VYTAUTAS MAGNUS UNIVERSITY

Stefan KIRCHNER

THE PRE-NATAL PERSONAL SCOPE OF ARTICLE 2 SECTION 1 SENTENCE 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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"Speak up for those who cannot speak for themselves,
for the rights of all who are destitute."

PROVERBS 31:8
(NEW INTERNATIONAL VERSION)[1]

[1] International Bible Society – HOLY BIBLE, NEW INTERNATIONAL VERSION, no edition named, Hodder & Stoughton, London (2000), p. 741.

NOTE ON ABBREVIATIONS

With the exception of very common abbreviations (for example *cf.*, ed., eds., *e.g.*, *etc., et seq.*, p., para., pp., *v.*), abbreviations, whether used in a footnote or in the main body of the text, are explained at the respective occasion of the first use in brackets.

PREFACE

Life, in particular human life, is precious beyond measure. Virtually every being that lives wants to continue to live and to spread life to the next generation. Our bond with future generations has become a legal concern not only since sustainability has entered into the consciousness and parlance of international lawyers. Already for centuries some states allow the unborn to inherit[2] in accordance with the Roman Law principle *nasciturus pro iam nato habetur, quotiens de commodis eius agitur* (who is to be born is to be treated as if born as far as his interests are concerned[3]). Yet, many of the same states seem to have no problem to deny that the same child's life ought to be protected as much as that of any born human being, making the right to life less protected than mere financial interests. At the same time, the question arises whether there is a right to have an abortion – a question which has been denied by the European Court of Human Rights (ECtHR) at least with regard to the context of the right to privacy under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (which is commonly, and also in this thesis, referred to as the European Convention of Human Rights or ECHR).[4] This decision in the case of *A, B and C v. Ireland* will feature prominently in this thesis.

No human right is more fundamental than the right to life and no human being is more vulnerable than the unborn child who finds herself[5] the target of life-ending actions initiated by the very people who are supposed to love and protect her more than anybody else, her parents. But abortion is also a women's right issue – just that it is not merely about the rights of the mother, it is about the rights of millions of girls all over the world who are killed in the womb simply because they are girls. These

[2] On the contradiction between the denial of the right to life and the guarantee of a right to inherit see already C. C. Teodorescu – *The Right to Life Guaranteed by the European Convention on Human Rights and it's Exceptions*, in: R. Dávid / D. Sehnálek / J. Valdhans (eds.) – DNY PRÁVA – 2010 – DAYS OF LAW, 4. ROČNÍK MEZINÁRODNÍ KONFERENCE POŘÁDANÉ PRÁVNICKOU FAKULTOU MASARYKOVY UNIVERZITY - THE FOURTH YEAR OF THE INTERNATIONAL CONFERENCE HELD BY MASARYK UNIVERSITY, FACULTY OF LAW, SBORNÍK PŘÍSPĚVKŮ - THE CONFERENCE PROCEEDINGS, 1st ed., Masaryk University, Brno (2010), available online at <http://www.law.muni.cz/sborniky/dny_prava_2010/files/prispevky/11_evropa/TEODORESCU_Cristian%20Claudiu_(4344).pdf> (last visited 13 November 2011), pp. 9 *et seq.*

[3] Pravni Fakultet u Zagrebu – LATINSKE IZREKE, available online at <www.pravo.unizg.hr/RP/latinske_izreke> (last visited 30 January 2012).

[4] EUROPEAN TREATY SERIES No. 5.

[5] The male form also refers to women wherever appropriate and *vice versa*.

are not merely archaic practices in places such as China where the Communist Party's one-child-law forces women to have (often late-term) abortions, but it occurs even in the developed world: in many places, boys are seen as more 'precious' than girls. While every man who has ever loved a woman and every father who has ever looked at his daughter should know better, this is the reality for too many unborn girls. Being a girl can be a death sentence, which is why in several countries such as India it is either already illegal to reveal the gender of the unborn child or such laws are being debated.

Although abortion is among the most controversial issues in the context of the issue of the right to life of the unborn child, this thesis is not primarily about abortion, although abortion plays an important practical role in the context of the topic dealt with in this thesis. This thesis is about human rights, more specifically, the right to life. Although the right to life is a universal issue, the focus of this thesis is restricted to a regional human rights document, the European Convention on Human Rights. The reason for the focus on this particular international treaty can be found in the leading role of the Convention among all regional human rights conventions. In a sense, the ECHR is a model for other regional human rights documents, not least due to the direct access enjoyed by applicants.

Unless an other source is given, translations from German to English are my own. Often reference will be made to the corresponding rules under different domestic legislations, for example the legal situation in the Republic of Ireland or the West-German constitution of 1949 which was created against the same background as the ECHR – as a response to the horrors of Nazi rule, World War II and the *Shoa*. This thesis, though, is not so much concerned with domestic laws, rather, rules from different jurisdictions are used to provide examples to illustrate the arguments made regarding the right to life under Art. 2 (1) ECHR. The same applies also to the other international legal documents which will be mentioned in this thesis, most notably the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

It is the intention behind this thesis to show that the unborn child has a right to life under Art. 2 (1) ECHR. At this time neither the European Court of Human Rights nor the majority of the states which are parties to the Convention share this view.

With this thesis I also want to give a voice to those who cannot speak for themselves. In so far, this is also a work of advocacy. This approach follows the example of some of the classic voices in international law such as *Hugo Grotius* or *Francisco de Vitoria* who established new legal concepts like the freedom of the high seas (*Grotius*) or the global legal community and fundamental rights (*Vitoria*) by looking at a specific problem (in the case of *Grotius* the maritime trade competition between the Netherlands and England, in the case of *Vitoria* the legal status of the newly discovered peoples of the new world). In particular at a time when international law becomes increasingly fragmented, despite attempts at constitutionalization, a problem-oriented yet holistic approach appears most appropriate for an attempt to deal with an issue on which the majority opinion is so clearly against the legal opinion which will be expressed in this thesis.

Although the writing of a dissertation is a solitary process, no man is an island and with regard to this thesis, the words of the British writer *John Donne* in his *Meditation XVII*, that

> *„[n]o man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were. Any man's death diminishes me because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee"*[6]

seem particularly fitting due to both the religious motivation behind the choice of this topic and the universal relevance of the right to life. My thanks go first and foremost to God for giving me the skills and endurance needed to conduct this work, but also to my friends who have backed this project. All the opinions and mistakes in this thesis are mine.

[6] J. Donne – *Meditation XVII – Devotions upon Emergent Occasions*, available online at <http://web.cs.dal.ca/~johnston/poetry/island.html> (last visited 14 November 2011).

Every year, there around 42 million abortions are conducted worldwide,[7] about three million of which in the states which have ratified the ECHR – not counting unreported cases. This text was not only written in partial fulfillment of the requirements for the doctorate but also a consequence of my very personal obligation to speak out against abortion.[8] Changing the prevailing interpretation of Art. 2 (1) ECHR would essentially mean outlawing not only abortions but also a host of other activities which aim at the death of unborn children. This would in turn require all of the 47 states which have ratified the ECHR to take measures which actually help parents to take responsibility for their children.

Stefan Kirchner

Hamburg-Uhlenhorst, 29 September 2012

[7] The Center for Bio-Ethical Reform – ABORTION FACTS, available online at <http://www.abortionno.org/Resources/fastfacts.html> (last visited 15 October 2011).

[8] *Cf.* PROVERBS 31:8.

POST SCRIPTUM

With a few exceptions, this text is up to date as of 15 October 2011. After the manuscript was finished, the European Court of Justice (ECJ) decided on 18 October 2011 in the case of *Oliver Brüstle v. Greenpeace e.V.* (Case C-34/10) that research methods which involve the death of an embryo are not patentable.[9] Apart from limiting embryonal stem cell research, this judgment is important in that the ECJ explicitly recognized that human life begins at conception. Although the ECJ referred[10] specifically to Directive 98/44/EC,[11] this judgment will also have implications for the interpretation of European Union (EU) human rights law. Taking into account the parallel interpretation of EU human rights law and the ECHR this is an extremely important step towards the full realization of the solution proposed in this thesis.

The first draft of this thesis which was submitted in November 2011 was approximately 200 pages longer than the final text of the manuscript. A number of issues have since been taken out and have made it into separate publications which may be of interest to the reader. Some of these texts have already been published. These include: *Turning Religious Values into Law through the Language of Human Rights: Legal Ethics and the Right to Life under the European Convention on Human Rights*, in: 5 BALTIC JOURNAL OF LAW AND POLITICS (2012), pp. 70-98; *The Personal Scope of the Right to Life under Article 2(1) of the European Convention of Human Rights After the Judgment in* A, B and C v. Ireland, in: 13 GERMAN LAW JOURNAL (2012), pp. 783-792 and *Personhood and the Right to Life under the European Convention of Human Rights: Current and Future Challenges of Modern (Bio-)Technology*, in: 3 UNIVERSITY OF WARMIA-MAZURY LAW REVIEW (2011), pp. 44-58.

[9] European Court of Justice – *Oliver Brüstle v. Greenpeace e.V*, Case C-34/10, Judgment of 18 October 2011, para. 53, part. 1.

[10] *Ibid.*

[11] *Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions*, in: OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES 1998 L 213/13.

CONTENTS

INTRODUCTION

Old problems and new challenges

In this thesis, which is written from the perspective of a practicing human rights lawyer who is concerned with the European Convention on Human Rights (ECHR), I am looking at several ways in which the life of the unborn child can be threatened. The right to life of all human beings also implies that the 'destruction' of unimplanted embryos *ex utero* is equally wrong. In particular, 'direct abortion'[12] is considered a grave "moral evil"[13] because the innocent unborn child is said to have a right to life[14] which is violated.[15] Direct abortions – as opposed to indirect abortions – are those in which the death of the child is wanted, or "abortion willed either as an end or a means".[16] There is some debate as to the permissibility of indirect abortions, *i.e.* procedures in which the death of the child is only an unintended "side effect"[17] of the desired procedure, specifically, of a measure which is necessary to save the life of the mother.[18] It has to be kept in mind that no human being may be turned into an object since this would infringe upon his or her human dignity[19] (we will return to the issue of human dignity in more detail later). Furthermore, allowing a procedure which would benefit the mother but kill the child would mean that one were to consider one human life to

[12] CATECHISM OF THE CATHOLIC CHURCH, available online at <http://www.vatican.va/archive/ENG0015/_INDEX.HTM> (last visited 23 November 2011), # 2271.

[13] *Ibid.*

[14] Whether the unborn child does indeed have a right to life under Art. 2 (1) ECHR will be discussed later in this thesis.

[15] A. Wilhelm – CHRIST AMONG US – A MODERN PRESENTATION OF THE CATHOLIC FAITH FOR ADULTS, 6th ed., Harper Collins, New York (1996), p. 313.

[16] CATECHISM OF THE CATHOLIC CHURCH, available online at <http://www.vatican.va/archive/ENG0015/_INDEX.HTM> (last visited 23 November 2011), # 2271.

[17] P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. 112.

[18] *Cf.* W. E. May – CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE, 2nd ed., Our Sunday Visitor Publishing Division, Huntington (2008), pp. 168 *et seq.* and P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. 112 *et seq.* and p. 131 *et seq.*

[19] Bundesverfassungsgericht – *Tanz der Teufel*, Case no: 1 BvR 698/89, Decision of 20 October 1992, in: 87 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 209 *et seq.*, at p. 228; see also S. Martini – DIE FORMULIERUNG DER MENSCHENWÜRDE BEI IMMANUEL KANT UND DIE „OBJEKTFORMEL" IN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS, available online at <http://akj.rewi.hu-berlin.de/projekte/ seminararbeiten/marini2.pdf> (last visited 2 November 2011).

be more worthy of protection than the other, which is also problematic because all human lives are equally worthy of protection.[20] Of course, this view presupposes that human life is indeed a higher legal good that other interests.

This view is not shared universally. For example the People's Republic of China places greater emphasis on controlled population growth than on the individuals' right to life.[21] This is not irrelevant to our debate because other interests might be used to substitute the right to life as a preeminent legal good, for example an alleged right to be protected against suffering and the issue of 'wrongful' births. So called wrongful births are the births of children who are unwanted because they are sick or handicapped and whose parents seek compensation from physicians for 'failing' to prevent the 'damage' caused to them by the birth of their child. While wrongful birth claims and the idea that a child could amount to a damage in the legal sense of the term have long been controversial, growing technological possibilities have made unwanted unborn children even more vulnerable than they have been before. *In vitro*-fertilization and pre-implantation diagnostics (PID) lead not only to selection of children without known genetic risks over those without known risks *in abstracto*. These practices also mean that the number of embryos[22] who are 'produced' but never implanted will increase: it is estimated that allowing pre-implantation diagnostics will mean that for every implanted embryo, several other embryos, who had been produced but did not pass the tests to which they were subjected, will not be implanted.[23] They will at best remain frozen[24] and left to die slowly or will be destroyed right away. At the same time does the decreasing respect for others and the

[20] Bundesverfassungsgericht – *First Abortion Judgment, Joined* Cases nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, at para. 109).

[21] This view seems to be echoed by H. Geddert – *Abtreibungsverbot und Grundgesetz (BVerfGE 39, 1 ff.)*, in: K. Lüderssen / F. Sack (eds.) – VOM NUTZEN UND NACHTEIL DER SOZIALWISSENSCHAFTEN FÜR DAS STRAFRECHT – ZWEITER TEILBAND, 1st ed., Suhrkamp Verlag, Frankfurt am Main (1980), pp. 333 *et seq.*, at p. 341 in his critique of the German Federal Constitutional Court's First Abortion Judgment (*ibid.*, at p. 336)

[22] On the terminology see A. A. Kiessling – *What Is an Embryo*, in: 36 CONNECTICUT LAW REVIEW (2003-2004), pp. 1051 *et seq.*

[23] Netzwerk gegen Selektion durch Präimplantationsdiagnostik – ERKLÄRUNG ZUR PRÄIMPLANTATIONSDIAGNOSTIK (March 2011), available online at <http://www.bvkm.de/ dokumente/pdf/Praenataldiagnostik/2011_Stellungnahme_PID.pdf> (last visited 15 October 2011), p. 1.

increasing egoism in a time of moral relativism[25] and economic uncertainty mean that the risk that expectant mothers who feel that they are lacking the necessary support of the father of their children, the necessary financial security etc. will choose to have an abortion. Even according to pro-abortion sources such as the Guttmacher Institute, every day, 115,000 children are killed in the womb of the mother,[26] that is 42 million every year.[27] To put it into perspective: this is about the number of Allied war dead (military and civilian) during World War II.[28] Of these 42 million abortions per year, 83 % occur in developing countries.[29] In Germany, a country with a population of 82 million, around 1,000 children are killed every day through abortion.[30] Because the domestic law in many states often does not punish physicians who conduct abortions or women who have had an abortion, many believe that they are entitled to have an abortion if they wish so. In many jurisdictions this alleged right is only restricted by term limits, often set at twelve weeks of gestation,[31] or weak formal requirements.[32] In addition,

> "[m]odern advances in (bio-)technology have made possible what only a few years ago would have been considered science fiction. Yet, while science continues to develop, lawmakers often fail to take the action which

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[24] A method which brings with it a host of problems, *cf.* D. J. Campisi / C. Lowder / N. B. Challa – *Heirs in the Freezer – Bronze Age Biology Confronts Biotechnology*, in: 36 AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL JOURNAL (2010-2011), pp. 179 *et seq.*

[25] This moral relativism, though, is by no means universal. In fact, it has also led to a counter-movement for the adherents of which the necessary reaction to an *anything goes*-mentality is a return to religious values, *cf.* Pope Benedikt XVI. – LICHT DER WELT – DER PAPST, DIE KIRCHE UND DIE ZEICHEN DER ZEIT – EIN GESPRÄCH MIT PETER SEEWALD, 1st ed., Herder, Freiburg im Breisgau (2010), p. 14.

[26] The Center for Bio-Ethical Reform – ABORTION FACTS, available online at <http://www.abortionno.org/Resources/fastfacts.html> (last visited 15 October 2011).

[27] *Ibid.*

[28] No author named – ESTIMATED DEAD WORLD WAR II, available online at <http://warchronicle.com/numbers/WWII/deaths.htm> (last visited 15 October 2011).

[29] The Center for Bio-Ethical Reform – ABORTION FACTS, available online at <http://www.abortionno.org/Resources/fastfacts.html> (last visited 15 October 2011). See also C. G. Ngwena – *Inscribing Abortion as a Human Rights: Significance of the Protocol on the Rights of Women in Africa*, in: 32 HUMAN RIGHTS QUARTERLY (2010), pp. 783 *et seq.*

[30] kath.net/idea – *Abtreibung ist 'das größte Unrecht in unserem Land' – Lebensrechtler feiern in Nürnberg ein "Fest des Lebens" für Ungeborene*, in: KATH.NET, 21 July 2011, available online at <http://www.kath.net/detail.php?id=32397> (last visited 15 October 2011).

[31] On Italy, Spain and Denmark see Ohio Right to Life – SUMMARY OF EUROPEAN ABORTION LAWS, available online at <http://www.pregnantpause.org/lex/lexeuro.htm> (last visited 15 October 2011).

[32] For Germany see *ibid.*

would be necessary to ensure that new developments are used for the common good while at the same time protecting the rights of everybody involved. Often, as could be seen [...] in Germany where the parliament after a long public debate which exhibited a rift through political parties, allowed pre-implantation diagnosis of embryos with regard to potential disease risks,[33] a move which will result in the death of numerous unborn children who will be discarded like waste merely because they carry a gene which might put them at risk of future medical problems. The current, and ongoing, biotechnological developments have the potential to help many people who suffer from diseases which are considered incurable today. At the same time is there a significant risk for abuse. In the case of [pre-implantation genetic diagnostics], innocent unborn children are killed for the purpose of having less sick or handicapped people. In other words, the eugenics policies of the Nazi era have returned in the disguise of eradicating suffering, which have made them acceptable by many if not the majority of people."[34]

How far the idea that suffering is to be avoided[35] has come can be seen in the fact that *e.g.* in Austria even partial-birth abortions are permissible in case the unborn child is thought to have a cleft,[36] even though cleft surgery is a fairly simple and common procedure. The opposite approach to suffering can be seen in the Apostolic letter SALVIFICI DOLORIS by Pope *John Paul II*,[37] in which the role of human suffering

[33] On ethical and religious consequences of this new legislation see S. Kirchner – *Zulassung der PID: Christen in der Diktatur des Relativismus*, in: KATH.NET, 21 July 2011, available online at <http://www.kath.net/detail.php?id=32282> (last visited 15 October 2011).

[34] S. Kirchner – *Personhood and the Right to Life under the European Convention on Human Rights: Current and Future Challenges of Modern (Bio-)Technology*, in: 3 UNIVERSITY OF WARMIA-MAZURY LAW REVIEW, pp. 44 *et seq.*, at pp. 44 *et seq*.

[35] See also D. Mieth – *Die Sehnsucht nach einem Leben ohne Leiden – Ein Recht auf Nicht-Leiden*, in: K. Hilpert / D. Mieth (eds.), KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Herder, Freiburg im Breisgau (2006), pp. 133 *et seq.*

[36] A. Laun – *Die Hasenscharte – tödliche Behinderung?*, in: KATH.NET, 9 September 2011, available online at <http://www.kath.net/detail.php?id=32992> (last visited 15 October 2011).

[37] Pope John Paul II – APOSTOLIC LETTER SALVIFICI DOLORIS, 11 February 1984, available online at <http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jpii_apl_1102198 4_salvifici-doloris_en.html> (last visited 15 October 2011).

is explained from a Christian perspective as being a part of human life[38] as well as part of God's plan for salvation.[39]

In this sense, suffering has a meaning, even if it is not understood. Medical issues are just one aspect of human suffering.[40] Therefore, suffering, disease, handicaps *etc.* do not take anything away from the worth of any human being. The example of abortions due to a cleft also illustrates a certain degree of schizophrenia in dealing with abortion: a premature baby, born after seven months of gestation, who suffers from a cleft will benefit from modern surgery and is unlikely to have many negative long-term effects. An unborn child at eight months of gestation, hence already even more developed, might be put to death under the same condition merely because he or she is still in his or her mother's womb. Were anybody to suggest that babies who suffer from clefts ought to be killed on the spot he or she would in all likelihood be scorned by society. Yet, in many states the tax payers and health insurance customers actually participate in financing this modern day eugenics. It may be the mothers who ask for an abortion, the physicians (or 'angel makers') who perform them and the fathers who all too often provide the underlying cause for the woman's decision or even pressure her, but it is the members of the public who are co-opted into funding abortions and who actually make abortions cheap and accessible.

The question whether the unborn child has a right to life is closely associated with the issue of abortion. Abortion is the killing of the unborn child in the womb and the subsequent removal of the body from the womb before birth, although in many domestic legal systems, the term is commonly used only for the killing and removal of the unborn after the implantation in the endometrium. Also, abortion is one of the most controversial political issues – yet it is only the tip of the iceberg as far as the right to life of the unborn child is concerned. Modern technology enables us to manipulate human life already at its earliest stages in ways beyond what was imaginable only a few generations ago. These technological advances raise new questions of the ethics of medicine, which also leads to an increased attention on old questions, which have been around for millennia, in particular the problem of abortion –

[38] *Ibid.*, para. 31.
[39] *Ibid.*
[40] *Ibid.*, para. 5.

as well as to an increasing interest in ethics.[41] Although there has been increasing interest in bioethics in recent years, ethical considerations alone are not enough to ensure an effective protection of human rights, although ethics are not completely irrelevant and inform the law.

> "Ethical aspects are – though not necessarily to a greater extent – but still to some extent – more open to discussion than legal norms once they have been defined. Of course, legal experts do not incessantly discuss about the usefulness or uselessness or about the pros and cons of legal norms. However, for changing the law it is not sufficient to convince the interlocutor, it is the lawmaker who has to be convinced. But for changing the ethical points of view of another person, one only has to convince the interlocutor. Thus, ethical issues are far more open to discussion than law. At the same time, ethical concepts have a preserving function, which distinguishes them from the vast number of political discussions. Of course it is also possible to have political discussions about ethical or legal questions, but a purely political discussion can not have the same effects as an ethics-related discussion or a discussion departing from legal point of views. Thus, ethics plays a decisive role and serves as a mediator between law and politics. Ethical considerations, which are based on the values of those, carefully pondering a problem[42] will not only make it possible to integrate values into the construction and interpretation of statutes, but will also make it possible to establish a legal system based on ethical, *i.e.* value-oriented concepts. For this reason not only future legal experts should consider basic ethical questions to a far greater extent in their work than they have done until now."[43]

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[41] A. Boldizar / O. Korhonen – *Ethics, Morals and International Law*, in: 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW (1999), pp. 279 *et seq.*, at p. 279; see *e.g.* S. Kadelbach – *Ethik des Völkerrechts unter Bedingungen der Globalisierung*, in: 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT / HEIDELBERG JOURNAL OF INTERNATIONAL LAW (2004), pp. 1 *et seq.*, on the connection between law and ethics see T. Achen – *The Merging of Ethics, Law and Politics in the Age of Genetic Engineering*, in: 7 STUDIES IN ETHICS AND LAW (June 1998), pp. 121 *et seq.*

[42] For the relation between values and law, and the expample related to publich international law *cf.* S. Kirchner – *Relative Normativity and the Constitutional Dimension of international law: A Place for Values in the International Legal System ?*, in: 5 GERMAN LAW JOURNAL(2004), pp. 47 *et seq.*

Ethics can be turned into legal rules or – as in our case, since we are concerned with the interpretation of an existing legal rule – lead to questions regarding the interpretation of the norm in question.

> "Not all legal rules are based on ethics and not everything which is required by ethics has been made into law.[44] But ideally, good ethical concepts become legal norms. This interrelation is ignored again and again. If *e.g. Frank M. Wuketits* assumes that legal concepts – *i.e.* human dignity – can be used for formulating morale principles,[45] than he does not only put the cart before the horse, but totally misconceives the relation between ethics and law: Ethical considerations or, "morale principles", as he calls it, can become legal norms - and not vice versa. Certainly, it is right to say that the existence of certain specific legal norms points towards the existence of an ethical concept it is based on. But the focus is on the expression "based on": Ethical concepts are the basis for legal norms. If it was the other way around, we would live under a positivistic dictatorship. *Wuketits* does not take into consideration, that Art. 1 [(1)] of the German constitution, is a concrete legal norm and is not only to be considered as a general statement, which then serves as a basis for developing ethical concepts. Without ethics, we would not develop such concepts as human dignity. Ethics and human dignity are interrelated in the same way as the foundations of a house and the roof. Without the roof, *i.e.* without human dignity, it would be rather uncomfortable, and without the foundations, *i.e.* without ethical concepts, our house could not exist, and we would be homeless. *Wuketits* applies criteria to human dignity that cannot fit. It is comparable to trying to measure the weight of a letter in tons and to be disappointed about the fact that the weight then turns out to be so low. Consequently, it is not really surprising that *Wuketits* does not attribute importance to human dignity. He has not understood the meaning and function of Art. 1 [(1)] GG, German constitution, but rather has projected his own ideas upon

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[43] S. Kirchner (translation by R. Bielecki-Weyenberg) – *The Protection of Unborn Life at the Crossroads between Law and Bioethics*, in: AU-EU WEEKLY MONITOR, Issue 8, 19 February 2008.

[44] J. Taupitz – *Die Aufgaben der Zentralen Ethik-Kommission für Stammzellforschung*, in: K. Amelung / W. Beulke / H. Lilie / H. Rosenau / H. Rüping / G. Wolfslast (eds.) – STRAFRECHT – BIORECHT – RECHTSPHILOSOPHIE – FESTSCHRIFT FÜR HANS-LUDWIG SCHREIBER ZUM 70. GEBURTSTAG AM 10. MAI 2003, 1st ed., C. F. Müller Verlag, Heidelberg (2003), pp. 903 *et seq.*, at p. 908

[45] F. M. Wuketits – BIOETHIK – EINE KRITISCHE EINFÜHRUNG, 1st ed., C.H. Beck, Munich (2006), p. 55.

the concept of human dignity, and is now disappointed that the legal concepts in real life are not identical with his ideas. Anyone who assumes that the concept of human dignity does not have any meaning, quite naturally does not have a problem in stating on the next page that he regards abortion as a form of birth control,[46] and that in his opinion human life before birth is only to be considered as "nascent (human) life"[,][47] with the embryo only later on developing into a human being.[48] This opinion is hardly compatible with the above mentioned interpretation of Art. 1 [(1) *Grundgesetz*] by the German Constitutional Court. [H]uman embryos are not significantly different from born humans,[49] […] which means that human embryos are not significantly different from human beings [who] have already been born. Human dignity is attributed to them as they belong to the *genus* [']*homo*['], and because they are constantly undergoing a process of development, from procreation until death, without morally relevant turning points[50].“[51]

Focus of the thesis

This is a work on international, more specifically, European, human rights law. At the same time it contains aspects of ethics and philosophy – the former as a starting point, the latter in reference to the understanding of philosophy as the desire for knowledge goes beyond a single science at a deeper understanding of the nature of things.[52] While this thesis is about human rights law, there is a need to look beyond one's own discipline. This need appears to be particularly relevant for lawyers, not

[46] *Ibid.*, p. 56.
[47] *Ibid.*
[48] *Ibid*, p. 60.
[49] P. Kunzmann – *Ist Potentialität relevant für den moralischen Status des menschlichen Embryos ?*, in: K. Hilpert / D. Mieth (Hrsg.) – KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Herder, Freiburg im Breisgau (2006), pp. 16 *et seq.*, at p. 16.
[50] *Cf.* P. Kunzmann – *Ist Potentialität relevant für den moralischen Status des menschlichen Embryos ?*, in: K. Hilpert / D. Mieth (Hrsg.) – KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Herder, Freiburg im Breisgau (2006), pp. 16 *et seq.*, at pp. 16 *et seq.*
[51] S. Kirchner (translation by R. Bielecki-Weyenberg) – *The Protection of Unborn Life at the Crossroads between Law and Bioethics*, in: AU-EU WEEKLY MONITOR, Issue 8, 19 February 2008. Some italics added.
[52] R. Weber-Faß – STAATSDENKER DER VORMODERNE – KLASSIKERTEXTE VON PLATON BIS MARTIN LUTHER, 1st ed., Mohr Siebeck, Tübingen (2005), p. 3.

only because an understanding of the ramifications of the law requires an understanding of the facts in question, but also due to the existence of different approaches to human rights.[53] These different approaches can be integrated if they are seen from a philosophical perspective, thereby avoiding to the risk of falling into the trap of cultural relativism, which has been discredited since the fall of the iron curtain but which tends to resurface every now and then. The multitude of potential problems, even within one field of law, makes it necessary to be open to a range of different situation. Even an attorney who practices only the law of sales contracts will have to deal with situations as diverse as the sale of a used car or the sale of an entire industrial building. For a human rights lawyer, this challenge is multiplied due to the wide range of situations in which human rights law can become relevant.

For *Jeremy Bentham*[54] rights follow from (positive) laws, while for *Herbert Lionel Adolphus Hart* (more commonly known as *H. L. A. Hart*)[55] laws follow from human rights.[56] *Hart*'s view is proven by the impact of the Universal Declaration of Human Rights[57] and other international human rights documents[58] on domestic legislation.[59] This approach, which transcends positivism, is convincing,[60] regardless of the fact that positivism has been largely discredited in the 20th century. In fact, human rights are deliberately used to shape domestic laws.[61] This is not a new phenomenon, in fact many new constitutions include human rights norms which still require to

[53] M. Haas – INTERNATIONAL HUMAN RIGHTS – A COMPREHENSIVE INTRODUCTION, 1st ed., Routledge, London / New York (2008), p. 10.

[54] J. Bentham – ANARCHICAL FALLACIES (1792), available online at <http://www.law.georgetown.edu/faculty/lpw/documents/Bentham_Anarchical_Fallacies.pdf> (last visited 31 October 2011), p. L-2, line 40.

[55] H. L. A. Hart – *Are There Any Natural Rights?*, in: 64 THE PHILOSOPHICAL REVIEW (April 1955), reprinted in J. Waldron (ed.) – THEORIES OF RIGHTS, 1st ed., Oxford University Press, Oxford (1984), p. 79, cited by A. Sen – DIE IDEE DER GERECHTIGKEIT, 1st ed., C. H. Beck, Munich (2009), p. 390.

[56] A. Sen – DIE IDEE DER GERECHTIGKEIT, 1st ed., C. H. Beck, Munich (2009), p. 390.

[57] United Nations General Assembly Resolution 217 A (III), 10 December 1948; see also J. Marsink – THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT, 1st ed., University of Pennsylvania Press, Philadelphia (2000).

[58] On human rights within the context of the United Nations see S. Chesterman / T. M. Franck / D. M. Malone – LAW AND PRACTICE OF THE UNITED NATIONS – DOCUMENTS AND COMMENTARY, 1st ed., Oxford University Press, Oxford and other locations (2008), pp. 448 et seq.; T. G. Weiss / D. P. Forsythe / R. A. Coate / K.-K. Pease – THE UNITED NATIONS AND CHANGING WORLD POLITICS, 5th ed., Westview Press, Boulder (2007), pp. 135 *et seq.*

[59] cf. A. Sen – DIE IDEE DER GERECHTIGKEIT, 1st ed., C. H. Beck, Munich (2009), p. 383.

[60] *Ibid.*, p. 390.

[61] *Ibid.*

be given life by the domestic legislature, for example the United States' Declaration of Independence[62] or Germany's *Grundgesetz*. In that sense, the ECHR is – albeit only in terms of values rather than organizational issues[63] – a constitutional document of post-war Europe. The margin of appreciation given to the states parties to the ECHR with respect to many rights under the Convention is a reminder of the need to give effect to internationally guaranteed human rights on the domestic level. Rights require those in power to take action on behalf of others.[64]

Like in many other states, in my native country, Germany, abortion is easily available upon request in the first three months of gestation as long as one is one is willing to go through the necessary bureaucratic steps, which is just a matter of days. This has led to the general impression that abortion were permitted, even though it is a crime under §§ 218 *et seq.* of the German Criminal Code, the *Strafgesetzbuch* (StGB).[65] All this despite the fact that the right to life clause of the *Grundgesetz* (GG), Germany's Federal Constitution,[66] Art. 2 (2) GG protects everyone and that the Federal Constitutional Court has decided that the unborn child also falls under Art. 2 (2) GG.[67] In practice, though, it is still the majority opinion in most states which are parties to the European Convention on Human Rights that the unborn child does not enjoy a right to life in the same way born humans do.

This thesis puts the focus on Art. 2 ECHR, which reads as follows:

> "*1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

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[62] *Ibid.*, there fn. **.

[63] S. Kirchner - *Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System ?*, in: 5 GERMAN LAW JOURNAL (2004), pp. 47 et seq., at p. 62.

[64] J. Raz – THE MORALITY OF FREEDOM, 1st ed., Clarendon Press, Oxford (1986), p. 180, cited by A. Sen – DIE IDEE DER GERECHTIGKEIT, 1st ed., C. H. Beck, Munich (2009), p. 404 .

[65] BUNDESGESETZBLATT (German Federal Gazette) 1998, Vol. I, pp. 3322 *et seq*.

[66] BUNDESGESETZBLATT 1949, pp. 1 *et seq.*

[67] Bundesverfassungsgericht – *First Abortion Judgment*, Joined Cases nos. 1 BvF 1/74, 1 BvF 2/74, 1 BvF 3/74, 1 BvF 4/74, 1 BvF 5/74 and 1 BvF 6/74, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, at p. 1, guiding sentence 1.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

It is the aim behind this thesis to show that Art. 2 (1) ECHR protects the unborn child – although the norm is currently not yet applied in this manner by the European Court of Human Rights. Given the good reputation of the Court, changing the opinion of the respective judges would mean a great step forward towards a more complete protection of human rights.

For the time being, though, as a look at the existing legal literature reveals, the wide view on the personal scope of the right to life which is presented in this thesis is not reflected in domestic laws, nor is it the dominant interpretation of the Convention. But where national laws fail, international rules might be employed to protect human rights.[68] As will be shown in this thesis, the idea that the unborn child enjoys a right to life does indeed have a basis in the existing case law and literature, albeit it is not yet the dominant opinion. This is hardly surprising: the right to life of the unborn child might easily be one of the most hotly contested legal-political issues and has been controversial for a very long time. Indeed, abortion has been practiced in ancient Egypt since at least the year 1,550 B.C.[69] and has been subject to regulation for millennia as well.[70] While such a controversial discourse might already be prob-

[68] An overview over the protection of unborn human life under international and European law is provided in the seminal work by R. Müller-Terpitz – DER SCHUTZ DES PRÄNATALEN LEBENS: EINE VERFASSUNGS-, VÖLKER- UND GEMEINSCHAFTSRECHTLICHE STATUSBETRACHTUNG AN DER SCHWELLE ZUM BIOMEDIZINISCHEN ZEITALTER, 1st ed., Mohr Siebeck, Tübingen (2007), pp. 382 *et seq.*

[69] M. Potts / M. Campbell – *History of Contraception*, in: THE GLOBAL LIBRARY OF WOMEN'S MEDICINE (2009), available online at <http://www.glowm.com/?p=glowm.cml/section_view &articleid=375> (last visited 14 November 2011).

[70] M. Matthews – *Quantitative Interference with the Right to Life: Abortion and Irish Law*, in 22 CATHOLIC LAWYER (1976), pp. 344 *et seq.*, at p. 344.

lematic in academia, it becomes even more difficult once it enters the political or public realm. The difference between the law as it is on the books and the mistaken public perception about the legality of abortion makes public discourse about abortion only more difficult: in Germany, criticism against abortion is permitted as free speech[71] but measures which aim at preventing access to abortion clinics might fall outside the scope of the right to the free speech clause in Art. 5 (1) of the *Grundgesetz*.[72] At the end of the day, "[e]xpressing true facts which are protected by the freedom of speech cannot be prohibited only because it is inconvenient for others."[73] German law prohibits degrading the severity of the Holocaust which appears only appropriate, given the severity of this monstrous crime. The European Court of Human Rights held on 13 January 2011[74] that it does not constitute a violation of the right to free speech if German law forbids comparing abortion to the Shoa by using the word "babycaust".[75] Criticism of *Hoffer and Annen v. Germany*[76] which puts the focus on the contrast between *Hoffer*[77] and the Court's earlier case law,[78] such as in *Steel and Morris v. The United Kingdom*,[79] risks overlooking the unique significance of the term 'holocaust' for contemporary Germany as well as the fact that the European Court of Human Rights in *Steel and Morris v. The United Kingdom*[80] did not issue the *carte blanche*[81] which *Rónán Ó Fathaigh* claims it had issued.[82] Unlike the

[71] Bundesverfassungsgericht – Case No. 1 BvR 1745/06, Decision of 8 June 2010, in: 64 NEUE JURISTISCHE WOCHENSCHRIFT (2011), pp. 47 *et seq.*, at p. 47.

[72] *Ibid.*, p. 48; *cf.* also S. Muckel – *Abtreibungsgegner demonstriert vor Arztpraxis*, in: 42 JURISTISCHE ARBEITSBLÄTTER (2010), pp. 759 *et seq.*

[73] S. Muckel – *Abtreibungsgegner demonstriert vor Arztpraxis*, in: 42 JURISTISCHE ARBEITSBLÄTTER (2010), pp. 759 *et seq.*, at p. 760.

[74] ECtHR – *Hoffer and Annen v. Germany*, Application nos. 397/07 and 2322/07, Judgment of 13 January 2011.

[75] *Ibid.*, at para. 50; *cf.* also R. Ó Fathaigh – *Comparing Abortion to the Holocaust*, in: STRASBOURG OBSERVERS, 25 January 2011, available online at <http://strasbourgobservers.com/2011/01/25/comparing-abortion-to-the-holocaust/> (last visited 28 October 2011).

[76] ECtHR – *Hoffer and Annen v. Germany*, Application nos. 397/07 and 2322/07, Judgment of 13 January 2011.

[77] *Ibid.*

[78] R. Ó Fathaigh – *Comparing Abortion to the Holocaust*, in: STRASBOURG OBSERVERS, 25 January 2011, available online at <http://strasbourgobservers.com/2011/01/25/comparing-abortion-to-the-holocaust/> (last visited 28 October 2011).

[79] ECtHR – *Steel and Morris v. The United Kingdom*, Application no. 68416/01, Judgment of 15 February 2005, para. 90 *et seq.*

[80] *Ibid.*

[81] *Ibid.*, para. 90.

reference to the holocaust,[83] the use of the term "killing specialist for unborn children" as well as the claim that somebody is responsible for "the murder of children in their mother's womb" on the other hand are permitted as free speech under German law.[84] But comparisons between different crimes appear to be inappropriate since they have the inherent risk of instrumentalizing the victims' suffering and I therefore do not repeat the position taken there but only provide this link as a source in the context of academic debate. But one might also want to note that "[r]egrettably, the ECtHR failed to provide any argument why such a prohibition could be "necessary in a democratic society". One would rather have believed that what is ['']necessary in a democratic society['] is the protection of its weakest and most helpless members, *i.e.* the unborn children, against arbitrary killings."[85] This goal, the protection of unborn children, can also be used without instrumentalizing the suffering of millions of people during the Nazi era. The respect for all victims, be they victims of German, Russian, Chinese or other crimes, requires to refrain from comparing one suffering with the other. The individual victim suffers, regardless of whether she is killed alone or whether millions are murdered with her. There might be a certain shock value in comparing the killing of unborn children to the Shoa but using a shocking approach to defend the right to life of unborn children might actually have the opposite effect and lead to resentments against the pro-life message. What appears necessary is to disseminate information about life in the womb and the effect of abortions. This information will at times also have to be presented in a more graphic manner but always with the aim to inform rather than to shock the audience.

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[82] R. Ó Fathaigh – *Comparing Abortion to the Holocaust*, in: STRASBOURG OBSERVERS, 25 January 2011, available online at <http://strasbourgobservers.com/2011/01/25/comparing-abortion-to-the-holocaust/> (last visited 28 October 2011).

[83] On the use of the term by pro-life activists *cf.* G. Annen – *Pressemitteilung – Es gibt viele Gedenktage aber zu wenige Menschen denken darüber nach! – zum „Holocaust-Gedenktag"* –, in: NACHRICHTEN EUROPÄISCHER BÜRGERINITIATIVEN ZUM SCHUTZE DES LEBENS UND DER MENSCHENWÜRDE, 27 January 2010, available online at <http://www. babykaust.de/01/2010/aktuell2010.html> (last visited 28 October 2011).

[84] *Cf.* J. C. von Krempach – *European Human Rights Court: Germany is allowed to prohibit comparison between abortion and the Holocaust*, in: TURTLE BAY AND BEYOND – INTERNATIONAL LAW, POLICY AND INSTITUTIONS, 16 January 2011, available online at <http://www.turtlebayandbeyond.org/2011/abortion/european-human-rights-court-germany-is-allowerd-to-prohibit-comparison-between-abortion-and-the-holocaust> (last visited 10 October 2011). It has to be noted that some of the contents of this website might trigger responsibility under German Criminal Law because it might be interpreted as making the holocaust appear less serious than it is.

