MASTER’S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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THE PROTECTION OF ABORTION-RELATED RIGHTS IN THE CONTEXT OF ARTICLE 12 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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"Not the Church, not the State, women must decide their fate"[1]

- Slogan of the Pro-choice movement

[1] Orr Judith, *Abortion wars: The fight for reproductive rights*, Bristol University Press, 2017, p. 6

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Abstract for Master´s Thesis

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The thesis examines the protection of abortion rights within the framework of article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 12 of the ICESCR protects the right to health and reproductive health and rights are inherent to Article 12. Reproductive rights and freedom encompass the right to have access to medical services relating to reproductive health, and ensuring full accessibility, protects abortion-related rights for women. However, many women do not enjoy unhindered access to safe abortion and resort to unsafe and clandestine methods of terminating a pregnancy which have disastrous effects on their physical and mental health and may even prove fatal. The objective of the thesis is to examine the protection of abortion-related rights through article 12 of the ICESCR and to prove that abortion rights are important for the full realization of women's right to health. The aim of the thesis is also to prove that a lack of access to safe abortion and a faulty protection of abortion rights, are discriminatory and unjustified limitations in women's rights. Furthermore, the aim is to prove that an unjustified limitation in women's right to reproductive rights are in violation of the State obligations to respect, protect and fulfil the rights in the ICESCR.

The thesis examines different aspects of the protection of the right to health: access to safe abortion and the right to non-discrimination, stereotypical gender aspects, criminalization of abortion and stigmatization of abortion. The issues of the thesis are examined with the ICESCR's article 12 as a basis and continues to analyze the findings through relevant case-law and General Comments issued by the Committee on Economic, Social and Cultural Rights. The central findings of the thesis are indeed that a lack of protection of safe abortion is a violation of women's right to health and that the protection of abortion-related rights is important to safeguard the right to health for women. The failure of providing safe abortions for women who need it, violates their right to health, self-determination and dignity. Prohibiting or restricting women from obtaining abortions, has disproportionate effects on women and adds to the stigmatization of abortion and the women who undergo it. Furthermore, the failure of a State to provide unhindered access to abortion and ensure protection of abortion-related rights are in violation of the State's core obligations.

In order to ensure a proper protection, the thesis gives three example on how to transform the protection of access to safe abortion into a comprehensive legal framework: decriminalization, realization of access to safe abortion as an integral part of the right to health and ensuring proper and comprehensive sexual and reproductive education for women and girls. Therefore, it can be concluded that the protection of safe abortion needs protection in hard-law instruments. Protection of safe abortion needs to be considered as an integral part of women's human rights and women should have unhindered access to safe abortions. The protection of abortion-related rights in the context of Article 12 could also benefit from overlapping jurisprudence from other international courts or treaty bodies, as the case-law examples will show.

Key words:

Abortion, Women's Rights, ICESCR, Article 12, Health, Reproductive Rights

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1. INTRODUCTION

1.1 Introductory remarks

Throughout history, women have attempted to control their fertility. In ancient Egypt, almost three thousand years ago, women were mixing different herbs or applying honey to their vaginas to prevent pregnancy. In both ancient Greece and Egypt, different plants have been known to have anti-fertility properties.[2] Abortion is not a new concept and has in fact been practiced for thousands of years. It is only quite recently that the debate for abortion rights has risen. It is only recently that restrictions on the right to abortion have come to light. The access to abortion and the right to have an abortion have always been discussed in the context of politics, religion, medicine, and even morality. Women have had their bodies discussed publicly and have been shamed or even punished for deciding to have an abortion, or not have an abortion. Women can be faced with an unintended pregnancy for various reasons, including, failed or incorrect use of contraception, rape, age, fatal abnormalities in the fetus, and economic and social reasons.[3] Ending an unwanted pregnancy should be a relatively straightforward medical procedure, but alas, it is not. The most used method of safe abortion is generally medical abortion which means that a woman is given two pills: mifepristone and misoprostol. These drugs are intended to cause an early miscarriage. Both drugs are listed as "essential drugs" by the World Health Organization ('WHO').[4] The other common method for abortion is vacuum aspiration. It is done surgically by inserting a tube into the cervix and applying suction to extract the contents of the womb.[5]

Ever since the US Supreme Court decided to overturn the landmark judgment of *Roe v Wade*, the topic of abortion has become even more current. The United States is now one of four countries to severely restrict abortion rights in the world since 1994.[6] The overturning of *Roe*

[2] Orr Judith, *Abortion wars: The fight for reproductive rights*, Bristol University Press, 2017, p. 41-42
[3] *Ibid*, p. 4
[4] *Ibid*, p.5; World Health Organization, List of Essential Drugs, available at https://list.essentialmeds.org accessed on 11th January 2023
[5] Orr Judith, *Abortion wars: The fight for reproductive rights*, Bristol University Press, 2017, p. 5
[6] The Guardian (24th January 2022): Jessica Glenza, Martin Pengelly, and Sam Levin: *US supreme court overturns abortion rights, upending Roe v Wade*

v Wade constituted in a mass protest both in the US but also around the world. Women, tired of having their bodies used as political vessels, protested the restriction on abortion rights. The overturning of *Roe v Wade* can be defined as a major setback in the development of women's rights. Even US President Joe Biden has called this a "tragic error" and that the Supreme Court "has taken America down an extreme and dangerous path".[7]

The Center for Reproductive Rights has set up a complete map of the different abortion laws in the world. Some countries allow abortion to save the woman's life, to preserve health, on broad social or economic grounds, or upon request. Some Asian, Middle Eastern, South American, and African countries have a complete abortion ban.[8]

Unintended pregnancies affect millions of women worldwide, and every year, a large percentage of these women seek an abortion, regardless of the law.[9] According to the WHO, every year, around 73 million induced abortions are carried out worldwide.[10] Furthermore, the WHO states that 45% of abortions carried out are unsafe.[11] Unsafe abortions can be defined as "a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking minimal medical standards or both".[12] Needless to say, unsafe abortions present a high risk for the health of a woman seeking to terminate an unwanted pregnancy. Women seeking unsafe abortions may suffer from both long-term and short-term complications from the procedure.[13] Almost all these complications and in some cases fatalities, could have been prevented by using contraceptives and by providing women with safe abortions.[14] In countries where abortion is restricted by law, women seek to terminate pregnancies using self-induced methods or seek the help of persons lacking the necessary skills to perform an abortion. Thus, unsafe, and therefore also unlawful abortions take place in

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[7] The Guardian (24th January 2022): Jessica Glenza, Martin Pengelly, and Sam Levin: *US supreme court overturns abortion rights, upending Roe v Wade*

[8] Center for Reproductive Rights, interactive map on the world's abortion laws, available at https://reproductiverights.org/maps/worlds-abortion-laws/?category[1348]=1348, accessed on 7th September 2022

[9] Shah, H. Iqbal, Åhman, Elisabeth, Ortayli Nuriye, *Access to Safe Abortion: Progress and Challenges since the 1994 International Conference on Population and Development* (ICPD), 2014, p.3

[10] https://www.who.int/news-room/fact-sheets/detail/abortion accessed on 19th January 2022

[11] https://www.who.int/health-topics/abortion#tab=tab_1 accessed on 19th January 2022

[12] https://www.who.int/reproductivehealth/topics/unsafe_abortion/hrpwork/en/ accessed on 19th January 2022

[13] Complications include sepsis, trauma to cervix, uterus, vagina, and hemorrhage. See for example: World Health Organization. *Safe abortion: technical and policy guidance for health system*s. Second Edition. Geneva: World Health Organization, 2012, p. 19-20

[14] Shah, H. Iqbal, Åhman, Elisabeth, Ortayli Nuriye, *Access to Safe Abortion: Progress and Challenges since the 1994 International Conference on Population and Development* (ICPD), 2014, p. 14

countries with more restrictive abortion laws.[15] However, it is worth noting that the deaths and complications resulting from unsafe and unlawful abortions are hard to measure in countries with strict abortion laws. Fear of punishment, as well as social stigma, makes women more cautious in reporting the deaths and complications resulting from an illegal procedure.[16]

Abortion affects many human rights. The lack of abortion or the complete ban on abortion affects the lives of millions of women and their human rights. Abortion-related rights are interdependent with many other rights such as the right to health, the right to respect for private, - and family life as well as the prohibition of torture and the freedom from discrimination.[17] Abortion can also be argued to be part of the reproductive rights of women. Reproductive rights are inherent in the right to health, as laid out in article 12 of the International Covenant on Economic, Cultural, and Social Rights (hereafter: "the ICESCR" or "the Covenant").[18]

1.2. Purpose, legal issue, and research questions

The research question of the present thesis is the following: the protection of abortion-related rights in the context of the ICESCR, more specifically Article 12. Abortion-related rights, in the scope of the present thesis, encompasses the access to safe abortion, the right to health perspective according to Article 12, the right to self-determination and autonomy, and the right to be free from discrimination. Furthermore, the author will examine different types of breaches of the right to health and how they relate to the protection of abortion-related rights. The author will examine the discrimination aspect of not having access to safe abortion for the purposes laid out in the Covenant. More specifically, the author will discuss the discrimination aspect relating to marginalized groups of women and its impact on the protection of abortion-related rights. The author will also examine in what sense a lack of access to safe abortion has disproportionate effects on the protection of abortion-related rights and the right to health as laid out in Article 12. Moreover, the author will discuss criminalization of abortion in detail since criminalization is an extreme form of restriction of abortion rights and women's

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[15] Shah, H. Iqbal, Åhman, Elisabeth, Ortayli Nuriye, *Access to Safe Abortion: Progress and Challenges since the 1994 International Conference on Population and Development* (ICPD), 2014, p.5

[16] *Ibid,* p.14

[17] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 10

[18] General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, in E/C.12/2000/4, para. 11

reproductive freedom. Therefore, it is useful to separately examine the criminalization aspect in regards to abortion and the protection of abortion-related rights. A chapter is devoted to discussion two particular cases from the Human Rights Committee and the CEDAW Committee. The cases are not decided within the framework of Article 12 of the ICESCR, but they are relevant because they illustrate the vast impact that criminalization of abortion has on women's right to reproductive health which is an integral part of the right to health according to Article 12. The cases also highlight the need for an improved protection of abortion-related rights. The author will also examine stigmatization of abortion and in what sense stigmatization affects the right to health of women, as laid out in Article 12 of the Covenant, and the protection of abortion-related rights.

The scope of the present thesis will be focusing on ICESCR jurisdiction. Some examples of countries with very strict abortion laws and policies will be examined as examples to further highlight the research question.

1.3. Material and method

The Statute of the International Court of Justice presents the different legal sources recognized in international law. International conventions, international custom, general principles of law and judicial decisions, and teachings of highly qualified publicists in international law.[19] For the present thesis, the primary source of law will be the 1966 International Covenant on Economic, Social, and Cultural Rights articles 2, 3, and 12. To answer the research questions laid out in chapter 1.2., the author will analyze relevant legal documents such as General Comments that have been issued by the Committee on Economic, Social, and Cultural Rights ("the Committee"), or by relevant Special Rapporteurs. When it comes to implementing the rights outlined in the ICESCR, the Committee is the primary treaty body. Their General Comments are of great importance and are relevant since they lay out the different content of the rights in the Covenant. General Comment Nos. 3, 12, 14, 20, and 22 will be used. To highlight the research questions, the author will also analyze a State Report issued by the Committee, specifically the Poland State Report. Furthermore, the author will make use of relevant reports of relevant UN Special Rapporteurs. To further highlight the research question,

[19] Statute of the ICJ, article 38

the author will analyze and discuss several cases from judicial bodies such as the European Court of Human Rights, the CEDAW Committee and the CCPR Committee.

1.4. Outline

The outline of the present thesis will be to first introduce the reader by giving a historical overview in chapter 1. Chapter 2 will be focusing on the Covenant in general terms beginning with a more general perspective of the Covenant itself, including the State Parties' obligations laid out in Article 2, and then continuing to describe the state obligations of the Covenant generally as well as in relation to the right to health. Chapter 3 will be dedicated to describing the right to health as outlined in the ICESCR. Chapter 3 will in detail describe the core content of article 12 and the scope and meaning of it. Chapter 3 will conclude with a description of retrogressive measures and end with an example of a state that has made use of retrogressive measures in relation to abortion. Chapter 4 will discuss women's sexual and reproductive health including the Cairo Programme of Action. Chapter 5 will include examples of breaches of the right to health as well as examples of countries that have restrictive abortion laws. In chapter 5, the author will also discuss how marginalized women face more discrimination on account of not being able to access abortion as easily as non-marginalized women. Chapter 5 will also give an overview on how the criminalization of abortion has disadvantageous effects on women and more specifically, how it affects the protection of abortion-related rights in a negative manner. A subchapter in chapter 5 will include an analysis on two judicial cases that encompass the criminalization of abortion in order to highlight the health effects criminalization of abortion has on women. Chapter 5 will continue with an in-depth analysis of the cases and highlight some key points as to why criminalization is a key detrimental factor when it comes to the protection of abortion in relation to Article 12 of the ICESCR. Chapter 5 will end with discussing stigmatization, its different spheres and how they relate to the cases presented earlier in the chapter and how stigmatization relate to the rights outlined in Article 12. In chapter 6, the author will give an overview on how abortion rights can be transformed in order to ensure complete protection of the right to abortion and accessing it. The author will give a few key points that have come up in different sections of the thesis. To conclude the thesis, chapter 6 will end with some final remarks as well as some analytical viewpoints as to why the right to abortion is such an important topic, why, if and how, international law has failed in its protection of women's abortion-related rights and the right to health as laid out in ICESCR.

2. THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

2.1. Overview

The author will begin to describe the Covenant in general detail as it is the foundation of the present thesis and to understand the principles and objectives that make up the ICESCR. The ICESCR was adopted by the UN General Assembly on 16th December 1966 through resolution 2200A (XXI). The Covenant entered into force in 1976.[20] Together with the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights they make up the so-called International Bill of Rights.[21] The International Bill of Rights can be defined as the standing stone for the protection of human rights within the framework of the United Nations.[22]

Before diving into the Covenant, it is important to understand some of the perceptions of economic, social, and cultural rights ('ESC-rights'). One way of understanding the perspectives of ESC-rights is to compare them with civil and political rights (as laid out in the International Covenant on Civil and Political Rights).[23] Generally, in human rights law, one needs to make the distinction between positive rights and negative rights. Civil and political rights can be categorized as negative rights where the State Party needs only to refrain from activities that would violate civil and political rights. ESC-rights can be categorized as positive rights. This would require active interference from the State to not violate the rights laid out in the ICESCR.[24]

Therefore, the Covenant gives rise to a series of obligations to the ratifying State Party and the treaty must be interpreted in good faith. The principle that a treaty must be interpreted in good

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[20] International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976

[21] Fact Sheet No. 2 (Rev. 1), The International Bill of Rights, United Nations Office of the High Commissioner, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet2Rev.1en.pdf

[22] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 1

[23] Philip Alston and Gerard Quinn (1987), *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, Human Rights Quarterly, vol. 9, in *Economic, Social and Cultural Rights*, edited by Manisuli Ssenyonjo, (Routledge), 2016, p. 6

[24] *Ibid*

faith is part of customary international law and has been laid out in the Vienna Convention on the Law of Treaties.[25] Article 31(1) stipulates the general rule of interpretation:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[26]

Furthermore, the International Court of Justice has stated in its Nuclear Test cases that the principle of good faith is inherently a part of the *pacta sunt servanda* ("agreements must be kept") principle in international law.[27] The obligations outlined in the Covenant must be interpreted in good faith. However, the wide range of obligations that rises from the Covenant are different by nature and have been interpreted widely. In January 1976, when the Covenant entered into force, some governments of State Parties interpreted the obligations as mere aspirations and achievable goals, rather than binding legal obligations for the State.[28] In fact, the Covenant and its provisions have been heavily criticized by scholars and lawyers. The critique stems from the vagueness of many provisions laid out in the Covenant.[29] The justiciability of the international treaties governing economic, social, and cultural rights may be underdeveloped and threatened. Firstly, the underdevelopment of justiciability may be because of the wording of the specific provisions.[30] As mentioned above, the wordings of the provisions laid out in the Covenant are vague and not very specific, making it hard for States to interpret them and fulfill their obligations under the Covenant. Here, one could compare the language of the provisions laid out in the 1990 International Convention on the Protection of the Rights of All Migrant Workers. To highlight the matter at hand, take Article 28 of the Migrant Workers Convention: "(…) shall have the right to receive any medical care that it

[25] UN Doc. A/Conf.39/27, the Vienna Convention on the Law of Treaties, Vienna 23 May 1969, in force 27 January 1980
[26] Vienna Convention, article 31(1)
[27] *Nuclear Test Cases*, Australia v. France, judgment on 20th December 1974, International Court of Justice, para. 46; see also; Philip Alston and Gerard Quinn (1987), *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, Human Rights Quarterly, vol. 9, in *Economic, Social and Cultural Rights*, edited by Manisuli Ssenyonjo, (Routledge), 2016, p. 8
[28] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 2; for further and in-depth examination of state obligations see chapter 2.1.1
[29] Martin Scheinin: *Economic and Social Rights as Legal Rights*, p. 30-31 in A. Eide et al. (eds.), *Economic, Social and Cultural Rights*, 2nd ed., 2001, Kluwer Law International
[30] *Ibid*, p. 30

urgently required of the preservation of their life or the avoidance (…)".[31] The wording of Article 28 of the Migrant Workers Convention is clear and easy to interpret as the article is focusing on the rights of the individual itself. Secondly, the international mechanisms governing the interpretation of the provisions can be understood as weak.[32] The Committee on Economic, Social, and Cultural Rights issues General Comments that serve as recommendations for State Parties to the ICESCR.[33]

2.2. State obligations under the Covenant

In human rights law, States are the most important duty holders regarding the full realization of human rights within their territory. As with all international human rights treaties, it is paramount that the obligations of the duty holders, the States, are defined in said human rights instrument. The ICESCR is no exception, and the nature of the State obligations can be found in Article 2 (1) which reads as follows:

> 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[34]

The obligations of State Parties to the Covenant have been described as a spectrum of duties. On the one hand, States have the duty not to interfere with the rights in the Covenant, and on the other hand, States must take action to ensure the rights outlined in the Covenant.[35] The obligation of non-interference can be described as a negative obligation, whereas the obligation to take action can be described as a positive obligation.[36] Most of the rights outlined in the Covenant require both negative and positive obligations by States. As stated in the beginning, States are the primary duty holders when it comes to human rights law.

