to allow the *Borndiep* to dock, prevented Women on Waves from imparting ideas and information, and also prevented Women on Waves from engaging in symbolic activity. Late in the evening of the same day, the judge read her verdict, which maintained that it was within the discretion of the Minister of Defense to prohibit Women on Waves from docking. On September 9, the *Borndiep* headed back to the Netherlands after more than two weeks of sitting in international waters outside of Portugal’s territorial waters. \(^{128}\)

Following their failed attempt in the Portuguese judicial system, Women on Waves and the two other plaintiffs brought the case to the ECtHR. They claimed Portugal violated their rights to freedom of expression and peaceful meeting and freedom of association under Articles 10 and 11 of the ECHR by preventing the group from sharing ideas and information with Portuguese women. \(^{129}\) The Portuguese government maintained that its actions were permissible under Articles 19 and 25 of the UNCLOS because the ship’s passage would have violated Portuguese law. Portugal also argued that its actions were legal under Articles 10(2) and 11(2) of the ECHR, claiming that Women on Waves posed a threat to national security, as well as to the country’s “health and morals.” \(^{130}\)

\(^{125}\) *See War?!*, WOMEN ON WAVES: THE PORTUGUESE DIARY (Aug. 29, 2004), http://perma.cc/RJ3M-4UKN.

\(^{126}\) *See Feed Me, Paste Me*, WOMEN ON WAVES: THE PORTUGUESE DIARY (Sept. 3, 2004), http://perma.cc/9DQQ-56TD.

\(^{127}\) *See Going to Court*, WOMEN ON WAVES: THE PORTUGUESE DIARY (Sept. 6, 2004), http://perma.cc/B98M-FCUH.

\(^{128}\) *See Borndiep Heads Back Home*, WOMEN ON WAVES: THE PORTUGUESE DIARY (Sept. 9, 2004), http://perma.cc/ZK4A-7KMW.


\(^{130}\) *Id.* at 11.
The ECtHR released its unanimous decision for *Women on Waves and Others v. Portugal* on February 3, 2009. The opinion began by stating that there had been interference with the plaintiffs’ rights to freedom of expression, as Portugal effectively barred Women on Waves from communicating its message. The key issue was whether this interference was “prescribed by law” and “necessary in a democratic society.” The ECtHR maintained that Portugal’s actions were allowed under UNCLOS Articles 19(2)(g) and 25. This ruling demonstrates that the ECtHR considers UNCLOS to be controlling law when determining the legality of certain acts under the European Convention.

However, ultimately the ECtHR found that Portugal violated Article 10 of the ECHR and that its response was disproportionate. The Court held that Portugal’s acts of interference were not “necessary in a democratic society.” The ECtHR emphasized that Women on Waves had not trespassed on public or private property, nor was there strong evidence that Women on Waves intended to deliberately breach Portugal’s abortion laws. Additionally, the Court noted that freedom of expression cannot be restricted at all, provided the entity is not committing reprehensible acts. The decision also highlighted how the extreme actions of sending warships to international waters may serve to further deter freedom of expression in general.

Regarding proportionality, the decision noted “the State certainly had at its disposal other means to attain the legitimate objectives of defending order and protecting health than to resort to a total interdiction of entry of the Borndiep in its territorial waters, especially by sending a warship against a merchant vessel.” The Court maintained that the government should have enforced its laws in a softer manner, such as sequestrating the abortion pills.

In weighing Portugal’s sovereignty against Women on Waves’ right to expression, the ECtHR stated:

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131 The unanimity of this opinion marked a significant change from the ECtHR’s 1992 decision *Open Door and Dublin Well Women v. Ireland*. In that case, the ECtHR held that the Ireland Supreme Court’s injunction, which restrained counseling agencies from giving information on abortion clinics to pregnant women, violated Article 10 of the ECHR. However, the case featured 18 pages of concurring, separate, and dissenting opinions. See *Open Door and Dublin Well Woman v. Ireland*, 14234/88 Eur. Ct. H. R. (1992).


134 *Id*. at 11.

135 *Id*.

136 *Id*.

137 See *Women on Waves and Others v. Portugal*, *supra* note 132, at ¶ 41.

The Court does not underestimate how important the protection of the legislation concerning abortion was for the Portuguese State together with the principles and values that undermined it. But the Court highlights that presenting shocking ideas contesting the modus operandi makes freedom of expression more valuable and necessary than ever.139

Despite the legal victory, Women on Waves did not receive anywhere near the amount of damages that it requested. The ECtHR rejected Women on Waves’ request for 49,528.38 Euros for the costs of the Borndiep’s trip.140 However, the Court did award 2,000 Euros to each plaintiff for moral injury141 (out of the 5,000 Euros requested142). The ECtHR also rejected Women on Waves’ requests for 3,309 Euros for legal fees, maintaining that the plaintiffs already received reasonable support in the amount of less than 1,500 Euros.143

Regardless of the amount of damages awarded, Women on Waves clearly considered its campaign in Portugal to be an overwhelming success. The event garnered extensive press coverage, both across the world and within the state itself. In Portugal, more than seven hundred local newspaper articles focused on the story, and multiple TV channels continuously followed the story as it unfolded.144 Juventude Socialista, the youth section of Portugal’s Socialist Party, sailed out to the Borndiep to hold a press conference on the boat.145 One talk show even hosted Dr. Gomperts, who explained on live television how to induce abortion.146 Women on Waves was also able to operate a hotline for women, which was inundated with calls following Dr. Gomperts’ appearance on the talk show.

Roughly two and a half years after Women on Waves attempted to dock in Portugal, on February 11, 2007, the country voted in a national referendum to legalize abortion up to ten weeks. President Aníbal Cavaco Silva, a Social Democrat who had been elected to office one year earlier, ratified the law on April 10. The ECtHR’s decision would not be released for another two years.