"If lawmakers fail to act, human rights activists who are concerned about the dangers of biotechnology (which, it has to be noted, go far beyond the risks to the unborn described so far) have to take recourse to the already existing legal instruments in order to ensure that everybody's basic human rights are respected. One such instrument, which is not only widely respected but also legally enforceable is the European Convention on Human Rights, which for all practical ends and purposes all member states of the Council of Europe (COE) are obliged to comply (all COE member states are expected to ratify the ECHR shortly after accession to the COE and at the time all member states of the Council of Europe are also parties to the ECHR)."[86]

Currently there are 47 states parties to the European Convention on Human Rights.[87] This raises the question how there can be a common standard I will come back to this problem in more detail later, but at this point it seems to be in order to keep in mind the diversity of the countries which will be dealt with in this thesis.

According to Art. 1 ECHR, the parties to the ECHR are under an obligation to "secure to everyone within their jurisdiction the rights and freedoms"[88] which are included in the Convention as well as the protocol or protocols ratified by the state in question. The duty to implement the Convention domestically,[89] even over national law,[90] and a very

> "high degree of compliance with the judgments of the European Court of Human Rights […] and the decades of case work of the Strasbourg organs

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[85] *Ibid.*, italics added.

[86] S. Kirchner – *Personhood and the Right to Life under the European Convention on Human Rights: Current and Future Challenges of Modern (Bio-)Technology*, in: 3 UNIVERSITY OF WARMIA-MAZURY LAW REVIEW (2011), pp. 44 *et seq.*, at p. 45 – footnotes edited.

[87] With the notable exceptions of Belarus, Kosovo, Kazahkstan and the Vatican State, all European States are parties to the Convention. The special nature of the Vatican is taken into account by the observer status which is enjoyed by the Holy See, a subject of international law which is independent of the Vatican State despite the personal identity of the head of both institutions.

[88] Art. 1 ECHR.

[89] M. W. Janis / R. S. Kay / A. W.Bradley – EUROPEAN HUMAN RIGHTS LAW – TEXT AND MATERIALS, 3rd ed., Oxford University Press, Oxford and other locations (2008), p. 831.

[90] *Ibid.*

as well as the reputation of the Court among states and the population at large make the Convention a unique tool for human rights advocates who want to convince lawmakers of the need to ensure the complete protection of human rights also in the context of new technologies which are welcomed by many and yet might be somewhat more deserving of critical attention.[91] This is particularly true at this stage of technological development: our technological abilities have developed rather rapidly in recent years, while the ethical attitude of our society, although many people are becoming aware of the problems associated with an unlimited adoration of technology, has not yet changed accordingly."[92]

Scientific Preliminaries

When discussing the legal protection of human life, often fundamental preliminary questions are ignored, yet these questions need to be answered before we can enter into a legal discussion to begin with: What is life? And who is human? In the past, these questions might have been easy to answer, but modern biotechnological developments, such as hybridization, make it necessary to devote some attention to the issue beforehand.

While it appears obvious – at least on a macro level[93] – to everybody, whether someone (or something?) is alive, things become significantly more sketchy the closer we look. At the most basic level, we often find it difficult to define what amounts to life. Is somebody who's heart stopped beating dead? Is somebody who's

[91] Such an internationalisation of the debate can draw more attention to the issue, *cf.* also G. Virt – *Internationalisierung ethischer und rechtlicher Standards: Zwischen Chancen und Druck*, in: K. Hilpert / D. Mieth (eds.), KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Herder, Freiburg im Breisgau (2006), pp. 380 *et seq.*, as could be seen in the 2010-2011 debate on pre-implantation diagnostics in Germany.

[92] S. Kirchner – *Personhood and the Right to Life under the European Convention on Human Rights: Current and Future Challenges of Modern (Bio-)Technology*, in: 3 UNIVERSITY OF WARMIA-MAZURY LAW REVIEW (2011), pp. 44 *et seq.*, at p. 45 – footnotes edited.

[93] A classical counterexample is the question whether a virus is alive in the technical sense of the term because they are lacking a metabolism (G. Rice – *Are Viruses Alive?*, in: Microbial Educational Resources, 28 January 2012, available online at <http://serc.carleton.edu/microbelife/yellowstone/viruslive.html> (last visited 8 February 2012) and are not much more than genetic information and protein (*ibid.*), see also L. P. Villareal – *Are Viruses Alive?*, in: 291 SCIENTIFIC AMERICAN (2004), pp. 100 *et seq*.

brain has stopped working dead? Is somebody who is braindead and who has had his organs removed for transplantation dead? After all, the organs still need to function in order to be transplantable, so there must be something there, is this something life? Or to look beyond human life: is a virus 'alive'? One could argue that this is not the case because it requires a host to survive and multiply. But certainly it is something different from a stone. Minerals on the other hand are not considered to be alive even though they can grow. On a higher level the question can be raised which rights or benefits should be given to animals. The German constitution is sometimes said to contain animal rights,[94] a claim which is incorrect in several regards. To begin with, Art. 20a of the *Grundgesetz*[95] does not deal with human dignity (that clause is Art. 1 GG[96]), in addition, the norm requires that consideration is given to the environment as well as animals, but does not grant subjective rights to animals[97] (Common Law jurisdictions appear to be more ambiguous[98]). Even though, Art. 20a GG requires the state to enact laws which protect animals, such as the Animal Protection Law, the *Tierschutzgesetz* (TierSchG), the Law on the Protection of Animals.[99] Other states have experienced similar debates and usually some kind of differentiation is made between different types of animals. The German law protects vertebrates more than other animals[100] and gives special attention also to warm blooded animals,[101] while in some states sentient species such as dolphins and great apes are given a *status aparte*[102] between other animals and humans.

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[94] No author named – *Germany votes for animal rights*, in: CNN.COM, 17 May 2002, available online at <http://articles.cnn.com/2002-05-17/world/germany.animals_1_animal-rights-human-rights-lawmakers?_s=PM:WORLD> (last visited on 9 November 2011).

[95] Art. 20a *Grundgesetz.*

[96] Art 1 *Grundgesetz.*

[97] H. D. Jarass – *Art. 20a*, in: H. D. Jarass / B. Pieroth – GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, 10th ed., Verlag C. H. Beck Munich (2009), pp. 528 *et seq.*, at p. 528.

[98] *Cf. e.g.* J. Lubinski – INTRODUCTION TO ANIMAL RIGHTS, 2nd ed., Michigan State University / Detroit College of Law, Detroit (2004), available online at <http://www.animallaw.info/articles/art_details/print.htm> (last visited 15 November 2011), Chapter II, Part A.

[99] BUNDESGESETZBLATT 2006, Vol. I, pp. 1206 *et seq*.

[100] *E.g.* in § 4 (1) sentence 1 TierSchG: „Ein Wirbeltier darf nur unter Betäubung oder sonst, soweit nach den gegebenen Umständen zumutbar, nur unter Vermeidung von Schmerzen getötet werden." (A vertebrate animal may only be killed under sedation or otherwise, in as far as reasonable given the concrete circumstances, only while avoiding pain.)

[101] § 4a TierSchG.

[102] Originally describing one possible status of a dependent territory with relation to the mainland it is used here in the sense that sentient animals, because they are animals, are not a sui generis category between humans and animals but that they have a special status with regard to other

At the core of this thesis is the legal status of unborn human beings. But who or what is a human? One might think that it should be clear enough that everyone who is born by a human woman is a human.[103] This view is flawed in so far as it is not extensive enough. The unborn child is undoubtedly a human being, even before being born. Should it become technically possible in the future to have not only the fertilization but the entire pregnancy *ex utero*, this criterion will become useless. Therefore we need to have a better definition of what it means to be a human being. The same applies to the case of human-animal hybrids which already exist today.

As soon as humans are concerned in any way, we enter the realm of bio-ethics in the proper sense of the word. Therefore, if some human genes are implanted into an animal, it becomes an issue of bioethics,[104] and hence, of biolaw. Many states on paper prohibit the creation of human-animal hybrids or plan to do so,[105] at least beyond a certain point in the development of the embryo,[106] but the reality on the ground, in laboratories and hospitals, has been different for some time now: Already more than five years ago, the Dutch company *Pharming* has created a human-cow hybrid,[107] albeit in the form of a cow with just one human gene.[108] It is

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animals which goes beyond the special treatment afforded e.g. to vertebrae or warm blooded animals (*cf.* the last two footnotes).

[103] *Cf.* Statement by Dr. iur., Ass. iur. *Hendrik Munsonius*, M.Th., during a workshop on human dignity organised by the author of this thesis at the University of Göttingen on 6 July 2011.

[104] *Cf.* L. MacDonald Glenn – ETHICAL ISSUES IN GENETIC ENGINEERING AND TRANSGENICS (2004), available online at <http://www.actionbioscience.org/biotech/glenn.html> (last visited 31 October 2011).

[105] In the United States, the Human-Animal Hybrid Prohibition Act of 2009 has been referred to the United States Senate Committee on the Judiciary on 9 July 2009 but has not been dealt with since, *cf.* Bill Summary & Status, 111th Congress (2009-2010), S. 1435, available online at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S1435:> (last visited 31 October 2011); see also 111th Congress: Bills Considered by the Senate Judiciary Committee, available online at <http://www.judisiciary.state.gov/legislation/111thCongress.cfm> (last visited 31 October 2011) and 112nd Congress: Bills Considered by the Senate Judiciary Committee, available online at <http://www.judisiciary.state.gov/legislation/112ndCongress.cfm> (last visited 31 October 2011).

[106] DW staff (jen) – *British Nod to Embryo 'Chimeras' Raises Hackles in Germany*, in: DW-WORLD.DE, DEUTSCHE WELLE – SCIENCE, 21 May 2008, available online at <http://www.dw-world.de/dw/article/0,,3351368,00.html> (last visited 8 November 2011).

[107] No author named – *A Dutch company looks to bring a protein created frmo transgenic cows to the American public. Is This Cow a Human-Animal Hybrid?*, in: Seed Magazine, 12 April 2006, available online at <http://seedmagazine.com/content/article/is_this_cow_a_human-animal_hybrid> (last visited 31 October 2011).

[108] *Ibid.*

the aim of this project to create milk which contains human *lactoferrin*,[109] a protein with many medical applications.[110] Similar projects involve human genes in rice[111] as well as in goats.[112] While the idea of a human-ape brain hybrid seems to be the stuff of nightmares, such experiments have already been conducted in 2001.[113]

Is an animal embryo which contains one specific human gene sequence, in the case of the transgenic cow the gene sequences which causes the human (and hence the cow's) body to produce human lactoferrin enough to claim that this animal is in fact no longer a cow but a human? This seems to be hardly the case, but the question already becomes more complicated if for example 10 % or 25 % percent of the genome of a hybrid are human. Where should we draw the line? Are only 'pure humans' humans within the meaning of the law and therefore worthy of protection? This, too, cannot be the solution since it would deny the human nature of patients who have received donor organs from animals, for example heart valves from pigs. Is it sufficient to have a genome which is more than 50 % human? Or would that line have to be drawn arbitrarily? In case of doubt, if we cannot exclude that the creature in question is human, we have to protect it / him / her.[114]

Why do these questions matter? These questions are more than a prelude to our topic. In my investigation I will restrict myself, as is commonly done when discussing bioethics, to issues concerning the human life, although we will look at the issue raised here again briefly towards the end of the thesis. Even more specifically,

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[109] *Ibid.*

[110] See P. P. Ward / E. Paz / O. M. Conneely - *Multifunctional roles of lactoferrin: a critical overview*, in: 62 CELLULAR AND MOLECULAR LIFE SCIENCES (2005), pp. 2540 *et seq.*, at pp. 2541 *et seq.*

[111] *Ibid.*

[112] *Ibid.*

[113] V. Ourednik / J. Ourednik / J. D. Flax / M. Zawada / C. Hutt / C. Yang / K. I. Park / S. U. Kim / R. L. Sidman / C. R. Freed / E. Y. Snyder – *Segregation of Human Neural Stem Cells in the Developing Primate Forebrain*, in: 293 SCIENCE (2001), pp. 1820 *et seq.*, also published as V. Ourednik / J. Ourednik / J. D. Flax / M. Zawada / C. Hutt / C. Yang / K. I. Park / S. U. Kim / R. L. Sidman / C. R. Freed / E. Y. Snyder – *Segregation of Human Neural Stem Cells in the Developing Primate Forebrain*, in: SCIENCE EXPRESS, 26 July 2001, pp. 1 *et seq.*, available online at <http://www.sciencemag.org/content/early/2001/07/26/science.10b0580.full.pdf> (last visited 15 October 2011); P. Recer – *Stem cells may help in brain repair*, in: Gereontology Research Group – NO TITLE, 27 July 2001, available online at <http://www.grg.org/StemCellMonkeyBrain.htm> (last visited 7 November 2011).

[114] *Cf.* J. Petre – *Chimera embryos have right to life, say bishops*, in: THE TELEGRAPH, 26 June 2007, available online at <http://www.telegraph.co.uk/news/uknews/1555639/Chimera-embryos-have-right-to-life-say-bishops.html> (last visited 31 October 2011).

we will look at dangers to human life and the right to life in situations of extreme vulnerability. One of the key questions in this context, with which we will deal more in detail later, is the question when human life begins. Among the foundations of this thesis is the assumption, which will be explained later on the basis of the notion of continuous development,[115] that human life begins at conception.[116] Just like in the case of human-animal hybrids, many are quick to deny the human nature of the unborn child and continue to apply some variant or other of the so called recapitulation theory, an idea which has been rebuked by a Göttingen-based scientist, *Erich Blechschmidt*, almost half a century ago.[117] According to this theory, every individual repeats in the womb the entire evolution of his species.[118] Essentially, according to this theory which today seems so outlandish that it is hardly conceivable that it still forms the basis for many arguments concerning the right to life of unborn children, the unborn human child is thought to be some kind of tadpole or fish-like creature and then to evolve in the coming months in the mother's womb into some kind of reptile and later a small mammal only to become a human being in the moment he or she is born. While this theory is obviously incompatible with the results of modern science, many who should know better still base their claims about the human nature of the unborn child on models such as this one.

It is therefore imperative to establish the scientific facts on the basis of which we discuss the legal, moral and ethical status of the unborn.[119] It is now known, that

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[115] P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. 71.

[116] *Ibid.*, pp. 70 et seq.

[117] E. Blechschmidt – WIE BEGINNT DAS MENSCHLICHE LEBEN?. VOM EI ZUM EMBRYO, now available in the 8th ed., Christiania-Verlag, Stein am Rhein (2008); see also the interview which the late Prof. Dr. Erich Blechschmidt gave to PUR Magazin: E. Blechschmidt – *Naturgesetz oder Irrtum?* [Interview], in: PUR Magazin, available online at <http://www.aktion-leben.de/Abtreibung/Embryonal-Entwicklung/sld01.html> (last visited 8 November 2011).

[118] E. Haeckel – GENERELLE MORPHOLOGIE DER ORGANISMEN – ALLGEMEINE GRUNDZÜGE DER ORGANISCHEN FORMEN-WISSENSCHAFT, MECHANISCH BEGRÜNDET DURCH DIE VON CHARLES DARWIN REFOMIRTE DESCENDENZ-THEORIE, 1st ed., Georg Reimer, Berlin (1866), p. 54. – Although both *Haeckel* and his thesis have been widely discredited, to say the very least, the idea that the unborn child is something less than a human being still exists in the mind of many people, which inidicates the need for an improved general education in the natural sciences. See also Internationaler Arbeitskreis für Verantwortung in der Gesellschaft e.V. – BEGINN DES MENSCHLICHEN LEBENS, 8 March 2006, available online at <http://www.iavg.org/iavg131.pdf> (last visited 8 November 2011).

[119] On the question of the *ethical* status of the unborn child see L. Palazzani – INTRODUZIONE ALLA BIOGIURIDICA, 1st ed., G. Giappichelli Editore, Torino (2002), pp. 114 *et seq.*

there is a continuous development from the moment of conception[120] until the moment we die.

Horst Dreier, a German legal philosopher and former member of the German National Ethics Council, compares this argument to the *Sórités* paradox,[121] which is also known as the paradox of the heap:[122] one strand of hay is just that – a strand of hay. Two are also just that – but many strands of hay are a heap – just when does it become a heap? After all, if you have a heap of hay and take one strand away, it still is a heap. Comparing the argument of continuous development to the heap paradox simply implies that we cannot know when the unborn child is big enough to amount to a human being. One cell? Sixteen? Maybe after three months of gestation? Or only at birth? *Dreier*'s view is seriously mistaken, though: a heap requires quantity while being human is a quality. To be human, all that is required is the human nature (even if only in a single cell) – to amount to a heap, one needs to have an – albeit unspecific, yet necessarily substantial – amount of items. For the definition of the heap, the number of items matters, for the definition of who is a human being the number of cells does not. If one person has more body cells than an other person, this difference makes the latter person not less a person than the first one – a heap which consists of less things on the other hand is a smaller, hence a lesser, heap. In things, quantity can impact quality, which in humans it is human nature alone which determines the quality. Also the scientific evidence makes it clear that *Dreier*'s comparison with *Sórités* paradox[123] is unsound because in fact today we *do* know how

[120] H. T. Krimmel / M. J. Foley – *Abortion: an inspection into the nature of human life and potential consequences of legalizing its destruction*, in: 46 UNIVERSITY OF CINCINNATI LAW REVIEW (1977), pp. 725 *et seq.*, at p. 729; T. Blechschmidt – *Mensch von Anfang an – Das Wunder einer Entwicklung*, in: K. Schweiger (ed.) – DU DARST LEBEN! EINE CHANCE FÜR DIE UNGEBORENEN, 1st ed., Hänssler, Neuhausen/Stuttgart (1995), pp. 9 *et seq.*, at p. 14. In fact, this continuous development and the fact that 'what' is in the womb of the mother is already a human being are likewise already implied in the Hippocratic oath, *cf.* U. Körner – *Ärztliche Verantwortung, Kompetenzen und ethische Konflikte beim Schwangerschaftsabbruch*, in: U. Körner (ed.) – ETHIK DER MENSCHLICHEN FORTPFLANZUNG – ETHISCHE, SOZIALE, MEDIZINISCHE UND RECHTLICHE PROBLEME IN FAMILIENPLANUNG, SCHWANGERSCHAFTSKONFLIKT UND REPRODUKTIONSMEDIZIN, 1st ed., Thieme, Stuttgart (1992), pp. 139 *et seq.*, at p. 139.

[121] H. Dreier – *Artikel 1*, in: H. Dreier (ed.) – GRUNDGESETZ KOMMENTAR, BAND I, 2nd ed., Mohr Siebeck, Tübingen (2001), pp. 139 *et seq.*, at p. 184.

[122] *Ibid.*, there fn. 274.

[123] Also referred to as the paradox of the heap: one part (*e.g.* one leaf) is just a single piece, but many are a heap. If more leaves are added one after another, it is unclear when the adding one more leaf turns the leaves which are already present into a heap of leaves. The paradox is that we know that there is a heap of leaves but we do not know when it became a heap.

the unborn child develops[124] and – even more importantly – because it confuses mass with identity.[125]

It is this scientific knowledge which allows us to conclude that the unborn child is a human being from the moment of conception because after the gametes fuse, something new exists. Indeed, there is some*one* new – the embryo.[126] After that, this human being merely develops. This development continues until the moment we die (whatever the correct definition of death may be, but that is an other issue altogether). It is not with the implantation of the zygote into the endometrium but with conception that life begins. This is evidenced by the fact that the primitive streak is formed in the first phase of development which in fact ends with the implantation into the endometrium.[127] From the moment of conception until death, all the time, we are one and the same being, even though we look significantly different during the different stages of our lives. It appears obvious to us that a man in his 40s looks different from the boy he was at the age of ten, who in turn looks significantly different from the infant he was when he was half a year old, who also looked hardly the same as the child just before birth, let alone the same man at age 95 or three months or three days after conception. These differences, though, cannot detract from the fact that this continuous character of the human development indicates the continued individuality of this human being. A change in appearance does not imply a change in identity of the person in question.[128]

In his landmark book on abortion,[129] *Patrick Lee* provides the example brought forward by *Thomas Vincent Daly* regarding the timing of the conception.

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[124] Hence, to compare it with the example of the heap of leaves, the development of the unborn child is predictable. In so far, the body cells of the unborn child cannot be compared with the leaves in a heap of leaves.

[125] The heap cannot exist without the leaves, in other words, it has no identity without the sum of the leaves. A smaller number of leaves makes it less of a heap. A smaller number of cells in a human body does not make the person in question less human.

[126] *Cf.* H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENSEN IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 131.

[127] Cf. *ibid.*

[128] H. T. Krimmel / M. J. Foley – *Abortion: an inspection into the nature of human life and potential consequences of legalizing its destruction*, in: 46 UNIVERSITY OF CINCINNATI LAW REVIEW (1977), pp. 725 *et seq.*, at p. 730.

[129] P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997).

Daly is of the opinion that there is already an individual biological entity from the moment the sperm has broken through the outer wall of the *oocyte*.[130] If one were to refer only to the *corona radiata*, I would have had my doubts. But because *Lee* explicitly refers to the *corona radiata* as well as the *zona pellucida*,[131] I concur with his view because after the sperm has moved past the *zona pellucida*, the cortical reaction begins after which no other sperm can fertilize the same ovum. Therefore, from this moment on, there is only one genetic combination which could possibly emerge from this act. There is not yet a new being with his or her own DNA at that point. An effective protection of the human right to life, though, requires that there is a protection already at this point in time, regardless of the biological status, because at this point the 'program' already has begun to run. The new entity is human and already individualized enough to trigger the protection of the law. Genetic individualism is not strictly necessary.

This brings us to a point somewhat later in the fertilization process which is also closely linked to the issue of who is an individual. Identical twins[132] (triplets *etc.*) develop from one zygote and hence are also referred to as monozygotic twins. The zygote is a human being in the earliest stage of development, it is more than either egg or sperm but a new entity. It might be argued that the phenomenon of identical twins indicates that the unimplanted zygote is not yet an individual before the last point in time at which twinning is possible.[133] One might consider the impossibility of twinning to be required to trigger any legal consideration for the unborn.[134] The German Federal Constitutional Court on the other hand considered the point after which twinning was no longer possible to be the point at which the unborn child has to have some kind of legal status at the very latest.[135] This explains why there are two fun-

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[130] *Cf. ibid.*, p. 3, there fn. 2.

[131] *Ibid.*

[132] On the problem of twinning *cf.* also P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), pp. 90 *et seq.*; L. Palazzani – INTRODUCTION TO THE PHILOSOPHY OF BIOLAW, 1st ed., Edizioni Studium, Rome (2009), p. 51

[133] H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENSEN IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 132.

[134] *Cf. ibid.*

[135] Bundesverfassungsgericht – *Second Abortion Judgment*, Joined cases 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, Judgment of 28 May 1993, in: 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 203 *et seq.*, at pp. 251 *et seq.*; on this judgment see R. Frank – *Federal Republic of Germany, Three*

damentally different sets of rules in German law for the treatment of the unborn child *in* and *ex utero*. While the child *in utero* is covered by the German (Federal[136]) Criminal Code, the *Strafgesetzbuch* (StGB),[137] the child *ex utero* is regulated by the *Embryonenschutzgesetz*[138] (the German Embryo Protection Law,[139] ESchG),[140] which also is a federal law.

Based on this notion, the embryo is considered to be in a '*status potentialis*' before implantation (*i.e.*, as long as twinning is still possible)[141] and in a '*status nascendi*' after implantation, when twinning cannot occur anymore.[142] The unborn child *in statu potentialis* is said not to be an individual human being because from this one being can still emerge two or more humans.[143] This view is flawed. Also the embryo *in statu potentialis* is *in statu nascendi*. The normal course of events is the absence of twinning. The zygote simply develops normally. If twinning occurs, there are two individuals after twinning but there was already one individual before twinning. This individual is already a human being. The zygote is already human, even if there is still a chance for twinning.[144] Every unborn child is an individual from the moment of conception.[145] Hence the personal scope of Art. 2 (1) ECHR already begins when the human being comes into existence – the moment of conception. If one were to

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Decisions of the Federal Constitutional Court, in: 33 UNIVERSITY OF LOUISVILLE JOURNAL OF FAMILY LAW (1994-1995), pp. 353 *et seq.*, at pp. 356 *et seq.*

[136] Since the 1871 constitution, all criminal law in Germany applies nation-wide (with the exception of the occupation of Germany 1945-1949 in the three Western zones of occupation, 1945-1990 in the Soviet zone / the German Democratic Republic). This is also the case under the current constitution, *cf.* Art. 74 (1) GG, hence the word "federal" has been added for explanatory purposes. It is not part of the official title of the Criminal Code.

[137] REICHSGESETZBLATT 1871, pp. 127 *et seq.*; BUNDESGESETZBLATT 1998, Vol. I, pp. 3322 *et seq.*

[138] BUNDESGESETZBLATT 1990, Vol. I, pp. 2746 *et seq.*

[139] *Cf.* also C. Starck – *Embryonic Stem Cell Research according to German and European Law*, in: 7 GERMAN LAW JOURNAL (2006), pp. 625 *et seq.*, at pp. 641 *et seq.*

[140] On the ESchG see also M. Brewe – EMBRYONENSCHUTZ UND STAMMZELLGESETZ – RECHTLICHE ASPEKTE DER FORSCHUNG MIT EMBRYONALEN STAMMZELLEN, 1st ed., Springer-Verlag, Berlin and other locations (2006), pp. 11 *et seq.*

[141] H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENSEN IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 132.

[142] *Ibid.*

[143] *Ibid.*

[144] E. Schockenhoff – *Lebensbeginn und Menschenwürde – Eine Begründung für die lehramtliche Position der katholischen Kirche*, in: K. Hilpert / D. Mieth (eds.) – KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Verlag Herder, Freiburg im Breisgau (2006), pp. 198 *et seq.*, at p. 221.

assume that the unborn child is not yet a person before implantation because twinning, *i.e.* the coming into existence of one or more additional human beings, can still occur, what then is the mother? Is a pregnant woman an other person than the same woman before pregnancy? Or are even women who might become pregnant (and hence 'separate' into several human beings) not persons at all? Surely nobody would argue that. Just like the mother did not lose her identity by 'splitting' into two (or more beings) when she became pregnant, we all divide, if one wants to use the term, every time we loose some skin cells, get a haircut *etc.* Although this is not strictly comparable to twinning, it indicates that physical divisibility is insufficient to deny anybody's individuality.[146] Also, the totipotency of the cells of the zygote does not mean that the zygote would not yet be an individual.[147] This becomes even clearer if one takes into account the recent scientific progress concerning the reprogrammability of regular body cells.[148] If a skin cell can be reprogrammed to become an induced pluripotent stem cell (iPSC), we will have to rethink which moral and legal consequences toti- and pluripotency can have, if any. Therefore, the breakthrough in human iPSC research might be a game changer for the protection of the unborn child as well.

Consequently, it can be concluded that twinning does not affect the status of the already existing unborn child during the time that twinning is still possible. Twinning does not take anything away from the child who already exists. Hence at no point after conception, also not in the time before the implantation of the zygote into the endometrium, is the unborn child not a human being.

The human-ness of the unborn child already at the earliest stages of development after conception is given evident even if the physical appearance of the embryo is still a far cry from the appearance of the newborn child[149] – but so is the difference in appearance between a child and the same person as an old man. The

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[145] P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. 3.

[146] *Ibid.*, p. 91.

[147] *Ibid.*, p. 95.

[148] I. Sample – *Scientists' stem cell breakthrough ends ethical dilemma*, in: THE GUARDIAN, 1 March 2009, available online at <http://www.guardian.co.uk/science/2009/mar/01/stem-cells-breakthrough> (last visited 31 October 2011).

[149] *Cf.* N. Shubin – YOUR INNER FISH – THE AMAZING DISCOVERY OF OUR 375-MILLION-YEAR-OLD ANCESTOR, 3rd ed., Penguin Books, London (2007), p. 100.

unborn child is the same being as the born child or the old man. At no point could the unborn child have become something else but a born human – because it always was a human, right from the moment of conception. Human embryos, even at the most basic stage in the moments between conception and implantation into the endometrium, are already human because they cannot be anything else, nor can they become anything else.

The Protection afforded to the unborn Child

During the time between conception and implantation, German criminal law for example does not protect the right to life of the unborn child completely.[150] Rather, the right to life clause of the German Federal Constitution, Art. 2 (2) of the *Grundgesetz*, is said to apply only after the embryo has implanted itself in the endometrium.[151] The zygote's implantation into the endometrium is not an instant event but a process which requires about one week to be completed.[152] This time-span in which the unborn child is devoid of any legal protection is particularly problematic since this is the time during which emergency contraceptive pills (ECPs, often simply referred to as the so called 'morning after-pill') and implantation inhibitors (such as intra-uterine devices (IUDs) threaten the life of the unborn child who, after the merger of sperm and oocyte, already exists as a distinct human being in the form of the zygote. Not only can ECPs have serious side effects, as has become evident in the many cases[153] involving diethylstilbestrol (DES), which has led to cancer in women who have been prescribed the drug as an ECP.[154] Also some of their daughters suffered from

[150] G. Geilen – *Materielles Arztstrafrecht*, in: F. Wenzel (ed.) – HANDBUCH DES FACHANWALTS MEDIZINRECHT, 1st ed., Luchterhand Verlag, Cologne (2007), pp. 326 *et seq.*, at p. 415.

[151] Bundesverfassungsgericht – *First Abortion Judgment, Joined* Cases nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, at pp. 36 *et seq.*; U. Steiner – DER SCHUTZ DES LEBENS DURCH DAS GRUNDGESETZ – ERWEITERTE FASSUNG EINES VORTRAGS GEHALTEN VOR DER JURISTISCHEN GESELLSCHAFT ZU BERLIN AM 28. JUNI 1991, 1st ed., Walter de Gruyter, Berlin / New York (1992), p. 11.

[152] H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENS IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 134.

[153] On the DES problem *cf. e.g.* L. Schreiber / H. L. Hirsch – *Theories of liability applied to overcome the unique 'identification problem' in DES cases*, in: 4 MEDICINE AND LAW (1985), pp. 337 *et seq.* and L. Bergkamp – *Compensating personal injuries caused by DES: "No causation liability" in the Netherlands*, in: 1 EUROPEAN JOURNAL OF HEALTH LAW (1994), pp. 35 *et seq.*

[154] L. Titus-Ernstoff / E. E. Hatch / R. N. Hoover / J. R. Palmer / E. R. Greenberg ER *et al.* – *Long-term cancer risk in women given diethylstilbestrol (DES) during pregnancy*, in: 84 BRITISH JOURNAL OF

cancer[155] and the next generation is also at an increased risk of uterine fibrosis later in life.[156] DES has furthermore been linked to an increase in homosexuality among children of women who had taken the drug.[157] Among sons of DES patients, the drug has resulted in effect on the psychosexual development of the boys,[158] hypogonadism,[159] genital cysts and / or genital abnormalities.[160] Today there is already research about the effects of DES on the third generation, *i.e.* on the grandchildren of the women who originally took the drug.[161] This indicates the dangers of ECPs.[162]

CANCER (2001), pp. 125 *et seq.*, available online at <http://www.cdc.gov/des/consumers/research/recent_longterm.html> (last visited 10 October 2011).

[155] A. L. Herbst / H. Ulfelder / D. C. Poskanzer – *Adenocarcinoma of the Vagina — Association of Maternal Stilbestrol Therapy with Tumor Appearance in Young Women*, in: 284 NEW ENGLAND JOURNAL OF MEDICINE (1971), pp. 878 *et seq.*, available online at <http://www.nejm.org/doi/full/10.1056/NEJM197104222841604#t=articleTop> (last visited 10 October 2011); H. Kaulen – *Der Krebs der Töchter*, in: FRANKFURTER ALLGEMEINE ZEITUNG, 28 October 2011, available online at <http://www.faz.net/aktuell/wissen/oestrogen_behandlung-der-krebs-der-toechter-11504680.html> (last visited 28 October 2011).

[156] Office of Research on Women's Health / NIH / DHHS – STATUS OF RESEARCH ON UTERINE FIBROIDS (LEIOMYOMATA UTERI) AT THE NATIONAL INSTITUTES OF HEALTH (2006), <http://orwh.od.nih.gov/health/fibroidsrevisedmarch2006.pdf> (last visited 10 October 2011), pp. 2 *et seq.*

[157] A. A. Ehrhardt / H. F. Meyer-Nahlburg / L. R. Rosen / J. F. Feldman / N. P. Veridiano / I. Zimmerman / B. S. McEwen – *Sexual orientation after prenatal exposure to exogenous estrogen*, in: 14 ARCHIVES OF SEXUAL BEHAVIOR (1985), pp. 57 *et seq.*, it has to be noted, though, that the sampled groups remain fairly small (30 individuals who had been exposed to DES prenatally and a control group of the same size and in later research the correlation could not be found with the same degree of clarity, although there is indeed a correlation between pre-natal hormonal exposure and the central nervous system, R. R. Newbold – *Gender-related behavior in women exposed prenatally to diethylstilbestrol*, in: 101 ENVIRONMENTAL HEALTH PERSPECTIVES (1993), pp. 208 *et seq.*

[158] I. D. Yalom / R. Green / N. Fisk – *Prenatal exposure to female hormones. Effect on psychosexual development in boys*, in: 28 ARCHIVES OF GENERAL PSYCHIATRY (1973), pp. 554 *et seq.*

[159] *Cf.* AACE Hypogonadism Task Force – *American Association of Clinical Endocrinologists Medical Guidelines for Clinical Practice for the Evaluation and Treatment of Hypogonasidm in Adult Male Patients — 2002 Update*, in: 8 ENDOCRINE PRACTICE (2002), pp. 439 *et seq.*, at p. 441.

[160] United States Department of Health and Human Services / Centers for Disease Control and Prevention – KNOWN HEALTH EFFECTS FOR DES SONS, available online at <http://www.cdc.gov/des/consumers/about/effects_sons.html> (last visited 5 October 2011).

[161] H. Klip / J. Verloop / J. D. van Gool / M. E. T. A. Koster / C. W. Burger / F. E. van Leeuwen / OMEGA project group – *Hypospadias in sons of women exposed to diethylstilbestrol in utero: a cohort study*, in: 359 THE LANCET (2002), pp. 1102 *et seq.*, available online at <http://www.sciencedirect.com/science?_ob=MiamiImageURL&_cid=271074&_user=5731894&_pii=S0140673602081527&_check=y&_origin=&_coverDate=30-Mar-2002&view=c&wchp=dGLbVBA-zSkWb&md5=e7c72a739f9fba3441df6ed1ec69cb39/1-s2.0-S0140673602081527-main.pdf> (last visited 5 October 2011); J. M. Reinisch / M. Ziemba-Davis / S. A. Sanders – *Hormonal contributions to sexually dimorphic behavioral development in humans*, in: 16 PSYCHONEUROENDOCRINOLOGY (1991), pp. 213 *et seq.*, available online at <http://www.sciencedirect.com/science?_ob=MiamiImageURL&_cid=271135&_us

While DES is off the market in many developed countries, certainly also due to the a key product liability decision in the United States,[163] other issues regarding implantation inhibitors remain. Even though many women use IUDs on a near-permanent basis, it is to this day unclear how IUDs function in the first place,[164] a fact that is also known outside the medical community,[165] although it is suspected they the cause an inflammation of the endometrium.[166] This raises the question how much not only the unborn child but also the woman and the children she conceives after having taken ECPs like DES and her descendants are really at risk.

A human egg if fertilized does not produce a fish, a reptile or anything else. From this argument of identity and continuous development we must conclude that the unborn child is already a human being. Since there is no further change in the fundamental nature of the being and its genetic code, the unborn child is a human being from the moment of conception.

Abortion under the European Convention on Human Rights

Although this thesis is not chiefly about abortion, it is impossible to write about the right to life of unborn children without having the problem of abortion in mind. In many legal systems, abortion is a controversial issue and has been for a long

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[162] J. M. Reinisch / M. Ziemba-Davis / S. A. Sanders – *Hormonal contributions to sexually dimorphic behavioral development in humans*, in: 16 PSYCHONEUROENDOCRINOLOGY (1991), pp. 213 *et seq.*, available online at <http://www.sciencedirect.com/science?_ob=MiamiImageURL&_cid=271135&_user=5731894&_pii=030645309190080D&_check=y&_origin=&_coverDate=31-Dec-1991&view=c&wchp=dGLbVlV-zSkWb&md5=be789eb32f11707557067eedffa86be3/1-s2.0-030645309190080D-main.pdf> (last visited 5 October 2011, at p. 270.

[163] Supreme Court of California – *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980).

[164] no author named – *Mechanisms of the Contraceptive Action of Hormonal Methods and Intrauterine Devices (IUDs)*, available online at <http://www.fhi.org/en/RH/Pubs/booksReports/methodaction.htm> (last visited 14 October 2011)

[165] *Cf.* no author named – *intrauterine device*, in: ENCYCLOPAEDIA BRITANNICA available online at <http://www.britannica.com/EBchecked/topic/291983/intrauterine-device> (last visited 14 October 2011).

[166] *Ibid.*

time.[167] It has been controversial for millennia and in all likelihood will remain controversial for the time to come. What is different today from the past is our increased knowledge of life before birth. Abortion is the killing of a human being who cannot be seen directly. At times, pro-abortion advocates attempt to de-humanize the unborn child, a method which has been applied in armed conflicts throughout the ages: if the enemy is not really human, it requires much less justification to kill him. Today, the same flawed way of thinking is applied to unborn children. This goes so far that some even claim a human right to abortion.[168]

The question of abortion under the European Convention on Human Rights is not merely controversial – for a long time it was virtually untouchable.[169] It has to be noted, though, that, as the Court noted correctly in *Vo v. France*,[170] in those cases the question of abortion came up with regard to Art. 2 ECHR as well as only "*in abstracto*".[171] This has changed somewhat, although the European Commission of Human Rights (EComHR) and later the European Court of Human Rights have dodged their responsibility to clearly spell out the rights of mother and child by giving states a wide margin of appreciation[172] due to the controversial nature of the subject.[173] A key case which will feature prominently in this thesis is the case of *A, B and*

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[167] M. N. Slabbert – *The fetus and embryo: legal status and personhood*, in: 22 TYDSKRIF VIR DE SUID-AFRKAANSE REG / JOURNAL OF SOUTH AFRICAN LAW (1997), pp. 234 *et seq.*, at p. 234.

[168] *Cf.* J. N. Erdmann – *In the Back Alleys of Health Care: Abortion, Equality and Community in Canada*, in: 56 EMORY LAW JOURNAL (2006-2007), pp. 1093 *et seq.*, at pp. 1133 *et seq.*; C. H. Pailet – *Abortion and Physician-Assisted Suicide: is there a Constitutional Right to both?*, in: 8 LOYOLA JOURNAL OF PUBLIC INTEREST LAW (2006-2007), pp. 45 *et seq.*

[169] *Cf.* C. Ovey / R. White – JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Oxford University Press, Oxford (2006), p. 69; EComHR – *X v. Norway*, Application No. 867/60, Decision of 29 May 1961, in: 6 COLLECTION OF DECISIONS 34; EComHR – *X v. Austria*, Application No. 7045/75, Decision of 10 December 1976, in: 7 DECISIONS AND REPORTS 87 which were also named by the Court in *Vo v. France* (ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004) as examples for the Convention organs' initial refusal to address the issue of abortion. On the Convention organs' early approach to the right to life of unborn children *cf.* B. M. Knoppers – *Reproductive Technology and International Mechanisms of Protection of the Human Person*, in: 32 MCGILL LAW JOURNAL (1986-1987), pp. 336 *et seq.*, at p. 352.

[170] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, para. 76.

[171] *Ibid.*

[172] On the margin of appreciation in the ECHR *cf.* P. Schiff Berman – *Global Legal Pluralism*, in: 80 SOUTHERN CALIFORNIA LAW REVIEW (2006-2007), pp. 1155 *et seq.*, at p. 1201 and L. R. Helfer / A.-M. Slaughter – *Toward a Theory of Effective Supranational Adjudication*, in: 107 YALE LAW JOURNAL (1997), pp. 273 *et seq.*, at pp. 316 *et seq.*

[173] *Cf.* T. Goldman – Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*, at p. 280. The importance of the legal discourse on

C v. Ireland which was decided by the ECtHR in December 2010.[174] Since this judgment is one of the most important ECHR-related documents on abortions, this thesis will also include an in depth look at the background of this case, in particular the domestic situation in Ireland, which has long had strict anti-abortion laws. Interestingly enough, though, in recent years Ireland has almost lost its special status with regard to its role as a vanguard of the rights of the unborn, not because it had changed any laws but because other states have made their laws more protective of the unborn child. The finding by the European Court of Human Rights in *A, B and C v. Ireland*[175] that Ireland's anti-abortion legislation is not fully in line with the European Convention on Human Rights[176] does further damage to Ireland's reputation in pro-life circles, not to mention the uncertainty which may be associated with the attitude of the current Irish government, which is taking a clear course away from Ireland's traditional, faith-based, roots. It remains to be seen how this political tendency will affect the legal situation in Ireland.

