Kronieke / Chronicles

The Unborn and A, B, & C v Ireland

1. Introduction

A, B, and C v Ireland (*ABC*-case) arose from an application lodged on 15 July 2005 to the European Court of Human Rights, which was directly referred to the Grand Chambers[1] (thus indicating the importance of the case) for a hearing which commenced on 9 December 2009. The complaints were briefly the following: the third applicant[2] complained that the restriction on abortion, and the lack of clear legal guidelines regarding the circumstances in which a woman may have an abortion to save her life, infringed upon her right to life under Article 2 of the European Convention on Human Rights. All three applicants[3] complained that the restriction on abortion stigmatised and

1 Cases are also sent to the Grand Chamber when relinquished by a Chamber, but this takes place only in exceptional instances. The Chamber to which a case is assigned can relinquish it to the Grand Chamber if the case raises a serious question affecting the interpretation of the Convention (or if there is a risk of inconsistency with a previous judgment of the Court).

2 The third applicant, before commencing chemotherapy treatment for cancer, asked her doctor about the implications of her illness as regards her desire to have children. She was advised that it was not possible to predict the effect of pregnancy on the cancer but, if she did become pregnant, it would be dangerous for the foetus if she underwent chemotherapy during the first trimester. The cancer went into remission and the applicant unintentionally became pregnant. She was unaware of this fact when she underwent a series of tests, contraindicated during pregnancy, to determine her current state of health. When she discovered she was pregnant she was unable to find a doctor willing to make a determination as to whether her life would be at risk if she continued to term or to give her clear advice as to how the foetus might have been affected by the tests she had undergone. Given the uncertainty about the risks involved, the applicant decided to have an abortion in the United Kingdom. Although her pregnancy was at a very early stage she could not have a medical abortion (where drugs are used to induce miscarriage) because she could not find a clinic which would provide this treatment to a non-resident because of the need for follow-up. Instead she had to wait for eight weeks until a surgical abortion was possible, which caused her emotional distress and fear for her health. On returning to Ireland after the abortion, the applicant suffered the complications of an incomplete abortion, including prolonged bleeding and infection. Official webpage of the European Court of Human Rights, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=835487&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (accessed 28 September 2009).

3 The first applicant was unmarried, unemployed and living in poverty at the time of the events in question. She became pregnant unintentionally, believing that her partner was infertile. She had four young children, all at that time in foster care as a result of problems the applicant had experienced as an alcoholic. During the year preceding her fifth pregnancy the applicant had remained sober and had been in constant contact with social workers with a view to regaining custody of her children. She considered that a further child at this critical stage in her life would jeopardise

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humiliated them and risked damaging their health in breach of Article 3 of the said Convention (which deals with torture, inhuman or degrading treatment or punishment). They further complained, in the context of Article 8 of the Convention (right to respect for family and private life), that the national law on abortion was not sufficiently clear and precise, since the Constitutional term "unborn" was vague and the criminal prohibition was open to different interpretations.[4] The fact that it was open to women — provided they had sufficient resources — to travel outside Ireland to have an abortion defeated

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the successful reunification of her existing family. She decided to travel to England to have an abortion. The United Kingdom National Health Service refused to carry out the operation at public expense and she had to borrow the money for treatment in a private clinic from a money lender. Her difficulty in raising the money delayed the abortion by three weeks. She had to travel to England alone, in secrecy and with no money to spare, without alerting the social workers and without missing a contact visit with her children. On her return to Ireland she experienced pain, nausea and bleeding for eight to nine weeks, but was afraid to seek medical advice because of the prohibition on abortion. The second applicant was single when she became pregnant unintentionally. She had taken emergency contraception (the "morning-after pill") the day after the unprotected intercourse, but she was advised by two different doctors that this had not only failed to prevent the pregnancy but also given rise to a substantial risk that it would be an ectopic pregnancy, where the foetus develops outside the uterus. The applicant was not prepared either to become a single parent or to run the risks associated with an ectopic pregnancy. She travelled to England for an abortion. On her return to Ireland she started passing blood clots and, since she was unsure whether or not this was normal and could not seek medical advice in Ireland, she returned to the clinic in England two weeks after the abortion for a check-up. The impossibility for her to have an abortion in Ireland made the procedure unnecessarily expensive, complicated and traumatic. Official webpage of the European Court of Human Rights, http://cmiskp.echr.coe.int /tkp197/view.asp?action=html&documentId=835487&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (accessed 28 September 2009).

4 The Irish courts relied upon various pieces of domestic legislation (for example, sections 58 and 59 of the Offences Against the Person Act 1861 ("the 1861 Act"); section 58 of the Civil Liability Act 1961; section 10 of the Health (Family Planning) Act 1979; and sections 2, 5 and 8 of the Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995), also including the Constitution (a referendum was held in 1983 resulting in the adoption of a provision which became Article 40.3.3 of the Irish Constitution, the Eighth Amendment (53.67% of the electorate voted with 841,233 votes in favour and 416,136 against) – this Article, a self-executing provision of the Constitution not requiring legislation to give it effect, reads as follows: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right") and relevant court decisions. In 2002, a third referendum on abortion was called to decide on the proposed Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill. The said Bill proposed to permit abortions to be lawfully provided in Ireland at specific institutions but only when, in the opinion of the doctor, it was necessary to prevent a real risk of loss of the woman's life, other than self-destruction. The referendum of March 2002 resulted in the lowest turnout in all three abortion referenda (at 42.89% of the electorate) and the proposal was defeated (50.42% against and 49.58% in favour). Official webpage of the European Court of Human Rights, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&d

the aim of the restriction. The restriction was, in addition, discriminatory and therefore in breach of Article 14 of the Convention in that it had placed an excessive burden on them, as women, and particularly on the first applicant, a poor woman, who had found it more difficult to travel.[5]