Women on Waves had ostensibly already achieved both its short-term and long-term goals in Portugal by the time of the ECtHR decision, as the ship campaign attracted widespread attention and possibly contributed to the outcome

139 See Women on Waves and Others v. Portugal, supra note 132, at ¶ 42.
140 Id. at ¶¶ 49, 51.
141 Id. at ¶ 51.
142 Id. at ¶ 49.
143 Id. at ¶¶ 52, 54.
146 See Live on Television, WOMEN ON WAVES: THE PORTUGUESE DIARY (Sept. 7, 2004), http://perma.cc/6LVG-DN9Y.
of Portugal’s referendum two years later. Still, the decision was hugely important for Women on Waves’ future impact in Europe, as well as around the world. The group has not visited any other European states via boat since the decision (Women on Waves sailed to Spain in 2008, one year before the decision came out). However, recent Women on Waves press releases sharply condemn restrictive abortion laws in Poland. Additionally, Women on Waves has expanded beyond its traditional ship campaigns to deliver abortion pills via robot to women in Belfast, Northern Ireland.

2. The Inter-American System strongly promotes the right to freedom of expression.

The impact of Women on Waves and Others v. Portugal may be felt beyond the continent of Europe, as the ruling of one international human rights court could influence the decisions of another such court. Like the European Community, the Inter-American System also recognizes a right to freedom of expression. Article 4 of the American Declaration on Rights and Duties of Man states, “Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.” Similarly, the American Convention states in Article 13 that “[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers . . . through any . . . medium of one’s choice.” The agreement further details:

The exercise of [this] right . . . shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or
b. the protection of national security, public order, or public health or morals.

This language implies that freedom of expression is an essential individual liberty, which can only be restricted for a pressing public interest. Furthermore, the emphasis on banning “prior censorship” may imply that, while a subsequent fine may be acceptable, preemptive action is not.

147 See International Experts Condemn Attempt to Further Restrict Abortion in Poland, WOMEN ON WAVES, http://perma.cc/K7UJ-QZAZ.
149 American Declaration of the Rights and Duties of Man, art. 4, May 2, 1948, OEA/Ser.L.V./II.82.
150 American Convention on Human Rights, supra note 68, at art. 13(1).
151 Id. at art. 13(2).
The OAS has also created a Declaration of Principles of Freedom of Expression to detail how the rights articulated in Article 13 apply to various forms of expression.\(^{153}\) The Declaration highlights the importance of “free circulation of ideas and opinions” for a strong democratic society.\(^{154}\) However, the Declaration mostly focuses on journalist activities, “social communicators,” and communication media.\(^{155}\) While Women on Waves may fall into the second category of “social communicators,” especially with its hotline activities, the Declaration does not directly address expressive actions beyond direct communication (such as offering services to locals).

The Inter-American Court of Human Rights (IACHR) has a long history of promoting freedom of expression. In its 1985 advisory opinion, the court stated, “Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard.”\(^{156}\) It also noted that freedom of expression is not limited to a particular type of medium, stating, “[F]reedom of expression . . . cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.”\(^{157}\)

In the 1985 decision of *Francisco Martorell v. Chile*,\(^{158}\) the IACHR further elaborated on the importance of dissemination. This case focused on Chile’s censorship of a book entitled *Impunidad diplomática*. In the opinion, the IACHR explicitly called out the prohibition on entering the country as an illegal prior restraint, stating,

> [T]he decision to ban the entry, circulation and distribution of the book “Impunidad diplomática” in Chile violates the right to impart “information and ideas of all kinds,” a right that Chile is bound to respect as a State party to the American Convention. In other words, the decision is an unlawful restriction of the right to freedom of expression, in the form of an act of prior censorship disallowed by Article 13 of the Convention.\(^{159}\)

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155 See id.


157 Grossman, supra note 90, at 424.


159 Id. at ¶ 59.
In the 2008 decision of *Kimel v. Argentina*, the IACHR detailed the specific requirements that states must meet to limit freedom of expression under Article 13.2. The state must demonstrate that (1) the limit is articulated by a law; (2) the state has a legitimate interest; (3) the limit on freedom of expression is necessary to achieve the state interest; and (4) the limit is proportional to the interest. For the first element, the IACHR specified that the law must “formally and materially” enumerate the limitation on freedom of expression. The second element, legitimate interest, must pertain to some sort of goal listed in the American Convention itself. For the third element, the government must consider all possible alternatives for achieving the state interest to determine that there is not a less restrictive means for achieving the purpose. Lastly, for the proportionality element, the IACHR specified that analysis consists of: “i) the degree of impairment of one of the rights at stake, establishing whether the extent of such impairment was serious, limited, or moderate; ii) the relevance of the satisfaction of the opposing right, and iii) whether the satisfaction of the latter justifies the restriction of the former.” The decision also included a concurring opinion, which emphasized that criminal law is not an appropriate means for controlling abuses of the right to freedom of expression.

The IACHR often follows similar guidelines to the ECtHR. Most pertinently, in Article 13, the IACHR adopts the same standard as the ECtHR in emphasizing that freedom of expression is guaranteed even for ideas that may be deemed shocking or offensive by the state. Thus, while the jurisprudence of the ECtHR is not binding on the IACHR, it may serve as persuasive guidance.

Still, the two courts differ from one another markedly in regard to their comparative force on member states. The ECtHR adheres to the doctrine of the margin of appreciation. This principle recognizes that states have some discretion in how they implement an international agreement. Thus, European

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161 See id. at ¶ 88.