Beyond the ECHR: Ethics and Domestic Laws

An other country the domestic laws of which will receive some attention in this thesis is Germany. The human rights provisions of the German constitution of 1949, although not identical to those included in the ECHR, share the background against which they were developed.

> "Although it is regrettable from a legal perspective that with regard to Art. 1[(1) *Grundgesetz*], German constitution, not much attention is paid to the rulings of the constitutional court, one has to take into consideration, that the question of the human dignity of the unborn first of all is perceived as a *political* issue, and only then as an *ethical* issue - and only in third place, if at all - as a legal issue. […] But seen from a legal point of view, this is the role bioethics can take on. […] Legal experts always associate such terms as "ethics"

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abortion also outside the legal profession (at least in Germany) is illustrated by the fact that the entry on abortion in Germany's leading general medical reference book devotes more than four fifths to a summary of the legal situation, see W. Pschyrembel – KLINISCHES WÖRTERBUCH, 257th ed., de Gruyter, Berlin (1994), pp. 1394 *et seq.* In Germany, abortion also plays a relatively important role in legal education, being a required subject for all law students in fifteen of Germany's sixteen federal states, W. Joecks – STUDIENKOMMENTAR STGB, 5th ed., Verlag C. H. Beck, Munich (2004), p. 397.

[174] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010.

[175] *Ibid.*

[176] *Ibid.*, para. 268.

or "morale" with something insufficient or inadequate. The seemingly lacking binding character and enforceability are regarded as flaws by legal experts. Something similar has happened to Public international law, an actually rather archaic legal system, [which some even consider not to be a legal system in the proper sense of the term at all]. For Public International Law and (bio-)ethics alike such underestimates are wrong and, depending on the circumstances, could even be dangerous. However, particularly in legal departments of universities (which now request students to study as fast and as effectively as possible, and which at the same time lose more and more of their freedom, and are in danger of degrading from universities to law schools in a negative sense) the discussion of ethical questions is frequently neglected."[177]

In fact, ethics hardly plays a role in the curriculum at many law faculties.[178] This is not only the case in Germany but also in the Baltic countries which have seen the first major conference on legal ethics in 2011. The need to increase the inclusion of ethics in legal education is not to be taken lightly.

"[W]here, if not at the universities, should law students and experts discuss this subject? But due to this inattentiveness, one fundamental relation is ignored: Ethics and law are interrelated – according to the principles of *Rad-*

[177] S. Kirchner (translation by R. Bielecki-Weyenberg) – *The Protection of Unborn Life at the Crossroads between Law and Bioethics*, in: AU-EU WEEKLY MONITOR, Issue 8, 19 February 2008, italics added. *Nota bene:* This text is a translation of my original article S. Kirchner - *Der Schutz ungeborenen Lebens zwischen Recht und Bioethik – Zugleich ein Beitrag zur Bedeutung der Ethik in der Juristenausbildung* (Unborn Life between Law and Bioethics), in: SOCIAL SCIENCE RESEARCH NETWORK (27 September 2007), <http://ssrn.com/abstract=1017472> (last visited 4 October 2011) and was translated by a volunteer for the Center for African Affairs and Global Peace (CAAGLOP), the NGO which publishes the AU-EU Weekly Monitor. The quote is from the English translation of the text, some italics have been added for this thesis. In *Der Schutz ungeborenen Lebens zwischen Recht und Bioethik – Zugleich ein Beitrag zur Bedeutung der Ethik in der Juristenausbildung* I had still referred to the membership in the species *homo sapiens* (a view shared by E.-H. W. Kluge – *The Euthanasia of Radically Defective Neonates: Some Statutory Considerations*, in: 6 DALHOUSIE LAW JOURNAL (1980-1981), pp. 229 *et seq.*, at p. 244). In light of my research conducted since that working paper was originally written, I have come to the conclusion that the membership in the genus *homo* ought to be sufficient. See also S. Kirchner – *Personhood and the Right to Life under the European Convention of Human Rights: Current and Future Challenges of Modern (Bio-)Technology*, in: 3 UNIVERSITY OF WARMIA-MAZURY LAW REVIEW (2011), pp. 44 *et seq.*

[178] *Cf.* S. Kirchner - *Der Schutz ungeborenen Lebens zwischen Recht und Bioethik – Zugleich ein Beitrag zur Bedeutung der Ethik in der Juristenausbildung* (Unborn Life between Law and Bioethics),

bruch,[179] an absolutely unethical law is [not a binding law at all,] if it is [']so [u]nacceptable that the written law has to give way for justice['].[180]"[181]

Although *Radbruch*'s now famous formula was created with the then recent horrors of the Nazi regime in mind it is nevertheless also applicable to other unjust regimes.[182] And

"[e]ven if this is not always evident, law is usually based on ethical concepts, even if one [']only['] wishes to find a just solution to a problem or merely one which is acceptable for the general public. At the same time, when considering ethical aspects, the inflexibility of the law is nonexistent. Law, by nature, preserves the status quo, law is static and not dynamic."[183]

in: SOCIAL SCIENCE RESEARCH NETWORK (27 September 2007), <http://ssrn.com/abstract=1017472> (last visited 4 October 2011).

[179] G. Radbruch – *Gesetzliches Unrecht und übergesetzliches Recht*, in: 1 SÜDDEUTSCHE JURISTENZEITUNG (1946), pp. 105 *et seq.* This landmark text has been published also in an English translation under the title *Statutory Lawlessness and Supra-Statutory Law (1946)*, in: 26 OXFORD JOURNAL OF LEGAL STUDIES (2006), pp. 1 *et seq.*; *cf.* also M. Dlugosch – *La cuestión de la continuidad de las normas nacionalsocialistas en la Alemania de postguerra* (1945-1949), in: 13 JUECES PARA LA DEMOCRACIA – INFORMACION Y DEBATE (1991) 9, no. 2, pp. 69 *et seq.*, at p. 75.

[180] G. Radbruch – *Gesetzliches Unrecht und übergesetzliches Recht*, in: 1 SÜDDEUTSCHE JURISTENZEITUNG (1946), pp. 105 *et seq.*, *ibid.*, at p. 107. (Translation by S.K. For an other English translation of *Radbruch*'s text *cf. supra*.)

[181] S. Kirchner (translation by R. Bielecki-Weyenberg) – *The Protection of Unborn Life at the Crossroads between Law and Bioethics*, in: AU-EU WEEKLY MONITOR, Issue 8, 19 February 2008.

[182] H. Kirchner – *DDR-Unrecht in Fallbeispielen aus der höchstrichterlichen Rechtsprechung*, in: 20 JURA – JURISTISCHE AUSBILDUNG (1998), pp. 46 *et seq.*, at p. 47.

[183] S. Kirchner (translation by R. Bielecki-Weyenberg) – *The Protection of Unborn Life at the Crossroads between Law and Bioethics*, in: AU-EU WEEKLY MONITOR, Issue 8, 19 February 2008.

HYPOTHESIS

It is my thesis

that unborn children have a right to life under Art. 2 (1) ECHR,

that the margin of appreciation, while useful for the treatment of religion under domestic law, is inappropriate for dealing with the right to life

and that consequently the European Court of Human Rights should establish an autonomous concept of what constitutes human life in which it clarifies that Art. 2 ECHR also applies to unborn human life, thereby closing this large gap in the protection of human rights under the Convention.

LITERATURE REVIEW

There has been a lot of debate in Germany between the 2010 decision of the Supreme Court (*Bundesgerichtshof*) not to punish a physician for pre-implantation genetic diagnostics and the 2011 legislation which expressly allowed screening for congenital diseases prior to the implantation of an embryo.

The majority view in the existing legal literature is still opposed to the idea of an unlimited right to life also for the unborn child – but the thesis presented here does not come out of the blue: from a human rights perspective, *Grabenwarter* has left the possibility that Art. 2 (1) ECHR applies already in the pre-natal stage.[184] The debate between the pro choice and the pro life camp, though, has essentially ignored Art. 2 (1) ECHR. This exclusion of European or International Human Rights Law is not uncommon in the debate which all too often is focused on the issue of abortion. A notable extension of the debate could be seen in 2010 and 2011 in Germany when it was discussed – also in mainstream media – whether pre-implantation genetic diagnostics should be permitted. Lawyers are hardly alone in the discussion of right to life issues, which brings with it the danger that the limits between law, ethics, morals and politics are being eroded. While the connections between these distinct fields are highly relevant, this thesis will focus on the legal aspects under Art. 2 (1) ECHR while looking beyond single issues, such as abortion or PID.

But even among lawyers, right to life issues seem to be either dealt with only by experts[185] who often hold pre-defined positions[186] or requires an external trigger, such as a new case,[187] new legislation,[188] new literature[189] or new technological de-

[184] C. Grabenwarter – EUROPÄISCHE MENSCHENRECHTSKONVENTION, 3rd ed., Verlag C.H. Beck, Munich (2008), p. 132.

[185] *Cf. e.g.* R. J. Araujo – *Abortion: From Privacy to Equality: The Failure of Justifications for Taking Human Life*, in: 45 HOUSTON LAW REVIEW (2009), pp. 1737 *et seq.;* F. J. Beckwith – *When You Come To a Fork in the Road, Take It?: Abortion, Personhood, and the Jurisprudence of Neutrality*, in: 45 JOURNAL OF CHURCH AND STATE (2003), pp. 485 *et seq.*; *cf.* also the instructive text J. Carbone / N. Cahn – *Embryo Fundamentalism*, in: 18 WILLIAM & MARY BILL OF RIGHTS JOURNAL (2009-2010), pp. 1015 *et seq.*

[186] *Cf.* R. Fletcher – *"Pro-Life" Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986-1992*, in: 36 OSGOODE HALL LAW JOURNAL (1998), pp. 1 *et seq.*

[187] *Cf.* C. E. Borgmann – *Winter Count: Taking Stock of Abortion Rights after* Casey *and* Carhardt, in: 31 FORDHAM URBAN LAW JOURNAL (2004), pp. 675 *et seq.*; S. Bouclin – *Abortion in Post-X Ireland*, in: 13 WINDSOR REVIEW OF LEGAL AND SOCIAL ISSUES (2002), pp. 133 *et seq.*; A. M. Buckley – *The Pri-*

macy of Democracy over Natural Law in Irish Abortion Law: An Examination of the C *Case*, in: 9 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW (1998), pp. 275 *et seq.*; S. K. Calt – *A., B. & C. v. Ireland*: „Europe's *Roe v. Wade*"?, in: 14 LEWIS & CLARK LAW REVIEW (2010), pp. 1189 *et seq.*; P. Charleton – *Judicial Discretion in Abortion: The Irish Perspective*, in: 6 INTERNATIONAL JOURNAL OF LAW AND THE FAMILY (1992), pp. 349 *et seq.*; A. M. Clifford – *Abortion in International Waters off the Coast of Ireland: Avoiding a collision between Irish moral sovereignty and the European Community*, in: 14 PACE INTERNATIONAL LAW REVIEW (2002), pp. 385 *et seq.;* D. Cole – *"Going to England": Irish Abortion Law and the European Community*, in: 17 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW (1993), pp. 113 *et seq.*; J. English – *Abortion and the Concept of a Person*. in: 5 CANADIAN JOURNAL OF PHILOSOPHY (1975), pp. 233 *et seq.*; E. Finney – *Shifting to a European* Roe v. Wade*: Should Judicial Activism create an international right to abortion with* A., B. and C. v. Ireland*?*, in: 72 UNIVERSITY OF PITTSBURGH LAW REVIEW (2010), pp. 389 *et seq.*; M. Ford – *Evans v United Kingdom: What Implications for the Jurisprudence of Pregnancy?*, in: 8 HUMAN RIGHTS LAW REVIEW (2008), pp. 171 *et seq.*; H. Geddert – *Abtreibungsverbot und Grundgesetz (BVerfGE 39, 1 ff.)*, in: K. Lüderssen / F. Sack (eds.) – VOM NUTZEN UND NACHTEIL DER SOZIALWISSENSCHAFTEN FÜR DAS STRAFRECHT – ZWEITER TEILBAND, 1st ed., Suhrkamp Verlag, Frankfurt am Main (1980), pp. 333 *et seq.*; T. Goldman – Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*; C. E. Howard – *The* Roe'd *to Confusion:* Planned Parenthood v. Casey, in: 30 HOUSTON LAW REVIEW (1993-1994), pp. 1457 *et seq.*; A. Komanovics – *Effective enforcement of human rights: the Tysiac v. Poland case*, in: 143 STUDIA IURIDICA AUCTORITATE UNIVERSITATIS PECS (2009), pp. 186 *et seq.*; D. P. Kommers – *The Constitutional Law of Abortion in Germany: Should Americans pay Attention?*, in: 10 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY (1994), pp. 1 *et seq.*; M. Kraulich – *The Abortion Debate Thirty Years Later: From Choice to Coercion*, in: 21 FORDHAM URBAN LAW JOURNAL (2004), pp. 783 *et seq.*; G. D. Lee – *Ireland's Constitutional Protection of the Unborn: Is it in Danger?*, in: 7 TULSA JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW (1999-2000), pp. 413 *et seq.*; S. A. Low – *Europe threatens the Sovereignty of the Republic of Ireland: Freedom of Information and the Right to Life*, in: 15 EMORY INTERNATIONAL LAW REVIEW (2001), pp. 175 *et seq.*; S. McGuinness – *A, B and C leads to D (for delegation),* A, B and C v. Ireland, 25579/05, *[2010] ECHR 2032*, in: 19 MEDICAL LAW REVIEW (2011), pp. 476 *et seq.*; B. Mercurio – *Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union*, in: 11 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2003), pp. 141 *et seq.*; M. F. Moses – Casey *and its Impact on Abortion Regulation*, in: 21 FORDHAM URBAN LAW JOURNAL (2003-2004), pp. 805 *et seq.*; G. L. Neuman – Casey *in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, in: 43 AMERICAN JOURNAL OF COMPARATIVE LAW (1995), pp. 273 *et seq.*; C. G. Ngwena – *Inscribing Abortion as a Human Rights: Significance of the Protocol on the Rights of Women in Africa*, in: 32 HUMAN RIGHTS QUARTERLY (2010), pp. 783 *et seq.* ; S. Pentz Bottini – *Europe's Rebellious Daughter: Will Ireland Be Forced to Conform Its Abortion Law to That of Its Neighbors*, in: 49 JOURNAL OF CHURCH AND STATE (2007), pp. 211 *et seq.*; J. Pichon – *Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France*, in: 7 GERMAN LAW JOURNAL (2006), pp. 433 *et seq.*; A. Plomer – *A Foetal Right to Life? The Case of Vo v France*, in: 5 HUMAN RIGHTS LAW REVIEW (2005), pp. 311 *et seq.* ; P. A. Ward – *Ireland: Abortion: "X" + "Y" = ?!*, in: 33 UNIVERSITY OF LOUISVILLE JOURNAL OF FAMILY LAW (1994-1995), pp. 385 *et seq.* ; S. Zenkich – X *marks the spot while* Casey *strikes out: two controversial abortion decisions*, in: 23 GOLDEN GATE UNIVERSITY LAW REVIEW (1993), pp. 1001 *et seq.*

[188] *Cf.* H. Kreiß – *Präimplantationsdiagnostik: Anschlussfragen für das Embryonenschutz- und Gendiagnostikgesetz und Auswirkungen auf das Stammzellgesetz*, in: 44 ZEITSCHRIFT FÜR RECHTSPOLITIK (2011), pp. 68 *et seq.*; M. Kriele – DIE NICHT-THERAPEUTISCHE ABTREIBUNG VOR DEM GRUNDGESETZ, 1st ed., Duncker & Humblot, Berlin (1992); H. T. Krimmel / M. J. Foley – *Abortion: an inspection into the nature of human life and potential consequences of legalizing its destruction*, in: 46

velopments.[190] In addition, the focus is often put on domestic law, in all likelihood due to the fact that it is the criminal law provisions on abortion which draw the most criticism by the pro-choice camp while for pro-life advocates the protection of human life needs to be efficient, which usually means that the law has to provide for criminal sanctions in the case a human life is taken.

What appears still to be missing is a large overarching look at the issue as a whole from a legal[191] perspective. Although there have been attempts to provide some insights into the issue,[192] these, too, are mostly restricted to the domestic lev-

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UNIVERSITY OF CINCINNATI LAW REVIEW (1977), pp. 725 *et seq.*; see also J. Schweppe – *Beyond Abortion: The Right to Life of the Unborn Child under Irish Law*, in: 3 UNIVERSITY COLLEGE DUBLIN LAW REVIEW (2003), pp. 1 *et seq.*; J. Schweppe – *Mothers, Fathers, Children and the Unborn – Abortion and the Twenty-Fifth Amendment to the Constitutional Bill*, in: 9 IRISH STUDENT LAW REVIEW (2001), pp. 136 *et seq.*

[189] U. Werner – *The Convergence of Abortion Regulation in Germany and the United States: A Critique of Glendon's Rights Talk Thesis*, in: 18 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL (1995-1996), pp. 571 *et seq.*

[190] *Cf.* C. M. Browne / B. J. Hynes – *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, in: 17 JOURNAL OF LEGISLATION (1990-1991), pp. 97 *et seq.*; D. J. Campisi / C. Lowder / N. B. Challa – *Heirs in the Freezer – Bronze Age Biology Confronts Biotechnology*,in: 36 AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL JOURNAL (2010-2011), pp. 179 *et seq.*; S. Goldberg – *Religious Contributions to the Bioethics Debate: Utilizing legal rights while avoiding scientific temptations*, in: 30 FORDHAM URBAN LAW JOURNAL (2002-2003), pp. 35 *et seq.;* N. M. de S. Cameron – *Biotechnology and the Future of Humanity*, in: 22 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY (2005-2006), pp. 413 *et seq.*; R. Dixon / M. Nussbaum – *Abortion, Dignity and a Capabilities Approach*, CHICAGO PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 345 (March 2011), available online at <http://www.law.uchicago.edu/files/file345-rd-mn-abortion.pdf> (last visited 26 November 2011); J. R. Gorny – *The Fate of Surplus Cryopreserved Embroys: What is the Superior Alternative for their Disposition?*, in: 37 SUFFOLK UNIVERSITY LAW REVIEW (2004), pp. 459 *et seq.*; L. Honnefelder – *Was macht Genomanalyse und Genetik zur Herausforderungen für den Menschen?*, in: K. Amelung / W. Beulke / H. Lilie / H. Rosenau / H. Rüping / G. Wolfslast (eds.) – STRAFRECHT – BIORECHT – RECHTSPHILOSOPHIE, FESTSCHRIFT FÜR HANS-LUDWIG SCHREIBER ZUM 70. GEBURTSTAG AM 10. MAI 2003, 1st ed., C. F. Müller Verlag, Heidelberg (2003), pp. 711 *et seq.*

[191] On philosophical perspectives see R. Dworkin – DIE GRENZEN DES LEBENS – ABTREIBUNG, EUTHANASIE UND PERSÖNLICHE FREIHEIT, 1st ed., Rowohlt, Reinbek (1994); G. Grisez – *When Do People Begin?*, in: 63 PROCEEDINGS OF THE AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION (1990), pp. 27 *et seq.*; T. Groh / N. Lange-Bertalot – *Der Schutz des Lebens Ungeborener nach der EMRK*, in: 58 NEUE JURISTISCHE WOCHENSCHRIFT (2005), pp. 713 *et seq.*

[192] L. K. Jonker – *Learning from the Past: How the Events that shaped the Constitutions of the United States and Germany play out in the Abortion Controversy*, in: 23 REGENT UNIVERSITY LAW REVIEW (2010-2011), pp. 447 *et seq.*; S. Kirchner - *Der Schutz ungeborenen Lebens zwischen Recht und Bioethik – Zugleich ein Beitrag zur Bedeutung der Ethik in der Juristenausbildung* (Unborn Life between Law and Bioethics), in: SOCIAL SCIENCE RESEARCH NETWORK (27 September 2007), <http://ssrn.com/abstract=1017472> (last visited 4 October 2011); K. O'Donovan – *Taking a Neutral Stance on the Legal Protection of the Fetus*, in: 14 MEDICAL LAW REVIEW (2006), pp. 115 *et seq.*; K.

el. Regarding the European Convention on Human Rights, there is almost no in depth literature[193] and a more detailed analysis of the pre-natal applicability of the personal scope of Art. 2 (1) ECHR appears to be necessary. Providing this analysis is the aim behind this thesis.

It can therefore be concluded that while there is a lot of material on abortion in general, there is very little literature available on the right to life of the unborn child under Art. 2 (1) ECHR. In a sense, the right to life of the unborn child appears to be the third rail of European Human Rights Law. If anything, the issue is seen almost exclusively through from the abortion perspective and usually abortion is considered to amount to a right of the mother. While the Strasbourg organs have held already decades ago that there is no unlimited discretion of the mother, the rejection of a right to abortion based on the very wide Art. 8 ECHR in *A, B and C v. Ireland* has created a window of opportunity in which arguments for the right to life of the unborn child might be heard more willingly than in the past. It has to be noted, though, that there already has been a considerable backlash in so far as pro-choice proponents now seek to usurp the fact that the European Court of Human Rights criticized some procedural aspects of Irish law. Therefore there are still many attempts to steer the debate away from the general observations attempted in this thesis towards a debate about the question whether the mother has a right to have an abortion, as is the case in the United States.

O'Rourke – *Catholic teaching in regard to two prominent "right to life issues": a historical theological study*, in: 11 St. LOUIS UNIVERSITY PUBLIC LAW REVIEW (1992), pp. 427 *et seq.*; P. Reichenbach – *Ist die medizinisch-embryopathische Indikation bei dem Schwangerschaftsabbruch nach § 218a II StGB verfassungswidrig?*, in: 22 JURA – JURISTISCHE AUSBILDUNG (2000), pp. 622 *et seq.*; D. Rihossa – THE RIGHT TO ABORTION: COMPARATIVE APPROACH CONCERNING CROATIA, FEDERAL REPUBLIC OF GERMANY, AND US, 1st ed., Dissertation.com, Boca Raton (2000), available online at <http://www.bookpump.com/dps/pdf-b/94268546,pdf> (last visited 18 March 2011); G. J. Roden – *Unborn Children as Constitutional Persons*, in: 25 ISSUES IN LAW & MEDICINE (2010), pp. 185 *et seq.*; S. Theilig – DIE STRAFBARKEIT PRÄNATALER EINWIRKUNGEN AUF DIE MENSCHLICHE LEIBESFRUCHT UNTER BESONDERER BERÜCKSICHTIGUNG DER MÖGLICHKEITEN DER PRÄNATALEN MEDIZINISCHEN DIAGNOSTITK, INAUGURALDISSERTATION ZUR ERLANGUNG DES GRADES EINES DOKTORS DER RECHTE DURCH DIE RECHTS- UND STAATSWISSENSCHAFTLICHE FAKULTÄT DER RHEINISCHEN FRIEDRICH-WILHELMS-UNIVERSITÄT BONN, 1st ed., self-published, Bonn (1995).

[193] But see K. Freeman – *Comments: The Unborn Child and the European Convention on Human Rights: To Whom does "Everyone's Right to Life" belong?*, in: 8 EMORY INTERNATIONAL LAW REVIEW (1994), pp. 615 *et seq.*; S. Kirchner – *Abortion and the Right to Life under Article 2 of the European Convention on Human Rights?*, in: A. Begum (ed.), MEDICAL TREATMENT AND LAW, 1st ed., Icfai University Press, Hyderabad (2010), pp. 198 *et seq.*; S. Kirchner – *Abortion and the Right to Life under Art. 2 of the European Convention on Human Rights*, in: 9 IUP JOURNAL OF ENVIRONMENT & HEALTH CARE LAW (2010), pp. 10 *et seq.*

METHODOLOGY

The methodological approach behind this thesis is fairly straightforward. Because the question behind the project centers on the interpretation of one norm, Art. 2 (1) sentence 1 ECHR, this text will be analyzed in the context of the jurisprudence of the European Court of Human Rights and the former European Commission of Human Rights.

Because the thesis is based on the analysis of legal texts, language – the key tool of every lawyer – plays a central role. Not only will I look at language as an issue of interpretation but also at the way language shapes our perception of the law. The method used is strictly legal in nature. The political debate on the right to life is often not far from the legal debate but has to be seen as distinct from it. For the purposes of this thesis, though, despite obvious linkages to religious and moral issues, the point of departure are medical and biological, that is, scientific facts, such as the continuous development of the human being from the moment of conception. Taking the natural sciences into account and being aware of the political, religious and moral dimensions of the debate forced me to ensure that the legal research which is presented in this thesis is protected against undue contamination by non-legal considerations.

My position in terms of international legal philosophy is that of a modern, applied, scholastic view which is rooted in the concept of Natural Law. In so far it is distinct from the different schools of Neo-Scholasticism of the 19th and 20th century but more closely related to the New Haven School, although due to my academic training my approach certainly has also been influenced by *Thilo Marauhn*'s "Studies in Applied International Law" approach as well as by the Roman-Dutch influence on Public International Law.

The first chapter of this thesis will deal with the applicability of the right to life under Art. 2 (1) ECHR to the Unborn Child. In this context the wide margin of appreciation which is given to states will be examined as to its suitability with regard to the right to life and will be contrasted with the possibility of autonomous concepts.

In the second chapter, the existing case law will be investigated. The Strasbourg organs have dealt with issues such as abortion on a number of occasions, including the 2010 judgment in the case of *A, B and C v. Ireland*. This judgment will feature prominently in this thesis and will be put into the national context as well. It will be put in the context of the existing case law while academic literature will take only a secondary role in interpreting Art. 2 (1) ECHR. Because the right to life covers more issues than merely abortion, other issues will be dealt with towards the end of the second chapter.

In the third chapter the wording of Art. 2 (1) ECHR is interpreted, in particular within the systematic framework of the Convention but also with a look to the differences between the two authentic versions of the Convention – in English and French. In addition, the notion of personhood is taken into account as are other international documents. In connection with the latter, the status of the Convention as a self-contained regime under international law is emphasized. Attention is also given to the European Union's Charter of Fundamental Rights which shows many parallels to the Convention.

The concluding observations form the fourth and last chapter of this thesis.

1. LIFE BEFORE BIRTH AND THE INTERPRETATION OF ART. 2 (1) ECHR

1.1. Abortion and the Right to Private Life under Art. 8 ECHR

A key issue in the context of the right to life of the unborn child is abortion. The issue of abortion touches upon three major issues under the Convention: the right to life of the mother and the child respectively as well as the mother's rights under the "private life"–clause of Art. 8 (1) ECHR. While many pro-choice activists consider the right to private life of the mother to include a right to have an abortion without further requirements, the Court has now ruled out such a wide interpretation of the concept of private life:

With a clarity which gives this judgment the potential to significantly change the treatment of abortion under the Convention, the Court stated in *A, B and C v. Ireland* that Art. 8 of the Convention does not provide for a right to have an abortion.[194] This change is certainly not sudden but could have been predicted from the earlier case law of the Convention organs and in fact has been tied by the Court to its own earlier jurisprudence by the word "accordingly"[195] which refers back to the paragraph before where the Court had cited its earlier judgments in *Vo v. France*[196] and *Tysiąc v. Poland*.[197] That there is no unlimited right to abortion had already been decided by the Commission in *Brüggemann and Scheuten v. Germany*[198] in relation to the limits placed on abortion under West German law in the 1970s after the Federal Constitutional Court had decided that mere necessity was an insufficient reason for allowing abortions.[199] Pregnancy is a highly intimate matter,[200] but the embryo is

[194] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 214.
[195] *Ibid.*
[196] ECtHR – *Vo v. France*, Application no. 53924/00, Judgment of 8 July 2004. On *Vo v. France* see also T. Groh / N. Lange-Bertalot – *Der Schutz des Lebens Ungeborener nach der EMRK*, in: 58 NEUE JURISTISCHE WOCHENSCHRIFT (2005), pp. 713 *et seq.* and A. Plomer – *A Foetal Right to Life? The Case of Vo v France*, in 5 HUMAN RIGHTS LAW REVIEW (2005), pp. 311 *et seq.*
[197] ECtHR – *Tysiąc v. Poland*, Application No. 5410/03, Judgment of 20 March 2007.
[198] EComHR – *Brüggemann and Scheuten v. Germany*, Application No. 6959/75, Report of 12 July 1977.
[199] Bundesverfassungsgericht – *First Abortion Judgment*, Joined Cases nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, at p. 1, *cf.* there guiding sentence 5.

not merely a part of the pregnant woman's body.[201] The phrase that "[w]henever a woman is pregnant her private life becomes closely connected with the developing [child]",[202] which the Court repeated in *A, B and C v. Ireland*,[203] is found also in Brüggemann but it is the context in which it stands which already back in 1977 indicated that the Convention would not allow for a right to abortion under Art. 8 (1) ECHR. This sentence immediately follows the conclusion by the Commission that "pregnancy cannot be said to pertain uniquely to the sphere of private life".[204] The Commission (and also the Court which repeated the emphasis on the connection between mother and child in *Boso*[205]) therefore is to be understood as to interpret Art. 8 (1) ECHR to the effect that pregnancy (and hence abortion) are not covered by the protective scope or *Schutzbereich* of Art. 8 (1) ECHR precisely *because* the mother is most intimately linked to the child. If the Convention organs assume that this link reduces the scope of the mother's private life within the meaning of Art. 8 (1) ECHR, they logically have to assume that the child is an individual being with its own life. The Commission even clarified that

> "the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests",[206]

in this case the interest of the unborn child to remain alive. If the Commission in *Brüggemann* had considered the unborn child not to be a living individual, it could have treated the unborn child like a mere part of the body of the woman. In not doing so, the Commission has shown its awareness for the unique identity of the child, for his or her individuality – and consequently for the personhood of the child. It might very well have been the greatest omission in the work of the Commission to have failed to spell this out more clearly in *Brüggemann*, but it seems that it can be de-

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[200] *Cf.* B. Schmidt-Bleibtreu / F. Klein – Kommentar zum Grundgesetz, 9th ed., Luchterhand Verlag, Neuwied / Kriftel (1999), p. 142.

[201] *Ibid.*

[202] EComHR – *Brüggemann and Scheuten v. Germany*, Application No. 6959/75, Report of 12 July 1977, para 59.

[203] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 213.

[204] *Ibid.*

[205] ECtHR – *Boso v. Italy*, Application No. 50490/99, Decision of 5 September 2002, para. 2.

ducted from the Commission's emphasis on the connection between mother and child and the effect a pregnancy has on the right to private life of a woman. If the unborn child is already an individual capable of affecting the rights of an other person under Art. 8 (1) ECHR, it only appears logical that the child should also have not only interests but also rights under the Convention – in particular the right to life under Art. 2 ECHR, a view which is furthermore supported by the fact that the Commission in *Brüggemann* seemed to have no problem applying the precedent of *X v. Iceland*[207] to the situation of the unborn child.[208] It was the failure of the Commission in *Brüggemann* to clarify its line of thought which later has led to renewed discussions concerning the legal status of the unborn child under the Convention. This debate would have been unnecessary, had the Convention organs followed through on its view which apparently informed the decision in *Brüggemann*.

An alternative line of reasoning for the Commission could have been to see an implied reduction of the scope of the right to private life in the female gender of Ms. *Brüggemann* and Mrs. *Scheuten*. It could be argued that being female implies the chance of becoming pregnant and that, since pregnancy is a natural state most women experience at least once in their lifetime, if falls outside the scope *ratione materiae* of Art. 8 (1) ECHR. Such an approach, though, would have been incompatible with Art. 14 ECHR, which essentially forced the Commission to take the direction it chose in *Brüggemann.*

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[206] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 56.

[207] EComHR – *X v. Iceland*, Application No. 6825/74, Decision of 18 May 1976, in: 5 DECISIONS AND REPORTS pp. 86 *et seq.*, cf. p. 87.

[208] EComHR – *Brüggemann and Scheuten v. Germany*, Application No. 6959/75, Report of 12 July 1977. para 57. *Nota bene*: The source offered by the Commission for *X v. Iceland* in *Brüggemann and Scheuten v. Germany* contains an incorrect application number. Since *Brüggemann* has had a far greater influence on European Human Rights Law than *X v. Iceland* (in which it was essentially established that Art. 8 (1) ECHR does not grant everybody to keep a dog regardless of external circumstances, EComHR – *X v. Iceland*, Application no. 6825/74, Decision of 18 May 1976, in: 5 DECISIONS AND REPORTS pp. 86 *et seq.*, at p. 87), the decision in *Brüggemann and Scheuten v. Germany* is reade far more often than *X v. Iceland* and at times the reference to *X* is taken from *Brüggemann*, with the consequence that this error committed by the Commission in *Brüggemann* can now be found elsewhere, *cf.* 大 島 俊 之 (Toshiyuki Hiroshi Shima), 性同一性障害とヨーロッパ人権裁判所 (EUROPEAN COURT OF HUMAN RIGHTS AND GENDER IDENTITY DISORDER), Graduate School of Law, Kobe (1999), available online at <http://www.law.kobegakuin.ac.jp/~jura/hbun1A.htm> (last visited 1 February 2011); F. F. Martin / S. J. Schnably / R. J. Wilson / J. S. Simon / M. V. Tushnet – INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW – TREATIES, CASES, & ANALYSIS, 1st ed., Cambridge University Press, Cambridge (2006), p. 725, which needs to be taken into account when consulting said texts.

1.2. The Applicability of the Right to Life under Art. 2 (1) ECHR to the Unborn Child

1.2.1. The Problem

In the 1980 decision of *X v. United Kingdom* the European Commission of Human Rights it had been held that

> "[t]he word "everyone's"[209] [in Art. 2 (1) ECHR] seems not to be applicable to the unborn child"[210] and the Commission assumed that if there were a right to life of the unborn child, it would be "subject to an implied limitation allowing pregnancy to be terminated in order to protect the mother's life or health".[211]

This is a view which, in my opinion, begs understanding.[212] Not only did the Commission fail to live up to its mandate by refusing to provide a clear interpretation of Art. 2 ECHR, the conclusion offered in *X v. United Kingdom* is also flawed in several respects. In this part of the thesis, we will see that Art. 2 ECHR indeed does apply to the unborn child and that the idea of an unwritten limitation of the personal

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[209] *Cf.* K. Freeman – *Comments: The Unborn Child and the European Convention on Human Rights: To Whom does "Everyone's Right to Life" belong?*, in: 8 EMORY INTERNATIONAL LAW REVIEW (1994), pp. 615 *et seq.*

[210] EComHR – *X v. United Kingdom*, Application No. 8416/78, Decision of 13 May 1980, in: 19 DECISIONS AND REPORTS (1980), pp. 244 *et seq.*, at p. 244.

[211] *Ibid.*

[212] On the implied limitation of human rights *cf.* also R. Zimmermann – *Die Schrankenregelungen der Europäischen Menschenrechtskonvention, des Grundgesetzes und der Grundrechtecharta der Europäischen Union im Vergleich*, in: F. Böllmann / S. Hemme / Ö. Korkmaz / F. Kühn / A. Sinn (eds.) – DIE MENSCHENRECHTE ALS GRUNDLAGE FÜR EINE GESAMTEUROPÄISCHE RECHTSENTWICKLUNG UND IHR EINFLUSS AUF DAS STRAFRECHT, DAS ÖFFENTLICHE RECHT UND DAS ZIVILRECHT – TÜM AVRUPA'DAKI HUKUKSAL GELIŞMELERIN DAYANAĞI OLARAK İNSAN HAKLARI VE BUNUN CEZA HUKUKU, KAMU HUKUKU VE ÖZEL HUKUKTAKI ETKILERI – AUSGEWÄHLTE VORTRÄGE UND REFERATE DER SOMMERAKADEMIE IN FOÇA/IZMIR/TÜRKEI VOM 18.–30. SEPT. 2005 UND DER SOMMERAKADEMIE IN KEMER/ANTALYA/TÜRKEI VOM 15.–28. SEPT. 2003, Deutsch-Türkische Rechtsstudien, Band 5, 1st ed., BWV Berliner Wissenschafts-Verlag, Berlin (2006), pp. 63 *et seq.*; on the limitation of human rights, *e.g.* for purposes of public safety *cf. ibid.* as well as S. Kirchner – *Human Rights Guarantees during States of Emergency – The European Convention on Human Rights*, in: 3 BALTIC JOURNAL OF LAW AND POLITICS (2010), No. 2, pp. 1 *et seq.*

scope of the right to life is incompatible with Articles 2 and 15 ECHR[213] as well as with the spirit of the Convention. While the balancing of the rights of the child and the mother can lead to a situation in which an action which is necessary to save the life of the mother may go unpunished even if it results in the death of the child (although under other circumstances, like in the scenario which led to *Vo v. France*,[214] the negligent killing of an unborn child will have to be penalized due to the state's positive obligation[215] to protect all human life[216]), the seemingly similar results are reached through fundamentally different approaches of reasoning. What makes *X v. United Kingdom* important in the context of *A, B and C v. Ireland* is that the 1980 decision and the 2010 judgment have to be seen together: the Commission has allowed the death of an unborn child to save the life and health of the mother while the Court has clarified that other considerations which were covered (only) by Art. 8 (1) ECHR cannot lead to states allowing abortion. Read together, *X v. United Kingdom* and *A, B and C v. Ireland* define the limits of abortion under the Convention. The reason why this limitation has not received significantly more attention since the judgment in December 2010 seems to be the fact that, once again, the Court has not explicitly applied Art. 2 ECHR to unborn children. The main reason for not doing will in all likelihood be a lack of substantive submissions: the Court will deal with the legal questions which are brought before it and if the issue is not raised by the parties, it is unlikely to be dealt with by the Court.

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[213] *Cf.* ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, separate opinion of Judge *Costa*, joined by Judge *Traja*, para. 14.

[214] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004.

[215] P. van Dijk / F. van Hoof / A. van Rijn / L. Zwaak (eds.) – THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Intersentia, Antwerpen / Oxford (2006), pp. 353 *et seq.* See also in particular ECtHR – *Calvelli and Ciglio v. Italy*, Application No. 32967/96, Judgment of 17 January 2002, para. 49.

[216] *Cf.* P. Leach – TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, 2nd ed., Oxford University Press, Oxford (2005), p. 200 and ECtHR – *Powell v. United Kingdom*, Application No. 45305/99, Decision of 4 May 2000. The situation in *Calvelli and Ciglio v. Italy* was significantly different from *Vo* since in *Calvelli*, the child died two days after birth (ECtHR – *Calvelli and Ciglio v. Italy*, Application No. 32967/96, Judgment of 17 January 2002, para. 9), allowing the Court to consider Art. 2 ECHR applicable (*ibid.*, para. 50).

1.2.2. Interpreting the Convention

According to Art. 32 VCLT, the content of which has long been a norm of customary international law,[217] the starting point for every interpretation of an international norm is its ordinary meaning. But what does ordinary meaning still mean when one is asked to apply a document which is interpreted differently at different times rather than in a strictly static manner?[218] In particular concerning the question whether the right to life applies to unborn children, no satisfactory answer has so far been provided by the Convention organs.

1.2.2.1. The Margin of Appreciation Doctrine in the Context of the Abortion Debate before the ECtHR

The Court is of the opinion that, due to a lack of a general consensus among states[219] parties to the Convention as to the legality of abortion, it has to give states a wide margin of appreciation on this matter.[220]

The ECtHR might not see a consensus among all states parties to the Convention but at least it can be argued that there is a Europe-wide tradition of ethics of life which transcends religions and philosophies.[221] We will return to this issue later and see that it is not as simple as *Pfürdtner* makes it appear, although, as will be shown in this part, consensus is also not as relevant it one might imagine. It has to be noted, though, that according to Art. 1 of the Statute of the Council of Europe,[222] the COE has been created with the aim to protect and support the ideas and princi-

[217] International Court of Justice – *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, in: INTERNATIONAL COURT OF JUSTICE REPORTS 1991, pp. 53 *et seq.*, at para. 48.

[218] *Cf.* ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, dissenting opinion Judge *Ress*, para. 5.

[219] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 223; *cf.* also K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 215; A. Mowbray – *Institutional Developments and Recent Strasbourg Cases*, in: 5 HUMAN RIGHTS LAW REVIEW (2005), pp. 169 *et seq.*, at p. 177.

[220] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, para. 82.

[221] *Cf.* S. H. Pfürtner – *Ethische Aspekte des Schwangerschaftsabbruchs*, in: U. Körner (ed.) – ETHIK DER MENSCHLICHEN FORTPFLANZUNG – ETHISCHE, SOZIALE, MEDIZINISCHE UND RECHTLICHE PROBLEME IN FAMILIENPLANUNG, SCHWANGERSCHAFTSKONFLIKT UND REPRODUKTIONSMEDIZIN, 1st ed., Thieme, Stuttgart (1996), pp. 103 *et seq.*, at p. 104

[222] EUROPEAN TREATY SERIES No. 001.

ples which are part of the "common heritage"[223] of the member states of the Council of Europe by deepening the connections between these states.[224] In so far, the COE's claim to a coherence of values is wider but not as deep as that of the European Union.

