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Human Rights for the Potential Child:
A Legal and Ethical Inquiry

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Abstract

The intersection of human rights, reproductive rights and children's rights presents a complex and evolving legal landscape. This thesis examines the legal, sociological and ethical considerations surrounding the rights of potential children within international human rights framework. It seeks to address whether potential children should be granted rights and how existing frameworks like the Convention on the Rights of the Child (CRC) may be applied. The study employs a comparative analysis of legal texts, case studies, and scholarly literature to explore these issues. The findings indicate that current international laws do not explicitly grant rights to potential children, but there is a compelling argument for their inclusion based on the principles of the CRC and existence of detrimental risks to the health and well-being of potential children. Recognizing the rights of potential children could significantly impact legislative and judicial approaches to human rights and child protection. This thesis concludes that incorporating the rights of potential children into international law is both a logical extension of existing human rights principles and a necessary step towards comprehensive child protection. Further research is recommended to explore the practical implementation of these rights and the potential conflicts with parental and reproductive autonomy.

List of Abbreviations

ACEs	Adverse Childhood Experiences
ACHR	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRC-Com	Convention on the Rights of the Child Committee
DRC	Declaration of the Rights of the Child
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
FASD	Fetal Alcohol Spectrum Disorder
GC	General Comment
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NAS	Neonatal Abstinence Syndrome
NGO	Non-Government Organization
NIP	Non-Identity Problem
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
TPR	Termination of Parental Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
US	United States of America
WHO	World Health Organization

Chapter I – Introduction

"These drug babies, I mean, their insides are just fried. You should hear how they scream at night; it's like they are trying to crawl out of their skin."
(former associate)

1. Preface

I feel it is necessary to provide some background that has undoubtedly influenced the lens through which this thesis was formed. For the past four years, I have spent countless hours advocating for underserved and overlooked children who, due to egregious conduct, have been sheltered from their parents by the local child protection system. In the United States (US), except for one, each state has an organization dedicated to this specific type of child- advocacy and is composed mostly of volunteers who receive training on the child protection systems specific to their state-of-residency. These advocates are then tasked with becoming the expert on the child(dren) assigned to them, visiting at least once monthly, becoming familiar with all the facets of their life, such as likes and dislikes, their educational and medical needs, and their opinions on reunification. It is normal for these advocates to form a working relationship with caregivers, case managers, service providers and, when appropriate, offending parents. The agencies are usually financially supported by non-profits that ensure the child(ren) receives birthday and holiday gifts, as well as clothing, school supplies, medical devices, etc. Most importantly, advocates represent the child or children's best interest by testifying their observations in court and providing recommendations regarding reunification or termination of parental rights (TPR).

Throughout the time I have spent both as a volunteer and staff advocate, I have gained burdensome insight about child protection. I have become privy to the dysfunction and incompetence that plague my local system and know too many sorrowful stories of beaten, burned, molested, and trafficked kids. Children have been reunified only to be killed by the offending parent a few weeks later; group homes that receive government funding to house children in-care who cannot be placed in relative or foster homes are found to be neglectful and further traumatizing; my local system even gained attention when a privatized social work agency was found to be having children in-care sleep on office floors or in cars of case workers because there are not enough foster or group homes (O'Donnell, 2022).

Two patterns or occurrences in my field of work have consistently garnered my interest due to their ability to exacerbate child welfare cases. The first concerns babies born drug dependent. I have

encountered multiple instances where toddlers exhibited difficult and concerning behaviors, only to discover through medical records that they were hospitalized for days after birth due to in utero exposure to narcotics. A close associate of mine (quoted above) fosters upwards of four babies at a time and witnesses first-hand the consequences of drug exposure in the womb. Nonetheless, the response to the increased rates of children being born addicted seems non-existent. This is especially odd when considering that the state of Florida has altered their abortion statutes to not permit elective abortion past 6 weeks yet offers no other protection to the fetus throughout pregnancy. To be frank, in Florida, you cannot abort a fetus, but you can drug it for nine months. There are no laws preventing a pregnant mother smoking, drinking or using other substances, except for few that are ineffective until after birth. This leads to newborns being shelters only hours after birth, expanding the already lifelong consequences of in utero substance exposure to include the trauma of removal and being a child in-care.

The second pattern involves repeat-offending parents. Most parents retain the legal right to reunification with their child, and it is only after a termination of parental rights (TPR) trial that these rights are permanently severed, with no further opportunity for rehabilitation or redemption. Many US states stipulate that to ensure timely permanency to children-in-care, parents shall have no longer than twelve months to complete tasks to achieve reunification, though the average case stays open months longer than that in the state of Florida (The Florida Senate, n.d.; Fostering Court Improvement, n.d.). All this to say, parental-rights are heavily guarded in the US. A TPR is usually granted only after parents have been given ample time and resources for reunification and have not demonstrated their ability to provide for their child's safety and best interests. Nevertheless, even once a TPR is ordered, nothing prevents the offending parent from reproducing and having subsequent children enter the system, perpetuating a devastating cycle of abuse, trauma and insecurity.

These two different patterns, despite their distinct characteristics, ultimately converge in their potential to leave children vulnerable to victimization and unstable life trajectories. The rights to privacy, bodily autonomy, bodily integrity, freedom from discrimination, and the perceived right to found a family are fundamental human rights that I acknowledge and respect. However, it is crucial to examine how these rights, when asserted without adequate safeguards, can lead to unintended consequences for the unborn potential child. By highlighting these patterns, the objective is to foster a more nuanced understanding and encourage informed discussions about balancing the human rights that become intertwined by the parent-child dynamic. This thesis aims to illuminate the complex

interplay between varying human rights and the rights of the child, emphasizing the need to consider the potential child as a rightsholder in legal and ethical debates.

2. Outline

This multi-disciplinary thesis aims to examine contemporary risks posed against *potential children* (see terminology section for definition) and analyze whether the human rights approach protects against such risks. The objective is to provide specific responses to the broad research questions:

1. Do potential children have rights under international law?
2. Should potential children have rights under international law?

Fetal exposure to substances, including narcotics, alcohol, and nicotine, has increased in recent years and poses detrimental risks to a child's health and development before and after birth. In addition, children continue to be conceived by parents with a documented history of perpetrating abuse or neglect, thereby establishing a reasonable concern for the risk of abuse and neglect for any subsequent children born to them. Both dilemmas present reason to consider the research questions; if potential children are or should be right bearers.

The current frameworks relating to potential children remain contentious and largely shaped by other discussions and debates regarding the unborn child and women's reproductive rights. Considering elective abortion has been a continuous debate in the human rights realm, with both opposing sides having found recent success, such as the overturn of *Roe v. Wade* in the United States and subsequent implementation of anti-abortion state legislation, and the acceptance of abortion within the French constitution, it seems crucial to consider the implications legal decisions pertaining to reproductive rights may bring against potential children. These research questions are posed because as reproductive rights, particularly those concerning elective abortion, continue to gain traction in legal and human rights contexts, the opportunity to secure or enhance the rights of potential children may become increasingly constrained or jeopardized.

To establish a foundation for an adequate response to first research question, existing legal approaches to children's rights and protection will be explored, with an emphasis place upon the Convention on the Rights of the Child (CRC). Additionally, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) will be reviewed as it may relate to the potential child. Then, cases that have occurred within regional human rights bodies will be studied within the context of the first research question.

Then, to answer the second research question, risks posed against the potential child, both in utero and ex utero, will be examined. The precise risks that will be detailed include Neonatal Abstinence Syndrome (NAS), Fetal Alcohol Spectrum Disorder (FASD), exposure to nicotine, and the impacts of abuse and neglect resulting in trauma and unhealthy attachment styles. This review is necessary to provide substantiated data to a more normative question.

The findings will be analyzed to confirm or deny the following hypothesized responses to the research questions.

1. Potential children do not have rights under international law.
2. Potential children should have rights under international law, or, at the very least, be considered.

This thesis will then offer a brief discussion pertaining to the findings, including philosophical theories related to procreation and existence and other themes of the overall thesis. The conclusion will offer suggestions for the implementation and assess the implications to the human rights framework.

3. Terminology

This section defines the terms and categories that will be utilized throughout the study. Given the variability of commonly used phrases, it is necessary for readers to be provided with specific definitions relating to the research topics.

3.1. Potential child or potential children

For the purposes of this essay, the author will utilize the term “potential child” (or “potential children”) when referring to a fetus that is intended to be birthed alive. The purpose of this term is to offer an analytical category beyond the implied and contested categories in use throughout the divisive debates over abortion rights. While the contents within this thesis may briefly highlight general discussions regarding abortion as it relates to the overall research questions, it is not the intention to emphasize any already established postures. Nonetheless, it is understood that the terms “fetus” and/or “embryo” in discussions and publications concerning abortion, have been differentiated from the term “baby”, “infant”, or “child”, as the latter is regarded as a human being and, therefore, a right-holder, while the prior remains up for debate (Mikołajczak & Bilewicz, 2015; Halva-Neubauer & Zeigler, 2010; Condit, 1990).

For purposes of simplicity, this essay proposes a term that lies within the middle of the differing terms, recognizing that there may be fetuses that are not intended to reach viability, rather voluntarily

aborted, and fetuses that are intended to reach viability. With this differentiation, the scope through which the unborn child is considered can shift or broaden. Also, it becomes easier to question whether potential children – those that are *intended* and likely to be born– should be granted special safeguards and care prior to birth, without denouncing abortion rights (Post, 1997, p. 765)

Additionally, "potential child" can refer to a child that has yet to be conceived but exists hypothetically. The broader category of future generations has already been considered throughout the human rights framework, most notable through the Maastricht Principles on The Human Rights of Future Generations. This thesis will adopt this same consideration of risks posed to potential children but shrink the scope of concern to the individual potential child as opposed to entire generations. While, philosophically speaking, it is possible that no child is ever born again, many decisions are made based upon the high likelihood that children will continue to be reproduced. This thesis aims to flesh out risks that are posed to the hypothetical but likely to exist potential children.

Overall, potential child should be understood to refer to children not yet living but intended, at some point, to be living and is based upon the irrefutable understanding that children will continue to be born.

3.2. Unborn child or unborn children

It is important to underline that the term "unborn child" is a frequently used term within this frame of study. It is typically used when describing a conceived child prior to birth. Like the disputed terms "fetus", "embryo", "baby", etc., "unborn child" has conflicting connotations, with literature arguing for and against granting rights to this population. However, this term should not be confused with "potential child" as an unborn child may not necessarily have fixed intentions of ever being born. Thus, within the contexts of this thesis, potential children can be unborn children or those not yet conceived; however, not all unborn children are potential children, as unborn children might not be intended to be born but potential children are.

3.3. Potentiality of the child

The original terms "potentiality of the child" and "potentiality of children" will denote the potential experiences and behaviors of both potential and living children. These terms may also be interpreted to include aborted or miscarried fetuses, as death prior to birth retains the potential to cause effects directly related to the concept of a child, though this will not be of concern for this thesis. This term should be used in conjunction with the concept of best interest of the child, as the latter should

seek to improve the potentiality of the child. This thesis will highlight the risks to potential children, including risks to their potentiality.

4. Methodology

This thesis was completed through desk research, supplemented by the author's professional background as contextual guidance. To answer the research questions, an extensive review of scholarly human rights literature, international case law and case studies, and UN documents was completed. The research was largely qualitative, relying on legal interpretations of human rights doctrines. However, quantitative statistical data was also included.

To answer the first research question the CRC was reviewed, along with relevant General Comments (GC). Two comprehensive published commentaries were selected for their detailed examination of the drafting history and legal interpretations of the CRC articles. Supplemental resources were identified through scholarly databases, UN databases and the secondary citations. Alston (1990) and Tobin's (2019) publications were selected for their esteemed recognition in international legal scholarship. Joseph's (2009) book was identified in the preliminary stages of research and proved to be controversial but valued for its differing stance. Secondary citations were verified to establish the reliability of this source.

Sections from the CRC were selected for review based upon whether they had the potential to relate to the potential child. Key phrases such as "unborn child", "abortion", "birth", and "substance use/abuse", were used to search the indexes of the commentaries for relevant articles. Articles were also considered based upon their relation to the topics of this thesis, such as health, development, birth, and protection from violence and abuse. All the "general principles" were included in the review as it is understood that the entirety of the CRC should be interpreted holistically within these principles. Overall, this is not an exhaustive review of the entire CRC, rather a general overview of its application to the potential child.

Given the interconnectedness of potential children, abortion and women's reproductive rights, the CEDAW and an Oxford commentary on the CEDAW were reviewed, highlighting only sections that pertaining to "children", "motherhood", "pregnancy" or "family" to assess the consistency between CRC and CEDAW in interpreting the rights of the child and mother.

To answer the second research question, multiple medical scholarly sources were consulted to demonstrate the relevancy of in-utero treatment of potential children. Additionally, many online-based organizations detail the trends in NAS, FAS, and ACEs, and child protection systems, which were used

supplementally to peer-reviewed literature. This too is not a comprehensive review, and it is understood that there are many threats against the well-being of the potential child. Emphasis was placed upon threats that are typically posed by the parent(s) rather than other perpetrators.

Finally, case studies from various regional human rights bodies were identified through organizational database searches and references in scholarly publications. The same keywords and phrases used in the CRC and CEDAW searches guided this inquiry. This methodology ensured a comprehensive and multidisciplinary approach, integrating legal, medical, and sociological perspectives to provide a nuanced understanding of the potential child within the framework of human rights.

Chapter II – Literature Review

1. Do potential children have rights under international law?

1.1. Convention on the Rights of the Child (CRC)

The CRC is widely regarded as the principal source for comprehensively understanding the rights of children globally. Drawing inspiration from the preceding 1924 and 1959 DRC, the CRC provides a robust framework that encompasses protection, provision, and participation rights. Its significance is underscored by its near-universal ratification by member states of the UN, with the notable exception of the United States. Nevertheless, the CRC remains a pivotal instrument guiding policymaking, legal discourse, and advocacy initiatives worldwide, aiming to ensure the realization of children's rights in diverse socio-cultural contexts. The elements of the CRC that are relevant to the research questions will be reviewed in this section.

1.1.1. Preamble

There are many articles within the CRC that are applicable to potential children. However, most notably, paragraph 9 of the preamble states:

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

This is one of only a few international assertions of legal protections to humans who have yet to be born and remains a contentious element of the CRC. Some have attempted to argue that the preamble should be an interpretive guide for the whole of the CRC and therefore, each article is applicable to both living and unborn children. Others point to the customs of international law, which consider preambular clauses as legally non-binding (Klabbers, 2018; UN, 2014). Thus, it is crucial to examine the varying arguments and interpretations to conclude upon the role that paragraph 9 of the CRC preamble fulfills.

Alston (1990) details the internal deliberation amongst the Working Group of the Commission on Human Rights related to the CRC. The preamble of the CRC was the decided compromise deemed to be necessary after "the abortion issue" (p.156) was raised during the CRC drafting multiple times without solution. Prior to the final draft reading, multiple representatives proposed stipulating that the right to life begins at "the moment of conception" (UNCHR, 1989) with another proposing the inclusion of "unborn children" (OHCHR, 2007). The representative of the UN Commission on the Status of Women opposed such proposals understanding the potential of such wording creating barriers to prospective international abortion rights (OHCHR, 2007). Alston (1990) suggests that the conversations throughout the drafting of the CRC, as well as the drafting of the Universal Declaration of Human Rights (UDHR), clearly demonstrates the Working Group's refusal to offer a definitive and concluding position regarding unborn children. Alston (1990) states:

> "… while there is no basis for asserting that the notion that human rights inhere in the unborn child has been authoritatively rejected by international human rights law, there has been a consistent pattern of avoiding any explicit recognition of such rights…thereby leaving the matter to be dealt with outside the international legal framework" (p. 161).

Alston (1990) continues to explain that after the completion of the final draft, multiple stakeholders were given the opportunity to comment. Regarding the issue of the unborn child, a few participants suggested more specification, with one commenter highlighting "children must be the result of a choice freely exercised by their parents" (U.N. Doc. E/CN.4/1324, 1978, p. 16). An non-governmental organization (NGO) commenter recommended including a right "to be born a wanted child" (p. 24). These comments demonstrate that the interconnectivity of parental and children's rights

prior to birth were considered prior to the implementation of the CRC but that efforts to have more precise language were futile.

Vandenhole et al. (2019) categorizes the CRC preamble as an "additional interpretive tool to clarify the meaning of the CRC's provisions" (p. 44), citing article 31(1) of the 1969 Vienna Convention, which states:

> "[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 light of its object and purpose."

Article 31(2)(a) does elect the inclusion of the preambular text for interpretation purposes; however, the rest of the article stipulates interpretations to include "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty". This would include the *travaux préparatoires*, which contain details of the drafting and negotiation process of legal instruments. Vandenhole et al. (2019) provides a very brief account of the drafting history, making it necessary to directly review published reports from the drafting sessions.

Within the report of the forty-fifth drafting session of the CRC, henceforth called the Report (UNCHR, 1989), it is documented that multiple state representatives had previously sought to include reference to or direct quotation of the 1959 Declaration on the Rights of the Child, which states:

> "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"

The objective of state representatives that proposed such inclusions was to ensure that the rights of the unborn child were included in the CRC. In the "prolonged discussion" (UNCHR, 1989, p. 9), it was proffered that "in all national legal systems protection was provided to the unborn child and the draft convention should not ignore this fact" (p. 10). Opposing representatives were fearful of reopening the debate pertaining to what Alston (1990) termed the "abortion issue" and continued to deny the unborn child as a rights-holder.