162 Id. at ¶ 63.

163 Id. at ¶ 84.

164 See id. at ¶ 19.


Community member states are allowed to account for their unique cultural norms when applying the ECHR. In contrast, the IACHR does not follow the margin of appreciation doctrine; each state in the Inter-American System must adhere to the same standard. 167 The IACHR’s stricter standard indicates that the court may be even less amenable to arguments pertaining to national morality. As described earlier, though, both the ECHR and the American Convention expressly state that freedom of expression is subject to local laws relating to morals, health, and national security. While the IACHR does not follow the doctrine of the margin of appreciation, it may put a greater emphasis on the factors that limit the right to freedom of expression. For instance, the specific elements delineated in *Kimel v. Argentina* would require the IACHR to rule that Guatemala’s restrictive abortion laws embody a legitimate state interest, and that Guatemala’s actions to limit Women on Waves’ freedom of expression in the name of these laws were both necessary and proportional.

The two systems also follow different approaches in awarding reparations. The ECtHR typically can only order “just satisfaction,” which amounts to monetary reparations, while the IACHR can order injunctive relief. 168 The IACHR’s ability to issue injunctions is a double-edged sword for Women on Waves. While the court could order countries to permit Women on Waves’ ships to enter local harbors, it could also issue an injunction against the group, preventing Women on Waves from even attempting to dock. Thus, the stakes are much higher than with ECtHR, especially since Women on Waves is not primarily concerned with recovering monetary damages.

In conclusion, Women on Waves’ right to freedom of expression may provide a possible means for the group to defend against the actions of states such as Guatemala, especially following the ECtHR’s decision in *Women on Waves and Others v. Portugal*. Still, while the IACHR has a robust history of protecting freedom of expression under the American Convention, it has never before weighed this right directly against countries’ abortion laws. Thus, any lawsuit involves some level of risk, especially given the possibility of an injunction preventing Women on Waves from approaching coastal states’ waters. However, there are other potential legal avenues that the nonprofit could pursue.

B. UNCLOS and the Right to “Innocent Passage”

The UNCLOS offers another option for Women on Waves if it chooses to pursue legal action against countries that prevent its boats from entering local ports. UNCLOS is an international treaty, signed in 1982 and entered into force in 1994, that governs countries’ rights and responsibilities regarding maritime

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167 *See* Gorence, *supra* note 166.
168 *Id.*
travel, commerce, and use of resources. UNCLOS is widely recognized by most states, including countries that have prevented Women on Waves’ ships from docking. Currently, there are 157 signatories and 168 parties to UNCLOS. Portugal, Guatemala, and Morocco have all ratified UNCLOS (and had ratified it before the events in their waters occurred). The Netherlands signed UNCLOS on December 10, 1982 and ratified the agreement on June 28, 1996. Parties have a range of options when choosing where to settle a UNCLOS dispute. Possible forums include the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany (Annex VI of UNCLOS); the International Court of Justice in the Hague, the Netherlands; ad hoc arbitration (Annex VII); or a “special arbitral tribunal” (Annex VIII).

UNCLOS divides the waters surrounding a coastal state into various zones: the internal waters, the territorial sea, the contiguous zone, the exclusive economic zone (EEZ), and the high seas. States have the utmost authority within their internal waters, which are treated the same as land territory. Ports and harbors are considered to be part of a state’s internal waters. There are two approaches regarding how coastal states should treat vessels in ports. The absolutist approach endorses the idea that the state has total control over the ship’s activities. In contrast, the French modification approach, which is the predominant view among most states, maintains that states may not exert control over activities that are related to the ship’s “internal economy.” Under the French rule, a state may only exercise jurisdiction over a vessel if its activities impact the local state and threaten the peace of the harbor. Vessel activities that are immune from state control include wages, collective bargaining, necessary discipline, and crimes committed aboard.

The territorial seas consist of the waters within twelve nautical miles of a state’s shoreline. UNCLOS provides ships with a right of innocent passage through a state’s territorial waters. The treaty defines innocent passage in Article 18: “Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.” Article 19 further specifies that passage is innocent “so long as it is not prejudicial to the peace, good order or security of...”

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169 UNCLOS, supra note 4, at art. 287(1).
170 See id. at arts. 2, 3, 33, 55, 86.
171 Wolf, supra note 12, at 117.
173 UNCLOS, supra note 4, at art. 17.
174 Id. at art. 18.
the coastal State. Such passage shall take place in conformity with . . . other rules of international law.”\textsuperscript{175} In Article 19(2), UNCLOS states that it does not consider the following activities to be innocent:

(d) any act of propaganda aimed at affecting the defence or security of the coastal State; . . . (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; . . . (l) any other activity not having a direct bearing on passage.\textsuperscript{176}

UNCLOS itself does not specify whether the activities enumerated in Article 19(2) are an exhaustive list, but it has been interpreted as such in a bilateral agreement between the U.S. and the Soviet Union.\textsuperscript{177} Thus, the creation of a limited list withdraws the ability of the state to use its sole discretion to subjectively determine non-innocence. The list reflects a desire for global uniformity and a “[c]oncern for broad, community interests.”\textsuperscript{178} Furthermore, scholars highlight that only acts that occur while the vessel is \textit{within} the territorial sea should be taken into account when determining the innocence of the passage: “the coastal State’s subjective appraisal is limited, restricted objectively by the requirement that the violation occur while the foreign ship is \textit{in} passage.”\textsuperscript{179}