This lack of consensus does not really come as a surprise, after all, "[i]f there is any medico-legal issue on which it seems virtually impossible to reach consensus, it is abortion."[225] In giving states a margin of appreciation in this matter, the Court is following in the footsteps of the old Commission[226] which, "[s]ensitive to the difficult moral and ethical issues involved and to the lack of consensus, [...] was reluctant to intervene and condemn any particular State policy that has been adopted"[227] – in other words, both the Commission and the Court have failed to do their job and to clarify which state actions violate human rights and which do not. In fact, the Court even went so far as to question when life begins,[228] which is a question not of law but of biology and medicine. It seems absurd that the Court has placed this scientific question within the margin of appreciation of the states parties to the Convention[229] since that margin of appreciation relates to the diverse measures which may be taken by member states in response to facts, not to the facts themselves. It has been established by medical science for a long time that there is a continuous development of the individual human being from the moment of conception.[230] Hence, arguing that the unborn child is not a human means ignoring scientific facts.[231] There is

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[223] R. Geiger – GRUNDGESETZ UND VÖLKERRECHT – MIT EUROPARECHT, 5th ed., Verlag C. H. Beck, Munich (2010), p. 17.

[224] *Ibid.*

[225] S. Gevers – *Abortion Legislation and the Future of the 'Counselling Model'*, in: 13 EUROPEAN JOURNAL OF HEALTH LAW (2006), pp. 27 *et seq.*, at p. 27.

[226] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 215.

[227] *Ibid.*

[228] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, para. 82.

[229] *Ibid.*

[230] *Cf.* R. E. Felberbaum / W. Küpker – *Wo steht die morderne Embryologie?*, in: K. Hilpert / D. Mieth (eds.), KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Herder, Freiburg im Breisgau (2006), pp. 158 *et seq.*; A. Holderergger – *Die „Geistbeseelung" als Personwerdung des Menschen. Stadien der philosophisch-theologischen Lehr-Entwicklung*, in: K. Hilpert / D. Mieth (eds.), KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Herder, Freiburg im Breisgau (2006), pp. 175 *et seq.*

[231] N. Pearcey – WHY PRO-ABORTION IS ANTI-SCIENCE, 6 August 2011, <http://www.godandscience.org/doctrine/pro-abortion_anti-science.html> (last visited 10 October 2011).

no room for doubts as to facts proven by medical expertise – facts which are even referred to in the Hippocratic oath.[232] It has to be noted, though, that the Court (like the Commission before it) will usually only deal with the materials brought to it by the parties and will not investigate facts on its own. This explains why in its decision in *H v. Norway*[233] the Commission did not investigate the applicant's claim that an unborn child at 14 weeks of gestation can already feel the pain caused by the mechanical abortion procedure – even though in other cases such as the aforementioned case of *Menteş et al. v. Turkey* the Commission has endeavored on fact finding missions.[234] In *H v. Norway*, all the Commission would have had to do was to question experts in the field since the unborn child's capability for nociception (the neurological aspect of the ability to feel pain) has long been studied.[235] In this case, though, the Commission was in principle open to the idea that an unborn child can have rights under the Convention. Had the applicant in *H v. Norway* (the father[236] of the unborn child[237]) stated the case more clearly by submitting more convincing evidence as to the unborn child's capability to feel pain, the Commission might very well

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[232] U. Körner – *Ärztliche Verantwortung, Kompetenzen und ethische Konflikte beim Schwangerschaftsabbruch*, in: U. Körner (ed.) – ETHIK DER MENSCHLICHEN FORTPFLANZUNG – ETHISCHE, SOZIALE, MEDIZINISCHE UND RECHTLICHE PROBLEME IN FAMILIENPLANUNG, SCHWANGERSCHAFTSKONFLIKT UND REPRODUKTIONSMEDIZIN, 1st ed., Thieme, Stuttgart (1992), pp. 139 *et seq.*, at p. 139.

[233] EComHR – *H v. Norway*, Application No. 17004/90, Decision of 19 May 1992.

[234] *Cf.* ECtHR – *Menteş et al. v. Turkey*, Application No. 23186/94, Judgment of 28 November 1997, Summary, pp. ii *et seq.*, at p. ii.

[235] *Cf.* H. B. Valman / J. F. Pearson – *What the fetus feels*, in: 280 BRITISH MEDICAL JOURNAL (1980), pp. 233 *et seq.*; for examples from the time after *H v. Norway* see A. Morrow Fragoso – FETAL PAIN – CAN UNBORN CHILDREN FEEL PAIN IN THE WOMB?, 1st ed., Family Research Council, Washington D.C. (2010), pp. 3 *et seq.*; W. Huang / J. Deprest / C. Missant / M. van de Velde – *Management of Fetal Pain during invasive fetal procedures*, in: 55 ACTA ANAESTHESIOLOGICA BELGICA (2004), pp. 119 *et seq.*; N. M. Fisk / R. Gitau / J. M. Texeira / X. Giannakoulopoulos et al. – *Effect of Direct Fetal Opioid Analgesia on Fetal Hormonal and Hemodynamic Stress Response to Intrauterine Needling*, in: 95 ANESTHESIOLOGY (2001), pp. 828 *et seq.*; X. Giannakoulopoulos / W. Sepulveda / P. Kourtis *et al.* – *Fetal Plasma Cortisol and Beta-Endorphin Response to Intra-Uterine Needling*, in: 344 THE LANCET (1994), pp. 77 *et seq.* On the legal aspects of the fetal pain debate in the United States see T. Stanton Collett – FETAL PAIN LEGISLATION: IS IT VIABLE?, available online at <http://www.ethicalhealthcare.org/articles/collett_fetal_pain.pdf> (last visited 1 February 2011).

[236] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), pp. 216 *et seq.*, refers to the applicant as the "potential" father, which is biologically inacurrate since the man was the child's biological father, a phrase also employed *e.g.* by R. Emerton / K. Adams / A. Byrnes / J. Connors (eds.) – INTERNATIONAL WOMEN'S RIGHTS CASES, 1st ed., Cavendish Publishing Ltd., London (2005), p. 352.

[237] On the possibility that the father can be a victim within the meaning of the Convention *cf.* EComHR – *X v. United Kingdom*, Application No. 8416/78, Decision of 13 May 1980, in: 19 DECISIONS AND REPORTS (1980), pp. 244 *et seq.*, para. 2.

have had to decide differently. As it was, the Commission felt free to ignore the existing medical research in the field since it appears to have been ignored by the applicant as well. The situation of *Sariye Uvat*, the fourth applicant in the case of *Menteş et al. v. Turkey*,[238] is somewhat different since Mrs. *Uvat* had been pregnant with twins who were born prematurely (according to the, albeit unsubstantiated,[239] claim of the applicant as the result of actions on the part of the respondent government) and had died soon thereafter.[240] Mrs. *Uvat* had fled her village while in the ninth month of pregnancy due to military operations in the context of the conflict between the *Partiya Karkerên Kurdistanê* (PKK) and the armed forces of the Turkish Republic.[241] She then gave birth in Diyabakır but the twin boys died due to lack of medical care.[242] While *Karen Reid*[243] is correct in suggesting that the admissibility of Mrs. *Uvat*'s claim[244] could suggest a role for the Convention in the context of the right to life of the unborn child outside of the context of abortion, it has to be noted that the Mrs. *Uvat*'s children had been alive for ten days after having been born,[245] which – if one were to follow the understanding of the Court on how the right to life applies to unborn and born children – would lead to conclude that it is simply a case of the right to life which the Court affords to all born humans. In fact the claim made by Mrs. *Uvat*, as far as can be concluded from the publicly available Court records shows nothing to indicate that Mrs. *Uvat* sought to claim a right to life before birth.

In *X v. United Kingdom*[246] the Commission indicated that Art. 2 (1) ECHR would not protect unborn children,[247] but it has to be kept in mind that also in *Poku v.*

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[238] European Commission of Human Rights – *Menteş et al. v. Turkey*, Application No. 23186/94, Decision of 9 January 1995.

[239] *Cf.* K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 216 and ECtHR – *Menteş et al. v. Turkey*, Application no. 23186/94, Judgment of 28 November 1997, para. 100.

[240] EComHR – *Menteş et al. v. Turkey*, Application No. 23186/94, Decision of 9 January 1995, p. 4.

[241] *Ibid.*, pp. 3 *et seq*.

[242] *Ibid.*, p.4.

[243] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 216.

[244] On the content of Mrs. *Uvat*'s claim *cf.* ECtHR – *Menteş et al. v. Turkey*, Application no. 23186/94, Judgment of 28 November 1997, paras. 16 *et seq.* and paras. 99 *et seq.*

[245] European Commission of Human Rights – *Menteş et al. v. Turkey*, Application No. 23186/94, Decision of 9 January 1995, p. 3.

[246] EComHR – *X v. United Kingdom*, Application No. 8416/78, Decision of 13 May 1980, in: 19 DECISIONS AND REPORTS (1980), pp. 244 *et seq.*; *cf.* also D. Feldman – CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES, 2nd ed., Oxford University Press, Oxford and other locations (2002), p. 204.

United Kingdom[248] we have seen that the idea that the unborn child might be protected was not rejected outright (although the Commission did not find enough evidence to support the application in this case).

Despite these small cracks in the shield erected by the Convention organs, the basic line still stands, which is to say that, like the Commission before, the Court relies heavily on an extensive use of the margin of appreciation doctrine to justify its refusal to condemn the liberal abortion laws of member states. Of course it has to be taken into account that the Court can only deal with the cases brought before it and it seems that most cases brought before it involve women who want to have an abortion and use the Convention as a tool to fight domestic laws which restrict abortion.

In *A, B and C v. Ireland*,

> "[t]he Court recall[ed] that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when determining any case under Art. 8 of the Convention. Where a particularly important fact of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted [...].Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider [...]."[249]

Here the Court seems to focus on the margin of appreciation with regard to Art. 8 (1) ECHR, but it ignores the fact that any case concerning abortion cannot be dealt with only by looking at Art. 8 (1) ECHR, as it had said itself in a number of cases including *Brüggemann* and *A, B and C* that mother and child are intimately linked. Therefore the Court has given states also a wide margin of appreciation with regard to the unborn child's right to life. But there have been other cases in which the case

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[247] EComHR – *X v. United Kingdom*, Application No. 8416/78, Decision of 13 May 1980, in: 19 DECISIONS AND REPORTS (1980), pp. 244 *et seq.*, at p. 244.

[248] EComHR – *Poku v. United Kingdom*, Application No. 26985/95, Decision of 15 May 1996.

[249] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 232.

was made for the life of the child, such as in *X v. United Kingdom*, *H v. Norway*, *Boso v. Italy* and *Vo v. France*.

Also a look beyond the Convention at an other key document of the Council of Europe, the Convention on Human Rights and Biomedicine[250] highlights the need to understand Art. 2 ECHR in a wide sense such as to including the unborn child. This has been explained so well by Judge *Mularoni* in *Vo v. France* that her dissenting opinion in that case deserves to be quoted generously:

> "[S]ince the 1950s, considerable advances have been made in science, biology and medicine, including at the prenatal stage. The political community is engaged at both national and international level in trying to identify the most suitable means of protecting, even prenatally, human rights and the dignity of the human being against certain biological and medical applications. [I]t is not possible to ignore the major debate that has taken place within national parliaments in recent years on the subject of bioethics and the desirability of introducing or reforming legislation on medically assisted procreation and prenatal diagnosis, in order to reinforce guarantees, prohibit techniques such as the reproductive cloning of human beings and provide a strict framework for techniques with a proven medical interest. The aim of the Convention on Human Rights and Biomedicine [...] is to protect the dignity and identity of human beings and to guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine. It protects the dignity of everyone, including the unborn, and its main concern is to ensure that no research or intervention may be carried out that would undermine respect for the dignity and identity of the human being. Although this convention is very recent, it does not define the terms ['']everyone['] and ['']human being['] either, although it affirms their primacy in Article 2 in these terms: ['']The interests and welfare of the human being shall prevail over the sole interests of society or science.['] As to the problem of defining the term ['']everyone['], the explanatory report produced by the Directorate General of Legal Affairs at the Council of Europe states, in

[250] EUROPEAN TREATY SERIES No. 164; see also E. Riedel – *Global Responsibilities and Bioethics: Reflections on the Council of Europe's Bioethics Convention*, in: 5 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES (1997), pp. 179 *et seq.*

paragraph 18: [']In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention.[' T]his convention unquestionably contains provisions on the prenatal phase (see, for instance, Chapter IV – Human Genome). Requests may be made to the European Court of Human Rights under Article 29 of the convention for advisory opinions on its interpretation. The Contracting States did not impose any restriction on the scope of such referrals confining the Court's jurisdiction to questions arising postnatally."[251]

Judge *Mularoni*, the current Secretary of State of San Marino continued by emphasizing

"that one should not overlook the fact that the foetus in the [case of *Vo v. France*] was almost as old as foetuses that have survived and that scientific advances now make it possible to know virtually everything about a foetus of that age: its weight, sex, exact measurements, and whether it has any deformities or problems. Although it does not yet have any independent existence from that of its mother"[252]

is it an individual being, distinct of his or her mother.[253] Judge *Mularoni* concluded that

"[a]lthough legal personality is only acquired at birth, this does not to my mind mean that there must be no recognition or protection of [']everyone's right to life['] before birth. Indeed, this seems to me to be a principle that is shared by all the member States of the Council of Europe, as domestic legislation permitting the voluntary termination of pregnancy would not have been necessary if the foetus was not regarded as having a life that should be protected."[254]

[251] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, dissenting opinion Judge *Mularoni*.
[252] *Ibid.*
[253] *Ibid.*
[254] *Ibid.*

So far, though, it seems that the Court has ignored the impact of the Biomedicine Convention on the interpretation of Art. 2 (1) ECHR.[255]

The Court may be accused of looking for a simple way to avoid the discussion of the material compatibility of abortion with the Convention. From a political perspective, this attitude is understandable. After all, abortion is the third rail of human rights politics. Some claim that abortion is a human right for every woman while others consider abortion a grave violation of human rights, committed against the weakest humans by the very people who like no others are called to protect the young humans they kill. Abortion is a very emotional issue and for many it is hardly possible to discuss the matter in a rational way. This goes so far that those who defend innocent human lives are at times arrested while on the other hand those who claim to be pro-life intentionally take the lives of others whom they consider guilty of abortion. Against this backdrop, the Court has found itself unable to de-emotionalize the abortion debate and is, for the time being, that is, until a consensus is reached, refraining from issuing a clear decision. But the Court is not a political body. It is a legal, even more, a juridical body and as such it must not bend to the expectations of the population or the member states. Of course the Court cannot function without the financial contribution of the member states but if the Court wants to retain its credibility. This is particularly so since the Court has already indicated a certain awareness of the legal status of the unborn child in *Boso* and *H v. Norway*. The contrast to these careful steps can be seen in *Vo v. France* where the Court decided not to decide.[256] In other cases, such as 2009 judgment in *Lautsi v. Italy*,[257] the Court has clearly shown that it can make decisions which are absolutely contrary to the wishes

[255] Because this thesis is concerned with the right to life under Art. 2 (1) ECHR and not so much with biomedicine as such, the Biomedicine Convention will only be mentioned in passing. An introduction on the subject from a rather multidisciplinarian approach is provided by J. D. Rendtorff – *The Basic Principles and the Convention of Human Rights and Biomedicine of the Council of Europe*, in: 7 STUDIES IN ETHICS AND LAW (June 1998), pp. 93 *et seq.*

[256] T. Goldman – Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*, at pp. 277 and 279; J. Pichon – *Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France*, in: 7 GERMAN LAW JOURNAL (2006), pp. 433 *et seq.*, at p. 444.

[257] ECtHR – *Lautsi v. Italy*, Application no. 30814/06, Judgment of 3 November 2009, paras. 50 and 59.

of the majority.[258] Even if a large majority of the European population were in favor of abortion and even if all states parties to the Convention were to legalize abortion, is the Court required to apply the Convention which is rather clear in its wide wording of Art. 2 (1) 1 ECHR. If states parties to the Convention want to have clarity to the effect that abortion is allowed, then they all have to agree on a change to the Convention or at least on an Additional Protocol. *Goldman* suggests the opposite: the creation of an additional protocol to the Convention for the further protection of the unborn child.[259] In doing so, she overlooks that Art. 2 (1) ECHR is already worded as generously as possible ("everyone"). In furthermore suggesting that such an additional protocol would have to "employ more careful language so as not to encroach upon the rights of the mother",[260] she overlooks the only one and not several rights of the mother, that is, her right to life, may be balanced against the right to life of the child since mother and child are humans of equal value.[261] Given the experience with earlier Additional Protocols and the controversial nature of the subject, this approach would only benefit those member states which feel that they can sign away the rights of the unborn without provoking a domestic backlash, which seem to be few. In fact, despite the possibility given to member states by Art. 57 (1) ECHR, not a single member state has submitted a reservation to the effect that there is a right to abortion.[262] In this context, any examination of the scope *ratione personae* of Art. 2 (1) ECHR would be incomplete without taking into account the view of the *Verfassungsgerichtshof*, the Austrian Constitutional Court, to the effect that the lack of a reservation concerning abortion indicates a narrower understanding of Art. 2 (1) ECHR if at the time of ratification the state party in question had allowed abortion

[258] That the 2009 judgment in *Lautsi* was flawed is an other matter which goes beyond the scope of this thesis, *cf.* ECtHR – *Lautsi v. Italy*, Application no. 30814/06, Judgment of 18 March 2011, para. 77.

[259] T. Goldman – Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*, at p. 281, there fn. 25.

[260] *Ibid.*

[261] H. Tröndle / T. Fischer – STRAFGESETZBUCH UND NEBENGESETZE, 53rd ed., Verlag C. H. Beck, Munich (2006), p. 1348 (vor §§ 218-219b, margin no. 2).

[262] Alliance Defense Fund – JOINT WRITTEN OBSERVATION OF THIRD PARTY INTERVENERS: THE ALLIANCE DEFENSE FUND ON BEHALF OF THE FAMILY RESEARCH COUNCIL, WASHINGTON D.C., UNITED STATES, THE EUROPEAN CENTRE FOR LAW AND JUSTICE ON BEHALF OF KATHY SINNOTT, THE SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN, LONDON. Filed on 10 September 2009, <http://www.aul.org/wp-content/uploads/2010/12/ABC_FINAL.pdf> (last visited 1 February 2011). p. 4. (This document was submitted in the case of *A, B and C v. Ireland*.)

under certain circumstances.[263] Although at first sight this view appears not to be without some merit, it has to be noted that both the Commission's later "implied limitation"-approach in *X v. United Kingdom* and balancing of unequal legal goods – rights *vs.* interests – which had been suggested by the Court in *Boso v. Italy* would, from the perspective of the government of the day, make a reservation under Art. 57 (1) ECHR unnecessary for a member state which was of the opinion that the unborn child would *per se* not enjoy the right to life. As the government of the Austrian state of Salzburg in its role as the plaintiff in the aforementioned Austrian case noted, though, at the time the Convention was created, there was indeed a consensus among the founding nations of the Council of Europe to the effect that abortion was illegal in principle.[264] It is the development of abortion law since then which is at odds with the Convention. Also, the fact that member states do not allow abortion under all circumstances (including cases of late-term abortion) indicates that Art. 2 (1) ECHR, which includes the right to life of the unborn child, has by no means fallen victim to *desuetudo*.

1.2.2.2. The Role of Consensus in determining the Content of Convention Norms[265]

The main reason for the Court's generous treatment of the margin of appreciation enjoyed by states is the perceived lack of a consensus among states parties to the Convention – although in *A, B and C v. Ireland* the Court identified a consensus regarding a more permissive stance towards abortion.[266] This consensus must be one different from the one which lead to the states ratifying the Convention in the first place. Rather, in this context the term refers to a consensus on a very specific matter. The Court's reliance on a 'consensus', which it deducts from investigating the domestic legal regimes in the member states, requires a further explanation, as to

[263] *Verfassungsgerichtshof* (Austrian Constitutional Court), Judgment of 11 October 1974, Case no. G 8/74, in: SAMMLUNG DER ERKENNTNISSE UND WICHTIGSTEN BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES (VfSlg, Collection of the Judgment and most important decisions of the Constitutional Court), No. 7400, Volume 1974, 2nd half of the year 1974, pp. 221 *et seq.*, at p. 230.

[264] *Cf. ibid.*, at p. 227.

[265] See now also K. Dzehtsiarou – *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1730 *et seq.*, at pp. 1733 *et seq.*

[266] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 235 *et seq.*

which this aspect of comparative law ought to be relevant for the interpretation of the Convention. After all, there is no guarantee that it is not the majority of the member states which errs in interpreting the Convention.

In *A, B and C v. Ireland*,[267] the Court has relied on a consensus among states parties to the Convention,[268] or rather upon similarities in their different domestic legal systems, to interpret the Convention. The limits of this consensus identified by the Court are well explained by Judge *Mary Finlay Geoghegan*:

> "The Court refers to the role long played by consensus in its judgments. The case law indicates that it has been used in different contexts and for different purposes. As stated, these include interpretation of the Convention as a living instrument in the light of present day conditions [...]. However, this is not a case of use of consensus for interpretation of the Convention. The Court has interpreted Article 8 as not conferring a right to abortion without resort to consensus [and it] has also previously, in its judgments, used consensus or a lack thereof to assist in determining the breadth of the margin of appreciation to be accorded to States when striking a balance between competing interests or whether a particular decision comes within the State's margin of appreciation [...]. Where consensus is used for this purpose, it appears from those decisions [...] that for the consensus to be relevant, it must be a consensus on the question in respect of which the margin of appreciation is accorded to the State."[269]

Extending Judge *Finlay Geoghegan*'s argument further, we can conclude that consensus is only relevant in as far as there is a legitimate[270] margin of appreciation, which appears logical because only a consensus on questions which are the object of states' margin of appreciation can be relevant for the Court. Thus, even if there were a consensus on abortion among all the other states which are parties to the

[267] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010.

[268] *Cf.* also *ibid.*, joint partly dissenting opinion of Judges *Rozakis*, *Tulkens*, *Fura*, *Hirvelä*, *Malinverni* and *Poalelungi*, paras. 4 *et seq.*

[269] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, concurring opinion Judge *Finlay Geoghegan*, paras. 7 *et seq.*

Convention, the Court could deviate from this consensus,[271] in particular in morally sensitive cases.[272] "Accordingly, [*Finlay Geoghegan* can conclude] that it follows from the existing case law of the Court, (and using consensus in the sense used therein) that the consensus identified in the judgment amongst a majority of Contracting States on abortion legislation is not a relevant consensus with the potentiality to narrow the breadth of the margin of appreciation to be accorded to the Irish State in striking a balance between the competing interests."[273] Here, the term margin of appreciation refers to the ability of the Republic of Ireland to strike a balance, not to the margin of appreciation criticized in this thesis which refers to the definition of when human life begins.

A consensus among many states parties to the Convention regarding the interpretation of the Convention which is manifestly unjust because it is incompatible with the material[274] purpose of the norm in question makes the consensus in question illegitimate and the Court is under an obligation to clarify the situation by ruling against the majority view,[275] should it have the opportunity to do so.

1.2.2.3. Autonomous Concepts as an alternative Approach to Interpreting the Convention

The issue when human life begins is not a question which can be decided differently in different jurisdictions by legal *fiat* but a biological fact.[276] In so far, the Court is mistaken when it leaves this issue to the states parties to the Convention to decide – because there is nothing to decide on that matter. No parliament's decision can

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[270] See also K. Dzehtsiarou – *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1730 *et seq.,* at pp. 1734 *et seq*.

[271] *Ibid.*, at p. 1733.

[272] *Ibid.*

[273] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, concurring opinion Judge *Finlay Geoghegan*, para. 10.

[274] On the related problem of "process legitimacy" (K. Dzehtsiarou – *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1730 *et seq.*, at p. 1735) see *ibid.*, at pp. 1734 *et seq*.

[275] This in turn raises the usual problems associated with what is commonly referred to as the "counter-majoritarian difficulty" (*ibid.*, at p. 1734), *cf. ibid.*, fn. 33 and the literature referred to there.

[276] H. Reis – DAS LEBENSRECHT DES UNGEBORENEN KINDES ALS VERFASSUNGSPROBLEM, 1st ed., J.C.B. Mohr (Paul Siebeck), Tübingen (1984), p. 133.

change physiological facts.[277] The beginning of life, though, is not subject to any authoritative decision (a mistake already committed during the negotiations before the adoption of the Grundgesetz by *Otto Heinrich Greve*, a social-democratic member of the *Parlamentarischer Rat*, the Parliamentary Council, which drafted the *Grundgesetz*[278]). The legal order has to deal with these facts of pre-natal development[279] and cannot claim to decide, rather artificially, that life begins only at a (more or less) certain point during the gestation period.[280]

But there is an alternative to the wide margin of appreciation afforded by the Convention organs to the member states. In fact, there exists a fundamentally opposite approach to interpreting the Convention, which has likewise been endorsed by the Court and the old Commission – the notion of autonomous concepts. Rather than arguing that existing differences in opinion between the member states would require giving the states a wide margin of appreciation, the Convention organs often have taken the opportunity to establish a definition of certain terms within the context of the Convention by establishing "autonomous concepts".[281] Autonomous concepts were created first by the Commission and are still used by the Court "to prevent contracting states from circumventing the Convention guarantees".[282] This is exactly the risk inherent to the approach employed by the Convention organs in the past when it comes to the personal scope of Art. 2 (1) ECHR. The very idea that the right to life could be subject to an "implied limitation"[283] relating to the condition of already having been born, is an attempt at circumventing the Convention – one which has in the past received the approval of the Convention organs. While the concept of the margin of appreciation might be appropriate to smaller differences between the high contracting states which might be explained by their diverse legal traditions (while safeguarding against any form of cultural relativism of human rights by clearly remaining

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[277] *Cf. ibid.*

[278] *Ibid.*, pp. 134 *et seq.*; H. Schütze – EMBRYONALE HUMANSTAMMZELLEN: EINE RECHTVERGLEICHENDE UNTERSUCHUNG DER DEUTSCHEN, FRANZÖSISCHEN, BRITISCHEN UND US-AMERIKANISCHEN REGELUNG, 1st ed., Springer Verlag, Berlin / Heidelberg (2005), p. 152.

[279] H. Reis – DAS LEBENSRECHT DES UNGEBORENEN KINDES ALS VERFASSUNGSPROBLEM, 1st ed., J.C.B. Mohr (Paul Siebeck), Tübingen (1984), p. 134.

[280] *Ibid.*

[281] *Cf.* G. Letsas – *The Truth in Autonomous Concepts: How to Interpret the ECHR*, in: 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2004), pp. 279 *et seq.*, at pp. 281 *et seq.*

[282] Ibid., at p. 282.

[283] EComHR – *X v. United Kingdom*, Application No. 8416/78, Decision of 13 May 1980, in: 19 DECISIONS AND REPORTS (1980), pp. 244 *et seq.*, at p. 244.

within the limits set by the Convention), the notion of autonomous concepts on the other hand appears to be more fitting to a question which can be answered scientifically rather than legally. By its very nature, the question of when human life begins (and therefore, when it starts to fall under Art. 2 (1) ECHR), is not a question for lawyers, not even one for philosophers or ethicists but a question of science. That the Convention organs have failed to take this reality into account and they have failed to do so for decades despite the fact that they had had the tool of autonomous concepts at their disposal since at least 1968.[284] The margin of appreciation doctrine has no place when facts are not only clear but absolutely identical in all states parties to the Convention. Human life does not start after 12 weeks of pregnancy in state A, at viability in state B, at birth in state C and when the umbilical cord is cut in state D. Without factual difference, there is only a difference in opinion and legal construction. But while the different "domestic law classification[s might be] relevant [they are] not decisive for the meaning of the concepts of the Convention. This is what the adjective 'autonomous' stands for: the autonomous concepts of the Convention enjoy a status of semantic independence: their meaning is not to be equated with the meaning that these very same concepts possess in domestic law."[285] This is by no means a contradiction between the will of the member states and interpretation of the Convention offered by Strasbourg. Far from being undue activism on the part of the judges,[286] it is merely the checking of the interpretation of a norm employed by those who are called to adhere to the norm by those who are tasked with interpreting it authoritatively. Also, the notion of autonomous concepts does not fracture the legal order among the member states of the Council of Europe. In fact, it helps to maintain the legal order created by the Convention. Besides, even within the legal order of one state, definitions may vary. While for example under German private law a child has legal personality only after having been born,[287] the killing of a child during the process of being born after the beginning of the initial contractions is no different from the murder of an adult and not a case of abortion.[288] In fact, in the past the term *homicidium*, from which the English language derives the word homi-

[284] A number of judgments and decisions with regard to the different autonomous concepts identified by the Convention organs is provided by G. Letsas – *The Truth in Autonomous Concepts: How to Interpret the ECHR*, in: 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2004), pp. 279 *et seq.*, at pp. 281 *et seq.*, there fn. 6-18.

[285] *Ibid.*, at p. 282.

[286] *Cf. ibid.*, at pp. 279 *et seq.*

[287] § 1 *Bürgerliches Gesetzbuch* (BGB), the German Civil Code.

cide, used to refer not only to the killing of born humans but also to contraception as an attack against the sanctity of all human life.[289]

While it may seem arbitrary to make this distinction, the German legal system has not collapsed from this contradiction. Neither will the legal systems of the member states if the Court clearly states when Art. 2 ECHR begins to apply to the unborn child. From a scientific perspective, the only correct answer can be that this has to happen from the moment of conception. Also the idea that rights are to be protected as effectively as possible requires the Court to employ this tool in order to ensure compliance with the Convention. After all, the problem is not so much that the state in question has not met the requirements of a certain Convention norm. The problem is that the state has limited the scope to a norm[290] – in this case by excluding all unborn humans from the right to life. In such a case, "the question of a human rights violation under the ECHR arises because the instances that have been authoritatively [, that is, by the state,] excluded from the extension of the concept [, here, the right to life,] do not enjoy full or adequate protection, as do the instances that remain within the extension."[291] Those "instances" *George Letsas* refers to *in abstracto* are humans yet unborn *vs.* humans born, only the latter remaining within the "extension", the scope, of Art. 2 (1) ECHR. But that need not be: if "the Court believes the excluded instances properly fall *within* the extension of the of the concept X [, here, the concept of human life as is necessary for the applicability of Art. 2 ECHR], it reasonably goes on the find a violation of the Convention *right* to X [, here, the right to life]."[292] Taking into account the existing scientific evidence, it not only need not, it even may not be. It is possible to scientifically establish whether a number of cells in the body of a woman are just cells of that woman's body or whether they constitute a living human being: The science of genetics has been accepted by courts around the world to help identify human individuals. After the unification of the maternal and the

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[288] Bundesgerichtshof – Case No. 1 StR 665/83, Judgment of 7 December 1983, guiding sentence.

[289] R. Dworkin – DIE GRENZEN DES LEBENS – ABTREIBUNG, EUTHANASIE UND PERSÖNLICHE FREIHEIT, 1st ed., Rowohlt, Reinbek bei Hamburg (1994), p. 64.

[290] G. Letsas – *The Truth in Autonomous Concepts: How to Interpret the ECHR*, in: 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2004), pp. 279 *et seq.*, at p. 283, *cf.* also there fn. 19 on the philosophical aspects of this distinction.

[291] *Ibid.*, at pp. 283 *et seq.*

[292] *Ibid.*, at p. 284. Emphases in the original text.

paternal deoxyribonucleic acid (DNA),[293] the newly conceived child develops from the zygote state to birth and beyond without outside triggers.[294] For about 30 minutes from the fusion of sperm and egg the zygote as a (temporary) triploid genome before it sheds half the genetic information contributed by the oocyte.[295] This "transiently triploid genome of the zygote is entirely unique and distinct from that of either parent."[296] The fact that the genome changes subsequently is no qualitatively different event from any other change of the genome, which nevertheless does not alter the identity of an individual,[297] regardless of the cause of the change in the genome or the effects on the individual. The differences between the unborn and the born child are not relevant from a moral point of view.[298] Hence, from the moment of the fusion of sperm and egg, a new individual has come into existence. The zygote is more than merely human in nature, it is already an individual human being: "From the moment of sperm-egg fusion, a human zygote acts as a complete whole, with all the parts of the zygote interacting in an orchestrated fashion to generate the structures and relationships required for the zygote to continue developing towards its mature state. [...] The zygote acts immediately and decisively to initiate a program of development that will, if uninterrupted by accident, disease, or external intervention, proceed seamlessly through formation of the definitive body, birth, childhood, adolescence, maturity, and aging, ending with death. His coordinated behavior is the very hallmark of an organism. Mere human cells, in contrast, are composed of human deoxyribonucleic acid […] and other human molecules, but they show no global organization beyond that intrinsic to cells in isolation. A human skin cell removed from a mature body and maintained in the laboratory will continue to live and will divide many times to produce a large mass of cells, but it will not re-establish the

[293] On the first days of the development of the child in the womb *cf.* W. E. May – CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE, 2nd ed., Our Sunday Visitor Publishing Division, Huntington (2008), pp. 170 *et seq.*

[294] Bundesverfassungsgericht – *First Abortion Judgment*, Joined Cases nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, at p. 37; P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. 4, *cf.* also *ibid.*, p. 72 and *ibid.*, p. 3, there fn. 2.

[295] M. L. Condic – WHEN DOES HUMAN LIFE BEGIN? A SCIENTIFIC PERSPECTIVE, The Westchester Institute for Ethics and the Human Person, White Paper, Vol. 1, No. 1, October 2008, Thornwood, New York (2008), available online at <http://www.westchesterinstitute.net/images/wi_whitepaper_life_print.pdf> (last visited 1 February 2011), p. 4.

[296] *Ibid.*, there fn. 14.

[297] *Ibid.*

[298] P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. 9.

whole organism from which it was removed; it will not regenerate an entire human body in culture. Although embryogenesis begins with a single-cell zygote, the complex, integrated process of embryogenesis is the activity of an organism, not the activity of a cell."[299]

The unborn child is a human being,[300] "[t]his distinguishes the human embryo or fetus from a hydatidiform mole. The hydatidiform mole is a growth in the womb which arises from incomplete fertilization, so that it is not funcationally a whole human being, even though genetically it is human."[301] Since the beginning of human life has been scientifically determined to occur in the moment of conception, lawyers should defer to scientific facts just like we do with all kinds of evidence. If genetic evidence is good enough to send a murderer to prison for the rest of his life, it ought to be good enough to save the life of an unborn child. No judge can find an accused guilty of a crime if she has evidence that he is innocent. How is it possible that the Court on one hand is flooded with cases involving the right to a fair trial under Art. 6 ECHR while at the same time it is unable to respect one of the most fundamental rules of fairness in court by ignoring the existing scientific evidence? After all, the unborn child is as innocent as anybody can possibly be.[302]

While the Court in principle only has to deal with the facts presented to it, this has not stopped the Court to investigate on its own if it has found it necessary to do so.[303] The same approach could have been followed with regard to the physiological aspects of pre-natal human life, although the Commission and the Court appear not to claim that the unborn child is not a living, human being. The question, rather, is how far human rights apply to this human.

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[299] M. L. Condic – WHEN DOES HUMAN LIFE BEGIN? A SCIENTIFIC PERSPECTIVE, The Westchester Institute for Ethics and the Human Person, White Paper, Vol. 1, No. 1, October 2008, Thornwood, New York (2008), available online at <http://www.westchesterinstitute.net/images/wi_whitepaper_life_print.pdf> (last visited 1 February 2011), p. 7.

[300] P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), pp. 4 *et seq.*

[301] *Ibid.*, p. 5, there fn. 3.

[302] *Ibid.*, p. 6.

[303] *Cf.* ECtHR – *Menteş et al. v. Turkey*, Application No. 23186/94, Judgment of 28 November 1997, Summary, pp. ii *et seq.*, at p. ii.

The notion of autonomous concepts, though, has to be rooted in the existing law,[304] that is, in the Convention.[305] While it may be true that the term "life" might be less of a legal nature than some other terms which have been defined by the Convention organs, "life" also takes on a legal meaning within the context of the Convention, in particular by being explicitly mentioned in Art. 2 (1) ECHR. In order to work effectively, the Court must have the power to provide a definition for every term employed in the Convention, including a definition of "life" and who "everyone" is whose right to life is to be protected under Art. 2 (1) ECHR.

If the Court were, as is proposed here, to follow what *Letsas* calls "the international theorist's argument",[306] it would merely do its job of interpreting the Convention. After all, "[t]here is nothing special about autonomous concepts; they are just the result of the fact that Strasbourg adjudicates on cases coming from different jurisdictions, the ECHR being an international convention. Departure from domestic definitions may not only be acceptable but also necessary for international instruments whose main aim is to coordinate different legal systems. Although the contracting parties share some legal concepts in order to draft the Conventions in the first place, we should expect that there are still important differences as to how these concepts are understood and classified in each domestic law. States do not speak, as it were, the same legal language, both literally and metaphorically. [...] The Court, on this account, must necessarily have some discretion to legislate in these [...] cases."[307] When *Letsas* then continues by attacking this very argument by claiming that applicants don't argue that they right under the Convention has been violated by a lack of consensus,[308] he overlooks that this would not be the line of reasoning which is to be expected from the applicant. Rather, the applicant will have to argue that his or her right to X (to make use of the descriptive model employed by *Letsas* himself) were violated, X being defined in a certain manner, and that the state's behavior infringes upon X, thereby leading to a violation of the applicant's right to X – which is

[304] G. Letsas – *The Truth in Autonomous Concepts: How to Interpret the ECHR*, in: 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2004), pp. 279 *et seq.*, at pp. 281 *et seq.*, at p. 286.
[305] On criticism of the approach *cf. ibid.*, at pp. 285 *et seq.*
[306] *Ibid.*, at p. 286.
[307] *Ibid.* Emphasis omitted. One has to note that Letsas only presents this line of thought as a model without making it his own yet at this point.
[308] *Ibid.*, at pp. 286 *et seq.*

essentially what *Letsas* has described himself earlier. [309] Even one claims that "[a]utonomous concepts are not the result of certain contingent features of the ECHR".[310] When bringing such an application, "the applicant disputes his own state's classification of a concept and puts forward a different understanding of it, while the state insists that the applicant's conception is wrong."[311] In other words, we are talking merely about a difference in opinion, which ought to come more naturally to a Court than any attempts to weaken the Court's own legal basis, the Convention, by essentially putting it at risk of being circumvented by the states parties to it through the concept of a wide margin of appreciation.

The suggestion to employ the notion of autonomous concepts is similar to that made by Judge *Costa*, the current president of the European Court of Human Rights, in his separate opinion in *Vo v. France*.[312] Additionally, *Costa* shows (and discards) an alternative way to achieve protection of the unborn child, that is, by assuming that the mother, who unquestionably is a "person" within the meaning of Art. 2 ECHR has "a right to life [...] of her unborn child".[313] The question is therefore, whether the mother 'owns' the right to the life of the child, which would, if it were so, mean that she could dispose of it as she sees fit. This latter view, which Judge *Costa* is right to reject, can hardly be maintained since it is at odds not only with common sense but also with Art. 34 ECHR.[314]

[309] *Cf. ibid.*, at p. 284.
[310] *Ibid.*, at p. 287.
[311] *Ibid.*
[312] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, separate opinion Judge *Costa*, para. 7.
[313] *Ibid.*, para. 8.
[314] *Ibid.*

1.2.2.4. The Roads not taken: Implied Limitations and Reservations

That the right to life requires special treatment in this regard becomes also more evident when one looks at which rights can be limited under which circumstances:

> "As is the case with many international human rights treaties,[315] the European Convention on Human Rights [allows the] parties to the convention possibilities to limit the exercise of human rights in times of crisis. Just how far the Convention goes is the question. The margin of appreciation doctrine[316] employed by the European Court of Human Rights […] gives states a lot of leeway in applying the Convention domestically. The question is therefore whether the Convention also allows states to restrict rights guaranteed under the Convention to a degree which would be inconsistent with the spirit of the Convention. That this possibility is not so far-fetched becomes evident when we look at the perversion of justice which has already been allowed to happen under the umbrella of the margin of appreciation doctrine in the context of Art. 2 of the Convention. Art. 2 ECHR guarantees "[e]veryone" the right to life – without restriction. In fact, the term is a wide as possible. Nevertheless has the Court refrained from stating the obvious, namely that abortion is incompatible with Art. 2 of the Convention. If it would be legal, there would have been an exception to this effect already included within the norm, which is not the case. The Court justifies its failure to apply the law according to its wording with the lack of agreement between the member states on this issue. In giving states that much of an opportunity to deviate from the wording of the Convention, the Court has shown that it is at risk of being abused by states at the cost of individual human rights holders. Abortion is incompatible with the wording of Art. 2 (1) ECHR. Yet, most states' parties to the Convention allow abortion in one way or another. But that does not mean that abortion has sud-

[315] *Cf.* M. Maslaton – NOTSTANDSKLAUSELN IM REGIONALEN MENSCHENRECHTSSCHUTZ: EINE VERGLEICHENDE UNTERSUCHUNG DER ART. 15 EMRK UND ART. 27 AMRK, 1st ed., Peter Lang, Frankfurt am Main (2002).