Bearing in mind the weight of the matter, as well as the potential degree of authority that the said judgment might have in future pertaining to the legal status of the unborn (both internationally and domestically)[6], this investigation serves to postulate an approach to be taken by the European Court of Human Rights when it comes to deciding on such an important and contentious matter. This investigation is neither an argument exclusively for the "pro-life" sector nor about an unsympathetic approach towards the pregnant woman in circumstances where her health is seriously threatened. Rather, it is about constructively and critically seeking, as far as is possible, a balance between protecting the interests of the mother on the one hand, and those of the unborn on the other. This needs to be understood against the background of supporting the interests of the unborn *as well*, something that has been neglected in a contemporary mainstream Western jurisprudential pro-choice climate. Although much development has taken place in international and human rights law (especially pertaining to the woman and child), the international community has neglected to approach the legal status of the unborn from a more urgent and concerted angle,[7] hereby symbolising a disregard towards the unborn. There is a profusion of pro-choice jurisprudence that, since the 1970s, has dominated Western jurisprudence on the unborn, and which has, in the process, excluded any views to the contrary.[8] It is this imbalance that this note addresses by looking specifically at the position of the unborn, and the role that the European Court of Human Rights in the *ABC*-case can play in considering the protection of the unborn *as well*. Whatever the outcome, the *ABC*-case will serve as authority in future abortion jurisprudence, and therefore it is important to present concerns pertaining to that part of the mother-unborn relationship which has received scant attention since the monopolising effect of *Roe v Wade*[9] over three decades ago. Freeman states:

> The independent legal significance of the unborn child's life must be determined independently of the woman who carries it. Only then can the interests of the unborn child be weighed accurately in relation to the rights and interests of the woman during pregnancy. The total effect of any laws regarding abortion, contraception, and family support must be

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5 Official webpage of the European Court of Human Rights, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=835487&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (accessed 28 September 2009).

6 This case has already been referred to by some as the "Roe v. Wade" of Europe.

7 This is clear from the volumes of popular modern-day Western jurisprudence which reflects an emphasis on the rights of the pregnant woman whilst little is said pertaining to the unborn.

8 See, for example, De Freitas 2001:107-127.

9 410 US 113 (1973).

> 'to support and protect the value of human life,' which is central to the European Convention … 'everyone's right to life' within the European Convention of Human Rights, and the historical abuse of life which spurred its conception, permit nothing less than a clear, principled vision of humanity to which law and society must cling.[10]

In this regard, much is expected of the *ABC*-case in improving on the non-existent efforts in contemporary international law pertaining to sensitivity towards the unborn. International law is inundated with arguments and international instruments supporting the protection of the pregnant woman's rights, which has led to an unbalanced approach in international jurisprudence on the relationship between the interests of the unborn and the rights of the pregnant woman. In addition, and with specific reference to the European Court of Human Rights' stance on the issue, the perceived views on the moderate approach that the said court has taken on abortion[11] serve as added motivation that the Court provide a more direct and unique contribution to jurisprudence on the unborn by saying more than that which has been said to date regarding the interests of the unborn. Judge Borrego's dissenting opinion in *Tysiac v Poland*[12] provides the awareness that such a moderate approach by the said court may imply an emphasis on the rights of the pregnant woman, which indirectly negates the interests of the unborn.[13] According to Hewson, the European Court of Human Rights in *Vo v France*[14] neatly side-stepped the questions of whether the unborn child is a "person" for the purposes of Article 2 of the European Convention of Human Rights, and whether its termination falls within the scope of that Article. In the words of Hewson: "Fudging the issue, the Court stated with Delphic obscurity: 'as to the instant case, it considers it unnecessary to determine whether the abrupt end to the applicant's pregnancy

10 Freeman 1994:665. Freeman also states: "The meaning of 'everyone,' therefore, may vary throughout the European convention. 'Everyone' may consist of a variety of 'natural or legal persons,' depending on the nature of and the reasonable recipient of the right granted, and on the context of a particular Article. The Court must determine whether this legal philosophy leads to the conclusion that 'everyone' includes the unborn child". Freeman 1994:653. Also see Freeman 1994:661.

11 See Goldhaber 2009:2.

12 European Court of Human Rights (Application no. 5410/03), 20 March 2007.

13 *Tysiac v Poland* 2007:38-42. In the words of judge Borrego: "The Court appears to be proposing that the High Contracting Party, Poland, join those States that have adopted a more permissive approach with regard to abortion. It must be stressed that 'certain State parties' referred to in paragraph 123 allow 'abortion on demand' until eighteen weeks of pregnancy. Is this the law that the Court is laying down to Poland? I consider that the Court contradicts itself in the last sentence of paragraph 104: 'It is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion' … I consider that the Court's decision in the instant case favours 'abortion on demand', as is clearly stated in paragraph 128: 'Having regard to the circumstances of the case as a whole, it cannot therefore be said that … the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion". *Tysiac v Poland* 2007:41.