If a passage is not innocent, UNCLOS specifies that “[t]he coastal State may take the necessary steps in its territorial sea to prevent passage.”\textsuperscript{180} Furthermore, a state may arrest a foreign ship that is violating local law in territorial waters.\textsuperscript{181} Article 21 allows coastal states to “adopt laws and regulations . . . relating to innocent passage through the territorial sea.”\textsuperscript{182} If the parties on a foreign vessel were to breach these laws (or if a state had reason to \textit{believe} the parties violated the law), the state would have the right of hot pursuit.\textsuperscript{183} Otherwise, states do not have authority to pursue or interfere with vessels in any way; Article 24 of UNCLOS states that “[t]he coastal State shall not hamper the innocent passage of foreign ships through the territorial sea.”\textsuperscript{184} Article 25 provides states with the explicit

\textsuperscript{175} UNCLOS, \textit{supra} note 4, at art. 19(1).
\textsuperscript{176} \textit{Id.} at art. 19(2).
\textsuperscript{177} \textit{See} Wolf, \textit{supra} note 12, at 124 n.135.
\textsuperscript{180} UNCLOS, \textit{supra} note 4, at art. 25(1).
\textsuperscript{181} \textit{See id.} at art. 28(3).
\textsuperscript{182} \textit{Id.} at art. 21.
\textsuperscript{183} \textit{See id.} at art. 111.
\textsuperscript{184} \textit{Id.} at art. 24.
power to take “necessary steps” to stop non-innocent passages.\footnote{185}{UNCLOS, supra note 4, at art. 25.} In \textit{Women on Waves and Others v. Portugal}, the ECtHR ruled that Articles 19 and 25 provided a legal basis for Portugal’s decision to send warships out to the Women on Waves’ ship, because if the ship had entered Portuguese territorial waters, it would have constituted a breach of Portugal’s abortion laws.\footnote{186}{See \textit{Women on Waves and Others v. Portugal}, supra note 132, at ¶ 26.}

Beyond the territorial sea lies the contiguous zone, which includes waters between twelve and twenty-four nautical miles from a state’s shores. Article 33 of UNCLOS specifies that a state may only exert control over vessels in this zone to prevent and punish the “infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.”\footnote{187}{UNCLOS, supra note 4, at art. 33(1).} Once Women on Waves’ ship reaches this zone, it has much more freedom to provide services that may violate the laws of nearby coastal states.

The EEZ is the most expansive area in which a state may exercise jurisdiction, as it may constitute up to two hundred nautical miles outside of a state’s territorial waters. In this zone, coastal states have specific, enumerated rights pertaining to artificial islands, scientific research, and the protection and preservation of the environment.\footnote{188}{See id. at art. 56(1)(b).}

Lastly, the high seas consist of all waters beyond the EEZ. UNCLOS strongly emphasizes freedom of the high seas, noting that “[t]hese freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.”\footnote{189}{Id. at art. 87(2).} UNCLOS also states that “[t]he high seas shall be reserved for peaceful purposes.”\footnote{190}{Id. at art. 88.} In this zone, Women on Waves is totally free to conduct operations as it wishes.

For each zone listed in UNCLOS, vessels should expect countries to adhere to the jurisdictional boundaries as they best understand them. States have an obligation to follow all articles of UNCLOS in good faith,\footnote{191}{See id. at art. 300.} and should not attempt to abuse any of the rights granted in the treaty.

UNCLOS offers an alternative option beyond human rights law for Women on Waves to pursue. While there is some ambiguity regarding which types of passages count as innocent for the purposes of Article 17, Women on Waves can
point to the U.S.-Soviet treaty and a large number of legal scholars as indicators that its mission should qualify.

V. POSSIBLE CLAIMS AGAINST GUATEMALA

On its website, Women on Waves states that “all participating activists agreed that it is very important to continue with the legal battle against the expulsion of the crew up [sic] the Inter-American court of human rights.” However, the organization has not announced any litigation. This Section will discuss potential claims under the ICCPR, the American Convention on Human Rights (American Convention), and the UNCLOS that Women on Waves could bring against Guatemala, if it ever chooses to pursue legal action. While Women on Waves could bring numerous claims based solely on the specific mistreatment of the ship’s crew by Guatemalan authorities, this Section will focus on broader courses of action which Women on Waves could possibly pursue in other scenarios if it were to attempt to visit another Latin American country.

A. Actions Based on Guatemalan Women’s Rights

Guatemalan women, rather than Women on Waves, could seek relief based on violations of their human rights.

1. Guatemalan women have procedural rights as a group.

On countless occasions, groups of women have sued their own state to challenge discriminatory laws. The U.N. permits groups of individuals to bring complaints under numerous mechanisms, including the 1503 procedure and the first Optional Protocol to the ICCPR. For example, in 1978, nineteen Mauritian women filed a complaint based on an immigration law preventing foreign husbands of Mauritian women from becoming de facto citizens. The group of women used the first Optional Protocol to the ICCPR, which provides complaint procedures for individuals and groups to submit complaints. The UNHCR found that the law made an adverse distinction on the grounds of sex, as the law permitted foreign wives of Mauritian men to become de facto citizens.

193 See id.
citizens. Women have used this Optional Protocol on numerous occasions since the Mauritius case.  

Within the Inter-American System, the Inter-American Commission may receive petitions from “any person or group of persons . . . legally recognized in one or more OAS members states.” The Inter-American Court of Human Rights’ (IACHR) rules stipulate that “[w]hen there are several alleged victims or representatives, these shall designate a common intervener, who shall be the only person authorized to present pleadings, motions, and evidence during the proceedings, including the public hearings.” Furthermore, NGOs may represent other petitioners. Thus, Women on Waves could serve as the women’s representative.

Because Guatemala ratified the American Convention, the state is subject to the IACHR’s jurisdiction in general. State parties must also voluntarily submit to the IACHR’s jurisdiction for particular cases. However, numerous states, including Guatemala, have accepted contentious jurisdiction on a blanket basis.

