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Abortion and the right to life: A case study of South Africa and Germany



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Keywords

Abortion

Arbitrary Deprivation of Life

Highest attainable Standard in Health

Human Being

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Privacy

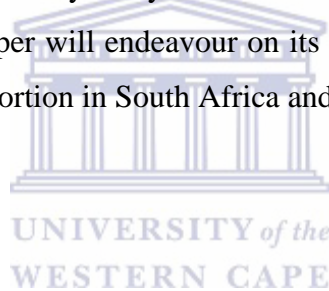
Right to Information

Right to life



Abstract

The issue of abortion and the protection of the right to life have been discussed by many academics, yet remains an unresolved topic in many countries. The mere fact that abortion is the deliberate termination of a human pregnancy raises the question, whether or not such an act violates the right to life. Abortion has been legalised in South Africa and Germany. This study explores the area of abortion vis a viz the obligation of South Africa and Germany under the international and regional human rights instruments to protect the right to life. Notably, the right to life is protected under a plethora of international and regional human rights instruments. At international level, the right to life is protected under Article 3 of the Universal declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights. At regional level of the right to life is protected by Article 2 of the European Convention on Human Rights and Article 4 of the African Charter on Human and Peoples' Rights. To give a broad understanding of the meaning, nature and content of the right to life, this mini-thesis shall critically analyse the words used under the above Articles which protect the right to life. Then the paper will endeavour on its main objective which is to determine whether or not the legalisation of Abortion in South Africa and Germany violates the right to life?



Abbreviations

| | |
|--------|---|
| ACHPR | African Charter on Human and Peoples' Rights |
| ACHR | American Convention on Human Rights |
| ART | Article |
| CAT | Convention Against Torture |
| CEDAW | Convention on the Elimination of all Forms of Discrimination Against Women |
| CRC | Convention on the Rights of the Child |
| ECHR | European Convention on Human Rights |
| EHRC | European Human Rights Committee |
| GG | German Basic Law |
| HRC | Human Rights Committee |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| NAAPC | The National Association for the Advancement of Preborn Children |
| OHCRC | Office of the United Nations High Commissioner for Human Rights |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |

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Chapter 1

Introduction

1. Introduction

Abortion is a widely controversial topic which affects women from all over the world. The issue of abortion and the protection of the right to life has been discussed by many academics, but yet it remains an unresolved topic in many countries. According to the Oxford dictionary, ‘abortion is the deliberate termination of a human pregnancy which is most often performed during the first 28 weeks of pregnancy’.¹ Abortion mainly affects woman’s health, social and economic circumstances. Notably, around 46 Million abortions take place every year. Many countries around the globe prohibit abortions. To this end, it has also been established that 20 million unsafe abortions are performed yearly and 13% of all maternal deaths are a result of unsafe abortions.²

Various academics have taken differing positions with regard to the legality of abortions. In light of these different positions, there are two main groups on the topic of abortion namely Pro-choice and Pro-life opinions.³ This has created a big controversy regarding the compatibility of abortions and the right to life. Supporters of the pro-life such as Patrick Lee and Robert P. George state that, it is obvious that some living entity is killed in an abortion.⁴ Therefore, according to Pro life

¹ Oxford dictionary of English available at

<http://www.oxforddictionaries.com/definition/english/abortion> (accessed on 02 July 2014).

² Institute of Development Studies ‘Unsafe Abortion: A Development Issue’ available at: <https://www.ids.ac.uk/news/news-at-ids-unsafe-abortion-a-development-issue> (accessed on 20 October 2015).

³ Institute of Development Studies ‘Unsafe Abortion: A Development Issue’ available at: <https://www.ids.ac.uk/go/news/news-at-ids-unsafe-abortion-a-development-issue> (accessed on 20 October 2015).

⁴ Lee P & George RP ‘The wrong of abortion’ (2005) available at: http://www.blackwellpublishing.com/content/BPL/Images/Content_store/Sample_chapter/1405115475/Cohen_sample%20chapter_Contemporary%20debates%20in%20applied%20ethics.pdf

supporters, a foetus is a human being which deserves to be protected and afforded fundamental human rights such as the right to life.⁵ This is summed up by the following explanation made by Lee & George,

‘It will be useful to begin by considering some of the facts of sexual reproduction. The standard embryology texts indicate that in the case of ordinary sexual reproduction the life of an individual human being begins with complete fertilization, which yields a genetically and functionally distinct organism, possessing the resources and active disposition for internally directed development toward human maturity.’⁶

However some scholars such as Singer, Tooley and Warren who support the issue of abortion argue that, ‘human beings in the embryonic stage are not persons because embryonic human beings do not exercise higher mental capacities or function.’⁷ These scholars also argue that, the fact that human embryos and fetuses (and infants) would not have developed self-awareness, means that they are not persons.⁸ Following the above arguments by scholars who support the issue of abortion, the following question is often raised: Where does one draw the line between those who are subjects of rights and those that are not? A long tradition

(accessed on 21 November 2015).

⁵ Alcorn R *Why Pro-Life: Caring for the Unborn and Their Mothers* (2012) 27.

⁶ Lee P & George RP ‘The wrong of abortion’ (2005) available at: http://www.blackwellpublishing.com/content/BPL/Images/Content_store/Sample_chapter/1405115475/Cohen_sample%20chapter_Contemporary%20debates%20in%20applied%20ethics.pdf

(accessed at: 21 November 2015). According to Pro-Life arguments, there are three important points that must be noted when looking at the human embryo: First, it is from the start distinct from any cell of the mother or of the father. This is clear because it is growing in its own distinct direction. Its growth is internally directed to its own survival and maturation. Secondly, the embryo is human; it has the genetic makeup characteristic of human beings. Thirdly, and most importantly, the embryo is a complete or whole organism, though immature. The human embryo, from conception onward, is fully programmed actively to develop himself or herself to the mature stage of a human being, and, unless prevented by disease or violence, will actually do so, despite possibly significant variation in environment (in the mother’s womb).

⁷ Lee P & George RP ‘The wrong of abortion’ (2005) available at: http://www.blackwellpublishing.com/content/BPL/Images/Content_store/Sample_chapter/1405115475/Cohen_sample%20chapter_Contemporary%20debates%20in%20applied%20ethics.pdf (accessed on 21 November 2015).

⁸ Lee P & George RP ‘The wrong of abortion’ (2005) available at: http://www.blackwellpublishing.com/content/BPL/Images/Content_store/Sample_chapter/1405115475/Cohen_sample%20chapter_Contemporary%20debates%20in%20applied%20ethics.pdf (accessed on 21 November 2015).

says that the line should be drawn on determining who can be regarded as a person.

In addition to the above assertion, it can also be noted that, the scholars who support the issue of abortion also evaluate this topic as controversial in regard to different human rights of the women.⁹ They say that rights such as the right to the highest possible attainable standard of health,¹⁰ the right to liberty,¹¹ the right to non-discrimination,¹² the right to privacy¹³ and the right to information¹⁴ are violated when abortion takes place. Further, pro-abortionists even consider that the prohibition of abortions can be evaluated as a violation of the right to life of the expecting mother which also can be regarded as torture or other ill-treatment of the expecting mother.¹⁵

The right to life is ratified in different treaties such as the International Covenant on Civil and Political Rights,¹⁶ the Universal Declaration of Human Rights,¹⁷ the European Convention on Human Rights,¹⁸ the African Charter on Human and Peoples' Rights,¹⁹ and the American Convention on Human Rights.²⁰ This study focuses on the issue of abortion in light of the protection of the right to life. Special focus shall be on the international and regional human rights instruments which protect the right to life. At an international level, this thesis shall look at Article 6 of the International Covenant on Civil and Political Rights (ICCPR). This Article states that,

⁹ Parliamentary Network for Critical Issues 'Abortion' available at: <http://www.pncius.org/issues-abortion.aspx> (accessed on 20 October 2015).

¹⁰ Article 12(1) of the International Covenant on Economic, Social and Cultural Rights.

¹¹ Article 9(1) of the International Covenant on Civil and Political Rights.

¹² Article 2(1) of the ICCPR.

¹³ Article 17 of the ICCPR.

¹⁴ Article 19(2) of the ICCPR.

¹⁵ Article 7 of the ICCPR. Some "pro-choice" philosophers have attempted to justify abortion by denying that all abortions are intentional killing. They have granted (at least for the sake of argument) that an unborn human being has a right to life but have then argued that this right does not entail that the child in utero is morally entitled to the use of the mother's body for life support. In effect, their argument is that: At least in many cases, abortion is not a case of intentionally killing the child, but a choice not to provide the child with assistance, that is, a choice to expel (or "evict") the child from the womb, despite the likelihood or certainty that expulsion (or "eviction") will result in his or her death (Little, 1999; McDonagh, 1996; Thomson, 1971).

¹⁶ Article 6 of the ICCPR.

¹⁷ Article 3 of the Universal Declaration of Human Rights.

¹⁸ Article 2 of the European Convention on Human Rights.

¹⁹ Article 4 of the African Charter on Human and Peoples' Rights.

²⁰ Article 4 of the American Convention on Human Rights.

‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’.²¹

At a regional level, the focus shall be on the European Convention on Human Rights (ECHR) and the African Charter on Human and Peoples’ Rights (African Charter). Article 2 (1) of the ECHR states that,

‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.’²²

Article 4 of the African Charter states that,

‘Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.’

The mere fact that abortion is the deliberate termination of a human pregnancy raises the question, whether or not such an act violates the right to life which is protected under Article 6 of the ICCPR. In order to provide this discussion with descriptiveness and support in understanding on a legal basis a special focus on the implementation and argumentation of this provision shall be made on South Africa and Germany.

2. Research Questions

²¹ Article 6(1) of the ICCPR.

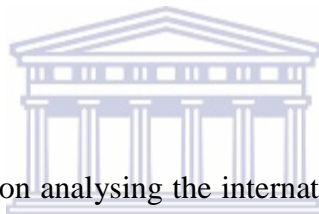
²² Article 2(2) of the ECHR also states that, Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The main research question shall be: Whether the legalisation of abortion in South Africa and Germany violates the right to life or not?

Adjacent to the major research question outlined above, this research shall also focus on the following questions:

- What is the nature and content of the right to life?
- What is the obligation of South Africa and Germany in protecting the right to life?
- When does life begin?
- What are the lessons that can be deciphered from these two jurisdictions in the way they have regulated abortion?

3. Scope of the Study



This mini-thesis focuses on analysing the international and regional human rights instruments which protect the right to life and determine whether the legalising of abortion in South Africa and Germany violates the right to life or not. As a result of time and resource limitations, no interviews or field work will be conducted. While this study will look at the two selected jurisdictions namely South Africa and Germany, it is not a comparative study. It is, however, going to assess whether or not the legalising of abortion in Germany and South Africa meet the legal requirements of protecting the right to life which are demanded by the international and regional human rights instruments.

4. Aim of the Study

The aim of this study is to determine whether or not the legality of abortion in South Africa and Germany is in line with the protection of the right to life under international and regional human rights instruments. Another aim is to analyse the protection of the right to life in South Africa and Germany. The analysis is going to be made by evaluating the requirements and the respective rationales of the

requirements which lead to the abortion laws of South Africa and Germany.

5. Methodology

This study will be conducted strictly by employing a desk-top research. No interviews or other methods of research will be used. The documents to be reviewed will include laws, policies, case law, articles and books, as well as the relevant international human rights instruments in particular the ICCPR, African Charter and the ECHR. While the study will look at two jurisdictions, namely; South Africa and Germany, the proposed study is not going to be a comparative research.

Decisions of the European Court of Human Rights, United Nations Human Rights Committees as well as the African Court on Human and People's Rights, concerning the controversy of abortions and the right to life and their treatment under the different jurisdictions will also be considered. This thesis shall also make reference to positions of the Human Rights Council, the Committee on the Rights of Persons with Disabilities, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women. The positions of such bodies find consideration by using their reports, their general comments and their concluding observations to assess the issue of legalising abortion and protecting the right to life. Possible concerns about different developments of the jurisprudence of the CRC and CEDW with the risk of contradictory results are viewed.

6. Motivation for Choice of Study

South Africa and Germany are of special interests on this topic because of their very different cultural structures but partly common legal systems. The premise of this paper is to investigate countries which have different cultural characters leading to varying views, while considering their relevant economical and social differences.

South Africa and Germany have legal systems which are similar in many respects.

With the Dutch settlers occupying South Africa in the mid of the seventeenth century and the British taking over in the beginning of 1800, South Africa's legal system has been built out of European influences.²³ A mixed legal system exists in South Africa. South Africa has a statute legal system combined with a common legal system and customary law.²⁴ In comparison, Germany also has a statute law system. However, in opposition to the common law system, Germany uses the inquisitorial system, which means that judges are actively involved in investigating the facts of the individual case.²⁵ The inquisitorial system brings judges a certain grade of influence to the performance of law, just like in the common law system. Customary law also exists. In total, it must be observed that both systems are not of total common character, but both systems live under European influences in their statute system.

A further reason which makes it worth investigating these countries is the time in which constitutions have been adopted. South Africa's constitution came into force in 1996,²⁶ Germany's constitution, however, already became effective in 1949.²⁷ This leads to factors which have been handled differently by the time of adoption of the respective constitutions. Time and technology have experienced less development by the time the German constitution was adopted compared to the South African constitution. This possibly had an effect on abortion opportunities as medical treatment simply wasn't as developed in 1949 as it was in 1996. But also a general modernisation needs to be considered. Not only is technology a leading factor in this discussion, but further, a general point of view might have experienced a development. Such factors might lead to possible differences in treatment of abortions.

7. Significance of the Study

This study brings a detailed explanation and discussion on the issue of abortion

²³ Barratt A & Snyman P 'Update: Researching South African Law' available at http://www.nyulawglobal.org/globalex/South_Africa1.htm (assessed on 04 July 2015).

²⁴ South African Government 'The Judicial System' available at: <http://www.gov.za/about-government/judicial-system> (accessed on 20 October 2015).

²⁵ Grabowski A *Juristic Concept of the Validity of Statutory Law* (2013) 250.

²⁶ The Constitution of the Republic of South Africa Act 108 of 1996.

²⁷ The Constitution of the Federal Republic of Germany of 1949.

together with its relation to the protection of the right to life. It brings out clear lines on women's rights on the one hand and the rights of the unborn on the other hand, keeping the human rights perspective in foreground.

This topic addresses an issue that is timeless. Unwanted pregnancies, for different reasons, have always affected society. In the past this issue has even been of different interest with regards to less existing medical possibilities for avoiding unwanted pregnancies. On a developing point of view, even if unwanted pregnancies have found a decrease, the topic of abortions remains of highest interest, as there has been a legal development concerning human rights, demanding an even higher importance to evaluate the legal situation.

Further, unwanted pregnancies are not always only about controllable factors. They arise out of situations that are not suggestible by the suffering party, such as, situations of rape or sexual assault.

This study is supposed to serve as a guideline for considerations of compatibility of abortions and the protection of the right to life. It shall help in legislating processes to give indications on the human rights perspectives regarding the issue of abortion and the protection of the right to life. The goal is to elucidate about the controversy between abortions and the right to life. The biggest problem today is that the majority of the people in the world have lack insightful knowledge about this topic. Their views on different matters are often clouded by value judgments which are based on their religion, morality and culture. According to Vaknin, 'the issue of abortion is emotionally loaded and this often makes for poor, not thoroughly thought out arguments'.²⁸ This makes it clear that, easy access to good and well-grounded information about this topic should be regarded as essential. Individuals should be able to retrieve information with regards to the legal standards on this topic easily in order for every individual to be able to evaluate their personal situation.

²⁸ Vaknin S 'Abortion the aborted contract and the right to life' available at samvak.tripod.com/abort.html (accessed on 18 November 2015).

8. Literature Review

There are various opinions in literature concerning the controversy of abortion. Many authors have dealt with this topic and grounded their statements in literature. Controversies take place about the problematical question if a foetus can be considered as a human being and what the consequences to the answer of such questions are.

Some authors do not classify a foetus as a human-being.²⁹ The consequence out of this assumption is that no protection of Art. 6 of the ICCPR should be given to the foetus since Art. 6 ICCPR only protects “human beings” by its wording. They argue that life begins at viability, at birth or when there is capacity for social interaction.³⁰

Further, there are opinions that call for a consideration of the foetus as a human being, but protection of the foetus under Art. 6 of the ICCPR is still not supposed to take place for different reasons.³¹ It is to be considered that the right to life under the ICCPR is not of an absolute character, it can, therefore, be limited by measures which are reasonable and objective.³²

Hoerster is of the view that there is no reason to grant life to someone if rights are withheld from other human beings. From his standpoint, there is simply no right to life if reasons exist to terminate life of a foetus, a weight of survival interests between humans has to take place and a survival interest at a later stage has to be given.³³ A foetus, however, can't build the interest of survival. Hoerster opines the state of building such interests of a human being in birth itself.³⁴

²⁹ Judith Thomson argued for this position by comparing the right to life with the right to vote: “If children are allowed to develop normally they will have a right to vote; that does not show that they now have a right to vote” (1995). According to this position, it is true that we once were embryos and fetuses, but in the embryonic and fetal stages of our lives we were not yet valuable in the special way that would qualify us as having a right to life. We acquired that special kind of value and the right to life that comes with it at some point after we came into existence.

³⁰ Danagan A *The Theory of Morality* (1977) 169.

³¹ Hoerster N *Abtreibung im skularen Staat: Argumente gegen den §218* (1991a) 25.

³² Jayawickrama N *The Judicial Application of Human Rights law: National Regional and International Jurisprudence* (2002) 184.

³³ Hoerster N (1991a) 25.

³⁴ Hoerster N (1991a) 25.