The Report documents:

> "The representative of Italy observed that no State was manifestly opposed to the principles contained in the Declaration of the Rights of the Child and, therefore, according to the Vienna

> Convention on the Law of Treaties, the rule regarding the protection of life before birth could be considered as "jus cogens" since it formed part of the common conscience of members of the international community." (p.10)

Given the seeming inability for delegates to compromise, the Working Group decided that an informal drafting group would consult to determine a solution to the divisive dilemma. This group included many of the State Parties that had sought to protect the rights of the unborn and ultimately concluded on the official paragraph 9 of the preamble. However, the group submitted a statement of which they urged the Chairman to include in the *travaux preparatoires*, which stated:

> "In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by States Parties." (p. 11)

The Report explains that the representative of the United Kingdom sought guidance from the UN Legal Counsel as to whether such a statement is permitted in the *travaux preparatoires.* The response of the UN Legal Counsel to the United Kingdom's concern for the *travaux préparatoires* stated:

> 1. The preamble to a treaty serves to set out the general considerations which motivate the adoption of the treaty. Therefore, it is *at first sight strange* [emphasis added] that a text is sought to be included in the *travaux préparatoires* for the purpose of depriving a particular preambular paragraph of its usual purpose, i.e. to form part of the basis for the interpretation of the treaty. Also, it is not easy to assess what conclusions States may later draw, when interpreting the treaty, from the inclusion of such a text in the travaux préparatoires. *Furthermore, seeking to establish the meaning of a particular provision of a treaty, through an inclusion in the travaux préparatoires may not optimally fulfil the intended purpose, because, as you know, under article 32 of the Vienna Convention on the Law of Treaties, travaux préparatoires constitute a "supplementary means of interpretation" and hence recourse to travaux préparatoires may only be had if the relevant treaty provisions are in fact found by those interpreting the treaty to be unclear* [emphasis added].

> 2. *Nevertheless, there is no prohibition in law or practice against inclusion of an interpretative statement in travaux préparatoires* [emphasis added]. Though this is better done through the inclusion of such interpretative statement in the final act or in an accompanying resolution or other instrument. (Inclusion in the final act, etc. would be possible under article 31 of the Vienna Convention on the Law of Treaties.) Nor is there a prohibition in law or practice from making an interpretative statement; in the negative sense, intended here as part of the travaux préparatoires. (OHCHR, 2007, pp. 299, 312, 368)

Joseph (2009) attempts to counter the claims that the CRC preamble is not compulsory, stating "it is precisely what is agreed in the preamble that enables the ensuing content to be asserted and agreed." (p. 4). Much of Joseph's (2009) argument remains focused on discussions held during drafting sessions and the adoption process of the CRC and other UN treaties, including the 1959 Declaration of the Rights of the Child (DRC). Joseph (2009) makes frequent reference OHCHR (2007) legislative history, which noted that "the Holy See would have preferred to see further elaboration of [rights of the unborn child] in the articles of the draft convention, [however] it was confident that the ninth preambular paragraph would serve as a guide for interpreting the rest of the convention." (p. 253). Furthermore, Joseph (2009) quotes the report of the forty-fifth drafting session, which states:

> "the representative of Poland stated that the present formulation of preambular paragraph [9] was a delicate balance which the Working Group had reached in the course of continued discussions. In his view, the present compromise wording of this paragraph did not exclude the protection of the child before birth…" (p. 10).

Joseph (2009) begins their argument by attempting to connect the authority of the UDHR and the International Covenant on Civil and Political Rights (ICCPR) to the CRC preamble. It is suggested that since the CRC preamble was influenced by the DRC preamble, it was also, therefore, influenced by the Universal Declaration of Human Rights (UDHR). Additionally, while it preceded the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR), all UN texts are intended to be read in accordance with the International Bill of Human Rights. Joseph (2009) points to the sequential layout of the DRC preamble, which first establishes the authority of the UDHR and then states, "Whereas the child…needs special safe-guards…before as well as after birth" (UN, 1959). Joseph (2009) further supports this argument by pointing to paragraph 8 of the preambular text of the

CRC, which supports the good faith interpretation of paragraph 9 and is an "agreement to honor all previous human's rights protection" (p. 122).

Joseph (2009) goes on to interpret Article 6 (5) of the ICCPR, which stipulates "Sentence of death … shall not be carried out on pregnant women", as already affording rights to the unborn child. Particularly, Joseph (2009) argues that the purpose of including pregnant women was solely to protect the life of the unborn child, citing the *travaux préparatoires* of the ICCPR, which states:

> "The principal reason for providing in paragraph 4 [now Article 6(5)] of the original text that the death sentence could not be carried out on pregnant women was to save the life of an innocent unborn child [UNGA, 1957, para. 33]" (Joseph, 2009, p. 44).

Joseph (2009) also looks to the Fourth Geneva Convention as evidence that the UN, historically, had intentions of protecting the rights of the unborn child, citing Articles 14 and 50, which differentiate between "expectant mothers and mothers of children under seven". Joseph (2009) suggests the commonality exists not because of the focus on mothers, but rather due to the need to protect children who are unborn *and* under seven. The wording does not prioritize one sort of child over the other but distinguishes two populations needing protection.

Ultimately, Joseph (2009) is a biased source as their argument is openly anti-abortion and includes what can be considered inflammatory and hyperbolic writing; however, the insistence that the preambular text has been unconventionally stripped of its purpose through the inclusion of a later added *travaux préparatoires* is worthy of consideration.

Janoff (2004) considers the unborn child within the scope of the CRC, taking interest in the ambiguity of the preamble and following articles. It is inferred that the drafters intentionally rejected a more definitive definition "to encourage more widespread ratification" (p. 167). This is further supported by reference of the International Committee on the Red Cross, which commented on the lack of specificity by stating "silence seems wise and will facilitate universal application of the Convention irrespective of local peculiarities." (Detrick, 1992). Additionally, Janoff (2004) offers that Austria, Barbados and New Zealand all sought clarification on the matter, which was ultimately withheld, though it is unclear as to why. It should be noted that Janoff (2004), like many publications (Tobin, 2019; Vandenhole, 2019), relies heavily on Alston's (1990) account and interpretation of the preamble, which demonstrates that subsequent conclusions have not evolved much further.

Also included within the CRC preamble is the statement:

> "Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it *can* [emphasis added] fully assume its responsibilities within the community".

The foresightedness of the CRC can be noted in this quote as it forms the intention of supporting the future responsibilities of children, establishing the potentiality of children as a concern of the CRC; although, this does not necessarily mean the CRC is concerned with the potentiality of potential children.

1.1.2. Article 1

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

The first provision of the CRC provides a definition of a child, specifically during what ages childhood occurs. Interestingly, this article sets an upper age of "eighteen years unless under the law applicable to the child, majority is attained earlier," but does not set a lower age. This was done intentionally as the Working Group for this Convention were unable to conclude upon an acceptable lower age (at fertilization, conception or birth) and left State Parties the authority to determine a lower age if inclined (Alston, 1990).

In Vandenhole et al.'s (2019) commentary, it is acknowledged that a compromise was decided by the Working Group of the CRC to not include a minimum age in Article 1 because paragraph 9, of the preamble was included. Nonetheless, Vandenhole et al.'s (2019) goes on to reference the *travaux préparatoires*, which ensures that the preambular text shall not surpass the definition of the child outlined in Article 1. Janoff (2004) also presents the fact that at least two State Parties withdrew their proposal to narrow the definition of the child to begin at the time of conception based upon the preambular text.

Joseph (2009), as well as Alston (1990), particularly present that Malta and Senegal had originally submitted a proposal for Article 1 of the CRC to specify that life begins "from conception"; these State Parties withdrew their proposal based upon the interpretation that the operative text would

be read "*consistently"* (Joseph, 2009, p.122) with the preamble, specifically paragraph 9. This demonstrates that there was perhaps an unclear understanding of the intended limitations of the ninth preambular paragraph included in the *travaux préparatoires* in favor of article 1.

Joseph (2009) cites OHCHR (2007), which documents that, upon review of article 1 after the adoption of the draft convention, the representative of the United Kingdom stated "[...] In the absence of the advice from Legal Counsel on the Chairman's statement regarding paragraph 6 [now paragraph 9] of the preamble,…[our] Government might have to lodge a reservation with regard to article 1 and 1 bis at the time of ratification." (OHCHR, 2007, p. 299, 312 & 368). The Legal Counsel's response is included in the previous section of this thesis and concludes that the particular use of the *travaux préparatoires* is strange but not specifically prohibited. Furthermore, OHCHR (2007) records that during the adoption of the report, "The representative of Ireland stated that he had no recollection of such a statement having been made at the time that the text of preambular paragraph 6 [now paragraph 9] was adopted. He therefore questioned the appropriateness of its inclusion in the official report of the Working Group." (OHCHR, 2007, p. 312). It is important to mention that within report of the forty-fifth drafting session of the CRC, it is documented that the informal drafting group, which prepared the *travaux préparatoires* statement, was "composed of the Federal Republic of Germany, Ireland, Italy, Netherlands, Poland, Sweden and the United States of America" (p.11).

Archard and Tobin (2019) was reviewed due to their extensive background in human rights law and scholarship. The commentary provides similar accounts of the drafting history as the other sources reviewed in this section. Archard and Tobin (2019) accepts the finality of the *travaux préparatoires* but does not conclude that the CRC does not afford rights to unborn children, rather it is left to the state's discretion. More interestingly, in Archard and Tobin's (2019) commentary of article 1, the author presents an extensive analysis of three differing conceptions, or "senses" (p. 26), of rights of the unborn child. The first sense would have unborn children described as having the same moral status as those "living outside the mother's womb" (p. 26). The second sense includes concern for the unborn child based upon the potential consequences that "might follow for that child *once born*" (p. 26). Archard and Tobin (2019) summarizes that the motivation to consider this second conceptualization of the unborn child is the harm that "is done to the future child and not directly to the being that exists *in utero*" (p. 27). This sense encapsulates the essence of this thesis by questioning whether this second sense of the unborn child is consistent with the scope of the CRC. It is then reiterated that the mandate of the CRC "does not demand that the unborn child has rights" (p. 27).

The third sense also encapsulates the considerations that have been set forth by this thesis; Archard and Tobin (2019) refers to this population as "*possible* children" that "might come into existence as a result of the reproductive acts and omissions of adults" (p. 27) and connects this sense to Parfit's (1984) 'non-identity' problem. Archard and Tobin (2019) suggests that if article 1 of the CRC were to include this sense, "that right would significantly constrain the exercise by adults of their putative rights to procreate" (p. 27). In conducting a review of Archard and Tobin's (2019) commentary, there was not an expectation to encounter such a direct reference to the concepts explored in this thesis. In other words, Archard and Tobin's (2019) description of the three senses was not anticipated within this review but nonetheless supports the concerns and research questions of this thesis. By dedicating attention to these senses in the commentary of article 1, Archard and Tobin (2019) applies a comprehensive and philosophical approach to interpreting a on the issues of the unborn child.

1.1.3. Article 2

"1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

Article 2 is regarded as one of the CRC's "general principles", along with articles 3, 6 and 12. These general principles are found, in essence, throughout the entire Convention and are used as a guiding tool for interpretation and implementation (Vandenhole et al., 2019, p. 8)

This article sets forth the Convention's non-discrimination principle, one which exists in every human rights treaty (Besson & Kleber, 2019) Additionally, it establishes the positive right of the child to be granted protection by State Parties "against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." This article is crucial to the function of child protection systems as it grants authority of the state over parents and family in certain circumstances. The inclusion of the word "birth" does not

typically garner attention and has been interpreted to refer to discrimination arising from birth out of wedlock (Besson & Kleber, 2019; Vandenhole et al., 2019). Nonetheless, it has been difficult to locate any commentaries that further establish what the status of birth is and in what ways it can be discriminated against.

Separate from its precise, yet also unclear, mention of "birth", Article 2 does not provide insight as to what would fall into the scope of "other status[es]". The lack of specificity for these two categories does permit the argument for potential children's right to non-discrimination. However, as explained by Besson and Kleber (2019), "… article 2(1) is a *subordinate* rather than an autonomous clause of non-discrimination", meaning "it applies only to those rights guaranteed in the Convention" (p. 48). Therefore, if accepting *travaux préparatoires* as accurate, non-discrimination is not automatically extended as a right to potential children but is permitted to be extended by State Parties.

"…in the event of equivalency between competing interests, those of children's interests should prevail"
(Eekelaar & Tobin, 2019, p. 98)

1.1.4. Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision".

Vandenhole et al. (2019) states that "art. 3.1 CRC [and the best-interest principle] remains one of the most controversial and debated provisions of the CRC" (p. 60). For the purposes of this thesis, the best-interest principle is the most relevant aspect of article 3. While article 3.2 mentions the rights and duties of parents, Vandenhole et al. (2019) explains that the intention of the article is not to

"impose legal obligations on parents, legal guardians or other individuals…" (p.61). Vandenhole et al. (2019) cites the CRC GC 14, which establishes that "the best interests principle aims to ensure not only the full and effective enjoyment of all rights in the Convention, but also the physical, mental, spiritual, moral, psychological and social development, integrity and human dignity of the child" (p. 62). However, a precise definition of "best interest" has yet to be identified as to not limit the consideration and application of the doctrine. Nevertheless, the best interests of any child cannot conflict with the contents of the CRC (Vandenhole et al., 2019, Tobin, 2006).

Vandenhole et al. (2019) further elaborates that the best interest principle can be potentially problematic as it requires a level of subjectivity (p.65) dependent upon the perspective of adults. Vandenhole et al. (2019) points out that even the consideration of whether a child can or should be involved in proceedings regarding their rights, is determined by adult decision makers (p.66). Additionally, Vandenhole et al. (2019) suggests that the wording "a primary consideration" weakens the scope of article 3, as it does not establish the concept of best interest as an "absolute priority over other considerations" (p. 67). Vandenhole et al. (2019) goes on to discuss the difficulty in balancing the best interests of a child with their parents, other children and the multiple existing interests of the child themselves (pp. 67-68). Vandenhole et al. (2019) provides the example "living in poverty is generally not in a child's interest [however], preservation of the family environment may conflict with the need to protect the child's adequate standard of living" (p.68). Vandenhole et al. (2019) continues that there must be a balance of "children's current and future interests" and with the "interests of wider society" (p.68). Vandenhole et al. (2019) concludes that such examples must be considered on a case-by-case basis and "requires continuous caution" (p. 72); however, "in balancing the best interest of the child with other rights and interests, the former must be considered chronologically prior, and must be seen as hieratically higher" (p.73).

Juhlin (2023) explains that the concept of best interest exists in many other sources of customary international law pertaining to children and that the principle "extends to all kinds of actions or omissions" (p.18-19). Furthermore, Juhlin (2023) concludes that article 3 create both positive and negative obligations. In more detail, Juhlin (2023) describes that this article establishes a "substantive right", "principle of interpretation" and "rule of procedure", meaning it must be applied to all matters involving children, the most effective and enjoyable interpretation must be selected, and states must demonstrate their consideration for the best interest of the child (p.20).

Eekelaar and Tobin (2019) can be read to provide additional points to Vandenhole et al.'s (2019) commentary. Eekelaar and Tobin (2019) highlights that the scope of article 3's principle

requires “children’s best interests are considered in *all actions concerning them* [emphasis added], indicates that there are no limitations to the application of this principle where children are concerned” (p. 74). Eekelaar and Tobin (2019) explain that this article is intended to be considered broadly, and as typically accepted by the CRC Committee, the use of the word “concerning” can be considered synonymous with the word “affecting” (p. 78) and can include actions that both directly and indirectly affect the child or children. A general example of an indirect affect, as noted throughout Tobin’s (2019) commentary, would be motor vehicle/driving laws; while they are not about children, they still can potentially affect children.

Eekelaar and Tobin (2019) explains the difficulty State Parties may face in trying to implement the best interest principle within private institutions and non-state parties, which permits a certain margin of discretion for both states and non-states (p. 81). It is understood that such efforts to implement the best interest principle shall be “progressive” and “contingent upon available resources” (p.82). Nonetheless, the CRC Committee has provided a “non-exhaustive and non-hierarchical list” (p. 84) of elements that must be assessed and weighed when considering the best interest of the child. Furthermore, Eekelaar and Tobin (2019) explains that the best interest principle “does not have a status that allows it to override the other rights set out in the Convention” (p. 88).

The 1959 Declaration on the Rights of the Child required that the best interest of the child be “the paramount consideration” but Eekelaar and Tobin (2019) explains that during the drafting process of the CRC, it was decided to “adopt a formulation that required the best interests of the child to be merely a primary consideration” (p. 96). Even with the rewording and slight demotion of the principle, there remains different interpretations of what primary consideration constitutes. About the shift of the best interest principle, Eekelaar and Tobin (2019) present the need to consider the principles of necessity and reasonableness “which underpin any discussions about an interference with a human right” (p. 97). This means that there must be a lawful basis to dismiss considerations and conclusions of the best interest principle. Additionally, such interferences must achieve a legitimate aim and the methods of achieving the aim must be proportionate; yet again, another standard that permits a certain level of circumstantial discretion.