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[31] Example found in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights,* A Textbook, Second Revised Edition, Marinus Nijhoff Publishers, 2001, p. 31; see also the 1990 International Convention on the Protection of the Rights of All Migrant Workers, adopted by UN General Assembly resolution 45/158 on 18th December 1990

[32] *Ibid*

[33] United Nations Human Rights, Office of the High Commissioner, *General Comments*, Committee on Economic, Social and Cultural Rights, available at https://www.ohchr.org/en/treaty-bodies/cescr/general-comments , accessed on 9 October 2023

[34] Article 2 (1) of the ICESCR

[35] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 116

[36] *Ibid*

Furthermore, the wording of Article 2 of the ICESCR differs from its sister Covenant, International Covenant on Civil and Political Rights (ICCPR). This is worth noting since Article 2 of the ICESCR uses the wording to '*take steps to*' ensure the rights in the Covenant. Meanwhile, its sister Covenant ICCPR uses the wording '*undertakes to respect and to ensure*' the rights in ICCPR.[37] The wording *'to take steps'* means that a State Party cannot sit idly by and do nothing to ensure the rights in the ICESCR, and by doing so evade its obligations under the ICESCR. ICESCR allows for the progressive realization of the rights and the initial steps to ensuring the rights in the Covenant can involve planning as to how the State Party will ensure the rights.[38] As mentioned, the ICESCR has been heavily criticized for being too vague and the obligations for State Parties lack specificness, therefore, making it difficult for States to interpret the ICESCR and ensure the rights outlined in it.[39] The difference in wording is based on the fact that the drafters of the ICESCR believed that economic, social, and cultural rights are inherently different in nature than civil and political rights.[40]

Moreover, the wording in article 2 (1) *'all appropriate means'* is rather ordinary and not apparent. It can be described as the specific measures States need to take in order to safeguard the rights the specific article of the ICESCR, for example in article 12, '*all appropriate means'* can be through giving equal access to health care of good quality. States enjoy a margin of appreciation in determining which means are appropriate for that specific State to ensure the effective enjoyment of the rights in ICESCR. The margin of appreciation ensured to States as regards the *'all appropriate means'* wording, the margin is not without limits and States should consider all the available means and evaluate which means is the most appropriate.[41] This approach was also confirmed in the Committee's General Comment No. 3 on State Obligations. It noted that:

"While each State Party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the "appropriateness" of the means chosen will not always be self-evident. It is therefore desirable that States parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances. However, the ultimate determination as the whether all appropriate measures have been taken remains one for the Committee to make".[42]

[37] ICCPR, article 2(1)
[38] John Tobin, *The Right to Health in International Law,* Oxford University Press, 2012, p. 177-178
[39] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 116-121
[40] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2000, p. 119 and 131-133
[41] John Tobin, *The Right to Health in International Law,* Oxford University Press, 2012, p. 179
[42] E/1991/23, General Comment No. 3: *The Nature of States Parties' Obligations (Art 2, Para. 1 of the Covenant*), 14 December 1990, para. 4

Since the dynamic development of international human rights law, it can be said that both ESC-rights as well as civil and political rights include positive and negative obligations as well as immediate actions which can be progressively realized.[43] Moreover, all human rights impose some sort of obligation on States. Some rights require a different level of involvement of a State – some rights require less state involvement, and some require more. As stated at the beginning of this chapter, the obligations of States can be considered a spectrum. The closer the obligation is to one end of the spectrum, the more resources are required by the State to realize the right in question.[44] Furthermore, the Committee on Economic, Social, and Cultural Rights has confirmed that the obligations of States in the ICESCR also entail actions of immediate effect and not only the progressive realization of the rights.[45] Also explained above, ESC-rights are inherently different in nature that civil and political rights. Therefore, it is considered that economic, social, and cultural rights require more positive actions by States thus imposing more positive obligations on States.[46]

Regarding the obligations of States in international human rights law, scholars have proposed the tripartite typology to explain the inherent nature of State obligations. It was first introduced in the 1980s by Henry Shue. He proposed that for every human right, there are three types of obligations for States: 'to avoid depriving', 'to protect from deprivation', and 'to aid the deprived'. Today, they better translate to 'the obligation to respect', 'the obligation to protect', and 'the obligation to fulfill'.[47] The Committee on Economic, Social, and Cultural Rights has used these terms to further clarify and illustrate the State obligations arising from the ICESCR.[48] The following three subchapters will examine each of these types of obligations.

[43] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 123-124 and 156
[44] *Ibid*, p. 156
[45] General Comment No 3, para 1; see also M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 134
[46] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 156
[47] *Ibid*, p. 157
[48] See for example General Comment No 12 para. 15

2.3. The obligation to respect

The duty to respect means that the State Party should not take any measures that would limit or contradict the rights granted in the Covenant. The obligation to respect therefore also includes that the State should refrain from discriminatory practices on a governmental level. Furthermore, all laws and policies that a State adopts that are incompatible with the rights in the Covenant, or other internationally acknowledged legal instruments, would therefore also be contradicting the obligation to respect.[49] Concerning the right to the highest attainable standard of mental and physical health, a violation of the obligation to respect would be to deny access to health facilities to a particular group or the adoption of laws or policies that inherently interfere with the core components of the right to health as laid out in article 12 of the Covenant.[50] The obligation to respect also encompass the amendment of laws that violate the right to sexual and reproductive health. Therefore, the obligation to respect means that State Parties should remove all laws that criminalize abortion.[51] The obligation to respect, in regards to access to abortion, also includes the removal of any requirements of third-party authorization such as parental, spousal or judicial consent.[52]

2.4. The obligation to protect

Under the obligation to protect, States are required to ensure that all individuals within their jurisdiction are protected from violations of the rights in the Covenant by third parties (*i.e.,* companies, other individuals, or groups). Through, for example, legislative measures, States are required to regulate the actions of third parties so that their actions are compatible with human rights. Furthermore, if third parties engage in practices that can be considered harmful to the full enjoyment of the rights in the Covenant, States are obligated to protect individuals from harm.[53] Regarding the right to health in the Covenant, the Committee has affirmed that the failure of States to protect women from violence, could be a violation of the obligation to

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[49] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 197; see also General Comment No. 14 para. 50
[50] General Comment No. 14 para. 50
[51] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 40
[52] *Ibid*, para. 41
[53] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 197

protect.[54] Furthermore, the obligation to protect requires State Parties to take measures to establish laws to prevent third parties from interfering in accessing sexual and reproductive services.[55]

2.5. The obligation to fulfil

In its General Comment No. 14, the Committee has confirmed that the duty to fulfil, also incorporates the obligation to facilitate, provide and promote.[56] The obligation to fulfil requires States to actively promote the rights in the Covenant and to adopt legislative measures to ensure the fulfillment of the right. Regarding the right to health, this could entail for example the adoption of a functioning healthcare system.[57] The obligation to facilitate includes the obligation for States to take positive action to realize the rights in the Covenant if an individual is incapable of doing so by themselves for reasons beyond their control.[58] The obligation to promote, requires States to take positive action to ensure the rights in the Covenant. Regarding article 12, these actions could include the training of health staff, recognizing the healthcare needs of marginalized groups, promoting a healthy lifestyle, and supporting individuals when making decisions about their health.[59] Consequently, States should ensure universal access to different healthcare services, including access to abortion services.[60]

2.6. Conclusion on State obligations

State Parties have general obligations, as listed in the previous subchapter, and they have core obligations inherent in each of the rights in the Covenant. For this thesis, the core obligations inherent in the right to health as laid out in Article 12 most relevant.[61] The core obligations regarding the right to health have been defined by the Committee on Economic, Social, and Cultural Rights in its General Comment No. 14 on Article 12. Every State Party must ensure that everyone has the right to access healthcare services, especially marginalized and vulnerable

[54] General Comment No. 14, para. 51
[55] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 42
[56] General Comment No. 14, para. 33
[57] *Ibid*, para. 36
[58] *Ibid*, para. 37
[59] *Ibid*
[60] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 45
[61] Chapter 3 will discuss Article 12 in detail

people. The health care services should also be equally distributed. The State Party needs to ensure access to adequate and safe food, to safeguard the right to freedom from hunger as well as adequate housing and a supply of safe water. Furthermore, the State needs to ensure the provision of essential drugs. Lastly, the adoption and implementation of a public health care strategy on a national level that addresses the health care concerns of the whole population. The public health care strategy should be transparent and closely monitored.[62] Moreover, the Committee explains that several other obligations are equally important regarding Article 12. States should safeguard reproductive and maternal (prenatal and post-natal) as well as child health care.[63]

To progressively realize the right in the Covenant, specifically the rights encompassed in article 12, it is important that States fulfil their core obligations. Since reproductive rights and health are encompassed in article 12 of the ICESCR, there are certain core obligations that States need to comply with to progressively realize the rights for women. Regarding abortion and access to abortion, States have a duty to respect, protect and fulfil women's rights and abortion related services. Should the State not comply with their core obligations, it may constitute in human rights violations. Regarding abortion, the core obligations for States is to remove all legal provisions that punish women who have undergone an abortion. States should also remove criminal laws relating to the punishment of medical practitioners who perform abortions. States are obligated to ensure that women have access to health services. If a doctor refuses to perform an abortion, he or she is required to refer the woman to another doctor who might perform the abortion. Lastly, States need to take steps to ensure access to abortion and to remove any barriers that may resort in women seeking unsafe methods to terminate their pregnancy.[64] Regarding abortion and sexual and reproductive rights, States also have a core obligation to ensure access to essential drugs and medicine according to the list made by the WHO Model List of Essential Medicines.[65] As already stated, abortion medication is on the list of essential medicines. [66]

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[62] General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, in E/C.12/2000/4, para. 43

[63] *Ibid*, para. 44; *N.B.* the paragraph continues to list other obligations, but they are not relevant for the present thesis therefore outside of its scope

[64] United Nations Human Rights, Office of the High Commissioner, *Information Series on Sexual and Reproductive Health and Rights: Abortion*, updated in 2020.

[65] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 49(e)

[66] World Health Organization, List of Essential Drugs, available at https://list.essentialmeds.org accessed on 12th October 2023

3. THE RIGHT TO HEALTH IN INTERNATIONAL HUMAN RIGHTS LAW

3.1. General remarks about the right to health

Throughout history, the term 'health' has been described as freedom from disease.[67] However, after the Second World War, and the establishment of the World Health Organization and the UN, the term has developed somewhat. The first notion of an individual's right to health as a human right can be found in the preamble of the Constitution of the World Health Organization, which was adopted and signed on 22 July 1946. It reads:

> Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[68]

The debate in international human rights law has often been about the definition of the right to health. What should be included in the right to health? Some scholars prefer the term 'the right to health, others prefer 'the right to health care'.[69] However, for the present thesis, to describe the human right to 'highest attainable physical and mental health', the term 'the right to health' will be used. Furthermore, the term 'right to health' corresponds best with all aspects included in Article 12 of the ICESCR, which is the foundation of the present thesis. It is important to not only recognize the 'right to health care' as part of the right to health, as the right itself incorporates much more such as access to clean drinking water and a safe environment.[70]

3.2. Article 12 of the ICESCR

> 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.[71]

In the field of international human rights law, the ICESCR and its definition of the right to health is perhaps the most known and most used. It is very similar to the Preamble of the

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[67] For an elaborate historical review on the right to health see Birgit C.A. Toebes, *The Right to Health as a Human Right in International Law*, Intersentia, 1999, p. 10-15,

[68] Preamble of the Constitution of the WHO, 22 July 1946

[69] Birgit C.A. Toebes, *The Right to Health as a Human Right in International Law,* Intersentia, 1999, p. 16-18

[70] *Ibid*, p. 17

[71] ICESCR, article 12.1

WHO Constitution, which was discussed in the previous chapter.[72] The right to health is featured in many international law instruments but article 12 of the ICESCR is the most comprehensive one on the right to health.[73]

Article 12 of the ICESCR features many health-related issues and rights that are incorporated in the core content of Article 12. To best describe and analyze the health-related issues incorporated in Article 12, one needs to look at General Comment No. 14 issued by the Committee. The General Comment is intended to give assistance and help the State Parties to implement article 12 and to aid State Parties realize the obligations arising from article 12.[74] GC 14 describes the Committee's view on the right to health and lays out a comprehensive foundation on the understanding of Article 12. Article 12.1 lays out the normative content of the right to health and provides a definition of the right to health. Article 12.2 provides for the State Parties' obligations under the right to health.[75]

In General Comment No. 14, the Committee notes that the right to health is not to be understood as the right to be *healthy* (emphasis added).[76] No State can guarantee that everyone is healthy nor can it offer protection for every cause of ill human health, such as disease or poor diet.[77] However, the State can guarantee that everyone has the same possibilities in accessing health care and that everyone is treated without discrimination or prejudice. The right to health incorporates both freedoms and obligations. The Committee notes that everyone has the freedom to control one's own health and body. This includes sexual and reproductive freedom and the right to non-interference by the State.[78] The right to health is interpreted by the Committee as "an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water /…/ and access to health-related education and information, including on sexual and reproductive health".[79] Article 12.2. (a) provides for "the reduction of stillbirth rate and of infant mortality and for the healthy development of the child".[80] The

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[72] See Preamble of the WHO

[73] General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, in E/C.12/2000/4, para. 2

[74] *Ibid*, para. 6

[75] ICESCR, article 12 and GC No. 14 para. 7

[76] GC No. 14, para. 8

[77] *Ibid*, para. 9

[78] *Ibid,* para.8

[79] *Ibid*, para. 11

[80] *Ibid*, para. 14; and ICESCR article 12.2(a)

Committee has interpreted this to be understood as States would be required to adopt concrete measures to improve child and maternal health, including sexual and reproductive health services as well as adequate access to family planning.[81] Moreover, this would mean that Article 12 of the ICESCR would encompass the right for women to have adequate access to safe abortion, if necessary, to safeguard their right to health according to article 12 of the ICESCR. Therefore, States should have the obligation to provide protection of abortion-related rights and timely access to safe abortion to realize the right to health for women.