Another point, which is represented by the German Federal Court, is the reflection of a foetus as a human being. It argues that abortion must be unlawful, but the necessity of protection of women can't be left out of sight. For this reason, abortion shall not be prosecuted if women consult counselling, receive a counselling certificate at least three days prior to the abortion, within the first trimester of pregnancy.³⁵

Prieto, however, says that, 'a private human right to family planning exists and therefore the choice of number of children must be included in this right'.³⁶ She argues that, 'the right of individuals to freely and responsibly decide the number and spacing of their children logically includes the right to abort an unwanted pregnancy'.³⁷

Siegel says that, 'a ban of abortion violates guarantees of equal citizenship'.³⁸ She argues that a certain division of roles between females and males exist, but at the same time that the law may not enforce such division of roles.³⁹

Furthermore, a UN independent expert's team states that the prohibition of abortion in cases of the possibility of no-survival of the foetus violates El Salvador's Human Rights obligations. This includes: A violation of Art. 12 of the ICESCR and Art. 12 of the CEDAW. The absolute ban on abortion, when the women's life is in serious risk, states also a violation of the state's obligation to prevent torture and ill-treatment. Further as this suffering only refers to women, discrimination on the basis of gender has taken place.⁴⁰

³⁵ BVerfGE 88, D III 3.

³⁶ Prieto I 'International Child Health and Women's reproductive Rights' (1993) *14 New York Law School Journal of International & Comparative Law* 2.

³⁷ Prieto I (1993) 7.

³⁸ Siegel RB 'The new Politics of Abortion: An equality Analysis of woman-protective Abortion Restrictions' (2007) *7 University of Illinois Law Review* (3) 2.

³⁹ Siegel RB (2007) 3.

⁴⁰ Human Rights Council 'El Salvador: UN experts urge Government to reconsider current Abortion Legislation and Practice' (2013) available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13404&LangID=E> (accessed on 19 January 2016).

Another consideration of the prohibition of abortion as torture or other ill-treatment is being made by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, in 2013.⁴¹

Moreover, it is considered that the foetus can be classified as a human being, without any exceptions. The beginning of human life is when the sperm of the father and the ovum of the mother unite.⁴² Consequently this carries the result of prohibition of abortions in total.

It is additionally argued that the right to life is a pre-condition for other rights. It is therefore the most important right which can't be overridden by any other right which is less important, such as the right to privacy.⁴³

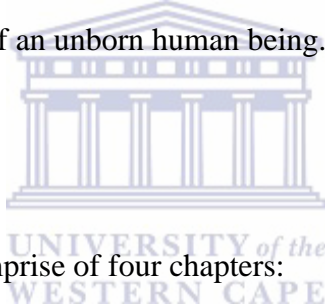
This outline of different opinions and considerations regarding to the controversy of abortions and the right to life, brings clear indicators on the unequal evaluation of this topic. In my view, by the time of conception, for the fact of the foetus being alive, growing and developing its own physical appearances, a foetus must be considered as a human being. This assumption is related to the question of human dignity. Not to award the foetus in its developing process as a human being would classify the unborn as not worth being treated humanely. But it must be seen that developing processes of humans never stop. One always grows, learns and changes its physical constitution. It is therefore favourable not to make a difference in developing processes of one and the same species. The fact that one process is still happening in the womb of the mother can't be reason enough to classify such processes in such different directions that one developing person has "more human dignity" than the other and is therefore more worth being classified as a human being.

⁴¹ Human Rights Council 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (2013).

⁴² Rice CE *The Winning Side. Question on Living the Culture of Life* (1999) 76.

⁴³ Ultius 'Argumentative Essay on Abortion: Pro-Life or Pro-Choice?' available at <http://www.ultius.com/ultius-blog/entry/argumentative-essay-on-abortion-pro-life-or-pro-choice.html> (accessed on 4 July 2015).

However, I also think that there must be limitations to the right of life of every human being, when it is about a foetus in its first trimester. By this time there has no significant process taken place which would allow the foetus to feel anything. It is not able to survive without the mother's help in giving it good treatment. However, a mother who doesn't want to be a mother won't be able to support the unborn the way it needs to be supported to go through the regular process of development. The fact of a poor development plus the fact that development is at its very first stage must be seen in total and comparison to the competing rights of the mother. Many rights of same character, namely human rights, would find interference if the mother wasn't allowed to abort its foetus within a certain amount of time. Levels of importance of the right to life of the unborn and competing rights of the mother must find a detailed examination to find the answer of exception regarding the treatment of an unborn human being.



9. Chapter Outline

The mini thesis shall comprise of four chapters:

Chapter 1: Introduction of the study

This chapter furnishes an introduction and a background to the study. In addition to that this chapter shall also provide an introduction of the topic, the research question, the scope of the study, the outline, the aim of the study, the methodology, the significance of the study as well as the literature review.

Chapter 2: The scope and content of the right to life

This chapter deals with the normative framework on the protection of the right to life. Special focus is on Article 6 of the ICCPR, as well as Article 2 of the ECHR and Article 4 of the African Charter. Therefore, this chapter outlines the nature and scope of the right to life, which includes a discussion regarding the position and

absoluteness. In addition to that, the obligations of South African and Germany under the ICCPR, ECHR and the African Charter in protecting the right to life shall also be discussed.

Further, Chapter 2 examines the terminologies, by giving an explanation of terms used or associated with the right to life. A discussion is also made on the general compatibility of abortions and the right to life. This is, among a general discussion, done by discussing whether a protection of prenatal life should exist and if competing rights of women, *vis a viz*, the right of life of the foetus, exist. In terms of other competing rights a special focus is placed on the highest possible attainable standard of health, the right to non-discrimination of women and the possible consideration to classify the prohibition of abortions as torture or other cruel, inhuman or degrading treatment. In addition chapter 2 provides a general discussion if abortions are compatible with the right to life under Article 6 ICCPR. This has its special focus on the consideration of classification of the foetus as a human being. Further a discussion takes place which analyses the different opinions of the United Nations mechanisms regarding this topic.

Chapter 3: The laws and practices in South Africa and Germany.

This chapter explains the current legal situations concerning abortions in both countries, South Africa and Germany. It shall discuss if the right to life is considered as absolute in both countries. Additionally the legal situations in both countries are examined. Their constitutional importance regarding abortions is presented and the fulfilment of the requirements under international law is discussed.

Chapter 4: Conclusion and Recommendations

Chapter 4 gives the conclusion of the study and recommendations.

Chapter II

Legal Framework and Justification of Abortions in regard to Art. 6 ICCPR

1. Introduction

This chapter will deal with the normative framework on the protection of the right to life. Special focus shall be on Article 6 of the ICCPR in particular, but further on Article 2 of the ECHR and Article 4 of the ACHPR. Therefore, this section is going to discuss the meaning, nature and content of the right to life. After giving a survey on the meaning, nature and content of the right to life, this chapter shall turn its focus to the issue of determining whether the issue of abortion is compatible with the protection of the right to life. The above discussion shall be followed by a discussion on the issue of abortion *viz a vis* the rights of the expecting mother. Special focus is going to be on the highest possible attainable standard of health, the right to non-discrimination, the right to liberty, the right to privacy and the right to information. The general arguments by pro and contra abortion scholars shall also be examined. In the end recent developments of the different United Nations mechanisms are going to be explained. Focus is going to be on the Human Rights Committee, the Committee on the Elimination of All Forms of Discrimination Against Women, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities.

2. The Right to Life

It is a fundamental principle of most moral theories that all human beings have a right to life. The right to life is the fountain of all the other rights. In other words without life all the other rights are devoid of meaning. This means that, the

enjoyment of all the other rights is dependent on the right to life.⁴⁴ The UN Human Rights Committee has described the right to life as the “supreme right”.⁴⁵

2.1 Protection of the right to life under international and regional human rights instruments.

The right to life is protected under a plethora of international and regional human rights instruments. These include the Universal Declaration of Human Rights (UDHR), ICCPR, ECHR and the African Charter.⁴⁶

Article 3 of the UDHR states that, ‘Everyone has the right to life, liberty and security of person’.⁴⁷ As we have highlighted in Chapter 1, another instrument which protects the right to life at international level is the ICCPR, which came into force in 1976.⁴⁸ Article 6(1) of the ICCPR states that,

“Every human being has the inherent right to life. The right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁴⁹

⁴⁴ Carlson-Whitley AK ‘A Dowry Death: A violation of the right to life under article six of the International Covenant of Civil and Political Rights’ (1994) 17 *University of Puget Sound Law Review* (3) 5.

⁴⁵ Joseph S & Schultz J & Castan M *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2000) 109. According to the Council of Europe the right to life is “one of the most obvious basic human rights.” Also the Inter-American Commission of Human Rights has said that “the right to life is, next to the right of physical integrity, the most elementary human right.

⁴⁶ Article 3 of the UDHR.

⁴⁷ Article 3 of the UDHR.

⁴⁸ Article 6 of the ICCPR.

⁴⁹ Article 6 of the ICCPR Art. 6(1) ICCPR protects the “inherent right to life”. The wording “inherent” makes clear that this right is comprehensive and can’t be interpreted in a restrictive sense. Further state parties must protect the right to life. Accordingly positive component measures must be taken to guarantee the fulfilment of the objective to protect life. The term “everyone has the inherent right to life” must further be understood that this is not a right that doesn’t apply to non-citizens. Everyone must be able to entail this right as a person before the law. The wording of Art. 6(1) ICCPR in its sentence 2 demands that the right to life needs to be “protected by law”. This brings clearly a claim to meet state obligations. Such obligations are on the one hand the legislation of criminal law and on the other hand further measures that need to be taken to protect human life.⁴⁹ A close examination on the demands of the “protection by law” will take place. Sentence 3 of Art. 6(1) ICCPR further prohibits the “arbitrary deprivation of life”. This can be seen as the negative component considered out of the right to life. This prohibition is supposed to protect against interference by state organs. It is supposed to be the safeguard against arbitrary killing.⁴⁹ Controversial about this term is of what is meant by “arbitrarily”. A detailed discussion on this will follow in the section of “Clarification of Terms”.

Following the discussion made in chapter 1 on the protection of the right to life it is worth to mention again that, besides the international human rights instruments mentioned above, the right to life is also protected under different regional human rights instruments. The right to life finds protection under the ECHR. Article 2 of the ECHR states that,

(1) “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

(2) “Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”⁵⁰

At the African regional level, Article 4 of the African Charter states that,

“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”.⁵¹

Now that we have established that the right to life is protected under both international and regional human rights instruments, the remaining question is to determine whether the right to life is absolute or not? To give an answer

⁵⁰ Article 2 of the ECHR.

⁵¹ Article 4 of the African Charter.

to this question, this paper shall critically analyse the meaning of the protection of the right to life under the international and regional human rights instruments.

2.2 Position and Absoluteness of the right to life under the international and regional human rights instruments.

In general, regardless of the treaty, the right to life occupies a very important position. No derogations of the right to life under the ICCPR may be made. Even in times of public emergencies, in the sense of Art. 4(2) of the ICCPR, derogations are strictly prohibited.⁵² The very important position of the right to life under Art. 6 of the ICCPR can also be described by the other numbers of Art. 6 of the ICCPR. It is therefore not only paragraph 1 which describes the importance by its wording, but it must be seen that only the detailed regulation of Art. 6 of the ICCPR can be taken as a factor of importance. Art. 6 of the ICCPR has six paragraphs which all provide information regarding the right to life, most Articles in the ICCPR have less paragraphs and don't experience such a detailed regulation. This only shows how important the right to life is, it can actually be evaluated as necessary to avoid any kind of misinterpretation as the life of a human being is the highest good.

An important role for the evaluation of the position of the right to life further plays Art. 6(2) of the ICCPR. Art. 6(2) of the ICCPR demands the very careful treatment with the death penalty in countries which have not abolished the death penalty yet. This paragraph clarifies on the one hand that it is desirable under the ICCPR to abolish the death penalty by its states, which is also ratified in Art. 6(6) ICCPR, but on the other hand, if not abolished, strict requirements are demanded to implement the death penalty. It can only be considered for the most serious cases and must be carried out pursuant to a final judgement rendered by a competent court. It further says that the death penalty may only be imposed in accordance to the law, not contrary to the ICCPR and not contrary to the Convention on the Prevention and

⁵² HRC 'General Comment No. 6 on Article 6 (The right to life)' (1982) para. 1.

Punishment on the Crime of Genocide.⁵³ This additional mentioning of simple legal rules which only repeat what needs to find attention anyway is another factor which leads to the important position of the right to life.

Additionally the other sections of Article 6 of the ICCPR support the above determined assumption. Article 6(4) of the ICCPR demands that “anyone sentenced to death shall have the right to seek pardon or to commute the sentence.”⁵⁴ It further says that “amnesty, pardon or commutation of the sentence may be granted in all cases”.⁵⁵ The above provision which demands that someone sentenced to death needs to be able to seek pardon, gives a clear indication of the importance of the right to life. The fact that anyone, without exceptions, may seek for pardon, shows that a special protection, even in borderline cases in which a person is already sentenced to death, is a clear testimony that the life of a human is still the highest good. The special protection and special treatment given to the right to life is unavoidable hence one can argue that in terms of Article 6(4) of the ICCPR the right to life is a fundamental right which deserves the highest level of protection.

One of the questions which are often raised with regards to the protection of the right to life is whether or not this right is accepted as international customary law?⁵⁶ According to Ramcharan, ‘the right to life must be international customary law, as the right to life is ratified in many treaties’.⁵⁷ Another question which is often raised on the issue of the right to life is whether or not the right to life can be deemed as *jus cogens* under international law?⁵⁸ *Jus Cogens* is a set of “peremptory principle or norms from which no derogation is permitted”.⁵⁹ In this case it must be answered equally: the predominant opinion of academics, such as the opinion of Martin, affirms the treatment of Article 6 of the ICCPR as *jus cogens*.⁶⁰

⁵³ Article 6(6) of the ICCPR.

⁵⁴ Article 6(4) of the ICCPR.

⁵⁵ Article 6(4) of the ICCPR.

⁵⁶ Plagman H ‘The status of the right to life and the prohibition of torture under international law: Its implications for the United States’ *Institute of Justice and International Studies* 3 (2003) 175.

⁵⁷ Ramcharan BG *The Right to Life in International Law* (1985) 3.

⁵⁸ Nowak M *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1997) 104.

⁵⁹ The Free Dictionary ‘Jus Cogens’ available at: <http://legal-dictionary.thefreedictionary.com/Jus+Cogens> (accessed on 22 October 2015).

⁶⁰ Martin F & Schnably S & Wilson R & Simon J et al *International Human Rights and Humanitarian Law* (2006) 35.

Although we have established in the above brief survey that, the right to life is fountain of all the other rights, it can also be argued that, only “arbitrary” deprivation of life are prohibited shows that deprivations of life are allowed, they may simply be not arbitrary.⁶¹ In addition to the above view, it is of paramount importance to note that, Article 6 (2) to (6) of the ICCPR describes that states are not obliged to abolish the death penalty totally, but to limit its use to the most serious crimes.⁶² In this regard “most serious crimes” must be understood restrictively, it may only be an exceptional measure.⁶³ The fact that deprivation of the right to life is possible under certain circumstances clearly reveals that, under the ICCPR the right to life can therefore not be seen as absolute.⁶⁴

Now turning to the ECHR, the status of the right to life must also be considered as the most fundamental of all human rights. This is revealed by Article 15 of the ECHR, which does not allow any derogations of the right to life even in times of emergency.⁶⁵ Although under the ECHR the right to life also is regarded as a fundamental right, this right is not absolute. Article 2(1) of the ECHR states that, ‘no one shall be deprived of his life intentionally’.⁶⁶ In this case the deprivation of life may not take place intentionally. This means *e contrario* that non-intentional deprivations can be justified.⁶⁷ But not only this *argumentum e contrario* enlightens the question of absoluteness of the right to life under the ECHR. Article 2(2) of the ECHR further informs about the requirements of a deprivation of the right to life. It demands that in cases where it is absolutely necessary and if one of the requirements of Article 2(2) of the ECHR are met, a deprivation of the right to life is possible.⁶⁸ The fact that the death penalty is not clearly abolished under Article 2 of the ECHR could also be a factor that leads to the assumption that the right to life

⁶¹ Nowak M (1997) 110.

⁶² HRC ‘General Comment No. 6 on Article 6 (The right to life)’ (1982) para. 6.

⁶³ HRC ‘General Comment No. 6 on Article 6 (The right to life)’ (1982) para. 7.

⁶⁴ HRC ‘General Comment No. 6 on Article 6 (The right to life)’ (1982) para. 6.

⁶⁵ Amos M *Human Rights Law* (2006) 175.

⁶⁶ Article 2(1) of the ECHR.

⁶⁷ Korff D *The Right to Life* (2006) 7.

⁶⁸ Article 2(2) of the ECHR. These requirements are, defence of any person from unlawful violence; in order to affect a lawful arrest or to prevent the escape of a person lawfully detained person; or in action lawfully taken for the purpose of quelling a riot or insurrection.

in the ECHR is not considered as absolute.⁶⁹

As already pointed out in the discussions regarding the ICCPR as well as the ECHR, it must also be noted that, the right to life is also regarded as a fundamental right under the African Charter.⁷⁰ The right to life under the ACHPR is non-derogable except in cases which are judicially recognized such as lawful acts or self-defence.⁷¹ It is therefore evaluated the same level of importance as in other treaties.⁷²

The right to life under the ACHPR is not considered as absolute. This can be concluded by the wording of Article 4 of the ACHPR, which states that

“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”.⁷³

The fact that Article 4 of the ACHPR speaks about the “inviolability” and “respect for his life” brings the assumption that the right to life in the ACHPR must be understood widely.⁷⁴ This however doesn’t mean that it necessarily needs to be considered as absolute. The third line of Article 4 of the ACHPR also states that, ‘no one may be arbitrarily deprived of this right’, this means *e contrario* that a deprivation is possible.⁷⁵ It may simply not be arbitrary. Hence one can argue that, the right to life under the African Charter is not absolute.

From the above brief survey we have established that, the right to life under the ICCPR, ECHR and the African charter is regarded as a fundamental human right. A right from which all the other rights flow from. It is also important to note that the discussion above has revealed that the right to life is not an absolute right. To give a clear meaning of the protection of the right to life under the above mentioned

⁶⁹ However although the right to life seems not to be absolute under the ECHR, it can also be noted that, Protocol 6 ECHR in its Arts. 1 and 2 call out for the abolition of the death penalty. Hence one can argue that the call for the abolition of the death penalty renders the right to life an absolute right.