While no other treaty demands primary consideration of interests of a particular group, the CRC grants special status to children, which “supports the idea that in the event of equivalency between competing interests, *those of children’s interests should prevail* [emphasis added]” (Eekelaar & Tobin, 2019, p. 98). This evaluation becomes difficult when considering the best interest of opposing children, specifically children who are parents or pregnant, as presented by Janoff (2004). Eekelaar and Tobin

(2019) discusses that when circumstances and evidence is not conclusive, "the fact that it is inconclusive should not preclude prohibition or regulation of the practice in question, *notwithstanding that such measures may interfere with the rights of others* [emphasis added]" (p. 99). Eekelaar and Tobin (2019) explains that this is like the precautionary principle, which would "taking preventive action in the face of uncertainty" (Kriebel et al., 2019, p. 871).

Eekelaar and Tobin (2019) touches on the concept of the parental role in the best interest principle. Citing Locke (1690), Eekelaar and Tobin (2019) discusses the notion that paternal power should be "for the children's good". It is recognized that parents are regular "decision makers" (p. 89) regarding the best interest of the child; however, parent's decision-making authority becomes void "where the views of the parents would threaten the enjoyment of a child's rights under the Convention" (p. 89).

Finally, Eekelaar and Tobin (2019) highlights the lack of attention paid to the second section of article 3, specifically the lack of a definition for the term "well-being". Eekelaar and Tobin (2019) explains that there is little in the drafting history and little interpretive guidance of which could establish a standard for "well-being".

1.1.5. Article 5

> *"States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."*

Vandenhole et al. (2019) explains that there are no human rights law in existence that is equivalent to article 5 of the CRC. It is described that the proposal for this article was introduced late into the drafting period and "sought to secure the protection of the family and recognition of parents' primary rights" (Vandenhole et al., 2019, p. 81). After some tweaking, the resulting emphasis was placed upon the evolving capacities of the child and the rights of parents to have primary responsibility over their children". Furthermore, Vandenhole et al. (2019) cites Lansdown (2005) who states that article 5 "implies a transfer of responsibility for decision-making…as the child acquires the competence and, of course, willingness to do so" (p. 4). Additionally, Vandenhole et al. (2019) presents Lansdown's

(2005) suggested criteria to establish the concept of capacity, which includes "the ability to understand and communicate relevant information; the ability to think and choose with some degree of independence; the ability to assess the potential for risk, benefit and harm; and the achievement of a fairly stable set of values" (p. 86).

Tobin and Varadan (2019) reiterate the drafting history presented by Vandenhole et al. (2019) emphasizing that it was necessary to balance children's rights with the obvious role and responsibility of parents and caregivers. Tobin and Varadan (2019) explains that article 5 defeated the historical notion that children were property or "merely passive objects" (p. 161) and promotes the concept of evolving agency and capacity. Tobin and Varadan (2019) compares the parent-child relationship outlined in article 5 as that of "a trustee or fiduciary…mandat[ing] that the power of the parents must be exercised not for their own benefit but for the benefit of their child" (p. 161; similar sentiments can be found in article 18). Therefore, Tobin and Varadan (2019) categorizes this as "the right of the child to receive appropriate direction and guidance from [their] parents…rather than a right of parents to have their rights regarding their parenting respected by the state." (p. 161).

Tobin and Varadan (2019) confirm that while rights of parents are mentioned in this article, "the drafting history of article 5 suggests that this provision was intended to deal with 'the rights of the child and not those of parents'" (p. 171). There are many articles within the CRC that further establish the role of parents and the family unit within the human rights framework. Typically, these provisions set forth the standard that the state shall respect the authority and discretion of the parent; however, "a state would not be required to respect behavior of a parent…" (Tobin & Varadan, 2019, p.170) that violated any of the rights enshrined in the CRC. Additionally, as noted by Tobin and Varadan (2019), the CRC does not provide a definition of a parent. This lack of definition, tied to the partial definition of the child in article 1, presents the question, is a pregnant mother a legal parent with parental rights, even if a child is not a child until birth. If this question is answered in the affirmative, then would the unborn child not also have rights to adequately balance the parent-child dynamic? If answered negatively, then who would be responsible for the rights of potential children is granted rights?

Tobin and Varadan (2019) explains that article 5 has is often connected to article 12, the right of a child to be heard, as the evolving capacities undoubtedly impact a child's ability to formulate and articulate their wishes and needs. Both rights are directly related to establishing and individualized concept of the child's best-interest. Tobin and Varadan (2019) concludes that "[u]ltimately, the principle of evolving capacities demands that parents concede that they are not always the sole arbiters of a child's best interest." (p. 184)

"We, therefore, have to consider the freedom for a child in a lifelong perspective."
(Peleg, 2013, p. 540)

1.1.6. Article 6

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

. This is an article that is often tied to child protection (Vandenhole et al., 2019) and while separated into two sections, it is generally accepted and highlighted in the *travaux préparatoires* "that life, survival and development are complementary concepts that reinforce one another" (Vandenhole et al., 2019, p. 88). What can be noted as interesting is that the article does not specify the quality of life, survival or development that must be recognized and ensured, just simply that they are to be. Upon interpretation at face-value, this could mean that State Parties can satisfy this responsibility by ensuring *unhealthy* survival and development. Indian delegates did propose including the term "healthy development" in the article, although this wording was ultimately not selected (Peleg & Tobin, 2019). Furthermore, the World Health Organization (WHO) has explained:

> "the term "survival" had a special meaning within the United Nations context, especially for this organization and UNICEF. "Survival" included growth monitoring, oral rehydration and disease control, breastfeeding, immunization, child spacing, food and female literacy" (UNCHR, 1989, para. 88)

Thus, the contents of proceeding articles and legal interpretations aim to establish an adequate form of treatment of which would positively impact survival and development.

Vandenhole et al. (2019) deems that the word survival within the article suggests "minimum requirements…to diminish child mortality and prolong the life of a child" (p. 93) and denotes that survival is partially dependent upon women's rights during and after pregnancy. Again, interpreting this responsibility at face-value could result in the conclusion that recognizing and ensuring these rights need not extend passed the minimum effort; however, Vandenhole et al. (2019) goes on to suggest the concept of survival within this article is interrelated to and "partly overlap[s]" (p. 93) articles 24 and 27.

Regarding the concept of development, Vandenhole et al. (2019) clarifies that it is not the same form of development as defined in the 1986 UN Declaration on the Right to Development, which is more political, but rather a reference to the child's "physical, mental, spiritual, moral, psychological and social development in a manner compatible with human dignity, and to prepare the child for an individual life in a free society" (para. 6.04). The CRC has recognized that childhood has many stages of development and that the method in which the right to development is achieved "should change accordingly" (Vandenhole et al., 2019, p. 95). Consistent with the overarching theme of this thesis, the development of the child is not intended to solely mean their development in childhood but also their development in childhood as it relates to "*becoming* an adult" (Vandenhole et al., 2019, p. 95). Vandenhole et al. (2019) ties this to article 2 using Peleg's deduction on the Concluding Observations on non-discrimination, stating "it is not the discriminated child's life at present that raises concern, but the effects on the child's future" (Vandenhole et al., 2019, p. 95).

Alston (1990) explains that the drafting of article 6 had the potential to reignite the abortion debate had during the drafting of the preamble and article 1, due to the wording of the first section and therefore, the right to life was a delayed proposal. Ultimately the working group agreed to include a right to life in the CRC, so long as it was understood that a position was still not being taken concerning when life begins (Alston, 1990; Peleg & Tobin, 2019). It was also reaffirmed that the allotting rights to the unborn was a possibility but within the discretion of each State Party (Peleg & Tobin, 2019).

Peleg and Tobin (2019) delve further into the broad scope of article 6, explaining that unlike other conceptions of development in international jurisprudence, this article 6 establishes a right to "*personal development*" (p. 190), as opposed to civil and political. Additionally, the CRC remains a unique contribution of international law in that it connects the two concepts of survival and development to the right to life. While right to life has normally been considered a negative obligation, the indivisibility of the additional concepts, along with the overall intentions of the CRC, require State Parties to undertake positive obligations as well. Another example of the CRC distinctive scope of the right to life is the CRC Committee's commitment to ensuring that article 6 is not interpreted narrowly (CRC-Com, 2018), requiring broad, thorough and reasonable measures. The many areas State Parties must consider include crime rates, traffic laws, environmental protection, spread of disease, hunger and malnutrition, and poverty (CRC-Com, 2018).

Furthermore, emphasis has been placed on the *enjoyment* of the right to life, demonstrating article 6 "extends not only to *protection against* any factor that would arbitrarily interfere with the ability of the

child to live his or her life by also the *provision or creation* of conditions that would allow a child to live a life of dignity" (Peleg & Tobin, 2019, p.196). Peleg and Tobin (2019) assert that State Parties cannot simply interpret article 6 alone but must also consider the other obligations set forth in the CRC, specifically in article 2 and 4. Specifically, article 2 establishes the obligation of State Parties to "respect and ensure" all rights set forth by the CRC, which are negative and positive obligations, respectively. These obligations encompass the responsibilities presented in the first sentence of this paragraph, particularly of the obligation to ensure, which requires right-bearers to be protected from third parties, to have their enjoyment of HR fulfilled and therefore facilitated, and services provided.

Article 4 requires that State Parties "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention". Peleg and Tobin (2019) go onto explain that the minimum measures that must be applied to article 6 incorporate "protection against unlawful and arbitrary deprivation of life; reasonable preventive measures to protect children from threats to their life; investigation…and, if appropriate, the prosecution and punishment of…persons responsible for the death of a child; and [t]he provisions of compensation and reparations for victims" (p. 199). Generally, the application of article 4 to article 6 establishes that State Parties not only have the discretion but the responsibility to implement legal responses to threats against children's lives.

The inclusion of the right to survival in article 6 further demonstrates the CRC's commitment to positively ensuring the right to life, As stated by Peleg and Tobin (2019), "…the right to survival should be understood as entitlement to all appropriate measures, both positive and negative, that will contribute to the survival of the child" (p.221). The right to survival is reinforced by multiple other articles within the CRC and the CRC Committee has identified concerns relating to survival of children, including inadequate prenatal care (Peleg & Tobin, 2019). It should be emphasized that the CRC recognizes that "the capacity of the state to ensure a child's survival and development…remains subject to the acts and omissions of a child's parent" (Peleg & Tobin, 2019, p. 227) as well as other non-state actors. Therefore, State Parties are not considered accountable for violations of article 6 by third parties, so long as "all reasonable steps" (p. 227) have been taken to prevent such violations. This may include aiding parents, along with prioritizing education initiatives and awareness campaigns related to harmful treatment and practices in child rearing.

As previously state, the right to development in the CRC is not intended to be read similarly to other rights to development enshrined to adults, which are typically political in nature. Peleg and Tobin (2019) summarize the emphasis that has been placed upon the extensively understanding the concept of

development as recognized by the CRC Committee, specifying that consideration is given to the child's development of "physical, psychological, spiritual, social, emotional, cognitive, cultural and economic capacities" (Peleg & Tobin, 2019; CRC-Com, 2018). Nonetheless, even with the provision of these forms of development, the assessment of childhood development remains complex and evolving, requiring continuous input and guidance, especially from practitioners in an array of disciplines relating to childhood development. Additionally, it has been recognized that the right to development must be mindful of the varying stages of development that have been identified by the CRC Committee: adolescence, middle childhood, and early childhood. For the purposes of this thesis, considerations regarding early childhood should be highlighted, as this stage is "[lays] the foundation for their physical and mental health, emotional security, cultural and personal identity, and developing competencies." (Peleg & Tobin, 2019, p. 234). In other words, it is acknowledged by the CRC that early childhood as the propensity to deeply impact the trajectory of the following stages of development. Therefore, it can be asserted that this stage must be critically considered and protected.

1.1.6.1 Right to Development and Capability Approach. In his commentary on article 6, Peleg and Tobin (2019) does warn of the harms that can occur when defining development, referencing one of their prior publications to support such warnings by stating childhood development should not be viewed simply as a "process of transformation from childhood to adulthood" (Peleg, 2013, p.524) as "such an approach reflects a conception of children as *human becomings* rather than *human beings*" (Peleg & Tobin, 2019, p. 226). Peleg (2013) argues that perceiving children as 'human becomings' deduces childhood as only significant to impending adulthood and permits adult control over children and their agency. To simplify the Capability Approach, Peleg (2013) provides the following example of Sen's conceptualization:

> "…a person might not eat for one of two reasons: either he does not have food, or he has decided to fast or go on a diet…While the latter is a matter of choice (function), the former is a matter of lack of capabilities. Capabilities can therefore be understood as 'the range of options a person has in deciding what kind of life to lead'" (p. 531; in-text quote from Drèze & Sen, 1995)

Additionally, its acknowledged that there are multiple categories of capabilities, such as internal capabilities, or intellectual and emotional capacities, as identified by Nussbaum (2011) who supports that internal capabilities must be secured for all other capabilities to be recognized.

Peleg (2013) suggests a reconceptualization of children's development that would realign the CRC's approach to prioritize a child's freedom rather than a "means to enable the child to become an

adult." (p. 538). Peleg (2013) presents Biggeri and Mehrota's (2011) child-focused list of capabilities, inspired by Nussbaum's (2011) ten capabilities, and recognizes that the CRC enumerates the majority of capabilities in articles 6, 7, 8, 12, 14, 24, 27, 28, 29, 30, 31 and 32. However, "the remaining capabilities, such as love and care, social relations and respect, are not considered human rights." (Peleg, 2013 p. 538). Largely, Peleg (2013) asserts that typical approaches to child development are more normative than empirical and fail to "realize that children's futures include not only their adulthood, but also their childhood" (p. 540) by denying children participation and autonomous choice. Peleg's (2013) general thesis can be summarized with the quote: "We, therefore, have to consider the freedom for a child in a lifelong perspective." (p. 540)

There are many complexities to article 6. However, for the purposes of this thesis, it should be emphasized that the phrasing of the article seemingly requires the prioritization of all three elements, life, survival, and development, equally, as they are interdependent and indivisible. Striking an optimal balance between the three may be difficult, but the nonetheless, it is not sufficient to only secure life and survival when development is disregarded.

1.1.7. Article 12

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Vandenhole et al. (2019) credits this article as an example of the evolved contemporary perspective of child capabilities, which no longer views children as exclusively dependent but also "active agents themselves" (p. 144). According to Vandenhole et al. (2019), State Parties have an obligation under this article "to assess the child's capacity to form their views on a case-by-case basis" (p. 145). Additionally, the right to have one's views respected must be supported through the provision of all information regarding the circumstances and possible outcomes of their preferences and decision.

Non-verbal expression, including "play, body language, facial expressions, drawings, role plays or digital media" (p. 146) are required to be taken into consideration under this article. Furthermore, the CRC requires that no child be forced to express their views and preferences.

As highlighted by Vandenhole et al. (2019), the drafters of the CRC chose to include "in all matters affecting the child*"* to ensure that the scope was all-inclusive and permitted participation at a micro-, meso- and macro-level (p. 149). In the article, the use of the term "due weight*"* is less explicit and does not require that the child's views result in any action. In other words, a child may express their preferences but, in respecting them, State Parties or other participants are not required to resolutely accommodate those preferences. Instead, the child's expression must be weighed against all the relevant facts and be "considered an equal factor" (p. 150) though this may not result in a conclusion favorable to the child's preference.

Article 12 has received criticism from those who are concerned that "granting children a say would undermine the authority of adults" (p.157). Vandenhole et al. (2019) states "whereas none of the 196 State parties has made an explicit reservation on the provision, some states have expressed general reservations…that may limit its scope of application" (p. 157). Like article 3, article 12 requires adult realization, decision and acceptance on behalf of children to be fully implemented. Moreso, the assessment of a child's capacity and maturity is completed by adults, with and without the input or expression of the child.

Lundy (2019) explains that article 12 was original to the CRC, being as there were no previously existing provisions in the 1924 or 1959 DRC that ensure freedom of expression. Lundy (2019) suggests this demonstrates that former instruments were more concerned with "child welfare, not [the child's] evolving autonomy" (p. 398). Furthermore, Lundy (2019) praises this article as "ground-breaking" and claims "along with article 3, [article 12] is the right that has been incorporated most frequently into domestic legal regimes, including at a constitutional level" (p. 398). Lundy (2019) explains that, unlike article 13's freedom of expression, article 12 "involves and active obligation to facilitate the actual expression of such views" (p. 402).

Lundy (2019) suggests that the clause allotting this right to children who are "capable of forming" their own views is not simple, stating:

> "…under international law and indeed the Convention, competency or the capacity to exercise rights is not a precondition for an entitlement to human rights. Children enjoy their rights by virtue of their status as human beings. Thus, for the purposes of article 12 the requirement that

child be 'capable' does not impose a requirement that he or she must be competent, accomplished, or skillful in the formation of their views" (p. 404)

Like Vandenhole et al. (2019), Lundy (2019) emphasizes the importance of the clause regarding matters that affect the child. Lundy (2019) goes further to explain "adults must not assume exclusive responsibility for determining what matters fall within the scope of article 12" (p.403) and that children must be involved in this decision as well. Additionally, and like Vandenhole et al. (2019), Lundy (2019) demonstrates that in weighing the child's view, the conclusion may contrast this view. In other words, "decisions that conflict with the views of the child may be justified where they are necessary to secure the child's best interest" (p. 403), though this is circumstantial and dependent upon age and maturity. Lundy (2019) expands further by including the CRC Committee's position that "there is no tension between articles 3 and 12, only a complementary role…one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching that goal of hearing…the child" (2019, p. 413).

