# ABORTION - A FIELD UNREGULATED BY INTERNATIONAL LAW?

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## ABSTRACT

Despite nuanced and complex international treaties on protecting human rights, women's rights, and prohibiting discrimination, sex-selective abortion remains a critical issue for legal scholars and social discourse alike. This paper examines the legal perspective on sex-selective abortion, considering the right to life of the fetus, discrimination against women, and the right to reproductive health. Drawing on interna*tional case law, international agreements, and existing legal scholarship, this paper argues th*at a stronger global regulatory framework to prohibit sex-selective abortion, recognizing it as a form of discrimination, would be a first step towards alleviating the problem.

**Keywords:** Sex-selective abortion; Discrimination; Human rights; Fetus; Right to life; Georgia

## INTRODUCTION

Abortion is one of society's most hotly debated topics, having equally complex and problematic social, religious, ethical, political, economic and legal dimensions. There is no unified position on abortion. In fact, various positions and assessments evolve from the various moral or legal normative systems applied. Grounds for seeking an abortion vary from financial concerns to health risks and beyond. The present paper considers a very specific topic—selective abortion. Selective abortion is conventionally divided into two categories: abortion due to the sex of the fetus and abortion due to the health status of the fetus. This paper will only discuss sex-selective abortion, considering it from a legal perspective. Thus, when 'selective abortion' is referenced in this paper, only the category of sex-selective abortion is implied.

The first chapter deals with abortion as a category of human rights and explains how the legal status of the fetus under international law significantly influences the legal categorization of abortion. The second chapter discusses sex-selective abortion in light of bioethics and human rights, the relationship between reproductive health and sex-selective abortion, reproductive health in terms of international legal agreements, and sex-selective abortion as discrimination. The third chapter briefly discusses the regulatory framework of sex-selective abortion in Georgia.

This paper aims to determine whether sex-selective abortion is a right, an institution prohibited by international law, or an unregulated field. It is worth noting in this introduction that the discussion of sex-selective abortion primarily in the context of the female fetus is guided by statistical data, and does not mean that selective abortion of male fetuses is not considered sex-selective abortion. This paper applies an inductive content analysis method.

## 1. ABORTION AS A RIGHT

### 1.1 The Legal Status of the Fetus in International Law

Abortion within the scope of medicine and law includes many complex aspects related to reproductive health, bioethics and human rights which cannot be fully discussed in the format of this paper. Neither will the moral or ethical aspects of abortion be discussed herein. This study considers only those components of the legal status of the fetus in international law that are necessary to analyze the legal position of sex-selective abortion.

The fact that the legal protection of the fetus has not been a primary concern of the international human rights agenda is evidenced by the fact that the Universal Declaration of Human Rights does not reference the legal status of the fetus at all.[1] However, the authors of the Declaration included general phrases in the document such as, "*Everyone has the right to life*," and "*All human beings are born free and equal*."[2] The inclusion of such phrases leaves room for broad discussions on human rights topics in the context of the Declaration.[3] Discussions on the status of the fetus during the drafting the process of the Declaration,[4] considering the time and context, may be regarded as progressive. The legalization of abortion by UN Member States for the sake of protecting a mother's rights,[5] remains a major obstacle to unification of positions around the legal status of the fetus in international law.

The European Convention on Human Rights generally prohibits violating the right to life,[6] though from this prohibition it is difficult to draw any conclusions about the legal status of the fetus. During the period of the Convention's adoption, in the late 1940s, abortion was criminalized in many countries, [7] which may have influenced the European Court of Human Rights' neutral approach towards regulating abortion. The European Court has, in most aspects, entrusted regulation of abortion to member states of the Convention. [8] The

[1] See: Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Articles 3, 6, and 7.

[2] Ibid.

[3] Schabas A. William, The Abolition of the Death Penalty in International Law (Cambridge UK: Cambridge Univ. Press, 2nd ed, 1997), 25; ციტირებული: Flood J. Patrick, "Does International Law Protect the Unborn Child?" Life and Learning XVI, 6 (2006):5-6, http://www.uffl.org/vol16/flood06.pdf [accessed 06.03.2020].

[4] Summary Record of the Second Meeting [of the Working Group on the Declaration of Human Rights] E/CN.4/AC.2/SR.2, 5 December 1947, 8.

[5] Schabas A. William, The Universal Declaration of Human Rights-The travaux préparatoires (Vol I, October 1946 to November 1947, CUP 2013), C.

[6] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Article 2, 1950; Renucci Jean-François, Introduction to the European Convention on Human Rights The rights guaranteed and the protection mechanism (Council of Europe Publishing 2005), 10, https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-01(2005).pdf [accessed 19.02.2020].

[7] Gregor Puppinck, Abortion and the European Convention on Human Rights, Irish Journal of Legal Studies, (vol.3 (2) 2013), 144.

[8] Christina Zampas and Gher M. "Jaime, Abortion as a Human Right – International and Regional Standards", Human Rights Law Review 8:2 (2008), 276.

Court has, however, delivered a number of decisions that establish firm positions on key issues. Specific case law is discussed in the following chapter.

The International Covenant on Civil and Political Rights also establishes a general prohibition on violating the right to life.[9] Article 6 uses formulations such as, "*No one shall be arbitrarily deprived of his life*," and "*Every human being has the inherent right to life*;" these formulations leave some room for the legal protection of the life of the fetus.[10] Within the existing textual framework, however, the protection of the right to life of the fetus is ultimately reliant on whether or not it is granted the status of a human being. It is difficult to agree with the opinion that the prohibition of capital punishment of pregnant women reveals an unconditional recognition of the right to life of the fetus.[11] The legal systems of many countries contain special protection mechanisms for pregnant women, children, and the elderly considering their unique physiological and psychological conditions, which are usually reflected in criminal legislation.[12] In the General Comments of the Human Rights Committee, discussions on protecting the legal rights of the fetus in the context of the mother's life and health, and in the context of the negative consequences of restrictive abortion legislation, is a sign that the fetus is not regarded as a subject having an independent legal personality.[13] Many legal scholars take a similar approach.[14]

The Declaration of the Rights of the Child,[15] the predecessor of the Convention on the Rights of the Child, is famous for straightforward formulations and for attaching the status of *child* to a fetus.[16] The preamble states that a "*child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal*

[9] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 6.

