FACULTY OF LAW

Lund University

Alexander Persson

Unborn Humans as Rights-bearers? – an Analysis under International Human Rights and Swedish Domestic Law

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program

30 higher education credits

Supervisor: Anna Nilsson

Semester of graduation: Autumn 2020

Contents

SUMMARY 1

SAMMANFATTNING 2

PREFACE 3

ABBREVIATIONS 4

INTRODUCTION 6

1.1 Life and abortion 6

1.2 Purpose and research questions 6

1.3 Method and delimitations 9

1.4 Materials 9

1.4.1 International human rights law 9

1.4.2 Swedish domestic law 10

1.5 Treaty interpretation 11

1.6 Outline 14

2 EXAMINATION OF INTERNATIONAL HUMAN RIGHTS NORMS 15

2.1 The Universal Declaration of Human Rights 15

2.2 The International Covenant on Civil and Political Rights 16

2.3 The Convention on the Rights of the Child 21

2.4 Interests regarding abortion that are acknowledged by international human rights 28

2.4.1 The interests of the born – a right to abortion? 28

2.4.2 Selective abortions and the interests of the unborn 30

2.5 Conclusion – no prenatal rights-bearer status in international human rights 37

3 EXAMINATION OF SWEDISH DOMESTIC LAW 40

3.1 The gestational limit 40

3.2 The gestational limit in the Swedish Abortion Act 42

3.3 The moment of viability 44

4 LEGAL CONSEQUENCES OF AMBIGUOUS VIABILITY 47

4.1 Ambiguous viability and legal certainty 47

4.2 Possible future amendments of Swedish domestic law 47

4.3 Possible future consequences of extended viability: a right to terminate parenthood? 49

5 CONCLUSIONS 56

5.1 International human rights law is silent on the question of prenatal rights-bearers 56

5.2 International human rights law is not neutral towards prenatal interests 57

5.3 Swedish domestic law recognizes prenatal rights-bearers from the point of viability, at the latest 58

5.4 The viability criterion in Swedish law is ambiguous 58

5.5 The right to abortion likely does not entail a right to fully opt out of parenthood 59

5.6 International human rights law should protect the right to life for unborn humans from the moment of viability 60

Summary

This essay set out to answer the questions whether a status as rights-bearer is acknowledged for unborn human beings, and if the regulations in place are adequate in order to protect unborn life.

Rights-bearer status was explored within the scope of the right to life, as this right was assumed to be the most relevant for unborn humans. The essay first examined international human rights law, focussing on the core United Nations instruments – the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child – and interpreting their provisions on the right to life in order to establish whether this right is accorded to unborn humans, which would confirm a rights-bearer status.

Results showed that, while the right to life is doubtlessly acknowledged from birth, all of the instruments remain silent on the question of a right to life for the unborn, neither denying nor confirming it. Thus, individual states would be free to govern the issue domestically. However, international human rights law was found to provide, effectively, a right to abortion, which indirectly dictates how states may act, as any domestically protected rights of the unborn will not be allowed to override an international human right to abortion.

This essay then examined Swedish domestic law, exploring the same question. The Swedish Abortion Act was found to grant unborn humans a right to life at the point of foetal viability, after which no abortions are permitted, save for in extreme cases.

Simultaneously, it was also discovered that modern medicine and technology have come to extend viability, with the result that late-term abortions risk overlapping with the existence of viable foetuses. The solutions proposed on this issue were found to either disregard or partly abolish the right to life currently accorded to the viable unborn in Swedish law, instead prioritizing the right to abortion.

The essay concluded that international human rights do not adequately protect unborn life. It argued that there exists a conceptual link between foetal viability and birth, as the former is a necessary prerequisite for the latter, thus distinguishing the born and the viable unborn only in matters of physical location. As such a distinction was not deemed to warrant a difference in the recognition of a right to life, this essay proposed that international human rights begin acknowledging such a right from the moment of foetal viability. For the same reason, it was proposed that Swedish legislation prioritize the viable unborn over interests of abortion.

Sammanfattning

Denna uppsats hade som syfte att besvara frågorna om huruvida status som rättighetsbärare tillkommer ofödda människor, samt om gällande regleringar är tillräckliga för att skydda ofött liv.

Undersökningen om rättighetsbärarstatus skedde inom ramen för rätten till liv, eftersom denna rättighet förutsattes vara den mest relevanta för ofödda människor. Uppsatsen undersökte först internationella mänskliga rättigheter, med fokus på kärninstrumenten inom Förenta Nationerna – den allmänna förklaringen om de mänskliga rättigheterna (UDHR), konventionen om medborgerliga och politiska rättigheter (ICCPR) och konventionen om barnets rättigheter (CRC) – och tolkade deras bestämmelser om rätten till liv i syfte att fastlå ifall denna rätt tillerkänns ofödda människor, vilket skulle bekräfta en rättighetsbärarstatus.

Resultatet utvisade att samtliga instrument tveklöst erkänner rätten till liv från och med födseln, men förblir tysta i frågan om en rätt till liv för ofödda, utan att varken erkänna eller förneka den. Därmed skulle enskilda stater vara fria att reglera området själva, efter nationellt mandat. Dock visade sig internationella mänskliga rättigheter erkänna en rätt till abort, vilken indirekt dikterar hur stater får agera på området, då nationella rättighetsskydd för ofödda inte kommer att tillåtas att åsidosätta en internationell mänsklig rättighet till abort.

Uppsatsen såg därefter till svensk nationell rätt, och utforskade samma fråga. Den svenska abortlagen fanns tillerkänna ofödda människor en rätt till liv vid tidpunkten för livsduglighet, efter vilken aborter är förbjudna, med undantag för extremfall.

Samtidigt upptäcktes det att modern teknologi och medicinska kunskaper har kommit att utöka livsduglighet, med resultatet att sena aborter riskerar att överlappa med förekomsten av livsdugliga foster. De lösningar på problemet som har föreslagits visade sig antingen åsidosätta eller delvis avskaffa den rätt till liv som tillkommer ofödda enligt nuvarande svensk rätt, då de istället prioriterade rätten till abort.

Uppsatsen drog slutsatsen att internationella mänskliga rättigheter inte tillräckligt skyddar ofött liv. Uppsatsen förde argumentet att det finns en begreppsmässig länk mellan livsduglighet och födsel, då det förra är en nödvändig förutsättning för den senare, vilket därmed särskiljer födda och livsdugliga ofödda enbart i form av fysisk placering. Eftersom en sådan åtskillnad inte bedömdes rättfärdiga en skillnad i hur rätten till liv tillerkänns föreslogs det därför att internationella mänskliga rättigheter ska börja erkänna en sådan rätt från och med tidpunkten för livsduglighet. Av samma anledning föreslogs det att svensk lagstiftning ska prioritera den livsdugliga ofödda människan över abortintresset.

Preface

This was fun.

I want to give a special thanks to my friends from abroad, Savannah Champion (US) and Christina Fittje (AU), both native English speakers who were kind enough to help me with language. I also want to thank my supervisor Anna Nilsson (SE), postdoc fellow in international law at the Lund Faculty of Law, who has – willingly – spent hours reading and commenting on my excerpts as well as discussing both writing process and legal minutia in person.

Finally, a huge thank you[1] to all of the Swedish authorities responsible for handling the ongoing covid-19 pandemic. If not for your unique approach to crisis management, I would have had a lot of other things in my life distracting me from my writing.

Alexander Persson

Lund, January 2021

Post scriptum:

For the second submission of this essay, I also want to thank my examiner Jessica Almqvist, professor in international law at the Lund Faculty of Law, who was willing to discuss the essay with me after first submission, and who helped bring the last piece of the puzzle necessary to elevate my analysis.

Alexander Persson

Lund, February 2021

[1] https://youtu.be/Yxh-ViNhd1g?t=19.

Abbreviations

Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
DPI	Disabled Peoples' International
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDC	International Disability Caucus
ILC	International Law Commission
JO	The Parliamentary Ombudsmen (“*Justitieombudsmannen*”)
PWD Australia	People with Disability Australia
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations

US	United States (a.k.a. USA, the United States of America)
USSR	Union of Soviet Socialist Republics (a.k.a. the Soviet Union)
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

Introduction

1.1 Life and abortion

In the late summer of 2017, Swedish media released a story detailing about a doctor in Eskilstuna who had been summoned one day by a midwife at her hospital to a room where she was confronted by the sight of a dying foetus; a late-term abortion had resulted in a live birth. This was not the first time such a thing had happened, and not the first time that the doctor attempted to save the life of a foetus post-abortion. “When I see an acutely sick child I want to help it”, she later explained. [2]

Her approach was questioned by the chairman of the Swedish Society of Obstetricians and Gynecologists. “The patient has been granted a permit by the National Board of Health and Welfare, and the aim is for her not to become a parent. Not to achieve an extremely premature birth where you then try to resuscitate this foetus or child whatever the cost”, he said.[3]

According to the Swedish National Council on Medical Ethics, there are a few cases per year of foetuses showing signs of life after late-term abortions, but no attempts to resuscitate them has ever succeeded.[4]

Abortion is a contentious subject that has been discussed, debated, argued and fought over countless times in modern history. Often, the issue has been the right to access to abortions,[5] the right not to perform abortions[6] or other questions of the rights of people already born.

But that is not what abortion is fundamentally about. Abortion is, at its core, about the thin line between life and death;[7] in the majority of cases – especially in the developed countries – it is about the life and death of the foetus. And as long as the questions prompted by this reality are not answered, other questions don’t matter.

1.2 Purpose and research questions

My ambition with this essay has not been to retread the same old points of arguments that frequent the abortion discourse *ad nauseam*, since they so often concern tangential issues. Instead, I have focussed on the core issue of abortion, which is the termination of the foetus. The fundamental questions posed by this fact are: *what is it that is being terminated*, and *should we be*

---

[2] See Nadja Yllner: “Läkare försöker rädda sent aborterade foster – ’I lagens mening är de barn’”, SVT Nyheter.

[3] ibid.

[4] See Sofia Bering: ”’Sent aborterade foster ska inte återupplivas’”, SVT Nyheter.

[5] See “Attacken: ’SD hotar svenska kvinnors aborträtt’”, Svenska Dagbladet.

[6] See Ulrika Öster: ”Tro – ett skäl att slippa arbetsuppgifter?”, Advokaten.

[7] In a biological sense, see chapter 1.2.

allowed to terminate it? With this framing, I have approached the issue of abortion *from the perspective of the prenatal life*.[8]

The answer to the question of what is being terminated directly influences the answer to whether such termination should be allowed. If we were to define abortion as the termination or killing of babies, children or humans, this would clearly violate international human rights law.[9] If, on the other hand, we describe the 'being' that is terminated by abortion as a foetus or unborn, the question of whether abortion violates international human rights law is less clear-cut.

From a biological point of view, we already know what it is that is terminated; it is *the biological process of developing human life before birth*. For the purpose of this essay, I have referred to this simply as *prenatal* or *unborn* (sometimes followed by words like "child", "human" etc.) or *prenatal life*. "Life" in this sense is not to be understood in a moral or legal sense – by using the term "life" I have merely referred to the fact that what is developing in the womb is, biologically speaking, alive.

Biological life is one thing, but as a jurist, I have needed to seek my answers in law. Abortion concerns the termination of prenatal *human* life, thereby making it an issue of fundamental human values. For this reason, it is natural to analyse questions of abortion in relation to the source of law that engages directly with such fundamental values, namely *international human rights law*. Since the adoption of the Universal Declaration of Human Rights (UDHR) international human rights law has striven to recognize "the equal and inalienable rights of all members of the human family".[10] The right to life is one such right.[11]

However, rights are only recognized to those who qualify as *rights-holders*. If, and only if, such a status can be ascribed to prenatal life, one can then proceed to the question of *which* human rights prenatal life is entitled to enjoy under international human rights law. The question of *rights-holder status* is therefore the focal point of the issue, not the question of rights.

Thus, the questions posed above about what it is that is being terminated and about the lawfulness of such termination can be formulated in a more succinct way. The legal question that this essay has sought to answer is:

- *Does prenatal life enjoy the status of a rights-holder under international human rights law*?

---

[8] The main effect of this approach has been that any critical analyses of the law were done by evaluating the adequacy of the law's protection of prenatal life, see the end of this chapter.

[9] See article 6 CRC, article 6 ICCPR.

[10] See the first paragraph of the preamble to the UDHR; see also Hannum, Hurst, p. 290, who recognizes the UDHR as the primary source of global human rights standards.

[11] See article 6 CRC, article 6 ICCPR.

International human rights law is a concept where states have decided to relinquish their domestic mandate on norms governing certain issues pertaining to how they treat their citizens to an international legislative authority.[12] If prenatal life is accorded status as rights-bearer under international human rights law, it thus follows that it should also be accorded such status in the domestic law of all individual states that subscribe to the relevant human rights instrument.

Conversely, if international human rights do *not* recognize a prenatal rights-bearer status, this can be for two reasons: either international human rights expressly forbid such a status, or they are neutral on the issue. In case of the former, this essay would have had its final answer.

In case of the latter, however, the possibility still exists that prenatal life is accorded rights-bearer status in the domestic legislations of individual states. For that reason, the legal question that this essay has sought to answer, should the answer to the first question permit it, is:

- *Does prenatal life enjoy the status of a rights-holder under Swedish domestic law*?[13]

The purpose of these two questions was to explore the relevant legal systems *de lege lata*.[14] However, this essay has also *evaluated* the solutions to the issue of prenatal life and abortion that have been found in the legal systems; the solutions were evaluated on the adequacy of their protection of prenatal life.[15] To this end, the third legal question that this essay has sought to answer is:

- *Are the solutions found in the legal systems analysed under the previous questions adequate in the protection they provide for prenatal life?*

This last question resulted in an analysis *de lege ferenda*,[16] though it must be noted that difficulties sometimes exist in distinguishing between *de lege lata* and *de lege ferenda*, as the legal dogmatic method allows for critical studies of the law under both of these rubrics. The main difference between them seems to be whether a conclusion drawn corresponds with the law as it *is*, or if it is instead a proposal for law as it *should be* – thus, I have striven to clarify in which camp my statements fall.[17]

[12] See Henriksen, p. 166.
[13] See chapter 1.3 below for further motivations to why Swedish law was chosen.
[14] Meaning that the purpose is to describe the law as it is, see Kleineman, p. 36.
[15] For reference to such a goal-oriented analysis, see Kleineman, pp. 36f, and Hellner, p. 407.
[16] Meaning that the purpose is to describe the law as it ought to be, see Kleineman, p. 36.
[17] See Kleineman, pp. 24, 39f.

1.3 Method and delimitations

This essay has approached the law through the *legal dogmatic method*, i.e. by identifying relevant norms of law through recognized and authoritative sources.[18]

Since the essay concerns questions of rights-holder status, not of rights themselves, it is primarily norms and provisions that ascribe such status that were of interest. However, while rights-holder status is a prerequisite for rights, the interdependent relationship between these legal facts allows for an inverse causality to be employed as a means of analysis, namely: *if someone is accorded rights, that someone is a rights-holder*. Rights-holder status might therefore be explored not only in a direct, but also an indirect way, through the method of *first* finding relevant human rights, *then* establishing the subjects of those rights.

In the case of termination of prenatal life, the right to life is the most relevant right for analysis of prenatal rights-bearer status; it has been described as "a right that inheres in every human being" and that its "effective protection is the prerequisite for [...] all other human rights".[19] Life is arguably the primary interest of unborn human beings, as enjoyment of other rights are less relevant due to the obvious limitations in unborn humans' agency.

Ideally, an analysis of domestic law would have contained a comparative study of select legal systems representative of the varieties across the globe. Such a study was too extensive to fit within this essay, however. In order to provide an analysis somewhat in depth, the essay instead focussed on one domestic legal system. The Swedish legislative system was chosen for reasons of easy access.

1.4 Materials

1.4.1 International human rights law

The right to life is present in three major international human rights instruments: the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).

The UDHR is a declaration, legally classified as a recommendation that is not binding upon its parties.[20] However, it is the founding instrument of modern human rights, developed by the United Nations (UN) in close concert with the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR), which together form the International Bill of

---

[18] See Kleineman, p. 21.
[19] See article 1 UDHR; article 6.1 ICCPR; article 6.1 CRC; General Comment No. 36, p. 1, para. 2.
[20] See Tomuschat, p. 33.

Human Rights.[21] The UDHR originally came about as a reaction to the political systems during the first half of the 20th century where life had been regarded as cheap.[22] This is evident in the preambular paragraph 2, which states that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind". Statements during the drafting show this as well; thus spoke the French delegate that "it was more than ever necessary to proclaim the right to life after the terrible crime that had been perpetrated during the war. Economic and social rights were generally recognized but the classic rights which had been considered as self-evident had been repeatedly violated in recent years. It was, therefore, essential to proclaim man's fundamental right to life".[23]

The ICCPR and the CRC are binding treaties, successors to the UDHR and also developed by the UN, ensuring a clear link to the original source of modern human rights.[24]

Since the aim of the essay was to examine the issue of prenatal rights-bearer status at the very core of international human rights law, through sources that are as widely recognized as possible, these three UN instruments were chosen. Regional human rights instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), were therefore left out.

1.4.2 Swedish domestic law

Subject of the analysis of Swedish domestic law was the Swedish Abortion Act (1974:595). This act regulates abortions through the legal concept of a gestational limit, thereby making it central for analysing how Swedish law views the right to life in regard to the unborn.[25] In addition, the legal dogmatic method dictates complementary sources of law, such as case law, preparatory works and academic literature, to be used for interpretation.[26] Preparatory works enjoy a rather senior position as means of interpretation in Swedish domestic law, and they have thus been used to a great extent.[27]

In addition, a recent report by the Parliamentary Ombudsmen (JO) was consulted. JO is an ombudsman institution accountable to the Swedish Parliament (*Riksdag*) and tasked with reviewing the public sector's compliance with the law.[28] The report, investigating the administration and

---

[21] See Tomuschat, p. 29; Fact Sheet No.2 (Rev.1), The International Bill of Human Rights, pp. 1–2; Nowak, p. XIX.
[22] See Morsink, The Universal Declaration of Human Rights, pp. 36f, 40f.
[23] See A/C.3/SR.102, p. 146.
[24] "The foundations of this body of law are the Charter of the United Nations and the Universal Declaration of Human Rights, adopted by the General Assembly in 1945 and 1948, respectively. Since then, the United Nations has gradually expanded human rights law to encompass specific standards for women, children, persons with disabilities, minorities and other vulnerable groups...", see "Human Rights", United Nations webpage.
[25] The gestational limit is explored in chapter 3.1.
[26] See Kleineman, p. 21.
[27] See Kleineman, p. 33.
[28] See "A Parliamentary agency", Parliamentary Ombudsmen webpage.

regulation of late-term abortions in Sweden, had accumulated a wealth of material relevant for my analysis, such as statements from the National Board of Health and Welfare on the interpretation of the law.[29]

A review by JO is non-binding, though in practice most public authorities follow it.[30] I have treated JO's interpretation of law as academic literature, which is typically judged by the soundness of its arguments. Due to their origin within a parliamentary institution, however, JO's statements have been accorded a particular seniority.