⁷⁰ Nmehielle V *The African Human Rights System* (2001) 85.

⁷¹ Nmehielle V (2001) 87.

⁷² Nmehielle V (2001) 87.

⁷³ Article 4 of the African Charter.

⁷⁴ Article 4 of the African Charter.

⁷⁵ Article 4 of the African Charter.

international and regional human rights instruments we need to define or give clarity to the words used under these instruments.

2.3. Clarification of Terms

2.3.1. Terms used under the ICCPR

2.3.1.1. “Human Being”

As we have highlighted in chapter 1, the term “human being” opens the question on what a human being is and when human life begins and when it ends. Notably, many different academic arguments regarding this question exist. The main issue on discussing this term is that humans tend to define human beings by appearance. But if this is the argument taken into account humans will only be defined as human if they actually appear in physical form. One can argue that restricting the term human to something which appears in physical form can be regarded as a narrow interpretation of this term. Hence it can be noted that human beings exist before birth, that the foetus can be considered as a human being.

According to the English Oxford Dictionary life is “the animate existence viewed as dependent on sustenance or favourable physical conditions”.⁷⁶ This concludes that from the moment the sperm fertilizes the egg and therefore combines to the uterus, life exists. It can be noted that this definition seems not to fulfil the requirements here, as life and human being can be interpreted differently. At this point we have established that there is no solid definition of the term human being since there is a two sided argument on when does life begin. The beginning of life is the determining factor on what can be regarded as a human being. Hence the discussion on defining the term human being will be taken in the later paragraphs where the issue of compatibility of abortion and the right to life shall be discussed.

⁷⁶ HubPages ‘The legalization of abortion violates the right to life of unborn children’ available at <http://kkolosh.hubpages.com/hub/The-legalization-of-abortion-violates-the-right-to-life-of-unborn-children> (accessed on 4 August 2015).

2.3.1.2. “Protected by Law”

The second line of Article 6(1) of the ICCPR states that, the right to life shall be ‘protected by law’. The main question under this line is what does the phrase ‘protected by law’ mean. According to Nowak, the term ‘protected by law’ requires implementing a minimum of prohibitive laws under criminal law.⁷⁷ States can implement this by adopting laws which punish murder and other kinds of crimes which affect the life of another person.

2.3.1.3. “Arbitrary Deprivation of his Life”

The third line of Article 3 of the ICCPR states that, ‘no one shall be arbitrarily deprived of his life’.⁷⁸ Following this wording, there is need to clarify the meaning of the phrase ‘arbitrarily deprived’. Authors such as Bossuyt proposed that, “arbitrarily” should mean “fixed or done capriciously or at pleasure; without adequate determining principle; depending on the will alone; tyrannical; despotic; without cause upon law; not governed by any fixed rule or standard”.⁷⁹ In the case of *Suárez de Guerrero v Colombia* in which Colombia has found that the killing of de Guerrero was lawful but the HRC has found that the killing was arbitrary.⁸⁰

2.3.2. Terms under the European Convention on Human Rights

The word “everyone” which is used under Article 2 of the ECHR needs to be clarified. The main question in this case is what does the word everyone mean and who falls under the umbrella term of ‘everyone’. In this regard, can a foetus be regarded part of the term ‘everyone’. The case of *Rance v Mid-Downs Health Authority* brought a clear indicator that life in this regard only begins after birth. In the case of *Evans v Amicus Healthcare Ltd & Others*, the judges decided that the

⁷⁷ Nowak M (1997) 106.

⁷⁸ Article 3 of the ICCPR.

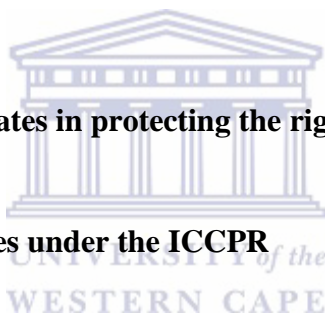
⁷⁹ Bossuyt M (1987) 123.

⁸⁰ *de Guerrero v Colombia* (1982) 11/45.

foetus doesn't have any rights or interests, prior to the moment of birth.⁸¹ Such a decision reveals that the foetus is not supposed to find protection under the word of "everyone" in the ECHR.

2.3.3. The terms under the African Charter on Human and Peoples' Rights

But further problems arise by the detailed viewing on its requirements. The meaning of the word "arbitrary" is controversial, which makes it difficult to find an adequate standard within the African world. A definition of what the arbitrary taking of life is doesn't exist in the ACHPR itself and the commission hasn't given such a definition when adopting such right.⁸² Its general understanding however defines "arbitrary" as "extra-judicial killing", which is a common factor taken into account under international law.⁸³



2.4. The obligation of states in protecting the right to life

2.4.1. Obligation of states under the ICCPR

The ICCPR obliges states to take both positive and negative measures in protecting the right to life.⁸⁴ The positive duties of the state parties in protecting the right to life entails taking appropriate steps to ensure that people in their states do not die.⁸⁵ The negative duty entails that state members must refrain from killing people.⁸⁶ The fact that an arbitrary deprivation of life is strictly prohibited obliges states to take positive measures which prevent and punish acts that reflect an arbitrary deprivation of life. One way to meet this requirement is the implementation of criminal laws by state parties of the ICCPR which will prevent the arbitrary deprivation of the right to life.⁸⁷ Additionally states are obliged to punish killings by negligence or

⁸¹ *Evans v Mid-Downs Health Authority* (2004) EWCA Civ 727.

⁸² *Nmehielle V* (2001) 86.

⁸³ Murray R 'Report on the 1996 Sessions of the African Commission on Human and Peoples Rights – 19th and 20th Sessions' (1997) *18 Humam Rights. Law Journal* 19.

⁸⁴ HRC 'General Comment No. 6 on Article 6 (The right to life)' (1982) para. 5.

⁸⁵ *Dermit Barbato v Uruguay* (1990) 84/1981.

⁸⁶ Joseph S & Schultz J & Castan M (2000) 129.

⁸⁷ *Kindler v Canada* (1993) 470/1991.

recklessness.⁸⁸ But they must not only prevent killings by private individuals, furthermore it is of outstanding demand of Art. 6 ICCPR to prevent killings by own state security forces.⁸⁹

2.4.2. The obligation of states under the ECHR

The first paragraph of Article 4 of the ECHR states that “everyone’s right to life shall be protected by law” and “no one shall be deprived of his life intentionally”.⁹⁰ The wording of Article 4 of the ECHR leaves room for different interpretations. The European Court as well as the British Federal Court have given their opinions and therefore explain that the duty of states must include;

“not only a duty not to take life, but in some circumstances to take steps to prevent life being taken and as part of that duty an obligation to investigate the circumstances surrounding the death”⁹¹

The case of *Osman v United Kingdom* repeats this obligation and clearly states that, ‘the state party must not only refrain from the intentional and unlawful taking of life but must also take appropriate steps to safeguard the lives of those within jurisdiction’.⁹² Following the above discussion it can be argued that, under the ECHR state parties have both positive and negative duties in protecting the right to life.

2.4.3. The obligation of states under the African Charter

State parties under the African Charter also have both positive and negative duties

⁸⁸ HRC ‘Concluding Observations on the Ukraine’ (1995).

⁸⁹ *Kindler v Canada* (1993) 470/1991. Different Concluding Comments have dealt with this regard so far, as such, the HRC criticized Paraguay to not have sufficient laws regarding infanticide. Further a few numbers of African countries have been criticised because of their approval of female gender mutilation by not adopting adequate laws to prevent such. The USA further was criticised for their laws of easy access to weapons.

⁹⁰ Article 4 of the ICCPR.

⁹¹ *Regina v Secretary of the State for the Home Department* (2001) UKHL 26.

⁹² *Osman v United Kingdom* (1997) 29 EHRR 245.

in protecting the right to life.⁹³ The ACHPR has agreed that Art. 4 ACHPR must ensure more than only the prohibition of state officials to not deprive individuals from their lives as a negative duty.⁹⁴ Further positive measures such as those in the ICCPR and the ECHR have to be implemented.⁹⁵

2.5. The Compatibility of Abortions and the Right to Life

The word abortion comes from the latin word “aboriri” and means “to perish” and is briefly defined as “the loss of a foetal life”.⁹⁶ It includes all cases of foetal expulsion from the womb whether inadvertently or induced.⁹⁷ Fagothey’s personal definition for abortion states that, “an abortion is the expulsion of a nonviable foetus, that is, of one too young to live outside the womb”.⁹⁸ Now that we have defined the word abortion, the remaining question is whether the issue of abortion is compatible with the right to life. To give clarity to the above question we shall look at abortion and issues such as prenatal protection of life.

2.5.1. Prenatal protection of Life

However, Article 6(1) of the ICCPR and Article 2 of the ECHR remain quiet about the beginning of protection of life.⁹⁹ Prenatal protection might be on the one hand necessary to guarantee the development of the human-species or to guarantee minimum standards of human-dignity and life.¹⁰⁰ On the other hand it must be seen that prenatal beings don’t have any feelings, rationality or similar to call for protection.¹⁰¹ There is a constant process of development while being in the uterus of the mother. Even if not born yet changes take place within the months of a

⁹³ Doswald-Beck L *Human Rights in Times of Conflict and Terrorism* (2011) 161.

⁹⁴ Doswald-Beck L (2011) 161.

⁹⁵ Doswald-Beck L (2011) 161.

⁹⁶ New Advent ‘Abortion’ available at <http://www.newadvent.org/cathen/01046b.htm> (accessed on 4 August 2015).

⁹⁷ *Roe v Wade* (1973) 410 US 113, 93 SC 705.

⁹⁸ Fagothey A (1963) 241.

⁹⁹ Nowak M (1997) 123.

¹⁰⁰ BVerfGE 1, 39 (1975).

¹⁰¹ Kalebic CQ ‘Children, the unprotected minority: A call for reexamination of children’s rights in lights of *Stenberg v. Carhart*’ (2003) 15 *Regent U.L. Rev.* 231.

pregnancy, that way it can't even be assumed that every unborn being doesn't have feelings. Clearly the rationality is missing, but this is not only a problem of unborn children. Going back to upper argumentation there is a call for equal treatment, in a world where human rights exist, all stages of life should find consideration. It doesn't necessarily have to be on the same level as more developed life, but the complete deprivation of rights seems not to fulfil the aims of international standards also not the aims of a fair world, fair chances and fair treatment.

2.5.2. Abortion *vis á viz* Competing Rights

The issue of abortion affects the rights of woman involved in the process. These rights include the highest possible attainable standard of health, the right to non-discrimination, the right to privacy, the right to information and the right to liberty and security. Further it might even be classified as torture or other cruel, inhuman or degrading treatment.

2.5.2.1. Highest possible attainable Standard of Health

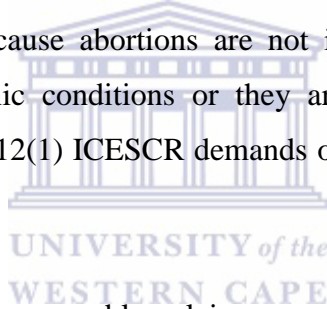
As one of the most important rights of the mother which might experience a violation is the highest possible attainable standard of health to mention. Open for discussion is whether the right to life interferes with such right and if yes in how far. The highest possible attainable standard of health is ratified in Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It states that,

“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁰²

Untimely or frequent pregnancies mean a risk of health for women. Statistics show that women are more likely to suffer in health when pregnancy occurs at the age

¹⁰² Article 12(1) of the International Covenant on Economic, Social and Cultural Rights.

before 18 or after 35.¹⁰³ The prohibition of abortions therefore leads to danger if the woman can be considered part of such group. High numbers of maternal deaths exist.¹⁰⁴ “Maternal death is the death of a woman while pregnant or within 42 days of termination of pregnancy [...]”¹⁰⁵ Reproductive health care however, including abortion services can reduce maternal mortality.¹⁰⁶ The prohibition of abortions takes away rights of women to have the highest possible standard of their physical integrity, because the derogation of health could simply be avoided by abortions. Furthermore not only the factor of age plays a role with regards to abortion and health. It brings further problems in regards of unsafe abortions. Notably 47.000 unsafe abortions per year result in death.¹⁰⁷ An unsafe abortion is an abortion that is implemented illegally because the country doesn’t provide any kind of abortion service, which would be the fact in countries that don’t allow abortions.¹⁰⁸ The circumstance that many women don’t abstain from abortions even if illegal, brings difficulties in health because abortions are not implemented through qualified personnel, under hygienic conditions or they are implemented simply not as carefully. However Art. 12(1) ICESCR demands otherwise. According to Cook it can even be said that,



“a woman may reasonably claim an entitlement to adequate reproductive health care to enable her to survive pregnancy and child birth, to the extent such health services are achievable within the economic and social circumstances of their nations”.¹⁰⁹

¹⁰³ Cook RJ ‘U.S. Population Policy, Sex Discrimination, and Principles of Equality under International Law’ (1987) 20 *New York University Journal of International Law & Politics* 97.

¹⁰⁴ According to the World Health Organisation approximately 800 maternal deaths per day occur. See: World Health Organisation ‘Media centre’ available at: <http://www.who.int/mediacentre/factsheets/fs348/en/> (accessed on 3 November 2015).

¹⁰⁵ World Health Organisation ‘Health statistics and information systems’ available at: <http://www.who.int/healthinfo/statistics/indmaternalmortality/en/> (accessed at: 3 November 2015).

¹⁰⁶ Cook RJ (1987) 95.

¹⁰⁷ World Health Organisation ‘Sexual and reproductive health’ available at: http://www.who.int/reproductivehealth/topics/unsafe_abortion/hrpwork/en/ (accessed on 3 November 2015).

¹⁰⁸ World Health Organisation ‘Sexual and reproductive health’ available at: http://www.who.int/reproductivehealth/topics/unsafe_abortion/hrpwork/en/ (accessed on 3 November 2015).

¹⁰⁹ Cook RJ (1987) 103.

The Convention on the Elimination of all Forms of Discrimination Against Women. Art. 12(1) CEDAW also states that;

“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”¹¹⁰

Such considerations show clearly that women make negative physical experiences if pregnancy under certain circumstances takes place or unsafe abortions are implemented. Legal abortions could be the measure to prevent such negative physical experiences. The right to the highest possible attainable standard in health is therefore violated.

2.5.2.2. The right to Non-Discrimination

Another right that is affected by the legality of abortion is the right to non-discrimination. The right to non-discrimination can be found in different treaties. The mentioning of this right at different places brings clarification regarding the importance of this right.

Art. 2(1) ICCPR states that;

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹¹¹

Furthermore Article 3 of the ICESCR states that;

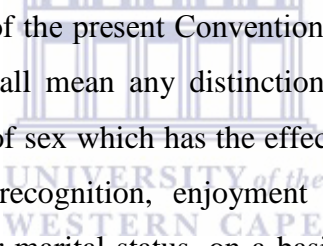
¹¹⁰ Article 12(1) of the Convention on the Elimination of all Forms of Discrimination against Women.

¹¹¹ Article 2(1) of the ICCPR.

“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”¹¹²

These provisions demand that no discrimination may be based, on the grounds such as of sex. In this case, placing women into disadvantages because of their liability to pregnancy constitutes discrimination based on sex.¹¹³ A risk exists during the first trimester of pregnancy. Women often experience miscarriages. This results often in physical and psychological disadvantages.¹¹⁴

A definition of “discrimination against women” is given by Article 1 of CEDAW. This Article states that;



“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”¹¹⁵

The Convention on the Elimination of All Forms of Discrimination against Women gives more information. It prohibits sex-based discrimination in total.¹¹⁶ Therefore discrimination on ground of pregnancy is prohibited.¹¹⁷

¹¹² Article 3 of the ICESCR.

¹¹³ Cook RJ (1987) 101.

¹¹⁴ Eunice Kennedy Shriver National Institute of Child Health and Human Development ‘What are the factors to put a pregnancy at risk?’ available at: <https://www.nichd.nih.gov/health/topics/high-risk/conditioninfo/Pages/factors.aspx> (accessed on 4 November 2015). Pregnancies are always a risk, during the whole process of pregnancy, women are likely to experience disadvantages in health, mental and physical, as well as in daily life situations.

¹¹⁵ Article 1 of the CEDAW.

¹¹⁶ Article 1 of the CEDAW.

¹¹⁷ Cook RJ (1987) 101.

The above discussion reveals that, discrimination against women takes place if abortions are prohibited. Some scholars argue that the prevention of discrimination amounts to torture, cruel, inhuman or degrading treatment against woman.

2.5.2.3. Classification of abortion Torture, Cruel, Inhuman or Degrading Treatment

Furthermore thoughts can be made on whether the prohibition of abortion can be classified as torture or other cruel, inhuman or degrading treatment. Torture is defined under Article 1 of the Convention against Torture as;

“ [...] any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”¹¹⁸

Torture is an ongoing and changing process. It used to be seen only in the context of punishment, but considerations can be made that torture can also exist in other contexts. One can argue that, a woman doubtlessly suffers from physical and mental pain if wanted abortion can't be implemented. The ECHR states in this context that, 'a violation of Article 3 of the ECHR may occur where the intention of the action or inaction committed by the state was not to degrade, humiliate or punish the victim, but where this happened to be the result anyway'.¹¹⁹ The specific purpose that needs to exist to qualify an act as torture can be formed by the general

¹¹⁸ Article 1 of the Convention against Torture.

¹¹⁹ *Peers v Greece* (2001) 28524/95.

acceptance of the non-exhaustive character of that list.¹²⁰ Also the involvement of a state official, or at least acquiescence of a state official is also given.¹²¹ The requirement applies to doctors, health-care professionals and social workers, including those working in private hospitals or other institutions.¹²² The state is responsible for action of private institutions when it outsources its medical services.¹²³ In total, any shortcoming of one of the four key elements might be interpreted as ill-treatment.