Lundy (2019) discusses the lack of a specified age limit for beneficiaries of this article. Specifically, CRC Committee is quoted to emphasize the article "imposes no age limit… and discourages State parties from introducing age limits…which would restrict the child's right to be heard on all matters affecting him or her" (2019, p. 415). Lundy (2019) acknowledges that this right may lead to contention amongst parents and societies as it strengthens the role of a child in society; however, the CRC Committee doubles down on the legitimacy of article 12 by contrasting it with article 5, which "may well demand that states respect parental rights but this respect is conditional on the rights of parents being exercised to provide direction and assistance to children for the purpose of facilitating children's enjoyment of rights" (2019, p. 419).

In looking at the second section of this article, the clause permitting a representative on behalf of the child is most relevant to the topics of this thesis. This is because the consideration of potential children can only be conducted by proxy, as would be true for non-verbal or infant right-holders. Lundy (2019) explains that an 'appropriate' representative "must be *independent* and *competent*", meaning there can be no conflict of interest and the representative should have appropriate training or understanding of children.

In conclusions, Lundy (2019) summarizes the function of this article by stating that "there will be occasions when adults must take sole responsibility for making decisions that are in the children's best interests, but there will be others when adults and children must undertake the decision-making

process collaboratively, and even more controversially, when adults must devolve the decision -making process to children themselves" (p. 434).

1.1.8. Article 19

"1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2.Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

Article 19 is another provision that restricts and guides the rights of a parent. Vandenhole et al. (2019) presents that the CRC GC 13 has been "interestingly titled" (p. 210) and references the intention of the article to be understood as a right of the child to be *protected* from violence, not a right of the child to freedom from violence. Furthermore, Vandenhole et al. (2019) asserts that this article "expands child protection beyond survival" (p. 210). The CRC Committee has accepted that violations of article 19 can come in "non-intentional forms" (Committee on the Rights of the Child, 2011, para. 4), which "diverges sharply from the common understanding of violence as intention" (Vandenhole et al., 2019, p. 211). These points presented by Vandenhole et al. (2019) first establishes the impossibility of ensuring freedom from violence for all children. Secondly, Vandenhole et al. (2019) indirectly acknowledges that survival is not a sufficient achievement if the child's dignity is not also protected and preserved. Finally, it is demonstrated that article 19 need not consider the intentions of perpetrators of violence, abuse, neglect or maltreatment against children.

Tobin and Cashmore (2019) recognize that there are many factors that contribute to violence against children and emphasize that it should not be assumed that a child will understand that their rights are being violated based upon their capacity, and socio and cultural norms. Thus, Tobin and Cashmore (2019) states "an objective assessment of the impact of conduct or treatment on children will be equally important in circumstances where a child is unable to identify or articulate the harm

occasioned to [them]" (p. 694). Additionally, Tobin and Cashmore (2019) suggest that "it is not necessary that the impact of conduct on a child be immediate or…permanent for it to fall foul of the terms under article 19" (p. 694). Tobin and Cashmore (2019) also reiterate, as Vandenhole et al (2019) has explained, that intention to cause harm need not be present for violation of article 19 to occur.

Additionally, Tobin and Cashmore (2019) express the difficulty in explicitly defining the forms of violence included in article 19 (pp.695-698), especially when considering varying social and cultural contexts. Tobin and Cashmore (2019) does present the WHO Report on The Consultation on Child Abuse (WHO, 1999), which defines "child abuse or maltreatment [as] all forms of physical and/or emotional ill treatment, sexual abuse, neglect or negligent mistreatment…resulting in actual or potential harm to the child health, survival, development or dignity in the context of a relationship of responsibility, trust or power"(Tobin & Cashmore, 2019, p. 699) - note that consideration for potentiality is included in this definition. Tobin and Cashmore (2019) suggest that the multiple definitions offered by the WHO sufficiently encompass reasonable determinant of "when a threat to a child's health and development will amount to abuse" (p. 699). Tobin and Cashmore (2019) acknowledge that "unlike so many other rights, [article 19] is not plagued with ambiguity or a lack of guidance" (p. 723) and establishes a clear scope that states must comply with. This includes offering sufficient protections and addressing "complex factors that enable violence to occur" (p. 723) and establishing that "parent(s)…or any other person who has the care of the child' covers those with 'clear, recognized legal, professional-ethical; and/or cultural responsibility for the safety, health, development and wellbeing of the child." (p. 703), a sentiment also generally established in article 18.

Overall, Tobin and Cashmore (2019) provide a detailed review of state obligations to develop a culture and society that actively addresses and prevents violence committed against children. Article 19 does not require children to be faced with an immediate or actual, as opposed to potential, threat for intervention to be necessary. It appears that the intentions of article 19 was to be extensive and considerate of the varying ways in which a child can be harmed physically, emotionally, socially, and mentally, and extends to consider accidental instances of harm, such as car accidents or drownings (p. 717).

1.1.9. Article 24

"1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.

States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries."

This article extensively outlines a child's right to health. Generally, this article is relevant to the research question, as it addresses infant and child mortality, as well as other variables that demonstrate an overlap with the obligations of article 6. Additionally, the responsibility to ensure appropriate pre-natal is seemingly the only enumerated reference to the care and treatment of the child prior to birth, though it is worded in way that implies it is a right of the mother.

Vandenhole et al. (2019) discusses that article 24(2)(a) aligns with the succeeding Millennium Development Goal (MDG) 4 and Sustainable Development Goal (SDG) 3, both of which specifically identify newborn and neonatal mortality. It seemingly goes without saying that achieving these goals is

partially dependent upon pre-natal care. As such, Vandenhole et al. (2019) includes the CRC Committee's GC 15, which highlights "reproductive health" and "a continuum of care from pre-pregnancy, through pregnancy, childbirth and throughout the post-partum period" (CRC-Com, 2013, para. 53). Additionally, Vandenhole et al. (2019) notes that 24(2)(d) is closely related to 24(2)(f), which too highlights reproductive health and family planning.

Janoff (2004) asserts that "the Working Group [of article 24] did not consider the possibility of conflicts between a guaranteed right to life of a fetus and the right to well-being of a child-mother whose pregnancy threatens her health" (p. 174). Janoff (2004) cites that one comment was made by Austria that noted "the child's right to adequate pre-natal care and the possibilities for legal abortion," (p. 174) but confirms that the comment was never addressed. It should be emphasized that Janoff's (2004) entire analysis is focused on rights of the pregnant child over the rights of the unborn child. Janoff (2004) concludes "In light of the ambiguity in the Convention, international law has developed which considers that the rights of the mother supersede the right to life of an unborn child under the Convention" (p.188). Additionally, Janoff (2004) suggests that the UN Committee on the Rights of the Child "affords the fetus limited right to protection" (p. 188) by disapproving the use of abortion as a form of contraception as had been observed in Slovakia, Latvia and Armenia at the turn of the century. Again, however, Janoff (2004) explains that such concerns might have more to do with the effects of abortion on the mother, specifically illegal abortion leading to maternal mortality or abortion carried out on a teenage mother, than the effects of the unborn child.

Tobin (2019) clarifies that article 24 should not be interpreted as a right to be "*healthy",* as has been established by the Economic, Social and Cultural Rights (ESCR) Committee (p.908). Therefore, article 24 is "not a right to be guaranteed health…but rather an entitlement to enjoy conditions that will maximize the potential for a child to enjoy [their] health in light of [their] personal circumstances and the resources available to a state" (p. 908). Furthermore, the intentions of article 24 are not simply to guarantee a right to healthcare, though this is an aspect of the obligation.

Considering article 24(2)(a), Tobin (2019) explains that this obligation is not to "eradicate" (p.938) infant or child mortality rates and that the use of the word "diminish" requires states to "demonstrate on a regular basis…that…ever reasonable measure has been taken to achieve a reduction in infant and child mortality rates" (p. 938). Regarding the risks associated with infant and child mortality, Tobin (2019) suggests that states must aim to identify and understand such risks and "develop effective strategies to prevent or mitigate…" them (p. 940). The risks mentioned by Tobin (2019) that are relevant to this thesis include "reduced prevalence of smoking during pregnancy" and

"increased levels of income" (p. 940), as poverty is known to be associated with abuse and neglect. Tobin (2019) does not mention reducing prevalence of alcohol consumption or substance use during pregnancy, although such actions have a likelihood of increasing infant mortality (Zyoud et al., 2022).

Considering article 24(2)(d), Tobin (2019) offers that while this article shares similarities with ICESCR article 10 and CEDAW article 12, the scope of obligations is not nearly as broad. Specifically, the "paid [maternity] leave" and "free services" enumerated in the ICESCR and CEDAW, respectively, were decisively excluded from the CRC. There were only a few concerns about the section's limited scope presented by State Parties during the drafting process. Particularly, the Central African Republic expressed concern that "the charging of fees for basic healthcare, particularly prenatal and maternal care, may limit the access of disadvantaged *children* [emphasis added] and their mothers to health services" (Tobin, 2019, p. 950). Nonetheless, "states enjoy a significant level of discretion with respect to the specific measures they adopt to fulfil their obligation regarding … pre- and post- natal care" (p. 951). The CRC has published recommendations in GC 15 on how State Parties might fulfil these obligations. The recommendations include:

> "but are not limited to… essential health prevention and promotion, and curative care including the prevention of neonatal tetanus, malaria in pregnancy and congenital syphilis; nutritional care; access to sexual and reproductive health education, information and services; *health behavior education (eg: related to smoking and substance abuse)* [emphasis added]; birth preparedness; early recognition and management of complications; *safe abortion services and post abortion care* [emphasis added]; essential care at child birth and prevention of mother-to-child HIV transmission and care and treatment of HIV-infected women and infants" (para. 54).

Finally, Tobin (2019) includes a reference to a child's right to refuse life-saving medical treatment and/or to elective euthanasia. Ultimately, the CRC has not established such rights but has urged the Netherlands to consider abolishing the practice of voluntary euthanasia to children 12 years and older. Tobin (2019) notes that "clearly the Committee has some anxieties about assisted dying for children" (p. 918). While not directly related to this thesis, it can be tied to underlying sentiment of the questions posed by this thesis: does a child have a right not to be born; does a potential child have right to choose death over life?

1.1.10. Article 33

"States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties."

As presented by Vandenhole et al. (2019), the CRC is the only UN treaty to include protection from drugs (p. 327). This article is intrinsically linked to article 24, as the CRC Committee considers "the protection of children 'from solvents, alcohol, tobacco and illicit substances…' '…to fall under the heading of preventative healthcare'" (p.328). Overall, article 33 places a positive obligation upon State Parties, understanding that exposure to substances and exploitation can be detrimental to the best interest, health and development of the child.

Barrett and Tobin (2019) explain that the CRC Committee has yet to provide a GC on article 33. Furthermore, Barrett and Tobin (2019) do not suggest that the connection of article 33 and relevant CRC Committee comments regarding article 24 as binding as implied by Vandenhole et al. (2019). Instead, Barrett and Tobin (2019) states "alcohol and inhalants, such as gas fuels, aerosols, glues and solvents remain excluded from the scope of the provision" (p. 1281).

For the most part, the commentaries on this article remain focused on the ambiguity of this article, as well as what can be considered appropriate measures to protect children from drug use. It is clear through Vandenhole et al. (2019) and Barrett and Tobin (2019) that article 33 is intertwined with other article interpretations and that the main debate remains focused on establishing adequate efforts. There is no discussion of accidental or indirect exposure to narcotics or other substances, rather the general concern of children engaging in such illicit activities and the threat to their health and well-being. This article does not seem to be the best reference for the potential child, the main influence for this thesis is exposure to substances in utero and this article is concerned with intentional substance use by the child.

1.2. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

It has been hypothesized and demonstrated throughout the review of the CRC that there exists a dilemma in securing rights of children before birth and protecting the rights of women who has been impregnated. Hence, it is imperative to review the existing UN law that is particular to women, to better assess this dilemma. It is important to remind readers that the CEDAW was adopted an entire

decade prior to the CRC. Throughout that decade, women's rights were on an inclined rate of development and prioritization arguably more than any other time in the contemporary. Therefore, it can be presumed that the concerns regarding the unborn child and abortion that were voiced throughout the CRC drafting process had not yet taken full shape at the time of the drafting of the CEDAW, and thus, would not be alluded to in the CEDAW.

The CEDAW does make brief reference to children's rights, specifically the best interest principle, making it even more relevant to this thesis. In this section, articles within CEDAW that relate to children, pregnancy and maternity/paternity will be reviewed and applied to the research question(s).

1.2.1. Preamble. As is mentioned in the introduction of Freeman et al.'s (2012) commentary, "the Conventions provisions related to fertility and reproduction are limited by adherence to the equality model and locate reproductive rights primarily in the context of the family" (p. 18). This is evident in the preamble, which references the woman's role in the family being equal to that of the man's. The 13th preambular paragraph of the CEDAW, while referencing "*children"* and "*the family*", does not aim to emphasize these entities, rather establishes the standard that women's childbearing abilities should not preclude them of equal treatment in the scope of reproduction and family founding.

Chinkin and Rudolf (2012) does not offer much relevant to this thesis regarding the potential child; however, it does reiterate the intentions of preambular texts. Chinkin and Rudolf (2012) states that the CEDAW preamble, "like most preambles, introduces the subject matter of the treaty, explains the background and foreshadows its articles, and indicates the context and object and purpose of the treaty" (p. 36). Chinkin and Rudolf (2012) acknowledges that the preamble is not directly legally binding but still "an integral part of the treaty and contextually significant for the purpose of interpretation under VCLT Art. 31" (p. 37). Conclusively, Chinkin and Rudolf (2012) state that "it is, therefore, important that there should not be inconsistency between the treaty text and the preamble" (p. 37).

Furthermore, Chinkin and Rudolf (2012) mentions the prioritization of the "development of women's potentialities" (p. 39), supporting that the forward-thinking concept of potentiality is within the consideration of international human rights law.

1.2.2. Article 1

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

While there is an inherent difference on the basis of sex between men and women, specifically their biological reproductive capabilities, article 1 of the CEDAW rejects any discrimination based upon these differences. Byrnes (2012) reviews the different concepts, specifically of equality, that are established through this article, as well as the difficulties of interpretation. It is emphasized that this article does not require the intention of discrimination and that "the critical criterion is whether a difference in treatment impairs their enjoyment of their rights" (p. 60).

Byrnes (2012) explains that the CEDAW does not deny the existence of sex and gender but establishes that these differences must be treated equally. Through Byrnes (p. 69) commentary, it is notable that the CEDAW Committee has accepted multiple conceptions of equality, "ranging from identical treatment of women and men to models of substantive equality, which requires contextual and structural analysis of the effect of particular laws, policies, and practices" (p. 62). These varying interpretations suggest that it would be difficult to conclude whether article 1 would impact protection of the potential child while in-utero. It also begs the question as to whether differential treatment of pregnant persons from non-pregnant persons would be considered a form of discrimination under the CEDAW. In other words, if laws were put into effect that protect the rights of the potential child, it is possible they would conflict with the rights of the pregnant mother; is this discriminatory?

1.2.3. Article 5

"States Parties shall take all appropriate measures:
(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

> *(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."*

Article 5 is the first of two articles to require the interest of children to be primordial consideration.

Holtmaat (2012) summarizes article 5 as "the obligation to modify gender stereotypes and fixed parental gender roles" (p.143). Holtmaat (2012) asserts that articles 1 and 5 are closely related. Specifically, it is stated "[a]rticle 5 acknowledges that gender stereotypes and fixed parental gender roles lie at the basis of discrimination against women, The elimination of all forms of discrimination against women is impossible without eradicating these causes" (p. 144). Holtmaat (2012) stresses that stereotypes and fixed gender roles "deny women the right to be treated respectfully as an equal and dignified human being…[and] the autonomy to live their lives according to their own choices and convictions" (p.145).

Holtmaat (2012) explains that during the drafting process, there were proposals that addressed the aspects of motherhood. Some were incorporated, though the word 'motherhood' was replaced with 'maternity'; this was to indicate:

> "that the drafters exclusively wanted to protect the biological aspects of giving birth to children and were aware of the fact that protection of the social and cultural construction of the motherly role all too often leads to fixed parental gender roles" (p. 152).

Holtmaat (2012) explains that the section about the best interest of the child "seems like an afterthought" (p. 153) and expresses concern that such an inclusion could "weaken" (p. 153) the provision's interpretation and ability to uphold women's rights.

Holtmaat's (2012) final reference to maternity presents the CEDAW Committee's criticism of protective maternity laws that "stretch beyond the mere protection of the biological or physical consequences of pregnancy and childbirth" (p. 157). It appears that, again, the CEDAW does not try to deny the difference between men and women reproductively but aims to diminish the difference in treatment and societal and cultural expectations.

1.2.4. Article 11

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

. . .

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

. . .

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."

Article 11 is entirely focused on women's rights of and in employment. For the purposes of this thesis, articles 11(1)(f) and 11(2)(d) have been deemed relevant to review as they reference reproduction and pregnancy. Raday (2012) explains that articles 11(1)(f) require states to ensure that the function of reproduction of both men and women are not at risk in the workplace. For example, this "may require prohibition of their exposure to certain industrial processes of chemicals, such as radiation (p. 297). Raday (2012) specifically states "[i]n case of pregnant women, an additional reason for protection may be to protect the foetus" (p. 297). Raday (2012) does not dive deeper into this interpretation; however, like similar laws that include the protection for pregnant woman, it seems appropriate to assume the partial reasoning is to protect the unborn child.