3.3. Scope and meaning of Article 12

The wording *'highest attainable standard of physical and mental health'* considers both the individual's biological and socio-economic preconditions as well as the State's resources.[82] The notion of health and the scope of the right to health has changed and widened somewhat since the adoption of the ICESCR in 1966. The scope of the right to health has widened so that it now covers gender differences and the distribution of resources.[83] For this thesis, the most important aspect of the scope of the right to health is sexual and reproductive health and access to abortion. The Committee has interpreted the right to health to incorporate the right to sexual and reproductive health. Furthermore, the Committee has noted that the right to health also extends to the right to *appropriate* health care for all.[84]

General Comment No. 14 lays out some essential elements of article 12 that are necessary for understanding its scope and meaning. The application of these elements on a national level will depend on the State's available resources to do so. Within the State Party, health care should be *available* for all in a sufficient quantity so that the right to health is ensured equally for all. Without discrimination, healthcare facilities and services should be *accessible* to all. Additionally, the aspect of accessibility encompasses four dimensions that overlap: non-discrimination, physical accessibility, economic accessibility, and information accessibility. Physical accessibility means that the healthcare facilities, goods, information and services must be safely available within both physical and geographical reach for all in

[81] *Ibid*, para. 14
[82] GC No. 14 , para. 9
[83] *Ibid*, para. 10
[84] *Ibid*, para. 11

order for everyone to receive timely services and information. Physical accessibility needs to be especially ensured for people belonging to marginalized groups, e.g. women living in rural areas.[85] Economic accessibility, or affordability, means that the sexual and reproductive services need to be affordable for everyone. Some essential goods and services need to be provided without a cost. The need for free essential healthcare is important so that no one is burdened by non-proportionate health expenses.[86] Information accessibility encompasses the right for everyone to receive information concerning sexual and reproductive health. The right to have access to information also includes the right to information regarding abortion and post-abortion care. The information needs to be modified accordingly, for example, taking in consideration age, gender and educational background.[87] The healthcare facilities are to be respectful of medical ethics and *acceptable* towards culture. However, it is important to note, that acceptance towards cultural differences should not be regarded as a justification to refuse to provide goods, services and information. That is, cultural differences are not to be regarded as a justification to restrict women from accessing abortion. Health care should be culturally respectful towards, among others, minorities, and different genders.[88] The *quality* of these facilities should be scientifically and medically appropriate, which requires, among others, appropriately trained medical personnel. Furthermore, the failure or refusal to, for example, provide medication for abortion, puts the quality of the healthcare service at risk and could amount to a violation of the right to health.[89] The list is, of course, non-exhaustive and serves as a guide for States in defining their obligations and actions toward the right to health. The examples are generic but illustrate that the scope of the right to health is broad and that the right itself should be interpreted in a wide manner.[90]

[85] CESCR, E/C.12/GC/22: *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Right*s), para. 16
[86] GC No. 22, para. 17
[87] *Ibid*, para. 18-19
[88] *Ibid*, para. 20
[89] CESCR, E/C.12/GC/22: *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Right*s), para. 21
[90] General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, in E/C.12/2000/4, para. 12-13

3.4. The foundation of Article 12

The foundation a specific right includes essential elements of a right which is inherently the foundation (core) of the right. The core content of a right captures the essence of the right and gives it a certain meaning.[91] Regarding the core elements of the right to health as laid out in Article 12 of the ICESCR, the two fundamental pillars in the core elements of Article 12 are the progressive realization using maximum available resources and the principle of non-retrogression. The progressive realization of using maximum available resources means that states should take immediate steps towards the fulfillment of a right, regardless of the resources available. Furthermore, States should make immediate improvements in the judicial systems to eliminate possible discrimination in the legal system. Generally, the rights outlined in the ICESCR are not going to be achieved in a short period of time. Therefore, the progressive realization of rights is one of the core elements in economic, social, and cultural rights, specifically the right to health. Progressive realization of the right to health means that States have more flexibility to ensure the right to health. In other words, the principle of progressive realization reflects the reality of the many differences between States, and that some have more resources to guarantee the rights in the Covenant much faster than others. However, the principle of progressive realization must be read considering the overall objective of the Covenant. The overall objective of the Covenant is to set up clear obligations for States so that they effectively can realize the rights enshrined in it.[92] Essentially, States have the right to choose how and when they make use of their resources. When becoming a Party to the Covenant, a State can decide which of the rights it chooses to implement and allocate its resources to.[93] Notwithstanding the fact that States should allocate a significant number of resources to implement the rights outlined in the Covenant. Failure to do so will inevitably result in a violation of the state obligations in Article 2(1).[94] Sepúlveda mentions two principles in international law that supports this: the principle of good faith and the principle that States cannot invoke national law to escape their

[91] Birgit C.A. Toebes, *The Right to Health as a Human Right in International Law*, Intersentia, 1999, p. 244

[92] In document E/1991/ 23: CESCR General Comment No. 3: *The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant),* adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990, paras. 1-9

[93] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 332

[94] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 332

obligations under the Covenant.[95] Additionally, both sets of principles are listed in the Vienna Convention on the Law of Treaties.[96]

When becoming a party to the ICESCR, States should prioritize the implementation of the rights outlined in the Covenant and take appropriate and concrete steps to ensure the rights in the Covenant.[97] Sepúlveda highlights this with an example. A developing State that is a party to the Covenant must decide whether to allocate resources to build a functioning new airport or to distribute clean water to poorer rural areas. Does the State violate the Covenant in deciding to allocate resources to the building of a new airport? The State holds a wide margin of appreciation in this matter and the decision to build a new airport instead of providing clean water to marginalized areas does not violate the Covenant *per se.* It is quite possible that a new airport is a greater investment for the State which would place that State in a more favorable position to comply with its overall obligations under the Covenant. However, if the goal is to achieve more tourism for the wealthier few, then the State has acted contrary to the Covenant. The obligation to give due priority to the realization rights in the Covenant is very difficult to monitor for the Committee.[98] While it is important to monitor the factual implementations of the State obligations, and to monitor how the State chooses to allocate its resources, it is perhaps more important to supervise whether or not a State is '*taking the steps to the maximum of its available resources'* to guarantee the rights in the Covenant. In other words, the burden of proving that it has used all its available resources to safeguard a right lies with the State.[99] Lastly, it can be noted that the Committee has not provided any rules for the distribution of resources within a State Party.[100] Ultimately, it is up to the State Party how to allocate its resources and the Committee can only provide guidance in this matter. Furthermore, regarding the right to health, it is very difficult to prove that other matters, such as building an airport, takes priority over for example providing adequate healthcare for children or women. The right to health is one of the most fundamental rights enshrined in the Covenant and it is hard for the State to prove that other matters require more resources than ensuring the right to health.

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[95] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p.333
[96] Vienna Convention on Law of Treaties articles 26-27
[97] In document E/1991/ 23: CESCR General Comment No. 3: *The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant),* adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990, para. 2
[98] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 333-334
[99] *Ibid*, p. 334
[100] *Ibid*, p. 335

The other core element of the right to health is non-retrogression. A retrogressive measure can be described as an act that indirectly or directly causes the existing protection of a right enshrined in the ICESCR, in this case, the right to health, to move backward.[101] Deteriorating from any of the obligations set up by the Covenant would require the State Party to produce strong justifications as to why it needs to deteriorate from its core obligations. Implementing any retrogressive measures to minimize the protection of any of the rights in the ICESCR would require careful consideration before doing so.[102] The Committee has noted in General Comment No. 3:

> Any deliberate retrogressive measures /… / would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[103]

Regarding the non-retrogression of a right, States should not allow the existing protection of a right to deteriorate.[104] However, the reality is that any retrogressive measures adopted by States relating to the right to health are overall prohibited.[105] The Committee noted in General Comment No 14 that:

> 48. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. The adoption of any retrogressive measures incompatible with the core obligation under the right to health, outlined in paragraph 43 above, constitutes a violation of the right to health."[106]

The core obligations that the Committee lists in General Comment No. 14 are for example access to healthcare facilities and the provision of essential drugs defined by the WHO.[107] Deliberate retrogressive measures adopted by States can include but are not limited to, the adoption of legislation or policy which have a negative effect on the Covenant rights or the

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[101] United Nations Human Rights, Office of the High Commissioner*: Protection of the economic, social, and cultural rights in conflict*, Report of the United Nations High Commissioner for Human Rights, para. 24
[102] In document E/1991/ 23: CESCR General Comment No. 3: *The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant),* adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990, para. 9
[103] General Comment No. 3 para. 9
[104] World Health Organization, Human Rights, available at https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health accessed on 6th January 2023
[105] General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, in E/C.12/2000/4, para. 32
[106] GC No. 14, para. 48
[107] GC No. 14, para. 43

reduction of costs that are devoted to implementing economic, social, and cultural rights.[108] After analyzing the relevant General Comments by the Committee it is apparent that retrogressive measures are contrary to the articles of the Covenant. States need to produce strong justifications as to why the retrogressive measure was inevitable. However, the Committee has the final say on whether the State has provided strong enough justifications for adopting deliberate retrogressive measures. The Committee analyzes all the relevant factors in determining if the retrogressive measure was compatible with the Covenant. These factors include limited resources and the State's respect for the Covenant as a whole.[109] However, the Committee has defined certain circumstances in which the adoption of retrogressive measures is unavoidable. These circumstances might for example include an economic crisis or a natural disaster. The Committee has noted that if a State finds itself in a situation that causes the rapid deterioration of a right even when the State has used all its available resources, the adoption of retrogressive measures might be inevitable, and that the Committee will take these special circumstances into account when evaluating if a State has acted contrary to the Covenant. Nevertheless, a State does not have unlimited discretion in a crisis and States need to provide extra attention to vulnerable groups in society.[110] Referring again to General Comment No. 3, the Committee has taken a rather firm approach to this:

> Similarly the Committee underlines the fact that even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of the society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.[111]

In numerous State Reports, the Committee has been consistent in this approach. When examining State Reports from Eastern European countries, the Committee has taken a more lenient approach and stated that circumstances such as the 'economic cost of transition' under 'factors and difficulties impeding the implementation of the Covenant'. Furthermore, Ukraine's transition to a market economy following its independence from the former Soviet Union is a transition that takes a significant amount of time.[112] The Committee has

[108] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 323-324
[109] *Ibid*, p. 328
[110] *Ibid*
[111] GC No. 3, para. 12
[112] E.g., Concluding Observations Ukraine, E/1996/22 para. 258

also taken a more flexible approach to countries that are recovering from an armed conflict, natural disasters, or countries that are in debt.[113]

Concluding on retrogressive measures, States must demonstrate that it has made use of all its available resources, demonstrate that it has paid particular attention to the most vulnerable groups in society, cancel all the restrictive measures taken to reduce expenses related to the protection of the Covenant and take appropriate steps to ensure that no violations of the State Party obligations of the Covenant occurs. Furthermore, it is important to stress that States should comply with the provisions stipulated in Article 4 of the Covenant when adopting possible retrogressive measures.[114] Article 4 of the ICESCR provides that:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.[115]

In reality, it is quite difficult for the Committee to establish when a retrogressive measure has fulfilled all the criteria laid out in General Comments and Article 4 of the ICESCR. It is even more difficult to establish when an act can constitute in a retrogressive measure. Even though the Committee monitors these situations, the national courts and judicial systems must supervise the possible retrogressive measures that may affect the rights outlined in the Covenant.[116] Furthermore, if any retrogressive measures are implemented, it is the State that has the burden to prove that the measures have been introduced after careful consideration and that the retrogressive measures are justified.[117]

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[113] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 329
[114] *Ibid*, p. 331-332
[115] ICESCR, article 4
[116] M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, (Intersentia), School of Human Rights Research, Volume 18, 2003, p. 332
[117] General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, in E/C.12/2000/4, para. 32

3.5. Poland and the adoption of retrogressive measures in the context of abortion

In recent years, Poland has been the topic of much controversy. In 2021, the country adopted a more restrictive abortion law that only permits abortion if the pregnancy is a result of rape or if the pregnancy is a threat to the life of the mother. Poland effectively ruled that it is unconstitutional to have an abortion on the grounds of the fetus having an incurable disease or having severe defects.[118] Poland has one of Europe's most restrictive abortion laws. For Poland to adopt a restrictive law which effectively minimizes the already little protection pregnant women have, can constitute a violation of the right to health and the progressive realization of the right to health. Moreover, the even more restrictive abortion law can constitute in a retrogressive measure since the country is taking away protection that has already been guaranteed before. As a State Party to the ICESCR, Poland has not ensured the full enjoyment of the rights of pregnant women by restricting access to abortion. Poland has not produced strong enough justifications as to why it chose to minimize the protection given to pregnant women and has effectively acted contrary to the Covenant.

In its Sixth Periodic State Report, the Committee expressed concern about the extremely restrictive abortion laws in Poland. Furthermore, the Committee was concerned about the number of unsafe abortions performed in Poland, which was extremely high. It recommended that Poland take measures in preventing the high number of unsafe abortions by ensuring that access to abortion is effective and that all women have access to post-abortion care.[119] Furthermore, the Committee expressed concern regarding the so-called Stop Abortion Bill. The Bill would have detrimental effects on the fundamental rights of women, including their right to health. The Committee recommended that the Bill should be reconsidered.[120] Additionally, the Committee expressed concern about the lack of access to sexual and reproductive health care services for women. The Committee proposed that the State Party should ensure that such health care services are accessible to all.[121]

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[118] Amnesty International: Poland, *Regression on Abortion Access harms Women*, 26 January 2022, available at: https://www.amnesty.org/en/latest/news/2022/01/poland-regression-on-abortion-access-harms-women/ accessed on 26 January 2023

[119] UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the sixth periodic report of Poland*, 26 October 2016, E/C.12/POL/CO/6, para. 46-50

[120] *Ibid*, para. 47c

[121] *Ibid*, para. 49

Continuing the topic of Poland and women's right to health, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health visited Poland in 2009. The focal point of the mission was to understand how Poland implements the right to health, especially in the context of sexual and reproductive health.[122] In his report, the Special Rapporteur expressed great concern regarding the difficulties in accessing abortion in Poland. Particularly, he expressed concern regarding the interference in accessing legal abortion by non-state actors such as priests. The Special Rapporteur had been informed of a case concerning a 14-year-old girl who became pregnant as a result of rape. A priest had then pressured the young girl not to have an abortion. In Poland, abortion is legal if the woman has become pregnant because of rape. In the case of the 14-year-old girl, she should have on all legal grounds, been able to obtain an abortion. The fact that she was pressured into not having an abortion by a priest, only highlights the numerous social obstacles women face even when the abortion is supposed to be legal. The stigma around abortion can be overturned if women are allowed to make free and informed choices about their bodies and their reproductive health. This establishes questionable results in the confidentiality of third parties such as priests or medical professionals. States have an obligation to guarantee that no one, including non-state actors, interferes or prevents, the right of the woman to access safe abortion.[123]

Furthermore, in his report, the Special Rapporteur stressed that a woman's need to have an abortion is not dependent on the legality of the procedure. In other words, women will always need to terminate unwanted pregnancies and if they are legally restricted, they will resort to more clandestine and unsafe methods of terminating the pregnancy. The number of unsafe abortions carried out in Poland is worrying and is reported to be between 80,000 and 180,000 per year. The Special Rapporteur noted that all the difficulties women face in obtaining an abortion should be removed and that Poland should remove all the policies and ensure access to abortion when it is legal.[124]

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[122] A/HRC/14/20/Add. 3, Human Rights Council, Fourteenth session, 20th May 2010, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Anand Grover, Mission to Poland, 5-11 May 2009

[123]A/HRC/14/20/Add. 3, Human Rights Council, Fourteenth session, 20th May 2010, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Anand Grover, Mission to Poland, 5-11 May 2009, para. 38

[124] *Ibid*, para. 46-48

The European Court of Human Rights often receives applications dealing with abortion. Poland's abortion laws are applied narrowly which often prevents women from terminating the pregnancy even when they have legal grounds. *Tysiąc v. Poland* concerned a woman which was refused to terminate her pregnancy after her doctors confirmed that if the pregnancy was carried out, it would threaten her eyesight. Polish law allows for the termination of pregnancy if the pregnancy threatens the woman's life or health. After getting pregnant, the applicant consulted with three different ophthalmologists, who came to the same result that the pregnancy and the delivery would constitute a threat to the applicant's eyesight and health due to changes in her retina, they refused to give her a certificate for the termination of the pregnancy. A few months later, medical professionals assessing her eyesight concluded that the grounds for obtaining a therapeutic abortion were not met and her request for an abortion was subsequently denied. As such, the applicant gave birth and as a result, her eyesight deteriorated. The European Court of Human Rights found a violation of article 8 of the European Convention on Human Rights (the right to respect for private and family life) because the applicant had not accessed legal abortion services.[125]

Furthermore, it can be concluded that the refusal to grant the applicant an abortion, even when she had legal grounds to terminate her pregnancy, had serious impacts on the applicant's physical health. Her eyesight worsened because of the pregnancy and had she been allowed to terminate it; it would not have had damaging effects on her health. Poland did not comply with its obligations under the European Convention as well as the ICESCR. The fact that the applicant did not have access to safe abortion when her health was in danger, meant that the State Party restricted her from having access to proper healthcare. Had she undergone the abortion, as was her legal right, she would not have suffered damage to her eyesight. Essentially, by restricting access to legal abortion, it can be argued that the State interfered in her right to health under the ICESCR. If Poland had granted her access to legal abortion, on the grounds of preserving her own health, Poland would have complied with its obligations under the ICESCR.