The fact that prohibition of abortions can possibly be qualified as torture shows of how deep the impacts on women are. The prohibition of torture is qualified as absolute.¹²⁴ States have the obligation to prevent torture in any case. The prohibition of abortion is for the reasons stated above a violation of one of the highest international obligations.

2.5.2.4. Right to Liberty and Security of Person

Other considerations can be made if the right to liberty or security of the person is violated. Article 9(1) of the ICCPR protects the right to liberty and security of person. This article states that;

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹²⁵

The right to liberty “concerns freedom from confinement of the body”, it is however

¹²⁰ Human Rights Council ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez’ (2013).

¹²¹ OHCHR ‘Interpretation of torture in the light of the practice and jurisprudence of international bodies’ available at: http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf (accessed on 4 November 2015).

¹²² *Silva Pimentel v Brazil* (2011) 17/2008.

¹²³ *Silva Pimentel v Brazil* (2011) 17/2008.

¹²⁴ HRC ‘General Comment No. 20 on Article 7’ (1992) para. 3.

¹²⁵ Article 9(1) ICCPR.

“not a general freedom of action”.¹²⁶ This right to liberty could be violated by laws which prohibit abortions. But the right to liberty of a person is not considered as absolute. The deprivation of life can be justified, especially in the enforcement of criminal laws.¹²⁷ In the *Morgentaler case* the court held that the prohibition of abortions and therefore the enforcement of the pregnancy is a serious violation of the woman’s health and therefore of the security of the person.¹²⁸ A violation of the right to liberty must even be agreed to in cases where women are deterred from consulting medical staff because of fear to be reported.¹²⁹

The Human Rights Committee confirms the above position. They refer to El Salvador which prohibits abortion completely and goes even further to prosecute women for miscarriages.¹³⁰ As a result women experience fear of prosecution, therefore they avoid seeking for health services.¹³¹ The HRC has stated that, in this regard the criminalisation of abortion and the prohibition to medical access must be seen as a violation of the right to liberty.¹³²

2.5.2.5. Right to Privacy

Another right which is affected by the issue of abortion is the right to privacy of women. The right to privacy is protected under Article 17 of the ICCPR. This article states that;

¹²⁶ HRC ‘General Comment No. 35 on Article 9’ para.3.

¹²⁷ HRC ‘General Comment No. 35 on Article 9’ para.10.

¹²⁸ *Morgentaler, Smoling and Scott v the Queen* (1988) 44 DLR (4th) 385.

¹²⁹ Human Rights Watch ‘International Human Rights Law and Abortion in Latin America’ available at: http://www.hrw.org/legacy/background/wrd/wrd0106/index.htm#_Toc108411721 (accessed on 20 August 2015).

¹³⁰ HRC ‘Report on violations of women’s human rights due to complete criminalization of abortion’ (2010) 2.

¹³¹ HRC ‘Report on violations of women’s human rights due to complete criminalization of abortion’ (2010) 2.

¹³² HRC ‘Report on violations of women’s human rights due to complete criminalization of abortion’ (2010) 6.

(1) “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”¹³³

(2) “Everyone has the right to the protection of the law against such interference or attacks.”¹³⁴

An interference with the right to privacy could take place when a pregnant woman is forced to disclose her stage of pregnancy. In principle Article 17 of the ICCPR protects against any kind of “arbitrary or unlawful interference with someone’s privacy, family, home or correspondence”¹³⁵ Especially information about pregnancy and therefore family matters can be considered to belong to the very personal sphere of oneself.¹³⁶ The fact that an abortion may only be allowed under certain circumstances, such as being in danger of health, implies that the affected person has to get proof of her medical condition. This then means that, state officials and private actors can get an insight in the women’s very personal wish to terminate the pregnancy. Furthermore cases exist in which women were supposed to get consent of her husband to have an abortion.¹³⁷ In cases of minors it is discussed if the consent of the parents is necessary.¹³⁸ Hence it can be noted that, every kind of forced involvement of another person might violate the women’s right to privacy.

In the case of *Tysiac v. Poland* the European Court of Human Rights has held that the right to privacy is violated when a women is not allowed to have an abortion even though her eye sight suffers by giving birth.¹³⁹

Another opinion states that, a comparison must be made to the right to vote.¹⁴⁰ It says that every kind of third party involvement is an injury of the right to privacy,

¹³³ Article 17(1) of the ICCPR.

¹³⁴ Article 17(2) of the ICCPR.

¹³⁵ HRC ‘General Comment No. 16 on Article 17’ (1988) para. 1.

¹³⁶ *Artavia Murillo and Others v Costa Rica* (2012).

¹³⁷ *Paton v British Pregnancy Advisory Service Trustees and Another* (1979) QB 276.

¹³⁸ *Planned Parenthood v Casey* (1992) 505 US 833.

¹³⁹ *Tysiac v Poland* (2007) 5410/03.

¹⁴⁰ Heller S ‘Abortion Rights of Young Women: The Supreme Court Attacks The Most Vulnerable’ (1990-1991) 30 *Washburn Law Journal* (15) 22.

just as the right to vote remains secret.¹⁴¹

2.5.2.6. Right to Information

Another human right that might be violated by abortion is the right to information. The right to information is ratified in Article 19(2) of the ICCPR and states that:

“Everyone shall have the right to freedom of expression; this right shall include 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.”¹⁴²

The right to information in this regard must provide information about abortions. Such information need to provide affected women with information about safe abortion services, risks of abortions, ethical and moral thoughts and alternative possibilities. Women need to have easy access to information even in countries where abortion is illegal.¹⁴³ The Uruguay model represents this figure. It provides women with information about abortion even if they don't qualify for lawful abortion.¹⁴⁴ According to Erdmann, “regardless of whether the objectives underlying criminal abortion laws are legitimate, depriving women of health information is an inhumane means to achieve them”¹⁴⁵

Further jurisdiction regarding the right to information exists. Irish law prohibited abortions in any cases, even the ones that are medically necessary. Ireland amended its constitution and added a right to life which states that the state acknowledges the right to life of the unborn. Information on abortions were banned by the supreme court and it held that the right to life of the unborn would be violated in events of

¹⁴¹ Heller S (1990-1991) 22.

¹⁴² Article 19(2) of the ICCPR.

¹⁴³ Human Rights Watch ‘Human Rights Law and Access to Abortion’ available at: <https://www.hrw.org/legacy/background/america/argentina0605/> (accessed on 4 November 2015).

¹⁴⁴ Briozzo L ‘Risk Reduction Strategy’ (2006) 95 *International Journal of Gynecology & Obstrics* (2) 226.

¹⁴⁵ Erdmann J ‘Access to information on safe abortion: A harm reduction and human rights approach’ (2011) 34 *Harvard Journal of Law & Gender* 440.

abortion. The European Court of Human Rights however held that the prohibition of giving women with information on abortion violates the right to freedom of expression under Article 10 of the ECHR. Therefore the court held that to prevent such violation of rights, it is therefore necessary to provide affected women with information.¹⁴⁶

2.5.3. General discussion on abortion

2.5.3.1. Opponents of Abortion

Pro-life arguments find a high number of representatives. Their arguments play an important role in giving clarity to the broader topic of abortion. Some of these arguments stem from the point that, the death penalty is prohibited on pregnant women under Article 6(5) of the ICCPR. The fact that the death penalty is prohibited on such could imply that abortions must be prohibited.

Furthermore misrepresentation must be prevented and abortion can represent a certain degree of coercion and social pressure. It can be stressed that women can't make a decision before actually giving birth. Further the prohibition of abortions prevents harm to women's health, because abortions are inherently dangerous to the physical and psychological health of the pregnant mother.¹⁴⁷ But this must also be concluded as circular reasoning, as obviously both, the abortion itself and the non-abortion if wished-for, can have deep psychological and physical affects. It is clear that the abortion process itself is an unpleasant procedure and mental and physical affects might be the result, but the same difficulties are most likely to appear if the abortion is not implemented. Women who don't want children so bad, that they are even willing to follow the unpleasant procedure of an abortion, are most likely to experience even deeper mental affects if not allowed to abort the child, as if being in regard to the abortion. They have made their own choice on which option they will be the best for their personal mental well-being. Physical

¹⁴⁶ *Open Door and Dublin Well Women v Ireland* (1992) 14234/88.

¹⁴⁷ Liberty Counsel 'Report of the South Dakota Task Force to study Abortion' (2005) available at: https://www.lc.org/Uploads/files/pdf/SD_abortion_rpt.pdf (accessed on 30 October 2015).

difficulties might be on the same level, an abortion, as well as giving birth, bring unpleasant stresses.

2.5.3.2. Proponents of Abortion

But just as many arguments can be found which are made in favour to the pro-choice option. Same sources as the ones mentioned for the pro-life option can be noted. The argumentation of the proponent parties are just as strong as the ones on the other hand.

Considerations must be made concerning the “condition” of the foetus. It can be argued that the foetus has no self-awareness at all.¹⁴⁸ It is located in the mother’s uterus and is only a little cell which can’t actually be defined out of outer appearance as something that is alive, even though it is. However, the fact that this cell is alive doesn’t change the fact that the foetus is not able to think, feel or, show any kind of rationality, has any kind of autonomy nor has it self-consciousness.¹⁴⁹ It therefore needs to be questioned if a “person” which doesn’t realise it exists needs the protection of its life.

But this statement must be criticised. It is on the one hand true that such characteristics don’t exist for a foetus and that this gives reason to think about the evaluation of such lives. But don’t such characteristics reflect the characteristic of a grown human being anyway? Comparable to a newborn¹⁵⁰, would someone actually say a newborn represents rationality? Autonomy? Self-consciousness? Awareness? Don’t all these characteristics show more of the ideal conception of a human which needs to be developed throughout the years? So consequently does this mean newborn babies as well as people who are not provided with such characteristics, as society would wish for, may be killed? This can obviously not be the aim. Such considerations must therefore in my opinion be evaluated as weak. But it needs to be seen in total. It therefore seems to be considerable to take the

¹⁴⁸ Kalebic CQ (2003) 231.

¹⁴⁹ Kalebic CQ (2003) 231.

¹⁵⁰ Kalebic CQ (2003) 231.

factor into account of awareness of existence and feelings. A foetus doesn't have feelings nor does it have any kind of awareness of existence. It may not be denied that the foetus develops feelings throughout its process of growing and actually starts slowly to begin a process of developing a sense for outer influences. But at the very first stage of pregnancy none of that exists. A newborn however clearly experiences feelings and therefore pain. It might be on the same level of realisation like an unborn, so it doesn't actually appreciate its own existence, but the decisive factor is the developed stage of realisation of outer influences, as well as the perception of pain and feelings.

A Further argument which is in favour of the allowance of abortions is one that has been made by Prieto. She says that a private human right to family planning exists and therefore to choose the number of children.¹⁵¹ She argues that the right of individuals to freely and responsibly decide the number and spacing of their children logically includes the right to abort an unwanted pregnancy.¹⁵² The right to individual family planning can be drawn out of Art. 16(1) CEDW which states:

“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

....

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

....”

In this regard the right of a mother to maximize the chance of surviving childbirth must be mentioned. As explained above chances of healthy birth for the mother decreases if she gets pregnant at certain ages.¹⁵³ The delay of first birth might

¹⁵¹ Prieto I (1993) 2.

¹⁵² Prieto I (1993) 7.

¹⁵³ Cook RJ (1987) 97.

therefore be necessary to keep the mother's individual family plan in balance. The force into a pregnancy of higher risk might even lead to a miscarriage. This supports the failure of family planning. Bearing after a miscarriage is a serious problem.

But a critical argument also has to be put aside at this place. The principle of family planning must be confirmed in the first place. Women must be able, as a basic construction of today's society, to find their own family planning without interference by state legislature. But it needs to be argued that abortion in this regard is not the only way to enforce such right. Some clear medical development steps concerning contraceptives have been made throughout the past years, which makes it easy to prevent pregnancies in total if not wanted. It is therefore highly questionable if abortions are necessary at all if such good medical treatments exist. On the other hand it must be said that there are always existing situations in which the expecting mother, as a victim of rape, or as a result of being financially disadvantaged, wasn't able to find the necessary preventions. Argumentations regarding to such cases are ineffective. Further it needs to be considered that not every expecting mother is mature enough to know about the importance of contraceptives if a pregnancy is not wanted, as to say teenage mothers or even mentally disabled people. Even though certain expectations are being made to people who have intercourse, expectations are not always fulfilled and it is questionable if such situations are supposed to be "punished" for the rest of the life.

The women's "fundamental right to self-determination" is necessary to discuss. This right to self-determination includes to make own decisions about one owns treatment.¹⁵⁴ The bodily integrity is in regard to self-determination of outstanding importance under which pregnancies can be subsumed, as the foetus is part of the mother's body. A women's choice is based on the "moral fact that a person belongs to himself and not to society as a whole".¹⁵⁵ This also confirms the right to privacy, which gives one the right to decide on its very own without interference. One could

¹⁵⁴ Legal Information Institute 'Self-determination' available at: https://www.law.cornell.edu/wex/self_determination_international_law (accessed on 6 November 2015).

¹⁵⁵ *Thornburgh v American College of Obstetricians & Gynecologists* (1986) 476 US 747.

bring the argument that decisions of termination of pregnancy are comparable to situations in which someone would decide to amputate its arm. This would also be covered under the right to privacy and the right self-determination.¹⁵⁶ Both include the very own personal ruling over the own body.

This goes in one hand with the best interest of children, which is one of the major principles within the Convention on the rights of the child.¹⁵⁷ Parents should thus be the ones who decide if they can provide their children with what's in their best interest.¹⁵⁸ It is not out of doubt that parents might simply not be able to take responsibility for children, to support them financially or even provide them with a regular familiar relationship. However by interfering in a woman's abortion decision, the state takes away the possibility for parents to decide on their own if they can give the child what's in their best interest. In very serious cases might it not be in the best interest of a child to not have to deal with the depth of human nature?¹⁵⁹ It therefore seems problematical under the view of the individual capability to define moral and ethic by legislative acts. Isn't every individual case special on its very own? Especially in view to the ICCPR, which is an international treaty, it is hard to find a fair argument which can be considered to be morally and ethically correct, as argumentation regarding these terms differs all over the world. But such argumentation shows that it actually is discussable if the best interest is only guaranteed if the child is able to be born, but on the other hand there is also room for an assumption that the child might be better off not to be born. It is therefore worth thinking about on how well the parents would want to care for the child if it is not wanted. Surely there might be unwanted children that grow up in loving families and safe surroundings. But how is the position to be placed where mothers are expected to fail? Are such children simply supposed to deal with a life which is characterised by human failure? This automatically leads to the question whether there are any ideal expectations. But further, if such expectations differ

¹⁵⁶ Alcorn R *Why Pro-Life: Caring for the Unborn and Their Mothers* (2012) 37.

¹⁵⁷ Article 3(1) of the Convention on the Rights of the Child.

¹⁵⁸ Jellinek MA 'Disease Prevention and the Genetic Revolution: Defending a parental Right to protect the bodily integrity of future Children' (2000) 27 *Hastings Constitutional Law Quarterly* 372.

¹⁵⁹ Jellinek MA (2000) 374.

from surrounding to surrounding, if this doesn't mean an unequal treatment of children within this principle.

Further jurisdiction has been made regarding this controversy which was in favor to the pro-choice alternative. Of high importance in this regard is the *Roe v Wade* case, in which the court decided that the right to privacy of a mother includes the termination of the pregnancy.¹⁶⁰

Thirdly, as stated above, the treatment of the right to life in comparison to the competing rights of the mother have to be discussed. It is to say that the child's right to life is one right against many competing rights of the mother. As discussed above violations can be assumed regarding the right to privacy, the right to information, the right to liberty, the right to the highest possible attainable standard of health, the right to non-discrimination or the prohibition of abortions might even be considered as torture or other ill treatment. It has to be asked oneself if the high number of competing rights can be a valuable factor to evaluate the situation. But clearly the quantity can't be the only criteria. The importance of the rights has to be weighted. Therefore the outstanding importance of the right to life has to find its position. The right to life is the basic human right which is precondition for all other rights. Without the right to life no other right can be implemented.¹⁶¹ But the importance of the competing rights may not be ignored. Every single right is very fundamental, this can be assumed by its position as human rights. Human rights are always of outstanding importance as they are supposed to achieve a minimum equal standard of humanity. It is therefore questionable if the right to life must always be weighted higher than other rights.

Abortions may be considered as torture or ill-treatment. Not everyone may agree to this point of view, because not everyone would evaluate a prohibition of abortion as torture. Indeed this is a very wide interpretation of a legislative act. But it must be seen that, regarding to the statement above which is made on torture, the requirements of torture are fulfilled or at least can be fulfilled if the interpretation

¹⁶⁰ *Roe v Wade* (1973) 410 US 113, 93 SC 705.

¹⁶¹ Carlson-Whitley AK (1994) 5.

is supposed to agree. This fact makes it important to see the outstanding importance and the kind of influences it has on women's life's, after all the prohibition of torture is absolute under international law and therefore of even "higher" treatment than the right to life.

Further the right to self-determination and privacy can be considered as basic rights. No one has to reveal information if not wanted. The right to self-determination goes in one hand with this. The right to self-determination is the fundamental right of a human being to challenge life.¹⁶² To guarantee the freedom of making own decisions is what makes every human unique. The uniqueness of humans is the factor which leads to a functioning society. If every human was equal a development of technique, knowledge, etc. would be impossible. On the one hand the right to life is the fundamental right to guarantee every other right. But on the other hand the right to self-determination is what brings life a certain standard through development. Is it therefore actually possible to consider other rights than the right to life as inferior? And not only the right to self-determination plays a role. Every other right discussed above plays a unique role which can also be brought into context with the right self-determination. Every right includes a certain degree of self-determining parts. Rights can't just simply be separated and find evaluations on its own without taking other influences into account. The right of bodily integrity and the right to privacy, etc. they all provide the standard of living which constitutes today's standard. Taking the just mentioned arguments it has to be denied that the right to life is always evaluated as more important. A general answer can't be given. Individual cases always have to find consideration.¹⁶³

This is exactly what is supposed to give a fair answer in the case of abortions. The protection of the unborn is very important, but the protection of the mother may not be left out of sight. Taking all the discussed points into account there must be an exemption clause regarding cases where an abortion is simply necessary, such as

¹⁶² Legal Information Institute 'Self-determination' available at: https://www.law.cornell.edu/wex/self_determination_international_law (accessed on 6 November 2015).