Raday (2012) acknowledges that article 11(2)(d) overlaps with article 11(1)(f), although emphasizes that the latter "refers to both men's and women's reproductive health" (p. 302). Ultimately, article 11(2)(d) does seem to only be concerned with the protection of the pregnant woman and not the fetus of the pregnant woman, although, Raday (2012) does not comment too broadly on this section.

1.2.5. Article 12

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

Cook and Undurraga (2012), again, underscore the "sex-specific differences in reproduction" (p. 312) between men and women that is recognized in the CEDAW, citing General Recommendation 24, which explains "distinctive health features and factors that differ for women in comparison to men" (p. 315). In their introduction, Cook and Undurraga (2012) also highlights articles 10(h) and 14(2)(b) that are like article 12 in their reference to "family planning'.

Cook and Undurraga (2012) emphasizes that "[t]he Committee requires State parties to interpret rights relating to health 'from the perspective of women's needs and interests…'" (p. 316). Cook and Undurraga (2012) asserts that "[t]he Committee interprets sexual and reproductive health consistently with the definitions found in the 1994 UN International Conference on Population and Development Programme Action and the 1995 UN Fourth World Conference on Women Platform for Action" (p. 320). Thus, Cook and Undurraga (2012) states

> "In signing these documents, State parties have agreed to fulfil the 'right of men and women to be informed and have access to safe, effective, affordable and acceptable methods of family planning of their choice…and the right of access to appropriate healthcare services that will…provide couples with the best chance of having a healthy infant.'" (p. 321).

1.2.6. Article 16

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

. . .

> *(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*
>
> *(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*
>
> *(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;*
>
> . . .
>
> *2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."*

Freeman (2012) begins by asserting that for article 16 to be fully implemented, all the elements of article 5 must first be understood and implemented. If one were to consider this assertion through the lens that includes primordially considering the interest of children in all cases, then it can be concluded all the provisions within article 16 must achieve the best interest of children.

Regarding articles 16(1)(d) and article 16(1)(f), Freeman (2012) does not pay direct attention to the clause "in all cases the interests of the children shall be paramount", rather focusing on the need for equality for male and female parents in rights and responsibility sharing. As was noted by Ekelaar and Tobin (2019), the use of the word paramount versus primary requires two different obligations, with the latter being subordinate to the former. The fact that article 16 regards the interest of the child as paramount in all cases is unique and seems rather objective. However, given the topics of the provision, these sections of article 16 do not seem relevant to the potential child. Nonetheless, it is an example of the international legal standard that intends to prioritize children's best interest over that of adults or parents.

1.2.7. Summary. The CEDAW does not seem to offer any direct reference to provisions that would deny a potential child's rights to protection in the womb and from birth into an abusive or neglectful family. As stated above, the general sentiment of the CEDAW still emphasizes the prioritization of children over adult men and women. There is recognition, specifically in article 11, of

the importance of protecting unborn children from potential harm. Ultimately, the main argument against ensuring rights to the unborn potential child that could be interpreted within the CEDAW would be the right for women to not be discriminated against due to their ability procreate and their right to health, which could be compromised by the needs of the potential child. However, rights pertaining to founding a family emphasize the best interest of the child over the rights of the parent.

1.3. International Case Studies

> "…the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person … require protection in the name of human dignity, without making it a "person" with the "right to life" ..." (ECtHR, 2004 p. 38)

In previous sections, consideration of the basic understandings of international law related to the unborn child have been reviewed, as drafting accounts and interpretations are crucial to answering this thesis' research questions. However, it is also important to consider the outcome of cases and conclusions or comments from committees or commissions that are related to the main themes of this thesis – the unborn child and abortion. This section will provide a brief overview of the different regional HR organizations and their rulings on the unborn child, including how they apply the discretion granted by the CRC.

1.3.1. CRC Committee. Janoff's (2004) publication remains largely focused on the rights of the unborn child relating to the rights of the pregnant girl/child specifically to have an abortion in cases of medical necessary, incest or rape. For the most part, Janoff (2004) concludes that international bodies prioritize the protection of the child mother over the unborn child (p.166). Janoff (2004) also states that "the language of the Convention is ambiguous and could be read to confer the right to life on the unborn" (p. 165). This source reviews the comments of the CRC Committee, which has "encourage[d] the legalization of abortion to protect the life and health of the mother" (p. 177) but also condemns using abortion as a form of contraceptive. Janoff (pg. 177) suggests that this condemnation "opin[es]that it is appropriate to protect a fetus when neither a mother's life nor well-being is in jeopardy" (p. 177). However, Janoff (2004) continues by stating:

> "The Committee never suggests in a concluding observation that the termination of a pregnancy is a violation of a fetus's rights under the Convention, or that legal abortion violates the Convention. In fact, in two concluding observations, the Committee urges the member state to legalize abortions sought in certain circumstances" (p. 179).

Thus, Janoff (2004) concludes that "the Committee recognizes fetuses to be entitled to some consideration… given its disapproval of the use of abortion to prevent unwanted births|" (p.179).

According to Janoff (2004) none of the regional bodies have addressed the unborn child through the provisions of the CRC. The regional bodies that were considered by Janoff (2004) were the African Commission on Human and Peoples' Rights, the European Court of Human Rights (ECtHR) and European Court of Justice (ECJ) and the Inter-American Commission on Human Rights (IACHR). Of these bodies, the ECtHR and IACHR have adjudicated cases concerning the unborn child, though these were not claims under the CRC (p. 186). Nevertheless, State Parties ratifying the CRC must integrate its standards into their legal frameworks and practices. Thus, despite the absence of direct CRC claims before regional bodies, the CRC's influence should be reflected in their rulings. This following section reviews cases involving the unborn child to elucidate regional perspectives on the rights of the potential child.

1.3.2. Council of Europe (CoE). The Council of Europe has received many applications concerning abortion laws and/or the unborn child. There have been multiple applications to the ECtHR pertaining to the unborn child's right to life under article 2, including and *X v. Austria* (1980), *X v. the United Kingdom* (1981), *H v. Norway* (1990), and *Boso v. Italy* (2002), all of which were found to be inadmissible. For many years, the ECtHR avoided opining whether article 2 was applicable to the unborn child, even in cases that were admissible. However, in 2004 the ECtHR finally offered a position on the matter in *Vo v. France*. This case, as well as other notable admissible ECtHR cases will be reviewed below.

1.3.2.1. Open Door and Dublin Well Women v. Ireland (1992). This case was heard by the ECtHR after two non-governmental Irish corporations received an injunction prohibiting them from providing counseling services and information regarding abortion. This injunction was brought against the claimants by the Society for the Protection of Unborn Children (SPUC) and granted by the Irish

Supreme Court. At the time of the injunction, the Irish Constitution granted right to life to the unborn "from the moment of conception onwards" (ECtHR, 1992, p. 6), therefore illegalizing abortion. It was the SPUC and Irish Supreme Court's position that offering services related to elective abortions violated the Irish Constitution.

Before the ECtHR, the applicants claimed violation of article 10, freedom of expression, and article 8, right to respect for private life, of the European Convention on Human Rights (ECHR). The ECtHR concluded a violation of article 10; however, the court "explicitly refused to decide whether the right to life guaranteed by the European Convention article 2 extends to the unborn" (ECtHR, 2004, p. 184; ECtHR, 1992, p. 22). Even still, the ECtHR accepted Ireland's "domestic goal of protecting a fetus's life to be a "legitimate aim" (ECtHR, 2004 p. 184; ECtHR, 1992) and did not conclude a violation of article 8's right to private and family right.

1.3.2.2. Odièvre v. France (2003). This case did not have much consideration of the unborn child, as the case facts were focused on whether French law that allows mothers to give birth anonymously conflicts with a child's right to information about their origins. The French law was implemented with the aim of decreasing elective abortions by guaranteeing the pregnant woman anonymity and encouraging birth even if a child is unwanted. The ECtHR did not find violation of the ECHR and commented that "[t]he State's concern to protect life and to reduce the number of cases of voluntary termination of pregnancy" (ECtHR, 2003, p. 34) was a legitimate aim. Furthermore, the ECtHR concluded that it was "unnecessary in the present case to decide whether the notion of life under Article 2 of the Convention also includes the life of the unborn child" (ECtHR, 2003, p. 34).

1.3.2.3. Vo v. France (2004). After many years of avoiding concluding whether the ECHR pertained to the unborn child, specifically article 2, the right to life, the ECtHR issued an opinion in the *Vo* case. This case was brought before the ECtHR after a French court acquitted a doctor of unintentional homicide. Charges were originally brough against this doctor after they accidentally administered treatment to the wrong patient who had the same surname as another. The doctor's actions resulted in the rupture of the pregnant patient's amniotic sac and subsequent need to terminate the applicant's pregnancy due to risk of infection. After the patient failed to achieve desirable remedy through French courts, they applied to the ECtHR arguing "that [France] had failed to discharge its obligations under Article 2 of the [European Convention on Human Rights] by not allowing the offence of unintentional homicide to cover injury to an unborn child" (ECtHR, 2004, p. 22).

This case, unlike the previous, is most relatable to the potential child as it considers a "a woman who *intended* [emphasis added] to carry her pregnancy to term and whose unborn child was expected to be viable, at the very least in good health" (ECtHR, 2004, p. 36). The court's issue was "whether, apart from cases where the mother has requested an abortion, harming a foetus should be treated as a criminal offence in the light of Article 2 of the Convention, with a view to protecting the foetus under that Article" (p. 36), to which the court responded "that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention" (p. 38). Thus, the ECtHR has concluded the CoE's stance on rights of potential children, which denies the right to life. However, in *Vo v. France,* it is recognized that elements pertaining to the potential child may be protected. Specifically, it is stated:

> "At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom (see paragraph 72 above) – require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2." (ECtHR, 2004 p. 38)

1.3.2.4. Case of A, B and C v. Ireland (2010). While this case does not pertain particularly to article 2 or the rights of unborn child, it readdressed Ireland's abortion laws and concluded a violation of article 8 for one of the applicants. Within the case judgments, there are multiple statements that reaffirm the ECtHR's position that prohibition of elective abortion, in the case of Ireland, "pursued the legitimate aims of the protection of morals and the rights and freedoms of others including the protection of pre-natal life" (ECtHR, 2010, p. 50). The judgement recognized that this legitimate aim can only be so if the State's population share the same or similar morals, as can be demonstrated in referendum. Additionally, the court referenced *Vo v. France* confirming "it was neither desirable nor possible to answer the question of whether the unborn was a person for the purposes of Article 2 of the Convention, so that it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life" (ECtHR, 2010, p. 61)

1.3.2.5. Summary. These select cases further exemplify the interconnectedness of abortion legislation and the rights of the unborn. The ECtHR has generally sought to respect the margin of appreciation afforded to states, allowing them discretion in sensitive moral issues like abortion. There

is nothing in the case law that suggests states cannot prohibit elective abortion and grant rights to the unborn child, within certain limitations. For example, the right to health of the pregnant woman cannot be violated by denying medically necessary abortions. States can implement laws that protect the unborn child if it can be demonstrated that doing so achieves a legitimate aim that reflects the morals and standards of the state's population. Even after the ECtHR concluded in *Vo v. France* that the right to life cannot be explicitly granted to the unborn child, it has been acknowledged that the Court's inability to offer a conclusion does not prevent states from making their own decisions within the framework of the ECHR.

1.3.3. Organization of American States (OAS). The Inter-American human rights body is unique in that it is the only regional body to give recognition to the unborn child through the stipulation of the right to life from the time of conception. Article 4(1) of American Convention on Human Rights (ACHR) states:

> "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

As Janoff (2004) explains, the inclusion of the wording "in general" was included "based on the legislation of American States that permitted abortion, inter alia, to save the mother's life and in case of rape" (p.187). Therefore, the interpretation of the article is understood to permit some level of exception with the level of protection not being absolute.

There have been multiple cases that give insight to how the Inter-American system applies article 4 to the unborn child; however, it must be pointed out that due to the design of this regional body, many of the rulings are not legally-binding as they have been issued by the Inter-American Commission of Human Rights (IACHR), not the Inter-American Court of Human Rights (IACtHR). Furthermore, a State may be an OAS member without being subject to the jurisdiction of the IACtHR (2012. This makes weighing the outcomes of cases to be difficult.

1.3.3.1. Baby Boy v. United States (1981). One such case that was decided upon by the IACHR involved a doctor who was tried and convicted for manslaughter in the US after performing a voluntary abortion. The original trial - *Commonwealth of Massachusetts v. Kenneth Edelin* - took place after the

Roe v. Wade ruling, which placed special interest on the concept of viability, or the ability for a fetus to survive outside of the womb. As De Jesus (2011 explains:

> "If a fetus is viable, the State, in promoting its interest in the potentiality of human life may regulate, and even proscribe abortion except where necessary for the "preservation of the life or health of the mother."" (p. 227)

The prosecution sought to establish that Baby Boy had been viable at the time that the abortion was performed. Evidence was presented to show that the doctor had made multiple attempts to complete the abortion and "provoked [Baby Boy's] death in utero, by deliberately delaying his live birth immediately following the detachment of the placenta, cutting his oxygen supply inside, rather than outside, of the uterus, to avoid legal restrictions surrounding viability" (De Jesus, 2011, p. 228). The Massachusetts Supreme Court reversed the conviction citing procedural reasons (p. 229).

The case was presented to the IACHR with the intention of contesting the Massachusetts' reversal and the *Roe v. Wade* ruling. The foundation of the argument was based upon article I of the American Declaration of the Rights and Duties of Man (American Declaration) "to be interpreted in connection with Article 4 of the [ACHR]" (De Jesus, 2011, p. 234). Ultimately, the IACHR concluded that neither *Roe v. Wade* or *Commonwealth of Massachusetts v. Kenneth Edelin* had violated the American Declaration or ACHR, which was inapplicable to the US due to lack of ratification.

De Jesus (2011 offers that "*Baby Boy* did not set international precedent or international jurisprudence on the unborn child's right to life in the Inter-American system, since the IACHR is a quasi-judicial body, which means that its reports are non-binding…" (p. 274). Furthermore, De Jesus (2011 suggests that due to the inapplicability of the ACHR to the US, *Baby Boy* "did not produce an authoritative interpretation of the American Convention Article 4(1)" (p. 274) Nonetheless, the *Baby Boy* opinion demonstrates that even a regional human right body that has explicitly included the unborn child has done so with the intention of balancing State's discretions, rights and interests of the pregnant mother and moral concerns. (2004, p187)

1.3.3.2. Xákmok Kásek Indigenous Community v. Paraguay (2010). This case was addressed by the IACtHR after the Xákmok Kásek Indigenous Community's claims to ancestral land went unrecognized by the State. The applicants claimed that "as a consequence of the lack of recognition of their ancestral land, they were obliged to live in a place without the necessary means for their

subsistence" (Paul, 2012, p 210). The Xákmok Kásek argued that this resulted in the health decline and death of many, including two unborn children. The IACtHR did find the State responsible for violations of multiple articles under the ACHR; however, the judgment included:

> "In this regard, the Court notes that the representatives and the Commission have not presented arguments regarding the alleged violation of the right to life of the "unborn," so that, given the absence of grounds, the Court lacks facts on which to form an opinion as to the State's responsibility in these cases" (IACtHR, 2010, p. 53)

Paul (2012) argues:

> "[this judgement] is in direct contrast to this court's frequent use of the *iura novit curia* principle,14 whereby it does not need the parties to invoke the law or explain it, because a court is supposed to know, apply, and interpret the law, even if the parties give no further explanations for their claims" (p. 212).

Additionally, Paul (2012) opines that "the Court should have had recourse to the ACHR, which is clear in stating that the unborn has a right to life, even though the law may not always protect this right" (p. 246). Nonetheless, the IACtHR did not cite violations regarding the two unborn children presented by the claimants.

1.3.3.3. Artavia Murillo v. Costa Rica (2012). This case was addressed by the IACtHR after Costa Rica had deemed in vitro fertilization (IVF) as unconstitutional, citing the need to protect fertilized embryos from potential damage or destruction. The IACHR found merit in the petitioners claim that the prohibition of IVF "constituted arbitrary interference in the right to private life and the right to found a family" (IACtHR, 2012, p.4). This case contributed further elaboration on the scope of article 4 of the ACHR with the IACtHR concluding that "that "conception" in the sense of Article 4(1) occurs at the moment when the embryo becomes implanted in the uterus" (IACtHR, 2012 p. 78).

The official judgement cites other international cases that addressed the topic of IVF; however, for the purpose of this thesis, these cases do not hold relevance. This is because most of the cases focus upon the right to life of the embryo, whereas this thesis accepts that there may be embryos that are not intended to be implanted and eventually birthed, therefore they are not within the category of potential

children. Nonetheless, the IACtHR's conclusion in this case addresses article 4(1), and further establishes the interpretive scope.

1.3.3.4. Summary. In reviewing these cases, it remains clear that the contemporary trend in international human rights case law does not grant right to life to the unborn child. This does not mean that individual states are not at liberty to enact their own protection for the unborn, but they must do so in a way that does not infringe upon the rights of the born. Furthermore, such laws must achieve a legitimate aim. It has been recognized through the CoE that protection of the unborn prenatally is a legitimate aim

The concern and consideration of this thesis is the potential child, not the unborn child; an unborn child only becomes classified as a potential child when there is the intention have the fetus be born. Therefore, this thesis is not aiming to conclude whether a potential child has a right to be born or to life, rather *if* they are to be born, do they have rights. Regarding these concerns, there have not been any international cases that offer rulings, aside from those considering the right to life.