14 53924/00, Eur. Ct. H.R., 8 July 2004.

falls within the scope of Article 2.'"[15] It is therefore postulated that the *ABC*-case provides a more balanced approach when comparing the interests of the pregnant mother and those of the unborn with one another. This note therefore (and as stated earlier) should not be understood as reflecting insensitivity towards the pregnant woman, but emphasises the insensitivity towards the unborn resulting from an over-sensitivity towards the rights of the pregnant mother. Having said this, it would be wise to comment briefly on a more specific approach to be taken, bearing in mind the insensitivities towards the pregnant woman that may arise from postulations on the protection of the unborn (this is dealt with in the proceeding section). This should be understood against the essential theme of this investigation, namely that the European Court of Human Rights, as an important law-making body in international law, play a more direct role in the development of international jurisprudence on the protection of the unborn.

15 Hewson 2005:365. Looking at the record of the European Court and Commission regarding cases directly linked to the unborn it becomes clear that these have not attempted a concerted effort at dealing with the status of the unborn. For example, Freeman observes that although confronted with the issue in 1992, the European Court of Human Rights avoided defining whether "everyone's right to life" includes the unborn child (*Open Door & Dublin Well Woman v Ireland*, 246, Eur. Ct. H.R. (ser. A) at 27-28 (1992)). Freeman 1994:616 and 645. Freeman also observes that, "a vehement dissent by Judge Blayney also accused the Court of ignoring Ireland's duty to protect the unborn 'right to life' guaranteed by the Irish Constitution …". Freeman 1994:645. In *Brüggemann and Scheuten v Federal Republic of Germany* (App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100 (1977) (adopted Jul. 12, 1977), the Commission did not address the unborn child's right to life in relation to the protections granted by Article 2 of the European Convention on Human Rights. Freeman 1994:636. In *X v United Kingdom* (App. No. 8416/78, 19 Eur. Comm'n H.R. Dec. & Rep. 244, 3 Eur. H.R. Rep. 408 (1980)), the facts of the application did not concern "the broad question as to whether Article 2 recognises a "right to life" of the foetus during the whole period of the pregnancy", but only whether that right, if it exists, overrides the woman's right to procure an abortion early in the pregnancy when necessary to protect her life and health. Freeman comments that the Commission, therefore, did not determine whether Article 2(1) recognised a 'right to life' of the foetus with implied limitations or whether Article 2(1) did not protect the unborn child at all. Freeman 1994:639-640. In this regard, Freeman refers to Sheila Grant's view that: "The European Commission and European Court cannot balance effectively the relative rights of other parties under the Convention, including the woman carrying the unborn child, without determining whether the unborn child also is recognized". Freeman 1994:646. Then there are also the two decisions of the European Commission, namely *X. v Norway* (App. No. 867/60, 6 Eur. Comm'n H.R. Coll. Dec. 34 [1961]) and *X. v Austria* (App. No. 7045/75, 7 Eur. Comm'n H.R. Dec. & Rep. 87 [1976]) where the application was ruled inadmissible because the applicant was not "personally affected", and therefore was not a victim as required by Article 25 of the European Convention on Human Rights. The applications were lodged "on behalf of those taken away by abortion who are unfit and unable to plead on their own behalf". Freeman 1994:627 and 631. In this regard, Freeman rightly states: "Providing an effective remedy may require re-evaluation of the 'victim' requirements under Article 25 to permit a representative to bring an application when an unborn child's right to life is violated under the Convention". Freeman 1994:662.

Consequently, this investigation briefly emphasises essential traits of international law (including substantial recent developments), which prove to be conducive to the proposals of this investigation. Following on this, the ambiguity in contemporary international law regarding a clear interpretation of the "right to life" and of the "unborn" is unveiled, together with the European Court of Human Rights' 'moderate' approach towards the unborn. On the one hand, this poses problems and complexities for the *ABC* case, while on the other hand, such uncertainty provides the opportunity for the said European Court of Human Rights to delve deeper and more sensitively towards a consideration and consequent recognition of the legal protection of the unborn. In conclusion, certain proposals are provided as to how a court should approach such a complex and contentious issue, hereby presenting crucial expectations for such a case. In this regard, the emphasis is placed on an impartial (bearing in mind the impossibility of neutrality) approach enriched by meaningful dialogue, which also introduces more rationality and sensitivity to the issue at hand. Participants to the argument will be required to argue in a non-arbitrary manner, with a mind open to persuasion by the evidence and the submissions of counsel. To do otherwise would be opposed not only to expectations of impartiality, but also to the expectations emanating from an international law paradigm which is (should be) sensitive towards the protection of, and respect for, the individual and humanity, and consequently also of the unborn. The European Court of Human Rights should therefore try its utmost to be open to diverse opinions on the matter and to provide a unique contribution towards international jurisprudence on the importance of the unborn *as well*.

2. International law and the unborn

After World War II, international law moved away from consisting simply of agreements and rules between states, and now involves human rights and humanitarian requirements serving as rules applicable to all states and also applicable to the relationship between each state and its citizens. International human rights instruments and jurisprudence carry with them much authority and popularity. International law is also rapidly changing in nature, from the view that international law only regulates the relationships between states against the background of positivism, to an understanding of international law as also serving the protection of the fundamental rights of the individual, based on a universal morality. At the basis of this understanding lies the concern for the protection of mankind, an issue which is inextricably linked to the question of the beginning of life, the parameters of human dignity, and of being human. Jenks observes that the founders of modern international law, Vitoria, Suarez and Grotius, proceeded each in their several ways upon the hypothesis that "the individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that the development, the well-being and the dignity of the individual human being are a matter of direct concern to international law".[16] Human

16 Jenks 1954:5. Also see Paul 1995:319. The preamble to the United Nations Charter, par. 1: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and

rights and "being human" are inextricably connected to one another.[17] If it is critical for the law in general, including international and human rights law, to see how it can protect the individual, then it is also important to address the legal status of the unborn from an international law perspective — the *ABC* case provides such an opportunity.