As the National Board of Health and Welfare is an administrative authority with responsibilities for the regulation of abortions, its statements on the subject have been regarded as authoritative. The Board furthermore issues normative regulations (*föreskrifter*), which enjoy official status as legal norms; they have also been consulted wherever needed.

Statements from other sources – notably medical professionals – of interpretative relevance have also been found in JO's report; they have been regarded as academic literature without any official authority.

Finally, a report from the Swedish National Council on Medical Ethics, on the issue of foetuses showing life signs after late-term abortions, was used. The Council is an independent national body within the Government offices, tasked with advising the Government and Parliament on ethical issues.[31] Its report was viewed as academic literature – an argument on how the Abortion Act might be amended.

1.5 Treaty interpretation

The material for this essay has included two international human rights treaties; thus, treaty interpretation has played a big part in elucidating the meaning of their provisions. The international customary law on treaty interpretation is codified in articles 31 – 33 of the Vienna Convention on the Law of Treaties (VCLT).

According to article 31, interpretation shall be done *in good faith*. The *ordinary meaning* of the terms is central, together with their *context* within the treaty and the *object and purpose* of the treaty. Context is stated to include the *preamble and annexes* of the treaty, as well as various other agreements and instruments.

The wording "good faith" is seen to give voice to a *principle of effectiveness*, meaning in the case of human rights that treaty provisions shall be interpreted in such a way as to secure for the rights-holders effective protection, so that their rights are not merely illusory, theoretical

[29] See JO 7035-2017, pp. 1f.
[30] See "JO-beslut ", Parliamentary Ombudsmen webpage.
[31] See "The Swedish National Council on Medical Ethics", Webpage.

concepts. [32] A variant to this main principle – the *evolutive* and/or *teleological* approach – has provisions being interpreted in a dynamic manner in order to stay up-to-date with the current general principles of the times and/or in line with the overarching object and purpose of the treaty. The evolutive/teleological approach is sometimes considered to have a special meaning for human rights treaties, as the object and purpose of such norms are seen to require an expansive interpretation of rights – one example is the right to life in the ICCPR, interpreted by its expert treaty body as a "right which should not be interpreted narrowly".[33]

Further means that shall be taken into account according to article 31 of the VCLT are for example *subsequent practice in the application of the treaty* and *other relevant rules of international law*. Regarding the latter, two instruments were chosen for this essay that did not deal with the right to life – the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). These were studied not as sources of the right to life, but as an example of how other instruments might influence – and thus clarify – that right.

Article 32 of the VCLT represents the *supplementary means of interpretation,* which shall complement article 31 when needed. Article 32 may be had recourse to in order to either *confirm* a meaning resulting from interpretation according to article 31, or to *determine* a meaning when interpretation according to article 31 is unclear; unclear is defined as either the meaning being left *ambiguous* or *obscure*, or the meaning leading to a *manifestly absurd or unreasonable result*.

Article 32 explicitly mentions the *preparatory works* of treaties as supplementary means of interpretation. In the case of the ICCPR and the CRC, the preparatory works were often found to contain interesting information on the underlying thoughts behind the treaty provisions. Together with the statements by the expert treaty bodies, they provided a valuable complement, as the sparseness of means available for interpretation according to article 31 often left provisions ambiguous. The articles of the ICCPR and the CRC are worded in a fairly short and general manner and could therefore not be fully interpreted in light of just the context or object and purpose of the treaty.

All of the treaties analysed in this essay have *expert treaty bodies* connected to them that oversee domestic implementation of the respective treaties. One function of the treaty bodies is the production of comments, recommendations and observations regarding treaty implementation.[34] The legal significance of such works for the interpretation of the treaties is contested, though there is widespread agreement on their non-binding

---

[32] See Çali, Başak, pp. 511ff.
[33] See Çali, Başak, pp. 513f; McGrogan, p. 348.
[34] See articles 40.4, 41 ICCPR; articles 44.4, 45 CRC; articles 18, 21.1 CEDAW; articles 36.1, 39 CRPD.

nature.[35] Treaty bodies are regarded to have some form of vaguely defined authority,[36] or it's argued that they should be accorded status as "subsequent practice" under article 31 VCLT.[37] It is also claimed that the International Court of Justice (ICJ) and the International Law Commission (ILC) both regard expert treaty bodies as authorities to at least some extent when it comes to interpreting international law.[38] Whatever the exact status of the treaty bodies and their work, I found it reasonable to view their commentaries, recommendations and observations as supplementary means of interpretation in accordance with article 32 of the VCLT. They have been consulted as academic literature, though since they are published by experts in the human rights field and under a direct mandate of the treaties, they have been accorded some seniority as sources of interpretation.

Academic literature and commentaries have also been consulted in a few cases. Their value as sources for interpretation was decided – just like in the interpretation of Swedish domestic law – according to the soundness of their arguments. even more so than the work of the expert treaty bodies.

Finally, I found it self-evident that the UDHR shall be ever-present in the interpretation of international human rights, being – as has already been stated – the founding instrument for the modern human rights.[39] Consider also the last paragraph of its preamble:

> The General Assembly proclaims this Universal Declaration of Human Rights *as a common standard of achievement for all peoples and all nations,* to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching an education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction [emphasis added].

The Office of the High Commissioner references this passage as it calls the UDHR "a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards". Furthermore, it names it an instrument that "has set the direction for all subsequent work in the field of human rights and has provided the basic philosophy for many legally binding international instruments designed to protect the rights and freedoms which it proclaims".[40] In the words of political philosopher Johannes Morsink, the UDHR articulates "the moral *lingua franca* of our age".[41] The UDHR was the first human rights instrument that I examined,

[35] See Azaria, p. 35.
[36] See McGrogan, p. 349; see also Petersen, p. 149.
[37] See McGrogan pp. 347, 350; Azaria, pp. 35f.
[38] See Azaria, p. 60.
[39] See Tomuschat, p. 29; Fact Sheet No.2 (Rev.1), The International Bill of Human Rights, pp. 1–2; Nowak, p. XIX.
[40] See Fact Sheet No.2 (Rev.1), The International Bill of Human Rights, p. 4; see also Bossuyt, p. XIX, who states that it is "obvious that the preparatory work on the [UDHR] sheds additional light on the meaning of the provisions of the [ICCPR]".
[41] See Morsink, Inherent Human Rights, p. 1.

and I looked into the preparatory works to try to elucidate its meaning, in a manner analogous to treaty interpretation. The role of the UDHR in the interpretation of the ICCPR and the CRC was then as supplementary means according to article 32.

1.6 Outline

Chapter 2 set out to answer the first research question: whether prenatal life enjoys the status of a rights-holder under international human rights law. This was done through interpretation of the relevant provisions in the UDHR, the ICCPR and the CRC. Additionally, chapter 2 analysed the issue of an *international human right to abortion*, and how this affects the answer to the first research question.

Chapter 3 set out to answer the second research question: whether prenatal life enjoys the status of a rights-holder under Swedish domestic law. This was done through an examination of the Swedish Abortion Act and other relevant legal norms of Swedish domestic law. In this analysis, the *gestational limit* was presented in brief as a concept of abortion regulation.

Chapter 4 explored some issues on *foetal viability* that manifested themselves following the results of chapter 3. It attempted to deliberate upon potential consequences of the existent regulations for foetal and abortion rights. It also presented and reviewed a suggestion for an amended Abortion Act made by the Swedish National Council on Medical Ethics.

Chapter 5 presented the various conclusions drawn throughout the essay.

2 Examination of international human rights norms

2.1 The Universal Declaration of Human Rights

The UDHR does not hold the same power as a treaty – being merely a declaration – though it is still very relevant as it is the basis for all subsequent modern human rights treaties.[42]

Article 3 of the UDHR provides the right to life:

> Everyone has the right to life, liberty and the security of person.

The key word here is "everyone". Article 1 provides a context within which to interpret it:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Within the contexts of the declaration – using principles borrowed from the rules on treaty interpretation – "everyone" thus means "human beings". Furthermore, according to article 1 human beings are *born* free and equal in rights. This wording is pointed to in literature as proof that the UDHR does not acknowledge rights for human beings before birth.[43]

If we look to the preparatory works, as supplementary means of interpretation, we see that the drafting of the UDHR went through several stages and different working groups within the United Nations.[44] During the second session of the Drafting Committee, in May 1948, the Chilean delegate proposed an addition to the article on the right to life:[45]

> Unborn children, incurables, the feeble-minded and the insane have the right to life

Shortly thereafter, the Lebanese delegate suggested that the article cover the right to life and physical integrity "from the moment of conception", which the Chilean delegate supported.[46] The delegate from the USSR pointed out, however, that not all countries had laws against abortion.[47] The Lebanese proposal was ultimately put to a vote in the Drafting Committee and

---

[42] See Nowak, p. XX; Human Rights", United Nations webpage.
[43] See Copelon, et. al, pp. 121f.
[44] For a complete presentation of the seven stages of drafting, see for example Morsink, The Universal Declaration of Human Rights, p. 4 in fine.
[45] See E/CN.4/AC.1/SR.35, pp. 1, 3.
[46] ibid., p. 4.
[47] ibid., p. 5.

rejected by six votes to two. Interestingly enough, the delegates of China and the UK thought that the wording of the article could already be interpreted as providing protection from the moment of conception, though the British delegate added that it "did not necessarily do so".[48] The representative of the US seems to have agreed with the British position.[49]

The inclusion of the word "born" in article 1 was debated and voted upon later, during the sessions of the Third Committee of the General Assembly in October 1948. The delegates of Venezuela and Mexico expressed how they favoured an interpretation where human rights were protected from the moment of conception, with the Venezuelan delegate explicitly stating his preference that the word "born" be omitted for that very reason.[50] A proposal to delete the word "born" was nevertheless rejected by 20 votes to 12, with five abstentions.[51] The Venezuelan delegate would later reiterate his position in the discussion on the article on the right to life, stating that "the right to life and, consequently, all the measures tending to protect it, originated at the moment of the conception of the human being".[52]

While the issue of prenatal rights was raised, debated and voted upon during the drafting of the UDHR, and while support existed for such rights, this did not result in a clear acknowledgement of the unborn as rights-holders. However, as seen in the statements of Chinese, British and US delegates, it did not result in a clear rejection either. It should also be acknowledged that the debate on the word "born" only partially concerned itself with the question of which point in time protection should begin. The majority of the discussion instead stemmed from the much more fundamental issue of the source of human rights – whether they were to be declared as inherent to the human species, instead of being accorded by some outside factor, and in that case by what words ("are born", "should be", "have the right to be" etc.).[53] In summary, I do not read the UDHR as granting prenatal life rights-bearer status, but neither do I see it as explicitly denying it.

2.2 The International Covenant on Civil and Political Rights

Unlike the UDHR, the ICCPR is a binding international treaty. As one-third of the International Bill of Rights, it serves to further define the principles

[48] ibid., p. 5.
[49] See E/CN.4/AC.1/SR.35, pp. 5f: "The [...] representative of the United States, stated that the terms of article 4 [3] were sufficiently broad to comprise certain ideas which a country might wish to adopt as general principles."
[50] See A/C.3/SR.98, pp. 108, 111; A/C.3/SR.99, pp. 115, 121f; with regards to Venezuela, see also the preceding session in the Economic & Social Council, E/SR.215, p. 656.
[51] See A/C.3/SR.99, p. 124.
[52] See A/C.3/SR.104, p. 167.
[53] See Morsink, The Universal Declaration of Human Rights, pp. 291ff.

originally laid down in the UDHR.[54] Works on the ICCPR began in 1947 and lasted until 1966.[55]

The right to life is provided in article 6, paragraph 1, which reads:

> 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.

Again, the subject is in question, i.e. what is meant by "[e]very human being". During the drafting process it was proposed that the right to life should be protected "from the moment of conception", first by Lebanon in 1950 and again by Belgium, Brazil, El Salvador, Mexico and Morocco in 1957.[56] The 1957 proposal was also voted upon, but rejected by 31 votes to 20, with 17 countries choosing to abstain.[57]

During the discussions, reasons for and against such a phrasing were broached. In 1950, the Chilean representative pointed out that the rights of the unborn human being were not universally recognized.[58] In 1957, opposition was partly based on the argument that such a clause would engage the rights and duties of the medical profession, which would be inappropriate in an international document since such rights and duties were governed by different principles in different states.[59] Other arguments given were that the proposal was too vaguely worded,[60] and that protection of life from the moment of conception was impossible since it was impossible for a state to determine that moment.[61] As for the affirmative view, it was claimed to be only logical to guarantee the right to life from the moment life began.[62] The words of the Belgian delegation on the matter of such protection were that this meant "from the first physiological origin" and that "[if] the United Nations really desired to demonstrate its concern with the right to life it could not ignore the period during which it would be decided whether there was to be a new life or not".[63] Another delegate claimed there to be "many precedents of long standing" for such protection,[64] while others pointed out that this was already to be found in many national legislations.[65]

The vote of 1957 shows that the drafters of the ICCPR did not explicitly acknowledge prenatal life with rights-bearer status. However, much as with the UDHR, this is not to say that they explicitly rejected it – the differing opinions on the issue suggest that the drafters never formed any consensus.

---

[54] See Nowak, pp. XIX – XX.
[55] See Bossuyt, pp. XIXf.
[56] See E/CN.4/386, E/CN.4/398; A/3764, p. 29, para. 96; Bossuyt, p. 121.
[57] See A/3764, pp. 38–41, para. 119.
[58] See E/CN.4/SR.149, p. 4, para. 11.
[59] See A/C.3/SR.815, p. 268, para. 37.
[60] See A/C.3/SR.819, p. 283, para. 6.
[61] See A/C.3/SR.817, p. 278, para. 37.
[62] See A/3764, pp. 33f, para. 112.
[63] See A/C.3/SR.813, p. 253, para. 5.
[64] See A/C.3/SR.815, p. 265, para. 5.
[65] See A/3764, pp. 33f, para. 112; A/C.3/SR.817, p. 277, para. 25; A/C.3/SR.818, p. 279, para. 6.

Apart from one paragraph, the rest of article 6 deals with the issue of capital punishment, restricting it in various ways:

> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
> [...]
> 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
>
> 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
>
> 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Furthermore, there exists the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. This is an additional treaty which abolishes capital punishment altogether.[66] The preamble to this protocol mentions article 6 of the ICCPR and notes that it "refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable".[67]

This view is evident in the preparatory works of the ICCPR, which state that while abolition was "a highly controversial question" better left for each state to resolve, it was nevertheless agreed to add the sixth paragraph "in order to avoid the impression that the Covenant sanctioned capital punishment".[68] The Human Rights Committee (HRC), the expert treaty body responsible for the ICCPR,[69] also comments that the sixth paragraph "reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty", since "[t]he death penalty cannot be reconciled with full respect for the right to life".[70] It even submits the view that the practice of states may have developed considerably towards establishing the death penalty to

[66] An optional protocol is a separate treaty accompanying the main treaty, and is accessed and ratified separately, see "What is an Optional Protocol", UN Women webpage. Article 1 of the Optional Protocol reads:
1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.
[67] See Second Optional Protocol to the International Covenant on Civil and Political Rights, Preamble, paragraph 3.
[68] See A/3764, pp. 32f, para. 110; the clause was subsequently voted upon and adopted, see A/3764, pp. 31,40, para. 105, 119(p).
[69] See article 28.1 ICCPR.
[70] See General Comment No. 36, p. 12, para. 50.

be *under all circumstances* contrary to human rights.[71] Such a development is, according to the Committee, "consistent with the pro-abolitionist spirit of the [ICCPR], which manifests itself, inter alia, in the texts of article 6, paragraph 6 and the Second Optional Protocol".[72]

Article 6 thus entails a clear preference for the abolition of the death penalty.[73] Compared to the silence on the status of prenatal life, this shows a general preoccupation with the rights of the *born*; the ICCPR goes to great lengths to protect the life of criminals, presumably convicted of grievous crimes, but simultaneously leaves the question on the lives of unborn children open. The similarities are not inconsequential – both prenatal life and capital punishment were controversial subjects at the time of drafting, as seen by the lack of consensus on the former issue and the explicit statements made on the latter. Nevertheless, the treaty could apparently not be allowed to give an impression of sanctioning capital punishment, prompting the inclusion of the sixth paragraph, while any ambiguity on the question of prenatal life was not seen as such a problem – there is thus a difference in weightiness accorded to the two questions that cannot be overlooked, the effect of which is in essence that the lives of born criminals get priority over the lives of unborn, morally innocent, foetuses. The obvious challenge to this reasoning is of course that consensus on whether the born criminals are "alive" would have been, and still is, much greater than consensus on the status of life for unborn, as evident by the argument given during drafting that it is impossible to pin-point the exact moment when life begins. Such an argument is not fully satisfactory, since the uncertainty of when human life begins conversely also entails the possibility that human life is indeed present before birth – a possibility that is not accorded any weight by the ICCPR, despite its implications for abortions etc.

Of particular interest for the issue of prenatal life is the fifth paragraph, which prohibits executions of pregnant women. Such a provision was originally proposed in 1951 by the Yugoslavian delegate, and adopted by twelve votes to one, with five abstentions.[74] The inspiration for this provision was noted to be "humanitarian considerations and [...] consideration for the interests of the unborn child".[75] During the sessions of 1957, there was discussion on whether executions should be prohibited only for the duration of their pregnancy, or for pregnant women overall – it was thought by some that the mother's stress over a death sentence might disturb the normal development of the unborn child – but no consensus was reached.[76] Finally, this provision was referred to by those supporting the proposal of Belgium, Brazil, El Salvador, Mexico and Morocco that life in general should be protected from the moment of conception – the

---

[71] In this case not article 6, but article *7*, of the ICCPR, which entails the prohibition against torture, cruel, inhuman or degrading treatment or punishment.
[72] See General Comment No. 36, pp. 12f, para. 51.
[73] For the same interpretation, see Nowak, p. 134 para. 22.
[74] See Nowak, p. 147; E/CN.4/SR.311, p. 7.
[75] See A/2929, Chapt. VI, p. 85, para. 10.
[76] See A/3764, p. 36, para. 117.