2. Should potential children have rights under international law?

"It's tragic because it's completely preventable"
(WHO, 2011, p. 398)

This chapter reviews and assesses risks posed to potential children. Recalling Archard and Tobin's (2019) second sense, which concerns "the future child and not directly to the being that exists in utero" (p. 27) and keeping in mind the proposed definition of 'potential children', the focus will be on risks and harms that can be identified to have a negative effect upon birth and throughout the child's life thereafter. Hence, abortion is excluded from consideration, as it cannot impact the child post-birth. This review remains focused upon the individual potential child rather than encompassing all future generations, as would align with Archard and Tobin's (2019) third sense. Thus, broad threats like climate change and armed conflict will be omitted.

First, the chapter examines in-utero harms such as Neonatal Abstinence Syndrome (NAS), Fetal Alcohol Spectrum Disorders (FASD), and nicotine exposure. These are linked to actions by the pregnant woman or those around her that are not in the best interests of mother or fetus (e.g., substance addiction, alcohol consumption, nicotine use; McQueen & Murphy-Oikonen, 2016 p. 2468; Colom et

al., 2021). This analysis is not intended to fault pregnant women or individuals struggling with addiction but to highlight the far-reaching and detrimental consequences of certain actions.

Next, the chapter considers ex-utero harms such as abuse, neglect, and trauma. The focus is on the risks posed by unrehabilitated prior-offending parents of child abuse and neglect to potential children they may conceive. While in-utero harm may be absent, potential children are likely to suffer from mistreatment, insecure attachments, trauma from removal, and other lifelong detriments post-birth.

2.1. In Utero

2.1.1 Neonatal Abstinence Syndrome (NAS). The diagnosis of NAS was first presented by Dr. Loretta Finnegan in the 1970s (McQueen & Murphy-Oikonen, 2016), although medical literature has been examining drug exposed neonates since 1875, with the diagnosis then being known then as congenital morphinism (Grossman & Berkwitt, 2019). Up until the 1950s, morphine was the drug associated with neonatal withdraw. Since then, opioids are the most common drug and with the development of methadone therapy in the 1960s, "medical literature recorded prenatal methadone exposure with increasing frequency" (Grossman & Berkwitt, 2019, p. 174). In the contemporary, there remains "a lack of clarity and consistency in how the syndrome is defined, measured, and managed" (McQueen & Murphy-Oikonen, 2016 p. 2468) with data seemingly concentrated in the United States, England, Canada and Australia.

NAS "can occur in 55 to 94% of newborns whose mothers were addicted to or treated with opioids while pregnant" (McQueen & Murphy-Oikonen, 2016 p. 2469). In the US, it is estimated that a baby is born drug dependent and displaying symptoms of NAS every 24 to 25 minutes (CDC, 2023 [1]). Rates increased at a national level by 82% between 2009 and 2017, and while there has been a decrease since then, there are still nine US states that have an average rate of >12.8 NAS births per 1,000 newborn hospitalizations. On a larger scale, there are not any notable comparable international statistics of NAS births, although Zyoud et al (2022) has compiled a dataset that provides the rates at which imperial research on NAS has been published from 1958 to 2019, citing the emergence of NAS as a global concern in the past decade. Additionally, Zyoud et al (2022) acknowledges the gaps in data concerning the long-term effects of NAS and institutional responses of drug abuse during pregnancy, though it is generally accepted that infants exposed, particularly to opioids, "are still at significantly higher risk of dying, of being abused, and of sliding towards an unpalatable life trajectory". Uebel et al.

(2015) quantifies this statement further through a 13-year population-based linkage study in Australia that concluded NAS was more significant a predictor for hospitalization of children for maltreatment, and mental and behavioral disorders than, for example, premature birth. The same authors concluded in another publication that "children with NAS, especially those of term gestation and from lower socio-economic groups, are more likely to die, especially from external causes" and that most deaths occurred between one month and one year (Uebel et al., 2020).

McQueen and Murphy-Oikonen (2016) states that NAS is "a complex disorder that primarily involves the central and autonomic nervous systems and gastrointestinal system" (p. 2469). Additionally, outcomes to the fetus include growth restriction, preterm labor, abnormal heart patterns and death with outcomes in newborns including low birth weight, small head circumference, child maltreatment and visual disturbances (McQueen & Murphy-Oikonen, 2016 Table 1, p. 2469). Grossman and Berkwitt (2019) suggests "many factors such as the agent of exposure, dose and poly-substance use can alter the clinical presentation of NAS" (p. 175).

Methadone remains a reliable treatment option for individuals aiming to mitigate their opioid addiction while avoiding severe withdrawal symptoms and cravings (SAMHSA, n.d.). One online source has purported that methadone can be safely taken while pregnant, as it does not cause birth defects; however, in the same breath, this source acknowledges that there is a risk that babies "may experience withdrawal, also known as neonatal abstinence syndrome (NAS) after birth" (SAMHSA, n.d.). Over half of infants born to mother's receiving methadone treatment will be diagnosed with NAS (Boston Children's Hospital, n.d.; Patrick et al., 2012), with Siu & Robinson (2014) reporting that "exposure to heroin and methadone has been associated with a 60% to 80% incidence of NAS". It is important to note that withdrawal during pregnancy, also known as intrauterine abstinence syndrome (IAS), may cause fetal distress and/or spontaneous abortion (McCarthy, 2011) meaning there is still significant risk of complications of the potential child's health prior to and after birth if treatment is not provided to the mother to assist with their own withdrawal (McCarthy & Terplan, 2016). Additionally, the alternative treatment of buprenorphine during pregnancy "may have less severe symptoms of withdrawal, shorter lengths of stay, and receive less pharmacologic treatment than methadone exposed infants".

Finally, it is recognized that children diagnosed with NAS are more likely to experience negative effects if removed from their mother but also more likely to "live in relatively unstable environments" (Grossman & Berkwitt, 2019, p. 180). One study showed that children with NAS who were adopted "had normal verbal IQ scores and math and reading abilities, while the children raised by

their parents scored significantly lower in all three categories" (Grossman & Berkwitt, 2019, p. 180). Nonetheless, Grossman and Berkwitt (2019) concludes that "maintaining and strengthening the parental-infant bond should serve as a main tenet of therapy" for children with NAS (p. 181).

2.1.2 Fetal Alcohol Spectrum Disorder (FASD). According to Brown et al. (2019), FASD "is a medical term used to describe a range of mental and physical disabilities caused by maternal alcohol consumption" (p. 164). While prenatal alcohol syndrome and postnatal effects were not scientifically researched and linked until the 1960s, and, especially so, in 1973, Brown et al. (2019) suggests that this linkage was anciently, and even biblically understood. Prior to the 1960s, doctors, authors and everyday persons recognized the connection of women who drank heavily, and children born with physical and cognitive abnormalities. Brown et al. (2019) presents a study in 1899 that "observed a higher mortality rate among the newborns of alcoholic women compared with others in the mother's family and/or incarcerated mothers who had limited or no access to alcohol" (p. 166). All this to say, FASD is a newer term with limited research that is based upon an undeniable and age-old understanding.

Riley et al. (2011) states "[t]he most profound effects of prenatal alcohol exposure are on the developing brain and the cognitive and behavioral effects that ensue" (p. 1). Furthermore, while Riley et al. (2011) acknowledges the need for more research to better understand FASD, he concludes four facts to be clear:

1. alcohol is a teratogen that can have devastating effects on the developing embryo and fetus;
2. the range of outcomes following gestational alcohol exposure is broader than those described as FAS;
3. the most profound effects of gestational alcohol exposure are those it has on cognitive and behavioral outcomes and on brain development; and
4. the consequences of prenatal alcohol exposure represent a major public health issue, having wide ranging effects at a staggering economic cost. (p. 1-2)

Riley et al. (2011) explains "not all individuals with heavy prenatal alcohol exposure demonstrated all of the features required for a diagnosis" (p. 2), hence why the terminology is based upon a spectrum of diagnoses, including, fetal alcohol syndrome (FAS), partial fetal alcohol syndrome (pFAS), alcohol-related birth defects (ARBD), static encephalopathy, alcohol-related neurodevelopmental disorder (ARND) and neurobehavioral disorder associated with prenatal alcohol exposure (ND-PAE) (Riley et

al., 2011); however, some international agencies do not accept all of the diagnoses on the spectrum due to lack of conclusive data.

Colom et al. (2021) recognizes FASD as “a leading cause of neurodevelopmental disorders” (p. 1). Riley et al. (2011) elaborates further by stating “the most profound effects of prenatal alcohol exposure disrupt brain development and subsequent cognitive, motor, and behavioral functions” (p. 4). Furthermore, FASD is linked to abnormal facial features and growth problems. The general conclusion is that the consequences and disabilities resulting from FASD are “lifelong” and exacerbated by adverse experiences (Brown et al, 2019C; Colom et al., 2021; Lange et al., 2017; Riley et al., 2011; WHO, 2011)

Like NAS, research on FASD is mostly published in Western states, although there is some global data available. Lange et al. (2017) has determined that “the global prevalence of FASD among children and youth in the general population was estimated to be 7.7 per 1000 population” (p. 948). Additionally, South Africa, Croatia and Ireland were identified as the states with the highest prevalence of FASD, in that order from highest to lowest. Lange et al. (2017) concludes with “an estimate that more than 1700 infants with FASD are born every day (630,000 every year) globally” (p. 950). Finally, marginalized populations were identified to be more at risk for high FASD prevalences.

Also, like NAS, FASD is hard to counter throughout pregnancy without risk to pregnant women suffering through addiction (Heberlein et al., 2012). This is because withdrawals can be taxing and even lethal to the body (Canver et al., 2024). The use of pharmaceuticals for alcohol detoxification in pregnancy is not well researched; however, there is data to show that some first-line pharmacological treatments create “an elevated risk of oral clefts and other malformations” and “risk of postnatal withdrawal syndrome as well as perinatal problems like floppy-infant syndrome” (Heberlein et al., 2012, p. 2).

Interestingly, there only seems to be one published article by the World Health Organization (WHO) regarding FASD, though the WHO has often contributed articles, opinions and data to support UN issues within the CRC. Published in 2011, the article details South Africa’s Western Cape province, which has been found to have the highest rate of FASD in the world. A quote within the article, from a human geneticist state “It is estimated that at least one million people in this country have fetal alcohol syndrome and approximately five million have partial fetal alcohol syndrome and [other] fetal alcohol spectrum disorders. It’s tragic because it’s completely preventable” (p. 398).

2.1.3. Nicotine In Utero. Unlike NAS and FASD, fetal exposure to tobacco and nicotine through first- and second-hand smoke does not have an accepted term. Even still, it is widely recognized that nicotine exposure in utero is detrimental to the potential child. Wickström (2007) cites "between the years 1957 and 1986, over 100 studies (comprising more than 500 000 births) were published demonstrating that children born to smoking mothers have lower birthweights" (p. 215) A report published by the WHO (2021) cites a study that found smoking to be the cause of "one third of the additional stillbirths and infant deaths among the most deprived households" (p. 2). Furthermore, "[m]aternal smoking during pregnancy is linked to a doubling of the risk of sudden infant death and birth defects" (p. 3) and is associated with heightened risks of cancer. Maternal smoking is also "associated with increased risks for ectopic pregnancy, premature rupture of membranes, abruptio placentae, placenta previa, miscarriage, stillbirth, preterm birth, low birth weight, small for gestational age, and congenital anomalies such as cleft lip" (WHO, 2013. p.22) and can result in "lifelong consequences including a heightened risk of developing chronic diseases in adulthood" (p.22).

Another article published by the WHO explains that national approaches to preventing tobacco use in pregnancy is available in "high-income countries such as Australia, Canada, the United Kingdom and the USA; however, few if any low- and middle-income countries have such guidelines" (WHO, 2013, p. 25). Wickström (2007) cites a study that "concluded in a survey of 21 centers in 17 countries that an average of 22% of mothers and 45% of fathers were smoking at the time of their child's birth" (p. 213). Furthermore, "it is estimated that 15 to 25% of women smoke during pregnancy" (p. 213).

Overall, there are many high-risk concerns that effect fetuses in utero and, therefore pose threat to the potential child if not safeguarded properly. Research remains continuous but limited; nevertheless, the significance of existing research demonstrates NAS, FASD and maternal-smoking cause life-long implications that affected the individual, the family, and society (Riley et al., 2011). Consequentially, social costs are impacted with one US report finding "lifelong costs of medical care and rehabilitation …at around US$ 4 billion in 1998" (WHO, 2011, p. 399). With an increase in NAS in the mid 2000s, it can only be assumed the costs have increased as well.

2.2. Ex Utero. As has been established, there are many harms that can occur to a fetus in utero that can be considered threats to the potential child. In other words, these harms occur in utero but affect the potentiality of the child upon and after birth. In this section, harms that exist ex utero but nonetheless should be considered in the context of the potential child will be briefly reviewed.

2.2.1 Adverse Childhood Experiences (ACEs). As previously acknowledged, a comprehensive review of all existing risks and harms posed against potential children is nearly impossible to achieve; this is because the very concept of potential children is hypothetical and hypothetical situations are nearly infinite. No matter, there are still rather reliable inferences that can be made about the potentiality of child born into certain circumstance, both good and bad. This is especially true when considering circumstances of childhood. As stated in WHO (2021), "[w]hat happens during early childhood (*pregnancy* [emphasis added] to age 8) lays the foundation for a lifetime" (p. 1). Therefore, "in improving child survival… we also need to create the conditions to help children thrive as they grow and develop. This requires providing children with nurturing care, especially in the earliest years (*pregnancy* [emphasis added] to age 3)" (p. 1).

In the interest of brevity, this section will consider the ACEs study, as it has been regarded as a rather inclusive approach to assessing effects of varying childhood experiences. ACEs was a term first coined by John Bowlby, a psychiatrist, who is also credited with pioneering attachment theory (Partridge, 2019). Subsequent research in the mid 1980s resulted in an entire movement dedicated to understanding how adverse experiences in childhood impacts the course of life. There are ten ACEs within the scoring system, each following under one of three categories: abuse, neglect and household dysfunction (Joining Forces for Children). High-risk behaviors that can be predicted by an ACE score include "smoking, obesity, unintended pregnancies, multiple sexual partners, and sexually transmitted diseases" (van der Kolk, 2014, p. 165).

Additional noteworthy findings from van der Kolk (2014) include:

- "women who had an early history of abuse and neglect were seven times more likely to be raped in adulthood" (p. 99)
- It is rare to find only one instance of an ACE and as the instance increase in frequency and variety, as do the adverse effects (p. 164)
- High ACE scores are associated with high rates of chronic depression in adulthood (p. 164).
- "People with an ACE score of four were seven times more likely to be alcoholic than adults with a score of zero" (p. 165).
- "For those with an ACE score of six or more, the likelihood of IV drug use was 4,600 percent greater than in those with a score of zero" (p. 165).

Furthermore, it is important to note that these experiences are not limited to those living in poverty, as might be assumed. Original respondents to the study "were mostly white, middle class, middle aged, well educated, and financially secure enough to have good medical insurance, and yet only one-third of the respondents reported no adverse childhood experiences" (van der Kolk, 2014, p. 163). Even still, WHO (2021) states "in low- and middle- income countries…– more than 40% of children – have greater risk of not reaching their developmental potential because of poverty and neglect" (p. 8).

Chapter III – Findings & Analysis

This chapter will analyze the scholarly literature, legal interpretations, and case studies reviewed in chapters II and III to respond conclusively to the research questions. The following sections will present the study's findings, highlighting key patterns within the international human rights framework. Given the complex nature of the first research question, both affirmative and negative responses will be explored. Although the second research question is philosophical in nature– one could ask should *anyone* have rights under international law – a pragmatic answer is attainable through application of legal standards and social norms.

1. Do potential children have rights under international law?

The literature and case law pertaining to this question reveal a complex landscape where the answer can be both conclusive and inconclusive. While certain sources provide clear and definitive evidence suggesting a negative response, others are more ambiguous and subjective, leaning to an affirmative. This duality underscores the multifaceted nature of the research problem that remains further complicated by social and sovereign agendas.

1.1. Succinct Negative Response

The obvious and succinct answer to this research question is no, potential children do not have rights under international law. This is primarily due to the concept of "potential child" being neither well-established nor widely recognized. Although, the unexpected finding of Archard and Tobin's (2019) second "sense", which encapsulates the essence of the "potential child" in a notably authoritative CRC commentary, proves that the potential child is not completely absent from consideration within the children's rights framework. Furthermore, this source proves that the potential

child is inherently intertwined with the unborn child. As emphasized in the chapter I, a potential child can be an unborn child. Thus, it was deemed appropriate to examine international legal approaches to the unborn child, thereby potentially shifting the answer to the research question away from an explicit "no".

1.2. Broadened Negative Response

Awkwardly, even broadening the scope of the review to consider the unborn child in international law appears to conclude a negative answer. The CRC's lone reference to protection of a child before birth is contained within the 9th paragraph of its preamble, not its operative text. Even more unfavorable to an affirmative response, this paragraph is intentionally and specifically limited within the *travaux préparatoires*, giving authority to article 1, which intentionally and specifically does not identify a minimum age. The pattern that is identifiable within the CRC drafting history, is State Parties neither explicitly granting nor denying rights to the unborn child. This consistently is due to the "abortion issue" (Alston, 1990) being debated amongst UN delegates without conclusion. Put simply, by not being explicit, discretion is entrusted to the states; then, neither abortion rights nor unborn child rights are restricted. However, recent international trends indicate a judicial preference for ruling in favor of abortion rights, often either avoiding the issue of unborn rights all together, or outright denying them.