[316] On the margin of appreciation doctrine see E. Brems – *The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights*, in: 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT / HEIDELBERG JOURNAL OF INTERNATIONAL LAW (1996), pp. 240 *et seq*.

denly become legal despite the wording of Art. 2 (1) ECHR.[317] To the contrary, it means that currently only Malta and Ireland can be considered as fulfilling their obligations under the Convention in this respect. But if the mere divergence of views between different member states *de facto* prevents the Court from clearly stating the law, it has to be feared that the Court might also be willing to grant states too much freedom to restrict human rights if they claim some kind of emergency and allege that this emergency makes it necessary for them to do so. One step in this direction can be seen in the Court's extensive interpretation of Art. 2 (2) ECHR to the detriment of unborn humans. To answer the question whether human rights are sufficiently guaranteed under the Convention even in times of emergency we will first look at general rules concerning the restriction of rights under the Convention. We will then move our investigation to Art. 15 ECHR and will then look at some special cases. The term "general" rules might be somewhat misleading, but there are unified rules on how at least some of the rights protected by the Convention can be limited by the states parties to the ECHR. This applies in particular to Articles 8 – 11 of the Convention,[318] which contain rules on the limitation of rights in their respective sections 2.[319] In order to understand how states can legally limit Convention rights in regular times, one has first to understand the scope of the right in question.[320] The scope of a right under the Convention is affected when a state organ limits or prohibits the exercise of a right.[321] Yet, not every minor effect is considered to touch the scope of a right under the ECHR. Rather, the state's measure has to reach a certain degree of intensity. For example *Mark E. Villiger*, a Swiss law professor who is [...]Liechtenstein['s] judge at the European Court of Human Rights, favors a narrow view and only assumes that a certain state behavior affects a right if it

[317] On this issue *cf.* also S. Kirchner – *Abortion and the Right to Life under Art. 2 of the European Convention on Human Rights*?, in: A. Begum (ed.) – MEDICAL TREATMENT AND LAW, 1st ed., ICFAI University Press, Hyderabad (2010), pp. 198 *et seq.*; S. Kirchner – *Abortion and the Right to Life under Art. 2 of the European Convention on Human Rights*, in: 9 IUP JOURNAL OF ENVIRONMENT & HEALTH CARE LAW (2010), pp. 10 *et seq.*

[318] A. Peters – EINFÜHRUNG IN DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION, 1st ed., Verlag C. H. Beck, Munich (2003), p. 22.

[319] *Ibid.*

[320] *Ibid.*

[321] *Ibid.*

is directly aimed at the rights holder,[322] while the Court favors a wider view, assuming that the scope of a right is affected more easily.[323] This second view is to be favored since it allows for a wider protection of rights[324] without being too far-reaching as infringements can be justified more easily according to this model[325] – if they meet the necessary requirements. The question then is how infringements upon human rights can be justified under the Convention. In general, the Convention differentiates between three different ways in which rights can be limited:[326] Articles 15 to 17 ECHR include general rules,[327] including states of emergency (Article 15 ECHR), to which we will return in a moment and a prohibition of an abuse of rights guaranteed by the Convention (Article 17 ECHR). In addition, the Convention knows special limitations for specific rights as well as implied limitations for those rights which are not subject to general or special limitations.[328] Such implied limitations are somewhat problematic since they affect rights which, according the wording of the Convention, are not subject to explicit limitations. Yet, since the exercise of one right will often affect the rights of others, some sort of limitation will often be inevitable. At the same time, the idea of a maximum protection of human rights makes it necessary to use this concept sparingly, which explains why the Court has assumed such implied limitations of rights in only a few cases, for example[329] concerning the prohibition of inhuman or degrading treatment (Article 3 ECHR)[330], the right to marry (Article 12 ECHR),[331] the right to education (Article 2 Protocol 1)[332] as well as the right to vote (Article 3 Protocol 1)[333]

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[322] M. E. Villiger – HANDBUCH DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION, 2nd ed., Schulthess Verlag, Zürich (1999), para. 542; *cf.* also the overview at A. Peters – *Einführung in die Europäische Menschenrechtskonvention*, 1st ed., Verlag C. H. Beck, Munich (2003), p. 22.

[323] *Cf.* A. Peters – EINFÜHRUNG IN DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION, 1st ed., Verlag C. H. Beck, Munich (2003), p. 22.

[324] *Ibid.*

[325] *Ibid.*

[326] *Ibid.*

[327] *Ibid.*

[328] *Ibid.*

[329] The following examples are taken from *ibid.*, p. 26.

[330] *Ibid.*, p. 44.

[331] ECtHR – *Goodwin v. United Kingdom*, Application no. 28957/95, Judgment of 11 July 2002, para. 99.

[332] ECtHR – *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Applications nos. 5095/71, 5920/72 and 5926/72, Judgment of 7 December 1976, para. 53.

[333] ECtHR – *Podkolzina v. Latvia*, Application no. 46726/99, Judgment of 9 April 2002, para. 34.

and the right to fair trial, in particular the right to access to a court (Article 6 (1) ECHR)[334] – a right which the Court itself has problems dealing with, given the large number of new applications it deals with and the significant backlog of cases.[335] (It is [thought] that the new Protocol 14[[336]] which will not only allow for accession of the European Union to the Convention[337] but, probably more important, will establish a new filtering system which will allow the Court to disallow cases which are very similar to cases which have already been decided against the same state party and which will require that the claimant proves a significant disadvantage, which could signal a fundamental shift in the role of the Court in protecting human rights in Europe.)"[338]

Even though the Court is overwhelmed with applications, the current course set by the states parties to the Convention, though, appears to be a serious mistake because it includes an inherent risk that justice is denied to those who seek it in Strasbourg. Already today the overwhelming number of applications is declared inadmissible, *e.g.* 99 % of all applications against Germany,[339] 98 % of the applications against the Russian Federation,[340] 97 % of all cases against Great Britain,[341]

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[334] ECtHR – *Prince Hans-Adam II. of Liechtenstein v. Germany*, Application no. 42527/98, Judgment of 12 July 2001, para. 44.

[335] For more literature on the problem of the backlog of cases at the ECtHR see S. Kirchner – *Human Rights Guarantees during States of Emergency – The European Convention on Human Rights*, in: 3 BALTIC JOURNAL OF LAW AND POLITICS (2010), No. 2, pp. 1 *et seq.*, at p. 6, there fn. 24. I have, though, changed my opinion on the idea of increasing the number of judges per state. In contrast to the position held in the cited text, I now consider an increase in the number of judges to be necessary in order to deal with the backlog of cases and to maintain the function of the Court.

[336] On Protocol 14 see also J. Meyer-Ladewig / H. Petzold – *Trivialbeschwerdem in der Rechtsprechung des EGMR – De minimis non curat praetor*, in: 64 NEUE JURISTISCHE WOCHENSCHRIFT (2011), pp. 3126 *et seq.*

[337] On the possibility of an accession of the European Union to the ECHR from a Convention perspective *cf.* H. C. Krüger – *Reflections Concerning Accession of the European Communities to the European Convention on Human Rights*, in: 21 PENN STATE INTERNATIONAL LAW REVIEW (2002), pp. 92 *et seq*. and the literature cited in S. Kirchner – *Human Rights Guarantees during States of Emergency – The European Convention on Human Rights*, in: 3 BALTIC JOURNAL OF LAW AND POLITICS (2010), No. 2, pp. 1 *et seq.*, at p. 7, there fn. 25.

[338] S. Kirchner – *Human Rights Guarantees during States of Emergency – The European Convention on Human Rights*, in: 3 BALTIC JOURNAL OF LAW AND POLITICS (2010), No. 2, pp. 1 et seq., at pp. 3 *et seq.* – footnotes edited, some italics added.

[339] A. Tickell – *Dismantling the Iron-Cage: the Discursive Persistence and Legal Failure of a „Bureaucratical Rational" Construction of the Admissibility Decision-Making of the European Court of Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1786 *et seq.*, at p. 1788.

[340] *Ibid.*

[341] *Ibid.*

96 % of all applications against France,[342] and 88 % of the cases against Turkey.[343] By raising the limits of admissibility even higher, the Court is put at risk of failing in its mission. Rather than decreasing the chances of individual applicants to be heard in Strasbourg also on the merits of their case, the Court should be given the manpower needed to deal with the applicants. Instead of one judge per member state there could be three or five judges and the number of support staff could be increased as well. Given that the costs for the Court are shared by almost four dozen of the richest countries on the planet and taking into account the importance of the work of the Court for all of Europe, the financial aspects of such an approach are almost negligible even in times of economic crisis, in particular when compared to other expenses on the part of states which usually go unquestioned. In order to be accepted by the people,[344] the Court must be seen[345] as being capable – and willing (even though the problem is caused by insufficient state support, the blame will be borne by the Court) – to provide justice for all. "The fact that the ECtHR has not yet had the opportunity to examine implied limitations in more detail also means that there are no unified rules concerning implied limitations.[346] Yet some generalized assumptions can already be made: What is required to limit rights based on an unwritten notion of implied rights is that the limitation serves a legitimate aim,[347] that the limitation itself is proportionate[348] and based on law.[349] This already follows *a fortiori* from the fact that this is also required in cases in which the Convention itself already allows for limitations.[350] That a limitation has to be based on (domestic) law is a key rule which has been developed by the Court with regard to special, or article-specific, limitations

[342] *Ibid.*
[343] *Ibid.*
[344] On the legitimacy of the Court from a national perspective see also K. Dzehtsiarou / A. Greene – *Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1706 *et seq.*, at pp. 1711 *et seq.*
[345] In fact, the Court can literally be seen thanks to a webcast project funded by Ireland, see J. Hedigan – *The European Court of Human Rights: Yesterday, Today and Tomorrow*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1716 *et seq.*, at pp. 1726 *et seq.* The webcasts are available online at <http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+ public+hearings/> (last visited 13 November 2011).
[346] A. Peters – EINFÜHRUNG IN DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION, 1st ed., Verlag C. H. Beck, Munich (2003), p. 27.
[347] *Ibid.*
[348] *Ibid.*
[349] *Ibid.*
[350] *Ibid.*

expressly allowed by the Convention.[351] As the Court stated in *Herczegfalvy v. Austria*,

> "the expression "in accordance with the law" requires firstly that the impugned measure should have some basis in national law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law[".[352]]

Such legal limitations are permissible only in the cases outlined in the section 2 of the Article in question.[353] These cases include measures which are necessary in a democratic society, which means that there has to be a pressing social need for the state to take the action in question which limits rights under the Convention.[354] The severity of the measures must not be disproportionate to the aim of the measure,[355] and, even more, the Court

> "must determine whether the interference in issue was proportionate to the legitimate aims pursued and whether the reasons adduced by the national authorities to justify it are relevant and sufficient."[356]

Nevertheless, the Court respects the sovereignty of the states' parties[357] by granting them a large margin of appreciation concerning both the conditions for limiting European Convention rights.[358] This margin of appreciation is said to be even wider when national interests are at stake which dominate over the interests of an

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[351] ECtHR – *Sunday Times v. United Kingdom (No. 1)*, Application no. 6538/74, Judgment of 26 April 1979, paras. 46 *et seq.*

[352] ECtHR – *Herczegfalvy v. Austria*, Application no. 10533/83, Judgment of 24 September 1992, para. 88.

[353] A. Peters – EINFÜHRUNG IN DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION, 1st ed., Verlag C. H. Beck, Munich (2003), p. 24.

[354] ECtHR – *Sener v. Turkey*, Application no. 26680/95, Judgment of 18 July 2000, para. 39.

[355] A. Peters – EINFÜHRUNG IN DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION, 1st ed., Verlag C. H. Beck, Munich (2003), p. 24.

[356] *Sener v. Turkey*, *supra* note 34, para. 39; also quoted by A. Peters – EINFÜHRUNG IN DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION, 1st ed., Verlag C. H. Beck, Munich (2003), pp. 24. *et seq*.

[357] *Cf.* A. Peters – EINFÜHRUNG IN DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION, 1st ed., Verlag C. H. Beck, Munich (2003), p. 25.

[358] *Ibid.*

individual.[359] This approach is problematic since human rights law to a large extent developed for the purpose of protecting individuals against the power of the majority. It is particularly important that limitations of human rights outside a state of emergency are only possible in a small number of cases, specifically, in those cases envisaged by section 2 of the relevant norm of the Convention, for example for the protection of national security, the prevention of crime, the protection of the rights of others or of public health.[360] In times of emergency, though, this possibility might not be enough to deal with pressing problems. Article 15 ECHR therefore allows states' parties to the Convention to derogate from their obligations under the Convention, albeit not concerning all rights under the ECHR.[361] Derogation means that the Convention as a whole is not applicable to the subject matter covered by the derogation.[362] Derogations differ from reservations[363] in that they exclude the applicability of the ECHR as a whole under special circumstances while reservations[364] under Art. 57 ECHR refer to particular provisions of the Convention. While derogations are general with regard to the subject matter and specific with regard to the circumstances, reservations are specific with regard to the subject matter and may not, by law, be general in nature.[365] Derogations might have been rare, but nevertheless a critical part of the European Human Rights System in that they create an option for states' parties to the Convention to severely limit the protection of human rights enjoyed *vis-à-vis* the state which feels compelled to derogate from the ECHR. The Convention organs have approached derogation cases by first examining the substantive complaint before approaching the issue of whether the right in question was covered by the derogation.[366] In the past, Greece, Ireland, Turkey, the United Kingdom, Albania and France have issued derogations, primarily for the purpose of limit-

[359] *Cf. ibid.*, pp. 25 *et seq*.
[360] *Ibid.*, p. 24.
[361] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 262.
[362] C. Grabenwarter – EUROPÄISCHE MENSCHENRECHTSKONVENTION, 3rd ed., Verlag C. H. Beck, Munich (2008), p. 11.
[363] On reservations under international law in general *cf.* Articles 19 *et seq*. VCLT.
[364] On reservations under Art. 57 ECHR *cf.* C. Ovey / R. C. A. White – JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Oxford University Press, Oxford and other locations (2006), pp. 451 *et seq*.
[365] In fact, Art. 57 (1) sentence 2 ECHR expressly prohibits reservations of a general character.
[366] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 262.

ing judicial guarantees under Articles 5 and 6 ECHR.[367] Until February 2001, the United Kingdom had a derogation concerning the situation in Northern Ireland; likewise, Turkey had derogations concerning PKK activities in the south-eastern part of the country.[368] Because of Art. 53 ECHR, Art. 15 ECHR is more important for those states which lack a national human rights standard which is comparable to the standard of the Convention.[369] After 9/11, the United Kingdom claimed a derogation concerning the war on terror.[370] This derogation was criticized as being disproportionate[371] and has since been withdrawn. Derogations are possible in times of war or in case of other emergencies: So far, no derogation has yet been made with regard to a state of war.[372] War, in the context of Art. 15 ECHR, refers to war between states.[373] Thus far the Convention reflects the time during which it was drafted and does not yet take into account new developments in the law of armed conflict. But this is not necessary since war is simply one case of the more general aspect of the state of emergency and non-international conflicts[374] are also covered by Art. 15 ECHR. The state of emergency for which a derogation can be permissible requires a

[367] C. Grabenwarter – EUROPÄISCHE MENSCHENRECHTSKONVENTION, 3rd ed., Verlag C.H. Beck, Munich (2008), p. 11; *cf*. H.-E. Kitz – DIE NOTSTANDSKLAUSEL DES ART. 15 DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION, 1st ed., Duncker & Humblot, Berlin (1982), pp. 96 *et seq*.

[368] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 262, there fn. 2. In case of geographically limited derogations (which have often been used by Turkey during the conflict with the *Partiya Karkerên Kurdistan*, *cf*. C Ovey / R. C. A. White – JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Oxford University Press, Oxford and other locations (2006), p. 443, there fn. 23) the state cannot rely on the derogation concerning other parts of the country, even in case of a thematic nexus between the derogation and the measure in question (Reid, this note, p. 263; Ovey / White, this note, pp. 444 *et seq*.; ECtHR – *Sakik and others v. Turkey*, Application No. 87/1996/706/898-903, Judgment of 26 November 1997, paras 26 *et seq*.

[369] C. Grabenwarter – EUROPÄISCHE MENSCHENRECHTSKONVENTION, 3rd ed., Verlag C.H. Beck, Munich (2008), p. 11.

[370] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 262. On this derogation *cf*. ECtHR – *A. and others. v. The United Kingdom*, Application no. 3455/05, Judgement of 19 February 2009, paras. 9 *et seq*.

[371] C. Grabenwarter – EUROPÄISCHE MENSCHENRECHTSKONVENTION, 3rd ed., Verlag C.H. Beck, Munich (2008), p. 11.

[372] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 263.

[373] C. Grabenwarter – EUROPÄISCHE MENSCHENRECHTSKONVENTION, 3rd ed., Verlag C.H. Beck, Munich (2008), p. 11.

[374] This is evidenced by the fact that also a war has to threaten the life of the nation (*ibid.*) in order to allow a state party to the Convention to derogate from the ECHR. For example the war against Serbia did not provide a sufficient threat to the life of the nation to allow those NATO member states which are also parties to the ECHR to derogate from the Convention.

threat to the life of the nation. This means that the situation has to affect the population as a whole[375] and that it has to constitute a threat to the organized life of the community.[376] It is required for the applicability of Art. 15 (1) ECHR that there exists

> "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed."[377]

Therefore, the term 'life of the nation' in this context does not necessarily mean 'existence of the state' or 'existence of the people' but is understood much wider, in the sense of the 'way of life' which is protected as well. In determining whether such a state of emergency which threatens the life of the nation,[378] states enjoy a wide but not unlimited margin of appreciation because, in line with the idea of subsidiarity, the national authorities are thought to be closer to the reality on the ground and therefore better able to determine whether an emergency exists and how to deal with them than international judges in Strasbourg.[379] The question whether the state has exceeded the limits of the margin of appreciation is to be examined as part of the question whether the derogation has been strictly required by the exigencies of the situation.[380] It is up to the states' parties to the Convention, which are responsible for the life of the nation,[381] "to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency."[382] The measures taken by the national authorities during the

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[375] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 263.
[376] *Ibid.*; ECtHR – *Lawless v. Ireland (No. 3)*, Application no. 332/57, Judgment of 1 July 1961, para. 28.
[377] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 263; C. Ovey / R. C. A. White – JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Oxford University Press, Oxford and other locations (2006), p. 443.
[378] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 263.
[379] *Ibid.*
[380] *Ibid.*; ECtHR – *Ireland v. United Kingdom*, Application no. 5310/71, Judgment of 18 January 1978, para. 207; ECtHR – *Lawless v. Ireland (No. 3)*, Application no. 332/57, Judgment of 1 July 1961, para. 28.
[381] C. Ovey / R. C. A. White – JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Oxford University Press, Oxford and other locations (2006), p. 445.
[382] *Ibid*.

state of emergency have to be strictly required by the situation at hand. This is the case if the emergency cannot be dealt with in any other manner. *Grabenwarter* requires that derogations, like limitations of Convention rights in normal times, are proportionate to the threat they are meant to address.[383] Yet, the use of the proportionality requirement in this context is not helpful. It is dogmatically clearer to examine the necessity of the derogation (which *Grabenwarter* in fact does immediately after his aforementioned remark concerning the proportionality by focusing his explanation on the issue of necessity[384]). In *Lawless v. Ireland*[385] and *Ireland v. United Kingdom*[386] the Court accepted that the threat posed by terrorism could not have been dealt with adequately under normal laws.[387] This is what makes the special situation exceptional: the need for exceptional laws rather than laws which could have been passed during the normal course of events because "the normal measures permitted by the Convention are plainly inadequate to deal with the situation."[388] In its investigation the Court will not only look at the measure as such but also at its intensity, which is why it adjudicated in favor of the claimant in *Aksoy v. Turkey*[389] based on the fact that it considered the 30-day detention period at stake in that case[390] to be longer than necessary.[391] What makes the Court's work in this regard effective is the Court's holistic approach to the issue, taking into account the entire situation, including "the safeguards which the State puts in place to compensate for suspension of the rights required by the Convention provision in respect of which the derogation is filed,"[392] *i.e.* the protection of individuals affected by the special measures[393] or the

[383] C. Grabenwarter – EUROPÄISCHE MENSCHENRECHTSKONVENTION, 3rd ed., Verlag C.H. Beck, Munich (2008), p. 12.
[384] *Ibid.*
[385] ECtHR – *Lawless v. Ireland (No. 3)*, Application no. 332/57, Judgment of 1 July 1961.
[386] ECtHR – *Ireland v. United Kingdom*, Application no. 5310/71, Judgment of 18 January 1978.
[387] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 264.
[388] C. Ovey / R. C. A. White – JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Oxford University Press, Oxford and other locations (2006), p. 443.
[389] ECtHR – *Aksoy v. Turkey*, Application no. 21987/93, Judgment of 18 December 1996.
[390] The law allowed for 30 days of detention while the applicant was only held for 14 days K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 264, there fn. 11).
[391] *Ibid.*, p. 264.
[392] C. Ovey / R. C. A. White – JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Oxford University Press, Oxford and other locations (2006), p. 447.
[393] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 266.

degree of parliamentary supervision[394] or the risk of an abuse associated with the emergency measures.[395] The latter can be limited by a timely end to the extraordinary measures (which is already implicitly required by Art. 15 (3) sentence 2 ECHR) while at the same time a change in the facts on the ground can necessitate an end to the measures and the state will have to end the derogation when the situation has been changed so far as it is no longer necessary to deal with the situation.[396] Finally, the Court expects that the authorities will strive to improve the human rights situation even during the continuation of the emergency. This was the case "[i]n *Ireland v. UK*, where the safeguards were less apparent or effective than in *Lawless* [*v. Ireland*]".[397] In [this case,] "the Court placed emphasis on the fact that the authorities responded to the situation by evolving towards protecting individual liberties in the measures".[398] The purpose of Article 15 ECHR "is to guarantee the continuing existence of the democratic rule of law"[399] (in so far the ECHR differs from the more rights-centered approach of the derogation clause (Article 4) of the International Covenant on Civil and Political rights which is to be interpreted in so far as "the restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State Party derogating from the Covenant".[400] The ECHR is significantly more holistic in that it accepts that the enjoyment of rights is only possible in a situation in which the rule of law is guaranteed for the present as well as for the future. Unlike the Covenant, which is a global instrument and at the time of its creation was more inspiration than reality, the European Convention on Human Rights is firmly rooted in the experiences of the continent, which certainly adds to its success and the level of compliance. In addition, derogations are only permissible if they do not violate the state's other obligations under international law. Article 4

[394] *Ibid*., p. 265.

[395] *Ibid*., p. 264.

[396] On the changing situation in Northern Ireland during the peace process see *ibid.*, p. 265.

[397] *Ibid*., italics added.

[398] *Ibid*.

[399] C. Flinterman - *Derogation from the Rights and Freedoms in Case of a Public Emergency*, in: P. van Dijk / F. van Hoof / A. van Rijn / L. Zwaak (eds.) – THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Intersentia, Antwerpen / Oxford (2006), pp. 1053 *et seq.*, at p. 1055

[400] Human Rights Committee – *General Comment No. 29, States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, p. 2; also quoted in C. Flinterman - *Derogation from the Rights and Freedoms in Case of a Public Emergency*, in: P. van Dijk / F. van Hoof / A. van Rijn / L. Zwaak (eds.) – THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Intersentia, Antwerpen / Oxford (2006), pp. 1053 *et seq.*, at p. 1055, there fn. 5.

ICCPR can pose a problem in this respect as well. Many rights are covered both by the ICCPR and the ECHR, which makes it necessary for a state which is a party to both human rights instruments to declare derogations under both Conventions but unlike Article 15 ECHR, Article 4 ICCPR requires that derogations are published. A derogation which has not been published might be permissible under the ECHR but would be incompatible with Article 4 ICCPR and by virtue of this incompatibility also not allowed under the European Convention on Human Rights.[401]

Certain rights under the Convention are non-derogable. According to Article 15 (2) ECHR, these are the right to life (Article 2 ECHR, except in respect of deaths resulting from lawful acts of war), the prohibition of torture (Art. 3 ECHR), the prohibition of slavery (Art. 4 (1) ECHR) and the right not to be punished without a legal basis (Art. 7 ECHR, *nulla poena sine lege*). The right to freedom of thought, conscience and religion under Art. 9 ECHR is not expressly mentioned in Art. 15 (2) ECHR, yet in practice it is non-derogable for those states parties to the Convention which are also parties to the ICCPR: the legality of a derogation under Art. 15 ECHR requires the compatibility of the derogation with the other international obligations of the state in question and the ICCPR does not allow for a derogation of the freedom of thought, conscience and religion due to Art. 4 (2) ICCPR.[402] The non-derogability of the right to life (Art. 2 ECHR) during a state of emergency is not absolute in that derogations are permitted with regard to killings in times of war which are a result of

> "lawful acts of war" (Art. 15 (2) ECHR).[403] Here it is not just the derogation which has to be compatible with the other obligations of the state in question under international law but the action taken on the basis of this derogation has to be lawful under the obligations under international humanitarian law incumbent upon the derogating state. As the first decade of the new century is characterized by a general sense of crisis,[404] including fears of global terror-

[401] *Cf.* also K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 266.

[402] C. Grabenwarter – EUROPÄISCHE MENSCHENRECHTSKONVENTION, 3rd ed., Verlag C.H. Beck, Munich (2008), p. 12.

[403] See also C. Ovey / R. C. A. White – JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Oxford University Press, Oxford and other locations (2006), p. 441.

[404] *Cf.* the special issue *Strategies for Solving Global Crises – The Financial Crisis and Beyond* in 2 GÖTTINGEN JOURNAL OF INTERNATIONAL LAW (2010), available online at <http://gojil.uni-

ism, diseases and most recently economic crisis, some special cases deserve particular attention since they are more likely to prompt states to derogate from their international human rights obligations: The purpose of Article 15 ECHR is to guarantee the rule of law in the long term – while imposing some limitations on states on how to achieve this goal. For example, while this goal might have been on the minds of Turkish authorities who were fighting Kurdish separatists who posed a threat to the integrity of the state, it already becomes questionable if the general threat of terrorism after 9/11 would have been sufficient, had it not been for specific ideology of Al Qaida which seeks to subjugate non-Muslim areas under their interpretation of Islam. The derogations made by Britain in the context of the conflict in Ulster on the other hand were incompatible with the purpose of Article 15 ECHR since, unlike in Turkey, Britain had occupied Ulster, making a stronger case for self-determination in Ulster than in Eastern Anatolia. Yet, in both situations the right of the Kurdish and Irish people to self-determination has not received the necessary attention. The Right to self-determination is an accepted right of peoples under international law and needs to be taken into account in the context of Article 15 of the Convention just like any other international obligation of the state which wishes to derogate from the Convention. As follows from the *Québec* precedent,[405] the right to self-determination does not have to lead to independence, making the case for derogation harder in instances in which regional secession movements resort to armed force. Neither the [Irish Republican Army or] IRA nor the PKK seriously challenged the existence of respectively the United Kingdom and the Turkish Republic as such. The same applied to ETA [(short for *Euskadi Ta Askatasuna*)] with regard to Spain and France but the situation is different when it comes to Al Qaida. Although Al Qaida might not have the local infrastructure like the those which had been established [by the] IRA, ETA and PKK, nor does the [threat of Islamist terrorism] in Europe (yet) reach the intensity of the aforementioned secessionist conflicts, but Al Qaida's plans, if realized, would have more far-reaching consequences than the plans by any of the three groups mentioned. Yet, the in-

goettingen.de/joomla/index.php?option=com_wrapper&view=wrapper&Itemid=71> (last visited 14 May 2010).

[405] Supreme Court (Canada) – *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, Decision of 30 September 1996.

tensity of the conflict between this groups and the states from which they wish to secede and the significant loss of life associated with the conflict already crossed the threshold of the threat to the organized life of the community[406] and hence to the life of the nation. The states' responsibility to protect the nation necessitates the wide margin of appreciation enjoyed by states in this respect. The way the norm has been phrased, placing threats to the life of the nation in the context of war, makes it easy to think that only violence-related threats to the life of the nation could be covered by Article 15 ECHR. This is by no means the case. In recent years, several highly publicized health threats such as mad cow disease and its human variant, Creutzfeld-Jacob [Disease], the avian flu or [...] the swine flu have lead states to take measures aimed at reducing the risk associated with such diseases. For example, it is conceivable that the risks posed to public health by a particularly risky behavior or a transmittable disease can amount to a situation which threatens the life of the nation and which requires special measures which would run afoul of the Convention, would the state not derogate from it. In fact, the states have an obligation to take the necessary measures to protect the population against such risks because the states' duty to protect inherent in the Convention also applies to public health. If the situation is of sufficient gravity and no ordinary means are available which would produce the desired result, the state might even be obliged to derogate from the Convention for the sake of protecting the life of the nation. The omission on the part of states to take extraordinary measures in this respect might in itself become problematic under the Convention."[407]

The special protection afforded to the right to life shows that, short of lawful acts of war, that is, the use of armed force in compliance with the applicable rules of International Humanitarian Law, there is no way in which states are allowed to take

[406] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 263; ECtHR – *Lawless v. Ireland (No. 3)*, Application no. 332/57, Judgment of 1 July 1961, para. 28.

[407] The preceeding paragraphs are a direct quote from my article *Human Rights Guarantees during States of Emergency – The European Convention on Human Rights*, in: 3 BALTIC JOURNAL OF LAW AND POLITICS (2010), No. 2, pp. 1 *et seq.*, at pp. 7 *et seq.* – footnotes edited, some italics added. On this topic see also more recently A. Greene – *Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1764 *et seq.*

the life of a human person. Keeping in mind the positive obligation incumbent on all states which are a party to the Convention, this means that, apart from war, states have to ensure that every human life is protected at all times. Also reasons of (public) health do not allow the state to permit the killing of a human being. Abortions and the killing of embryos *ex utero* therefore are always incompatible with the Convention. Due to their positive obligations to protect every human life, states also may not permit PID because it would lead to the death of unborn children.

Also, states could have declared a reservation when signing the Convention or at least an interpretative declaration to the effect that they do not consider the term 'everyone' to apply to unborn children. If states fail to do so, they have to accept the fact that the term "[e]veryone's right" in Art. 2 (1) ECHR might one day be interpreted by the Court in the manner suggested in this thesis. In fact, when the Convention entered into force, abortion was still far more regulated in the member states of the COE than it is now. In fact, at the time the ECHR was drafted, abortion was a crime in all states which were original parties to the Convention.[408] It was only the political changes in the late 1960s which facilitated the change to the permissive laws which we can find in many states today.[409]

1.2.2.5. Intermediate Conclusions

When it comes to a right as important as the right to life, there can be no margin of appreciation, indeed, the states are obliged to take positive action[410] to preserve the life[411] of every unborn child. Rather than granting states a wide margin of appreciation in this respect, the Court ought to employ its own method of autonomous concepts and establish a definition of the beginning of human life which is consistent with the available scientific evidence which proves a continuous development of eve-

[408] K. Freeman – *The Unborn Child and the European Convention on Human Rights: to whom does "everyone's right to life" belong?*, in: 8 EMORY INTERNATIONAL LAW REVIEW (1994), pp. 615 *et seq.*, at p. 616.
[409] *Cf. Ibid.*
[410] On the possibility of *positive* obligations under the Convention see ECtHR – *Airey v. Ireland*, Application no. 6289/73, Judgment of 9 October 1979, para. 32.
[411] ECtHR – *Makaratzis v. Greece*, Application no. 50385/99, Judgment of 20 December 2004, paras. 56 *et seq.*

ry human being from conception to death.[412] Also the fact that Art. 15 ECHR prevents derogations from Art. 2 ECHR[413] appears to be a valid argument against giving states a margin of appreciation as to the question when human life begins since this would be tantamount to allowing states to restrict the personal scope of the norm without having to fulfill any requirements whatsoever, which would be an invitation to circumvent both articles. Even if the Court were to maintain its stance on the margin of appreciation, it has to be kept in mind that no margin of appreciation gives a state "absolute discretion or freedom of action".[414]

[412] P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. 9.

[413] M. W. Janis / R. S. Kay / A. W. Bradley – EUROPEAN HUMAN RIGHTS LAW – TEXT AND MATERIALS, 3rd ed., Oxford University Press, Oxford and other locations (2008), p. 119.

[414] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, concurring opinion Judge *López Guerra*, para. 3.

2. THE UNUSED POTENTIAL OF THE ECHR

2.1. Individuals suing States: The Novelty of Strasbourg

On the international level, individuals normally cannot sue states. This mediation of the individual public international law is a remnant of classical (*i.e.* state-centered, Westphalian) Public International Law, a concept from which contemporary Public International Law is still in the course of moving away, a conception under which how a state treated its citizens used to be a matter of domestic concern only[415] - a position which is still held most prominently by the People's Republic of China (P.R.C.) which often decries international criticism of its human rights abuses as a unacceptable intrusion into China's domestic affairs. With the advent of international human rights law, and in particular with the establishment of a true judicial system accessible to everybody in the form of the ECtHR, this has changed fundamentally. Like few other institutions, if any, the ECtHR has contributed to furthering the current (and still ongoing) development of Public International Law from the Westphalian stage to its current form. In the current age of globalization, this evolution of international law is still continuing and the recent judgments of the European Court of Human Rights in *Al Skeini v. United Kingdom*[416] and *Al Jedda v. United Kingdom*[417] not only contribute to a possible merger of international human rights law and international humanitarian law but also indicate a clear willingness to hold states to task for human rights violations even in situations which are difficult to investigate. Here we see the true novelty of the Convention:[418] under the ECHR, individuals now can even sue their own states, or other states parties to the Convention. In fact, to apply to the Court one does not even have to be a citizen, one merely has to have been under

[415] M. Gibney – INTERNATIONAL HUMAN RIGHTS LAW – RETURNING TO UNIVERSAL PRINCIPLES, 1st ed., Rowman & Littlefield Publishers, Inc., Lanham / Plymouth (2008), p. 1.

[416] ECtHR – *Al-Skeini and others v. The United Kingdom*, Application no. 55721/07, Judgment of 7 July 2011, paras. 130 *et seq.*; A. Buyse – *Long-Awaited Al-Skeini and Al-Jedda Judgments Delivered*, in: ECHR BLOG, 7 July 2011, available online at <http://echrblog.blogspot.com/ 2011/07/long-awaited-al-skeini-and-al-jedda.html> (last visited 30 October 2011).

[417] ECtHR – *Al-Jedda v. The United Kingdom*, Application no. 27021/08, Judgment of 7 July 2011, paras. 74 *et seq.*

[418] On this aspect *cf.* also R. Geiger – GRUNDGESETZ UND VÖLKERRECHT – MIT EUROPARECHT, 5th ed., Verlag C. H. Beck, Munich (2010), p. 342.

the jurisdiction of a state which is a party to the ECHR at the time of the alleged violation in order to be able to lodge an application with the ECtHR.

2.2. Jurisdiction within the Meaning of Art. 1 ECHR

The term jurisdiction within the meaning of Art. 1 ECHR does not even require one to be in the territory of the respondent state,[419] as has been decided by the ECtHR already concerning operations of the North Atlantic Treaty Organization (NATO) in Bosnia and which has been repeated recently in relation to the conduct of British Forces in Iraq: While the *travaux prépatoires* of the Convention still referred to "persons residing within [the] territories"[420] of the states parties to the Convention, the Convention remains a "living instrument"[421] which accordingly has to be interpreted in light of new developments,[422] which also include the exercise of sovereignty beyond the borders of the state in question.[423] Accordingly, the Court has held states

[419] On the applicability of the ECHR outside the territory of the states parties to it *cf.* already S. Kirchner - *The Role of the European Court of Human Rights in Times of Conflict*, in: 2 SARIGIANNIDIS NEWSLETTER (Newsletter of the President of the Hellenic Association of international law) (2004), Ausgabe 4 (Apr. 2004), available online at <http://www.sarigiannidis.gr/articles/Kirchner_articleECtHR.PDF> (last visited 4 October 2011).

[420] As cited by the Grand Chamber in: ECtHR – *Banković, Stojanović, Stoimenovski, Joksimović and Suković v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, Application no. 52207/99, Decision of 12 December 2001, para. 19; O. De Schutter – *Globalization and Jurisdiction: Lessons from the European Convention on Human Rights*, CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPERS, Nuremberg (2005), available online at <http://www.chrgj.org/publications/docs/wp/DeSchutter%20Globalization%20and%20Jurisdiction.pdf> (last visited 30 October 2011), p. 8, there fn. 16; S. Kirchner - *The Role of the European Court of Human Rights in Times of Conflict*, in: 2 SARIGIANNIDIS NEWSLETTER (Newsletter of the President of the Hellenic Association of international law) (2004), Ausgabe 4 (Apr. 2004), <http://www.sarigiannidis.gr/articles/Kirchner_articleECtHR.PDF> (last visited 4 October 2011), p. 6.

[421] P. Leach – TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, 2nd ed., Oxford University Press, Oxford and other locations (2005), p. 164.

[422] K. Dzehtsiarou – *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1730 *et seq.*, at p. 1730.

[423] S. Kirchner - *The Role of the European Court of Human Rights in Times of Conflict*, in: 2 SARIGIANNIDIS NEWSLETTER (Newsletter of the President of the Hellenic Association of international law) (2004), Ausgabe 4 (Apr. 2004), <http://www.sarigiannidis.gr/articles/Kirchner_articleECtHR.PDF> (last visited 4 October 2011), pp. 8 *et seq.*

liable for violations of human rights which resulted from state actions its territory or which at least had effects abroad.[424]

2.3. The Status of the ECHR

The European Convention on Human Rights enjoys a different legal status in different states which have ratified it. It is equal to the national Constitution in Austria, has the status of a nationwide (in Germany: Federal) law in Germany, Italy and Greece and has a special status between the Constitution and ordinary laws in the Netherlands, Belgium, Luxembourg and France,[425] to give just a few examples. It has to be noted, though, that there is actually a trend towards monism,[426] which could be an option to resolve conflict of law issues in the European multi-level system of human rights protection (and, from the perspective of states, obligations).[427] As will be shown in more detail in the course of this thesis, the Convention not only obliges states to refrain from infringing upon the rights of persons but also carries positive obligations and therefore has *status negativus* as well as *status positivus* dimensions,[428] which need to be taken into account at all times.

In any case are those states which have ratified the Convention under an international legal obligation to comply with the norms included in the ECHR. But what

[424] M. Gibney – INTERNATIONAL HUMAN RIGHTS LAW – RETURNING TO UNIVERSAL PRINCIPLES, 1st ed., Rowman & Littlefield Publishers, Inc., Lanham / Plymouth (2008), p. 1; ECtHR – *Al-Skeini and others v. The United Kingdom*, Application no. 55721/07, Judgment of 7 July 2011, paras. 130 *et seq.*; A. Buyse – *Long-Awaited Al-Skeini and Al-Jedda Judgments Delivered*, in: ECHR BLOG, 7 July 2011, available online at <http://echrblog.blogspot.com/2011/07/long-awaited-al-skeini-and-al-jedda.html> (last visited 30 October 2011; ECtHR – *Cruz Varas and others v. Swerden*, Application No. 15576/89, Judgment of 20 March 1991, paras. 69 *et seq.*; ECtHR – *Al-Adsani v. The United Kingdom*, Application no. 35763/97, Judgment of 21 November 2001, para. 39. On the latter case see E. Bates – *The Al-Adsani Case, State Immunity and the International Legal Prohibition on Torture*, in: 3 HUMAN RIGHTS LAW REVIEW (2003), pp. 193 *et seq.*

[425] D. Ehlers – *Die Europäische Menschenrechtskonvention*, in: 22 JURA – JURISTISCHE AUSBILDUNG (2000), pp. 372 *et seq.*, at p. 373.

[426] *Cf.* H.-J. Cremer – *Grundrechtsvielfalt und Grundrechtskonflikte im europäischen Mehrebenensystem*, in: 38 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (2011), pp. 225 *et seq.*, at p. 227, there fn. 7.

[427] On the latter *cf.* C. Grabenwarter – *Grundrechtsvielfalt und Grundrechtskonflikte im europäischen Mehrebenensystem – Wirkungen von EGMR-Urteilen und der Beurteilungsspielraum der Mitgliedstaaten*, in: 38 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (2011), pp. 229 *et seq.*

[428] D. Ehlers – *Die Europäische Menschenrechtskonvention*, in: 22 JURA – JURISTISCHE AUSBILDUNG (2000), pp. 372 *et seq.*, at p. 374.

exactly does the Convention say about treating the unborn child? On 16 December 2010, the ECtHR held in *A, B and C v. Ireland*[429] that, although it took issue with procedural aspects of Ireland's anti-abortion legislation,[430] that the right to private life under Art. 8 (1) ECHR does not give a woman the right[431] to have an abortion at will or on demand.[432] After *A, B and C v. Ireland* the next question to be answered is how to classify the legal status of unborn children with regard to the right to life under Art. 2 (1) ECHR. It is my thesis, that also the unborn child has a right to life under Art. 2 (1) ECHR, hence that the personal scope of this norm includes every human bring from the moment of conception.

