

Humanity and the Protection of the Unborn:

**A jurisprudential rationale for the furtherance of
the anthropological paradigm of International law**

by

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A thesis submitted in accordance with the requirements of the
Master of Law degree,
in the Faculty of Law, Department of Constitutional Law and Philosophy of
Law at the University of the Free State

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May 2008

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A recurrent, yet subterranean, theme in many of our case studies, is the way in which modern international law operates as an ethical frame, as a discursively and normatively structured site for the conduct of delimited ethical argument and the negotiation of legally codified ethical principles. This is not to reduce ethics to law, which leaves no basis on which to critique 'the law', but rather to see international law as an institutional locale in which established norms and privileged modes of reasoning condition social dialogue about existing and desired norms, a dialogue that includes claims about the right and the good.¹

¹ Christian Reus-Smit, "Society, Power, and Ethics", in *The Politics of International Law*, (edited by Christian Reus-Smit, Cambridge: Cambridge Studies in International Relations, 2004), 285.

Chapter 1

Introduction

Before entering upon the theme of this study in any detail, it would be apt to mention a comment by Carter, in the interests of furthering the debate on the legal protection of the unborn in international law. He stated that: “Criticism is the beginning of dialogue, and, in a vibrant democracy, dialogue is what citizens do.”² This idea gives an important impetus to the theme of this thesis. Dialogue on crucial issues, such as the legal protection and status of the unborn in international law, is worthy of acclamation as it provides an inclusive, sensitive and constructive atmosphere for serving humanity in a civilised and caring manner. This thesis does not pretend to be absolute regarding the legal status of the unborn. What it sets out to do is to critically present the other side of the coin on an issue that has not received the attention that it deserves. It is hoped that this work will serve as a catalyst towards the beginning (at least) of well-represented international contributions in the clarification of the legal status of the unborn in a spirit of seeking commonality on such an important issue. Even if commonality is not reached, or even if the prospects in this regard seem far-fetched, any improvement of the contemporary situation will be a step in the right direction. Solutions are not only observed in *substance* but also in an improvement of the *process* that endeavours sometime in the future, to achieve clarity on a specific issue.

It is important that the title of this thesis be properly understood. The word “humanity”³ indicates the importance of including the legal protection of the unborn. Humanity is an inclusive concept which also supports humaneness. What is emphasised is the fact that the current emphasis on humanity and the lack thereof in terms of the legal status of the unborn in international law contradict each other and that the legal position of the unborn does not

² Stephen L. Carter, *Civility: manners, morals, and the etiquette of democracy*, (New York: Basic Books 1998), 211.

³ “...one of the seven Fundamental Principles of the Red Cross and Red Crescent Movement. This principle is based on respect for the human being, is inseparable from the idea of peace, and sums up the Movement’s ideal. The other Fundamental Principles therefore derive from it. Humanity means being sensible of and sharing the suffering of others, and preventing and alleviating it. Its purpose is to protect life against violence...”, Pietro Verri, *Dictionary of the International Law of Armed Conflict*, (Geneva: International Committee of the Red Cross, 1992), 58.

comply with the requirements of humanity as contained in international law. The concept of humanity also points to a consideration of natural law as opposed to positivism (as primary source). International law must pursue a more in-depth investigation into the meaning of life and mankind and should also not take the varying life- and human rights-jurisprudence of domestic legal systems as a prioritised or absolute measure. Also, debates on the legal status of the unborn need to ascribe to basic humanity (humaneness). Several of these do not meet these requirements and are therefore irrational and cannot be tolerated in international law. One such example is the following: When one considers the methods of abortion, especially late-term abortion and the effect this has on the parties involved, the humaneness of these procedures are questioned. For example, “hysterotomy” is the name given to major surgery used to end a pregnancy during the second or third trimester. It should be noted that in many countries abortion is legal, right up to full-term birth. The method for aborting the late-term unborn is nothing other than a Caesarean section. It is called a “hysterotomy” if abortion is to take place and a “Caesarean” in the case of a birth. In either case, however, a live baby is likely to emerge. Cases have been reported in which living babies following failed abortion by “hysterotomy” have been disposed of while actually breathing.⁴ Such abortion procedures cannot be viewed as being in line with humanity (humaneness). If these procedures are determined to be legal, then a much-distorted view of what humanity means exists. It is irrational to regard such a procedure as acceptable to humanity.

The question remains: is there a social necessity for the law to adopt and protect minimal standards of what constitutes humanity?⁵ The basic argument for relaxing abortion laws relies on the notion that humanity is an ‘achievement’ which results from social interaction.⁶ Consequently, the real danger lies in the possible diminution of value and humanity accorded to the socially deprived among the born: the infant of six months, the spastic teenager, the adult in an iron lung, the woman in a wheelchair, the lunatic in an asylum, the convicted criminal, the recluse, the hermit. On the scales of social intercourse, the humanity of each of these individuals either never appears or registers only at inferior levels.⁷ The second reason for law to adopt minimum standards of what constitutes humanity is posed by Hare. He states that the loss of principles of humanity can have the following results: If we sanction contraception, why not abortion; and if abortion, why not infanticide; and if infanticide, why

⁴ Shettles and Rorvik, *Rites of Life*, (Michigan: The Zondervan Corporation Grand Rapids, 1983), 73.

⁵ R.J. Gerber, “Abortion: Parameters for Decision”, *Ethics*, Vol. 82, No. 2 (January 1972), 150.

⁶ *Ibid.*, 151.

⁷ *Ibid.*, 154.

not the murder of adults?⁸ Therefore, there is a social necessity to adopt minimal standards of what constitutes humanity in order to provide a sensitive approach to mankind in general and to provide some boundaries concerning human beings and the unborn to prevent atrocities such as those posed by Hare. The question of humanity is therefore very important in any debate concerning the legal status of the unborn because if humanity is not considered when it comes to the legal status of the unborn, the danger exists that such exclusion could extend to the born.

Positive glimpses lurk beneath the surface where abortion jurisprudence gives some indication as to the importance of adherence to principles of humanity. In the case of *Vo v. France*⁹, the court observed that since the unborn has the capacity to become a person and in some states is protected, it requires “protection in the name of human dignity, without making it a ‘person’ with the ‘right to life’ for the purposes of Article 2¹⁰.”¹¹ Also, consideration of the requirements of humanity (as humaneness) is important in light of the fact that uncertainty as to the legal status of the unborn exists. In other words, since it is not sure and it has not been agreed upon whether and to what extent international law provides legal protection to the unborn, humanity would rather grant the unborn legal protection than deny it. This is true because, in light of the fact that the possibility still exists that the unborn could be provided with legal protection in international law, humanity would rather follow a safe approach when it comes to “human beings” than run the risk of allowing the death of thousands of unborn, which possibly have legal protection. This emanates from humanity’s view of the “human being” as being unique and worthy of legal protection and respect.

Finally, humanity plays a central role in causing superpowers, by way of their conscience, to refrain from doing anything justified merely by nationalism and state interest. This is done by way of the application of theory, scholarship, research and any rational activity with regard to a jurisprudential issue. One such issue is that of nuclear weapons, for example. Although the International Court of Justice stated in *The Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*¹² that because of Article 51 and the right to self-defence,

⁸ R. M. Hare, “Abortion and the Golden Rule,” *Philosophy and Public Affairs*, Vol. 4, No. 3, (Spring 1975), 216.

⁹ *Vo v. France*, 53924/00, Eur. Ct. H.R., 8 July 2004.

¹⁰ Reference is made to Article 2 of the European Convention.

¹¹ Rosamund Scott, “The English Fetus and the Right to Life”, *European Journal of Health Law*, Vol. 11, (2004), 352.

¹² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 36, ICJ, 8 July 1996.

such weapons cannot be prohibited altogether if the threat or use of nuclear weapons meets the requirements of self-defence; yet the court also considered the view that the use of nuclear weapons cannot be reconciled with international humanitarian law due to fundamental principles of humanity. Therefore, the court basically stated that the use of such weapons is contrary to humanity and is prohibited in almost all circumstances, except where requirements of self-defence are met. It may thus be assumed that humanity plays a central role in prohibiting superpowers, by way of their conscience, from using nuclear force for reasons such as nationalism and state interest. This is done by convincing them through the application of research, theory and scholarship of the effects of the use of nuclear weapons - in other words, the establishment and application of representative jurisprudential platforms for further discussion. The international community came together to discuss and is still busy discussing the matter of nuclear weapons. A great deal of active debate and writing exists on this matter, which helps to convince states not to use nuclear weapons. Much scholarship and research on nuclear weapons and its effects are therefore undertaken to convince states not to use these weapons. This debate is evident from the *The Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*¹³. Similarly, rational scholarship and debate on the legal status of the unborn in international law, considered together with the requirements of humanity, should also be encouraged and can be of great value in moving states to attempt rational platforms to determine the legal position of the unborn. Such scholarship and theory will cause humanity to play a central role in moving states to attempt substantial rational debate on the legal status of the unborn. Similarly, humanity will then play a central role in that states will not have a choice but to take part in such active debate. Therefore scholarship and research, considered in light of the requirements of humanity, will assist in moving states towards rational platforms on the legal status of the unborn.

The word “anthropological” is a rather objective term which refers to the study of man and the unborn in the context of life, humankind and humanity. It is an ideal term since it is holistic and includes several areas of concern. The vastness and inclusiveness of the field of anthropology is paramount to rational debate on a topic of such a complex nature, especially regarding concepts such as “the unborn”, “human being” and “life”. Anthropology therefore directly relates to the question at hand: “What is man”? It may assist in answering this question and may be advantageous because it requires an answer which explains as much as

¹³ Ibid.

possible of the known facts and conflicts with none; perhaps even that it explains all known facts and entails new ones. Most philosophers agree that a theory of man should, at the very least, not conflict with any known facts. In the case of philosophical anthropology at least, theory can scarcely conflict with facts.¹⁴ Thus, the study of anthropology is important in answering the question of “what is man?” and therefore also in determining whether the unborn is included in the concept of “man”. Furthermore, anthropology will require an approach that is not irrational, thereby providing one with a rational and accommodative basis to approach the legal status of the unborn. Also, it is clear from the study of anthropology that the concept of life is also culturally defined and subject to different interpretations. Peoples and Bailey explain this by stating that birth, childhood, physical/sexual maturation, marriage, adulthood, old age, and death of an individual (constituting stages in his/her life cycle) carry certain cultural expectations; and as individuals move through these stages their overall status and role in society changes. All societies recognise at least three major distinctions in the life cycle: childhood, adulthood, and old age, but it is also important to recognise that people vary in how they conceive of these stages and in how transitions from one to the other are recognised and marked.¹⁵ Therefore, the question is also asked whether attempts towards a universal rationality on the legal status of the unborn are possible in light of the fact that “life” and “human being” are culturally and ideologically defined. For example, one of the most striking facts when studying a wide variety of cultures is the ease with which abnormalities in western culture function as normal in other cultures. There are cultures in which the abnormalities of sadism, for example, are normal.¹⁶ In other words, the most spectacular illustrations of the extent to which normality may be culturally defined are those cultures where an abnormality of our culture is the cornerstone of their social structure.¹⁷ The same applies to the concept of a human being. What western society considers to be a normal human being may be considered abnormal in another culture. A normal action will therefore be one that falls well within the limits of expected behaviour for a particular society.¹⁸

A human being will thus be that which falls within the limits of what is expected in a

¹⁴ Joseph Agassi, *Towards a rational philosophical Anthropology*, (The Hague: Marinus Nijhoff, 1977), 363.

¹⁵ Peoples and Bailey, *Humanity: An Introduction to Cultural Anthropology*, (St. Paul: West Publishing Company, Second Edition, 1988), 325.

¹⁶ Ruth Benedict, “A defense of Ethical Relativism,” in *Life and Death: A reader in moral problems*, (edited by Louis P. Pojman, Belmont: Wadsworth Publishing Company, Second Edition, 2000), 38.

¹⁷ *Ibid.*, 39.

¹⁸ *Ibid.*, 41.

particular society, a phenomenon also known as “ethical relativism”. This theory holds that whether or not it is right for an individual to act in a certain way depends on or is relative to the society to which he belongs.¹⁹ Such different views on life force one to think that a rational platform on the legal status of the unborn may be impossible. However, as is explained later, rationality does not require absolute neutrality and objectivity.²⁰ It merely requires that international law should come together in an impartial and inclusive way, even though life is culturally defined. Agassi states that man cannot be defined by referring to one criterion only.²¹ Rather one should offer a general view of man, an overview, a metaphysical foundation for the various sciences of man.²² Therefore, the law as discipline cannot escape the relevance of anthropology against the background of jurisprudence on the legal protection of the unborn.

The use of the word “*unborn*” rather than “*foetus*” or “*embryo*” also needs special mention. Although the use of the word “unborn” may be partisan, the use of the word “foetus” may be just as partisan. Although the writer is of opinion that the “entity from the period of conception²³” should be considered a human being (hence the use of the word “unborn”), an

¹⁹ Louis P. Pojman, “A Defense of Ethical Objectivism,” in *Life and Death: A Reader in Moral Problems*, (edited by Louis P. Pojman, Belmont: Wadsworth Publishing Company, Second Edition, 2000), 45. Pojman states that ethical relativism is different from subjectivism. Subjectivism holds that individual choice (and not culture) determines the validity of a moral principle. According to Renteln, cultural relativism was an important development insofar as it encourages cross-cultural understanding and tolerance of differences. It contains a more or less implicit value judgment in its call for tolerance: it asserts that we ought to respect other ways of life, Alison Dundes Renteln, “The Unanswered Challenge of Relativism and the Consequences for Human Rights”, 521.

²⁰ See pages 105-106.

²¹ Joseph Agassi, *Towards a rational philosophical Anthropology*, 24.

²² *Ibid.*, 24-25.

²³ Differences in opinion exist on the meaning of “conception”. Alston states that it is often assumed that the unborn should be protected from the moment of “conception” or “fertilisation”. He adds that the concepts “fertilisation” and “conception” are not identical. “Fertilisation” refers to the union of ovum and sperm which can take place shortly after intercourse. “Conception” is defined as occurring only at the time of implantation in the uterine mucous, a process not completed until around the fourteenth day after fertilisation, P. Alston, “The Unborn Child and Abortion under the Draft Convention on the Right of the Child,” *Human Rights Quarterly: A comparative and International Journal of the Social Sciences, Humanities, and Law*, Vol. 12, (1990), 173. It must be remembered that conception as being the time of implantation means that implantation and therefore conception will occur about six to ten days after fertilisation and the zygote is already well on its way in the process of development by the time this occurs, Michelin M. Mathews – Roth, “Facing Scientific Facts”, *Social Science and Modern Society*, Vol.19, (1982), 69. However, implantation is not achieved in a matter of minutes or hours. It is a process that continues for several weeks. The embryo begins to derive nourishment from the mother almost immediately. It does this by soaking up nutrients from small blood vessels that burst as it digs into the uterine wall. So rich are these nutrients that for several days, the embryo more than doubles in size every twenty-four hours, Shettles and Rorvik, *Rites of Life*, 41-42. Ibegbu however, does not accept these changes in the term conception, dissociating it from fertilisation and associating it with implantation. Ibegbu states that traditionally conception marks the beginning of pregnancy and is identified with fertilisation, Jude Ibegbu, *Rights of the Unborn Child in International Law*, (Lewiston, Queenstown and Lampeter: The Edwin Mellen Press, 2000), 6. Furthermore, it is stated that the reason behind this change is to justify medically and

attempt is made not to impose the views of the writer on anyone. This choice of word is made for practical reasons (to avoid the use of multiple words to explain one concept) and to avoid having to negotiate the purpose of this thesis. Furthermore, the word “unborn” denotes “that which is yet to be born”, and it refers to the whole term of pregnancy because it does not distinguish between the embryo (the name given to the unborn from conception up to eight weeks) and the foetus (the name given to the unborn eight weeks after conception). It can therefore include the concepts of “zygote”, “embryo” and “foetus”. Ibegbu²⁴ agrees with the use of the word “unborn” in that it includes all the different stages of development. Furthermore, Ibegbu includes the definition of *Black’s Law Dictionary* of the unborn as “the individual human life in existence and developing prior to birth.”²⁵ By not distinguishing between the different stages of pregnancy it can be assumed that this definition also supports the view that the term “unborn” should include the whole period of pregnancy.

Furthermore, Ibegbu²⁶ mentions that authors such as Erikson state that the word “unborn” points to an assumption that the child born and the unborn child are considered to be children. Therefore, they are not distinguished as one being a human being and the other not, but are merely distinguished as one being born and the other not. According to Erikson, to avoid this, the word “unborn” should therefore only be used to define the viable foetus.²⁷ This view is not necessarily true. The choice of words (as stated before) is made for practical purposes only in this work. It would be unfair to consider that reference to the word “unborn” instead of “foetus” is necessarily partisan. If the use of the word “unborn” is considered partisan, the use of the word “foetus” will also be partisan because the use of the word “foetus” to describe the unborn arbitrarily assumes the unborn to be protected from 8 weeks after conception.²⁸

ideologically early abortion of the unborn on the grounds that before implantation of the zygote, no human being is present and consequently there is no crime in abortion. Such reasoning is a mere play on words, *ibid.*, 5. The other view on the meaning of conception is that conception identifies with fertilisation. They can be used interchangeably. They are both defined as meaning the time of the fusion of the egg cell and the sperm cell, Micheline M. Mathews-Roth, “Facing Scientific Facts”, *Social Science and Modern Society*, Vol. 19, No. 4, 69. It is the opinion of the author that, whatever and whenever we call conception or implantation, what should be looked at are biological facts. The legal status of the unborn should not be determined by how terms are being used and to which specific period a term applies. Whether conception applies to fertilisation or implantation does not change the biological processes by which the unborn develops: it is a mere change in terms. However, the use of the word conception as being identified with fertilisation is a use rich in historical background and it seems as though the change of the use of the word “conception” does have an ulterior motive when it comes to the legal status of the unborn. This motive seems to be the attempt to justify abortion by way of playing with scientific terms.

²⁴ Jude Ibegbu, *Rights of the Unborn Child in International law*, 3-4.

²⁵ *Ibid.*, 3.

²⁶ *Ibid.*, 1.

²⁷ *Ibid.*, 2.

²⁸ The foetal stage only begins after the eighth week of gestation, Donald Hope, “The Hand as Emblem of

Therefore, if the word “foetus” may be used, then the word “unborn” may also be used.

To return to the topic, the word *rationale* refers to *logical* or *reasoned* thinking and debate, and it also supports the effort to propose a *procedural* and *substantive* platform for further debate on the legal status of the unborn, which could provide common ground among the international community, regardless of diversity.²⁹ Furthermore, the nature of international law necessitates a rational discussion on the legal status of the unborn - even more so in light of the fact that there have been no substantial developments on this issue in contemporary international law. A detailed account of what this concept entails, however, follows in Chapter 3.

With regard to the use of the phrase “international law”, it should be emphasised that the author does not primarily mean “foreign law”. Foreign law refers to the constitutions, statutes, regulations and judicial decisions of a foreign country. International law, on the other hand, refers to treaties, customs of nations, general principles of law and the decisions made by international organisations if they are empowered.³⁰ International law is defined as a body of rules and principles which are binding upon states in their relations with one another. After the Second World War, for instance, numerous treaties were signed extending the protection of international law to individuals.³¹ Foreign law therefore refers to the study of the legal systems of different countries, while international law involves the study of the body of laws governing international relations. Thus, when using the phrase “international law”, reference is not made to each country’s perspective on, for example, the fundamentals of humanity. In other words, reference is not made to the relative views of one state to the next – in other words, foreign law. Furthermore, reference is also not primarily made to that part of international law concerning mere relations or bodies of rules between states alone.

Human Identity: A solution to the abortion controversy based on science and reason”, *University of Toledo Law Review*, Vol. 32, Number 2, (2001), 205.

²⁹ In its document, *Identità e statuto dell’embrione umano* the *Università Cattolica del Sacro Cuore Facoltà de Medicina e Chirurgia “A Gemelli” Roma, Centro di Bioetica, Medicina e Morale*, dealt with the legal protection of the human embryo in a multidisciplinary manner. In support of a rational platform the Board states: “This topic in itself, apart from any contingent context, questions man’s self-comprehension, his responsibility towards the unborn child and the human rights to equality and to non-discrimination, which are internationally recognized for all individual human beings...The Board of Directors has decided that the result of these considerations should be concentrated in the present document, *to offer the opportunity for dialogue and for a deeper understanding*,” (emphasis added), Jude Ibegbu, *Rights of the Unborn Child in International Law*, 509.

³⁰ Professor Sean D. Murphy, *Using international and foreign law as a part of U.S. law*, <http://66.102.9.104/search?q=cache:3JWeyHXvhnEJ:www.asil.org/docs/murphyweb060309.ppt+difference+between+Foreign+law+and+international+law&hl=en&ct=clnk&cd=2&gl=za> (accessed 26/02/2008).

³¹ John Dugard, *International law: A South African Perspective*, (Cape Town: Juta, Second Edition, 2000), 1.

After World War II international law moved away from simply being agreements and rules between states, and now involves human rights and humanitarian requirements serving as rules applicable to all states and also applicable to the relationship between each state and its individual citizens. Thus, international law has moved beyond the juxtaposition of equally sovereign states seeking, irrespective of their differences, the guaranteeing of their peaceful coexistence and cooperation. Especially since World War II the emphasis on universals in the form of the protection of fundamental human rights, has introduced a morality or an ethical measure into international law that transcends the purposes of peaceful existence, heralding an international legal system that exhibits a moral conscience inextricably linked to benevolence, humanity and humaneness. It is through this corridor that the jurisprudential consideration should take place regarding the legal protection of the unborn. It would have been a better state of affairs if one could speak of a *reconsideration*, but this is not the case. The upside is that this provides a sense of added urgency to the matter, and that delaying this process would mean taking many steps backwards regarding man's sensitivity towards his/her own. Jenks observes that the founders of modern international law, Vitoria, Suarez and Grotius, proceeded each in their several ways upon the hypothesis that "the individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that the development, the well-being and the dignity of the individual human being are a matter of direct concern to international law".³² According to Jenks, even writers who have denied individuals any status in international law have dealt in detail with rules of international law designed for their protection.

Oppenheim, for example, without conceding (like Westlake) that men are the ultimate subjects of the law, states very clearly that "the individual is often the object of international regulation and protection", and this statement has been elaborated by his editor into the proposition that "individuals are the ultimate objects of international law, as they are, indeed, of all law".³³ Referring to the fundamental and foundational international instruments such as the *European Conventions for the Protection of Human Rights and Fundamental Freedoms*, and the *International Covenant on Civil and Political Rights*, Jenks states that a legal system in which such rights increasingly hold a central place has evolved far in the direction of a

³² C. Wilfred Jenks, "The Scope of International Law", *British Yearbook of International Law*, Vol. 31, No. 1, (1954), 5.

³³ *Ibid.*, 33.

common law of mankind – it is no longer a law between states only and exclusively, but a law which embodies guarantees of individual rights which are simultaneously national and international in character and are enforced by both national and international procedures.³⁴ These observations by Jenks are pointers to the importance of the jurisprudential progression of the legal status of the unborn in an international law context. The emphasis here is on the individual, on the origins of the human being himself or herself, something that transcends the realist perception of international law as a law limited to peacekeeping and self-interest.

It should be kept in mind, and also indicative of the terms used in the title of this thesis, that this work is for a great part *idealistic* in nature. Since World War II, human rights have become idealistic in nature. This is because the achievement of human rights contains the elements and virtues of love, equality and benevolence and good for all mankind. However, experience shows that, although human rights exist, these virtues are not always the reality. Since this study also leans towards an idealistic approach (even though it has a realistic element to it), the difference between realism and idealism needs to be discussed. Griffiths discusses Berki's analysis of idealism and realism. Realism contains two dimensions, namely prescription and description or advocacy and ontology. "Necessity, not freedom, is the appropriate (realistic) starting-point for understanding international politics. A precarious form of order through the balance of power, not justice..."³⁵ Realism is the recognition of and respect for limits in terms of ends and the means to achieve them.³⁶ Idealism may take two forms: nostalgia (the evaluative reification of the past), and imagination (the reification of the future, a characteristic of chiliastic thought.)³⁷ Idealism is the striving towards unitary understanding, which presupposes the autonomy of either referent not as a dimension of political reality, but as its essence.³⁸ Also, ancient idealism was opposed, not to physical or mathematical science, but to the laxity of common sense.³⁹ Therefore, the nature of this thesis supports an idealistic approach, one in which there is striving towards unitary understanding. Virtues of justice, equality and benevolence are essential to this investigation and constantly considered. Furthermore, this thesis considers the results of the past and contemplates what can be done in the future. An investigation of this kind necessitates

³⁴ Ibid., 35.

³⁵ Martin Griffiths, *Realism, Idealism and international politics: A reinterpretation*, (London: Routledge, 1992), ix.

³⁶ Ibid., 26.

³⁷ Ibid., 16.

³⁸ Ibid., 30.

³⁹ Ralph Barton Perry, *Present Philosophical tendencies*, (New York: Longmans, Green and Co., 1925), 115.

coverage of various sources of international law and human rights, as well as a strong philosophical and scientific angle. How this approach is followed in each chapter will be discussed briefly.

The investigation commences in Chapter 2 by indicating that international law neglects the legal status of the unborn. Several international treaties, case law, documents and writings are investigated to prove that international law has very little to say on the unborn. Together with international instruments, a study is also made regarding different jurisprudential views on the unborn. This is important to obtain an idea of the different feelings and views that exist among the States Parties who are the subjects of international law. Also, the two major ideological undertones evident from some of these international legal instruments are feminism and liberalism. The two ideologies overlap and flow from each other. The different arguments used in these ideologies to determine the legal position of the unborn in states will be investigated and shown to be open to improvement. The following topics are also investigated as contra-logical indicators, showing that the current international position of the unborn is illogical and arbitrary: Animal rights, rights *per se*, feminism, criminal law approaches, medical ignorance/science, and life *per se*. Animal rights are dealt with in order to show that international law prioritises entities other than the unborn, entities which in fact should have a lower status in the hierarchical order of living organisms. Although no international instrument exists on animal rights, there is a movement currently under way to campaign for an international instrument to protect animals.

Several regional instruments exist (especially in the European Union) that protect animals. This amount of protection and development is then compared to the amount of protection or lack thereof provided to the unborn. When viewing the difference in legal protection provided to the unborn as compared to animals it becomes clear that international law is inconsistent in its claims regarding humanity and the protection of mankind. However, one also needs to be appreciative of the positive glimpses lurking beneath popular debate on the legal insight regarding life, as well as the rights of the woman and the child, which point towards the importance of the unborn. The legal status that the unborn enjoy in contemporary human rights jurisprudence confirms that the unborn are not totally excluded from legal protection. For example, in the European Court of Human Rights judgment of *Vo*

*v. France*⁴⁰, Judge Costa (in a separate opinion) declared that the present inability to reach consensus on what a person is does not prevent the law from defining these terms, for it is the task of judges to identify the notions that correspond to the words in the relevant legal instruments.⁴¹ In this regard it has also been commented that the institutions of the European Convention on Human Rights have not ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child – “that is what appears to have been contemplated by the Commission (of the said Convention) in considering that ‘Article 8 (1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother’”.⁴² In *Vo v. France*⁴³ the issue was whether, apart from cases where the mother has requested an abortion, harming a foetus should be treated as a criminal offence in the light of Article 2 of the said Convention (with a view to protecting the foetus under that Article).⁴⁴ In this regard, Mowbray states that:

On a general level, I believe (in company with many senior judicial bodies in Europe) that there is life before birth, within the meaning of Article 2, that the law must therefore protect such life, and that if a national legislature considers that such protection cannot be absolute, then it should only derogate from it, particularly as regards the voluntary termination of pregnancy, within a regulated framework that limits the scope of the derogation.⁴⁵

Also note Judge Ress’s dissent in the *Vo v. France* judgment namely:

Historically, lawyers have understood the notion of ‘everyone’ as including the human being before birth and, above all, the notion of ‘life’ as covering all human life commencing with conception, that is to say from the moment an *independent existence* develops until it ends with death, birth being but a stage in that development.⁴⁶

In addition, the dissenting opinion of Mularoni states:

Although legal personality is only acquired at birth, this does not to my mind mean that there must be no recognition or protection of ‘everyone’s right to life’ before birth. Indeed, this seems to me to be a principle that is shared by all the Member States of the Council of Europe, as domestic legislation permitting the voluntary termination of pregnancy would not have been necessary if the fetus was not regarded as having a life that should be protected. Abortion therefore constitutes an exception to the rule that the right to life should be

⁴⁰ *Vo v. France*, 53924/00, Eur. Ct. H.R., 8 July 2004.

⁴¹ J. Pichon, ‘Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment *Vo v France*’, *German Law Journal*, Vol. 7, No. 4, (2006), 437.

⁴² Alastair Mowbray, ‘Institutional Developments and Recent Strasbourg Cases’, *Human Rights Law Review*, Vol. 5, No. 1, (2005), 173.

⁴³ *Vo v. France*, 53924/00, Eur. Ct. H.R., 8 July 2004.

⁴⁴ Alastair Mowbray, ‘Institutional Developments and Recent Strasbourg Cases’, 174.

⁴⁵ *Ibid.*, 176.

⁴⁶ *Ibid.*

protected, even before birth.⁴⁷

Another positive development towards the legal protection of the unborn is that of the banning of partial-birth abortion in the United States of America. The Partial-Birth Abortion Act⁴⁸ prohibits partial-birth abortions, with the statute being signed into law by President George W. Bush on 5 November, 2003. In this case the court was required to consider the validity of the Partial-Birth Abortion Ban Act, a federal statute regulating abortion procedures. The said Act defines a partial-birth abortion as the child's body being delivered, while the head remains in the womb. The skull is then punctured and the brains sucked out.⁴⁹ The law was upheld in the case of *Gonzales v Carhart*,⁵⁰ handed down on 18 April 2007. The court stated that the Act does not impose an undue burden on a woman's right to abortion. The majority opinion held that "ethical and moral" considerations, including an interest in foetal life, represented 'substantial' state interests and as long as these interests did not impose an 'undue' burden they could be a basis for legislation at all times during pregnancy. Although the said Act prevents a method of abortion rather than abortion itself, it is a positive step towards respecting humanity in the wide sense, which includes the legal protection of the unborn. It remains rather ironic that amidst positive developments in international human rights regarding the protection of the rights of the woman, as well as the importance of the protection of the child, no formal international structure has been established in order to at least address the rather contentious issue related to the legal status of the unborn. Therefore, although international law exhibits recognition of human rights (and more specifically women's and children's rights), international justice, animal rights and the reverence for life, the fact remains that even in the light of positive developments in contemporary international law jurisprudence and in international organisational processes, the clarification of the legal status of the unborn has been neglected. This thesis will consequently critically highlight this neglect.

⁴⁷ Ibid., 177. These observations were taken from Shaun A. de Freitas, "Humanity, the Unborn and the Intersection of International Humanitarian Law and Human Rights Law," *African Yearbook on International Humanitarian Law*, (2007), 48-49.

⁴⁸ Partial- Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2000 ed., Supp. IV).

⁴⁹ The Partial-Birth Abortion Ban Act describes the method of abortion it prohibits as follows: "The term 'partial-birth abortion' means an abortion in which the person performing the abortion – (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus..." The Partial-Birth Abortion Ban Act: 1531(b) (1).

⁵⁰ *Gonzales v Carhart* 550 US (2007).

The foundational chapter (Chapter 3) will deal with the issue of “rationality”. In view of the conclusion drawn that international law is silent on the status of the unborn (in Chapter 2), the need for a rational argument to justify the present position of the unborn, or at least an effort towards a rational argument, is argued. Rationality is also relevant because it supports the effort to propose a *procedural* and *substantive* platform for further debate on the legal status of the unborn, which can provide common ground among states, regardless of any diversity. Such common ground will not attain the status of perfection; however there will at least be an improvement to the current situation. Although there is no agreement as to what is rational, this does not mean that a universal rationality does not exist at all, nor does it imply ignorance based on the mere fact that common-ground rationality is so hard to obtain.

One could ask why a rational argument should be viewed as the answer to the lack of substantial development in international law on the legal status of the unborn. The reasons for the use of this method of jurisprudence are discussed below. The need for some commonality among states is argued, even though such commonality might be very abstract or general. In light of the search for some commonality, one is aware of the relativist traditions among states as each state has different laws regarding the unborn and abortion. However, these cultural and legal differences have to be patiently examined and an effort towards a common rationale must be made. Rationality is also the most favourable method in issues of sensitive consequence such as abortion. The reason for this is that rationality does not support a mere technical approach to abortion and also because a technical approach is insufficient for an issue of this kind. By technical is meant an exclusive content or procedure, as well as a too literal or positivistic approach. The tension between a universal and a relativist approach on the legal status of the unborn automatically gives rise to the discussion between natural law and positive law as these issues are interlinked. It will be shown that natural law supports a universal rational jurisprudence as opposed to the relativist and technical approaches of positive law - although a rational approach also has a positive element to it. It will become clear that an absolutistic natural approach is not proposed, although natural law thought plays an important role in the pre-legal (in the conventional sense) context. In other words when it comes to the justification of an axiomatic point of departure pertaining to the importance of a fair, inclusive and sensitive approach, one would have to rely on the natural law side of the jurisprudential ideological spectrum. In the search for a rational jurisprudence, some concepts used to determine the legal status of the unborn will be investigated and argued to be irrational, arbitrary and without justification.

The first of these is prone to ideological interpretation, including the claims of states that the legal position of the unborn is to be determined solely by 'human rights'. In this thesis, the use of human rights as a negation of the legal status of the unborn is argued to be arbitrary and not adequately and rationally justified. Human rights are applied to "human beings", yet there is no consensus as to what this term "human being" entails. This creates a legal and moral dilemma in the application of the widely granted human rights (not to say that this is a simple issue). In other words, a liberal approach is followed in granting "human rights" in international law, yet that to which they must be granted and applied is not properly identified. In order to be rational therefore, anthropology and humanity have important roles to play. If the end of all law is the human being, and if it is critical for our understanding of international and human rights law to see how it can protect the individual, then it is also important to understand what is meant by the concept of "human being", coupled with the required protection. Thus, anthropology and humanity are paramount in this investigation. This is confirmed by the law's respect for human life and the promotion of health and dignity for all. The second of these ideologies is that of the "life" or "sanctity of life" issue. Similarly, no justification as negation of the protective legal status of the unborn exists regarding the ideology based on life. However, an approach is considered that will include the concepts of "human rights" and "life", but these will not be regarded as the sole factors to be considered in attempts to achieve universal platforms on the legal status of the unborn. Rationality therefore supports getting into the mode of active debate on the issue although a final/absolute solution is not sought. What is presented is the possibility of ascribing to some common ground on the legal status of the unborn in international law. This would not only be the most rational thing to do, but also the most humane.

Bearing in mind that at international level it is exactly the differences between states that results in cooperation and interaction, one would expect more involvement, discussion and establishment of forums to further the debate on the legal status of the unborn. The legal protection of the unborn is however at the vanishing point of international law. Science, technology, commerce and man's quest to live a more comfortable life free of disease and over-population has diminished the optimism that might have existed regarding the legal status of the unborn. Since there is no development towards such procedures in international law, the situation of silence provides a contradiction within international law, human rights instruments and jurisprudence, which will be clearer below. This however requires critical

investigation, especially taking into consideration that because the principle of “humanity” opens a broad and almost incalculable field of action, it implicates the need for further expounding and elucidation of the legal status of the unborn in international law.

Science presents the facts of abortion and the development of the unborn. This is important to this study since it presents a factual basis for argument: facts that cannot be changed and that have to be considered. When the biological structure and development of the unborn are known, these facts support consideration and sensitivity towards the unborn. The importance of these facts is that they cannot be manipulated and no argument can be made to make them fit into specific social and political patterns. This is not to say, however, that science is truly objective and neutral, because all science also rests on ideological foundations. However, the assistance of science should receive more attention than it is receiving at present. Science is a measure (not *the* measure) that can shed more light on complex jurisprudential and ethical issues such as the legal protection of the unborn. Grey areas still exist in science, but the fact remains that science presents an opportunity to be rational about a clearer determination of the legal status of the unborn. When dealing with science and the legal status of the unborn, one must also bear in mind potential weaknesses in scientific postulations regarding clarity on the legal status of the unborn. In this regard, viability stands out like a sore thumb. It will also be argued that conception as the start of life is most rational and should not be arbitrarily excluded from the debate.

Contemporary international law neglects the legal protection of the unborn. In the light of current developments in terms of humanity and human rights in international law, the absence and neglect of the legal protection of the unborn is a glaring contradiction. An investigation is therefore made to prove that an endeavour towards more clarity and rationality is needed for the legal protection of the unborn, taking as many rational factors and common ground as possible into consideration. This thesis attempts to consider all conflicts in concepts and all diversity in states to propose that there is hope for a minimum and common morality regarding the status of the unborn. An absolute solution to the contents of this minimum morality is not sought, but what is rather presented is the fact that such a minimum morality on the status of the unborn and its protection needs to be sought after in both substance (of law) and in fair procedure (regarding the law). Bearing the above in mind, the aim of this investigation is the furtherance of a constructive and positive jurisprudential argument towards the establishment of a fair and just degree of protection of the unborn in international

law. A positive development in this regard will be witness to a civilised approach and sensitivity to filling in the gaps in the genus of humanity. Civility in a global perspective will be further attained regarding the need for discussion on the origins of mankind, humanity and life. Irrespective of the determination of the precise point during pregnancy at which the unborn becomes human or lives or is seen as an important biological organism, there is no reason why the unborn (in a general sense) do not explicitly form part of the genus of humanity for purposes of international law and human rights.

The unique contribution of this thesis (that which makes it different and necessary), if not evident from the overview given above, will become clear as the work progresses. However, it is appropriate to discuss it briefly at this point.

One of the most controversial debates in current legal issues involves the legal status of the unborn and the legality of abortion⁵¹. So much has been written on the legal status of the unborn and abortion that yet another thesis on this matter may seem excessive, especially in light of the fact that Jude Ibegbu⁵² (2000) writes extensively on the legal protection of the unborn in international law. Detailed research was done on the legal protection of the unborn in several international legal provisions and also in the science field. Furthermore, Patrick J. Flood⁵³ (2007) discusses the legal status of the unborn in international law. He considers the different legal instruments at face value, but due to the nature of his Article, excludes a more philosophical approach to the legal position of the unborn in international law. This thesis concentrates to a large extent on international jurisprudence involving the unborn: there is much room for research and jurisprudence in this area of law. A unique approach is offered as the work advocates attempts towards universal rational platforms on the legal status of the unborn in international law. What is suggested is the bringing together of several disciplines and ideologies to create a rational substantive and procedural platform for further discussion on this matter – a platform which has, according to the research done for this thesis, been

⁵¹ The word ‘abortion’ is derived from the Latin word, *aboriri*, meaning ‘to die, disappear’. Abortion means: (1) Induced termination of a pregnancy before the foetus is capable of survival. (2) Any fatally premature expulsion of an embryo or foetus from the womb. The Latin, *abortare*, is the frequentative of *aboriri* (past participle of *abortus*), to die, disappear, William W. Van Alstyne, “The Cycle of Constitutional Uncertainty in American Abortion Law,” in *Abortion, Medicine and the Law*, (edited by J. Douglas Butler and David F Walvert, Oxford: Facts on File, Fourth Edition, 1992), 79.

⁵² Jude Ibegbu, *Rights of the Unborn Child in International Law*, (Lewiston, Queenstown and Lampeter: The Edwin Mellen Press 2000).

⁵³ Patrick J. Flood, “Is International Law on the Side of the Unborn Child?,” *The national Catholic bioethics quarterly*, Vol. 7, (2007), 73-96.

neglected and therefore has resulted in an irrational approach concerning the legal status of the unborn in international law. This work is furthermore unique in that, due to the nature of the sources mentioned above, the mentioned authors did not include investigations into the rationality with which international law deals with the legal status of the unborn. Also, an approach is sought that does not merely include specific disciplines, for example, human rights. The confidence with which the legal status of the unborn is solely determined by human rights (even in the two sources mentioned above) is criticised as being irrational, exclusive and without justification. Although human rights certainly has a place in the matter, it is not the sole measure to determine the legal status of the unborn in international law. A rational approach which includes disciplines such as international humanitarian law, international human rights law, criminal law, animal rights, anthropology, science, feminism and women's rights (amongst others) is sought. Furthermore, this exposition is necessary since it offers a unique and inclusive approach regarding the facts of science and biology in attempts to achieve rational platforms on the legal status of the unborn in international law. Not only is the study important in the light of how it supplements other similar contributions, but is also in the light of what is expected by international law.

Wilkins and Reynolds comment that the United Nations (UN) system was fashioned at the conclusion of World War II. Following two global conflicts, the international community was well aware that great evil is possible – and perhaps inevitable – when fundamental moral values are corrupted. The UN was organised to combat programmatic evil and to promote social responsibility, decency, and liberty. The achievement of these vital goals, however, requires recognition of and respect for the intrinsic and absolute value of human life. The Preamble to the Universal Declaration of Human Rights refers to “freedom, justice and peace in the world” which is based upon the “inherent dignity” of mankind and the “equal and inalienable rights of *all* members of the human family”. Therefore, Wilkins and Reynolds state that we have an obligation to remind the international community that, when respect for the basic rights of *all* members of the human family wanes, “barbarous acts” that “outraged the conscience of mankind” are the inevitable result.⁵⁴ The authors also state that a prudent, reasoned defence of human life is possible and can be successful – as demonstrated by the outcome of the Doha International Conference for the Family in 2004. In Doha, governmental representatives negotiated and adopted the Doha Declaration – which affirms

⁵⁴ Richard G. Wilkins and Jacob Reynolds, “International Law and the Right to Life”, *Ave Maria Law Journal*, Vol. 4, (2006), 165-166.

long-standing legal norms related to family life. On 6 December 2004 the UN General Assembly adopted a consensus resolution, co-sponsored by 149 nations, taking note of the Doha Declaration. The said Declaration reaffirms the inherent dignity of the human person and notes “that the child, by reason of his physical and mental immaturity, needs special safeguards and care before as well as after birth”. It proclaims that “motherhood and childhood are entitled to special care and assistance” and “everyone has the right to life, liberty and security of person”. The Declaration calls upon the international community, among other things, to “evaluate and reassess government policies to ensure that the inherent dignity of human beings is recognized and protected throughout all stages of life.”⁵⁵ Therefore, an important impetus regarding the furtherance of debate on an international level, pertaining to the legal status of the unborn, is crucial.

May I conclude by humbling myself before the challenges that such a theme may bring about regarding the enigmatic nature of any discussion or research project dealing with reason and the law. Philosophers throughout the centuries have grappled with the issues in their endeavour to seek common ground and solutions to metaphysical and epistemological questions pertaining to right and wrong, as well as to the law. It is especially natural law jurisprudence that has tried to bring about reasoned consensus within various jurisprudential arguments and discussion. Contributions by Kant, for example, and more recently by Dworkin, Rawls and Habermas, have postulated detailed and complex proposals towards reconciling reason and the law, and towards the reconciliation of problem areas resulting from different points of departure. However, an in-depth investigation of the views of these philosophers is not the aim of this thesis. In no way do I perceive myself to be an authority on the contributions of the mentioned theorists, and have only read some secondary material to give me a good sense of (some of) their insights. One is taught as basic insight in the undergraduate curriculum (as part of the module on jurisprudence) that, notwithstanding the fact that the law as scientific category is open to many interpretations, the law should not be viewed in isolation from other aspects of reality, other sciences. This latter insight forms the basis of the topic of this thesis. My proposal that the international community must become more accommodative, sensitive, and inclusive in respect of the determination of the legal status of the unborn (which also serves as a gesture towards respect for mankind and humanity), rests on the view that the law should not be cast in stone (in the positivistic sense),

⁵⁵ Wilkins and Reynolds, “International Law and the Right to Life”, 167-168.

and should not be isolated from pure philosophical reasoning, science, religion, natural law and political theory. Once this is accepted then one might understand the distance that still needs to be travelled in the endeavour to provide the legal status of the unborn with more respect. The irony is that with all that has been written on reason and the law, and on equations related to the effective application of logic in reasoning (and therefore the law as well), there are many instances where no reference is made to such important contributions related to reasoning and applying of logic within the law. Here I am thinking of any jurisprudential postulations (received with much acclaim) related to topics such as the death penalty, freedom of expression, reproductive rights, euthanasia, same sex marriages and so forth. With a topic such as the one chosen, it would be tempting to exceed the normal limits expected of such a work because there are so many fields and so much expertise that could be included. This is normal when dealing with contentious jurisprudential issues where there are concepts involved. Consequently, the aim is to present a justification for the commencement of a rationally motivated effort towards international clarification of the legal status of the unborn; this should also result in the unborn enjoying an increased level of respect from society – this would in fact be the most rational thing to do. With such a justification I have tried to restrict myself to the basics, because if the basics do not succeed then any further jurisprudence on the rationality of the legal status of the unborn will most certainly also not succeed. If what I have written, whether in part or as a whole, leads to deeper debate and more inclusive participation, calling upon the contributions of theorists such as Kant, Rawls, Habermas and Dworkin to try and shed more light on the issues in a movement towards some consensus and improvement regarding the legal status of the unborn in the context of international law, then the purpose of this work will have been achieved.

Chapter 2

International and other legal instruments concerning the legal status of the unborn

1. Introduction

In order to investigate the current legal status of the unborn in international law, the legal protection provided to the unborn or the lack thereof needs to be researched. In this chapter the current legal status of the unborn in international law is investigated from primary sources. It is demonstrated that a lack of attention and rational debate concerning the legal status of the unborn exists. After this lack of attention to the legal status of the unborn is demonstrated, a comparison will be made between this and the legal protection of the animals in international and domestic law. This lends validity to the crux of the thesis (rationality) as it points to and defines the problem that exists. In other words, it shows that the current lack of legal attention to the unborn is irrational, even more so in light of the fact that legal protection for animals exists in international and domestic law but similar legal protection for the unborn is lacking. This forms the platform that enables the author to embark on an investigation into the reasons for this problem and to present possible solutions in Chapter 3. Therefore, in order to investigate the legal status of the unborn in international law, several major human rights⁵⁶ treaties need to be discussed first.

2. The legal status of the unborn in international and regional instruments

In the following few paragraphs several important international and regional legal instruments are investigated in an attempt to determine the legal position of the unborn in international law. What this study sets out to show is that no substantial legal position regarding the unborn exists in international law and that it is left to domestic legal systems to determine the legal position of the unborn.

⁵⁶ Although it is denied that human rights is to be the sole criterion determining the legal status of the unborn, this chapter deals with the lack of legal protection provided by international instruments and these instruments express legal protection by way of human rights in general.

2.1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights was adopted by the UN General Assembly in 1948. It has inspired all subsequent human rights conventions and declarations. The preamble provides for “equal and inalienable rights of all members of the human family”. Article 3 states that “everyone has the right to life”. Whether the unborn is included in this Declaration is unsure. Flood is of the opinion that “all members of the human family” can only mean all members of the human species. He adds that abortion was not a major political or legal issue in 1948, and very few countries allowed it except on the most serious grounds.⁵⁷ However, it is nowhere expressly provided that the unborn are included in Article 3, and this is subject to interpretation by the states. Further, abortion is a serious political and legal issue today and it cannot be said for certain that the declaration can still be applied in the same manner as it was in 1948, particularly where the legal status of the unborn is concerned.

2.2. International Covenant on Civil and Political Rights (ICCPR)

This Covenant was adopted by the UN General Assembly in 1966 and came into force in 1976. The international supervision of the Covenant is entrusted to the Human Rights Committee (HRC), a body of eighteen experts elected for four years.⁵⁸ Currently, one hundred and sixty countries are signatories, and sixty-seven are party to the covenant.⁵⁹ This Covenant deals with first generation rights. “Civil rights” cover rights to protect physical integrity, procedural due process rights and non-discrimination rights. “Political rights” enable one to participate meaningfully in the political life of one’s society, and include rights such as freedom of expression.⁶⁰ This is the most comprehensive and well-established UN treaty on civil and political rights and has yielded the most jurisprudential discussion in this field.⁶¹ In order to determine whether this Covenant provides any clarity on the legal status of the unborn in international law, relevant articles have to be investigated.

⁵⁷ Patrick J. Flood, “Is International Law on the Side of the Unborn Child?”, 75-76.

⁵⁸ John Dugard, *International law: A South African perspective*, 244.

⁵⁹ Mushtaq Ghumman, “Pakistan to sign Civil Rights Covenant despite Indian reservation”, *AAJ News*, <http://www.aaj.tv/news/news.php?pg=3&show=detail&nid=92401> (accessed 12/02/2008).

⁶⁰ Schultz, Joseph S. and Castan, M., *The International Covenant on Civil and Political Rights - Cases, Materials, and Commentary*, (New York: Oxford University Press, 2000), 4.

⁶¹ *Ibid.*, 8.

Article 6(1) states that:

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

Articles 6(2) to 6(6) deal with the judicial imposition of the sentence of death. States Parties are not forced to abolish the death penalty but are forced to limit its use to “more serious crimes”. This article suggests that the abolition of the death penalty is desirable. Article 6(5) states that the death sentence “shall not be imposed on persons below 18 and shall not be carried out on pregnant women.”

With regard to the ICCPR, the Human Rights Committee describes the right to life as “the supreme right”.⁶² However, Joseph⁶³ is of the opinion that the HRC did not adopt the anti-abortion argument stating that abortion constitutes a breach of the right to life of the unborn but has rather “focused on the human rights detriment of anti-abortion laws”. The HRC also states that abortion laws may, depending on severity and comprehensiveness, breach not only Article 6 (right to life) but also Article 7 (torture and cruel, inhuman and degrading treatment) and Article 24 (protection of children) and women’s rights of non-discrimination under Articles 3 and 26. The HRC confirms that abortion is compatible with Article 6, and that anti-abortion laws may breach Article 6.⁶⁴ Article 6, paragraph 5 also states that the death penalty is not to be carried out on a pregnant woman.⁶⁵ According to Slabbert⁶⁶ this infers a

⁶² “CCPR General Comment No. 06: The right to life (art. 6): 30/04/82”, Office of the High Commissioner for Human Rights, <http://www.nd.edu/~sobrien2/General%20Comment%206.mht> (accessed 3/02/2008). Paragraph 1 states that: “the right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.”

⁶³ Schultz, Joseph S. and Castan, M., *The International Covenant on Civil and Political Rights - Cases, Materials, and Commentary*, 135.

⁶⁴ *Ibid.*, 138.

⁶⁵ Other international instruments also have similar provisions. Jude Ibegbu, *Rights of the Unborn Child in International Law*, 117. Article 76 (3) of Protocol 1: Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts states that: “to the maximum extent feasible, the Parties to the conflict shall endeavor to avoid the pronouncement of the death penalty on pregnant women...for an offense related to the armed conflict. The death penalty for such offenses shall not be executed on such women.” Article 6 (4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non International Armed Conflicts (Protocol II) 1978 states: “The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offense and shall not be carried out on pregnant women or mothers of young children”. Article 6 (4) of the Protocol Additional to the Geneva Conventions of 12 August 1959, and relating to the Protection of Victims of Non International Armed Conflicts (Protocol II) states: “The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offense and shall not be carried out on pregnant women or mothers of young children.”

limited right to life for the unborn in the sense that the execution of a death sentence on a pregnant woman is prohibited. This does not necessarily create a limited right to life that belongs to the unborn; it does, however, grant an indirect form of legal protection to the unborn. The nature of this form of protection cannot be determined for certain but it is undoubtedly dependent on the right of the pregnant mother who is to receive the death penalty. If this provision is merely to the advantage of the woman, it cannot be seen as an attempt to grant the unborn legal protection with the intent to provide him with the right to life.⁶⁷ The mere fact that a pregnant woman is treated differently from one who is not pregnant, shows that either (1) there is an entity to be protected in order to protect the well-being of the mother (which gives the unborn some indirect recognition but not necessarily as a human being) or (2) that an entity worthy of protection is recognised and not only from the view point of the mother's well-being, as stated in (1), but as an independent being. From this it is further concluded that the unborn is not considered to be a nothing (because of the distinction made between women who are pregnant and women who are not) but rather some sort of entity with possible consequences ranging from the right to life to an effect on the rights of women. According to Flood, the scope of "every human being" is not defined, but neither is it limited.

Furthermore, Flood mentions that Article 6, and especially the ban on executing pregnant women, provides a clear expression of a shared understanding that the unborn is a human being with legal protection. He goes further, stating that if this were not the case these provisions would make little sense, since the ban on executing pregnant women is based on one foundation – namely, to spare the life of an innocent human being, her child.⁶⁸ According to him, therefore, this Covenant provides clear legal protection to the unborn. Although the possibility that the opinion of Flood might be true is greatly welcomed, it is argued that this statement cannot be made with the same amount of confidence that it is made by Flood. It is not necessarily true, although it is hoped, that Article 6 (5) is based on one foundation – to save the life of the unborn. As stated above, it does provide some sort of

⁶⁶M. Nöthling Slabbert, "The position of the human embryo and foetus in international law and its relevance for the South African context", *The Comparative and International Law Journal of Southern Africa*, Vol. 32, No. 1, (1999), 339.

⁶⁷ What is meant by "... to the advantage of the woman" is the fact that the pregnant woman is excluded from the death penalty. It is to her advantage because then she will live. If the woman wants the baby to be born and does not wish to abort it, this provision against the death penalty will also be to her advantage because she will be able to live and keep her child and care for it.

⁶⁸ Patrick J. Flood, "Is International Law on the Side of the Unborn Child?", 76.

legal protection to the unborn, but this protection, whatever it may be, is still subject to the condition that the mother is to be executed. It cannot be said that the same amount of protection would be provided to the unborn where the mother is not to be executed and she expressly wishes to have an abortion. Therefore, it is not certain whether the legal protection is provided directly to the unborn or whether it is rather aimed at protecting the mother and therefore provides as a consequence indirect legal protection to the unborn. However, whatever the nature of the protection of Article 6 (5) is, it is clear that the unborn is at least considered to be ‘something’, which shows some positive development in the possibility of express legal protection of the unborn in the future.

Article 17 states that:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 provides for the right to privacy. Privacy has a very wide meaning and is difficult to define. This right, however, certainly provides the human being with self-determination and autonomy possibly to the detriment of the unborn. A good example where this right was applied to the detriment of the unborn is the US case of *Roe v Wade*.⁶⁹ In the Concluding Comments pertaining to Mexico (1999)⁷⁰ Joseph⁷¹ states that:

The Mexican comments may also imply that anti-abortion laws breach women’s article 17 rights of privacy and autonomy. However, the HRC has tended to condemn anti-abortion laws as dangers to women’s rights to life and non-discrimination, rather than as breaches of rights to privacy.

This follows the HRC’s concern that women seeking employment were subject to pregnancy tests, intrusive questioning and anti-pregnancy drugs, possibly infringing their right to privacy.⁷²

⁶⁹ *Roe v Wade* 410 US 113 (1973).

⁷⁰ Committee on the Elimination of Discrimination against Women, Concluding Observations, Mexico, (1999), UN doc. CCPR/C/79/Add. 109; These Comments involve the Committee on the Elimination of Discrimination against Women and the advancement of women’s rights in general. Paragraph 426 states that: “The Committee recommends that all states of Mexico should review their legislation so that, where necessary, women are granted access to rapid and easy abortion.” Paragraph 399 states that: “The Committee refers to the high rate of teenage pregnancy and the lack of access for women in all States to easy and swift abortion.”

⁷¹ Schultz, Joseph S. and Castan, M., *The International Covenant on Civil and Political Rights-Cases, Materials, and Commentary*, 352.

⁷² *Ibid.*

Article 24 provides protection for children. “Every child” shall have, without discrimination on several grounds, the right to such measures of protection as are required by his status as a minor on the part of his family, society and state. “Every child” is not defined. It cannot be determined from this article whether the unborn falls under the legal protection provided to children. According to Joseph⁷³ children were traditionally defined by their incompetence, rather than as right-holders in international law. The ICCPR and the Convention on the Rights of the Child demonstrate that civil and political rights are applicable to children both as ‘people’ in the general sense and, where appropriate, specifically by virtue of their status as minors.⁷⁴

Can it therefore be inferred from the Covenant, comments and recommendations that abortion should be allowed and that the unborn has no legal status? Although it seems as though the Commission would rather allow abortion where, according to them, it infringes human rights and especially women’s rights, it cannot be said for certain what the legal status of the unborn is in terms of this Covenant. Although it appears from the HRC’s comments that it is concerned about the effects of anti-abortion laws on women’s health, it can also not be said for certain that the Covenant can be interpreted as denying the unborn an inherent right to life. It can be derived that the right to life is very important and that it can be assumed to be inherent. It is nevertheless still uncertain when the existence of a human being commences. Consequently, the legal status of the unborn cannot be concluded from the articles discussed and the meaning of “every human being” and “inherent right to life” remains uncertain. In addition, the above is reflective of the fact that there was insufficient debate on the issue.

2. 3. Convention on the Rights of the Child (CRC)

This Convention came into effect in 1990 with the Committee on the Rights of the Child (CROC) as monitoring body. It followed the 1979 International Year of the Child, although its roots can be traced back to a quest which has lasted a century – the fact that children have

⁷³ Ibid., 467.

⁷⁴ Ibid.

been prime victims of human rights violations.⁷⁵ The first international instrument on the child was the Declaration of the Rights of the Child (1924), forming the structure of the later UN Declaration on the Rights of the Child (1959). The 1989 Convention on the Rights of the Child indicated international acceptance of the human rights of children. The Convention now establishes legally binding norms and principles which create international standards for states to meet in their domestic legislation and policy concerning areas covered by the Convention.⁷⁶ The Convention has been ratified by many states within a very short period of time. It came into operation seven months after its adoption.⁷⁷ As of 2008, one hundred and ninety-three countries have ratified the Convention, signifying their commitment to universal child welfare.⁷⁸ The CRC has the most States Parties of any of the major UN human rights treaties.⁷⁹ The principles underlying the Convention are based on the idea that children, by reason of their physical and mental immaturity, need special safeguards and care, including appropriate legal protection, and on the recognition that there are children living in exceptionally difficult conditions in all countries. The Convention covers the range of substantive human rights: civil, political, economic, social and cultural.⁸⁰ In order to determine whether this Convention provides any clarity on the legal status of the unborn in international law, relevant articles must be investigated.

In the preamble reference is made to the Declaration of the Rights of the Child, stating that the child, “by reason of his physical and mental immaturity, needs special safeguard and care, including appropriate legal protection before and after birth.” According to Joseph⁸¹ neither the CRC nor the ICCPR makes any significant express attempt to elicit rights for unborn children. The CRC preamble does refer to the need for appropriate legal protection applicable ‘before as well as after birth’. However, this Preamble essentially represents a compromise on the irreconcilable views of two groups of countries concerning the moment when childhood begins. The Preamble does protect the unborn by providing “special safeguards and care” due to physical and mental immaturity. However, the scope of “special

⁷⁵ Julia Sloth – Nielsen, “Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law”, *South African Journal on Human Rights*, Vol. 11, (1995), 401.

⁷⁶ *Ibid.*, 402.

⁷⁷ *Ibid.*, 402-403.

⁷⁸ “Campaign for U.S. Ratification of the Convention on the Rights of the Child”, Convention on the Rights of the Child, <http://www.childrightscampaign.org/crcabout.htm> (accessed 12/02/2008).

⁷⁹ Schultz, Joseph S. and Castan, M., *The International Covenant on Civil and Political Rights – Cases, Materials, and Commentary*, 468.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, 475.

safeguards”, “appropriate” and “legal protection” remains uncertain. It is uncertain because it is not clear whether it includes legal protection against abortion or merely protection against environmental factors after birth or against other factors. Although the preamble could suggest that a wide range of measures exists by means of which the interests of the unborn child can be promoted and protected without going so far as to recognise a right to life from the moment of conception or fertilisation, the vagueness of the preambular provision and its failure to address any of the complex issues which a foetal right to life would raise, serve to reinforce the assumption that it could not have been intended to have any precise operational implications.⁸²

Article 1 defines a child as “every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.” The phrase “every human being” is not elaborated upon and once again, the legal status of the unborn is not dealt with. The problem arises with the fact that while a majority age for the child is given, namely 18 years, no minimum age is indicated to determine to whom the Convention will apply. This presents a problem in that it gives domestic legal systems the opportunity to provide their own definition of the term “child”. For example, in the South African judgment of *Christian Lawyers Association of SA and Others v Minister of Health and Others*⁸³ the court decided that section 11⁸⁴ of the South African Constitution⁸⁵ does not provide the unborn with the right to life. In this case the court assumed that section 11 does not provide the unborn with the right to life because, if this was the intention, then section 28, which provides for children’s rights, would have applied to the unborn.⁸⁶ However, the court errs in assuming that section 28 does not protect the unborn since no minimum age is given for the term “child”. Only a maximum age of 18 years is given in section 28 (3)⁸⁷. Therefore, South African and other domestic legal systems can arbitrarily, and without justification, integrate their interpretation of the term “child”. Furthermore, the lack of debate on the legal status of the unborn in international law has the result of limiting the application of international law in domestic legal systems. For example, the Constitution of the Republic of South Africa⁸⁸ provides in section 39 (1) that:

⁸² Philip Alston, “The Unborn Child and Abortion under the Draft Convention on the Rights of the Child”, 174.

⁸³ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T).

⁸⁴ Section 11 states: “Everyone has the right to life.”

⁸⁵ *Constitution of the Republic of South Africa*, 1996.

⁸⁶ *Christian Lawyers Association of SA and Others v Minister of Health and Others*: 1122, paragraphs B – F.