"protection of the life of the unborn child whose mother was sentenced to death" should be extended to all unborn children, it was argued.[77]

The fact that a provision based on "consideration for the interests of the unborn child"[78] made it into the ICCPR suggests – at last – a recognition of rights-holder status for prenatal life. However, this is the only such recognition present in the preparatory works – any *general* right to life from the moment of conception was, as we have seen, clearly not acknowledged. Strangely, the difference in situation is present solely in the mother – a foetus borne by a convicted criminal is after all no different from a foetus borne by an unpunished, law-abiding citizen. However, with nothing but the scant justification that is given in the preparatory works, we cannot know the full logic behind the distinction. In summation, this minor indication of a recognition of prenatal rights is not nearly enough to overturn the general conclusion that the drafters of the ICCPR did not take a stance on the question of rights-holder status for the unborn.

The HRC comments to a considerable degree on the overall interpretation of article 6. According to the Committee, the right to life is "the supreme right from which no derogation is permitted" and its "effective protection is the prerequisite for the enjoyment of all other human rights"; it is a right which should not be interpreted narrowly.[79] Article 6 "guarantees this right for all human beings, without distinction of any kind" – any discriminatory deprivation of life "is *ipso facto* arbitrary in nature", and thus clearly prohibited by the first paragraph, which states that "no one shall be arbitrarily deprived of his life". [80] Femicide, here understood as "an extreme form of gender-based violence [...] directed against girls and women",[81] is according to the HRC "a particularly grave form of assault on the right to life".[82]

The HRC also comments extensively on the relationship between the right to life and abortions. While states party to the ICCPR may adopt measures to regulate and restrict abortion, "such measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant", such as subjecting her to pain or suffering, discrimination or arbitrary interference with her privacy.[83] "States parties *must* provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable. In

[77] See A/3764, pp. 33f, para. 112.
[78] See A/2929, Chapt. VI, p. 85, para. 10.
[79] See General Comment No. 36, p. 1, para. 2–3.
[80] ibid., pp. 1, 14, para. 3, 61.
[81] The World Health Organization (WHO) defines "femicide" as "generally understood to involve intentional murder of women because they are women, but broader definitions include any killings of women or girls", see information sheet "Understanding and addressing violence against women: Femicide", p. 1.
[82] See General Comment No. 36, p. 14, para. 61.
[83] ibid., p. 2, para. 8.

addition, States parties *may not* regulate pregnancy or abortion in *all other cases* in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions [emphasis added]".[84]

The HRC also comments on the right to life in conjunction with article 24.1 ICCPR. Article 24.1 states:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

According to the HRC, this provision means that *special* measures to protect the life of every child are required in addition to the *general* measures prescribed by Article 6. Such measures should be guided by, *inter alia*, "the best interests of the child" and "the need to ensure the survival and development of all children".[85]

These comments on the right to life are thorough, which is befitting of a "supreme right" which is a "prerequisite" for all other human rights.[86] However, in describing the *right*, the comments never explicitly state that prenatal life is to be *subject* to this right. Thus, the supremacy and expanse of the right to life, the prohibition on discriminatory deprivation of life, "the survival and development of all children", as well as any other statements made on the right to life, can be understood as applying exclusively to children born just as easily as applying also to children unborn.[87] And while the right to life is clearly understood to be a factor in the issue of abortion, it is not a foetal right to life; rather, abortions are understood to sometimes be necessary in order to safeguard the *pregnant woman's* right to life, essentially resulting in a right to abortion when the situation demands it.

In summation, the means of interpretation available to understand the right to life in the ICCPR provides for some questions, for example on the logic behind the sixth paragraph of the article. Nevertheless, the picture that emerges is that of a human right that neither acknowledges, nor rejects, a right to life for the unborn.

2.3 The Convention on the Rights of the Child

Article 6 of the CRC deals with the right to life:

> 1. States Parties recognize that every child has the inherent right to life.
> 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

---

[84] ibid., p. 2, para. 8.
[85] ibid., p. 14, para. 60.
[86] ibid., p. 1, para. 2.
[87] ibid., p. 14, para. 60.

Unlike the UDHR and ICCPR, the CRC provides a definition of the subject of its right to life. Article 1 states:

> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

The phrase “every human being below the age of eighteen years” does not, however, provide further clarification, the key term here being “human being”.

According to the rules for treaty interpretation “[a]ny relevant rules of international law applicable in the relations between the parties” shall be taken into account (see article 31 VCLT), which can mean, for example, taking the ordinary meaning of a term from other relevant treaties,[88] or more generally the principle of *systemic integration*, where interpretation is made in the larger context of the entire international law legal system, with the aim of promoting coherence.[89] As we have already seen, the UDHR and the ICCPR do not explicitly define “human being” as including the unborn. Furthermore, there exists a “widely understood [...] historical understanding that legally protected status as human being begins at live birth”.[90]

Despite this, there is an argument to be made that the context of the CRC allows for an interpretation of “child” that incorporates prenatal life. The context of a term comprises, according to article 31 VCLT, the preamble of the treaty. And paragraph 9 of the preamble to the CRC reads:

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*" [emphasis added]

While general context, i.e. the systemic integration with the entirety of international law and the historical understanding of protection of human beings, suggests no prenatal rights in the CRC, the specific context of the treaty suggests otherwise. In this case, as the term “child” remains ambiguous to us, it is - in line with article 32 VCLT – necessary to look to supplementary means of interpretation, such as the preparatory works and the opinions that were present during the drafting.

The drafting of the CRC took place over a ten-year period and was done mainly by the Working Group on the Question of a Convention on the Rights of the Child. It is important to know that the group’s work was based on consensus, meaning no votes were taken and proposals that might have had majority support were nonetheless dropped.[91] Thus, the final product of the CRC cannot be said to reflect anything but what the various states

[88] See Gardiner, pp. 323f.
[89] See Gardiner, p. 299; Çali, pp. 516f.
[90] See Cook & Dickens, p. 24.
[91] See Cantwell, pp. 21f.

managed to unanimously agree upon, since every single state effectively had veto power.[92]

The phrase “before as well as after birth” was suggested for the preamble early in the process, with arguments from several states that their domestic law protected the rights of children from the moment of conception. Nevertheless, it was claimed that the inclusion of such a phrase would not have the purpose of hindering abortion, since “many countries had adopted legislation providing for abortion in certain cases, such as a threat to the health of the mother”.[93]

Delegations that opposed the inclusion of the words argued that the preambular paragraph should be neutral regarding abortion, and that “child” should be defined exclusively in article 1 – since article 1 had been worded neutrally, one delegate argued, a different interpretation should not appear to be given in the preamble. The huge differences on the issue of abortion in various domestic legal systems was also put forth as a reason for the CRC to be neutral, lest it not be ratified to a wider extent.

Delegations in favour of the phrase claimed it to be “sufficiently neutral”, as it did not specify the length of the period before birth that should be covered. It was furthermore argued that all systems of domestic legislation included provisions for children’s protection before birth.[94]

Several years later during the drafting process, the phrase was finally included as a direct quotation from a previous human rights instrument, the 1959 Declaration on the Rights of the Child.[95] Supporters wanted to retain the concept of the 1959 Declaration and saw this connection between the instruments as “repeatedly stress[ing]” the importance of the protection of the child before birth.[96]

At this point, opponents regarded the question of protection for prenatal life as concluded, as a controversial issue already discussed, with no consensus reached. Some delegations explicitly held the view that an unborn child is “not literally a person whose right could already be protected, and that the main thrust of the convention was deemed to promulgate the rights and freedoms of every human being after his birth and to the age of 18 years”.[97] The declaration of 1959 was furthermore, in the view of some, obsolete and to be superseded by the new CRC, and thus did not hold an absolute authority over the current law-making.[98]

[92] See Tobin, p. 6.
[93] See E/CN.4/L.1542, p 2, para. 6.
[94] ibid, pp. 2–4, para. 7–11, 18.
[95] See E/CN.4/1989/48, p. 11, para. 43–46.
[96] ibid., pp.9f, para. 35.
[97] ibid., p. 10, para. 36.
[98] ibid.

Nevertheless, proponents insisted that the issue of the rights of the unborn child could not be ignored. The Italian delegate considered the protection of unborn life to be a *jus cogens* rule, since no state was manifestly opposed to the principles of the Declaration of 1959.[99] In the end, an informal drafting group within the Working Group was formed, and upon its suggestion paragraph 9, with the inclusion of the quote, was adopted. However, upon the urging of the drafting group, a statement on the issue was also included in the preparatory works. The statement read as follows:[100]

> In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by States Parties.

In connection to this, the Legal Counsel was asked by the British delegate whether such a statement would be taken into account when interpreting article 1.[101] The Legal Counsel responded that it is not prohibited to include an interpretative statement in the preparatory works, though such a statement would be better placed in the "final act or in an accompanying resolution or other instrument".[102] The Counsel referred to article 32 of the VCLT, which provides that preparatory works may only be taken into account if the treaty provisions being interpreted are found by those interpreting them to be unclear.[103] [104]

As we have already seen, however, the necessary clarity of article 1 of the CRC cannot be reached without recourse to the preparatory works. While individual actors might, of course, still come to different conclusions in their own interpretative work, thus affirming the misgivings of the Legal Counsel, this is an *empirical* question rather than a legal dogmatic; in my opinion, the CRC *de lege lata* is to be interpreted with full regard to the – supplementary – clarifications made in the preparatory works.

The discussion in the preparatory works related above took place in connection with the drafting of the preamble, but similar arguments were naturally present during the drafting of article 1; some delegations viewed the claim that childhood began at the moment of birth as going against the

---

[99] See E/CN.4/1989/48, p. 10, para. 38, 40; a *jus cogens* norm, also known as a peremptory norm of general international law, is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character", see article 53 of the VCLT. According to the ILC, the concept of *jus cogens* refers to "substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values", meaning for example the prohibition against torture and genocide, see Henriksen, pp. 34f.

[100] See E/CN.4/1989/48, pp. 10f, para. 41–43, 46.

[101] ibid., p. 11, para. 47.

[102] See E/CN.4/1989/48, Annex p. 144.

[103] ibid.

[104] Consequently, if one were to interpret the term "child" in article 1 of the CRC as including the unborn, in light of the statement in the preamble, and one found such an interpretation sufficiently clear, whatever statements to the contrary present in the preparatory works *could not be taken into consideration*.

domestic law in many states, and that the entirety of the period from conception should therefore be included, while others opposed the establishment of a beginning point, preferring instead an article that was compatible with the varying forms of domestic legislation.[105] During the final drafting, Malta and Senegal withdrew their proposed amendments, which would have added the phrase "from conception" to article 1, stating that in light of the adopted wording of paragraph 9 of the preamble, they would not insist on such amendments; however, they wished the preparatory works to show the view they had taken on the issue. The Holy See added that it would have supported their amendments.[106]

Of course, as has been shown above, Malta and Senegal credited the preambular statement with more weightiness than it in reality holds, seeing as it cannot be used to modify the scope of article 1; the adopted preamble cannot give the CRC such an explicit prenatal ambit as the phrase "from conception" would have done. Nevertheless, the Committee on the Rights of the Child (CRC Committee), which is the expert treaty body responsible for the CRC,[107] suggests in its commentaries that at least some regard should be had for the prenatal phase. The CRC Committee here uses the phrase "child" even when speaking of prenatal matters.

In its General Comment No. 7, regarding the implementation of child rights in early childhood, the CRC Committee, in connection with the "right to life [...] survival and development of the child" in article 6, urges the member states to "take all possible measures to improve perinatal care for mothers and babies, reduce infant and child mortality, and create conditions that promote the well-being of all young children during this critical phase of their lives".[108] In General Comment No. 9 on the rights of children with disabilities, the Committee recommends, in order to prevent disabilities, that states "introduce and strengthen prenatal care for children and ensure adequate quality of the assistance given during the delivery".[109] Furthermore, it points out lifestyle issues "such as alcohol and drug abuse during pregnancy" as causes for disabilities which should be combated.[110]

The latter General Comment No. 9 is clearly occupied with prevention, which is an issue of health, rather than life.[111] General Comment No. 7, however, talks about the "well-being of all young children *during this critical phase of their lives* [emphasis added]", the "critical phase" referring to the phase of perinatal care, which includes prenatal care.[112] In other

[105] See E/CN.4/L.1542, p. 5, para. 29.
[106] See E/CN.4/1989/48, pp. 15–16, para. 76f.
[107] See article 43.1 CRC.
[108] See General Comment No. 7, p. 4, para 10.
[109] See General Comment No. 9, p. 15, para 53.
[110] See General Comment No. 9, p. 15, para 54.
[111] The relevant paragraphs are furthermore situated under the heading "Basic health and welfare", see General Comment No. 9, p. 14.
[112] According to the WHO, "[t]he perinatal period commences at 22 completed weeks (154 days) of gestation and ends seven completed days after birth", see "Maternal, newborn, child and adolescent health", WHO webpage.

words, health-related rights are here possibly accorded unborn children, which would acknowledge them as rights-holders. However, such a brief and cursory text might also be understood differently – for example, perhaps the Committee only acknowledges the interest of well-being during the prenatal phase as interests of *already born children*, to prevent prenatal causes of post-natal ailments. These interests would then result in rights of born children, but with *repercussions before birth*, without ever acknowledging the unborn as rights-holders.[113] This type of future rights-holder construction has not been explored further in this essay; the point is that the comments made by the CRC Committee cannot clearly be read as acknowledging prenatal rights-holder status. Furthermore, if such a status can indeed be claimed, it will be highly circumstantial, and while the rights to "life [...] survival and development" are invoked, it is not clear how extensive such rights would be during the prenatal phase – abortion might, for example, still be allowed.[114] All things considered, such an ambiguous statement from a supplementary source without any formal authority as interpreter will probably not affect the definition of "child", and thus the scope of article 1, to any significant extent.

In contrast with the beginning of childhood, article 1 explicitly defines the end of childhood, describing it as "the age of eighteen years unless under the law applicable to the child, majority is attained earlier". Interestingly, the drafting debate concerning this definition saw arguments similar to the debate on when childhood should begin, with parties pointing to domestic law to support their view. Those who wished for a lower age limit than 18 years referred, for example, to the fact that the legal marriage age for girls was set at 14 in many countries, while those in favour of an age limit of 18 years cited the protection provided in their own domestic legal system. The latter "believed that the [CRC] should apply to as large an age group as possible" and also pointed out that article 1 already provided recourse to a lower age of majority.[115] A proposal was made that an explicit age limit be omitted altogether, and the article instead define the upper limits of childhood as the age of majority according to applicable domestic law.[116] The Working Group was not, however, prepared to adopt such a wording.[117] Several delegations that opposed this proposal did so with arguments that the age of majority "varied widely between countries and also within national legislations, according to whether the civil, penal, political or other aspects of majority were at issue".[118]

---

[113] For an example of recognition of rights of, as of yet, unborn generations, see the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), article 1, which has as objective "to contribute to the protection of the *right of every person* of present *and future* generations [emphasis added]".
[114] See General Comment No. 7, p. 4, para 10.
[115] See E/CN.4/L.1542, pp. 5–6, para. 32–35.
[116] See E/CN.4/L.1542, p. 6, para. 34.
[117] See E/CN.4/L.1542, Annex p. 2.
[118] See E/CN.4/L.1542, p. 6, para. 35.

The Nepalese delegate wished the upper age limit to be lowered to 16, “so as to take into account the concerns of poorer States who may not be able to shoulder the burdens imposed by [the CRC] for children up to 18 years of age” – this, he argued, “would leave more wealthy States with the option to expand their definition as they deem fit”.[119] By contrast, the Portuguese delegate stated that “mentioning the age of 18 years would underline the recognition of the need to ensure special protection to human beings under that age. A definition based on the simple notion of majority would not therefore seem to be desirable, taking into account the different solutions existing in various legal systems”.[120] In the end, article 1 was adopted in its current form.[121]

In other words, while the arguments were largely the same as those on the beginning point of childhood, the adopted solution was converse; the CRC was to be neutral on the question of beginning, but not on the question of ending. This is also evident in the subsequent interpretative and implementative works done by the CRC Committee. According to authors John Tobin and David Archard, article 1 of the CRC creates a presumption that childhood ends at 18, which can be refuted by domestic law; however, the CRC Committee has “repeatedly pressed states to adopt 18 as the end point for childhood”, in one case claiming that a definition of a child as anyone under the age of 16 years was incompatible with the CRC.[122] According to Tobin and Archard, while it is questionable whether such a stance is justified by the text of the convention, the Committee is “arguably within its mandate to demand that states must at least justify any definition of a child that does not extend to 18 years” since “[to] hold otherwise would be to give license to a state to avoid its obligations under the Convention by simply reducing the age of majority for reasons of convenience as opposed to a need to respect and accommodate long standing cultural or customary conceptions”.[123]

The words of the CRC Committee and authors are not in any way absolute authority on the interpretation of the CRC, and the preparatory works are supplementary means to such work. Nevertheless, they confirm what is evident in the words of the convention itself: if the CRC is neutral on when childhood begins, it is by comparison rather opinionated on when it should end. As a consequence, domestic sources of norms and legislation are allowed to define the former but marginalized in their influence upon the latter. Indeed, it seems to have been the diversity in the domestic solutions available that was the reason *for* the CRC’s neutrality on the first question, while simultaneously cited as argument *against* such neutrality on the latter – and real-world differences in economic circumstances did not change this, as the Nepalese delegate learned.

---

[119] See E/CN.4/1989/48, p. 16, para. 82.
[120] ibid.
[121] ibid., p. 16, para. 85.
[122] See Archard & Tobin, pp. 27f.
[123] ibid., p. 28.

2.4 Interests regarding abortion that are acknowledged by international human rights

2.4.1 The interests of the born – a right to abortion?

As we have seen, there is a strong case to be made that international human rights norms present in the ICCPR, the CRC and, by extension, the UDHR do not accord prenatal life the status of rights-bearer – apart from a few ambiguous passages in a commentary by the CRC Committee, and a curt and circumstantial regard for the unborn in cases of capital punishment, nothing seems to suggest it.[124] It would be reasonable then to conclude that international human rights generally do not acknowledge any rights held by unborn human beings. At the same time, it seems they do not explicitly *deny* such rights – rather, they remain silent on the issue.

This obviously has repercussions for the question of abortion; a silence on prenatal rights leaves domestic legislators free to accord or deny such rights as they please. But the abortion issue is defined by additional interests as well, not least those of the pregnant women. The interests of the born are not the subject of this essay and have not been purposefully explored. Nevertheless, some observations can still be made from the commentaries and statements of some expert treaty bodies, which show us that a silence on prenatal rights does not equal a silence on the issue of abortion. Whatever recognition of the interests of the born exists in international human rights therefore serves to further elaborate and contextualize the non-acknowledgement of prenatal rights.