2. Guatemalan women could sue Guatemala for violating their reproductive rights.

Initially, the most obvious option appears to be Guatemalan women bringing an action based on the precise right that Women on Waves seeks to protect and promote: the right to an abortion. Within the U.N. system, women could sue based on a large number of rights related to reproduction. Under the ICCPR, there is the right to life (Article 6), the prohibition against cruel and unusual treatment (Article 7), the right to privacy (Article 17), and the prohibition against discrimination (Article 26). The CEDAW explicitly grants reproductive rights in Article 16(e). Additionally, the International Covenant on Economic, Social and Cultural Rights (ICESCR) grants in Article 12 a right to physical and mental health, which the Committee on Economic, Social and Cultural Rights (CESCR) has interpreted to include reproductive rights. In contrast to the U.N., the Inter-American System has a much more confined view of reproductive rights. The American Convention is one of the few international documents to define the start of life at conception.

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196 See, for example, Examples of Cases Where Women Have Used the First Optional Protocol to the ICCPR to Challenge Sex Discrimination, UNITED NATIONS, http://perma.cc/5XSC-2RXV.
197 Rules of Procedure of the Inter-American Commission on Human Rights, art. 23.
198 Rules of Procedure of the Inter-American Court of Human Rights, art. 25(2).
199 See Rules of Procedure of the Inter-American Court of Human Rights, arts. 2(26), 25(1); Rules of Procedure of the Inter-American Commission on Human Rights, art. 23.
While U.N. and Inter-American System have vastly different language in their international agreements pertaining to reproductive rights, their judicial bodies have made markedly similar decisions about such rights. These governing bodies have all recognized a woman’s right to an abortion in extreme cases such as danger to the woman, health problems with the fetus, rape, and/or the young age of the woman, but are reluctant to apply that right more broadly. The Mellet case under the U.N. Human Rights Committee (UNHRC) featured a woman whose fetus had congenital heart defects. The L.C. case under CEDAW focused on a thirteen-year-old who was raped. For the Inter-American System, the Inter-American Commission found (and the IACHR affirmed) in the Baby Boy case that a doctor should not be criminally liable for aborting a seventeen-year-old’s fetus.

This precedent is problematic for Women on Waves, because the group does not target its services and information towards a particular scenario or type of woman. Guatemala could easily distinguish Women on Waves’ ship campaign from past cases by emphasizing the group’s outreach towards a wide range of women. Women on Waves aims to ensure that all women, regardless of health, background, or circumstance, have access to safe abortions. Therefore, because enforcement of international reproductive rights is still largely limited to therapeutic abortions and other extreme circumstances, Women on Waves’ legal efforts should focus on other human rights.

3. Guatemalan women could sue Guatemala for violating their right to access information.

Guatemalan women could bring an action against Guatemala either before the UNHCR for violation of Article 19 of the ICCPR, or before the IACHR for violation of Article 13 of the American Convention. While both of these provisions focus on freedom of expression, they either explicitly or implicitly include the right to freedom of access of information as well. Focusing on the right to access information would not help Women on Waves in its campaign to provide abortion services to women. However, a major component of the group’s mission is to empower women by providing them with information on how to induce abortion themselves with the drug misoprostol. Thus, the right to access information serves as useful means for Women on Waves to achieve this goal.

This claim is probably the strongest of the three options. If the women bring their claim before the UNHCR, they have the advantage of pointing to the precise language of the ICCPR, which highlights the freedom to “seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

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201 See ICCPR, supra note 98, at art. 19(2); Advisory Opinion OC-5/85, supra note 91, at ¶ 31.
202 ICCPR, supra note 98, at art. 19(2).
Furthermore, the precedent set by the *Mellet* case, which links this right to reproductive rights, provides an additional benefit. Guatemala may argue that *Mellet* featured a woman who faced severe health problems, while Women on Waves would provide abortion services and information to a range of women, some of whom would likely be perfectly healthy. Women on Waves could respond by highlighting how the right to access information is intrinsically connected to the right to freedom of expression, a right that some international bodies have considered to be superior to countries’ authority to determine morality norms, as demonstrated by *Women on Waves and Others v. Portugal*.

The IACHR, in contrast, does not have an explicit right or such on-point caselaw. However, this court has a long history of recognizing the right to access information as inextricably linked to the right to freedom of expression. Guatemala may argue that its actions were “necessary to ensure . . . the protection of national security, public order, or public health or morals.”203 Women on Waves could respond that preventing information from even reaching the women constitutes “prior censorship,” and is therefore banned under the American Convention.204 There are only two instances in which a prior restraint is acceptable under the American Convention: 1) regulating access to public entertainments to ensure the “moral protection of childhood and adolescence;”205 and 2) suspending the right to freedom of expression “[i]n a time of war, public danger, or other emergency.”206

Guatemala may claim that regulating Women on Waves’ information is necessary to preserve the moral sensibilities of its children. However, this argument falls short for two reasons. First, while Women on Waves certainly is hoping to reach all women who need its resources—including adolescents under the age of eighteen—children are not the only recipients of its information. Therefore, a ban on all resources solely for the purpose of protecting children would be exceedingly overbroad. Second, the American Convention specifies “public entertainments.”207 Women on Waves’ resources are purely didactic in nature and do not qualify as entertainment.

Guatemala could also argue that Women on Waves’ attempts to subvert its restrictive abortion laws count as a public danger or emergency. However, the group hardly qualifies as a grave danger to the state’s “independence or security,” as the provision requires.208 Furthermore, that same provision stipulates that any

204  *Id.* at art. 13(2).
205  *Id.* at art. 13(4).
206  *Id.* at art. 27(1).
207  *Id.* at art. 13(4).
208  *Id.* at art. 27(1).
suspension of rights must “not involve discrimination on the ground of... sex.” Any state regulation focused on suppression of information pertaining to abortion clearly impacts one gender disproportionately.