⁸⁷ Section 28 (3) states: “in this section ‘child’ means a person under the age of 18 years.”

⁸⁸ *Constitution of the Republic of South Africa*, 1996.

When interpreting the Bill of Rights, a court, tribunal or forum

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

Thus, if the CRC had any laws on the legal status of the unborn, these had to be applied to South African abortion laws by way of section 39 – even more so in light of the fact that section 39 (1) (b) is mandatory in that it states that international law “must” be considered in South African law. Due to the lack of debate, however, international law provides no guidelines (concerning the legal status of the unborn) to domestic legal systems that have to apply international law within their legal systems.

Article 6 requires parties to recognise every child’s inherent right to life and the obligation to ensure, to the maximum extent possible, the ‘survival and development of the child’. Eriksson⁸⁹ agrees that Article 6, which guarantees the right to life, is of special importance to the abortion issue but that an examination of the *travaux préparatoires* reveals that a prospective life was not intended to be protected from the moment of conception. The proposal made by Belgium, Brazil, Mexico and Morocco to amend this provision and which was designed to make it clear that the article would apply “from the moment of conception”, was rejected. In Article 6, life is described as inherent but still does not clarify whether it applies to the unborn. In other words, it is not stated whether life is inherent from conception or from birth. A. Glenn Mower, Jr.⁹⁰ states that it should be noted that the convention’s assertion of an “inherent right to life” is not to be taken as an attempt to resolve the debate over the practice of abortion. According to the author the issue was not the precise moment at which the right to life became operative but the wider and highly controversial issue of the rights of the unborn child. The question of whether ‘child’ was to include the unborn as well as the born was, in effect, left to be answered by implication through a compromise version of Article 1. J Sloth-Nielsen⁹¹ also expresses the view that Article 6 “was the result of compromise, and the view has been expressed that the article will not be interpreted as either

⁸⁹ M.K. Eriksson, *Reproductive Freedom – In the Context of International Human Rights and Humanitarian Law*, (The Hague, Netherlands: Martinus Nijhoff Publishers, 2000), 310-311.

⁹⁰ Glenn A. Mower, *The Convention on the Rights of the Child: International Law Support for Children*, (Wesport Connecticut: Greenwood Press, 1997), 28-30.

⁹¹ Julia Sloth-Nielsen, “Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African Law”, 411-412.

permitting or prohibiting abortion. In other words, the issue has been left open.”

The suggestion that Articles 1 and 6 were the result of a compromise probably has its source in the following events and may serve as one of the reasons for the silence on the legal status of the unborn in this Convention. The issue of abortion was raised during the session in which the draft was given the second and final reading before being sent to the General Assembly for possible adoption in 1989.⁹² After public debate and negotiations, it was agreed not to deal with the matter in the operative part of the Convention but rather to include it in the sixth preambular paragraph. “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.”⁹³ Every paragraph of the Convention was subject to debate and a number of issues came to the fore. One of the issues of controversy regarding this convention was the definition of the minimum age of the child. The Basic Working text of Article 1 (as adopted by the 1980 Working Group⁹⁴), preceding the official text, defined a child as follows:

According to the present Convention a child is every human being from the moment of his birth to the age of 18 years, unless, under the law of his state he has attained his age of majority earlier.

Therefore, the UN at first did not wish to consider the unborn as a “child” (“from the moment of his birth ...”). Next there were the Considerations of the 1980 Working Group⁹⁵. Paragraph 28 mentions a considerable debate on the initial and terminal points which define the child as contained in the Basic Working Text. In paragraph 29 it is further explained that some delegates opposed the idea that childhood begins at the moment of birth, as stated in the draft article, indicating that this is contrary to the legislation of many countries. They argued that the concept should be extended to include the entire period from the moment of conception:

Other delegates asserted that the attempt to establish a beginning point should be abandoned and that wording should be adopted which was compatible with the wide variety of domestic legislation on this subject.

⁹² Philip Alston, “The Unborn Child and Abortion under the Draft Convention on the Rights of the Child”, 156-157.

⁹³ *Ibid.*, 157.

⁹⁴ Working Group, 1980, E/CN.4/1349, 2.

⁹⁵ Working Group, 1980, E / CN. 4 / L 1542, 5-6.

Paragraph 30 states that the Moroccan representative proposed that the words “from the moment of his birth” should be adopted which was compatible with the wide variety of domestic legislation on this subject. The first part of the article was therefore adopted with the amendment proposed by Morocco. According to Cantwell⁹⁶ there were two groups of countries with opposing and irreconcilable viewpoints. The issue that divided the two groups was whether childhood begins at birth or at conception. The discussions did not bring any conclusion as to what the definition of a child was in Article 1. Any decision would either permit or outlaw abortion. Cantwell continues by saying that there was one point on which all could agree. As stated in the 1959 Declaration on the Rights of the Child, the child needs special safeguards and care, including appropriate legal protection, both before as well as after birth. The Working Group reached consensus that there would be no mention of a minimum age in Article 1.

Are the provisions contained in the Convention so vague that there is uncertainty concerning the nature and extent of the obligations assumed by States Parties? Glenn Mower⁹⁷ states that there are provisions within the convention whose terms are sufficiently vague as to lend themselves to various interpretations when applied to a specific situation. He also mentions that such vaguely phrased provisions can have at least two negative consequences, namely: (1) a State Party sincerely desiring to bring its performance up to the Convention’s standards may feel that it has not been given sufficient guidance for this purpose, and (2) a State Party desiring to justify performance that could be considered as falling short of the Convention’s norms could turn vagueness to its advantage through a self-serving interpretation of a particular provision. Thus, international law faces the danger of applying conventions so vague that uncertainty exists as to the nature of the obligations adopted by States Parties. The danger automatically exists of States Parties manipulating conventions and other international instruments to suit their own purposes. This compromise weakens the importance of the rights provided to children, as the subjects of the rights are not properly determined and various interpretations are possible, with the result that international law, in its intention to enhance the protection of mankind and other living organisms closely connected to post-natal man, becomes as a consequence, not only ineffective but also desensitised.

⁹⁶ Nigel Cantwell, “The Origins, Development and Significance of the United Nations Convention on the Rights of the Child,” 26.

⁹⁷ Glenn A. Mower, *The Convention on the Rights of the Child: International Law Support for Children*, 51-54.

Slabbert⁹⁸ states that the United Nations is silent on whether the embryo is protected under this Convention. There is no indication of whether the unborn is included within the scope of the Convention. Similarly, Alston agrees that most of the international human rights instruments, although recognising the right to life, are silent on the issue of whether or not some or all of the protections accorded under the provisions should be given to the unborn child. This is also the case with the Convention on the Rights of the Child,⁹⁹ which is reflective of the fact that there was insufficient debate on the issue.

In addition to these legal instruments, there is also the International Covenant on Economic, Social and Cultural Rights. As of 11 October 2007, there are sixty-six signatories and one hundred and fifty-seven parties to the covenant.¹⁰⁰ This covenant deals with second-generation rights. Therefore, these rights depend on the availability of resources for implementation and because the rights protected require positive implementation in accordance with the availability of resources, they are less capable of judicial determination.¹⁰¹ Although economic, social and cultural rights are of no real relevance to the legal status of the unborn, Article 12 deserves special mention. Article 12¹⁰² states that States Parties are required to take measures for the reduction of the stillbirth rate and of infant mortality. By this provision the UN probably wishes to enhance the conditions of the unborn by requiring the parties to take measures to reduce the stillbirth rate. However, the right to life of the unborn cannot be determined from this provision.

⁹⁸M. Nöthling Slabbert, "The position of the human embryo and foetus in international law and its relevance for the South African context", 339.

⁹⁹ Philip Alston, "The Unborn Child and Abortion under the Draft Convention on the Rights of the Child", 156.

¹⁰⁰ "Ratifications, Declarations and Reservations of the International Covenant on Economic, Social and Cultural Rights", Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications> (accessed 13/02/2008).

¹⁰¹ John Dugard, *International law: A South African perspective*, 246.

¹⁰² Article 12 states: "(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

2. 4. Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

The Convention on the Elimination of all Forms of Discrimination against Women (1979) was adopted unanimously by the UN General Assembly on 18 December 1979¹⁰³ and came into force on 3 September 1981¹⁰⁴. As of 25 January 2008, one hundred and eighty-five states ratified the Convention and there are ninety-eight signatories to the Convention.¹⁰⁵ The Convention aims to eliminate discrimination in all its forms and aims to achieve a society where women will be treated equally to men.¹⁰⁶ Comprehensive measures affecting the health of the unborn¹⁰⁷ are included, although drafted from the perspective of the mother:

The UN CEDAW Committee cited compulsory abortion as a danger to the mental and physical health of women in its General Recommendation 19, and also condemned the criminalizing of abortion in the same General Comment – The CEDAW Committee clearly endorses freedom of choice for women in the abortion debate.¹⁰⁸

Packer also mentions that the drafting of the Women’s Convention represented a constructive compromise, accommodating as many cultures as possible. Inevitably, specificity and clarity were sometimes sacrificed in order to appeal to as many parties as possible. Many use this ambiguity to argue that there is leeway in approaching the issue of abortion by means of interpretation. The Women’s Convention also sheds little light on the issue of the legal status of the unborn,¹⁰⁹ and this is again indicative of a lack of sufficient debate.

¹⁰³ Fayeeza Kathree, “Convention on the Elimination of all Forms of Discrimination against Women”, *South African Journal on Human Rights*, Vol. 11, (1995), 421.

¹⁰⁴ *Ibid.*, 422.

¹⁰⁵ “Ratifications, Declarations and Reservations of the International Covenant on Economic, Social and Cultural Rights”, <http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications>.

¹⁰⁶ Fayeeza Kathree, “Convention on the Elimination of all Forms of Discrimination against Women”, 425.

¹⁰⁷ For example, the preamble to the Women’s Convention states: “...Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and *aware that the role of women in procreation should not be a basis for discrimination* but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole. (Emphasis added); Article 4 (2) provides for “adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.” Also see articles 11 (1) (f), 11 (2) (a)-(c) and Article 12.

¹⁰⁸ Schultz, Joseph S. and Castan M., *The International Covenant on Civil and Political Rights-Cases, Materials, and Commentary*, 137.

¹⁰⁹ C.A.A. Packer, *The Right to Reproductive Choice – A study in international law*, (Finland: Åbo Akademi University, 1996), 72-75.

2. 5. European Convention on Human Rights (1950) and case law

Europe, the United States of America and Africa all adopted their own conventions to complement and reinforce universal human rights conventions. These conventions are likely to be more successful than their universal counterparts because of shared traditions and institutions within particular regions.¹¹⁰ Regional conventions will now be investigated further.

The European Convention on Human Rights was adopted by the Council of Europe in 1950 and came into force in 1953. Today it is an essential part of the political order of Europe. The Convention had forty-seven members on 13 February 2008.¹¹¹ Its importance within international human rights law is twofold: it was the first comprehensive treaty in the world in this field and it established the first international complaints procedure and international court for the determination of human rights. It forms a binding human rights agreement for the member states of the Council of Europe. The European Commission acts as a non-binding mediating force to promote friendly negotiations and settlement of violations. If settlements cannot be reached, a party or the commission may approach the European Court.¹¹² Several domestic legal systems used by members of the European Convention will be discussed below, and thereafter, the European Convention itself will be investigated.

In European case-law there are two predominant issues in relation to the life process: firstly the protection of life before birth and secondly the protection of life from birth onwards.¹¹³ Yet none of Europe's constitutional courts has ascribed proper constitutional status to the human embryo. Virtually all of them, however, acknowledge that the embryo should be protected by virtue of the right to life.¹¹⁴ The embryo is protected in Germany, Spain, Portugal and Italy. In Portugal, for example, constitutional provisions concerning the protection of human life are held to extend to life within the womb. Recently, though, the

¹¹⁰ John Dugard, *International law: A South African perspective*, (Cape Town: Juta, Third Edition, 2005), 330.

¹¹¹ "Ratifications of the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 005", *Council of Europe*, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=2/13/2008&CL=ENG> (accessed 13/02/2008).

¹¹² M. Nöthling Slabbert, "The position of the human embryo and foetus in international law and its relevance for the South African context", 342.

¹¹³ Bertrand Mathieu, *The right to life in European constitutional and international case – law*, (Strasbourg: Council of Europe Publishing, 2006), 21.

¹¹⁴ *Ibid.*, 23.

Prime Minister Jose Socrates proposed a referendum to liberalise abortion: this was declared void, however, because of low turnout and Portugal's policy remained unchanged.¹¹⁵ In Ireland, Article 40¹¹⁶ of the Irish constitution affords clear recognition of the unborn child's right to life. However, in the Irish case of *Attorney General v. X. and others*¹¹⁷, the court, on appeal, allowed for an abortion for a 14-year-old girl who was raped and became pregnant. In general, the European approach is also based on seeking a balance between the protection of the embryo's life and respect for the mother's freedom.¹¹⁸ Implicit in the constitutional case-law on abortion, in particularly European countries, is the arbitration between the rights of the embryo and those of the mother.¹¹⁹ The European Convention now needs further investigation. Article 2 (1) of the European Convention states that:

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

"Everyone" in Article 2 is not defined. Therefore uncertainty as to the legal status granted to the unborn exists. Because it would exclude abortion completely, the unborn is probably not lightly included in Article 2. According to this Convention the total recognition of the unborn would cause an imbalance in terms of the rights of women. In this Convention there is great emphasis on the right to life and rights of human beings in general. There is also great emphasis on the rights of children, women and other vulnerable groups. Yet, no mention is made of the legal status of the unborn and any development in enhancing the legal status of the unborn seems very limited:

It is submitted that if this question of a general 'right to life' of the unborn were again raised before the European Court, the right would not be elevated above the 'right to health' of the woman concerned. It is also inconceivable that the European Court, with its virtually all-male composition, could decide on a matter that affects women so closely.¹²⁰

Some cases deal with the interpretation of Article 2. In the case of *Paton v. U.K.*¹²¹ the

¹¹⁵ Barry Hatton, "Portugal fails to overturn Abortion law", *The Associated Press*, (11 February, 2007), www.washingtonpost.com/wp-dyn/content/article/2007/02/11/AR2007021100416_2.html (accessed 2/02/2008).

¹¹⁶ The Eighth Amendment to the Irish Constitution states: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws the respect, and, as far as practicable, by its laws to defend and vindicate that right."

¹¹⁷ *Attorney General v. X. and others* [1992] IESC 1; [1992] 1 IR 1 (5 March, 1992).

¹¹⁸ *Ibid.*, 25.

¹¹⁹ *Ibid.*, 32.

¹²⁰ M. Nöthling Slabbert, "The position of the human embryo and foetus in international law and its relevance for the South African context", 352

¹²¹ (1981) 3 E.H.R.R. 408.

application of Article 2 of the European Convention to the unborn was considered. In this case the Commission found that:

The abortion complained of is compatible with the first sentence of Article 2(1) because, if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the 'right to life' of the foetus.¹²²

Scott mentions that what the Commission actually said was that it did not have to decide whether the foetus had a right to life. In this way, the decision left the question of the extent to which Article 2 applied to the foetus very open.¹²³ Recent jurisprudence of the European Court of Human Rights in *Vo v. France*¹²⁴ confirms that the foetus's lack of right to life is and will remain compatible with the European Convention on Human Rights. Some statements made in this case show some positive glimpses towards legal protection of the unborn.¹²⁵ Although the court also stated that there is no European consensus on the scientific and legal definition of the beginning of life¹²⁶, it was also mentioned that the only point of agreement was that the foetus is a human being and since the fetus has the capacity to become a person and in some states is protected, it requires protection in the name of human dignity, without making it a 'person' with the 'right to life'.¹²⁷ However, in general the European Court of Human Rights decided on a neutral stance¹²⁸, again avoiding answering the question of the legal status of the unborn. O'Donovan is of the opinion that the judgment in *Vo v. France* would appear to have been driven by policy fears in terms of upsetting a form of settlement on the application of the margin of appreciation to domestic

¹²² *Paton v. U.K.*: par 22.

¹²³ Rosamund Scott, "The English Fetus and the Right to Life", 351.

¹²⁴ 53924/00, Eur. Ct. H.R., 8 July 2004.

¹²⁵ See pages 15-17. For example, Mowbray states that: "On a general level, I believe (in company with many senior judicial bodies in Europe) that there is life before birth, within the meaning of Article 2, that the law must therefore protect such life, and that if a national legislature considers that such protection cannot be absolute, then it should only derogate from it, particularly as regards the voluntary termination of pregnancy, within a regulated framework that limits the scope of the derogation," Alastair Mowbray, 'Institutional Developments and Recent Strasbourg Cases', 174.

¹²⁶ *Vo v. France*: par 82. Rosamund Scott, "The English Fetus and the Right to Life", 352.

¹²⁷ *Vo v. France*: par 84. Rosamund Scott, "The English Fetus and the Right to Life", 352.

¹²⁸ Katherine O'Donovan, "Commentary: Taking a neutral stance on the legal protection of the fetus-*Vo v. France*", *Medical Law Review*, Vol. 14, No. 1, (2006), 115. The Court acknowledged that: "...it has yet to determine the issue of the "beginning" of "everyone's right to life" within the meaning of the provision, and whether the unborn should have such a right," *Vo v. France*: par 75. Furthermore, the court stated that: "...the issue of when the right to life begins comes within the margin of appreciation which the court generally considers that states should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a 'living instrument which must be interpreted in the light of present-day conditions' ...The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the contracting states themselves, in France in particular, where it is the subject of debate and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life," *Vo v. France*: par 82.

laws on abortion that has been arrived at within the States Parties to the Convention. In other words, there is a consensus on non-interference with each jurisdiction's legislation.¹²⁹

2. 6. American Convention on Human Rights (1978) and case law

The inter-American system for the protection of human rights has two sources: the Charter of the Organization of American States (OAS) and the American Convention on the Human Rights (1969). These two overlap and supplement each other.¹³⁰ Twenty-four of the thirty-five OAS member states are party to the Convention.¹³¹ First of all, some case law of the US will be discussed. Thereafter, attention will be paid to the American Declaration on the Rights and Duties of Man, a non-binding resolution and the American Convention on Human Rights.

Some cases in the US deserve special mention – the first of these is *Roe v Wade*¹³². In this case the court decided that the unborn had no right to life, and the right to privacy of the pregnant mother was prioritised¹³³. The right to privacy was not a right included in the US Constitution and was created for the purposes of this case. According to Frankowski and Cole, another fundamental right (that of privacy) was discovered for the first time, as this right had nowhere before been mentioned and never explicitly referred to.¹³⁴ However the court, after developing the trimester approach, mentioned that the state has a compelling interest in the unborn at a certain stage.¹³⁵ Nevertheless, no real protection was given to the

¹²⁹ Katherine O'Donovan, "Commentary: Taking a neutral stance on the legal protection of the fetus - *Vo v. France*", 120.

¹³⁰ John Dugard, *International law: A South African perspective*, 332.

¹³¹ "American Convention on Human Rights", *Wikipedia: The free encyclopedia*, http://en.wikipedia.org/wiki/American_Convention_on_Human_Rights#_note-2 (accessed 2/02/2008).

¹³² 410 US 113 (1973).

¹³³ 410 US 113 (1973).

¹³⁴ Stanislaw Frankowski, "United States of America," in *Abortion and Protection of the Human Fetus*, (edited by Frankowski S.J. and Cole G.F., Dordrecht: Martinus Nijhoff Publishers, 1987), 24. Also see *Roe v Wade* 410 U.S. 113 (1973). Paragraph 15 of the case states: "Although the Constitution does not explicitly mention any right of privacy, the United States Supreme Court recognizes that a right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." Further paragraph 17 states: "the right to privacy to some extent extends to activities relating to marriage, procreation contraception, family relationships, and child rearing and education." The court then came to the conclusion in paragraph 18 that "the right to privacy, founded upon the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

¹³⁵ *Roe v Wade*: 159. "Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from

unborn. Read together with *Doe v. Bolton*¹³⁶ a right to abortion under virtually every circumstance is granted. What makes the American jurisprudence even more irrational is the fact that the court found yet another rationale in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹³⁷. This case threw out the trimester approach of *Roe* and developed an ‘undue burden approach’.¹³⁸ This ‘updates’ on how the legalization of abortion is to be justified and reveals the arbitrary jurisprudence in the *Roe* case and the arbitrary views that the US has on the right to life. The second case that deserves special mention is that of *Gonzales v. Carhart*¹³⁹. In this case, the court actually adhered to the state’s compelling interest in the unborn, as mentioned in *Roe*¹⁴⁰, and the importance of the unborn was emphasised. In this case the US Supreme Court considered the validity of the Partial-Birth Abortion Ban Act¹⁴¹, a federal statute regulating abortion procedures. The Act does not prohibit abortion as such, but only particular methods of abortion, namely partial-birth abortions or intact D & E – Delivery and Evacuation (this does not include regular D & E).¹⁴²

and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”

¹³⁶ 410 US 178 (1973). “The District Court, per curiam, 319 F.Supp. 1048 (ND Ga. 1970), held that all the plaintiffs had standing but that only Doe presented a justiciable controversy. On the merits, the court concluded that the limitation in the Georgia statute of the "number of reasons for which an abortion may be sought," id., at 1056, improperly restricted Doe's rights of privacy articulated in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and of "personal liberty," both of which it thought "broad enough to include the decision to abort a pregnancy," 319 F.Supp., at 1055. As a consequence, the court held invalid those portions of §§ 26-1202 (a) and (b)(3) limiting legal abortions to the three situations specified; § 26-1202 (b)(6) relating to certifications in a rape situation; and § 26-1202 (c) authorizing a court test. Declaratory relief was granted accordingly. The court, however, held that Georgia's interest in protection of health, and the existence of a "potential of independent human existence" (emphasis in original), id., at 1055, justified state regulation of "the manner of performance as well as the quality of the final decision to abort," id., at 1056, and it refused to strike down the other provisions of the statutes. It denied the request for an injunction, id., at 1057," *ibid.*, paragraph 39.

¹³⁷ 505 US 833 (1992).

¹³⁸ At issue were five provisions of the *Pennsylvania Abortion Control Act* of 1982. The court stated that “*Roe*'s rigid trimester framework is rejected. To promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right”, *ibid.*, 837. The court further rejected the “privacy” rationale and adopted the “undue burden standard”. “To protect the central right recognized by *Roe* while at the same time accommodating the State's profound interest in potential life...the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability,” *ibid.*, 837.

¹³⁹ 550 US (2007).

¹⁴⁰ 410 US 113 (1973).

¹⁴¹ 2003, 18 USC § 1531 (2000 ed., Supp. IV).

¹⁴² The Act prohibits “knowingly performing a partial-birth abortion ... that is not necessary to save the life of a mother...,” *Partial-Birth Abortion Ban Act*: 1531 (a). Furthermore, the Act defines partial-birth abortion as “an abortion in which the person performing the abortion - (A) deliberately and intentionally vaginally delivers a fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus...,” *Partial-Birth Abortion Ban Act*: 1531(b) (1). These sections only describe intact D & E and not regular D & E.

Such methods of abortion are common at the second trimester of pregnancy; the Act does not regulate the methods used during the first trimester.¹⁴³ The court stated that the Act's ban on abortions involving partial delivery of a living foetus furthers the Government's objectives - these objectives being that it may use its regulatory authority to *show its respect to the life within the woman*. The court described partial-birth abortions as being similar to killing a newborn infant and confirmed the validity of drawing boundaries to prevent practices that extinguish life, and that are similar to actions that are condemned.¹⁴⁴ Therefore, US case law shows that the unborn does not have any legal status. However, the *Carhart* case shows a positive glimpse in the direction of obtaining some respect or legal status for the unborn.

According to Frankowski and Cole¹⁴⁵, Article 1 of the American Declaration on the Rights and Duties of Man, first read:

Every person has the right to life. This right extends to the right to life from the moment of conception, to the right to life of incurables, imbeciles and the insane.

The second sentence was later deleted and based on this deletion the Commission concluded that no protection was intended for the unborn. The Commission does not apply or accept the express recognition of the unborn as it stands in the Convention. Therefore, such elimination demonstrated the intent not to include the unborn in the right to life.

The American Convention on Human Rights now requires discussion. Article 4 (1) states that every person has the right to have his life respected; this right shall be protected by law and from the moment of conception. No one shall be arbitrarily deprived of his life. Paragraph 5 states that capital punishment shall not be imposed upon persons who, at the time that a crime is committed, are under 18 years or over 70 years, nor shall it be applied to pregnant women. It is only in the American Convention on Human Rights that explicit reference is made to a pre-natal right to life. "Every person" is not defined but the unborn is

The difference between the two is that during regular D & Es the foetus is removed in pieces, not intact as is the case with intact D & Es. During intact D & Es the unborn is delivered past the anatomical landmarks discussed in the sections of the Act above and not in pieces.

¹⁴³ 85-90 percent of abortions in the United States take place in the first trimester. The most common methods used during this period are vacuum aspiration in which the physician vacuums out the embryonic tissue, or the use of medication, *Gonzales v Carhart*: par (I) (A).

¹⁴⁴ *Gonzales v Carhart*: par (3) (a).

¹⁴⁵ Dina Shelton, "International law on protection of the fetus," in *Abortion and Protection of the Human Fetus*, (edited by S.J. Frankowski and G.F. Cole, Dordrecht: Mirtinus Nijhoff Publishers, 1987), 3.

given the right to life and protection (“...from the moment of conception”). Article 4(5) also provides for protection in that the death sentence may not be carried out on a pregnant woman. Therefore, indirectly, by protecting the woman, the life of the child is also protected. The unborn is therefore given express legal status and the circumstances of a pregnant woman are elevated above the circumstances of a woman who is not pregnant. The unborn is therefore given the right to life. Article 15 of the Protocol of San Salvador to the American Convention on Human Rights provides for the right to formation and protection of families. A family is described as the neutral and fundamental element of society and ought to be protected by the state. Paragraph 3 states that States Parties undertake protection of the family unit and (a) special care for the mother for a reasonable period before and after childbirth, (b) adequate nutrition for children at the nursing stage and during school, (c) protection of adolescents and (d) special programmes of family training. Article 15 (3) (a) also provides care for mothers before and after birth, thus indirectly providing care for the unborn. This Convention provides legal status to the unborn. ‘Every person’ is not defined but the right to life shall be protected by law including life from conception. Therefore, the unborn is included in ‘every person’. However, elimination of explicit language protecting the unborn from a draft of the Declaration, by the Commission, indicates that there was no intent that such protection be extended to the unborn. Another reason for non-inclusion was the existence of abortion rights in a number of American states at the time of the drafting of the Declaration.¹⁴⁶

2. 7. African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights is the basis of Africa’s continental human rights system. It entered into force on 21 October 1986, upon ratification by a simple majority of member states of the Organisation of African Unity (OAU).¹⁴⁷ The principal supervisory organ is the African Commission on Human and People’s Rights.¹⁴⁸ There are currently fifty-three States Parties who ratified the Charter and forty-one signatories.¹⁴⁹

¹⁴⁶ Dina Shelton, “International law on protection of the fetus,” 2-4.

¹⁴⁷ Makau wa Mutua, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties”, *Virginia Journal of International Law*, Vol. 35, Issue 2, (1995), 339

¹⁴⁸ John Dugard, *International law: A South African perspective*, 336.

¹⁴⁹ “Ratifications of the African Charter on Human and Peoples’ Rights”, *African Commission on Human and Peoples’ Rights*, www.achpr.org/english/ratifications_charter_en.pdf (accessed 2/02/2008).

Article 4 states that:

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

Article 5 provides for the right to inherent human dignity:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The phrase “every human being” is not defined. Uncertainty exists as to whether the right to life is granted to the unborn. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa was adopted in Maputo, Mozambique on 11 July 2003 and entered into force on 25 November 2005. Article 66 of the African Charter provides for special protocols or agreements to supplement the African Charter. Article 14 explicitly provides for Health and Reproductive Rights. This article states that:

(1) States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes: (a) the right to control their fertility; (b) the right to decide whether to have children, the number of children and the spacing of children; (c) the right to choose any method of contraception... (2) States parties shall take all appropriate measures to :... (c) *protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.* (Emphasis added)

This protocol is the first international legal instrument, other than the American Convention, to explicitly mention the legal position of the unborn. In this case legal protection for the unborn is denied in the case of rape, incest, sexual assault and where the pregnancy endangers the mental and physical health of the mother or the life of the mother. According to Flood, international law does provide legal protection for the unborn and he is therefore of the opinion that this protocol represents a departure from the general pattern of legal protection of the unborn in international law.¹⁵⁰ However, the author of this thesis is of the opinion that no explicit general pattern protecting the unborn can be observed in international law and is therefore in disagreement with Flood.

¹⁵⁰ Patrick J. Flood, “Is International Law on the Side of the Unborn Child?”, 73.

3. The protection of women in international law as compared to the legal status of the unborn

3. 1. Introduction

An investigation into the protection of women in international law is important since the extent of protection provided to them directly affects the legal status of the unborn. This is so because women's reproductive rights and their right to equality have a great influence on the abortion debate: in many countries legalisation of abortions are justified by way of women's rights. Therefore, a possible imbalance in the extent to which women are protected and the extent to which the unborn is protected needs to be investigated. There is extensive protection for women in international law. The following international documents provide such protection: the Convention on the Elimination of all forms of Discrimination against Women; the Convention on the Political Rights of Women; the Declaration on the Protection of Women and Children in Emergency and Armed Conflict; the International Covenant on Civil and Political Rights; the Cairo Conference; the Beijing Conference; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005).

The Convention on the Elimination of all Forms of Discrimination against Women (1979) aims to eliminate discrimination in all its forms and to achieve a society where women will be treated equally to men.¹⁵¹ It therefore provides extensive rights to women and is a specialised convention applicable only to women:

The Convention is the definitive international legal instrument requiring respect for and observance of the human rights of women. It is universal in reach, comprehensive in scope and legally binding in character.¹⁵²

From the Preamble it is clear that the two main purposes of this Convention are to promote equality between men and women and to provide the right to reproductive health and choice to women. This Convention also protects the woman's human dignity and together with the

¹⁵¹ Fayeeza Kathree, "Convention on the Elimination of all Forms of Discrimination against Women", 425.

¹⁵² Ibid., 421. Other legal instruments also exist solely for the protection of women. These include the Declaration on the Elimination of Discrimination against Women, the Convention on the Political Rights of Women, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, the Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa, the Cairo Conference and the Beijing Conference.

right to human dignity lays the rights to reproductive health and choice.¹⁵³ Reproductive health rights are detrimental to the legal status of the unborn. The problem that exists is that the application of reproductive health rights is arbitrary and irrational, providing no inclusion whatsoever (hereby being absolutist) to the discussion on the legal status of the unborn. This is so because one of the reasons for the woman's autonomous position in international law is liberal feminism. As a result of the emphasis on autonomy and freedom, two fundamental values are in conflict when it comes to the relationship between the mother and the unborn, namely procreative autonomy including reproductive health rights provided for by human rights, and the legal position of the unborn. Note that most discussion in this regard is based solely on 'rights' with no inclusion of 'duties'. Rights without duties are irrational and unfair. Duties need to counter rights if there is to be a harmonious interaction between individuals and groups of individuals in society and between various stages of life or potential life. In addition, it is not clear what 'reproductive health rights' encompass. Reproductive health rights are applied to the abortion debate when it is not even clear or rationally justified whether or how they apply to such debate. Reproductive health rights may include, for example, the right to choose the number and spacing of one's children. It does not necessarily mean that it includes the right to have an abortion. Therefore, the current application of reproductive health rights to the legal status of the unborn in several domestic legal systems and reproductive rights jurisprudence is irrational and unjustified. It is unjustified because reproductive rights jurisprudence fails to further the discussion on reproductive rights beyond women's rights. The jurisprudence and justification for reproductive health rights are based mainly on women's fight for equality and equal rights, as well as for health reasons. However, it is not denied that reproductive health rights are important to the "health" of the mother. It is admitted that the "health" of the mother and women in general is important during pregnancy and otherwise. What is stated is that the concept of reproductive health rights should not be misused, where it is applied arbitrarily and without balance or justification. In other words, it cannot be applied to the abortion issue without defining whether such rights should include abortion. Several articles fail to discuss

¹⁵³ Several reproductive health rights exist. The preamble of the Women's Convention states: "...Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole." (Emphasis added). Article 4 (2) provides for "adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory." See also articles 11 (1) (f), 11 (2) (a)-(c) and Article 12.

the question of reproductive health rights beyond women's rights and arbitrarily assume that the right to abortion is therefore included in reproductive health rights for the furtherance of equality of women. For example, Elizabeth Kingdom¹⁵⁴ mentions the argument that the differences between men and women, notably but not exclusively in relation to the capacity to give birth, point to the need for legislation which accords special rights to women. She therefore assumes that reproductive health rights and abortion rights are to be discussed in light of women's fight for equal rights. Furthermore, in an article by the United Nations, reproductive health rights are also mainly discussed with respect to women's right to equality. The article itself confirms this when mentioning the following:

Over the years, a human rights-based approach to reproductive health has evolved which emphasizes the rights to health, to have children by choice, and to have a safe and satisfying sex life. It is now recognized that women have the right to the fullest enjoyment of health throughout their life cycle.

Women's right to health and reproductive health in particular, is essential to gender equality and female empowerment. The benefits of better reproductive health for both women and men can easily be demonstrated, from the point of view of society as well as the individual. In addition to saving lives and preventing infection and suffering, better reproductive health will lead to smaller families and slower population growth.

An emphasis on human rights obligations is a tool in the battle to secure reproductive and sexual health. It reinforces the fundamental point that reproductive health programmes are essential to protect the dignity of men and women - something governments are obligated to do.¹⁵⁵

None of these articles includes discussions on the woman's duties¹⁵⁶ when it comes to reproductive health. Duties are necessary to counter rights and the lack of discussion on duties renders discussions on reproductive health arbitrary. Furthermore, no reference is made to any philosophical or scientific consideration of the legal status of the unborn to determine the scope of "reproductive health rights".

The Protocol to the African Charter on Human and Peoples' Rights¹⁵⁷ on the Rights of Women in Africa basically provides that States Parties "shall combat all forms of discrimination against women through appropriate legislative, institutional and other

¹⁵⁴ Elizabeth Kingdom, "Birthrights: Equal or Special?", in *Birthrights, law and ethics at the beginnings of life*, (edited by Robert Lee and Derek Morgan, London: Routledge, 1989), 17.

¹⁵⁵ "Women: The right to reproductive and sexual health", *United Nations*, <http://www.un.org/ecosocdev/geninfo/women/womrepro.htm> (accessed 14/02/2008).

¹⁵⁶ The lack of emphasis on duties in international law and the western legal system is discussed on pages 133-136.

¹⁵⁷ This is discussed on page 134.

measures...”¹⁵⁸ Article 14 explicitly provides for health and reproductive rights, restricting any possible legal protection for the unborn in cases of sexual assault, rape, incest and danger to mental and physical health and life of the mother.¹⁵⁹ The Charter therefore deals extensively with achieving equality for women and advancing their reproductive rights.¹⁶⁰

Some of the main topics during the preparation for the Cairo Conference, as well as during the Conference itself were abortion, women’s reproductive health rights and the conflicts that arise between these issues. Two religions, Catholicism and Islam, persistently defended their ground against abortion. Pope John Paul 2 expressed the Catholic views against limitations on family size and limitations on birth as “constituting an assault on the sacredness of life.” He also expressed that:

Abortion, which destroys existing human life, is a heinous evil, and it is never an acceptable method of family planning, as was recognized by consensus at the Mexico City United Nations International Conference on Population (1984).

What was clear from the Conference was that there was more concern about the health of the woman who undergoes an illegal and unsafe abortion than about the right to life of the unborn. At the Conference, unsafe abortions were defined in paragraph 8.25 as “a procedure for terminating an unwanted pregnancy either by persons lacking necessary skills or in an environment lacking the minimal medical standards or both.” Thus a major achievement of the Cairo Conference is that unsafe abortions were considered a threat to the health of women (Article 12.17).¹⁶¹ The argument by several pro-abortionists that abortion should be legalised because it will prevent illegal and unsafe abortions, is questionable. It rids law of any ethical and moral considerations and promotes the practice of countering a wrong (unsafe abortions) with another wrong (legalising abortion). This (countering one wrong with another wrong) does not make it (abortion) right or rational. Also important to note is the reference to ‘pregnancy’ – hereby ignoring the ‘living organism’ inside the mother’s womb. In fact, many

¹⁵⁸ Protocol to the African Charter on Human and Peoples’ Rights, on the Rights of Women in Africa, Article 2 (1).

¹⁵⁹ “(1) States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes: (a) the right to control their fertility; (b) the right to decide whether to have children, the number of children and the spacing of children; (c) the right to choose any method of contraception... (2) States parties shall take all appropriate measures to; ... (c) *protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.*”

¹⁶⁰ For example Article 3 provides for the Right to Dignity, Article 4 provides for the Rights to Life, Integrity and Security of the Person and Article 6 provides for Marital Rights.

¹⁶¹ M.K. Eriksson, *Reproductive Freedom - In the Context of International Human Rights and Humanitarian Law*, 280.

pro-life adherents would even oppose mere reference to ‘pregnancy’. This conference provided no developments on the legal status of the unborn and was mainly concerned with women’s rights. Why is it that there would be an in-depth investigation into the nature of the unborn, be it from an ethical or scientific angle, when the international community needs to work on a proposal regarding the legal status of the unborn, but when reproductive rights are discussed on an international level, then there is simply a superficial reference to ‘pregnancy’, hereby bypassing all other legitimate and rational factors and issues? The international community still needs to explain this.

Similar to the Cairo Conference, great emphasis was placed on the human rights of women and their reproductive health during the Beijing Conference. Included in these human rights are reproductive health rights, which are important for the achievement of women’s equality. It is explicitly stated in paragraph 96 that the human rights of women include the right to have control over and decide freely on matters related to sexuality, sexual and reproductive health, free of coercion, discrimination and violence. As part of the declaration of the conference in Beijing it is stated that the governments at that conference were determined to “advance goals of equality, development and peace for all women everywhere in the interest of all humanity.”¹⁶² Several rights advancing equality are given. These include: “right to freedom of thought, conscience, religion and belief, thus contributing to the moral, ethical, spiritual and intellectual needs of women and men...”¹⁶³ Furthermore, the Conference provides for reproductive health rights. Paragraph 94 grants women reproductive health rights, such as to have control over their sexual and reproductive health, and access to safe, effective and affordable methods of family planning. Furthermore, paragraph 17 provides that the “right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment.” In other words, reproductive health rights as a woman’s human right are seen as a direct method to achieve equality for women. This is evident from paragraph 29 which states that: “...Maternity, motherhood, parenting and the role of women in procreation must not be a basis for discrimination nor restrict the full participation of women in society...” Therefore, the whole conference was motivated by the achievement of equality for women by way of women’s rights and reproductive health rights

¹⁶² Report of the Fourth World Conference on Women, UN official document 127, Beijing, 4-15 September, 1995, par 3; Paragraph 8 further stated: “We reaffirm our commitment to: the equal rights and inherent human dignity of women and men and other purposes and principles enshrined in the Charter of the United Nations, to the Universal Declaration of Human Rights and other international human rights instruments, in particular the Convention on the Elimination of All forms of Discrimination against Women...”

¹⁶³ Ibid., par 12.

and as a result no legal protection was agreed upon for the unborn. Here once again, one could criticise the mere referral to 'reproductive rights' without bringing other issues into consideration such as a determination as to the nature and legal status of the unborn.

These legal instruments and international conferences merely serve to strengthen the position of women. Generally, they advance the autonomy and equality of women, therefore supporting feminism (which is mainly pro-abortion when viewed in the liberal sense), and as a result thereof, the autonomy of women. Since most legal systems support women's rights and women's rights evidently receive extensive attention, the situation tends to be detrimental to the legal status of the unborn - especially since very little legal protection is granted to the unborn and very little is being said on the matter. An imbalance in the protection of women's rights and the legal protection of the unborn exists in international law. Taking into consideration that most domestic legal systems are more sensitive in their various legislations regarding abortion, with special reference to the third trimester, the international conventions and proposals which are worded in absolutist reproductive terminology necessitate further discussion.

3. 2. Autonomy and equality

What is the effect of women's self-determination, right to privacy and reproductive rights, provided for in international and regional instruments, on the legal status of the unborn? Before attempting an answer to this, the terms need to be defined. Joseph¹⁶⁴ defines the right to privacy as:

...freedom from unwarranted and unreasonable intrusions into activities that society recognizes as belonging to the realm of individual autonomy. The 'sphere of individual autonomy' has been described as 'the field of action that does not touch upon the liberty of others', where one may withdraw from others to 'shape one's life according to one's own (egocentric) wishes and expectations.

Freeman¹⁶⁵ mentions Mill's definition on the principle of autonomy as:

Over himself the individual is sovereign. And it is a cornerstone of medical law. This reflects the autonomy of each individual and the right of self-determination. So much so, that the

¹⁶⁴Schultz, Joseph S. and Castan, M., *The International Covenant on Civil and Political Rights - Cases, Materials, and Commentary*, 348-349.

¹⁶⁵M.D.A. Freeman, "A Time to be born and a time to die", *Current Legal Problems*, Vol. 56, (2003), 607.

principle of the sanctity of human life must yield to the principle of self-determination.

The extensive rights provided to women all enable the individual to be autonomous, which is a negative and absolutist principle for the legal status of the unborn in modern times. For example, in the case of *Re MB*¹⁶⁶, the Court of Appeal upheld the right of a pregnant woman to refuse treatment even though this would result in the death of a full-term foetus. Therefore, the pregnant woman's autonomy took precedence over the well-being of a viable foetus.¹⁶⁷ In the Convention on the Elimination of all forms of Discrimination against Women, the Beijing Conference, the Cairo Conference, the ICCPR and all relevant Conventions, women have extensive and emphasised reproductive health and choice rights forming part of their 'sphere of individual autonomy', right to privacy and human dignity. The question is whether reproductive rights extend to the right to have an abortion and whether abortion forms part of family planning (in an absolutist sense). The general point of departure is evident from pro-abortion writers. They are of the opinion that restrictive abortion laws are not an effective way in preventing abortions:

They only affect the procedure in such a way that often women who must have a clandestine abortion expose their health and lives to risk. So the controversy emphasizes nowadays not so much the question of whether or not to accept abortion, but merely what kind of abortion we will have and how to legitimize it.¹⁶⁸

First of all the woman's right to self-determination and its relationship to the legal status of the unborn was not approached from the angle of the unborn. It was approached from the viewpoint of women's reproductive health as well as from a pragmatic angle. Concern was expressed many times as to the health of women undergoing unsafe abortions due to the fact that these are illegal. Therefore, the supreme right to life or even an investigation into what the nature of the unborn entails was not considered first. The feminist pursuit of gender equality and an absolutist approach to the woman's health therefore affects the legal status of the unborn to a great extent. Reproductive choice rights are seen as one of the most important rights where measures are needed to reach substantive equality between men and women. It has been held that men are not similarly affected by pregnancy and therefore the burden of an unwanted pregnancy is discriminatory.¹⁶⁹ Women are unable to shape their

¹⁶⁶ *Re MB* [1997] Med LR 217, (1997) 38 BMLR 175, CA.

¹⁶⁷ J. K. Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction*, (New York: The Cambridge University Press, 2007), 20.

¹⁶⁸ M.K. Eriksson, *Reproductive Freedom - In the Context of International Human Rights and Humanitarian Law*, 283.

¹⁶⁹ *Ibid.*, 276-277.

lives and are “subjugated by their reproductive role which is determined by society at large and by their husbands in particular.”¹⁷⁰ Therefore, the view is that a woman’s equality and status is reduced because they cannot control an unwanted pregnancy. An unwanted pregnancy is seen as a problem in the search for equality of the sexes. The general feminist view is that women’s self-determination should bring them to a level of equality in their reproductive choice rights:

It is understandable why reproductive choice is addressed in a UN Convention concerning the elimination of discrimination based on gender. Clearly, freedom in fertility decision-making plays a central role in making overall equality achievable.¹⁷¹

The Convention on the Elimination of all forms of Discrimination against Women therefore provides for substantive equality to women and takes into account the differences between men and women.¹⁷² To provide adequate equality between men and women, their physiological differences must be taken into account. Unwanted pregnancy is regarded as one of these factors to be taken into account and is seen as something that needs to be changed. Therefore, the ability to become pregnant has the potential to be a physiological disadvantage. Are we denying the way we are physiologically composed? Can our physiological composition be seen as the cause of inequality between men and women? If that is the case in feminist thinking then it means that feminists actually discriminate against themselves because they are not content with their physiological composition and their ability to bear children. If the ability to bear children is a negative thing, then abortion is also a negative thing, because it highlights an undeniable difference between men and women. In other words, women have to undergo the unpleasant procedure of abortion, men don’t. Similarly, women can become pregnant and men can’t. Women empowerment can be separated from abortion.¹⁷³ Mason agrees that the equality and empowerment of women can

¹⁷⁰ C.A.A. Packer, *The Right to Reproductive Choice – A study international law*, 8.

¹⁷¹ *Ibid.*, 8-9.

¹⁷² Fayeza Kathree, “Convention on the Elimination of all Forms of Discrimination against Women”, 425.

¹⁷³ The author is well aware that various meanings exist in terms of feminism, and that there are feminists who are pro-life. However, in this context reference is primarily made to the liberal feminist movement. These are seven of the major feminist approaches: 1) liberal, 2) radical, 3) Marxist / socialist, 4) Freudian psychoanalytic, 5) Lacanian psychoanalytic (including the French feminists), 6) postmodern / poststructuralist, and 7) feminists concerned with race and/or ethnicity. For an in-depth discussion on the different forms of feminism see *Chris Beasley, What is feminism? An introduction to feminist theory* (Australia: SAGE Publications, 1999), 51-64. Furthermore, there are feminists who are pro-life. Hoskings explains that today it is assumed that in order to be a feminist you must be ‘pro-choice’. “The right to abortion is often deemed to be the most fundamental right of women, without which all others are said to be meaningless.” Furthermore, feminists hold that ‘pro-life’ feminism is “a contradiction in terms”. At ‘pro-choice’ rallies, banners have been held up stating that “a woman’s right to abortion is equivalent to her right to be”. Yet not all agree. Pro-life feminism has emerged

be separated by stating that “opposition to abortion, does not, of itself, constitute an attack on a woman’s right to respect for privacy in her life”.¹⁷⁴ Therefore, the legalisation of abortion is not indivisible from women empowerment. What is seen in the above is an imbalance between women’s rights and the legal protection of the unborn.

4. The protection of the born child in international law as compared to the legal status of the unborn

It is necessary to determine the extent to which the born child is protected in international law. This is very important in order to compare the legal position of the child an hour after birth to the legal position of the unborn child an hour before birth. The intention is to show that the imbalance between the extensive protections provided to the born child, when compared to the little legal protection provided to the unborn child in international law, is irrational and unjustified. Block and Whitehead comment that there are really only two reasonable possibilities of when life begins, namely at conception or at birth. According to these authors, all other points of development in between are merely points along a continuum which begins and ends with these two options. At any point before fertilisation there is only a sperm and an egg. Neither, without the other, is capable of developing into anything else, let alone anything human. But the fertilised egg will most certainly become a human being, if kept in the womb for nine months. At any point after birth, there is similarly no question: if a baby is not a human being, then no one is.¹⁷⁵ Block and Whitehead believe that life begins at the beginning point of the mentioned continuum because if not interfered with, and without any further effort, the foetus is already on its way to human status. In this regard, bear in mind the fact that the foetus of thirty-five weeks and several days, although viable outside the womb in virtually all cases given present technology, has no rights at all. It can be killed with legal impunity. It will be a fully rights-bearing baby in a matter of hours, yet at this stage it can be ‘disposed of’. Compare two entities, assuming this to be technologically possible: one, the new-born babe, still attached to its umbilical chord, a few seconds old. The other, its sibling, is still in the womb but due out in a matter of minutes. No two entities could be more alike, biologically, spiritually, or in any other way. Yet, in

voicing the concerns of those who have been marginalised by the mainstream, Liz Hoskings, *Pro-life feminism*, http://www.theliberal.co.uk/issue_9/politics/fof_hoskings_9.html (accessed 13/03/2007).

¹⁷⁴ J.K. Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction*, 18.

¹⁷⁵ Walter Block and Roy Whitehead, “Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy”, *Appalachian Journal of Law*, Vol, 4, No.1, (2005), 17.

‘pro-choice’ philosophy, it would be murder to kill the one and a matter of judicial irrelevance to kill the other – “surely, this is a travesty not only of justice but also of common sense”.¹⁷⁶

What follows is an investigation of the various measures protecting the born child. Extensive measures exist to protect the child: the Convention on the Rights of the Child (CRC); the Declaration of Geneva (1924); the Declaration of the Rights of the Child (1948); the UN Declaration of the Rights of the Child (1959); the International Covenant on Civil and Political Rights (Article 24); the Convention on the Elimination of all forms of Discrimination against Women (Preamble); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict.

There are those who believe that a convention on the rights of the child was not necessary. However the UN human rights treaties were not written with children in mind and children need even more protection as vulnerable entities of society:¹⁷⁷

The Convention now establishes legally binding norms and principles which create international standards for states to meet in their domestic legislation and policy concerning the areas covered by the Convention.¹⁷⁸

Children are recognised as vulnerable entities and enjoy considerable protection in international law, according to the Convention on the Rights of the Child (CRC). The CRC provides the child with extensive protection and rights. This includes among other things equality without discrimination (Article 2), the best interests of the child as primary consideration (Article 3), the inherent right to life (article 6), the right to name, nationality, and to be cared for by parents (Article 7), and the right not to suffer torture, inhumane or degrading treatment (Article 37). One of the rights underpinning the CRC is the right to life: not only life to be sustained but also to be protected and advanced. A range of positive measures exist such as rights to disease control, immunisation, nutrition and so forth. Article 3 sets the best interests of the child standard as a primary consideration. The best interests of the child are a primary consideration but not *the* primary consideration. The interests of parents and the state are not the only consideration regarding children, and the interests of the

¹⁷⁶ Ibid., 17.

¹⁷⁷ Nigel Cantwell, “The Origins, Development and Significance of the United Nations Convention on the Rights of the Child”, 29-30.

¹⁷⁸ Julia Sloth-Nielsen, “Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African Law”, 402.

child should also be given the weight due to them.¹⁷⁹ This shows the autonomy of the born child in that the child's best interest is always of paramount importance. However, this does not mean that the voice of the child will outweigh that of the adult or parent. It only necessitates consultation with children when decisions concern them.¹⁸⁰ Once a child is born, the mother's rights no longer infringe on the child's rights, and the mother in all her actions should consider whether they are in the best interests of the child. If it is an unborn child, however, the position is reversed: the important thing is not the best interests of the unborn but rather the best interests of the mother.

In conclusion, Du Plessis¹⁸¹ states that there is nothing like a start, and being born, however pessimistic one may become in later years, is undeniably a start:

Every unborn has a basic right to this start. The law is to enhance the protection of this right, instead of facilitating its destruction.¹⁸²

Surely there is a need for the CRC in that children are more vulnerable than the average adult and therefore measures have to be established for protecting children. The mentioned convention shows a large amount of sensitivity to the needs of children and greatly protects them. The CRC was created because the UN realised that the other conventions did not adequately protect children. The only inconsistency is the fact that such sensitivity to the vulnerability of children (in the CRC) and women (in CEDAW) was not, in many respects, extended further than the born child or pregnant woman. Where pre-natal protection is afforded, it seems to be more from the viewpoint of protecting pregnant women. The child and the pregnant woman are greatly protected but the same sensitivity does not apply to the unborn as a vulnerable entity. The born child that is 30 seconds old has extensive protection (considering of course that age commences after birth), while the unborn child, thirty seconds before birth, enjoys very little consideration from the UN.

¹⁷⁹ Ibid., 408.

¹⁸⁰ Ibid., 403.

¹⁸¹ LM Du Plessis, "Jurisprudential reflections on the status of unborn life", *South African Law Journal*, Vol. 1, (1990), 44.

¹⁸² Ibid.

5. Domestic legal systems on the legal status of the unborn

The legal status of the unborn in different countries is diverse. In most Catholic states such as Ireland¹⁸³ and Malta, abortion is prohibited. In Malta, abortion is prohibited in all circumstances under Section 241, Chapter 9 of the Criminal Code of Malta.¹⁸⁴ Also, in many countries where the Muslim faith is prominent, abortion is prohibited. The Islamic Penal Code of Iran prohibits abortion.¹⁸⁵ However, in countries such as the US and South Africa, a liberal approach towards abortion is followed. In the US abortion became legal after the case of *Roe v Wade*¹⁸⁶. This case introduced the trimester approach and basically made abortion available to women under most or all circumstances because of the woman's right to privacy.¹⁸⁷ *Gonzales v Carhart*¹⁸⁸ is another case in the US which governs abortion. However, this case does not prohibit abortion, but rather states that the prohibition of a specific method of abortion called partial-birth abortion is not unconstitutional.¹⁸⁹ In South Africa, abortion was made legal after the Choice on Termination of Pregnancy Act (92 of 1996). The case of *Christian Lawyers Association of SA and Others v Minister of Health and*

¹⁸³ However, Ireland allows for abortion when it puts the life of the woman in danger, "Summary of Abortion Laws Around the World", *Pregnantpause*, <http://www.pregnantpause.org/lex/world02.jsp> (accessed 7/08/2007).

¹⁸⁴ Section 241 states: "(1) Whosoever, by any food, drink, medicine, or by violence, or by any other means whatsoever, shall cause the miscarriage of any woman with child, whether the woman be consenting or not, shall, on conviction, be liable to imprisonment for a term from eighteen months to three years. (2) The same punishment shall be awarded against any woman who shall procure her own miscarriage, or who shall have consented to the use of the means by which the miscarriage is procured."

¹⁸⁵ Islamic Penal Code of Iran, "Part 12: Blood Money for Abortion", Article 487, Section 6, states: "Blood money for the aborted fetus which has taken in the human spirit shall be paid in full if it is male, one-half if it is female, and three-quarters if its gender is in doubt." Article 488: "If the fetus is destroyed as a result of its mother's murder its blood money shall be added to the blood money of its mother." Article 489: "If a woman aborts her fetus at any stage of pregnancy she shall pay its full blood money and no share of the blood money shall go to her." Article 490: "Separate blood monies shall be paid for each aborted fetus if more than one is involved in an abortion." Article 491: "Blood money for loss of limb of, or injuries to, the fetus shall be proportionate to its full blood money." Article 492: "The blood money for the aborted fetus in cases involving deliberate intent shall be paid by the culprit, otherwise by the fetus's next of kin."

¹⁸⁶ 410 US 113 (1973).

¹⁸⁷ Frankowski states that in *Roe v Wade* another fundamental right (that of the right to privacy) was discovered for the first time. This right was nowhere mentioned and never before explicitly referred to, Stanislaw Frankowski, "United States of America", 24. Also see *Roe v Wade* 410 US 113 (1973). Paragraph 15 of the case states: "Although the Constitution does not explicitly mention any right of privacy, the United States Supreme Court recognizes that a right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." Further paragraph 17 states: "the right to privacy to some extent extends to activities relating to marriage, procreation contraception, family relationships, and child rearing and education." The court then came to the conclusion in paragraph 18 that: "the right to privacy, founded upon the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

¹⁸⁸ 550 US (2007).

¹⁸⁹ The *Partial-Birth Abortion Ban Act* prohibits "knowingly performing a partial-birth abortion ... that is not necessary to save the life of a mother...", *Partial-Birth Abortion Ban Act*: 1531 (a).

*Others*¹⁹⁰ challenged the constitutionality of this Act. The Court found that the unborn was not included in section 11 of the 1996 Constitution containing the right to life but rather decided that the rights of the mother were of more importance.¹⁹¹ In Canadian law, the legal status of the unborn is given in *Tremblay v. Daigle*¹⁹². After considering women's rights and whether the unborn had a right to life, the court decided that the unborn does not have rights in the common and the civil law.¹⁹³

Therefore, diverse and inconsistent views on the legal status of the unborn exist in different states. Thus, generally, domestic abortion jurisprudence differs from one country to another. Conservative domestic views, like those in most Catholic countries such as Malta and Ireland, prohibit any form of abortion at any stage. Some domestic legal systems take a moderate stance and allow for abortions under certain circumstances, such as the health of the mother, or where the continued pregnancy will lead to the death of the mother. The liberal approach in domestic jurisprudence usually allows abortions under most circumstances. Overall, such liberal legal systems base their jurisprudence on women's rights, without considering the legal status of the unborn. When the unborn is considered, the effect that the unborn might have on the woman is considered only, and no other scientific or philosophical considerations concerning the unborn or any duties on the part of the woman, are taken into account. This is evident of an irrational and arbitrary exclusion of the unborn and an imbalance in liberal abortion jurisprudence. One such country with liberal abortion jurisprudence is Canada. As of 2007 Canada has allowed abortion in all circumstances. These include: to save the life of the mother, to preserve the physical health of the mother, to preserve the mental health of the mother, in cases of rape and incest, when the unborn child

¹⁹⁰ 1998 (4) SA p1113.

¹⁹¹ *Christian Lawyers Association of SA and Others v Minister of Health and Others*: 1123, paragraphs D-G, paraphrased: "I agree that proper regard must be had to the rights of women as enshrined in s 9 of the Constitution (the right to equality, which includes the full and actual enjoyment of all rights and freedoms and the protection that the State may not unfairly discriminate against anyone, *inter alia*, on the grounds of sex), s 12 (the right to freedom and security of the person, including, *inter alia*, the right to make decisions concerning reproduction and the right to security and control over their body) and the rights in respect of human dignity (s 10), life (s 11), privacy (s 14), religion, belief and opinion (s 15) and health and care (s 27), to which I have already referred within another context. I agree also that to afford the fetus the status of a legal persona may impinge, to a greater or lesser extent, on these rights."

¹⁹² *Tremblay v. Daigle* [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634. In this case the parties ended their relationship after five months of cohabitation. The appellant was 18 weeks pregnant at the time of the separation and decided to terminate her pregnancy. The respondent, the father of the unborn child, obtained an interlocutory injunction from the Superior Court preventing her from having the abortion. In the trial judgment the foetus was granted the right to life. On appeal, however, the foetus was denied the right to life.

¹⁹³ Martha Shaffer, "Foetal Rights and the Regulation of Abortion", *McGill Law Journal*, Vol. 39, No. 1, (1994), 66.

has medical problems or birth defects, for social and/or economic reasons, e.g. if the mother cannot afford to support a child, and available on demand, no reason needing to be given.¹⁹⁴

The position in Canada is evident of such an arbitrary approach and only the rights of the woman are taken into account. The unborn should at least be considered. The fact that the unborn is worthy of such consideration and that most states view the unborn as an entity to be at least considered is evident from some moderate domestic abortion laws¹⁹⁵ where abortion is allowed only in certain circumstances. If the abortion laws of approximately sixty-four percent of one hundred and nineteen states only allow for abortions based on: (1) a risk to life and health (physical and/or mental); (2) rape; and (3) foetal defect (hereby excluding 'demand' and 'social factors' as possible legal qualification for an abortion); then this points to the unborn as having some sort of importance regarding its protection. Included in the said percentage are no less than forty-six African states, which makes the issue, from an African perspective, rather important.¹⁹⁶ In conclusion, the lack of attempts towards rational platforms on the legal status of the unborn in international law provides the domestic legal systems with too much freedom in determining the legal status of the unborn. This in itself is irrational. Domestic legal systems are left to arbitrarily apply abortion laws without having to adhere to any international legal framework on the legal status of the unborn. As stated by Glenn Mower¹⁹⁷, there are provisions within certain conventions that are so vague that they lend themselves to various interpretations when applied to specific situations. Such vagueness may cause a State Party to justify performance that could be considered as falling short of the Convention's norms. This will then result in provisions being interpreted to be self-serving and arbitrary in the end. For example, in the case of *Attorney General's Reference No. 3*¹⁹⁸, such manipulation occurred. Although this was not manipulation of international conventions concerning the legal status of the unborn in the international arena, it nonetheless constitutes an indication and explanation of how this could happen. In this case the man stabbed his pregnant girlfriend; at the same time the knife penetrated the

¹⁹⁴“Summary of Abortion Laws Around the World”, <http://www.pregnantpause.org/lex/world02.jsp>. Similar liberal abortion jurisprudence exists in Albania, Australia, Bahrain, Belgium, Bosnia, Cambodia, China, Croatia, Cuba, Denmark, Estonia, Germany, Greece, Hungary, North Korea, Latvia, Lithuania, Macedonia, Montenegro, Nepal, Netherlands, Norway, Serbia, Slovenia, Sweden, Switzerland, United States, Vietnam and Yugoslavia, *ibid*.

¹⁹⁵ Such countries include Portugal, South Korea and Poland, *ibid*.

¹⁹⁶ *Ibid*.

¹⁹⁷ Glenn A. Mower, *The Convention on the Rights of the Child: International Law Support for Children*, 51-54.

¹⁹⁸ *Attorney-General's Reference* (No. 3 of 1994); [1996] QB 581, [1996] 2 All ER 10, CA; [1998] AC 245, [1997] 3 All ER 936, HL.

abdomen of her viable foetus. The Court of Appeal decided that the charge of murder or manslaughter was possible because the foetus was an integral part of the mother. Therefore, serious injury to the foetus constituted serious injury to the woman. This was only relevant, however, if the foetus was viable. This decision was rejected by the House of Lords. Lord Mustill stated that the mother and the foetus were distinct human beings, and that the foetus was a unique organism: to apply to such an organism the principles of a law evolved in relation to autonomous human beings was bound to mislead. Mason is of the opinion that it is fascinating to see how this “impasse of fetal identity can be manipulated according to need”. The Court of Appeal used the concept of bonding to establish a unity between mother and fetus; the House of Lords, on the contrary, saw a bonding relationship as negating one of common identity.¹⁹⁹ With regard to the legal status of the unborn, the danger exists that vagueness due to lack of debate on the legal status of the unborn could result, and possibly has already resulted in domestic legal systems interpreting abortion laws in a self-serving manner and arbitrarily.