As we have already seen in chapter 2.2, the HRC states that abortions are sometimes – for example in cases of incest, rape or non-viability of the foetus – necessary in order to safeguard the pregnant woman's right to life. Of particular interest is the position taken that, *in addition to this*, states "may not regulate pregnancy or abortion in *all other cases* in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions [emphasis added]".[125] Such an interpretation of the right to life in the ICCPR essentially results in a right to abortion for women.

The CEDAW is a treaty adopted by the UN in order to protect the human rights of, and combat discrimination against, women.[126] Attached expert

---

[124] The preambular acknowledgment of "legal protection, before as well as after birth" does not affect the scope of article 1 of the CRC, and thereby does not affect the extension of the right to life according to the convention – thus, it doesn't influence the convention's definition of rights-bearer.
[125] See General Comment No. 36, p. 2, para. 8.
[126] See article 2 CEDAW.

treaty body is the Committee on the Elimination of Discrimination against Women (CEDAW Committee), and the general recommendations released by this Committee throughout the years suggest an emerging clarification on the treaty body's stance on women's right to abortion.[127]

In 1999, in its General Recommendation No. 24 on article 12, the CEDAW Committee recommended states parties to, in particular, "[prioritize] the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. *When possible*, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion [emphasis added]".[128]

In 2016, the Committee released its General Recommendation No. 34 on the rights of rural women. Regarding access to health-care services, it stated that rural women are more prone to resorting to unsafe abortions and that access is hindered when restrictive conditions to abortion services apply, even more so when abortion is outlawed altogether.[129] States parties should therefore ensure access to safe abortion for rural women, "*regardless* of whether abortion is legal [emphasis added]", and *abolish* laws that impede such access, "in particular laws that criminalize or require waiting periods or third-party consent for abortion".[130]

Finally, in 2017, the CEDAW Committee in its General Recommendation No. 35 on gender-based violence[131] against women established that "criminalization of abortion, denial or delay of safe abortion [...] are forms of *gender-based violence* that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment [emphasis added]".[132] It recommended states parties to *repeal* provisions that "allow, tolerate or condone forms of gender-based violence against women, including [...] provisions that criminalize abortion".[133]

Throughout the years, the position of the CEDAW Committee has gone from recommending that criminalization of abortion should merely be amended when possible, to that it should be abolished no matter the

---

[127] See article 17 CEDAW.
[128] See General Recommendation No. 24., p. 7, para 31(c).
[129] See General Recommendation No. 34, p. 11, para 38.
[130] ibid., p. 11, para 39(a), 39(c).
[131] Gender-based violence is defined by the CEDAW Committee as "violence which is directed against a woman because she is a woman or that affects women disproportionately", see General Recommendation No. 35, p. 1 para. 1. Gender-based violence is considered a form of discrimination against women, as defined in the CEDAW, and is thus prohibited, see article 2 CEDAW; the Committee furthermore considers this prohibition to have evolved into customary international law, see General Recommendation No. 35, pp. 1f, para. 2.
[132] See General Recommendation No. 35, p. 7, para 18; for further reading, see also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), and General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the ICESCR).
[133] See General Recommendation No. 35, p. 12, para 29(c)(i).

circumstances. And while there is a difference between "criminalized" and "illegal", access to safe abortion for rural women is indeed considered to be a right regardless of the *legality* of the procedure in domestic law. This right to safe abortion is also, as we have seen, emphasised for all women by the HRC, and since denial of safe abortions has been declared gender-based violence, the end result is that a state *must* provide for legal abortions, for *all* women.

Unsafe abortions are, of course, a threat to the life and health of pregnant women.[134] However, the HRC and CEDAW Committee extend the interest of safe abortions to cases of "torture or cruel, inhuman or degrading treatment or punishment".[135] The HRC also states risks to the life and health of the woman, as well as discrimination and arbitrary interference her privacy, as situations where abortions must be provided, and furthermore exemplifies pregnancies due to incest or rape, or where the foetus is not viable, as causes of "substantial pain or suffering" which also mandate access to abortions.[136] In so doing, the Committees extends the right to abortion in such a way, that not only the *life* of those born, but the *quality of life* of those born, is valued higher than the life of the unborn.

2.4.2 Selective abortions and the interests of the unborn

As we have seen, some of the works of the expert treaty bodies have clarified situations where a right to abortion might exist. At the same time, there have been several instances where treaty bodies have also made statements that seem to suggest that it's not only the interests of the pregnant women that need to be taken into account when it comes to the issue of abortions.

The CRPD is a United Nations treaty with the objective to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms" by people with disabilities.[137] One of its general principles is non-discrimination, according to its article 3, and a prohibition of discrimination on the basis of disability is codified in its article 5. The expert treaty body responsible for the interpretation and implementation of the CRPD is the Committee on the Rights of Persons with Disabilities (CRPD Committee).[138]

In 2011, in observations made on reports by Spain, the CRPD Committee "[took] note" of Spanish national legislation which extended the time limits

---

[134] WHO estimates that 4,7 – 13,2 % of yearly maternal deaths are caused by unsafe abortions, see fact sheet "Preventing unsafe abortion", WHO webpage.
[135] See General Recommendation No. 35, p. 7, para 18; General Comment No. 36, p. 2, para. 8, which refers to article 7 of the ICCPR, which states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".
[136] See General Comment No. 36, p. 2, para. 8.
[137] See article 1 CRPD.
[138] See article 34 CRPD.

for abortions in case of particular forms of foetal disability – namely the "risk of serious anomalies in the foetus" and "an extremely serious and incurable illness". The Committee recommended Spain to remove this distinction in time limits between abortions of disabled and non-disabled foetuses.[139] This recommendation was reiterated in observations made in 2019, as the Committee expressed concern about the lack of progress to implement its earlier recommendations; now the Committee developed its reasoning somewhat, stating that the distinction made in Spanish law "reinforce[s] a negative perception of disability" and "contribute[s] to the stigmatization of disability, which can lead to discrimination".[140]

Of note is that Spain, in its response and explanation of the distinction, pointed out that the CRPD does not charge its member states to protect life before birth.[141] Thus, the observations made by the Committee marked a collision between two opposing views on the issue of abortion of disabled foetuses – views that had also been evident during the drafting of the CRPD.

The drafting of the CRPD saw a lot of input from various disability rights activists and organizations.[142] During the work on article 10, a proposal from the International Disability Caucus (IDC)[143] sought to establish that disability would not be a justification for the termination of life. This would prohibit compulsory abortion on the basis of prenatal diagnosis. However, the IDC was assumed to be part of a pro-life movement that sought to banish *all* forms of abortion.[144] The delegation of New Zealand, for example, stated that "[it] does not support the introduction of language attempting to cover issues such as the status of unborn children as this 'could open a Pandora's box'",[145] and the Indian delegate "cautioned against getting into a debate on issues such as the status of the unborn child".[146] The proposal was not adopted, even though the IDC pointed out that it "takes no position on the issue of abortion in general".[147]

---

[139] See Concluding Observations: Spain (2011), p. 3, para 17–18.
[140] See Concluding Observations: Spain (2019), p. 2, para 6–7.
[141] See Petersen, p. 158.
[142] See Petersen, p. 150.
[143] The IDC was a network of global, regional and national organizations of persons with disabilities and allied non-governmental organizations that participated in the negotiation of the CRPD, see "History", International Disability Alliance webpage.
[144] See Petersen, p. 152; Grandia, pp. 152f.
[145] See Ad Hoc Committee on Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Fourth Session of the Ad Hoc Committee, Daily summary of discussions related to Article 8 (right to life).
[146] ibid.
[147] See Grandia, pp. 152f; Ad Hoc Committee on Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Fourth Session of the Ad Hoc Committee, Daily summary of discussions related to Article 8 (right to life).

Another organization for disability rights and representation, People with Disability Australia (PWD Australia),[148] commented the following:[149]

> This [issue] obviously presents a difficult ethical challenge, not least because of its potential impact on the choice of women in relation to pregnancy. However, it might be possible to address this issue more indirectly. For example, much of the information that is made available to parents at the time of genetic testing and immediately following the birth of a child with disability is overwhelmingly negative and inaccurate, and induces parents to opt for termination of pregnancy or withdrawal of life-sustaining treatments. It is possible to impose an obligation on States to ensure that prospective parents of a child with disability receive positive and realistic orientation to their child and its future life. This may reduce the chances that parents will opt for termination of pregnancy.

The Japanese Assembly of Disabled Peoples' International (DPI)[150] went further, however, stating their opinion that "[no] person shall abort the pregnancy of an unborn child on the basis of a disability".[151]

Article 10 of the CRPD, as it was finally adopted, reads:

> States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

The original draft of the article had the subject be a "person", which was replaced by "human being" in order to harmonize with the language of the ICCPR. This went without debate at the time, but later the Council of Europe requested that this be replaced – either with the word "person", or the word "everyone" – in order to avoid the question of the status on the embryo and foetus.[152] [153]

In other words, the adoption of the CRPD did not depart from the silence on the question of prenatal rights established in international human rights. And yet, the CRPD Committee criticized Spanish domestic law. In 2012, the

---

[148] See "About Us", PWD Australia webpage.

[149] See U.N. Convention on the Rights of People with Disabilities, Proposals and Amendments Submitted Electronically, Fourth Session Comments by People with Disability Australia (2006), as related in Peterson, p. 153.

[150] DPI is a global, cross-disability organization for the protection and promotion of human rights for disabled persons, see DPI webpage.

[151] See Disabled Peoples' International, Japanese Assembly Position Paper regarding the Convention, submitted on 19 June 2003, Article 3 of the Elements of the Convention.

[152] See Ad Hoc Committee on Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Daily summary of discussions at the fifth session 25 January 2005; Schaffer, p. 284; Drafting proposals and comments by the Council of Europe Secretariat (21 April 2006), p. 3.

[153] The Council referred to how the right to life had been worded in article 3 of the UDHR, as well as in article 2 of the ECHR. It pointed out the case law of the European Court of Human Rights, which had ruled that the issue of life's beginning falls outside the ambit of the ECHR to decide, see Drafting proposals and comments by the Council of Europe Secretariat (21 April 2006), p. 3. While the proposed change might seem sensible from the viewpoint of European human rights, the tie-in with the ICCPR already existent in my opinion achieves the same goal, since – as we have seen – the ICCPR is also silent on the issue of when life begins.

Committee also stated similar concerns over Hungary's domestic legislation, which provisions made "abortive treatment possible for a wider circle than in general for the foetuses deemed to have health damage or some disability".[154] The Committee, referencing article 5 of the CRPD, considered this distinction to be *discrimination on the basis of disability* and recommended Hungary to abolish it.[155]

This is not the first time that UN expert treaty bodies have expressed regret over abortions of foetuses belonging to specific groups. In 1997, the CRC Committee held a general discussion on the rights of children with disabilities, together with representatives from various bodies and organizations.[156] This issue was seen as one of oppression and discrimination against disabled children, which needed to be challenged.[157] The right to life was deemed in need to be reaffirmed regarding disabled children, and it was stated that in working towards a safer world for children with minimized risks of harm and impairment, "the solution was not through the denial of life itself as a preventive strategy. Rather, we must celebrate diversity and learn to celebrate the birth of every child, with or without disability."[158] To that end, the Committee formulated recommendations to States to, *inter alia*, review and amend legislation not compatible with the CRC, such as law that denied disabled children an equal right to life, survival and development, "including [...] discriminatory laws on abortion affecting disabled children".[159]

A right to non-discrimination for children is provided in article 2 of the CRC, which states that the rights of the conventions shall be respected and ensured by states "without discrimination of any kind", and that the states shall take "all appropriate measures" to protect children from discrimination. The CRC Committee has established that discrimination against girl children may be in the form of *selective abortion*.[160] In its observations on the reports of India, the Committee has furthermore expressed concern over what it sees as discriminatory attitudes and harmful practices towards girls, among which are selective abortions. It has recommended India to determine the socio-cultural factors responsible for such practices and to develop measures to address them, as well as ensure effective implementation of legislation to prevent selective abortions.[161]

The CEDAW Committee has, in its observations on the reports of China, stated its concern over gender stereotypes that lead to son-preference and sex-selective abortion. The Committee was worried that such attitudes

---

[154] See Concluding Observations: Hungary, p. 3, para 17.
[155] ibid., p. 2, p. 3, para 17–18.
[156] See CRC/C/69, Chapter IV.D; CRC/C/69, p. 52, para. 316.
[157] See CRC/C/69, p. 55, para. 325.
[158] ibid., pp. 55f, para. 329.
[159] ibid., p. 58, para. 338(d)(i).
[160] See General Comment No. 7, p. 5, para 11(b)(i).
[161] See Concluding Observations: India (2000), p. 6, para 32 and p. 9, para 49; Concluding Observations: India (2014), pp. 6f, para 33, 34(c).

continue to "devalue women and violate their human rights".[162] The Committee has called sex-selective abortion one of several "illegal practices" and expressed concern over "the impact of the adverse sex ratio, which may contribute to the increase in trafficking in women and girls".[163]

The CEDAW Committee has likewise expressed regret over the "continuing deterioration in the ratio of females to males" in India.[164] The Committee was concerned that domestic legislation against sex-selection might criminalize women who were being pressured into seeking sex-selective abortions.[165] Such concerns notwithstanding, the Committee declared sex-selective abortions to be "harmful traditional practices" which were in need of elimination.[166]

The CRC Committee and, in the case of Hungary, the CRPD Committee have both made explicit references to *discrimination* in their criticism.[167] The condemnations made by the CEDAW Committee, and in the case of Spain the CRPD Committee, have by contrast been worded in a fairly sweeping manner, with selective abortion viewed as causing negative perceptions of disability and stigmatization which *can lead* to discrimination,[168], as example of illegal practices[169] or as causing devaluation of women and – undefined – violation of their human rights.[170] The CEDAW Committee's criticism has, however, been delivered in connection with "stereotypes regarding the roles and responsibilities of women and men"[171] or "stereotypes [...] that discriminate against women",[172] and the CRPD Committee's statements on Spain should be read in context with its statements on Hungary – thus, I find it reasonable to assume that all of the treaty bodies have made their criticisms of selective abortion from some form of perspective of non-discrimination.

The accusation of discrimination then begs the logical question: *who is the subject being discriminated?* We know that for someone to be able to hold a right – in this case the right to non-discrimination – one must be considered a rights-holder. In other words, one can only be discriminated against when

---

[162] See Concluding Comments: China (2006), p. 4, para 17; Concluding Observations: China (2014), pp. 5, 9, para 24, 38.
[163] See Concluding Comments: China (2006), p. 7, para 31.
[164] See Concluding Comments: India (2007), p. 7, para 38.
[165] ibid.
[166] See Concluding Observations (2014), pp. 7f, para. 20, 21(c).
[167] While a direct connection to discrimination is not evident in the CRC Committee's observations on India, they were still made with reference to article 2 CRC, which is the non-discrimination provision of the treaty, see Concluding Observations: India (2000), p. 6, para 32.
[168] See Concluding Observations: Spain (2019), p. 2, para 6–7.
[169] See Concluding Comments: China (2006), p. 7, para 31.
[170] See Concluding Comments: China (2006), p. 4, para. 17.
[171] See Concluding Comments: China (2006), p. 4, 7, para 17, 31; Concluding Observations: China (2014), p. 5, para 24.
[172] See Concluding Observations: India (2014), p. 7, para. 20.

one is accorded rights-holder status.[173] For the unborn to be acknowledged as discriminated against, they should consequently be accorded status as rights-holders.

However, this is not the inevitable conclusion to be drawn from the position taken by the treaty bodies. In her commentary on the statements made by the CRPD Committee towards Hungary, Carole Peterson describes the possible interpretations thus, a view to which I concur:[174]

> It appears that the Committee is implicitly taking the position that a fetus enjoys rights under the CRPD, despite the lack of any explicit statement to this effect in the treaty. If this is the case, the Committee's approach marks a departure from the predominant approach in international law, which has traditionally not provided for fetal rights in human rights treaties but rather allowed each individual state to determine whether a fetus enjoys legal rights within that state's domestic legal system. [...] In this author's view, the only other possible interpretation of the Committee's recommendation that Hungary abolish all distinctions based upon disability in its abortion law is that the Committee may believe that permitting abortion on the ground of fetal impairment devalues, and therefore discriminates against, people who are already living with disabilities.

Subject of discrimination in the case of selective abortion might thus be either the *unborn* being aborted, or the collective of *born* human beings that share some key attribute with the unborn – for example disability or sex. In order to try to deduce the correct meaning, some guidance can however be had from the texts themselves. A few short phrases exist in the statements of the treaty bodies that allow us to attempt an interpretation of the ideas behind the criticisms.

The CRC Committee, where it categorized sex-selective abortion as a form of discrimination against girls, spoke explicitly about discrimination against "particular groups of young children".[175] Similarly, it was discriminatory attitudes against "girls" that were addressed in the Committee's observations on India.[176] The discussions in the Committee preceding its recommendation to review and amend "discriminatory laws on abortion" had been on disabled children's right to life, where it had been stated that diversity, and thus disability, must be celebrated rather than prevented.[177] These phrases can be interpreted to support either stance on prenatal rights; it is possible that the CRC Committee meant the actual, foetal, unborn "girls" and "disabled children", when it spoke of the discrimination carried out, while it is equally possible that instead it is the collective of "all girls" or "all disabled children" that was viewed as the victim.

---

[173] The CRPD Committee states that the right to legal capacity, in article 12 CRPD, is a "threshold right", i.e. a prerequisite for the enjoyment of "almost all other rights [...] including the right to [...] non-discrimination", see General Comment No. 6, p. 12, para. 47.
[174] See Petersen, p. 159.
[175] See General Comment No. 7, p. 5, para. 11(b).
[176] See Concluding Observations: India (2000), p. 6, para. 32–33; Concluding Observations: India (2014), pp. 6f, para. 33.
[177] See CRC/C/69, pp. 55f, 58, para. 329, 338(d)(i).

In the CEDAW Committee's criticism of China, the sex-selective abortions were viewed as consequences of "deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family and society" which the Committee feared would devalue "women";[178] meanwhile, the issue of sex-selective abortions in India was raised in connection with "patriarchal attitudes and deep-rooted stereotypes entrenched in the social, cultural, economic and political institutions and structures of Indian society", which the Committee meant "discriminate[d] against women".[179] Here, the selective abortions were seen as but one symptom of a larger problem, affecting the entire society while being harmful to "women" – such an extensive scope of the problem, and the use of the word "women" rather than "girls" or "children", suggests that it wasn't the interests of individual foetuses that were of concern to the Committee.