¹⁶³ *Open Door and Dublin Well Women v Ireland* (1992) 14235/88.

the derogation of health of the mother if an abortion is not implemented and further the derogation of health of the foetus must play a role. Also in the case of rape the allowance of an abortion is necessary as the woman needs protection of her mental health in such situation. A provision for hardship cases is therefore unavoidable. But to go further, the above discussed evaluation, of competing rights has to be brought in balance. The right to life is not the only right which counts. It must be protected, this is clear, but the allowance of abortions may not necessarily be seen as arbitrary. The fact that the foetus doesn't have the ability to feel pain in the first trimester of pregnancy and doesn't have the ability to evaluate its own existence, draws a line to the balance of rights. The strong deprivation of women's human rights, in balance with the non-ability of the foetus to evaluate its existence, brings the assumption that abortions within the first trimester of pregnancy don't mean an arbitrary deprivation of life.

2.5.4. The Compatibility of Abortions and Art. 6 ICCPR

The issue of whether the issue of abortion is in line with Article 6 of the ICCPR or not is determined by the definition of the word human being. In this regard if a foetus is a human being then it means that abortion violates the right to life which is protected under Article 6 of the ICCPR. Conversely, if a foetus is not a human being then the issue of abortion does not violate Article 6 of the ICCPR.

2.5.4.1. Pro Arguments of Foetus as a “Human Being”

Academic scholars who regard a foetus as a human being states that, human life begins when the sperm of the father and the ovum of the mother unite.¹⁶⁴ In this case the individual creation of a person takes place at the moment of conception where the unique DNA is created.¹⁶⁵ But further arguments to consider a foetus as a human being exist.¹⁶⁶

¹⁶⁴ Rice CE (1999) 76.

¹⁶⁵ Alcorn R (2012) 27.

¹⁶⁶ The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993. It brings general arguments of the foetus being considered a human being. Article 156 (a) of such Act provides a punishment of up to 2 years in cases where “an unborn suffers

The Inter-American Court of Human Rights has referred to the foetus as a human-being or at least made it subject to human rights. In the case of *Artavia Murillo and Others v Costa Rica* the court stated that, ‘the foetus is a person by the time of conception’.¹⁶⁷ The court in the case of *Gómez-Paquiyaury Brothers v Peru* reparations were granted for the death of an unborn child.¹⁶⁸ But it needs to be critically viewed if one can actually consider this the right of the unborn or if this is actually the right of the one receiving the reparations. Further it could be argued that this right is not a prenatal right of the unborn but more a postnatal right of the unborn which is passed over to the legal successor of the dead “person”. In *Miguel Castro-Castro Prison v Peru* however took a recognition place of the unborn children as “children”.¹⁶⁹ The use of the term “children” implies the humanity in this situation, as a child clearly and without doubt is a human being.

In *Goiburú et al. v Paraguay* an unborn baby was granted repatriation because of forced disappearance of the father.¹⁷⁰ But in this case it could be asked oneself if it makes a difference that the child is actually born alive. It could be assumed that the child is granted such reparations because it was actually born. Thoughts have to be made about if there would have been a claim even if the child wasn’t born. Would the legal guardian of the child be able to request the child’s claim as a legal successor? Or would this simply mean that a claim never existed and reparation therefore failed?

Finally in the case of *Sawhoyamaxa Indigenous Community v Paraguay* the court calls state duties to secure the rights of pre-natal health.¹⁷¹ But the term pre-natal health is a wide term. It needs to be defined on what is meant by health care. Health

bodily harm or any life imperilling threat to its health”. This shows clearly that the polish legislature provides rights for the unborn, therefore that a consideration as “human” must have taken place. The right to life must according to this find attraction. Also Article 149 (a) (11) of the Act goes into the same direction. It finds that “a person who causes the death of a conceived child shall be subject to imprisonment for up to 2 years”.

¹⁶⁷ *Artavia Murillo and Others v Costa Rica* (2012).

¹⁶⁸ *Gómez-Paquiyaury Brothers v Peru* (2004).

¹⁶⁹ *Miguel Castro-Castro Prison v Peru* (2006).

¹⁷⁰ *Goiburú et al v Paraguay* (2006).

¹⁷¹ *Sawhoyamaxa Indigenous Community v Paraguay* (2006).

care could be meant in a sense that the mother must be granted protection during pregnancy. And in a case of difficulties that the best possible health care needs to be provided to save the mother's and the child's life. To provide the pregnant women with health care doesn't necessarily exclude to grant her with the right of an abortion and therefore consider her foetus as inhuman.

2.5.4.2. Contra Arguments of Foetus as a “Human Being”

There are also academic scholars who argue that, life only “begins at viability, at birth, or when there is capacity for social interaction”.¹⁷² This argument is backed up by the fact that the foetus is not actually able to survive without the mother. The foetus doesn't act outside the body of the mother, it is not even able to survive outside the womb of the mother until a late stage of pregnancy. This then raises the question whether “someone” who is not able to control oneself in simple surviving without getting inner support of the person one is connected to, should be treated as a “regular human being”.

The foetus may not be defined as human but in total the embryo is something alive, even though it is not able to survive without the protection of the body of the mother. Other scholars argue that, ‘human life begins at the point where the embryo is fully implanted in the uterus’.¹⁷³ Such considerations show of a short period of time in which the foetus is not considered human. The implantation process however only takes five to eight days from the moment of conception.¹⁷⁴ Hence following this train of thought, an embryo can be considered a human being five to eight days after conception.

More thoughts have been given to the criteria of personhood. This states that the acknowledgement of rights is attached to a person.¹⁷⁵ Arguments can be given that

¹⁷² Danagan A (1977) 169.

¹⁷³ Alcorn R ‘Why life begins at conception’ available at <http://naapc.org/why-life-begins-at-conception/> (accessed on 23 September 2015).

¹⁷⁴ Baby2See ‘Weeks, Months and Trimester Guides’ available at: <http://www.baby2see.com/development/week4.html> (accessed on 15 August 2015).

¹⁷⁵ Fagothey A *Right and Reason: Ethics in theory and practice* (1963) 252.

a foetus is not considerable as a person. Criteria that are being taken into account by representatives of this opinion argue that three factors have to be available to consider someone as a person. These factors are self-consciousness, rationality and moral awareness.¹⁷⁶

Further the Human Rights Committee has stated an opinion in its “Half Day Discussion in Preparation for a General Comment on Article 6 – Right to Life”.¹⁷⁷ Roseman has given her clear statement that, state duties to protect the unborn do not exist.¹⁷⁸ The demands of protection were rejected during the drafting process. She says that carriers of human rights, especially those of the right to life, are those already born.¹⁷⁹

2.6. Recent Developments

The Human Rights Committee stated in its concluding observation regarding Lesotho that, the state party shall “review the law of abortion to provide for situations where the life of the women is in danger.”¹⁸⁰ Regarding Peru the committee noted that Peru gives criminal penalty even in cases where “the woman is pregnant as a result of rape and that clandestine abortions are the main cause of maternal mortality”.¹⁸¹ The committee states that such criminal penalties in any cases can be possibly be incompatible with Articles 3, 6 and 7 ICCPR. Further concluding observations regarding Chile have been made. The committee stresses serious issues with regard to illegal abortions. This can possibly be classified as a danger to women’s lives. The reporting of medical personnel is most likely to keep women from seeking for medical treatment. The Committee therefore recommends that exceptions must be introduced.¹⁸² Also regarding Ecuador the committee’s opinion is clear. It states that a high number of suicides take place for the reason of illegality of abortions. Especially for rape victims, who were impregnated from the

¹⁷⁶ Fagothey A (1963) 252.

¹⁷⁷ HRC ‘Half Day Discussion in Preparation for a General Comment on Article 6’ (2015).

¹⁷⁸ HRC ‘Half Day Discussion in Preparation for a General Comment on Article 6’ (2015) 1.

¹⁷⁹ HRC ‘Half Day Discussion in Preparation for a General Comment on Article 6’ (2015) 1.

¹⁸⁰ HRC ‘Concluding Observations on Lesotho’ (1999) para. 11.

¹⁸¹ HRC ‘Concluding Comments on Peru’ (1996) para.15.

¹⁸² HRC ‘Concluding Observations on Chile’ (1999) para. 15.

abuser, are most likely not to handle circumstances. The committee stresses again that this is a violation of Arts. 3, 6 and 7 of the ICCPR as well as Art. 24 of the ICCPR when female minors are involved. The HRC recommends Ecuador to support females in adequate health and education facilities.¹⁸³

A clear line can be drawn comparing such statements that the HRC demands on the legality of abortions in certain hardship cases. The Committee on the Elimination of All Forms of Discrimination Against Women has given its statement. This given statement brings the same conclusions as the one of the Human Rights Committee.

In the committee's General Comment No. 19 on violence against women, it evaluates compulsory abortion as a danger to mental and physical health¹⁸⁴ but it also condemns the criminalization of abortions and therefore favours the freedom of choice.¹⁸⁵ Further in the "Statement of the Committee on the Elimination of Discrimination against women on sexual and reproductive health and rights: beyond 2014 ICPD review" the committee says that health services for women are necessary. Such services must include information on sexual and reproductive rights. Counselling and services that are available must further be accessible, affordable and of good quality. Failure to provide such services and the criminalisation of services that only women require is a violation of women's reproductive rights and discriminates them.¹⁸⁶

Additionally, in the same statement, the CEDAW holds that unsafe abortions are a leading cause of maternal mortality and morbidity. It demands therefore states parties to legalise abortions at least in certain cases. Included must be cases of rape, incest as well as threats to life or health of the mother, or severe foetal impairment. Further women should be provided with access to quality post-abortion care, especially in regard to cases of complications resulting from unsafe abortions.¹⁸⁷

¹⁸³ HRC 'Concluding Observations on Ecuador' (1998) CCPR/C/79 Add.92 para. 11.

¹⁸⁴ Committee on the Elimination of Discrimination against Women 'General Recommendation No. 19 on violence against women' (1992) para. 22.

¹⁸⁵ CEDAW 'General Recommendation No. 19 on violence against women' (1992) para. 24(m).

¹⁸⁶ CEDAW 'Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: beyond 2014 ICPD review' (2014) 1.

¹⁸⁷ CEDAW 'Statement of the Committee on the Elimination of Discrimination against Women on

Moreover in the committees General Comment No. 24 it states that state parties need to take measures to prevent discrimination. For this purpose health care services must be provided. Such health care systems must be considered as inappropriate if the requirements of health care service are not fulfilled. They need to prevent, detect or treat illness specific to women.¹⁸⁸

The opinion of the CEDW is therefore just as clear as the opinion of the HRC. It favors the possibility on abortions under at least certain circumstances. Also the Committee on the Rights of the Child has stated its opinion, giving a clear line to confirm what the Human Rights Committee and the Committee on the Elimination of All Forms of Discrimination Against Women have stated already.

In its General Comment No. 15 it stresses about different aspects. Its first statement concerns gender-based discrimination. It says that such discrimination is particularly pervasive and affects children, among others, through the missing access to services.¹⁸⁹ In addition the CRC states that children are provided with certain freedoms, including the right to health. The CRC also notes that, with growing maturity children must be able to make their own decisions regarding their health and body which must include “sexual and reproductive freedom to make responsible choices”.¹⁹⁰ Access to facilities and services therefore has to be provided. Concrete measures, stated by the committee, include among others safe abortion services and post-abortion care.¹⁹¹ Moreover the committee states that all couples must be able “to make sexual and reproductive decisions freely and responsibly, including the number, spacing and timing of their children, and give them the information and means to do so”. Adolescents may especially not be deprived of health information and services.¹⁹² Furthermore the Committee

sexual and reproductive health and rights: beyond 2014 ICPD review’ (2014) 2.

¹⁸⁸ CEDAW ‘General Recommendation No. 24 on Article 12’ (1999) para. 11.

¹⁸⁹ Committee on the Rights of the Child ‘General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health’ (2013) para. 9.

¹⁹⁰ CRC ‘General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health’ (2013) para. 24.

¹⁹¹ CRC ‘General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health’ (2013) para. 54.

¹⁹² CRC ‘General Comment No. 15 on the right of the child to the enjoyment of the highest attainable

recommends that parties to the convention provide access to safe abortion and post-abortion care services, irrespective of whether abortion itself is legal.¹⁹³

Summarised, also the Committee on the Rights of the Child represents the opinion that the provision of abortion services is necessary up to a certain degree. It supports the argumentation of the already above stated committees.

At last the opinion of the Committee on the Rights of Persons with Disabilities has to find its viewing. Its core statement shows different characters of evaluation than the statements of the other committees. The CRPD basically bans the possibility of disability selective abortions. The problem of disability selective abortions becomes more present recently. Reason is the medical development in non-invasive blood tests. This allows women to get genetic information of their unborn babies early in the stage of pregnancy. The result is such disability-selective abortion.¹⁹⁴

The committee clearly states in their concluding observations on Spain that a pregnancy can't be terminated based solely on the grounds of disability.¹⁹⁵ In its concluding observation regarding Hungary the committee confirms this only one year later. It stresses that a law that allows abortion on the grounds of foetal impairment is a form of discrimination, on the basis of disability, and violates Article 5 of the CRPD, which prohibits all kinds of discrimination on the grounds of disability.¹⁹⁶

The tendency of evaluation of foetus rights here clearly goes into another direction than what the former committees have pointed out. The CRPD doesn't support abortions at all if they are made on grounds of disability. The committee doesn't want to include exceptions like the other committees strongly recommended.

standard of health' (2013) para. 69.

¹⁹³ CRC 'General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health' (2013) para. 70.

¹⁹⁴ Rebouché R & Rothenberg K 'Mixed Messages: The Intersection of Prenatal Genetic Testing and Abortion' (2011-2012) 55 *Howard Law Journal* 987.

¹⁹⁵ Committee on the Rights of Persons with Disabilities 'Concluding observations for Spain' (2011) para. 17-18.

¹⁹⁶ CRPD 'Concluding observations for Hungary' (2012) para. 17-28.

Therefore it can be concluded that the CRPD realizes foetus rights under international law.

It can be noted from the above discussion that, contradictory results appear within the different United Nations mechanisms. The assumption of the total prohibition of disability-selective abortion brings difficulties in the above stated areas which led other committees to find abortion rights as necessary. Especially the concern of unsafe abortions needs to find explicit mentioning. Women are most likely to abort the foetus if they want to, regardless of illegality, which brings the result of unsafe abortions.¹⁹⁷ This must also count for disability selective abortions. If abortion is prohibited on the grounds of disability women are most likely not going to be deterred from aborting the foetus. This is very likely to bring serious difficulties in health for women which may even occur in death. The right to life of a woman therefore competes with the right to life of the foetus.

If abortions on request were legal any kind of abortion could be implemented. This would take place independently of the fact whether the foetus has a disability or not, the women would be able to ground her decision simply on her personal motives. Assuming such case the abortion of a disabled foetus would be possible “through the backdoor”.¹⁹⁸ Such assumption shows that this is not a difference in between the different United Nations mechanisms but furthermore even a difference within the opinion of only one committee. The concern of disability selective abortion is serious and the evaluation of such issue is unavoidable. But nonetheless the committee needs to state an opinion which brings clear demands regarding this topic to find a ground to work with for future questions regarding this topic.

3. Conclusion

¹⁹⁷ Center for Reproductive Rights ‘Submission to the Committee on the Rights of Persons with Disabilities; Half day of general discussion on women with disabilities’ (2013) 7-8.

¹⁹⁸ Petersen C ‘Reproductive justice, public policy, and abortion on the basis of fetal impairment: lessons from international human rights law and the Potential impact of the convention on the rights of persons with disabilities’ (2015) 28 *Journal of Law & Health* 162.

A conclusion to chapter 2 will follow. To start with is the question of whether the issue of abortion violates the right to life. Therefore the issue discussed above whether a foetus can be considered a human being will be concluded. Opinions exist which consider the foetus as a human being by the moment when the sperm of the father and the ovum of the mother unite.¹⁹⁹ Further opinions state that human life “begins at viability, at birth, or when there is capacity for social interaction”.²⁰⁰ Also representatives say that human life begins at the point where the embryo is fully implanted in the uterus.²⁰¹ Result of this opinion is that an embryo is considered a human being five to eight days after conception.

In my view the unborn needs the protection of the right to life. The foetus is a growing and developing being. Even though it doesn't appear like a human at this stage to other humans it must be seen that it will become a human, like every other human, eventually. The process of developing may not simply be evaluated as non-existing. Such process never stops, one always grows and develops. The fact that the very first part of such process happens differently compared to when someone actually is born doesn't seem to justify the different treatment of such processes. The foetus carries a certain degree of human character, as the pregnancy represents the very first stage of humanity, a certain protection is actually necessary. Such protection is also a question of awarding the foetus with human dignity. Human dignity must exist in this case for the just described reasons. It might even be thought of if the mother's dignity might lead over to dignity of the foetus which is one unit with the mother at that time. But the legal systems and demands of today's society require a certain protection of something that is alive and develops to become a human being. It is therefore of legal consequence to award the foetus with human dignity and therefore also with humanity, as this is what it will become eventually after birth.

Further it needs to be concluded if abortions violate the right to life. Many

¹⁹⁹ Rice CE (1999) 76.

²⁰⁰ Danagan A (1977) 169.