[10] Flood, Patrick, "Does International Law Protect the Unborn Child?", 7; Flood Patrick. Is International Law on the Side of the Unborn Child? (2007 NCBQ) 73.

[11] Ibid.

[12] Milligan M. Luke, "A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process" Baylor U L Rev (2007) 1177-1230; Ancel Mark, "Capital Punishment in the Second Half of the Twentieth Century" Review-International Commission of Jurists, Geneva, N2 (1969):33-48; Schabas, The Abolition of the Death Penalty, 150; Magnuson J. Roger and Lederman M. Joshua, "Aristotle, Abortion, and Fetal Rights" Wm Mitchell L Rev (2007): 767, 770; Fenzel Brigit, "Turning Morality into Legitimate Law" Focus (2007) 34-37.

[13] Human Rights Committee General Comment No.28: Equality of rights between men and women (Article 3) UN Doc HRI/GEN/1/Rev.6, 33.180, 182, para.10,11,20; 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, 30 October, 2018, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf [accessed 16.02.2020], Paragraph 8; See: Joseph Sarah and Castan Melissa, The International Covenant on Civil and Political Rights (3rd Edition): Cases, Materials, and Commentary, Third edition (OSAIL 2013), http://opil.ouplaw.com/view/10.1093/law/9780199641949.001.0001/law-9780199641949-chapter-8#law-9780199641949-div6-456 [accessed 19.02.2020].

[14] See: Eriksson K. Maja, "Making International Law More Responsive to Women's Needs" in Women and International Human Rights Law, ed. Askin D. Kelly and Koenig M. Dorean, vol. 3 (Ardsley NY: Transnational Publishers, 2001); Cook J. Rebecca and Fathalla F. Fathalla, "Advancing Reproductive Rights Beyond Cairo and Bejing" in Women and International Human Rights Law, ed. Askin D. Kelly and Koenig M. Dorean, vol. 3 (Ardsley NY: Transnational Publishers, 2001); Packer A.A. Corinne, "The Right to Reproductive Choice: A Study in International Law" Turku, Finland: Institute for Human Rights, Abo Academi University (1996).

[15] Declaration of the Rights of the Child, UNGA Res 14/1386 (20 November 1959) UN Doc A/RES/14/1386.

[16] Ibegbu I. Jude, "Rights of the Unborn Child in International Law" Vol. 1. 8., London UK: Edwin Mellen Press (2000), 132-139.

*protection, before as well as after birth*."[17] During discussions on the child's status in the Convention, countries' opinions diverged, and eventually the first article adopted a compromise definition of a child.[18] Paragraph 9 of the Preamble, which refers to the Declaration of the Rights of the Child, and the second paragraph of Article 24 of the Convention, which obliges Member States to provide appropriate prenatal healthcare for mothers, may be considered an attempt to recognize the legal status of the fetus.[19] The general text of the Convention, however, along with the circumstances related to its adoption, does not constitute sufficient evidence that the Convention requires its Member States to recognize and protect the right to life of the fetus.[20] Despite this, the Committee on the Rights of the Child has never hesitated to urge countries to change discriminatory legislation on abortion to protect the interests of the fetus.[21] This is further discussed in the following chapters. The legal differences between a child and a fetus are clear and existing regulations emphasize the distinctions; however, references to the fetus' needs in children's rights protection instruments may confirm the *similarities* between the legal interests of child and fetus protection.

The Convention on the Elimination of All Forms of Discrimination against Women does not mention the legal protection of the fetus either and focuses mainly on protecting pregnant women from discrimination and establishing appropriate conditions for them. [22] Similar emphasis has been placed on recommendations from the Committee on the Elimination of Discrimination against Women, which focuses on introducing mechanisms to prevent unwanted pregnancies and decriminalizing abortion.[23]

The African Charter on Human and People's Rights also generally discusses the importance of protecting human life.[24] The Maputo Protocol provides detailed explanations on prenatal

[17] Declaration of the Rights of the Child, UNGA Res 14/1386 (20 November 1959) UN Doc A/RES/14/1386, Preamble.
[18] Ibegbu, "Rights of the Unborn Child", 132-139; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 3 UNTS 1577 Article 1.
[19] Mower G. Alfred Jr., "The Convention on the Rights of the Child: International Law 13 Support for Children", Westport CT: Greenwood Press, (1997) 29; Joseph Rita, "Human Rights and the Unborn Child", Martinus Nijhoff Leiden (2009) 3; Alston Philip, "The Unborn Child and Abortion under the Draft Convention on the Right of the Child", Hum Rts Q (1990) 174; Slabbert M. Nöthling, "The Position of the Human Embryo and Foetus in International Law and its Relevance for the South African Context", CILSA (1999) 28-30; Sloth-Nielsen Julia, "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law", SAJHR (1995) 411-412.
[20] Leblanc Lawrence Jr., The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights (Lincoln: Univ. of Nebraska Press 1995) 71; Ibegbu, "Rights of the Unborn Child", 105.
[21] Nowak Manfred, Commentary on the United Nations Convention on the Rights of the Child, Article 6: the Right to Life, Survival and Development (Boston MA: Martinus Nijhoff Publishers, 2005) 29.
[22] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 13 UNTS 1249, Articles: 4, 11.
[23] UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24: Article 12 of the Convention (adopted 5 February 1999) UN Doc A/54/38/Rev.1, chap. I.
[24] African Charter on Human and Peoples' Rights, (adopted 27 June 1981, entered into force 21 October 1986) Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58, Article 4; Petersen Niels, "The Legal Status of the Human Embryo in vitro: General Human Rights Instruments", ZAÖRV (2005) 457.