Likewise, in the CRPD Committee's recommendations to Spain, the criticized legislation was seen to "reinforce a negative perception of disability" and "contribute to the stigmatization of disability, which can lead to discrimination".[180] In other words, it was not the individual action of selective abortion that would constitute discrimination, but the – perceived – causal link that such an action had with discrimination of disabled people in the entire society.

The expert treaty bodies thus seemingly have not attempted to challenge the silence in international human rights law on the question of prenatal rights. This seems the pragmatic course; the drafting of the CRPD took place 2002 – 2006, not even twenty years ago, during which, as we have seen, the desire to keep this silence was evident.[181] Endowing the unborn with rights-bearer status would break with this long tradition and bring about the end of abortion rights as they have been laid out by the treaty bodies throughout the years.[182] Viewing selective abortions instead as an interest of a collective of born persons does not pose any such threat, but is a legal construction which may need some further exploration. And while this hasn't been done in this essay, I will refer to Janet E. Lord, who, while writing on the principle of participation and inclusion in article 4.3 of the CRPD,[183] argues that: [184]

> [t]he implications of the right to participate in decision-making along with recognition of legal capacity for antenatal screening policies is clear – persons with disabilities are to be accorded recognition as persons with

[178] See Concluding Comments: China (2006), p. 4, para. 17.
[179] See Concluding Observations: India (2014), pp. 7f, para. 20 – 21.
[180] See Concluding Observations: Spain (2019), p. 2, para. 6(b), 7(b).
[181] See Della Fina, Palmisano, & Cera, pp. 15, 37.
[182] See, for further reference, this argument laid out in detail by the Center for Reproductive Rights, in its Submission to the CRPD Committee for the Half Day of General Discussion on Women with Disabilities, p. 9.
[183] Article 4.3 CRPD states: "In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes *concerning issues relating to persons with disabilities,* States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations [emphasis added]."
[184] See Lord, p. 9.

> legal capacity and, hence, the attendant right to participate in decision-making, whether in relation to large life decisions such as where and with whom to live or other decision-making processes. [...] Antenatal screening that ultimately impacts the number of children born with Down syndrome, as well as other disabling conditions [...] must, accordingly, include the participation of such persons whose interests are acutely impacted by the adoption of such policies. Studies clearly demonstrate that such screening policies invariably, as applied in practice, have an impact on the population of persons with disabilities. This raises the question as to whether the principle of participation in human rights law embodies the ability to associate with persons of one's own morphology, an issue for which there does not appear to be a definitive answer in human rights law.

Finally, Petersen has the following to say on such a view: [185]

> Ironically, Spain and Hungary could both comply with the [CRPD] Committee's comments by amending their laws to provide all women with unfettered access to abortion. Such amendments would address what the Committee views as the formal discrimination in the legislative framework, but would do nothing to reduce the incidence of disability-selective abortions.

The question remains if this would be an outcome accepted by the CRPD Committee.

2.5 Conclusion – no prenatal rights-bearer status in international human rights

This essay has analysed the right to life, as originally laid out in the UDHR and subsequently elaborated through the ICCPR and CRC. As a result of this work, I have concluded that none of these instruments acknowledge the right to life to the unborn, with a possible *minor* exception in the CRC, and to an even lesser degree in the ICCPR. These possibilities remain too undeveloped and ambiguous to be able to make any marked difference on this conclusion. As follows from the methodology applied in this essay, no rights for unborn means no rights-holder status for prenatal life. It should be kept in mind that, while prenatal rights and rights-bearer status are not acknowledged, they are not explicitly denied either. Thus, international human rights can be said to be silent on the issue.

The interpretations made by various expert treaty bodies have been consulted, in order to complement the understanding of international human rights. It has been discovered that there exists a treaty body jurisprudence on when abortions should be accessible to women, in order to comply with existing human rights provisions. It has also been found that several treaty bodies might consider selective abortions, on basis of disability and sex, as discriminatory. However, the conclusion reached has been that such discrimination is probably not considered to be infringing any rights held by the unborn, but instead being suffered by the collective of – born – persons sharing the attributes with the unborn being selected for abortion. Thus, an

[185] See Petersen, p. 162.

acknowledgement of such discrimination does not endow prenatal life with rights-bearer status.

The silence of the international human rights can be traced to the discussions and decisions during the drafting of the human rights instruments. As the analysis in this essay has progressed, it has become increasingly evident that a certain bias existed among the drafters of both the ICCPR and the CRC for the interests of the born. This manifested in the abolition of capital punishment in the ICCPR and the definition of "child" in the CRC.

While both the question of prenatal life and abolition of capital punishment were controversial issues among the drafters of the ICCPR, it was only in the case of the former that this resulted in a silence from the treaty. As both questions revolve around life and death – as the question of prenatal life is intimately connected to the question of abortion – such a distinction in treatment makes evident the difference in regard accorded by the drafters to unborn respectively born life. The fact that there has never been a commonly accepted definition of prenatal life to the same extent as with "postnatal" life does not fully account for this difference, since even such an ambiguous interest would still warrant some recognition and protection, based on the risks of in fact infringing upon human life inherent in that very ambiguity.

For the definition of "child" in the CRC, the circumstances surrounding the beginning and the end of childhood were similar, yet the solutions adopted vastly different. While domestic legislation differed on both accounts, this fact was used to simultaneously support an *absence* of definition in the CRC on when childhood begins, i.e. whether prenatal life was included or not, and a *clear definition*, with an explicit age limit, on when childhood ends. The variety in domestic regulations was allowed to retain legal primacy on the former account, but not the latter, which can arguably be understood as a trend among the drafters to consider the distinction between child and adult – and thus the extent of the special protection accorded to children – a more important issue than the distinction between life and non-life – indeed so important that it could not be left to domestic legislators to decide.

A silence from the international law system means that the question is left for domestic legislators to decide upon. However, while international human rights are *silent* on the issue of prenatal rights, this is not the same as to say that they are completely *neutral*.

As has been shown, treaty body jurisprudence has created what is effectively a right to abortion in several cases. And while it must of course be kept in mind that statements of treaty bodies remain *interpretations* of the international human rights law, their expertise accord them some seniority in this regard. Coupled with the fact that their jurisprudence on abortions is rather thorough and consistent, I have come to conclude that such a right to abortion does exist in international human rights.

The intimate connection between an interest to prenatal life and the issue of abortion means that any rights to the latter will also affect any rights regarding the former. Thus, while international human rights might be silent on the question of a prenatal right to life, they will still dictate indirectly how individual states may decide on this issue, as any domestically protected rights for the unborn will not be allowed to override certain internationally acknowledged human rights of the born, such as the right to abortion.

3 Examination of Swedish domestic law

3.1 The gestational limit

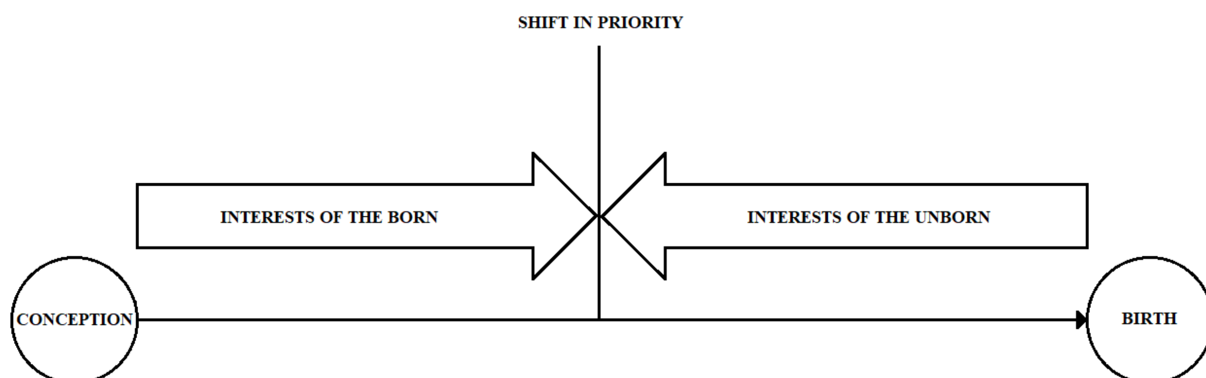
As has been demonstrated so far, international human rights seem to take a silent stance on the question of prenatal rights-holders. This means that, until the point of birth, international human rights do not apply to human beings – with a possible, but ambiguous, exception interpreted in the CRC by its expert treaty body. Without any guidance on the international level, the issue is left for the various domestic legislatures to decide.

According to the UN report "World Population Policies 2017", 54 % of all domestic legislations apply some form of *gestational limit* in their regulations on abortion, a gestational limit being an upper limit on the stage of advancement in pregnancy where abortion is permitted.[186] This means that a distinction is made between early and late-term abortions. The gestational limit is applied differently depending on the legal ground for the abortion; the UN report states that "[the] least restrictive legal grounds [...] tend to have more stringent gestational limits, while the more restrictive legal grounds, often do not".[187] Out of the countries that allow for abortions on request, 82 % apply a gestational limit, whereas merely 15 % of countries that allow abortions to save a woman's life specify such a limit.[188] Likewise, the gestational limits are commonly set later in the pregnancy for the more restrictive legal grounds, such as saving a woman's life, and earlier for abortion on request.[189]

A gestational limit imposed on abortion denotes an acknowledgement of *alternative interests*, opposing those of the pregnant woman and her right to abortion.[190] Meanwhile, the inverse relationship between restrictiveness of legal grounds invoked and stringency in gestational limit applied suggests a *balancing* of these competing interests. There would thus be a point in time, between conception and birth, where this balancing results in a shift in priority, from interests *for* to interests *against* abortion. We might visualize the balancing in the following manner:

---

[186] See World Population Policies 2017, p. vi.
[187] ibid., p. 25.
[188] ibid., p. 25.
[189] ibid., p. 26.
[190] As we have seen, international human rights law contains a right to abortion, depending on the circumstances. Furthermore, it is of course assumed that any domestic legislation *permitting* abortion also entails a *right* to abortion.



Now, the interests opposing the right to abortion might arguably be considered to be interests of the unborn.[191] If prenatal interests are acknowledged, might we not then consider this a recognition of prenatal rights? Such recognition would provide evidence of a starting-point for rights-holder status before birth, confirming the existence of prenatal rights-holders.

However, the fact that prenatal *interests* are acknowledged by law is not necessarily the same as an acknowledgement of prenatal *rights*. An example will illustrate this.

Canada currently has no legal restrictions on abortions, which are instead viewed as normal medical procedures.[192] This has been the situation since the case of *R v. Morgentaler* in 1988, when the Supreme Court of Canada struck down the previous abortion law, which had restricted abortion with reference to “the interests of the foetus”.[193] The Court expressly declined to rule on the issue of whether any “foetal rights” existed, but acknowledged “protection of foetal interests” as “a valid governmental objective”. The implementation of this objective, however, it found to be so lacking as to declare it unconstitutional.[194]

The Court expressly remained silent on the issue of foetal *rights*, but accepted the protection of foetal *interests* as a valid governmental objective. The protection of foetal interests was thus an interest of the *state*. The recognition of the interest of the state acknowledged *by proxy* the interests of the foetus; the interest of the state was after all that the interests of the foetus be protected.

---

[191] One can, admittedly, make the argument that unborn humans could also have an interest *not* to be born, which would then correspond with the interests of the pregnant woman during an abortion. Such could be the case when the child would be born into difficult conditions or with extensive disabilities (though this latter point might be contested by disability rights considerations, see chapter 2.4.2 above). For simplicity’s sake, however, it will be assumed that prenatal interests will involve the interest to be born.
[192] See World Population Policies 2017, p. 109, note 2.
[193] See *R. v. Morgentaler* (19556), Supreme Court of Canada, 28 January 1988, para. 62, 70; ”Decades later, abortions in Canada are still hard to get”, Policy Options.
[194] See *R. v. Morgentaler* (19556), Supreme Court of Canada, 28 January 1988, para. 3, 4, 59, 61 – 62, 70, 189, 280, 322.

However, such acknowledgement is not the same as to ascribe the foetus a *right* to have its interests protected. The only right, if any, recognized by the Court was the right of the *state* to have its interest acknowledged – thus, only the state was seen as a rights-holder, not the foetus. In other words: when interests are acknowledged by proxy¸ the proxy is the sole rights-holder.

Despite this, the existence of a gestational limit and, consequently, an acknowledgement of prenatal interests, still indicates some form of commitment to the idea of prenatal life being accorded legal weight. Thus, in the search for a possible prenatal rights-bearer status, it is reasonable to further explore this legal construction. Therefore, for the next part of this essay, the gestational limit, specifically as it has been conceptualized in Swedish domestic law, has been examined in greater detail.

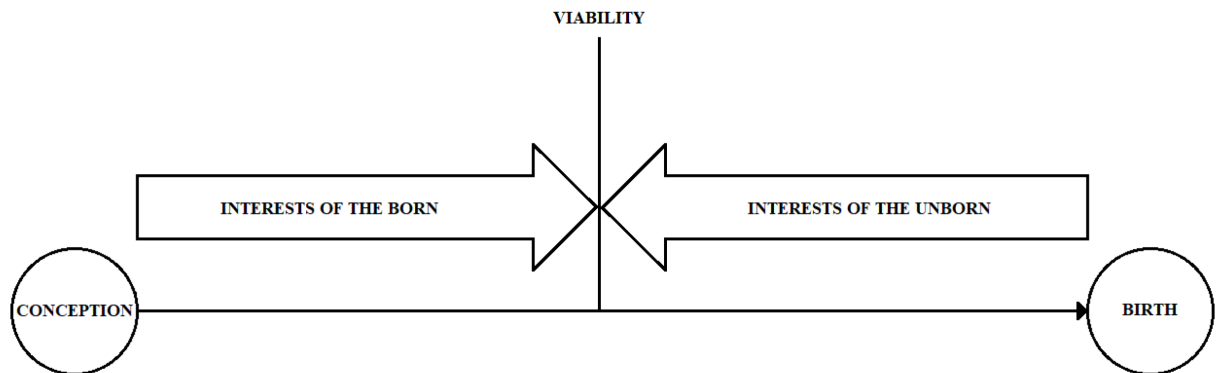
3.2 The gestational limit in the Swedish Abortion Act

In Swedish domestic legislation, there are several legal sources that apply to the question of prenatal life. Both the CRC and the ECHR have been incorporated as Swedish domestic law, and the right to life as elucidated in these treaties are therefore relevant from a Swedish domestic perspective.[195] Furthermore, the Constitution of Sweden provides several fundamental rights and freedoms, such as the protection against physical violation, though no explicit right to life.[196] Meanwhile, the principle of human dignity is expressed in the Patient Act (SFS 2014:821) and the Health and Medical Services Act (2017:30).[197] Finally, it should be noted that the state of Sweden is party to the ICCPR, the CEDAW and the CRPD, making it subject to the international human rights provisions present in these treaties.[198]

However, for provisions on the gestational limit, we need to examine the Abortion Act. This act allows for abortions on request until the 18th week of pregnancy – after this, abortions are allowed only in special cases, unless there is reason to assume the foetus to be *viable*.[199] According to the preparatory works, viability means that the foetus ”has reached such a state

[195] See the United Nations Convention on the Rights of the Child Act (2018:1197), the Act on the European Convention for the Protection of Human Rights and Fundamental Freedoms (1994:1219) and chapter 2, 19 § of the 1974 Instrument of Government.
[196] See chapter 2 of the 1974 Instrument of Government.
[197] See chapter 1, 6 § of the Patient Act and chapter 3, 1 § of the Health and Medical Services Act.
[198] See “United Nations Treaty Collection: International Covenant on Civil and Political Rights”; “United Nations Treaty Collection: Convention on the Elimination of All Forms of Discrimination against Women”; “United Nations Treaty Collection: Convention on the Rights of Persons with Disabilities”.
[199] See 1 and 3 §§ Swedish Abortion Act.

of development that it can survive and develop further outside the mother's body".[200] This then is the basic gestational limit in the Abortion Act:



However, termination of unborn life is always allowed when the pregnancy can be assumed to amount to serious danger to the life or health of the woman.[201] In those cases, a viable foetus shall still receive medical care in order to try and save its life. The Swedish legislator has not wanted to name such a procedure "abortion", reasoning that the pregnancy is not being terminated because it is unwanted, but rather because of the danger of health complications; therefore, the phrase "termination of pregnancy" is used instead.[202]

The limit at the 18th week of pregnancy was set "primarily so that abortions do not result in viable creatures".[203] The preparatory works state that "one [should] aim to create a satisfactory margin of safety to procedures, where foetuses can be produced that are showing signs of life and that may possibly be kept alive with the improved methods for preterm care that are currently available, or can be expected to be at doctors' disposal within a not too distant future".[204] For this same reason, later terminations of pregnancies may only be undertaken on viable foetuses in extreme situations, i.e. when there is serious danger to the life or health of the pregnant woman.[205] Additional basis for the 18 week limit is the medicinal and psychological health of the woman, which is considered to be more at risk when abortions are carried out later during pregnancy.[206]

---

[200] See prop. 1974:70, p. 68.
[201] See 6 § Swedish Abortion Act.
[202] See prop. 1994/95:142, p. 38; 6 § Swedish Abortion Act.
[203] See prop. 1974:70, pp. 67f.
[204] See prop. 1974:70, p. 67.
[205] See prop. 1974:70, p. 68.
[206] See prop. 1974:70, pp. 62f, 67f; prop. 1994/95:142, p. 36 – in this later government bill the legislator suggests that these reasons, as well as "reasons of an ethical [...] character", are the chief motives for a limit, rather than the viability of the foetus. The nature of this "ethical" motive is explained with a statement that abortion becomes increasingly ethically questionable as the pregnancy progresses, prompting a balancing of the interests of the foetus and the mother. I find it reasonable, however, to assume that such a motive is in fact largely dependent on values attached to foetal viability, not least considering the importance attached to viability in the previous prop. 1974:70.

The preparatory works suggest that the law views the unborn and the mother as separate individuals who are both worthy of protection:[207]

> The foetus cannot be considered merely a part of the woman's body, but it is dependent upon it for its development late into the pregnancy. Even if both are worthy of protection, one must [...] sometimes let the interests of one gain priority over the other's, in which the interests of the foetus ought to increasingly carry more weight as foetal development progresses.

This statement furthermore suggests that the gestational limit is the result of a balancing between the opposing interests of the unborn and the mother. As we know, acknowledging *interests* is not the same as acknowledging *rights*.