²⁰¹ NAAPC 'Why life begins at conception' available at <http://naapc.org/why-life-begins-at-conception/> (accessed on 23 September 2015).

arguments pro and contra exist regarding this controversy. But further considerations have to be made. One thing is that if the right to life of a foetus is agreed on, must the logical consequence not be that an abortion is absolutely impermissible? Isn't it simply impossible to make any kind of deprivations of the inherent right to life of everyone? Such assumption has to be denied, because sentence two of Art. 6(1) ICCPR states that killings may not be arbitrary. However it doesn't prohibit derogations completely. The main focus therefore needs to be on the arbitrariness. An answer has to be given regarding the question if abortions must be evaluated as a kind of arbitrary deprivation of life. For this the arguments of the work have to be considered. Results of this were that the foetus needs a special protection as it is what is going to develop to be a human being with a fully grown human character eventually. Resulting from its position of not being born yet, it needs a special protection because otherwise there is no control of external influences on the foetus in any way. The right to life has the special position on being one of the only rights, if considered in a very wide sense, that a foetus can actually be the carrier of. Other rights, such as the right to freedom of expression, etc., are simply not compatible with the character of an unborn. But on the other hand not only the right to life of the foetus is all that matters. The expecting mother has rights which are violated if the right to life of the foetus is the only right that finds attention. Her human rights of the right to information, the right to privacy, the right to liberty and security of person, the right to non-discrimination and the highest possible attainable standard of health are violated. The prohibition of abortions must even be classified as torture or other ill-treatment. Such violation of rights must be assessed in this regard, as all of these rights are at the same level as the right to life, as all of them are human rights. Even though the right to life has its very special position and might in certain instances be judged as higher than other rights, as this is the most fundamental right, however a schematic evaluation as always being higher than any other right, doesn't meet the requirements of the general system of human rights. There is always a competition of rights and not every case can be evaluated equally. Under every circumstance individual cases need to be considered, as every individual case is different. In this case it is of special importance that the foetus on the one hand is, at least at a certain point of

pregnancy, that undeveloped that it doesn't show any kind of awareness of existence. The mother on the other hand experiences the deprivation of her human rights in a very strong sense. It can even go that far due to unsafe abortions, high risk pregnancies, psychological problems, etc. that a woman's own right to life experiences deprivations. This shows that in this case the right to life of the unborn competes with the right to life of the mother. Such competition can't be answered with an easy rule of thumb. It must be the objective to evaluate every life equally. No life is worth more or less than any other life. But such a statement simply can't be asserted in this case, as one of both rights has to find a deprivation, reasonable considerations have to lead to an answer. The expecting mother experiences violations of numerous rights, the unborn however, is violated in only one regard. It further is not going to realise on what is actually happening, while however the expecting mother, is been tortured in a way. Torture is one of the rights which are seen as absolute without any kind of exception.²⁰² It doesn't even fall under the exception clause of Art. 4 ICCPR, it may under no circumstance experience any kind of derogations.²⁰³ To torture the expecting mother however would mean a derogation of such prohibition. Furthermore the mothers right to self-determination is been violated in a strong way if she may not be allowed to make such important decisions over her body, her private life and many more very sensitive rights. The right to self-determination however is what brings society into a developing society. It is a process of development of individuals which is lead by self-determination that actually develops the community. To hinder the community in its developing process is not the objective. Comparing such statements which are of that highly important character to the fact that a time actually exists in which the foetus has no kind of feelings and awareness of anything it seems like an adequate period of time to allow abortions within the first trimester of pregnancy. A balance between the very important right to life of the foetus and all other rights of the mother has been weighted. Taking this into account an abortion may not be seen as an arbitrary deprivation of life and therefore doesn't violate the right to life.

But further the question of the nature and the content of the right to life must be

²⁰² HRC 'General Comment No. 20 on Article 7' (1992) para. 3.

²⁰³ HRC 'General Comment No. 20 on Article 7' (1992) para. 3.

concluded. The research has shown that the right to life is one of the most fundamental human rights, it is of outstanding importance and can be described as the basic human right.²⁰⁴ It is ratified in the international and regional treaties.²⁰⁵ A sensitive treatment with this right is therefore necessary. This however doesn't mean that no limitations are possible. It is absolutely unavoidable to regulate society's coexistence by certain "limitations" of the right to life. It is necessary to adopt certain standards, such as norms of self-defence and norms which regulate cases of competitions of the right to life. Norms of protection in cases of "legally" deprivations of life must exist. This can also be considered as part of the discussion of the absolute protection of life. Under the ICCPR no absolute protection of the right to life is given.²⁰⁶ This can be concluded by the wording which states that "no one shall be arbitrarily deprived of his life"²⁰⁷ and the further fact that the death penalty is not completely abolished under subsections 2 to 6 of Article 6 of the ICCPR. It is on the one hand of advantageous fact to consider the right to life not as absolute to be able to regulate such cases, as just described, easily in order to allow a society to function. On the other hand it is important to consider the human life as one of the highest goods which needs to be protected at its highest possible level. It is of logical consequence to do so by awarding life with an absolute status.

Another question that is of interest is the question of what the obligation of states is in protecting the right to life. States have positive and negative duties. The protection of life as a positive duty on the one hand and not to kill someone as a negative duty on the other hand can be considered such demanded duties. The protection of life has to take place by the legislation of criminal laws, the prevention of certain dangers against society, individual protection by exercising control over society and exercising control over its own state actions.

Chapter 3 will evaluate the legal situations regarding abortion in Germany and South Africa and will determine if both countries fulfil the requirements under

²⁰⁴ Plagman H (2003) 174.

²⁰⁵ It is ratified in Article 6 of the ICCPR, Article 3 of the UDHR, Article 2 of the ECHR, Article 4 of the ACHPR and Article 4 of the ACHR

²⁰⁶ Nowak M (1997) 110.

²⁰⁷ Article 6(1) of the ICCPR.

international law.



Chapter III

Cases of South Africa and Germany

This chapter will evaluate the legal situation of South Africa and Germany regarding the controversy of abortions. In addition to that, this chapter shall also evaluate whether or not the right to life which is protected under the South African and German Constitution is absolute or not. The findings made in chapter 2 will serve as a guideline to determine whether the legislations, which permit abortion in South Africa and Germany, are in line with the international and regional obligations of these two countries in protecting the right to life.

The two countries, Germany and South Africa have an obligation under the ICCPR to protect the right to life. Germany signed and ratified the ICCPR in 1973.²⁰⁸ South Africa ratified the ICCPR in 1998.²⁰⁹

Besides the above mentioned international treaty, South Africa and Germany also have a regional obligation to protect the right to life. Germany is a member state to the ECHR. They joined the Council of Europe in 1950.²¹⁰ South Africa has ratified its membership to the African Charter in 1996.²¹¹

The right to life is one of the most fundamental human rights, it is of outstanding

²⁰⁸ United Nations 'Treaty Series – International Covenant on Civil and Political Rights' available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (accessed on 24 October 2015).

²⁰⁹ United Nations 'Treaty Collection' available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-4&chapter=4&lang=en (accessed on 24 October 2015).

²¹⁰ European Court of Human Rights 'State Members' available at: http://www.echr.coe.int/Documents/2010_Expo_50years_02_ENG.pdf (accessed on 24 October 2015).

²¹¹ African Commission on Human and Peoples' Rights 'Ratification Table' available at: <http://www.achpr.org/instruments/achpr/ratification/> (accessed on 24 October 2015).

importance and can be described as the basic human right.²¹² Under the ICCPR no absolute protection of the right to life is given.²¹³ States have positive and negative duties. The protection of life as a positive duty on the one hand and not to kill someone as a negative duty on the other hand can be considered such demanded duties.

Opinions exist which consider the foetus as a human being by the moment when the sperm of the father and the ovum of the mother unite.²¹⁴ Further opinions state that human life “begins at viability, at birth, or when there is capacity for social interaction”.²¹⁵ Also representatives say that human life begins at the point where the embryo is fully implanted in the uterus.²¹⁶ However, even if the foetus may not be considered as a human being, a clear demand exists to protect the unborn. The unborn must be awarded with certain rights which protect its existence.

A balance between the very important right to life of the foetus and all other rights of the mother has to be weighted. Taking this into account an abortion may not be seen as an arbitrary deprivation of life and therefore doesn't violate the right to life of the foetus on the hand nor the competing rights of the expecting mother.

1. The Protection of the Right to Life in South Africa and Germany and the Limitation of this Right

1.1. Absoluteness of the Right to Life

1.1.1. Absoluteness of the Right to Life in Germany

Germany considers itself to affirm the absoluteness of its constitutional right to life

²¹² Plagman H (2003) 174.

²¹³ Nowak M (1997) 110.

²¹⁴ Rice CE (1999) 76.

²¹⁵ Danagan A (1977) 169.

²¹⁶ NAAPC ‘Why life begins at conception’ available at <http://naapc.org/why-life-begins-at-conception/> (accessed on 23 September 2015).

in Art. 2(2) of the German basic law.²¹⁷ This is revealed by the close link of the right to life to human dignity which finds special mentioning in Art. 1(3) of the GG.²¹⁸ Art. 1(3) of the GG states that “human dignity shall be inviolable”.²¹⁹ According to the wording “inviolable” human dignity may under no circumstances be limited under German law. It is considered as the value which every individual is a carrier of, independent of personal characteristics, physical or mental condition, personal achievements or social status.²²⁰ It builds the basis for every other right.²²¹ Human dignity must be assumed to have a grounded substance within the right to life as human life must be the vital basis of human dignity to guarantee its full development.²²² On the basis of this close connection and combination of such two rights of the German basic law, it is prohibited for the state to interfere in any way with the right to life. Furthermore the state has to take positive measures to protect its citizens.²²³ The right to life must, because of the close connection to human dignity, find the same level of protection. As human dignity is considered as inviolable, same protection must count for the right to life.²²⁴

This assumption of absoluteness, however, became more problematic with the development of measures which are able to interfere in one’s life, such as medical development in regards of abortion and euthanasia.²²⁵ But not only the medical development creates criticism of absoluteness of the right to life. Cases of self-defence which allow someone “to kill” another person if absolutely necessary to protect his or her own life or the life of a third person, can also be classified as a breach of the principle of absolute protection. Making excuses for people who “killed someone” in regards to a controversy in which only one person could have been saved but two or more people needed help, seems to interfere with the principle of absoluteness. But in such cases it needs to be seen and evaluated that

²¹⁷ Article 2(2) of the Constitution of the Federal Republic of Germany of 1949.

²¹⁸ Article 1(3) of the GG.

²¹⁹ Article 1(3) of the GG.

²²⁰ BVerfGE 87, 209 (1992) 228.

²²¹ Kirchhof P ‘Menschenwürde, Recht auf Leben und körperliche Unversehrtheit, Allgemeines Persönlichkeitsrecht’ (2012) available at: file:///C:/Users/admin/Downloads/uni_hd_jura_material_6371.pdf (accessed on 26 January 2016).

²²² BVerfGE 1, 39 (1975) 42.

²²³ BVerfGE 1, 39 (1975) 42.

²²⁴ BVerfGE 46, 160 (1977) 164.

²²⁵ Kaufmann A ‘Relativierung des rechtlichen Lebensschutzes?’ (2001) 841.

such norms of self-defence are unavoidable to regulate the life of a working society. Punishment and guilt can't be the factors taken into account if justice was part of the controversy. In a state under the rule of law such regulations must be met to guarantee the fairness of justice. Right and wrong must find a clear distinction. Germany has, by its absolute protection of the right to life, found a way to protect the right to life in its highest possible way. This however doesn't mean that Germany ignores the fact of necessary self-defence clauses. Even though the choice of wording of "absolute protection of the right to life" is a misleading, such norms exist.

Germany has the obligation to protect their citizens by following the obligations of Art. 6 of the ICCPR. As described, there is no absolute protection of life in the ICCPR.²²⁶ Moreover the obligations of the European Convention on Human Rights is decisive rule for Germany, as Germany is a party to the Convention.²²⁷ In this convention life also doesn't experience absolute protection,²²⁸ however the difference to the ICCPR is that killings may not be intentionally by its wording. At last they have to follow their own constitutional rules. The different treatment of the absoluteness of life however is not a problematical factor because the treatment of absolute is a "more", compared to the non-absoluteness. Hence as long as Germany adheres to their own rules, they don't violate international standards.

1.1.2. Absoluteness of the Right to Life in South Africa

The right to life in South Africa is protected in section 11 of the South African Constitution. This section states that "everyone has the right to life"²²⁹ According to section 37(5)(c) the right to life is non-derogable, even in cases of emergencies.²³⁰ However section 7(3) determines that the right to life as a bill of

²²⁶ Nowak M (1997) 110.

²²⁷ Germany joined the Council of Europe in 1950. See: European Court of Human Rights 'State Members' available at: http://www.echr.coe.int/Documents/2010_Expo_50years_02_ENG.pdf (accessed on 28 October 2015).

²²⁸ Under the ECHR there is no absolute right to life. This can be concluded by an examination of the wording. Art. 2(1) of the ECHR states that no one shall be deprived of his life intentionally.

²²⁹ Section 11 of the Constitution of the Republic of South Africa Act 108 of 1996.

²³⁰ Section 37(5)(c) of the South African Constitution.

right is “subject to the limitations contained or referred to in section 36, or elsewhere in the bill”.²³¹ Section 8(3)(b) determines that “[...] a court may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)”.²³² Therefore the right to life in South Africa is not considered as absolute. Rights may be limited through section 36, which states:

(1) “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”²³³

(2) “Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”²³⁴

Section 36 of the South African Constitution therefore determines that not every violation of a right is unlawful. Proper limitations can take place if the limitation is in accordance with section 36. The strict requirements of section 36 however need to find close attention.²³⁵ When alleged infringements are in question a so called two-stage inquiry is applied. Firstly, the right itself is being examined. A violation must be agreed to in order to apply step two of the inquiry. The ‘limitation analysis’ will follow. An examination of section 36 takes place in which the requirements of

²³¹ Section 7(3) of the South African Constitution.

²³² Section 8(3)(b) of the South African Constitution.

²³³ Section 36(1) of the South African Constitution.

²³⁴ Section 36(2) of the South African Constitution.

²³⁵ James C ‘The constitutional court’s approach to the limitations analyses in socioeconomic rights cases’ (2012) *Inkundla Wits Students Law Journal* (1) 17.

such section are being investigated in order to find out whether the limitation of the right is constitutionally justifiable or not.²³⁶ The nature and importance of the right in question needs to find consideration hereby in contrast to limiting legislation.²³⁷

Questionable in regard to section 36 of the South African constitution is what exactly can be considered as a “law of general application”. The Constitutional Court does state that law of general application must include the general legislation, the common law as well as executive rules.²³⁸ Administrative actions do not satisfy the requirement as a law of general application.²³⁹ Reason for this is to prevent arbitrary limitations and further to enlighten about the possibility of limitations for citizens.²⁴⁰

As discussed above the limitation of the right to life is important for cases of “self-defence, the defence of lethal private defence in the protection of property, and the use of lethal force in effecting an arrest.”²⁴¹ Both characteristics, of absoluteness and non-absoluteness are necessary to bring society’s function to its maximum. The interests of absoluteness of life are to protect one’s life in a very sensible way and to find maximum protection by prohibiting any kind of interference. But on the other hand non-absoluteness is necessary to bring flexibility in certain norms. This serves as protection for society as well by distinguishing between right or wrong of actions which affect others lives. The interests of such advantages must therefore be put in a gentle line. A decision whether the right to life should be considered as absolute or not must take place, but it may however not lose sight of the above described demands.

South Africa has the obligation to protect their citizens by following the obligations out of Art. 6 ICCPR. Art. 6 ICCPR doesn’t recognize the protection of life as absolute.²⁴² Further South Africa has to follow obligations which can be deciphered

²³⁶ James C (2012) 17.

²³⁷ James C (2012) 19.

²³⁸ Currie I & De Waal J *The Bill of Rights handbook 5ed* (2005) 171.

²³⁹ Currie I & De Waal J (2005) 171.

²⁴⁰ James C (2012) 18.

²⁴¹ Devenish G *A commentary on the South African bill of rights* (1999) 111.

²⁴² Nowak M (1997) 110.

out of the African Charter on Human and Peoples Rights, as the country is a state member to the treaty.²⁴³ The African Charter however also doesn't demand the absolute protection of life.²⁴⁴ Additionally South Africa has to follow its own guidelines out of the South African Constitution. An absolute protection of life is again not given. This shows that there is no controversy for South Africa to fulfill the requirements of absoluteness as under all three mechanisms no absolute protection of the right to life exists. However this doesn't mean that the country may simply follow its own standards if this deviates from international standards. Under international law the position of the right to life is extremely high. It protects the inherent right to life of every human being. It needs to be protected by law and deprivations may not be arbitrary.²⁴⁵ This means that South Africa has to fulfill at least these requirements by its own interpretation of the right to life. The South African Constitution may therefore not be interpreted to protect less than this.

1.2. Legal Situations regarding Abortions

1.2.1. Legal Situation in Germany regarding Abortions

The legal situation regarding the controversy of abortions in Germany has developed since the reunion of East and West Germany. Before the reunion there were two different abortion laws, one for each part of Germany.²⁴⁶ In East Germany abortion was freely allowed on demand within the first trimester.²⁴⁷ In West Germany however abortion was only allowed if the pregnancy was either a risk to a woman's health, a risk of the child's health, a result of rape, or if a difficult life situation exists to raise a child.²⁴⁸ Further coerced abortion should take place for

²⁴³ South Africa has ratified the ACHPR in 1996. See: African Commission on Human and Peoples' Rights 'Ratification Table' available at: <http://www.achpr.org/instruments/achpr/ratification/> (accessed on 28 October 2015).

²⁴⁴ The wording of Article 4 of the ACHPR states that „Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”. Deprivations of life are therefore allowed, they may not be arbitrary though.

²⁴⁵ Article 6(1) of the ICCPR.

²⁴⁶ Owens T 'The Abortion Question: Germany's Dilemma Delays Unification' (1992-1993) 53 *Louisiana Law Review* 1.

²⁴⁷ Owens T (1992-1993) 1.