health and the importance of pregnant women having access to health services.[25] There is one school of thought that the Maputo Protocol recognizes the legal status of the fetus,[26] however, it is debatable whether women's reproductive rights include the right to life of the fetus, especially as there is no direct reference to the question in the Protocol. It is also interesting to note that the American Convention on Human Rights, as well as the American Declaration of the Rights and Duties of Man, do not differ substantially from the abovementioned documents in terms of the recognition of the legal status of the fetus.[27]

In academic literature, when discussing the legal status of the fetus and of abortion, we often find parallels with cloning, [28] including active criticism of cloning.[29] Since the main concerns surrounding cloning are linked to genetic engineering and related more to the physical process of human creation than to the legal status of the fetus, the discussion of cloning is irrelevant in the context of abortion. Within the legal community, an opinion periodically emerges that international law should address the basic moral issues related to abortion and a broad dialogue should be established based on an agreement of the fundamental aspects.[30] Due to biological differences, women have greater psychological and social pressure than men to avoid unwanted pregnancies. [31] Freedom of choice, in the context of unwanted pregnancy, is the main guarantee of protection of women from discrimination. [32] At the same time, it is important that the norms regulating abortion cover the interests of the fetus, in accordance with internationally recognized universal principles of law.

### 1.2 Practice of International Human Rights Institutions

There are numerous cases related to the legal status of the fetus and abortion in both regional and international human rights institutions; this paper focus only on landmark decisions to better present the global picture.

[25] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July, 2003, entered into force 25 November, 2005), http://www.achpr.org/instruments/women-protocol/ [accessed 23.12.2019] Article 14.

[26] Flood J. Patrick, "Is International Law on the Side of the Unborn Child?" NCBQ (2007) 73.

[27] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm [accessed 19.03.2020] Articles 1,3,4; American Declaration of the Rights and Duties of Man, 2 May 1948, http://www.hrcr.org/docs/OAS_Declaration/oasrights.html [accessed 19.03.2020].

[28] Shanin L. Elizabeth, "International Response to Human Cloning", Chicago J Int'l L (2002) 255.

[29] Isasi M. Rosario and Annas J. George, "Arbitrage, Bioethics, and Cloning: The ABCs of gestating a United Nations Cloning Convention", Case W Res J Int'l L (2003) 406; Jarrell Channah, "No worldwide consensus: The United Nations Declaration on Human Cloning", Ga J Int'l & Comp L (2006) 225-226.

[30] Tomuschat Christian, "International law: ensuring the survival of mankind on the eve of a new century: general course on public international law" Recueil Des Cours (1999) 26; Callahan Daniel, "The Sanctity of Life Principle: A New Consensus", in Life and Death: A Reader in Moral Problems, ed. Pojman P. Luis, 2nd ed. (Wadsworth Belmont 2000) 84; Bogdandy V. Armin, "Constitutionalism in International Law: Comment on a Proposal from Germany", Harv Int'l L J (2006) 227.

[31] Eriksson K. Maja, "Reproductive Freedom – In the Context of International Human Rights and Humanitarian Law", Martinus Nijhoff Leiden (2000) 276-277.

[32] Packer, "The Right to Reproductive Choice" 8-9.

Before the transformation of the European Court of Human Rights to a modern system, when it was still the European Commission of Human Rights, a key judgment was delivered in the case of *Brüggemann and Scheuten v. Germany*. The applicant argued that, in accordance with Article 8 of the European Convention on Human Rights, the decision on abortion should be completely the prerogative of the mother. The Commission found that the first paragraph of Article 8 of the Convention could not be interpreted as implying that pregnancy and its termination are solely within the sphere protected by the mother's right to privacy. [33] With this decision, the Commission indirectly recognized the status of the fetus as an independent legal personality.

An interpretation was made by the Commission in the case of *X v. the United Kingdom*, where the author of the complaint, the potential father, sought to establish a violation of Articles 2, 5, 6, 8, and 9 of the Convention under the Abortion Act 1967 in the United Kingdom. The potential father did not want the potential mother to terminate the pregnancy and requested the recognition of the right to life of the fetus. The Commission noted that under Article 2 of the Convention, there were three potential conclusions that may be drawn: the Convention does not recognize the right to life of the fetus, the fetus' rights are recognized within implied limitations, or the Convention recognizes the absolute right to life of the fetus. [34] The Commission determined that giving a higher value to the life of the fetus than to the life of the mother would have been incorrect—especially since the majority of the Member States of the Convention had *en masse* liberalized abortion.[35] According to the Commission, the Convention did not recognize the right to life of the fetus.[36]

In the case *H. v. Norway*, the factual circumstances and the content of the argument are similar to *X. v. the United Kingdom*. The potential father initiated procedures at the Commission with the argument that Norwegian law violated Articles 2, 3, 8, and 9 after unsuccessful legal petitions at the domestic level when the potential mother conducted an abortion during the 14th week of pregnancy against the will of the potential father.[37] While deliberating on the judgement, the Commission drew parallels with the decisions of the Supreme Courts of European countries and spoke about the importance of adopting a compromise approach. In the context of Article 2, a violation could not be ascertained and it was interpreted that the abortion was carried out within the legitimate limits set by Norwegian law, which did not go beyond the scope of the Convention.[38]

In the case of *Vo v. France* the applicant argued in domestic courts that French doctors be held criminally liable for negligent homicides due to forced abortions resulting from medical mistakes. Since the French Criminal Code did not recognize the fetus as a subject of criminal law, the court thus denied the possibility of criminal liability. The European Court, in turn, referred to all of the aforementioned cases and noted that even if the

[33] Brüggeman and Scheuten v. Germany, Appl. No. 6959/75, Commission Report of 12 July 1977, para. 61.
[34] X v. the United Kingdom, Appl. No. 8416/79, admissibility decision of 13 May 1980, para. 17.
[35] Ibid., paras. 19,20.
[36] Ibid., para. 23.
[37] H. v. Norway, Appl. No. 17004/90, admissibility decision of 19 May 1992.
[38] Ibid. DR 73, 155; see also Boso v. Italy, Appl. No. 50490/99, decision of 5 September 2002.