In conclusion, Poland has adopted retrogressive measures that eliminates the little protection pregnant women have in said country. The retrogressive measures adopted concerning reproductive rights are arbitrary and unjustified since retrogressive measures in the field of health are generally prohibited. Further, reproductive rights and reproductive choices are part

[125] *Ibid*, para. 39-46; see also *Tysiąc v. Poland,* Appl. No. 5410/03. ECHR (2007)

of an individual's most intimate sphere. A retrogressive measure in reproductive health and rights would need to have extremely strong arguments as to why it is necessary to minimize the protection already granted. Poland has not produced strong enough justifications as to why it chose to minimize the protection of pregnant women, an already vulnerable and marginalized group in society. The country's choice to adopt retrogressive measures in the field of reproductive rights constitutes in a failure of its State obligations and is a clear breach of the protection of the right to health of women.

4. SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

Women's rights and human rights issues that concern women have usually been inadequately addressed or even marginalized by the international community.[126] The international community has strived to establish a more legally equal relationship between the sexes. Women's rights have only recently been incorporated into international human rights law.[127]

Multiple times in this thesis, it has been stated that sexual and reproductive rights are an integral part of the right to health as outlined in the ICESCR.[128] Sexual and reproductive rights are of course addressed in other human rights instruments.[129] Furthermore, the 1994 Cairo Programme of Action is the first universal soft-law document to address the term "reproductive health".[130] Reproductive health can be described as a "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes".[131] Reproductive rights enable women to safely carry their pregnancies to term. In addition, reproductive rights and health enable women to reproduce, and at the same time, the capacity to decide if, and even when, to do so. Reproductive rights include the prevention

[126] Maja Kirilova Eriksson, *Abortion and Reproductive Health: Making International Law More Responsive to Women's Needs*, p. 3, in Kelly D. Askin and Dorean M. Koenig (eds.), *Women and International Human Rights Law*, volume 3, 2001, Transnational Publishers Inc.
[127] *Ibid*
[128] GC No. 14, para. 8
[129] *E.g.,* The Convention on the Elimination of All Forms of Discrimination against Women, art. 12; Convention on the Rights of Persons with Disabilities, arts. 23, 25
[130] The Programme of Action of the International Conference on Population Development, Cairo, 5-13 September 1994, 20th Anniversary edition, United Nations Population Fund (2014), para. 7.2
[131] *Ibid*

and cure of an unwanted pregnancy.[132] Paragraph 7.6 of the Cairo Programme of Action states that "all countries should strive to make accessible (…) abortion as specified in paragraph 8.25, including prevention of abortion and the management of the consequences of abortion".[133]

The Committee has addressed the right to sexual and reproductive health in its General Comment No. 22. Firstly, it noted that the right to the full enjoyment of sexual and reproductive rights remains an almost impossible goal to achieve for millions of girls and women around the world. For the most part, this is due to religious, social, or moral reasons.[134] As with any other right, the right to sexual and reproductive health incorporates both freedoms and entitlements. The Committee defines the freedoms as the freedom to make decisions, free from violence and discrimination, concerning matters of one's body and one's sexual and reproductive health. The Committee continues to list the entitlements which include access to health facilities, goods, and services that will ensure the unhindered and full enjoyment of the right to sexual and reproductive health. The WHO defines sexual health as *"a state of physical, emotional, mental and social well-being in relation to sexuality"*.[135] In general, sexual and reproductive health reflects the social inequities in a country. Marginalization, poverty, and discrimination are all factors that contribute to poorer access to the full enjoyment of sexual and reproductive rights. The choices an individual can make concerning his or her sexual and reproductive health are severely limited because of the above-mentioned social determinants. The Committee, therefore, encourages States to remove all legal or policy barriers which could restrict an individual from fully exercising their right to sexual and reproductive freedom.[136] The core content of the right to health has already been addressed in this thesis and they are equally relevant to the right to sexual and reproductive health: *availability*, *accessibility*, *acceptability*, and *quality*.[137] The abovementioned four core components of the right to health have already

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[132] Maja Kirilova Eriksson, *Abortion and Reproductive Health: Making International Law More Responsive to Women's Needs*, p. 7, see also the Programme of Action of the International Conference on Population Development, Cairo, 5-13 September 1994, 20th Anniversary edition, United Nations Population Fund (2014), para. 7.6

[133] The Programme of Action of the International Conference on Population Development, Cairo, 5-13 September 1994, 20th Anniversary edition, United Nations Population Fund (2014), para. 7.6

[134] CESCR, E/C.12/GC/22: *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Right*s), para. 2

[135] *Ibid*, para. 5; and WHO, *Sexual Health, Human Rights and the Law* (2015), p. 5

[136] CESCR, E/C.12/GC/22: *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Right*s), para. 8

[137] *Ibid*, paras. 12-21

been addressed elsewhere in this thesis. However, the *quality* of health-related goods and services must be of good quality. They should be up-to-date and performed by skilled medical professionals. The Committee further notes that "a failure or refusal to incorporate technological advances and innovations in the provision of sexual and reproductive health services, such as *medication for abortion*, /…/ jeopardizes the quality of the care" (emphasis added).[138]. The failure or even refusal to provide a woman with abortion-inducing drugs can violate her right to sexual and reproductive health. If the healthcare services are not of good quality, it can constitute in a breach of article 12 of the ICESCR. The failure or refusal by the State to provide drugs used to induce abortion, *i.e.* essential drugs, creates enormous barriers for women to the full enjoyment of their right to reproductive freedom, and the freedom to make responsible choices with respect to their bodies.

Regarding the sexual and reproductive rights of women, it is important to ensure equality between men and women. As established, the barriers for achieving the full enjoyment of sexual and reproductive health are high and States have a clear obligation to remove all such barriers to comply with their Covenant obligations. The Committee notes that to lower maternal mortality and morbidity it is important to prevent unsafe abortion. Unsafe abortion, because of unwanted pregnancy, occurs when the legal and moral barriers in a state are high. States should guarantee all individuals:

> Access to affordable, safe, and effective contraceptives, and comprehensive sexuality education, including for adolescents; to liberalize restrictive abortion laws; to guarantee women and girls access to safe abortion services and quality post-abortion care, including by training health-care providers; and to respect the right of women to make autonomous decisions about their sexual and reproductive health.[139]

Unnecessary and arbitrary restrictions on women's right to sexual and reproductive freedom and health should be removed. Governments should provide access to safe abortion for all women and girls to guarantee their right to health.[140] Albeit that abortion occurs in every country in the world, be it legal or not, abortion remains, to this day, a very sensitive and

[138] *Ibid*, para. 21; see also WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems*

[139] CESCR, E/C.12/GC/22: *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Right*s), para. 28; see also WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems*; see also United Nations General Assembly, A/69/62: *Framework of actions for the follow-up to the Programme of Action in the International Conference on Population and Development beyond 2014*, 12 February 2014, para. 315

[140] United Nations General Assembly, A/69/62: *Framework of actions for the follow-up to the Programme of Action in the International Conference on Population and Development beyond 2014*, 12 February 2014, para. 315

disruptive topic in international human rights law.[141] The reluctance of states to recognize abortion as part of the right to health stems from various reasons, be it religion or morals. Nevertheless, before a State has guaranteed all women and girls access to safe abortion and removed all possible barriers in accessing abortion, said State has not fulfilled its obligations under the Covenant nor has it ensured that girls and women have equal access to sexual and reproductive health.

5. THE LACK OF PROTECTION OF ABORTION-RELATED RIGHTS AS A BREACH OF ARTICLE 12 OF THE ICESCR

5.1. Examples of breaches of the right to health

In previous chapters, the author analyzed the different core elements of the right to health. These include availability, accessibility, acceptability, and quality.[142] Regarding breaches of the right to health, most of them occur when States have acted contrary to or in direct violation of one of these four core components.[143] When it comes to the lack of protection of abortion-related rights as a breach of the right to health, it is the aspect of sexual and reproductive health and freedom that is the most relevant. Possible violations of the right to sexual and reproductive health occur ifs a woman is denied an abortion to terminate an unwanted pregnancy. If the woman is denied an abortion, she has been denied her freedom to make free and responsible decisions regarding her body, which is one of the freedoms enshrined in her right to reproductive health. Following her possible denial of an abortion, her health may be affected severely, be it mental or physical, which is in direct violation of her right to health in general. Narrow interpretations of the right to health have often resulted in a breaches in women's right to mental health. Mental health is an integral part of the right to health.

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[141] The Programme of Action of the International Conference on Population Development, Cairo, 5-13 September 1994, 20th Anniversary edition, United Nations Population Fund (2014), para. 7.6
[142] GC No. 14, para. 12a-d
[143] General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, in E/C.12/2000/4, para. 48

Regrettably, even though being one of the most fundamental human rights, violations of the right to health occur frequently. Naturally, violations of the right to health result in devastating effects on one's health.[144] As mentioned earlier, women's sexual and reproductive health is inherent in the right to health.[145] Severely controlled policies and laws in many countries, leave women around the world lacking the full enjoyment of the right to health.[146]

Sexual and reproductive health incorporates freedoms and entitlements for the full enjoyment of complete sexual and reproductive freedom. The right to make free and responsible decisions, without violence and discrimination, concerning one's body and sexual and reproductive health, is one of the most important freedoms linked to the full enjoyment of sexual and reproductive rights. Full access to health facilities, goods, services, and information is among the entitlements which would ensure full enjoyment of the right to sexual and reproductive health under article 12 of the ICESCR.[147] Underlying the possible non-enjoyment of the right to sexual and reproductive health are social determinants. Generally, sexual and reproductive health reflects the vast social inequalities and the uneven distribution of power. Poor and marginalized women will inevitably have a harder time accessing proper health care and the proper medical treatments for unwanted pregnancies. This leaves the marginalized group of women severely restricted in their choices regarding their health, especially sexual and reproductive rights.[148] As mentioned in previous chapters, State Parties to the ICESCR must ensure that all the social determinants manifested in the laws and policies are addressed properly and fairly.[149]

Breaches of the right to sexual and reproductive rights can include adopting legislation, policies, regulations, or programs that directly affect the enjoyment of sexual and reproductive rights of women by creating barriers to effective realization. Furthermore, the failure to take appropriate steps to the full realization by the State, *e.g.,* by adopting relevant

[144] World Health Organization, Human Rights, available at https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health accessed on 6th January 2023
[145] United Nations, United Nations Human Rights, Office of the High Commissioner, *Sexual and reproductive health and rights*, available at https://www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights accessed on 6th January 2023
[146] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 2
[147] *Ibid*, para. 5
[148] *Ibid*, para. 8
[149] *Ibid*

legislative regulations, constitutes a violation of the right to sexual and reproductive rights. The establishment of legal barriers which hinder individuals from seeking sexual and reproductive health services is a violation of the right to sexual and reproductive health. The criminalization of women seeking abortion constitutes an example of this. The failure to protect women from violence because of having an abortion or receiving post-abortion care is a violation of the right to sexual and reproductive health. Furthermore, States should ensure to take effective measures to eradicate all the legal and policy barriers that prevent, especially women, from the full enjoyment of their right to sexual and reproductive freedom.[150]

Any restrictions on access to safe abortion will have poor health outcomes for women. Severely restrictive laws will inevitably result in women seeking clandestine methods of inducing abortions almost always resulting in preventable deaths and an increase in morbidity. In countries where abortion laws are severely restricted, poor, and marginalized women must resort to an unsafe alternative, resulting in many unnecessary deaths. Moreover, these deaths will inevitably cause a heavy burden on the healthcare systems of a country.[151] In comparison, in countries with more liberal abortion laws and less restrictive policies, the number of deaths occurring from abortions is significantly reduced.[152]

5.2. Lack of protection of abortion-related rights as a matter of discrimination

The above-mentioned breaches of sexual and reproductive rights of women are closely linked to the principle of non-discrimination of the ICESCR. .[153] Throughout their lives, women are being subjected to discrimination and violence based on sex. The full realization of sexual and reproductive rights of women is essential to the full realization of their basic human rights. Women have different reproductive capacities than men, and the protection of women's reproductive rights has to be regulated in a different way than men's. Because of their reproductive capabilities, women have the right to make informed decisions about their bodies,

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[150] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 54–63

[151] World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012)

[152] *Ibid*, see also Shah Iqbal and Elizabeth Åhman, *Unsafe Abortion in 2008: global and regional levels and trends*, Reproductive Health Matters, Vol. 18, No. 36, Privatization (November 2010)

[153] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 25

health, and lives. However, the reality for many women is that they are subjected to gender-based discrimination.

Article 2 (2) of the Covenant ensures that all people should be free from discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[154] The term 'other status' is being broadly interpreted in order to have a flexible approach to the differential treatment that may vary over time. The Committee has recognized that the additional grounds is based on the experience of marginalized groups.[155] Therefore, the Committee has recognized 'other statuses' that may be applicable in discrimination cases. Examples include disability, age, nationality, martial and family status, health status etc.[156] Health status encompasses both physical and mental health status. The obligation for States is to guarantee that mental or physical health status is not a hinder for the full enjoyment of the Covenant rights.[157] The Committee lists that the term health status is applicable in cases where differential treatment is based on for example HIV status, mental illness, diseases such as leprosy etc.[158] One could argue that the term health status is also applicable for pregnant women who seek an abortion. As such, in order to fully enjoy the right to health as laid out in the Covenant, they need access to health services, specifically reproductive health services, *i.e.* abortion. Furthermore, it can be argued that not encompassing pregnant women in the term 'health status' is contrary to the nature and objective of the Covenant. Pregnant women are part of a very specific group that cannot be compared to any other situation and should enjoy special protection against discrimination. The list of 'other statues' is non-exhaustive and on purpose left open to interpretation.[159]

In its General Comment No. 20, the Committee takes an exhaustive approach to non-discrimination in the ICESCR. The Committee underlined the importance of the non-discrimination approach to the rights listed in the ICESCR and stressed that the full realization and enjoyment of the rights in the Covenant, cannot be achieved without the right to non-discrimination.[160] The right to non-discrimination is a very important obligation in the ICESCR.

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[154] ICESCR, article 2 (2)
[155] E/C.12/GC/20, General Comment No. 20 on the non-discrimination in economic, social, and cultural rights (Art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), 2nd July 2009, para. 27
[156] *Ibid*, paras. 28-33
[157] *Ibid*, para. 33
[158] *Ibid*
[159] *Ibid*, para. 27
[160] *Ibid*, paras. 1-2

To progressively realize the right to non-discrimination, States must ensure that both formal and substantive discrimination are eliminated. Formal discrimination refers to, for example, the State's constitution, laws or policies and eliminating any discrimination aspects of the national laws.[161] One could argue that a State has the obligation to remove criminal laws on abortion in order to ensure that women are not discriminated against. Furthermore, States have an obligation to eliminate substantive discrimination so that no marginalized groups, often characterized by the prohibited grounds of discrimination listed in Article 2(1), are susceptible to discrimination. To eliminate substantive discrimination, States must remove all the conditions and attitudes that aggravates the discrimination.[162] It can be argued, that pregnant women are in a very vulnerable position that cannot be compared to any other situation. The protection of pregnant women and their rights is therefore of high priority.

The Committee notes two types of discrimination: direct and indirect. Direct discrimination occurs when a person is treated differently, or less favorably, than another person who is in a similar situation or position. Furthermore, direct discrimination occurs when someone has been subjected to differential treatment when there is no similar situation that can be comparable with, that is, if a woman receives detrimental or differential treatment when she is pregnant.[163] A pregnant woman is inevitably in a situation that can only be compared to another pregnant woman. Denying a woman an abortion, can amount to differential or detrimental treatment, *i.e.,* direct discrimination. Indirect discrimination in regards to abortion-related rights and reproductive freedom can occur when national laws, policies or practices in a State, that may seem neutral, has a disproportionate effect on the full enjoyment of the rights in the Covenant.[164] Article 3 of the ICESCR outlines that the State Parties should ensure "the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".[165] The Committee has stressed that access to health care and health services should be equal, and that States should provide marginalized groups special protection by ensuring their proper health insurance and healthcare facilities. Inappropriate and insufficient distribution of health care and access to health care services may result in discrimination.[166]

[161] E/C.12/GC/20, General Comment No. 20 on the non-discrimination in economic, social, and cultural rights (Art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), 2nd July 2009, para. 8(a)
[162] *Ibid*, para. 8(b)-9
[163] *Ibid*, para. 10a
[164] *Ibid*, para. 10b
[165] ICESCR, article 3
[166] General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, in E/C.12/2000/4, para. 19

When it comes to ensuring the equal rights of men and women, it is key to note that biological and sociocultural factors play a significant role. The Committee has underlined the importance for States to adopt a gender-based approach to their health-related policies, planning, and programs. A gender-based approach would ensure better health for both men and women.[167] Since women have significant reproductive capacities, it is imperative that women's right to health is ensured properly and issued special protection. To eliminate possible discrimination against women, States should adopt an exhaustive strategy to promote women's right to health. Such a strategy should include for example prevention and treatment of diseases only affecting women and full access to affordable health care which includes access to sexual and reproductive services.[168] For women to have equal enjoyment of the right to health, States must remove all barriers which could interfere with the right to health, including any barriers in the area of sexual and reproductive rights. Furthermore, the Committee noted that States must take preventative, promotive, and remedial action to protect women from harmful cultural practices as well as norms denying them the full enjoyment of their sexual and reproductive rights.[169]

For States to ensure the full realization of women's rights and their rights to sexual and reproductive freedom, it requires that States remove all discriminatory laws and policies that interfere. This includes any laws that may hinder women from seeking abortion and therefore the prevention of unsafe abortions. To prevent unintended pregnancies and unsafe abortions would require that States adopt the relevant legal and policy measures to ensure that all individuals have access to affordable, safe, and effective contraceptives. Furthermore, it would require that States with severely restrictive abortion laws liberalize them as well as guarantee all women and girls access to safe abortion services.[170]

Severely restricting the protection of abortion or the access to it could constitute in both indirect and direct discrimination against women. The prohibition, or restriction, of women's abortion-related rights, therefore, limits and violates the full enjoyment of women's right to health which constitutes a violation of the right to non-discrimination based on sex and health status.