Although the provisions in human rights treaties are stated in such a way as to grant a right to "everyone" or to all "human beings", none of these terms have been closely defined by international organs, and the United Nations is no exception.[18] Alston states that most of the international human rights instruments, although recognising the right to life, are silent on the issue of whether or not some or all of the protections accorded under the provisions should be given to the unborn child.[19] The Universal Declaration of Human Rights (UDHR), which does not constitute binding law, was adopted by the United Nations General Assembly in 1948, and has inspired all subsequent human rights conventions and declarations. The preamble provides for "equal and inalienable rights of all members of the human family". The right to life clause (Article 3) does not provide clarity on whether the unborn should be protected. Even in the treaty law emanating from the said declaration, there is no clarity on the legal status of the unborn. The International Covenant on Civil and Political Rights (ICCPR) states in Article 6(1): "Every human being has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Joseph *et al*[20] are of the opinion that the Human Rights Commission (HRC) did not adopt the anti-abortion argument,

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peace in the world"; par. 3: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person"; and par. 5: "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person … ". Bederman speaks of the pendulum of natural and positive approaches to international legal obligation which has swung back to a more neutral position in which the international community recognises values separate and apart from State sovereignty. In this regard, the world has managed to place State concerns alongside the principle of protecting and extending the dignity of individual human beings, Bederman in Weston *et al* 2006:39. Even theorists who have denied individuals any status in international law have dealt in detail with rules of international law designed for their protection. Oppenheim, for example, without conceding that men are the ultimate subjects of the law, states very clearly that, "the individual is often the object of international regulation and protection", and this statement has been elaborated into the proposition that "individuals are the ultimate objects of international law, as they are, indeed, of all law". Jenks 1954:33. If it is the case that international human rights norms are inclusive of respect for the dignity of all human beings, and that international law is ultimately aimed at the protection and well-being of the individual, then any failure to address the recognition of the unborn in more substantial terms, would be diametrically opposed to the supra-aims of international and human rights law.

17 Sloane 2001:553. If "humanity" serves as the common denominator in human rights discussion, and if human rights are deeply inclusive however culturally and historically diverse, then, again, failure to provide effort toward some or other recognition of the unborn may be seen as a failure to extend respect where it is warranted.

18 Ibegbu 2000:105.

19 Alston 1990:156.

20 Joseph *et al* 2000:135.

stating that abortion constitutes a breach of the right to life of the unborn but has rather "focused on the human rights detriment of anti-abortion laws". The HRC confirmed that abortion is compatible with Article 6, and that anti-abortion laws may breach Article 6.[21]

The European Convention on Human Rights (ECHR) is an essential part of the political order of Europe and directly applicable to the ABC-case. "Everyone" in Article 2 (dealing with the right to life) is not defined. No mention is made of the legal status of the unborn and any development in enhancing the legal status of the unborn seems very limited:

> It is submitted that if this question of a general 'right to life' of the unborn were again raised before the European Court, the right would not be elevated above the 'right to health' of the woman concerned. It is also inconceivable that the European Court, with its virtually all-male composition, could decide on a matter that affects women so closely.[22]

Some cases deal with the interpretation of Article 2 of the said Convention. In the case of *Paton v U.K.*[23] the application of Article 2 to the unborn was considered. Scott mentions that what the European Commission actually said was that it did not have to decide whether the "foetus" had a right to life. In this way, the decision left the question of the extent to which Article 2 applied to the "foetus" very open.[24] In general, the European Court of Human Rights in *Vo v France* decided on a neutral stance,[25] again avoiding answering the question of the legal status of the unborn. O'Donovan is of the opinion that the judgment in *Vo v France* would appear to have been driven by policy fears in terms of upsetting a form of settlement on the application of the margin of appreciation to domestic laws on abortion that has been arrived at within the States Parties to the Convention. In other words, there is a consensus on non-

21 Joseph *et al* 2000:138.

22 Nöthling-Slabbert 1999:352. This analysis, though, is surely incorrect in that the "maleness of the judiciary" is no reason for their being able to rule on matters that touch upon "gender" any more than the race or religious beliefs of the judiciary exclude them from participation in cases involving race or religion. Regarding the *ABC* case, the judges are representative of many countries whose domestic jurisprudence approaches the unborn with respect.

23 (1981) 3 E.H.R.R. 408.

24 Scott 2004:351.

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

interference with each jurisdiction's legislation.[26] As stated earlier, the *Tysiac v. Poland* judgment also (together with the Vo v. France judgment) reflected a moderate approach regarding the interests of the unborn.

The Convention on the Rights of the Child (CRC) has the most States Parties of any of the major UN human rights treaties.[27] In the preamble, reference is made to the Declaration of the Rights of the Child, stating that the child, "by reason of his physical and mental immaturity, needs special safeguard and care, including appropriate legal protection before and after birth." The CRC preamble refers to the need for appropriate legal protection applicable "before as well as after birth". However, this preamble essentially represents a compromise on the irreconcilable views of two groups of countries concerning the moment when childhood begins. One group believed that childhood begins at birth, while the other group believed that childhood begins at conception.[28] The preamble protects the unborn by providing "special safeguards and care" due to "physical and mental immaturity". However, the scope of "special safeguards", "appropriate" and "legal protection" remains uncertain.[29] According to Alston, although the preamble could suggest that a wide range of measures exists by means of which the interests of the unborn child can be promoted and protected without going so far as to recognise a right to life from the moment of fertilisation, the vagueness of the preambular provision and its failure to address any of the complex issues which a right to life of the unborn would raise, serve to reinforce the assumption that it could not have been intended to have any precise operational implications.[30]