French Courts were guided by the principle of the absolute right to life of the fetus, an administrative or civil liability proportionate to negligent homicide would have had to have been applied. [39]

In relatively recent decisions, the European Court has recognized the importance of comprehensive regulations and consideration of the interests of different groups when adopting legislation regulating abortion.[40] The case *Knecht v. Romania* is important in terms of recognizing the legal personality of the fetus in that the Court ordered Romania to cease destruction of frozen embryos meant for extracorporeal fertilization.[41] The Court, referencing Article 8 of the Convention, set a precedent that the right to procedures similar to abortion may be compromised in favor of the family's interest in the presence of a relevant argument.[42]

Numerous interesting decisions have been delivered by the Human Rights Committee (a treaty-based organ), which relate to, in the light of Article 6 of the International Covenant on Civil and Political Rights (ICCPR), abortion and the legal rights of the fetus. One example is the case of *Queenan v. Canada*,[43] in which the application did not meet the Committee's admissibility criteria due to the nonexistence of a specific casualty. Although it would have been interesting to evaluate the legality of abortion in connection with the right to life in the case, the qualification of the applicant's criteria, as determined by an optional protocol of the Covenant, is quite delicate.[44] In another decision, *L.M.R. v. Argentina*, the applicant had requested an abortion in domestic courts. A delay in the Argentine court's decision caused the pregnancy to advance to a state where the potential mother was no longer able to obtain a legal abortion, and she obtained an arbitrary, illegal, late-term abortion which, in the applicant's argument, endangered her life. The Committee eventually ruled that the Argentine court's delay in their ruling did not, in fact, violate the applicant's right to life.[45] This judgement is interesting in the fact that the Committee did not automatically connect a late-term abortion with the mother's right to life.[46]

The list of abortion-related cases does not end here, but as this paper aims to study the phenomenon of sex-selective abortion, the following chapter will discuss the cases with discriminatory components.

[39] Vo v. France, [GC] Appl.No 53924/00, judgement of 8 July 2004, paras. 77-80.
[40] Tysiac v. Poland, Appl. No. 5410/03, judgement of 20 March 2007, para.116; A. B. and C. v. Ireland, Appl .No 25579/05, judgement of 16 December 2010, para.249; R. R. v. Poland, Appl. No. 27617/04, judgement of 26 May 2011, Para. 187; P. and S. v. Poland, App. N 57375/08, judgement of 30 October 2012, para. 99.
[41] Knecht v. Romania, Appl. N 10048/10, judgement of 2 October 2012, para. 19.
[42] Puppinck Gregor, "Abortion on Demand and the European Convention on Human Rights", ECLJ (2014), https://eclj.org/abortion-on-demand-and-the-european-convention-on-human-rights [accessed 19.03.2020].
[43] Queenan (on behalf of Canadian unborn children) v Canada, Admissibility, Communication No 1379/2005, UN Doc CCPR/C/84/D/1379/2005.
[44] See: Joseph and Castan, "The International Covenant on Civil and Political Rights".
[45] L.M.R. v Argentina, Communication N 1608/2007, UN Doc CCPR/C/101/D/1608/2007, paras. 8.1-10.
[46] Llantoy Huamán v Peru, Communication N 1153/2003, UN Doc CCPR/C/85/D/1153/2003, para. 6.3.

## 2. THE PHENOMENON OF SEX-SELECTIVE ABORTION IN INTERNATIONAL LAW

### 2.1 Sex Selection as a Component of Human Rights and Bioethics

Human rights and bioethics are independent branches of science which merge in two documents: the Convention on Human Rights and Biomedicine and the Universal Declaration on the Human Genome and Human Rights.[47] The previous chapter established that moral and ethical consideration are not within the scope of this paper, thus, it is first necessary to define bioethics. According to Article 1 of the Convention on Human Rights and Biomedicine, bioethics must include the protection of human rights and freedoms, their dignity and their inviolability in biology and medicine, without discrimination. The semantic meaning of the word "*bioethics*" itself represents the protection of ethics in medical and biological research.[48]

The Convention on Human Rights and Biomedicine unequivocally condemns the use of artificial conception methods to select sex in Article 14.[49] However, the Convention prohibits only pre-implant embryonic sex-selection and does not include prenatal sex-selection. In discussions around the formulation of the Convention, there was an idea to record the prohibition of sex-selective abortion, however, this was not included in the final version of the Convention on Human Rights and Biomedicine.[50]

Given the essence of bioethics, it is reasonable to expect that the Convention would also prohibit sex-selective abortion, however, due to the ambiguity of the right to fetal life and its direct connection to women's health, there is no consensus on the issue. This hinders regulation of sex-selective abortion within the field of bioethics.[51] The only undisputed form of sex-selection, the prohibition of which is not controversial in international law, is the killing of newborns.[52] Since the killing of a newborn goes beyond the classical definition

[47] Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (adopted 4 April 1997, entered into force 12 January 1999) ETS No. 164; UN Educational, Scientific and Cultural Organisation (UNESCO), Universal Declaration on the Human Genome and Human Rights, 11 November 1997, available https://unesdoc.unesco.org/ark:/48223/pf0000146180 accessed 20 January, 2019. Toebes Brigit, "Sex Selection under International Human Rights Law", Medical Law International Vol. 9 (2008): 208, https://www.researchgate.net/publication/270487124_Sex_Selection_under_International_Human_Rights_Law [accessed 19.04.2020] Baker Robert, "Bioethics and Human Rights: A Historical Perspective", Cambridge Quarterly of Healthcare Ethics 10 (2001) 241–252.

[48] Oxford Dictionary bioethics, https://en.oxforddictionaries.com/definition/bioethics [accessed 19.02.2020].