In conclusion it can be summarised that no explicit legal protection is provided to the unborn in regional and international legal instruments. Most instruments providing the right to life or any protection relevant to the legal status of the unborn are mostly subject to compromise and therefore subject to interpretation by domestic legal systems. Thus, international human rights law provides no guidelines to domestic legal systems on the legal status of the unborn. As a result domestic legal systems interpret this issue as they wish. For example, South Africa liberalised abortion and did not have to take into account international law (as required by section 39 of the Constitution of the Republic of South Africa, 1996) because there were no international provisions in this regard. The lack of debate in international law is also evident from the varying views of domestic legal systems. Not only do they differ in that some are pro-abortion and others anti-abortion, they also differ with regard to the fact that liberal legal systems justify abortions for different reasons and do not even agree on their reasons for justifying the legalisation of abortion. International law and some domestic legal systems also prioritise reproductive health rights (although the author does not deny that these rights are important). What is disputed is the imbalance with which reproductive health rights are used to emphasise women and leave the unborn in the dark. There is no balance between women’s rights and the legal status of the unborn. Also, international law and some

¹⁹⁹ J. K. Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction*, 42-43.

domestic legal systems are sensitive to vulnerable entities of society such as women and children but the same sensitivity is lacking when it comes to the legal status of the unborn, pointing towards an irrational approach. Furthermore, the tendency exists in international and domestic law not to view all three trimesters equally (as in *Roe v Wade*²⁰⁰). According to the author this is irrational as no adequate or logical reasons are given for differentiating between the three trimesters. This is dealt with in more detail later.

6. International law and domestic legal systems on the legal position of animals

The reason for an investigation into the position of animals is to highlight the fact that animals enjoy more legal protection than the unborn in international law.²⁰¹ Animal laws vary from one country to the next. Some countries view animals as ‘beings’ to be protected; others view animals as mere objects of pleasure or property. The position of the unborn also varies from country to country. However in international law steps (conventions) are being taken to protect animals and in general non-human beings, such as the environment. No such attempts are being made in the case of the unborn. International law and domestic legal systems also have to be investigated to determine the amount of legal protection provided to animals and compare these findings to the legal protection provided to the unborn. The results are aimed at showing that animals receive more legal protection than the unborn and to show why such a position is contrary to humanity, rationality, fair process and fairness in general.

6. 1. International law

There are several animal welfare organisations working towards the advancement of the position of animals. These include organisations such as CIFW (Compassion in World Farming), the European Coalition to End Animal Experiments (ECEAE), the Humane

²⁰⁰ 410 US 113 (1973).

²⁰¹ Some might argue that although the animal is protected in international law, this is done because an animal has life and it has not been determined whether the unborn has life or not. However, as mentioned in a previous chapter, it is irrational and arbitrary to view life as the determining factor of the position of the unborn. The concept of life is mere opinion. Even if it is decided that a foetus is not a person, this does not necessarily mean that the question of the legality of abortion is answered. Many non-persons, like animals, are protected. The state can have an interest in protecting potential human life, even if the foetus is not a person, Austin Cline, *Fetus, Humanity, Personhood: When Does a Fetus Become a Human Person with Rights?* <http://atheism.about.com/od/abortioncontraception/p/PersonhoodFetus.htm> (4/05/2007).

Society International, the international arm of the Humane Society of the United States (HSUS), the International Fund for Animal Welfare (IFAW), the International Institute for Animal Law (IIAL), the International Society for Animal Rights (ISAR) and the World Society for the Protection of Animals (WSPA).²⁰² Although these organisations exist, there is still no worldwide treaty safeguarding the welfare of animals. Animal welfare organisations such as the ASPCA and the World Society for the Protection of Animals are currently campaigning for ten million signatures to present to the UN, together with a proposal for a Universal Declaration for the Welfare of Animals. In addition to the Universal Declaration, there has also been a proposed International Convention for the Protection of Animals (proposed text from Animal Legal & Historical Center).²⁰³ The WSPA has consultative status with the UN and several other international organisations and advises governments and member-societies on appropriate animal welfare legislation.²⁰⁴ One hundred and thirty countries received an official briefing on the global initiative supported by the WSPA to establish a UN Universal Declaration on Animal Welfare.²⁰⁵ Therefore, although no UN instruments on the legal protection of animals exist, developments in that direction are evident.

The following reasons are given as to why it is important to have this declaration/convention for the protection of animals: improved practices for sustainable agriculture; lessened risk of diseases; more productive relationships between people and the animals they control; a more compassionate global attitude towards animals; promotion of biodiversity; and the provision of a benchmark for those countries with little or no animal welfare standards.²⁰⁶ With regard to the convention, this is a proposed umbrella treaty to deal with all aspects of animal issues. Although this is only a draft proposal made to the General Assembly, it is still important to have an overview of this proposal to highlight the fact that steps are being taken towards the protection of animals and this proposal could be a valuable source of the current approaches on animals in international law. This proposal was made by the Committee for the Convention for the Protection of Animals on 4 April, 1988. The materials reflect the

²⁰² “Animal Law Worldwide”, *Georgetown Law Library, International and Foreign Animal Law Research Guide*, <http://www.ll.georgetown.edu/intl/guides/InternationalAnimalLaw.cfm> (accessed 4/05/2007).

²⁰³ Ibid.

²⁰⁴ “World Society for the Protection of Animals”, *Georgetown Law Library*, www.wspa-international.org/campaigns.asp?campaignType=50 (accessed 18/05/2007).

²⁰⁵ “Declaration for animal welfare ‘on UN agenda’”, *Our Dogs Shop*, <http://www.ourdogs.co.uk/News/2006/December2006/291206/un.htm> (accessed 4/05/2007).

²⁰⁶ “World Society for the Protection of Animals”, www.wspa-international.org/campaigns.asp?campaignType=50.

deliberations of the Drafting Committee over three years and also comments and discussions received at two public conferences.²⁰⁷ The proposal includes several protocols on companion animals, transportation of animals, care of exhibited wildlife and protection from cruel treatment. Article 1(1) mentions humans as moral beings having an obligation to act responsibly toward animals. Article 1(2) also mentions that: “Life has intrinsic value. No animal should be killed unnecessarily or be subjected to cruel acts or to unnecessary suffering”. Article 9 minimises the use of animals in scientific research. The Companion Animal Protocol provides in Article 1 for the prevention of suffering and distress of companion animals²⁰⁸. Article 3 provides for an age limit of persons who can have companion animals and Article 4 for the measures to be taken to provide adequate care to companion animals. Article 9 gives several preventions, restrictions and exceptions on Surgical Operations. Article 10 provides for preventions and restrictions on the killing of companion animals. The rest of the Protocols provide for similar provisions in the case of each type of animal²⁰⁹.

Not only is a declaration or convention on the legal protection of animals sought, but attempts are also being made to include animals within the ambit of protection of the Universal Declaration of Human Rights. With the ratification of the Universal Declaration of Human Rights (1948), ‘human rights’ saw a new era in international law. This symbolised the triumph of humanitarianism. This was a new era in human morality in which justice came to be more important than power.²¹⁰ Organisations argue that to pay tribute to the idealism of the Universal Declaration of Human Rights is to acknowledge the limitations of our own ideals, and to shape the morality of our own future in the same way as did the framers of the Declaration of Human Rights. They believe that it is therefore time to include non-human animals in the sphere of protection of the Declaration. To them the protection of animals will be the logical end inevitable progression of this principle.²¹¹ Jürgen Moltmann²¹² mentions a

²⁰⁷ These conferences were Geneva, July, 1986 and London, November, 1987.

²⁰⁸ Companion animals are pet animals. These include “stray animals” but exclude wildlife. A “stray animal” is a companion animal which is outside the bounds of its owner's or keeper's household and is not under the control or direct supervision of the owner or keeper, “Proposed Convention on the Protection of Animals”, *Michigan State University College of Law: Animal Legal and Historical Centre*, <http://www.animallaw.info/treaties/itconfprotanimal.htm#Companion%20Animal%20Protocol> (accessed 15/02/2008).

²⁰⁹ Ibid.

²¹⁰ “Universal Declaration of Animal Rights”, *Uncaged*, <http://www.uncaged.co.uk/declarat.htm> (18/05/2007).

²¹¹ Ibid.

²¹² Jürgen Moltmann, *God for a Secular Society: The public relevance of Theology*, London: SCM Press, 1997, 112 – 113.

proposal and appeal to the UN to expand its Universal Declaration of Human Rights. This proposal was put before the major UN Conference in Rio de Janeiro in 1992 and was incorporated in the Earth Charter. The proposal included that animate and inanimate nature has a right to existence, preservation, development and protection of its eco-systems, species and genetic inheritance. Organisms have a right to a life fit for their species, including procreation within their appropriate ecosystems, and rare eco-systems need to be placed under protection. The extinction of species is forbidden. Any disturbances of nature also require justification.

However, the problem arises with the fact that international law has failed to define the concept of “human being” (whether the unborn is included or not) and therefore, the liberally applied human rights of the Universal Declaration of Human Rights are being applied to vague concepts of “human being”, rendering it arbitrary. International law now seeks to extend rights to animals. Organisations such as the WSPA are campaigning for a Universal Declaration on Animal Welfare. Yet, the concept of “human being” has not been finalised - nothing is being said about the unborn and whether it is included in the concept of “human being”. These principles and benchmarks provide for minimum universal standards to protect animals: a universal rationale lacking in the case of protection of the unborn.

6. 2. The European Union

The European Union has several regional treaties governing the protection of animals in transport, farming and experimentation.²¹³ Descriptions of some of these treaties are provided in illustration of what is on the table. The European Convention for the Protection of Pet Animals promotes the welfare of pet animals. It stipulates minimum standards to which national governments should give effect. The preamble states that it recognises that “man has a moral obligation to respect all living creatures” and that pet animals have a

²¹³ “Animal Law Worldwide”, <http://www.ll.georgetown.edu/intl/guides/InternationalAnimalLaw.cfm>. These include: the European Convention for the Protection of Pet Animals, the European Convention for the Protection of Animals During International Transport (1968), the Additional Protocol to the European Convention for the Protection of Animals During International Transport (1979), the European Convention on the Protection of Animals During International Transport, the European Convention for the Protection of Animals Kept for Farming Purposes, the Protocol of Amendment to the European Convention for the Protection of Animals Kept for Farming Purposes, the European Convention for the Protection of Animals for Slaughter, the European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes, the Protocol on Protection and Welfare of Animals and a Protocol of the Treaty of Amsterdam Amending the Treaty on European Union.

special relationship with man. Articles 3(1) and 3(2) prohibit pain, suffering, distress and abandonment of pet animals. Article 4 imposes the responsibilities, in regard to the welfare of the pet animal, on the person keeping such animal in terms of accommodation, food, water and exercise. Article 10 provides for prohibitions and restrictions on surgical operations and Article 11 for restrictions and prohibitions on the killing of pet animals. The Protocol of the Treaty of Amsterdam Amending the Treaty on European Union (a Protocol on protection and welfare of animals as part of the Amsterdam treaty) also “provides for the improved protection and respect for the welfare of animals as sentient beings.”

Earlier it was mentioned that a universal jurisprudence is sought on the legal status of the unborn. The mentioned European conventions provide for a universal jurisprudence on how animals should be treated and its signature States Parties must adhere to these principles. Why can such minimum standards not be created in the case of the unborn?

6. 3. Domestic legal systems

Several domestic legal systems contain provisions protecting animals. In the US there are three federal statutes relating to animal welfare: (1) The Humane Methods of Slaughter Act (7 USC 1901-1907) the Twenty-Eight Hour Law (49 USC 80502, 1877), and the (3) US Animal Welfare Act (7 USC 2131-2159). The US Animal Welfare Act is not a federal anti-cruelty law; instead, anti-cruelty legislation is determined by states.²¹⁴ It should be borne in mind that “the anti-cruelty laws in the US were not created to protect the animals themselves, but to protect the morality of human members of society.”²¹⁵ Therefore, animals are protected in the US to protect the morality of humans. Looking at this statement, the following questions come to mind: (1) what is meant by “protecting the morality of human members”? and (2) if animals are to be protected in order to protect the moral fibre of society, what about protecting the unborn to protect the moral fibre of society? With regard to (1) it can only be assumed that attempts are made to establish a sense of morality in society by showing no tolerance or acceptance of violence and cruelty. This leads automatically to the second question: should the same not be done regarding the unborn? A substantial

²¹⁴Tomaselli, Paige M, “International Comparative Animal Cruelty Laws”, *Animal Legal and Historical Center*, (2003), <http://www.animallawinfor/articles/ddusicacl.htm> (accessed 24/2/2007).

²¹⁵ Ibid.

contradiction exists if prevention of cruelty towards animals protects the morality of society but prevention of abortion does not – all that is brought into play is a re-consideration of the importance of certain phases in the pregnancy period. The two are treated differently, yet abortion also boils down to cruelty towards the unborn. Also, the legal protection of animals provides a limitation to the autonomous rights of human beings to do what they want with animals. This limitation of autonomy is accepted but a limitation of the autonomous rights of women with regard to abortion is not acceptable. When it comes to animal rights, the law is sensitive towards animals and humanity. The situation is not the same with the unborn. This contradiction is indicative of an arbitrary and irrational approach towards the legal status of the unborn.

The United Kingdom also provides legal protection for animals. The UK signed and ratified the European Convention for the Protection of Animals Kept for Farming Purposes, and must therefore adhere to the principles agreed to as a member state. The Protection of Animals Act (1911) is the main piece of anti-cruelty legislation applicable to England and Wales.²¹⁶ Animals are protected in South Africa by way of the Animals Protection Act (71/1962). Article 2 prohibits several offences in respect of animals and provides for a penalty in the event of non-compliance. In Germany the German Animal Welfare Act (Federal Law Gazette I, p. 1094) is the primary legislation on animal welfare in Germany. It enforces utilitarian principles in that there must be good reason for one to cause an animal harm and identifies that it is the responsibility of human beings to protect the lives and well-being of their fellow creatures.²¹⁷ In Sudan, the Penal Code Act (2003) provides for measures prohibiting cruelty to animals.²¹⁸

²¹⁶ Section 1 prohibits several offences of cruelty such as beating (article 1 (1) (a)), over-loading (article 1 (1) (a)), fighting (article 1 (1) (c)), operations performed without considerations of humanity (article 1 (1) (e)), etc. A penalty is also provided for contravention of these prohibitions. Similar to the UK, Spain signed and ratified the European Convention for the Protection of Animals Kept for Farming Purposes and must adhere to the principles agreed to as a member state. Switzerland signed and ratified the European Convention for the Protection of Pet Animals, as well as the European Convention for the Protection of Animals Kept for Farming Purposes and must therefore adhere to these principles agreed to as a member State.

²¹⁷ “Germany Animal Welfare Act,” Michigan State University College of Law: Animal Legal and Historical Center, <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (accessed 18/05/2007). Article 1 states that the act protects the lives and well-being of animals. It prevents animals begin caused pain, suffering and harm without good reason. Article 2 provides for requirements in the care of animals.

²¹⁸ Penal Code Act of 2003, Chapter 20, Sections 238-241.

7. Conclusion

First of all, it has been established that the United Nations is silent on the legal status of the unborn. It may be stated that the United Nations chose to avoid this question. “Avoid” is a better word to use than “exclude” because although the issue of abortion is mentioned, the unborn is not expressly denied legal status in international law, yet no convention or declaration expressly gives a position on the legal status of the unborn. The only convention that expressly and directly provides the unborn with the right to life is the American Convention on Human Rights. On the other hand, the only international measure expressly and directly denying the unborn the right to life is The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Flood, however, is of the opinion that universal and regional legal instruments support the unborn’s right to life. He states that the available evidence points more often, more clearly, and with more weight to a preference for life.²¹⁹ However, although this is the hope of the author, the provisions that do concern the unborn are too vague to determine whether legal protection is provided directly to the unborn and if so, to what extent is the unborn protected. It is unclear whether the provisions that do protect the unborn are merely from the viewpoint of the mother or whether they include the right to life. From comments by the Human Rights Commission and the CEDAW Committee, it may be concluded that there is concern that illegal and unsafe abortions are detrimental to the health of women. Therefore, the abortion issue is approached overwhelmingly from a women’s health perspective in international law and not from a right to life perspective (or any other legitimate perspective which emphasises the importance of the unborn.) Ibegbu²²⁰ agrees that international instruments on human rights are ambiguous on the issue of whether the unborn is protected or not. As far as is known, in all contemporary international instruments on human rights, there is no place where the term “unborn child” is defined. Nor has there been any interpretation in jurisprudence of this term so far.²²¹ Ibegbu’s analysis of the instruments also indicates that there is no explicit protection of the right to life of the unborn. The regional commissions, the courts of human rights and some national courts have refused to declare categorically that the unborn is subject to the right to life. Therefore, it is left to the free decision of the states.²²² The fact that the decision is left to the states results in the situation that some states protect certain

²¹⁹ Patrick J. Flood, “Is international law on the side of the unborn?”, 73.

²²⁰ Jude Ibegbu, *Rights of the Unborn Child in International Law*, xxvii.

²²¹ *Ibid.*, 2-3.

²²² *Ibid.*, xxvii.

rights of the unborn and others deny them. This is due to the fact that there is no universal convention which protects the rights of the unborn.²²³ This has played a role in the existence of arbitrary and conflicting laws on the rights of the unborn in many states. Therefore, according to Ibegbu (and it is agreed with him), there is a *lacuna* in the law.²²⁴ This *lacuna* has led to irrationality due to the fact that it has caused arbitrary and conflicting laws on the legal status of the unborn by states. However, in this study it is not necessarily agreed that the right to life perspective is the solution to the problem. What is rather presented as a solution is rational debate which includes the ‘life’ issue as a factor among other factors.

The right to life was described by the Human Rights Committee as the supreme right. It has been established that, in the light of this emphasis on the right to life, the non-proven status of the unborn is unethical and irrational. As the right to life is the supreme right, the unborn’s legal status had to be determined first before the extent of any women’s rights and children’s rights were determined. By not determining the legal status of the unborn and leaving it to local law, the right to life in international law becomes relevant. The scope of the right to life will therefore depend on its interpretation in local law. Nöthling Slabbert²²⁵ is of the opinion that the question of the legal status of the unborn is a moral question which must be decided by each state individually. Where does one draw the line between moral issues limited to the sovereign legal system of a state, and moral issues open to universal agreement among states? Regarding the latter there are many examples of issues pertaining to morality that are determined by collective discussion among states in an effort towards the attainment of agreement. Gutmann and Thompson (albeit in a political context) state that if citizens do not practice mutual respect as they try to come to agreement on a morally disputed policy, or as they try to live with the disagreement that remains after the disputed policy is adopted, they are forced to turn to non-moral ways of dealing with moral conflict. They are driven to count on procedural agreements, political deals, and threats of violence - all of which obviously stand in the way of moral deliberation.²²⁶ The authors add: “The underlying assumption is that we should value reaching conclusions through reason rather than force, and more

²²³ Bueren observes that states hold such fundamentally divergent views on the issue of when childhood begins that they cannot simply be reconciled by the use of a treaty, *ibid.*, 149.

²²⁴ *Ibid.*, xxviii.

²²⁵ M. Nöthling Slabbert, “The position of the human embryo and fetus in international law and its relevance for the South African context”, 352.

²²⁶ Amy Gutmann and Dennis Thompson, “Moral Conflict and Political Consensus”, *Ethics*, Vol. 101, Number 1, (1990), 77.

specifically through moral reasoning rather than through self-interested bargaining”.²²⁷ The same should apply to the international community regarding communicative structures on the legal protection of the unborn.

The woman is extensively protected in international human rights instruments. This is probably due to an overcompensation resulting from past and present inequalities between men and women and also the vulnerability of women. Measures to affect substantive equality between men and women are called for. One of these international law measures to achieve substantive equality is women’s autonomy and reproductive rights. This includes the right to reproductive choice or freedom, as well as the right to reproductive health and family planning. Legal and safe abortions are considered to be a method to achieve this reproductive health. The liberal feminist movement also views unwanted pregnancy as something that can cause inequality between men and women. Children are also given extensive rights by international law provisions resulting in the autonomy of the child. The exclusion of the unborn weakens and compromises the validity of these rights. The definition of a child will depend on its definition in local law and international law. It has also been established that the regional human rights instruments have no consensus on the legal status of the unborn, resulting in a dichotomy and the consequent relativity of life. Several cases and legal instruments of regional and domestic legal systems unanimously and extensively (with a few exceptions) provide protection for women and women’s reproductive health rights. Furthermore, these instruments also provide for extensive protection of the born child. For the most part, these instruments are silent on the legal status of the unborn. However, the American Convention on Human Rights provides protection for the unborn, while the European Convention and the African Charter are silent on this matter.

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa denies the right to life to the unborn in specific instances. These include cases of rape, incest, sexual assault, mental and physical harm to the mother and possible death of the mother. However, this protocol does at least give some indication of the legal status of the unborn and does protect the unborn in certain circumstances. In other words, the protocol does not allow for abortion on demand or for mere social reasons. This is indicative of the fact that, although the protocol allows for abortion under certain circumstances, it still gives

²²⁷ Ibid.

some consideration and respect to the unborn by not allowing abortion on demand or for mere social reasons. Such kind of legal protection for the unborn might be better than no protection at all, which is the current position in international law. In conclusion, the lack of consensus amongst these instruments renders the right to life, held so high in international law, arbitrary and relative.

Not only is the legal status of the unborn irrational when international and domestic legal systems are investigated, but it is also irrational when compared to the amount of legal protection or debate concerning animals on domestic and international level. Animals are protected by several conventions and domestic legal systems, and the process towards the furtherance of this protection is ongoing and active. Several organisations are campaigning for the development of a UN convention protecting animals. The aim of protecting animals is partly to protect and enhance the moral fibre of society, but the emphasis on the legal protection of animals is rather disappointing taking into consideration the importance of human beings and consequently ‘anything’ even remotely (at minimum) related to man such as the unborn - the harm or killing of animals is immoral but the issue of the harm or killing of the unborn lingers in silence. According to Animal Rights activists animals have been oppressed, not because of any meaningful or relevant distinction between human and non-human, but for the same reason that human beings have been oppressed. Giving rights to humans threatens the freedom of those in power.²²⁸ Therefore, animal rights threaten the freedom and power of humans to use these animals as they wish.²²⁹ In other words, if rights are granted to animals, this will mean fewer freedoms for human beings to do with animals as they wish. It will mean discomfort and a limitation of the autonomous needs and wants of human beings. Similarly, the main reasons for abortion are the rights of the mother and her autonomy. Opposition to abortion is considered to be a threat to her autonomy and freedom – in other words, a limitation of her power. Therefore, the exact same reasons why the unborn is oppressed are the exact reasons for the oppression of animals. In both cases the freedom (the interpretation of which will also differ from one person/state to the next) of those in power is threatened.

²²⁸ “The Universal Declaration of animal rights”, <http://www.uncaged.co.uk/declarat.htm>. “The source of resistance to this emancipation of animals is not reason or justice, but a false notion of human self-interest”, *ibid.*

²²⁹ *Ibid.*

As was noted above, several European conventions protect animals. Domestic legal systems also have different but several provisions regulating and protecting animal welfare. Most of all, campaigns are being fought for a universal declaration and eventually a convention on animal welfare. Organisations assist in animal welfare protection and the furthering of the campaign to the UN. Several pro-life movements exist campaigning for the protection of the unborn. Yet the European Union and the United Nations have been silent on the legal protection of the unborn. No proposal for a draft declaration on the protection of the unborn is being suggested. In the quest for animal welfare, appeals are made to protect animals in an attempt to protect the morality of humanity, not to subject them as our resources and subjects of human power or to extend human rights to include the animal. In abortion jurisprudence humanity is not considered, the unborn is the subject of human power and a threat to women's autonomy, and human rights are being used as the weapon for women to protect their autonomy against the unborn. Why this distinction? Senator Robert Byrd of West Virginia called cruelty to animals 'barbaric'.²³⁰ Former Congressman J.C. Watts noted that something was wrong with this response.²³¹ Watts' explanation for this moral blindness was that "cultural degeneration" has so skewed our priorities that we decry "the mistreatment of innocent animals, while we turn a collective and legislative blind eye to the premature and barbaric killing of human life in the name of 'choice.'" ²³² People get "more worked up over the admittedly brutal and inhumane treatment of soulless dogs" than "the brutal procedure known as partial-birth abortion."²³³

In conclusion, Mason states that the lack of debate on the legal status of the unborn is due to a sense of war-weariness accompanied by something of a tacit agreement to stop fighting about it. Whatever the reasons for the current lack of debate concerning the legal status of the unborn in international law are, the fact remains that such silence is irrational. Even more so in light of the fact that strongly held views still exist and are not deceased but merely being suppressed.²³⁴

²³⁰ Colson, "Of Dogs and Babies Cruelty and Outrage", *BreakPoint with Chuck Colson*, http://www.breakpoint.org/site_hmpg.asp (17/08/2007).

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ J.K. Mason, *The Troubled Pregnancy: Legal Wrongs and rights in reproduction*, 14.

Chapter 3

Towards rationality in the international furtherance of the legal protection of the unborn: The essence of the argument

1. Rationality explained

Gutmann and Thompson state the following:

In seeking principles for political consensus in the face of fundamental moral disagreement, we need to attend not only to the nature of the positions but also to the way in which people hold or express positions. Morally respectable positions can be defended in morally disrespectful ways. It is the role of the principles of accommodation to restrain those ways. These principles govern the relations among citizens who hold morally legitimate though fundamentally opposed positions on public policy. They suggest how citizens who disagree about an issue should treat each other with regard to that issue and related issues, even when the policy debate results in legislation and the state takes a position favouring one side of the dispute. The principles are best conceived as expressing a virtue that lies at the core of moral deliberation in a moral democracy - mutual respect. Like toleration, mutual respect is a form of agreeing to disagree. But mutual respect demands more than toleration. It requires a favourable attitude toward, and constructive interaction with, the persons with whom one disagrees. It consists in a reciprocal positive regard of citizens who manifest the excellence of character that permits democracy to flourish in the fact of (at least temporarily) irresolvable moral conflict.²³⁵

... mutual respect requires citizens to strive not only for agreement on principles governing the basic structure but also for agreement on practices governing the way they deal with principled disagreements, whether about the basic structure or ordinary policies. The agreement on these practices is possible because citizens who seriously disagree over policies such as the legalization of abortion, capital punishment, and pornography can share other substantive standards: they can recognize that their own moral commitments might turn out to be wrong even though they now have good reason to believe them to be true; they can value public deliberation as a critical means of subjecting their moral commitments to critical scrutiny ... and they can give serious consideration to opposing points of view as a manifestation of their respect for morally reasonable people.²³⁶

Encapsulated in the above insight is the purpose of this thesis. The above is emphasised as guide to the way forward for the international community to develop the legal status of the unborn from an international law perspective. In order to further the relevance of the above

²³⁵ Amy Gutmann and Dennis Thompson, "Moral Conflict and Political Consensus", 76.

²³⁶ Ibid., 88.

insight regarding the legal status of the unborn in international law, the author proposes in what follows, ways to stimulate the progression of the latter theme, such progression founded upon the basics pertaining to rationality as substance and procedure, which, by implication, provides for a sensitive, inclusive, communicative and benevolent structure towards the plight of a section touching on the survival of humanity and ‘anything’ remotely connected. Many additional ideas (to the above quotation) emanating from discussion and proposals regarding constitutional and democratic expectations serve as hints for the furtherance of the same concepts on an international plane. Nagel, for example, states that public justification in a context of actual disagreement requires, first, preparedness to submit one’s reasons to the criticism of others, and to find that the exercise of a common critical rationality and consideration of evidence that can be shared will reveal that one is mistaken. In the words of Nagel: “This means that it must be possible to present to others the basis of your own beliefs, so that once you have done so, they have what you have, and can arrive at a judgment on the same basis...”.²³⁷ Nagel adds that secondly, public justification requires an expectation that if others who do not share your belief are wrong, there is probably an explanation of their error which is not circular. The explanation should not come down to the mere assertion that they do not believe the truth (what you believe), but should explain their false belief in terms of errors in their evidence, or identifiable errors in drawing conclusions from it, or in argument, judgment, and so forth.

According to Nagel, one may not always have the information necessary to give such an account, but one must believe there is one, and that the justifiability of one’s own belief would survive a full examination of the reasons behind theirs.²³⁸ Nagel sums it up by stating: “These two points may be combined in the idea that a disagreement which falls on objective common ground must be open-ended in the possibility of its investigation and pursuit, and not come down finally to bare confrontation between incompatible personal points of view”.²³⁹ In this one realises that in the contemporary international domain regarding human rights jurisprudence on the legal status of the unborn (which in fact is to a large degree non-existent from the perspective of activity from international organisations such as the UN) the discussions overly emphasise certain issues without accommodating others, for example, reproductive rights is at present a dominating factor when compared to the interests of the

²³⁷ Thomas Nagel, “Moral Conflict and Political Legitimacy”, *Philosophy and Public Affairs*, Vol. 16, No. 3, (1987), 232.

²³⁸ Thomas Nagel, “Moral Conflict and Political Legitimacy”, 232.

²³⁹ Ibid.

unborn. This thesis, in addition to emphasising these *lacunae*, proposes rational, reasoned and fair structures and procedures to remedy this.

Regarding neutrality and objectivity of legal reasoning, it is said that an important aspect of the feminist legal project is to expose the misleading nature of ideals of neutrality and objectivity from which legal reasoning derives its legitimacy. This according to Scales is referred to as ‘the tyranny of objectivity’. Legal reasoning is a variation of Cartesian logic, which assumes that knowledge is acquired by individual people through the exercise of their faculties of reason. When knowledge is obtained through the correct process of reasoning, it will tend to be true, irrespective of the identity of the ‘knowers’ (subjects of knowledge) or the people about whom knowledge is obtained (objects of knowledge). For this reason, legal rules can and should be objective and based on universally accepted philosophical methods and grounds.²⁴⁰ This type of criticism in jurisprudential debate is quite abundant, where the quest for reasoning and universality is strongly negated. This, however, should not always be the case. The law is a conceptual being, comprised of numerous other concepts and their specific relationships with one another. The feminists will, for example, postulate that the law not only accepts male life experiences as the basis for the formulation of universally applicable rules, but the very structure of legal reasoning replicates the ways in which men of particular racial, class and social status are socialised to think and behave.²⁴¹

The relevance and application of the law is determined by contexts and ideologies, and consequently this affects the degree of qualification regarding the relevance and application of reason (rationality) and universality. However, one needs to be vigilant regarding the issue at hand, because the relevance of reason and universality can differ from instance to instance. For example, in the feminist approach referred to in the above, it might be true that reason and universality in the law is encapsulated by male insights; but this is not to say that the quest for more clarity on the legal status of the unborn does not merit the application of reason and universality. In addition, reason and universality are not to be viewed in an absolute manner. In other words, attempting the application of reason and universality as far as possible is in fact possible and useful in many situations. A good example of the accomplishment hereof is the rules of natural justice, accepted to a large extent by everyone

²⁴⁰ Karin van Marle and Elsje Bonthuys, “Feminist theories and concepts”, in *Gender, Law and Justice*, (edited by Elsje Bonthuys and Catherine Albertyn, Cape Town: Juta & Co. Ltd, 2007), 44.

²⁴¹ *Ibid.*, 45.

around the world. The rules of natural justice are not so deeply entrenched in a certain mindset or ideology as for example, norms that prescribe things to women that would be viewed by the feminists as biased, unfairly advantaging males. The same applies to the legal requirements for the establishment of a contract between two parties. Bringing the legal status of the unborn into the picture one could argue that discussion pertaining to the determination as to the legal status of the unborn is not to be totally excluded from rational, reasoned and universal platforms. To do so would allow the law and legal systems to become lost in chaos and conflict. Communicative structures must be accessible and tolerable. This is especially applicable to the debate on the legal status of the unborn.

It is proposed that rationality is the *best method* to further any legal discourse on the legal status of the unborn in international law. When one considers judgements in law, hard cases usually present us with the thought of whether or not interpretations of legal norms can be right in some essential meaning of this word.²⁴² This question becomes somewhat more puzzling when one considers that the laws serving as authoritative basis for legal decisions are sometimes ambiguous, full of gaps or “fuzzy”. This causes the one interpreting the case to move around in circles.²⁴³ Discourse and laws on the legal status of the unborn is a very good example, if not the case where this happens the most, of argumentation moving around in circles with varying outcomes. Attempts have been made to break out of this circle by giving normative answers to these questions: in interpreting the law, for instance, one should follow the letter of the law, or its purpose etc. The answer to a routine decision is usually one of applying a specific set of facts.²⁴⁴ Aarnio refers to the routine cases and the hard cases. Routine cases are mechanical, important for daily life but from the point of view of legal interpretation, lacking in interest.²⁴⁵ With regards to hard cases, there is usually more than one legal norm applicable to the same set of facts, or the same legal norm permits more than one interpretation.²⁴⁶ Clearly, the legal status of the unborn qualifies as a hard case evident from the several legal norms being applied to the same set of facts. Consequently, in this section the scope and definition of rationality is investigated and also presented as the *best method* of debate. It is the best method since social theory and political philosophy, in

²⁴² Aarnio Aulis, *The Rational as Reasonable: A Treatise on Legal Justification*, Dordrecht: D. Reidel Publishing Company, 1986, xiii.

²⁴³ Ibid.

²⁴⁴ Ibid., xiv.

²⁴⁵ Ibid., 1.

²⁴⁶ Ibid., 2

particular, have never proved able to lead the debate on “right or wrong” more effectively than the established paths of legal reasoning.²⁴⁷ The advantages and virtues of this method of debate are then discussed and the lack of use of rationality is explained and illustrated by way of example. What is needed is to start with a comprehensive definition and explanation of the concept “rationality”, and the following insight and elements provides a good start:

Reason opposes isolation; it seeks coherence. To this end reason requires consistent and correlated, not arbitrary or haphazard, thinking, to bring out contradictions, to integrate every isolated thing and thought. . .It breaks all barriers, overrides all inhibitions; reason gives credit where credit is due and in this fashion preserves the essence of whatever it contemplates.²⁴⁸

A rational debate, as stated above, will be *consistent*. By way of illustration, the following regarding the abortion issue: In some instances international law is inconsistent on the legal status of the unborn²⁴⁹. Take for example Article 6(5) of the International Covenant on Civil and Political Rights. This article states that the death sentence “shall not be imposed on persons below 18 and shall not be carried out on pregnant women.” In other words, in international law, the unborn is protected and regarded as an entity worthy of protection by prohibiting the death penalty on a pregnant woman.²⁵⁰ However, in international human rights law, as shown in the previous chapter, international law is silent on the unborn where a woman is pregnant but has not committed a crime. Chapter 2 clearly shows that a very few human rights are given to the unborn but that women are provided with several reproductive rights. Therefore in terms of human rights the pregnant woman has reproductive rights but no effort is made towards the legal protection of the unborn. International human rights law and international criminal law, when compared with each other, have contradictory approaches regarding the legal status of the unborn. Therefore, international law is inconsistent in its views and provides for disparities on the legal status of the unborn. Another example of such inconsistency is the law of the United States of America. Although

²⁴⁷ Armin von Bogdandy, “Constitutionalism in International Law: Comment on a Proposal from Germany”, *Harvard International Law Journal*, Vol. 47, No. 1, (2006), 227.

²⁴⁸ Karl Jaspers, *The Idea of the University*, (London: Peter Owen 1959), 45.

²⁴⁹ Although the use of the word “unborn” may be partisan, the use of the word “foetus” will also be partisan. Although the writer is of opinion that the “entity from the period of conception” should be considered as a human being (and therefore the use of the word “unborn”) an attempt is made not to project the views of the author on any reader. This choice of word is for practical purposes (to avoid the use of multiple words to explain one concept). This was also explained in the introduction (Ch 1).

²⁵⁰ However, Article 6(5) can possibly exist only to provide further protection of women’s human rights and thereby only indirectly protecting the unborn. Yet, even if this is the case, a distinction is still being made between pregnant and non-pregnant women and therefore the unborn must be considered to have some sort of status, whether legal or not, to grant this kind of protection to women.

the case of *Roe v Wade*²⁵¹ is not a case of international nature, it can still be used to explain inconsistencies and lack of rational debate in the jurisprudence of the developed, larger and more influential states such as the United States of America. In this case the court decided that no consideration was to be made of the biological facts concerning the unborn.²⁵² Yet, in the end the court decided to use the viability method (considering the biological characteristics of the unborn and its development) to decide when the legal status of the unborn becomes compelling.²⁵³ US jurisprudence on the legal status of the unborn is even more inconsistent when one considers the case of *Planned Parenthood of Southeastern Pa v. Casey*²⁵⁴. In this case the court ‘updated’ the abortion argument by rejecting the *Roe* trimester framework and “privacy” rationale, now deciding to justify abortions by way of another argument – the ‘undue burden’ argument.²⁵⁵ Furthermore, the court held that in a liberal society a conception about the mystery of life is to be determined by each person for himself.²⁵⁶ Thereby, the court upheld the autonomy jurisprudence so held on to with great

²⁵¹ *Roe v Wade*: 159.

²⁵² Ibid. “Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology is unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”

²⁵³ “With respect to a state’s important and legitimate interest in potential human life, the point at which its interest becomes compelling is at viability, because the fetus is then presumably capable of meaningful life outside the mother’s womb”, *ibid.*, 154.

²⁵⁴ 505 U.S. 833 (1992)

²⁵⁵ At issue were five provisions of the *Pennsylvania Abortion Control Act* of 1982. The court stated that “Roe’s rigid trimester framework is rejected. To promote the State’s interest in potential life throughout pregnancy, the State may take measures to ensure that the woman’s choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right”, *ibid.*, 837. The court further rejected the “privacy” rationale and adopted the “undue burden standard”. “To protect the central right recognized by *Roe* while at the same time accommodating the State’s profound interest in potential life...the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability,” *ibid.*, 837.

²⁵⁶ “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. These considerations begin our analysis of the woman’s interest in terminating her pregnancy, but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition, and so, unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual

vigor in the US, an approach divorced from rationality. Such inconsistencies are indicative of an irrational approach regarding the legal status of the unborn in international law.

Another requirement of a rational argument (as indicated by the above quotation) is that it must not be *arbitrary*. Brusiin observes that traditionally in the Finnish-Swedish concept of law, avoidance of arbitrariness has been regarded as a basic norm for the judge. Already during the 1500s, such a norm was to be found in the so-called “Judge’s Rules”. Olaus Petri, the author of those rules, refers to an old saying when he says that arbitrariness or violence is not the law of the land. In this, arbitrariness is the same as randomness and the resulting unpredictability.²⁵⁷

In other words, courts have to behave so that the citizens are able to plan their own activity on a rational basis. In many cases legal decisions are the only proper reason for the future planning. Rational planning, in turn, is a necessary condition for the continuity of society. It is one requirement for the cohesion of society. If there is no scope for predictability, society will dissolve into anarchy, which in turn is at odds a just and legal foundation.²⁵⁸

Contrary to arbitrariness, procedural rationality can provide a basis for such rational planning and predictability. According to Marsden²⁵⁹ not simply anything can pass muster academically and therefore procedural rationality is still necessary. Some basic rules of evidence and argument must be honoured. In each case a lot of nonsense can be excluded in such a way.²⁶⁰ Therefore, procedural rationality on the legal status of the unborn is necessary to exclude arguments of an, unpredictable, arbitrary and nonsensical nature. Avoidance of arbitrariness has often been understood as the genuine content of legal certainty. This however, only presents one side of the coin.²⁶¹ The other side of the coin presents that of rational justification. The relevance of rationality has been highlighted even more in light of the fact that “the requirement of factual justification has bypassed the belief in power itself”.²⁶² In other words, the requirement that opinions be justified has replaced the belief in authorities.²⁶³ This placed a social responsibility on the interpreter of law.²⁶⁴ This responsibility is connected with global tendencies, which at this moment are shaking all of

imperatives and her place in society”, *ibid.*, 851-852.

²⁵⁷ Aarnio Aulis, *The Rational as Reasonable: A Treatise on Legal Justification*, 4.

²⁵⁸ *Ibid.*, 4.

²⁵⁹ George M. Marsden, *The Soul of the American University: From Protestant Establishment to Established Nonbelief*, (New York: Oxford University, 1994), 431.

²⁶⁰ *Ibid.*

²⁶¹ Aarnio Aulis, *The Rational as Reasonable: A Treatise on Legal Justification*, 4.

²⁶² *Ibid.*, xv.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*, xiv.

humanity.²⁶⁵ It is presupposed that decisions are not only non-arbitrary but also substantially proper. It is not enough that the decisions are predictable. The degree of predictability may be really high and, at the same time, every single decision can heavily violate even the elementary demands of justice.²⁶⁶ The decision-maker cannot merely trust on mere formal authority anymore. In modern society people do not ask only for authoritative decisions but they ask for reasons. This also applied to the administration of justice.²⁶⁷ In this respect, the presentation of justification is always also a means of ensuring legal certainty on a rational basis in society.²⁶⁸ There is an important connection between being rational in one's actions and having reasons that justify them.²⁶⁹ A reasoned argument that is justified does not necessarily have to persuade everybody but hopes to persuade those who are reasonable. Public justification requires an expectation that if others who do not share your belief are wrong, there is an explanation of their error which does not come down to the mere assertion that they do not believe the truth (what you believe), but should explain their false belief in terms of errors in their evidence, or identifiable errors in drawing conclusions from it, or in argument, judgment, and so forth.²⁷⁰ Therefore, what a rational argument expects from international law is justification as to why concepts such as reproductive health rights should be the sole determinant (together with consequent fears of, for example, the fatality of backstreet abortions) used to determine the legal status of the unborn. This will prevent *arbitrary* argument and debate. In other words, authority should exist as to why these concepts are to be used as the criteria defining the legal status of the unborn. In fact, rationality expects the global community of nations to discuss collectively, inclusively and accommodatively, this issue regarding the legal protection of the unborn. Abortion is legalised in most states without an informed process having been followed in the finalisation of their legal approach regarding the protection of the unborn. From the moral point of view, economic or social reasons cannot justify lack of legal protection of the unborn.²⁷¹

The irrationality of the lack of non-arbitrary justification of the legal position of the unborn is even more prominent in light of the fact that certain countries statutorily require rational justification for harm caused to *animals*. However, such rational justification is not required

²⁶⁵ Ibid., xv.

²⁶⁶ Ibid., 4.

²⁶⁷ Ibid., 6.

²⁶⁸ Ibid.

²⁶⁹ Stephen Nathanson, *The Ideal of Rationality: A defense, within reason*, (Chicago: Open Court, 1994), 4.

²⁷⁰ Thomas Nagel, "Moral Conflict and Political Legitimacy", 232.

²⁷¹ Jude Ibegbu, *Rights of the Unborn Child in International Law*, 577.

or even absent in most domestic legal systems. For example, the German Animal Welfare Act (Federal Law Gazette I, p. 1094) is the primary legislation on animal welfare in Germany. It enforces utilitarian principles in that there must be good reason for one to cause an animal harm and stipulates that it is the responsibility of human beings to protect the lives and well-being of their fellow creatures.²⁷² This sensitivity could also be helpful to the abortion situation. Furthermore, closer to the issue at hand, the pro-choice assumption that “only persons have the right to life” suffers from ambiguity. The term ‘person’ is typically defined in terms of psychological characteristics. The pro-choicer is then left with the problem of explaining why psychological characteristics should make a moral difference. The pro-choicer cannot then claim that such explanation or justification is unnecessary. This is true because if it is legitimate for the pro-choicer to demand that the anti-abortionist provide an explanation of the connection between the biological character of being a human being and the wrongness of being killed, then it is legitimate for the anti-abortionist to demand that the pro-choicer provide an explanation of the connection between psychological criteria for being a person and the wrongness of being killed.²⁷³ Therefore, in order to be rational, all arguments concerning the legal status of the unborn need justification. It is arbitrary to expect this from only the pro-life side and not from the pro-choice side.

A rational argument also *integrates every isolated thing and thought*. The legal status of the unborn is not to be determined by a single concept such as reproductive rights. Although the jurisprudence of reproductive rights is also linked to other concepts, the whole paradigm of reproductive jurisprudence excludes those jurisprudential paradigms that counter the reproductive argument. The latter paradigms are not necessarily erroneous and need to be included in the debate. Aarnio states that a legal decision is always a balance between the letter of the law and other ground having significance in the decision-making.²⁷⁴ Many sub-themes exist concerning the unborn, for example, animal rights, science, reproductive health rights, feminism (from a liberal perspective) and international humanitarian law²⁷⁵. A single

²⁷² “German Animal Welfare Act”, <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm>. Article 1 states that the act protects the lives and well-being of animals. It prevents the cause of animal pain, suffering and harm without good reason. Article 2 provides for requirements in the care of animals.

²⁷³ Don Marquis, “Why abortion is immoral”, *The Journal of Philosophy*, Vol. 86, No. 4, (1989), 187.

²⁷⁴ Aarnio Aulis, *The Rational as Reasonable: A Treatise on Legal Justification*, 8.

²⁷⁵ International Humanitarian Law provides interesting insights regarding the protection of civilians in times of armed conflict, where, among other things, ‘civilians’ enjoy special protection. The concept ‘civilian’ does not only include, among others, women and children, but also the unborn. In this regard see Shaun A. de Freitas, “Humanity, the Unborn and the Intersection of International Humanitarian Law and Human Rights Law”, *African Yearbook on International Humanitarian Law and Human Rights Law*, (2007), 39-59.

theme cannot be taken to determine the legal status of the unborn on its own. These themes will all have to be considered and integrated. Ibegbu²⁷⁶ also follows an inclusive approach. He is of the opinion that this is a ‘multi-dimensional’ topic. It has ethical, legal, biological and philosophical dimensions. He discusses the rights of the unborn in international law from these perspectives: “Thus our approach cannot be but interdisciplinary and integral.” This is necessary to ensure a comprehensive protection of all the rights of the unborn.²⁷⁷ Ibegbu therefore also supports an approach that is inclusive and not based merely on a single concept. Furthermore, in its document *Identità e statuto dell’embrione umano*, the Board of Directors of the *Università Cattolica del Sacro Cuore Facoltà de Medicina e Chirurgia “A Gemelli” Roma*, dealt with the legal protection of the human embryo in a multidisciplinary manner. This multidisciplinary approach is demonstrated in the biological, philosophical, legal, psychological, ethical and theological perspectives highlighted by the Board in its treatment of the theme.²⁷⁸ Dworkin agrees with such an approach. He is of the opinion that legal reasoning means the bringing to bear of particular discrete legal problems, a vast network of principles of legal derivation or of political morality.²⁷⁹ Therefore, he is of the opinion that a vast network of principles should be applied to discrete legal problems, of which the legal status of the unborn is one:

In practice, you cannot think about the correct answer to questions of law unless you have thought through or are ready to think through a vast over-arching theoretical system of complex principles about the nature of, for example, tort law.²⁸⁰

Dworkin continues by stating that when we take our eyes off a particular case and its immediate surroundings, and look at neighbouring areas of law – look more generally to

²⁷⁶ Jude Ibegbu, *Rights of the Unborn Child in International Law*, xxxv.

²⁷⁷ Ibid. Although this thesis supports Ibegbu with regard to an inclusive approach, one does not necessarily agree with him that human rights *per se* will determine the legal protection of the unborn in the end.

²⁷⁸ Jude Ibegbu, *Rights of the Unborn Child in International Law*, 509-510. The Board stated that: “...the theme of the identity, the status and the moral and legal protection of the human embryo...at the basis of many debates on bioethics, which go beyond abortion, reproductive technologies, research on the embryo and fetus, sampling of their cells or tissues for implantation or transplants into other subjects, prenatal diagnosis and fetal therapy, all actually raise the problem of safeguarding the human embryo and therefore require some explanation on its identity and status, which appears as the crucial point. Moreover, the cultural debate taking place in qualified meetings and the legal debate in the Parliament in many countries and in international organizations, confirm that this theme, on which decisions are about to be taken both in terms of law and in terms of human rights, is current and also very urgent.” Continuing, the Board stated: “This topic in itself, apart from any contingent context, questions man’s self-comprehension, his responsibility towards the unborn child and the human rights to equality and to non-discrimination, which are internationally recognized for all individual human beings...The Board of Directors has decided that the result of these considerations should be concentrated in the present document, to offer the opportunity for dialogue and for a deeper understanding”, *ibid.*, 509.

²⁷⁹ Ronald Dworkin, “In praise of theory”, *Arizona State Law Journal*, Vol. 29, Issue 2, (1997), 354.

²⁸⁰ Ibid.

constitutional law, for example – one may find serious threats to their claim that the principle endorsed allows one to see legal practices in the best light. For one might discover that that principle is inconsistent with, or in some other way fits badly with, some other principle that one relies on to justify some part of the law.²⁸¹ This tendency in discourse goes hand in hand with an “inside-out” approach. According to Dworkin such an approach is one according to which matters are solved as they arise. According to him this form of approach sometimes takes the structure and justifications upon which some laws are based for granted. We might be forced to re-examine some part of the structure from time to time. The other approach is that of the “outside-in” approach. With regard to this approach, an over-arching theory is created, taking into consideration all applicable matters, and which is good for all seasons.²⁸² Current abortion jurisprudence is not inclusive in its approach. States also solve abortion matters as they arise - from the inside out.

An “outside-in” approach can be explained as follows. The pro-choice movement can argue that, if one wants to be rational, all subjects that the pro-choice bring to the debate must also be considered. This is true, and one such argument that the pro-choice movement will definitely bring to the table is the “personhood theory”. The theory goes as follows: proponents of this theory hold that genetic humanity is not sufficient for moral humanity. The moral community consists of all and only people, rather than human beings.²⁸³ The argument goes further that the unborn does not meet the criteria of personhood such as consciousness, reasoning, capacity to communicate etc.²⁸⁴ Such an argument is valid when one takes an exclusive approach but as soon as thoughts are lifted to surrounding relevant subjects the argument becomes irrational. Besides that fact that the premise of the argument (that a moral community only consists of persons and not human beings) is unjustified and an assumption, the argument also becomes irrational when one considers animal rights. Animals do not meet the requirement of personhood or human being but are still awarded more legal protection in international law than the unborn. The unborn at least meets the requirement of “human being”. If the personhood is a requirement for any legal protection, how can one then explain any protection towards animals? Is it because the preservation of animals is in favour of mankind? The same should then be asked of the unborn. Surely, preservation of

²⁸¹ Ibid., 356-357.

²⁸² Ibid., 357-360.

²⁸³ Mary Anne Warren, “The Personhood Argument in Favor of Abortion,” in *Life and Death: A reader in moral problems*, (edited by Louis P. Pojman, Belmont: Wadsworth Publishing Company, Second Edition, 2000), 262.

²⁸⁴ Ibid., 263.

“human beings” is in favour of mankind. Thus, when one takes an inclusive approach considering various subjects relevant to the legal status of the unborn, various theories to determine the legal position of the unborn become arbitrary.

An attempt towards universal platforms on the legal status of the unborn will rather require, and be in line with, an outside-in approach, since this supports the taking into account of different concepts, and supports attempts towards universal platforms on the legal status of the unborn. Although a complete and final over-arching solution to the legal status of the unborn will not necessarily be possible, an attempt at least should be made towards such a universal platform. If no such attempt is made, one will never know whether it is possible and this will also result in irrationality. We take the exclusive structure with which the legal status of the unborn is determined for granted and one is now forced to re-examine these single concepts upon which the legal status of the unborn is being based. Also, such an approach forces those who advocate human rights as the singular basis to determine the legal status of the unborn, to lift their eyes from the concept of human rights and to look towards international law in general, science, international humanitarian law and animal rights. This is what a rational approach requires.

Still bearing the initial quotation of this chapter in mind, it is stated that a rational argument will also *break barriers and override all inhibitions*. Regarding the legal status of the unborn there are several inhibitions and sensitivities. The issue often becomes one of religion, church or women’s rights. Such sensitivity should be disposed of and replaced by a rational debate open to different ideas and thoughts and considering all views brought to the rational platform. Therefore, an inclusive approach is needed and not an isolated one, also bearing in mind that this proposal does not exclude complexities.

Furthermore, the difference between a rationalist and an anti-rationalist is the disagreement about the *proper way* to justify beliefs. Rationalists value reasoning as the *best method* of acquiring truth,²⁸⁵ and therefore the *proper way* to justify arguments. It is called the *best method* because rationality²⁸⁶ implies debate that is *well thought through*, ‘explained’,²⁸⁷ and

²⁸⁵ Stephen Nathanson, *The Ideal of Rationality: A defense, within reason*, 6.

²⁸⁶ Although the author is aware that reason and rationality may have different meanings, the words reason and rationality have the same meaning in this context. Later in this chapter the difference in the meaning of the concepts is discussed.

²⁸⁷ P.H. Collin, *Dictionary of Law*, (Great Britain: Peter Collin, 1986), 200.

where practical reasoning is used to answer questions that are careful in consequence. When one is irrational, on the other hand, it means that one is foolish, absurd, ridiculous, senseless or unintelligent.²⁸⁸ Rationality therefore, contains several characteristics making it the *best method* for argumentation. These characteristics have been discussed in detail. Therefore, bearing the above in mind (regarding jurisprudence on the legal protection of the unborn) the results of a rational jurisprudence will be the argumentation of a consistent and well thought through nature. It therefore provides the *best (or most convincing) method* and gives the correct amount of legal protection that is due to the unborn without deviation lacking in logical justification. Further, such an argument will not be isolated in a specific context or developed from only one single ideology, but should break the barriers separating different ideologies and prohibiting the result of an argument that is arbitrarily based on only a single ideology (such as reproductive rights, for example).

This proposal is in itself an ideological point of departure, but one that should be in line with the contemporary philosophical mindset of prioritising reason. An irrational jurisprudence will, on the other hand, be an argument that is arbitrary and lacking justification in its outcome. Rationality therefore supports getting into the mode of active debate on the issue and it is therefore agreed with Thomas²⁸⁹ that what is sought is a solution to a disagreement (although not entirely possible), falling on objective common ground, that is open-ended in the possibility of its investigation and pursuit, and not descended finally to a bare confrontation between incompatible personal points of view. Although Thomas is of the opinion that a solution is sought, one is aware that a final/absolute solution is not entirely possible. What is sought is rather an *improvement* to the legal status of the unborn. Therefore, a final solution is not sought. What is presented is the possibility and progression of an effort towards attaining some common ground on the legal status of the unborn in international law. This will be reflective of a caring, sensitive and civilised society aimed at achieving progress on the legal protection to be afforded to mankind and ‘anything’ closely related thereto.

²⁸⁸ W.M. Sibley, “The Rational Versus the Reasonable”, *The Philosophical Review*, Vol. 62, No. 4, (1953), 555.

²⁸⁹ Thomas Nagel, “Moral Conflict and Political Legitimacy”, 232.

2. The necessity and relevance of rationality

Perry speaks of the demand for reasons as a fundamental challenge when it comes to what ought and what ought not to be done to every human being. Bearing this in mind, one finds that Nickel, for example, has distinguished between two different interpretations of the demand, namely one according to which it is ‘a demand for prudential reasons’ and another, according to which it is ‘a request for moral reasons.’²⁹⁰ This thesis supports this important ‘demand for prudential reasons’ (as well as a request for moral reasons). Also, an understanding of the necessity and application of rationality becomes relevant once it is shown that the current position of the unborn in international law is arbitrary, isolated, inconsistent and therefore, in general, opposing the nature of rationality.

First of all, rationality is the better alternative in argumentation. Freeman²⁹¹ states that the inability to engage in rational debate is unfavourable as one can fight or one can reason about a specific issue, but that reasoning is the most favourable alternative in accurately addressing the problem of deep cultural differences. This should be done by way of patient examination of conflicting ideas with as much skill and as little prejudice as can be managed.²⁹² Thus, what Freeman proposes is that rationality will be the better alternative to loose and haphazard thinking or argument.

Secondly, rationality is necessary because of the present forms of public discourse. According to Colson²⁹³ anger has become the new form of public discourse evident from the current arguments on ‘gay’ marriages, abortion and other controversial issues. Therefore discussion and debate have been replaced by yelling²⁹⁴, which lacks rational deliberation. This is not akin to a civilised and conducive approach. In this context, the word “yelling” has a symbolic meaning and is not to be understood literally. “Yelling” actually refers to the inability of people these days to engage in logical and reasoned argument; as well as to the fact that people are so partisan in their views that they are unable to communicate their views

²⁹⁰ Michael Perry, “Is the Idea of Human Rights Ineliminably Religious?”, *University of Richmond Law Review*, Vol. 27, No. 5, (1993), 1064.

²⁹¹ Michael Freeman, “The Problem of Secularism in Human Rights Theory”, *Human Rights Quarterly*, Vol. 26, No. 2, (2004), 400.

²⁹² Ibid.

²⁹³ Colson, “Anger in Public Discourse”, *Breakpoint*, http://www.breakpoint.org/site_hmpg.asp (accessed 21/08/2007).

²⁹⁴ Ibid.

in a rational manner and consider other views. This reminds one of Sunstein's observations that polarisation by choice poses an insidious threat - potentially stripping us of meaningful debate. Sunstein also refers to the contemporary development of 'information fragmentation', which includes the fact that people become less tolerant of others' viewpoints.²⁹⁵ Although Sunstein is writing from a republican context, there are republican connotations for jurisprudential debate on 'hard issues' for the international legal community as well. This entails the need for the establishment of forums for interactive and inclusive debate and participation.

This 'yelling' as a means of discourse can also be called *confrontational listening*. It is not civil and it is not listening at all. It is disrespectful and leads to no dialogue, and consequently to a weakened 'product'. It is just a more cautious and polite form of the screaming and incivility that has characterised our age. Confrontational listening signals to others that they are not worthy of your respect.²⁹⁶ This type of cynicism is also the enemy of reason and therefore of civility.²⁹⁷ For example, international law supports women's rights. Actually, international law 'yells' women's rights without reserve and no substantial attempts are made to consider the case of the unborn. Therefore, international law fails to engage in a logical and reasoned approach regarding the legal status of the unborn and cannot communicate its views on women's rights in a rational manner because international law is not inclusive since other views, such as the legal status of the unborn, are not considered. Also, current public discourse encourages only the predisposed ideas of the talker instead of accommodating other ideas or reason. For example, the liberal state mostly supports the feminist influence (in a liberal sense) on abortion without questioning its authority, neglecting other ideas on the legal status of the unborn. Personal experience also shows that people come with pre-conceived attitudes preceding debate on contentious issues such as abortion. Debates have been witnessed where accommodation of other views were excluded. For example, participants immediately begin their argumentation from their respective ideologies: not that there is anything wrong with this, but they then proceed to display an exclusivist attitude to the different views of others.

²⁹⁵ "Cass R. Sunstein's, 'Republic.com 2.0.'" (book review), *Harvard Law Review*, Vol. 121, (Princeton, N. J.: Princeton University Press, 2007-2008), 940.

²⁹⁶ Stephen L. Carter, *Civility: manners, morals, and the etiquette of democracy*, 138.

²⁹⁷ *Ibid.*, 139.

Judith Jarvis Thomson²⁹⁸ makes several assumptions in her article, “A defence of abortion”. Throughout the entire article the assumption is made that rights (and more specifically the right to life) should determine the legal status of the unborn. No consideration is given to science or any other concept that might influence the legal position of the unborn (in either a positive or negative context). Thomson, by using the example of a violinist²⁹⁹, makes the assumption that the legal status of the unborn should be defined and determined within the context of the rights of women. The result is that she excludes the consideration of other human rights, other than rights as they apply to women. Furthermore, in her violinist example, she equates the condition of pregnancy with an “ailment”. Reference to the term “ailment” in the example reveals the *arbitrary assumption* of Thomson that pregnancy should be equated with an ailment. Similarly, the *ad hoc* Select Committee on Abortion and Sterilisation in South Africa (culminating the Choice on Termination of Pregnancy Bill) did not seem to appreciate the importance of supporting its recommendations by arguments and many of the recommendations were made without proper reasons.³⁰⁰ This is even more irrational in light of the fact that South Africa’s constitutional commitment to an open society demands that the subject be discussed and decided rationally.³⁰¹

What a rational approach proposes is that the very reason not to attack those with whom one disagrees is that they too are fully human and deserving of respect.³⁰² True listening or civil listening signals a belief in the equality of all people and the resultant betterment of society -

²⁹⁸ Judith Jarvis Thomson, “A defense of Abortion,” in *The Rights and Wrongs of Abortion*, (edited by Marshall Cohen, Thomas Nagel and Thomas Scanlon, Princeton: Princeton University Press, 1974), 3-22.

²⁹⁹ The example goes as follows: “You wake up in the morning and find yourself back to back in bed with an unconscious violinist - a famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist’s circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, ‘Look, we’re sorry the Society of Music Lovers did this to you - we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it’s only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you,” Judith Jarvis Thomson, “A defense of abortion,” in *Life and Death: A reader in moral problems*, (edited by Louis P. Pojman, Belmont: Wadsworth Publishing Company, Second Edition, 2000), 241. It is clear from this example that a parallel is drawn with the legal position of the pregnant woman and how the pregnancy affects her. However, when this example is compared to that of the position of the pregnant woman, a lot of irrationalities are clear from the example. First of all, the pregnancy, in most cases (except the cases of rape and incest) occurred with the knowledge and consent of the woman. In the case of the example, the kidneys are used by force. Secondly, reference to the term “ailment” in the example reveals the assumption of Thomson that pregnancy may be equated with an ailment.