²⁴⁸ Owens T (1992-1993) 1.

those who were “unfit” (those who had defects; racial inferiority; etc.) and a prohibition of abortion should take place for those considered “racially valuable” women.²⁴⁹

After the reunion in 1989 the abortion laws have changed. The Aid for Pregnant Women and Families Act of 1992²⁵⁰ came into force. It constituted a compromise between abortion laws of West and East Germany. It said abortions were lawful within its first trimester of pregnancy and it required counselling to protect the unborn and to prevent future unwanted pregnancies.²⁵¹ But this was questioned to be in conflict with German Basic Law which the court held it was.²⁵² A new module was developed. It says abortion must be considered as unlawful but at the same time it must be decriminalised and prevented through counselling. So it was retained that abortion is legal within the first 12 weeks of pregnancy after counselling. Sections 218 et seq. of the German Penal Code gives clarification about this.²⁵³ After section 218 of the German Penal Code which sets out the general prohibition on abortion, section 218 a section 1 provides this exemption:

"An abortion is not unlawful, if

1. the pregnant woman demands the interruption of pregnancy and has proven by a (specific) certificate that at least three days prior to the intervention she was counselled (with regard to her state of emergency or conflict),
2. the interruption of pregnancy is procured by a physician and
3. that not more than twelve weeks have passed since conception".²⁵⁴

1.2.2. Legal Situation in South Africa regarding Abortions

²⁴⁹ Stark B ‘Crazy Jane talks with the Bishop: Abortion in China, Germany, South Africa and International Human Rights Law’ (2003) *12 Texas Journal of Women & Law* 298.

²⁵⁰ Aid for Pregnant Women and Families Act of 1992.

²⁵¹ Stark B (2003) 307.

²⁵² BVerfGE 88, 203 (1993).

²⁵³ Section 218 of the German Penal Code.

²⁵⁴ Eser A ‘Abortion law reform in Germany in international comparative perspective’ (1994) *1 European Journal of Health Law* 28.

In 1975 the Abortion and Sterilization Act was adopted.²⁵⁵ The act medicalised the abortion decision, which means that the decision, whether an abortion can be implemented, had to be made by a doctor. It furthermore demanded that the pregnancy must have been a “serious threat” or causes “permanent damage”.²⁵⁶ These demands brought the result that most applications for abortions were denied (60%)²⁵⁷ and of those women, abortions were agreed to, were overwhelmingly white. The problem of racism played therefore a big role in this controversy. Wealthy women were able to go abroad to abort their unwanted pregnancy, the rest however couldn’t afford to travel for an abortion. As a result the number of illegal abortions increased.²⁵⁸ Approximately 43.000 abortions took place in the year 1989 in South Africa, from which 42.000 were illegal. About 400 women died yearly as a result of unsafe abortions.²⁵⁹ The number of clandestine abortions was overwhelmingly higher.²⁶⁰ Death rates under the black population were higher than under the white population.²⁶¹ Then, at the end of apartheid, the constitution came into force, which establishes the right “to make decisions concerning reproduction” and the right “to security in and control over the body”.²⁶² Out of such constitutional rights the Choice on Termination on Pregnancy Act (CTOP) was established in 1996.²⁶³ This act allows to have an abortion within the first 12 weeks of pregnancy, abortion on request was legalised. The act also allows abortions under certain circumstances from week 13-20. It must either be a risk of injury to women’s physical or mental health, a risk for the foetus to experience physical or mental abnormality, a result of rape or incest or a significant effect on women’s social or

²⁵⁵ Abortion and Sterilisation Act No. 2 of 1975.

²⁵⁶ Stark B (2003) 297.

²⁵⁷ Moosa N ‘A descriptive analysis of South African and Islamic abortion legislation and local Muslim community responses’ (2002) *21 Medicine & Law* (2) 260.

²⁵⁸ Stark B (2003) 297.

²⁵⁹ D’Souza KA ‘Abortion and the Three Bodies: An Interpretive Understanding of Barriers to Abortion Access in South Africa’ (2014) available at: <http://anthrojournal.com/issue/may/article/abortion-and-the-three-bodies-an-interpretive-understanding-of-barriers-to-abortion-access-in-south-africa/> (accessed on 11 November 2015).

²⁶⁰ D’Souza KA ‘Abortion and the Three Bodies: An Interpretive Understanding of Barriers to Abortion Access in South Africa’ (2014) available at: <http://anthrojournal.com/issue/may/article/abortion-and-the-three-bodies-an-interpretive-understanding-of-barriers-to-abortion-access-in-south-africa/> (accessed on 11 November 2015).

²⁶¹ Stark B (2003) 307.

²⁶² Moosa N (2002) 262.

²⁶³ Stark B (2003) 306.

economic circumstances.²⁶⁴ After week 20 abortion is only allowed if the pregnancy endangers the women's life or if a risk of malformation of the foetus or a risk of an injury to foetus exists, which is confirmed by two medical practitioners or one medical practitioner and one midwife.²⁶⁵

1.3. The Constitutions

1.3.1. The Constitution of Germany

The different rights in question, of the foetus on the one hand and the mother on the other hand, are anchored in the German constitution.

The foetus might therefore enjoy the protection of the right to life in function of protection through the state. Art. 2(2) of the GG states:

“Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.”²⁶⁶

But constitutional rights of the mother may interfere with this possible right to life of the foetus. Rights of the expecting mother that can be considered are the following:

Art. 2 (1), the General freedom of action:

“Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law”²⁶⁷;

²⁶⁴ Sarkin J ‘Patriarchy and discrimination in Apartheid South Africa’s abortion law’ (1998) 4 *Buffalo Human Rights Law Review* 141.

²⁶⁵ Sarkin J (1998) 141.

²⁶⁶ Article 2(2) of the GG.

²⁶⁷ Article 2(1) of the GG.

Art. 2(2), the right to bodily integrity:

“Every person shall have the right to life and physical integrity”.²⁶⁸

In this case it can be noted that, women’s right to life also plays a role in this controversy. As explained above the result of unsafe abortions of the prohibition of the right to life constitutes a violation of the woman’s right to life. Art. 2(2) of the GG, the right to life, must therefore be mentioned at this point again.

Art. 4(1), the freedom of conscience:

“Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.”²⁶⁹

As outlined a collision of respective basic rights exists. This collision has to be brought in balance by the sensitive weighting of rights.²⁷⁰ The right to life in the German constitution is classified as one of the highest goods, it is of outstanding importance.²⁷¹ Art. 2(2) of the German Basic Law demands same protection and same significance for every human life.²⁷² In the German Constitution life is protected indisputably between birth and death. But it is problematical as far as this should reach to a level before and after birth, because it can’t automatically be ignored.

1.3.2. The Constitution of South Africa

Also the relevant norms out of the South African Constitution are going to be viewed.

Firstly the right to life which is discussed to be the foetus right is being viewed. It

²⁶⁸ Article 2(2) of the GG.

²⁶⁹ Article 4(1) of the GG.

²⁷⁰ Von Münch I & Kunig P *Grundgesetzkommentar Band 1* (1993) 186.

²⁷¹ BVerfGE 49, 24 (1977).

²⁷² Von Münch I & Kunig P (1993) 177.

is ratified in section 11 of the South African Constitution and states that “everyone has the right to life”²⁷³. But however the woman is able to refer to constitutional rights as well. Therefore she can consider section 12(2), which guarantees reproductive rights and the bodily integrity, to be violated. It states that

“Everyone has the right to bodily and psychological integrity, which includes the right

- a. to make decisions concerning reproduction;
- b. to security in and control over their body; and
- c. not to be subjected to medical or scientific experiments without their informed consent.”

Further Section 9 of the South African Constitution which guarantees the equality before the law needs to find attention.

(1) “Everyone is equal before the law and has the right to equal protection and benefit of the law.”²⁷⁴

(2) “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”²⁷⁵

Same as above mentioned counts for the South African constitutional difficulties. The right to life must be considered as one of the highest goods. But women’s rights are also on constitutional level and are therefore to be balanced as competing rights. As explained above a possible injury of the woman’s right to life can even be assumed in regard to unsafe abortions if abortions were prohibited completely.

2. Fulfilment of the Requirements under International Law

2.1. Fulfilment of the Requirements under International Law of Germany

²⁷³ Section 11 of the South African Constitution.

²⁷⁴ Section 9(1) of the South African Constitution.

²⁷⁵ Section 9(2) of the South African Constitution.

Now that we have established that the right to life is protected under the German Constitution, the remaining question is whether the state's duty to protect life includes the duty to prohibit abortions.²⁷⁶

The starting point of this discussion is on the relation between the acceptance of the foetus as a legal person and holders of rights in Germany versus the possibility to implement an abortion after counseling.²⁷⁷ German law accepts that human life begins 14 days after conception.²⁷⁸ The reason for such acceptance is that the leaving of the womb can't be the factor taken into account to provide "someone" with such important rights or not. It doesn't make a difference regarding the vulnerability, the foetus is in the same helpless position as the already born baby is. Both are dependent on their mothers.²⁷⁹ But assuming this, the logical consequence firstly seems to be that abortion can't be justified in any way. The foetus as a carrier of the right to life and its absolute protection under German law makes a limitation impossible. But it must be seen that only because the unborn is considered as a carrier of the basic right of the right to life doesn't necessarily mean that abortions must be punishable in every status of pregnancy. It moreover depends on the qualification of the basic law and the interpretation of protection it needs to give.²⁸⁰ A balance between the acceptance of the foetus as a holder of legal rights and the allowance of abortions must necessarily be found. Eventually the consideration of abortions as unlawful helps in this regard.²⁸¹ Such consideration is supposed to make clear that an abortion is not tolerated under the legal perspective, it is however not punishable under certain circumstances. A certain degree of balancing of interests is unavoidable and takes place by finding this compromise.

Further the requirement of counselling plays a role in the fulfilment of international standards. The goal of counselling is to avoid abortion. A social kind of support has

²⁷⁶ Von Münch I & Kunig P (1993) 178.

²⁷⁷ Stark B (2003) 308.

²⁷⁸ BVerfGE 1, 39 (1975).

²⁷⁹ Von Münch I & Kunig P (1993) 179.

²⁸⁰ Von Münch I & Kunig P (1993) 179.

²⁸¹ BVerfGE 88, 203 (1993).

to take place to advise the woman and to provide her with information, after counselling the women should be able to consider every fact pro and contra of an abortion. It is supposed to make women responsible to make a decision. Recognition of the high value of the right to life of the unborn as well as the right to self-responsibility is supposed to be recognized.²⁸² Further it should enlighten about the constitutional demands that the woman must be encouraged to carry her pregnancy to term. Such counsellors must specially be authorized and be subject to public supervision.²⁸³ If, however, she decides for abortion, her decision is ultimately to be respected as an act of conscious self-responsibility with due respect to the unborn life and not be viewed as an act of merely one-sided self-determination.²⁸⁴

But further measures are taken into account. Since assistance to the woman appears more effective than threatening her with punishment, the act contains several social measures which may encourage the woman to make a choice pro life".²⁸⁵ Same respect to the woman's decision however has to be made in this regard.

Another point of consideration is the financial aspect of an abortion. Medical insurances are not paying for abortions, women have to pay for abortions themselves. This expresses the legal aspect of unlawfulness of such action. Insurances are not hold to pay and therefore support anything which is illegal. Medical insurances however will have to pay in cases where an abortion is medically indicated.²⁸⁶ Further to avoid discriminatory aspects to poor women special hardship cases must exist in which poor women receive financial help to implement an abortion.²⁸⁷

Further a statement of unlawfulness and therefore a balancing consideration of the foetus right to life is the problematical result of invalid contracts between doctors

²⁸² BVerfGE 88, 203 (1993).

²⁸³ BVerfGE 88, 203 (1993).

²⁸⁴ Eser A (1994) 28-29.

²⁸⁵ Eser A (1994) 28-29.

²⁸⁶ BVerfGE 88, 315 (1992).

²⁸⁷ BVerfGE 88, 315 (1992).

and affected women. The legal system can't protect civil actions which are made under illegal intentions. However a certain protection must be provided to both parties of the contract to ensure necessary rights.

In Germany the foetus is considered as a human being and is therefore carrier of the right to life. This would actually mean, because in Germany the right to life is considered as absolute, that abortions must be considered as unlawful, simply because a deprivation of life is not possible and an unborn is a protected person. If assumed so, this would mean a violation of the requirements of the right to life as that demands a balance between the rights of the unborn and the rights of the expecting mother. If not done so, because the absolute protection of the right of the unborn would hinder any kind of weighing, an adequate balance would not have been found. But as this goes too far, not only under international and regional aspects but also under German understanding of balancing of rights a compromise has been found. Germany balanced its own national demands and international demands by considering abortions as unlawful, but demanding the non-punishment of abortions up to the first twelve weeks of pregnancy. Further the requirement of counselling adds protection of the unborn. This requirement aims at the conviction of women to desist from actually implementing the abortion. This compromise represents the demands of the German constitution to consider the unborn as a human being and to protect its life under Art. 2(2) of the GG on the one hand, as well as the demands under international law which require the protection of the unborn but also to consider the mother's rights extensively. The ICCPR doesn't demand the right to life to be protected absolutely. A deprivation of the right may take place, it may simply not be arbitrary. The requirement of counselling which's aim is to convince the mother to rethink their decision as well as the mother's rights which are taken into account and the circumstance that medical aid is not provided for an abortion, makes it plausible to deny the arbitrary character of abortions within the first trimester in Germany.

2.2. Fulfillment of the Requirements under International Law of South Africa

Further it is to be examined whether South Africa fulfills the international requirements with its abortion legislature. In total the situation seems to be less complicated than it does in Germany because South African common law doesn't regard the foetus as a human being until parturition has taken place.²⁸⁸ This information can be found in the court decision of *van Heerden v Joubert NO*, in which the court decided that a stillborn child is not treated as a dead person.²⁸⁹ Further courts have decided that to be "born alive" is not a legally protected interest.²⁹⁰ In the case of *Christian Lawyers Association of South Africa v Minister of Health* it was decided that the word "everyone" in section 11 doesn't refer to the foetus.²⁹¹ But this doesn't seem to fulfill the interests of international standards and also individual interests. Further the complete ignorance of foetal rights opens the question if the state has a duty to protect the developing life.²⁹² This duty to protect could be taken out of its constitutional demands of the right to life to take positive measures to protect.²⁹³ To counteract in this regard South Africa authorised the unborn child with certain rights. Therefore section 278 of the Criminal Procedure Act²⁹⁴ prohibits the execution of a pregnant woman. Further the nasciturus doctrine calls out for the protection of the foetus in its pre-natal condition if advantageous after born alive, even though it is not considered as a person.²⁹⁵

On the other hand it has to be seen that in the South African jurisdiction the right to life might be considered stronger than in other jurisdictions. It may be concluded that this means South Africa wouldn't be able to allow abortions if the foetus was accepted as a legal person. The assumption of a strong position of the right to life can be made out of the constitution. In such the right to life is unqualified. This is in comparison to other jurisdictions a contrast, in most other jurisdictions the right to life is qualified. In South Africa however the right to life can only be limited by

²⁸⁸ Devenish G (1999) 105.

²⁸⁹ *Van Heerden v Joubert NO* (1994) 4 SA 793 (AD).

²⁹⁰ Devenish G (1999) 105; *Christian League of Southern Africa v Rall* (1981) 2 SA 821 (O).

²⁹¹ *Christian Lawyers Association of South Africa v Minister of Health* (2005) 1 SA 509 (T).

²⁹² Naudé T 'The Value of Life: a Note on *Christian Lawyers' Association of SA v Minister of Health*' (1999) 15 *South African Journal on Human Rights* (4) 556.

²⁹³ Currie I & de Waal J (2005) 285.

²⁹⁴ The Criminal Procedure Act No. 51 of 1977.

²⁹⁵ Devenish G (1999) 106.

the limitation clause of section 36 but not by its own wording.²⁹⁶ The right to life in South Africa must therefore find an adequate factor to exclude the foetus if abortion laws are wanted to exist. The additional authorisation of rights however is necessary to fulfill international requirements.

Further women's rights are taken into consideration. The possibility on performing an abortion shows that women's rights clearly are protected. A weighing of rights between the foetus and the expecting mother can be considered by the implementation of the Choice on Termination of Pregnancy Act of 1996.²⁹⁷ This legalised abortions to actually reach the aim on preventing unsafe abortions and therefore decrease the number of maternal deaths with the aim to protect the right to life of the mother. Even though religion in South Africa plays a big role in this controversy, which makes it harder to actually reach the aim, as "there is a religious movement in the country, with a varying level of conservative persuasions"²⁹⁸, which generally represent the view that abortion is not considerable. Women often experience moral and religious conflicts regarding abortions.²⁹⁹ They often don't perform legal abortions for this reason, they rather perform abortions in secret to not officially act contrary to their religion.³⁰⁰ Therefore it might be questionable if the state fulfilled its duties to protect. But anyhow the personal and moral conflict regarding the abortion controversy remains independent of the state actions. The legalisation is a step forward into the decrease of unsafe abortions. It can even be seen as a support for those who are in moral conflicts because work on enlightenment is officially being done.

South Africa doesn't evaluate the unborn as a human being which actually makes its legal consequence logical. A violation of Art. 6 ICCPR has not taken place by

²⁹⁶ Currie I & de Waal J (2005) 281.

²⁹⁷ Choice on Termination of Pregnancy Act No. 92 of 1996.

²⁹⁸ British Medical Bulletin 'Abortion: developments and impact in South Africa' available at: <http://bmb.oxfordjournals.org/content/67/1/115.full> (accessed on 11 November 2015).

²⁹⁹ Guttmacher S & Kapadia F & de Pinho H et al. 'Abortion Reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act' available at: <https://www.guttmacher.org/pubs/journals/2419198.html> (accessed on 11 November 2015).