Article 1 (of the CRC) defines a child as "every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier." The phrase 'every human being' is not elaborated upon and once again, the legal status of the unborn is not dealt with. The problem arises with the fact that while a majority age for the child is given, namely 18 years, no minimum age is indicated to determine to whom the Convention will apply. Article 6 requires parties to recognise every child's inherent right to life and the obligation to ensure, to the maximum extent possible, the "survival and

26 O'Donovan 2006:120.
27 Joseph *et al* 2000:468.
28 Cantwell in Detrick 1992:26.
29 Cantwell confirms that there were two groups of countries with opposing and irreconcilable viewpoints: what divided the two groups was whether childhood begins at birth or at conception. The discussions did not bring any conclusion as to what the definition of a child was in Article 1. Any decision would either permit or outlaw abortion. Cantwell adds that there was one point on which all could agree. As stated in the 1959 Declaration on the Rights of the Child, the child needs special safeguards and care, including appropriate legal protection, both before as well as after birth. The Working Group reached consensus that there would be no mention of a minimum age in Article 1. Cantwell in Detrick 1992:26.
30 Alston 1990:174. Slabbert states that the United Nations is silent on whether the embryo is protected under the Convention on the Rights of the Child. Nöthling-Slabbert 1999:339.

development of the child".[31] Eriksson[32] agrees that Article 6, which guarantees the right to life, is of special importance to the abortion issue but that an examination of the *travaux préparatoires* reveals that a prospective life was not intended to be protected from the moment of conception. The proposal made by Belgium, Brazil, Mexico and Morocco to amend this provision in such a manner as to make it clear that the Article would apply "from the moment of conception", was rejected.[33] Article 6 describes "life" as "inherent" but still does not clarify whether it applies to the unborn. In other words, it is not stated whether life is inherent from conception or from birth. According to Mower[34], the Convention's assertion of an "inherent right to life" is not to be taken as an attempt to resolve the debate over the practice of abortion. The issue with which the group dealt was not the precise moment at which the right to life becomes operative but the wider and highly controversial issue of the rights of the unborn child. The question of whether "child" was to include the unborn as well as the born was, in effect, left to be answered by implication through a compromise version of Article 1 of the said Convention.[35]

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31 1. "State 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."

32 Eriksson 2000:310-311.

33 Petersen also observes that, while elaborating the CCPR, a group of five states, including Belgium, Brazil, El Salvador, Mexico and Morocco, proposed formulating Art. 6 in such a way that human life is protected from the moment of conception, Petersen 2005:450.

34 Mower 1997:28-30.

35 Sloth-Nielsen 1995:411-412 also expresses the view that Article 6 "was the result of compromise, and the view has been expressed that the said section will not be interpreted as either permitting or prohibiting abortion. In other words, the issue has been left open." The issue of abortion was raised during the session in which the draft was given the second and final reading before being sent to the General Assembly for possible adoption in 1989. Alston 1990:156-157. After public debate and negotiations, it was agreed not to deal with the matter in the operative part of the Convention but rather to include it in the sixth preambular paragraph: "The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". Alston 1990:157. Every paragraph of the Convention was subject to debate and a number of issues came to the fore. One of the issues of controversy regarding this convention was the definition of the minimum age of the child. The Basic Working text of Article 1 (as adopted by the 1980 Working Group, Working Group, 1980, E/CN.4/1349, 2), preceding the official text, defined a child as follows: "According to the present Convention a child is every human being from the moment of his birth to the age of 18 years, unless, under the law of his state he has attained his age of majority earlier". Working Group, 1980, E/CN. 4/1349, 2. Regarding the Considerations of the 1980 Working Group, 1980, E / CN. 4/L 1542, 5-6 the following: Paragraph 28 of the considerations documented (E/CN. 4/L 1542, 5-6) mentions a considerable debate on the initial and terminal points which define the child as contained in the Basic Working Text. In paragraph 29 it is further explained that some delegates opposed the idea that childhood begins at the moment of birth, as stated in the draft Article, indicating that this is contrary to the legislation of many countries. They argued that the concept should be extended to include the entire period from the moment of conception while other delegates asserted that the attempt to establish a starting point should be abandoned and that wording should be adopted which was

The inter-American system for the protection of human rights has two sources: the Charter of the Organization of American States (OAS) and the American Convention on Human Rights (1969) (ACHR). These two overlap and supplement each other. According to Shelton,[36] Article 1 of the American Declaration on the Rights and Duties of Man, first read: "Every person has the right to life. This right extends to the right to life from the moment of conception, to the right to life of incurables, imbeciles and the insane." The second sentence was later deleted and based on this deletion the Commission concluded that no protection was intended for the unborn. The ACHR, in Article 4(1), states that "every person has the right to have his life respected; this right shall be protected by law and from the moment of conception. No one shall be arbitrarily deprived of his life", while paragraph 5 states that capital punishment shall not be imposed upon persons who, at the time that a crime is committed, are under 18 years or over 70 years, nor shall it be applied to pregnant women. It is only in the ACHR that explicit reference is made to a pre-natal right to life. "Every person" is not defined but the unborn is given the right to life and protection ("… from the moment of conception").[37] Article 15(3)(a) of the Protocol of San Salvador to the American Convention on Human Rights also provides care for mothers before and after birth, thus indirectly providing care for the unborn. Although there are positive glimpses in the ACHR regarding the protection of the unborn, there is nonetheless elimination of explicit language protecting the unborn from a draft of the Declaration which indicates that there was no intent that such protection be extended to the unborn. Another basis for non-inclusion was the existence of abortion rights in a number of American states at the time of the drafting of the Declaration.[38]

The African Charter on Human and Peoples' Rights is the basis of Africa's continental human rights system. It entered into force on 21 October 1986, upon ratification by a simple majority of member states of the Organisation of African Unity (OAU).[39] Uncertainty exists however as to whether the right to life is granted to the unborn.[40] The Protocol to the African Charter on Human

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compatible with the wide variety of domestic legislation on this subject. Paragraph 30 (of the said considerations) states that the Moroccan representative proposed that the words 'from the moment of his birth' should be adopted which was compatible with the wide variety of domestic legislation on this subject. The first part of the Article was therefore adopted with the amendment proposed by Morocco. 1980 Working Group, E/CN.4/L1542, 5-6.