[49] Convention on Human Rights and Biomedicine, Article 14.

[50] Steering Committee On Bioethics, Convention on the Protection of Human Rights and Dignity of the Human Being With Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine-Preparatory Work on the Convention, 28 June 2000, https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/CDBI-INF(2000)1PrepConv.pdf [accessed 19.02.2020], 69.

[51] Pattinson D. Shaun, Medical Law and Ethics (London: Sweet & Maxwell, 2006) 19 and 316–319; Jones D. Owen, "Sex selection: regulating technology enabling the predetermination of a child's gender", 6 Harvard Journal of Law and Technology 2 (1992–1993) 23.

[52] Singer Peter, Taking Life: Humans, excerpted from Practical Ethics (Cambridge, 2nd Ed. 1993) 175–217.

of abortion, this form of sex-selection will not be discussed in this paper.

Prohibition of the use of artificial childbirth methods for the purpose of sex-selection in the context of the prohibition of all forms of discrimination is a clear statement that sex-selection is a form of discrimination. However, the explanatory report to the Convention does not address the specific reasons for the restriction, nor does it define whether Article 14's prohibition is a direct result of the principles laid out in Article 1.[53] The explanatory report only discusses the methods of fetal conception and the regulation of exclusions at the domestic level determined in Article 14, which leaves questions related to the legal aspects open.[54] Since the European Court of Human Rights abstains from giving a definite position on the legal status of the fetus and the discriminatory character of sex-selective abortion,[55] it is to be expected that the Convention does not discuss the discriminatory character of sex-selection in open legal discourse. On the other hand, the majority of Council of Europe Member States ratified the Convention without making a reservation on Article 14, [56] which confirms that there is at least a declaratory readiness by these states to prohibit sex-selective artificial conception methods in their domestic legislation. Reference to the Convention on Human Rights and Biomedicine by the European Court of Human Rights when a party to a case is not a member of that convention emphasizes the Court's recognition of the special legal value of the Convention.[57]

As previously mentioned, another legal document that defines issues of bioethics is the Universal Declaration on the Human Genome and Human Rights. Given that the Declaration is adopted within the framework of UNESCO and includes states with different legal agendas, religions and cultures, it is more general in nature and does not mention sex-selection.[58] Since the purpose of this subsection is to discuss bioethics and human rights in the context of sex selection, it will refrain from discussing the general legal nature of the Declaration.

## 2.2 Reproductive Health and Selective Abortion

Issues of reproductive health rights were actively raised at the 1994 UN Conference on

[53] Explanatory Report to the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 1997 ETS No. 164, 15.

[54] Ibid.

[55] See: Brüggeman and Scheuten v. Germany, Appl. No. 6959/75, Commission Report of 12 July 1977.

[56] See: Committee on Bioethics, Chart of signatures and ratifications of: the Convention on Human Rights and Biomedicine ,the Protocol on the Prohibition of Cloning Human Beings, the Protocol concerning Transplantation of Organs, Tissues of Human Origin, the Protocol concerning Biomedical Research, the Protocol concerning Genetic testing for Health Purposes, 2017, https://rm.coe.int/inf-2017-7-rev-etat-sign-ratif-reserves/168077dd22 [accessed 19.02.2020].

[57] Glass v. the United Kingdom, Appl. No. 61827/00, Judgement of 9 March 2004, para. 75.

[58] Toebes, "Sex Selection under International Law", 209; Nys Herman, "Towards an International Treaty on Human Rights and Biomedicine? Some Reflections Inspired by UNESCO's Universal Declaration on Bioethics and Human Rights", 13 European Journal of Health Law 5 (editorial) (2006) 7–8.

Population and Development (Cairo Conference).[59] The main focus of the conference was the reproductive needs of individuals rather than the demographic problems of the general population.[60] The final report of the Cairo Conference defines reproductive health, which is very significant in the context of the main topic of this paper. The definition of reproductive health contains a number of important components, including: freedom of reproductive choice, the autonomous selection of timing and spacing of children, and access to safe, effective and affordable methods for family planning.[61] Remarkably, the Cairo Conference Report does not consider sex-selection within the framework of human rights when defining reproductive health.[62] The Document does, however, discuss the reasons behind the practice of sex-selective abortion and its possible solutions and the importance of changing, and methods to change, the ideology of "*son preference*."[63] In paragraph 4.16, subparagraph (a) of the Cairo Conference Report, it is written that an object of the Report is the elimination of all forms of discrimination against women and the grounds for son preference, as this leads to the unethical and painful practice of infanticide for the purpose of sex selection.[64] The consent of 179 states to implement the action program of the Report is a precondition for the establishment of legal grounds for the prohibition of sex-selective prenatal abortion.[65]

In 1995 the adoption of the Beijing Declaration strengthened the definition of reproductive health established during the Cairo Conference: "*the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence*."[66] The Beijing Declaration also calls on states, by adopting proper legislation and effective enforcement, to ensure measures against violent practices against women such as

[59] See: Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, UN Doc A/CONF.171/13/Rev.1.

[60] Cook J. Rebecca et al. Reproductive health and human rights (Oxford: Clarendon Press, 2003) 155.

[61] Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, UN Doc A/CONF.171/13/Rev.1, para. 7.2.

[62] Toebes, "Sex Selection under International Law", 209.

[63] Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, UN Doc A/CONF.171/13/Rev.1, Para. 4.15.

[64] Ibid., Para. 4.16.