So far, the Strasbourg organs have been very careful in this regard. In *Poku v. United Kingdom*[433] the Commission looked at the question whether the threat of deportation amounted to a risk to the life of a pregnant woman who had a known high risk of spontaneous abortions, who had already lost six children due to miscarriages and who was now pregnant again – as well as to the life of her unborn child.[434] In this case, the Commission did not find enough evidence for such a threat since no deportation occurred before the child was actually born[435] but the fact that the Commission actually looked into the matter indicates that the existence of a right to life of the unborn child under Art. 2 (1) ECHR cannot be excluded outright. So far, the Convention organs have given states a margin of appreciation[436] in this matter and have not made a definitive ruling, although, as we will see in the course of this thesis, there have been a number of occasions on which the Court and the Commission have touched upon the issue, even if only implicitly or in the form of dissenting opinions.

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[429] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010.

[430] *Ibid.*, para. 275

[431] On the notion of a right to have an abortion *cf.* also M. Kraulich – *The Abortion Debate Thirty Years Later: From Choice to Coercion*, in: 21 FORDHAM URBAN LAW JOURNAL (2004), pp. 783 *et seq.*, at p. 785.

[432] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 214.

[433] EComHR – *Poku v. United Kingdom*, Application No. 26985/95, Decision of 15 May 1996.

[434] *Ibid.*

[435] *Ibid.*

[436] On this concept *cf.* C. Grabenwarter – *Grundrechtsvielfalt und Grundrechtskonflikte im europäischen Mehrebenensystem – Wirkungen von EGMR-Urteilen und der Beurteilungsspielraum der Mitgliedstaaten*, in: 38 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (2011), pp. 229 *et seq.*, at pp. 230 *et seq.*

2.4. The Scope *ratione personae* of Art. 2 ECHR

2.4.1. Earlier Case Law

The question whether the unborn child is protected by Art. 2 ECHR had been left open in *Open Door* as well as in *Boso* with the consequence that in the later case of *Evans v. United Kingdom*[437] the Court could return to the line that had been held by the Commission which, although not explicitly deciding so,[438] had tended towards excluding unborn children from the protection offered by Art. 2 ECHR. In *Evans*, the Court held that stored embryos may be excluded from the right to life under domestic law, giving member states a wide margin of appreciation in that respect.[439] The margin of appreciation afforded to member states makes it difficult to deduct a clear line of reasoning in the jurisprudence of the Court. In *Boso*, the Court merely allowed that a state which allows abortions to avert a risk for the mother does not violate Art. 2 ECHR,[440] which might be interpreted as a move towards more rights for the unborn – had it not been for the *Evans* judgment. In fact, there appears to be no clear line of thought in the case law of the ECtHR beyond giving member states a wide margin of appreciation due to a lack of consensus among member states. This approach fails to take into account that there are a number of valid arguments in favor of including unborn children in the scope *ratione personae* of Art. 2 ECHR. In fact, the Court's claim that it may refrain from deciding on the matter due to a lacking European-wide consensus is based on a premise which does not hold up to closer inspection, given that abortion is not fully legalized in any of the states parties to the Convention there is indeed a consensus – a consensus not to allow abortion under all circumstances.[441] This legal reality is based on a European tradition of ethics with roots both in the Christian faith and in the pre-Christian humanist ethics of ancient Greece.[442]

[437] ECtHR – *Evans v. United Kingdom*, Application No. 6339/05, Judgment of 10 April 2007, paras. 54 *et seq.*; *cf.* also M. Ford – *Evans v United Kingdom: What Implications for the Jurisprudence of Pregnancy?*, in: 8 HUMAN RIGHTS LAW REVIEW (2008), pp. 171 *et seq.*

[438] *Cf.* K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 216.

[439] ECtHR – *Evans v. United Kingdom*, Application No. 6339/05, Judgment of 10 April 2007, paras. 54 *et seq.*

[440] ECtHR – *Boso v. Italy*, Application No. 50490/99, Decision of 5 September 2002, para. 1.

[441] While the most notable change from Socialist to democratic abortion laws occurred in Poland, also Russia has repealed its Soviet era legislation and restricted access to abortion, *cf.* at T. Wites – *Abortions in Russia before and after the Fall of the Soviet Union*, in: 11 MISCELLANEA GEOGRAPHICA (2004), pp. 217 *et seq.*, at p. 224.

At the end of the day, it all comes down to the question how to interpret the word "everyone" in Art. 2 ECHR. This question has occupied both the Court and academia for some time. A first step towards actually dealing with the rights of the unborn was done in *X v. United Kingdom*[443] in which the Commission concluded that Art. 2 ECHR does not give unborn children an unqualified right to life[444] but decided not to answer the question whether the norm applies to unborn children at all.[445] Specifically, the Commission held that "[t]he word [']everyone's[']*seems* not to be applicable to an unborn child."[446]

It has to be said, though, that the Commission immediately qualified this remark by stating that

> "[a]ssuming that the right to life is secured to a foetus from the beginning of pregnancy, this right is subject to an implied limitation allowing pregnancy to be terminated in order to protect the mother's life or health",[447]

thereby balancing the (hypothetical) right of the unborn child against the rights of mother – a concept[448] to which we will return later. By excluding intentional abortion for means other than preserving the life or health of the mother, the Commission back then had already shown a first insight into the legal status of the unborn under

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[442] S. H. Pfürtner – *Ethische Aspekte des Schwangerschaftsabbruchs*, in: U. Körner (ed.) – ETHIK DER MENSCHLICHEN FORTPFLANZUNG – ETHISCHE, SOZIALE, MEDIZINISCHE UND RECHTLICHE PROBLEME IN FAMILIENPLANUNG, SCHWANGERSCHAFTSKONFLIKT UND REPRODUKTIONSMEDIZIN, 1st ed., Thieme, Stuttgart (1992), pp. 103 *et seq.*, at p. 104.

[443] EComHR – *X v. United Kingdom*, Application No. 8416/78, Decision of 13 May 1980, in: 19 DECISIONS AND REPORTS (1980), pp. 244 *et seq.*, at pp. 244 *et seq.*

[444] *Ibid.*, at p. 252.

[445] *Ibid.*, at p. 244; *cf.* L. Zwaak – *Chapter 6, Right to Life (Article 2)*, in: P. van Dijk / F. van Hoof / A. van Rijn / L. Zwaak (eds.) – THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Intersentia, Antwerp / Oxford (2006), pp. 351 *et seq.*, at pp. 387 *et seq.*

[446] EComHR – *X v. United Kingdom*, Application No. 8416/78, Decision of 13 May 1980, in: 19 DECISIONS AND REPORTS (1980), pp. 244 *et seq.*, at p. 244., emphasis added.

[447] *Ibid.*

[448] According to the Bundesgerichtshof – Case No. 1 StR 172/51, Judgment of 25 March 1952, para. 4, the balancing of rights has been introduced to German law in a case involving a risk to the life of a pregnant woman (*cf.* also the Reichsgericht's judgment of 11 March 1927 in case no. StS 105/26, in: 61 ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN, pp. 242 *et seq.*, at p. 254, and T. Lenckner – DER RECHTFERTIGENDE NOTSTAND: ZUR PROBLEMATIK DER NOTSTANDSREGELUNG IM ENTWURF EINES STRAFGESETZBUCHES (E 1962), 1st ed., Mohr Siebeck, Tübingen (1965), p. 232.

the Convention. Yet, in the following years the Convention organs strayed from the course the Commission could have set, had it not been so vague in *X v. United Kingdom*. In *A, B and C v. Ireland*, the Court has taken the next step by rejecting a right to abortion under Art. 8 (1) ECHR – albeit without giving effect to the protection[449] (the rights under the Convention are not merely rights of the *status negativus* or defensive rights but require the states parties to the Convention to take positive action on behalf of the rights of individuals[450]) required to be given to the unborn child under Art. 2 ECHR. More than two decades after *X v. the United Kingdom* the Court in *Boso v. Italy* allowed for the possibility that Art. 2 ECHR might, under certain conditions, which were not spelled out by the Court, apply to unborn children,[451] thus essentially creating a case by case approach[452] – albeit one in which the margin of appreciation afforded to states parties to the Convention continues to play a key role. Also in *Boso*, the Court reiterated its approach of seeking "a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests".[453] Here the Court betrays the key flaw underlying its treatment of the preborn – the judges do not only not believe that the unborn child has rights under the Convention, on top, they hold that even if unborn children have rights, those rights can be balanced against mere interests of the woman. Essentially in *Boso* the judges admitted that they compare not just apples with oranges but say that they believe even a rotten apple to be comparable to the best orange. It is not the method which is flawed, rather it is the content of the scales employed by the judges in Strasbourg, an error repeated later in *Tysiąc v. Poland* when compared to *D v. Ireland*[454] which had been decided briefly before.[455] The balancing approach suggested

[449] ECtHR – *L.C.B. v. the United Kingdom*, Application No. 23413/94, Judgment of 9 June 1998, para. 36; ECtHR – *Boso v. Italy*, Application No. 50490/99, Decision of 5 September 2002, para. 1.

[450] ECtHR – *Osman v. the United Kingdom*, Application No. 23452/94, Judgment of 28 October 1998, para. 115; ECtHR – *L.C.B. v. the United Kingdom*, Application No. 23413/94, Judgment of 9 June 1998, para. 36; ECtHR – *Keenan v. the United Kingdom*, Application No. 27229/95, Judgment of 3 April 2001, para. 89; ECtHR – *Guerra et al. v. Italy*, Application No. 14967/89, Judgment of 19 February 1998, para. 58; EComHR – *Association X. v. United Kingdom*, Application No. 7154/75, Decision of 12 July 1978, in: DECISIONS AND REPORTS 14, pp. 31 *et seq.*, at p. 31; EComHR – *Airey v. Ireland*, Application No. 6289/73, Report of 9 March 1977, para. 32.

[451] ECtHR – *Boso v. Italy*, Application No. 50490/99, Decision of 5 September 2002, para. 1.

[452] L. Zwaak – *Chapter 6, Right to Life (Article 2)*, in: P. van Dijk / F. van Hoof / A. van Rijn / L. Zwaak (eds.) – THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Intersentia, Antwerp / Oxford (2006), pp. 351 *et seq.*, at p. 390.

[453] ECtHR – *Boso v. Italy*, Application No. 50490/99, Decision of 5 September 2002, para. 1.

[454] ECtHR – *D v. Ireland*, Application No. 26499/02, Decision of 27 June 2006, para. 90.

by the Court in *X v. United Kingdom* and *Boso v. Italy* should be employed – but it should be done by balancing legal goods of the same category, that is rights against rights or interests against interests.

In this thesis it is held that the unborn child enjoys the right under the Convention, but even if one is of the opinion that preborn are not covered by Art. 2 (1) ECHR then the interest of the unborn child has to be balanced against the interest of the mother. Every living being has an interest in being alive, even the least developed creatures. Hence this interest to be alive would have to be balanced against the interest of the mother and certainly cannot be considered inferior to mere considerations of comfort, social security or hedonism, although mere interests are notoriously more difficult for courts to evaluate than rights.

While everybody has a right to bodily integrity, *i.e.* a right to one's own body,[456] the unborn child, *in* or *ex utero*, is not a mere part of the mother's body but has its own body. Keeping in mind furthermore that cryostasis is not a permanent solution. The frozen embryo will die sooner or later in cryostasis since no such system is perfect. In addition, although implanted embryos have been brought to term successfully after more than a decade in cryostasis,[457] as even in IVF service providers admit, up to half the embryos do not even survive the thawing process,[458] which is necessary before implantation, which means essentially that even if the cryostasis were to work perfectly, the frozen unborn children might either be frozen indefinitely (that is, as long as there is no technical malfunction and as long as the bills for the storage are being paid, that is, assuming that there were no damage to the embryo from the freezing itself) or would be at risk of death by thawing and only a fraction of all implanted embryos is actually brought to term. If PID is employed, it is implied that

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[455] ECtHR – *Tysiąc v. Poland*, Application No. 5410/03, Judgment of 20 March 2007, dissenting opinion Judge *Borrego Borrego*, paras. 4 *et seq.*, culminating in the conclusion, *ibid.* in para. 15, that in *Tysiąc* "the Court has decided that a human being was born as a result of a violation of the European Convention on Human Rights. According to this reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention. I would never have thought that the Convention would go so far, and I find it frightening."

[456] H. Forkel – *Das Persönlichkeitsrecht am Körper, gesehen besonders im Lichte des Transplantationsgesetzes*, in: 23 JURA – JURISTISCHE AUSBILDUNG (2001), pp. 73 *et seq.*, at p. 73.

[457] K. Horsey – *'Twins' born 16 years apart*, in: BIONEWS, 29 May 2006, available online at <http://www.bionews.org.uk/page_12734.asp> (last visited 24 November 2011).

[458] The Miracles Waiting, Inc. Team – *Embryo Facts*, in: MIRACLES WAITING, available online at <http://miracleswaiting.org/factembryos.html> (last visited 4 November 2011).

for every implanted embryo there will be others who (after all, they are already embryos, hence human beings) have been created but then are dismissed as unfit for implantation and will be discarded as medical waste. Even if they are not discarded as waste immediately (and which parents would be willing to pay for the storage of embryos whom they never intend to implant anyway?), they would face essentially a lifeterm sentence in an early embryonic stage (already alive, nevertheless), in cryostasis – merely because their genetic information did not fit the demands of their parents, the very people from whom they inherited said genetic information in the first place. In cases in which the life of the mother is at stake, given that both goods are human lives, it all comes down to the question whether one believes that the child's life is worth as much as that of the mother, which brings us to the question whether one considers the unborn child to be human – a question which has long since been answered by science. Also, the idea that the unborn child may be treated like an aggressor[459] against whom the mother has a right to self-defense[460] is absurd not only because the unborn child is innocent but also because the unborn child has not taken any action against the mother[461] for which he or she could be held "accountable".[462] Being conceived is not an action which can be attributed to the child, ruling out self-defense, and any form of emergency action against an innocent bystander (which the unborn child is in this case, due to not having set any cause to harm the mother) can only be permissible (if at all), if the good which is protected is more important than the good which is damaged in the course of protecting the first good.[463] In any case have the Convention organs already responded to this charge when the special link between the mother and her unborn child was highlighted in *Brüggemann and Scheuten v. Germany*[464] as well as in *Boso v. Italy*.[465] Later we will

[459] *Cf.* H. Geddert – *Abtreibungsverbot und Grundgesetz (BVerfGE 39, 1 ff.)*, in: K. Lüderssen / F. Sack (eds.) – VOM NUTZEN UND NACHTEIL DER SOZIALWISSENSCHAFTEN FÜR DAS STRAFRECHT – ZWEITER TEILBAND, 1st ed., Suhrkamp Verlag, Frankfurt am Main (1980), pp. 333 *et seq.*, at p. 351.

[460] On this notion *cf.* N. Cox – *Causation, Responsibility and Foetal Personhood*, in: 51 NORTHERN IRELAND LEGAL QUARTERLY (2000), pp. 579 *et seq.*, at pp. 580 *et seq.*

[461] P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. 129.

[462] On this idea *cf.* E. L. McDonagh – BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT, 1st ed., Oxford University Press, Oxford and other locations (1996), p. 7, cf. also N. Cox – *Causation, Responsibility and Foetal Personhood*, in: 51 NORTHERN IRELAND LEGAL QUARTERLY (2000), pp. 579 *et seq.*, at p. 580)

[463] *Cf.* § 34 StGB.

[464] EComHR – *Brüggemann and Scheuten v. Germany*, Application No. 6959/75, Report of 12 July 1977, para 59.

[465] ECtHR – *Boso v. Italy*, Application No. 50490/99, Decision of 5 September 2002, para. 2.

see how the rights of the child and the mother can be balanced in accordance with the Convention, leading to a degree of protection for the mother which is not that dissimilar from the one afforded by the Italian legislation which was under scrutiny by the Court in *Boso*.[466]

In *A, B and C v. Ireland*, the Court referred to the rights, rather than the mere interests, of the unborn child,[467] only to conclude that "[a] prohibition of abortion to protect unborn life is [...] not automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature."[468] Apart from potentially conceding on the term "automatically" that the Court will have to balance rights on a case by case basis, this view can hardly be followed since the right to life is essential to the enjoyment of all other rights and of such a fundamental nature[469] that it already amounts to a category of rights of its own. There is a hierarchy of rights which might not always be evident but which becomes evident when rights have to be balanced against each other, an impression which is reinforced by a closer look at human dignity. Unlike in the case of other human rights, there is no right *to* human dignity, rather, human dignity is a quality inherent to all human beings from which follow the right to be treated with dignity as well as other human rights.[470]

2.4.2. The case of *A, B and C v. Ireland*[471]

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[466] *Cf.* ECtHR – *Boso v. Italy*, Application No. 50490/99, Decision of 5 September 2002, para. 1.

[467] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 237.

[468] *Ibid.*, para. 238.

[469] *Cf.* ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, diss. op. *Ress*, para. 1, and diss. op. *Mularoni*.

[470] On the role of human dignity as a distinct legal term in international human rights law see M. Kotzur – THEORIEELEMENTE DES INTERNATIONALEN MENSCHENRECHTSSCHUTZES – DAS BEISPIEL DER PRÄAMBEL DES INTERNATIONALEN PAKTES ÜBER BÜRGERLICHE UND POLITISCHE RECHTE, 1st ed., Duncker & Humblot, Berlin (2001), p. 218 and P. Tiedemann – MENSCHENWÜRDE ALS RECHTSBEGRIFF – EINE PHILOSOPHISCHE KLÄRUNG, 1st ed., Berliner Wissenschafts-Verlag, Berlin (2007), pp. 9 *et seq.*, for its role in the context of the Council of Europe *cf. ibid.*, pp. 34 *et seq.*

[471] On the impact of European and international law on Irish abortion law see also B. Mercurio – *Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union*, in: 11 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2003), pp. 141 *et seq.*; S. Pentz Bottini – *Europe's Rebellious Daughter: Will Ireland Be Forced to Conform Its Abortion Law to That of Its Neighbors?*, in: 14 JOURNAL OF CHURCH & STATE (2007), pp. 211 *et seq.*; R. S. Rose – *Induced Abortion in the Republic of Ireland*, in: 18 BRITISH JOURNAL OF CRIMINOLOGY (1978), pp. 248 *et seq.*; S. Bouclin – *Abortion in Post-X Ireland*, in: 13 WINDSOR REVIEW OF LEGAL AND SOCIAL ISSUES (2002), pp. 133 *et seq.*, at pp. 136 *et seq.*; S. A. Low – *Europe threatens the sovereignty of the Re-*

In its judgment of 16 December 2010 in *A, B and C v. Ireland*,[472] though, the Court's Grand Chamber has made it clear that the Convention does not grant women a general right to abortion. The Court did not expand the potential cases in which an abortion ought to be permitted beyond the abortions for the purpose of saving the life of the mother which are already allowed under existing Irish law[473] but only took issue with procedural and informational aspects of the domestic law.

In this case decided in December 2010 the European Court of Human Rights had to deal with an other Irish case involving travels to Britain for the purpose of obtaining an abortion there.[474] The Court, like the Commission in the past, had long been avoiding clear pronouncements on the issue of abortion under the Convention,[475] rather electing to give states a wide margin of appreciation on this controversial issue.[476]

In *A, B and C v. Ireland*, three women complained that the fact that they were unable to have a non-therapeutic abortion in Ireland and claimed violations of Articles 3, 8, 13 and 14 of the Convention.[477] In sum, though, only one violation of Art. 8 (1) ECHR was confirmed by the court because in the case of one woman who had some medical problems due to a lack of a "legislative or regulatory regime providing

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public of Ireland: Freedom of Information and the Right to Life, in: 15 EMORY INTERNATIONAL LAW REVIEW (2001), pp. 175 *et seq.*; A. M. Clifford – *Abortion in International Waters off the Coast of Ireland: Avoiding a collision between Irish moral sovereignty and the European Community*, in: 14 PACE INTERNATIONAL LAW REVIEW (2002), pp. 385 *et seq.*

[472] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010.

[473] S. McGuinness – *A, B and C leads to D (for delegation),* A, B and C v. Ireland*, 25579/05, [2010] ECHR 2032*, in: 19 MEDICAL LAW REVIEW (2011), pp. 476 *et seq.*, at p. 476.

[474] Due to Ireland's restrictive abortion law, this is a recurring theme in the discussion of abortion under Irish law, *cf.* A. M. Clifford – *Abortion in International Waters off the Coast of Ireland: Avoiding a collision between Irish moral sovereignty and the European Community*, in: 14 PACE INTERNATIONAL LAW REVIEW (2002), pp. 385 *et seq.* and D. Cole – *"Going to England": Irish Abortion Law and the European Community*, in: 17 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW (1993-1994), pp. 113 *et seq*.

[475] *Cf.* C. Ovey / R. White – JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Oxford University Press, Oxford (2006), p. 69; *cf.* also the jurisprudence cited there: EComHR – *X v. Norway*, Application No. 867/60, Decision of 29 May 1961, 6 COLLECTION OF DECISIONS 34; EComHR – *X v. Austria*, Application No. 7045/75, Decision of 10 December 1976, 7 DECISIONS AND REPORTS 87 as well as ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, para. 76. *Cf.* also B. M. Knoppers – *Reproductive Technology and International Mechanisms of Protection of the Human Person*, in: 32 MCGILL LAW JOURNAL (1986-1987), pp. 336 *et seq.*, at p. 352.

[476] *Cf.* T. Goldman –Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*, at p. 280.

an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article [40 (3) 3] of the [Irish] Constitution."[478] It has to be noted, though, that the case of this particular applicant was characterized by her health problems while the Court decided with regard to abortions which were not medically necessary for the mother, the right to private life under Art. 8 (1) ECHR does not include a 'right' to have an abortion,[479] thus dealing a blow to the so called 'pro-choice' movement. Rather, the rights of the mother have to be balanced against the rights of the unborn child.[480] In this balancing process, anything less important than the mother's right to life can hardly suffice to legally end the life of an innocent child. In this sense, the ECtHR has come to the same conclusion as Art. 40 (3) 1 of the Irish Constitution which refers to "the equal right to life of the mother". By rejecting a "right" to abortion by choice, the Court has prepared the stage for future challenges of domestic abortion laws.

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[477] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 113.

[478] *Ibid.*, paras. 267 *et seq.*; *cf.* for a similar constellation ECtHR – *Tysiąc v. Poland*, Application No. 5410/03, Judgment of 20 March 2007, para. 117; *cf.* K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 217. On *Tysiąc* see also A. Komanovics – *Effective enforcement of human rights: the Tysiac v. Poland case*, in: 143 STUDIA IURIDICA AUCTORITATE UNIVERSITATIS PECS (2009), pp. 186 *et seq.*

[479] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 214.

[480] *Ibid.*, paras. 213 *et seq.*

2.4.2.1. The Facts of the Case

In *A, B and C v. Ireland*,[481] three women, residents of Ireland[482] over 18 years of age,[483] had applied to the Court, two of them Irish, one a Lithuanian citizen.[484] In the first months of 2005, all three of them had traveled from Ireland, where all three live and which has restrictive anti-abortion legislation,[485] to the United Kingdom[486] in order to procure an abortion there.[487] They complained that the fact that they were unable to have the abortion in Ireland and that they were required to leave the country to terminate their pregnancies amounted to a violation of the prohibition of inhuman and degrading treatment (Art. 3 ECHR) and of the prohibition of discrimination (Art. 14 ECHR), a violation of the right to respect for private and family life (Art. 8 (1) ECHR) and of the right to an effective remedy (Art. 13 ECHR) while the third applicant additionally claimed a violation of her right to life under Art. 2 ECHR due to health problems suffered after the abortion.[488]

As will be seen later, *A, B and C v. Ireland* is hardly "Europe's *Roe v. Wade*"[489] but rather signals a move into the other direction, even though the Court

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[481] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010. This case has drawn attention already before the judgment by the Grand Chamber, *cf.* S. Pentz Bottini – *Europe's Rebellious Daughter: Will Ireland Be Forced to Conform Its Abortion Law to That of Its Neighbors*, in: 49 JOURNAL OF CHURCH AND STATE (2007), pp. 211 *et seq.* and S. K. Calt – *A., B. & C. v. Ireland*: „Europe's *Roe v. Wade*"?, in: 14 LEWIS & CLARK LAW REVIEW (2010), pp. 1189 *et seq.*, who also addresses the case of *D v. Ireland* which had been declared inadmissible in 2006: ECtHR – *D v. Ireland*, Application No. 26499/02, Decision of 27 June 2006; Bottini (this note), at p. 211; Calt (this note), at pp. 1206 *et seq.*

[482] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 11.

[483] *Ibid.*

[484] *Ibid.*, para. 1.

[485] *Ibid.*, para. 27 *et seq.*

[486] This is a common method for women from Ireland to get an abortion without fear of legal repercussions, see already D. Cole – *"Going to England": Irish Abortion Law and the European Community*, in: 17 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW (1993), pp. 113 *et seq.*

[487] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 13 *et seq.*

[488] *Ibid.*, para. 113.

[489] S. K. Calt – *A., B. & C. v. Ireland*: „Europe's *Roe v. Wade*"?, in: 14 LEWIS & CLARK LAW REVIEW (2010), pp. 1189 *et seq.* This is a particularly misleading and incorrect phrase which was actually not invented by *Calt* but which had already been used by Alliance Defense Fund – PRO-LIFE ORGANIZATIONS FILE BRIEF TO DEFEND IRELAND ABORTION BAN, available online at <http://www.alliancedefensefund.org/News/PRDetail/4470> (last visited 1 February 2011), *cf.* S. K. Calt – *A., B. & C. v.*

did not allow a complete ban on abortions either.[490] In *Roe v. Wade*,[491] the United States Supreme Court had held that it would be incompatible with the right to privacy under U.S. law if abortion were only legal to save the life of the mother.[492]

2.4.2.2. Similarities to other Cases

2.4.2.2.1. *Open Door Counselling and Dublin Well Women v. Ireland*

In a sense, this case is reminiscent of the Commission's earlier decision in *Open Door Counselling and Dublin Well Women v. Ireland*[493] in which the Commission had found a violation of Art. 10 ECHR due to a domestic prohibition to provide information about abortion facilities outside Ireland[494] even though the same information could have been obtained through other means.[495] Ireland is known for its rather restrictive anti-abortion legislation which has its legal basis in Art. 40 (3) 3 of the Irish Constitution, the *Bunreacht na hÉirann*,[496] which 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. This subsection shall not limit freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available, in the State,*

Ireland: „Europe's *Roe v. Wade*"?, in: 14 LEWIS & CLARK LAW REVIEW (2010), pp. 1189 *et seq.*, at p. 1232, there fn. 243.

[490] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 268.

[491] United States Supreme Court – *Roe v. Wade*, 410 US 113. For a relatively recent critique of *Roe v. Wade* see G. J. Roden – *Unborn Children as Constitutional Persons*, in: 25 ISSUES IN LAW & MEDICINE (2010), pp. 185 *et seq.*, at pp. 187 *et seq.*

[492] On the domestic legislation *cf. ibid.*, there fn. 1, *cf.* also H. Reis, DAS LEBENSRECHT DES UNGEBORENEN KINDES ALS VERFASSUNGSPROBLEM, 1st ed., J.C.B. Mohr (Paul Siebeck), Tübingen (1984), p. 2.

[493] EComHR – *Open Door Counselling Ltd. and Dublin Well Women Centre Ltd. and others v. Ireland*, Application Nos. 14234/88 and 14235/88, Report of 7 March 1991.

[494] *Ibid.*, para. 53.

[495] K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 218. *Cf. ibid.* for the social aspects of the Irish prohibition.

[496] Available online at <http://www.constitution.ie/reports/ConstitutionofIreland.pdf> (last visited 28 November 2011).

subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

2.4.2.2.2. The *X* Case[497]

In the 1992 case of *X*, a fourteen year old girl who had become pregnant as the result of a rape, the *Chúirt Uachtarach*, the Irish Supreme Court allowed abortion if there is a real and substantial risk to the life of the mother,[498] thus allowing for medical procedures which can result in the death of the unborn child if said medical procedure is necessary to save the life of the mother (whether such a risk really existed in the *X* case, as had been assumed by the Irish Supreme Court,[499] is an other matter which cannot be resolved here).

In *X*, though, it was also made clear, as has now been made clear by the European Court of Human Rights in *A, B and C v. Ireland*[500] that there is no right to have an abortion as part of the woman's privacy rights:

> "One cannot make distinctions between individual phases of the unborn life before birth, or between unborn and born life. Clearly the State's duty of protection is far reaching. Direct State interference in the developing unborn life is outlawed and furthermore the State must protect and promote that life and above all defend it from unlawful interference by other persons. The State's duty to protect life also extends to the mother. The natural connection between the unborn child and die mother's life constitutes a special relationship. But one cannot consider the unborn life only as part of the maternal organism. The extinction of unborn life is not confined to the sphere of private life of the mother or family because the unborn life is an autonomous human being protected by the Constitution. Therefore the termination of pregnancy other than a natural one has a legal and social dimension and requires a special responsibility on the part of the State. There cannot be a freedom to ex-

[497] Supreme Court (Ireland) – *The Attorney General v. X. and Others*, Case no. 1992 No. 846 P, Judgment of 5 March 1992, in: [1992] 1 IRISH REPORTS, pp. 1 *et seq*.
[498] *Ibid.*, Judgment by Chief Judge *Finley*, pp. 41 *et seq.*, at p. 43.
[499] *Ibid.*
[500] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 214.

tinguish life side by side with a guarantee of protection of that life because the termination of pregnancy always means the destruction of an unborn life. Therefore no recognition of a mother's right of self-determination can be given priority over the protection of the unborn life. The creation of a new life, involving as it does pregnancy, birth and raising the child, necessarily involves some restriction of a mother's freedom but the alternative is the destruction of the unborn life. The termination of pregnancy is not like a visit to the doctor to cure an illness. The State must, in principle, act in accordance with the mother's duty to carry out the pregnancy and, in principle must also outlaw termination of pregnancy.

The State's obligation is to do all that is reasonably possible having regard to the importance of preserving life."[501]

While the Irish Supreme Court in *X* considered a risk of suicide a sufficient threat to the life of the mother, two later attempts at defining permitted killings of unborn children were put before the people in referenda in 1992 and 2002 without being accepted. Only the last two sentences of Art. 40 (3) 3 of the Irish Constitution were accepted in referenda by the Irish people a few months after the decision of the Irish Supreme Court in the case of the minor *X*.[502]

2.4.2.3. The Judgment of the ECtHR of 16 December 2010

The Court found that only the rights of the third applicant had been violated and in her case only the right under Art. 8 (1) ECHR because "the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article [40 (3) 3] of the [Irish] Constitution."[503] In a somewhat similar

[501] Supreme Court (Ireland) – *The Attorney General v. X. and Others*, Case no. 1992 No. 846 P, Judgment of 5 March 1992, in: [1992] 1 IRISH REPORTS, pp. 1 *et seq.*, concurring opinion by Judge *Hederman*, pp. 62 *et seq.*, at p. 72.

[502] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 45 *et seq.*

[503] Ibid., paras. 267 *et seq.*

constellation in *Tysiąc v. Poland*[504] the Court did not claim a right to abortion but criticized the respondent state's failure to provide for an adequate procedure which led to a violation of Art. 8 (1) ECHR.[505] *A, B and C v. Ireland* also shows some parallels with *Tysiąc* as far as the third applicant is concerned and concerning the third applicant, our case is the logical development out of *Tysiąc*.

While the problems raised in *Tysiąc* as well as with respect to the third applicant in *A, B and C v. Ireland* are important and need to be taken under consideration by domestic lawmakers in all member states in order to ensure that pregnant women will receive the healthcare they require, we will focus our attention on the fact that the Court has made history on 16 December 2010 by excluding abortion from the right to private life under Art. 8 (1) ECHR. Specifically, the Court held that the exclusion of abortion from the scope *ratione materiae* of Art. 8 (1) ECHR has its basis in the earlier case law of the Convention organs:

> "The Court has also previously found, citing with approval the case-law of the former Commission, that legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman, the Court emphasising that Article 8 [ECHR] cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman's private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child [...]. [Therefore] Article 8 [ECHR] cannot, accordingly, be interpreted as conferring a right to abortion".[506]

In this part of the thesis, I will not get into the question whether the travel restrictions imposed by Irish law are compatible with the Convention or not, nor will I focus on the exact technical details of procedures concerning the determination of

[504] ECtHR – *Tysiąc v. Poland*, Application No. 5410/03, Judgment of 20 March 2007; *cf.* also A. Komanovics – *Effective enforcement of human rights: the Tysiac v. Poland case*, in: 143 STUDIA IURIDICA AUCTORITATE UNIVERSITATIS PECS (2009), pp. 186 *et seq.*

[505] ECtHR – *Tysiąc v. Poland*, Application No. 5410/03, Judgment of 20 March 2007, para. 117; *cf.* K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 217.

medical criteria for abortions under Irish law because both aspects are of more interest from a domestic perspective. Rather, we will focus on one sentence in the Court's judgment which can have far-reaching consequences and which signals an important evolutionary step in the Court's case law on abortion. After stressing the role of Art. 8 (1) ECHR in the context of pregnancy,[507] the Court clarified that "Article 8 [ECHR] cannot [...] be interpreted as conferring a right to abortion".[508] In its 2002 decision in *Boso v. Italy*, the Court had still cited its earlier jurisprudence stating that "legislation regulating the interruption of pregnancy touches upon the sphere of private life [because] whenever a woman is pregnant her private life becomes closely connected with the developing foetus"[509] but until 2010, the Court had not yet issued a clear statement concerning the question whether the Convention gives women a right to abortion.[510] While the Court had not been called upon to rule on the applicability of Art. 2 ECHR to unborn children, this has changed with the Grand Chamber's judgment in *A, B and C v. Ireland*.

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[506] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 213 *et seq.*, using a phrase already employed in *Brüggemann*, *Boso* and *Tysiąc*.

[507] *Ibid.*, paras. 212 *et seq.*

[508] *Ibid.*, para. 213.

[509] ECtHR – *Boso v. Italy*, Application No. 50490/99, Decision of 5 September 2002, para. 2.

[510] S. K. Calt – *A., B. & C. v. Ireland*: "Europe's *Roe v. Wade*"?, in: 14 LEWIS & CLARK LAW REVIEW (2010), pp. 1189 *et seq.*, at p. 1189; K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 215; ECtHR – *Tysiąc v. Poland*, Application No. 5410/03, Judgment of 20 March 2007, paras. 104 and 108; *cf.* also A. Mowbray – *Institutional Developments and Recent Strasbourg Cases*, in: 5 HUMAN RIGHTS LAW REVIEW (2005), pp. 169 *et seq.*, at pp. 170 *et seq.*

2.4.2.4. The Development of Irish Abortion Law before *A, B and C v. Ireland*[511]

2.4.2.4.1. Domestic Legislation on Abortion in Ireland[512]

2.4.2.4.1.1. Constitutional Law

Art. 40 of the Irish Constitution reads as follows:

> "*1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*
> *2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.*
> *3° 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. This subsection shall not limit freedom to travel between the State and another state.*

[511] On the history of Irish abortion law see also N. Whitty – *Law and the Regulation of Reproduction in Ireland: 1922-1992*, in: 43 UNIVERSITY OF TORONTO LAW JOURNAL (1993), pp. 851 *et seq.*; R. Fletcher – *Post-colonial Fragments: Representations of Abortion in Irish Law and Politics*, in: 28 JOURNAL OF LAW AND SOCIETY (2001), pp. 568 *et seq.* and by the same author – *"Pro-Life" Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986-1992*, in: 36 OSGOODE HALL LAW JOURNAL (1998), pp. 1 *et seq.*; S. K. Calt – *A., B. & C. v. Ireland*: "Europe's *Roe v. Wade*"?, in: 14 LEWIS & CLARK LAW REVIEW (2010), pp. 1189 *et seq.*, at pp. 1192 *et seq.*; P. A. Ward – *Ireland: Abortion: "X" + "Y" = ?!*, in: 33 UNIVERSITY OF LOUISVILLE JOURNAL OF FAMILY LAW (1994-1995), pp. 385 *et seq.*, at pp. 386 *et seq.*; S. Bouclin – *Abortion in Post-X Ireland*, in: 13 WINDSOR REVIEW OF LEGAL AND SOCIAL ISSUES (2002), pp. 133 *et seq.*, at pp. 136 *et seq.*; B. Mercurio – *Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union*, in: 11 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2003), pp. 141 *et seq.*, at pp. 174 *et seq.*; J. Schweppe – *Mothers, Fathers, Children and the Unborn – Abortion and the Twenty-Fifth Amendment to the Constitutional Bill*, in: 9 IRISH STUDENT LAW REVIEW (2001), pp. 136 *et seq.*; N. Whitty – *Law and the Regulation of Reproduction in Ireland: 1922-1992*, in: 43 UNIVERSITY OF TORONTO LAW JOURNAL (1993), pp. 851 *et seq.*, at pp. 852 *et seq.*; A. M. Buckley – *The Primacy of Democracy over Natural Law in Irish Abortion Law: An Examination of the* C *Case*, in: 9 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW (1998), pp. 275 *et seq.*, at pp. 278 *et seq.*; D. Cole – *"Going to England": Irish Abortion Law and the European Community*, in: 17 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW (1993), pp. 113 *et seq.*, at pp. 115 *et seq.*; J. Lombard – *Can the State Intervene in Cases of Maternal/Foetal Conflict?*, in: 17 IRISH STUDENT LAW REVIEW (2010), pp. 129 *et seq.*, at pp. 131 *et seq.*

[512] The following part is based on the discussion of domestic Irish law in the ECtHR's judgment in *A, B and C v. Ireland*: ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."[513]

Most importantly, the unborn child has a right to life under Irish constitutional law.[514] The constitution requires the "each branch of the State which exercises the powers of legislating, executing and giving judgment on those laws[[515]]"[516] enact this rule. Art. 40 of the Irish Constitution, in particular Art. 40 (1), means a positive obligation on the part of the Irish authorities to protect human rights regardless of whether they are explicitly written down in the Constitution or not.[517] Until the eighth amendment to the *Bunreacht na hÉireann* in 1983,[518] Art. 40 (3) only consisted of Art. 40 (3) 1 and Art. 40 (3) 2. On this basis, Irish courts had already in the past found an implicit prohibition of abortion.[519] In 1992, the last subsections were added to Art. 40 (3) of the Irish Constitution referring to information about abortion services offered abroad[520] and the freedom to travel.[521] After a process of public reflection,[522] a referendum was held in 2002 which was meant to "defined the crime of abortion (to replace to replace sections 58 and 59 of the 1861 [Offences Against the Person] Act

[513] Reprinted in: *ibid.*, para. 55; *cf.* also N. Whitty – *Law and the Regulation of Reproduction in Ireland: 1922-1992*, in: 43 UNIVERSITY OF TORONTO LAW JOURNAL (1993), pp. 851 *et seq.*, at pp. 861 *et seq.*; G. Hogan – *Legal Aspects of Church/State Relations in Ireland*, in: 7 ST. LOUIS UNIVERSITY PUBLIC LAW REVIEW (1988), pp. 275 *et seq.*, at p. 281.

[514] J. Schweppe – *Beyond Abortion: The Right to Life of the Unborn Child under Irish Law*, in: 3 UNIVERSITY COLLEGE DUBLIN LAW REVIEW (2003), pp. 1 *et seq.*, at pp. 2 *et seq.*

[515] Court of Criminal Appeal (Ireland) – *The People at the Suit of the Director of Public Prosecutions v. John Shaw*, S. C. No. 129 of 1979, Judgment of 17 December 1980, in: [1982] IRISH REPORTS 1.

[516] Reprinted in: ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 27.

[517] G. Hogan – *Legal Aspects of Church/State Relations in Ireland*, in: 7 ST. LOUIS UNIVERSITY PUBLIC LAW REVIEW (1988), pp. 275 *et seq.*, at p. 281.

[518] On the 1983 amendment *cf.* P. Charleton – *Judicial Discretion in Abortion: The Irish Perspective*, in: 6 INTERNATIONAL JOURNAL OF LAW AND THE FAMILY (1992), pp. 349 *et seq.*, at pp. 350 *et seq.*; J. A. Quinland – *The Right to Life of the Unborn – An Assessment of the Eight Amendment to the Irish Constitution*, in: 10 BRIGHAM YOUNG UNIVERSITY LAW REVIEW (1984), pp. 371 *et seq.* and ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 35 *et seq.*

[519] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 29.

[520] On provision of information in Ireland about abortion services abroad see S. A. Low – *Europe threatens the sovereignty of the Republic of Ireland: Freedom of Information and the Right to Life*, in: 15 EMORY INTERNATIONAL LAW REVIEW (2001), pp. 175 *et seq.*

[521] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 48 *et seq.*

[522] *Cf. ibid.*, paras. 62 *et seq.*

and to reduce the maximum penalty).[523] The definition of abortion excluded [‘]the carrying out of a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman’s life other than by self-destruction[’]. The proposed 2002 Act also provided safeguards to medical procedures to protect the life of the mother by setting out the conditions which such procedures were to meet in order to be lawful: the procedures had, *inter alia*, to be carried out by a medical practitioner at an approved place; the practitioner had to form a reasonable opinion that the procedure was necessary to save the life of the mother; the practitioner had also to make and sign a written record of the basis for the opinion; and there would be no obligation on anyone to carry out or assist in carrying out a procedure.”[524] The proposal failed to receive the necessary votes,[525] keeping Art. 40 of the Irish Constitution as quoted above.