36 Shelton in Frankowski & Cole 1987:3.

37 Article 15 of the ACHR provides for the right to formation and protection of families, and a family is described as the neutral and fundamental element of society, which ought to be protected by the state. Paragraph 3 states that States Parties undertake protection of the family unit and (a) special care for the mother for a reasonable period before and after childbirth, (b) adequate nutrition for children at the nursing stage and during school, (c) protection of adolescents and (d) special programmes of family training.

38 Shelton in Frankowski & Cole 1987:2-4.

39 Wa Mutua 1995:339.

40 According to Petersen, the African Commission on Human Rights has not yet decided the question of whether the scope of Article 4 of the African Charter also includes forms of unborn life. As the wording of the provision resembles in its core

and Peoples' Rights on the Rights of Women in Africa entered into force on 25 November 2005. Article 14 of the said Protocol explicitly provides for "Health and Reproductive Rights", and infers the protection of the unborn in that legal protection for the unborn is denied in the case of rape, incest, sexual assault and where the pregnancy endangers the mental and physical health of the mother or the life of the mother (Article 14(2)(c)).

From the above it is clear that within international and regional law there is uncertainty as to whether or not the right to life of the unborn is protected. In addition, there have been no efforts regarding the establishment of international law platforms to take the discussions on the legal interests of the unborn further (nor have regional human rights courts said anything more decisive or direct on this issue).

On the one hand, this poses problems and complexities for the *ABC* case while, on the other hand, such uncertainty provides the opportunity and expectation that the *ABC*-case delve deeper, directly and more sensitively towards the legal protection of the unborn. This investigation is not aimed at presenting a specifically delineated proposal for the *ABC* case; however, it is pleaded that the said European Court of Human Rights aims to provide a unique and sensitive gesture towards the protection of the unborn. This the *ABC* case can only do by taking neither a neutral nor moderate stance on the issue (as in the past), nor by supporting only the rights of the woman, as well as by being sensitive to "hard" and "soft" cases regarding the qualification for abortion. It is true from the facts of the case that the European Court on Human Rights has to consider difficult situations, such as poverty, responsibilities by the mother towards already existing children, and serious health threats to both the mother and the unborn. However, this should not detract from the fact that the European Court of Human Rights must tread carefully in formulating its jurisprudence on the unborn, as whatever is ruled will surely be referred to in future. It is precisely the spectrum of interpretations that lies in words such as "poverty", "health", and "vulnerability" (issues specifically related to the *ABC* case) that may sway a court to make a decision which is aligned to the choice of the pregnant mother, especially within a Western contemporary climate that is overly supportive towards the pregnant woman's absolute right of choice.[41] In this regard, it is pleaded that the European Court of Human Rights ardently approach that sometimes elusive boundary between serious and less serious instances[42], and not, in the process, to negate the interests of the unborn.

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the wording of Article 6 of the CCPR, a similar line of argumentation may be used in interpreting the term "human being". Petersen 2005:457.

41 Although the inverse might also be important, chances are that words such as "vulnerability", "poverty", and "health" will slant rather towards a pro-choice interpretation given the dominant Western international jurisprudential climate on the issue.

42 The authors propose that serious cases be limited to rape, incest, threat to the life of the mother, serious foetal defect, and risk of serious emotional health of the mother — cases that Paulsen refers to as abortion "for reasons of self-defence". Factors that Paulsen refers to as abortion "for reasons of less morally defensible self-interest" are social convenience, economic convenience, gender selection, and getting back at the biological father. see Paulsen 2003:1021. A brief look at the

The European Court of Human Rights, in treading carefully, would be in accordance with Tomuschat's view that discourse on issues of international law must be accompanied by meaningful dialogue permitting the highlighting on a common basis of understanding any controversial issues – "discourse on what is right or wrong must be crystal-clear and should not fall into the hands of a few magicians who invariably are able to prove that law and justice are on their side."[43] To be open-minded is to be sensitive to the possibility that one may not yet have succeeded in being as impartial and as objective as one may have intended and hoped; that there may still be new facts to be discovered, old facts whose relevance has yet to be reassessed, new interpretations to be considered of the total situation or of certain aspects of it.[44] The European Court of Human Rights should be reminded that absolute neutrality is a chimera. This is because judges are human and therefore subjective elements do play a role in the judicial law-making process of the judge.[45] Neutrality, however, stands in contrast to judicial impartiality:

> Impartiality is that quality of open-minded readiness to persuasion without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views — that is the keystone of a civilised system of adjudication. Impartiality requires, in short, a mind, open to persuasion by the evidence and the submissions of counsel; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding.[46]