³⁰⁰ SA de Freitas, “A critical retrospection regarding the legality of abortion in South Africa”, *Journal for Juridical Science*, Vol. 30, No. 1, (2005), 119.

³⁰¹ Donrich W Jordaan, “The legal status of the human pre-embryo in the context of genetic revolution”, *The South African Law Journal*, Vol. 122, Number 1, (2005), 241.

³⁰² Stephen L. Carter, *Civility: manners, morals, and the etiquette of democracy*, 138.

a betterment that is not necessarily linked to pragmatic and liberal ends but rather towards the intellectual and moral ends of society. This type of listening, required by rationality, is not easy because it demands of the civil listener a considerable risk,³⁰³ as it requires that we listen to others with knowledge of the possibility that they are right and we are wrong. The sacrifice, however, is nothing less than the ego-support that comes from the certainty of our own rightness.³⁰⁴ Therefore, if pro-abortion advocates have to engage in civil listening they will have to face the risk that their position on abortion and other central beliefs might be wrong. The author is referring here to the pro-choice advocates having to listen to others and not the other way around, because it is the pro-choice camp that is not listening or providing indications in this regard. Impartiality, a requirement of rationality, also requires such openness to what others have to say. An example of where civil listening is negated regarding the legal status of the unborn on an international level is the proposed discussion related to the statutes of the International Criminal Court (ICC). In this regard, the Caucus for Gender Justice (headquartered at the law school at the City University of New York) was instrumental in framing the debate on “forced” or “enforced” pregnancy, and various versions of the draft ICC statute listed the concept as a “war crime”, or as a “crime against humanity”.

“Forced” or “enforced” pregnancy was designed to create a world-wide right to abortion on demand, and western nations, as well as hundreds of NGOs, pushed for the inclusion of this new “crime” in the ICC statute: “they adamantly resisted any effort either to define or limit this previously unknown offence”.³⁰⁵ When one looks at the composition of this discussion group then one realises the arbitrary, misrepresented nature of this discussion that in turn is neither fair nor rational procedure-wise. In this regard, there were exceptionally few pro-life law professors and law students engaged full-time at the conference in Rome; perhaps only three. In addition, during the actual course of negotiations, the tactics of the abortion proponents were highly questionable, involving at various times, parliamentary evasion and procedural irregularities, as well as outright disavowal of previously stated and published positions.³⁰⁶ Therefore, on procedural grounds this process was unfair and rationally unconvincing.

Bloom states that even when the foundations for a definitive rationality have crumbled, each

³⁰³ Ibid., 138.

³⁰⁴ Ibid., 139.

³⁰⁵ Wilkins and Reynolds, “International Law and the Right to Life”, 136-139.

³⁰⁶ Ibid., 142-143.

discipline finds that it must nonetheless honour some basic rules of evidence and argument. Talking on the integration of religion in higher education, Bloom states that: "...while the procedural rules of academia may preclude some extreme religious attitudes and view points, there is no reason why it should be a rule of academia that *no* religious viewpoint shall receive serious consideration". The latter idea, by way of analogy to the accommodation of other points of view on the legal status of the unborn, explains why it can only be reasonable to include other measures into the abortion debate on an international law level.³⁰⁷ The South African case of *SA Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafood Division Fish Processing)*³⁰⁸ also states that impartiality requires "...open-minded readiness to persuasion...".³⁰⁹ Therefore, impartiality also requires a civilised approach.

There is a type of compartmentalisation of jurisprudential approaches, where it must be either the one or the other. For example, discussions on abortion in many instances and from a pro-choice approach, fail to see different phases during pregnancy, differently. In other words, when pro-choice supporters support women's rights there is no room for the unborn even during a later stage of the pregnancy. Therefore, there is no room to consider any other views that might add to the legal protection of the unborn, even at a later stage during the pregnancy. Supporters of reproductive rights speak in absolute support of the pregnant mother, hereby negating any other issues that may be additional and relevant to the debate. Also, human rights themes on the legality of abortion have monopolised other legal fields to follow suit. For example, in subjects such as private law, concepts such as "human being" and "personhood" are defined solely within the scope of rights and more specifically the right to life, with the effect that the unborn is usually excluded. However, criminal law, international humanitarian law and private law also need to come up with possibilities of legal protection of the unborn that do not have to disappoint supporters of abortion. For example, there are certain legal systems that ascribe importance to the unborn when it comes to criminal law, while in international humanitarian law, there are signs that the unborn also require protection and respect.³¹⁰

Another reason for our current inability to engage in proper rational debate is the nature of

³⁰⁷ Allan Bloom, *The Soul of the American University*, (Oxford: Oxford University Press, 1994), 431.

³⁰⁸ *SA Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafood Division Fish Processing)* 2000 8 BCLR 886 (CC).

³⁰⁹ *Ibid.*, par 13.

³¹⁰ This has already been briefly discussed in the aforementioned.

the perception by society of the law, as well as the nature of the dissemination of legal knowledge. Too much emphasis is placed on a positivistic and exclusive approach regarding the law as well as the teaching thereof. This entails excluding religion, philosophy, economics, and science from the law. Similarly, in abortion jurisprudence, reliance on a single concept tends to define the legal status of the unborn without including the principles of different subject matter. In other words, an either-or approach exists. This culminates in an abortion jurisprudence consisting of the compartmentalisation of jurisprudential approaches, where it is either the one view that determines the legal status of the unborn or the other, without considering further views.

An understanding of the concept of international justice also becomes relevant in terms of the legal status of the unborn in international law. A rational approach requires *international justice*. As stated by Hill, international justice is a rational concept.³¹¹ In turn, international justice requires internationally just *procedural* and *substantive* procedures. This statement will now be explored further. First of all, the meaning and development of international justice needs to be established. International justice first appeared in the negative form of the equalising of injuries inflicted.³¹² The early and negative notion of justice is wholly material and expresses a relation between measurable things and quantities. According to this idea, there is not debt of injury that cannot be paid and none that should not be.³¹³

The positive and modern idea of justice is at every point in opposition to this compensation of evil with evil. It is a *rational conception*, based upon the idea of personality as a power of infinitely expansive tendency.³¹⁴ Therefore, the question is no longer whether international law is law, the question now becomes, “Is international law fair?”³¹⁵ This question is very important because a rational approach to the legal status of the unborn requires an approach that is rationally fair and just. Furthermore, international law also requires us to ask whether the law is fair since it protects individuals and bestows human rights. Therefore, the concept of international justice has become increasingly important in that those in power are not only being measured against regional but also against universal standards. Conditions are being developed where the notion of national sovereignty may yield to a higher order of

³¹¹ David Jayne Hill, “International Justice”, *The Yale Law Journal*, Vol. 6, No. 1, (1896), 3.

³¹² *Ibid.*, 2-3.

³¹³ *Ibid.*, 3.

³¹⁴ *Ibid.*, 3.

³¹⁵ Thomas M. Franck, *Fairness in International Law and Institutions*, (Oxford: Clarendon Press, 1995), 6.

international justice.³¹⁶ These conditions are the ratification of the Universal Declaration of Human Rights (1948). Human rights saw a new era in international law and symbolised the triumph of humanitarianism. This was a new era in human morality in which justice came to be more important than power.³¹⁷ Historically, sovereignty has been greatly overrated in international relations. Nowadays issues of sovereignty require cautious rethinking. Many times national sovereignty is overridden by international law.³¹⁸ Also, by implication, positive law of states is subordinated to universal natural legal principles of international justice. Therefore, rationality requires international justice, where sovereign states yield to universal requirements of fairness in *procedure* and in *substance*.

According to Hedley Bull, justice is a term that can only be given a private or subjective definition.³¹⁹ However, this is not a problem, and it is agreed with Franck that fairness is not a fixed destination but that “it is a journey or process.”³²⁰ Fairness as a destination remains an open question. What matters is the opportunity for discourse: the process and its rules.³²¹ Fairness is not ‘out there’ waiting to be discovered, it is a product of social context and history.³²² What is considered fair has varied across time, and still varies across cultures. It does not mean that the search for fairness is the pursuit of a chimera.³²³ It is a human, subjective, contingent quality which captures in one word a process of discourse, reasoning, and negotiation leading to an agreed formula located at a conceptual intersection between various plausible formulas for allocation. Fairness requires the reasoned pursuit of what John Rawls has identified as the ‘the idea of an overlapping consensus’.³²⁴ This means that

³¹⁶ “Justice Unfettered? Internationalizing Justice in the Human Rights Era”, *Global Policy Forum*, (July, 2006), <http://www.globalpolicy.org/intljustice/general/2006/0706unfettered.htm> (accessed 27 March 2008).

³¹⁷ “The Universal Declaration of Animal Rights”, <http://www.uncaged.co.uk/declarat.htm>.

³¹⁸ Thomas M. Franck, *Fairness in International Law and Institutions*, 3.

³¹⁹ Paul G. Harris, *What's fair?: International Justice from an Environmental Perspective*, paper presented at the Annual Convention of the International Studies Association, Washington DC, 16 – 20 February, 1993.

³²⁰ Thomas M. Franck, *Fairness in International Law and Institutions*, 83.

³²¹ Ibid.

³²² Ibid., 14.

³²³ Ibid.

³²⁴ Ibid. To Cicero, justice consists of piety, goodness, generosity, kindness, courtesy and other characteristics of the same nature, D.H. van Zyl, *Justice and Equity in Greek and Roman Legal thought*, (Pretoria: Academica, 1991), 73. It transcends the borders of cities or states and eventually encompasses the whole human race (*gens humana*), *ibid.*, 74. It appears that the universal concept of *iustitia* in Cicero has an intimate bond with nature. Cicero's definition of justice may indeed be described as the definition of morally good and virtuous conduct in accordance with the tenets of natural law. Justice is thus rooted in nature and arises from the practical application of the *ius naturale*, *ibid.*, 77. In *De legibus*, after stating that it is most foolish to consider that all things founded on the institutions or law of people are just, he further states: “...for there is one form of law (*ius*), by which the community of men is bound and which constitutes one all-embracing law (*lex*). This law is right reason (*recta ratio*) which is directed at commanding and prohibiting. The person who is ignorant of it, whether it is recorded somewhere or nowhere, is unjust (*iniustus*),” *ibid.*, 77-78. The basic principle emanating

different groups, countries, religious communities and civilizations, while holding incompatible fundamental views on theology, metaphysics, human nature and so on, would come to an agreement on certain norms that ought to govern human behaviour. Each would have its own way of justifying this from out of its profound background conception. We would agree on the norms, while disagreeing on why they were the right norms.³²⁵ This is in line with the fact that rationality does not require the justification of concepts to convince everybody, as long as an opinion is not merely based on the assumption, without justification, that such an opinion is correct.

Cohen calls such ‘overlapping consensus’ *justificatory minimalism*.³²⁶ It is animated by an acknowledgement of pluralism and embrace of toleration. It aspires to present a conception of human rights without itself connecting that conception to a particular ethical or religious outlook.³²⁷ It presents us with a “...practice of argument that aims to clarify and perhaps narrow the terms of disagreement.”³²⁸ It is not the purpose of this investigation to look critically at Rawls’ understanding of what this ‘overlapping consensus’ precisely entails, but the mere idea of having or striving towards an overlapping consensus even on the abortion issue would be most welcome in the international legal community. Such attempts towards overlapping consensus will also require international justice and procedural and substantive platforms to be put into place to govern and facilitate rational attempts. Although conflicts in concepts and domestic legal systems exist, rationality and an overlapping consensus supports the effort in proposing a *procedural* and *substantive* platform for further debate on the legal status of the unborn that is rational and can provide common ground among states, regardless of any diversity³²⁹. This is required by international justice. The need for such a *procedural*

from Cicero’s definition of justice is that the dignity of man should be respected and that each should receive his due, *ibid.*, 80.

³²⁵ Charles Taylor, “A world consensus on human rights?”, in *Theories of Rights*, (edited by C.L. Ten, England: Ashgate, 2006), 411. This idea was expressed in 1949 by Jacques Maritain: “I am quite certain that my way of justifying belief in the rights of man and the ideal of liberty, equality, fraternity is the only way with a firm foundation in truth. This does not prevent me from being in agreement on these practical convictions with people who are certain that their way of justifying them, entirely different from mine or opposed to mine...is equally the only way founded upon truth,” *ibid.*

³²⁶ Joshua Cohen, “Minimalism about human rights: The most we can hope for?”, in *Theories of Rights*, (edited by C.L. Ten, England: Ashgate, 2006), 422.

³²⁷ *Ibid.*, 421.

³²⁸ *Ibid.*, 424.

³²⁹ In its document *Identità e statuto dell’embrione umano*, the Board of Directors of the *Università Cattolica del Sacro Cuore Facoltà de Medicina e Chirurgia “A Gemelli” Roma*, dealt with the legal protection of the human embryo in a multidisciplinary manner supporting the objectives of this thesis. In support of a rational platform the Board stated: “This topic in itself, apart from any contingent context, questions man’s self-comprehension, his responsibility towards the unborn child and the human rights to equality and to non-discrimination, which are internationally recognized for all individual human beings...The Board of Directors

and *substantive* platform, which is supported by rationality, is made even clearer by the following example of Freeman³³⁰: explosives have been set the day before to detonate and destroy a crumbling factory and its chimneys. Those who will detonate the explosion are a mile away from the site. Ten minutes before the agreed time, an onlooker says that he saw a tramp climbing through all the defences and into the factory. None of the security men employed to guard the site at night saw him. The evidence of a human being within the factory is thin. Yet, it would be both illegal and unethical to go ahead with the plan to detonate the factory.

Similarly, rational action is needed to set into motion *substantive* and *procedural* platforms on the legal status of the unborn before the scope of the right to life and women's reproductive rights can be determined. It would be unethical and even illegal to continue without such *substantive* and *procedural* platforms. Therefore, procedural and substantive rationality is necessary due to the lack of action taken in addressing the legal status of the unborn in international law. For example, an effort towards such a development would be one where the member states of the United Nations come together to discuss the issue and adopt a system to achieve a platform for further debate. Ibegbu³³¹ proposes the establishment of a special Committee on Human Rights of the Unborn Child in International Law, to monitor the fulfilment by States Parties of obligations regarding the legal status of the unborn. He also proposes the appointment of a special Commissioner for the promotion and protection of the human rights of the unborn child in international law and a compulsory course on the human rights of the unborn child in all institutions at all levels of education.³³² Since there is no such current procedure, the system is irrational and contrary to international justice. The system is irrational even more so in light of the fact that a procedural and substantive platform on the legal status of the unborn is called upon by Article 13 of the *UN Charter*. Article 13 states the following:

(1)The General Assembly shall *initiate studies and make recommendations* for the purpose of:....*encouraging the progressive development of international law and its codification*;...and *assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion*. (Emphasis added)

has decided that the result of these considerations should be concentrated in the present document, *to offer the opportunity for dialogue and for a deeper understanding*", Jude Ibegbu, *Rights of the unborn child in international law*, 509.

³³⁰ M.D.A Freeman, ed., *Medicine, Ethics and the Law: Current Legal Problems*, (London: Stevens and Sons, 1988), 15.

³³¹ Jude Ibegbu, *Rights of the Unborn Child in International Law*, 613-614.

³³² *Ibid*.

There was a desire, after the Second World War, to build a new international order based on international law.³³³ As a result Article 13 provides a basis for extremely constructive work by the General Assembly, where there are expectations regarding the taking place of discussions of the subjects in Article 14, in order to make recommendations.³³⁴ Therefore, in order to discharge the responsibilities of Article 13, the International Law Commission (ILC) was established.³³⁵ The record of the ILC³³⁶, as well as that of the General Assembly, is very impressive (with regard to human rights developments)³³⁷, and yet no substantial developments or research has been done on the legal status of the unborn. Clearly the UN and other regional organisations call for cooperation, platforms for research, discussion, codification and recommendation. Although this is being done in other areas of international law, it is not being done regarding the legal status of the unborn. In addition, an emphasis on the irrationality of contemporary abortion jurisprudence should act as a catalyst towards the establishment of structures to allow for further rational debate to take place which in itself will be the most rational thing to do. Rawls takes the importance of procedure a step further in that he states that pure procedural justice is the basis of fairness. In the case of pure procedural justice, the justice of the outcome consists entirely in the fact that a fair procedure has been employed.³³⁸ In other words, if the procedure is just, the outcome will be fair and

³³³ Er. Carl-August Fleischhauer, "Article 13", in *The Charter of the United Nations: A Commentary*, (edited by Bruno Simma, Hermann Mosler, Albrecht, New York: Oxford University Press, 1995), 265.

³³⁴ Lenand M., Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents*, (Boston: World Peace Foundation, Second and Revised Edition, 1949), 174.

³³⁵ Er. Carl-August Fleischhauer, "Article 13", 268.

³³⁶ In this list of works done by the ILC under Article 13 (1) (a), there is not a single development on the status of the unborn. The ILC is responsible for 14 conventions: The four Geneva Conventions on the Law of the Sea (1958); the Convention on the Reduction of Statelessness (1961); the Vienna Conventions on Diplomatic (1961) and Consular (1963) Relations; the Convention on Special Missions (1969); the Vienna Convention on the Law of Treaties (1969); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Person, including Diplomatic Agents (1973); the Vienna Convention on the Representation of States in their Relations with International Organizations of Universal Character (1975); the Vienna Convention on the Succession of States in Respect of Treaties (1978); the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts (1983); and the Vienna Convention on the Law of Treaties concluded between States and International Organizations or between International Organizations (1986), *ibid.*, 270.

³³⁷ The General Assembly formulated several instruments on the realisation of human rights and fundamental freedoms under Articles 13(1)(b) and Article 13(2). Not one of these includes extensive research on the unborn. The conventions are: The Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, the Convention on Economic, Social and Cultural Rights, the Declaration and Convention on the Elimination of All Forms of Racial Discrimination (1965); the Declaration and later Convention on the Elimination of All Forms of Discrimination against Women (1979); the Declaration and later the Convention against the Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (1984); the International Convention against Apartheid in Sports (1985); and the Declaration and recent Convention on the Rights of the Child (1989), *ibid.*, 278.

³³⁸ Robert Paul Wolff, *Understanding Rawls: A Reconstruction and Critique of A Theory of Justice*, (New Jersey: Princeton University Press 1977), 177.

just. In this regard, rationality and justice are perceived as one and the same. Currently an international procedure on the legal status of the unborn is non-existent, and therefore, the current position on the unborn is irrational and contrary to requirements of international justice.

In this investigation, the outcome of the rational platform for further debate does not depend solely on procedure but also on *substance*. It is presupposed that decisions are not only non-arbitrary but also substantially proper. It is not enough that the decisions are predictable. The degree of predictability may be really high and, at the same time, every single decision can heavily violate even the elementary demands of justice.³³⁹ As mentioned earlier, the decision-maker cannot merely trust on mere formal authority anymore. In modern society people do not ask only for authoritative decisions but they ask for reasons. This also applied to the administration of justice.³⁴⁰ This substantive discussion cannot focus on a single ideology as the governing authority and sole measure of law.³⁴¹ For example, in a certain sector, law demands that all individuals be treated on an equal basis. As such, the text of law does not provide an answer to the question, what is equality? The contents of the law are thus depending on interpretation and the interpretation presupposes, in turn, that also non-legal norms concerning equality are taken into accounts. Thus, it must be in accordance with morals and with other social norms than law.³⁴² This does not imply that the author is proposing a neutral approach in the strict sense of the term as this would be impossible. What is rather meant is an approach which is more inclusive and accommodative to discussion from many angles, some close to one another, others not. Therefore, several issues such as science, animal rights, comparative analysis of legal systems and anthropology need to be discussed in the context of the legal status of the unborn to start forming an argument to obtain a rational platform on the legal status of the unborn. This investigation into different substantive issues is necessary to prevent argument based on a single concept (for example reproductive rights) and to prevent argument without analysis of other concepts. Therefore, rationality is necessary because rationalising involves the reorganisation of a process or system so as to make it more logical and consistent³⁴³ - for this inclusion of and

³³⁹ Aarnio Aulis, *The Rational as Reasonable: A Treatise on Legal Justification*, 4.

³⁴⁰ *Ibid.*, 6.

³⁴¹ Alfred P. Rubin, *Ethics and authority in international law*, (UK, US and Australia: Cambridge University Press, 1997), 10.

³⁴² Aarnio Aulis, *The Rational as Reasonable: A Treatise on Legal Justification*, 4.

³⁴³ Catherine Soanes and Angus Stevenson, eds., *Concise Oxford English Dictionary* 1193 (New York: Oxford University Press, Eleventh Edition revised, 2006), 1193.

sensitivity to the various points of view are of the utmost importance. Rationality re-organises an inconsistent system on the legal status of the unborn and is a catalyst for further debate in procedural jurisprudence as well as in substantive content, in order to bring us to a position that ignites conditions favourable for further debate. Several authors also agree on the necessity of rational debate in international law. Hare states that if philosophers are going to apply ethical theory successfully to practical issues, they must first have a theory.³⁴⁴ In other words, a substantive theory needs to be established before practical problems can be solved. He further states that authors often proceed as if it were not so:

A philosopher's chief contribution to a practical issue should be to show us which are good and which are bad arguments; and to do this he has to have some way of telling one from the other. Moral philosophy therefore needs a basis in philosophical logic - the logic of the moral concepts.³⁴⁵

On these grounds Hare criticises Thomson, stating that in her article on abortion, which has been justly praised for the ingenuity and liveliness of her examples, simply parades the examples before us and asks what we would say about them. But how do we know whether what we feel inclined to say has any secure ground? May we not feel inclined to say it just because we were brought up to think this way? And was this necessarily the right way?³⁴⁶ Hare states further that:

In contrast, a philosopher who wishes to contribute to the solution of this and similar practical problems should be trying to develop, on the basis of a study of the moral concepts and their logical properties, a theory of moral reasoning that will determine which arguments we ought to accept.³⁴⁷

Thus, to be successful in arguments, it is necessary to obtain a rational theory of substance and procedure to enable us to determine acceptable/rational and unacceptable/irrational arguments. Furthermore, Callahan³⁴⁸ states that a minimal moral consensus in a pluralistic society on the doctrine of the sanctity of life³⁴⁹ is needed.

I believe it is possible to discern considerable agreement among the different western moral sub-communities, at least if one remains at a fairly high level of abstraction and generality.³⁵⁰

In other words, he aims to find some minimum common ground or agreement on the sanctity of life although various views and ideologies exist. Included must be a high degree of

³⁴⁴ R. M. Hare, "Abortion and the Golden Rule," 201.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Ibid., 202.

³⁴⁸ Daniel Callahan, "The Sanctity of Life Principle: A new Consensus", in *Life and Death: A reader in moral problems*, (edited by Louis P. Pojman, Belmont: Wadsworth Publishing Company, Second Edition, 2000), 84.

³⁴⁹ Although Callahan is moving towards a certain solution of a minimum jurisprudence, one must bear in mind that the concept of life as a point of departure is in itself an opinion.

³⁵⁰ Ibid., 93.

rationality as point of departure for other useful insights. Davies³⁵¹ agrees with this view in that a social procedure is needed, in principle open to all, for the testing of normative claims. The normative claims that need to be tested include both concrete rules and universal moral principles.³⁵² According to Warren, a rational platform, that can be universal to all persons, is sought for the concept 'moral status'. She states that this is necessary because human beings badly need shared standards and principles of moral status, based upon arguments that most people can understand and accept.³⁵³ However, rationality as a foundational-shared standard implies a certain moral status in itself. In other words, the insight of looking for a common standard is a common standard in itself. This gives added weight to endeavouring a logical conclusion to a dispute. A society reflecting two absolutely contrasting approaches regarding the legal protection of the unborn reflects an irrational and consequently insensitive society. Finally, rationality requires procedure and substance on the legal status of the unborn to be considered carefully because this is what international justice requires.

But if one's understanding of human worth and dignity commits one to being arbitrary about who are to be treated justly (i.e., about who are the very subjects of justice), it is clear that one lacks what is recognisable as a framework of justice.³⁵⁴

It is not compatible with our institutions of justice that we should determine the subjects of justice in an arbitrary manner. A non-arbitrary understanding of the subjects of justice requires that just treatment is owed to all humans merely due to their humanity.³⁵⁵ Therefore, justice and humanity do not allow for the arbitrary exclusion of the unborn from international protection. Yet, the legal status of the unborn is currently unjust and therefore against the claims of humanity since no rational procedure or substance exists. Furthermore, no justification for this lack of internationally just procedure or substance exists. If such arbitrary justifications are permitted, the whole nature of justice is undermined and depreciated. International justice and humanity require us to look at sufficient justification for abortion and for protecting the unborn. Such reason or justification must be sufficiently compelling and distributed fairly. Are autonomy and women's rights sufficiently just to permit abortion? There is no satisfying evidence that they are, with reference to the full term of pregnancy. If autonomy and women's rights are used to justify abortion, it will result in

³⁵¹Charles Davies, *Religion and the Making of Society*, 139.

³⁵²Ibid.

³⁵³Mary Anne Warren, *Moral Status: Obligations to Persons and other living things*, (Oxford: Clarendon Press, 1997), 10.

³⁵⁴William E. May, *Philosophical Anthropology and Evangelium Vitae*, www.christendom-awake.org. (accessed 25/3/2008).

³⁵⁵ Ibid.

abortion being justified based on mere opinion in terms of autonomy and women's rights for the full length of the pregnancy period. If a justification based on opinion is sufficient then one can also justify the prohibition of abortion by stating that it is contrary to the natural right to life – which is also mere opinion. In summary therefore, international justice requires (1) fair universal procedure and substance to govern the legal status of the unborn in international law, and (2) rational justification for the legal status of the unborn in international law.

The fundamental rights exhibited in international human rights law and reflected in the Charter of the United Nations, the International Covenant on Civil and Political Rights and the Convention on Economic, Social and Cultural Rights, necessitate a rational consideration of the unborn in light of these fundamental rights. However, although these fundamental rights necessitate a rational consideration of the unborn, several of these rights applied in international law have not been defined. For example Article 7³⁵⁶ of the Covenant on Civil and Political Rights prohibits inhumane treatment. Article 6 (1)³⁵⁷ grants the inherent right to life. Although the legal status of the unborn needs to be discussed in the light of fundamental concepts such as 'life' and 'inhumane treatment', international law has not yet defined these concepts, but has been applying them without definition, making it difficult to discuss the legal status of the unborn because the substantive and procedural concepts that apply have not yet been defined. Therefore, a procedural and substantive development on the legal status of the unborn is not only necessary to obtain a rational platform for discussion on the unborn, but also to create a platform and environment to progress with discussions on concepts such as 'life', 'humanity' and other fundamental values. Besides all of this, one must bear in mind that, not only is the current international climate favourable for such debate, but the nature of international law in itself seeks agreement among differing states and thus finds rational procedural and substantive developments necessary. This is the case because at international level it is exactly the differences between states that results in cooperation and interaction and therefore one would expect more involvement, discussion and establishment of forums to further the debate on the legal status and the protection of the unborn. Take also, for example, the issue related to reservations³⁵⁸. Reservations make it clear that international law

³⁵⁶ "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

³⁵⁷ "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."

³⁵⁸ A reservation allows a state to be a party to a treaty while maintaining a reservation excluding the legal effect of certain clauses of the treaty, provided that the reservation is compatible with the object and purpose of

is inclusive, prioritises participation and expects involvement. This is so because reservations allow for states to be involved in treaties but still take into account their differences.³⁵⁹ For example: Malta has the following reservation to Article 16 (1) (e)³⁶⁰ of the Convention on the Elimination of all forms of Discrimination against Women. The reservation states that:

The Government of Malta does not consider itself bound by sub-paragraph (e) of paragraph (1) of article 16 in so far as the same may be interpreted as imposing an obligation on Malta to legalize abortion.³⁶¹

Therefore, reservations allow for a state like Malta to be a party to the Convention but still to retain their views and laws on abortion.³⁶² The same prioritisation of participation and inclusion is needed on the legal status of the unborn. There should therefore be even less reason for states to refrain from participation in discussion on the legal protection of the unborn. What also comes to the fore is that a rational platform is necessary on the legal status of the unborn because the great amount of disagreement demonstrates that normative issues underlying the legal status of the unborn cannot be taken for granted or assumed but must be ‘candidly and coherently addressed’.³⁶³

A rational and reasoned approach is also necessary and important in this day and age because of the so-called legacy of enlightenment. This necessitates reasoning on the abortion issue. Secularism³⁶⁴ (which is the dominating ideology especially in the western world) proclaims

the treaty, John Dugard, *International Law: A South African Perspective*, 331. Article 2(1)(d) of the Vienna Convention of the Law of Treaties, defines a reservation as “a unilateral statement, however phrased or named, made by a state when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state.”

³⁵⁹ An example of this would be the Convention on the Elimination of all forms of Discrimination against Women, possessing the greatest number of reservations by States Parties of any human rights treaty. This is due to the fact that it deals with a highly sensitive issue, C.A.A. Packer, *The Right to Reproductive Choice: A study in International Law*, 120-121.

³⁶⁰ Article 16 (1) (e) states that: “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:...(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”

³⁶¹ “Obligations, Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination against Women”, Division for the Advancement of Women, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (accessed 17/10/2007).

³⁶² Another reservation of Malta is that of Article 11: “The Government of Malta interprets paragraph 1 of article II, in the light of provisions of paragraph 2 of article 4, as not precluding prohibitions, restrictions, or conditions on the employment of women in certain areas, or the work done by them, where this is considered necessary or desirable to protect the health and safety of women or the human fetus, including such prohibitions, restrictions or conditions imposed in consequence of other international obligations of Malta”, *ibid*.

³⁶³ Martha Shaffer, “Foetal Rights and the Regulation of Abortion”, 84.

³⁶⁴ Secularism pertains to things of the world, as distinguished from religious (in the traditional sense) or spiritual things, Handler, *Ballentine’s Law Dictionary*, (New York: Lawyers Cooperative Publishing, 1994), 497. According to Anderson it means “temporal; pertaining to temporal things, things of the world; worldly;

that it is in line with reason and rationality while religion is irrational.³⁶⁵ Yet, secularism proclaims reasoning as a necessity but fails to apply its own theory of reason when it comes to the legal status of the unborn. The continuing descent of the enlightenment and its neglect in terms of its own proclaimed attention to reason and rationality, is revealed both in its inability to maintain a method of discourse by which it can morally condemn and legally prevent mass abortion on demand, and also by the increasingly brutal manner in which abortion on demand is defended.³⁶⁶

3. Negative aspects of rationality

First of all, Ritter³⁶⁷ touches on the negativity that is related to rational argument by emphasising Dworkin's argument that rationalist strategies fail because they do not express command. They fail to provide a final effective source. They are conclusional in that there is no authority beyond their reasoning. Dworkin³⁶⁸ continues his argument by stating that issues like the principle of equality require no reasoning or justification and are self-satisfying. A second negative aspect of rationality can be expressed in the following question: What happens when more than one approach seems rational? This is a real problem, which is illustrated by the following example: Several states differ in their opinions on the imposition of the death penalty. Some are for it and others against it. However, both routes are potentially parallel to rationality if argued correctly. For example, in the South African case *S v Makwanyane*³⁶⁹ the death sentence was considered to be contrary to the Constitution of South Africa since it is cruel, inhuman and degrading and incompatible with the right to life.³⁷⁰ On the other hand, Texas supports the death penalty in the case where the crime was murder.³⁷¹ Article 1, Section 18 of the Texas Constitution states that "no citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." In other words, "by the due

distinguished from the holy or spiritual", William S. Anderson, ed., *Ballentine's Law Dictionary*, (New York: The lawyers cooperative publishing company, Third Edition, 1969), 1154.

³⁶⁵Richard Ekins, "Secular Fundamentalism and Democracy", *Journal of Markets and Morality*, Volume 8, Number 1, (2005), http://www.acton.org/publicat/m_and_m/new/print.php (accessed 17/03/2007).

³⁶⁶David M. Smolin, "The Judeo-Christian Tradition and Self-censorship in Legal Discourse", *University of Dayton Law Review*, Vol. 13, No. 3, (1988), 404.

³⁶⁷Matthew A. Ritter, "Human Rights": Would you recognize one if you saw one? A philosophical hearing of international rights talk", *California Western International Law Journal*, Vol. 27, Issue 2, (1997), 274.

³⁶⁸Ibid.

³⁶⁹*S v Makwanyane* 1995 3 SA 391 (CC); 1995 2 SACR 1 (CC).

³⁷⁰CR Snyman, *Criminal Law*, (Durban: Butterworths, Fourth Edition, 2002), 29.

³⁷¹"*Guide to Texas death penalty law: Tarlton Law Library*", Jamail Center for legal research, <http://tarlton.law.utexas.edu/vlibrary/outlines/deathpenprint.html> (accessed 23/10/2007).

course of the law” means that the death penalty is allowed in Texas. Countries like Texas believe that the death penalty is the only pro-active method to limit crime in countries. Snyman is of the opinion that South Africa needs to impose the death penalty once again especially in a country like this where the crime rate requires drastic measures.³⁷² Here the problem of both sides of an argument being rational is clearly illustrated. The two arguments are as follows: On the one hand, the death penalty is viewed to be cruel, inhuman and degrading, and in general against the principles of humanity. On the other hand the death penalty is viewed as necessary, especially in a country where the crime rate requires such measures.

It is also argued that murdering innocent persons is also against the principles of humanity and if such crimes are not punished adequately, the requirements of humanity are not met. Also, the death penalty can be approached from the point of view of sensitivities pertaining to the victim as priority; while on the other hand, it can be approached from the point of view of sensitivities pertaining to the human dignity of the murderer. Each approach would not necessarily be irrational, yet would have contrasting outcomes. The fact that common ground exists does not mean that people will actually reach agreement, nor does it mean that only one belief is reasonable on the evidence.³⁷³ Such disagreements over the truth can be interpreted as the result of differences in judgment in the exercise of a common reason.³⁷⁴ Freeman³⁷⁵ agrees with a rational approach but also mentions that history shows that reasonable persons can disagree on such rules. Reasonable persons disagree over religious doctrines, ultimate conceptions of the good life, levels of public provision of education and health care, social security, defence policy, environmental preservation and several other issues that liberal societies determine by legislative action.³⁷⁶ Similarly, a human being is a person (and in other words, the unborn is legally protected or not) if it suits the judge’s objectives.³⁷⁷ In addition to disagreement on what is rational, every person believes that his or her personal insights are universally valid.³⁷⁸ Jarvie³⁷⁹ explains this as the problem of

³⁷² CR Snyman, *Criminal Law*, (Durban: Butterworths, Fourth Edition, 2002), 29.

³⁷³ Thomas Nagel, “Moral Conflict and Political Legitimacy”, 234.

³⁷⁴ *Ibid.*, 236.

³⁷⁵ Michael Freeman, “The Problem of Secularism in Human Rights Theory”, 400.

³⁷⁶ Thomas Nagel, “Moral Conflict and Political Legitimacy”, 231-232.

³⁷⁷ Charles I. Lugosi, “Respecting Human life in the 21st Century America: A moral perspective to extend civil right to the unborn from creation to natural death”, *Issues in Law and Medicine*, Vol. 20, No. 3, (2005), 218.

³⁷⁸ Alfred P. Rubin, *Ethics and authority in international law*, 4.

³⁷⁹ I.C. Jarvie, *Rationality and Relativism: In search of a philosophy and history of anthropology*, (London: Routledge and Kegan Paul, 1984), 3.

sustaining a principle of rational unity of mankind in the face of a vast diversity in achievements and especially of culture, society and cognition (even ideology). Therefore, it may be that competing actions, beliefs and desires may all qualify to be rational and there is no universal agreement as to what is rational. The opposite is also true: although there is not always agreement as to what is rational and irrational, one should where possible endeavour towards universal agreement. Renteln agrees that the requirement of relativism that diversity be recognised in no way destroys the *possibility* of an international moral community.³⁸⁰ In other words, the possibility still exists and it would only be rational to make attempts to explore these possibilities when it comes to the legal status of the unborn in international law. Of course one could go deeper into this issue, but for purposes of this thesis, the gist of the principle is clearly illustrated.

De Freitas³⁸¹ states that another problem of rational debate is *getting beyond* basic conflicts in presuppositions, and he refers to Smolin's view that the solution is to find *some* common ground. However, the solution of reliance on a common principle is ideal but not credible. A similar problem of getting beyond basic conflicts in presuppositions applies to the various ideologies encapsulated in secularism. Take, for example, the life issue. When people debate the abortion issue they start by discussing the question of when life begins. This is due to the fact that people view the outcome of the abortion issue as totally dependent on the sanctity of life claim.³⁸² De Freitas³⁸³ poses the question as to whether life is a useful argument regarding the protection of the unborn, because secularism, by basing the argument on scientific naturalism, defines man in terms of physical and biological function, reducing man to an object or mere nature. This in opposition to a traditionally religious view that man is the epitome of Creation and should therefore be approached with such sensitivity that even the unborn are to be protected. Engelhardt³⁸⁴ states that talking of life presupposes that we know what life is, what makes for its sanctity and what constitutes a person, yet there is no clarity to these concepts. 'Life' is therefore granted to 'human beings' without either of these concepts being defined.

³⁸⁰ Alison Dundes Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights", 540.

³⁸¹ Shaun A. de Freitas, "Transcending 'Life' in the Biblical Protection of the Unborn: Perspectives towards a Jurisprudential Anti-Abortion Apologetic", *Journal for Christian Scholarship*, Special edition 2, (2006), 171.

³⁸² Ibid.

³⁸³ Ibid., 174.

³⁸⁴ H. Tristram Engelhardt, Jr., "The Sanctity of Life and the Concept of a Person", 77.

De Freitas³⁸⁵ further states that it is impossible to show why a woman's right to procreative autonomy is superior to the rights of the embryo. Such claims are arbitrary since no justification exists for the women being more important than the unborn and no justification exists for using rights, such as the right to life, to determine the position of the unborn. Women's rights therefore enjoy a partisan prioritisation and are rationally unqualified.³⁸⁶ In fact, when reading theory in support of reproductive rights, it soon becomes clear that an absolutist route is followed (as stated earlier on), making no mention of the possibility of protecting the unborn at least towards the final stages of pregnancy. Therefore, supporters of reproductive choice are insensitive towards any alternative arguments on the unborn even during the later stages of pregnancy.

The abortion debate is therefore based on several different concepts, leading to various interpretations of concepts, each of them offering a different solution to the legal status of the unborn. It is therefore difficult to get beyond these differences in presuppositions. Rationality can also be linked to a specific religion or ideology that perceives mere loyalty to such a religion or ideology as being rational. For example, an atheist may believe that animals should not be killed. This conclusion might be arrived at after logical and rational thinking - therefore, meeting the requirements of rationality. A Christian, on the other hand, might say that doing harm to animals is wrong because the Bible says so and the Bible comes from God. In other words, the Christian will claim to be rational. Therefore, even certain presuppositions or religions can claim to be rational but this is not to say that the legal status of the unborn should go by unnoticed and uncared for. In any event, it is better to pursue the debate along rationalist lines as far as possible, than not to do anything at all. If 'life' is so difficult to determine, and if it is open to so many ideological interpretations, then we can just as well give up on protecting the human life of an adult person also. But society does not do this, and rather affords much legal protection towards adult human beings. If this is the case, why give up on the plight of the unborn if that which determines life is so complex and open to so many ideologies?

These questions make it clear that there is no easy way to determine the law or virtue – morality, in other words. If it were easy, then Plato, Aristotle and the like would have done

³⁸⁵ Shaun A. de Freitas, "Transcending 'Life' in the Biblical Protection of the Unborn: Perspectives towards a Jurisprudential Anti-Abortion Apologetic", 181.

³⁸⁶ *Ibid.*, 183.

so.³⁸⁷ Although these negatives make life difficult it is not impossible to deal with them and achieve the desired goal since surface agreements by way of communication and rational platforms are possible, while our differences in ideologies remain.

4. Positive aspects of rationality

Although the task of getting beyond conflicting presupposition in order to be rational seems impossible, several positive aspects regarding rationality do exist that oppose the negative aspects. First of all, this task becomes possible when one considers the fact that rationality does not require the impossible idea of absolute *neutrality* but rather *impartiality*. This necessitates an explanation of the two concepts. Montefiore states that to be neutral in any conflict is to do one's best to help or to hinder the various parties concerned to an equal degree.³⁸⁸ Furthermore, he states that access to a realm of pure and evaluatively neutral facts is objected to.³⁸⁹ In other words, he is of the opinion that absolute neutrality does not exist. He is also of the opinion that absolute impartiality and openness of mind are imaginary.³⁹⁰ However, this is where open-mindedness comes to the rescue. To be open-minded is to be sensitive to the possibility that one may not yet have succeeded in being as impartial and as objective as one may have intended and hoped; that there may still be new facts to be discovered, old facts whose relevance has yet to be reassessed, new interpretations to be considered of the total situation or of certain aspects of it.³⁹¹ It is argued that such an attempt towards impartiality, requiring open-mindedness, is necessary for a rational approach on the legal status of the unborn. It will therefore require current abortion jurisprudence to investigate whether they have been sensitive and impartial, and whether they have considered the total situation and all interpretations of the legal status of the unborn. This idea is further explained in the South African case of *SA Commercial Catering and Allied Workers Union v*

³⁸⁷ Matthew A. Ritter, "Human Rights": Would you recognize one if you saw one? A philosophical hearing of international rights talk", 185.

³⁸⁸ Alan Montefiore, "Neutrality, indifference and detachment", in *Neutrality and Impartiality: The University and Political Commitment* (edited by Alan Montefiore and Andrew Graham, London: Cambridge University Press 1975), 5. Montefiore distinguishes neutrality from indifference and detachment. To be indifferent is to have no personal preferences one way or the other. Detachment may be regarded as the setting aside of whatever personal preferences one may happen to have, it is compatible with indifference, but does not presuppose it, *ibid.*

³⁸⁹ *Ibid.*, 19.

³⁹⁰ *Ibid.*, 18. However, although it might not exist, rationality requires an attempt towards impartiality. This will automatically involve open-mindedness.

³⁹¹ *Ibid.*, 21.

*Irvin and Johnson Ltd (Seafood Division Fish Processing)*³⁹². Judge Cameron states that absolute neutrality is a chimera in the judicial context. This is because judges are human and therefore subjective elements do play a role in the judicial lawmaking process of the judge. Neutrality, however, stands in contrast to judicial impartiality.

Impartiality is that quality of open-minded readiness to persuasion without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views - that is the keystone of a civilised system of adjudication. Impartiality requires, in short, 'a mind, open to persuasion by the evidence and the submissions of counsel; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding.'³⁹³

In addition, impartiality involves treating everyone equally, with the same rights and considering each individual's welfare the same in determining what would be a *permissible* course of action.³⁹⁴ Therefore, the difference between neutrality and impartiality is that neutrality requires total objectivity, detached from any personal ideologies or feelings. On the contrary when it comes to impartiality, total detachment and objectivity is not required. It merely requires open-minded readiness and openness to persuasion.³⁹⁵ *International justice* as a requirement of rationality also requires impartiality because by being open to what others have to say, one is impartial but also accords others respect, acknowledges their equality and shows a civilised approach.³⁹⁶ In agreement, Nathanson³⁹⁷ argues that every view is a partial view and that pure objectivity is misguided in that a view from a non-subjective perspective is no view at all. He however also urges the aim to be more objective without urging total detachment.³⁹⁸ Now that the distinction between impartiality and neutrality is made the problem of conflict between a personal standpoint and the requirement of impartiality still exists.³⁹⁹

Thomas is of the opinion that this problem between personal and subjective viewpoints can be overcome because there is a higher order framework of moral reasoning, taking us outside ourselves to a standpoint independent of who we are. Therefore, such highest-order moral

³⁹²2000 8 BCLR 886 (CC).

³⁹³*SA Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafood Division Fish Processing)*: par 13.

³⁹⁴ Thomas Nagel, "Moral Conflict and Political Legitimacy", 215.

³⁹⁵ *SA Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafood Division Fish Processing)*: par 13.

³⁹⁶ Stephen L. Carter, *Civility: manners, morals, and the etiquette of democracy*, 139.

³⁹⁷ Stephen Nathanson, *The Ideal of Rationality: A defense, within reason*, 67.

³⁹⁸ Sibley agrees that reasonableness requires impartiality expressed in the notion of equity, W.M. Sibley, "The Rational Versus the Reasonable", 557.

³⁹⁹ Thomas Nagel, "Moral Conflict and Political Legitimacy", 215.

reasoning cannot derive its basic premises from our different starting points or beliefs, although it may authorise relying on these specialised points of view if this is justified from the more universal perspective.⁴⁰⁰ As mentioned earlier, the *overlapping consensus* or *justificatory minimalism* provides a method to overcome conflicts in presuppositions without neutrality being present. In other words, people can maintain their presuppositions and justify the application of human rights, for instance, by way of different views and means. These justifications do not need to convince everybody, as long as they are not irrational justifications⁴⁰¹ or justifications based on assumptions. Finally, several reasons exist as to why rationality requires impartiality rather than neutrality. This is also the case in the context of the legal status of the unborn. First of all, rationality becomes possible in the context of impartiality because impartiality does not require an absolute lack of subjectivity as neutrality does, but in the context of the legal status of the unborn, will require participants to debate or argue in a non-arbitrary manner and with a ‘mind, open to persuasion by the evidence and the submissions of counsel’⁴⁰².

Therefore, impartiality will require participants to the debate on the legal status of the unborn to be sensitive to other ideologies and evidence on the unborn presented, and not merely to assume that their ideology is the deciding factor. For example, parties to the debate will not simply assume that the legal position of the unborn is to be determined by human rights but will also consider the fact that other evidence or ideologies, such as science, the context of humanity and anthropology, also exist. Furthermore, impartiality necessitates all evidence to be present in argumentation which is reflective of an inclusive approach. Therefore, if applied to the legal status of the unborn, impartiality will require all evidence, or rather concepts concerning the unborn (such as biology, international justice, humanity, international humanitarian law, benevolence and anthropology) to be present when discussing the legal status of the unborn. Rationality therefore, does not mean that one has to be absolutely neutral. However, rationality requires at least an effort towards common ground as far as possible, together with impartiality, justice, commitment and sensitivity towards mankind, when it comes to the legal status of the unborn.

The second advantage is the fact that it is exactly the differences in ideologies of different

⁴⁰⁰ Ibid., 229.

⁴⁰¹ As described on page 120 concerning the common denominator argument.

⁴⁰² *SA Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafood Division Fish Processing)*: par 13.

states that allow them to engage rationally with each other. These differences allow for debate and dialogue on the legal status of the unborn. As stated earlier, a neutral principle accepted by all is impossible and one cannot assume that all debate is based on shared moral premises because then all worldviews would share basic moral premises or the same presupposition.⁴⁰³ This in itself is impossible. However, while there is no neutrality in scientific facts and observations, the different ideologies are able, via an inclusive and sensitive approach, to communicate and come to surface agreements while our radical differences remain.⁴⁰⁴ However, it is exactly these differences between states that allow them to come together and communicate or initiate dialogue. Ritter⁴⁰⁵ disagrees that diversities are a disadvantage to rational discourse. According to him pluralism plays a necessary part in forming a community of discourse with mutual understanding, tolerance, and respect required for political community.

Therefore, plurality provides for the emergence of community. And, it is only by virtue of talking to one another that we know our real differences, and may therefore truly communicate with each other and mediate consensus and dissensus.⁴⁰⁶

Similarly Rubin⁴⁰⁷ agrees in that, assuming that word-based abstract models of reality are necessary for social thought, and words are the best tools we have for people to communicate their abstract thought to each other, some basic agreement as to the processes of logical thinking is also necessary.⁴⁰⁸ Taylor also points out the differences in ideologies as the source of a potentially fruitful exchange within an emerging world.⁴⁰⁹ Therefore, differences in ideologies allow for states to come together and communicate in a rational manner, opposing compartmentalisation and exclusiveness in arguments. In addition, the boundaries of state sovereignty are slowly withering when it comes to fundamental values and rights. Such an approach is also contrary to one in which concepts such as human rights are solely used to determine the legal status of the unborn in international law.

To avoid arbitrary jurisprudence and outcome without justification in international law,

⁴⁰³ Shaun A. de Freitas, "Transcending 'Life' in the Biblical Protection of the Unborn: Perspectives towards a Jurisprudential Anti-Abortion Apologetic", 172-173

⁴⁰⁴ *Ibid.*, 181.

⁴⁰⁵ Matthew A. Ritter, "Human Rights": Would you recognize one if you saw one? A philosophical hearing of international rights talk", 284-285.

⁴⁰⁶ *Ibid.*, 285.

⁴⁰⁷ Alfred P. Rubin, *Ethics and authority in international law*, 5.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Charles Taylor, "A world consensus on human rights?", 416.

ideologies such as human rights cannot stand on their own when it comes to the legal status of the unborn. This is proven by the arbitrary and inconsistent outcome of the legal status of the unborn when based solely on human rights presuppositions. For example, human rights can support either outcome on the legal status of the unborn. If based on women's rights, these rights will be considered to override the right to life of the unborn. When considered from a 'right to life' point of view, the right to life of the unborn will override any other rights. Therefore, human rights can potentially both support and oppose abortion. The problem is therefore that rationality needs to get beyond these differences in ideologies (feminism, life and human rights), as they cannot function on their own if a fair and rational outcome is to be attained.

Under subsection 3, criticism by Dworkin⁴¹⁰ mentions possible negative aspects of rationality. It is agreed with Dworkin that (1) rational argument may fail to express command, or in other words action, and that (2) sometimes there is no authority for a rational outcome but the mere reasoning thereof. In other words, with regard to (2), some outcomes are by nature or perception the way they are, without the need for recourse to any deep thought or study. For example, the perception that concepts such as murder and inequality are immoral and unlawful needs no justification. These are reasoned principles due to the nature of the act being immoral.⁴¹¹ Is it viable, though, that a principle such as equality can *always* be self-evident and free of any need for deep thought and reasoning (where reasoning means something that is rationalised as being good)? One wonders how Dworkin would respond to the abortion issue by his theory of self-evident principles. This argument cannot hold for abortion since the legal status of the unborn is unable to be presented with a single self-evident solution (or so it seems). This is evident from the divisiveness and conflict that still exists. Due to the fact that there is no agreement on abortion, it cannot be said that the outcome of the abortion issue is self-evident and in need of no reasoning⁴¹². Finally, it is also agreed with Dworkin that sometimes there is no authority for a rational outcome but the mere reasoning (or nature) thereof. However, this is so because reasoning sometimes shows close affinity to natural law, which requires no other justifications than the mere fact that it is a natural law principle. But reason can also be a principle where the outcome of a decision

⁴¹⁰ See page 101 for a discussion on Dworkin's criticism against rationalist strategies.

⁴¹¹ This will be discussed in more detail in the next section.

⁴¹² The word "reasoning" in this context means, "to be rational".

needs deep thought and where the outcome is rationalised to be good. Ritter⁴¹³ also mentions that defining principles of equality as axiomatic or self-evident merely sidesteps the problem of rational justification because what is self-evident for one is dogmatic for another. Therefore, although several negative aspects on rationality do exist, there are positive aspects and contradicting arguments to circumvent these problems and come to the desired solution of a rational platform in procedure and substance on the legal status of the unborn.

5. Rationality *versus* reason

In order to obtain a proper delineation of the concept of rationality, a distinction/correlation between *rationality* and *reason* is necessary. Considerable disagreement exists as to what these concepts mean. Several authors assume these two terms to be synonymous; however, in some contexts the term ‘reasonable’⁴¹⁴ is used with implications not possessed by the term ‘rational’.⁴¹⁵ The concepts of *rationality* and *reason* overlap but also differ. They overlap in the sense that reason can also mean that a rationalised approach was followed in obtaining an outcome. In other words, logical and in-depth research was done to achieve an answer. Rationality and reason however differ in that reason can also show an affinity towards natural law. Sometimes certain concepts are known to be reasoned without any in-depth research or thinking. In other words the concept, merely because of its nature, has a certain conclusion. In this context, reason therefore shows affinity towards natural law. For example, murder and rape are simply known and accepted to be wrong. There is no need to argue or debate the outcome.

Evident from the following definitions is the fact that rationality and reason overlap but that they are also different. To be rational means to be reasonable, in other words to be capable of reasoning in a sane manner.⁴¹⁶ The words ‘to be capable of’ give meaning to the word rationality as the capacity of man to reason or think sensibly and logically.⁴¹⁷ Where rationality is essentially an intellectual virtue⁴¹⁸, reason requires more than intellectual capability. It requires a positive sympathetic disposition toward others. To have reason

⁴¹³ Matthew A. Ritter, “Human Rights”: Would you recognize one if you saw one? A philosophical hearing of international rights talk”, 274.

⁴¹⁴ In this context the term ‘reasonable’ is taken to have the same meaning as ‘reasoned’.

⁴¹⁵ W.M. Sibley, “The Rational Versus the Reasonable”, 554.

⁴¹⁶ Handler, *Ballentine’s Law Dictionary*, 455.

⁴¹⁷ Catherine Soanes and Angus Stevenson, *Concise Oxford English Dictionary*, 1193.

⁴¹⁸ W.M. Sibley, “The Rational Versus the Reasonable”, 556.

therefore includes moral judgment.⁴¹⁹ The following example by Sibley explains the difference between rationality and reason clearly: Two individuals *A* and *B* have an equally strong claim to a sum of money. *A*, however, is in a position to retain all of the money for himself without paying regard to *B*'s rights in the matter. *A* then decides to retain the money. How would we characterise *A*'s action? Obviously he is selfish and acting wrongly. One might say he is unreasonable. But the fact that *B* will be injured is to *A* no reason for deciding to act otherwise. Therefore, to condemn *A* as unreasonable is not *ipso facto* to mark him as irrational.⁴²⁰ Furthermore, in this regard, reason within the context of rationality means justified outcomes/platforms on the legal status of the unborn – justified in that the platforms may not be arbitrary and inconsistent or support any single concept as basis of the legal status of the unborn. In other words, a platform that is as inclusive and in agreement as possible.

As stated before, a reasoned principle is sometimes justification in itself and need not be justified with further rational argument. This is so because it is also possible for reason to show affinity to natural law. For example, one can make the inference from international law that the general feeling on genocide is that genocide is wrong. Therefore, to draw an inference and say that genocide is wrong, will be a reasonable statement that need not even be argued rationally. Cicero agreed with this, stating that there is one form of law that is natural law and that this law is right reason (*recta ratio*).⁴²¹ Due to this nature of reason the serving of the public good does not have to be qualified by rational debate and could be accepted without the need for logical argument to confirm it. Finally, therefore, the concept of *reason*, for purposes of this thesis, will be applied and dealt with as (1) reason as rationality, i.e. a logical, well thought through argument where the outcome is rationalised as being good, and (2) perception, or reason as natural law, where some principles have a certain outcome by their mere nature and how persons view them in a pre-discussion content.

⁴¹⁹ Ibid., 557.

⁴²⁰ Ibid., 554-555.

⁴²¹ A quotation of Cicero from *De Legibus* as quoted in D.H. van Zyl, "Justice and Equity in Greek and Roman Legal thought", 77-78.

6. Natural law *versus* positive law

6. 1. The history and relevance of the debate

The concept of *natural law* is relevant to this thesis as it links with *one* of the meanings of *reason*. This meaning is that reasoning shows affinity to natural law – in other words, where the nature of the outcome is good due to the mere nature of the concept. For example, murder is regarded as immoral without any deep thought or debate. The concept reason in this context is not entirely separate from natural law but also not entirely common to natural law. The similarities between reason and natural law are evident from the views that crimes such as murder and rape are viewed to be wrong without any deep thinking or debate.

In order to shed light on the relevance of the natural law and positive law debate, it is necessary to investigate the source of this debate. According to Rubin, positivism has dominated the thinking of statesmen and has so dominated since the seventeenth century regardless of naturalist models adopted by publicists whose writings have survived with great reputation.⁴²² This domination of positive law has its roots in classical history. From the middle of the fifth century BC, Greece placed the emphasis on man-made institutions rather than on the physical principles of nature.⁴²³ The movement had the effect that man as such became the centre of attention while the things created by man were evaluated as something relative to him. It was in this climate of anthropology and relativism that a group of persons known as the “Sophists” appeared.⁴²⁴ Socrates rejected the relativistic approach of the Sophists, who argued that justice varied from city-state to city-state and that there was no such thing as universally valid justice.⁴²⁵ Socrates declared that a universal definition of justice could be attained as an expression of the innate, deeply penetrating nature of justice, which is the same for all men. He supported a natural theory although he maintained his respect for positive law.⁴²⁶ Similar to the views of the Sophists, state sovereignty resulted in the favouring of relativism⁴²⁷ and positive law, as the State became the embodiment of the

⁴²² Alfred P. Rubin, *Ethics and authority in international law*, 19.

⁴²³ D.H. van Zyl, “Justice and Equity in Greek and Roman Legal thought”, 17-18.

⁴²⁴ *Ibid.*, 18.

⁴²⁵ *Ibid.*, 20.

⁴²⁶ *Ibid.*

⁴²⁷ Relativism is a doctrine in the theory of knowledge: it asserts that there is no unique truth, no unique objective reality, Ernest Gellner, “Relativism and Universals”, in *Rationality and Relativism*, (edited by Martin Hollis and Steven Lukes, England: Basil Blackwell Publishers, 1982), 183.

will of people, causing abortion laws to vary from city-state to city-state⁴²⁸.

Currently, western law and politics are still based on a relativist and subjective moral theory. This is evident from the fact that we are not able to choose a rational outcome on the legal status of the unborn because the subjectivity of a relativist approach supports either conclusion, for or against abortion⁴²⁹ and therefore current abortion law, lacking in universal agreement on procedure and substance, is a symptom of the positivistic and relativistic approaches of sovereign states today. Jarvie⁴³⁰ agrees in that relativism proposes that there is no way of mediating cross-cultural disagreement. Although the possibility exists that no cross-cultural agreement is possible when it comes to the legal status of the unborn, it does not negate the possibility of universal agreement on the matter and, in order to be rational, such possibility needs to be investigated. Interesting is that naturalists find pluralism to be favourable in that it creates irresolvable disagreement on natural precepts.⁴³¹ This disagreement generates dialogue between the differing perspectives. Similarly, pluralism provokes dialogue and dialogue allows for the possibility of community.⁴³² Therefore, for the naturalist the problem of pluralism is a benefit. Pluralism is differing perspectives, and generates irresolvable disagreement. Such disagreement however generates dialogue between the different perspectives. Therefore pluralism provokes dialogue and dialogue allows for the possibility of community.⁴³³

Perhaps the time has come when we should endeavor to dissolve the structure of war that underlies our pluralistic society, and erect the more civilized structure of the dialogue. It would be no less sharply pluralistic, but rather more so, since the real pluralisms would be clarified out of their present confusion. And amid the pluralism a unity would be discernable – the unity of orderly conversation.⁴³⁴

Positivism supports relativism in that the varying laws from one state to the next, unable to come together in dialogue, reject a universal development on the legal status of the unborn. Relativism and positivism support differing perspectives on the legal status of the unborn but do not support the coming together of these perspectives or opinions to form dialogue in attempts towards universal rational debate. They merely state that different perspectives

⁴²⁸ D.H. van Zyl, “Justice and Equity in Greek and Roman Legal thought”, 20.

⁴²⁹ David M. Smolin, “The Judeo-Christian Tradition and Self-censorship in Legal Discourse”, 401.

⁴³⁰ I.C. Jarvie, *Rationality and Relativism: In search of a philosophy and history of anthropology*, 102.

⁴³¹ Matthew A. Ritter, “Human Rights”: Would you recognize one if you saw one? A philosophical hearing of international rights talk”, 284.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Ritter quotes Johan Courtney Murray, *ibid.*

should be left alone – there is no discussion. Positivism is therefore a favourable environment for relativism and supports pragmatic views changing from one state to another state. On the other hand, natural law takes note of the fact that pluralism/different perspectives do exist, but supports the coming together of these differences in rational debate. Therefore, natural law does not claim that cultural and ethical differences do not exist; it rather differs from positive law in the way it approaches these differences. Natural law and rationality support the search for a minimum platform on the legal status of the unborn in that both of these concepts oppose relativism and as a result also positive legal principles (although positive law may have a rational aspect to it) and allow for the opportunity to achieve universal developments based on natural law because they allow for disagreement generating dialogue. Several authors agree with the view that natural law is more favourable to rationality: in *De legibus*, Cicero tells about the nature and ambit of justice. He states that it is foolish to consider all things founded on institutions or law of people as just. He states that there is only one form of law (*ius*), which is an all-embracing law, binding the community of men. This law is right reason (*recta ratio*). The person ignorant of this is unjust. If such law is not confirmed by nature it is unjust. People therefore do not enact Law but it is eternal and reflective of the divine reason and will.⁴³⁵ Gellner⁴³⁶ also states that if all is relative (i.e. if there are no universal principles) then the content of truth will vary; he also mentions that there is a remedy – namely that of human universals.