Ultimately, the IACHR’s decision on this sort of claim would hinge on whether the court determines women's rights under Article 13 to be more significant than Guatemala’s ability to promote its own moral norms. The UNHCR would probably provide a friendlier forum, based on its previous ruling in the *Mellet* case. If the UNHCR were to expand its holding in *Mellet* and rule that all women seeking abortions have a right to access information (as opposed to just women seeking therapeutic abortions for their own health), it would be a major victory for Women on Waves, as well as the international reproductive rights movements in general.

4. Guatemalan women could sue Guatemala for violating their right to leave.

Another option for Guatemalan women is suing their state for violating their right to freedom of mobility, either under Article 12(2) of the ICCPR or Article 22(2) of the American Convention. Unlike Article 13 of the Convention, Article 22(2) does not contain any references to permissible *ex post* impositions of liability on the state’s part. Guatemala may contend that it never physically stopped women from leaving or inhibited their travel in any way. However, Women on Waves could respond that Guatemala’s decision to block the harbor effectively prevented any women from boarding the ship, and thus restricted their right to total mobility.

Most UNHRC precedent regarding the right to leave focuses on terrorist activity, political dissidents, and military service, so it is difficult to predict how the Committee would rule on a situation where women’s rights to temporarily leave their country conflict with that country’s perspective on public morals. Regardless, one major flaw with focusing on this claim is that it depends on Women on Waves’ ship being able to dock in the first place so that the women can physically access the boat. If countries preemptively stop the boat from accessing a local port, as Portugal did in 2004, women would not be able to leave the country. Women on Waves could attempt to create some sort of tugboat system to transport women to and from the boat, but that approach would require significant coordination and cooperation from locals. In Portugal, Women on Waves briefly tried to set up a tugboat system, but local ships were unwilling to bring women out to the *Borndiep* out of fear of getting arrested. Therefore, the right to access information is probably a superior option for local women to pursue.

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210 See *VESSEL* (Sovereignty Productions 2014).
B. Actions Based on Women on Waves’ Rights

Women on Waves could choose to follow a path similar to what it did in Portugal and sue Guatemala for violating its human rights and/or its rights under the law of the sea. Women on Waves was able to prevail in its case against Portugal, so it has a possible roadmap going forward. However, clearly Women on Waves cannot bring an action against Guatemala before the ECtHR, because Guatemala is not a member state of the European Community. Thus, as the forum will differ, the group may need to adjust its strategy. Because the American Convention defines life as beginning at conception, Women on Waves’ best options are either bringing a human rights claim before a U.N. body, or bringing a UNCLOS claim before an alternative forum such as the ITLOS or the International Court of Justice.

1. NGOs have procedural rights to sue states.

Under the U.N., anyone—including individuals, states, and NGOs—may bring a complaint before the UNHRC under the 1503 procedure (the U.N.’s complaint procedure). The U.N. fact sheet stipulates that NGOs must act in “good faith” and provide “reliable direct evidence.”

Within the Inter-American System, NGOs need to file a petition with the Inter-American Commission for their complaints to be heard by the IACHR. NGOs do not need to be recognized by the member state that they are bringing a claim against; the NGO must simply be recognized by any member state.

2. Women on Waves could sue Guatemala for violating its right to freedom of expression.

As it did with Portugal in 2004, Women on Waves could bring an action against Guatemala based on a violation of its right to freedom of expression. Guatemala may invoke arguments similar to those detailed in Section V.A.2 pertaining to national security and public health.

Guatemala could argue that its actions meet the four requirements detailed in *Kimel v. Argentina* for state limitations of freedom of expression. First, the limitation is clearly based on state law. Second, Guatemala could maintain that

211. See Fact Sheet No. 7/ Rev. 1, Complaints Procedure, OHCHR 15.
212. Id.
213. See American Convention on Human Rights, supra note 68, at art. 44.
215. Guatemala’s constitution specifies that life begins at conception. Guat. Const. Title II Ch. I art. 3. Abortion was illegal under all circumstances until 1973, when the penal code was amended to permit abortion in cases that endangered the woman’s life. Guat. Cong. Decree 17-73.
it has a legitimate interest in protecting the lives of unborn children. Women on Waves could argue that this decision should be entirely up to the woman, and the state has no legitimate basis for interfering. However, because both the American Convention and Guatemala’s constitution state that life begins at conception, this would be an uphill battle.216 Third, Guatemala could contend that limiting Women on Waves’ freedom of expression is necessary to advance its state interest. However, there are alternative ways to achieve this interest without directly attacking expression, such as monitoring the sale of misoprostol and mifepristone (the drugs used to self-induce abortion). Of course, Women on Waves would not be happy with any alternatives, as Guatemala’s interest directly conflicts with the group’s objectives. Fourth, Guatemala could claim that its actions were proportionate to the interest. Women on Waves could respond that its rights to freedom of expression were impaired to a significant degree; the group could not even dock in local waters to express itself.