2.4.2.4.1.2. Criminal Law

The results of the 2002 referendum also mean that there is no recent criminal law legislation on abortion in Ireland. Instead, the 1861 Offences Against the Person Act[526] remains the relevant Irish law on abortion. Section 58 of the 1861 Offences Against the Person Act reads as follows:

> “*Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall*

[523] On the proposal put forward at the 2002 *cf.* also J. Schweppe – *Mothers, Fathers, Children and the Unborn – Abortion and the Twenty-Fifth Amendment to the Constitution Bill*, in: 9 IRISH STUDENT LAW REVIEW (2001), pp. 136 *et seq.*

[524] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 52 *et seq.*, italics added.

[525] *Ibid.*, para. 54.

be guilty of a felony, and being convicted thereof shall be liable to be kept in penal servitude for life."[527]

According to Section 59 of the same law,

"*Whoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour*[.]"[528]

Even though these laws entered into force before the adoption of the Irish constitution in 1937, they continue to apply by virtue of Art. 50.1 of the Constitution of the Republic of Ireland.[529] Over time, judges have tried to adapt this old law to contemporary problems. There have also been attempts to relax the prohibition of abortion with the aim to protect the health of the mother. These attempts, though, were contrary to the clear wording of the law. An other example is the case of *R. v. Bourne*[530] which has also been cited by the European Court of Human Rights in *A, B and C v. Ireland*:[531] "The meaning of section 58 of the 1861 Act was considered in England and Wales in *R. v. Bourne*,[[532]] where the defendant had carried out an abortion on a minor, pregnant as a result of multiple rape. [In this case, Judge] *Macnaghten* [...] accepted that abortion to preserve the life of a pregnant woman was not unlawful and, further, where a doctor was of the opinion that the woman's physical or mental health[[533]] would be seriously harmed by continuing with the

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[526] Available online at <http://www.legislation.gov.uk/ukpga/1861/100/pdfs/ukpga_18610100_en.pdf> (last visited 16 November 2011).

[527] *Ibid.*, also quoted by ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 30.

[528] *Ibid.*

[529] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 33.

[530] King's Bench Division - *R. v. Bourne*, [1939] 1 KING'S BENCH 687.

[531] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 34.

[532] King's Bench Division - *R. v. Bourne*, [1939] 1 KING'S BENCH 687, at pp. 689 *et seq.*

[533] On the problem of mental health reasons as a justification for abortion see R. J. Cook / A. Ortega-Ortiz / S. Romans / L. E. Ross – *Legal Abortion for mental health indications*, in: 95 INTERNATIONAL JOURNAL OF GYNECOLOGCY AND OBSTETRICS (2006), pp. 185 *et seq.*

pregnancy, he could properly be said to be operating for the purpose of preserving the life of the mother."[534] This view was rejected as incompatible with the Irish Constitution even before the 1983 amendment.[535]

2.4.2.4.1.3. Tort Law

In Irish Private Law, "Section 58 of the Civil Liability Act 1961[536] provides that [']the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive[,]."[537] This rule is similar to legislation in other countries.

2.4.2.4.1.3. Other Legislation

Other pieces of domestic legislation relating to abortion include the Crisis Pregnancy Agency (Establishment) Order 2001[538] and Section 10 of the Health (Family Planning) Act 1979.[539]

In addition, the Medical Council Guidelines 2004[540] based on the Medical Practitioners Act 1978[541] needs to be mentioned.[542]

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[534] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 34.

[535] *Ibid.*

[536] Available online at <http://www.irishstatutebook.ie/1961/en/act/pub/0041/index.html> (last visited 16 November 2011).

[537] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 31.

[538] Available online at <http://www.irishstatutebook.ie/2001/en/si/0446.html> (last visited 16 November 2011); *cf.* ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 77 *et seq.*

[539] Available online at <http://www.irishstatutebook.ie/1979/en/act/pub/0020/index.html> (last visited 16 November 2011); *cf.* ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 32.

[540] The Medical Council – A GUIDE TO ETHICAL CONDUCT AND BEHAVIOUR, 6th ed., The Medical Council, Dublin (2004), available online at <http://www.medicalcouncil.ie/Media-Centre/Publications/Older/Ethical%20Guide%202004.pdf> (last visited 16 November 2011).

[541] Available online at <http://www.irishstatutebook.ie/1978/en/act/pub/0004/index.html> (last visited 16 November 2011).

[542] *Cf.* ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 89 *et seq.*

2.4.2.4.2. Jurisprudence

Given that the key criminal law rule applicable to abortions in Ireland is 150 years old, it becomes evident that the jurisprudence of the Irish courts on abortion is particularly relevant, most likely more so than in many other countries. The key principle to be kept in mind in this context is the Common Law principle[543] of *stare decisis et quieta non movere*.

2.4.2.4.2.1. The *X* Case

Arguably the most controversial abortion case of the last decades, *X* continues to play a key role in the debate on abortion in Ireland.[544] The case concerns a young girl, *X*, who

> "was fourteen years of age when she became pregnant as a result of rape. Her parents arranged for her to have an abortion in the United Kingdom and asked the Irish police whether it would be possible to have scientific tests carried out on retrieved foetal tissue with a view to determining the identity of the rapist. The Director of Public Prosecutions was consulted who, in turn, informed the Attorney General. On 7 February 1992 an interim injunction was granted *ex parte* on the application of the Attorney General restraining X from leaving the jurisdiction or from arranging or carrying out a termination of the

[543] On the importance of the principle for the Common Law world *cf.* L. Erades – *Is stare decisis an impediment to the enforcement of international law by British courts ?*, in: 4 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW (1973), pp. 105 *et seq.*, at p. 105 and K. Zweigert / H. Kötz – INTRODUCTION TO COMPARATIVE LAW, 3rd ed., Clarendon Press, Oxford (1998), p. 259.

[544] Supreme Court (Ireland) – *Attorney General v. X and Others*, [1992] 1 IRISH REPORTS, pp. 1 *et seq.*; see also ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 37 *et seq.*; S. Zenkich – X *marks the spot while* Casey *strikes out: two controversial abortion decisions*, in: 23 GOLDEN GATE UNIVERSITY LAW REVIEW (1993), pp. 1001 *et seq.* and P. A. Ward – *Ireland: Abortion: "X" + "Y" = ?!*, in: 33 UNIVERSITY OF LOUISVILLE JOURNAL OF FAMILY LAW (1994-1995), pp. 285 *et seq.*; on the impact of *X* see S. Bouclin – *Abortion in Post-X Ireland*, in: 13 WINDSOR REVIEW OF LEGAL AND SOCIOLOGICAL ISSUES (2002), pp. 133 *et seq.*; on *Casey* see also M. F. Moses – Casey *and its Impact on Abortion Regulation*, in: 21 FORDHAM URBAN LAW JOURNAL (2003-2004), pp. 805 *et seq.*; P. D. Simmons – *Religious Liberty and Abortion Policy:* Casey *as "Catch-22"*, in: 42 JOURNAL OF CHURCH AND STATE (2000), pp. 69 *et seq.*; C. E. Howard – *The* Roe'd *to Confusion:* Planned Parenthood v. Casey, in: 30 HOUSTON LAW REVIEW (1993-1994), pp. 1457 *et seq.*; C. E. Borgmann – *Winter Count: Taking Stock of Abortion Rights after* Casey *and* Carhardt, in: 31 FORDHAM URBAN LAW JOURNAL (2004), pp. 675 *et seq.*; G. L. Neuman – Casey *in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, in: 43 AMERICAN JOURNAL OF COMPARATIVE LAW (1995), pp. 273 *et seq.*

pregnancy. X and her parents returned from the United Kingdom to contest the injunction. [In] 1992, on appeal, a majority [...] of the Supreme Court discharged the injunction. [...] The Chief Justice noted [in a dissenting opinion] that [...] in vindicating and defending as far as practicable the right of the unborn to life but at the same time giving due regard to the right of the mother to life, [...] the test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother's right to life. [Rather,] the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article [40] of the Constitution."[545]

On this basis, the court accepted that the risk of suicide was sufficient to establish a risk to the life of the mother,[546] a view which was controversial enough to eventually lead to the proposal for a clarification in the Constitution to the effect that that should not be so.[547] It was this proposal which was rejected in 2002.[548]

[545] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 41, italics added.
[546] Supreme Court (Ireland) – *The Attorney General v. X. and Others*, Case no. 1992 No. 846 P, Judgment of 5 March 1992, in: [1992] 1 IRISH REPORTS, pp. 1 *et seq.*, at para. 37.
[547] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 50.
[548] *Ibid.*, para. 54.

2.4.2.4.2.2. The *C* Case[549]

An other case involving a young teenage girl who had become pregnant during a rape[550] was before the High Court about five years after *X*.

> "The Health Board, which had taken [C] into its care, became aware that she was pregnant and, in accordance with her wishes, obtained a interim care order (under the Child Care Act 1991) from the District Court allowing the Health Board to facilitate a termination of her pregnancy. C's parents sought to challenge that order by judicial review. On appeal C, her parents and the Health Board were each represented by a Senior and Junior Counsel, and the Attorney General was represented by two Senior and two Junior Counsel. [...] On 28 November 1997 the High Court accepted that, where evidence had been given to the effect that the pregnant young woman might commit suicide unless allowed to terminate her pregnancy, there was a real and substantial risk to her life and such termination was therefore a permissible medical treatment of her condition where abortion was the only means of avoiding such a risk. An abortion was therefore lawful in Ireland in C's case and the [...] Child Care Act [of]1991 [was considered the] appropriate [legal tool to resolve this issue]."[551]

2.4.2.4.2.3. *MR v. TR and Others*[552]

In the case of *MR v. TR and Others*, the High Court excluded embryos who had been created through *in vitro*-fertilization (IVF) and are currently outside the womb of the mother (usually frozen[553]), were not protected under Art. 40 (3) 1 of the Constitu-

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[549] *Cf.* ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 95 *et seq.*, referring to Supreme Court (Ireland) – *A and B v. Eastern Health Board, Judge Mary Fahy and C, and the Attorney General (notice party)*, [1998] 1 IRISH REPORTS, pp. 464 *et seq.*; A. M. Buckley – *The Primacy of Democracy over Natural Law in Irish Abortion Law: An Examination of the* C *Case*, in: 9 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW (1998), pp. 275 *et seq.*, at pp. 276 *et seq.*

[550] *Cf.* ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 95.

[551] *Ibid.*, para. 95, italics added.

[552] High Court (Ireland) – *MR v. TR and Others*, [2006] HIGH COURT OF IRELAND DECISIONS {IEHC} 359.

[553] On this issue see also J. Lejeune – THE CONCENTRATION CAN: WHEN DOES HUMAN LIFE BEGIN? AN EMINENT GENETICIST TESTIFIES, 1st ed., Ignatius Press, San Francisco (1992), p. 9; J. Carbone / N.

tion of the Republic of Ireland.[554] The Medical Council Guidelines 2004, "the High Court noted [,] do not have the force of law and offer only such limited protection as derives from the fear on the part of a doctor that he might be found guilty of professional misconduct with all the professional consequences that might follow". This view was upheld upon appeal but there were concerns about the fact that Ireland has no legislation on IVF.[555] (This lack of domestic legislation on IVF shows a marked contrast to other countries, such Germany[556] where artificial inseminations are actually indirectly paid for in part by the state, *e.g.* in that the costs for a heterologous artificial insemination can be calculated against the taxes owed to the state by the couple as an extraordinary expense.[557])

Indeed, it seems rather difficult to apply a mid-19th century law to contemporary century technology: section 58 of the 1861 Act requires the woman to be "with child", section 59 implicitly requires a pregnancy as well. For the 19th century legislator, IVF was not within the realm of the imaginable. In particular when one keeps in mind the principle *nuella poena sine lege* (*scripta, certa, praevia*),[558] nobody can be held liable under Irish criminal law for the destruction of frozen embryos – but Art. 40 (3) 1 of the Irish Constitution does not allow this either since it protects "unborn life" as such – regardless of where it is located. Hence the destruction of embryos, which is common in the context of IVF because usually more embryos are produced than are later implanted.[559] In fact, between 1995 and 2003 around 1.2 million embryos who had been 'produced' for the purpose of in-vitro fertilization had who had not

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Cahn – *Embryo Fundamentalism*, in: 18 WILLIAM & MARY BILL OF RIGHTS JOURNAL (2009-2010), pp. 1015 *et seq.*

554 *Cf.* the summary of *MR v. TR and Others* at ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 97.

555 *Cf.* the summary *ibid.*, para. 98.

556 On IVF in Germany *cf.* S. Dije – PRÄIMPLANTATIONSDIAGNOSTIK AUS RECHTLICHER SICHT, 1st ed., Shaker Verlag, Aachen (2001), pp. 43 *et seq.*

557 Bundesfinanzhof (Germany's Supreme Court for Tax Law), Case no. VI R 43/10, Judgment of 16 December 2010, guiding sentence. This judgment is a deviation from earlier case law, *e.g.* Bundesfinanzhof – Case no. III R 46/97, Judgment of 18 May 1999, which contrasts with Bundesfinanzhof – Case no. VI R 43/10, Judgment of 16 December 2010, para. 16.

558 *Cf.* B. Pieroth / B. Schlink – GRUNDRECHTE, STAATSRECHT II, 25th ed., C. F. Müller, Heidelberg (2009), pp. 297 *et seq.*

559 M. Woolf – *IVF clinics destroy 1m 'waste' embryos*, in: THE SUNDAY TIMES, 30 December 2007, available online at <http://www.timesonline.co.uk/tol/life_and_style/health/article 3108160.ece> (non-permanent link, the text is also available at <http://www.indiadivine. org/audarya/ayurveda-health-wellbeing/1068564-ivf-clinics-destroy-1m-waste-british-embryos-my-daddys-name-donor.html> (last visited 16 November 2011).

been implanted have been destroyed in the United Kingdom alone.[560] This is forbidden under Art. 40 (3) of the Irish Constitution but does not carry a penalty under Irish criminal law. Keeping in mind the *status positivus* function of human rights, which can also be seen in Art. 40 (3) 1 of the Irish Constitution which requires the state to "defend" the rights to life of the unborn child, the Irish Republic is under a positive obligation to enact legislation which effectively protects all unborn children, including frozen ones outside the womb of the mother.

2.4.2.4.2.4. The *D* Case[561]

In *D* the authorities tolerated a behavior which was not necessarily punishable under criminal law but which was incompatible with the spirit of Art. 40 (3) sentence 1 of the Irish Constitution:

> "D was a minor in care who had been prevented by the local authority from going abroad for an abortion. Her foetus had been diagnosed with anencephaly, which diagnosis was accepted as being incompatible with life outside the uterus. [...] The High Court held that the right to travel guaranteed by the Thirteenth Amendment took precedence over the right of the unborn guaranteed by Article [40 (3) 1 of the Irish Constitution]. There was no statutory or constitutional impediment preventing Ms D from travelling to the United Kingdom for an abortion."[562]

In *D*, the High Court attempted to focus on the question of the legality of travelling abroad to obtain an abortion in an other country[563] since *D* never attempted to have an abortion in Ireland. The reason for this approach is self-evident: *D*'s life or her health were never at risk, rather, *D* wanted an abortion for embryopathic, that is, eugenic reasons. This the Constitution of Ireland rightfully does not allow. *D*'s child had to die because of his or her physical handicap which

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[560] *Ibid.*

[561] High Court – *D (A Minor) v. District Judge Brennan, the Health Services Executive, Ireland and the Attorney General*, Judgment of 9 May 2007, referred to by also ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 99.

[562] *Ibid.*, italics added.

[563] *Cf. ibid*.

would have led to death either before birth or within hours or days after birth.[564] Nevertheless the child was a human being and as such had a right to life, no matter how short this life might have been. Therefore obtaining an abortion in Ireland was impossible. If local authorities were complicit in this circumvention of Irish law, as it seems to have been the case, it appears that the authorities were more interested in following the eugenic wishes of the mother than in conforming with the spirit instead of merely with the letter of the law.

2.4.2.5. The Future of Irish Abortion Legislation

The judgment in *A, B and C v. Ireland* is unlikely to trigger changes in Irish abortion legislation anytime soon,[565] but from a pro-life perspective, the ECtHR's judgment in *A, B and C v. Ireland* is important beyond Ireland, even though the Court favors the margin of appreciation-approach in this regard. This is due to the fact that most European states have far more permissive abortion laws than Ireland and this judgment provides an opening to challenge elective abortion in Strasbourg,

Ireland has long been a bastion of the rights of the unborn child. In an age of moral relativism, the Court in Strasbourg decided to stand firm on the principles on which the Convention has been built by rejecting the idea of a right to abortion as part of the right to private life under Art. 8 (1) ECHR. In the long run, the judgment in *A, B and C v. Ireland* might remove at least a bit of pressure from the Irish Republic to further 'liberalize' its abortion legislation. *De lege lata*, abortion is legally possible in Ireland to save the mother's life. Some clarification as to the permissibility of abortion in case of mere dangers to the health of the mother, in particular her mental health, might be helpful but in terms of the 'liberalization' of abortion expected by some,[566] the position of the Irish Republic has been confirmed by Strasbourg. For the time being, the Irish law on abortion will remain unchanged, which is a blessing for many unborn children on the emerald isle. The old age of the existing law,

[564] *Cf.* S. J. Swierzewski – *Cephalic Disorders Overview, Anencephaly, Colpocephaly*, in: HEALTH-COMMUNITIES.COM, 23 February 2011, available online at <http://www.healthcomm unities.com/cephalic-disorders/children/cephalic-disorders-overview.shtml> (last visited 16 November 2011).

[565] S. McGuinness – *A, B and C leads to D (for delegation),* A, B and C v. Ireland, 25579/05, *[2010] ECHR 2032*, in: 19 MEDICAL LAW REVIEW (2011), pp. 476 *et seq.*, at p. 488.

though, is becoming problematic as far as new reproductive technologies are concerned. In this respect, the Irish legislature is called upon to take action in order to comply with its obligations under the Constitution, in particular when it comes to ensuring that laws are enforced effectively and if necessary with criminal sanctions.

2.5. Intermediate Conclusions

For decades, both the Court and the Commission have hinted at the possibility that the unborn child is not without protection under the Convention, that the mother has no right to abortion at will. So far, the Court has not yet ruled whether or not the unborn child does indeed fall within the personal scope of Art. 2 (1) ECHR. The case of *A, B and C v. Ireland* has received so much attention because in it the European Court of Human Rights made it clear that the mother has not right to abortion as part of her right to private life and that her right has to be balanced against the rights of the child. Thereby the Court has implied that the unborn child indeed has human rights under the Convention – and which right could the child have, if not at least the right to life?

[566] *Cf.* S. K. Calt – *A., B. & C. v. Ireland: Europe's "Roe v. Wade"?*, in: 14 LEWIS & CLARK LAW REVIEW (2010), pp. 1189 *et seq.*

3. PERSONHOOD AND ART. 2 (1) ECHR

3.1. Art. 34 ECHR

According to Art. 34 ECHR,

> "[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

At first sight, Art. 34 ECHR, which gives every victim a right to bring a case before the Court, could be invoked to restrict the status of victims to born humans because only they could bring a claim. Yet this view would be too narrow since parents can undoubtedly bring a case on behalf of their children or representatives of a corporation for the legal person they represent. Excluding the unborn by means of Art. 34 ECHR would impose a differentiation for which the norm provides no legal basis.

3.2. The Wording of Art. 2 ECHR and different Language Versions of the Convention

The outer limit for the interpretation of any legal norm has to be its wording. Because the ECHR is not a piece of supranational legislation but an international treaty, Art. 31 (1) of the Vienna Convention on the Law of Treaties, or for those states parties, such as France, Turkey, Norway, Iceland, Romania, San Marino, Monaco, Malta, and Azerbaijan, which have not (yet) ratified the VCLT, the corresponding norm of customary Public International Law,[567] applies to the interpretation of Art. 2 ECHR.[568]

[567] That Articles 31 – 33 of the Vienna Convention on the Law of Treaties reflect the existing customary law has already been held by the International Court of Justice: International Court of Justice – *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, in: INTERNATIONAL COURT OF JUSTICE REPORTS 1991, pp. 53 *et seq.*, at para. 48.

"According to Art. 31 (1) VCLT, every international treaty ['']shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose['']. In the most literal sense of the word, ['']everyone['] is as all-encompassing as it gets and the context of the term ['']everyone['] in the Convention reveals that it means more than the term ['']person['], which is used frequently in the Convention – while the French version of Art. 2 ECHR, which refers to ['']*toute personne*['] (every person), does not allow this conclusion. The *travaux prépatoires* of Art. 2 ECHR fail to provide a definition of either the term ['']everyone['],[569] neither do they allow for a restriction of the term ['']life['] to ['']life after birth['].[570] One might think that the inclusion of the unborn child into the scope *ratione personae* of Art. 2 (1) ECHR is not absolutely necessary[571] (['']*Aus dem Wortlaut der Gewährleistung ergibt sich die Erstreckung auf den Schutz ungeborenen Lebens nicht zwingend*['],[572] to cite *Christoph Grabenwarter*)and thanks to the wavering position of the Convention organs a number of cases can be cited in support of his thesis.[573] When *Grabenwarter* chooses the term ['']*zwingend*['], he indicates that he [is open to the idea] that Art. 2 ECHR does indeed apply to the unborn. He also deserves credit for not stopping there but making the effort to interpret the norm in question in more detail.[574] *Grabenwarter* cites both the French form as well as the German text ['']*jedes Menschen*['] (of every human) as suggesting a limitation to born humans[575] – a limit which cannot be deducted from the English text of Art. 2 [(1)] ECHR which refers to ['']everyone['].[576] *Grabenwarter* concludes that it cannot be excluded that unborn children enjoy

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[568] *Cf.* ECtHR – *Golder v. The United Kingdom*, Application no. 4451/70, Judgment of 21 February 1970, para. 29; D. Shelton – *The Boundaries of Human Rights Jurisdiction in Europe*, in: 13 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW (2003), pp. 95 *et seq.*, at p. 125; T. Goldman –Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*, at p. 281.

[569] *Ibid.*; ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, diss. op. *Mularoni*.

[570] *Cf. ibid.*

[571] C. Grabenwarter – EUROPÄISCHE MENSCHENRECHTSKONVENTION, 3rd ed., Verlag C.H. Beck, Munich (2008), pp. 131 *et seq.*

[572] *Ibid.*

[573] *Ibid.*, p. 132, there fn. 12.

[574] *Ibid.*, p. 132.

[575] *Ibid.*

[576] *Ibid.*, p. 132.

the right to life under Art. 2 [(1) 1] ECHR[577] - a conclusion which is furthermore supported by the penultimate sentence of the Convention in the short paragraph after Art. 59 ECHR, according to which both the French and the English texts are equally authentic. In such a case, a wider interpretation which ensures that no violation occurs in any case seems more than in order, in fact, the *ratio* of the Convention, its entire *raison d'être*, its purpose within the meaning of Art. 31 [(1)] VCLT, is to protect human rights. This calls for a wide interpretation of the scope of any right under the Convention, in particular when one takes into account the fundamental importance of the right to life and the fact that there are still ways to limit this right without violating the Convention."[578]

The common interpretation of the word "everyone" in Art. 2 (1) ECHR is wide, in fact, it is as wide as possible. The word "everyone" does not provide a tool to limit the applicability ratione personae of the right to life under the Convention only to born humans or only to embryos who are already implanted in the endometrium (a point which will be difficult to determine to begin with).[579]

But there are differences between the French and the English version of Art. 2 (1) ECHR, which is the price paid for this elegance and conciseness of the norm: the English version refers to "everyone" while the French version refers to "every person". Were the norm more elaborate, like Art. 1 of the American Declaration on the Rights and Duties of Man (ADRDM), this would not be a problem. Therefore it might very well have been the desire for a simpler, more catchy, phrase, which now raises questions.

Assuming one were to apply only the French version of the Convention, granting the right to life only to "persons" – would this necessarily mean that unborn children do not enjoy the right to life? In other words: is the unborn child a person in the

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[577] *Ibid.*

[578] S. Kirchner – *Personhood and the Right to Life under the European Convention on Human Rights: Current and Future Challenges of Modern (Bio-)Technology*, in: 3 UNIVERSITY OF WARMIA-MAZURY LAW REVIEW (2011), pp. 44 *et seq.*, at pp. 47 *et seq.* – footnotes edited, italics added.

[579] On the relationship between human dignity and the right to life under in the context of the early days of human life in the womb from the perspective of German constitutional law (Art. 1 (1) GG and Art. 2 (2) sentences 1 and 3 GG), *cf.* U. Steiner – DER SCHUTZ DES LEBENS DURCH DAS GRUNDGESETZ – ERWEITERTE FASSUNG EINES VORTRAGS GEHALTEN VOR DER JURISTISCHEN GESELLSCHAFT ZU BERLIN AM 28. JUNI 1991, 1st ed., Walter de Gruyter, Berlin / New York (1992), pp. 11 *et seq.*

eyes of the Convention?[580] It may not be a person under domestic law, but that cannot be too much of a concern for the interpretation of the ECHR since the Court is called upon to measure the domestic law against the yardstick of the Convention and not *vice versa*.

The idea that the unborn child is not a person is hardly new[581] - in fact, the Court's decision in *Vo* reflects the philosophical debates of the 1970s, which should not come as a surprise, given that the Court's expertise on pre-natal medicine at times gives on the impression that it has also failed to develop much further, leaving one with the impression that there truly is nothing new under the sun.[582, 583]

3.3. The Charter of Fundamental Rights of the European Union

The term "human beings" in Art. 3 para. 2 final sub-para. of the Charter of Fundamental Rights of the European Union[584] also applies to the unborn child.[585] This view has been elaborated by Judge *Ress* in his dissenting opinion in *Vo v. France*:

> "It is obvious that the premise of the debate on genetic safeguards in a number of recent conventions and the prohibition on the reproductive cloning of "human beings" in the Charter of Fundamental Rights of the European Un-

[580] On this issue *cf.* P. Kunzmann – *Ist Potentialität relevant für den moralischen Status des menschlichen Embryos?*, in: K. Hilpert / D. Mieth (eds.), KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Herder, Freiburg im Breisgau (2006), pp. 16 *et seq.*; F. Ricken – *„Mensch" und „Person"*, in: *ibid.*, pp. 66 *et seq.*

[581] *Cf.* also G. Luf – *Rechtsethische Probleme des Personenbegriffs – Ein Beitrag zur Debatte um Peter Singer*, in: 121 WISSENSCHAFTLICHE NACHRICHTEN (2003), pp. 3 *et seq.*; G. Luf – *Recht und ethischer Pluralismus in der Biomedizin*, in: P. Weingartner (ed.) – ROHSTOFF MENSCH, DAS FLÜSSIGE GOLD DER ZUKUNFT?, 1st ed., Peter Lang, Frankfurt am Main (2008), pp. 175 *et seq.*, at pp. 177 *et seq.*; J. English – *Abortion and the Concept of a Person*. in: 5 CANADIAN JOURNAL OF PHILOSOPHY (1975), pp. 233 *et seq.*

[582] The phrase "nothing new under the sun" is from the Old Testament (ECCLESIASTES (also referred to as KOHELET) Chapter 1 Verse 9).

[583] The debate as to the personhood of the unborn child, including a number of different views and the responses to them, including diverse political, philosophical and religious approaches, has been summarized very instructively by P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), pp. 7 *et seq.*

[584] OFFICIAL JOURNAL OF THE EUROPEAN UNION 2000 C 364/01, available online at <http://www.europarl.europa.eu/charter/pdf/text_en.pdf> (last visited 1 February 2011).

[585] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, dissenting opinion Judge *Ress*, para. 5.

ion (Article 3 § 2, final sub-paragraph) is that the protection of life extends to the initial phase of human life. The Convention, which was conceived as a living instrument to be interpreted in the light of present-day conditions in society, must take such a development into account in order to confirm the "ordinary meaning", in accordance with Article 32 of the Vienna Convention.

Even if it is assumed that the ordinary meaning of "human life" in Article 2 of the Convention is not entirely clear and can be interpreted in different ways, the obligation to protect human life requires more extensive protection, particularly in view of the techniques available for genetic manipulation and the unlimited production of embryos for various purposes. The manner in which Article 2 is interpreted must evolve in accordance with these developments and constraints and confront the real dangers now facing human life. Any restriction on such a dynamic interpretation must take into account the relationship between the life of a person who has been born and the unborn life, which means that protecting the foetus to the mother's detriment would be unacceptable."[586]

While *Ress* took a step ahead by taking into account a document of the European Union which was not yet binding at the time, things have changed since the Treaty of Lisbon.[587] Not only does the Charter now have a clear legal status within EU law, the joint declaration of the presidents of the European Court of Justice and the ECtHR, *Skouris* and *Costa*, of 24 January 2011, now allows for, and in fact requires, a parallel interpretation of the Charter and the Convention,[588] as is already envisaged in Art. 52 (3) of the Charter in the light of Art. 6 (2) 1 EU Treaty[589] which

[586] *Ibid.*

[587] OFFICIAL JOURNAL OF THE EUROPEAN UNION OJ 2007/C 306/01, available online at <http://www.ecb.int/ecb/legal/pdf/en_lisbon_treaty.pdf> (last visited 1 February 2011).

[588] JOINT COMMUNICATION FROM PRESIDENTS COSTA AND SKOURIS, available online at <http://www.echr.COE.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Comm unication_CEDHCJUE_EN.pdf> (last visited 1 February 2011), para. 1.

[589] On the importance of the possibility of the accession of the EU to the ECHR which has been provided in the Lisbon treaty see also M. O'Boyle – *The Future of the European Court of Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1862 *et seq.*, at pp. 1862 *et seq.*, p. 1866 and pp. 1875 *et seq.*

calls for the eventual accession[590] of the European Union to the Convention.[591] Therefore Art. 2 (1) ECHR has to be understood as to apply to unborn children as well.[592]

3.4. Other International Law Documents

Such a wide interpretation also would do justice to the status of the Convention and its Protocols as a self-contained regime[593] under Public International Law. Other international instruments, regardless of whether they ignore the rights of the unborn and give preference to the rights of the mother or whether they actually are more explicit than the ECHR (such as Art. 4[594] of the American Convention on Human Rights (ACHR)[595]) are, if they have been created outside of this self contained regime, of lesser relevance to the interpretation of norms within the human rights regime established by the Convention. For example, *Tanya Goldman* claims that the work of the Fourth World Conference on Women in Beijing or of the International Conference on Population and Development in Cairo as well as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) should be taken into account when interpreting Art. 2 ECHR.[596] Not only does she fail to support this thesis with further arguments despite the nature of the Convention as a self-contained regime. *Goldman* also conveniently ignores other norms which are either

[590] On the EU's potential accession to the Convention see N. O'Meara – *"A More Secure Europe of Rights?" The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1813 *et seq.*

[591] On the emerging conflict of laws rules between the ECHR and EU law *cf.* H. Sauer – *Bausteine eines Grundrechtskollisionsrechts für das europäische Mehrebenensystem*, in: 38 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (2011), pp. 195 *et seq.*, in particular at p. 197 as well as the commentary on the different legal orders edited by R. Grote / T. Marauhn (eds.) – KONKORDANZKOMMENTAR ZUM DEUTSCHEN UND EUROPÄISCHEN GRUNDRECHTSSCHUTZ, 1st ed., Mohr Siebeck, Tübingen (2006).

[592] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, dissenting opinion Judge *Ress*, para. 9.

[593] On the concept as such see B. Simma / D. Pulkowski – *Of Planets and the Universe: Self-Contained Regimes in International Law*, in: 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2006), pp. 483 *et seq.*

[594] Which is conveniently ignored by T. Goldman –Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*, at p. 281.

[595] 1144 UNITED NATIONS TREATY SERIES 123, OAS Treaty Series No. 36.

[596] T. Goldman –Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*, at p. 281.

binding directly (as opposed to the Beijing Declaration[597] and the Programme of Action of the International Conference on Population and Development),[598] such as Art. 6 (1) and Art. 24 (1) of the International Covenant on Civil and Political Rights,[599] or at least enjoy customary law[600] status.

The creation of a new rule of customary Public International Law requires a consistent[601] state practice[602] which is based on a corresponding *opinio juris*,[603] that is, the states' actions have to be based on the conviction that the action in question

[597] Beijing Declaration – Platform for Action, 17 October 1995, A/CONF.177/20, in: 35 INTERNATIONAL LEGAL MATERIALS (1996), pp. 401 *et seq.*, reprinted in: R. Wallace – INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT, 1st ed., Sweet & Maxwell, London (1997), pp. 47 *et seq.*; *cf.* also *ibid.*, p. 63.

[598] Report of the International Conference on Population and Development, Cairo, 5-13 September 1994 (94/10/18), UN Doc. A/CONF.171/13, available online at <http://www.un.org/popin/icpd/conference/offeng/poa.html> (last visited 2 November 2011).

[599] 999 UNITED NATIONS TREATY SERIES 171.

[600] On the concept of customary law in Public International Law at large see, among many texts dealing with the subject, the concise presentations by P. Malanczuk – AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW, 7th ed., Routledge, London / New York (1997), pp. 220 *et seq.*; M. Dixon – TEXTBOOK ON INTERNATIONAL LAW, 6th ed., Oxford University Press, Oxford and other locations (2007), pp. 31 *et seq.*; M. Dixon / R. McCorquodale – CASES & MATERIALS ON INTERNATIONAL LAW, 4th ed., Oxford University Press, Oxford and other locations (2003), pp. 28 *et seq.*; K. Ipsen – VÖLKERRECHT, 5th ed., Verlag C. H. Beck, Munich (2004), pp. 211 *et seq.*; J. Dugard – INTERNATIONAL LAW – A SOUTH AFRICAN PERSPECTIVE, 2nd ed., Juta Law, Lansdowne (2000), pp. 26 *et seq.*; A. Cassese – INTERNATIONAL LAW, 1st ed., Oxford University Press, Oxford and other locations (2001), pp. 117 *et seq.*; M. Shaw – INTERNATIONAL LAW, 4th ed., Cambridge University Press, Cambridge (1997), pp. 56 *et seq.*; S. Hobe / O. Kimminich – EINFÜHRUNG IN DAS VÖLKERRECHT, 8th ed., A. Francke Verlag, Tübingen / Basel (2004), pp. 184 *et seq.*; C. C. Joyner – INTERNATIONAL LAW IN THE 21ST CENTURY – RULES FOR GLOBAL GOVERNANCE, 1st ed., Rowan & Littlefield Publishers, Lanham and other locations (2005), pp. 11 *et seq.*; H. Thirlway – *The Sources of International Law*, in: M. D. Evans (ed.) – INTERNATIONAL LAW, 3rd ed., Oxford University Press, Oxford and other locations (2010), pp. 101 *et seq.*; I. Brownlie – PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 7th ed., Oxford University Press, Oxford and other locations (2008), pp. 6 *et seq.*; M. Byers – CUSTOM, POWER AND THE POWER OF RULES, 1st ed. Cambridge University Press, Cambridge (1999) and J. Kammerhofer – *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, in: 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2004), pp. 523 *et seq.*

[601] M. Dixon – TEXTBOOK ON INTERNATIONAL LAW, 6th ed., Oxford University Press, Oxford and other locations (2007), pp. 31 *et seq.*

[602] *Ibid.*, p. 31.; J. Dugard – INTERNATIONAL LAW – A SOUTH AFRICAN PERSPECTIVE, 2nd ed., Juta Law, Lansdowne (2000), pp. 28 *et seq.*; M. Shaw – INTERNATIONAL LAW, 4th ed., Cambridge University Press, Cambridge (1997), pp. 64 *et seq.*

[603] M. Dixon – TEXTBOOK ON INTERNATIONAL LAW, 6th ed., Oxford University Press, Oxford and other locations (2007), pp. 34 *et seq.*; J. Dugard – INTERNATIONAL LAW – A SOUTH AFRICAN PERSPECTIVE, 2nd ed., Juta Law, Lansdowne (2000), pp. 31 *et seq.*; M. Shaw – INTERNATIONAL LAW, 4th ed., Cambridge University Press, Cambridge (1997), pp. 66 *et seq.*

is not merely what the political leadership wants but that it is required by international law.

Among the human rights norms which have become rules of customary international law are Art. 1 sentence 1 and Art. 3 of the Universal Declaration of Human Rights (UDHR).[604]

Art. 3 UDHR is almost as simple as it could possibly be.[605] It reads:
"*Everyone has the right to life, liberty and security of person.*"

The ECHR being a self-contained legal regime within the wider context of Public International Law, we might not be able to draw direct conclusions from the understanding of the term "everyone" within the meaning of Art. 3 UDHR for the meaning of the same term in Art. 2 (1) ECHR. But nevertheless can we investigate the personal scope of Art. 3 UDHR, which might give us a better understanding of Art. 2 (1) ECHR. During the negotiation of what was to become the Universal Declaration, Lebanon had unsuccessfully suggested to include unborn children in the wording of the norm *expressis verbis*.[606] A historic interpretation of Art. 3 UDHR therefore seems to allow a narrow interpretation despite the wide wording. Or was Lebanon's proposal rejected because it was felt that there was no need to state it in more detail? After all, the Universal Declaration has a particular textual style and is rather neat: most articles contain only one paragraph, none contains more than three and the first ten articles appear to be particularly concise. This effort would be foiled by overly long explanations. Rarely does the Universal Declaration spell out matters in more detail, one example being Art. 18 UDHR, according to which

> "*[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom,*

[604] G.A. Res. 217A (III), available online at <http://www.un.org/en/documents/udhr/> (last visited 2 November 2011).
[605] Amazingly enough, this did not prevent the right to life to be claimed in *support* of abortion in a case in which the life of the mother was not even at stake, *cf.* Human Rights Committee – *K. N. L. H. v. Peru*, Communication No. 1153/2003, 14 August 2006, UN Doc. CCPR/C/85/D/1152/2003/Rev. 1, reprinted in: H. J. Steiner / P. Alston / R. Goodman – INTERNATIONAL HUMAN RIGHTS IN CONTEXT – LAW – POLITICS – MORALS, 3rd ed., Oxford University Press, Oxford (2007), pp. 906 *et seq.*
[606] H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENSEN IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 141.

either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

The language used in the UDHR explains the scope of the norm. While doing so in the later part of the Universal Declaration might be fine, it would have seriously cramped the style in which the Universal Declaration was written, had a similar kind of disclaimer been added to the most basic of human rights, the right to life. One should therefore be careful not too read too much into the rejection of the Lebanese proposal during the drafting of the Universal Declaration. Problems may arise from a more systematic interpretation of the Universal Declaration of Human Rights: Art. 1 UDHR states that

"*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*"

This might be understood to mean that only born humans are human beings who have human dignity and human rights.[607] The second sentence might even be construed to constitute a requirement to the effect that only humans who are *in concreto* capable of reason are human beings within the sense of Art. 1 UDHR. This view, however, would be incompatible with the non-discrimination clause of Art. 2 sentence 1 UDHR.[608] A brain is not needed to be human.[609] The anencephalic child is a human being, too. Especially viability, the ability "to live outside the mother's womb, albeit with artificial aid"[610] is not a requirement for the unborn child to have a right to life,[611] not to mention that viability is not one clearly identifiable event,[612] making it a rather useless criterion, just like implantation.

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[607] This view is expanded on *ibid.*

[608] Against *individual* sentience as a moral criterion, *cf. ibid.*, pp. 50 *et seq.*

[609] *Ibid.*, p. 76.

[610] United States Supreme Court – *Roe v. Wade*, 410 US 113, at p. 160; also cited by H. T. Krimmel / M. J. Foley – *Abortion: an inspection into the nature of human life and potential consequences of legalizing its destruction*, in: 46 UNIVERSITY OF CINCINNATI LAW REVIEW (1977), pp. 725 *et seq.*, at p. 739.

[611] H. T. Krimmel / M. J. Foley – *Abortion: an inspection into the nature of human life and potential consequences of legalizing its destruction*, in: 46 UNIVERSITY OF CINCINNATI LAW REVIEW (1977), pp. 725 *et seq.*, at p. 739.

Moreover, Art. 25 (2) sentence 2 UDHR, according to which

> "*[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection*"

might, due to the reference to "*born*" children, be considered as an argument against the inclusion of unborn children in the human rights regime of the Universal Declaration. Such a view would be unfounded, though: the reference to the birth is intended to prevent discrimination and has to be seen in the overall context of Art. 25 UDHR which is concerned with social issues. The issue of children born out of wedlock is only a secondary issue in this context.