[167] General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, in E/C.12/2000/4, para. 20

[168] *Ibid*, para. 21

[169] *Ibid*

[170] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 28; see also World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012)

Women's reproductive rights and health are based on the notion that women should be able to freely choose when, and if, to have children.

5.3. Abortion and marginalized women

Inevitably, as proven multiple times in this thesis, abortion is often a privilege of the rich, and poorer women do not have the same access to (safe) abortion as richer women do. In developing regions, WHO estimates that around 220 deaths occur in 100 000 unsafe abortions. In sub-Saharan Africa, that number increases to 520 deaths in 100 000 unsafe abortions.[171] Methods used to induce abortion are many and vary, but they can all have fatal effects on women. Women can induce abortion themselves by for example ingesting acid, laundry bleach, and detergent solutions. Women can place foreign objects into the uterus, for example, a coat hanger, a knitting needle, or a wire. Furthermore, women can intentionally cause trauma to the abdomen by lifting heavy weights or jumping from a roof.[172] These methods have disastrous effects on the general health of women, and they can even prove fatal. The possible deaths occurring from self-induced, unsafe abortions are unnecessary but also preventable. Hemorrhage, infection, and poisoning are the main drivers of mortality among women who use unsafe abortion methods.[173] The methods of self-inducing abortion are almost exclusively used by poor and marginalized women in countries that have very restrictive abortion laws. If a woman cannot access safe abortion, she immediately is at risk of unsafe abortion. Furthermore, the social stigma of having an abortion might be detrimental to the woman.[174] In many countries, abortion is highly stigmatized and women that have undergone an abortion might be subject to discrimination or other forms of ill-treatment, or even punishment. Political and religious leaders often stigmatize abortion which causes the woman to seek questionable abortion methods.[175] The barriers to having an abortion are very high for marginalized women. Many women who, for example, seek treatment for complications from unsafe abortions, are faced with a tremendous amount of judgment and threats by members of the community. For example, healthcare workers may be threatening to report the women to the police or harass

[171] World Health Organization, *Preventing Unsafe Abortion,* Evidence Brief, 2019
[172] David A Grimes, Janie Benson, Susheela Singh, Mariana Romero, Bela Ganatra Friday E Okonofua, Iqbal H Shah, *Unsafe abortion: the preventable pandemic*, The Lancet, Volume 368, Issue 9550, 2006, Panel 2, p. 1911
[173] *Ibid*, Panel 1, p. 1908
[174] World Health Organization, *Preventing Unsafe Abortion,* Evidence Brief, 201
[175] David A Grimes, Janie Benson, Susheela Singh, Mariana Romero, Bela Ganatra Friday E Okonofua, Iqbal H Shah, *Unsafe abortion: the preventable pandemic*, The Lancet, Volume 368, Issue 9550, 2006, p. 1909

them both physically and verbally.[176] This leaves women frightened to seek help or medical care when they might need it.

The UN Human Rights Committee, which implements the rights outlined in the International Covenant on Civil and Political Rights (ICCPR), decided on a case regarding the failure of a State to provide safe abortion to a girl under the age of 18. Ms. Huamán is Peruvian and became pregnant when she was 17. She was given a scan at a local hospital, and it was revealed that she was carrying an anencephalic fetus.[177] A few days later, a doctor informed Ms. Huamán of the risks to her life as well as the fact that the child would not survive if the pregnancy was carried out and he advised that the best option would be to terminate it. For the termination to be carried out, the applicant needed to obtain written authorization from the hospital director. The hospital director said that the termination could not be carried out as it would be illegal under the Peruvian Criminal Code. The national penal code in Peru at the time, permits abortion in the case of when there is a serious threat to the life of the mother or if a termination is the only way to avoid permanent health damage. The Peruvian Penal Code prohibits therapeutic abortion in the case of fetal impairment. Many other experts concluded that a termination of the pregnancy would be in Ms. Huamán's best interest as a continuation of the pregnancy would only result in prolonging the author's mental suffering and distress, *i.e.* permanent health damage. Ultimately, Ms. Huamán gave birth to a girl with a birth defect. The child only survived four days. The applicant fell into a deep depression as she was forced to give birth to a child with fatal birth defects that caused the child to die only four days later. During those four days, the applicant had to breastfeed the child and to witness the child's birth defects. The trauma of witnessing the death of her child, knowing it could have been prevented had she been granted the termination of the pregnancy, caused her severe mental harm. The mental harm that the applicant was subjected to was further aggravated by the fact that the author was a minor at the time and had severe impacts on her development and her future mental health. The author further stated that the financial situation of herself and that of her family prevented her from seeking appropriate legal advice.[178]

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[176] Center for Reproductive Rights, Fact Sheet, *Facts on Abortion in the Philippines: Criminalization and a General Ban on Abortion,* available at https://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_philippines_1%2010.pdf accessed on 18th January 2023

[177] Anencephalic is a birth defect in the fetus's brain and skull

[178] United Nations Human Rights Committee, Communication No. 1153/2003, CCPR/C/85/D/1153/2003, *Huamán v Peru,* 22 November 2005, Eighty-fifth session (17th October-3rd November), paras. 1-3.9

The applicant submitted a complaint to the Human Rights Committee that her rights under articles 2, 3, 6, 7, 17, 24, and 26 had been violated. She claimed that the experience of the refusal of the abortion had severe consequences on her mental health and constituted a violation of article 6 of ICCPR. She further claimed that being forced to carry the pregnancy to term, subjected her to cruel and inhuman treatment. The author had to endure severe distress insofar as she was aware of the short life expectancy of her daughter and that she had to see her daughter's marked deformities. The author claimed a violation of article 17 insofar as to the State arbitrarily interfered with her right to private life when it made the decision to continue the pregnancy on her behalf. She further added that had the State officials not interfered in her decision, she would have been able to terminate the pregnancy. The author claimed a violation of article 26, arguing that the State left her without protection as a result of a very restrictive interpretation of the Peruvian Penal Code. She noted that the hospital authorities had divided the concept of health only in respect of the applicant's physical health and not to encompass her mental health. Therefore, as the refusal to grant her the therapeutic abortion triggered the applicant's depression, the decision not to grant her the therapeutic abortion was arbitrary and unjustified.[179] Furthermore, the facts of the case was given increased significance because of the State Party's refusal to cooperate under article 4 of the Optional Protocol of the ICCPR. No reply from the State Party had been made available to the Committee regarding the alleged allegations, so due weight had to be given to Ms. Huamán's claims.[180]

The Human Rights Committee concluded that there had been several violations of the applicant's rights under the ICCPR. In the view of the Human Rights Committee, the failure of the doctor to perform the abortion, even though they knew of the birth defects of the fetus, resulted in the applicant's mental suffering. Therefore, the Committee noted that the facts revealed a violation of article 7 of the ICCPR and that the applicant had indeed been subjected to inhuman and cruel treatment. Moreover, the facts revealed a violation of article 17 of the ICCPR insofar as that the author was denied an abortion even though all the conditions under national law were met. The State had chosen to narrowly interpret the concept of health and that choice had impacted the applicant's mental health. Therefore, the interference in her decision to terminate the pregnancy was arbitrary. Lasty, the author claimed that here had been

[179] United Nations Human Rights Committee, Communication No. 1153/2003, CCPR/C/85/D/1153/2003, *Huamán v Peru,* 22 November 2005, Eighty-fifth session (17th October-3rd November), paras. 3.1-3.9
[180] *Ibid*, para. 4; see also Optional Protocol to the International Covenant on Civil and Political Rights, article 4

a violation of article 24 of the ICCPR. The Human Rights Committee concluded that the author had not received the special protection she was entitled to as a minor.[181]

In this case, not having access to abortion constituted several violations of the girl's human rights. While this case primarily concerned civil and political rights, it highlights the intersectionality of human rights. Reproductive rights often intersect with other rights, such as the right to life and the right to be free from inhuman and degrading treatment. In this case, it is noteworthy that the refusal to permit the abortion occurred in a context where the life of the child and the mother were under imminent threat, an observation that underscores the gravity of the infringements of the young woman's rights. Furthermore, as a minor lacking the necessary funds to obtain legal advice, it can be concluded that she belonged to a marginalized group. The applicant's chances of achieving effective remedy in Peru were slim.

As stated in the WHO Preamble, health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".[182] In this case, the applicant suffered tremendous mental pain and suffering because she was being denied an abortion and had to watch her child die. Furthermore, the narrow interpretation of the Peruvian national law, that health only refers to physical health and not mental health, constitutes in a violation of the right to health since health also encompasses the mental health. The refusal to grant Ms. Huamán the abortion constitutes a violation of article 12 of the ICESCR since it affected the applicant's mental health severely. Moreover, the fact that the applicant was a minor further aggravated the violations in her reproductive rights. She would have needed special protection, but the State did not grant her the special care she was entitled to.

[181] United Nations Human Rights Committee, Communication No. 1153/2003, CCPR/C/85/D/1153/2003, *Huamán v Peru,* 22 November 2005, Eighty-fifth session (17th October-3rd November), paras. 6.1-6.5
[182] Preamble of the Constitution of the WHO, 22 July 1946

5.4. Abortion and legislation

5.4.1. The impact of criminalization on women's right to health and abortion-related rights

The author will next discuss the criminalization of abortion in relation to the protection of abortion-related rights in the context of the right to health. In general, criminal laws and penal codes are established by the State to regulate dangerous, threatening, conduct that is harmful to an individual or other individuals. Criminal laws and penal codes can be considered the most powerful display of a State's power to punish individuals that do not act within legal boundaries and at the same time, deter others from acting against the law.[183] When States regulate sexual and reproductive rights through criminal law, it is simultaneously repressing the freedom of an individual to make free and informed choices about their own body.[184] When it comes to sexual and reproductive rights and health, there are multiple ways in which the State may legally impose restrictions on these rights. These include legal restrictions in access to goods associated with sexual and reproductive rights such as contraceptive methods, outlawing medical procedures such as abortion or restrict the right to information and education about sexual and reproductive rights in schools.[185] When restricting sexual and reproductive rights through legal means, the State is not only putting the women seeking to have an abortion at risk. It is also affecting a wide range of other individuals such as medical personnel performing the actual procedure, friends or family members that help women seek the abortion, pharmacies providing contraceptives etc.[186]

Today, many countries are still having criminal laws that regulate abortion. When it comes to regulating abortion, religion plays an integral part. Many catholic States frown upon the concept of abortion and often regard it as murder. For example, many Latin American States have criminalized abortion. In Peru and Brazil, it is punishable with up to three years in prison with the exception to preserve the life of the pregnant woman. In the United States, it is regulated on a state level, due to the recent overturning of *Roe v Wade* by the Supreme Court. In Asia,

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[183] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 11
[184] *Ibid*, para. 12
[185] *Ibid*, para. 14
[186] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 14

countries like Myanmar and the Philippines have banned abortion all together with the threat of imprisonment.[187]

Restricting the right to have an abortion, imposes a lot of risks for human rights violations. When a State is legally regulating women's right to make free and personal decisions about themselves without the interference from the State, the State is arbitrarily interfering with their right to self-determination and dignity. The right to dignity is one of the many fundamental human rights and it is crucial in an area as intimate as sexual and reproductive health. State interference in an individual's right to dignity and to make free and personal decisions about their bodies is in direct violation of their human rights.[188] Furthermore, criminal laws restricting the right to have an abortion may amount to a breach of the right to health. Unfortunately, as discussed previously, women have a disadvantage when it comes to sexual and reproductive rights because of their reproductive capacities. Many societal norms and stereotypes are perceived so that women's reproductive capacitates need to be controlled or regulated and even restricted. In the cases where women object to these stereotypical assumptions, they are often punished for doing so and that in turn will have harmful effects on their health.[189] For example, if a woman seeking to terminate her pregnancy in a country where the law is restricting her from doing so, even threatening to take criminal action if she seeks an abortion, she may be facing extreme amounts of psychological and even physical violence from others not sharing her beliefs. Criminalization only enhances the stigma around abortions and creates more barriers for women in an area where the ability to obtain an abortion is already severely limited. When abortion is criminalized, it does not take away the fact that if a woman needs, or wants, to terminate her pregnancy, no legal barriers will stop her and she will do anything to obtain the abortion, even resort to dangerous methods that ultimately will jeopardize her health or even have a fatal outcome. The criminalization of abortion not only enhances stigma, but it also hinders women from fully being part of society as they do not have the same and equal rights as men to make free and informed decisions about their bodies. Furthermore, the criminalization of a rather safe and common medical procedure disempowers women who may be refraining from taking the necessary steps to protect their health in fear from stigmatization, criminal charges, and violence. Moreover, criminal laws restricting women from having abortions can

[187] Centre for Reproductive Rights, Interactive Map on the World's Abortion Laws, available at https://reproductiverights.org/maps/worlds-abortion-laws/ accessed on 9 September 2023
[188] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011 para. 15
[189] *Ibid*, para. 16

be regarded as discriminatory as they hinder women from seeking the proper medical care in their time of need. When women follow the laws on the prohibition of abortion, they put themselves and their health at risk by not seeking medical treatment when they need it. When women seek abortion in countries where it is outlawed and criminalized, they could even risk serving long prison sentences.[190]

When States impose restrictions in people's sexual and reproductive rights they often do so on the grounds of public health or public morality. When imposing restrictions in sexual and reproductive health and rights, States need strong justifications on why doing so. Public morality cannot be regarded as a valid justification since the restrictions being imposed on people's sexual and reproductive rights, may result in human rights violations. A justification for a restriction cannot be valid if it brings more harm than good. Securing public health is a valid justification for States in many cases where rights may be restricted, but even so, the measures taken, be it legal or through policy, must always be proportionate and evidence based. In cases concerning sexual and reproductive health, States should refrain from using criminal laws to restrict or control sexual and reproductive rights and health.[191]

The criminalization of abortion has a chilling effect on the rights of women. Not only is the criminalization of the procedure contributing to further lack of access to obtaining it safely, the criminalization of it also enhances the stigma surrounding abortion. Because of the stigma, underreporting is a serious problem in many States. When sexual and reproductive health problems, such as lack of access to safe abortion is underreported, the core obligations that States have, such as the ones listed earlier in this thesis, are jeopardized.[192] Impermissible barriers for women are formed when States criminalize abortion. Furthermore, criminal laws on abortion jeopardize women's right to dignity and self-determination. Criminal laws automatically affect poorly on the right to health, including both physical and mental health. The disastrous effects on the right to health can easily be prevented with less restrictive laws on abortion.[193] Furthermore, the criminalization of abortion puts women in the criminal justice system. The criminal justice system is at risk of being overburdened with cases due to the

[190] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 17
[191] *Ibid*,para. 18
[192] *Ibid*, para. 19
[193] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 21

criminal restrictions on women's right in accessing abortion. Women are being put in prison, serving long sentences only for seeking the termination of a pregnancy which she should have had the right to do in the first place. There are numerous judicial cases that prove the disproportionate effect the criminalization of abortion has on the right to health of women and the chilling effect criminalization has on both the protection of the procedure as well as accessing it. The author will continue with an analysis on case-law relating to the criminalization of abortion and how it disproportionately affects the right to reproductive health for thousands of women. The cases that will be analyzed demonstrates the disastrous effects that severely restrictive abortion laws have on women's right to health. The complaints are not made under the ICESCR, but they serve as illuminating examples of the right to health and how important abortion-related rights are for women's health.