The above does not support the use of natural law in an absolutist sense. As is stated in the introduction, natural law needs more emphasis in the international debate on the progression of the legal position of the unborn. However, when it comes to justifying an axiomatic point of departure as presented in this thesis, such as a process containing an inclusive, rational, reasoned, sensitive and informative approach, it becomes clear that natural law would have to serve as justification for such a universally agreed-upon model. In this regard, one could therefore speak of different levels and relevancies of natural law in progressive debate on the international legal status of the unborn. Once this step has reached consensus (and in this thesis this is assumed to be the case) then one becomes inextricably active in both natural law and positive law discussion, although the former requires added attention due to it being negated on many occasions in the past and present (and possibly the future). It cannot be

⁴³⁵ A quotation of Cicero from *De Legibus* as quoted in D.H. van Zyl, “Justice and Equity in Greek and Roman Legal thought”, 77-78.

⁴³⁶ Ernest Gellner, “Relativism and Universals”, 181.

denied that natural law plays an integral role in the endeavour towards a rational and reasoned approach pertaining to the progression of theory and practice regarding the international jurisprudential approach to the legal status of the unborn. In fact, natural law and rational/reasoned argument, in whatever stage of the presented topic, are inextricably linked to one another. In order to confirm the above, reference is made to Rubin's observation in this regard namely:

Positivism, obsessed with authority and contemptuous of moral balancing, dominates the thinking of statesman and has so dominated since the seventeenth century regardless of the naturalist models adopted by the publicists whose writings seem to have survived with greatest reputation.⁴³⁷

To summarise the distinctions and approach taken here, it might be useful to relate to two parables. The first, or naturalist-mocking, parable is of the violinist whose fiddle had only one string, whose finger remained in the same place on that string and who played the same note to all who could hear. When asked why the other violinists used four strings and moved their fingers about, the reply was: "They are looking for the note. I have found it."⁴³⁸ Rubin adds that in his view, three thousand years of people insisting on the validity of a single insight and denying the validity of the insights of colleagues who view the world differently demonstrates the futility of the one-string approach to jurisprudence.⁴³⁹ The world is full of music to those who would listen. The second, or positivist-mocking, parable is of the person who argued from a presumption of the authority to attach a word for reason for human choice or policy, to a fact or relationship – in the form of a limerick:⁴⁴⁰

There was a person of Deal
Who said, "Although pain is not real,
When I sit on a pin
And I puncture my skin
I dislike what I fancy I feel."⁴⁴¹

According to Rubin, what passes for scholarship in jurisprudential writings is usually either naturalist elaboration of principles that are asserted as self-evident but with no necessary connection to wisdom or truth, or positivist works merely descriptive or empirical. Still other judges and legislators cite as influential only those scholars and judicial precedents with whose conclusions they agree, and ignore or misstate and denigrate those scholarly writings

⁴³⁷ Alfred P. Rubin, *Ethics and authority in international law*, 19.

⁴³⁸ *Ibid.*, 20.

⁴³⁹ *Ibid.*, 20-21.

⁴⁴⁰ *Ibid.*, 21.

⁴⁴¹ *Ibid.*

and juridical precedents that lead to conclusions which they prefer not to adopt for reasons they prefer not to analyse in open writing.⁴⁴² As to the moralist, the notion that the legal is the same as the reasonable assumes that reasonable people agree on all essential questions of morality and order. Very few products of human law-making effort are adopted through a legislative procedure by unanimous vote or equal enthusiasm in any consensus, however, the experience of the ages is that group decisions are at least as likely to be immoral as are individual decisions. Indeed, Cicero himself argued that the true law, the “*vera lex*,” might well require an honourable person to violate the positive law passed by the Roman State. So the result of the notion that morality and law are identical leads to each individual being his own lawmaker, and little likelihood of a cohesive community.⁴⁴³

Rubin therefore sums it up well, and it is the author’s intention that the application of natural law in this thesis should not provide the wrong impression, or imply that the author is not aware of these complexities. What cannot be ignored is that somewhere, somehow, the legal status of the unborn from an international law perspective will have to be dealt with in a progressive context. Therefore where does one start? One starts by what reality and foundational legal theory give you, which is foundational concepts such as natural law, positive law, ideology, rationality, reasonableness, inclusiveness and humaneness.

6. 2. The importance of natural law as preferred legal method

Since it is clear that natural law is the favourable legal method it is important to illustrate *other reasons* as to why this is so. One of the reasons why natural law is important is the fact that, although positive law still dominates the legal systems of different states, there has been a general re-emphasis of natural law and universal principles. This has been the case since World War Two and it is reflected in many codified and non-codified sources of public international law.⁴⁴⁴ Even in the light of all these developments in natural law, however, no effort has been made towards investigating a minimum possibility of natural universal laws for the legal protection of the unborn. The necessity of an effort towards natural universal principles is clear from the following example and shows the consequences of the neglect of

⁴⁴² Ibid., 54.

⁴⁴³ Ibid., 187.

⁴⁴⁴ Harold J. Berman, “Law and Revolution. The Formation of the Western Legal Tradition”, (Cambridge Massachusetts: Harvard University Press, 1983), 31.

natural law principles. Such neglect is in itself irrational. The *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*⁴⁴⁵ is an example of a positivistic approach followed by the International Court of Justice.⁴⁴⁶ The court stated that it would simply address the issues by applying the legal rules relevant to the situation.⁴⁴⁷ The problem arose with Article 51 and the right to self-defence. If the threat or use of nuclear weapons meets the requirements of self-defence, then it cannot be prohibited altogether and is in line with international humanitarian law. This is a positivistic view. The court also considered the view that the use of nuclear weapons cannot be reconciled with international humanitarian law because of to the fundamental principles of humanity. This view supports a more natural law approach. In the end the court failed to answer the question of whether the threat or use of nuclear weapons was to be prohibited in all circumstances. The court only considered convention and customary law and clearly no convincing consideration was made of natural law. If it had been considered, a total prohibition of nuclear weapons could have been justified. Such weapons would kill and destroy in a necessarily indiscriminate manner and the effect would be uncontrollable and unrestricted. In the same manner, a lack of consideration of natural law regarding the legal status of the unborn may result in adverse consequences. One of these adverse consequences is that various legal systems will have different views and laws on the legal status of the unborn, and will be unable to reach consensus. Yet, within this confusion, there is enough substance to indicate towards the idea that the unborn becomes more important during the later stages of pregnancy, and therefore reliance on the authority of the various legal systems that are not sensitive to the various stages of the development of the unborn, would be to treat humanity in an indiscriminate and uncontrollable manner.

However, the search for natural law solutions to problems is not always that easy. The problem with natural law is that we do not all agree on what natural law says.⁴⁴⁸ However, universal principles and a minimum jurisprudence, regardless of diversity among states, are evident from the following examples (inscribed in each of these ideas or norms is some sort

⁴⁴⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 36, ICJ, 8 July 1996.

⁴⁴⁶ Thomas is however of the opinion that disagreements on the morality of nuclear deterrence and the death penalty is not as ultimate and as personal as disagreement over abortion in that these issues are not matters of individual conduct, as in the case of abortion, but the state may or may not decide to regulate them, Thomas Nagel, "Moral Conflict and Political Legitimacy", 233. These issues cannot be left to the private conscience of individuals, the state must decide, *ibid.*, 233-234.

⁴⁴⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*: par. 15.

⁴⁴⁸ John Robson, "Natural Law: Respectable Again?", *Centre Points*, Vol. 14, (2006), 2.

of rationality that would be difficult to oppose): One of the sources of international law is “General principles of law recognized by civilised nations”⁴⁴⁹. According to Sassòli and Bouvier⁴⁵⁰ this includes principles of domestic law, common to all legal orders, for example *good faith* and *proportionality*. These principles do not have a consensual basis like other sources of international law and confirm the natural law basis of the international legal order.⁴⁵¹ States that follow a positive law approach also have difficulty in accepting this source of international law.⁴⁵² Another example of a universally accepted norm would be that of the elements of a crime: intention as an element of murder is a worldwide legal requirement. The elements of a contract can also be described to be universal as “a legally binding agreement involving two or more people or businesses (called parties) that sets forth what the parties should or should not do.”⁴⁵³ Procedural law is a universal concept. Not one state, culture or society can function without some kind of legal procedure based on, for example, the rules of natural justice governing their actions. One of the most important examples of a minimum jurisprudence can be found in international humanitarian law and deserves special mention. A minimum of generally respected rules provide for armed conflicts as distinct from the chaos that would exist without such minimum rules.⁴⁵⁴ Not only do legal rules apply but also other principles based on fair discretion rather than a legal rule, for example, the prohibition of attacks on civilians.⁴⁵⁵ People with different backgrounds and opinions agree that in an armed conflict killing an enemy soldier on the battlefield and killing women and children because they belong to the ‘enemy’ are not equivalent acts.⁴⁵⁶ The humanitarian ideas of international humanitarian law are shared by many different cultures.⁴⁵⁷

⁴⁴⁹ Article 38(1)(c) of the Statute of the International Court of Justice. Article 38 states: “(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. (2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”

⁴⁵⁰ Marco Sassòli and Antoine A. Bouvier, *How does law protect in war?: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, (Geneva: International Committee of the Red Cross, 1999), 112.

⁴⁵¹ John Dugard, *International law: A South African Perspective*, 39.

⁴⁵² Ibid.

⁴⁵³ “Contract”, *Nolo*, <http://www.nolo.com/definition.cfm/Term/5477BBD7-40E0-492E-9A623482AE9D47FC/alpha/C/> (accessed 3/5/2007).

⁴⁵⁴ Marco Sassòli and Antoine A. Bouvier, *How does law protect in war?: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 69.

⁴⁵⁵ Ibid., 112.

⁴⁵⁶ Ibid., 69.

⁴⁵⁷ Ibid., 71

Taylor agrees that there seems to be some basis for hoping to achieve at least some agreement on norms. One can presumably find in all cultures condemnations of genocide, murder, torture, and slavery. The deep underlying values supporting these common conclusions will, in the nature of the case, belong to the alternative, mutually incompatible justifications.⁴⁵⁸ The examples above show that there are universal principles against the background of natural law qualified by rational and reasoned debate. Therefore, a universal platform on the legal status of the unborn against the background of rational and reasoned debate is not unattainable.

6. 3. The relevance of reason to natural law

Within this context reason means *natural law* or where the *first perception* of an outcome is “just good” due to the mere nature of such outcome, without any deep thought or debate. Therefore, the concept of reason is relevant to this investigation in that it shows close affinity to natural law. When one makes a decision, and the option that is universally accepted is chosen, one can say that a reasonable decision was made. For example, genocide is universally unacceptable, and when the decision is made that genocide is wrong and immoral, the decision is reasonable. The decision need not even be argued since the reasonableness is evident in the universal acceptance of the decision.⁴⁵⁹ Therefore, when one chooses a universal principle, one acts reasonably, and by implication rationally. This idea is supported by the principle of *jus cogens*⁴⁶⁰ because as Article 53 of the Vienna Convention on the Law of Treaties states, a treaty is void if it is in conflict with an international peremptory norm⁴⁶¹.

⁴⁵⁸ Charles Taylor, “A world consensus on human rights?”, 411-412.

⁴⁵⁹ Genocide is universally unacceptable. According to the preamble of the Convention on the Prevention and Punishment of the Crime of Genocide, ‘genocide is a crime under international law’ and at ‘all periods of history genocide has inflicted great losses on humanity’. Article 1 further states that ‘genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.’ The Convention on the Prevention and Punishment of the Crime of Genocide has forty-one signatories and one hundred and thirty-three parties, “Ratifications, Declarations and reservations of the Convention on the Prevention and punishment of the Crime of Genocide”, Office of the United Nations Commissioner for Human Rights, <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm> (accessed 25/09/2007). The large number of parties to the Convention is evident of universal acceptance that genocide is an international crime, especially bearing in mind that as of 2007 the UN has one hundred and ninety-two member states and one hundred and thirty-three of those are signatories to the Convention, *ibid*.

⁴⁶⁰ These are peremptory norms from which no derogation is permitted. There is little agreement as to which norm qualifies as peremptory, John Dugard, *International Law: A South African Perspective*, 40. *Jus Cogens* is a norm in international law that means that some rules stand on a higher level than others. They are elite norms and create obligations for all states. They are universally applicable norms and are of normative superiority, M.K. Eriksson, *Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law*, 130 – 131.

⁴⁶¹ Article 53 reads as follows: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory

If a decision contradicts a universally accepted principle (*jus cogens*) it is unreasonable and therefore void. Therefore, when one looks at examples of *jus cogens* one realises that they represent norms that require, generally speaking, little theoretic justification or argument. Some of these principles that require little theoretic justification are: war crimes, protection of the environment, genocide, crimes against humanity and the crime of aggression.⁴⁶²

7. The common denominator argument

An important part of this investigation centres on the search for a rational platform or some common ground, in *substance* and *procedure*, on the legal status of the unborn. However, this effort is not without difficulties. Smith⁴⁶³ argues that the common denominator argument is fraudulent and that the argument that secular public discourse provides a common denominator that all citizens share is clever but equally unpersuasive. He uses the following example to explain his statement: A daughter asks her father what he wishes to eat for dinner. The daughter proposes that she only wants dessert. The father suggests that it would be better to have a full meal, with salad, meat, fruit, cooked vegetables, and then dessert. The daughter then responds by saying that they both agree on having dessert and that the fair and democratic solution is to accept that which they commonly agree on.⁴⁶⁴ This implies that because ‘dessert is the common denominator, that therefore both parties can only have dessert.’ In other words, the less sensible option becomes the solution to the problem. A few things may be said regarding this example.

Taken on face value, the argument makes sense. Both agree on pudding and therefore that will be the most democratic solution for both. However, on deeper investigation it is clear that the resulting common denominator is not found on rational deliberation. The common denominator found in the example is not persuasive due to a lack of reason and

norm of general international law. For the purposes of the present Convention, a peremptory norm 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.”

⁴⁶² Article 5 of the Rome Statute of the International Criminal Court states that: “(1) The jurisdiction of the Court shall be limited to the *most serious crimes of concern to the international community as a whole*... (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression...” (Emphasis added) Crimes against humanity includes under Article 7, murder, extermination, enslavement, torture, rape, apartheid etc.

⁴⁶³ Matthew A. Ritter, “Human Rights”: Would you recognize one if you saw one? A philosophical hearing of international rights talk”, 285.

⁴⁶⁴ Ibid.

justification.⁴⁶⁵ The irrationality of the outcome of the disagreement is evident from the fact that a rational argument will not come down to a bare confrontation between incompatible personal points of view.⁴⁶⁶ Firstly, when one looks at the definition of rationality and reason, it requires thinking that is not haphazard and arbitrary.⁴⁶⁷ It also takes into account all surrounding circumstances and from that makes an informed and intellectual inference. Reasoning also requires a sense of morality and is not mere intellectual capacity. In the example, the father wants dessert, vegetables and a whole meal. The daughter wants only dessert. When all the circumstances are taken into account it is clear that the father is not in agreement with the daughter regarding the fact that dessert will be acceptable to him. He wants dessert, vegetables and a whole meal, not only dessert. The common denominator in this case would be that *both want to eat* and not *what both want to eat*. There is however, no agreement on what to eat and therefore no common denominator can be attained on what to eat. Also, one has to take into account the age of the daughter against the age of her father, and consider who is capable of making the least arbitrary decision. Also bear in mind that eating a proper meal is generally speaking the more rational thing to do, as this will maintain a physically healthy body.

This argument could be relevant to human rights, science, comparative analysis and humanity. Take the following example: *A* thinks abortion is right because of women's reproductive rights and that the unborn has no right to life. *B* states that women have women's reproductive rights but the unborn has the right to life. Can one then say that the common denominator determining the status of the unborn is the women's reproductive rights? No, because *B* did not agree only on women's reproductive rights, his views on abortion included, as a whole, the belief that the unborn has the right to life. Therefore, presenting his belief in women's rights as his view on the legal status of the unborn would be a manipulated version of his intention. If women's reproductive rights are taken as the common denominator, such a result will be unfair and unjust because it will be contrary to what all parties agreed upon. The common denominator in this example would rather be that the legal status of the unborn is to be determined by rights, and such rights would have to be more clearly explained taking into consideration all other factors possible. With regard to science, some believe that the unborn has legal status when the brain has developed; others

⁴⁶⁵ Reference is made to pages 80 where this was discussed. In short, a rational argument requires justification. This justification is not necessarily persuasive but will normally persuade those who are rational.

⁴⁶⁶ Thomas Nagel, "Moral Conflict and Political Legitimacy", 232.

⁴⁶⁷ Reference is made to the definition of reason on page 77.

believe it is with viability and another group when the toes develop. Where is the common denominator in such an argument? If this example is dealt with in the same manner as Smith's argument, the lowest common denominator will probably be the point in time when all three of the options will be present in the unborn. Therefore, this will be the time when there are toes, a brain and the unborn is viable. Yet again, this result is not rational since none of the groups agree that all three of these characteristics need to be present. Therefore, their intentions are misrepresented. The group that considers the toes to be important was never of the opinion that the brain must also be present. This argument is also relevant to humanity and comparative analysis. Therefore, the fact that a concept is the common denominator does not make that concept acceptable and rational. Only by way of natural law, rationality and reason can the validity of a common denominator be determined.

Take for example the following: What if the whole of Asia believes that a baby daughter should be killed after birth? This does not make it the common denominator because it is against precepts of natural law, international law, rationality and reason. One would then argue that there are other ways of achieving a common denominator than by way of rationality and that rationality is not the only criteria. This might be true, but as already stated, it is the better alternative.⁴⁶⁸ Davies agrees with this in that where only claims that are justified and reasons given for them are presented, can there be a rationally motivated agreement, a rational consensus, on how to co-ordinate actions.⁴⁶⁹ However, this thesis is not looking for a specific result that is the final common denominator. What is stated is that international law and consequently the international community must at least attempt procedural and substantive developments on the legal status of the unborn because at the moment nothing is being done. In the end, providing some substance and procedure will not necessarily be the final answer to the legal status of the unborn but merely an effort in that direction. This mere effort will be a rational and humane approach *per se*. Furthermore, the common ground will be open-ended and not a conflict between different beliefs⁴⁷⁰ as well as a common ground allowing for differences in opinion but still generating dialogue. Therefore, in the example of the father and the daughter, the common ground came down to a bare conflict in beliefs as well as preferences, and resulted in choosing the most frequent principle that occurred as the final solution to the problem. This is not an open-ended,

⁴⁶⁸Reference is made to page 105 concerning 'The positive aspects of rationality'.

⁴⁶⁹Charles Davies, *Religion and the Making of Society*, 194.

⁴⁷⁰Thomas Nagel, "Moral Conflict and Political Legitimacy", 232.

rationally debated common denominator leaving room for disagreements and generating dialogue.

8. Human rights

A discussion on this topic is necessary in order to investigate the rationality of the current position regarding human rights and the legal status of the unborn in international law - even more so in light of the fact that human rights *per se* are one of the prominent ideologies on which the abortion debate is based. The history of human rights places the concept in perspective and is necessary to understand its use today. The concept of a 'right' arose in Roman jurisprudence and was extended to ethics *via* natural law theory. Just as positive law confers legal rights, so the natural law confers natural rights. Human rights play the same role in ethics once played by natural rights. Human rights are still thought to be natural in the broad sense of existing independently of any human action or institution.⁴⁷¹ One of the earliest precursors to human rights might be found in the notions of 'natural rights' developed by the classical Greek philosophers, such as Aristotle. However, the concept was more fully explained by Thomas Aquinas in his *Summa Theologica*. Humans could ascertain what was naturally right by 'right reason'. John Locke wrote a substantial defence of natural rights in the late 17th century in his *Two Treatises on Government*, which has had a lasting influence on political discourse that was reflected in both the American Declaration of Independence and France's Declaration of the Rights of Man and the Citizen, passed by the Republican Assembly after the revolution in 1789.⁴⁷² Further, Immanuel Kant's writings brought further reinforcement of natural rights.⁴⁷³

Irrespective of the source, human rights are those privileges that belong to all persons simply because, as human beings, there are certain things they may not be forbidden. The exact nature of the list of rights, and why we are entitled to them, varies from thinker to thinker.⁴⁷⁴ Although the above definition might give an idea as to what human rights are, a

⁴⁷¹ Carl Wellman, "Human Rights", in *The Cambridge Dictionary of Philosophy*, (edited by Robert Audi, Cambridge: Cambridge University Press, Second Edition, 1995), 796.

⁴⁷² Satya P. Kanan, *Encyclopedia of Human Rights and Social Justice*, (New Delhi: Dominant Publishers and Distributors, 2006), 2.

⁴⁷³ Moira Rayner, *History of Universal Human Rights – Up to WW2*, <http://www.universalrights.net/main/histof.htm> (accessed 24/10/2007).

⁴⁷⁴ David Robertson, *The Routledge Dictionary of Politics*, (London and New York: Routledge Taylor and Francis Group, Third Edition, 2004), 228-229.

comprehensive and all-encompassing definition of “human rights” is very difficult to obtain.⁴⁷⁵ The different perspectives as to the nature and lists of applicable human rights have their source in underlying conflicts between universal international human rights⁴⁷⁶ and cultural and ethical relativism.⁴⁷⁷ This conflict is clear from the number of reservations that some countries have to international human rights instruments. The definition also assumes that human rights are inherent to human beings. Renteln⁴⁷⁸ criticises this assumption, stating that it is based on the assumption that natural rights, which have become associated with human rights, are self-evident. Although the justification, definition and application of human rights become complicated in light of the debate between cultural and ethical relativism and universalism, no doubt exists as to the fact that human rights essentially apply

⁴⁷⁵ Feinberg offers a very negative view on obtaining a definition for human rights. He states that: “As we shall see, the right is a kind of claim, and a claim is ‘an assertion of right’, so that a formal definition of either notion in terms of the other will not get us very far. Thus if a ‘formal definition’ of the usual philosophical sort is what we are after, the game is over before it has begun, and we can say that the concept of a right is a ‘simple, undefinable, unanalyzable primitive’. Here as elsewhere in philosophy this will have the effect of making the commonplace seem unnecessarily mysterious. We would be better advised, I think, not to attempt a formal definition of either ‘right’ or ‘claim’, but rather to use the idea of a claim in informal elucidation of the idea of a right”, Alison Dundes Renteln, “The Unanswered Challenge of Relativism and the Consequences for Human Rights”, 515-516.

⁴⁷⁶ Human rights make a strong claim to universality. This claim stems from three premises that are integral to human rights both as a matter of historical fact and logic. (1) A limited international normative order exists, or can be created, in which states can express and act upon collective moral judgments. (2) A result of the existence of a global moral order with respect to human rights is the legal “internationalization” of those shared, universal values. The internationalization of human rights necessarily implies some degree of common standards, thereby necessitating an exception to the fundamental rule of absolute state sovereignty – an exception that has become a firmly entrenched tenet of international law as confirmed by state practice. (3) The third basis is the diverse philosophical bases from which these internationally shared values are derived, Douglas Lee Donoho, “Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards”, *Stanford Journal for International Law*, Vol. 27, (1990-1991), 357-359.

⁴⁷⁷ Alison Dundes Renteln, “The Unanswered Challenge of Relativism and the Consequences for Human Rights”, 514. Relativism typically involves some combination of three related propositions. The first simply points out that an observable divergence in moral judgments exists among societies due to their differing cultural, political, and social tradition. The second often described as “normative relativism,” asserts that these divergent moral judgments and values have no meaning or validity outside their particular social context. In other words, “what is right or good for an individual or society is not right or good for another, even if the situations involved are similar. The third version argues that no objectively justifiable moral standards or judgments exist outside particular cultural contexts. This view does not necessarily deny the possibility of universal truths or shared values, but rather contends that no valid means exist to objectively justify one culture’s moral values over another’s, Douglas Lee Donoho, “Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards”, 352. Relativism in human rights suggests four related and somewhat overlapping claims. First, the relativist position argues that certain human values, as articulated in general and abstract rights such as equal protection or political participation, are simply inappropriate in certain cultural and political contexts. Second, even if an abstract human right is appropriate to a culture, its specific content and application depend primarily upon the cultural and political circumstances of that society. Fundamental values such as justice, liberty, equality, and freedom mean markedly different things depending upon one’s cultural and political assumptions. A third major relativist claim, derived from the two preceding claims, asserts that respect for and toleration of diverse cultural traditions should insulate certain specific, culturally-based social practices from external critique and action. Finally, relativists contend that each state should espouse its own conception of what human rights entail as a social institution based upon its cultural preferences and political ideology, *ibid.*, 353-354.

⁴⁷⁸ Alison Dundes Renteln, “The Unanswered Challenge of Relativism and the Consequences for Human Rights”, 519.

to ‘human beings’. Thus, irrespective of whether human rights are inherent to human beings or not, the fact remains that the subject of human rights are human beings. For the purposes of this thesis, a problem of more concern is the controversy about what the concept “human being” entails, rather than whether human rights are inherent to them. Therefore, contents and application of human rights may vary from one state to the next and the nature of these rights and the justifications for why ‘human beings’ are entitled to them are unsure.

The doctrine of human rights received its first spiritual impulse from Renaissance humanism⁴⁷⁹, in the idea of the fundamentally free, autonomous and self-determining human person. Locke and Kant translated this into the political terms of the liberal state, which has as its only task the protection of the freedom and rights of its individual citizens. The state must refrain as much as possible from interference with society.⁴⁸⁰ Although human rights are very prominent in international law at present, this was not the case in the past. International law only concerned itself with states, but after the atrocities of the Second World War, human rights became internationalised⁴⁸¹ and resulted in the fact that international respect for the human rights of the individual has been the one most influential

⁴⁷⁹ Humanism is the philosophical and literary movement originating in Italy and diffusing into other countries of Europe, becoming a major factor in modern culture. It is a philosophy that recognises the value or dignity of man and makes him the measure of all things or somehow takes human nature, its limits, or its interests as its theme. Humanism is a basic aspect of the Renaissance period and that aspect through which Renaissance thinkers sought to reintegrate man into the world of nature and history and to interpret him in this perspective. The term derives from *humanitas*, which meant the education of man as such. The Greeks called this *paideia*. It realises a spirit of freedom that provides justification for man’s claim of rational autonomy. Humanists rejected the medieval heritage and chose the heritage of the classical world instead. The exaltation of freedom was one of the major themes of the humanists. Humanism had fought and was fighting for its autonomy and saw in traditional hierarchical orders an obstacle, rather than an aid to the goods indispensable to man. Humanists defended man’s freedom to project his life in the world in an autonomous way. Humanists also had a widespread recognition of the value of pleasure and their aversion to medieval scepticism clearly shows towards the evaluation of man’s natural aspects. The spirit of tolerance permeated the religious views of humanism. This implies the possibility of peaceful coexistence between the various religions that remain different from each other and are not reducible to a single confession. Renaissance humanism can also be considered as one of the conditions that contributed to the birth of modern science. It can be used to designate the doctrine of Pragmatism because of its anthropocentric view, which as Protagoras did, makes man ‘the measure of all things’, Nicola Abbagnano, “Humanity,” in *The Encyclopaedia of Philosophy*, (edited by Paul Edwards, New York: The Macmillan Company and The Free Press, Volume 4, 1967), 69-72. Humanism is also defined as a set of presuppositions that assigns to human beings a special position in the scheme of things. It is rather a general perspective from which the world is viewed. It continues to be a central recurring theme of Western civilization. It discerns in human beings unique capacities and abilities to be cultivated and celebrated for their own sake. During the Renaissance period humanity was the centre of interest. Humanists champion freedom of thought and opinion, the use of intelligence and pragmatic research in science and technology, and social and political systems governed by representative institutions, Konstantin Kolenda, “Humanism,” in *The Cambridge Dictionary of Philosophy*, (edited by Robert Audi, Cambridge: Cambridge University Press, Second Edition, 1999), 396-397.

⁴⁸⁰ J.D. Dengerink, “Human Rights,” in *New Dictionary of Theology*, (edited by Sinclair B. Ferguson, David F. Wright and J.I. Packer, Illinois: InterVarsity Press, 1988), 594-595.

⁴⁸¹ Matthew A. Ritter, “Human Rights”: Would you recognize one if you saw one? A philosophical hearing of international rights talk”, 268.

idea of the UN.⁴⁸² This is evident from the fact that the UN Charter enacted a multitude of declarations and covenants having to do with the proclamation of human rights.⁴⁸³ Human rights have also become the authoritative language of law. We have come to understand what law means in terms of human rights. Rights tell us what the law is and should be these days.⁴⁸⁴

8. 1. The relevance of human rights and duties

The concept of human rights is relevant and necessary to the efforts to achieve a rational procedural and substantive platform on the legal status of the unborn in an international law context. This is because ‘human rights’ is one of the prominent ideologies upon which the abortion debate is based (albeit it having been coloured in a specific ideological context). Yet, even though this is the case, a survey of international human rights instruments and jurisprudence reveals lack of agreement among states on inclusion of the unborn as a human being for purposes of human rights protection. In fact numerous domestic legal systems do not reflect substantial abortion debate. Controversy also exists as to the question of whether, if rights of the unborn do exist, they are outweighed by the mother’s rights. International jurisprudence has thus far avoided answering the question of whether the unborn is included in the universal guarantee of the right to life.⁴⁸⁵ Therefore, discussion is necessary in order to investigate the rationality of this current position regarding human rights and the legal status of the unborn in international law, even more so in light of the fact that human rights is a prominent ideology in the abortion debate.

Another reason why a discussion on human rights is relevant is the fact that the *debate* on the legal status of the unborn is based on a single ideology of human rights, excluding other approaches. Ritter⁴⁸⁶ mentions that some moralists reject the ‘golden mean’ and elevate a single ideology, social or personal value to a level where governing authority is given to that value, making it the sole measure of virtue or law. An example of such an ideology is human rights where some rights are held to be the touchstone of law without analysis of other values

⁴⁸²Ibid., 269.

⁴⁸³ Ibid., 267. These include instruments like: the *Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child*, the *Universal Declaration of Human Rights* and the *Convention on the Elimination of All forms of Discrimination against Women*.

⁴⁸⁴ Ibid., 266.

⁴⁸⁵ SA de Freitas, “A critical retrospection regarding the legality of abortion in South Africa”, 120.

⁴⁸⁶ Alfred P. Rubin, *Ethics and authority in international law*, 10.

or principles that might be affected by the rules derived from this approach.⁴⁸⁷ Scott agrees that the rights language is not the only valid legal currency.⁴⁸⁸ Also, Hare states that the rights theory is unhelpful at the moment because nobody has yet proposed a plausible account of how we might argue conclusively about rights.⁴⁸⁹ Currently, a great part of the debate on the legal status of the unborn is based on the single ideology of human rights, the latter being comprised of a specific point of departure based upon liberalism (autonomy of the individual and consequent reproductive rights). Thus, the tendency in the abortion debate to exclusively assume the validity of human rights is irrational, not to even mention various interpretations of a specific human right. Renteln⁴⁹⁰ states that for the most part, there is even a lack of agreement on the meaning of a right. In other words, different interpretations on a single human right exist – for example, the right to life. For some the right to life includes the right not to receive the death penalty and for others it does not include a right against the death penalty. For some the right to life includes the unborn and for others not. The rationality of basing the abortion issue on human rights alone is investigated and argued to be contrary to rationality. Therefore, the questions to be asked are whether the use of human rights and the right to life in abortion jurisprudence has been irrational and whether it has resulted in bias. Even more so in light of the fact that human rights, as mentioned in the definition above, are based on humanism and, as previously mentioned, rationality poses a challenge to secularism, humanism⁴⁹¹ and pragmatism. This challenge emanates from rationality's tendency to support a natural law approach, opposed to relativist approaches where different viewpoints are held separately and not brought together for rational deliberation. Therefore, rationality and natural law do not deny that different viewpoints exist; however, both support the coming together of these opinions for rational deliberation and legal platforms. On the contrary,

⁴⁸⁷ Ibid.

⁴⁸⁸ Rosamund Scott, "The English Fetus and the Right to Life", 359.

⁴⁸⁹ R. M. Hare. "Abortion and the Golden Rule," 202-203.

⁴⁹⁰ Alison Dundes Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights", 515.

⁴⁹¹ Humanism plays a major role in jurisprudence today. Therefore, it is relevant to this thesis. Humanism, as already stated, makes man the measure of all things and therefore provides him with full autonomy. Yet, as humanism is very prominent today, and in light of its emphasis on mankind, no substantial attempts are being made to provide for a rational platform on the legal status of the unborn. Furthermore, man determines law and most other things. Thus, such law and other things change as mankind and views change. Therefore, relativism and pragmatism are the order of the day resulting in positivistic and relative views on the legal status of the unborn varying from one state to the next. The notion of human rights also supports the humanistic emphasis on man and his autonomy and therefore, the legitimacy of basing the legal status of the unborn on human rights needs to be investigated and determined whether it is contrary to rationality. Rationally also opposes the unjustified and absolute autonomy sometimes assumed by humanism and human rights. Therefore, humanism is relevant because an attempt towards a rational legal position on the unborn in international law challenges this pragmatism and relativism, and also positivistic notions of humanism.

relativism allows for different viewpoints, adapted to suit different situations, which may not interfere with each other or debate their opinions. The emphasis on relativism today is evident from the failure to achieve a rational outcome on the legal status of the unborn because relativism supports either conclusion, for or against abortion. Furthermore, rationality poses a challenge to secularism because those who support secularism boldly state the importance of rational deliberation but still fail to apply their own jurisprudence as evident from, for example, the secularist movement's failure to rationally justify the legal status of the unborn being based solely on human rights.

Different subsections of human rights are used to argue the abortion debate and it is necessary to discuss these. They include feminism, reproductive health rights, the right to privacy and the right to life. The debate on the legal protection of the unborn based *solely* on the ideology of human rights is questionable, and the fact that the concept of "human being" and whether the unborn is included in this concept has not been properly defined in international law. Erikson in his study on the legal position of the unborn child in international law affirmed that the provisions in human rights treaties are stated in such a way as to grant a right to "everyone" or to all "human beings." None of these terms have been closely defined by the international organs, with specific reference to the UN.⁴⁹² Therefore, those to whom human rights have to be applied are uncertain as the definition of a "human being" varies from one state to the next. Not much has been done on an international level either.⁴⁹³ Disagreement also exists among different legal categories, such as private law and

⁴⁹² Jude Ibegbu, *Rights of the Unborn Child in International Law*, 105. The lack of definition by the UN is confirmed from several types of sources. On a website there was a discussion on the legal definition of a human being. The only definition that was attempted was a scientific description of a human being but no legal definition. One of the participants to the conversation emphasised the position of this thesis, stating that international law has no legal definition on a "human being". The participant stated, "I have done a Google search on the phrase 'legal definition of human being' and I can't find an answer. The only thing that you can do ... is to legally define human as it pertains to the various regions of the world. What is legally human in the US is not human elsewhere. It seems to me that if there was a legal definition then you would find it at the UN but even they do not have one", "Legal definition of human", *Sciforums*, <http://www.sciforums.com/showthread.php?t=52918> (accessed 19/02/2008). Furthermore, a Google search by the author of this thesis on "international legal definitions on the human being", reveals no developments in this regard. What can be found are general dictionary definitions and scientific descriptions of the term "human being".

⁴⁹³ The problem with the defining of the term "person" is that in legal history there has never been a univocal concept of person in law. Consequently there have existed throughout history various definitions of the term "person". In the past not all human beings have been recognised by civil law as possessing a legal personality and therefore as being a "person". For example, a slave in the Roman Empire was excluded from those having legal personality, Jude Ibegbu, *Rights of the Unborn Child in International Law*, 406. For the Germanic people, the determining moment of acquisition of natural capacity was not at birth but at a successive moment after birth. The born child was not yet a person, it was necessary to wait until seven nights had passed from the natural event and only after that period, was he given a name and sprinkled with purifying water according to

public law. For example in private law there are certain legal systems where the unborn is given some protection by way of the *nasciturus* fiction.⁴⁹⁴ Roman lawyers developed an exception to the general rule that legal personality begins at birth. This maxim is termed '*nasciturus pro iam nato habetur quotiens de commodo eius agitur*' - the so called *nasciturus* rule. This states that an unborn child in the mother's womb (*in ventre sa mère*) is deemed to have been born, and therefore to have acquired legal personality, prior to the date of his actual birth, if this would be to his advantage. This rule is subject to the condition that the child is born alive.⁴⁹⁵ Therefore, the *nasciturus* fiction means that the unborn can be regarded as already having been born when it is to the unborn's advantage.⁴⁹⁶ Although this insight does not award protection to the unborn, it points to due consideration of the existence of a potentiality that is not too far away from being human. In fact, there are some authors who ascribe more importance to the *nasciturus* fiction. There are also domestic criminal law systems that view the intentional killing of the unborn against the wishes of the mother by someone else as a crime.⁴⁹⁷

In public law, the unborn is clearly treated differently in different states, and denied in several of them. Also, disagreement exists in human rights as to its application in the context of the legal status of the unborn. Different states use different human rights to determine the legal position of the unborn. Therefore, reference should also be made to various legal systems regarding their emphasis on specific and different rights. Each of the following countries calls upon human rights in their arguments on abortion, yet they rely on different rights for such justification. In the US, abortion is justified by way of the woman's right to privacy, in South Africa it is justified by way of the right of choice of women. Therefore, even within the concept of human rights, there is disagreement when it comes to the legal status of the

the rites, *ibid.*, 407. There are obvious difficulties in dealing with the concept of personhood because of the existing confusion as to the criteria used when defining the term. The result is that there is no single coherent concept of person in law, *ibid.*, 410. However, an attempt should at least be made towards attaining such a definition of "person" or "human being" for the purposes of the application of international law. Otherwise the definition of the term "human being" would be left to be defined by the different states. This will result in contradictory and arbitrary definitions.

⁴⁹⁴ The Roman jurists realised that association of legal personality with birth had negative consequences on the child who was unborn at the death of the father. Thus, if the father bequeathed his estate "to his children" only the born children would have received their part of the estate. The unborn, who at the time of the father's death was in the mother's womb, would have received nothing. The *nasciturus* fiction changed this position and provided the unborn with certain rights in the estate if it was to his or her advantage. P.Q.R. Boberg, *The law of persons and the family*, (Cape Town: Juta, 1977), 9.

⁴⁹⁵ *Ibid.*, 10.

⁴⁹⁶ C.J. Davel and R.A. Jordaan, *Law of Persons: Students' textbook*, (Lansdowne: Juta, Third Edition, 2000), 12.

⁴⁹⁷ This is also discussed in more detail in another section of this investigation.

unborn. The South African case of *Christian Lawyers Association of SA and Others v Minister of Health and Others*⁴⁹⁸ is of special importance. In this case the plaintiffs sought an order declaring the Choice on Termination of Pregnancy Act (92 of 1996) unconstitutional and invalid. The plaintiffs pleaded that life begins at conception and that the act was contrary to section 11 of the Constitution of the Republic of South Africa, 1996 containing the right to life. The defendants stated that the right of women to choose is protected under various sections of the Constitution.⁴⁹⁹ Further, the court decided that the Constitution contained no express provision affording the foetus legal personality or protection and in s 12(2) provided specifically that everyone had the right to make decisions concerning reproduction and to security in and control over their bodies without anywhere qualifying a woman's rights in this regard in order to protect the foetus.⁵⁰⁰

In Canadian law, the legal status of the unborn is given in *Tremblay v Daigle*⁵⁰¹. After considering whether the unborn had a right to life and women's rights, the court decided that the unborn does not have rights in the common and the civil law.⁵⁰² The woman has control over her bodily integrity. The right to privacy was prioritised in *Roe v Wade*⁵⁰³. The right to privacy was not even a right included in the US Constitution and was created for purposes of the case. Frankowski and Cole state that, in *Roe v Wade*⁵⁰⁴, another fundamental right (that of the right to privacy) was discovered for the first time. This right was nowhere mentioned and never before explicitly referred to.⁵⁰⁵ In Germany, although not without exception, the

⁴⁹⁸ 1998 (4) SA p1113.

⁴⁹⁹ Tjakie Naudè, "The value of life: A note on *Christian Lawyers Association of SA v Minister of Health*", *South African Journal on Human Rights*, Vol. 15, (1999), 541.

⁵⁰⁰ *Christian Lawyers Association of SA and Others v Minister of Health and Others*: 1123 paragraphs D - G, paraphrased: "I agree that proper regard must be had to the rights of women as enshrined in s 9 of the Constitution (the right to equality, which includes the full and actual enjoyment of all rights and freedoms and the protection that the State may not unfairly discriminate against anyone, *inter alia*, on the grounds of sex), s 12 (the right to freedom and security of the person, including, *inter alia*, the right to make decisions concerning reproduction and the right to security and control over their body) and the rights in respect of human dignity (s 10), life (s 11), privacy (s 14), religion, belief and opinion (s 15) and health and care (s 27), to which I have already referred within another context. I agree also that to afford the fetus the status of a legal persona may impinge, to a greater or lesser extent, on these rights."

⁵⁰¹ *Tremblay v. Daigle* [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634. In this case the parties ended their relationship after five months of cohabitation. The appellant was 18 weeks pregnant at the time of the separation and decided to terminate her pregnancy. The respondent, the father of the unborn child, obtained an interlocutory injunction from the Superior Court preventing her from having the abortion. In the trial judgment the foetus was granted the right to life. On appeal, however, the foetus was denied the right to life.

⁵⁰² Martha Shaffer, "Foetal Rights and the Regulation of Abortion", 66.

⁵⁰³ 410 US 113 (1973).

⁵⁰⁴ 410 US 113 (1973).

⁵⁰⁵ Stanislaw Frankowski, "United States of America," 24. Also see *Roe v Wade* 410 US 113 (1973). Paragraph 15 of the case states: "Although the Constitution does not explicitly mention any right of privacy, the United States Supreme Court recognizes that a right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment,

unborn is protected to a great extent. Section 218 of the Penal Code, 1995 states in subsection 3 that if an abortion is “committed by the pregnant woman, then the punishment shall be imprisonment for not more than one year or a fine.” However, section 218a, subsection 2 states that it is not an offence if the woman’s life is in danger or if the continued pregnancy poses any risk of mental impairment of the woman. Section 218a, subsection 1, states that it is also not an offence if (1) the abortion occurred before twelve weeks of the pregnancy have lapsed, (2) if done by a physician and (3) after counselling of the woman. Section 291 (1) further provides the unborn with protection by stating:

The counseling serves to protect unborn life. It should be guided by efforts to encourage the woman to continue the pregnancy and to open her to the prospects of a life with the child; it should help her to make a responsible and conscientious decision. The woman must thereby be aware, that the unborn child has *its own right to life* with respect to her at every stage of the pregnancy and that a termination of pregnancy can therefore only be considered under the legal order in exceptional situations, when carrying the child to term would give rise to a burden for the woman which is so serious and extraordinary that it exceeds the reasonable limits of sacrifice. The counseling should, through advice and assistance, contribute to overcoming the conflict situation which exists in connection with the pregnancy and remedying an emergency situation. Further details shall be regulated by the Act on Pregnancies in Conflict Situations, (emphasis added).

In the case of *BVerf GE*⁵⁰⁶, the court, in its judgment of 28 May 1993, supported a verdict which emphasised that the state had a primary duty to protect human life, even before birth.⁵⁰⁷ The court in no uncertain terms expressed their support for the state’s duty to protect the unborn. The court did make an attempt to reconcile the opposing position by stating that, in spite of the heavy burden which the constitution placed upon the state to protect the unborn, it was permissible, within the first trimester of pregnancy, for the state not to criminalise an abortion when it was conducted after the pregnant woman had been counselled.⁵⁰⁸ Germany, on the other hand, explicitly protects the unborn but attempts to balance the right to life with the rights of women in a very limited degree. It is clear from

in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.” Further paragraph 17 states: “the right to privacy to some extent extends to activities relating to marriage, procreation contraception, family relationships, and child rearing and education.” The court then came to the conclusion in paragraph 18 that: “the right to privacy, founded upon the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

⁵⁰⁶ D.1.1 JZ at 16.

⁵⁰⁷ D. Van Zyl Smit, “Reconciling the irreconcilable? Recent developments in the German law on abortion”, *Medical Law Review*, Vol. 2, No. 3, (1994), 311.

⁵⁰⁸ *Ibid.*, 316.

these examples that inconsistency exists in foreign law, even within the concept of human rights on which the legal status of the unborn is based, for the majority of the states.

Not only is the subject (human beings) of human rights uncertain but also the contents of human rights. For example, 'life' has not been defined and therefore the contents of the right to life are uncertain. This renders the content and application of human rights arbitrary, pragmatic and open to diverse opinions which are, to a large degree, unsubstantiated. Many atrocities have been committed against various human beings through the manipulation of definitions. The concept of "human being" has been re-defined in many circumstances. For example, America's Constitution protects all human beings. However, slavery was justified in the *'Dred Scott' case* (1856) where slaves were not regarded as humans for purposes of the constitution. Nazi Germany stated that those outside the ruling race were no longer human beings and could be treated as objects.

Therefore, the message that needs to be proclaimed is that it is necessary to obtain a more acceptable definition of terms such as *life* and *human beings* in order to prevent the manipulation of these concepts, and with special reference to the legal status of the unborn. If there is a better development towards, or a more rational explanation of, an approximate understanding of the unborn, and if the proper procedures and steps are established, this will limit possible definitional manipulation based on one insensitive, exclusive and arbitrary approach. However, as the term justificatory minimalism suggests, the possibility exists that an approach of overlapping consensus, in a quest to obtain more acceptable definitions on "life" and "human being", might lead to a dilemma for more expansive conceptions of human rights. In other words, achieving acceptable definitions through agreeing on the outcome of the definition but not on how such definition is justified, can limit one in obtaining a detailed account of definitions of "life" and "human being". According to the dilemma, we can be tolerant of fundamentally different outlooks on life or we can be ambitious in our understanding of what human rights demand, but we cannot – contrary to the aims of many human rights activists – be both tolerant and ambitious. Therefore, philosophical depth is minimised.⁵⁰⁹ In other words, one can be tolerant of other viewpoints and only agree on the outcome of a definition (as with overlapping consensus) but in the process a comprehensive and detailed account of such definition is compromised or, one can be totally ambitious about

⁵⁰⁹ Joshua Cohen, "Minimalism about human rights: The most we can hope for?", 421.

one's own definition of a concept and achieve a detailed definition, but in the process compromise universal agreement on such definition. This poses a threat to the attempts in this thesis towards a rational platform on the meaning and subjects of the right to life. However, when one considers international human rights instruments like the Universal Declaration of Human Rights, the Covenant on Economic, Political and Social Rights and the Covenant on Civil and Political Rights, these present more ambitious agendas on human rights but are still universal in reach and comprehensive in scope. Its account of human rights extends well beyond minimalist assurances of bodily security, prohibitions on killing and so forth.⁵¹⁰

Not only should a discussion be commenced on human rights but an overview of duties is also necessary. We should not only speak of rights but also of duties.⁵¹¹ This is necessary especially when the following questions are considered: “What is the duty of the mother to the unborn?”, “what is the duty of mankind towards the unborn?” and “what is the duty of international law towards the unborn?” These questions become even more important when one takes into consideration the physiological differences between a man and a woman. Most international human rights instruments provide for duties. For example, Article 5 of the International Covenant on Civil and Political Rights provides that nothing contained therein can imply “for any state, group or person” any right to limit the right of others⁵¹²; the United Nations Declaration on Human Rights provides in Article 29 that “everyone has the duties to the community in which alone the free and full development of his personality is possible.” Other laws on a domestic level also include duties. Section 11 and section 7 (2) of the South African Constitution also places a duty for the state to promote the right to life.⁵¹³ Section 7 (2) states that: “The state must respect, protect, promote and fulfill the rights in the Bill of Rights.”

Furthermore, section 11 states one of these rights that must be protected by the state, namely, “everyone has the right to life.” Although these and other legal instruments also contain

⁵¹⁰ Ibid., 419.

⁵¹¹ However, Hart challenges the alleged connection between right and duty by pointing to rights not attached to duties and the moral duties in particular. Our ‘duty’ not to ill-treat animals and babies corresponds to no right held by them. However, he states that, though there is ‘no simple identification’ between the two, there is ‘an intimate connection’ between them, Alison Dundes Renteln, “The Unanswered Challenge of Relativism and the Consequences for Human Rights”, 516.

⁵¹² Makau wa Mutua, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties”, 341.

⁵¹³ SA de Freitas, “A critical retrospection regarding the legality of abortion in South Africa”, 133.

duties, such duties are best discussed in the light of the African Charter on Human and Peoples' Rights⁵¹⁴ (hereafter referred to as the African Charter), because of the nature of this Charter. The African Charter is different from other international legal instruments in various aspects. This Charter attracted criticism because it departs from narrow formulations of other international human rights instruments.⁵¹⁵ Firstly, the African Charter is different in that it provides for *group/collective rights (peoples' rights)* - for example the right to self-determination.⁵¹⁶ This emphasis on group rights is evident from the name of the Charter. Howard says that the reason for framing the charter in such a manner is so that individual rights should be de-emphasised.⁵¹⁷ The Charter distinguishes between human rights and peoples' rights but still sees them in cooperation and not in competition or conflict.⁵¹⁸ Therefore the African Charter codifies these group rights and imposes *duties* on individual members of the African societies.⁵¹⁹ The African Charter refers to several duties in articles 27-29. According to Article 29 (1), for example, states have the duty "to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parent at all times, to maintain them in case of need." It has been mentioned that several articles of other international legal instruments also provide for such duties but the African Charter is the first human rights document to articulate the concept in a meaningful way. Therefore, the western liberal idea of human rights⁵²⁰ as the sacralisation of the individual is not sufficient to that of the African Charter as the development of Africa is so radically different to that of Europe.⁵²¹ Therefore, the current human rights movement portrayed as the western liberal idea must be understood as only a piece of the whole.⁵²² This is one of the problems when it comes to the discourse on rights and duties. The claim is made that rights come from the western political tradition.⁵²³ Sinha argues that the current

⁵¹⁴ *African Charter on Human and Peoples' Rights* 27 June, 1981, OAU Doc. CAB/LEG/67/3/ Rev.5 (1981), reprinted in 21 I.L.M. 59 (1982).

⁵¹⁵ Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties", 341.

⁵¹⁶ *Ibid.*, 340.

⁵¹⁷ Alison Dundes Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights", 532.

⁵¹⁸ Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties", 377.

⁵¹⁹ *Ibid.*, 340.

⁵²⁰ Scholars commonly group states into the three competing views of human rights: Western, socialist, and developing nations, Douglas Lee Donoho, "Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards", 350.

⁵²¹ Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties", 342.

⁵²² *Ibid.*, 344.

⁵²³ Alison Dundes Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human

formulation of human rights contains three elements that reflect western values:

One, the fundamental unit of society is the individual, not the family. Two, the primary basis for securing human existence in society is through rights, not duties. Three, the primary method of securing rights is through legalism whereunder rights are claims and adjudicated upon, not reconciliation, repentance, or education.⁵²⁴

Therefore, the emphasis on duties and group rights in the African Charter is important in adding another piece to the puzzle presenting and colouring human rights as a whole (however, it is not assumed that other societies necessarily lack some of the ideas expressed in the western rights framework⁵²⁵). The African Charter is specifically relevant because African notions of human rights, more than western ideas, existing prior to colonisation, differed from contemporary Eurocentric articulation of human rights in that these notions saw the individual social being as the bearer of rights and duties. When one looks at current western views on human rights one realises that there needs to be a balance brought about between duties and rights to restrain the runaway individualism of the West. Therefore, contrary to the West (where rights primarily developed as claims against the state) the African language of duty offers a different meaning: while people had rights, they also bore *duties*.⁵²⁶ Much of the criticism of the African Charter has been directed at its inclusion of duties on individuals. The concept of duty however is valid in conceptualising a unitary, integrated conception of human rights in which the extreme individualism of current human rights norms is tempered by the individual's obligation to the society.⁵²⁷ Therefore, African countries view individuals as bearers of rights and duties, uniting one's needs with the needs of others – thus, leading to the harmonisation of rights and duties.⁵²⁸ The prominence of rights/entitlements in the west only provides a part of the concept of human rights. The concept can only be completed when one considers other views such as the African Charter, which places more emphasis on duties than do other legal instruments. However, the view exists that taking into account cultural and ethical differences when it comes to human rights, renders universal human rights impossible. This thesis proposes that the possibility of providing a universal and integrated approach concerning human rights and its application to the legal status of the unborn should be investigated. This is what a rational approach

Rights”, 517.

⁵²⁴ Ibid.

⁵²⁵ Ibid.

⁵²⁶ Makau wa Mutua, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties”, 344.

⁵²⁷ Ibid., 359.

⁵²⁸ Ibid., 341.

requires.

Thus, to present the picture as a whole and completely, the legal status of the unborn need also be affected by duties of individuals and groups and not only rights. In addition, a re-emphasis on the 'duty'-aspect of human rights jurisprudence will limit the role of the pregnant woman during the time of pregnancy, where the potential of bringing the unborn into the picture will drastically increase. When rights are applied to the legal status of the unborn in the West, it is realised that a balance needs to be struck between rights and duties. Firstly, not only should the mother's rights, international rights or the rights of mankind be considered, they should also be considered by being balanced against the duties that the mother, international law and mankind have towards the unborn. So the duty-aspect also surpasses the rights categorisation as such and should be applied as a principle outside of human rights discussion, a principle that should also play a role in channeling human rights jurisprudence and more important, the law *per se*. Secondly, the emphasis on group rights also places the emphasis on group duties. Not only do individuals such as the pregnant mother have duties, but also mankind as a group has duties towards the unborn for future generations. The fact that human rights are mainly rooted in western culture provides the first obstacle in attempts to achieve a rational platform on the meaning and content of certain human rights.⁵²⁹

8. 2. Specific forms of human rights

The concept of human rights is so vast that many different sub-categories of human rights are used as the basis of the abortion debate. The types of human rights to be discussed are reproductive health rights (as part of liberal feminism) and the right to life. Feminism greatly affects the abortion debate since the woman is the bearer of the unborn. The legal status of the unborn is automatically affected and viewed in the light of the international movements on women's rights and reproductive health rights. Therefore, the autonomous position of women in international law affects the legal status of the unborn. However, the rationality of determining the legal status of the unborn solely within the parameters of women's rights is questionable. Also, the application of reproductive health rights, without adequate definition of what this entails, is questionable and devoid of rationality. Also, consideration of the right

⁵²⁹ Charles Taylor, "A world consensus on human rights?", 411.

to life is important since much of the abortion debate is based on determining whether the unborn has the right to life and whether he has “life” in general.

8. 2. 1. Feminism and reproductive health rights

Different forms of feminism exist and there is no general theory on abortion in feminism. Defining feminism is controversial because it is an issue that is complex and shifting. Sometimes one even has to consider whether it is distinguishable from any other form of thought.⁵³⁰ Different forms of feminism exist. Some feminists employ a notion of sameness assuming that men and women are much the same.⁵³¹ Other feminists adhere to the notion of women as distinct from men.⁵³² A number of feminist writers make use of a framework of alliance or coalition: men and women are potential political allies.⁵³³ Not all of these forms support abortion. Some feminists are pro-life. They believe that “instead of liberating women, abortion liberates men and society.” What women ‘won’ was the right to undergo invasive procedure in order to terminate unwanted pregnancies.⁵³⁴ However, liberal feminism generally supports abortion rights for women and therefore reference to feminism in this thesis is limited to liberal feminism. Liberal feminism presumes that men and women are the same.⁵³⁵ Liberal feminism⁵³⁶ is the most well known form of feminism and is often seen as the face of feminism. This is what is known to most to be feminism. It focuses on the public sphere and there is emphasis on the value of individual ‘autonomy’ and ‘freedom’.⁵³⁷ It also constitutes a presumption of sameness between men and women.⁵³⁸ Therefore, one of the reasons for women’s autonomous position in international law is liberal feminism. Liberal feminism is the form of feminism that mainly supports a right to abortion.

Therefore, reference to feminism in this thesis means *liberal feminism only*. As a result of the emphasis on autonomy and freedom, two fundamental values are in conflict when it comes to the relationship between the mother and the unborn, namely procreative autonomy (including

⁵³⁰ Chris Beasley, *What is feminism? An introduction to feminist theory*, xi.

⁵³¹ *Ibid.*, 15.

⁵³² *Ibid.*, 16.

⁵³³ *Ibid.*, 17.

⁵³⁴ Claire Pomeroy, *Abortion and Women's Rights: Unification of Pro-Life and Pro-Choice through Feminism*, http://serendip.brynmawr.edu/sci_cult/courses/knowbody/f04/web2/cpomeroy.html (accessed 13/3/2007).

⁵³⁵ Chris Beasley, *What is feminism? An introduction to feminist theory*, 52.

⁵³⁶ Although different forms of feminism exist, this section will be limited to Liberal feminism.

⁵³⁷ *Ibid.*, 51.

⁵³⁸ *Ibid.*, 52.

reproductive health rights) on the one hand, and the legal position of the unborn on the other hand. Liberal human rights gave rise to the ‘right to life’ versus the ‘women’s right over bodily integrity and autonomy’ debate. This tension between the right to life and women’s rights exists across international boundaries.⁵³⁹ Regarding human rights in the context of feminism, special attention has to be given to reproductive health rights. The feminist movement has adopted reproductive health rights to advance their autonomous position and therefore, reproductive health rights have been assumed to form part of the abortion debate. This is to be expected since the feminist movement argues that one of the major causes of discrimination against women, as believed by many feminists, is their reproductive function and ability to bear children - they would unjustly be forced into motherhood, limiting their resources to education, employment and health care.⁵⁴⁰ Reproductive health rights have also been assumed to form part of the abortion debate due to the argument that in countries where abortion is illegal, women resort to unsafe abortions which is contrary to their reproductive health rights. The reproductive position of women is obviously very important and much of what women do is defined within the parameters of this reproductive function. This is evidenced by the definition of “female” as “one of the sex that bears offspring”.⁵⁴¹ International law has catered for the feminist belief that the reproductive functions of females cause oppression. International law provides several reproductive rights⁵⁴² to women in an attempt to create substantive equality⁵⁴³ with that of men. For example, during the Cairo Program⁵⁴⁴ it was stated that childbirth was one of the leading causes of death of women. This was as a result of unsafe abortion. Thus it was implied that pregnancy is viewed as possibly causing inequality between men and women. To achieve equality, women are therefore to be given reproductive rights. The feminist approach to abortion reveals a utilitarian flavour. Utilitarianism accepts, as the foundation of morals, utility, or the Greatest Happiness Principle. It holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. The moral value of an

⁵³⁹ SA de Freitas, “A critical retrospection regarding the legality of abortion in South Africa”, 120.

⁵⁴⁰ Ibid.

⁵⁴¹ William S. Anderson, *Ballentine's Law dictionary*, 464.

⁵⁴² The following articles provide for reproductive choice rights. Convention on the Elimination of All Forms of Discrimination Against Women - Articles 10(h), 12(1), 14(2)(b), 16(1)(e). Convention on the Rights of the Child – Articles 13(1), 24(2)(f). Covenant on Civil and Political Rights - Articles 17(1), 19(2), 23(2). Convention on Economic, Social and Cultural Rights - Articles 8(1), 10(1), 12.

⁵⁴³ “The Convention (CEDAW) is not concerned with formal equality of women with men. Its focus lies in according to women substantive equality. The provisions in the Convention take into account the significant differences in the characteristics and circumstances of men and women so as to avoid unfair, gender-related outcomes.” Fayeeza Kathree, “Convention on the Elimination of all Forms of Discrimination against Women”, 425.

⁵⁴⁴ Cairo Program of Action, 1994, *Women’s health and safe motherhood*, Chapter 8, C, 225 - 226.

action depends entirely upon the state of affairs it promoted or produces upon its outcome. Moral action thus has an aim or end of maximising happiness and minimising unhappiness.⁵⁴⁵ According to Mills, the Principle of Utility is the only fundamental principle of morality; no other principles are on a level with it. The general happiness – the greatest amount of happiness altogether – is the sole ultimate measure of right and wrong.⁵⁴⁶ Thus, moral action, according to pure utilitarianism, aims at the maximising of preference-satisfaction.⁵⁴⁷ For example, if lying is wrong, it is wrong because of the bad consequences that acts of lying generally have; and the same goes for any other sort of wrong action.⁵⁴⁸ With regards to abortion, the feminist movement views the autonomy and happiness of the woman as paramount. Even above the happiness of the father of the unborn. If the woman wants the child, and it will make her happy and be a good thing to her, she can keep the child. However, if the birth of her child will make her unhappy, her autonomy and happiness allows her to abort the child, even if it makes the father unhappy and without consideration of any other concepts of morality. Maclean argues that utilitarianism contains no moral terms in which to think. It is not a moral conception and cannot serve as the measure or standard of moral conduct.⁵⁴⁹ Therefore, using utilitarianism and the happiness of the woman to determine a highly complicated and moral issue such as possible life is a grave and dangerous error. This feminist utilitarian approach cannot be the only basis for ethic decision. However, in many instances it is. Furthermore, evidence that legal abortions contribute to the general health and well-being of society is rare. Further evidence of the woman's autonomy disadvantaging the legal status of the unborn can be found in the case of *Planned Parenthood of Southeastern Pa. v. Casey*⁵⁵⁰, where the court explicitly referred to the radical autonomy of

⁵⁴⁵ Anne Maclean, *The Elimination of Morality: Reflections on Utilitarianism and Bioethics*, London and New York: Routledge, 1993, 10.