Vo v. France offers the most definitive denial of the unborn child's right to life under article 2 of the ECHR. While a regional body, the ECtHR ruling aligns with the general international human rights approach. One might presume that the Inter-American system would assert the opposite, in accordance with article 4 of the ACHR, however even the IACtHR and IACHR have avoided ruling on the question of the unborn child or outright denied recognition, as in the case of *Xákmok Kásek Indigenous Community v. Paraguay*. These examples further demonstrate that protection of the unborn or potential child is not guaranteed at the international-level, though regarded as a legitimate aim when guaranteed at the state-level.

1.3. Unconventional Affirmative Response

Even with the clear answer of "no", the collected data suggests an affirmative response may also be appropriate, although not widely accepted. It has been demonstrated that the intentions of international law prior to the adoption of the CRC prioritized the child and sought to offer protections to the child before and after birth (ICRC 1949; UN, 1959; UNGA, 1966). It was not until extensive

debate, of which was influenced by other political concerns, namely abortion laws, that the international framework began retracting explicit protection to the unborn child.

These retractions were deliberate but also unclear and "strange", as accounted in the CRC drafting history (OHCHR, 2007, pp. 299, 312, 368). The *travaux préparatoires* referring to the 9th preambular paragraph of the CRC contradicted the preamble's legal usage recognized through the Vienna Convention, thereby limiting the interpretability of the CRC. It remains clear through the comments of UN Legal Counsel that this *travaux préparatoires* was an unusual utilization (OHCHR, 2007) of the negotiation practice, which stripped the significance of a preamble to a treaty (UN, 1969; Joseph, 2009, Chinkin & Rudolf, 2012). However, it does not remain clear, throughout the many commentaries and legislative histories, whether all State Parties were aware of the inclusion of this statement in the *travaux préparatoires* (OHCHR, 2007) and whether such knowledge would have influenced the adoption of the CRC. The situation is concerning and, even suspicious, due to multiple State Parties withdrawing proposals for the protection of the child "at the time of conception" (Alston, 1990; Joseph, 2009; OHCHR, 2007; Vandenhole et al. 2019) in Article 1, believing the CRC's ninth preambular paragraph would satisfy their concerns. It remains undocumented whether these State Parties comprehended the implications of the *travaux préparatoires*. This is not to say that the outcome would have been different, though there is no way to know for sure.

Joseph (2009) is an outlying source that refutes the typical interpretations of the CRC. The source has received criticism, been accused of inaccuracies and makes frequent use of hyperboles (Penovic, 2011) While biased – meaning the author is admittedly anti-abortion/pro-life - this source is reliable, having been published by a credible academic publisher that utilizes a peer-review process. Additionally, the author has served as an advisor to delegates of the UN. Joseph (2009) remains steadfast in their assertion that the CRC applies to the unborn child, stating:

> "The inescapable conclusion here is that the child before as well as after birth is to be protected by the CRC, if that Convention is interpreted in good faith [without discrimination against the child before birth] in accordance with the ordinary meaning to be given to the terms of the treaty in their context [both text and preamble] and in the light of its object and purpose [recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family, and that human rights should be protected by the rule of law]." (p. 6)

Due to the potential controversy of this source, meticulous verification of the bibliography was necessary and all mention of the source in the literature review of chapter II was verified through other references. This was necessary as a unique perspective was presented, albeit seemingly unintentionally, by Joseph (2009) that allows this thesis to further conclude an affirmative response to the research question.

As the *travaux préparatoires* states:

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

Emphasis has been placed upon the word "this" because it demonstrates that the intention of the *travaux préparatoires* was to only limit the singular 9th paragraph of the preamble. As presented by Joseph (2009), the preceding paragraph 8 of the preamble states:

> "Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,"

This preambular paragraph suggests that the CRC must be interpreted in good faith as an extension to preexisting international legal texts. As also presented by Joseph (2009) and outlined in this thesis' literature review, the UDHR (through its influence of the 1959 DRC), ICCPR, ICESCR (Joseph, 2009, p. 95) the Fourth Geneva Convention all allot consideration and protection to the unborn child. Therefore, the existence of reference to rights of unborn children within the ICCPR, can be applied to the CRC. Furthermore, the *travaux préparatoires* cannot be applied to deny this interpretation as it only restricts paragraph 9 relating to article 1.

Moreover, CEDAW does not seem to achieve any limitations over the interpretation of the CRC, specifically as it relates to pregnant women. There is recognition, specifically in article 11, of the

importance of protecting unborn children from potential harm. All other mentions of children in CEDAW emphasizes prioritizing the best interest of the child in all cases. Regarding this thesis, the reviewed CEDAW commentary does not offer much to suggest that "it being understood that the interest of the children is the primordial consideration in all case" was not intended to be broad and all encompassing. Without any documentation to suggest otherwise, it is the position of this thesis to interpret this clause very literally, meaning, that children's rights and interest shall come before both men and women's role in upbringing and development.

It is the position of this thesis to understand the nature of international customary law and the importance of cooperative interpretation. Thus, it remains factual that State Parties are granted the authority to grant rights to a child prior to birth, as has been done in the Inter-American system (OAS, 1969). However, internationally, the rights of the potential child are not explicitly recognized and often implicitly denied.

2. Should potential children have rights under international law?

Throughout the review of international law, the concept of potentiality is present (WHO, 1999; ECtHR, 2004; Holtmaat, 2012), and it is standard to grant primary consideration to the rights and concerns of the child. Given that the consideration of the potential child pertains to the potentiality of the child, it is reasonable to conclude that, international law *should*, to some extent, extend protections to the potential child. This is even more evident through the examination of the risks to potential children in chapter III, with in utero substance exposure being on the rise in some countries, posing significant concerns for human behavior, interaction, and social costs. As stated by a leading expert in the field of trauma and psychiatry, "[t]here are hundreds of thousands of children [that experience trauma], and they absorb enormous resources, often without appreciable benefit. They end up filling our jails, our welfare rolls, and our medical clinics." (van der Kolk, 2014, p. 168).

The review of the CRC and CEDAW, which, without reservation, prioritize the child above most all else, along with the review of threats posed against potential children, suggests the necessity of legally ensuring the capacities and health of potential children. As Tobin (2019) describes in the commentary of article 24 of the CRC, State Parties have a responsibility identify risks to the health of children and "develop effective strategies to prevent or mitigate [them] …" (p. 940). This study has identified risks that occur prenatally but effect numerous living children, necessitating an adequate response under the CRC.

At the time of ratification, harms threatening the potential child, such as NAS, FASD, and ACEs, were not fully understood or well researched. However, recent studies have clarified these risks, some of which are argued to be completely preventable (WHO, 2011, p. 398). Nonetheless, the most recent international rulings concerning a population of potential children - unborn children - continue to favor judicial standards that allot preference to abortion rights. *Vo* included the admittance that "it was neither desirable nor possible to answer the question of whether the unborn was a person…" (ECtHR, 2004) This study presents that, regardless of desirability, it is *possible* to determine that the unborn child can be harmed the same as any person and therefore should be afforded the same indiscriminate protection as any person. The statement in *Vo* is unjustifiable under article 3 of the CRC, especially given the prevalence of NAS, FASD, and ACEs. As Eekelaar and Tobin explain, when circumstances and evidence are inconclusive, "the fact that it is inconclusive should not preclude prohibition or regulation of the practice in question, notwithstanding that such measures may interfere with the rights of others" (p. 99). Thus, even with the recognized conflict of rights, preventative action is still required.

The increasing legislative acceptance of abortion rights does not sufficiently excuse denying protection to the potential child based upon the standards of articles 3, 6, 19 and 24 of the CRC. The perceived conflict between the unborn child's right to protection and the voluntarily pregnant woman's right to bodily autonomy is already addressed by the parental obligations established in the CRC and CEDAW. In any parent-child dynamic, parents who wish to be and remain parents, are not permitted to exercise their bodily autonomy to harm or neglect their child. In fact, the CRC obligates parents to use their bodily autonomy to care for their child, and the state has the obligation to support such endeavors. If the parent were to use their bodily autonomy in contrast of their parental obligations, the state is required to intervene to protect the child. The parent-child dynamic in the case of a potential child is different only in that the potential child is unborn; however, once the intention of the parent(s) to procreate is present, the same level of obligation and responsibility should be required. This thesis highlights the inconsistency of imposing such obligations only after birth when harm can also occur prenatally. Article 3 requires consideration of the child "in all actions concerning" them; it is illogical to not legally require consideration throughout the literal process of their prenatal creation.

Admittedly, there are some rights that might not be easily applied to the potential child. For example, potential children cannot form their own opinions because they do not yet exist. Thus, they might not benefit from the rights enshrined in article 12 of the CRC. However, the child's lack of capability and maturity is precisely why children have been deemed to be requiring of special safeguards; the physical inability to fully enjoy certain rights should not preclude the enjoyment of

others. Peleg (2013) supports this by emphasizing that human rights are inadequate without recognizing internal capabilities. Denying capabilities to potential children, as seen in cases of NAS and FAS, undermines the entire foundation for enjoying human rights.

Consider an analogy: a potential child in utero has a section of its brain surgically removed for no medically justifiable reason. This surgery does not result in fetal death but causes severe disability after birth. While the fetus is directly impacted, the overall violation is of the child and adult that the fetus will become. Such actions could detrimentally impact all rights enshrined in the CRC, which ensures not just life, survival, and development, but the enjoyment of each right [1].

Regardless of political debates, normative standards and cultural practice, the threats to the potential child remain, as do the principles of the CRC, which supports some form of recognition of the unborn and potentiality of the child. Separate from the aforementioned evidence, the potential child should have rights under international law not only to protect the individual but to secure the enjoyment of all human rights. As one source states, "[we] may be treating today experiences that happened fifty years ago—at ever- increasing cost" (van der Kolk, 2014, p. 164). Research repeatedly demonstrates that many concerns within the international human rights framework stem from the "nature of the parent-child relationship" (p. 180). The cycles of abuse, addiction, and poverty often begin prior to birth, yet protections for potential children remain indirect and limited.

Chapter IV – Discussion and Conclusion

The research has concluded that current international laws do not grant rights to the potential child. It has also been concluded that the potential child should be granted rights, or a level of protection based upon the standards of the CRC and the very essence through which it was established. There are multiple articles, drafting negotiations and comments that would permit a swift shift of legal interpretations and practices, as exemplified by the arguments of Joseph (2009), though it is understood this is easier said than done. This chapter will briefly explore and infer the implications of this study, including concerns for contemporary attitudes, proposals for implementation and recognition, and the

[1] This analogy is not intended to analyze or respond to the potential disability as the exploration of disability rights is beyond this scope of this thesis. Rather what is examined is the act(s) leading to the potential disability. As such, consideration of potential children differs from that of potential or living disabled children, as there is clear difference between the fetus in the analogy and a fetus that naturally develops with a missing brain section.

philosophical theories that survey the consequences of bringing children into the world and address the underlying hypothetical question of this thesis: does a child have a right not to be born?

1. Contemporary Attitudes

This section will examine the trends and attitudes that have influenced the conversation, or lack thereof, related to the potential children's rights.

1.1. Abortion Debate

As was stated in chapter I, it is not the objective of this study to contribute direct opinions to the broader abortion debate. Even still, this thesis has demonstrated how the contentiousness of the debate diverts attention from reasonable consideration of potential children. In the drafting process of this study, it was hypothesized that recent legislative trends would confirm this, and they do. Those who support instituting a human right to elective abortion are inconsiderate to the consequences that their rhetoric and attitude have for the potential child. Arguing that life is entitled to human rights only after birth is ignorant to the significance of in utero development.

It is notable that international cases concerning the unborn child typically focus solely on the right to life, neglecting consideration of other rights. This may be because the right to life has been regarded as non-derogable (UN ICCPR, 1966; Australian Government Attorney-General's Department, n.d.) and it would be challenging to grant other rights without first establishing the right to life. However, two truths can coexist: the potential child cannot be guaranteed the right to life due to the need to balance the pregnant woman's bodily autonomy and integrity, but if a pregnant woman autonomously chooses to carry the pregnancy to term, rather than voluntary abortion, the potential child should be legally protected and entitled to rights. This would intensify the literalness of the pro-choice movement, which supports the existence of choice to be or to not be a parent. By this standard and those of international child protection, once you chose to be a parent the obligations and responsibilities should be immediate as they are autonomously "self-imposed" (Post, 1997, p.765); if one no longer wants such duties, the solution is to remove their parental rights and the child from their care, not allow the physical harm of the child.

To further illustrate the illogicality of denying rights to the potential child because the right to life cannot be first established [2], consider an alternative scenario in the *Vo* case: if the physician's

[2] Assuming that right to life cannot be established because it contradicts rights to voluntary abortion.

actions did not result in an abortion but rather physical harm to the fetus, and the fetus was subsequently born with a detrimental injury or disability, should the ruling have been the same? In such circumstances, it would have been a fetus that was harmed but a child that experienced the consequences upon birth. Would it be just to dismiss the child of legal claim because it was injured prior to achieving the court's legal conception of personhood? Perhaps these questions are too complex to answer here but they should be answered prior to expanding abortion rights as human rights.

On the other side of the abortion debate, those who reject abortion rights assert the right to life from conception or fertilization. This perspective prioritizes life even if it leads to suffering, abuse, neglect, rejection, and other traumas, even if the life is unwanted or accidental and even if the life is born unto parents unable or unwilling to treat it with respect and dignity. This assertion still places authority unto one to decide the livelihood of another, like the pro-choice side. For pro-life advocates, religious, moral or philosophical values are given preference over consideration of the conditions of the life they seek to protect; preservation of life is paramount. This outlook also contradicts the sentiments of this thesis, which seeks to limit imposition of existential circumstances upon non-consenting potential children, and should be further explored before conclusions are instituted.

1.2. Right to Procreate

While an exhaustive discussion on procreative liberty would require extensive additional research and explanation, it is crucial to acknowledge that the implicit standard of parenthood, procreation, and reproduction as a human right significantly impacts the concerns of this study. Although there is no explicit international human right to procreate, it is a norm inferred from:

- the right to privacy guaranteed in article 12 of the UDHR and article 17 of the ICCPR;
- the right to bodily autonomy established in articles 3 and 5 of the UDH, articles 7 and 9 of the ICCPR and article 12 of the ICESCR and;
- the right to found a family enshrined in articles 12 and 16 of the UDHR, article 23 of the ICCPR, article 10 of the ICESCR and articles 12 and 16 of the CEDAW.

Even without explicit recognition of a right to procreate, it can be said that "[t]o deny procreative choice is to deny or impose a crucial self-defining experience, thus denying persons respect and dignity at the most basic level" (Robertson, 1994, page 4). Moreso, socially, "everyone's entitlement to procreate is widely accepted and indeed procreation is expected of virtually everyone" (Cutas, 2009, p. 49; Veevers, 1980).

The prevalence of this attitude, like the abortion debate, demonstrates that concern for the potential child is often overshadowed by the desires of the living. Procreation should ideally involve consenting adults engaging in reproductive activities with the intention of properly rearing the child created. Yet, emphasis on rearing is not required for procreation to take place, and the focus often lies on exercising reproductive autonomy or fulfilling societal norms (Weinberg, 2002). Regardless of intention or outcome, the parent-child relationship is inherently unilateral, founded on the parent's autonomy without mutual consent of the child. As Cutas (2009) presents, this is not tolerable for any other human relationship, stating "[a] relationship, however, cannot be founded on the unilateral right to personal autonomy, or bodily integrity, or one's desires however strong these may be" (p. 47).

To further elucidate the points attempted to be made, consider Vandenhole et. al. (2019) commentary of article 3, which provides the example "living in poverty is generally not in a child's interest [however], preservation of the family environment may conflict with the need to protect the child's adequate standard of living" (p.68). However, this conflict would be less frequent if no child were procreated and born into poverty.

A report published by Human Rights Watch titled "If I Wasn't Poor, I Wouldn't Be Unfit" (2022) offers a perspective of impoverished US parent's experiences in child dependency cases. The title itself implies that being a poor parent can equate to being an unfit parent, although the article aims to assert that it is unfair for impoverished parents to have their children removed due to safety concerns related to poverty. While the international human rights goal is to eliminate poverty (UN, 2015), and governments are tasked with mitigating factors related to poverty, the issue remains largely unresolved. Therefore, this discussion sets forth the uncomfortable questions: why continue to support children being born into poverty that is unlikely to be resolved before the implications are near irreversible? Why should the autonomy, desires, and actions. of any person be prioritized over the best interest of potential children? Why is it unfair to categorize "unfit" parents as those unable to financially their support children, among other criteria? Why is it more unfair to be expected not to have children if "unfit" than it is to be nonconsensually born to someone unfit?

Please note that these questions are not intended to be insensitive to the legitimate unfairness of poverty, and previous sentences are meant to acknowledge that solving poverty is the most ideal solution. Nevertheless, that objective remains improbable and therefore such questions should be considered due to the consequences poverty poses against future generations. Furthermore, it's not about judging what types of people should procreate, rather it's about questioning whether potential children should be subjected to a life with odds in favor of a diminished life trajectory. In other words,

"we are not determining who will exist; we are formulating principles which will dictate the conditions under which procreation is permissible" (Weinberg, 2002, p. 409)

Re-citing Archard and Tobin (2019), it has been generally accepted that there is a right to procreate that should not be imposed upon regardless of the ultimate wellbeing of the potential child (p. 27). As it stands, denying the "right" to reproduce is deemed more unfathomable than a potential child being born into a life of abuse, neglect, instability, and poverty.