5.4.2. Mellet v Ireland (ICCPR)

The case of *Mellet v Ireland* was communicated before the Human Rights Committee (International Covenant on Civil and Political Rights) on 11 November 2013. The author, Amanda Mellet, was 21 weeks pregnant when she was informed that her fetus had congenial heart defects. The diagnosis of the fetus would ultimately lead to the death of the fetus, either *in utero* or after the birth. Even though the fetal impairment would eventually turn fatal, she could not obtain an abortion in Ireland because of the, at that time, current laws prohibiting and outlawing abortion all together. Her doctors advised her simply to "travel" and did not give her any recommendations of a suitable provider of abortions in the United Kingdom. Shortly after the initial exams, she underwent further exams that established and confirmed that the fetus would die inside the womb or shortly after birth. The author was again advised to "travel". The author decided to travel to the United Kingdom for the termination of the pregnancy and was referred to the Liverpool Women's Hospital. At the British hospital, she received the medication used to induce labor and a couple of days later, she gave birth to a stillborn child. The day after the delivery, still bleeding and weak, she and her husband flew back to Dublin because they could not afford to stay in the United Kingdom. She did not receive any financial assistance from Ireland and spent in total around 3000,00 euros.[194]

[194] United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016, paras. 2.1-2.4

After her return back to Ireland, the hospital did not give her any aftercare nor was she offered bereavement counsel to deal with the trauma of losing her pregnancy and travel abroad to obtain it. The hospital offered grief counselling to women who have suffered spontaneous stillbirths. However, this service is not available for those who themselves have chosen to terminate the pregnancy abroad on the ground of fetal impairment. After some time, she received post-abortion counselling at a family planning organization but no grief counselling. To this day, the author still suffers from unresolved grief and trauma. The author submitted that she would have been able to handle the loss of her child better had she been able to terminate the pregnancy in Ireland, a familiar setting. Furthermore, the author submitted that the travel to the United Kingdom caused her much pain and that she even felt ashamed to travel abroad to obtain the abortion.[195]

The chapter will continue to highlight the most important complaints made by the author of the communication. This chapter will not encompass the complaints made by the author under article 19 of the ICCPR.

Article 7 of the International Covenant on Civil and Political Rights prohibits torture and cruel, inhuman, and degrading treatment. The author complained, under article 7 of the ICCPR, that because of the Irish abortion law, she had been subjected to cruel, inhuman, and degrading treatment. Further, she complained that it had infringed on her physical and mental dignity. By denying her the care she needed, by forcing her to carry a dying child, by compelling her to travel abroad to terminate the pregnancy and by stigmatizing her decision to terminate her pregnancy, the Irish State had infringed upon the author´s dignity. The author submitted that she felt extreme mental suffering because of her vulnerable position and then having to terminate a pregnancy abroad. According to the author, the fact that the Irish hospital was not supportive of her decision to have an abortion and then denied her the care she needed, amounted to cruel, inhuman and degrading treatment. Because of the hospital's refusal to provide her with grief counselling, she was unable to cope with her trauma and could not grieve normally. This was only amplified when the author learned that the hospital offered bereavement counselling to women who have suffered from spontaneous miscarriage, and it made her feel that she did was not deserving of support from her own hospital. Furthermore, her mental anguish increased when she was forced to travel abroad to terminate the unviable

[195] United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016, paras. 2.4-2.5

pregnancy. In her opinion, this was a clear infringement on her right to physical and mental dignity. Moreover, the hospital in Liverpool did not give her any options regarding the baby's remains and they were unexpectedly delivered to her front door three weeks after her return to Ireland, which deeply upset her and caused more trauma and mental suffering.[196]

Article 17 of the ICCPR stipulates 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".[197] By not allowing her to terminate the pregnancy in Ireland, the author claimed that the State arbitrarily interfered with her right to decision-making. Had she been allowed to terminate the pregnancy on her own terms, it would have preserved her mental and physical well-being. She claimed that the Irish abortion ban interfered with her right to make her own informed decisions about her own body, and especially decisions in an area such as intimate as reproductive health. [198]

In a catholic country such as Ireland, the abortion ban is heavily influenced by the church. The abortion ban had a disproportionate effect on her right to health, her right to private life and her right to make informed decisions about her own body and reproductive health. The moral question of protecting the life of the unborn, per the Irish Constitution, versus protecting Ms. Mellet's right to mental and physical stability as well as reproductive authority, cannot be seen as proportionate in this regard. The principle of proportionality is crucial whenever the State is attempting to justify an interference in the rights of a person. On the one hand, there is the right of the author to reproductive, physical, and mental health, and her right to self-determination. On the other hand, there is the protection of the rights of the unborn child as per the Irish Constitution. The author claimed that the weighing of the different interests in the present case was not proportional. The State should not have prioritized the rights of the unborn child over the rights of the author.[199]

The interference by the State in her private life was prescribed by law – the Irish law only permits abortion in cases where the life of the woman is in danger. Despite this, the

[196] United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016, paras. 3.1–3.4
[197] ICCPR, article 17
[198] United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016, para. 3.5
[199] *Ibid*, para. 3.6

interference in her rights was arbitrary and non-proportional. The aim presented by the Irish State, *i.e.,* the protection of the unborn child, is not applicable in the present case since the pregnancy was unviable in the first place and the child would have died either way. The author accepted that the protection of an unborn child may serve as a legitimate aim when interfering in the rights of women, however, it is not applicable in the present communication.[200]

Criminalizing abortion and restricting the access to safe abortion for women violate the rights to non-discrimination and equal enjoyment of other rights on the basis of sex and gender. States have an obligation to ensure that healthcare services are accessible for all, and to ensure that the healthcare services consider the basic biological reproductive differences between women and men. The laws criminalizing a service that *de facto* only women need is in direct violation with the right to non-discrimination. Ms. Mellet claimed that the Irish abortion ban causes emotional trauma for women wanting to terminate their unviable pregnancies. Furthermore, she claimed that the abortion ban patently punishes women for seeking to terminate these pregnancies that do not even result in a viable, living child. She claimed she did not get the support she needed from hospital staff when she expressed her will to have an abortion. In comparison, there are no medical procedures where men are faced with the same amount of stigma and judgement. Men are not asked to put their own health needs aside in relation to their reproductive capabilities.[201] The author felt that she was subjected to a gender-based stereotype where women's primary roles and only purpose in life are to be mothers. The author claimed that subjecting her to this gender-based stereotype was discriminatory and violating her right to gender equality. Furthermore, the Irish hospital did not offer her any bereavement counselling after her abortion and the loss of her child whereas the counselling services were offered to mothers who have suffered spontaneous miscarriages. She felt that she was as much entitled to grief counselling as women who have miscarried, because she had also lost a child, only through different means. This treatment by the hospital illustrates what women are expected to do if they learn that their pregnancies are unviable. They should let nature take its course and

[200] United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016, para. 3.7
[201] *Ibid*, paras. 3.15-3.17

carry the pregnancy to term and give birth to either a stillborn child or a child that will die shortly after birth disregarding their own emotions and feelings.[202]

In regards to the complaints made under article 7 of the ICCPR, the Committee established that even if a conduct, in this case abortion, is legal under domestic law, does not mean that the conduct cannot violate article 7 of the ICCPR. The existing legal framework at the time in Ireland caused the applicant extreme amounts of mental and physical anguish and suffering. Moreover, the Committee noted that all of the trauma endured by the applicant would have been avoided had she been allowed to terminate the pregnancy in Ireland, with familiar doctors and in a place where she felt comfortable. Instead, this was only available to her had she agreed to carry the pregnancy to term and given birth to a stillborn child in Dublin. The Committee noted that the fact that the hospital did not provide her with information regarding the overseas abortion, aggravated her suffering. Finally, the Committee noted that when it comes to article 7 of the ICCPR, no limitations by the State are justified and article 7 is absolute. The Committee concluded that the mental and physical trauma to the applicant subjected to her by the state was enough to establish a violation of article 7.[203] Furthermore, the Committee considered the interference in the author's private life to be arbitrary and unlawful. The Committee also noted that a woman's request for abortion falls under the scope of article 17 of the ICCPR. The Committee noted that even if the interference was in accordance with domestic law, *i.e.*, the interference was provided for in the Irish Constitution, it does not mean that it is in accordance with the ICCPR. Even if an interference is provided for in domestic law, the interference needs to be in accordance with the provisions, aims and objectives of the ICCPR. The Committee concluded that there had been a violation of the author's right to privacy. It noted that the balance the State had attempted to strike between the mother and the unborn child was not proportionate nor did it serve a legitimate aim. Any arbitrary interference in the rights in the ICCPR should be in accordance with the objective, aim and provisions of the ICCPR. The author's pregnancy was not viable, and she should have been allowed to terminate it in Ireland instead of travelling abroad which only increased her mental suffering.[204] Lastly, the Committee found a violation of article 26 of the ICCPR because of the State Party's failure to provide the

[202] United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016, paras. 3.19-3.20
[203] *Ibid*, para. 7.4-7.5
[204] *Ibid*, paras. 7.7-7.8

necessary services needed by the author and it amounted to discrimination. The Committee recalled that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".[205] Furthermore, the Committee stated that the differential treatment of the author amounted to gender-based stereotyping and that the situation had failed to consider the socio-economic and medical needs of the author. Therefore, the differential treatment did not meet the criteria of reasonableness, objectivity and legitimacy of the treatment's purpose.[206] The Committee noted that women who choose to carry a non-viable pregnancy to term in Ireland, still receive the full protection of the Irish public health care system. Their hospital expenses are covered by insurance, and they continue to get the appropriate care from medical professionals. In contrast, women who decide to terminate their non-viable pregnancies, are not protected by the health care system, and have to cover their own medical costs and denied medical insurance. The Committee noted that the State Party had not adequately considered Ms. Mellet's individual circumstances, compared to other women in similar situations, and that the treatment of her amounted to discrimination as provided for in article 26 of the ICCPR. Thus, the Committee decided not to examine articles 2(1) and 3 separately.[207]

5.4.3. L.C. v Peru (CEDAW)

The case of *L.C. v Peru* was communicated before the Committee on the Elimination of Discrimination against Women on 18 June 2009.[208] The claim was submitted by the alleged victim's mother. The victim, L.C., was only 13 years old when she was sexually abused by a 34-year-old man who lived in her impoverished neighborhood near Lima. Following the on-going sexual abuse, she became pregnant and fell into a state of deep depression. Because of her depression and being pregnant, she decided to attempt to take her own life by jumping from a building on 31 March 2007. The attempted suicide failed, and she was admitted to the hospital with severe trauma to the uterus and her spinal cord. The damage

[205] Ibid para. 7.11; see also UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: https://www.refworld.org/docid/453883fa8.html , [accessed on 11 October 2023]

[206] United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016, para. 7.11

[207] *Ibid*, paras. 7.9-7.11

[208] Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011

to her spine, in combination with her other medical problems, caused paraplegia of her lower limbs that required immediate emergency surgery to prevent L.C. from becoming permanently paralyzed. Her spinal surgery was scheduled on 12 April 2007.

In the beginning of April, just weeks before her surgery, the hospital performed a psychological evaluation of L.C. The evaluation revealed the fact that she had been sexually abused and gotten pregnant as a result. These factors drove her to the attempted suicide. The day of the surgery, 12 April 2007, the author was informed by the doctors that the surgery had been postponed because of L.C.´s pregnancy. The doctors did not want to operate because of fear of damaging the fetus. After careful consideration, L.C. and her mother concluded on 18 April 2007 to terminate the pregnancy so L.C. could receive the emergency surgery. L.C. alleged that the termination of the pregnancy was essential to preserve both her physical and psychological health and integrity. 42 days after they submitted the request for therapeutic abortion, the request was denied because the hospital board concluded that the life of L.C. was not in danger. However, on 16 June 2007 L.C. spontaneously miscarried and her spinal surgery could be performed on 11 July 2007. L.C. received physical therapy for two months but had to leave the treatment on the grounds that it was too expensive, and they could not afford the care she needed. As a result, at the time of the communication before the CEDAW Committee, she was paralyzed from the neck down. She was completely dependent on others for care and required a wheelchair to get around. She could not attend school because of her need of constant care and her mother was prevented from working. All the medicine and medical equipment placed a heavy burden on their financial means.[209]

Under Peruvian law at the time of the communication, abortion is criminalized and punishable with up to two years in prison.[210] Abortion is only permitted in cases where the conditions for therapeutic abortion in the Penal Code are met. Article 119 of the Peruvian Penal Code permits abortion if the procedure is “performed by a doctor with the consent of the pregnant woman or her legal representative, if any, when it is the only way to save the

[209] Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011, paras. 2.1-2.15

[210] Peruvian Penal Code, article 114

life of the mother or to avoid serious and permanent harm to her health".[211] The author claimed that the conditions for obtaining legal therapeutic abortion were met and that the denial of the procedure was an unjustified limitation in L.C.'s rights.

The author alleged that the refusal of the hospital to perform the therapeutic abortion was in violation of L.C.'s right to health, a life of dignity and her right to non-discrimination regarding the access of such care. The refusal to carry out the abortion deprived L.C. the possibility of walking. The withdrawal of the emergency surgery amounted to an unjustified limitation in the rights of L.C. Furthermore, the State Party had failed to comply with its obligations under the CEDAW Convention by refusing to ensure access to medical services that are essential to women, in this case abortion. The obligation to protect by the State Party is twice as important when the rights of a minor are at stake. The author alleged that the State Party had violated articles 1, 2, 3, 5, 12 and 16 of the Convention, as well as the CEDAW General Recommendation No. 24.[212] The author claimed that the refusal to carry out the therapeutic abortion violated L.C.'s rights under article 5. It resulted in discrimination because the reproductive function of L.C. was put above her overall welfare. The author claimed that given the special conditions of L.C., the need for a therapeutic abortion was necessary and appropriate. The right to the protection of her physical and psychological health was completely ignored by the doctors, who should have been able to put the best interest of L.C. above the unborn child. Therefore, the author claimed that there had been a violation of L.C.'s rights under article 12. Moreover, the lack of judicial means to access legal abortion constituted in a violation of L.C.'s rights under articles 2(c), 5 and 12. The absence of these judicial mechanisms had a disproportionate effect on L.C. and her rights. The author also claimed that because she was denied the therapeutic abortion, L.C. life prospects were shattered, and she is now suffering from a permanent condition because she did not receive the emergency spinal surgery in time.[213]

[211] Peruvian Penal Code article 119; See also Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011, paras. 2.1-2.15

[212] This chapter will only explore the complaints made under articles 2, 5, and 12; Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011, paras. 3.1-3.2

[213] Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011, paras. 3.3–3.5

The Committee recalled the State Party's obligation to take all appropriate steps to ensure that women have access to healthcare without discrimination, including family planning services. The Committee further noted that in its General Recommendation No. 24, the failure by States to provide certain reproductive health services that only women require amounts to discrimination.[214] Furthermore, the Committee noted that there was no doubt whether L.C. needed the spinal surgery or not. The hospital board did not consider the possible effects the continuation of the pregnancy would have on L.C.'s physical and mental health. The medical board that assessed the need for therapeutic abortion decided that the life of L.C. was not in danger. The Committee concluded that the facts of the present communication amount to a violation of L.C.'s rights under article 12 of the CEDAW Convention. Furthermore, the facts revealed a violation of article 5. The fact that the emergency spinal surgery was postponed due to L.C.'s pregnancy clearly shows that the hospital decided to put the unborn child's needs above L.C. The decision to postpone the surgery was heavily influenced by the stereotypical view of women as reproductive vessels and that the life of the fetus outweighed the life of the mother.[215] The fact that the hospital decided that the conditions for therapeutic abortion were not met, left L.C. in a legal vacuum. The Committee noted that since the State Party has *de facto* legalized therapeutic abortion, it must establish a clear legal framework so that women can exercise their right to therapeutic abortion in situations where the conditions are met. Consequently, the Committee noted that the delay in the decision-making process by the hospital had detrimental effects on L.C.'s mental and physical health. The facts gave rise to a violation of articles 2 (c) and (f) of CEDAW.[216]

Subsequently, the Committee noted that the failure of the State Party to protect the reproductive rights of women and the failure to establish a proper legal framework as to allowing abortion in cases of sexual abuse and rape, contributed to L.C:s situation. Furthermore, the serious risk for L.C. to become permanently disabled and the fact that she was pregnant because of sexual abuse had detrimental effects on her physical and mental

[214] *Ibid*, para. 8.11; see also UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women & Health),* 1999, A/54/38/Rev. 1, Chap. I, para. 11

[215] Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011, paras. 8.9-8.15

[216] *Ibid*, paras. 8.16–8.17

health. The failure by the State Party to recognize this and provide her with the emergency spinal surgery and a timely abortion, resulted inevitably in a violation of her rights.[217]