⁵⁴⁶ *Ibid.*, 11

⁵⁴⁷ *Ibid.*, 12

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*, 16

⁵⁵⁰ 505 U.S. 833 (1992). "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. These considerations begin our analysis of the woman's interest in terminating her pregnancy, but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition, and so, unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman

the woman. Also, the irrationality in comparing discrimination against women as part of being pregnant can immediately be seen. Even from a medical point of view this would be irrational. Pregnancy in normal circumstances is not to be viewed as a debilitating factor. How can men and women be compared when it comes to pregnancy? It was also argued earlier that it is irrational to remedy one wrong (backstreet and unsafe abortions) with another wrong (legalised abortion), and that two wrongs do not necessarily make a right.⁵⁵¹ Much more can be said on this argument and illustrations are required by way of example: Woman A becomes pregnant and it is an unwanted pregnancy. Let it be assumed that this example excludes matters such as rape and incest in order to avoid complicating the matter. Let us say that A views this state of unwanted pregnancy as a “disadvantage” to her. It is a disadvantage because it will affect her socio-economic condition and she will have to undergo a backstreet and unsafe abortion (let us assume that the abortion is not legalised in the state where she lives.) The woman now claims that she is disadvantaged because she has an unwanted pregnancy, wants to undergo an abortion but is compelled to do this *via* unsafe methods. Does this argument necessarily make abortion right or acceptable? Obviously, it is the view of the author that this argument does not make abortion right as one wrong (unsafe abortions) cannot be remedied by another wrong (legalising abortion). However, the author’s view that abortion is morally wrong is debateable and therefore the “wrongness” of legalising abortion in this case needs to be based on a different argument. This argument has been mentioned briefly before but now needs substance. The wrongness of legalising abortion because of unsafe abortions and reproductive health rights of women is based on the existing imbalance: when one compares the degree to which socio-economic inconvenience, unsafe abortions or reproductive rights of women in general are taken into account, with the degree to which the legal status of the unborn is taken into account in the abortion debate, the imbalance is clear. What is called for is that the legal status of the unborn and matters (such as science) relevant to the unborn should be considered in an equal degree to that of reproductive health rights of the mother in the abortion debate. Such an approach will be inclusive and will meet the requirements of rationality.

Attitudes of women towards babies differ from those of men. For example, perhaps with the

with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society,” *ibid.*, 851-852.

⁵⁵¹ See page 50.

odd exception, women, rather than men, will buy a magazine concerning pregnancy. During conversation women are more inclined to talk about pregnancy and their children than men are. Furthermore, if liberal feminists view pregnancy as a potential threat to the equality between men and women, merely because the woman's physiological ability to become pregnant makes her different from the man, then abortion also causes inequality between men and women because men do not have to undergo abortions and women sometimes have to face that choice. In other words, the potentiality of women facing abortion and being subject to the traumatic experience, because it makes them different from men, should also be considered by liberal feminists as a threat to equality between men and women. However, liberal feminists do not see abortion as a potential threat to the equality between men and women but rather as a method to achieve equality between men and women. Therefore, in order to be rational, the liberal feminists' view that any difference between men and women is a potential threat to equality needs to be consistent. Then the potentiality of a woman undergoing an abortion should also be seen as a threat to equality because it makes her different from a man, and not the other way around, as is currently the case. Thus, it is irrational to think that men and women are not equal because women can get pregnant. Therefore, in effect what is said is that women have a physiological detriment. Women are denying the way they are physiologically composed and such physiological composition is seen as the cause of inequality between men and women. If this is the case in feminist thinking then it means that they actually discriminate against themselves because they are not content with their physiological composition and their ability to bear children. If the ability to bear children is a negative thing, then abortion is also a negative thing, because it highlights an undeniable difference in men and women. However, there is the possibility of exceptions e.g. rape, incest and serious psychological and/or physical injury resulting from the furthering of pregnancy. Not all the consequences of the forceful defence of the link between reproductive health rights, women's equality and abortion rights have been adequately thought through and exposed, thus resulting in irrationality.

This irrationality is evident from the following: If it can be said that denying a right to abortion will be a disadvantage to women seeking abortions, it can also be said that allowing abortion rights will be a disadvantage to women not seeking abortions. The forceful defence of the link between women's equality, reproductive health rights and abortion can in the end, to put it bluntly, only shoot women in the foot. Let us assume that the unborn is denied any legal protection in order to provide the woman with reproductive health rights. This would,

let us assume and which is also claimed by many liberal feminists, be to the advantage of women in their achievement of equality and freedom. In other words, it is an advantage to those women who actually seek abortion – but what about those women who do not seek abortion? The result of the field work of pro-choice feminists has been more rights to women and fewer to the unborn: but this has proven to be a disadvantage to women as well. Let us say that a pregnant woman goes for her check-up to determine whether the growth of the unborn is normal. She wants to keep the baby and is very excited about the potential birth. The doctor attending to her mistakes the identity of the woman and negligently performs an act or procedure causing the death of the unborn. What kind of defence will the woman have? Yes, the doctor was negligent, but will the unborn really have the desired legal protection? What choice did the pregnant woman have within the context of the pro-choice debate? Of course, or at least in most cases, the pregnant mother would want the guilty party to be found guilty of murder of her unborn child. This scenario might seem highly unlikely but has actually happened in the case of *Vo v. France*⁵⁵². A Vietnamese woman was 20 weeks pregnant when she went to hospital for a routine antenatal appointment. Following a series of mishaps, including mistaken identity, she was negligently treated for the removal of a non-existent contraceptive coil and her membranes were ruptured. In the end, this case before the European Court, which had been hoped might become an ‘evolutive interpretation’ petered out into a non-decision. Mrs Vo left empty handed.⁵⁵³ As stated by Mason:

Irrespective of any question of fetal rights, to deprive a woman of her future child cannot be seen as anything less than a gross insult to her bodily integrity. Looked at in this way, protection of the fetus in no way conflicts with women’s rights – rather, it enhances their right to conceive and carry a child free from external interference.⁵⁵⁴

One wonders whether the pro-choice advocates would still defend their position so strongly when one takes into account that when it comes to crimes or negligence against pregnant women that cause harm to the unborn, all their work done would only be a disadvantage to those they want to protect (women) and would not enhance their autonomy or position of equality. In fact, crimes against pregnant women occur quite often, resulting at most in charges of grievous bodily harm (where the woman is not killed but the unborn is). This usually leaves the woman in great distress since she often feels that “grievous bodily harm” is not a sufficient charge for the loss she suffered. Furthermore, the lack of legal protection to

⁵⁵² *Vo v. France*, 53924/00, Eur. Ct. H.R., 8 July 2004.

⁵⁵³ J.K. Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction*, 48-49.

⁵⁵⁴ *Ibid.*, 50.

the unborn has also led to issues such as sex-selective abortions, causing discrimination against the unborn girl. The fact that lack of legal protection to the unborn makes sex-selective abortion more possible is also a consequence that women's rights advocates need to consider when advocating for abortion rights. If all the consequences of the pro-choice argument are not brought into the open for rational debate on the legal status of the unborn, such argument will be irrational. For example, pro-choice advocates cannot only argue that illegal abortions will be a health risk to women. Although this may be true and should be brought to the table in rational discourse on the legal status of the unborn, the negative consequences (such as those described above) of legalising abortion should also be considered in the same manner in order to be rational.

In addition, when one looks at the term 'reproductive health rights', it is not clear what this encompasses. When the phrase is read alone one immediately makes the assumption that it has something to do with creating a healthy and planned environment for reproduction. According to the Cairo Program of Action:

Reproductive health is a state of complete physical, mental and social well-being in all matters relating to the reproductive system and to its functions and processes. It implies that people have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this right of men and women is to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility, which are not against the law, and the right of access to health care services that will enable women to go safely through pregnancy and childbirth.⁵⁵⁵

In *Reproductive health and human rights*, one of the authors' definitions of reproductive health rights which was published in 1988, is mentioned:⁵⁵⁶

Health is defined in the WHO Constitution as a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity. Reproductive health, in the context of this positive definition, would have a number of basic elements. It would mean that people have the ability to reproduce, to regulate their fertility; and that women are able to go safely through pregnancy and childbirth; and that reproduction is carried to a successful outcome through infant and child survival and well-being. To this may be added that people are able to enjoy and are safe in having sex.⁵⁵⁷

How, then, does the pro-abortion argument come to the conclusion that reproductive health

⁵⁵⁵ Cairo Program of Action, Gender Equality, Equity and Empowerment of Women, Chapter 4.

⁵⁵⁶ Rebecca J. Cook, Bernard M. Dickens and Mahmoud F. Fathalla, *Reproductive health and human rights*, (Oxford: Oxford University Press, 2003), 12.

⁵⁵⁷ Ibid.

rights include abortion rights? Several international instruments provide for reproductive health rights yet the concept has not been defined and is assumed to include the issue of the right to undergo an abortion. An arbitrary reference to a right, such as 'reproductive health rights', has questionable implications regarding the content of such rights. In ignoring efforts in the investigation of the nature of the unborn, the judiciary can read anything it wants into a right in order to accommodate the pregnant woman's wishes.⁵⁵⁸ Therefore, it is important that reproductive health rights should not arbitrarily allow for abortions to take place freely. The rational threshold for the qualification of reproductive rights needs to be lifted considerably.

Several pro-life articles undertake extensive research to define the concept of life, in contradiction to several pro-abortion articles where reproductive health rights are not even defined in the articles. For example, Micheline M. Mathews-Roth⁵⁵⁹ does extensive scientific research on the beginning of life in the article *Facing Scientific Facts*, in order to prove that life is present from conception. Also, Irving⁵⁶⁰ tries extensively to define the unborn by use of science and philosophy. In the article she embarks upon an investigation using scientific facts, considering and mentioning the different scientific and philosophical arguments that exist on the legal status of the unborn. Claude Newbury, in his pro-life supplementary argument presented to the Registrar of the Constitutional Court on 11 June 1996, also presents in general, scientific facts in defence of pro-life arguments and contradicting pro-choice arguments. Furthermore, he presents several philosophical and scientific arguments.⁵⁶¹

In contradiction, in another article on reproductive health rights, namely, *Putting It to Good Use: The International Covenant on Civil and Political Rights and Women's Right to Reproductive Health*,⁵⁶² the author describes reproductive health rights as mentioned by the World Health Organisation and at the Beijing and Cairo conferences. However, she fails to embark critically upon an investigation to determine what reproductive health rights actually

⁵⁵⁸ SA de Freitas, "A critical retrospection regarding the legality of abortion in South Africa", 131.

⁵⁵⁹ Micheline M. Mathews-Roth, "Facing Scientific Facts", 68-70.

⁵⁶⁰ Dianne N. Irving, "Scientific and Philosophical Expertise: An Evaluation of the Arguments on "Personhood"", *Linacre Quarterly*, Vol. 60, No. 1, (February 1993), 18-46.

⁵⁶¹ Claude Newbury, National President of Pro-life South Africa, Pro-life supplementary argument presented to the Registrar of the Constitutional Court on 11 June, 1996, 1-59.

⁵⁶² Dina Bogecho, "Putting It to Good Use: The International Covenant on Civil and Political Rights and Women's Right to Reproductive Health", *Southern California Review of Law and Women's Studies*, Vol. 13, No. 2, (2004), 229-271.

mean. There is investigation into what the different conventions and conferences say but no express mention is made that reproductive health rights include the right to an abortion. She therefore links abortion to reproductive health rights without justification and simply assumes that reproductive health rights concern the right to have an abortion. The use of women's rights to support the abortion debate becomes even more arbitrary when it is remembered that the early feminists opposed abortion and saw it as a threat to motherhood and marriage.⁵⁶³ Feminists like Wolstonecroft and Stanton declared respect for pregnancy and the duty of motherhood.⁵⁶⁴ This was the position of feminism until Margaret Sanger began to use persuasive eugenics arguments concerning birth control and reproductive rights.⁵⁶⁵

A number of examples where human rights have been used to determine the legal position of the unborn and the mother can be mentioned. Although *Roe v Wade*⁵⁶⁶ is not an international case, it is a good example of the conflicting rights of the mother and the unborn, and the embodiment and the culmination of the legal relativist tradition.⁵⁶⁷ The woman's right to privacy was elevated above the right to life of the unborn. "The right to privacy, founded upon the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁵⁶⁸ *Roe v Wade*⁵⁶⁹ prioritised rights above any other measure, and, even if rights were to be the measure, it prioritised women's rights above those of the foetus without any satisfactory justification and arbitrarily.⁵⁷⁰ In *Roe*, at least three of the Justices accepted the feminist approach that the abortion right is necessary to the equality of women. They therefore adopted the view that gender equality requires the law to minimise the impact of real gender difference, such as the fact that only women can bear children.⁵⁷¹

The right to privacy prioritised in *Roe* was not even a right included in the US Constitution: it was created for purposes of the case. Frankowski and Cole state that this right (that of the right to privacy) was discovered for the first time. This right was nowhere mentioned and

⁵⁶³ Charles I. Lugosi, "Respecting Human Life in the 21st Century America: A moral perspective to extend civil rights to the unborn from creation to natural death", 214.

⁵⁶⁴ *Ibid.*, 214-215.

⁵⁶⁵ *Ibid.*, 215.

⁵⁶⁶ 410 US 113 (1973).

⁵⁶⁷ David M. Smolin, "The Judeo-Christian Tradition and Self-censorship in Legal Discourse", 403.

⁵⁶⁸ *Roe v Wade*: 153.

⁵⁶⁹ 410 US 113 (1973).

⁵⁷⁰ Shaun A. de Freitas, "Transcending 'Life' in the Biblical Protection of the Unborn: Perspectives towards a Jurisprudential Anti-Abortion Apologetic", 189.

⁵⁷¹ David M. Smolin, "The Judeo-Christian Tradition and Self-censorship in Legal Discourse", 408.

never before explicitly referred to.⁵⁷² In South Africa, the court also decided in the judgment of *Christian Lawyers Association of SA and Others v Minister of Health and Others*⁵⁷³ that the Constitution contained no express provision affording the foetus legal personality or protection and in s 12(2) of the said Constitution provided specifically that everyone had the right to make decisions concerning reproduction, and to security in and control over their bodies without anywhere qualifying a woman's rights in this regard in order to protect the foetus, nor providing sensitivity to the various stages of the development of the unborn from conception. In Canadian jurisprudence, the legal status of the unborn is given in *Tremblay v. Daigle*⁵⁷⁴. The court decided that the unborn does not have rights in the common or the civil law.⁵⁷⁵ Defending abortion solely by way of women's rights, however, is arbitrary, exclusive and irrational. The use of human rights as sole determinant of the legal status of the unborn is not well thought through or explained. In any case, if one is to make use of women's rights in the abortion debate, one should also at least consider the right to life of the unborn. No rational justification exists for regarding women's rights as overriding the right to life of the unborn.

Several authors, for and against abortion, agree with the fact that the use of human rights alone is irrational. Mackenzie⁵⁷⁶ defends a feminist perspective on abortion by showing that the conflict-of-rights framework and right-based models of bodily autonomy seriously misrepresent the nature of abortion decisions and the reason why it is necessary for abortions to be available to women's autonomy. She bases her argument on four concerns. Firstly, a conflict-of-rights approach fails to address the issue of responsibility in pregnancy properly. It mischaracterises the nature of the moral relationship between the woman and the foetus and also the kind of autonomy exercised during pregnancy. Secondly, it oversimplifies the legal status of the foetus. Thirdly, it leads to a misunderstood meaning of bodily autonomy because

⁵⁷² Stanislaw Frankowski, "United States of America," 24.

⁵⁷³ *Christian Lawyers Association of SA and Others v Minister of Health and Others*: 1121, paragraphs F/G--J, paraphrased). "I agree that proper regard must be had to the rights of women as enshrined in s 9 of the Constitution (the right to equality, which includes the full and actual enjoyment of all rights and freedoms and the protection that the State may not unfairly discriminate against anyone, *inter alia*, on the grounds of sex), s 12 (the right to freedom and security of the person, including, *inter alia*, the right to make decisions concerning reproduction and the right to security and control over their body) and the rights in respect of human dignity (s 10), life (s 11), privacy (s 14), religion, belief and opinion (s 15) and health and care (s 27), to which I have already referred within another context. I agree also that to afford the fetus the status of a legal persona may impinge, to a greater or lesser extent, on these rights."

⁵⁷⁴ [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634

⁵⁷⁵ Martha Shaffer, "Foetal Rights and the Regulation of Abortion", 66.

⁵⁷⁶ Catriona Mackenzie, "Abortion and Embodiment", *Australasian Journal of Philosophy*, Vol. 70, Number 2, (1992), 137.

it is inattentive to the kind of reflective bodily perspective that arises from a phenomenological account of pregnant embodiment. Finally, defending abortion solely on the grounds of the women's right to bodily autonomy logically requires that the right to abortion cannot entail a right to secure the death of the foetus but only a right to foetal evacuation.⁵⁷⁷

Thomson⁵⁷⁸ mentions in her article that although the assumption is made that the unborn is human from the beginning of conception, it can still be argued that the mother has a right to abort the unborn. In other words, even with the assumption that the foetus has life, abortion can still be justified by the woman's right to bodily integrity. Thomson states that abortion will have to be justified by reference to some right on the part of the mother, such as the right to control one's body. If the mother has no rights against the foetus, there is no justification for abortion, whether or not the foetus is a person. Himma does not agree with these views of Thomson. According to him the problem is the underlying assumption that any justification for abortion must make reference to rights. A rights-based justification is false and unnecessary.⁵⁷⁹ The concept of rights has been developed in an atomistic model of "self-sufficient and self-interested"⁵⁸⁰ individuals whose relationships with one another are competitive. Such an approach is "particularly inappropriate in the context of pregnancy, birth and parental responsibility"⁵⁸¹

To make this point is not to say that Western feminists' position on abortion is unjustifiable. However, it highlights the problem that a feminist strategy of situating the issue of abortion in the discourse of liberal rights gives rise to both philosophical incoherence and political contradictions.⁵⁸²

De Freitas⁵⁸³ provides four reasons why contemporary secular abortion jurisprudence is irrational: (1) it is positivistic and arbitrary; (2) it is one-sided in that it gives priority to women without due justification; (3) "the rationality of fertilisation"; and the (4) confusion proclaimed by contemporary abortion jurisprudence. With regard to point 2, he states that it

⁵⁷⁷ Ibid.

⁵⁷⁸ Judith Jarvis Thomson, "A Defense of Abortion", *Philosophy and Public Affairs*, Vol. 1, No. 1, (1971), 47-66.

⁵⁷⁹ Kenneth Einar Himma, "Thomson's Violinist and Conjoined Twins", *Cambridge Quarterly of Health Care Ethics*, Vol. 8, Issue 4, (1999), 434.

⁵⁸⁰ Mary Anne Warren, "The Moral Significance of Birth", *Hypatia*, Vol. 4, No. 3, (1989), 47.

⁵⁸¹ Ibid.

⁵⁸² Nivedita Menon, "Abortion and the Law: Questions for Feminism", *Canadian Journal of Women and the Law*, Vol. 6, Issue 1, (1993), 105.

⁵⁸³ Shaun A. de Freitas, "Transcending 'Life' in the Biblical Protection of the Unborn: Perspectives towards a Jurisprudential Anti-Abortion Apologetic", 182.

is one-sided in that contemporary secular abortion jurisprudence gives priority to women without due justification. The prioritisation of the pregnant woman's rights over those of the foetus is a rationally unqualified argument.⁵⁸⁴ The assumption that the pregnant woman has more important rights than those of the foetus is an assumption, arbitrary and without justification.⁵⁸⁵ A sober assessment of women's rights as justification for abortion will also reveal that it was not founded on genuine consideration of women and their needs or on an accurate understanding of elective abortion in practice.⁵⁸⁶ There is a discrepancy between the political agenda of the women's movement – and its philosophical underpinnings in academic feminism - and the needs of the majority of mainstream American women. In 1990, the *Gallup Organization* conducted the largest and most comprehensive survey of US attitudes on abortion.⁵⁸⁷ This Abortion and Moral Beliefs Survey reveals that the women's movement is out of touch with the fact that for a majority of women access to abortion is a low priority. It is also out of touch with the feeling of the majority of women who consider abortion to be murder.⁵⁸⁸ Abortion also negates women's own understanding of themselves.⁵⁸⁹ Therefore, there is an imbalance of legal, political, economic and social power between the unborn and the mother.⁵⁹⁰ The fact that women's rights, reproductive health rights or rights in general are the determining factor of foetal life is questionable. No authority is relied upon to make rights the measure for determining the validity of abortion.⁵⁹¹ This is not to exclude such feminists from participation in international debate; however as it appears at present, the emphasis on liberal feminism is too overly rated.

⁵⁸⁴ Ibid., 183. Nathanson states that feminists sometimes argue that rationality should be rejected because rational ideals are often modeled on traits associated with men, Stephen Nathanson, *The Ideal of Rationality: A defense, within reason*, 41.

⁵⁸⁵ Shaun A. de Freitas, "Transcending 'Life' in the Biblical Protection of the Unborn: Perspectives towards a Jurisprudential Anti-Abortion Apologetic", 184.

⁵⁸⁶ Paige Comstock Cunningham, J.D. and Clarke D. Forsythe, J.D., "Is Abortion the "First Right" for Women?: Some Consequences of Legal Abortion", in *Abortion, Medicine and the Law*, (edited by J. Douglas Butler and David F. Walbert, Fourth Edition, Oxford: Facts on File Oxford, Fourth Edition, 1992), 102.

⁵⁸⁷ Ibid., 103.

⁵⁸⁸ This survey revealed that 77% of the respondents believed that abortion is an "act of murder as bad as killing a born human being" (37%) or "act of murder but not as bad as killing a born human being" (12%) or the "taking of human life" (28%), *ibid.*, 105. More women than men (53% to 46%) believed that "the unborn child's right to be born" outweighs the "woman's right to choose whether she wants to have the child at the moment of conception", *ibid.*, 105-106.

⁵⁸⁹ Ibid., 109.

⁵⁹⁰ Charles I. Lugosi, "Respecting Human Life in the 21st Century America: A moral perspective to extend civil rights to the unborn from creation to natural death", 228.

⁵⁹¹ Shaun A. de Freitas, "Transcending 'Life' in the Biblical Protection of the Unborn: Perspectives towards a Jurisprudential Anti-Abortion Apologetic", 185.

8. 2. 2. The right to life

The right to life is one of the most highly held rights in international human rights law. This right also dominates the legal protection of the unborn debate. It is therefore important to discuss the rationality thereof in the light of an effort towards a procedural and substantive platform on the legal status of the unborn. “Life” can be defined as the time when a person is alive⁵⁹² or existing as a person.⁵⁹³ Although the term is commonly used in legal issues connected with abortion,⁵⁹⁴ the law fails to prescribe a specific and certain point in time when human life begins. What certainty there is in law changes with the matter in question and ranges from conception, through the end of the first trimester of pregnancy, to the point of viability, the moment of birth and sometimes only after birth.⁵⁹⁵ The secular view on the value of life argues that life in itself is not valuable. It is the kind of life one leads that determines its value. Subjective secularists believe that something obtains value by simply being desired and that life has no inherent value. It obtains value depending on the desires of the particular person holding that life. Objective secularists believe that qualities such as reason, knowledge and health are valuable in their own right whether or not a particular person values them or not. Some lives are worth more than others, depending on how much of those objective qualities are within that life.⁵⁹⁶ Reading on the various definitions ascribed to ‘life’, one arrives at the question as to what is truly meant by ‘life’. Warren comes to the conclusion that it is no surprise that there is no single (or multiple) necessary and sufficient condition for the proper application of the ordinary concept of life.⁵⁹⁷ Warren uses the example that most of us know what a lion is but very few could formulate a precise and substantive definition that will be sufficient to settle all questions regarding the species *Pantera leo*.⁵⁹⁸ The reason for this difficulty is due to cultural differences, subjective views on a concept, lack of adequate research, lack of debate that is constructive, well-researched and informed in nature and discussion platforms on *Pantera leo*, and the vast variety of opinions that exist on its definition. The same applies to the concept of life. Due to subjective views, cultural relativism and lack of debate of a constructive, well-researched and

⁵⁹² P.H. Collin, *Dictionary of Law*, 200.

⁵⁹³ Handler, *Ballentine's Law Dictionary*, 308.

⁵⁹⁴ *Ibid.*, 485.

⁵⁹⁵ *Ibid.*, 308.

⁵⁹⁶ Louis P. Pojman, “The Sanctity of Life and the Quality of Life”, in *Life and Death: A reader in moral problems* (edited by Louis P. Pojman, Belmont: Wadsworth Publishing Company, Second Edition, 2000), 56.

⁵⁹⁷ Mary Anne Warren, *Moral Status: Obligations to Persons and other living things*, 26.

⁵⁹⁸ *Ibid.*, 27.

informed nature, no precise and substantive definition can be given to the concept 'life'. Therefore, most of us will recognise life when we see it, but very few of us can give a definition of life that will be sufficient to answer all questions concerning life. It becomes clear then that the concept of life is not that simple.

To talk of the sanctity of life, for example, presupposes that one knows (1) what life is, and (2) what makes for its sanctity. More importantly, to talk of the rights of persons presupposes that one knows what counts as a person.⁵⁹⁹

Yet, we do not find clarity regarding jurisprudential clarification of concepts such as 'person', 'life' and 'human'. The liberal ideology grants the 'right to life' to 'human beings'. Yet, neither the term 'life' nor 'human being' has been rationally defined, attempted to be further understood or given universal meaning. Thus the question arises as to how one can respect human life (since it is claimed to be the most highly held right in international human rights law) in any case without understanding when a new human life is created?⁶⁰⁰ Although Judith Jarvis Thomson advocates a defence for abortion, she agrees with the fact that to draw a line and say that before a certain point a foetus is human and after a certain point a foetus is not human, is an arbitrary choice, for which no good reason or justification can be given.⁶⁰¹

There is also no authoritative answer to the question of whether 'life' is the characteristic that marks off the class of individuals who have inherent value from those who do not.⁶⁰² Why then should we sometimes have reverence for things that are not alive? For example, we would avoid shattering a precious crystal. A crystal is not alive but yet we want to preserve it: so is being alive the necessary condition to having inherent value?⁶⁰³ There is no authority for this conclusion. Regan⁶⁰⁴ comes to the conclusion that life is a sufficient condition but that we are in need of a more general principle. Therefore, being alive is not a necessary condition but is nevertheless a sufficient condition especially when considered together with other relevant factors or issues. Therefore, in the case of the legal status of the unborn, life could be a sufficient condition but not a necessary condition for legal protection, and other relevant factors should also be conditions taken into consideration when determining the legal

⁵⁹⁹ H. Tristram Engelhardt, Jr., "The Sanctity of Life and the Concept of a Person" 77.

⁶⁰⁰ Charles I. Lugini, "Respecting Human Life in the 21st Century America: A moral perspective to extend civil rights to the unborn from creation to natural death", 211.

⁶⁰¹ Judith Jarvis Thomson, "A Defense of Abortion", 47.

⁶⁰² Tom Regan, *The case for Animal Rights*, (Berkeley: University of California Press, 1983), 241.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid., 242.

status of the unborn in international law. Similarly, the concept of ‘human rights’, the very encapsulating concept of ‘life’ itself in human rights jurisprudence, is also questionable as sole determinant of the legal status of the unborn. The assumption that the whole world engages in human rights as the western world does is also a questionable assumption.⁶⁰⁵ Human rights support the liberalistic community of autonomous individuals. Therefore, the use of rights regarding the legal status of the unborn should also be complemented by the duties emanating from human rights instruments such as the African Charter on Human and Peoples’ Rights. In this regard, there will be a more inclusive approach which hints at the establishment of a more rational approach.

8. 3. Conclusion

Campos⁶⁰⁶ asks the question of what one is to say to a person who bases his justification of abortion on the fact that the political value of the equality of women overrides that of the unborn. Campos⁶⁰⁷ argues that if human rights are the premises upon which the justification of abortion is based, then such a person can no more be argued with than those who simply declare that a particular result is required because ‘God says so’. In other words, if a person solely uses human rights to justify his position on the legal status of the unborn, religion and other presuppositions may also be used to justify the legal status of the unborn. Yet, Campos mentions, at least the religious fundamentalist is basing his argument on a rich cultural and intellectual tradition to justify his defence of abortion.⁶⁰⁸ Therefore, the religious fundamentalist is at least more rational in that he bases his argument on thousands of years of philosophy. Wertheimer agrees, stating that liberals habitually argue as though extreme conservatism regarding abortion were an invention of contemporary scholasticism with a mere century of popish heritage behind it: this in the face of the fact that conservative views on abortion have had the force of law in most American states for more than a century, and continue to be law even in states where Catholicism is without influence.⁶⁰⁹ Can eras of philosophy be disregarded so easily as incorrect and merely put aside, and the short period of contributions regarding rights allowed to take its position? In cases such as *Roe v Wade*, eras

⁶⁰⁵ Matthew A. Ritter, “Human Rights”: Would you recognize one if you saw one? A philosophical hearing of international rights talk”, 296.

⁶⁰⁶ Paul F. Campos, “Secular Fundamentalism”, *Columbia Law Review*, Vol. 94, No. 6, (1994), 1826.

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid.

⁶⁰⁹ Roger Wertheimer, “Understanding the Abortion Argument”, *Philosophy and Public Affairs*, Vol.1, No. 1, (Autumn 1971), 68.

of philosophy and history were disregarded and replaced by relativistic approaches. For example, *Roe* reflects the liberal relativist assumption that divisive and difficult moral questions cannot be answered by the state, and have to be answered by each individual.⁶¹⁰ Similarly, international law refrains from providing any concerted effort aimed at presenting and discussing opinions on the legal status of the unborn due to the ‘sovereignty’ of domestic legal systems which reflect different approaches to the issue. Consequently, no rational procedural and substantive platform exists to deal with this problematic issue.

If we do not consider the “rights view” as determining the position of the unborn, what other alternatives are there? Two alternatives to the Rights view are the “Indirect Duty Views” and the “Direct Duty Views”. Although the Indirect Duty and Direct Duty views do not necessarily determine the legal position of the unborn either, these alternative views are mentioned to show that the Rights View is mere opinion and other opinions (such as the Indirect Duty and Direct Duty views) also exist. Indirect views mean that no duties are owed directly to animals. Animals are a medium through which direct duties to human beings are discharged. These are duties involving animals and not duties to animals.⁶¹¹ Take for example the works of Picasso. We have no direct duty towards his works of art. The duty to preserve his paintings is an indirect duty to humanity. Similarly we have a duty to preserve animals, but not as a duty towards the animals but as an indirect duty we owe, for example, to humanity and a civilised approach. Direct duty views hold that we have duties directly to animals. Utilitarianism and duties based on considerations of cruelty and kindness are examples of direct duty views.⁶¹² In other words, let us assume that the position of the unborn is that of the indirect duty view and not the rights view. Then we need to treat the unborn to the best of our ability in order to preserve them for the environment and future generations. The unborn is then not a holder of rights and cannot be said, for example, to possess the right to life. But, on behalf of humanity, environmental preservation, a moral society, a culture of life and the future generations, abortion (under this view) cannot be allowed. This offers some form of indirect protection, which in fact should be more convincing and consequently more rational than prioritising animal rights for similar purposes.

⁶¹⁰ David M. Smolin, “The Judeo-Christian Tradition and Self-censorship in Legal Discourse”, 403.

⁶¹¹ Tom Regan, *The case for Animal Rights*, 150.

⁶¹² *Ibid.*, 150 – 151.

One of the most dominant pro-abortion arguments is that the unborn is not a holder of rights and therefore does not possess the right to life. Let us assume this is true. We still need to work towards a society of justice and humanity. Will it then not be correct to argue that the unborn should be indirectly protected at least, not because it has rights, but because of the duties we owe towards humanity and justice and others? Although Regan⁶¹³ and this thesis do not necessarily support the Indirect and Direct Duty Views, these are alternatives that have to be mentioned to indicate that the 'rights view' is not a universal jurisprudence adequate to the determination of the legal position of the unborn, and this is due to the fact that it forms part of a specific opinion in opposition to other opinions. Therefore, several alternatives to the rights view exist. If the rights view can be used, several other opinions (such as the indirect duty view) may also be used. Even if it is assumed that the foetus does not have rights or life, it does not necessarily follow that the rights view implies that we have the liberty to do as we wish to the unborn. The rights view advocates taking steps toward the creation of a moral climate where rights are taken seriously. It is better then, where the recognition of moral rights are at issue, to be cautious, because it is uncertain where the line should be drawn between those who have life and rights and those who do not; and due to this ignorance on the position of the unborn it is better to give the viable foetus⁶¹⁴ the benefit of the doubt⁶¹⁵ but more importantly to give a rational approach (substantive and procedural) the benefit of the doubt.

The view of John Finnis is another good example of a philosophy that rejects the use of rights for the determination of the legal position of the unborn. Finnis criticises Judith Thomson's playing-off of the "right to life" and the "right to decide what happens in and to one's body" in his article, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*⁶¹⁶. In reply, Finnis states that no argument, whether for or against abortion, has to be or needs to be expressed by way of rights. It unnecessarily complicates this issue. It is inappropriate and inconvenient to express something like the moral permissibility of a type of action such as abortion in terms of "rights".⁶¹⁷ Although it is agreed that arguments for or against abortion

⁶¹³Tom Regan, *The Case for Animal Rights*,

http://www.animalsvoice.com/PAGES/writes/editorial/essays/aniphilo/regan_rights3.html (18.05/2007).

⁶¹⁴ The author only mentions the viable foetus. The solution and argument is only agreed with if it applies to the unborn whether viable or not. Although the author is working towards a solution, this thesis does not support the view that only the viable unborn should be given the benefit of the doubt.

⁶¹⁵ Tom Regan, *The case for Animal Rights*, 319-320.

⁶¹⁶ John Finnis, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson", *Philosophy and Public Affairs*, Vol. 2, No. 2, (1973), 117-145.

⁶¹⁷ *Ibid.*, 130.

need not be expressed by way of rights, they can however play a role if reason is accommodated, reason in the sense of an accommodative and sensitive process. Finnis believes that rights (for example the right to life) are not the fundamental rationale or reasoning behind the judgment that killing of another person is impermissible.⁶¹⁸ He therefore does not state that rights play *no* role in determining the position of the unborn; he merely states that it does not play the fundamental role it is made out to play in international abortion jurisprudence. Finnis states that the real need for speaking of “rights” is to make the point that the basic human values have to be realised in the lives and well-being of others.⁶¹⁹

9. Summary

In the complex debate on the legal status of the unborn, several methods of argument, debate and research have been used. This chapter begins by introducing what seems to be yet another method of research. This method is called rationality. Yet, rationality is not to be understood as just another method of research or as an absolute method of research but rather as a competitive method of research when compared with a situation in which little has been done, or even as a method that is not inclusive and sensitive to the situation. Rationality is defined as a process and product of logical thinking and research in order to reach a rational approach. It excludes arbitrary thinking and rejects argument without justification. For further delineation, a distinction is made between rationality and reason. They overlap, in that both rationality and reason can mean a process and product of logical thought or argument. In other words, reason and rationality are similar in that both sometimes require logical and fair argument. They differ in that the outcome of a reasoned approach can also function as a natural precept - where the reasoned outcome, without in-depth logical thinking, is perceived to be *just good*. However, although reason differs with rationality in this regard, there are still similarities in that such a reasoned principle, functioning as a natural precept, will automatically be perceived as rational without any condition required. For example in the case of murder, there is no need for any logical thought process to establish that murder is wrong and unlawful. Both these meanings are applied throughout this thesis.

Several reasons are given as to why rationality is the better alternative in argumentation and

⁶¹⁸ Ibid.

⁶¹⁹ Ibid.

debate on the issue pertaining to the legality of abortion - it is definitely the better alternative. Today's uncivilised approach to discourse is one reason why rationality is a better alternative in debate and argumentation. This uncivilised approach is evident from partisan views such as international human rights law's support for women's rights without reasoned argument that also tends to postulations from other sectors. This is also clear from popular contemporary views which on the one hand support the abolishment of the death penalty and on the other, the promotion of abortion laws. Concepts such as 'life' and 'human being' are applied in public discourse. Yet, this is done arbitrarily since no attempt has been made to define these concepts. Furthermore, rationality supports an effort towards a *procedural* and *substantive* platform on the legal status of the unborn to provide common ground among states regardless of diversity of positive legal systems and ideologies. This is so because rationality favours inclusiveness and seeks coherence. Such procedural developments are statutorily required by Article 13 of the United Nations Charter calling for recommendation and studies in international development and codification. The work done under Article 13 is tremendous. This includes: the four Geneva Conventions on the Law of the Sea (1958), the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the Convention on Economic, Social and Cultural Rights, and many others. Regarding substance, the conclusion is made that international law needs to take an inclusive and sensitive approach on the legal status of the unborn, integrating various ideas, ideologies and concepts. Some states, regional human rights instruments and specific fields of the law emphasise the importance of the unborn; for instance in specific fields of the law it is a crime to terminate the unborn without the mother's consent.

In addition, there are areas of the law which are indicative of viewing the unborn rather sympathetically, for example in the case of *Gonzales v Carhart*.⁶²⁰ In this case, the Supreme Court of the United States considered the validity of the Partial-Birth Abortion Ban Act⁶²¹, a federal statute regulating abortion procedures. The act does not prohibit abortion as such but only particular methods of abortion, namely partial-birth abortions or intact D & E - Delivery and Evacuation (this does not include regular Delivery and Evacuation). These methods of abortion are common during the second trimester of pregnancy and the act does not regulate the methods used during the first trimester.⁶²² The court stated that the Act's ban on

⁶²⁰ 550 US (2007).

⁶²¹ 2003, 18 USC § 1531 (2000 ed., Supp. IV).

⁶²² 85-90 percent of abortions in the United States take place in the first trimester. The most common methods

abortions involving partial delivery of a living foetus furthers the Government's objectives, these objectives being that it may use its regulatory authority to show its respect to the life within the woman. The court described partial-birth abortions as being similar to killing a newborn infant, and confirmed the validity of drawing boundaries to prevent practices that extinguish life and that are close to actions that are condemned.⁶²³ Therefore, this case emphasised and recognised the unborn to a certain extent, providing a favourable climate for further rational debate.

The search for a rational jurisprudence is not without problems. People disagree on what is rational and often more than one approach is or seems rational. Not only is more than one view sometimes rational but getting beyond these conflicts also presents a problem and ultimately leads to the question: "What should be done when more than one approach seems rational and a neutral principle impossible?" However, even if neutrality is impossible, the different approaches can communicate and come to a surface agreement while radical differences remain. It is exactly these differences that should stimulate international effort towards a *procedural* and *substantive* rational platform regarding the legal status of the unborn. The fact that neutrality is impossible does not present a problem when one distinguishes between *neutrality* and *impartiality*. A rational platform does not call for a neutral outcome but merely an impartial one, albeit defective in some areas. Impartiality allows for a greater degree of objectivity, sensitivity, accommodation and procedural fairness. In fact, if this can be done on many other fronts in international law, why not on the legal status of the unborn?

Both rationality and reason require a logical thought process of deep thinking, analysis and debate in order to come to the desired conclusion. However, the second meaning of reason now needs special mention. This is reason showing close affinity to natural law where an outcome is 'reasoned' merely due to the way it is perceived – its inherent acceptability, such as murder, for example. This naturally also leads to a discussion on reason within the '*natural law vs positive law*' debate. Earlier on it was indicated that a natural law approach rather than a positive law approach allows for an environment more conducive to the flourishing of rational debate. This is true because natural law finds pluralism in concepts to

used during this period are vacuum aspiration in which the physician vacuums out the embryonic tissue or uses medication, *Gonzales v Carhart*: par (I) (A).

⁶²³ *Gonzales v Carhart*: par (3) (a).

be an advantage since it creates irresolvable disagreement on natural precepts, this disagreement generating dialogue, which is in line with a rational approach. Contrary to natural law, positivism supports relativism. Although relativism also involves plural perspectives, positive law favours each state having its own perspective and not coming together in dialogue. In other words, ‘my perspective is mine and your perspective is yours and we do not meddle with or discuss each other’s perspectives.’ However, this relativistic view is also being challenged in debates concerning state sovereignty supporting such relativism and an international legal order supporting universal natural precepts. Natural law and human rights are also currently applicable due to a general re-emphasis thereof in international law, especially since World War Two.

Since the concept of *human rights* is so prominent in the abortion debate, special mention should be made of this. Different human rights are considered. These include the right to life and women’s reproductive health rights. What is found is the fact that although human rights are very prominent in international law, the scope and content of these rights is still to be determined. In light of this uncertainty, these rights cannot be applied before concepts such as ‘human being’ and ‘life’ have been more clearly explained. For example, the right to life is applied to all human beings. Yet no substantial effort has been made towards explaining concepts such as ‘life’ or ‘human-being’. This leads to arbitrariness and irrationality. Therefore, international law is called upon to make a substantial attempt towards progressing in discussion on the legal status of the unborn.

Another issue neglected by international law is that of the *duties* aspect (even within human rights instruments and jurisprudence). When the focus is shifted from the western interpretation of human rights to other interpretations such as that of Africa, it is clear that not only rights exist but also *duties*. This provides a whole new angle on the legal status of the unborn. International law should consider other views on human rights and deal rationally with problems such as the duty of the mother towards the unborn, the duty of mankind towards the unborn and the duty of international law towards the unborn. *Roe v Wade*⁶²⁴ is an example of where a new-found right to privacy was chosen to override the right to life of the unborn. The court only considered human rights without reference to other sub-themes like biology or duties. The court expressly rejected dealing with the biological factors of the

⁶²⁴ 410 US 113 (1973).

unborn only to later implement the trimester approach which is of biological consideration and thereby contradicting itself.⁶²⁵ This contradiction is irrational in itself. Direct duty views hold that we have duties directly to animals. Utilitarianism and duties based on considerations of cruelty and kindness are examples of direct duty views.⁶²⁶

What is proposed is that rationality is not merely another method of argument but a more informed, inclusive and sensitive approach regarding more clarity on the legal status of the unborn in international law. International law in several aspects has neglected any substantial attempts towards argument, let alone rational argument. What is proposed is an integrated and collective approach of several concepts (although a final solution on the legal status of the unborn is not possible). What is sought is an *improvement* as well as a *constructive* approach regarding the legal status of the unborn, and what is presented is the possibility and progression of an effort towards some common ground on the legal status of the unborn. Therefore, a *procedural* and *substantive* platform for further debate on the legal status of the unborn is sought. Furthermore, such platforms for further debate are also required to make a substantial effort to define concepts such as 'life' and 'human being'. Rationality supports such an effort. This is also required by Article 13⁶²⁷ of the United Nations Charter (for reasons already explained).

Regarding a *substantive* rational platform, an integrated approach of all concepts on the legal status of the unborn is required. For international law to live up to its primary goal, it needs to make a concerted effort towards the attainment of a (more) rational platform regarding the legal status of the unborn. In order to accomplish this, international law should make a substantial effort to define the scope and application of rights such as the right to life and reproductive health rights, as well as seek, as far as possible, common ground between these two approaches. Here, for example, one can propose the trimester scale where the third trimester presents the unborn with protective emphasis. It is also clear that different

⁶²⁵*Roe v Wade*: 159. "Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology is unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

⁶²⁶ Tom Regan, *The case for Animal Rights*, 150-151.

⁶²⁷ (1) The General Assembly shall *initiate studies* and *make recommendations* for the purpose of ... *encouraging the progressive development of international law and its codification*; ... and *assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion* (emphasis added).

approaches exist as to what is rational (and neutrality amongst these different approaches is impossible), however, there is a universal rationality and sense of fairness that ascribes to the establishment of a favourable climate for different states to come together in an attempt towards a *substantive* and *procedural* platform on the legal status of the unborn. Therefore, states should utilise their differences in a substantial effort towards such a platform and not follow an exclusive, insensitive approach where only one view or categorisation of views is followed by a state to solve a legal problem such as the legal status of the unborn. Also, a call for impartiality, rather than neutrality, is made in an effort towards a rational platform. Furthermore, if there is an international initiative towards a collective jurisprudence on the unborn, then this will also lend clarity to various legal systems when deciding on the legality of abortion. If this is not done then national jurisdictions could abuse the system by following their own views which could result in an arbitrary/insensitive approach based on pragmatism and limited to pragmatic ends, which on their own, are contrary to the aims of international and human rights law.

Finally, attempts to achieve a rational platform for the legal status of the unborn are supported by the foundational ideas upon which the UN, international humanitarian law and international human rights law rest. After World War Two the potential of mankind for evil became very clear. To prevent further cruelty and repetition of the injustices of the past, international law stepped up in the formation of the UN and the development of international humanitarian law and international human rights law. The foundational ideas of the UN can be found in the preamble⁶²⁸ and Articles 1⁶²⁹ and 2 of the Charter of the UN. As a brief summary, it is stated that because of the sorrows of war, human rights, dignity and equality are to be reaffirmed and that peace and security should be maintained. In everyday terms, as taken from the Charter, it may be said that the foundational ideas upon which the UN,

⁶²⁸ “We the peoples of the United Nations determined; to have succeeding generations *from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal right of men and women* and of nations large and small, and to establish conditions under which *justice and respect* for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to *practice tolerance and live together in peace with one another as good neighbors*, and to unite our strength to *maintain international peace and security*, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples...” (emphasis added).

⁶²⁹ “The purposes of the United Nations are: 1. to *maintain international peace and security*, and to that end: to take effective collective measures for the *prevention and removal of threats to the peace*... 2. To *develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples*, and to take other appropriate measures to strengthen universal peace...” (emphasis added).

international humanitarian law, international human rights law and international law in general rest include the following: peace, benevolence, love, sensitivity towards mankind and the age-old principle of respecting and treating your neighbour as you would like them to respect or treat you. These principles, as foundations of human rights, cannot be restricted or violated by laws or allowed to be restricted or violated by international law. This is so because, for example, “love is the one thing that cannot hurt your neighbor”⁶³⁰. Therefore, law does not forbid virtues of love⁶³¹, and also not benevolence, sensitivity towards mankind, joy, peace, patience, kindness, goodness, trustfulness, gentleness and self-control. There is no law against such virtues.⁶³² Instead, it is promoted as evidenced from the Charter of the UN. The demands of these principles, as the foundational roots of international law, should serve as a catalyst towards the promotion of clarity and informed consensus regarding the legal status of the unborn in international law. If love, benevolence, respect, equality and sensitivity towards mankind forms the foundation of international human rights law, then these principles should be seen as the “essence of ethics and rights”⁶³³, providing a valuable point of departure for issues relating to abortion.⁶³⁴ The direct implications of these virtues are the optimising of the freedom and equality of all, and increasing one’s own liberty and equality. Social benevolence works for the general good and the well-being of all, all implying anything that might be viewed as being on the periphery of that which is popularly perceived to be part of the ‘all’.

Social benevolence works towards attaining the highest virtue, namely justice,⁶³⁵ and therefore one can also speak of international benevolence, because that is what international human rights is all about. If these principles are applied to the issue of the legal status of the unborn the following question should be asked: What do love, benevolence, respect, equality, justice and sensitivity towards mankind, all being foundational principles of international law, require from international (human rights) law when it comes to the legal status of the unborn? What is expected of international law is exactly what the principles above require in everyday life. And these principles cannot and should not be limited by international law. It requires us to respect the unborn, care for it and be sensitive to its

⁶³⁰ A.W.G. Raath and N.P. Swartz, “Benevolence and Tiny Human life: A Pauline platform for ecumenical and cultural engagement on Abortion ethics”, *Journal for Christian Scholarship*, Special edition 2, (2006), 145.

⁶³¹ *Ibid.*, 145-146.

⁶³² *Ibid.*, 145.

⁶³³ *Ibid.*, 141.

⁶³⁴ *Ibid.*

⁶³⁵ *Ibid.*, 159.

existence because of reverence for humankind. However, the UN and international law have, thus far, failed to apply the foundations upon which it is founded regarding the legal protection of the unborn. Consequently, man's care towards his own, namely "humanity" is questioned. The lack of attention to the legal status of abortion and the great number of legal abortions today is a "barometer of the insensitive attitude towards benevolence and justice in matters concerning life and death – ultimately, it is a reflection of the insensitivity towards the right to life"⁶³⁶ of the unborn. Therefore, in light of all these considerations, rationality presents the best alternative method to further debate and platforms on the legal status of the unborn in international law. Rationality as intellect, rationality as reason, and rationality as benevolence could do much to assist mankind in being more aware of its own, no matter, for now, what the degree of such assistance might be.

⁶³⁶ Ibid., 164.

Chapter 4

Towards a universal rationale on the legal status of the unborn: the role of science

1. Introduction

Science is important as a role player towards a universal rationale on the legal status of the unborn in international law. However, it is not an absolute solution to the problem. It is emphasised that science should only serve as *an important factor* in the process towards obtaining a universal rationale on the legal status of the unborn and *not the important factor*. First of all, the concept of Science has to be defined in the context of this thesis. There will also be a determination as to how this definition is being applied in international law.

The Latin of science is *scientia* which is translated as ‘knowledge’. It also means any systematic field of study or body of knowledge that aims, through experiment, observation, and deduction, to produce reliable explanations of phenomena, with reference to the material and physical world.⁶³⁷

This system uses *observation* and *experimentation* to describe and explain natural phenomena.⁶³⁸

The investigation of natural phenomena through observation, theoretical explanation and experimentation or the knowledge produced by such investigation. Science makes use of the scientific method, which includes the careful observation of natural phenomena, the formulation of a hypothesis, the conducting of one or more experiments to test the hypothesis, and the drawing of a conclusion that confirms or modifies the hypothesis.⁶³⁹

Science is devoted to formulating and testing naturalistic explanations for natural phenomena. It is a process for systematically collecting and recording data about the physical world, then categorizing and studying the collected data in an effort to infer the principles of nature that best explain the observed phenomena. Science is not equipped to evaluate supernatural explanations for our observations; without passing judgment on the truth or falsity of supernatural explanations, science leaves their consideration to the domain of religious faith. Because the scope of scientific inquiry is consciously limited to the search for naturalistic

⁶³⁷ “Science”, *The Hutchinson Unabridged Encyclopedia including Atlas*, <http://wagtail.uovs.ac.za/search/XDictionary++and+science&SORT=D/XDictionary++and+science&SORT=D&extended=0&SUBKEY=Dictionary%20%20and%20science/1,140,140,B/1856~b1495282&FF=XDictionary++and+science&SORT=D&18,18,2,0> (accessed 26/02/2008).

⁶³⁸ “The definition of science: What is science?”, *Science made simple*, <http://www.sciencemadesimple.com/science-definition.html> (accessed 22/02/2008).; For purposes of this thesis the main field concentrated on is that of Biology.

⁶³⁹ “Science”, *The free dictionary by Farlex*, <http://www.thefreedictionary.com/science> (accessed 4/03/2008).

principles, science remains free of religious dogma and is thus an appropriate subject for public-school instruction.⁶⁴⁰

Especially, such knowledge when it relates to the physical world and its phenomena, the nature, constitution, and forces of matter, the qualities and functions of living tissues, etc.; called also natural science, and physical science.⁶⁴¹

In general therefore, science describes a body of knowledge, as opposed to ignorance, gained by way of observation and experimentation. For example, the knowledge obtained on the human body was done by way of observation and experimentation done in science laboratories by scientists (i.e. obtained and tested through scientific method). This knowledge obtained serves as useful models of reality. Therefore, dominantly today, science deals with the material world - what we can see. In other words, it provides us with model frameworks serving as facts and guidelines when answering any question. It deals with what can be seen and that which has been proven. For example, science within the context of this thesis should be understood as follows: when a student is asked to describe a university from a helicopter hovering over a university he can produce two answers: (1) He can state that it is an institution. Furthermore, he can describe the kind of classes provided there, the different cultures on the university grounds and the political problems experienced there. He can describe what he sees materially. In other words, the student will describe what he sees: buildings, with cars and people walking around. He will describe the university as a fact, describing what he sees at face value and the physical component thereof: facts which cannot be denied and cannot be debated. What is seen is reality and it cannot be altered by way of debate. (2) On the other hand, he can state that the sole purpose of the university is the dissemination of theory as opposed to practical skills-training. However, not everyone will agree with him on this. The difference between the two is that in the first instance the student deals with that which can be physically seen or material facts: facts that cannot be altered or changed. In the second instance the student deals with that which is abstract. It is subject to disagreement and subjective opinion. This thesis advocates that science within the context of the legal status of the unborn, should be used as it is done in example 1. However, the author is aware of the fact that everything, including science, has a philosophical element to it. The *philosophy of science* does exist. Yet, for the purposes of this thesis only that part of science within the context of the legal status of the unborn, which can materially be seen and which

⁶⁴⁰ *Edwards v. Aguillard*, 482 US 578 (1987): paragraph D, II.

⁶⁴¹ "Science," *Accurate and reliable dictionary*, <http://ardictionary.com/Science/2235> (accessed 4/03/2008).

has been proven as fact, devoid of any philosophical content, is applicable. In other words, the proven development of the unborn is applicable within this context of science. Therefore, the scientific information that is available on the unborn should be presented in a rational debate as it is seen, free from any value judgements. In international environmental law science is used like this. Material scientific knowledge is used to determine the extent of environmental pollution and how to prevent it. Scientific groups study the damaging effects on plant, animal and human life, thereby obtaining scientific facts to assess the damage caused. Thereafter, the first step in solving air pollution is *assessment*. Researchers have investigated outdoor air pollution and have developed standards for measuring the type and amount of some serious air pollutants. Scientists must then determine *how much* exposure to pollutants is harmful. At the UN, the Atmosphere Management Program carries out worldwide environmental projects. In the US, the primary federal agency is the Environmental Protection Agency. Many state and local organisations also participate in monitoring and controlling the environment.⁶⁴² The UN confirms the use of science in this method by stating that:

Governments at the appropriate level, with the cooperation of the relevant United Nations bodies and, as appropriate, intergovernmental and non-governmental organizations, and the private sector, should: (e) Promote, and cooperate in the building of scientific capacities, the exchange of scientific data and information, and the facilitation of the participation and training of experts and technical staff, particularly of developing countries, in the fields of research, data assembly, collection and assessment, and systematic observation related to the atmosphere.⁶⁴³

If science is used like this in environmental law, international law, in order to be inclusive and fair and therefore rational, needs to apply science in the same manner when it comes to the international legal status of the unborn in international law. However, although it is the view of the author that science has some common ground and should be regarded as only the facts that can be seen, free from any value judgments, it is not denied that science is subject to different interpretations. This is discussed below.

In an emotionally charged and heated debate such as abortion it seems as though scientific facts do not have a lot to add, and as though rationality itself has been excluded.⁶⁴⁴ The problem is that there is no consensus on the essential attributes forming human life and we do

⁶⁴² “How can we prevent the damaging effects of air pollution?,” *Berkeley Law*, <http://www.lbl.gov/Education/ELSI/Frames/pollution-prevention-f.html> (accessed 25/02/2008).

⁶⁴³ United Nations, Protection of the Atmosphere, Agenda 21, Chapter 9, paragraph 9.8 (e).

⁶⁴⁴ Harold J. Morowitz and James S. Trefil, *The Facts of Life: Science and the Abortion Controversy*, (New York: Oxford University Press, 1992), vii-viii.

not have enough knowledge to be precise about the appropriate stage.⁶⁴⁵ This seems to be even truer in light of the fact that the value of life is culturally created, resting on social meanings and sexual politics. Thus, the conclusion is made that foetal life has value when people with power value it⁶⁴⁶ – irrespective of logical discussion. Zack went so far as to say that asking science to define human life in scientific terms for use by law in moral terms is a travesty of both honourable traditions.⁶⁴⁷ However, it is not a travesty; it is precisely what science should do to assist any public decision-making that involves serious legal issues. This seriousness results from the close affinity that the unborn has with mankind in general. Furthermore, when the definition of science is considered it is realised that science provides knowledge based on material facts of reality concerning the unborn. Therefore, understanding the meaning of ‘life’, ‘being alive’ and ‘human’ is substantially enhanced by scientific knowledge.⁶⁴⁸ This is even truer in light of the fact that the mystery surrounding life in history has progressively been replaced by scientific understanding. For example, it was only fifty years ago that the double helix structure of DNA⁶⁴⁹ was discovered. The connection between DNA and “life” was made because *deoxyribonucleic acid* (DNA) is the basic building block of life, the genes and chromosomes.⁶⁵⁰ The genome is often called the blueprint for life. The genome is composed of chromosomes. In humans, there are 24 different types of chromosomes. Thus, the Great Code is contained in 24 volumes.⁶⁵¹ Therefore, DNA is usually regarded as the *sine qua non* of life. DNA is considered the identifying mark of a living system. We judge something as living if it contains DNA.⁶⁵² Jordaan himself refers to DNA as the “building blocks of life.”⁶⁵³ According to Block and Whitehead new medical technology will solve the abortion problem: but this will be only if

⁶⁴⁵ Clifford Grobstein, Joseph Stokes, Brian G. Zack, “Defining Human Life”, *Science*, Vol. 214, No. 4516, (1981), 6.

⁶⁴⁶ Donald Hope, “The Hand as emblem of Human Identity: A solution to the abortion controversy based on science and reason”, 210.

⁶⁴⁷ Clifford Grobstein, Joseph Stokes, Brian G. Zack, “Defining Human Life”, 6.

⁶⁴⁸ *Ibid.*

⁶⁴⁹ Donrich W Jordaan, “The legal status of the human pre-embryo in the context of genetic revolution”, 237.

⁶⁵⁰ Shettles and Rorvik, *Rites of Life*, 28-29.

⁶⁵¹ “Greatest Biological Development in Science History”, *Jupiter Scientific*, <http://www.jupiterscientific.org/sciinfo/genome.html> (accessed 25/02/2008). The numerics of DNA are staggering: written in just a four-letter alphabet (A, T, C, G), the human genome is around 3 billion letters long and there are around 600 billion-trillion copies of it on Earth (6 billion people times 100 trillion cells per person). The genome encodes the proteins that form the structural elements of life and that regulate numerous biological processes. Genes provide the characteristics that distinguish one individual from another and allow these features to be passed from one generation to the next through reproduction, *ibid.*

⁶⁵² Charles B. Thaxton, *DNA, Design and the Origin of Life*, Paper presented as part of the international conference, “Jesus Christ: God and Man”, Dallas Texas, 13-16 November, 1986, http://www.origins.org/articles/thaxton_dnadesign.html (accessed 25/02/2008).

⁶⁵³ Donrich W Jordaan, “The legal status of the human pre-embryo in the context of genetic revolution”, 237.

pro-lifers work morally and philosophically to pave the way for this eventuality. The said authors add that on a pragmatic level, the only way to resolve this vexing question in a way that will satisfy both sides – at least partially – is to rely on new medical technology.⁶⁵⁴ However, it is the opinion of the author that, in order to meet the requirements of rationality, a decision on abortion cannot be made based purely and only on scientific grounds. Becker disagrees as he states that there is a decisive way to define, in purely biological terms, either the point at which a human life begins, or the point at which it ends. He disagrees with the view that if the end points are going to be used as moral divides, they should be defined in terms of morally relevant characteristics, not purely biological ones.⁶⁵⁵ In other words, he believes that the beginning of human life can be determined solely by science. The author disagrees with Becker as rationality requires an inclusive approach and opposes a single discipline, such as science, to determine the legal status of the unborn.⁶⁵⁶ Therefore science should at least be considered in the debate because it provides for material scientific knowledge on the unborn: however not as the sole measure in determining the legal status of the unborn. If science is used as the sole measure and argument in the pro-life debate, the following is possible: the conservative points to the similarities between the successive stages of foetal development. The liberal points to the gross differences between widely separated stages, thereby arguing that the unborn has different value at different stages. Each of these arguments is persuasive, but if these were the only considerations, the total argument of the conservative would be no more compelling than that of the liberal and *vice versa*.⁶⁵⁷ They would both be open to criticism by the other's convincing argument showing the contrary. Thus an inclusive approach, where all the concepts relevant to the unborn are considered, is necessary. Furthermore, it is also the opinion of the author that if science is to

⁶⁵⁴ Walter Block and Roy Whitehead, "Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy", 16.

⁶⁵⁵ Lawrence C. Becker, "Human Being: The Boundaries of the Concept", *Philosophy and Public Affairs*, Vol. 4, No. 4, (Summer 1957), 335.

⁶⁵⁶ This irrationality is clear from his arguments. He argues that his rationale begins with the straightforward observation that entry into the class of living human beings is a process. The claim that "entry is a process" means no more than that humans come into being by way of a process, *ibid.*, 334. Further he compares the development of the unborn to that of the metamorphosis of a larva and a butterfly, *ibid.*, 337. He states that we can say that an insect is a butterfly as opposed to a caterpillar when the process of metamorphosis is complete - that is, when the relatively undifferentiated mass left by the disintegration of the caterpillar's tissues has metamorphosed into the pattern of differentiation we call a butterfly. So it makes sense to say that human eggs, embryos, and fetuses are distinct from the humans they become - that they are not human beings, only human becomings, *ibid.* This line of thought is disagreed with. Both caterpillar and butterfly are of the same species of insect. Just as the unborn and the born is. Also, the biological processes of development in the metamorphosis and the development of the unborn are not proven to be biologically similar and can therefore not be compared to each other without objection.

⁶⁵⁷ Roger Wertheimer, "Understanding the Abortion Argument", *Philosophy and Public Affairs*, Vol. 1, No. 1, (Autumn 1971), 81.

be used, all should get their scientific facts straight.⁶⁵⁸ The importance of this lies in the fact that material scientific information can be used to guide our moral and political judgments.⁶⁵⁹ As mentioned in the definition, science provides *useful models of reality*⁶⁶⁰ to serve as guidelines. Science as facts also helps to establish more useful dialogue.⁶⁶¹ Science cannot make the decisions in the political or legal process but if sensitively applied to appropriately framed questions, science can substantially assist jurisprudence.⁶⁶²

All of this is in line with a rational and reasoned approach to the determination of the legal status of the unborn. It presents us with proven facts upon which one can rely and which cannot be denied. It presents us with information on the unborn apart from any ethical or moral considerations and cannot be transformed to suit political views or moral wants. Therefore, a more concerted enquiry as to the application of science and medicine in the determination of the legal status of the unborn is needed.⁶⁶³ In order to avoid even further irrationality, it is necessary to apply science to the legal status of the unborn since science is being applied in most other areas of law. In the case of *Roe v Wade*⁶⁶⁴ the court explicitly refused to apply science. This is arbitrary since science is being applied in most other areas of law – for example, animal rights⁶⁶⁵, medical law⁶⁶⁶ and the death penalty⁶⁶⁷.