1.3. Woman v. Child

The research and societal attitudes subtly yet clearly indicate that women's rights can and have been pitted against children's rights (Post, 1997; Holtmaat, 2012; Luttrell-Rowland, 2012). This is unavoidable given the unique mother-child dynamic, where the woman often bears physical, emotional, and mental responsibilities that the child cannot reciprocate (Post, 1997). Although this duality is too complex to review comprehensively here, it is relevant to briefly note that women's rights and children's rights are inherently intertwined (UNFPA, & UNICEF, 2011).

1.3.1. Maternal-Fetal Conflict. Post's (1997) publication provides a deep examination of the maternal-fetal conflict, of which has been given implicit consideration throughout this study. Post (1997) acknowledges "[t]he relationship between a pregnant woman and her fetus is unlike any other in law, medicine, or ethics" (p. 757) and defines the maternal-fetal conflict as "those situations in which there is a discordance between the interests of a pregnant woman and the fetus she is carrying" (p. 758). Examples of this conflict include situations throughout wanted and unwanted pregnancies.

Post (1997) presents the most pressing concern related to possible implications of granting potential child of fetal rights, stating:

> "Recognition of this 'contingent legal personhood'… not only fundamentally alters the maternal-fetal relationship, it makes a woman vulnerable to civil and even criminal liability for any acts or failures to act during pregnancy that are or could possibly be harmful to her fetus" (p. 763-764)

Post (1997) offers recognition to the potential child, offering the term "intended-to-be-born" (p. 765), which is different than a fetus that is intended to be aborted. It is suggested that to grant an unborn child protection from harm, it must first be considered:

> "(1) what constitutes a risk of harm to the fetus that is sufficiently grave to justify limitation of the woman's liberty, and (2) what constitutes a legitimate reason for the woman not to take appropriate steps to prevent harm." (Post, 1997, p. 765; Beauchamp & Walters, 1994)

Ultimately, Post (1997) critically opposes the institution of a "legal duty" of fetal protection, categorizing it instead as be a "moral duty" (p. 768) instead. Post (1997) asserts that such duties "underlie broader and more disturbing convictions about the *purpose* of women (to produce strong, healthy members of society) and the corresponding obligation of society to ensure the realization of that purpose" (p. 768). Furthermore, Post (1997) concludes "[i]f society assumes the position of moral arbiter and pregnancy police, then women become defined by their reproductive roles and are reduced to what have been called 'fetal containers' and 'Handmaids'" (p. 775) This use of hyperbolic language reflects an oppositional stance that warrants deeper exploration. The intent of this discussion is not to reinforce discriminatory views on female reproduction but to advocate for shared accountability among all parties responsible for child welfare. Despite the unique nature of pregnancy, it is unreasonable to allow apprehension to override the pursuit of balanced solutions. While Post raises significant concerns about women's rights, these should not obstruct efforts to find compromise, especially given the high rates of preventable NAS and FASD diagnoses.

Additionally, as discussed in the last section, parental responsibility is foundationally, using Post's (1997) phrasing, a moral duty that necessitates a legal duty. In its nature, this duty involves prioritizing the child's welfare over certain aspects of personal autonomy. Legal parental standards do not compel a parent to donate an organ to their child but does require provision of essential care and thus, a part of parents is still required to be given. Suggesting that a pregnant woman who wants to and intends to have a child should not consume alcohol because it is harmful to the fetus should not be viewed so differently than if she were to feed a living infant alcohol, which would be categorized as child abuse. Moreso, this suggestion should not be deduced to categorizing the woman as a "fetal container".

It is senseless to dismiss the reality of female reproduction because it is undesirable to contemporary feminist positions. Supporting the rights of a pregnant woman is integrally different than simply supporting rights of a woman, *because* of the child that is being produced. In other words, even though pre-natal care benefits the woman and the fetus, the reason it is necessary for the woman is because she is pregnant, not because she is a woman. Yet even distinguishing between pregnant and

non-pregnant women can be viewed as a violation of women's human rights as it discriminates women based upon their reproductive capacity (Post, 1997; Amnesty International, 2017). This underscores a sort of dissonance in the human rights framework, which, in this instance, aims for equality beyond reasonableness.

Tobin (2019) includes in their commentary examples of another sort of persistent dissonance dating back to the drafting period of the CRC. While the unborn child is not recognized as a rights-bearer under the CRC, various inclusions show indirect consideration for potential children. For example, article 24.2.d is not worded as a right to a child but the mother; however, it must be considered *why* the inclusion of a right to women belongs in convention embodying children's rights (UNGA, 1989); *why* the CRC Committee has included recommendations on women's access to abortion and not just as it relates to child-mothers (Janoff, 2004; CRC-Com, 2013); *why* the Central African Republic cite concern for children when considering prenatal and maternal care (Tobin, 2019). All these questions, when answered, are connected to the unborn children, not the woman. This is supported by the CRC GC 15, which specifically acknowledges that "[t]he care that women receive before, during and after their pregnancy has profound implications for the health and development of their children". Additionally, CRC GC 9 "recommends that States parties introduce and strengthen prenatal care *for children*" (para. 53).

Advocacy for women to not be intrinsically tied their reproductive role is not misled. For centuries women have been denied autonomy and confined to a maternal role regardless of their will and passions (Ginsburg & Rapp, 1991). However, it can be said that swinging from one extreme end to another will not succeed in dismantling patriarchal views of maternity. Thus, rather than liberating women from reproductive responsibilities at the potential children's expense, the rights of women and children should be "considered together, [so] they can reinforce each other and make mutually supportive demands on society" (Ginsburg & Rapp, 1991, p. 21). Arguably, the categorization of "potential children" can simplify the abortion debates that have greatly influenced international standards and recognize the free-will of women by permitting recognition of rights to fetuses that are only *intended* to be brought-to-term and born. The conflict of rights that exists between the unborn and living are unique and complex and so require their solutions to be the same. Regardless of situation, the interests of one should not be unfairly balanced against the interests of another.

2. Implementation

This section will explore methods of implementation by first recognizing the dilemmas and conflicts that should be aimed to be avoided. This will be include a short commentary of potential solutions

2.1. Issues

When considering the protection of potential children from a human rights perspective, it would be essential to acknowledge that some approaches would be problematic and not sufficiently balance the rights of parent and child. Imprisoning or criminalizing pregnant women for drug use, for instance, is a punitive measure that fails to address the underlying issues of addiction and can result in more harm than good for both the mother and child (Hui & Fisher, 2017; Amnesty International, 2017). This approach disregards the rehabilitative needs of the mother, who may require medical treatment, counseling, and support rather than incarceration. Such policies can exacerbate health risks for both the mother and child, disrupt family units, and place additional strains on social services, ultimately failing to provide the necessary protection and care that both parties require (North, 2019; Amnesty International, 2017; Newman, 2017; Stone, 2015).

Moreover, punitive measures disproportionately affect women from lower socio-economic backgrounds, exacerbating existing inequalities and perpetuating cycles of poverty and marginalization (Kavattur et al., 2023). These women are often already vulnerable, facing limited access to healthcare, education, and economic opportunities. By focusing on punitive rather than protective measures, we neglect the broader socio-economic factors that contribute to substance abuse and other behaviors deemed harmful during pregnancy.

In this context, however, the idea of having a child as a right must be reconsidered as a privilege that comes with responsibilities, including societal support to ensure that potential parents are able to provide safe and nurturing environments for their children. Policies should aim to protect and empower, rather than punish, recognizing the complex interplay of individual rights and societal obligations in promoting the well-being of future generations. Furthermore, parenthood should be given its full weight and not categorized as an accomplishment entitled to everyone.

2.2. Solutions

To implement the rights of potential children effectively, a creative and adaptive approach is necessary. The categorical difference between potential children and living children may be the best

starting point for a pragmatic approach. Aiming to secure only negative obligations for the potential child seems to have merits. In other words, only guaranteeing a right to be free of explicit harm seems more practical than legally implementing an "obligation [of parents] to produce the 'best' child they can" (Kavka, 1982, p. 106). Though children are always deserving of best treatment possible, typically positive obligations that are within the ability of the parent are also within the scope of parent discretion. For example, parents may decide to provide their child with a daily multi-vitamin or skip it based upon their own volition; however, they cannot completely neglect the nutrition and health of their child. The same can be true for a pregnant woman making an informed decision to skip pre-natal vitamins (Wanjari et al., 2023) but cannot skip all recommended prenatal care as this could cause harm. Nonetheless, a more in-depth discussion should consider the rights that potential children should or should not have in comparison to the rights that living children do or do not have.

Some drastic approaches could include states enforcing laws that prohibit behaviors known to harm fetal development. Banning the sale of alcohol and tobacco to pregnant women could limit opportunities to engage in activity that threatens fetal health. Parents that have a history of child removals stemming from abuse and neglect could be required to take birth control or medical intervention to prevent further procreation to safeguard potential children. These are all quite controversial and may prove to be more detrimental, though more research and consideration is warranted.

Less drastically, states already have a critical role in mitigating poverty and increasing access to information as part of their responsibility to protect potential children. Addressing socio-economic determinants of health and deviant behavior by implementing policies that reduce poverty can create a more conducive environment for healthy pregnancies and childhoods untainted by abuse. Programs that provide accessible, comprehensive information about birth control, prenatal care, nutrition, and the dangers of substance abuse can empower individuals to make informed decisions that benefit potential children. These solutions should be adaptable and informed by evolving research and data, ensuring that they remain effective in promoting the best interests of potential children. This thesis has emphasized the potential child as an individual; however, mitigation should not be limited and include consideration for all future generations (OHCHR, 2018).

Ultimately, policies should be designed to prioritize the well-being of the potential child, supporting a balanced approach that respects the rights of all parties involved while fostering healthier future generations. While Peleg and Tobin (2019) sought to denounce approaches that regard children as "human becomings" versus "human beings" (p.226), perhaps categorizing potential children as the

former is the best approach as they are, in fact, becoming humans. This would limit the applicability of some human rights but still offer recognition to potential children as being a part of the human species.

3. Philosophies and Theories

"It is depressing, not comforting, to realize that most people are accidents"
(Fletcher, 1984, page 36)

Consideration of the potential child in the context of this study necessitates an exploration of moral, ethical and philosophical ideas of existence and procreation. Scholars have contributed multiple differing assertions of whether non-existence may be preferable to existence, particularly when the latter entails significant suffering. These interpretations are further relevant due to the evolving legal principles relating to a right to die through elective euthanasia, as well as wrongful life and wrongful birth civil claims. These occurrences demonstrate that philosophical deductions on the value of life can and have influenced legal response.

3.1. Procreation Ethics

Rivka Weinberg's scholarship has been identified as one of the most aligned with the essence of this study through her many publications on bioethics and procreation ethics. Weinberg tackles multiple viewpoints within these field's but generally agrees with the inherent badness of life but does not assert existence is always wrong. Weinberg supports applying a Rawlsian Contractualist approach to procreative justice as it "doesn't seek the *best* outcome for *particular* individuals; it seeks the set of principles that would result in a *society* that is *justifiable* to each of its members." (Weinberg, 2002, p. 407). Weinberg (2002) doesn't provide a clear answer to whether a child has a right not to be born but would support a child having a right not to be wronged by their parent not "abiding by just procreative principles" (p. 407)

3.1.1. Versus Parfit. Derek Parfit's non-identity problem (NIP) establishes that conception at one time produces an entirely different being/identity than conception at another time (Robert, 2022). Parfit assumes that non-existence is less bearable than any other conditions of existence (Parfit, 1984; Woodward, 1986). Therefore, he posits that any actions affecting future individuals cannot be regarded as harmful to them if those actions are integral to their very existence. If a child is born with a

hereditary condition that could have been avoided had the parent with the hereditary condition not chose to reproduce, it is difficult to claim that the child has been harmed since the alternative would be their non-existence. Thus, Parfit would deny interventions for the potential child that would conclude their life would be better not lived. Interestingly, Parfit's attention to conception at one time or another impacting identity or non-identity, also reasons that in utero manipulation of any sort alters the identity from original conception, though no identified source has mentioned this.

Weinberg (2008) cites multiple philosophers that attempted to refute the NIP. For example, Woodward's (1986) argues that no benefit can negate harm or wrongdoing, thus existence is not payment enough for the debt of negligent procreation. Weinberg's (2008) thesis is that "merely possible people, i.e., hypothetical people who could possibly, but will not actually, exist, are morally irrelevant" (p. 3). This position dissipates the NIP by supporting:

> "existence *per se* is not an interest that future people have, especially since nonexistence is *not* an alternative for them. Nonexistence is only an alternative for a merely possible person; it has no bearing on the interests (or rights) of any real person (present or future)" (p. 7).

Additionally, Weinberg (2002) counters NIP with Contractualism by stating that the approach "easily avoids making claims of procreative harm to identified individuals who have a life worth living and thus easily avoids the NIP" (p. 407)

3.1.2. Versus Benatar. David Benatar's antinatalist philosophy asserts that coming into existence, no matter the circumstances, is always a harm. Benatar (2006) argues that life inevitably involves suffering, which outweighs any potential pleasure. Benatar (2006) claims there to be an "asymmetry between pleasure and pain" (Weinberg, 2012, p. 27), and maintains that the absence of pleasure is only bad if there is someone to feel deprivation and the absence of pain is always good, even if there is no one to enjoy that good (Weinberg, 2012). From this perspective, not bringing a potential child into existence is preferrable to the unavoidable harm of existence. Weinberg (2012) counters Benatar based upon the inability to prove without a doubt that "procreation is always wrong due to the badness of life" suggesting "[p]eople may be the sort of creatures born to enjoy their suffering" (p. 34). Overall, Weinberg (2012) agrees with Benatar's sentiments but denies that it can be regarded as objective citing "that most people not only do not regret being brought into existence but, to the contrary, are glad of it" (p. 36)

3.2. Right to ~~die~~ [not live]

As has been previously mentioned, influence of this thesis has come from the philosophical question “should a child have a right not to be born?”. Such a right would be like voluntary euthanasia as it grants autonomy in the decision of living or dying. Philosophies that justify euthanasia often center on the principles of autonomy, mercy, and the alleviation of suffering. Advocates argue that individuals should have the right to end their lives to escape unbearable pain, thus prioritizing personal choice and quality of life.

In the children rights framework, the CRC has not established explicit rights for children to have access to voluntary euthanasia. However, it has expressed concerns about the practice of voluntary euthanasia for children aged 12 and older in the Netherlands, urging its reconsideration. Tobin (2019) observes that “clearly the Committee has some anxieties about assisted dying for children” (p. 918).

3.3. Wrongful Birth/Life

“I want adults who can't raise kids not to have any.”
(Labaki, 2018)

Wrongful birth and wrongful life claims emerged as legal concepts in the mid-20th century, primarily in the United States and Europe. Wrongful birth claims are brought by parents, alleging that negligent medical advice or treatment deprived them of the choice to avoid conception or terminate a pregnancy, resulting in the birth of a child with disabilities. Wrongful life claims, conversely, are initiated on behalf of the child, asserting that they would have been better off not being born. These claims have seen varying degrees of success; for instance, wrongful birth suits seen success in some Western states, where courts have awarded damages to cover the additional costs of raising a child with disabilities. Wrongful life claims, however, have faced greater judicial resistance due to the philosophical and ethical challenges in asserting that non-existence is preferable to a life with disabilities.

There have not been any notable claims having to do with situations other than disability. For example, wrongful life claims have not been filed against parents who have birth children into poverty, conflict zones, or other instabilities. The fictional film "Capernaum" is relevant to this discussion as it poignantly depicts a young Lebanese boy suing his negligent parents for bringing him into a life of

extreme hardship and suffering. This narrative encapsulates the essence of wrongful life claims and highlights the profound ethical dilemmas surrounding the right to be born and the right to a life worth living.

4. Conclusion

This study has demonstrated that consideration of the potential child reveals a profound intersection of legal, ethical, sociological and philosophical considerations. Current international laws, while comprehensive in many respects, fall short of explicitly recognizing the rights of potential children. However, the principles underlying the Convention on the Rights of the Child (CRC) provide a compelling foundation for such recognition.

This thesis has argued that extending rights to potential children is imperative to public health and societal function. Furthermore, it has presented concerning attitudes and trends that threaten to prevent achievement of human rights equilibrium. The essence of human rights is to safeguard the dignity and worth of every individual, and this protection should logically extend to the potential child who waits at the threshold of life. By considering the potential child, the continuum of human existence and the inherent value that each stage of development holds is acknowledged.

The philosophical underpinnings of this argument challenge us to reconsider the boundaries of existence, personhood and the ethical obligations owed to those who are not yet born. In doing so, the fundamental question of what it means to be human is confronted. The potential child, though not yet a bearer of rights, embodies the future of humanity and, as such, warrants protection and consideration within our legal frameworks.

Recognizing the rights of potential children would necessitate a paradigm shift in how issues of reproductive autonomy, parental obligations, and child protection are approached. It demands a delicate balance between the rights of parents, pregnant women, fetuses, and those potential children not even thought up yet, ensuring that neither is unfairly subordinated to the other but that both are harmonized within a comprehensive and reasonable human rights framework.

In conclusion, the incorporation of potential children's rights into international law is both a logical extension of existing human rights principles and a necessary evolution in our understanding of justice and bioethical responsibility. It is imperative that these complex issues are researched, and approaches adapt, being always guided by a commitment to uphold the dignity and worth of all life, aiming to ensure it is worth its creation.

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