[65] ICPD Beyond 2014 International Conference on Human Rights, Conference Report 2013, available https://www.ohchr.org/Documents/Issues/Women/WRGS/ICP_%20Beyond_2014_International_Thematic_Conference/Report_of_the_ICPD_Beyond_2014_International_Conference_on_Human_Rights.pdf accessed 20 January 2019, 3; See also: Westerman C. Pauline, "The disintegration of Natural Law theory: Aquinas to Finnis", Leiden: Brill (1997) 169; Orakhelashvili Alexander, "Natural Law and Customary Law", 68 HJIL (2008): from 69, http://www.zaoerv.de/68_2008/68_2008_1_a_69_110.pdf [accessed 8.05.2020]; Kokott Juliane, "States, Sovereign Equality", MPEPIL (2011): Section 24-, http://opil.ouplaw.com.proxy-ub.rug.nl/view/10.1093/law:epil/9780199231690/law-9780199231690-e1113?rskey=lNdjzq&result=1&prd=EPIL [accessed 8.05.2020]; The case of the S.S. Lotus Case (France v Turkey) (Merits) (Judgement) PCIJ Reports 1927 Ser A No10, 18; Hollis B. Duncan, "Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law" 23 BJIL (2005): from 137, http://scholarship.law.berkeley.edu/bjil/vol23/iss1/4 [accessed 29.12.2019]; Crawford James, Brownlie's Principles of Public International Law (8th, OUP 2012) 115.

[66] Toebes, "Sex Selection under International Law", 210; Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995, UN Doc A/CONF.177/20/Rev.1, para. 96.

prenatal sex-selection.[67] The extensive involvement of states in the implementation of the action plan may, at first glance, imply a dedication to preventing sex-selective abortion,[68] however, statistics show the problem is still acute in a number of countries. [69] I am far from believing that legal instruments alone can overcome this challenge without significant efforts to shift public opinion. However, the existence of powerful legal instruments will significantly intensify the fight against sex-selective abortion at both national and international levels.

## 2.3 The Treaty-Based Protection Mechanisms of the Right to Reproductive Health

International human rights treaties neither directly prohibit sex-selective abortion, nor do they codify it as a right.[70] A provision on the prohibition of sex-selection is found only in the Convention on Human Rights and Biomedicine. To discuss the problems related to international legal regulation of sex-selective prenatal abortion, it is necessary to determine whether any rights related to reproductive health indirectly include the right to choose a potential child's sex. The right to reproductive choice, which is an interconnected system of rights, includes the following: the right to independently determine the number, timing, and spacing of children, the right to private and family life, the right to liberty and security, the right to marriage and to establish a family, the right to protection of pregnant women, the right to health, the right to access information, and the right to benefit from medical advancements.[71]

The right most often proclaimed in the context of sex-selection is the right to privacy. Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women affirms the right to access information on education and family planning for the elimination of discrimination against women. This provision should not imply the right to receive information about sex.[72] According to both Article 19 of the International Covenant on Civil and Political Rights, and Article 10 of the European Convention on Human Rights, the right to access information in acquiring knowledge of the sex of a fetus does not align with the goal of preventing discrimination against women, nor to the practices of the Human Rights Committee or the European Court of Human Rights.[73] The correlation between the right to privacy and abortion can be seen clearly in the following instances: prohibition of requesting information from a doctor about an abortion they

[67] Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995, UN Doc A/CONF.177/20/Rev.1, Para. 124.

[68] Review and appraisal of the implementation of the Beijing Declaration and Platform for Action and the outcomes of the twenty-third special session of the General Assembly, 15 December 2015, UN Doc E/CN.6/2015/3, 3-14.

[69] UNFPA Asia and the Pacific Regional Office, Sex Imbalances at Birth: Current trends, consequences and policy implications, 2012, 26 https://www.unfpa.org/sites/default/files/pub-pdf/Sex%20Imbalances%20at%20Birth.%20PDF%20UNFPA%20APRO%20publication%202012.pdf [accessed 05.02.2020].

[70] Toebes, "Sex Selection under International Law", 215.

[71] Ibid.; Cook, "Reproductive Health"158,175.

[72] Toebes, "Sex Selection under International Law", 212.

[73] Dijk V. Peter et al. Theory and Practice of the European Convention on Human Rights (Antwerpen – Oxford: Intersentia, Fourth ed., 2006) 787.

have performed;[74] the prohibition of the denial of therapeutic abortion when necessary to protect the life of the mother.[75]

Considering the interrelationship between sex-selective prenatal abortion and the right to access information, several key circumstances arise. For proper family planning, access to information on all relevant services is essential, including in the context of pregnancy planning.[76] As previously mentioned, full and exhaustive access to information is essential for a woman to live with dignity. The availability of complete information on pregnancy and family planning is important at all stages of such processes. Significantly, information about the sex of the fetus is static and cannot be influenced or changed. Consequently, information about the sex of the fetus is not and cannot be, in a broad sense, considered an essential component of family planning. Given all this, if it is possible to prevent sex-selective abortion by nondisclosure of the sex of the fetus in the early stages of pregnancy, then it is advisable to postpone human curiosity for several weeks for the sake of the greater legal and humanitarian good.

## 2.4 Selective abortion as discrimination against women

Numerous human rights documents focus on the prohibition of discrimination. In particular, Article 26 of the International Covenant on Civil and Political Rights discusses discrimination on the grounds of sex; Articles 1 and 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as well as Article 5, paragraph (a), prohibit discriminatory practices in an attempt to challenge the stereotypical roles of women and men in society, including the elimination of malicious superstitions and customs.

The CEDAW Committee has repeatedly mentioned the alarming incidence of sex-selection in China within its practice of state reporting.[77] The UN Commission on the Status of Women has repeatedly raised the issue of sex-selective abortion, including through a draft resolution on its elimination, which was cast by the EU delegation, along with China, on the grounds of a possible threat that abortion in general may be prohibited.[78] General Comment No. 28 of the Human Rights Committee, in the context of equality between men and women, notes "*The subordinate role of women in some countries is illustrated by the high incidence of pre-natal sex selection and abortion of female fetuses.*"[79] Concluding observations released by the Committee on the Rights of the Child on the Second Periodic

[74] Supra n.13, General Comment 28, Para. 20.
[75] See: Karen Noelia Llantoy Huamán v. Peru, Communication No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003 (2005).
[76] International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3, Article 12.
[77] Toebes, "Sex Selection under International Law", 214.
[78] Ibid.; Draft resolution entitled 'Elimination of harmful practices of prenatal sex selection and female infanticide', UN Doc E/CN.6/2007/L.5.
[79] Human Rights Committee General Comment No.28: Equality of rights between men and women (Article 3) UN Doc HRI/GEN/1/Rev.6, Para. 5.