The outcome of Guatemala’s defense may hinge on how far the IACHR is willing to extend Kimel v. Argentina. Kimel featured a clear-cut case of abuse of freedom of the press: Argentina imprisoned a journalist who was critical of the state’s investigation of a massacre during its military dictatorship.217 Women on Waves is not a news organization aiming to uncover the truth; it is an NGO with a very specific agenda. However, the IACHR may be hesitant to draw lines regarding which organizations are worthy of Article 13 protection.218 Guatemala may also contend that recognizing Women on Waves’ right to expression would threaten its moral sovereignty. Women on Waves could respond by pointing to Women on Waves and Others v. Portugal in the EChHR, and noting that—unlike the EChHR—the IACHR does not follow the doctrine of margin of appreciation and thus does not account for states’ individual standards pertaining to morality.219 However, the American Convention also states that life begins at

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216 See American Convention on Human Rights, supra note 68, at art 4; Guat. Const. Title II Ch. I art. 3.

217 See generally Kimel v. Argentina, supra note 160.

218 The IACHR has applied the precedent of Kimel to cases featuring individuals other than journalists, including retired military personnel, attorneys, and judges. See, for example, Usón Ramírez v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 207 (Nov. 20, 2009); Tristán Donoso v. Panamá, Inter-Am. Ct. H.R. (ser. C) No. 193 (Jan. 27, 2009); Adriana Beatriz Gallo v. Argentina, Inter-Am. Ct. H.R. Informe No. 43/15 (July 28, 2015). Furthermore, many local courts within OAS member states have relied on Kimel precedent in cases featuring non-journalistic organization. See, for example, Party of the Democratic Revolution (PRD Party) v. Specialized Regional Chamber of the Electoral, Mex., SUP-REP 55/15 (Feb. 19, 2015) (reversing a political party’s sanction based on Kimel); Irigoyen v. Wallenberg Foundation, Arg., I.419.XIVII (Aug. 5, 2014) (holding the Raoul Wallenberg Foundation, which researches Holocaust rescuers, engaged in protected expression based on Kimel); The Case of Sugary Drinks, Colom., T-543/17 (Aug. 25, 2017) (ruling a non-profit has a right to broadcast a public service announcement describing the harms of excessive sugar consumption).

219 See Gorence, supra note 166.
conception,220 putting Women on Waves’ right to freedom of expression in direct conflict with the right to life, as defined by the agreement. Furthermore, the IACHR may be more sympathetic to Guatemala’s moral views and consider them as largely reflective of the region as a whole. Thus, while the court does not follow the margin of appreciation doctrine, it may not need to in order to find that Guatemala is justified in limiting the group’s right to freedom of expression. Because the entire Inter-American region strongly favors pro-life views, Women on Waves should either bring its freedom of expression claim before the UNHRC, or instead bring a law of the sea claim before an alternative forum.

3. Women on Waves could sue Guatemala for violating its right to innocent passage.

Women on Waves could choose to focus on the law of the sea, rather than human rights, and sue Guatemala for violating its right to innocent passage under UNCLOS. The first issue in bringing a UNCLOS claim is determining where to settle the dispute. As discussed earlier, UNCLOS provides for a wide array of forum options.221 If the parties’ choice of forum does not match, or if one of the parties fails to make a choice, an arbitral tribunal hears the dispute in accordance with Annex VII.

Beyond forum choice, in dealing with the law of the sea, there are five widely recognized bases for jurisdiction that Guatemala may invoke.222 First, the territorial principle maintains that states have exclusive jurisdiction to enforce their laws and regulations within their borders. Second, the nationality principle (also known as the active personality principle) contends that a state may assert jurisdiction over its nationals, no matter where their actions take place. Third, the passive personality principle puts forth the idea that states are authorized to exercise jurisdiction over any place where offenses are committed against victims who are nationals. Fourth, the protective principle maintains that a state may assume jurisdiction over harmful conduct that has serious consequences for the state. And lastly, the universal principle asserts that states may claim jurisdiction over criminals who commit particularly terrible crimes, such as war crimes, genocide, and terrorism.

Guatemala could invoke several of these principles in attempting to demonstrate that Women on Waves’ passage is not innocent. However, Guatemala would first either need to demonstrate either (1) that the activities listed in Article 19(2) are not exhaustive; or (2) that Women on Waves’ actions fall within one of the activities listed in Article 19(2).

220 See American Convention on Human Rights, supra note 68, at art. 4.
221 See Section IV.B, supra.
222 See Wolf, supra note 12, at 114–16.
Regarding the first option, Guatemala could highlight how Article 19(2)(l) states that “any other activity not having a direct bearing on passage” demonstrates non-innocence. While this provision is rather vague and open-ended, it seems to at least suggest that the list of activities in Article 19(2) is not exhaustive. However, because both scholars and U.N. history point to a consensus that the list of activities is meant to be exclusive, Guatemala’s better option would be trying to demonstrate that Women on Waves is performing one of the activities already listed in Articles 19(2)(a)–(k).

Guatemala may claim that Women on Waves’ mission represents a threat to defense and national security, and therefore—under the protective principle—it is protecting its own nationals against a grave outside threat. Women on Waves could argue that its services do not conflict with traditional national interests, such as security, treasury, or government functions. Rather, the group provides information and services to nationals who seek them. Guatemala may instead argue that—under the passive personality principle—it may exercise jurisdiction over Women on Waves, as it protects unborn Guatemalan nationals. In that case, Women on Waves could contend that, because it is operating a Dutch ship, flag state jurisdiction applies on the high seas. Thus, Dutch law applies, which does not recognize life as beginning at conception. Finally, Guatemala could argue that—under the universal principle—it has authority to prevent heinous crimes. However, abortion has never been universally recognized as such an offense on par with crimes like terrorism and genocide. Thus, this defense likely would not carry much weight.

Guatemala may also choose to focus on Article 19(2)(g), which maintains that the “loading or unloading of any commodity . . . or person contrary to the . . . laws and regulations of the coastal State” on the part of a foreign ship makes the ship’s passage non-innocent. Guatemala may contend that, under the nationality (or active personality) principle, it has the authority to assert jurisdiction over Guatemalan passengers and prevent them from boarding. Women on Waves could respond by emphasizing that Guatemalan women have a right to freedom of movement, as described above.