5.4.4. The *Mellet* and *L.C.* cases and their relevance to article 12 of ICESCR

The above-mentioned cases clearly illustrate the barriers criminalization of abortion creates for women, especially in the context of their reproductive rights as established in article 12 of ICESCR. Both cases show that the women suffered from extreme mental and physical trauma for not being allowed an abortion. The *Mellet* and *L.C.* cases are highly relevant when discussing women's right to health. Being forced to travel abroad to obtain an abortion or being forced to wait for an emergency surgery are clear violations of women's right to reproductive health and self-determination and puts severe limitations in the protection of abortion rights of women. Limitations in the reproductive rights of women also amount to breaches in their overall right to health. In its General Comment No. 22, the Committee on Economic, Social and Cultural Rights confirms that:

> The obligation to respect requires States to refrain from directly or indirectly interfering with the exercise by individuals of the right to sexual and reproductive health. States must not limit or deny anyone access to sexual and reproductive health, including through laws criminalizing sexual and reproductive health services and information […] Examples include laws criminalizing abortion […][218]

Furthermore, the obligation for States to respect the right to sexual and reproductive health requires that they refrain from creating laws or policies that create barriers in obtaining sexual and reproductive healthcare services.[219]

Even though the laws in Ireland have changed and abortion is no longer criminalized, the *Mellet* case clearly illustrates what women go through when trying to end a pregnancy in a country that has criminalized abortion. Having to travel abroad to an unfamiliar setting to deal with a very private medical matter has negative effects on one's mental health. Depression and unresolved trauma can create long-lasting problems. The effects on the applicant's mental health could have been completely avoided had she been able to

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[217] Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011, para. 8.18

[218] Committee on Economic, Social and Cultural Rights, E/C./12/GC/22, *General Comment No. 22(2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights),* 2 May 2016, para. 40

[219] *Ibid*, para. 41

terminate the pregnancy in Ireland. Furthermore, the stigma surrounding the procedure affected Ms. Mellet in a way that decreased her mental well-being. She carried a child that would not survive outside the womb or even die inside of her. The hospital staff did not want to cooperate and encouraged her to carry the pregnancy to term as the child "might not suffer".[220] The disrespect towards her decision that was shown by her doctors and nurses, people that she should have been able to trust to care for her best interest, let her down and made her feel ashamed and guilty. The balance between the interests that needed to be struck in this case was not proportionate. The fact that the well-being of the unborn, unviable child was put above Ms. Mellets is unjustified. The stereotype that the sole purpose for women is to have children is an outdated one. Women cannot be defined by their reproductive capabilities. Therefore, the treatment of Ms. Mellet was discriminatory and not in her best interest. To control the reproductive rights of women, infringe on their right to health as well as self-determination. In the *Mellet* case, the CCPR Committee even found that the treatment of Ms. Mellet constituted cruel, inhuman, or degrading treatment. Furthermore, the stigma and shame created by the abortion ban constituted in a different source of emotional pain.[221] For Ireland to have had abortion included in its penal code, was a clear violation of its state obligation to refrain from limiting the access to sexual and reproductive services.

In his concurring opinion on *Mellet v Ireland*, Committee member Achour even goes as far as to say the abortion ban in effect at the time in Ireland targets women only because they are women. The ban put women in a vulnerable position which can be considered as discriminatory compared to men. Furthermore, he continues to say that Ms. Mellet had been the victim of a 'sexist' stereotype where women are forced to carry pregnancies to term irrespective of the individual circumstances of the pregnancy. Forcing the author to either carry out the non-viable pregnancy, or to travel to obtain an abortion, reduced her to be defined only on the basis of her reproductive capabilities, which in turn violated her right to self-determination and made her a victim of gender-based discrimination.[222]

[220] United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016, para. 3.17
[221] *Ibid*, para. 3.4
[222] United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016, Individual opinion of Committee member Yadh Ben Achour (concurring), para. 4

The case of *Mellet v Ireland* clearly illustrates the fact that the criminalization of abortion has negative impacts on women's right to health. Article 12 of the ICESCR encompasses 'the right to the enjoyment of the highest attainable standard of physical and mental health'.[223] The case proves that restrictions in the protection of abortion-related rights such as the right to reproductive health, the right to non-discrimination and the right to self-determination are factors that are in breach of Article 12 of the ICESCR. As the State Party in the present case, it can be argued that Ireland acted contrary to its State obligations under the ICESCR.

L.C. v Peru also shows the negative effects that criminalization of abortion has on the access to safe abortion. L.C. was left with life-long disability and permanently paralyzed because of her doctor's choice to put her unborn child's needs above her own. She was in desperate need of a spinal surgery to prevent this from happening, but her right to health was not effectively realized. In L.C.'s case, the aggravating factor was also that she was raped as a minor by a much older man. Only 13 years old at the time, faced with a pregnancy resulted from rape, and the healthcare system chose to fail her by not allowing her to terminate it. The Peruvian Penal Code clearly allows for abortion when the health or life of the mother is in danger. Had she been able to access a complete termination of her pregnancy, she would have undergone the emergency spinal surgery on time and would not have been left with life-long consequences. The refusal of the hospital to grant her the abortion is a clear violation of L.C. right to health. Furthermore, as previously established, the prevention of interference from third parties, *i.e.* the hospital staff, in the right to health is a clear violation of the State obligation to protect.[224]

L.C. v Peru highlights the impacts that the refusal to perform a therapeutic abortion can have on the health of the woman. As established above, Article 12 of the ICESCR provides for the right to 'the enjoyment of the *highest* attainable standard of physical and mental health' (emphasis added).[225] This case proves that the refusal of a third party to grant therapeutic abortion, infringes on the right to health. The relevant abortion-related rights relating to her right to reproductive health were not protected. The State Party in the present

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[223] ICESCR, article 12(1)
[224] See Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011
[225] ICESCR, article 12

case, Peru, cannot be said to have lived up to its core obligations under the ICESCR. Peru did not ensure that the applicant had enjoyed the *highest* standard of health, as is protected under Article 12. The applicant had a legal basis for her claim to undergo a therapeutic abortion and that would have safeguarded her right to health. The narrow interpretation of the term 'health' by the State insofar as to refuse her the therapeutic abortion because her life was not in danger is an arbitrary interference in L.C.'s right to health.[226]

CESCR has, in its General Comment No. 22, further emphasized the need for the removal of barriers for women seeking abortion. The Committee highlighted that no girl or woman should be faced with barriers or be deprived of sexual and reproductive health information and services because of the refusal of healthcare personnel.[227] Furthermore, several human rights mechanisms have emphasized the need to for the removal of barriers in obtaining sexual and reproductive services.[228] The complete removal of barriers to obtain an abortion is crucial in order to progressively realize the human right to reproductive health for women.

Criminal laws that restrict women from having abortions are good examples of a violation of women's rights, specifically the right to health, dignity, and autonomy. Furthermore, including abortion in penal codes, only generates poor mental and physical health outcomes for women that may prove fatal. Women who are faced with criminal charges and risk being thrown into prison because of abortion, is of course at risk for increased levels of anxiety and depression. The Special Rapporteur, in his interim report, even goes as far as to say that laws criminalizing abortion may result in violations of State obligations.[229]

Furthermore, other legal restrictions impose severe limitations on women's access to abortion. Such restrictions may be 'conscientious objection' meaning that healthcare personnel can refuse to perform the abortion, refuse to give information about accessing abortion, and even refuse to refer a woman to alternative providers.[230] Other legal restrictions include limited funding of abortion care, mandatory waiting periods for women

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[226] See Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011
[227] GC No. 22, para. 43
[228] United Nations Human Rights, Office of the High Commissioner, *Information Series on Sexual and Reproductive Health and Rights: Abortion*, updated 2020
[229] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 21
[230] *Ibid*, para. 24

wanting to terminate a pregnancy and even laws that require healthcare personnel to report suspected abortions to the authorities.[231] Criminal interference in the right to access abortion is a clear interference by the State with the woman's right to sexual and reproductive health, which is also inherent in article 12 of the ICESCR. Criminal laws restrict a woman from making informed and conscious choices about her body. The threat of being prosecuted for having an abortion forces the woman to give birth to a child when it is not her choice, or want, to do so.[232] Furthermore, having to care for an unwanted child when a woman does not have the financial means to do so, only results in child neglect and poor health outcomes for the child. When a woman is faced with an unwanted pregnancy, she often resorts to unsafe methods to obtain the abortion. Thus, criminal laws create and encourages the unsafe methods and environments that in turn may lead to unnecessary deaths.[233]

5.4.5. The stigmatization of criminal abortion laws

The criminalization of abortion and, thus the severe restriction in the protection of abortion-related rights, increases the stigma surrounding it and it creates a dangerous cycle for women. The notion that abortion is an unsafe procedure results in the continuation of the criminalization of a rather safe procedure, when performed in the right, sanitary conditions.[234]

Furthermore, it cannot be understated that criminalization of abortion has a severe negative impact on the mental health of women. Because of the extreme stigmatization of both the procedure itself and the women seeking to obtain one, women's mental health may start to deteriorate. A woman may be forced to carry the pregnancy to term and give birth to a child she does not want, or she needs to obtain an illegal, unsafe abortion. Naturally, both options create increased mental anguish and anxiety. Then having the threat of being prosecuted, investigated, and punished for her actions hanging over her head only adds to her fear and mental anguish.[235]

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[231] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 24
[232] *Ibid*, para. 27
[233] *Ibid,* para. 26
[234] *Ibid*, para. 35
[235] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 36

The common ground in the above-mentioned judicial cases is the fact that both women were heavily stigmatized and judged based on an outdated stereotype that the sole purpose of a woman is to be a mother.[236] Continuing on the topic of stigma, Cook lists three separate domains in which stigma is located: *perceived*, *experienced* and *internalized.*[237] When these three domains are applied to abortion, perceived stigma relates to an individual's perception of what other people's opinion is of abortion and what other people's reaction might be if they found out that a woman has had an abortion. Perceived stigma may cause a woman to delay the abortion, or it might cause her to completely avoid seeking the abortion or even avoid seeking the necessary post-abortion care. Perceived stigma also causes a woman to feel the need to hide her abortion, which in turn leaves the woman lacking the emotional support she desperately might need. Experienced stigma relates to the actual experience of a woman who has experienced discrimination or negative treatment because of her abortion. For example, experienced stigma refers to women who have been denied information about abortion that they need in order to decide on having a timely abortion. Furthermore, experienced stigma also encompasses the harassment, humiliation and condemnation a woman might receive when trying to access abortion services, even from their own medical professionals. Internalized stigma refers to women who have had access to abortion services but still feel shame and guilt on a personal level because of their abortion. Internalized stigma may even lead to negative thoughts about oneself because of the termination of a pregnancy or even suicide.[238]

On the one hand, in the case of *Mellet v Ireland*, the applicant experienced all three domains of stigma. She felt shame, guilt and her medical personnel treated her according to an outdated stereotype that she must put her unviable fetus' rights and well-being above her own. Upon returning to Dublin after her abortion, she felt ashamed of what she had done. The stigma surrounding abortion in Ireland at the time put her in a very unfair position and the guilt that she was feeling was almost solely because of that.[239] The internalized stigma Ms. Mellet experienced, had enduring effects on her mental health. Having to hide and to

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[236] See above *Mellet v Ireland* and *L.C. v Peru*
[237] Rebecca J. Cook: *Stigmatized Meanings of Criminal Abortion Law*, p. 354, in *Abortion Law in Transnational Perspective: cases and controversies* by Rebecca J. Cook, Joanna N. Erdman and Bernard M. Dickens, University of Pennsylvania Press, 2014, 1st edition
[238] *Ibid*, p. 354–355
[239] United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016

stay silent about having an abortion only attributes to the fact that stigmatization has negative effects on mental health. An already traumatic procedure needs to be hidden and silenced, only to fit into the mainstream of society. The silencing, the hiding and the covering up abortion, are detrimental factors in the dismantling of on-going prejudices of abortion and the treatment of women.[240] On the other hand, the Peruvian girl who was permanently disabled because she was the victim of experienced stigma. Her doctors did not give her access to a timely abortion, nor any information of the process. The decision about not granting her access to a therapeutic abortion came 42 days later, leaving the girl in a state of disbelief and confusion.[241]

Ideals of womanhood are deeply influenced by social stigma. Some ideals of womanhood can be linked directly with access to abortion. Negative influences on womanhood can be attributed to the stigma surrounding access to abortion depending on cultural factors. Women who seek abortion is directly challenging the stereotype of the ideal woman. Cook lists some ideals of womanhood that can be directly attributed to abortion: "Female sexuality as solely for the purpose of procreation, the inevitability of motherhood and women's instinctual nurturance of the vulnerable".[242] Some ideals are even manifested in gender stereotypes. When it comes to abortion as a procedure, the criminalization of it and the stigma surrounding it, there are five components that create the stigma itself. The criminalization of abortion *marks* women seeking it, and those providing it, as different and somehow social outcasts. Criminalization *links* these women to characteristics that are labelled undesirable and that in turn manifests as gender stereotypes. The women are then *separated* from society through criminal deviance. When the women are separated as social outcasts because of having an abortion or wanting to have an abortion, the discrimination is considered *justified.* These four components of stigma production, in turn, allows criminal law to *exert power* over the women seeking abortion in the first place.[243] How women are labelled according to the above-mentioned stigma creation is solely dependent on their individual circumstances and how far along they are in their decision-making

[240] Rebecca J. Cook: *Stigmatized Meanings of Criminal Abortion Law*, p. 356 in *Abortion Law in Transnational Perspective: cases and controversies* by Rebecca J. Cook, Joanna N. Erdman and Bernard M. Dickens, University of Pennsylvania Press, 2014, 1st edition
[241] Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011
[242] Rebecca J. Cook: *Stigmatized Meanings of Criminal Abortion Law*, p. 353 in *Abortion Law in Transnational Perspective: cases and controversies* by Rebecca J. Cook, Joanna N. Erdman and Bernard M. Dickens, University of Pennsylvania Press, 2014, 1st edition
[243] *Ibid*, p. 354

process relating to abortion. Women who are faced with unwanted pregnancies may then proceed to decide to seek an abortion from unsafe practitioners or even induce their own abortion through unsafe manners because of lack of access to it. These are factors that relate to which stigmatization component the women may find themselves in. Society labels women through criminal abortion laws on the reasons why women seek to terminate a pregnancy. For example, unmarried women or teenagers seeking abortion may be labelled as promiscuous, married women seeking the same procedure may be labelled as selfish. Society tends to label women that undergo abortions without even considering the individual circumstances that brought them to seek an abortion in the first place.[244]

In *Mellet v Ireland*, it can be argued that the applicant could be labelled as selfish for putting her own medical needs above her unviable child's. She should have carried the pregnancy to term on the grounds that "the child might not suffer". What about her suffering? She received discriminatory treatment based on gender. She was labelled as a woman whose sole purpose in life was to carry children and give birth, without even acknowledging the fact that the child would have died either way, was she to give birth or to terminate the pregnancy in advance. She had a husband, and the pregnancy was planned, it was just not viable and to continue it would have been unnecessary and even more traumatizing than the abortion itself. Nevertheless, the abortion traumatized her insofar as she was forced to travel in order to obtain one when she should have been allowed an abortion in her home country.[245]

In *L.C. v Peru,* although a victim of rape, it can be argued that the applicant could be labelled as selfish for wanting to terminate the pregnancy to protect her ability to walk. She was still a minor when she got pregnant, barely even a teenager. She was denied access to abortion even when she had a legitimate claim to undergo one. The fact that the doctors took 42 days to decide whether to grant the abortion, also clearly shows that the doctors treated her as unworthy and not treating her according to her medical needs. The request for an abortion was justified in L.C.'s case and her doctors refused to treat her as a patient with legitimate medical needs. Furthermore, the delay in deciding the necessity of an abortion in L.C.:s

[244] Rebecca J. Cook: *Stigmatized Meanings of Criminal Abortion Law*, p. 354 in *Abortion Law in Transnational Perspective: cases and controversies* by Rebecca J. Cook, Joanna N. Erdman and Bernard M. Dickens, University of Pennsylvania Press, 2014, 1st edition

[245] See The United Nations Human Rights Committee, *Mellet v Ireland,* Communication No. 2324/2013, CCPR/C/116/D/2324/2013, 11 November 2013, views adopted on 31 March 2016

case clearly shows the State's failure to institute effective procedural mechanisms to determine the need for a therapeutic abortion and if the conditions that allow for a therapeutic abortion were met, constitutes a violation of the State obligations to fulfil the rights of L.C. The burden to establish such a mechanism lies with the State and is an integral part of its obligations under international human rights law. The establishment of a functional legal framework eliminates the threat of human rights violations. Moreover, the delay in the already existing procedural mechanisms, prevented L.C. from receiving the medical care she needed, and thus also constituted in a violation of her right to health.[246]

The choice to terminate a pregnancy should not be up to the state, the hospital staff or even family members. The choice to undergo an abortion is the woman's alone, and not letting her make an informed decision about her body is an arbitrary interference in her rights. The criminalization of abortion not only legally prevents women from undergoing an abortion, but it also moralizes and stigmatizes them to the point that can have disastrous effects on their overall mental and physical health. Treating women who are considering abortion, have had an abortion in the past or scheduling the doctor's appointment to have an abortion differently than other patients amounts to discriminatory treatment. The stigma links the women to characteristics that are labelled as undesirable and that they may be lesser women for choosing to terminate a pregnancy instead of fulfilling their purpose as mothers and caregivers. The persistent stereotyping of the roles of women within society aggravates the notion that they are considered to be lesser women if they have an abortion. The social norms that exist when it comes to women's reproductive rights are that their reproductive rights need to be somehow regulated and restricted. As a result, the women that defy these societal norms they are punished. As shown, the punishment of the women that challenge the stereotypes have severe effects on their right to the highest attainable standard of health.[247]

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[246] See Committee on the Elimination of Discrimination against Women (CEDAW Committee*), L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 18 June 2009, views adopted on 17 October 2011

[247] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 16

6. CONCLUSION

6.1. How to transform abortion rights?

What does the international community need in order to progressively realize the right to the highest attainable standard of health for women? The progressive realization of the reproductive rights of women necessitates substantive changes in the legal frameworks that safeguard them, paradigm shifts in the societal perception of women who undergo abortions and an overhaul of the stereotypes that continue to differentiate the treatment of women. The prevailing constrictions and limitations placed upon abortion-related rights underscore the inadequacy and inefficiency of the existing international judicial mechanisms. To effect meaningful change in abortion laws, policies and biases, the next section will explore potential avenues through which the international community can foster the progressive realization of women's reproductive rights.