Criminal law uses science in several areas. For example, sometimes an accused cannot be found guilty of a crime committed because of his/her state of mental illness. Mental illness has for centuries been a concept dealt with in law because it negates the postulate of responsibility or accountability of an accused person.⁶⁶⁸ In other words, the issue of mental

⁶⁵⁸ Harold J. Morowitz and James S. Trefil, *The Facts of Life: Science and the Abortion Controversy*, vii – viii.

⁶⁵⁹ *Ibid.*, 151.

⁶⁶⁰ “The definition of science: What is science?”, *Science made simple*, <http://www.science.madesimple.com/science-definition.html> (accessed 22/02/2008).

⁶⁶¹ Clifford Grobstein, Joseph Stokes, Brian G. Zack, “*Defining Human Life*”, 7.

⁶⁶² *Ibid.*

⁶⁶³ S.A. de Freitas, “A critical retrospection regarding the legality of abortion in South Africa”, 132.

⁶⁶⁴ 410 US 113.

⁶⁶⁵ For example, science is sometimes used for the conservation of animals or species. The conditions of the animal’s habitat are often determined by way of science in order to preserve or protect such animals or species.

⁶⁶⁶ Medical law uses the facts of science in debates and ethical questions concerning euthanasia. Furthermore, scientific facts are also used to conduct debates on the moment of death.

⁶⁶⁷ For example, science is used in determining the dosages and drugs to be administered during the lethal injection. Furthermore, with regard to the electrical chair, science is used to determine the procedure and degree of electrical shock necessary to cause the moment of death. Also, the amount of pain caused to the person during the death penalty is determined by way of scientific means.

⁶⁶⁸ Michael S. Moore, “Legal conceptions of mental illness”, in *Philosophy and Medicine: Mental Illness: Law and Public Policy* (edited by Baruch A. Brody and H. Tristram Engelhardt, Jr, Holland: D. Reidel Publishing Company, 1980), 25.

illness may be raised as a defence; namely, that at the time of the offence A was too disordered to be held liable. Medical evidence is crucial with such a defence.⁶⁶⁹ Therefore, the science of psychology is used to determine whether a person can be held liable in law for a crime committed. Furthermore, Engelhardt agrees that the practices of medicine (which forms part of science) and law are intertwined, where legal concerns for harms and medical concerns for cure and care are joined, as in the case of much public policy bearing on the mentally ill.⁶⁷⁰ A further example is that of the lie detector/polygraph test. Science and psychology are used to determine the truthfulness of a person's statement and in the end, therefore, serve justice. Very important, is the use of science in feminist arguments. The feminist debate uses science to determine reproductive health rights⁶⁷¹. What is therefore asked of pro-abortion supporters is that they come to a rational platform when discussing the legal status of the unborn and be willing to listen to the facts of science applying to the unborn on the side of the argument of the pro-life advocates. Even amongst some pro-choice advocates science is used: the argument of viability is a scientific consideration. Science is also used to determine whether the use of certain substances is illegal or not.⁶⁷² It is used to determine the advantages and disadvantages of making cannabis legal, for instance.

In international law the court uses science in environmental protection.⁶⁷³ After the collapse of communism in the 1990s, a dispute arose between Hungary and Slovakia over a project to dam the Danube River. It was the first of its type heard by the International Court of Justice and highlighted the difficulty for the Court to resolve such issues decisively. This reveals the limits of international environmental law, and the potential for scientific methods to help resolve disputes between countries that share water resources. Science came to the aid of the International Court. Instead of determining the case outright, the Court left it up to the parties to reach an agreement in view of their treaty obligations and the damages born by each of the countries. To assess them, Hungarian and Slovak scientists and engineers used joint

⁶⁶⁹ Andrew Ashworth, *Principles of Criminal Law*, (Oxford New York: Clarendon Press, Second Edition, 1995), 204.

⁶⁷⁰ H. Tristram Engelhardt, Jr., "Introduction", in *Philosophy and Medicine: Mental Illness: Law and Public Policy* (edited by Baruch A. Brody and H. Tristram Engelhardt, Jr, Holland: D. Reidel Publishing Company 1980), ix.

⁶⁷¹ Science is used to determine, for example, the physiological effect that pregnancy has on girls who are under-aged. Furthermore, the effect of too many pregnancies on the woman's body is also determined by science.

⁶⁷² For example, science is used to determine the limit of the blood alcohol levels of a person driving. Science is also used to determine the advantages and disadvantages of legalising the use of Cannabis. Furthermore, science is used to determine which drugs are to be available without a prescription and which ones are not.

⁶⁷³ For example, the effects of air pollution are determined by way of scientific investigation amongst other methods.

environmental monitoring and evaluation to determine and agree on the amount of environmental impact caused by the dam.⁶⁷⁴ However, there have been some positive developments regarding the use of science on the legal status of the unborn since the case of *Gonzales v Carhart*⁶⁷⁵. This case used science to ban the method of partial-birth abortion. This case shattered a long stalemate on abortion regulation. The decision was the first to uphold a ban on a specific abortion procedure, but also represents the first time that the Court approved an abortion restriction that fails to provide an exception for the health of the pregnant woman. The 5-4 decision in *Gonzales* suggests an emerging conservative majority in the Court. In the end the court concluded that the “alleged health advantages were based on speculation without scientific studies to support them.”⁶⁷⁶ However, the court did not use science in the determination of the legal status of the unborn, only in the determination of the legality of a certain *method of abortion*. Therefore, this case may not save a single foetal life. The Partial-Birth Abortion Ban Act does not, in fact, promote the State’s interest in foetal life, but rather the interest in not having foetal life ended in a manner that Congress considers brutal and inhumane.⁶⁷⁷ Although these developments are in a positive direction concerning the use of science in international law, the irrationality of this case is still clear. It is irrational to hold that a certain method of abortion is inhumane, but the act of abortion itself is not. This is evident of the fact that, although science was used in abortion jurisprudence, it was not necessarily used in line with the principles of humanity.

The use of science in other areas of law (domestically and internationally) and also by pro-choice activists in their support for abortion, will result in the fact that rationality will require scientific investigations forming part of the anti-abortion arguments to be considered as well, giving rise to a rational procedural and substantive platform working towards discussion on the legal status of the unborn. Furthermore, in view of the vast application of science in several areas of law, it may be said that the absence of the use of science regarding the legal status of the unborn results in selective ethical relativism. In other words, secularism today preaches the use of science in several areas of law. As the examples show above, this is being done in several areas of law, yet when it comes to abortion, science is excluded. However, the answers we find in biology are also limited. Although biology is helpful in that

⁶⁷⁴ Libor Jansky, Masahiro Murakami and Nevelina I. Pachova, *Science is ally of international law on Danube: UNU book details formula for alleviating international conflict over water*, http://www.eurekalert.org/pub_releases/2005-02/unu-sia021805.php (accessed 28/01/2008).

⁶⁷⁵ 550 US (2007).

⁶⁷⁶ 550 US (2007).

⁶⁷⁷ Graham Gee, “Regulating Abortion in the United States after *Gonzales v Carhart*”, 984.

it presents us with facts, it is also limited in that it *only* presents us with facts (if one does not take into account the philosophy of science) as answers to our questions. It cannot offer value judgments and answers to moral or ethical questions⁶⁷⁸ and the abortion debate cannot be reduced to a question of scientific fact⁶⁷⁹ because in science there are too many grey areas.⁶⁸⁰ De Freitas⁶⁸¹ agrees in that science alone cannot provide the answer regarding the reasoning why the unborn is human and why not. Science can tell us when certain attributes can be detected in the unborn, but science cannot tell us which biological attributes establish the existence of a human being.⁶⁸² However, science indicates that the unborn is more than a mere (1) fetus, (2) entity with potential life or (3) biological or living organism.⁶⁸³ Therefore, life cannot be defined or disproved scientifically, but it can serve as an important measure adding value to the legal protection of the unborn.⁶⁸⁴ In other words, if the world is using science why can abortion jurisprudence not do the same? It will never be a fact or a non-fact but value is then added to the process regarding the determination of the legal status of the unborn. Legal and philosophical reasoning cannot ignore objective reality as confirmed by scientific findings,⁶⁸⁵ but on the other hand, this reality cannot be denied and if adapted and bent to suit political and social views, will amount to a manipulation of facts.

Bowes states that the beginning of life is conception and that “this straightforward biological fact should not be distorted to serve sociological, political, or economic goals.”⁶⁸⁶ Pro-choice advocates have adapted and manipulated scientific facts by applying the viability approach to the legal status of the unborn. Regarding the trimesters of pregnancy, no evidence for justification exists that the unborn is scientifically more important during the one stage of pregnancy than during another stage. Abortion touches on several areas and can be viewed as a legal, moral, social, political or religious question. Science (especially from the pro-choice camp) has received little, as well as partisan (viability), attention in the abortion debate and it can provide a unique perspective.⁶⁸⁷ What is known in the science of the unborn can help us to be more precise about just what sort of being the unborn is during the course of its coming

⁶⁷⁸ Micheline M. Mathews-Roth, “Is the Pre-implantation Embryo a Person?”, 2.

⁶⁷⁹ Harold J. Morowitz and James S. Trefil, *The Facts of Life: Science and the Abortion Controversy*, 6.

⁶⁸⁰ *Ibid.*, 10.

⁶⁸¹ S.A. de Freitas, “A critical retrospection regarding the legality of abortion in South Africa”, 140.

⁶⁸² *Ibid.*, 140-141.

⁶⁸³ *Ibid.*, 140.

⁶⁸⁴ *Ibid.*, 135.

⁶⁸⁵ Micheline M. Mathews-Roth, *Facing Scientific Facts*, 19.

⁶⁸⁶ Randy Alcorn, *Scientists attest to life beginning at conception*, http://www.epm.org/article/life_conception.html (accessed 31/01/2008).

⁶⁸⁷ Harold J. Morowitz and James S. Trefil, *The Facts of Life: Science and the Abortion Controversy*, 5.

into being.⁶⁸⁸ Matthew-Roth (Harvard University Medical School), states that: “Our law, one function of which is to help preserve the lives of our people, should be based on accurate scientific data.”⁶⁸⁹ Many state that science should not play a role because it is in itself normative and open to many interpretations.

The pro-life advocate appeals to established scientific facts about the gradual development of a fertilised egg into a viable foetus with the biological characteristics of a human infant, and the pro-choice advocate refers to testable claims about the effects of pregnancy and childbearing on women.⁶⁹⁰ In this regard, Wertheimer has argued that pro-choice and pro-life advocates can agree on all the facts about foetuses (and the circumstances of women who bear them) and still disagree in their beliefs as to whether the foetus is a person. Different plausible beliefs lie at the base of the best arguments for and against the legalisation of abortion. Besides the religious approach, the pro-life belief derives its plausibility from secular considerations such as the similarity of successive stages of foetal development, just as the pro-choice belief derives its plausibility partly from the apparent differences between a zygote and an infant. Both pro-life and pro-choice positions are in this sense reasonable. However, Gutmann and Thompson state that what is important is that “...reason itself does not point in either direction: it is we who must point it, and we who are led by it ...”⁶⁹¹

Bearing this in mind, the author is in agreement that science can be the friend and foe of both sides of the abortion debate, especially if one applies philosophy. On the other hand one needs to ask the question as to what extent the pro-life use of science is accommodated in international and regional human rights jurisprudence (even in local legal systems). In other words, the question needs to be asked whether there is commitment and whether there are procedures in place to fairly balance the use of science to lend weight to the pro-life stance as well as the pro-choice stance. Also, one may argue that science supporting the classification of the foetus as something similar to or nearly similar to the human could lie on a more convincing level, as compared to science indicating the effects of pregnancy on women (bearing in mind of course that it is not life-threatening or having the potential to psychologically impair the mother as a result of extreme scenarios such as rape and incest).

⁶⁸⁸ Michael J. Flower, “Coming into Being: The Prenatal Development of Humans”, in *Abortion, Medicine and the Law*, (edited by J. Douglas Butler and David F. Walbert, Oxford: Facts on File, Fourth Edition, 1992), 451.

⁶⁸⁹ Randy Alcorn, *Scientists attest to life beginning at conception*, http://www.epm.org/article/life_conception.html.

⁶⁹⁰ Amy Gutmann and Dennis Thompson, “Moral Conflict and Political Consensus”, 72.

⁶⁹¹ *Ibid.*, 72-73.

Therefore, although science presents us with facts, this does not mean that science is objective. This is a myth, taking into consideration that various scientific models are applied by corresponding value judgments. However, this does not negate the use of science in the debate on the legal status of the unborn.⁶⁹²

Jurisprudence on the legal status of the unborn without discussion of science from a pro-life perspective will in the end present an irrational argument, without justification and without consideration of all the necessary facts. The use of science in rational platforms on the legal status of the unborn must be balanced between pro-life and pro-choice advocates and not only considering the use of science when it comes to pro-choice arguments. Furthermore, the sole use of science in a discussion on the legal status of the unborn will also be irrational since a rational approach calls for an inclusive approach considering all subjects relevant to the legal status of the unborn. Yet, the theory that the use of science in law and more importantly the use of science in abortion are secondary in importance to political and social considerations and also sexual politics (such as women's right to equality and reproductive health rights) is flawed and leads away from important empirical knowledge because the definition of science provides us with the fact that science offers a unique approach to the abortion debate in that it provides for physical knowledge obtained regarding the unborn, tested and proven by scientific method and experimentation.

Thus, an approach completely excluding science will be an irrational one even though science has its limitations when dealing with public policy, and the issues that are raised in the abortion controversy dramatises these limitations.⁶⁹³ For example, science fails to answer all questions of philosophy, morality and humanity. A rational argument on abortion also requires the legal status of the unborn to be considered in the light of issues such as morality, humanity and international justice. Science cannot perform this function either. Therefore, science alone does not provide a determinative answer to the abortion question. Nevertheless, in a pluralistic society, when deciding an issue that is deeply rooted in human biology, it certainly makes sense to first delve deeply into the facts to search for a conceptual fault line where distinctions can be drawn based on science and reason.⁶⁹⁴ In other words, as the definition of science provides, it would make sense to first find a material set of

⁶⁹² S.A. de Freitas, "A critical retrospection regarding the legality of abortion in South Africa", 135.

⁶⁹³ Clifford Grobstein, Joseph Stokes, Brian G. Zack, "Defining Human Life", 6.

⁶⁹⁴ Donald Hope, "The Hand as emblem of Human Identity: A solution to the abortion controversy based on science and reason", 210.

knowledge on the unborn, providing a factual framework to work from, before embarking on further discussions concerning the legal status of the unborn in international law. A “conceptual fault line” implies that a scientific concept serving as a dividing point between those to be considered as human beings and those not to be considered as human beings is needed. For example, it must be determined at which point science presents the most evidence to show that there is a human being present. If sufficient evidence exists to justify the claim that the unborn is a human being at the moment of conception, such a conceptual fault line will then be conception.

Not only is science important to the legal status of the unborn on its own – it is also important in the use of humanity (humaneness) to further attempts for a rational platform on the legal status of the unborn. By applying science within the context of humanity, adherence is also given to one of the requirements of a rational approach in terms of which an argument or debate needs to be inclusive, thereby including all concepts and subjects having a bearing on the legal status of the unborn. Humanity (being humane) in the context of science is relevant when it comes to the legal status of the unborn. Denise Meyerson, in her article, reaches the conclusion that despite denying that the foetus has the right to life, the values of human dignity, equality and freedom⁶⁹⁵ play a special role in the interpretation stage of human rights analysis. She says that ‘even if there is no human rights protection prior to birth, we need to consider whether the values of human dignity, equality and freedom might nevertheless operate as a constitutional constraint on legislation governing access to abortion’. Meyerson concludes that human dignity does operate in that way. ‘It is the value of human dignity which is most obviously under threat when abortion is permitted, because it is hard to deny that the destruction of foetal life, although it violates no constitutionally protected subject’s right to life, nevertheless undermines human dignity.’⁶⁹⁶ Therefore, even if the unborn has no human rights or any other form of protection, it is necessary that the facts that science presents be viewed in light of humanity. In order for science, in the context of the legal status of the unborn, to be in line with humanity, the pro-choice advocates need to use science carefully and without prior assumptions. An example of this is Judith Jarvis Thomson in her article ‘A defence of abortion.’⁶⁹⁷ She uses the violinist example, comparing this to the

⁶⁹⁵ Although the concept “humanity” differs from equality, freedom and human dignity, all these principles are derived from humanity.

⁶⁹⁶ Tjakie Naudé, “The value of Life: A note on *Christian Lawyers Association of SA v Minister of Health*”, 558.

⁶⁹⁷ See Judith Jarvis Thomson, “A defense of abortion”, 241.

position of the pregnant woman. She describes how a violinist is attached to one's kidneys and must be attached there for nine months. He will only be removed once he is healed from his *ailment*. The use of the word *ailment* in the example is suggestive of the condition of pregnancy. This assumption is one that assumes pregnancy to be a mere condition of ill health and nothing more. This is indicative of an inhumane use of science, without justification. Another example where pro-choice activists misuse science and make unjustified assumptions is their reference sometimes to the first and second trimester unborn as a "mere blob of tissue". The reasons why this assumption is unjustified and incorrect (in the light of evidence to the contrary) are discussed below. The heated debates on abortion clearly reveal that the unborn is more than just a mere "nothing" to society.

Let us assume the unborn to be the very least in society. Let us assume it to be a *thing* or a mere *property*. As "things", or "quasi-property", the unborn is still subject to government regulation. Just as there are federal and state regulations that limit individual liberty to cut down trees or slaughter domestic animals, and to control hunting and fishing seasons of wildlife, there are state laws that protect the health of pregnant women and regulate abortion. However, her assumed constitutional right of privacy gives a pregnant woman more personal freedom and preferred status in an "open season" to arbitrarily take the life of the unborn, than to take the life of an animal, which is protected by laws against cruelty and excessive slaughter.⁶⁹⁸ Humanity requires international law and science to at least consider whether the unborn is a "human being". At least, international law should make attempts towards such investigation on the legal status of the unborn. In this regard, international law must also pursue a more in-depth investigation into the meaning of life and mankind in the light of science that meets the requirements of humanity.⁶⁹⁹ Also bear in mind the importance of science in assisting in the determination of humanity. The following requires emphasis: Carter states that in jurisprudential discussion such as the issue pertaining to the legal protection of the unborn, proponents are uneasy in stating the chain of reasoning that has led them to their moral conclusions. In other words, science, according to Carter, is being used to buttress a claim that proponents have actually reached on some other ground. Consequently science is tried, which perhaps seems more 'objective'. In the words of Carter: "But that is the other side of scientism's trap: it persuades us that our strongest moral convictions are useless in public debate unless we can repackage them as the conclusions of

⁶⁹⁸ Charles I. Lugosi, "Respecting Human life in the 21st Century America: A moral perspective to extend civil right to the unborn from creation to natural death", 218.

⁶⁹⁹ R.J. Gerber, "Abortion: Parameters for Decision", 139.

natural science. Scientism thus betrays a lack of faith in our ability to conduct dialogues on moral questions.” According to Carter, this then is a way in which we abandon civility when we go to scientism: “we manifest a mistrust of public moral conversation, and we demonstrate a disbelief that our opponents might have anything useful to say. When democratic dialogue becomes infected with such mistrust and disbelief, the conversation simply stops.”⁷⁰⁰

Now, in response to this insight, the discussion on science makes mention of the fact that science is not an absolute, although it can play an important role in jurisprudential debate, because science can be complementary to rationality, as well as to common agreement. Science however, is not the *only* measure. Positive glimpses do exist regarding the enhancement of humanity via science when it concerns the legal status of the unborn. In the *Roe* decision, a ‘background’ sensitivity regarding the unborn is also to be witnessed, which was largely directed by scientific inclinations. This took the form of Justice Powell’s eleventh-hour intervention, Justice Powell having urged that the Texas case not be decided on vagueness grounds, but on the central merits of the claims.

More specifically, Powell wrote privately to Blackmun that drawing the line at viability would be “more defensible in logic and biology than perhaps any other single time.” Powell directed Blackmun’s attention to the opinion in *Abele v. Markle*⁷⁰¹, which suggested that the state’s interest in foetal life would be weightier after the foetus became capable of living outside the uterus.⁷⁰² What is also interesting is the actual sensitivity that Blackmun had in that fundamentally he thought that he was writing an opinion that would reform abortion law, largely by protecting reputable physicians acting in good faith. Hunter states that although the decisions in *Roe* and *Doe* accomplished that, they also ended state power to compel the completion of pregnancy based on absolutist notions of foetal life or traditional precepts about sexual morality. As a result, in cultural if not legal terms, to his own surprise and dismay, Blackmun wrote the repeal of abortion law.⁷⁰³ The parameters of the obstacle placed in the way of the state’s potential to protect the unborn were not expected by Blackmun, which indicates that even in the *Roe* decision there was an underlying sensitivity to the status of the unborn.

⁷⁰⁰ Stephen L. Carter, *Civility. Morals, Manners and the Etiquette of democracy*, 206.

⁷⁰¹ 351 F. Supp. 224 (D. Conn. 1972).

⁷⁰² Nan D. Hunter, “Justice Blackmun, Abortion, and the Myth of Medical Independence”, *Brooklyn Law Review*, Vol. 72, Number 1, (2006), 183-184.

⁷⁰³ *Ibid.*, 185.

Our starting point on the importance of science in attempts towards a universal platform for discussion on the legal status of the unborn can therefore be concluded with the following: Science, within the context of this thesis, means that which can be physically and materially seen. It includes explanations and justifications and therefore provides us with facts. It is proposed in this thesis that science should be used in its material form, and all material evidence obtained regarding the unborn. Furthermore, it is proposed that it is irrational not to use science in debate on the legal status of the unborn, since this is contrary to an inclusive approach. This is currently being done in domestic legal systems, where the case of *Roe v Wade* was a primary example of the lack of consideration of science, only to find itself contradicted and science used in a partisan manner by way of viability. Also, when science is used, this must be done rationally. If the pro-abortionists use science in their debates, the pro-life advocates must also be allowed to do so. However, the author is aware that science cannot be used alone to determine the legal status of the unborn as this will also result in an irrational and exclusive approach. Therefore, it is proposed that science should be used, together with other concepts such as humanity, human rights and justice (amongst others), in determining the legal status of the unborn. Furthermore, science is important in the determination of humanity when it comes to the legal status of the unborn. Several scientific assumptions are being made when it comes to the legal status of the unborn and such assumptions may point towards inhumanity, especially in light of the possibility that those assumptions are not proven. If they are incorrect, they will present grave breaches in terms of humanity – for example, reference to pregnancy as an “ailment” or to the 1-month-old unborn as a mere “blob of tissue.”

2. The unborn and development of the unborn as defined by science

The voluminous literature on abortion distorts the biological facts evident from the incorrect use of words such as ‘foetus’ and ‘embryo’. The word “foetus” is routinely misused. The foetus is written about “from the moment of conception”. However, the foetal stage does not begin until after the eighth week of gestation. Until this time there is not a foetus but an embryo.⁷⁰⁴ The word embryo is derived from Greek, ‘to swell or teem within’, and refers to the initial stages of development after implantation in the uterus. The word foetus is derived

⁷⁰⁴ Donald Hope, “The Hand as emblem of Human Identity: A solution to the abortion controversy based on science and reason”, 205.

from the Latin meaning ‘young one’ or ‘offspring’ and refers to the stage that begins when the embryo has developed all of its internal organs and attained the exterior form of a human being.⁷⁰⁵ Misuse of these terms illustrates general confusion about the biological substrate of the abortion controversy as lawyers from literary rather than scientific backgrounds deal with these issues.⁷⁰⁶

Not only is knowledge of concepts concerning the unborn necessary but also knowledge of the process of development of the unborn. First of all, four sorts of processes need to be distinguished involving human generative development: (a) Cell proliferation, in which the number of cells increases; (b) growth, in which there is an increase in the mass of the developing organism; (c) morphogenesis, in which progressive changes in form take place; and (d) histogenesis, in which cells specialise into tissues. Morphogenesis and histogenesis are often lumped together under the title *differentiation*.⁷⁰⁷ It is necessary to discuss these processes in detail. *Fertilisation* and *conception* is the time of the fusion of the egg cell and the sperm cell.⁷⁰⁸ This takes place in the upper reaches of the Fallopian tube, which connects the ovary to the uterus.⁷⁰⁹ The sperm swims ‘up’ the tube while the egg is swept toward the uterus.⁷¹⁰ There is a tendency in some medical circles to define conception as the time of the implantation of the developing embryo into the wall of the uterus rather than the time of fertilisation of the egg by the sperm. However, one must remember that implantation occurs about six to ten days after fertilisation and the zygote is at that stage already well into its development.⁷¹¹ Fertilisation is a process and not a moment: it takes about twelve to twenty-four hours to complete. Fertilisation begins with the contact of a sperm with the outside of an *oocyte* (egg cell). Many sperm attach themselves to a typical egg and, through chemical action; start to break down the egg’s protective outer membrane. Eventually one sperm gets through.⁷¹² The sperm then penetrates the *oocyte*. The male and female *pronuclei* form, come next to each other but do not fuse. Fertilisation ends with the breakdown of the pronuclear

⁷⁰⁵Ibid., 206. Examinations of embryos have shown that structural characteristics recognisably human are present at twelve to thirteen weeks of development. In other words, this is the end of the first trimester. This is the traditional time to change the term embryo to foetus. Responsive movements are strong and spontaneous movement is beginning at this moment. The foetus is still very small but any observer is able to see that it is a human being, *ibid.*

⁷⁰⁶ *Ibid.*

⁷⁰⁷ Lawrence C. Becker “Human Being: The Boundaries of the Concept”, 341.

⁷⁰⁸ Michelin M. Mathews-Roth, “Facing Scientific Facts”, 69.

⁷⁰⁹ Harold J. Morowitz and James S. Trefil, *The Facts of Life: Science and the Abortion Controversy*, 45-46.

⁷¹⁰ Michael J. Flower, “Coming into Being: The Prenatal Development of Humans”, 438.

⁷¹¹ Michelin M. Mathews-Roth, “Facing Scientific Facts”, 69.

⁷¹² Harold J. Morowitz and James S. Trefil, *The Facts of Life: Science and the Abortion Controversy*, 45-46.

membranes and the intermingling of maternal and paternal chromosomes resulting in a new cell namely, the zygote.⁷¹³ Therefore, the first sperm to make contact moves into the egg itself, delivering twenty-three chromosomes that contain the genetic information that will contribute the male's characteristics to a new individual.⁷¹⁴

Fertilisation is also the moment when all things are fixed: the colour of the eyes, the hair, the skin, the shape of the nose and ears, the strength of the person and all other characteristics. Gender is also determined during fertilisation.⁷¹⁵ The fertilised egg may still develop and duplicate into twins. Though one-fourth of the fertilised eggs may perish before implantation, this does not negate the importance of the ovum after impregnation.⁷¹⁶ The two sets of chromosomes together are called a genome, constituting the unique genetic contribution of each parent to a cell that now has the capacity to begin development.⁷¹⁷ During the next four days the zygote continues its journey down the Fallopian tube into the uterus, and it starts to divide. By the time it reaches the uterus the original zygote has grown to eight or sixteen cells. A few more divisions occur and the *blastocyst* develops. It eventually develops into the placenta and the embryo.⁷¹⁸ It is not until about sixty hours after egg and sperm first made contact that any new genetic information is expressed; this means that for about two-and-a-half days following initial egg/sperm contact, the molecular characteristics of the pre-embryo are maternally determined.⁷¹⁹ Six days after fertilisation, the *blastocyst* implants itself in the wall of the uterus. This is implantation of the growing embryo in the wall of the uterus.⁷²⁰ Implantation is not achieved in a matter of minutes or hours. It is a process that continues for several weeks. The embryo begins to derive nourishment from the mother almost immediately. It does this by soaking up nutrients from small blood vessels that burst as it digs into the uterine wall. So rich are these nutrients that for several days, the embryo more than doubles in size every twenty-four hours.⁷²¹

⁷¹³ Micheline M. Mathews-Roth, "Is the pre-implantation embryo a person?", 2-3.

⁷¹⁴ Michael J. Flower, "Coming into Being: The Prenatal Development of Humans", 438-439.

⁷¹⁵ S.A. de Freitas, "A critical retrospection regarding the legality of abortion in South Africa", 138-139.

⁷¹⁶ S.A. de Freitas, "A critical retrospection regarding the legality of abortion in South Africa", 139.

⁷¹⁷ Michael J. Flower, "Coming into Being: The Prenatal Development of Humans", 439. According to Jordaan, the embryo, at about four days after fertilisation, is a "spherical clump of cells, like a microscopic raspberry". He also states that there is a 50% chance that it will never implant in the uterine wall and subsequently pass right through the uterus and out of the woman's body. The chance of actually implanting, leading to a successful pregnancy, is between 10 and 20%, Donrich W Jordaan, "The legal status of the human pre-embryo in the context of genetic revolution", 239.

⁷¹⁸ Micheline M. Mathews-Roth, "Is the pre-implantation embryo a person?", 3.

⁷¹⁹ Michael J. Flower, "Coming into Being: The Prenatal Development of Humans", 439.

⁷²⁰ Micheline M. Mathews-Roth, "Is the pre-implantation embryo a person?", 3.

⁷²¹ Shettles and Rorvik, *Rites of Life*, 41-42.

All of the stages of development up to this point are referred to as pre-embryonic. As implantation comes to completion and as the third week of development commences, cells begin moving about in a process called *gastrulation*. Therefore, what was once a disc of cells now becomes increasingly complex. A three-dimensional embryo with a distinguishable anterior-posterior axis is identified. One can identify the future head- and tail-ends.⁷²² ‘Embryo’ is used to describe the system after implantation; ‘foetus’, to describe it after sixty days.⁷²³ The mass of cells gradually takes on a complex and increasingly recognisable human shape, with identifiable internal organs and organ systems. A period of rapid growth as well as further developments of tissues and organs will occur starting in the ninth week, with a much slower rate of growth beginning at about twenty weeks of development.⁷²⁴ Up to the end of the second month the products of conception are called an embryo. By the end of the first month the length is about one third of an inch and the weight about twenty grams; the eyes and ears are distinguishable and limb buds are present. By the end of the third month the length is three quarters of an inch, the weight about 3 oz, the neck is developed and the oral and nasal cavities become separated by the palate. Sexual organs, fingers and toes have appeared and ossification has begun in most bones. The sex is not distinguishable until the fourth month. By the end of the fifth month the length is 9 inches and weight about 1 lb and hair appears.⁷²⁵

The emergence of the nervous system is exceedingly complex and the region of the early three-week-old embryo that will alter to form the central nervous system can be identified.⁷²⁶ Two questions need to be asked. When do we first detect electrical activity? When does a complex function appear that we know is dependent on prior neural maturation? The answer to both questions is the same: about the sixth to seventh week.⁷²⁷ The late-stage embryo of six weeks can be seen to exhibit occasional and just discernible movement. About a week later, a startle response emerges. Over the next six to seven weeks, spontaneous motor activities appear. The foetal limbs and head move about, breathing movements occur, and swallowing and sucking are observed.⁷²⁸ By the end of the first trimester, the twelfth week,

⁷²² Michael J. Flower, “Coming into Being: The Prenatal Development of Humans”, 440.

⁷²³ Harold J. Morowitz and James S. Trefil, *The Facts of Life: Science and the Abortion Controversy*, 45-46.

⁷²⁴ Michael J. Flower, “Coming into Being: The Prenatal Development of Humans”, 442.

⁷²⁵ Walter Montague Levitt, *Short Encyclopaedia of Medicine for Lawyers*, (London: Butterworths, 1966), 166.

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.*, 443.

⁷²⁸ *Ibid.*

the foetus is more than three inches long and weighs about one ounce. The limbs are well shaped and the rib structure is visible through the skin. The digestive system is complete. Blood is beginning to be produced in the bone marrow. The brain has taken on the overall anatomical features that will characterise it for life.⁷²⁹ During the second trimester, the fourth month, the foetus may more than quadruple its weight – going from one ounce to as many as seven ounces. The foetus now has the fingerprints he will have for the rest of his life, fine hair covers much of the body and the ears begin functioning. The lungs are largely complete but still collapsed.

The heart pumps several quarts of blood through the foetus each day. The brain has many convolutions. At about the sixth month the foetus is much more active. The mother will definitely feel the unborn now. The mother may also now learn the sleeping patterns of her unborn child. She may even feel the foetus stretch upon awakening. When occasionally the foetus hiccups, the mother will know it is there. Hair follicles and sweat glands develop; cartilage gives way to real bone. At the end of the second trimester the foetus weighs two pounds and is about a foot in length. During the third trimester, the foetus will more than triple its weight. At nine months the baby measures about twenty inches. Final touches occur during this month – for example, fingernails and toe nails grow rapidly.⁷³⁰

Rich Deem asks the question whether science addresses the concept of when human life begins, and if so, what does science say?⁷³¹ When all the above information is considered it is clear that according to science there is enough data available to make a firm case for the protection of the human being from the zygote stage.⁷³² Given what is presently known in embryology, we can do no less.⁷³³ Rich Deem is also of the opinion that the facts that science

⁷²⁹ Shettles and Rorvik, *Rites of Life*, 55.

⁷³⁰ *Ibid.*, 61-65.

⁷³¹ Rich Deem, *Science and Abortion: The scientific basis for a pro-life position.*, <http://www.godandscience.org/doctrine/scienceabortion.html> (accessed 1/02/2008).

⁷³² Micheline M. Mathews-Roth, "Is the pre-implantation embryo a person?", 13.

⁷³³ *Ibid.*, 14. Some of the world's most prominent scientists and physicians testified to a US Senate committee that human life begins at conception. Dr. Alfred M. Bongioanni, professor of paediatrics and obstetrics at the University of Pennsylvania, stated: "I have learned from my earliest medical education that human life begins at the time of conception...I submit that human life is present throughout this entire sequence from conception to adulthood and that any interruption at any point throughout this time constitutes a termination of human life... I am no more prepared to say that these early stages (of development in the womb) represent an incomplete human being than I would be to say that the child prior to the dramatic effects of puberty ... is not a human being. This is human life at every stage." Furthermore, Dr Jerome LeJeune, professor of genetics at the University of Descartes in Paris, was the discoverer of the chromosome pattern of Down syndrome. He states that "after fertilization has taken place a new human being has come into being." He states further that this "is no longer a matter of taste or opinion," and "not a metaphysical contention, it is plain experimental evidence."

presents are enough to make a positive case for the legal protection of the unborn.⁷³⁴ He states that:

Those who have taken embryology know full well the answer to this question. If you examine pro-choice arguments for abortion, you will find the proponents using such terms as "tissue" and "grams of material" (a weight). What they do not like to discuss is what that "tissue" consists of.⁷³⁵

He reveals that discussion of what this "tissue" consists of will reveal sufficient data in science to provide legal protection for the unborn. The aborted foetus is not just "a blob of tissue". He mentions the experience of Dr David Brewer. The doctor, upon encountering his first experience of abortion, describes the "blob of tissue" as follows:

I opened the sock up and I put it on the towel and there were parts in there of a person. I'd taken anatomy; I was a medical student. I knew what I was looking at. There was a little scapula [shoulder blade] and there was an arm, and I saw some ribs and a chest, and I saw a little tiny head, and I saw a piece of a leg, and I saw a tiny hand. ... I checked it out and there were two arms and two legs and one head, etc., and I turned and said, I guess you got it all ... It was pretty awful that first time... it was like somebody put a hot poker into me.⁷³⁶

Shettles and Rorvik agree that the unborn is not just a "blob of tissue" and confirm this by stating that those who employ this terminology are genuinely ignorant of the facts, while others are willing to overlook the biological facts, convinced that abortion is an acceptable means to a desired end.⁷³⁷ They confirm that when the foetus is ten weeks or older, recognisable human body parts often emerge.⁷³⁸ In light of the available scientific data, sufficient to make a firm case against abortion, the consequences of not regarding the

He adds: "Each individual has a very neat beginning at conception." Professor Hymie Gordeon states that: "by all criteria of modern molecular biology, life is present from the moment of conception", Randy Alcorn, *Scientists Attest to Life Beginning at conception*, http://www.epm.org/article/life_conception.html. Therefore, conception meets all the criteria of modern molecular biology for life.

⁷³⁴ According to Rich Deem, "human beings are not constructed in the womb - they develop." All major organ systems are initiated within the first few weeks after conception. The process of embryonic development is a continuous process, with no obvious point at which the foetus magically becomes a "person." Further, science tells us that the heart of the human foetus begins to form eighteen days after conception. There is a measurable heartbeat twenty-one to twenty-four days after conception. This is only seven to ten days after a woman would expect to begin her menses. Since most women have cycles that can vary by this amount, they do not discover they are pregnant until after this point. Therefore, *all* abortions stop a beating heart, even "early" abortions. However, most abortions do not occur until four to six weeks after the foetus begins to form. The human brain begins to form on day 23 and is sufficiently formed to produce brain waves by 6 weeks, which means that most abortions destroy a functioning human brain, Rich Deem, *Science and Abortion: The scientific basis for a pro - life position*, <http://www.godandscience.org/doctrine/scienceabortion.html>.

⁷³⁵ Ibid.

⁷³⁶ Ibid.

⁷³⁷ Shettles and Rorvik, *Rites of Life*, 56.

⁷³⁸ Ibid., 58.

developing human being as a person worthy of protection are terrible and vast. Lugosi⁷³⁹ agrees that there is no biological basis to deny that the unborn, from the first moment of their creation at conception, are fully alive and are fully human. The person, who would have developed from that embryo, if it had been allowed to live, will be destroyed also: a human life will be lost. Such consequences can be described by a situation such as that of Dr Bernard Nathanson. He owned and operated what was at the time the largest abortion clinic in the western hemisphere. He was directly involved in over sixty thousand abortions. After studying developments in the science of fetology, he was led to the conclusion that he had made a mistake. He later wrote that he was deeply troubled by his “increasing certainty that I had in fact presided over 60 000 deaths.”⁷⁴⁰

3. Scientific and anthropological views on the reverence⁷⁴¹, beginning and sanctity of life⁷⁴²

Several theories and views on the beginning of life, personhood and the concept ‘human being’ exist. In order to obtain a rational universal anthropology on the concept human being in the context of abortion, the different views on the beginning of life need to be investigated. Although it is not necessarily concluded that the legal status of the unborn should be determined by the subject “life”, it is still important to consider the subject to maintain an inclusive approach and be rational. The subject “life” is also important to add in the chapter concerning science since science is the one discipline that is very relevant in determining the beginning and end of life. However, science also supports the clarification and confirmation that an organism equipped with the necessary cellular make-up, substance and form, should receive the necessary attention.

⁷³⁹ Charles I. Lugosi, “Respecting Human life in the 21st Century America: A moral perspective to extend civil right to the unborn from creation to natural death”, 218.

⁷⁴⁰ Randy Alcorn, *Scientists attest to life beginning at conception*, http://www.epm.org/articles/life_conception.html.

⁷⁴¹ ‘Reverence for life’ implies the extension of moral concern to all living things. It also entails the recognition of an obligation not to harm even the ‘lowliest’ organism. A person who reveres life, Schweitzer says, “tears no leaf from a tree, plucks no flower, and takes care to crush no insect”, Mary Anne Warren, *Moral Status: Obligations to Persons and Other Living Things*, 32.

⁷⁴² Jordaan mentions Silver’s definitions of “life”: ‘There are two very different meanings of the word life as it is used in connection with humanness. One meaning is associated with the basic processes of energy utilization, maintenance of structure and information, reproduction, and evolution that are shared by all living things. In the context of bio-life specifically, life in a general sense is rooted within the individual cell...In contrast, the second meaning of the word life is rooted within the cerebral functioning that gives rise to consciousness. In human beings, life in a special sense is localized to the region between your ears, but it lies far beyond the level of any individual nerve cell’, Donrich W Jordaan, “The legal status of the human pre-embryo in the context of genetic revolution”, 241.

Today, life has become a very relative concept evident in the different views on life and the anomalies existing around it. What is regarded as scientifically correct is also not always the same for everyone. Therefore, science is not always objective. All kinds of anomalies exist. In hospitals, on one side of the hall, doctors are working to save a five hundred-gram preemie, while on the other side of the hall they are aborting a similar preemie.⁷⁴³ Cigarette containers have warnings regarding the dangers of smoking to the unborn, but still no substantial legal protection is provided to the unborn. The same anomalies and subjectivity exist in the abortion debate and the views on the beginning of life. When people talk about abortion they start by talking about when life begins. The reason for this is that people think that the abortion issue is determined primarily by the claims that life is sacred.⁷⁴⁴

The concept of life varies when considered in the light of science. Several examples exist. These include: before the union of the sperm and ovum, at conception (fertilisation), upon the acquisition of a soul, at the change from embryo to foetus - after about the fourth month, upon the acquisition of human form, when the foetal brain has developed to a certain functional level, at or after quickening, on viability, at birth or during delivery or following birth.⁷⁴⁵ The pro-choice supporters make a strong case when they argue the embryonic stages of development. Pro-life supporters claim that life begins at conception, however the pro-choice argument leads that conception is a process over time and therefore the claim that life begins at conception becomes ambiguous. After fertilisation, there are possibilities of splitting of one embryo into two or more individuals or the merging of two embryos with different genotypes into one individual. This questions the notion of individuality at this early cellular level of development.⁷⁴⁶ The protagonists of this view hold that human life begins fourteen days after conception. The main reason for this is that the fertilised ovum shall have been implanted in the womb and the possibility of its division leading to the loss of its individuality is completely lost. Dworkin states that ‘scientists disagree about exactly when the biological life of an animal begins, but it seems undeniable that a human embryo is an identifiable living organism at least by the time it is implanted in a womb...’⁷⁴⁷

⁷⁴³ Professor Stanley Hauerwas, *Abortion Theologically Understood*, Dothan: Taskforce of United Methodists on Abortion and Sexuality, 1991, www.lifewatch.org/abortion.html (accessed 25/03/2008).

⁷⁴⁴ Ibid.

⁷⁴⁵ Edwin Kenyon, *The Dilemma of Abortion*, (London: Faber and Faber, 1986), 22-23.

⁷⁴⁶ Donald Hope, “The Hand as emblem of Human Identity: A solution to the abortion controversy based on science and reason”, 207.

⁷⁴⁷ Jude Ibegbu, *Rights of the Unborn Child in International Law*, 491.

However, when pro-choice argument is applied to the more mature foetus, there is a collision with the biological facts. At twenty weeks the foetus is similar to a premature human infant. It has well-developed facial features, arms, legs, hands, feet, fingers, toes, fingernails and fingerprints. It breathes amniotic fluid and moves both spontaneously and in response to stimuli. It sucks, swallows and squints. The fetus is responsive to light and sound. It has well-developed external genitalia that make it easily identifiable as male or female.⁷⁴⁸ Pro-lifers also state that the viability standard in *Roe v Wade* sometimes means that the constitutional abortion right borders on infanticide.

There have been cases where the foetus is aborted and emerges alive from the process, though possibly gravely injured.⁷⁴⁹ According to Morowitz and Trefil the mistake being made is the fact that participants in the debate ask the wrong question. This question is: “When does an individual life begin?” This question cannot be answered by science.⁷⁵⁰ The reason for this is because science cannot provide a definition for the meaning of ‘individual life’.⁷⁵¹ Humans aren’t very much different from other animals. Human cells function in much the same way as other animals and they use the same molecules to carry out the same tasks. In light of this connection of human beings to the rest of the living world, what is the difference that sets us apart from the rest of the world?⁷⁵² Therefore, we do not ask “when does life begin?” but “When does the foetus acquire those properties that make humans uniquely different from other living things?” First one has to determine the properties distinguishing human beings from other living beings, and then the development of the foetus has to be investigated.⁷⁵³ This point of departure is not necessarily correct however. These authors again begin their scientific investigation from the presumption that the legal status of the unborn should be found in the comparison of the human being with other living beings and when the human being’s humanness or “difference” from other animals develops. As a result therefore, Morowitz and Trefil⁷⁵⁴ eventually come to the conclusion that conception is not special. According to them there is no specific time where a new life is created. All that

⁷⁴⁸ Donald Hope, “The Hand as emblem of Human Identity: A solution to the abortion controversy based on science and reason”, 208.

⁷⁴⁹ Ibid.

⁷⁵⁰ Harold J. Morowitz and James S. Trefil, *The Facts of Life: Science and the Abortion Controversy*, 6.

⁷⁵¹ Ibid., 7.

⁷⁵² Ibid., 8.

⁷⁵³ Ibid., 9.

⁷⁵⁴ Ibid., 46-47.

it is, is two previously existing living things that come together to form another living thing and not a new set of DNA marking the start of new life.⁷⁵⁵

They believe that the zygote is not unique, in that the idea of a new combination of DNA as being unique is a poor way to support the idea that life begins at conception.⁷⁵⁶ The crux of their argument is to distinguish the difference between human beings and other living things. They call this *humanness* and investigate when the human being acquires this humanness which distinguishes them from other living things. They find that the difference conferring humanness is the addition of a greatly enlarged cerebral cortex – far larger than that of an ordinary primate. They then state that it is important to ascertain the point at which each individual human acquires a functioning cerebral cortex, the quality of humanness.⁷⁵⁷ If it is argued that the acquisition of humanness in the foetus is linked to the development of the cerebral cortex, the question is when is the cerebral cortex developed? During the second month most of the major organs of the body start to form in the embryo.⁷⁵⁸ During this period the embryo acquires “mammal-ness” and by the end of the first trimester the foetus has clearly acquired “primate-ness.”⁷⁵⁹ The period from twenty-five to thirty-two weeks, then, is what we will identify as the time during which the foetus acquires the property of humanness.⁷⁶⁰

In reply to such pro-abortion scientific views, anti-abortion scientific views also exist. These include that at the time of conception a situation exists where an adult human being could develop.⁷⁶¹ In other words, a potential life may exist. Mathews concludes that 1) there is continuity in development from the zygote stage onwards: the developing human remains a member of the human species and is the same individual from the start as a zygote until natural death because of the presence of human genes; 2) monozygotic twinning⁷⁶² is of genetic origin and thus two or more individuals would be present from the zygote state on; and 3) human zygotes only give rise to humans, not *hydatidiform* moles or members of other

⁷⁵⁵ Ibid., 47.

⁷⁵⁶ Ibid., 49.

⁷⁵⁷ Ibid., 80.

⁷⁵⁸ Ibid., 84.

⁷⁵⁹ Ibid., 85.

⁷⁶⁰ Ibid., 119.

⁷⁶¹ Ibid., 48.

⁷⁶² This is also known as identical twins. A type of twins derived from a single (mono) egg (zygote). Monozygotic twins form when a single fertilised egg splits into two embryos. Because the twins share the same DNA set, they tend to have similar features, “Monozygotic”, *About.com: twins and multiples*, http://multiples.about.com/cs/glossary/g/monozygotic_def.htm (accessed 28/02/2008).

species.⁷⁶³ Brody, who approaches the unborn from a philosophical point of view⁷⁶⁴, agrees with the finding that human zygotes give rise to humans and not members of another species. Brody mentions the *principle of essentialism*. An object only has a property essentially if it cannot lose it without going out of existence. If it has the property accidentally, it can change and lose that property without extinction. Brody uses the following example: If *o* possesses a property *P*, and a change occurs, destroying *P* but *o* continues to exist, the change is an alteration and not a substantial change causing *o* no longer to exist.⁷⁶⁵ The essential properties of an object determine what a natural kind is. The set of objects having that property is a natural kind.⁷⁶⁶ If every member of that class has that property essentially, if no human being can stop being a human being and still exist, then the class of human beings will be a natural kind. So a human being goes out of existence when he stops being human: being human is therefore an essential property of every human being, and humanity is a natural kind.⁷⁶⁷

Brody's philosophy is a mere philosophical version witnessing to the facts of science that no member of a species changes from one species to another and therefore, the unborn does not change from one species to another when being born. Being human is an essential property of the unborn because if the unborn stops being human it will go out of existence. This is true because the unborn retains its property of being human prior to and after birth. It does not change into a different species. Taking away the element of a human being from the unborn does not change the unborn from one species to another but causes the unborn to cease to exist. Thus, Brody supports the view that the unborn is a human being. According to Mathews-Roth⁷⁶⁸ it is incorrect to say that such biological data cannot be decisive. Experiments repeated and confirmed prove that particular biological findings are true. No experiment has disproved the finding that the human begins as a zygote and remains as the same species throughout his or her life. Therefore, it is scientifically correct to say that human life begins at conception, when egg and sperm join to form the zygote. When one considers the facts of science it is clear that abortion is the destruction of growing human life.

⁷⁶³ Micheline M. Mathews-Roth, "Is the pre-implantation embryo a person?", 12.

⁷⁶⁴ However, the author is aware that all views are philosophical.

⁷⁶⁵ Baruch A. Brody, *Abortion and the Sanctity of Human Life: A Philosophical View*, (Cambridge Massachusetts and London England: MIT Press, 1975), 97.

⁷⁶⁶ *Ibid.*, 98.

⁷⁶⁷ *Ibid.*, 100.

⁷⁶⁸ Micheline M. Mathews-Roth, "Facing Scientific Facts", 69.

Life itself does not begin; it is continuous, being passed from generation to generation.⁷⁶⁹ Mathews-Roth⁷⁷⁰ explains that this fact is established by science. De Freitas⁷⁷¹ is also of the opinion that science indicates that the unborn is more than just a biological organism. He also states that although science cannot provide the answer regarding the reasoning why the foetus is human or not, it can indicate that it is (1) a foetus, or (2) an entity with potential life, or (3) a biological or living organism. He also states that fertilisation is the most rational argument for indicating that the foetus is more than mere potential life, or a biological or living organism, because it would be ridiculous to speak of the foetus as being part of the pregnant woman's body. This would mean that the pregnant woman has four arms, four legs and more chromosomes than the normal human being does.⁷⁷² The organisation "Doctors for life" brings together medical doctors to discuss, campaign and research issues such as abortion. They take a strong position against abortion and promote "sound science in the medical profession"⁷⁷³. Therefore, they apply the science of the medical profession to abortion. They state that:

Scientific research clearly defines the beginning of life at conception. Each cell immediately after conception has sufficient information in its DNA structure to produce a complete human being. Destruction at any stage from one cell to several million cells after conception is murder of a human being.⁷⁷⁴

Evident from these different scientific views on life and the legal status of the unborn, it is clear that science is not always objective and that different views on the application of science to the beginning of life exists. If one were to answer the question, what does it mean to say that something is alive, or is a living organism,⁷⁷⁵ it should not come as a surprise that there is no single (or multiple) necessary and sufficient condition for the proper application of the ordinary concept of life.⁷⁷⁶ However, rationality requires that science within the context of life be investigated and that the different views should come together to create rational debate and opportunity for rational dialogue. If this is not done, how can law respect human life without understanding when a new human life is created?⁷⁷⁷ This is even truer in light of

⁷⁶⁹ Ibid.

⁷⁷⁰ Ibid., 70.

⁷⁷¹ S.A. de Freitas, "A critical retrospection regarding the legality of abortion in South Africa", 135.

⁷⁷² Ibid., 140.

⁷⁷³ "Doctors for life: Mission statement", *Doctors for life international*, <http://www.doctorsforlifeinternational.com/about/mission.cfm> (1/02/2008).

⁷⁷⁴ "Issues: Abortion", *Doctors for life*, <http://www.doctorsforlifeinternational.com/issues/abortion.cfm> (accessed 1/02/2008).

⁷⁷⁵ Mary Anne Warren, *Moral Status: Obligations to Persons and Other Living Things*, 25.

⁷⁷⁶ Mary Anne Warren, *Moral Status: Obligations to Persons and Other Living Things*, 26.

⁷⁷⁷ Charles I. Lugosi, "Respecting Human life in the 21st Century America: A moral perspective to extend civil

the fact that a great number of international human rights instruments contain reference in some or other form to the sentence “everyone has the right to life.” If the concept of life is so popular in these human rights instruments, why is an inclusive and rational approach to explaining what life is, so unpopular?

4. Viability with special reference to *Roe v Wade*

Special reference is made to *Roe v Wade*⁷⁷⁸ because of two reasons: (1) this was the defining case in the US on abortion and several other countries followed this liberalisation of abortion; and (2) *Roe v Wade*⁷⁷⁹ explicitly refused the use of science and biology in the determination of the legal status of the unborn, only to contradict themselves in the end by using the viability approach. It is necessary to highlight this irrationality. Although the case following *Roe*, namely, *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁷⁸⁰ threw out the trimester approach of *Roe*, it is still necessary to investigate the courts line of argumentation followed in *Roe* regarding viability and the trimester approach. In *Roe v Wade*⁷⁸¹ the unborn was never given any real protection.⁷⁸² Read together with *Doe v. Bolton*⁷⁸³ a right to

right to the unborn from creation to natural death”, 211.

⁷⁷⁸ 410 US 113.

⁷⁷⁹ 410 US 113.

⁷⁸⁰ 505 US 833 (1992). At issue were five provisions of the *Pennsylvania Abortion Control Act* of 1982. The court stated that “Roe’s rigid trimester framework is rejected. To promote the State’s interest in potential life throughout pregnancy, the State may take measures to ensure that the woman’s choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right”, *ibid.*, 837. The court further rejected the “privacy” rationale and adopted the “undue burden standard”. “To protect the central right recognized by Roe while at the same time accommodating the State’s profound interest in potential life...the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability,” *ibid.*, 837.

⁷⁸¹ 410 US 113.

⁷⁸² “A woman’s right to terminate her pregnancy is not absolute, and may to some extent be limited by the state’s legitimate interests in safeguarding the woman’s health, in maintaining proper medical standards, and in protecting potential human life, the unborn are not included within the definition of “person” as used in the Fourteenth Amendment”, *Roe v Wade*: 148.

⁷⁸³ 410 US 178 (1973). “The District Court, per curiam, 319 F.Supp. 1048 (ND Ga. 1970), held that all the plaintiffs had standing but that only Doe presented a justiciable controversy. On the merits, the court concluded that the limitation in the Georgia statute of the “number of reasons for which an abortion may be sought,” *id.*, at 1056, improperly restricted Doe’s rights of privacy articulated in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and of “personal liberty,” both of which it thought “broad enough to include the decision to abort a pregnancy,” 319 F.Supp., at 1055. As a consequence, the court held invalid those portions of §§ 26-1202 (a) and (b)(3) limiting legal abortions to the three situations specified; § 26-1202 (b)(6) relating to certifications in a rape situation; and § 26-1202 (c) authorizing a court test. Declaratory relief was granted accordingly. The court, however, held that Georgia’s interest in protection of health, and the existence of a “potential of independent human existence” (emphasis in original), *id.*, at 1055, justified state regulation of “the manner of performance as well as the quality of the final decision to abort,” *id.*, at 1056, and it refused to strike down the other provisions of the statutes. It denied the request for an injunction, *id.*, at 1057,” *ibid.*, paragraph 39.

abortion under virtually every circumstance is granted. The only form of protection provided was to the unborn at viability in the trimester approach.⁷⁸⁴ Viability is the foetus' ability to survive without the assistance of his or her mother. Any other physical development, organs, heart, brain, science or what the foetus is, was deemed unworthy of discussion. Justice Blackmun thus dehumanised the unborn, and maintained a semblance of humanitarianism.⁷⁸⁵ The court also chose to silently pass over the briefs describing foetal development and photographs of the foetus. This was done by all of the judges including the dissenting judges.⁷⁸⁶ There was also no attempt to approach or consider medical expert evidence.⁷⁸⁷ The court chose to ignore the scientific fact of human development, focusing instead on lengthy discussion of the medical-legal history of abortion.⁷⁸⁸ The lack of consideration of science is not justified because courts are often asked to solve difficult questions where there is no scientific consensus yet at the same time a need for a rational standard.⁷⁸⁹ To develop a rational standard one has to build as much as possible from the known facts and stick close to the data. Yet, *Roe* steadfastly avoided discussing the facts of ontogeny to avoid having to discuss the appellee's contention that life begins at conception. What is even stranger from the *Roe*-case is that at the end of the opinion the viability standard (which is scientific in nature) is invented without supporting analysis (of a scientific nature) or reasoned explanation (reasoned scientific explanation explaining why viability should be the compelling point).⁷⁹⁰

⁷⁸⁴ "With respect to a state's important and legitimate interest in potential human life, the point at which its interest becomes compelling is at viability, because the fetus is then presumably capable of meaningful life outside the mother's womb", *Roe v Wade*: 154. "Prior to the end of the first trimester of pregnancy, the state may not interfere with or regulate an attending physician's decision, reached in consultation with his patient, that the patient's pregnancy should be terminated, from and after the end of the first trimester, and until the point in time when the foetus becomes viable, the state may regulate the abortion procedure only to the extent that such regulation relates to the preservation and protection of maternal health, from and after the point in time when the foetus becomes viable, the state may prohibit abortions altogether, except those necessary to preserve the life or health of the mother, and the state may proscribe the performance of all abortions except those performed by physicians currently licensed by the state," *ibid.*, 148.

⁷⁸⁵ David M. Smolin, "The Judeo-Christian Tradition and Self-censorship in Legal Discourse", 404.

⁷⁸⁶ *Ibid.*

⁷⁸⁷ Shaun A. de Freitas, "Transcending 'Life' in the Biblical Protection of the Unborn: Perspectives towards a Jurisprudential Anti-Abortion Apologetic", 184. A similar approach was taken in the case of *Tremblay v. Daigle* [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634.

⁷⁸⁸ *Roe v Wade*: 129-147. "Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer", *ibid.*, 159. Donald Hope states that if there was consensus as to 'when life begins', the abortion issue would not have been in the Supreme Court, Donald Hope, "The Hand as emblem of Human Identity: A solution to the abortion controversy based on science and reason", 223.

⁷⁸⁹ *Ibid.*, 223-224.

⁷⁹⁰ "With respect to the State's important and legitimate interest in potential life, the "compelling" point is at

Therefore, there is a conclusionary nature that viability is the compelling point.⁷⁹¹ This was done without supporting analysis and reasoned deliberation. However, in *Gonzales v Carhart*⁷⁹², the court stated that the *Partial-Birth Abortion Ban Act* of 2003 (prohibiting partial-birth abortions) does not impose an undue burden on pre-viability abortion. In other words, banning partial-birth abortions of the pre-viable foetus does not place an undue burden on the mother, and therefore partial-birth abortions, even before viability, are illegal. Therefore, the trimester approach was also altered and pre-viability abortions restricted in this case because pre-viability partial-birth abortions were banned – although only with regard to the one method of abortion and not other methods of abortion.⁷⁹³ *Roe v Wade*⁷⁹⁴ is therefore an important case concerning the lack of consideration of factual science and therefore pointing to irrationality both in procedure and substance. Furthermore, viability as the ‘compelling’ point marking the constitutional protection of foetal life is logically and biologically flawed and unworkable.⁷⁹⁵ Using viability as a legal standard is that it seems to stand out, in theory, as a marker in the continuum of human development.⁷⁹⁶

In practice this is not true. Viability becomes a vague marker when one considers different circumstances.⁷⁹⁷ For example, the concept of viability becomes vague and relative if we ask whether we mean viability in an advanced neonatal ICU or viability in a remote rural county with limited medical resources. Viability lacks one of the key characteristics of a rational standard, namely that it identifies a conceptually distinct division point. Pediatric medicine has improved and the frontier of viability has moved backwards several weeks and may retreat further. Using a standard such as viability is relative, arbitrary and deeply flawed.⁷⁹⁸ It is stated in *Roe v Wade*⁷⁹⁹ that viability can be at twenty-four weeks, maybe twenty-six weeks. However the treatment of premature infants has progressed to such a point that the

viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother”, *Roe v Wade*: 163-164.

⁷⁹¹ Donald Hope, “The Hand as emblem of Human Identity: A solution to the abortion controversy based on science and reason”, 224.

⁷⁹² 550 US (2007).

⁷⁹³ Graham Gee, “Regulating Abortion in the United States after *Gonzales v Carhart*”, 984.

⁷⁹⁴ 410 US 113

⁷⁹⁵ Donald Hope, “The Hand as emblem of Human Identity: A solution to the abortion controversy based on science and reason”, 211.

⁷⁹⁶ Ibid.

⁷⁹⁷ Ibid.

⁷⁹⁸ Ibid.

⁷⁹⁹ 410 US 113

distinction in *Roe v Wade* is no longer valid. Physicians are now able to intervene successfully at earlier and earlier stages in the pregnancy.⁸⁰⁰ However, no improvement in the survival of babies below twenty-five weeks was observed. They talk of “hitting the wall”.⁸⁰¹

Improvements in medicine would seem to have caused justifications given in earlier times for abortion no longer to apply.⁸⁰² Viability also does not measure the universal human characteristics shared by the foetus and the larger community and species, rather it focuses on the potential ability of the foetus to breath air.⁸⁰³ Therefore clearly, the viability standard was not derived from ontogeny/a consideration of the developing characteristics of the foetus. It makes little sense from the human development perspective.⁸⁰⁴ The reproductive process has become more determinate at each stage of the pregnancy. The singling out of a specific stage as the stage where development is determinate enough for legal protection to start, must rest on convincing, objective ground, otherwise it will be arbitrary and unacceptable.⁸⁰⁵ What is argued in this thesis is that viability, as the point of providing legal protection to the unborn, is arbitrary. Noonan is of opinion that conception is the only start for human life that is not arbitrary.⁸⁰⁶ He agrees that viability is relative and practically flawed. Viability is elastic and can change in different circumstances. Therefore life will vary and viability will be an arbitrary and unjustified criteria.⁸⁰⁷ Mary Anne Warren also believes that viability is relative, among other things, to the medical care available to the pregnant woman and her infant.⁸⁰⁸ When a court establishes an extreme position such as the validity of abortion, such as in the case of *Roe v Wade*, a very compelling rationale needs to be given in order to justify and validate the position. This was not the case in *Roe v Wade*⁸⁰⁹.