However, the preparatory works declare that, in fact, "*the foetus has a right to protection* during its development, but [...] this right must be balanced against the mother's right to self-determination [emphasis added]. [208] Thus, Swedish law acknowledges prenatal rights, and consequently a prenatal rights-holder status. This status evolves gradually as the pregnancy proceeds, until the foetus is accorded a prenatal right to life:[209]

> Due regard must [...] be taken both to the circumstance that every abortion is combined with some more or less serious risks for the woman and to the fact that the foetus during pregnancy gradually develops into a viable creature *whose right to life* must be respected [emphasis added].

Apart from a right to life, it is not clear which other rights might be relevant, or at what point during the pregnancy they might be accorded.[210] Nevertheless, it *is* clear from the above excerpt that *prenatal rights are acknowledged*, at the point of foetal viability at the latest. This is also in line with the gestational limit of the Abortion Act, where foetal viability marks the final point after which, other than in extreme cases of danger to the woman, abortions are no longer permitted.

Thus, a right to life is accorded the foetus at the point of viability, which in turn denotes a rights-bearer status. We can thus conclude that Swedish law recognizes prenatal rights-bearers, not from the moment of conception, but from the moment of viability.

3.3 The moment of viability

Putting the tipping point at viability makes the definition of this concept central to our understanding of the prenatal rights-holder status. As we have seen, the preparatory works define viability as the point when the foetus "has reached such a state of development that it can survive and develop further outside the mother's body" and that this means "foetuses [...] that are

[207] See prop. 1994/95:142, p. 14.
[208] See prop. 1994/95:142, p. 15.
[209] See prop. 1974:70, p. 62.
[210] As seen above, the preparatory works reference a "right to protection" without further clarification.

showing signs of life and that may possibly be kept alive with the improved methods for preterm care that are currently available, or can be expected to be at doctors' disposal within a not too distant future".[211]

According to 3 § of the Abortion Act, abortions after the 18th week must be approved by the National Board of Health and Welfare. Approval is only given when especial reasons are at hand *and* the foetus cannot be assumed to be viable. The Board has expressed its understanding of the legal regulations of abortions as follows: [212]

> That an aborted foetus is showing signs of life doesn't necessarily mean that it is viable. If an abortion should result in the birth of a viable child, the situation is another. When a viable child is born it is no longer to be viewed as a foetus, but as a child with the rights that are accorded to children. To let the woman's desires and the decision to permit abortion affect the decision regarding life-support treatment in such a situation will clash with the principle of human dignity and the child's right to life. A decision to deliver or deny life-support treatment shall in that case emanate from an assessment of the child's medical condition, based on scientific knowledge and proven experience.

An application to the Board for approval of late-term abortion must include a medicinal report by the doctor responsible for the procedure, as basis for the Board's decision. In the report, the doctor shall assess the foetus's viability.[213]

The Swedish Association of Midwives and the Swedish Society of Obstetricians and Gynecologists have produced a consensus document in order to provide guidance on the administration of abortions. In this document, viability is interpreted as "possibility of survival after birth at current gestational age *without* measures being taken during pregnancy in order to improve the chances of survival, and *without* immediate resuscitation being performed after the birth of the foetus. The woman who has been permitted abortion has already, through her application to have an abortion, taken the position that such measures shall not be performed [emphasis added]".[214] It is also stated that if the – presumable unviable – foetus expresses "instinctive movements", it shall be given palliative care.[215]

JO has, as a result of its investigation of the administration and regulation of late abortions in Sweden, concluded that some doctors have different interpretations of viability than the one given in the consensus document; one such interpretation is that viability should mean ability to survive at current level of gestation *with measures taken before and after* the birthing of the foetus. Thus, there exists an ambiguity as to whether doctors should

---

[211] See prop. 1974:70, pp. 67f.
[212] See JO 7035-2017, p. 7.
[213] See JO 7035-2017, p. 8; chapter 5 of the Regulations on Abortion by the National Board of Health and Welfare (SOSFS 2009:15).
[214] See JO 7035-2017, p. 11.
[215] ibid., p. 12.

take possible medical procedures into account when assessing viability, something which was criticized by JO.[216]

Swedish domestic law acknowledges a right to prenatal life, thereby according the unborn the status of rights-holder. The point where the status is granted, as well as the rationale for granting this status, is the viability – i.e. ability to survive independently of the mother's body – of the prenatal life. The exact definition of viability has been left to the medical profession to define; this seems a reasonable solution, given that viability is arguably as much a medical term as a legal.

However, the definition of viability differs among medical professionals. Furthermore, it is the assessment of the doctor responsible for the procedure that forms the basis for the decision made in the individual case. JO has concluded that the estimation of the individual doctor therefore influences the assessment of viability to a significant degree, even though opinions among doctors differ on what viability entails.[217]

It should also be mentioned that the rationale behind the definition of viability in the consensus document is flawed. The reason given, it seems, for the lack of measures being taken to save the life of the foetus, is that the woman has decided to have an abortion; it is additionally pointed out in the introduction of the document that "the handling of an abortion and the handling of a premature delivery are two completely different healthcare procedures that shall not be confused with each other".[218] Seemingly, the authors of the document predicated their interpretation of viability on the fact that it concerned the issue of an abortion.

Such a fallacy of the consequent does not conform with the legislator's statements in the preparatory works, for example that "one [should] aim to create a satisfactory margin of safety to procedures, where foetuses can be produced that are showing signs of life and that may possibly be kept alive".[219] The preparatory works make it clear that foetal viability is meant to be a restriction on abortion, not the other way around; the fact that the procedure is an abortion, with the intent of terminating foetal life, can therefore not be used as a reason to terminate foetal life. For the same reason, the argument that the woman's decision to have an abortion is grounds for potentially life-saving measures not to be employed, is one-sided and completely disregards the fact that a viable foetus is accorded a right to life under Swedish law.

[216] ibid., pp. 1, 18.
[217] See JO 7035-2017, pp. 17f.
[218] ibid., p. 22.
[219] See prop. 1974:70, p. 67.

4 Legal consequences of ambiguous viability

4.1 Ambiguous viability and legal certainty

With the results presented at the end of the last chapter, this essay has answered the question on rights-holder status of prenatal life, through a legal dogmatic analysis of Swedish domestic law *de lege lata*. The answers make evident, however, an ambiguity present in the distinction between status and non-status as rights-holder, between right and non-right to life.

This ambiguity is, as JO has established, the result of differing interpretations among those in the medical profession of what viability – and, by extension, the right to life – shall entail.[220] It is exacerbated by the fact that the assessment of professionals – primarily the individual doctor responsible for the procedure – makes up a significant part of the decision basis in the singular case.

As a result, the individual doctor influences the *normative content* of the viability criterion, and thus the normative content of the prenatal right to life. This in itself is nothing unusual – it has long been a case made by legal philosophers that normative input is present in basically all of the stages of norm implementation.[221] But coupled with the difference in interpretations present, and the fact that it is a question of a fundamental human right,[222] such influence threatens the *legal certainty* of the Swedish regulation on abortions. A threat to legal certainty was also argued by JO in its report.[223]

4.2 Possible future amendments of Swedish domestic law

In 2019, the Swedish National Council on Medical Ethics produced a report on the issue of foetuses showing life signs after late-term abortions.[224] The Council considered it imperative that abortions not result in the birth of

---

[220] See JO 7035-2017, pp. 1, 18.
[221] According to the hierarchical structure of the legal system (*Stufenbaulehre*) as developed by Hans Kelsen and Adolf Julius Merkl, a legal system can be said to be made up of a hierarchy of norms, where superior norms condition the status and meaning of subordinate norms, and confers to them legal power to, in turn, do the same to norms subject to *them*, and so on. The end point in this chain is the coercive act, the execution of a norm applied to an individual case, which is a fact, not a norm. However, up until this point, all steps have contained a normative component. See Borowski, pp. 81f.
[222] See General Comment No. 36, p. 1, para. 2
[223] See JO 7035-2017, p. 22.
[224] See Smer rapport 2019:1, pp. 4, 24.

living foetuses, since this would infringe upon interests that were considered "very strong".[225] These interests were predicated upon the fact that whenever approval for late-term abortion had been granted, based on the especial reasons that the National Board of Health and Welfare had confirmed to be existent, "the woman has a legitimate interest in having the procedure carried out as intended".[226] With a failed abortion, the woman's well-being as well as the health of the resulting child would be in danger. The Council pointed out that cases of extremely premature birth still typically lead to a high risk for sickness and disability for the child. This risk, the Council stated, would probably be even higher when the birth was a result of an induced abortion. When premature birth is a risk, medicinal measures are normally deployed in order to improve upon the prognosis of the child; such measures are not used in the case of an abortion – instead, the procedure in itself could damage the foetus further. In addition, the Council claimed, a child born as a result of an abortion risks having no parents willing or able to care for it.[227] The Council also considered it probable that "the knowledge that a foetus could be made to survive after a late-term abortion would influence the decision for many women to go through with an abortion during the last week [...] thereby in practice becoming a restriction on women's self-determination and access to a late-term abortion".[228]

Development in medicine and technology were confirmed by the Council to have shifted the onset of foetal viability forwards. Future possibilities such as artificial wombs were considered to potentially "radically change" the conditions for preterm care.[229] The collision between the interests of the unborn and the born that exists in the Swedish Abortion Act would thereby be in danger of being exacerbated.[230] The Council therefore suggested that the government explore the possibility of revising the viability criterion in Swedish law, replacing it with a fixed gestational limit "not based on the medical-technological development within neonatology but on a balancing of the protective value of the foetus, connected to its stage of development, and the woman's interest of procuring a late-term abortion", as was stated to be commonly existent in the abortion regulations of other states.[231]

The Council then considered that a legally fixed gestational limit, coupled with a continued shift in medicinal viability, could result in increasing instances of live births as a result of abortions.[232] For this reason, it was suggested that the possibility of feticide, i.e. lethal injection into the foetus before the abortion procedure, be explored, in order to ensure that no living foetuses would be born as a result of an abortion; this was also stated to be a

[225] ibid., p. 71.
[226] ibid., p. 70.
[227] ibid, pp. 28, 48f, 70; it would be interesting to see how well the argument of the disability of the born child might be received by the CRPD Committee, see chapter 2.4.2.
[228] ibid., pp. 70f.
[229] ibid., p. 76.
[230] ibid., pp. 75f.
[231] ibid., pp. 76f, 80.
[232] ibid., p. 77.

commonly used method in states where abortion was not legally dependent on foetal viability.[233]

The rationale behind the Council's stance was that a lowering of the gestational limit would be ethically "unfortunate", and should be avoided as far as possible, since the possibilities for late-term abortion in Sweden were already more restricted than in other countries.[234] The Council stated that there will continue to exist a need for late-term abortions – for example, because the pregnant woman doesn't contact the health care services until later during the pregnancy, or because some foetal impairments are not possible to detect earlier.[235]

The Council's report actualizes key points regarding viability as the benchmark for a gestational limit, and – by extension – for the legal status of the foetus as a rights-bearer. As medicine and technology develops, the existent legal framework turns foetuses into rights-holders earlier and earlier in the gestational process, theoretically approaching the moment of conception; after all, in Sweden this status is to be accorded as long as the foetus "may possibly be kept alive with the improved methods for preterm care that are currently available, or can be expected to be at doctors' disposal *within a not too distant future* [emphasis added]".[236]

4.3 Possible future consequences of extended viability: a right to terminate parenthood?

If viability continues to be the prerequisite for a status as rights-bearer and a right to life, and medicinal technology allows for an ever lower gestational limit, the woman's right to abortion is naturally affected, as has been laid out in detail above by the Swedish National Council on Medical Ethics. One could speculate that in the future, with the use of ever more sophisticated artificial wombs, an unborn human being could, in theory, be viable immediately after conception.

In its statements, the Council has judged that an abortion resulting in a live birth would endanger "very strong" interests, referencing both social and health-related factors, such as the well-being of the woman, the willingness and ability for parental care for the child and "[t]he woman's self-

[233] See Smer rapport 2019:1, pp. 77f. This line of reasoning echoes the logic employed in the consensus document produced by medical professionals, see chapter 3.3: the fact that the procedure is an abortion, with the intent of terminating foetal life, is used as the reason to terminate foetal life. As we have already seen, this argument works only if medical viability is removed as a factor from the consideration.
[234] ibid., p. 71.
[235] ibid., p. 71.
[236] See prop. 1974:70, p. 67; see also Smer rapport 2019:1 pp. 52f, which made the same interpretation, but added that the legislators at the time could not foresee the possibilities for saving premature children that exist today.

determination as regards achieving the purpose of the abortion".[237] Interestingly, the Council explicitly mentioned future technological measures, such as artificial wombs, as an exacerbating factor for the conflict of interests inherent in the abortion legislation; by extension, such future possibilities to extend foetal viability were seen as problematic for the ambitions to ensure women's right to abortion, to the extent that the Council considered removing viability as a legal criterion altogether.[238]

The Council might have viewed foetal viability as a problem merely because of the way it results in an infringement on the right to abortion in the existent legal framework. Its reasoning might thus have been pragmatic in character, considering the abandonment of viability as the quickest and easiest way to fix the perceived issues of the Swedish Abortion Act. Alternatively, it might have seen the existence of viable foetuses in and of itself as an issue. A theoretical future, where prenatal life can be removed from the uterus shortly after the moment of conception to gestate in an artificial womb, would then still, in the view of the Council, infringe upon the interests of the mother.

The latter argument would raise important questions on the nature of abortion; does the right to abortion entail the right to terminate the *pregnancy* or the right to terminate *parenthood altogether*? Should abortion mean the right not to be merely a *gestational* parent or also to not become a *genetic* parent?[239] "Since the medical community defines abortion as evacuation, if methods of non-lethal evacuation were available and safe for maternal health, then this statement would require that doctors use these means", writes philosopher Christopher Kaczor, referring to the American debate on abortion, and adding "[a]mong philosophers defending abortion [...] the right to abortion is also understood as a right of evacuation and not a right of termination".[240] He later points out that if the right to not become a mother instead entails also motherhood in a genetic sense, this right must then logically include the right to terminate the life of the foetus.[241]

As we have seen, the current right to abortion in Swedish domestic law clearly does not allow the termination of anything but gestational parenthood. [242] This view is evident in the interpretation made by JO in its report:[243]

> The Abortion Act expresses a balancing of the interests of the foetus and the pregnant woman. *The right to abortion is ultimately based on respect for the woman's right to bodily self-determination, rather than a right to opt out of parenthood*. The woman's partner – the future co-parent – thus has no legal possibility either to enforce or prevent an abortion [...] *The interests that have caused the woman to be granted permission to an*

[237] See Smer rapport 2019:1, pp. 28, 70f.
[238] ibid., pp. 75–77.
[239] See Cohen, p. 1.
[240] See Kaczor, p. 107.
[241] ibid., p. 111.
[242] See prop. 1974:70, p. 68.
[243] See JO 7035-2017, p. 21.

> *abortion can, as far as I see it, no longer be awarded any significance once the foetus has left the woman's body* [emphasis added].

But what about the right to abortion in international human rights law? As we have seen above, in chapters 2.2 and 2.4.1, a right to abortion can be said to exist within the expert treaty bodies' interpretation of human rights. The most detailed account is given by the HRC in its interpretation on the right to life in the ICCPR. States may restrict abortion, as long as such measures do not violate the rights of the pregnant women – this means, *inter alia*, that regulations may not subject women to "physical or mental pain or suffering which violates [the prohibition on torture or cruel, inhuman or degrading treatment or punishment in] article 7, discriminate against them or arbitrarily interfere with their privacy".[244] Safe access to abortions must be provided where pregnancy would cause "substantial pain or suffering, most notably where [it] is the result of rape or incest or is not viable".[245]

HRC's commentary is presumably grounded in the medical and technological measures currently available, where abortions are naturally the primary method for terminating both pregnancy and parenthood. The current inability to separate these different measures thus naturally colours the interpretations made by the Committee. The Committee's statements on pain and suffering references an individual communication,[246] *Mellet v. Ireland*, which revolved around issues of gestation and termination because of foetal non-viability.[247] It seems then that the pain and suffering considered by the Committee in its commentary refers to the purely gestational issues of parenthood.

According to article 16.1.e of CEDAW, women shall enjoy the same right as men to decide freely and responsibly on the number and spacing of their children. The CEDAW Committee states that this right came about for the following reasons:[248]

> The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women's lives and also affect their physical and mental health, as well as that of their children.

Coercive practices, "such as forced pregnancies", are said to have "serious consequences for women".[249] Denial of abortion and forced continuation of pregnancy are furthermore classified as forms of gender-based violence, that

---

[244] See General Comment No. 36, p. 2, para. 8.
[245] ibid.
[246] A communication is the non-binding opinion by the Committee on a particular case, which has been brought to the Committee's attention via a complaints procedure, see Nilsson, p. 182.
[247] See General Comment No. 36, p. 2, para. 8, referencing Communication No. 2324/2013, *Mellet v. Ireland*, Views adopted on 31 March 2016, para. 7.4-7.8.
[248] See General Recommendation No. 21, p. xi, para. 21.
[249] ibid., pp. xi–xii, para. 22.

may even count as torture or cruel, inhuman or degrading treatment, depending on the circumstances.[250]

Both of the latter statements seem to deal with *gestational* issues, and the CEDAW Committee also references sources that revolve around such issues.[251] Thus, unless in the future "pregnancy" comes to be interpreted as "parenthood", these statements cannot be understood to condemn a forced continuation of genetic parenthood.

By contrast, the reasons given by the CEDAW Committee for the right in article 16.1.e to decide upon number and spacing of children are consequences of *parenthood*, which suggests that the Committee might raise objections to women not being able to fully opt out of *genetic* parenthood.

So far, the rights of the mother; what about the rights of the child to its parents? If such a right exists, the potential right of the mother not to be a parent must presumably be balanced against this interest. Article 7.1 of the CRC states:

> The child shall be registered immediately after birth and shall have [...], as far as possible, the right to know and be cared for by his or her parents".

The term "parent" is not defined in the CRC.[252] The CRC Committee states however that "the term 'parents' must be interpreted in a broad sense to include biological, adoptive or foster parents, or, where applicable, the members of the extended family or community as provided for by local custom".[253]

John Tobin and Florence Seow, in a commentary on article 7 CRC, explain the different types of parenthood as birth/gestational,[254] genetic/biological[255] and social.[256] All of these, they argue, should be recognized as "parents" for the purposes of the article. The alternative, heteronormative and dualist conception of "parents" – meaning (only) the two persons who fulfil all three roles – does not satisfy the child's need for a complete understanding of its identity: "[i]f a child's identity lies at the core of a child's right to right to know [sic!] his or her parents, it must follow that the definition of parents must extend to the child's birth/gestational parent, genetic/biological

---

[250] See General Recommendation No. 35 p. 7, para. 18.