³⁰⁰ D'Souza KA 'Abortion and the Three Bodies: An Interpretive Understanding of Barriers to Abortion Access in South Africa' (2014) available at: <http://anthrojournal.com/issue/may/article/abortion-and-the-three-bodies-an-interpretive-understanding-of-barriers-to-abortion-access-in-south-africa/> (accessed on 11 November 2015).

its wording because only human beings are protected under the right to life. However it is to say that a prenatal protection of the right to life has to be granted. The simple denial of prenatal rights, because of the negative evaluation of an unborn as a human being, doesn't fulfil international requirements. Such requirements demand the protection of an unborn. It may not be necessary to actually evaluate the unborn as a human being as long as the protection of the unborn is given. Such protection may be in question if the human character is denied. But different factors have to be taken into account. South Africa's abortion law doesn't allow abortion up to every stage of pregnancy. An abortion on demand is possible but however only within the first trimester of pregnancy. This requirement of time makes it possible to evaluate the deprivation of life not as arbitrary. But further arguments have to be taken into account. Not only the foetus needs protection but also the mother's rights must be considered. A weighing of rights between the foetus and the expecting mother can further be considered by the implementation of the Choice on Termination of Pregnancy Act of 1996.³⁰¹ This legalised abortions to actually reach the aim on preventing unsafe abortions and therefore decrease the number of maternal deaths with the aim to protect the right to life of the mother. Taking on the one hand the just described arguments to protect the woman into account and the other hand the protection of the unborn by not allowing unlimited abortions in regard of times which shows that a clear prenatal protection is given, the conclusion must be made that a weighing between the competing rights has taken place. The weighting of rights makes me deny the arbitrary character in this regard. South Africa has fulfilled its requirements under international law.

3. Conclusion

To finalise this it needs to be concluded what the state obligations of South Africa and Germany are and if the legislation of abortion in South Africa and Germany violates the right to life under the ICCPR.

³⁰¹ Choice on Termination of Pregnancy Act No. 92 of 1996.

Both countries need to follow the obligations which can be demanded out of Art. 6 of the ICCPR as both countries are parties to the Covenant.³⁰² South Africa has the obligation to protect their citizens by following the obligations out of Art. 6 of the ICCPR. Art. 6 ICCPR doesn't recognize the protection of life as absolute.³⁰³ Further South Africa has to follow obligations which can be deciphered out of the African Charter on Human and Peoples Rights, as the country is a state member to the treaty.³⁰⁴ The African Charter however also doesn't demand the absolute protection of life.³⁰⁵ Additionally South Africa has to follow its own guidelines out of the South African Constitution. An absolute protection of life is again not given. This shows that there is no controversy for South Africa to fulfill the requirements of absoluteness as under all three mechanisms no absolute protection of the right to life exists.

Germany has the obligation to protect their citizens by following the obligations of Art. 6 of the ICCPR. As described, there is no absolute protection of life in the ICCPR.³⁰⁶ Moreover the obligations of the European Convention on Human Rights is decisive rule for Germany, as Germany is a party to the Convention.³⁰⁷ In this convention life doesn't experience absolute protection,³⁰⁸ however the difference to the ICCPR is that killings may not be intentionally by its wording. At last they have to follow their own constitutional rules. The difference between Germany and South Africa is that Germany accepts the absolute protection of life under national constitutional law.³⁰⁹

³⁰² Germany has signed and ratified the ICCPR in 1973. South Africa has ratified the treaty in 1998. See: United Nations 'Treaty Collection' available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed on 28 October 2015).

³⁰³ Nowak M (1997) 110.

³⁰⁴ South Africa has ratified the ACHPR in 1996. See: African Commission on Human and Peoples' Rights 'Ratification Table' available at: <http://www.achpr.org/instruments/achpr/ratification/> (accessed on 28 October 2015).

³⁰⁵ The wording of Article 4 of the ACHPR states that „Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”. Deprivations of life are therefore allowed, they may not be arbitrary though.

³⁰⁶ Nowak M (1997) 110.

³⁰⁷ Germany joined the Council of Europe in 1950. See: European Court of Human Rights 'State Members' available at: http://www.echr.coe.int/Documents/2010_Expo_50years_02_ENG.pdf (accessed on 28 October 2015).

³⁰⁸ Under the ECHR there is no absolute right to life. This can be concluded by an examination of the wording. Art. 2(1) of the ECHR states that no one shall be deprived of his life intentionally.

³⁰⁹ Article 2(2) of the GG.

Germany has considered both, the foetus rights, as well as women's rights. A balance of competing and substantial rights for both parties has taken place. The possibility of abortions with the requirement of professional counselling considers the woman's right on the one hand by providing her with the possibility to ensure her wishes, her constitutional and international rights, but on the other hand a protection of the foetus' right to life takes place by implementing measures which are supposed to make the woman sensible for the topic. An attempt to try to convince the pregnant woman not to abort the unborn is being performed. However if the woman doesn't decide to follow the recommendations, her right to self-determination doesn't get violated by respecting her decision.

South Africa has found a balance in making sure international demands are fulfilled. Women's rights are considered on the one hand. The evaluation of the unborn not to be protected under the right to life opens the possibility on allowing abortions without further justification, like Germany had to do. But the complete ignorance of foetal rights seems assailable if evaluated under international points of view. A certain degree of protection has to be given to the unborn to reward the fact that a foetus is "alive" and is supposed to develop and grow into a "regular human being". The recognition of South Africa with certain rights to the unborn even if not qualified as a human being brings the necessary balance in the controversy.

Chapter 4 will give the conclusion as well as recommendations.

Chapter IV

Conclusion and Recommendations

1. Conclusion

Abortion is “the expulsion of a nonviable foetus, that is, of one too young to live outside the womb”.³¹⁰ Abortion is a controversial topic which affects women from all over the world. Around 22 Million abortions take place every year.³¹¹ It has been established that 13% of all maternal deaths are a result of unsafe abortions.³¹² Also it is a matter of fact that women implement abortions no matter if legal or illegal. All kinds of reasons are of decisive factor. Women experience disadvantages in health, social, economic or other personal circumstances. But furthermore even rape or other sexual assaults play a role.³¹³ Almost 20 million unsafe abortions are performed yearly. Almost all of them take place in developing countries.³¹⁴ Barriers of unsafe abortions are restrictive laws³¹⁵ and the absence of safe abortion services even where permitted.³¹⁶ Abortions are still completely prohibited in a number of countries.³¹⁷

³¹⁰ Fagothey A (1963) 241.

³¹¹ World Health Organisation ‘Preventing unsafe abortion’ available at <http://www.who.int/mediacentre/factsheets/fs388/en/> (accessed on 19 January 2016).

³¹² Health and Rights ‘Causes of Maternal Mortality’ available at: http://healthandrights.ccnmtl.columbia.edu/reproductive_health/causes_maternal_mortality.html (accessed on 19 January 2016).

³¹³ Institute of Development Studies ‘Unsafe Abortion: A Development Issue’ available at: <https://www.ids.ac.uk/go/news/news-at-ids-unsafe-abortion-a-development-issue> (accessed on 20 October 2015).

³¹⁴ Institute of Development Studies ‘Unsafe Abortion: A Development Issue’ available at: <https://www.ids.ac.uk/go/news/news-at-ids-unsafe-abortion-a-development-issue> (accessed on 20 October 2015).

³¹⁵ World Health Organisation ‘Preventing unsafe abortion’ available at <http://www.who.int/mediacentre/factsheets/fs388/en/> (accessed on 4 July 2015).

³¹⁶ Institute of Development Studies ‘Unsafe Abortion: A Development Issue’ available at: <https://www.ids.ac.uk/go/news/news-at-ids-unsafe-abortion-a-development-issue> (accessed on 20 October 2015).

³¹⁷ 13 South American countries, 31 African countries, 7 Asian countries and 2 European countries prohibit abortions completely or only allow abortions to save a woman’s life. See: Center for Reproductive Rights ‘The World’s Abortion Laws 2015’ available at:

This chapter is going to give an overview of the work with a conclusion and recommendations regarding the controversy of abortions and the right to life. Further it analyses the fulfilment of requirements regarding this topic under international law of South Africa and Germany.

A controversy exists whether a foetus can be considered a human being as demanded under Art. 6 ICCPR. Opinions exist which consider the foetus as a human being by the moment when the sperm and the ovum unite.³¹⁸ Further opinions state that human life “begins at viability, at birth, or when there is capacity for social interaction”.³¹⁹ Also views exist which say that human life begins at the point where the embryo is fully implanted in the uterus.³²⁰ Result of this opinion is that an embryo is considered a human being five to eight days after conception. In total a call for protection of the unborn must be granted, this must be done by awarding the foetus with the right to life by considering it as a human being.

But further opinions exist which interpret the controversy of abortion very differently. On the one hand people represent the pro-life alternative and are of the opinion that abortions violate the right to life of the unborn.³²¹ They find their conclusion out of the assumption that the unborn is a carrier of the right to life and must therefore be protected.³²² They argue that the right to life is the highest good and no deprivations can be made if the mother’s rights are affected as the right to life must be evaluated higher.³²³

Representatives of the pro-choice option however say that ‘human beings in the embryonic stage are not persons because embryonic human beings do not exercise

<http://worldabortionlaws.com/map/> (accessed on 29 October 2015).

³¹⁸ Rice CE (1999) 76.

³¹⁹ Danagan A (1977) 169.

³²⁰ NAAPC ‘Why life begins at conception’ available at <http://naapc.org/why-life-begins-at-conception/> (accessed on 23 September 2015).

³²¹ Parliamentary Network for Critical Issues ‘Abortion’ available at: <http://www.pncius.org/issues-abortion.aspx> (accessed on 28 October 2015).

³²² Rice CE (1999) 76.

³²³ Ultius ‘Argumentative Essay on Abortion: Pro-Life or Pro-Choice?’ available at <http://www.ultius.com/ultius-blog/entry/argumentative-essay-on-abortion-pro-life-or-pro-choice.html> (accessed on 28 October 2015).

higher mental capacities or function.³²⁴ They also argue that, the fact that human embryos and fetuses (and infants) would not have developed self-awareness, means that they are not persons.³²⁵

Further opinions state that a certain degree of protection of women in cases of pregnancy must exist. If a pregnancy is the result of rape a woman must be able to perform an abortion.³²⁶ Additionally in cases of serious affection of the woman's health, as well as the foetus' health abortions are demanded.³²⁷

The research has shown that the right to life is one of the most fundamental human rights, it is of outstanding importance.³²⁸ It is ratified the international and regional treaties.³²⁹ But even though the right to life's position is very important it is unavoidable to regulate society's coexistence by certain "limitations" of the right to life. Under the ICCPR no absolute protection of the right to life is given.³³⁰

Furthermore state obligations in regards to the right to life are of positive and negative character.³³¹ The protection of life as a positive duty on the one hand and not to deprive someone of his life as a negative duty on the other hand can be considered such demanded duties.³³² The protection of life has to take place by the legislation of criminal laws, the prevention of certain dangers against society, individual protection by exercising control over society and exercising control over its own state actions.³³³

³²⁴ Lee P & George RP 'The wrong of abortion' (2005) available at: http://www.blackwellpublishing.com/content/BPL/Images/Content_store/Sample_chapter/1405115475/Cohen_sample%20chapter_Contemporary%20debates%20in%20applied%20ethics.pdf (accessed on 21 November 2015).

³²⁵ Lee P & George RP 'The wrong of abortion' (2005) available at: http://www.blackwellpublishing.com/content/BPL/Images/Content_store/Sample_chapter/1405115475/Cohen_sample%20chapter_Contemporary%20debates%20in%20applied%20ethics.pdf (accessed on 21 November 2015).

³²⁶ HRC 'Concluding Comments on Peru' (1996) para.15.

³²⁷ *X v United Kingdom* (1981) 7215/75.

³²⁸ Plagman H (2003) 174.

³²⁹ It is ratified in Article 6 of the ICCPR, Article 3 of the UDHR, Article 2 of the ECHR, Article 4 of the ACHPR and Article 4 of the ACHR.

³³⁰ Nowak M (1997) 110.

³³¹ HRC 'General Comment No. 6 on Article 6 (The right to life)' (1982) para. 5.

³³² *Dermitt Barbato v Uruguay* (1990) 84/1981; Joseph S & Schultz J & Castan M (2000) 129.

³³³ *Kindler v Canada* (1993) 470/1991.

At last it needs to be concluded if the legislation on abortion in South Africa and Germany violates the right to life under the ICCPR.

In Germany the foetus is considered as a human being and is therefore carrier of the right to life.³³⁴ This would actually mean, because in Germany the right to life is considered as absolute³³⁵, that abortions must be considered as unlawful. However if the absolute protection of the right of the unborn would hinder any kind of weighing, international standards which demand an adequate weighing, would have been violated. But Germany balanced its own national demands and international demands by considering abortions as unlawful in order to protect the unborn, but demanding the non-punishment of abortions up to the first twelve weeks of pregnancy in order to protect the expecting mother.³³⁶ Further the requirement of counselling adds protection of the unborn. This requirement aims at the conviction of women to desist from actually performing the abortion.³³⁷ The ICCPR doesn't demand the right to life to be protected absolutely. A deprivation of the right may take place, it may simply not be arbitrary.³³⁸ The requirement of counselling which's aim is to convince the mother to rethink their decision as well as the mother's rights which are taken into account and the circumstance that medical aid is not provided for an abortion, makes it plausible to deny the arbitrary character of abortions within the first trimester in Germany. Germany has fulfilled the requirements under international law.

South Africa however doesn't consider the unborn as a human being.³³⁹ A violation of Art. 6 of the ICCPR has therefore not taken place by its wording. Only "human beings" are protected under the right to life.³⁴⁰ But a prenatal protection of the right to life has to be granted in order to fulfil international obligations, which demand the protection of the unborn. South Africa's abortion legislation doesn't allow

³³⁴ BVerfGE 1, 39 (1975).

³³⁵ Article 2(2) of the GG.

³³⁶ Eser A (1994) 28.

³³⁷ BVerfGE 88, 203 (1993).

³³⁸ Article 6(1) of the ICCPR.

³³⁹ Devenish G (1999) 105.

³⁴⁰ Article 6(1) of the ICCPR.

abortion up to every stage of pregnancy. An abortion on demand is possible but however only within the first trimester of pregnancy.³⁴¹ This requirement of time makes it possible to evaluate the deprivation of life not as arbitrary. The allowance of abortions up to three months of pregnancy shows, that the assumption of an arbitrary deprivation is not adequate. The protection of the unborn by not allowing abortions in regard of times show that a clear prenatal protection is given but on the other hand by allowing abortions up to this period of time the competing issue of the obligation of the state to take positive measures brings the balance in the controversy. South Africa has fulfilled its requirements under international law.

Further the lessons that can be deciphered from these two jurisdictions in the way they have regulated abortion will be described. The cases of South Africa and Germany, two countries which are very different but have a close common legal system, make clear that cultural and economical points of view may differ, which makes it hard to find a common factor to evaluate the right to life. However it is necessary that a common standard has to be found in order to guarantee the same level of protection throughout the member states. It is therefore important to consider cultural and economical differences on the one hand but also to find a basis of adjustment. Everyone's life must be evaluated equally eventually.

2. Recommendations

In first place a general perspective concerning member states of the ICCPR is being taken into account. The general requirements under an international perspective are supposed to give recommendations regarding national legislation independent of the countries of Germany and South Africa. Secondly a special focus on recommendations will be made on the two chosen jurisdictions.

Firstly it must be recommended, to follow up with the opinion of the Human Rights Committee, which gave clear statements in their concluding observations regarding

³⁴¹ Choice on Termination of Pregnancy Act No. 92 of 1996.

Peru³⁴² and Lesotho³⁴³, that in such countries where abortion is completely illegal to change legislature and allow abortion at least in cases where the pregnancy is a result of rape, but also where a threat to the mother's health exists or a threat to the foetus health is given. In such countries a balance between the protection of the unborn on the one hand and the protection of the woman on the other hand doesn't take place at all. The weighing of such competing interests must come to the conclusion that in those certain circumstances the rights of the mother prevail.

But to go further it must even be recommended that in countries where abortion is only allowed under those, just described circumstances, the legislature is going to get changed into the legality of abortion on demand up to twelve weeks of pregnancy. If this is not given it must be considered that a weighting of interests of the unborn and the mother hasn't taken place. The Human Rights Committee stresses in its concluding observations on Ecuador the high number of suicides is the result of the illegality of abortions.³⁴⁴ An adequate balance is to protect the unborn under the "umbrella of time" and the mother by respecting her many competing rights that are affected.

Further it is recommended that countries which allow abortion must provide their society with work on enlightenment regarding the topic of abortion. It must be the goal to provide the society with information about the rights of the foetus and that an actual right to life of the unborn exists to prevent future abortions and to keep the number low. According the Human Rights Committee adequate health and education facilities must exist.³⁴⁵

Secondly to find special attention to the countries of South Africa and Germany their evaluations must be addressed. For South Africa it must be recommended to reconsider their evaluation of the unborn not as a human being. The ignorance of the right to life of the foetus can be determined as insufficient if not a clear

³⁴² HRC 'Concluding Comments on Peru' (1996) para.15.

³⁴³ HRC 'Concluding Observations on Lesotho' (1999) para. 11.

³⁴⁴ HRC 'Concluding Observations on Ecuador' (1998) CCPR/C/79 Add.92 para. 11.

³⁴⁵ HRC 'Concluding Observations on Ecuador' (1998) CCPR/C/79 Add.92 para. 11.

protection is being found on another level. The fact that South Africa's abortion legislature allows abortion on demand up to three months time, without any other steps taken into account, can be considered as a violation of the foetus rights. However the fact that South Africa protects the unborn in the sense of time shows that the foetus rights are not completely undermined. A prenatal protection must therefore be agreed to. Nonetheless this must be considered as a borderline case in regards to the protection. It is therefore recommended to recognize the foetus as a human being or to add further requirements to legalise abortions, such as the requirement of counselling, to make sure the foetus receives the rights it is required to under international law.

For Germany it is to say that abortion laws may be critical in regards to national requirements as the unborn is considered a human being but at the same time life is considered to find absolute protection. However under international standards requirements are fulfilled. This can be assumed out of the fact that life doesn't find absolute protection under international and regional mechanisms. In regards to international law no changes are recommended but could rather be seen as a good example regarding abortion legislature for other countries.

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