Report of India expresses concern about the sharp demographic imbalance that may be a result of sex selection.[80]

Violence against women as a human rights abuse is not controversial.[81] The CEDAW Committee, in its General Recommendation No. 19 on violence against women,[82] the UN General Assembly Declaration on the Elimination of Violence Against Women,[83] and the Inter-American Convention on the Prevention, Punishment, and Erradication of Violence Against Women,[84] all discuss the various forms of violence against women. None of these documents mention sex-selective abortion as a form of violence, however, in certain interpretations of these broad definitions sex-selective abortion may qualify as a form of violence against women.[85]

No international human rights treaty on discrimination directly prohibits sex-selective abortion, and therefore such treaties do not consider it in the category of discrimination. Reference of the treaty bodies to the discriminatory character of sex-selective abortion is worth mentioning, however, it is insufficient to tackle the real challenges facing the world on the issue. When the definitions of specific forms of discrimination against women are properly interpreted, in accordance with the interpretation of the rules established in international law,[86] sex-selective abortion should qualify as discrimination against women. According to the object and purpose of CEDAW,[87] and the context of its

[80] See: CRC, Concluding Observations: India, UN Doc. CRC/C/15/Add.228, 26 February 2004.

[81] Boerefijn Ineke, "Domestic violence against women in international human rights law", in Violence in the Domestic Sphere, ed. Ingrid Westendorp and Ria Wolleswinkel (Antwerpen/Oxford: Intersentia, 2005) 35–57.

[82] General recommendations made by the Committee on the Elimination of Discrimination against Women, http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm [accessed 05.02.2020].

[83] UN General Assembly, Declaration on the Elimination of Violence Against Women, adopted December 20th, 1993, UN Doc. A/RES/48/104.

[84] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (adopted 9 June 1994, entered into force 5 March 1995) http://www.oas.org/juridico/english/treaties/a-61.html [accessed 05.02.2020].

[85] Toebes, "Sex Selection under International Law"215-216.

[86] See: Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Articles 31-33; Competence of Assembly regarding admission to the United Nations (Advisory Opinion) (Admissions Opinion 2) I.C.J. Reports 1950, 4 Para. 18; Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad) (Judgement) I.C.J. Reports 1994, 6 para. 41; Hollis B. Duncan, "The Existential Function of Interpretation in International Law", in Interpretation in International Law, ed. Andrea Bianchi, Daniel Peat, and Matthew (Oxford Scholarship Online: April 2015): 5, http://www.oxfordscholarship.com.proxy-ub.rug.nl/view/10.1093/acprof:oso/9780198725749.001.0001/acprof-9780198725749-chapter-4 [accessed 05.02.2020]; Klabbers Jan and Orakhelashvili Alexander, The Interpretation of Acts and Rules in Public International Law (OUP 2008) 288; Bianchi Andrea, "Textual Interpretation and (International) Law Reading; The Myth of (In)Determinacy and the Genealogy of Meaning" in Making Transnational Law Work in the Global Economy— Essays in Honour of Detlev Vagts, ed. Pieter HF Bekker, Rudolf Dolzer, and Michael Waibel (CUP 2010) 34, 36; Gardiner Richard, Treaty Interpretation (OUP 2008) 189; Herdegen Matthias, "Interpretation in International Law" MPEPIL (2013): para. 1, http://opil.ouplaw.com.proxy-ub.rug.nl/view/10.1093/law:epil/9780199231690/law-9780199231690-e723?rskey=sxUBO5&result=1&prd=EPIL [accessed 05.02.2020].

[87] Villiger E. Mark, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff Publishers, 2009) 427.

adoption,[88] any action, which, in its form or content, is directed against women based on their sex, shall qualify as discrimination. Unlike the right to life of the fetus, the timing of which is contentious,[89] sex-selective abortion can be qualified as discrimination without consideration of the question of when the right to life of the fetus begins. Sex-selective abortion is discriminatory by its essence, since it denies a woman's right to life. Selective abortion does not mean the general termination of an unwanted pregnancy to end a specific life or potential life, but is the removal of an undesired female-sex fetus due to cultural, religious, or other social factors. Unlike abortion, the legality of which has not been called into question in this article, sex selective abortion is one of the most dangerous instruments used by perpetrators of violence against women.

The consequences of sex-selective abortion and its potential harm to women's rights has been discussed in previous sub-chapters. In summary, the problem exists in several directions:

- international human rights treaties do not provide for a direct ban on selective abortion;
- there is no effective international-level mechanism for the legal evaluation of the discrimination conducted through sex-selective abortion at the national level;
- the decisions of international institutions regarding sex-selective abortion do not provide clear interpretations;
- the international accountability of states to prevent sex-selective abortion is extremely weak;
- states' approach to prohibiting sex-selective abortion is inconsistent and erratic.

Since the problem of sex-selective abortion is acute in states with different cultures, histories, geographies, economies, and political conditions, it is difficult to provide any ready-made prescriptive solution.[90] However, it is clear that in the event of a ban on sex-selective abortion at the convention-level, many aspects of the legal angle of the problem would be resolved. In particular: An effective international legal mechanism to prevent sex-selective abortion would be established; Judicial practice would expand and explanations would be more tangible at the national level; Greater legitimacy would be given to the demand for international and non-governmental organizations to ban selective abortion at the national level; The level of public awareness would rise and move in the direction of banning selective abortion.

[88] Case of Certain Norwegian Loans (France v. Norway) (Judgment) I.C.J. Reports 1957, 9,24; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) I.C.J. Reports 1951, 15, 22-23; International Law Commission 'Draft Articles on the Law of Treaties with commentaries' YBI LC, 1966, Vol. II, 221.