[251] See General Recommendation No. 35 p. 7, para. 18, note 26, referencing the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/HRC/31/57), the CEDAW Committee's Communication No. 22/2009, *L.C. v. Peru*, Views adopted on 17 October 2011, para. 8.18, and the HRC's Communications No. 2324/2013, *Mellet v. Ireland*, Views adopted on 31 March 2016, para. 7.4, and No. 2425/2014, *Whelan v. Ireland*, Views adopted on 17 March 2017.

[252] See Tobin & Seow, Article 7, p. 258.

[253] See Joint General Comment No. 4 and No. 23, p. 8, para. 27.

[254] Defined as "the woman who gave birth to the child", see Tobin & Seow, Article 7, p. 259.

[255] Defined as "the woman whose ovum was used for the creation of the child and the man whose sperm was used to fertilize the ovum", see Tobin & Seow, Article 7, p. 259.

[256] Defined as "the person or persons who perform the function of undertaking the day-to-day care of the child", see Tobin & Seow, Article 7, p. 259.

parents, and/or a social/legal parents [sic!] irrespective of whether there is perfect, partial, or absolutely no alignment with the identity of the persons who fall within each of these dimensions of parenthood."[257]

The authors do not argue that all types of parenthood should have the same legal consequences – a surrogate mother might for example not necessarily be charged with the responsibilities that would normally come from being the social mother of a child – but they nevertheless see the CRC as providing children "a right to know the identity of those persons who have a gestational, biological, or social link with their creation and care, irrespective of whether they are classified as parents or not", though this right must be balanced against the rights of the parents.[258]

One situation where such a balancing might occur is in the case of "secret adoption", ie. where the parent giving birth does so anonymously and leaves the child to be cared for by others.[259] This issue was raised during the drafting, where it was consequently pointed out that the right to know one's parents could not always be applied.[260] Shortly thereafter, the phrase "as far as possible" was inserted.[261] Tobin and Seow argue that there might be valid reasons for allowing anonymous adoptions, since an obligation for a genetic mother to disclose her identity may encourage her to instead abort the pregnancy or abandon her baby.[262] At the same time, they point out that the CRC Committee has in large part not held this view, stressing the child's right to information about its parents while refusing to weigh it against the rights of the mother, and only marginally and circumstantially conceding a "possibility of confidential births at hospitals as a measure of last resort to prevent abandonment and/or death of a child".[263]

A future scenario where the gestation can be terminated, through means of medicine and technology, without depriving the foetus of life, thus leaving the mother as parent in a genetical sense only, might benefit from a comparison with the situation of a mother putting her new-born child up for adoption. We assume that the mother choosing to end gestation would have had an abortion, had not technology allowed for the continued life of the foetus, and that she therefore has no interest in parenthood at all. Assuming also that the CRC would be applicable on a foetus removed from the womb in this way,[264] we see that there are indeed arguments that children's rights –

---

[257] See Tobin & Seow, Article 7, p. 259.
[258] ibid, pp. 259–261.
[259] ibid., p. 261.
[260] See E/CN.4/1989/48, p. 19, para. 96.
[261] ibid., p. 21, para. 114.
[262] See Tobin & Seow, Article 7, p. 264.
[263] See Tobin & Seow, Article 7, p. 265; the quote is originally from CRC Committee, CO Holy See (n 169) but printed here as given in the above source.
[264] As we have seen, the CRC does not apply to unborn children. It would therefore have to be assumed that this would have changed with the technological and medicinal means of early foetal viability. Bringing up the prospect of avoiding abortions as a valid exemption to the child's right to knowledge of its genetical heritage would for example probably raise fundamental questions of the value of foetal life, which might further such a legal evolution.

and thus corresponding parental duties[265] – may apply even when parenthood exists in a genetic sense only. Through a comparison with secret adoptions, we furthermore see that the child's right to know its birth parent is strong, and only marginally overridden by conflicting interests. The status of birth parent in the case of secret adoptions arguably corresponds to the genetical parenthood which would be relevant in the hypothetical scenario of terminated gestation – therefore, it is reasonable to assume that a child removed from the womb in such a way would be entitled to know its genetic parent.

Another comparable situation might be anonymous sperm and ovum donations. Such donations require much less involvement in the development of a child than both gestational and social parenthood typically does. This puts anonymous sperm/ovum donations and anonymous adoptions at opposite ends on a spectrum where in between these two outlier points the hypothetical scenario of – brief – gestational parenthood followed by early-term foetal removal might reasonably be placed. With sperm and ovum donations, conception has yet to occur however, and thus the situation is arguably vastly different from our hypothetical scenario, as the process of developing a foetus has not even started; the motives – related above by Tobin and Seow, and to a lesser degree the CRC Committee – of avoiding abortion and abandonment of the child therefore do not apply. Tobin and Seow also do not see any arguments weighty enough to overturn the child's right to know the identity of its parents in a donor scenario.[266]

These results indicate such duties attaching to the parental role that might perhaps warrant an argument that *full and complete termination* of pregnancy is necessary, if the right for women to opt out of parenthood on the same premises as men according to article 16.1.e of the CEDAW is to be preserved. However, such an argument is only sustainable if *genetic* parenthood is also assumed to entail *social* parenthood. Split these roles – presumably through adoption – and the genetic mother's "responsibilities [...] to bear and raise children" [267] will be reduced to the responsibilities corresponding to a child's right to know its genetic parent, as sketched above. Such duties should neither "affect [her] right of access to education, employment and other activities related to [her] personal development", "impose inequitable burdens of work on [her]" nor affect "[her] physical and mental health"[268] to the extent that her rights under the article can be said to be infringed.

In summary, a future where foetal viability is extended would restrict the possibilities for abortion under existent Swedish law. The flip side to this is

[265] Note of course that the CRC as international law only governs the actions of *states*, but that even so it can indirectly recognize duties of third parties by charging the states to do so. See for a further commentary on this, and a reference to the drafting works, Tobin & Seow, Article 18, p. 651.
[266] See Tobin & Seow, Article 7, pp. 267f.
[267] To use the rationale for the article stated by the CEDAW Committee, see General Recommendation No. 21, p. xi, para. 21.
[268] ibid.

the existence of means to terminate pregnancy without simultaneously terminating foetal life, much like with premature births today.[269] While no prenatal right to life exists within the international human rights law system, an analysis of provisions in the CRC and CEDAW – with comparisons to contemporary scenarios – suggests that the interests of women would be sufficiently protected by a right only to termination of gestational parenthood. That being said, this is mere speculation, since a situation where gestation might be terminated without resulting death is new and untested territory.

[269] Ignoring, for brevity's sake, the reality of health issues connected to premature births, see chapter 4.1.

5 Conclusions

5.1 International human rights law is silent on the question of prenatal rights-bearers

This essay set out to answer the question whether international human rights law acknowledges the unborn as rights-holders. This is the relevant starting point for exploring the existence of human rights, since a status as rights-holder is a precondition for being granted rights in the first place.

It was found that the relevant human rights instrument state neither an explicit acknowledgement, nor an explicit denial, of such a status for the unborn.

The drafters of the UDHR and the ICCPR never specified whether the rights there applied to the unborn or not, though the latter prohibits the execution of pregnant women because of consideration for the interests of the unborn child. This alone is not enough to confirm a prenatal rights-holder status under the ICCPR, since it is highly circumstantial – a *general* protection for unborn children was never accepted.

The CRC, likewise, was found not to expressly apply to the unborn. While the preamble does acknowledge children's need for legal protection "before as well as after birth", the preparatory works clarify that the drafters did not intend to change the scope of the treaty's application with the inclusion of this phrase. The CRC Committee meanwhile states the importance of perinatal care in order to promote the well-being of children "during this critical phase", which can be interpreted both as a health-related right for unborn children and as a health-related right exclusively for born children; such ambiguity suggests that this treaty body statement will not affect the scope of the CRC to any significant extent – any potential applicability as a source of prenatal rights-holder status will be highly circumstantial.

In addition to what can be said generally of the treaties, several of the expert treaty bodies have made statements, comments and observations on the particular issue of selective abortions. These were all critical, claiming such abortions to be – in a direct or indirect manner – in breach of non-discrimination norms and principles within international human rights law. The question thus arose whether the treaty bodies considered the victims of discrimination to be the aborted foetuses; however, this was found to likely not have been the case. The perceived discrimination has instead afflicted the collectively held rights of those already born who shared attributes with the aborted foetuses.

In conclusion, international human rights were found to be silent on whether the unborn shall be accorded status as rights-bearers.

5.2 International human rights law is not neutral towards prenatal interests

During the examination of the international human rights law, a pattern emerged showing a bias against prenatal interests in the treaties and jurisprudence of the treaty bodies. While the international human rights are *silent* on the issue of prenatal rights-bearer status, they cannot be said to be *neutral* on the broader issue of prenatal *interests*. This became evident as the preparatory works and the treaty body jurisprudence was studied.

In the case of the ICCPR, the right to life, and indeed the entire convention, entails a strong disposition towards the abolition of capital punishment. This trend in the treaty was accomplished by the drafters despite the fact that the issue of abolition was not uncontroversial at the time, in a manner not unlike the issue of a prenatal right to life. By prioritizing the abolishment of executions of convicted criminals over any protection to unborn – by most accounts morally innocent – human life, the drafters made clear that the interests of those born were put before the interests of the unborn, even regarding such fundamental issues as the right to life. The right to life is, for reference, described by the HRC as "the supreme right", of which "effective protection is the prerequisite for the enjoyment of all other human rights".

The drafters of article 1 of the CRC had the task of defining the scope of the rights-bearer under the treaty as they decided what should be understood as a "child"; this entailed a demarcation to be made at the *beginning* and at the *end* of childhood. Opinions varied on both the issue of beginning and end, but the results of the drafting were as opposite as can be; while the question of childhood's starting point was left open – keeping with the traditional silence on prenatal rights-bearer status – the issue of its end was regulated in detail. This was done despite the fact that circumstances and arguments were in both cases very similar. The plurality on the definition of childhood that existed in domestic legislation was allowed free reign over the decision when childhood began, but was constrained by a rather opinionated CRC on the question of its end. Since the definition of "child" decides the scope of applicability for the special protection that is accorded through the CRC, the drafters and the Committee have thus demonstrated that such protection is more important for born children than for unborn.

Finally, the jurisprudence of various treaty bodies has come to develop a right to abortion, in cases of, *inter alia*, threats to the life and health of the pregnant woman, but also of arbitrary interference with her privacy and situations of substantial pain or suffering, which it's stated might be caused by rape, incest or a non-viable foetus. In asserting such a right for pregnant women, which does not protect only *life* but also *quality of life*, while simultaneously remaining silent on rights for the unborn, international human rights once again show preference for the interests of the born over

the interests of the unborn – seemingly leaving the question of prenatal life open, but in practice dictating how individual states must (not) value such interests.

5.3 Swedish domestic law recognizes prenatal rights-bearers from the point of viability, at the latest

The silence of international human rights on the issue of unborn rights-holders means that if any such status exists, it is to be found exclusively within domestic legislation. After drawing its conclusions on international human rights law, this essay has been able to establish the existence of a prenatal rights-holder status in *Swedish domestic law*.

Like 54 % of all domestic legislations in the world, the Swedish Abortion Act applies a *gestational limit* in its regulations of abortions, this being an upper limit on the stage of development in pregnancy, after which abortion is no longer permitted. While this limit can often vary depending on the reasons for the abortion, Swedish domestic law in most cases invokes a limit at *foetal viability*.

The preparatory works of the Abortion Act state a balancing during pregnancy of foetal rights and the interests of the pregnant woman, thus confirming the acknowledgement of prenatal rights and rights-bearer status. The preparatory works suggest a gradual development of such a status, without specifying at what point it might first come into existence. However, it is made clear that a foetal *right to life* is predicated upon the moment of viability. A status as prenatal rights-bearer can therefore be said to exist at this point, at the latest.

5.4 The viability criterion in Swedish law is ambiguous

This essay has found the viability criterion to be central to Swedish domestic law on abortion and, by extension, for the Swedish acknowledgement of prenatal rights-holder status. It has also found this criterion to be ambiguous, as it is subject to differing opinions among those tasked with its application.

A definition of viability has been made in the preparatory works to the Abortion Act, stating that a foetus is viable when it "has reached such a state of development that it can survive and develop further outside the mother's body", meaning foetuses "that are showing signs of life and that may possibly be kept alive with the improved methods for preterm care that are currently available, or can be expected to be at doctors' disposal within a not too distant future".

It is questionable whether this definition corresponds with the interpretation that has been made in a consensus document produced by several organizations of medical professionals. There, viability is viewed as possibility for the foetus to survive *without* measures for improving survival being deployed before the procedure and *without* immediate resuscitation after. This stance seems to be predicated on a faulty logic that abortions are meant to bring about the termination of foetal life, rather than – as stated clearly in the preparatory works – that (viable) foetal life is meant to hinder abortion.

In addition to this, individual doctors have been found to differ in their interpretations, most notably where doctors view viability to *include* such survival improving and life-saving measures that the consensus document rejects. Coupled with the fact that individual doctor assessments influence the decision on whether foetal viability is present in the singular case, this essay has concluded that the current solution in Swedish domestic legislation results in legal uncertainty.

5.5 The right to abortion likely does not entail a right to fully opt out of parenthood

Foetal viability has been extended, further and further, as technological and medicinal development proceeds. Future possibilities, such as artificial wombs, beg the question whether unborn life can one day be taken out of the uterus shortly after conception, to survive and develop fully removed from its biological mother's body. If so, would the right to abortion entail a right to terminate foetal life, even when the foetus no longer resides in the woman's body? Does the freedom of choice for women cover parenthood in its entirety, ie. not only in a *gestational*, but *genetic* and *social* sense as well?

Swedish domestic law is predicated upon the viability criterion, which clearly states the foetus's ability to "survive and develop further outside the mother's body" as the point where a right to life is activated, thereby allowing for termination only of *gestational* parenthood. As for international human rights, while no comparable protection of the foetus exists, the duties put on *genetic* parents by the CRC cannot be regarded to infringe upon a mother's freedom to the extent that a right to termination of the foetus would still be applicable.

Regarding *social* parenthood, the situation might be different, owing to the CEDAW Committee's statements on the right to decide upon the number and spacing of children, which accentuate the burdens women face due to the bearing and raising of children; but such burdens can be remedied in other ways, for example through adoption.

5.6 International human rights law should protect the right to life for unborn humans from the moment of viability

The analysis of the various legal norms made in this essay has been conditioned by one particular perspective: the *adequacy* of the norms regarding *protection of prenatal life*. And this analysis has led me to one last conclusion: such protection is insufficient.

The Swedish example shows us that modern medicine and technology have resulted in a situation where viable foetuses are in danger of being aborted; the point of foetal viability has been pushed forwards until it now risks overlapping with legally permitted late-term abortions. This is arguably not a situation isolated to Sweden, but instead present all over the world where developments in medicine are made. Future progress is furthermore likely to escalate this situation.

Despite the Swedish Abortion Act stating that viability shall be prioritized over the interest of abortion, the solutions currently put in place to remedy this situation have followed the opposite logic. The consensus document produced in order to guide medical personnel on late-term abortions advocates the withholding of medical measures that might improve survivability, based on a reasoning that prioritizes abortions over foetal viability. Such a stance in clear disregard of the Abortion Act. Furthermore, since viability is the point where a right to life is recognized, an infringement upon foetal viability is in actuality an infringement upon the right to life.

It has been shown that individual doctors do not necessarily assess abortions in line with the consensus document. Nevertheless, this document and the solutions it provides must be seen as a valid part of the legal regulation of abortion in Swedish domestic law. Critically, they are part of the *existent* regulation, together with the principles and provisions of the larger legal framework that is the Swedish Abortion Act, and as such, their disregard of the right to life expressed in said framework makes no sense.

As for possible *future* legal regulation, the Swedish National Council on Medical Ethics has made suggestions for changes to the Act, which consist not of a lowering of the gestational limit, but instead a solution where the foetus is deprived of its life before the abortion is carried out – so-called feticide. In effect, such measures would amount to the termination of viable foetuses. However, since the Council has also suggested that the possibility of revising the viability criterion be explored, decoupling the legal gestational limit from the medical-technological viability concept, a foetal right to life would then no longer follow from such viability. This would remove this obstacle to the termination of the foetus, making feticide legally permissible within the scope of the Abortion Act and thus eliminating the infraction upon the right to life that is currently in place.

This essay has shown that international human rights law is silent on the issue of prenatal rights, including the right to life. Thus, the Swedish legislator is free to amend the Abortion Act, removing a foetal right to life altogether if so wished – what has been granted under exclusively a domestic mandate may after all also be taken away under such a mandate. This is the legal situation *de lege lata*; however, I will make the argument that such a system is not adequate in order to protect prenatal life. In contrast to the other conclusions drawn in this essay, this argument will be in the form of an analysis *de lege ferenda*.

The viability criterion was chosen by the Swedish legislator as the deciding factor for when a right to life should be accorded to the unborn. At first glance, this criterion might be regarded as an arbitrarily picked gestational limit. However, foetal viability bears a logical link to the concept of birth; thus, there exists a conceptual connection between how Swedish domestic law and international human rights law recognize the right to life.

International human rights acknowledge a right to life for all human beings from the moment of birth. As far as can be deduced from the sources of law, the circumstances of the birth do not matter – thus, a born child has its right to life protected, regardless of *when* and *how* it was born. Premature children, for example, are accorded the same right to life as children born after a complete pregnancy. Similarly, a child born alive as a result of a failed late-term abortion has a right to life. Such premature births are predicated on the existence of foetal viability; the foetus must be viable in order for a successful birth to occur. Thus, foetal viability is a necessary precursor for birth – it denotes an *ability to be born*.

For this reason, both international human rights law and Swedish domestic law base their recognition of the right to life on the concept of birth; the only difference is that Swedish law has incorporated the *theoretical ability* of birth in its provisions, whereas international human rights take a more passive stance, waiting until the point in time when *actual* birth occurs. It is this difference that has resulted in a recognition of a prenatal right to life from the Swedish legislator, but not from international human rights instruments.

Consider the following example: two women are impregnated at the same time. The child of the first woman is born normally after nine months, whereas the other child is born prematurely, after six months. Thus, seven months after conception, one foetus is in the womb, viable but unborn, and *not accorded a right to life by international human rights*. The other child however is outside the womb, cared for in a hospital's premature ward, and *its right to life is recognized by international human rights law*. Both beings have reached the same level of viability; the only difference between them is whether or not they have been born, ie. their *physical location* – inside or outside the womb.