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facts of the *ABC* case unveils a mixture of both "reasons of self-defence" as well as "reasons of less morally defensible self-interest". For example, the third applicant, when she discovered she was pregnant, she was unable to find a doctor willing to make a determination as to whether her life would be at risk if she continued to term or to give her clear advice as to how the "foetus" might have been affected by the tests she had undergone. This, according to the authors, is a reason of self-defence for the pregnant woman. The same can be said regarding the second applicant's exposure to the substantial risk of an ectopic pregnancy. On the other hand, the reasons given by the first applicant was poverty, as well as the fact that she had four children placed in foster care as a result of her alcoholism. Having a fifth child would jeopardise her chances of a reunification of her existing family. The authors are concerned about the slippery slope that may arise regarding such instances. Freeman observes that: "Contemporary medical advances result in the pregnant woman's life rarely being placed at risk, and few abortions are necessary to preserve the woman's life or physical health. Most abortions performed today result from other considerations. Article 2 (of the European Convention on Human Rights) would provide empty protections, however, if the Convention granted full freedom of abortion up to the time of birth". Freeman 1994:661. Regarding the *ABC* case, the European Court of Human Rights needs to diligently and more concertedly provide a proper boundary between serious issues allowing for abortion and non-serious issues which should provide the unborn with the necessary protection.

43 Von Bogdandy 2006:227.

44 Montefiore in Montefiore & Graham 1975:21.

45 *SA Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafood Division Fish Processing)* 2000 8 BCLR 886 CC:893.

46 *SA Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafood Division Fish Processing)*: 893. Impartiality is also proposed as a hermeneutical tool. In this regard, if someone wishes to assure another person of his point of view

Rationality becomes possible in the context of impartiality because impartiality does not require futile efforts towards neutrality, but in the context of the legal status of the unborn, will require participants to argue in a non-arbitrary manner, with a "mind, open to persuasion by the evidence and the submissions of counsel".[47] Therefore, impartiality will require participants to the debate on the legal status of the unborn to be sensitive to other cosmologies, and not merely to assume that their views are the deciding factor. It is hoped that the European Court of Human Rights will move in this direction, and assist towards the establishment of a concerted effort within international law jurisprudence regarding the protection of the unborn as well.

Contrary to the abortion debate, the debate on cloning has been inclusive and sensitive to several areas affecting the issue (especially to scientific information).[48] Araujo states that one of the most important recent declarations issued by the United Nations was its call to end all human cloning.[49] In March 2005, the General Assembly accepted the recommendation despite the inability to achieve consensus and passed the *United Nations Declaration on Human Cloning* by a vote of eighty-four in favour, thirty-four against, and thirty-seven abstentions.[50] The Declaration "prohibits all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life". Since the Declaration is non-binding, it seeks "to protect human life in the application of life and reproductive sciences, by urging member states to adopt domestic legislation compatible with the Declaration's text". This understanding provides a conducive platform pertaining to the progression of international dialogue on the legal status of the unborn, strengthening

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on rational grounds, he must be impartial; in other words he must be objective specifically in this sense. This means above all that the interpreter must present not only his own views but also arguments that speak against his reasons — in other words, he must follow the principle of *audiatur et altera pars* [hear or listen to both sides]. Aarnio 1987:198.

47 *SA Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafood Division Fish Processing)* 893.

48 The General Assembly (in resolution 56/93 of 12 December 2001) decided to establish an Ad Hoc Committee, open to all States Members of the United Nations or members of specialised agencies or of the International Atomic Energy Agency, for the purpose of considering the elaboration of an international convention against the reproductive cloning of human beings. At its 82nd meeting, on 8 March 2005, the General Assembly adopted resolution 59/280, containing in its annex the text of the *United Nations Declaration on Human Cloning*, by a recorded vote of 84 to 34, with 37 abstentions, *First session of the Ad Hoc Committee (25 February to 1 March 2002)*. The Assembly decided further, in resolution 56/93, that the session of the Ad Hoc Committee would open with an exchange of information and technical assessments provided by experts on genetics and bioethics. The first meeting on the treaty was held in February 2002 and began with experts providing background information on scientific, ethical, philosophical and legal issues relevant to the reproductive cloning of human beings. The expert panel was criticised for not representing all regions of the world, and for not conveying a clear message about the risks and societal implications of human reproductive cloning. Isasi & Annas 2003:406.

49 Araujo 2007:129.

50 Jarrell 2006:225-226.

Callahan's[51] proposal that a minimal moral consensus in a pluralistic society on the doctrine of the sanctity of life is required: "I believe it is possible to discern considerable agreement among the different western moral sub-communities, at least if one remains at a fairly high level of abstraction and generality."[52] The European Court of Human Rights can play a vital role in this regard.

3. Conclusion

The contemporary jurisprudential milieu is reflective of a bifurcated narrative on the unborn. On the one hand, such narrative is epitomised by the restructuring of criminal codes in order to protect the unborn from violent actions[53], bioethical efforts related to the human embryo[54], and a substantive anti-abortion movement while, on the other hand, there is the view supporting the subordination (not necessarily in an absolute sense) of the unborn to maternal liberty.[55] In addition, popular abortion jurisprudence emanating from the United States during the latter half of the twentieth century has gained in momentum all around the world. Also, for the past three decades there has been a general apathy in formal international law structures regarding efforts towards clarifying the status of the unborn. This calls for a more direct, informed, reasoned and sensitive approach by the European Court of Human Rights pertaining to the legal status of the unborn. Those countries in which the legal status of the unborn has not yet been resolved in the highest courts, will be looking with much interest at the outcome of the *ABC* case once the need arises in these countries to address the abortion issue at the highest judicial levels. To ignore efforts at clarifying and consequently strengthening the legal status of the unborn due to the "complexity" and "disparate" views surrounding the legal status of the unborn (or due to fears of reflecting insensitivity towards the pregnant woman), is simply a weak argument and counters international law's emphasis on humanity and the individual (as explained earlier).[56]

Although international law exhibits development in human rights jurisprudence, and has taken giant steps towards the protection of women's and children's rights and even animal welfare[57], its deliberate avoidance of

51 Callahan in Pojman 2000:84.

52 Callahan in Pojman 2000:93.

53 This development is especially evident in US and Canadian Criminal Law – see for example: Klasing 1995; Maledon 1971; Nelson 1984 and Parness 1985.