[89] CESCR, General Comment 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4, adopted 11 August 2000; K.L. v. Peru, Communication No. 1153/2003, CCPR/C/85/D/1153/2003.

[90] See: Flood, "Is International Law on the Side of the Unborn Child?".

## 3. SEX-SELECTIVE ABORTION IN GEORGIA

In the country of Georgia, the imbalance of women to men exceeds the permissible norm, which, among other factors, may be attributable to sex-selective abortion. [91] Georgia is a party to all international agreements discussed in this paper. Therefore, domestic legislation reflects all commitments that the country bears after the ratification of such documents. The Council of Europe on preventing and combating violence against women and domestic violence is one of the fundamental international legal considerations for the prevention of selective abortion in Georgia, which the country ratified in 2017. In particular, Article 12 of the Convention obliges States to eliminate superstitions, traditions, customs, and other practices that promote stereotypical roles for women and men. Selective abortion is a phenomenon based on stereotypical notions of the role of women in society. In terms of Georgian legislation, article 133 of the Georgian Criminal Code criminalizes illegal abortion.[92] The Code does not define illegal abortion, however the Law of Georgia on Healthcare, Article 140, explains that abortion is permitted until the 12th week of pregnancy, while after the 12th week of pregnancy abortion is permitted only under certain conditions.[93] It is clear that neither the Criminal Code nor the Law on Healthcare provides complete information on what exactly constitutes illegal abortion. More details are found in a decree by the former Ministry of Labor, Health, and Social Defense, which defines the rules for artificial termination of pregnancy.[94] Annex 1, paragraph 2 states that abortion is illegal if it was conducted after the 22nd week of pregnancy, or between the 12th and 22nd week of pregnancy without sufficient cause. Notably, paragraph 14 repeats the prohibition of sex selection outlined in the Universal Declaration on the Human Genome and Human Rights. At the same time, no law prohibits the identification of sex at any stage of the pregnancy or conception, which increases the risk of sex discrimination.[95] In Georgia's case, there are problems in various directions:

- the state does not ensure effective implementation of legislation;
- sex-selective abortion is regulated by a Minister's decree, which lowers the legal value of any potential harm;
- the identification of the sex of the fetus is unregulated;
- anti-discrimination legislation does not recognize sex-selective abortion as a form of discrimination.

[91] Guilmoto Z. Christophe, "Trends in the Sex Ratio at Birth in Georgia- An Overview Based in the 2014 General Population Census Data"(2017) https://georgia.unfpa.org/sites/default/files/pub-pdf/4.%20SRB%20trends-GEO_%20Final.pdf [accessed 05.02.2020].

[92] Criminal Code of Georgia, 1999, https://matsne.gov.ge/ka/document/view/16426?publication=205 [accessed 08.02.2020].

[93] Law of Georgia on Healthcare, 1997, https://matsne.gov.ge/ka/document/view/29980?publication=41 [accessed 08.02.2020].

[94] Minister's decree, https://matsne.gov.ge/ka/document/view/2514236?publication=0 [accessed 08.02.2020].

[95] Darbaidze Eka, "Selective Abortion as the gendercide in Georgia" (2018) http://womensgaze.org.ge/2018/01/18/%E1%83%A1%E1%83%94%E1%83%9A%E1%83%94%E1%83%A5%E1%83%AA%E1%83%98%E1%83%A3%E1%83%A0%E1%83%98-%-%E1%83%90%E1%83%91%E1%83%9D%E1%83%A0%E1%83%A2%E1%83%98-%E1%83%A0%E1%83%9D%E1%83%92%E1%83%9D/ [accessed 08.02.2020].

## CONCLUSION

Discussing selective abortion is different than discussing other legal concepts or paradigms, as the topic addresses other components of reproductive and private life, a pregnant woman's health, as well as the possible realization of the right to life of the fetus and sex-based discrimination. This paper aimed to demonstrate the imperfections and inefficiencies of the international legal mechanisms regarding sex-selective abortion. The first chapter was devoted to a discussion of the legal status of the fetus and identifying abortion-related practices of human rights institutions. The purpose of this chapter was, on the one hand, to discuss the legal status of the fetus and, on the other hand, to introduce the practice of human rights institutions in relation to abortion. Clarifying the legal status of the fetus shed light on the possible directions in which to discuss the interpretations of the right to life of the fetus. Additionally, studying the practices of international institutions has revealed to what extent it is possible to discuss the right to fetal life in addition to discrimination when discussing sex-selective abortion.

The second chapter was devoted to discussions of the international legal aspects of sex-selective abortion. It began with bioethics, evaluated by those international treaties and documents, which emphasize either selective abortion or sex-selection. The next sub-chapter covered the right to reproductive health and the right to privacy. This research concluded that the right to gain information on the sex of the fetus is not absolute and legally delaying the possibility to identify a fetus' sex in the defense of a greater value does not violate the right to privacy, including the right to access information. The key thesis that has been gradually proven within this paper is that selective abortion is recognized as a form of discrimination. Studies of sources made it clear that there is a sufficient normative basis to qualify sex-selection abortion as discrimination. In the absence of consensus on this topic, the lack of direct prohibition of sex-selective abortions in international treaties significantly hinders changing established practices. It is worth mentioning that legal mechanisms are not the sole provision to solve the problem, although it would be impossible without an effective legal system. The main goal of this paper was to identify the flaws that rise to the surface within improper regulatory systems. Discussing the situation revealed that many challenges that currently exist may be overcome in the case that a prohibition of sex-selective abortion is raised to the convention level, especially since states have already willingly committed to declarations which prohibit sex-selective abortion.

Statistics referenced in this paper reveal the acute problem that is sex-selective abortion, including in Georgia. In a time when science is approaching artificial intelligence and its integration into daily life, the severity of sex-selective abortion may sound absurd. It is,