223 UNCLOS, supra note 4, at art. 19(2)(l) (emphasis added).
224 See id. at art. 19(2)(d).
226 As international law universally recognizes a right to life, legal attitudes towards abortion tend to hinge on the key issue of when life begins. See, for example, Glanville Williams, The Fetus and the Right to Life, 53 CAMBRIDGE L.J. 71 (1994).
227 UNCLOS, supra note 4, at art. 19(2)(g).
228 See Sections III.C and V.A.3, supra.
Additionally, Guatemala may assert that Women on Waves is abusing freedom of the high seas under Article 300, which requires “good faith.”229 Women on Waves could respond by highlighting that freedom of the high seas is expansive, and the group is providing what it considers to be a universal human right to the state’s women.

Ultimately, the issue of innocent passage comes down to questions of ambiguity. Does a ship make an innocent passage when it aims to dock on a country’s harbor, board citizens, and then take those citizens to international waters and perform actions that are illegal in that country? Does a ship make an innocent passage when it aims to publicize information about a practice that is illegal in the country? The ECtHR determined in Women on Waves and Others v. Portugal that Women on Waves did not have a claim based on its right to innocent passage. However, the ECtHR ultimately does not have jurisdiction over UNCLOS claims; a different forum may come to the opposite conclusion. Women on Waves would highlight the emerging view that “human rights concerns are . . . inextricably intertwined with the concerns of the Law of the Sea.”230 ITLOS, for example, has a history of interpreting UNCLOS provisions to benefit individual ships and their crew over the state.231 Forums such as the International Court of Justice do not need to adopt the perspective of the specific treaty under which the case is submitted to,232 and thus may be even more amenable than ITLOS to considering human rights principles in addition to UNCLOS provisions. Still, Guatemala would be quick to point to the ECtHR decision as proof that even courts that specialize in human rights may not be swayed to interpret “innocent passage” in favor of Women on Waves.

VI. CONCLUSION

Women on Waves has not announced plans to visit more Latin American coastal states in the near future (its most recent press release focused on Northern Ireland).233 However, given the vast amount of restrictive abortion laws in the region, a future visit is highly likely.

When states such as Guatemala take action to prevent Women on Waves either from directly providing services for nationals, or from communicating information via apps, hotlines, and its website, legal action is one of the best

229 UNCLOS, supra note 4, at art. 300.
231 In multiple cases, ITLOS has broadly interpreted the meaning of “detention” to better protect vessels. See, for example, Camouco (Pan. v. Fr.), Case No. 5, Order of Feb. 7, 4 ITLOS Rep. 10; Monte Confurco (Sey. v. Fr.), Case No. 6, Order of Dec. 18, 2000, 4 ITLOS Rep. 86.
232 See Treves, supra note 129, at 12.
233 See New study of Women on Web data shows harm caused by restrictive abortion laws in Northern Ireland, WOMEN ON WAVES (Oct. 19, 2018), http://perma.cc/NWH9-D4ET.
options for the group. While Women on Waves’ ship campaigns aim to provide information and abortion services to women, Women on Waves also has the secondary goal of highlighting the problems of women in countries with restrictive abortion laws. Thus, countries’ attempts to restrict Women on Waves’ ships, and the lawsuits that follow, may ironically be more useful in achieving Women on Waves’ second goal than if the countries passively permitted Women on Waves to dock. Still, it is key that Women on Waves has the capacity to—at the very least—attempt to reach the shores of coastal states (an injunction would be a drastic blow to Women on Waves’ mission). Furthermore, Women on Waves still also hopes to help the individual women of each country it chooses to visit, through access to information and/or services.

If Women on Waves decides to bring a suit on behalf of Guatemalan women, a right to access information claim is probably the best option. Reproductive rights are still largely recognized only within the context of other rights, especially if the case does not feature an extreme situation. Even the more liberal bodies in the U.N. have yet to rule on cases featuring non-therapeutic abortions. A right to leave claim would raise similar ambiguity problems, as no court has ever ruled on mobility rights in this particular scenario. Furthermore, that claim would depend on Women on Waves’ boat getting to a port so that women have the option to leave.

Women on Waves may prefer to sue on behalf of itself, rather than local women, to circumvent procedural and safety issues. While NGOs have the capacity to represent groups of individuals, the claim would involve an additional procedural hurdle to get through. Furthermore, local women may be unwilling to bring a case out of fear of their community’s backlash. If Women on Waves brings its own claim, its best options are either bringing an Article 19 freedom of expression claim before the UNHRC, or bringing an innocent passage claim before the ITLOS or the International Court of Justice. Despite the outcome in Women on Waves and Others v. Portugal, a case before the IACHR would be risky considering the American Convention’s definition of life and the entire region’s pro-life tendencies.

Regardless of the type of claim brought, if Women on Waves chooses to sue Guatemala (or another coastal state in Latin America at some point in the future) in the IACHR, the UNHRC, or another forum, the organization will almost certainly be able to raise its profile, while simultaneously opening the possibility of collecting monetary damages and an injunction against the state. However, on that same note, because the IACHR—unlike the ECtHR—may order injunctive relief that could impact Women on Waves’ ability both to make headline-worthy trips and to provide local women with information or services. Women on Waves should proceed with caution when choosing a forum. Paradoxically, while

234 See Gorence, supra note 166.
Women on Waves aims to promote global reproductive rights, focusing on other rights such as freedom of expression, freedom of travel, and the right to innocent passage may better serve the group in ultimately fulfilling its mission.