The first step for ensuring that the right to health of women is to decriminalize abortion. Abortion-related rights and the right to health need to be protected from arbitrary interference from the State. Moreover, the criminalization of abortion is in direct violation of the State obligation to respect.[248] Criminalization of abortion can be regarded as an attempt by the State to control women and limiting their decision-making power. The right to health enshrined in article 12 of the ICESCR encompasses the right to reproductive rights and health, which means that as long as the procedure is part of a penal code, the right to health can never be fully recognized. Controlling a woman's fertility through threats of criminal prosecution, is an arbitrary interference in her right to health.

Criminalization, when scrutinized through a rigorous legal and ethical lens, fails to present itself an efficient tool to safeguard the fundamental right to health, largely due to frequently illegitimate objectives underlying its pursuit. The invocations of public morale of public health concerns does not substantiate a valid basis for infringing on women's right to health and their inherent autonomy. Moreover, it is pertinent to acknowledge that the

[248] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 40

criminalization of a medical procedure exclusively applicable to women can potentially amount to discrimination.

Criminalization and stigma surrounding abortion reinforce and complement each other. If abortion is illegal and criminalized, it automatically becomes a procedure that people are against. Criminalization creates stigma and puts the women who have had an abortion or the ones performing an abortion in an unfair position. When abortion is decriminalized, the stigma is automatically either fully removed or diminished. When abortion is labelled as a serious crime, the stigmatization around it enhances even more.

General Comment No. 14 also notes that in order to fully ensure the right to health for women, it is imperative that States remove all barriers that interfere with accessing reproductive health services.[249] Lack of access to abortion, a reproductive healthcare service, constitutes a breach of the right to health and is discriminatory towards women. In the previous chapter, the author touched upon the notion that criminalization creates a vicious circle for women trying to have an abortion.[250] Criminal abortion laws may force the women who have had abortions to feel closeted and intense shame. The isolated feeling a woman has after an illegal abortion only justifies the criminalization. Women who are isolated are less willing to deal with the trauma of having an abortion. Reluctant, silenced women justify the criminalization of abortion even more.[251] These factors contribute to the toxic circle women find themselves in when abortion is restricted by criminal law. To remove abortion from penal codes, would be a step in the right direction and towards ensuring the comprehensive protection of the reproductive rights for women.

Furthermore, it is part of States Parties general legal obligations to remove all barriers in law or policy that undermine the full enjoyment of sexual and reproductive rights.[252] The

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[249] General Comment No. 14: *The Right to the Highest Attainable Standard of Health (Art. 12)*, adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, in E/C.12/2000/4, para. 21

[250] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 35

[251] Rebecca J. Cook: *Stigmatized Meanings of Criminal Abortion Law*, p. 369 in *Abortion Law in Transnational Perspective: cases and controversies* by Rebecca J. Cook, Joanna N. Erdman and Bernard M. Dickens, University of Pennsylvania Press, 2014, 1st edition

[252] Committee on Economic, Social and Cultural Rights, E/C./12/GC/22, *General Comment No. 22(2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights),* 2 May 2016, para. 34

existence of such laws is not only discriminatory, but also infringes on women's right to health. Therefore, a State cannot completely live up to its obligation to respect under the ICESCR if it has restrictive abortion laws or completely outlawed abortion. Moreover, a State Party's obligations include the combatting of stereotypical views and attitudes that perpetuate inequality and discrimination.[253]

In previous chapters, the author has described that accessibility and availability are two of the most important elements when it comes to the right to health according to ICESCR. The facilities, goods, information and services relating to sexual and reproductive health should be made accessible to everyone without discrimination.[254] However, the tragic reality is that abortion is neither accessible nor available for most women. The barriers that some countries have when it comes to accessing abortion are significant, not even mentioning the poor and marginalized women in rural areas. When abortion is not made accessible and available, the healthcare system, and the State Party itself, is encouraging discriminatory practices. Abortion should be regarded as a normal medical procedure, instead of a procedure that can only be accessible to non-marginalized groups of women.

Moreover, as established by the Committee in its General Comment No. 22, accessibility also encompasses economic accessibility.[255] Abortion itself and the post-abortion care should be minimal cost, preferably free of charge. Nowadays, abortion is often a privilege of the rich, and marginalized and poor women resort to unsafe manners to terminate a pregnancy. Making abortion economically accessible reduces the number of deaths or complications caused by unsafe abortions, therefore ensures the full protection of the right to health. Physical accessibility is equally important since abortion should be a service that is easily obtainable. In the previous chapter, the author analyzed the case *Mellet v Ireland*, in which the defendant was forced to travel abroad in order to obtain an abortion. The case is an illuminating example of the detrimental effects non-accessibility may have on a woman wanting to have an abortion. Information accessibility encompasses the right to receive timely information about the health services.[256] The Peruvian case, *L.C. v Peru*,

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[253] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 35
[254] *Ibid*, para. 15
[255] *Ibid*, para. 17
[256] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 18

clearly shows that the lack of accessibility to information also have equally detrimental effects on a woman's health. When abortion is not easily accessible, it affects the availability of the procedure. Therefore, it can be said that availability supports the overall accessibility of abortion.

In addition, making abortion accessible also means that a State should allocate resources for the removal of long waiting periods for women wanting to have an abortion.[257] The long waiting periods may be due to overburdened health systems, unnecessary bureaucracy created by restrictive abortion laws or even uncooperative doctors. The time limit is more critical if a woman discovers she is pregnant later, her age, her health and so on.[258] Third-party authorization for abortion from spouse, doctor or judge, needs to be removed as it delays an already long and bureaucratic process that is access to abortion. The choice to terminate a pregnancy should be a woman's alone, and third-party authorization requirements are unnecessary steps in the progressive realization of the health of women.

Biologically, it is evident that women have distinct reproductive capabilities in comparison to men, thereby necessitating a different approach when addressing reproductive health and rights. Given the inherent dissimilarity in women's reproductive capabilities, the protection of women's reproductive rights demands a distinctive and specialized framework. The imperative recognition of abortion-related rights as an integral part of women's right to health, is a pivotal requirement in the preservation of women's rights. Consequently, the preservation of women's rights must be accorded the highest priority. Moreover, the reproductive capabilities of women need to be recognized as a vital part of their right to health. The right to sexual and reproductive health is crucial to women's right to autonomy and their right to self-determination. To achieve gender equality, States need to consider that the health needs of women are different than men's. This means that States need to provide the appropriate services for women regardless of their life cycles.[259] Since the health needs are different for women than men, States and third parties should not be allowed to limit the right to health of women.

[257] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 41
[258] Orr Judith, *Abortion wars: The fight for reproductive rights*, Bristol University Press, 2017, p. 128
[259] E/C.12/GC/22, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), on 2nd May 2016, para. 25

Furthermore, the recognition of reproductive rights as an integral part of women's right to health, supports gender equality. States have an obligation to ensure gender equality. According to the ICRESCR article 3, State Parties have an obligation to ensure the equal enjoyment of economic, social and cultural right for both men and women.[260] Therefore, women should have access to reproductive health services should they need them. Correspondingly, men should have access to health services regarding their reproductive health. However, the biological differences in men and women make the medical procedures inherently different and restricting one gender from having medical procedures done and allowing the other, amounts to an unjustified interference in both the right to health according to Article 12 of the ICESCR, and a failure to ensure the equal safeguarding of economic, social and cultural rights of both men and women in accordance with article 3 of the ICESCR.

The right to access information regarding sexual and reproductive health is a vital part of the accessibility, which was already covered elsewhere. However, the right to access to information also encompass the proper education regarding sexual and reproductive rights. Comprehensive education is essential to the full realization of the right to health.[261] Furthermore, States have an obligation to provide access to correct information and not withhold any relevant information about sexual and reproductive rights, including sexual education.[262] Sexual education is vital to the young generation, and it reduces the stigmatized nature of some of the topics such as abortion. Proper knowledge about sexual and reproductive health has been proven to lower the rates of maternal mortality, to prevent unwanted pregnancies, to prevent unsafe abortions etc. Comprehensive education and access to information are vital components for the empowerment of women and help them have more power in their potential relationships in the future. Proper education may even protect women from violence, coercion, abuse and exploitation in their future relationships.[263] Giving women and girls a proper education about their sexual and reproductive health, supports their freedom to take informed decisions about their health. Proper education also supports women as equal participants in society.[264] States that have

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[260] ICESCR, article 3
[261] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 56
[262] *Ibid*, para. 57; see also General Comment No. 14
[263] *Ibid*, para. 63
[264] *Ibid*

restrictive, or criminal, abortion laws may also restrict access to information and education regarding sexual and reproductive health. This is in clear violation of the State obligation to respect the right to health. Consequently, restricting access to proper sexual education may cause third parties such as teachers, publishers or booksellers to deny women access to necessary sexual and reproductive health material such as books or education. States are also required, as part of their obligation to fulfil, to develop strategies to guarantee an exhaustive and proper sexual and reproductive health education as well as information.[265] Therefore, States are recommended to take steps to change their national curricula to guarantee that sexual and reproductive education is comprehensive, non-discriminatory, non-biased and evidence based.[266]

In order for women to enjoy a new era where their abortion rights are ensured and protected, the proper education for the younger generation needs to be guaranteed. When children are taught from a young age the importance of sexual and reproductive health, the stigma and fear surrounding it will automatically decrease in the future.

6.2 Final remarks

The above-mentioned factors all have the potential to open up a new epoch with profound implications for women and their reproductive rights and health. Contemporary society finds itself in an increasingly polarized state concerning the matter of abortion. It is important to transcend the reduction of women to mere vessels for reproduction and to extricate their bodies from the political sphere.[267] The persistent stereotype that a woman's primary or exclusive role in society is that of a mother exacerbates the process of criminalizing and stigmatizing abortion, thereby constricting access to the medical procedure itself. The perpetuation of such gender-based stereotypes not only impairs the safeguarding of abortion-related rights but also engenders discrimination by its very nature.

[265] UN Special Rapporteur, A/66/254, Right of everyone to the highest attainable standard of physical and mental health, interim report to the General Assembly, 3 August 2011, para. 64
[266] *Ibid*, para. 65(g); see also GC No. 22, para.49(f)
[267] Orr Judith, *Abortion wars: The fight for reproductive rights*, Bristol University Press, 2017, p. 132

As the author has presented in this thesis, there is a clear disconnect between the legal consensus regarding Article 12 and the *de facto* circumstances in many State Parties. The consensus that exists in regards to Article 12 is not reflected in the national legislation of many State Parties. It can be concluded that the soft-law instruments concerning the ICESCR, seems to have a limited impact on the State Parties' legislation regarding abortion. The ICESCR as a hard-law instrument, is effective however, the soft-law parts, *i.e.* the General Comments seem to have a limited impact on the national legislation in State Parties. As such, it can be argued that the impact of the soft-law instrument is unevenly distributed among the State Parties to achieve harmonization in national law amongst State Parties. There seems to be a clear need for further hard-law instruments.

Furthermore, many international courts, such as the European Court of Human Rights, has been reluctant in addressing the topic of abortion.[268] It can be argued that the case *Mellet v Ireland*, analyzed in the previous chapter can act as a tipping point for the European Court of Human Rights.[269] The Human Rights Committee found a that denying Ms. Mellet an abortion amounted to a violation of Article 7 of the ICCPR.[270] The significance of the findings in the *Mellet* case, and also the *L.C v Peru* case, can be considered powerful steps in the right direction for the development of stronger abortion-related rights and a will to safeguard women's right to health. Because of women's reproductive capabilities, their reproductive health needs better safeguarding in the international legal field. The international community is very divided on the topic of abortion rights and naturally that means that the protection of the rights is decreased and severely limited in some parts of the world. The strong jurisprudence arising from, especially the *Mellet* case, but also the *L.C.* case, creates an overlap between international courts and international treaty monitoring bodies such as the Committee on Economic, Social and Cultural Rights. The overlapping jurisprudence can create a more comprehensive development of human rights, as different judicial bodies co-operate to obtain a common goal.[271] Overlapping jurisprudence and judicial bodies influencing each other is a positive notion in international law.[272] Regarding abortion-related rights, it is important that judicial bodies have

[268] See for example: Bríd Ní Ghráinne, Aisling McMahon, Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?, *Human Rights Law Review*, Volume 19, Issue 3, November 2019, Pages 561–584, https://doi.org/10.1093/hrlr/ngz020
[269] *Ibid*, p. 577
[270] See *Mellet v Ireland*
[271] Bríd Ní Ghráinne, Aisling McMahon, Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?, *Human Rights Law Review*, Volume 19, Issue 3, November 2019, Pages 561–584, p. 582, https://doi.org/10.1093/hrlr/ngz020
[272] *Ibid*, p. 583

a common ground and that the abortion-related rights are interpreted as to offer women the most comprehensive protection. The harmonizing effect that overlapping jurisprudence between different international judicial bodies has on the growth of rights is a forward-thinking approach to the development of abortion-related rights.[273] In the context of Article 12 of the ICESCR, the right to reproductive health could benefit from the harmonizing effect of overlapping jurisprudence. Article 12 is, as mentioned before, one of the most comprehensive articles on the right to health in international human rights law.[274] Therefore, overlapping jurisprudence could offer the ICESCR increased standing when it comes to the protection of women's abortion-related rights in the context of Article 12. Abortion-related rights need to be seen as a legitimate part of the right to health of women and women need to be effectively protected against arbitrary interference from State Parties. This approach would also serve the objective and aim of the ICESCR.

Although the right to reproductive health is enshrined in Article 12 of the ICESCR, the reality for many women is quite the opposite. Article 12 protects the right to the enjoyment of the '*highest* attainable standard of physical and mental health' (emphasis added).[275] To achieve the *highest* possible standard of health, women need to have full access to abortion-related services. A lack of protection of abortion-related rights has, as the author has demonstrated in this thesis, detrimental effects on the right to health as laid out in Article 12. The Committee has noted that the concept of health has changed since the adoption of the ICESCR in 1966. The right to health is understood to be an 'inclusive right' that is also encompassing the right to appropriate and timely health care.[276] Appropriate and, above all, timely health care, is crucial for most women when trying to decide whether or not to terminate a pregnancy. Appropriate and timely abortions reduce the number of unsafe abortions and prevents further breaches of women's rights under Article 12. Due to the fact that Article 12 of the ICESCR is one of the most comprehensive articles on the right to health[277], it has a lot of potential to provide an extensive protection of abortion-related rights.

[273] Bríd Ní Ghráinne, Aisling McMahon, Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?, *Human Rights Law Review*, Volume 19, Issue 3, November 2019, Pages 561–584, p. 583, https://doi.org/10.1093/hrlr/ngz020
[274] See GC No. 14, para. 2
[275] ICESCR, article 12(1)
[276] GC No. 14, para 10–11
[277] *Ibid*, para. 2

In sum, the current protection of abortion-related rights that is offered by Article 12 is insufficient to progressively realize the right to health for women. Societal norms and stereotypes play significant parts in the decreased protection and a consensus is desperately needed. As such, women cannot obtain 'the highest standard of physical and mental health' [278], as laid out in Article 12 until their reproductive rights are fulfilled and comprehensively protected. As the author has argued in the present thesis, whilst there is a comprehensive interpretation of the right to health in Article 12, the *de facto* interpretations vary amongst national courts and legislation.

[278] ICESCR, Article 12(1)

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