A proponent of a continued silence from the international human rights on the issue of a prenatal right to life would have to make the case that physical location alone is enough to warrant a non-recognition of this right. This position might arguably be hard to uphold, chiefly because of its inherent arbitrariness in distinguishing between right and non-right to life; pregnancy is a process that naturally entails differences in matters of time. Birth might occur a week later than expected, or a week earlier – or indeed three months earlier. This arbitrariness comes to a head in situations where late-term abortions produce live births; what would have continued to be a foetus without a right to life for several more months is suddenly – through the outside action of induced abortion – turned into a new-born child with such a right.

As we know, the right to life in article 6.1 of the ICCPR should not be interpreted narrowly, and it does not allow for arbitrary deprivation of life. This would suggest that the preferred point for recognizing a right to life is one that minimizes the risks of arbitrary deprivation of life.

Since foetal viability denotes the ability to be born alive, there exists no difference between a viable foetus inside the womb and a prematurely born child outside the womb, other than physical location. It therefore follows logically that if life exists in the one case, it also exists in the other. Currently, life is indeed legally recognized by international human rights in the case of the prematurely born child, as it is accorded a right to life at its birth. And as we have seen, there is an inherent arbitrariness to relying on the physical location of the womb as sole deciding factor for distinguishing between right and non-right to life. Consequently, the non-recognition of a right to life for the viable foetus in the womb leaves such life unprotected in a manner that is arbitrary. And from this arbitrary non-protection of life follows a clear risk that if said life is then terminated, such a deprivation of life would be arbitrary – since in many cases where unborn life is ended, that action is directly predicated upon the fact that such life is not recognized as protected in the first place, as is the case with e.g. abortions.

It would therefore be more suitable for the purpose of the right to life to tie the status as rights-holder not to live birth itself, but to foetal viability. Furthermore, in the interest of minimizing arbitrary deprivations of life, priority must always be given to such foetal viability over the interest of abortion in cases where the two might come into sharp conflict, for example as regards late-term abortions. As this essay has shown, both international human rights law and Swedish domestic legislation currently fail to meet these standards.

Human life is a question of fundamental values. It is precisely such values which the instruments and institutions of international human rights law have been put into place to govern. International human rights were founded upon the idea that some interests are of such fundamental importance that they need to be safeguarded internationally and communally. This is a huge responsibility, as states have decided to surrender part of their sovereignty

on key fundamental questions of human values to a higher, international mandate; and crucially, this responsibility is not being shouldered for so long as the silence on the question of prenatal human rights is being kept up. If the ideals of the international human rights are to be upheld, and the effective protection of life is to be a reality also in the future, it is time for international human rights law to finally recognize a prenatal rights-holder status all the way from the moment of foetal viability.[270]

[270] This stance naturally has major repercussions for abortion rights, as a gestational limit would then always need to be implemented in order to respect the right to life. My essay has concerned itself with the status of prenatal life, since this is the core issue of abortion, prompting the questions which need to be answered before other questions can even be asked. I therefore leave it to others to explore secondary matters, such as the future scope of abortion rights.

Instruments of international law

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted in Aarhus on 25 June 1998, entered into force on 30 October 2001.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in New York on 18 December 1979, entered into force on 3 September 1981.

Convention on the Rights of the Child (CRC), adopted in New York on 20 November 1989, entered into force on 2 September 1990.

Convention on the Rights of Persons with Disabilities (CRPD), adopted in New York on 13 December 2006, entered into force on 3 May 2008.

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted in Rome on 4 November 1950, entered into force on 3 September 1953.

International Covenant on Civil and Political Rights (ICCPR), adopted in New York on 16 December 1966, entered into force on 23 March 1976 and 28 March 1979.

International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in New York on 16 December 1966, entered into force on 3 January 1976.

Universal Declaration of Human Rights (UDHR), adopted in Paris on 10 December 1948.

Vienna Convention on the Law of Treaties (VCLT), adopted in Vienna on 23 May 1969, entered into force on 27 January 1980.

Bibliography

LITERATURE

Archard, David, Tobin, John (2019): "Article 1. The Definition of a Child", in: Tobin, John (ed.), *The UN Convention on the Rights of the Child: A Commentary*. Oxford University Press.

Azaria, Danae: "The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties". International Community Law Review 22, 2020, p. 33 – 60.

Borowski, Martin, "Concretized Norm and Sanction qua Fact in the Vienna School's *Stufenbaulehre*". Ratio Juris, vol. 27, no. 1, 2014, p. 79 – 93.

Bossuyt, Marc J. (1987): *Guide to the* "Travaux Préparatoires" *of the International Covenant on Civil and Political Rights*. Martinus Nijhoff Publishers.

Çali, Başak (2020, 2 ed.): "Specialized Rules of Treaty Interpretation: Human Rights", in: B. Hollis, Duncan (ed.), *The Oxford Guide to Treaties*. Oxford University Press.

Cantwell, Nigel (1992): "The Origins, Development and Significance of the United Nations Convention on the Rights of the Child", in Detrick, Sharon (ed.), *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires*. Martinus Nijhoff Publishers.

Cook, Rebecca J., Dickens, Bernard M.: "Human Rights Dynamics of Abortion Law Reform". Human Rights Quarterly, vol. 25, no. 1, 2003, p. 1 – 59.

Copelon, Rhonda et. al: "Human Rights Begin at Birth: International Law and the Claim of Fetal Rights". Reproductive Health Matters, vol. 13, no. 26, 2005, p. 120 – 129.

Della Fina, Valentina, Palmisano, Giuseppe & Rachele Cera (2017): *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*. Springer.

Gardiner, Richard (2015, 2 ed.): *Treaty Interpretation*. Oxford University Press.

Grandia, Lex (2014): "Imagine: To be a Part of This", in: Sabatello, Maya Schulze, Marianne (ed.), *Human Rights and Disability Advocacy*. University of Pennsylvania Press.

Hannum, Hurst: “The Status of the Universal Declaration of Human Rights in National and International Law”. Georgia Journal of International and Comparative Law, vol. 25, Issues 1 & 2, 1995/1996, p. 287 – 398.

Hellner, Jan: “Argumentation de lege ferenda”. SvJT 1975, p. 401 – 420.

Henriksen, Anders (2019, 2 ed.): *International Law*. Oxford University Press.

Kaczor, Christopher (2005), *The Edge of Life*, Springer.

Kleineman, Jan (2013): „Rättsdogmatisk metod“, in: Korling, Fredric & Zamboni, Mauro (ed.), *Juridisk metodlära*. Studentlitteratur AB, p. 21 – 45.

Lord, Janes E., “Screened Out of Existence: The Convention on the Rights of Persons with Disabilities and Selective Screening Policies”. International Journal of Disability, Community & Rehabilitation, vol. 12, no. 2, p. 1 – 18.

McGrogan, David: “On the Interpretation of Human Rights Treaties and Subsequent Practice”. Netherlands Quarterly of Human Rights, vol 32, no. 4, 2014, p. 347 – 378.

Morsink, Johannes (1999): *The Universal Declaration of Human Rights: Origins, Drafting and Intent*. University of Pennsylvania Press.

Morsink, Johannes (2009): *Inherent Human Rights – Philosophical Roots of the Universal Declaration.* University of Pennsylvania Press.

Nilsson, Anna (2020, 3 ed.): “Internationella mänskliga rättigheter”, in: Linderfalk, Ulf, *Folkrätten i ett nötskal*. Studentlitteratur AB.

Nowak, Manfred (2005, 2 ed.): *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. N.P. Engel.

Petersen, Carole J., “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”. Journal of Law and Health vol. 28, no. 1, 2015, p. 121 – 163.

Schaffer, Bret, “The Right to Life, the Convention on the Rights of Persons with Disabilites, and Abortion”. Penn State International Law Review, vol. 28, no. 2, 2009, p. 265 – 288.

Tobin, John (2019): “Introduction – The Foundation for Children’s Rights”, in: Tobin, John (ed.), *The UN Convention on the Rights of the Child: A Commentary*. Oxford University Press.

Tobin, John, Seow Florence (2019): “Article 7. The Right to Birth Registration, Name, Nationality, and to Know and Be Cared for by

Parents", in: Tobin, John (ed.), *The UN Convention on the Rights of the Child: A Commentary*. Oxford University Press.

Tobin, John, Seow Florence (2019): "Article 18. Parental Responsibilities and State Assistance", in: Tobin, John (ed.), *The UN Convention on the Rights of the Child: A Commentary*. Oxford University Press.

Tomuschat, Christian (2014, 3 ed.): *Human Rights: Between Idealism and Realism*. Oxford University Press.

ELECTRONICAL RESOURCES

"About Us", PWD Australia webpage, https://pwd.org.au/about-us/ (visited 2021-01-01).

Ad Hoc Committee on Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Fourth Session of the Ad Hoc Committee, Daily summary of discussions related to Article 8 (right to life). Available at: https://www.un.org/esa/socdev/enable/rights/ahc4sumart08.htm (visited 2020-10-22).

Ad Hoc Committee on Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Daily summary of discussions at the fifth session 25 January 2005. Available at: https://www.un.org/esa/socdev/enable/rights/ahc5sum25jan.htm (visited 2020-10-23).

"A Parliamentary agency", Parliamentary Ombudsmen webpage, https://www.jo.se/en/About-JO/The-Parliamentary-agency/ (visited 2020-12-18).

"Attacken: 'SD hotar svenska kvinnors aborträtt'", Svenska Dagbladet, https://www.svd.se/1000-s-haller-presstraff-pa-barnmorskeforbundet (visited 2021-01-06).

Center for Reproductive Rights, Submission to the CRPD Committee, for the Half Day of General Discussion on Women with Disabilities on 17 April 2013, available at: https://www.ohchr.org/en/hrbodies/crpd/pages/dgd17april2013.aspx (visited 2021-02-02).

Cohen, I. Glenn: "Artificial Wombs and Abortion Rights", available at https://onlinelibrary.wiley.com/doi/full/10.1002/hast.730 (visited 2021-01-07).

”Decades later, abortions in Canada are still hard to get”, Policy Options, https://policyoptions.irpp.org/magazines/august-2019/decades-later-abortions-in-canada-are-still-hard-to-get/ (visited 2020-11-09).

Disabled Peoples' International, Japanese Assembly Position Paper regarding the Convention, submitted on 19 June 2003, Article 3 of the Elements of the Convention. Available at: https://www.un.org/esa/socdev/enable/rights/wgcontrib-dpi.htm (visited 2020-10-22).

DPI webpage, http://www.disabledpeoplesinternational.org/ (visited 2021-01-01).

Drafting proposals and comments by the Council of Europe Secretariat (21 April 2006), p. 3. Available at: https://www.un.org/esa/socdev/enable/rights/ahc8contigorg.htm (visited 2020-10-23).

”Fact Sheet No.2 (Rev.1), The International Bill of Human Rights”, published 1996-06, https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf, (visited 2021-02-02).

Fact sheet "Preventing unsafe abortion", published 2020-09-25 on WHO webpage, https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion (visited 2021-01-02).

"History", IDA webpage, https://www.internationaldisabilityalliance.org/content/history (visited 2021-01-01).

"Human Rights", United Nations webpage, https://www.un.org/en/sections/issues-depth/human-rights/ (visited 2020-12-16).

Information sheet "Understanding and addressing violence against women: Femicide", published 2012, available at WHO webpage, https://www.who.int/reproductivehealth/topics/violence/vaw_series/en/ (visited 2021-02-02).

"JO-beslut ", Parliamentary Ombudsmen webpage, https://www.jo.se/sv/JO-beslut/ (visited 2021-01-07).

"Maternal, newborn, child and adolescent health", WHO webpage, https://www.who.int/maternal_child_adolescent/topics/maternal/maternal_perinatal/en/ (visited 2020-12-30).

Nadja Yllner: "Läkare försöker rädda sent aborterade foster – 'I lagens mening är de barn'", SVT Nyheter, https://www.svt.se/nyheter/inrikes/lakare-forsoker-radda-aborterade-foster (visited 2021-01-06).

Sofia Bering: ”’Sent aborterade foster ska inte återupplivas’”, SVT Nyheter, https://www.svt.se/nyheter/inrikes/klart-sent-aborterade-foster-ska-inte-aterupplivas (visited 2021-01-06).

“The Swedish National Council on Medical Ethics”, webpage, https://smer.se/en/about-the-council-2/ (visited 2021-01-07).

Ulrika Öster: ”Tro – ett skäl att slippa arbetsuppgifter?”, Advokaten, https://www.advokaten.se/Tidningsnummer/2019/nr-1-2019-argang-85/new-page21/ (visited 2021-01-06).

“United Nations Treaty Collection: Convention on the Elimination of All Forms of Discrimination against Women”, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en (visited 2021-01-28).

“United Nations Treaty Collection: Convention on the Rights of Persons with Disabilities”, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (visited 2021-01-28).

“United Nations Treaty Collection: International Covenant on Civil and Political Rights”, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (visited 2021-01-28).

“What is an Optional Protocol”, UN Women webpage, https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm (visited 2020-12-21).

REPORTS

A/HRC/31/57 – *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, on 5 January 2016.

JO 7035-2017 – *Parliamentary Ombudsmen, ”Uttalanden i vissa frågor om handläggningen av sena aborter”,* on 17 September 2019.

Smer rapport 2019:1 – *Swedish National Council on Medical Ethics, ”Livstecken efter sen abort”*, 2019.

ST/ESA/SER.A/447 – *United Nations, Department of Economic and Social Affairs, Population Division, “World Population Policies 2017: Abortion Law and Policies (Advance copy)”*, 2020.

UNITED NATIONS PREPARATORY WORKS

The Universal Declaration of Human Rights

E/CN.4/AC.1/SR.35 – *Drafting Committee, Second Session, Summary Record of the 35th Meeting,* on 17 May 1948.

E/SR.215 – *Economic & Social Council, Seventh Session, 215th Meeting,* on 25 August 1948.

A/C.3/SR.98 – *General Assembly, Third Session, Third Committee, 98th Meeting,* on 9 October 1948.

A/C.3/SR.99 – *General Assembly, Third Session, Third Committee, 99th Meeting,* on 11 October 1948.

A/C.3/SR.102 – *General Assembly, Third Session, Third Committee, 102d Meeting*, on 14 October 1948.

A/C.3/SR.104 – *General Assembly, Third Session, Third Committee, 104th Meeting*, on 16 October 1948.

The International Covenant on Civil and Political Rights

E/CN.4/386 – *Draft International Covenant on Human Rights, Lebanon: Amendment to Article 5,* on 30 March 1950.

E/CN.4/398 – *Draft International Covenant on Human Rights, Lebanon: Proposed text for Article 5*, on 3 April 1950.

E/CN.4/SR.149 – *Commission on Human Rights, Sixth Session, Summary Record of the 149th Meeting*, on 17 April 1950.

E/CN.4/SR.311 – *Commission on Human Rights, Eighth Session, Summary Record of the 311th Meeting,* on 27 May 1952.

A/2929 – *Draft International Covenants on Human Rights, Annotation prepared by the Secretary-General*, on 1 July 1955.

A/C.3/SR.813 – *General Assembly, Twelfth Session, Third Committee, 813th Meeting*, on 18 November 1957.

A/C.3/SR.815 – *General Assembly, Twelfth Session, Third Committee, 815th Meeting,* on 20 November 1957.

A/C.3/SR.817 – *General Assembly, Twelfth Session, Third Committee, 817th Meeting,* on 22 November 1957.

A/C.3/SR.818 – *General Assembly, Twelfth Session, Third Committee, 818th Meeting,* on 22 November 1957.

A/C.3/SR.819 – *General Assembly, Twelfth Session, Third Committee, 819th Meeting*, on 25 November 1957.

A/3764 – *Draft International Covenants on Human Rights, Report of the Third Committee*, on 5 December 1957.

The Convention on the Rights of the Child

E/CN.4/L.1542 – *Commission on Human Rights, 36th Session, Report of the Working Group*, on 10 March 1980.

E/CN.4/1989/48 – *Commission on Human Rights, 45th Session, Report of the Working Group on a draft convention on the rights of the child,* on 2 March 1989.

UNITED NATIONS EXPERT TREATY BODY WORKS

Human Rights Committee

General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (CCPR/C/GC/36).

Committee on the Rights of the Child

General Comment No. 7 (2005), *Implementing child rights in early childhood* (CRC/C/GC/7/Rev.1).

General Comment No. 9 (2006), *The rights of children with disabilities* (CRC/C/GC/9).

Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return (CMW/C/GC/4-CRC/C/GC/23).

CRC/C/69 – *Committee on the Rights of the Child, Report on the Sixteenth Session*¸ on 26 November 1997.

Concluding Observations of the Committee on the Rights of the Child: India (CRC/C/15/Add.115), on 23 February 2000.

Concluding Observations on the Combined Third and Fourth Periodic Reports of India (CRC/C/IND/CO/3-4), on 7 July 2014.

Committee on the Elimination of Discrimination against Women

General Recommendation No. 21 (1994): Equality in Marriage and Family Relations (in A/49/38).

General Recommendation No. 24 (1999): Article 12 of the Convention (Women and Health) (in A/54/38/Rev.1, chap. I).

General Recommendation No. 34 (2016) on the Rights of Rural Women (CEDAW/C/GC/34).

General Recommendation No. 35 (2017) on gender-based violence against women (CEDAW/C/GC/35).

Concluding Comments of the Committee on the Elimination of Discrimination against Women: China (CEDAW/C/CHN/CO/6), on 25 August 2006.

Concluding Observations on the Combined Seventh and Eighth Periodic Reports of China (CEDAW/C/CHN/CO/7-8), on 14 November 2014.

Concluding Comments of the Committee on the Elimination of Discrimination against Women: India (CEDAW/C/IND/CO/3), on 2 February 2007.

Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India (CEDAW/C/IND/CO/4-5), on 24 July 2014.

Committee on the Rights of Persons with Disabilities

Concluding Observations of the Committee on the Rights of Persons with Disabilities: Spain (CRPD/C/ESP/CO/1), on 19 October 2011.

Concluding Observations on the Combined Second and Third Periodic Reports of Spain (CRPD/C/ESP/CO/2-3), on 13 May 2019.

Concluding Observations on the Initial Periodic Report of Hungary (CRPD/C/HUN/CO/1), on 22 October 2012.

General Comment No. 6 (2018) on Equality and Non-discrimination (CRPD/C/GC/6).

Committee on Economic, Social and Cultural Rights

General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (article 12 of the ICESCR) (E/C.12/GC/22).

SWEDISH PREPARATORY WORKS

Prop. 1974:70 – *Kungl. Maj:ts proposition med förslag till abortlag, mm.*, on 8 March 1974.

Prop. 1994/95:142 – *Fosterdiagnostik och abort*, on 9 February 1995.