Viability and the trimester approach are not sufficient to circumvent the scientific facts of the

⁸⁰⁰ Harold J. Morowitz and James S. Trefil, *The Facts of Life: Science and the Abortion Controversy*, 131.

⁸⁰¹ *Ibid.*, 132.

⁸⁰² Frankowski, S.J. and Cole, G.F., “Introduction,” in *Abortion and Protection of the Human Fetus*, (edited by S.J. Frankowski and G.F. Cole, Dordrecht: Martinus Nijhoff Publishers, 1987), XIV.

⁸⁰³ Donald Hope, “The Hand as emblem of Human Identity: A solution to the abortion controversy based on science and reason”, 211.

⁸⁰⁴ *Ibid.*

⁸⁰⁵ Donrich W Jordaan, “The legal status of the human pre-embryo in the context of genetic revolution”, 244.

⁸⁰⁶ Louis P. Pojman, “Abortion: Introduction,” in *Life and Death: A reader in moral problems*, (edited by Louis P. Pojman, Belmont: Wadsworth Publishing Company, Second Edition, 2000), 233.

⁸⁰⁷ John T. Noonan, “Abortion is Morally Wrong,” in *Life and Death: A reader in moral problems* (edited by Louis P. Pojman, Belmont: Wadsworth Publishing Company, Second Edition, 2000), 236.

⁸⁰⁸ Mary Anne Warren, “The Moral Significance of Birth”, 50.

⁸⁰⁹ 410 US 113 (1973); also see Shaun A. de Freitas, “Transcending ‘Life’ in the Biblical Protection of the Unborn: Perspectives towards a Jurisprudential Anti-Abortion Apologetic”, 187.

presence of a human being during the whole of pregnancy. It is therefore irrational to say that the unborn is worthy of protection due to the fact that it can survive outside of the womb because the court, in making this decision, had no investigative analysis into facts to support and justify such a conclusion. If such reasoning is acceptable, it can also be said that the presence of a developed heart is sufficient to bestow the unborn with legal protection without giving any justification. Whether the heart is developed or not, how can we say that the fact that there is a certain organ present makes the unborn more important? What if the spinal cord is enough for life to exist? Who determines that? If the spinal cord were enough, life would begin at ten weeks or even earlier. If the arms were enough, life would begin very close to conception. In other words, it seems to be a general rule that humanness according to Morowitz and Trefil, and the ability to survive outside the womb, develop at the same time.⁸¹⁰ And this is accepted without justification. In the light of all this, choosing viability still as the point of protecting the unborn remains an arbitrary decision. There is no rational reason why the fact that the unborn is able to survive outside the mother's womb, should be the determining factor for protection of the unborn. What is more, viability in itself refers to science, therefore to state that science has no role or relevance in or to the law is a contradiction in secular and positivistic pro-abortion jurisprudence.

5. The use of science in the determination of pain and its importance for the unborn

The issue of pain⁸¹¹ is important when it comes to science. Science and biology, for example the central nervous system, is important when determining whether something or someone experiences pain. For example, science is used to determine whether the animal experiences pain during animal testing or killing of animals. Furthermore, science is used to determine whether the human being experiences pain when being executed on the electric chair or by lethal injection. An investigation into pain is important because it is being used in several other areas of law and science as a tool to determine pain and suffering in these areas of law.

⁸¹⁰ Ibid., 146.

⁸¹¹ "Pain" (noun): physical suffering or distress, as due to injury, illness, etc., a distressing sensation in a particular part of the body, mental or emotional suffering or torment, "Pain," *Dictionary.com*, <http://dictionary.reference.com/browse/pain> (28/01/2008). "Pain" (verb): to cause physical pain to, hurt, to cause mental or emotional pain, distress, *ibid.* "Pain" (Synonyms): torture, misery, torment. PAIN, ACHE, AGONY, ANGUISH are terms for sensations causing suffering or torment. PAIN and ACHE usually refer to physical sensations (except *heartache*); AGONY and ANGUISH may be physical or mental. PAIN suggests a sudden sharp twinge: *a pain in one's ankle*. ACHE applies to a continuous pain, whether acute or dull: *headache; muscular aches*. AGONY implies a continuous, excruciating, scarcely endurable pain: *in agony from a wound*. ANGUISH suggests not only extreme and long-continued pain, but also a feeling of despair. 2. pang, twinge, stitch, *ibid.*

Furthermore, pain caused to human beings and animals and harm to the environment are also contrary to international requirements of humanity. In the end, what is aimed at is to show that science is being used in other areas of law when it comes to pain, and the findings of such pain experienced are applied to the respective areas of law. It would therefore be irrational if the scientific research on the pain experienced by the unborn during abortion was not used with regard to the legal position of the unborn. Therefore, the problem is not that no scientific investigation is being made on the pain suffered by the unborn. The problem is that the law does not take into account these scientific investigations on pain suffered by the unborn, or declare judgment on it when determining the legal status of the unborn. The issue of pain is even more relevant in light of that fact that international law contains explicit provisions against pain and torture - for example the Convention against Torture and other cruel, Inhuman or Degrading Treatment or Punishment.

To show how scientific investigations on pain are used in law, examples will be discussed. Recently, the Supreme Court of Kentucky had to decide on whether the lethal injection administered to the person receiving the death penalty caused unnecessary pain and suffering. In the case *Baze v Rees*⁸¹² the court considered the application of persons to receive the death penalty, to ensure a different formula to be used during lethal injection to prevent unnecessary pain and suffering. In this case, in-depth investigations and observations were considered regarding the substances used, whether in the past there was any suffering from it and how long it takes for the person to become unconscious. In the end it was decided that the use of the lethal injection was not unconstitutional. Similarly, the issue of pain was considered when Georgia's highest court struck down the state's use of the electric chair on 5 October, 2001 on the basis that death by electrocution "inflicts purposeless physical violence and needless mutilation that makes no measurable contribution to accepted goals of punishment." Ohio altered its law to allow only lethal injection in November 2001.⁸¹³ There is some debate about what the electrocuted prisoner experiences before he dies: many doctors believe that he feels himself being burned to death and suffocating, since the shock causes respiratory paralysis as well as cardiac arrest.⁸¹⁴

⁸¹² *Baze v Rees* 2005-SC-0543-MR.

⁸¹³ "The Electric Chair, 1889-?", *Capital Punishment U.K.*, <http://www.richard.clark32.btinternet.co.uk/chair.html> (accessed 28/01/2008).

⁸¹⁴ *Ibid.* "My mouth tasted like cold peanut butter. I felt a burning in my head and my left leg, and I jumped against the straps," Willie Francis, a 17-year-old who survived an attempted execution in 1946, is reported to have said. Francis was successfully executed a year later, *ibid.*

Several advocates for animal protection also use pain as a justification for the protection of animals. Peter Singer started a modern animal rights movement. He represents the utilitarians and follows Jeremy Bentham in stating that what makes sentient creatures morally considerable is their ability to suffer and not their rationality or moral capacity. All creatures have interests and frustrating those interests leads to suffering. The condition of suffering must be satisfied before we can talk of rights. No matter what the nature of the being, if capable of experiencing suffering, its suffering must be compared to the suffering of another being.⁸¹⁵

If it is said that animals are morally considerable due to the fact that they experience suffering by way of their interests being infringed, can the same not be said of the unborn? The unborn experiences possible suffering when aborted. “Pain is a complex phenomenon which can include feeling, suffering, and learning,” write Glover and Fisk of the Institute of Obstetrics and Gynecology at Queen Charlotte’s and Chelsea Hospital in London. “Even if the nature of the experience changes with development, this does not prove that immature humans cannot be distressed by pain.”⁸¹⁶ Therefore, although it is not definitely proven that pain is experienced throughout every stage of the pregnancy, it has similarly not been proven that there are stages where no pain is experienced. However, some are of the opinion that the unborn does experience pain. Dr Sunny Anand testified before Congress, saying: “The pain perceived by a fetus is possibly more intense than that perceived by term newborns or older children...the highest density of pain receptors per square inch of skin in human development occurs *in utero* from twenty to thirty weeks gestation.” Also, the biological mechanisms that inhibit the experience of pain do not begin to develop until weeks thirty-two to thirty-four.⁸¹⁷ Therefore, in light of considerations of humanity it will be more acceptable to give the benefit of the doubt to the unborn.

If considerations of possible pain caused to animals or during the death penalty are made, the same must be done in the case of the unborn. The question is therefore, “Does the unborn experience pain and if so, at what stage of development?” Views on whether the unborn

⁸¹⁵ Peter Singer, “All animals are equal,” in *Life and Death: A Reader in Moral Problems*, (edited by Louis P. Pojman, Belmont: Wadsworth Publishing Company, Second Edition, 2000), 404.

⁸¹⁶ “Can a fetus feel pain?”, *Personal MD: Your lifeline online*, www.personalmd.com/news/a1996092705.shtml (accessed 22/02/2007).

⁸¹⁷ “Abortion is excruciatingly painful to Unborn Children”, *National Right to life*, http://www.nrlc.org/abortion/Fetal_Pain/Smithremarks052004.html (accessed 27/02/2008).

experiences pain, differ in science. Some authors argue that whether a foetus feels pain hinges not on its biological development, but on the development of consciousness. According to Dr Stuart Derbyshire, professor of radiology at the University of Pittsburgh Medical Centre, a number of studies suggest that twenty-six weeks is the developmental point at which the experience of pain arises. But he says that a foetus cannot tell the difference between pains from a reflex (automatic) reaction or some form of “noxious” sensation. “Fetal pain is therefore a misnomer at any stage of development,” Derbyshire writes. “Scientific evidence suggests that women considering abortion can be assured that fetuses do not experience pain in the way that those who oppose abortion claim,” he adds. But others argue that measures of “hormonal stress responses” in the unborn during invasive procedures such as abortion and birth indicate that the foetus is suffering.⁸¹⁸ Therefore, if scientific investigations on pain were being used in other areas of law, it would be irrational if it were not to be used in obtaining a rational platform on the legal status of the unborn.

6. Conclusion

The use of science in obtaining a universal rational jurisprudence on the legal status of the unborn is very important since it provides a factual aid on the development of the unborn, which will assist in the development of a rational platform on the legal status of the unborn. Science is not always objective, however, but this does not render its use irrational. It is the absolute exclusion of science from the debate (especially pertaining to the science applied by the pro-life movement) that will result in irrationality since it is contrary to the inclusive nature of rationality. However, the continuous development of the unborn is disregarded and different opinions are given, supporting abortion, based on different scientific developments. What scientific principles do provide us with are facts upon which a rational jurisprudence can be based. These are facts that have been proven or that have not yet been disproved. As stated by Mathews-Roth⁸¹⁹ we can only find factual answers to our questions in science and not ethical or moral answers and the experimentation and proof of biology and science shows that the factual answer is that the unborn is a human life from conception and remains in the same species throughout the development of life. Since this is the only conclusion that can

⁸¹⁸ “Can a fetus feel pain?”, www.personalmd.com/news/a1996092705.shtml.

⁸¹⁹ Michelin M. Mathews-Roth, “Facing Scientific Facts”, 70.

be drawn from scientific facts, pro-abortionists cannot rely on these facts to support their arguments. Yet, many pro-abortionists state that they only rely on positivistic facts and not argument, religion or philosophy. Nevertheless, science forces the pro-choice movement to delve into other areas to justify their claim to abortion.

Pro-abortionists, in contradiction to their positivistic views, start relying on other philosophies and ideologies to justify their claim to abortion – ideologies other than the proven and stated facts of science. Such reliance on other concepts, such as women’s rights, to justify pro-abortion claims leads to irrational argument – which is in opposition to an approach that is both inclusive and sensitive. However, the author of this thesis is aware that such an absolute answer is not necessarily true because all concepts are based on differing perspectives. The argument of Mathews-Roth is nonetheless a factor and must be taken into account in order to maintain a rational approach. Furthermore, science is used to determine the pain caused to human beings and animals in several areas of law. This in turn ends up in the protection of human beings and animals, to prevent this torture and pain. Carter refers to the feminist author Naomi Wolf, who warned her fellow feminists to be more measured in their objections to the tactics of pro-life activists. For example, by protesting the display of graphic photographs of aborted fetuses, noted Wolf, abortion rights supporters may be trying to evade an unpleasant truth that intellectually honest arguments would accept: abortion does kill ‘something’. Carter adds that Wolf’s acknowledgment promotes civility because it elevates the pro-life conception from a position of presumptive fanaticism or misogyny to one that is worthy of respect: “it turns out that the other side is within rather than without the universe of rational discourse”. According to Carter, this implies that it is not ridiculous for pro-life forces to refuse to abandon the field of battle whenever somebody cries ‘tolerance’. The fact that pro-lifers disagree with the pro-choicers hardly makes the former’s position ridiculous, to say nothing of oppressive. And, once the pro-life position is treated as rational, it becomes plain that no call for tolerance can possibly carry the day. In this one finds the qualification of the virtue of an open and communicative process where a rational approach should be prioritized.⁸²⁰ Rational in the sense of accommodating various measures, in the example above we see that empirical science plays a role (not the role), as well as rational in the sense of Carter’s civility which reminds us that, even as we disagree, we need to treat one another with respect and in line with principles of humanity.

⁸²⁰ Stephen L. Carter, *Civility. Manners, Morals, and the Etiquette of Democracy*, 218-219.

Chapter 5

Conclusion

According to Christian Wolff, nature herself has established society among all nations and compels them to preserve it, for the purposes of promoting the common good by their combined powers. Therefore, since a society of men united for the purposes of promoting the common good by their combined powers, is a state, nature herself has combined nations into a state. The State, into which nations are understood to have combined, and of which they are members or citizens, is called the supreme State.⁸²¹ The law of this supreme State rests on the will of its members, but they are in turn bound by natural law to agree upon the rules derived by right reason in accordance with nature: “Hence it is plain ... that what has been approved by the more civilised nations is the nation of nations.”⁸²² This society may be regarded as a moral person, since it has an understanding, a will, and power peculiar to itself; and it is therefore obliged to live with other societies or States according to the laws of the natural society of the human race, just as individual men before the establishment of civil society lived according to them; with such exceptions, however, as are due to the difference of the subjects.⁸²³ From the above a valid proposal becomes clear regarding the ‘supranational’ state as a community of nations with a moral responsibility, which is also indicative of a civilised, uniquely human existence. There is therefore no moral and civilised reason why, in the context of the abortion debate, the community of nations cannot come together endeavouring the progression of jurisprudential debate regarding the legal status of the unborn. This is a humanity and humane theme, directly in line with the aims of the UN. The common good should therefore include this endeavour.

Through the ages, discussion on the legal status of the unborn has taken on many forms. The same applies to the contemporary approach. If ever there was a controversial theme to be nominated for jurisprudential reflection, then the abortion issue should rank among the top. Abortion jurisprudence has also taken legal theory to extremes, taking man’s philosophical

⁸²¹ Rubin, Alfred P. *Ethics and authority in international law*, 43.

⁸²² Ibid.

⁸²³ Ibid., 47.

enquiries to high levels of research. The abortion issue has also highlighted foundational aspects of the law, for example the interplay or distinction between natural law and positive law, the meanings of life, mankind as well as humanity; and the relationship between law and other scientific aspects of reality. In this thesis the role of reason, rationality and natural law becomes a theme that in no manner may be negated in the abortion jurisprudential saga. Albeit a difficult terrain in terms of philosophical navigation, any jurisprudential discussion is founded upon communication between role players. This communication requires a proper environment conducive to the progression and systematisation of ideas. The law in this regard attains a civilised character based upon the dictates of the natural law emphasis on fair, inclusive, reflective, rational, reasoned sensitivity towards man as unique species of the universe that he lives in.

The communicative structures to be considered and established for the effective application of jurisprudential discussion and solutions/consensus, do not imply a simple process. Communication includes words and words include conceptual and opinionated factors. Rubin provides some introductory understanding in this regard namely that when dealing with words and reality it seems “natural for every person to construct in his or her own mind an abstract model of reality. We all do it. Without an abstract model (a “paradigm”, in the academic jargon of my youth; “ontology” in current philosophical jargon) to give order to our perceptions, every perception would be unique and we would see no order in the world. Of course, it is possible that there is no order in the world and that we deceive ourselves in supposing our models to be useful. But our brains, the intellectual hardware with which we are born, seem to be “wired” to think in terms of generalities and relationships, and we each accept for our own purposes the abstractions and connections that we find enable us best to understand and interact with the world we perceive around us. We label everything, concrete or abstract, things or relationships, with “words”. By usage, we find that our conceptions of what the words stand for in the perceived world seem to come sufficiently close to what we take to be the perceptions of others that communication between people seems possible. The arguments are endless about the meanings of words, their interrelationships, the structure of communication in particular languages and in general, and the connections, if any, between the words we use to represent reality and reality itself, assuming there is any reality behind our individual perceptions.⁸²⁴ Assuming that word-based abstract models of reality are

⁸²⁴ Ibid., 4.

necessary for social thought, and words are the best tools we have for people to communicate their abstract thought to each other, some basic agreement as to the processes of logical thinking is also necessary.⁸²⁵

Thus, the basics of first finding consensus as to the processes to be linked with logical reasoning need to be prioritised in a study such as this one. It is the latter point with which philosophers and theorists in both and especially the political and legal fields, have busied themselves. This reminds one of the complexities of dealing with a subject such as the legal status of the unborn, which not only includes proposals regarding substance but also of procedure – both inherently containing abstract characteristics. This is one more way in which a topic such as the one chosen for this thesis can be furthered beyond the basic confines of this study. This thesis, although limited in providing an in-depth study of logic and the various theories in this regard, at least provides some clarity to a picture which is still so distanced that not much is clear from where we are standing at the moment. In fact, this could be stated for many areas of the law other than the legal status of the unborn. What can be easily concluded at this point regarding theory of logic is that if there is no attempt at endeavouring further scholarship in this regard specifically aimed at the abortion debate, then this would be an easily branded case of irresponsibility towards humanity and the dictates of a civilised legal community. What I would also like to ask is to what extent we see such in-depth analysis regarding the pre-legal sphere of jurisprudential debate. In how many instances do jurists and political theorists write from a basis so far removed from the foundational aspect, the latter belonging to a domain that is, although pre-legal (in the conventional sense), so important.

The law as substance is inextricably linked to the law as activity. The law cannot be linked to a single category, such as reproductive rights, human rights, liberalism, humanism, or the positive law. The law as substance and of process (activity) should operate within the whole of reality. The law is explained and justified among thinking individuals and groups of individuals. In order to do this effectively one needs to transcend secondary principles and reasons, and ask the primary question as to what the purpose of such an exchange of information should be. This necessitates a philosophical enquiry. The law is inherently part of a purpose, and what this purpose should be forms the basis of any jurisprudential issue

⁸²⁵ Ibid., 5.

such as the abortion issue. Here the role of universal guidelines such as rationality, reason, humanity, history (precedent) and inclusiveness play a large role. When the judiciary has to decide on an issue, all the facts possibly relevant are collected, distributed and exposed to scrutiny within a regulated, fair and informed surrounding. This is an age-old practice within civilised and constitutional legal systems – this is what the rule of law is all about. Here I am touching on the correlation between constitutional principles in domestic law on the one hand, and such principles in public international law. In fact, this is a part of the law that is enjoying renewed interest. Much has been written and proposed pertaining to justice as procedure, as well as to universality in the law. Here I am thinking of important contributors such as Rawls and Dworkin.

On reading these contributions on justice and political procedure, and on the relationship between hard and easy cases, one notices the *lacunae* that there are regarding the application of such political, constitutional and jurisprudential ideas specifically to the abortion scenario. In this regard, there is much that needs to be written, which will also contribute to one of the primary purposes of this thesis, which is the progression of international (in communication with foreign legal systems) debate aimed at possible consensus on the legal status of the unborn, also against the background of justifying some protection that is required towards the unborn. In writing this thesis, it also became clear how neglected are fields of the law such as “objectivity in the law”, “towards consensus in jurisprudential debate” and “the use of rationality in legal theory”. In this regard the law has to a large extent become superficialised. This is not only clear in contemporary legal education which is rapidly gaining in practical orientation towards legal education, but the judiciary as well has shown (in abortion jurisprudence) a limited and unconvincing slant in the endeavour to vindicate the legalisation of abortion in the sense of ascribing importance (not in an absolute sense) to the unborn in addition to sensitivity towards the woman. The law has as a matter of fact become enthroned to a kingship of ignorance (due to various reasons) in regard to the legal plight of the unborn. A fair approach to the issue would necessitate the introduction of humility back into the law, humility that would be open to the law (judiciary) as being a medium facilitating (to start off with) the collection and absorption of information and to mould such information into a sensible and benevolent structure, at least as far as possible. This is especially applicable to the abortion debate in international law.

Over the past forty years, abortion jurisprudence has taken a diametrically opposite approach

to hundreds of years of dominance (arguably) by a school of thought that preferred the protection of the unborn. This however does not imply that there were in the annals of history no instances of disparity regarding the legal status of the unborn. For example, the Shemitic Mesopotamian Code of Hammurabi in Ancient Akkadia (around B.C. 2100) punished injuries inflicted on pregnant women. Much later, one finds similarities in the laws of the Ancient Hindus and Ancient Irish – going back in India and Ireland as far as B.C. 1500. Ancient Greek opinion on abortion was mixed. Pythagoras and Hippocrates proscribed abortion in no uncertain terms. Temple inscriptions and other ancient writing disclose considerable opposition to abortion in the Greco-Roman world.⁸²⁶ There is also abundant evidence to show that Pythagorean-Hippocratic proscription of abortion was ignored to one degree or another by the population in pre-Platonic Greece and that abortion was not uncommon in Greece. Opinions among Greek thinkers on the issue ranged from the apparent *carte blanche* approval given by Plato, to the absolute Pythagorean-Hippocratic proscription; and somewhere between these two poles is Aristotle, with his guarded approval of abortion under some circumstances. Similar to today, the Greeks and Romans had difficulty formulating a consistent policy on abortion.⁸²⁷

With the decline of the Roman Empire, the rise of Christianity forced pagan Rome to re-evaluate its legal code. Emperor Septimus Severus (193-211) drafted a new law against abortion. Neither abortion nor infanticide was tolerated by two great codifiers of Roman law, Theodosius (408-450) and Leo (457-474). Probably the greatest of the medieval scholastic theologians, namely Thomas Aquinas, wrote in opposition to abortion.⁸²⁸ Around B.C. 500, Classic Buddhism condemned abortion. In Southeast Asia it was taught that anyone who “intentionally kills a human being, down to procuring an abortion, is ...no follower of the Sakyaputta.” Even today, this tradition is found in Buddhism. This religion still adopts a basic non-violent stance.⁸²⁹ Pagan Xhosas in South Africa punished abortion with a fine of four or five cows. The heathen Greenlanders used to believe that the aborted foetus – transformed upon his or her death into an evil spirit – later avenged the crime.⁸³⁰ Therefore, history clearly provides us with argument for and against the practice of abortion, a historic

⁸²⁶ S.A. de Freitas, “Roe v Wade: A Profusion of Errors”, (unpublished paper), 6.

⁸²⁷ S.A. de Freitas, “Roe v Wade: A Profusion of Errors”, 7.

⁸²⁸ Ibid.

⁸²⁹ Rev. Dr Adv. Francis Nigel Lee, *Tiny Human Life: When, Whether, and Where: on ensoulment, abortion, AIH, AID IVF, surrogate Wombs, and cloning*, academic dissertation for Doctor of Humanities, 3rd edition: 22 January, 2001, 205.

⁸³⁰ Ibid., 205-206.

fact not mentioned in *Roe v Wade*.⁸³¹ Several parallels can be drawn between the historical debate on the legal status of the unborn and the present-day debate. Both in history and today there are different views on the legal status of the unborn. In both cases there is no consensus and the legal status is based on different religions or concepts - rendering present day and historical views on the legal status of the unborn irrational. Thus, history and the present show us that the legal status of the unborn is complicated and difficult in nature.

Many theoretical battles have taken place and will still take place regarding this contentious subject. With the rapid increase in the development of the natural sciences over the past century, additional jurisprudential issues have arisen that have placed the abortion debate on the back foot, pragmatism playing a large role in this regard. Here one is reminded of cloning and its similar scientific endeavours, with the result that abortion has lost its impact on society. The profusion of states around the world also provides a different picture when compared to medieval, pre-modern and modern Europe, this having an influence pertaining to the legal status of the unborn. World War Two reminded mankind of the devastation that mankind can cause, hereby introducing and enforcing a large spectrum of fundamental rights and principles. However, there are numerous contemporary fragmentations of the law that also support a more positivistic approach. On the one hand, we have positivism and state sovereignty, and on the other there is the development of commitments pertaining to human rights which are viewed as having universal application. Amidst this quagmire of factors one needs to identify the best way of attaining common ground, inclusive discussion and representation regarding a specific jurisprudential topic. This thesis provides a proposal pertaining to clarity on the legal status of the unborn.

This has been done as follows:

The best way to explain the gist of this thesis is by way of example. The following example is familiar to those acquainted with abortion and everything surrounding it: “The foetus infringes on the reproductive freedom of the pregnant mother. As a result, women cannot achieve equality with men. In order to achieve equality with men they must have the right to abort the foetus.” On the other side of the coin the typical argument goes as follows: “The unborn is a human being, human beings have the right to life. Therefore, the unborn has the

⁸³¹ S.A. de Freitas, “*Roe v Wade: A Profusion of Errors*”, 8.

right to life and abortion is illegal.” Obviously these are the simplest forms in which these arguments can be made. There are several variations and much argumentation surrounding them. Some are less extreme and provide the unborn with legal protection up until the end of the first or second trimester. Others provide abortion rights only in specific circumstances. However, they all represent the gist of the current abortion debate and it would therefore be wise to start with them. When one looks at these arguments a tiresome feeling emerges. These arguments have been written about, argued, debated and talked about over and over again.

Therefore, one would assume that yet another thesis concerning this topic is just the next highway train to nowhere and as a result, unnecessary. Gentles agrees by stating that judges have ruled, politicians have legislated, but the issue seems no closer than ever to resolution. In the view of many there is nothing new to be said on the topic. People are weary of the sit-ins, the demonstrations and the angry words. Gentles asks the question whether there is any point in discussing the matter further. He is in agreement that there is *lack of thoughtful consideration* on this issue.⁸³² Therefore, scrutinising current arguments and the basis upon which they are formed, brings one to a new question, one which has been talked and written about substantially by authors of great name, but not necessarily applied to the legal status of the unborn in international law: *Rationality*. This topic, foreign to the abortion debate, presents us with a new question: “Are these arguments rational?” And to be more specific: “Are these arguments rational within the international law context?” This question in itself presents us with several other questions and is not simple to answer. In fact, it required a whole thesis (this thesis) just to cover the basics in considering this question. Therefore, this question cannot be answered before that which has been done in this thesis is summarised.

In order to justify the necessity of investigating the questions presented above, it was necessary to show that the area of law (international law) with regard to the specific topic (the legal status of the unborn) lacked rationality and furthermore, that rationality was necessary to the topic within the specific area of law. Chapter 2 embarks upon an investigation to determine the legal status of the unborn in international law. Investigations of international legal documents and case law of various natures highlight the fact that there is lack of consensus regarding the legal status of the unborn in international law. Investigation of

⁸³² Ian Gentles, “Introduction”, in *A time to choose life: Women, Abortion and Human Rights*, (edited by Ian Gentles, Canada: Stoddart, 1990), 1.

primary sources reveals that very little is being said on the legal status of the unborn in international law. However, provisions such as article 6 (5)⁸³³ of the International Covenant on Civil and Political Rights show some recognition for the unborn. Whether this recognition is extended to the right to life is impossible to determine for certain due to the lack of activity and debate on the legal status of the unborn in international law. The only primary source explicitly referring to the unborn is the American Convention on Human Rights⁸³⁴. Consequently, the matter has been left unanswered and lacking in substantial debate. When this lack of substantial debate on such a controversial matter is compared to the type of debates conducted in cases such as, for example, the death penalty and animals rights, it is clear that ambiguity exists. Thus, the nature of international law necessitates states to come together for the achievement of common good, such as was done with regard to the death penalty, children's rights, women's rights and animal rights. This nature of international law therefore necessitates a discussion on the legal status of the unborn – even more so in light of the fact that there are no substantial developments in this regard in international law. The fact that the nature of international law necessitates a discussion on the legal status of the unborn is evident from the fact that international law has necessitated discussion on other controversial issues (such as the death penalty) and therefore it is the nature of international law to do so.

There is no justification for international law to have failed in providing for substantial debate on the legal status of the unborn as the nature of international law requires this. As is seen from the definition of rationality in Chapter 3, it is clear that rationality requires consistency and justification in arguments. The lack of substantial argument on the legal status of the unborn is both inconsistent and without justification. It is inconsistent and unjustified in light of the fact that international law shows ample debate on other controversial issues but not when it comes to the legal status of the unborn. On the other hand, international human rights in some instances assume certain deductions without ample discussion and in-depth research, especially, in light of the fact that ample debate is conducted on animal rights in international law, an entity considered to be of lesser value than that of a human being. Furthermore, when the legal status of the unborn is compared to the legal protection provided to women and children in international law, a great difference and imbalance exists. The

⁸³³ Article 6(5) states that the death sentence “shall not be imposed on persons below 18 and shall not be carried out on pregnant women.”

⁸³⁴ Article 4 (1) states that every person has the right to have his life respected; this right shall be protected by law and from moment of conception. No one shall be arbitrarily deprived of his life.

amount of protection provided, as revealed from the research done, to women and children, far exceeds the legal protection provided to the unborn in international law. Women are also provided with reproductive health rights without defining whether it includes abortion or not. Therefore, primary sources provide rights to women and children without defining the content and scope of these rights. Also, the legal status of the unborn in domestic legal systems is very diverse. This presents the possibility that international law will be unable to provide a single outcome on the legal status of the unborn since the domestic views on abortion are so vast and diverse. Three things can be said for such an argument: (1) in this thesis, a call is not made on international law to find a final solution on the legal status of the unborn. What is asked is that international law, in light of procedural and substantive international justice/fairness and rationality, should at least make a substantial attempt to obtain a platform for debate on the legal status of the unborn that is rational; (2) if developments in the protection of animals are made in order to be in line with humanity and to protect the moral fibre of society, even in light of all the diverse domestic laws on animals, there is no reason why the same cannot be done concerning the legal status of the unborn; and (3) domestic laws have never been the sole determinants of international laws. It is true that customary international laws are derived from the settled practices of states but these have never been the sole determinant of international laws. International laws have several sources. Therefore, lack of justification, consistency, and textual determinacy, lack of transparency and elasticity of concepts compromise the validity of these international and regional instruments. Concepts are vague and can lend themselves to various interpretations. This may lead to frustration of the States Parties.

Those who wish to comply with the principles may find it frustrating as they will not be clear on the scope and content of the principles. Other States Parties may use the indeterminacy to their advantage and may manipulate the concepts to suit the aims of the state. This has been the case regarding the legal status of the unborn, and therefore several relative views now exist on the legal status of the unborn. The instruments give rise to several interpretations on the unborn and therefore play a role in the relativist, state to state, views on the legal status of the unborn. However, an investigation on the legal status of the unborn is not only justified because of the reasons described above. It is also justified in light of the requirements of international procedural and substantive justice and humanity. Humanity and international justice/fairness are two of the corner principles upon which international law is based. Humanity requires that life, humaneness, humankind and the morality of society be protected

and that international law be sensitive to the human being in general. The definitions of man and life as defined in humanity and anthropology also provide us with a basis upon which to continue attempts towards a rational deliberation on the legal status of the unborn. Humanity requires international law to promote substantial and procedural debate on the legal status of the unborn since the possibility exists that the unborn forms part of the concept “human being” and in light of the uncertainty that exists, it would be more humane to be sensitive to legally protecting the unborn than to run the risk of causing the death of possible “human beings”. Humanity also implies that abortion may possibly be a crime against humanity. This is evident from examples such as women’s rights not being sufficient justification to permit abortion and therefore being contrary to the current western ideals of humanity. Abortion also shows several parallels with ancient slavery and the danger exists that abortion may just be another form of slavery. This is partly due to the fact that the vagueness of the conventions gives way to various interpretations and flexibility that may result in the abuse of provisions such as “human being” and “life”. Many atrocities have been committed against various human beings through the manipulation of definitions. For example, Nazi Germany stated that those outside the ruling race were no longer human beings and could be treated as objects. The constitutions of many different countries confer the right to life. However, the right to life is denied to the unborn due to the re-definition of “persons”. The unborn is therefore dehumanised.⁸³⁵ It is necessary to obtain a constant valid definition of terms such as “life” and “human beings” in order to prevent the manipulation of these concepts. If a universally valid definition is found, it will prevent any further manipulation of concepts. There is a case to be made that voluntary abortion is a crime against humanity.

Declaring something legal does not necessarily make it moral and immune from international judgment and punishment.⁸³⁶ *Roe v Wade* denied the unborn as a human being. Yet the unborn still had to be something. The unborn therefore became a thing, laying the foundation for the legalisation of the slavery of unborn human beings. The Justices thus dehumanised their victims, and maintained a semblance of humanitarianism.⁸³⁷ They could be exploited, consumed, destroyed and used for scientific experiment. They are unable to give informed consent and are therefore coerced and subject to the will of another, considered to be

⁸³⁵ Damian Mc Leish, *A reply on the Choice on termination of pregnancy Act*, an informal letter written to Mr. S.A. de Freitas, 26 August, 2007.

⁸³⁶ Charles I. Lugosi, “Respecting Human Life in the 21st Century America: A moral perspective to extend civil rights to the unborn from creation to natural death”, 245.

⁸³⁷ David M. Smolin, “The Judeo-Christian Tradition and Self-censorship in Legal Discourse”, 404.

property. A current example of such exploitation already under way and against humanity is that of “interspecies embryos” or “human-animal hybrids”. Great Britain’s government gave their official blessing to Britain’s Human Fertilisation and Embryology Authority to create “interspecies embryos” or “human-animal hybrids”.⁸³⁸ Researchers remove the nucleus from a human cell and transplant it into an empty cow egg.⁸³⁹ The resulting embryo’s stem cells may then be used “for studying diseases, researching genetics, or testing drugs and the embryo must be destroyed within fourteen days.”⁸⁴⁰ If people can be made to feel at ease with these procedures, they can be made to feel at ease with greater assaults on human dignity.⁸⁴¹ *Roe v Wade* therefore resulted in creating a class system.⁸⁴²

Cloning and embryonic stem cell research represents modern forms of human exploitation by the powerful over the powerless and is no different in principle from slavery rooted in ancient history. Slaves were used to achieve personal goals. This way of thinking about slaves is similar to Justice Blackmun’s thinking that state interest in potential life is a legitimate interest grounded in humanitarian or pragmatic concerns.⁸⁴³ Both abortionists and those who supported slavery argue that certain classes of human beings are not persons, have no constitutional rights to life and liberty and are property to be disposed of or exploited at will.⁸⁴⁴ The justification of abortion by way of women’s rights is also contrary to humanity. No authority for the use of women’s rights to justify abortion exists. The second devastating message of *Roe v Wade* was that you may legally obtain an abortion even if you believe that you are killing your baby.⁸⁴⁵ The choice of establishment liberalism and feminism is clear: to equalise men and women, they will allow women to kill their babies.⁸⁴⁶ There is the very real problem of repentance, and of saving face. It is perhaps easier to look the foetus in the eye and call it a non-person than to look at oneself in the mirror and admit to complicity in mass murder.⁸⁴⁷ Gerber stated that abortion is an unnecessary price to pay for the sexual emancipation of women, a price inconsistent with the fundamental humanist values of

⁸³⁸ Colson, “Experimenting with Human Dignity”, *BreakPoint*, http://www.breakpoint.org/site_hmpg.asp (accessed 20/09/2007).

⁸³⁹ *Ibid.*

⁸⁴⁰ *Ibid.*

⁸⁴¹ *Ibid.*

⁸⁴² Charles I. Lugini, “Respecting Human Life in the 21st Century America: A moral perspective to extend civil rights to the unborn from creation to natural death”, 225.

⁸⁴³ *Ibid.*, 226.

⁸⁴⁴ *Ibid.*, 230.

⁸⁴⁵ David M. Smolin, “The Judeo-Christian Tradition and Self-censorship in Legal Discourse”, 404 – 405.

⁸⁴⁶ *Ibid.*, 406.

⁸⁴⁷ *Ibid.*, 407.

western society.⁸⁴⁸ Justice required that there be respect for the life of all human beings, from the very beginning to the very end of life.⁸⁴⁹ Therefore, humanity cannot exclude the unborn. A truly compassionate approach to mankind implies compassion and sensitivity to the unborn.⁸⁵⁰ A truly liberal law is one which seeks to enhance and preserve the most varied expressions of life; a restrictive law is one which seeks to categorise who is and who is not human.⁸⁵¹ Therefore, ‘liberalising’ abortion laws to the point of ‘destruction of life on demand’ imposes on society an arbitrary definition of humanity inconsistent with values we already prize. Surprisingly, the humanity of the foetus is too speculative for many who pronounce with conviction on the immorality of war, inhumanity of violence, the cruelty of capital punishment and those who devote themselves to protecting oil-coated sea gulls and innocent seal pups.⁸⁵²

This is true because with ancient slavery, the slaves were considered as property to be disposed of and used by their masters as they wished. If the legal status of the unborn is denied, this will also be the case with the unborn. The unborn will be considered as property to be used in, for example cloning, or disposed of (abortion) by the mother. In light of the above, it is paramount for international law to be in line with the requirements of humanity, to protect humanity and the moral fibre of society and conduct procedurally and substantively fair debate/platform on the legal status of the unborn. Yet, the research that has been done in Chapter 2 reveals that there are very few developments in this regard, and this lack of development is inconsistent and unjustified – thus resulting in an irrational approach concerning the legal status of the unborn in international law. However, positive developments do lurk beneath the surface. The ban on partial-birth abortions in the Partial-Birth Abortion Ban Act⁸⁵³ and *Gonzales v Carhart*⁸⁵⁴ shows that attempts are made to get in line with humanity. The decision is the first to uphold a ban on a specific abortion procedure, but also represents the first time that the Court has approved an abortion restriction that fails to provide an exception for the health of the pregnant woman. The 5-4 decision in *Gonzales*

⁸⁴⁸ R.J. Gerber, “Abortion: Parameters for Decision”, 139.

⁸⁴⁹ Charles I. Lugosi, “Respecting Human Life in the 21st Century America: A moral perspective to extend civil rights to the unborn from creation to natural death”, 246.

⁸⁵⁰ Marco Sassoli and Antoine A. Bouvier, *How does law protect in war?: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 87.

⁸⁵¹ R.J. Gerber, “Abortion: Parameters for Decision”, 150.

⁸⁵² *Ibid.*

⁸⁵³ 2003, 18 U.S.C. § 1531 (2000 ed., Supp. IV).

⁸⁵⁴ 550 US (2007).

suggests an emerging conservative majority on the Court.⁸⁵⁵ Furthermore, the emphasis on humanity in international law after World War Two could mean, if one remains positive, some developments concerning the legal status of the unborn. Therefore, although international law exhibits growth in human rights (more specifically women's and children's rights) and animal rights, it still remains, even in light of some positive developments, that contemporary international law has neglected to embark on an internationally just and rational debate concerning the legal status of the unborn. Although it is clear that the legal status of the unborn in international law is irrational, it has to be proven why it is necessary for international law to be rational and why rationality is important. The importance and use of rationality is justified in Chapter 3.

Chapter 3 is the foundational chapter of this thesis. First of all, a *rational* furtherance of the legal status of the unborn in international law had to be justified. The conclusion is made that it is the best method of research to embark on this investigation. When the virtues of rationality are compared with the current approach of international law it is clear that rationality is the better alternative and in line with the principles supported by international law for several reasons. The definition of rationality provided justifies these statements. These justifications are as follows: (1) a rational debate will be consistent, contrary to the inconsistency currently present in international law – for example, between international criminal law and international human rights law. In Article 6 (5) of the International Covenant on Civil and Political Rights some protection is provided for the unborn in criminal law, whereas international human rights law is silent on the legal status of the unborn as evident from Chapter 2; (2) a rational argument is not arbitrary and always requires justification. This also prevents the mere reliance on an ideological view to justify an argument. For example, it will require a justification more than the mere reliance on a specific belief. If others do not share your belief, there is an explanation which does not come down to the mere assertion that they do not believe what you do. Therefore rationality expects international and domestic law to justify the use of reproductive health rights and human rights to determine the legal position of the unborn. Therefore, the legalisation of abortion in several countries by way of economic difficulties of women or the deformity of the unborn will have to be justified; (3) rationality integrates every isolated thing or thought and is not exclusive. In other words, rationality requires the consideration of several subjects

⁸⁵⁵ Graham Gee, "Regulating Abortion in the United States after *Gonzales v Carhart*", 979.

– for example, science, international justice and humanity. They all have to be considered in the determination of the legal status of the unborn in international law; and (4) a rational argument also breaks barriers and overrides all inhibitions. Sensitivity surrounding the legal status of the unborn should be disposed of. Barriers exist, preventing the religious pro-lifer to come into a civilised debate with a serious feminist. These barriers, inhibitions and sensitivities need to be disposed of and civilised debate should be conducted.

A rational argument is also necessary and relevant to international legal development on the legal status of the unborn for several reasons: (1) rationality is the better alternative to the present form of public discourse. The current form of public discourse is irrational and uncivilised due to the inability of people these days to engage in logical argument. They are also so partisan in their views that they are unable to communicate their views in a civil manner and consider other views. Current public discourse only encourages the predisposed ideas of the talker instead of being accommodating to other ideas. For example, the liberal state mostly supports the influence of human rights on abortion without questioning the authority or justification of human rights to determine the legal status of the unborn; (2) the superficial education of most academic institutions has led to the inability to engage in proper rational debate. Students are taught blind facts and they are taught that these facts are true. One of the results of this is current abortion jurisprudence and the blind acceptance of the fact that human rights and women's rights should define the legal status of the unborn in domestic and international law; (3) most importantly, a rational approach requires international justice. In turn international justice requires internationally just procedural and substantive procedures on the legal status of the unborn. Rationality therefore requires international justice because it allows for sovereign states to yield to universal requirements of fairness in procedure and substance. These universal requirements on the legal status of the unborn are exactly what is needed and also neglected as shown in Chapter 2. However, what is fair will always differ from one person/state to the next. But what matters is that fairness in procedure and substance provides an opportunity for discourse: the process and its rules. Opportunity for procedural fairness is provided for and required by international law. Such procedural fairness would, for example, be the establishment of a special committee on the legal status of the unborn in international law. This commission will then deal with universal developments on the legal status of the unborn. However, no such attempts are made and therefore no procedural justice exists. This is contrary to the requirements of international justice and irrational – even more so in light of the fact that such procedural fairness is

required by international legislation in, for example, Article 13⁸⁵⁶ of the UN Charter. Such procedures of cooperation, platform, research and codification are being done in several other areas of law (for example the attempt to obtain signatures for the drafting of a convention on the protection of animals) but not for the legal status of the unborn. The rationality of a debate will also depend on substantive international justice. This basically means that in order for international law to be just, it cannot focus on only single subjects to determine the legal status of the unborn. In other words, it cannot rely solely on women's reproductive health rights. International justice will also call for sufficient justification to legalise abortion and no evidence exists that women's rights are sufficiently just to permit abortion; in any case, not in light of the requirements and emphasis of humanity in international law and the preservation of the moral fibre of society. Women's rights are not sufficient justification to legalise abortion because then, similarly, the right to life can be sufficient justification to prohibit abortions; (4) furthermore, the fundamental rights of the UN Charter and the International Covenant on Civil and Political Rights and other legislation necessitate a rational consideration of the legal status of the unborn in light of the fundamental rights present in these instruments; (5) the jurisprudence of enlightenment also requires a rational approach. Secularism and the enlightenment era as a whole, claim to be in line with rationality but fail to apply the theory of reason when it comes to the legal status of the unborn. This is evident from secularism's failure to maintain a method of discourse by which it can morally condemn and legally prevent mass abortion on demand and the brutal manner in which this demand is defended.

In order to remain impartial and keep an open mind, the negative aspects of rationality were admitted and discussed – however, not without defence. Firstly different opinions may all be rational. States have different views on the death penalty, for example, and sometimes all of these views are rational. Another problem is that of getting beyond basic conflicts in presuppositions. States have different presuppositions upon which they base their abortion laws. However, for all these negative aspects, arguments in defence of rationality were possible. First of all, rationality can get beyond conflicts in presuppositions because rationality does not require neutrality but rather requires impartiality. Therefore, when

⁸⁵⁶ (1) The General Assembly shall *initiate studies and make recommendations* for the purpose of *...encouraging the progressive development of international law and its codification;...and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.* (Emphasis added)

achieving a universal platform on the legal status of the unborn the different presuppositions do not need to be neutral. In other words, there is room for difference. What is required, however, is impartiality – in other words, open-mindedness. It requires that new views and interpretations should at least be considered. Pro-choice advocates will therefore be required to consider pro-life interpretations and vice versa. Secondly, it is exactly these differences in ideologies that allow for rational debate/platform. These differences give rise to the need to present rational arguments to opposing parties – a need emanating from the desire to be treated equally with other states. In such a manner, every state's claim to equality is met in that different viewpoints, including your own, are equally considered, thus allowing for the desired procedural and substantive platforms. Therefore, the different ideologies are able to communicate and come to surface agreements while radical differences remain.

It becomes clear that a connection exists between rationality and natural law. This connection is explained by the further delineation of the concept rationality. A distinction is made between rationality and reason. They overlap but also differ. They overlap in the sense that both rationality and reason can mean a non-arbitrary way of argument/debate, containing all the elements discussed from the definition of rationality. In other words, it will be research of an in-depth nature, logical, consistent and non-arbitrary. However, rationality and reason differ, as reason can show affinity towards natural law. This means that certain concepts are known to be non-arbitrary, reasoned and the best outcome without any in-depth research or investigations into consistency and other elements of rational argument. In other words, the concept, merely because of its nature, has a certain conclusion. For example, murder and rape, without deeper research, are known to be morally wrong. Therefore, in that regard reason shows affinity towards natural law. In the end, it is concluded that both reason and natural law support the search for a minimum universal platform on the legal status of the unborn because both oppose relativism and positive legal principles (although rationality may have a positive aspect to it). Natural law also supports a procedural and substantive platform in international law, since after World War 2 there has been a general re-emphasis of natural law in international law.

It is important that the need for rational procedural and substantive platforms on the legal status of the unborn be understood properly. A common denominator or universally accepted view on the legal status of the unborn is not necessarily possible but in the end, providing some substance and procedure will not necessarily be the final answer to the legal status of

the unborn but merely an effort in that direction. The mere effort will be a rational and humane approach *per se*. The common ground will be open-ended and not a mere conflict between different beliefs.

Human rights have received extensive attention in this thesis. Human rights are being applied to the legal status of the unborn without defining the scope and content of these rights (whether concepts such as reproductive health rights include abortion has not been determined yet). Furthermore, a concept such as “life” has not been defined in international law and yet human rights are being applied to “human beings”. Therefore, rights in general are applied to legal subjects, but what these legal subjects include has not been determined. Therefore, the application of human rights to determine the legal status of the unborn is irrational. There is also no real authority or justification for human rights to be the sole determining factor of the legal status of the unborn. Human rights are not even being applied in the same manner everywhere. The western world views human rights as individualistic while in Africa human rights are viewed from a communitarian perspective. These differences will also result in different application of human rights to the legal status of the unborn. When one researches the application of international law in Africa, it reveals greater emphasis on duties, this in turn affecting the legal status of the unborn. Therefore, the views of international law on human rights may not be based solely on the western perception of the application of human rights. Thus, to remain true to an inclusive and rational approach, the picture as a whole needs to be presented and the legal status of the unborn needs to be affected by the duties of individuals and states and not only by the rights.

Finally, the foundational ideas of international law, such as international humanitarian law and international human rights law, support a rational platform on the legal status of the unborn. In everyday terms these foundational ideas include: peace, benevolence, love, sensitivity towards mankind and treating/respecting your neighbour as you would like them to treat/respect you. The demands of these principles as forming the foundations of international law should certainly have an effect on the legal status of the unborn.

In the final chapter the central theme concerns the use of science in an attempt towards a rational platform on the legal status of the unborn in international law. The reasons for this

emphasis on science *per se* are threefold: (1) *Roe v Wade*⁸⁵⁷ explicitly refused to use science in determining the legal status of the unborn. The irrationality and arbitrariness of this is clear, even more so in light of the fact that the court contradicted itself by later referring to the viability method – which is scientific in nature; (2) science presents one of the subjects, other than human rights, international justice, humanity and others, that needs investigation to ensure an inclusive rational approach. It is not the only subject that needs consideration but the consequences of the exclusion of science from the abortion debate are irrational and this needed to be demonstrated; and (3) science is one of the few subjects that can provide us with facts upon which the abortion debate can be based. Science needs to assist any public decision-making that involves substantive scientific content. Abortion is one such a topic that involves scientific substantive content. Therefore, science cannot be placed as secondary to human rights or sexual politics. However, science alone does not provide an answer on the legal status of the unborn. Such an approach would in turn be an irrational one, as it would exclude other subjects. Still, several views exist within science on when life begins. However, these views also generate dialogue towards rational platforms on the legal status of the unborn. Rationality does not merely assume one scientific view on the unborn as the determinative answer. However, science strongly indicates that the unborn is more than just a mere biological organism.

In light of uncertainties and the strong scientific evidence supporting the presence of a human being it is better to prohibit abortion than to allow it. What if one day it is determined that the unborn is one hundred percent alive without doubt? What will we do about the millions of unborn aborted? Such consequences can be described by a situation such as that of Dr. Bernard Nathanson. He owned and operated what was at the time the largest abortion clinic in the western hemisphere. He was directly involved in over sixty thousand abortions. After the study of developments in the science of fetology, he was led to the conclusion that he had made a mistake. He later wrote that he was deeply trouble by his “increasing certainty that I had in fact presided over sixty thousand deaths.”⁸⁵⁸ To avoid such kind of massacre and to uphold the moral fibre of society and humanity it is better to give effect to the strong scientific evidence that the unborn is more than a biological organism. Of great importance is

⁸⁵⁷ 410 US 113.

⁸⁵⁸ Randy Alcorn, *Scientists attest to life beginning at conception*, http://www.epm.org/articles/life_conception.html.

the irrationality contained in *Roe v Wade*⁸⁵⁹. First of all the consideration of science is explicitly excluded and then afterwards the court contradicts itself by instituting the scientific approach of viability. Furthermore, there is no justification for using viability to measure the legal status of the unborn, which results in irrationality. Since international law is largely built upon principles of humanity, any scientific investigation in international jurisprudence on the legal status of the unborn will be required to be in line with these principles of humanity. The incorrect use of scientific facts, the legalisation of inhumane methods of abortion and assumptions made about the unborn in science, are all evident of lack of considerations of humanity when it comes to the use of science. Science is also used in other areas of law. For example, the death penalty, illegality of drugs⁸⁶⁰, the administration of therapeutic drugs, animal rights and cloning. In the case of the death penalty and animal rights, science is used to determine the pain cause during death in both instances. The same is being done regarding the unborn, but these findings then need to be applied in cases and legislation on domestic and international level, not as the only relevant consideration but inclusive with other subjects.

Taking into consideration the above exposition of the thesis, it is necessary to return to the example referred to on pages 202-203. For the sake of clarity the examples are mentioned again: “The foetus infringes on the reproductive freedom of the pregnant mother. As a result, that woman cannot achieve equality with men. In order to achieve equality with men they must have the right to abort the foetus.” On the other side of the coin the typical argument goes as follows: “The unborn is a human being, human beings have the right to life. Therefore, the unborn has the right to life and abortion is illegal.” Are the arguments referred to rational? Furthermore, are they rational within international law and if not, what needs to be done? These questions are not easy to answer but in light of the research done in this thesis, the following conclusions are inevitable. Both of the arguments are irrational because they are based on several unjustified assumptions or ideologies. These include the use of the word “foetus”, the assumption that the unborn necessarily infringes on the reproductive freedom of the pregnant mother, the assumption that international human rights, like reproductive health rights and the right to life, should determine whether the unborn is to be legally protected in international law and that abortion rights are necessary to achieve equality between men and women. The use of the word foetus is not necessarily correct. Up

⁸⁵⁹ 410 US 113.

⁸⁶⁰ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (1) SACR 431 (CC)2002 (1) SACR.

to the first eight weeks after conception, it is an embryo and from eight weeks after conception, it becomes a foetus. Therefore, the typical argument on abortion today uses incorrect scientific terms. This is also evident of the lack of consideration of science in determining the legal status of the unborn. “Reproductive freedom” has not been defined properly by international law to definitely include the right to abortion. And the question should be asked whether international laws ever intended to include abortion as part of reproductive freedom. Furthermore, no justification exists that the unborn has any part to play in obtaining equality between men and women. Also, as mentioned on page 138, the use of reproductive health rights as compared to the consideration of the legal status of the unborn poses a great imbalance in international law. Such use of rights, without balancing them against other rights, is also irrational.

The following questions have not been considered in this regard and are indicative of irrationality: Is equality really achieved by way of abortion? Or is the trauma of abortion not another form of discrimination against women? How can it be assumed that abortion will be advantageous to the equality of women? Has research been done to prove that abortion advances the position of the woman? No real justification exists for such a statement, as these questions have not been answered yet. Therefore, over the years vast amounts of research and writing have been done on the legal status of the unborn, but unfortunately most of it (not all) has been irrational and based on single presuppositions and assumptions. The arguments above are also irrational because they exclude several disciplines and contents applicable to the legal status of the unborn. This is contrary to rationality since rationality requires an inclusive approach. The arguments make no investigation into humanity, anthropology, animal rights, science or international justice (amongst others). They merely assume that the legal status of the unborn should be determined solely by human rights. However, human rights should also be considered, but must not be the sole measure in determining the legal status of the unborn. Also, before human rights in international law can be applied non-arbitrarily in an inclusive approach, the subjects to whom these rights apply first have to be determined.

Therefore, it has to be determined whether the unborn is a legal subject of human rights in international law. If this is not determined, as is the case currently, international human rights law will continue to be applied irrationally and arbitrarily. But the question remains, how then should such arguments, within international law, be dealt with. Obviously, as

shown, this thesis advocates the view that these arguments should be dealt with rationally. But what will such a rational argument look like as opposed to the one above? The mentioned argument is the one in which opposing states disagree on the reasons for legalising or prohibiting abortion. They clash, argue about why they are correct, obviously do not reach any agreement (as evident from the current position we are in) and then carry on and implement their views in their respective states. They have no international goal towards which they are working, which is be an obvious consequence since international law has thus far failed to provide a goal. Furthermore, they have no rational substantial or procedural guidelines to guide them when approaching each other. Such goals and rational procedural and substantive guidelines are presented in this thesis to be attempts towards rational common ground by states for the common good concerning the legal status of the unborn in international law. In the case where the different arguments come together in a rational approach, the picture will look very different. The pro-abortion state and the anti-abortion state will come together in an attitude of tolerance. They will not meet each other in a head-on collision and fight about why they are right and the other wrong. Rather, they will present their case, in an open manner, including all evidence and concepts relevant to the matter.

They will justify their arguments not by merely stating that their assumption is correct, but by offering a rational justification based on and in line with the evidence present – not coming down to the mere conclusion that an assumption is correct. They will consider arguments of the opposing party, and where they require the opposing party to justify arguments, they will also justify their arguments. They will take into account matters of science, humanity, anthropology, developments in international law and international justice amongst other disciplines. These states will disagree about the legal status of the unborn. They will not be neutral in their approach or objective. They will retain their subjective views but at least attempt to be impartial and tolerate the views of others. By being impartial, they will consider opposing views and not merely assume that they are wrong. Such states will conduct their investigations and debates according to rational just procedures – procedures already established and entrenched in a rational manner to facilitate rational substantive arguments on the legal status of the unborn. Furthermore, such states will come together in an environment promoted by the nature of international law. This will include honesty, equality, tolerance, impartiality (as opposed to neutrality), dignity, and sensitivity towards the requirements of humanity. As for the result of such a debate, this thesis does not pretend that such rational argument will necessarily end up in universal consensus on the legal status of

the unborn in international law. What is stated is that at least an attempt should be made to achieve such a rational platform on the legal status of the unborn, something which is neglected in international law. Only after the attempt has been made, can it be determined whether a universal consensus is possible. This is required by rationality itself and this thesis presents a step in that direction. The aim of this study is to create awareness of this need in international law and the hope is that these developments will be embarked upon and that international law will take an active approach on the legal status of the unborn. The unborn cannot bring itself to the attention of international law. Therefore, it is up to those educated in law and other subjects to put the developments into motion.

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ABSTRACT

This thesis is primarily concerned with the legal status of the unborn in international law. It investigates the lack of jurisprudence concerning the legal status of the unborn in this area of law and contends that such a *lacuna* is unacceptable. The unacceptability of this lack of discourse is highlighted in light of the concept of rationality; and rationality is presented as the best alternative method to deal with the legal status of the unborn, based on various justifications showing that the current method of legal discourse is not only devoid of rationality but inadequate to deal with this problem. Rational procedural and substantive attempts are then promoted to advance the legal status of the unborn in international law. Here the thesis emphasises the importance of taking into account requirements of humanity, sensitivity to animals and fairness, and continues to investigate the irrationality of abortion jurisprudence by arguing that the sole use of human rights and more specifically, the right to life and women's rights, as determining the legal status of the unborn is part of the problem. Rationality requires an inclusive and sensitive approach and therefore, the sole use of concepts such as human rights, to the exclusion of science, anthropology, humanity and international justice, amongst others, are argued to be irrational. Scientific and anthropological consideration is also very important, not only to present an inclusive approach, but because these disciplines present us with some of the few convincing facts that can be used to aid philosophers when dealing with a topic where assumption and argument, rather than facts, are ample. However, this thesis does not pretend that a final or absolute solution on the legal status of the unborn is possible as cultural and ethical relativism as well as ideological affiliations present a problem to obtaining a universal rational outcome on the legal status of the unborn. However, it is stated that the *possibility* of a universal rational outcome, which represents an improvement on the contemporary situation, does exist and therefore, it would be irrational if such possibility were not attempted on rational grounds by way of procedure and substance, taking into account requirements of humanity.

OPSOMMING

Hierdie proefskrif is primêr gemoeid met die regstatus van die ongeborene in internasionale reg. Dit ondersoek die gebrek aan regsleer rakende die regstatus van die ongeborene in hierdie area van die reg en voer aan dat sodanige leemte onaanvaarbaar is. Die onaanvaarbaarheid van hierdie gebrek aan redevoering word na vore gebring in die lig van die konsep van rasionaliteit en hou laasgenoemde voor as die beste alternatiewe metode om met die regstatus van die ongeborene te handel, gebaseer op verskeie regverdigings wat toon dat die huidige metode van regsredevoering nie net aan rasionaliteit ontbreek nie, maar ook ontoereikend is om met hierdie probleem te handel. Rasionele prosessuele en wesenlike pogings word dan aangemoedig om die regstatus van die ongeborene in internasionale reg te bevorder. Hier beklemtoon die proefskrif die belangrikheid van die inagneming van die vereistes van menslikheid, sensitiwiteit jeens diere, asook regverdigheid en gaan die studie voort om die irrasionaliteit van aborsieregseleer te ondersoek deur te argumenteer dat die alleen gebruik van menseregte en meer spesifiek die reg tot lewe en vroueregte, as bepalend van die regstatus van die ongeborene, deel vorm van die probleem. Rasionaliteit vereis 'n inklusiewe en sensitiewe benadering en daarom word geredeneer dat die alleen gebruik van konsepte soos menseregte, tot die uitsluiting van onder andere die wetenskap, antropologie, mensheid en internasionale reg, irrasioneel is. Wetenskaplike en antropologiese oorweging is ook baie belangrik, nie net om 'n inklusiewe benadering voor te hou nie, maar omdat hierdie dissiplines ons van 'n paar oortuigende feite voorsien wat gebruik kan word om filosofie te help wanneer hulle met 'n onderwerp te doen het waar aanname en argument, eerder as feite, volop is. Hierdie proefskrif gee egter nie voor dat 'n finale of absolute oplossing oor die regstatus van die ongeborene moontlik is nie aangesien kulturele en etiese relativisme, asook ideologiese affiliasies, 'n probleem in die weg lê van die verkryging van 'n universele rasionele uitkoms oor die regstatus van die ongeborene. Dit word egter gestel dat die *moontlikheid* van 'n universele rasionele uitkoms, wat 'n verbetering op die kontemporêre situasie verteenwoordig, wel bestaan en daarom sal dit irrasioneel wees indien so 'n moontlikheid nie op rasionele gronde deur middel van prosedure en substansie, met inagneming van die vereistes van mensheid, oorweeg word nie.

Key Concepts:

international law

rationality

reason

abortion

unborn

humanity

anthropology

foetus

human rights

viability

united nations

reproductive rights