54 See Fenzel 2007:34.

55 In fact, Canavan commented some thirty years ago, that the moral consensus in contemporary society is disintegrating in various significant respects, adding that, "… we no longer have general agreement even on the value of human life … or for that matter on the meaning of being human". Canavan 1979:15.

56 This is mentioned due to the fact that courts have on more than one occasion proclaimed their exclusion on matters so complex, especially pertaining to the status of the unborn. The irony is that by avoiding the issue, a decision is in fact made which influences perspectives on the unborn.

57 The World Society for the Protection of Animals (WSPA) is the world's largest alliance of animal welfare societies, and has 900 member organisations in over 150 countries, and has consultative status at the United Nations and the Council

establishing and developing a conducive, inclusive, and tolerable approach towards furthering the discussion on the legal status of the unborn needs to be addressed.[58] In this regard, the *ABC* case presents a good opportunity: not doing so would be contradictory to that which has been taught and accepted through the ages, namely the sacredness of "humanity" and a "benevolent society" which in turn would lead to a diversion from similar initiatives such as the protection to animals, the development in many jurisdictions to criminalise the intentional killing of the unborn, efforts towards attaining further clarification on the moral implications of cloning and genetic engineering, the prosecution of crimes against humanity, the limitation on the use of nuclear weapons, as well as the protection of the rights of women and children. The expectations of the *ABC*-case are enormous for reasons mentioned above, and this judgment could be a watershed case for the future of jurisprudence on the unborn.[59]

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of Europe. One hundred and thirty countries received an official briefing on the global initiative supported by the WSPA to establish a United Nations Universal Declaration on Animal Welfare. Declaration for animal welfare 'on UN agenda', Our Dogs Shop, http://www.ourdogs. co.uk/News/2006/December2006/291206/un.htm (accessed on 19 August 2009). The proposal also states via Article 1(2) that: "Life has intrinsic value. No animal should be killed unnecessarily or be subjected to cruel acts or to unnecessary suffering". Proposed Convention on the Protection of Animals, Michigan State University College of Law: Animal Legal and Historical Centre, http://www.animallaw.info/treaties/itconfprotanimal.htm (accessed on 25 August 2009). The European Convention for the Protection of Pet Animals promotes the welfare of pet animals, and stipulates minimum standards to which national governments should give effect. The Preamble states that it recognises that "man has a moral obligation to respect all living creatures and bearing in mind that pet animals have a special relationship with man … ". The Protocol of the Treaty of Amsterdam Amending the Treaty on European Union (a Protocol on protection and welfare of animals as part of the Amsterdam treaty) also provides "for the improved protection and respect for the welfare of animals as sentient beings". Treaty of Amsterdam Amending the Treaty on European Union, The Treaties establishing the European Communities and Related Acts, Official Journal C 340, 10 November 1997, Protocol on protection and welfare of animals, http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0110010013 (accessed 25 August 2009).

58 In fact, there are currently efforts to investigate the difficult relationship between ethics, morality and law in view of the advances made in biotechnology and biomedicine at the national and international level. In this regard. see Fenzel 2007:34-37.

59 A good example in this regard is South Africa. Since the inception of a democratic and constitutional dispensation in South Africa in 1994, the abortion issue against the background of, for example, the right to life, has not yet been taken to the Constitutional Court. If it does, the Constitutional Court in South Africa will most certainly refer to the views of the European Court of Human Rights for some guidance in this regard. This is due to the fact that Section 39(1) states that, "When interpreting the Bill of Rights, a court, tribunal or forum — (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. Even for the African continent, the *ABC* decision carries much potential, bearing in mind that the African Commission on Human Rights has not yet decided the question as to whether the scope of Article 4 (regarding the right to life) of the African Charter also includes forms of unborn life. Also, Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa infers protection of the unborn, but the unborn is denied protection in exceptional

Whether the European Court of Human Rights will offer something different in the sense of delving deeper, more inclusively and more sensitively into the issue, remains to be seen. However, this is unlikely, bearing in mind that the European Court of Human Rights in *Vo v France* decided on a neutral stance,[60] again avoiding answering the question of the legal status of the unborn. O'Donovan is of the opinion that the judgment in *Vo v France* would appear to have been driven by policy fears in terms of upsetting a form of settlement on the application of the margin of appreciation to domestic laws on abortion that has been arrived at within the States Parties to the European Convention on Human Rights. In other words, there is a consensus on non-interference with each jurisdiction's legislation.[61] In the *Tysiac v Poland* judgment an ambivalent attitude towards the unborn was also reflected. If the *ABC* case, on the other hand, decides to make a more substantial decision, then it needs to be sensitive to the concerns *also* of the unborn.

instances, for example, rape, incest and sexual assault. However, it also states that the unborn may be terminated when not doing so will endanger the mental health of the mother. This can lead to a very wide interpretation and therefore any international authority on the issue could influence such an interpretation.

60 O'Donovan 2006:115.

61 O'Donovan 2006:120.

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