Many rights contained in the Universal Declaration obviously only apply to born humans,[613] *e.g.* the presumption of innocence under Art. 11 (1) UDHR. But this is the case with most, if not all, human right documents and the argument that unborn children cannot do much except being alive is by no means a reason to limit their right to life – not to mention that the unborn child can indeed be rather active. Arguably, any pregnant woman who experiences the growth of the child first hand and who can feel her child kicking inside her if the child is not doing anything would take issue with the idea that the unborn child was incapable of doing anything and therefore should have no rights. Also, this argument already violates the logical and linguistic distinction between the term "capacity", which refers to concrete abilities, and the term "potentiality",[614] which refers to the abilities usually found in members of a certain group, in this case, humans. The potentiality to exercise a right at a future point is sufficient. It is not necessary for anybody to have the concrete capacity to make use of a right in order to be able to claim it. Somebody who is unable to read still has the right

> "*to seek, receive and impart information and ideas through any media and regardless of frontiers*".[615]

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[612] *Ibid.*

[613] H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENSEN IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 141.

[614] *Cf.* P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. 24.

[615] Art. 19 UDHR.

Similarly, the unborn child is a human being, even though he or she cannot (yet) do everything born humans normally do – but the, neither can the old, the infirm, little children, the unconscious[616] or each and everyone of us when we are sleeping. Yet, we are not loosing our human rights every evening when we fall asleep only to regain them when waking up. Consciousness is not a requirement for the right to life. What matters in fact is the membership of the individual in the genus *homo*, the members of which are sentient *in abstracto*.[617]

Art. 6 (1) ICCPR on the other hand appears to be much more inclusive as it states that

> "*[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*"

Every human being is the widest possible phrase to refer to humans, including all human beings from the moment of conception. The use of the word "inherent" implicates that the right to life is dependent only on being human and not on any other qualities or attributed and is a secular reflection of the religious concept of the sanctity of all human life.

While *Leenen* and *Gevers* argue that the wide phrase employed in Art. 6 (1) ICCPR was meant to clarify that the norm applies to both men and women,[618] the same effect could have been reached by writing exactly that rather than use language which might be open to interpretation. In any case does Art. 2 (1) ICCPR already prohibit gender-based discrimination, which would make it even more unnecessary to use such wide terms as have been employed in Art. 6 (1) ICCPR, unless one would want to ensure that really all human beings are protected in this regard. One the other hand it could be argued that were Art. 6 (1) ICCPR meant to protect the unborn child, the latter part of Art. 6 (5) ICCPR – which prohibits the application

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[616] *Cf.* P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. 48.

[617] *Cf. ibid.*

[618] H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENSEN IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 141.

of the death penalty to pregnant women – would not have been necessary. It is not unusual, though, for a legal norm to clarify matters at the risk of repetition.

Also the legislative history of the norm does not provide sufficient arguments to counter this view, when seen in the context of the time as well as the context of subsequent developments: it is correct that there had been the idea to include a right to life for the unborn *expressis verbis* which was rejected during the drafting period. Like in the case of the UDHR, a proposal had failed to include clearer language on the beginning of human life in the ICCPR during the drafting phase.[619] It has to be noted, though, that the fact that this proposal was rejected (and essentially abandoned by the proponents Belgium, Brazil, El Salvador, Mexico and Morocco, none of which later voted for it,[620] although this might not necessarily have been due to a change in attitude but rather because it was considered to be a lame duck by the time the vote came up) in all likelihood had more to do with the scientific uncertainty back then in the 1960s as to when human life actually begins than with the question whether the unborn child is protected under Art. 6 (1) 1 ICCPR. The wording of that norm seems to support this interpretation. "The amendment submitted by Belgium, Brazil, El Salvador, Mexico and Morocco (A/C.3/L.654) led to discussion as to whether the right to life should be protected by law 'from the moment of conception'. Those supporting the amendment maintained that it was only logical to guarantee the right to life from the moment life began. The provisions of paragraph 4 of the draft article aimed at the protection of the life of the unborn child whose mother was sentenced to death; that protection should be extended to all unborn children. It was pointed out that the legislation of many countries accorded protection to the unborn child. On the other hand, the amendment was opposed on the grounds that it was impossible for the State to determine the moment of conception and, hence, to undertake to protect life from that moment. Moreover, the proposed clause would involve the question of the rights and duties of the medical profession. Legislation on the subject was based on different principles in different countries and it was, therefore, inappropriate to include such provision in an international instrument."[621]

[619] *Ibid.*, pp. 141 *et seq.*

[620] *Cf. ibd.*, pp. 141 *et seq.*

[621] No author named – *Article 6 in the Third Committee of the General Assembly (A/3764)*, in: B. Ramcharan (ed.) – THE RIGHT TO LIFE IN INTERNATIONAL LAW, 1st ed., Martinus Nijhoff Publishers, Dordrecht (1985), pp. 45 *et seq.*, at p. 51.

It does not need much in terms of explanations that the latter argument has to be seen in the context of the debate on the cultural relativism of human rights which was still ongoing at the time the ICCPR was drafted. The cultural relativism debate essentially reflected the East-West conflict during the Cold War, even if it was sometimes dressed from the perspective of developing countries. With the end of this ideological conflict, the idea that there could be cultural relativism of fundamental human rights is today used by human rights violators which wish to prevent outside interference with their crimes, *e.g.* in the case of the People's Republic of China or North Korea. When it comes to violations of the right to life, human dignity and other abuses of human rights, this concept has been soundly discredited.

In addition to ignoring international human rights documents such as the UDHR and the other aforementioned texts, which might be excused because, apart from the ICCPR, they are non binding and only constitute soft law, although the norms in the (due to Art. 10 UN Charter, which refers to "recommendations", non-binding) Universal Declaration have long since entered into the realm of customary international law, *Goldman* overlooks that Art. 31 (2) and in particular Art. 31 (2) *lit.* a) and *lit.* b) VCLT refer only to the direct context of the treaty which is being interpreted, that is, the ECHR. On top of that does CEDAW, the only one of the three documents mentioned by Goldman which might pass the test of Art. 31 (3) *lit.* c) VCLT, not even make a reference to abortion and neither the non-binding Report of the Beijing Conference[622] nor the Cairo document establish a right to abortion, neither does Recommendation 1903 (2010) of the Parliamentary Assembly of the Council of Europe in which reference is made to Cairo.[623] In fact, A/CONF.177/20/Rev.1 repeats paragraph 8.25 of the Programme of Action of the International Conference on Population and Development[624] verbatim, according to which abortion should "not be promoted as a method of family planning" in any case.[625] Paragraph 97 of the Beijing Declaration's Annex II ("Platform for Action"[626])

[622] UN Doc. A/CONF.177/20/Rev.1, available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N96/273/01/PDF/N9627301.pdf?OpenElement> (last visited 1 February 2011).

[623] *Cf.* ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 106.

[624] UN Doc. A/CONF.171/13, available online at <http://www.un.org/popin/icpd/conference/offeng/poa.html> (last visited 1 February 2011). See also ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 104.

[625] UN Doc. A/CONF.171/13, available online at <http://www.un.org/popin/icpd/conference/offeng/poa.html> (last visited 1 February 2011).

limits "reproductive health care" to those measures "which are not against the law",[627] thus clarifying that states can be allowed to prohibit abortions. The fact that paragraph 97 of Annex II to the Beijing Declaration claims a right to "access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law"[628] might at first sight be understood to limit the words "not against the law" to the "other measures" but a systematic reading of the text requires to apply the words "not against the law" to both "methods of family planning" and "other methods [...] for regulation of fertility". In fact, the wording of para. 97 of the Platform for Action does nothing to suggest that it should apply to abortions in the first place. It only refers to "methods of family planning" and "other methods [...] for regulation of fertility". The key question which needs to be asked in this context is whether the "regulation of fertility" includes abortions. Due to the disclaimer with regards to "methods [...] which are not against the law", para. 97 of the aforementioned document allows states to restrict the regulation of fertility by outlawing abortion. If states are allowed to outlaw abortion, it is not a protected method of fertility regulation. The word "other" indicates that the "methods of family planning" are part of the "methods [...] for regulation of fertility" within the meaning of para. 97 of the Annex II to the Beijing Declaration, which indicates that abortion is not a form of "family planning". Even if, as *Goldman* seems to understand para. 97, abortion were a kind of family planning, if could be forbidden by states. Not containing a *Schranken-Schranke*, a limit to the potential limitations to a human right, para. 97 could not even establish an exceptional right to abortion, let alone a general right to this effect, even if that Declaration were legally binding, which is not the case.[629] In fact, even if the Beijing Declaration were legally binding, states could still make most methods aimed at limiting fertility illegal under domestic law without running afoul of this text – as long as there is some kind of choice (which might well be reduced to natural methods of family planning). In fact, a closer reading of the Beijing Declaration reveals that it is not the pro-

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[626] UN Doc. A/CONF.177/20/Rev.1, available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N96/273/01/PDF/N9627301.pdf?OpenElement> (last visited 1 February 2011), pp. 6 *et seq.*; see also ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 104.

[627] UN Doc. A/CONF.177/20/Rev.1, available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N96/273/01/PDF/N9627301.pdf?OpenElement> (last visited 1 February 2011), p. 36.

[628] *Ibid.*

[629] *Cf.* also R. Wallace – INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT, 1st ed., Sweet & Maxwell, London (1997), p. 63.

abortion document *Goldman* purports it to be. Shortly after the passage discussed here, the Declaration spells out in the very same paragraph that the cornerstone of women's reproductive right, a right which cannot be limited through domestic legislation, is the "right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant".[630] Other norms receive less attention in *Goldman*'s analysis, for example Art. 6 (1) and (5) and 24 (1) ICCPR or Art. 1 sentence 1 and Art. 3 UDHR. Also the nature of the ECHR as a self-contained legal regime within Public International Law is not given sufficient attention. In addition, para. 97 of the, non-binding, Annex II to the Beijing Declaration[631] clearly limits "reproductive health care"[632] to those measures "which are not against the law"[633] thereby giving states the possibility to outlaw abortion.[634] Also, paragraph 8.25 of the Programme of Action of the International Conference on Population and Development,[635] "abortion [should not] be promoted as a method of family planning",[636] implicitly acknowledging that abortion is morally problematic, to say the very least.

As an aside, the comparison with similar norms might help us gain a better understanding of Art. 2 (1) ECHR. The drafters of the American Declaration on the Rights and Duties of Man[637] of 1948 (not to be confused with the American Convention on Human Rights[638] of 1969, which is the American equivalent to the ECHR) rejected language which would have included the unborn *expressis verbis* in that Declaration's clause on the right to life.[639] Interestingly enough, Art. 4 (1) sentence 2

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[630] UN Doc. A/CONF.177/20/Rev.1, available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N96/273/01/PDF/N9627301.pdf?OpenElement> (last visited 1 February 2011), p. 35, para 94.

[631] *Ibid.*

[632] Para. 97 Beijing Declaration.

[633] *Ibid.*

[634] *Cf.* also R. Wallace – INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT, 1st ed., Sweet & Maxwell, London (1997), p. 63.

[635] UN Doc. A/CONF.171/13, available online at <http://www.un.org/popin/icpd/conference/offeng/poa.html> (last visited 1 February 2011).

[636] Programme of Action of the International Conference on Population and Development, para. 8.25.

[637] OAS Res. XXX, adopted by the Ninth International Conference of American States (1948).

[638] On the ACHR also J. Colon-Collazo – *A legislative History of the Right to Life in the Inter-American Legal System*, in: B. Ramcharan (ed.) – THE RIGHT TO LIFE IN INTERNATIONAL LAW, 1st ed., Martinus Nijhoff, Dordrecht (1985), pp. 33 *et seq.*, at p. 35.

[639] M. Mollmann – *Decisions denied: women's access to contraceptives and abortion in Argentina*, in: 17 HUMAN RIGHTS WATCH, No. 1 (B), New York City (2005), p. 79.

ACHR protects the right to life "from the moment of conception."[640] Given that the general attitude in the 1960s when the ACHR was drafted was considerably more pro-abortion than in the late 1940s, it does not seem to be so far fetched to assume that the drafters of the ADRDM chose a simpler language (similar to the UDHR) not because they wanted to exclude unborn children from the right to life but because they wanted to avoid cumbersome language. This idea is supported by the text of the draft which was rejected in 1948 and which stated that

> "[e]*very person has the right to life, including those who are not yet born as well as the incurable, the insane and the mentally retarded*."[641]

This certainly would have sounded far less elegant than the text of Art. 1 ADRDM which was eventually adopted:

> "*Every human being has the right to life, liberty and the security of his person."*[642]

Taking into account that the ECHR was drafted around the same time in the wake of World War II, one might speculate that the simplicity of Art. 2 (1) ECHR can be seen as an indicator that the omission to mention the unborn in Art. 2 (1) ECHR *expressis verbis* does not have to mean that they were not meant to be included right from the start.

[640] Art. 4 (1) sentence 2 American Convention on Human Rights.
[641] Art. 1 Draft Text, cited from T. Buergenthal / R. Norris / D. Shelton – PROTECTING HUMAN RIGHTS IN THE AMERICAS – SELECTED PROBLEMS, 3rd ed., N. P. Engel, Kehl and other locations (1990), p. 112.
[642] Art. 1 ADRDM.

3.5. Human Life and Human Dignity[643]

In addition, the understanding of the right to life can be enhanced by keeping in mind the idea of human dignity. Although not identical, the two concepts are closely connected. In the words of the German Federal Constitutional Court,[644] "[w]here human life exists, it has human dignity."[645] This means that already the unborn child[646] enjoys human dignity:[647] "Where there is human life, it has human dignity."[648] Therefore, also the unborn child has human dignity,[649] whether the child is wanted by the mother or not,[650] indeed, already before the mother knows that she is pregnant in the first place.[651] This results in an obligation on the part of the state to protect unborn

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[643] On the connection between the right to life and human dignity *cf.* P. Dabrock – *Zum Verhältnis von Menschenwürde und Lebensschutz*, in: P. Dabrock / L. Klinnert / S. Schardien – MENSCHENWÜRDE UND LEBENSSCHUTZ – HERAUSFORDERUNGEN THEOLOGISCHER BIOETHIK, 1st ed. Gütersloher Verlagshaus, Gütersloh (2004), pp. 117 *et seq.* On human dignity within German Constitutional Law see A. Podlech – *Art. 1 (Schutz der Menschenwürde)*, in: E. Denninger / W. Hoffmann-Riem / H.-P. Schneider / E. Stein (eds.) – KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [This work is commonly referred to as the ALTERNATIVKOMMENTAR after the name of the series in which it was published.], 3rd ed., 2nd additional supplement (August 2002), Luchterhand Verlag, Neuwied (2002), pp. 1 *et seq.*

[644] On the treatment of the concept of human dignity in jurisprudence see C. McCrudden – *Human Dignity and Judicial Interpretation of Human Rights*, in: 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2008), pp. 655 *et seq.*

[645] Bundesverfassungsgericht – *First Abortion Judgment*, Joined Cases Nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, at p. 4. The word "it" refers – grammatically – to the word "life" and does not mean that the unborn child is an "it" rather than a "he" or a "she". On this case *cf.* also M. Kriele – DIE NICHTTHERAPEUTISCHE ABTREIBUNG VOR DEM GRUNDGESETZ, 1st ed., Duncker & Humblot, Berlin (1992), pp. 7 *et seq.*

[646] On the idea of the human dignity of the mother as a legal basis for a right to have an abortion see R. Dixon / M. Nussbaum – *Abortion, Dignity and a Capabilities Approach*, CHICAGO PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 345 (March 2011), available online at <http://www.law.uchicago.edu/files/file345-rd-mn-abortion.pdf> (last visited 26 November 2011), pp. 2 *et seq.*

[647] On the human dignity of the unborn child in the medical context *cf.* M. Pap – EXTRAKORPORALE BEFRUCHTUNG UND EMBRYOTRANSFER AUS ARZTRECHTLICHER SICHT, 1st ed., Verlag Peter Lang, Frankfurt am Main (1987), pp. 181 *et seq.*; L. Klinnert / P. Dabrock – *Verbrauchende Embryonenforschung. Kommt allen Embryonen Menschenwürde zu?*, in: P. Dabrock / L. Klinnert / S. Schardien – MENSCHENWÜRDE UND LEBENSSCHUTZ – HERAUSFORDERUNGEN THEOLOGISCHER BIOETHIK, 1st ed., Gütersloher Verlagshaus, Gütersloh (2004), pp. 173 *et seq.*, at pp. 193 *et seq.*

[648] B. Schmidt-Bleibtreu / F. Klein – KOMMENTAR ZUM GRUNDGESETZ, 9th ed., Luchterhand Verlag, Neuwied / Kriftel (1999), p. 133.

[649] *Ibid.*, p. 134.

[650] *Ibid.*

[651] *Cf. ibid.*

life.[652] While human dignity is the root of the duty to protect human life,[653] this obligation on the part of the state is laid out in detail in Art. 2 (2) GG.[654] The same applies to the European Convention on Human Rights: the origin of the right to life is to be found in human dignity – Art. 2 (1) ECHR only spells out the obligation which is incumbent on every state anyway. Everybody, not just the state as the primary addressee of all human rights norms, has to respect the human dignity of every other human being.[655] It is my view that unborn humans have human dignity[656] and a right to life. But human dignity is not only a legal category "but has also more and more become a political slogan, the sometimes inflationary use of which is not necessarily identical with the term of human dignity as [it is understood by lawyers and e.g.] defined in Art. 1 [(1) *Grundgesetz*]."

In *Vo v. France*,[657] the applicant had been six month pregnant when she went to a hospital for routine check-up where she was confused with an other woman with the same family name who had wanted to have her intra-uterine device (IUD) removed.[658] As a result of this confusion, the doctor injured the applicant in the attempt to remove an IUD which did not exist in this patient, causing *Vo* to loose her child.[659] The reasoning offered by the ECtHR in *Vo v. France* is worth further contemplation since it highlights the previous difference between the English and French versions of the Convention. In detail, the Court states that "[a]t best, it may be regarded as common ground between [the states parties to the Convention] that the embryo/fetus

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[652] *Ibid.*

[653] *Ibid.*

[654] *Cf. ibid.*

[655] T. Groh / B. Kaplonek – *No Licence to Kill*, in: 28 JURA – JURISTISCHE AUSBILDUNG (2006), pp. 304 *et seq.*, at p. 307 with further references applicable to the human dignity clause of the German *Grundgesetz*, cf. also Bundesverwaltungsgericht (German Federal Supreme Court for Administrative Law) – Case no. 6 C 3/01, Decision of 24 October 2001, in: 115 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS, pp. 189 *et seq.*, at pp. 199 *et seq.*

[656] H. Dreier – *Art. 1 I*, in: H. Dreier (ed.) – GRUNDGESETZ KOMMENTAR, BAND I, PRÄAMBEL, ARTIKEL 1-19, 2nd ed., Mohr Siebeck, Tübingen, pp. 139 *et seq.*, margin no. 66, with numerous further references *ibid.*, fn. 95.

[657] ECtHR – *Vo v. France*, Application no. 53924/00, Judgment of 8 July 2004.

[658] *Ibid.*, paras. 10 *et seq.*; *cf.* also C. Ovey / R. White – JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Oxford University Press, Oxford (2006), p. 71. For a somewhat similar case, which was discussed in *Vo v. France*, *cf.* ECtHR - *Calvelli and Ciglio v. Italy*, Application No. 32967/96, Judgment of 17 January 2002.

[659] ECtHR – *Vo v. France*, Application no. 53924/00, Judgment of 8 July 2004, para. 12; on the human dignity of the unborn child in the medical context *cf.* also M. Pap – EXTRAKORPOALE BEFRUCHTUNG UND EMBRYOTRANSFER AUS ARZTRECHTLICHER SICHT, 1st ed., Verlag Peter Lang, Frankfurt (1987).

belongs to the human race. The potentiality[660] 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' for the purposes of Article 2".[661] Here the Court made several crucial mistakes: the first one is technical in nature as the Court requires a "protection in the name of human dignity". Unlike in Art. 1 (1) of Germany's *Grundgesetz*, dignity is not protected under the ECHR as such, albeit one can easily see how the concept of human dignity has influenced the creation and application of the Convention. But which conception of human dignity informs the decision making processes of the Court? Dignity within the Kantian sense[662] will not be able to answer questions related to the unborn since *Kant*'s understanding of dignity is one rooted in autonomy.[663] But while for example the contemporary German legal philosopher *Dietmar von der Pfordten*, after offering an instructive overview over *Kant*'s understanding of human dignity, critizises *Kant*'s approach as being too metaphysical,[664] the opposite is true. It is not metaphysical enough. In fact, *Kant* reduces man to a reasonable animal, which, and in so far von der Pfordten is right, is insufficient to explain why humans have dignity.[665] Although *von der Pfordten* concludes that also lesser beings deserve respect,[666] this approach fails to explain the special nature of man in the context of all living beings. In particular in the German constitutional discourse it might often be forgotten, but human dignity is not merely a secular concept, evidenced in German law by the position of human dignity in Art. 1 (1) GG[667] and the special protection afforded to the concept under the eternity clause of Art. 79 (3) GG. The human dignity clause in the German constitution (Art. 1 (1) GG)

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[660] On the issue of potentiality see P. Kuntzmann – *Ist Potentialität relevant für den moralischen Status des menschlichen Embryos?*, in: K. Hilpert / D. Mieth (eds.) – KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Verlag Herder, Freiburg im Breisgau (2006), pp. 16 *et seq*.

[661] ECtHR – *Vo v. France*, Application no. 53924/00, Judgment of 8 July 2004, para. 84.

[662] Kant's view of human dignity is well explained in P. Capps – HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW, 1st ed., Hart Publishing, Oxford / Portland (2009), pp. 122 *et seq.*

[663] D. von der Pfordten – NORMATIVE ETHIK, 1st ed., de Gruyter, Berlin (2010), p. 70, there fn. 59.

[664] *Ibid.*, p. 80.

[665] *Ibid.*

[666] *Cf. ibid.*

[667] On human dignity from the perspective of German law *cf.* W. Höfling – *Die Unantastbarkeit der Menschenwürde – Annäherung an einen schwierigen Verfassungsrechtssatz*, in: 46 JURISTISCHE SCHULUNG (1995), pp. 857 *et seq.*; C. Starck – *Menschenwürde als Verfassungsgarantie im modernen Staat*, in: 31 JURISTENZEITUNG (1981), pp. 457 *et seq.*; W. Graf Vitzthum – *Die Menschenwürde als Verfassungsbegriff*, in: 35 JURISTENZEITUNG (1985), pp. 201 *et seq*.

is both an objective norm *and* a subjective human right of the individual.[668] The European Convention on Human Rights may not spell the importance of human dignity out in the same way the Grundgesetz does but the Court will not be able to ignore that the tree of European Human Rights Law has a large number of Thomist and Scholastic roots. Every human, also the unborn,[669] has human dignity.[670] There are essentially two ways to reach this conclusion: either the unborn child has rights from the moment of conception, then he or she has human dignity[671] as well as a right to life[672] (the derivative argument), or human life is intrinsically valuable, qua being human.[673]

In German law, the moment of implantation,[674] not the moment of conception is considered to be the starting point for the applicability of the right to life.[675] The text of Art. 2 (2) sentences 1 and 3 GG does not indicate such a limitation and there is no legal reason, why the unborn child should not be protected between conception and implantation. Nor does the right to life clause of the Convention provide any

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[668] A. Podlech – *Art. 1 (Schutz der Menschenwürde)*, in: E. Denninger / W. Hoffmann-Riem / H.-P. Schneider / E. Stein (eds.) – KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, 3rd ed., 2nd additional supplement (August 2002), Luchterhand Verlag, Neuwied (2002), pp. 1 *et seq.*, at p. 27.

[669] B. Schmidt-Bleibtreu / F. Klein – KOMMENTAR ZUM GRUNDGESETZ, 9th ed., Luchterhand, Neuwied / Kriftel (1999), p. 134.

[670] H. Dreier – *Art. 1 I*, in: Horst Dreier (ed.), GRUNDGESETZ KOMMENTAR, BAND I, PRÄAMBEL, ARTIKEL 1-19, 2nd ed., Mohr Siebeck, Tübingen (2004), pp. 139 *et seq.*, at margin no. 66, with many futher references (*ibid.*, there fn. 95).

[671] On the human dignity of the unborn child and in the context of reproductive medicine and biotechnology see in more detail A. Podlech – *Art. 1 (Schutz der Menschenwürde)*, in: E. Denninger / W. Hoffmann-Riem / H.-P. Schneider / E. Stein (eds.) – KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, 3rd ed., 2nd additional supplement (August 2002), Luchterhand Verlag, Neuwied (2002), pp. 1 *et seq.*, at pp. 20 *et seq.*

[672] Bundesverfassungsgericht – *First Abortion Judgment*, Joined Cases nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, at p. 36; *cf.* also H. Reis – DAS LEBENSRECHT DES UNGEBORENEN KINDES ALS VERFASSUNGSPROBLEM, 1st ed., J. C. B. Mohr (Siebeck), Tübingen (1984), pp. 131 *et seq.*

[673] *Cf.* R. Dworkin – DIE GRENZEN DES LEBENS – ABTREIBUNG, EUTHANASIE UND PERSÖNLICHE FREIHEIT, 1st ed., Rowohlt, Reinbek (1994), p. 20.

[674] The implantation of the zygote into the endometrium is not really a clearly definable 'moment' but rather a process which takes about one week, see H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENSEN IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 134.

[675] U. Steiner – DER SCHUTZ DES LEBENS DURCH DAS GRUNDGESETZ, ERWEITERTE FASSUNG EINES VORTRAGS GEHALTEN VOR DER JURISTISCHEN GESELLSCHAFT ZU BERLIN AM 26. JUNI 1991, 1st ed., Walter de Gruyter, Berlin/New York (1992), p. 11.

such indication. One explanation might be that intra-uterine devices are considered to be contraceptives rather than the abortive instruments they actually are.

Because we are human beings from the moment of conception, all humans have equal[676] human dignity and the right to life without having to meet any conditions.[677] *Ronald Dworkin* claims that mixing both arguments may cause confusion,[678] but when these arguments often appear to be separated insufficiently in the discussion of abortion, it is most likely for the reason that one (the derivative argument) follows from the other (the intrinsic value-approach[679]). The basic question that every debate about abortion (but also about euthanasia) needs to answer is therefore whether human life has an intrinsic value.[680] Who wants to allow abortion also has to reject the notion that human life is valuable per se. But what is it that makes human life valuable in a sense that no animal life ever could be? One might be forgiven were one to suspect an anthropocentric bias in determining what is of value. But not even the most ardent supporter of animal rights would claim that animals per se have a higher value than humans. This special nature, and the special dignity inherent[681] to every human, has its reasons beyond flesh and *ratio* in what might be called soul, spirit or *Gottesebenbildlichkeit*, the fact that man is made in the image of God.[682] It is from this that the intrinsic dignity follows which every human being en-

[676] Bundesverfassungsgericht – *Case concerning the Prohibition of the Communist Party of Germany (KPD)*, Case no. 1 BvB 2/51, Judgment of 17 August 1956, in: 5 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 85 *et seq.*, at p. 205.

[677] P. Kunig – *Art. 1 (Würde des Menschen, Grundrechtsbindung)*, in: P. Kunig (ed.), GRUNDGESETZ – KOMMENTAR, BAND 1 (PRÄAMBEL BIS ART. 19), 5th ed., Verlag C.H. Beck, Munich (2000), pp. 65 *et seq.*, at margin no. 12; Bundesverfassungsgericht – *Tanz der Teufel*, Case no: 1 BvR 698/89, Decision of 20 October 1992, in: 87 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 209 *et seq.*, at p. 228.

[678] R. Dworkin – DIE GRENZEN DES LEBENS – ABTREIBUNG, EUTHANASIE UND PERSÖNLICHE FREIHEIT, 1st ed., Rowohlt, Reinbek (1994), p. 22.

[679] *Cf.* N. Rao – *Three Concepts of Dignity in Constitutional Law*, in: 86 NOTRE DAME LAW REVIEW (2011), pp. 183 *et seq.*, at p. 196.

[680] R. Dworkin – DIE GRENZEN DES LEBENS – ABTREIBUNG, EUTHANASIE UND PERSÖNLICHE FREIHEIT, 1st ed., Rowohlt, Reinbek (1994), p. 22.

[681] On the differentiation between inherent and contingent dignity *cf.* D. von der Pfordten – NORMATIVE ETHIK, 1st ed., de Gruyter, Berlin (2010), pp. 74 *et seq.*

[682] Cf. also H. Baranzke – *Heiligkeit des Lebens. Eine Spurensuche*, in: K. Hilpert / D. Mieth (eds.), KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Herder, Freiburg im Breisgau (2006), pp. 87 *et seq.*; R. Zippelius – *Art. 1 Abs. 1 u. 2*, in: R. Dolzer / K. Vogel / K. Großhof (eds.) – BONNER KOMMENTAR ZUM GRUNDGESETZ, 125th update, C. F. Müller, Heidelberg (2006), margin no. 4 with numerous further references from religion, philosophy and law (*ibid.*, there fn. 3). On the concept of the sanctity of life, which follows from the idea that man

joys.[683] The notion that man is made in the image of God has influenced not only the religious but also the legal understanding of human dignity.[684] Both the Irish[685] and the German[686] constitution stand out among Western legal systems as making explicit reference to God and His creation, as did the *Bundesverfassungsgericht* also in its landmark First Abortion Judgment[687] (which resulted from an abstract procedure to determine the constitutionality of the then recently changed Criminal Code[688]) when it stated "that man has an own autonomous value which [...] inalienably demands unconditional respect for the life of every single human".[689] In that sense,

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is made in the image of God, *cf.* H. Reis – DAS LEBENSRECHT DES UNGEBORENEN KINDES ALS VERFASSUNGSPROBLEM, 1st ed., J. C. B. Mohr (Siebeck), Tübingen (1984), pp. 5 *et seq.*

[683] On the historical development of the notion of the dignity of the human person and its relation to human freedom cf. A. Podlech – *Art. 1 (Schutz der Menschenwürde)*, in: E. Denninger / W. Hoffmann-Riem / H.-P. Schneider / E. Stein (eds.) – KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, 3rd d., 2nd additional supplement (August 2002), Luchterhand Verlag, Neuwied (2002), pp. 1 *et seq.*, at pp. 3 *et seq.*

[684] R. Zippelius – *Art. 1 Abs. 1 u. 2*, in: R. Dolzer / K. Vogel / K. Graßhof (eds.) – BONNER KOMMENTAR ZUM GRUNDGESETZ, 125th update (October 2006), C. F. Müller Verlag, Heidelberg (2006), pp. 7 *et seq.*, at pp. 7 *et seq.*

[685] Preamble, sentence 1 *Bunreacht na hÉirann*.

[686] Preamble, sentence 1 *Grundgesetz*.

[687] Bundesverfassungsgericht – *First Abortion Judgment, Joined* Cases nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.* For a comparison of this 1975 judgment with the United States Supreme Court's 1973 decision in *Roe v. Wade* (410 U.S. 113, 153 (1973)) see U. Werner – *The Convergence of Abortion Regulation in Germany and the United States: A Critique of Glendon's Rights Talk Thesis*, in: 18 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL (1995-1996), pp. 571 *et seq.*, at pp. 571 *et seq.*, for a more detailed analysis see also D. Rihossa – THE RIGHT TO ABORTION: COMPARATIVE APPROACH CONCERNING CROATIA, FEDERAL REPUBLIC OF GERMANY, AND US, 1st ed., Dissertation.com, Boca Raton (2000), available online at <http://www.bookpump.com/dps/pdf-b/94268546.pdf> (last visited 18 March 2011); R. E. Levy / A. Somek – *Paradoxical Parallels in the American and German Abortion Decisions*, in: 9 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2001), pp. 109 *et seq.*; see also D. P. Kommers – *The Constitutional Law of Abortion in Germany: Should Americans pay Attention?*, in: 10 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY (1994), pp. 1 *et seq.* On the historical background to both the German and American approaches to abortion see L. K. Jonker – *Learning from the Past: How the Events that shaped the Constitutions of the United States and Germany play out in the Abortion Controversy*, in: 23 REGENT UNIVERSITY LAW REVIEW (2010-2011), pp. 447 *et seq.*, at pp. 460 *et seq.*

[688] *Cf.* K. Schlaich / S. Korioth – DAS BUNDESVERFASSUNGSGERICHT – STELLUNG, VERFAHREN, ENTSCHEIDUNGEN – EIN STUDIENBUCH, 8th ed., Verlag C. H. Beck, Munich (2010), pp. 82 *et seq.*

[689] Bundesverfassungsgericht – *First Abortion Judgment, Joined* Cases nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, at p. 67; see also Bundesverfassungsgericht – *Case concerning the constitutional complaint regarding the 2nd law on the reorganization in the states of Baden, Württemberg-Baden and Württemberg-Hohenzollern*, Case no. 2 BvQ 1/51, Decision of 9 September 1951, in: 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, at p. 12 and H. Reis – DAS

Gottesebenbildlichkeit is not necessarily an extra-legal term and the concept of the *imago Dei* is not only theological, ethical or moral in nature but has also legal implications.[690] If every human is made in the image of God, then so is the anencephalic child who dies shortly after birth or the unborn child in the second after conception.[691] To say that the anencephalic child is made in the image of God is not an insult to God, far from it, because is it not 'merely' the dignity of the individual which commands respect for the individual. Rather, it is the source of dignity which effects the legal obligation towards the bearer of that dignity.[692] In that sense, every recourse to human dignity is necessarily metaphysical.[693] Therefore philosophy and religion have their licit place in legal discourse (and therefore, eventually, in lawmaking[694]), in particular on matters concerning human dignity and bioethics,[695] which are closely interwoven with each other.[696] Law not only may be influenced by values[697] – it is supposed to be based on at least informed by values.

LEBENSRECHT DES UNGEBORENEN KINDES ALS VERFASSUNGSPROBLEM, 1st ed., J. C. B. Mohr (Siebeck), Tübingen (1984), p. 4.

[690] R. Zippelius – *Art. 1 Abs. 1 u. 2*, in: R. / K. Vogel / K. Großhof (eds.) – BONNER KOMMENTAR ZUM GRUNDGESETZ, 125th update, C. F. Müller, Ort (2006), margin no. 4 with numerous further references from religion, philosophy and law, *ibid.*, fn. 3; E. Schockenhoff – *Lebensbeginn und Menschenwürde – Eine Begründung für die lehramtliche Position der katholischen Kirche*, in: K Hilpert / D. Mieth (eds.) – KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Verlag Herder, Freiburg im Breisgau (2006), pp. 198 *et seq.*, at p. 202.

[691] Sharing the view that the unborn child enjoys human dignity is *i.a.* B. Schmidt-Bleibtreu / Franz Klein, KOMMENTAR ZUM GRUNDGESETZ, 9th ed., Luchterhand, Neuwied / Kriftel (1999), p. 134.

[692] D. von der Pfordten – NORMATIVE ETHIK, 1st ed., de Gruyter, Berlin (2010), p. 76.

[693] A legal as well as a theological approach is offered by P. Bahr / H. M. Heinig (eds.) – MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG – RECHTSWISSENSCHAFTFLICHE UND THEOLOGISCHE PERSPEKTIVEN, 1st ed., Mohr Siebeck, Tübingen (2006); for a theological / bioethical perspective see S. Schardien – *Menschenwürde. Zur Geschichte und theologischen Deutung eines umstrittenen Konzepts*, in: P. Dabrock / L. Klinnert / S. Schardien – MENSCHENWÜRDE UND LEBENSSCHUTZ – HERAUSFORDERUNGEN THEOLOGISCHER BIOETHIK, 1st ed., Gütersloher Verlagshaus, Gütersloh (2004), pp. 57 *et seq.* and P. Dabrock – *Bedingungen des Unbedingten – Zum problematischen aber notwendigen Gebrauch der Menschenwürde-Konzeption in der Bioethik*, in: P. Dabrock / L. Klinnert / S. Schardien, *ibid.*, pp. 147 et seq. While the aforementioned sources focus on protestant theology, the view of the Catholic church is summed up by J. A. Hardon – THE FAITH – A POPULAR GUIDE BASED ON THE CATECHISM OF THE CATHOLIC CHURCH, 1st ed., Servant Books / St. Anthony Messenger Press, Cincinnati (1995), p. 202.

[694] *Cf.* A. Card. Dulles – *John F. Scarpa Conference on Law, Politics and Culture: The Indirect Mission of the Church to Politics*, in: 52 VILLANOVA LAW REVIEW (2007), pp. 241 *et seq.*

[695] S. Goldberg – *Religious Contributions to the Bioethics Debate: Utilizing legal rights while avoiding scientific temptations*, in: 30 FORDHAM URBAN LAW JOURNAL (2002-2003), pp. 35 *et seq.*, at p. 35.

[696] On the role of human dignity in bioethics see *e.g.* A. M. M. Lebech – *Dignity v. Dignity – The Significance of the Notion of Human Dignity in the Human Rights Tradition and its use in Bioethics*, in:

3.6. The Parallel Interpretation of ECHR and EU Rights

In early 2011, the presidents of the ECtHR and of the EU's European Court of Justice signed a joint declaration to the effect that the human rights contained in the EU's Charter of Fundamental Rights[698] and in the ECHR are to be interpreted in parallel.[699] This parallel interpretation serves to prepare the eventual accession of the European Union to the ECHR. EU law, though, already was thought to protect the unborn child even before the human rights of the law of the Union were even codified in the Charter,[700] which at least indicates that the unborn child ought to be considered to be some*one*, a person capable of having rights, rather than some*thing*, a mere object of the desires of the parents. It can therefore be concluded that Art. 2 (1) ECHR does indeed protect unborn children against abortion since they also have a right to life as individual humans. This leaves us with two more questions: Under which circumstances may this right be infringed upon? And how does the Court deal with the latter question in its jurisprudence? We will see that the answer to the first question will be fairly short while the second answer will require a rather long way of explaining that it simply doesn't.

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7 STUDIES IN ETHICS AND LAW (June 1998), pp. 29 *et seq.*, at p. 37 (specifically on the Council of Europe's Bioethics Convention).

[697] *Cf.* S. Kirchner – *Relative Normativity and the Constitutional Dimension of international law: A Place for Values in the International Legal System?*, in: 5 GERMAN LAW JOURNAL (2004), pp. 47 *et seq.*, at p. 56.

[698] OFFICIAL JOURNAL OF THE EUROPEAN UNION 2000 C 364/01, available online at <http://www.europarl.europa.eu/charter/pdf/text_en.pdf> (last visited 2 November 2011).

[699] JOINT COMMUNICATION FROM PRESIDENTS COSTAS AND SKOURIS, Strasbourg and Luxembourg, 24 January 2011, available online at <http://curia.europa.eu/jcms/upload/_docs/application/pdf/2011-02/cedh_cjue_english.pdf> (last visited 2 November 2011).

[700] D. Ehlers – *Die Grundrechte des europäischen Gemeinschaftsrechts*, in: 24 JURA – JURISTISCHE AUSBILDUNG (2002), pp. 468 *et seq.*, at p. 472.

3.7. Exceptions to the Right to Life under Art. 2 ECHR

Art. 2 ECHR allows for a number of exceptions to the right to life, none of which apply to unborn children. In particular is a risk suffered by the mother due to the pregnancy, as had for example been claimed to have been the case in *Tysiąc*,[701] not unlawful within the meaning of Art. 2 (2) *lit.* a) ECHR. Therefore, since both the born and the unborn human are of equal value before the law,[702] the only constellation in which a solution has to be found involves the conflict between equal rights of both humans. Given that the consequences of abortion are most severe, the rights which might thus come into conflict are the right to life of the mother and the right to life of the child. To take action to save the life of the mother had already been allowed by the Court in *Boso*,[703] yet the Court has not only not taken the next logical step,[704] it has also failed to show the other side of the medal, that is, to declare that the killing of an unborn child is in principle incompatible with Art. 2 ECHR. It is only the conflict between two equal rights of equal persons which forces a decision between actively killing an unborn child and letting the mother die.[705] Only as a unintended side-effect of the rescue of the mother from a danger to her life might the death of the unborn child be acceptable as the lesser evil. The lack of a written exception in Art. 2 (2) ECHR in combination with the equal value of mother and child as human beings al-

[701] In *Tysiąc* the Court did not require medical evidence for the applicant's claim but considered it to be "sufficient to note that the applicant feared that the pregnancy and delivery might further endanger her eyesight", ECtHR – *Tysiąc v. Poland*, Application No. 5410/03, Judgment of 20 March 2007, para. 119.

[702] A. Komanovics – *Effective enforcement of human rights: the Tysiac v. Poland case*, in: 143 STUDIA IURIDICA AUCTORITATE UNIVERSITATIS PECS (2009), pp. 186 *et seq.*, at p. 222; H. Tröndle / T. Fischer – STRAFGESETZBUCH UND NEBENGESETZE, 53rd ed., Verlag C. H. Beck, Munich (2006), p. 1348 (Vor §§ 218-219b, mn. 2).

[703] *Cf.* P. Leach – TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, 2nd ed., Oxford University Press, Oxford (2005), p. 201.

[704] See also R. Millette – *Maltese Judge: European Court has 'weak, hesitant' approach to protecting unborn*, in: LIFESITENEWS, 30 May 2011, available online at <http://www.lifesitenews.com/news/maltese-judge-court-has-weak-hesitant-approach-to-protecting-unborn-child/> (last visited 13 November 2011). This reluctance is also reflected in the materials provided by the Council of Europe, *cf.* D. Korff – THE RIGHT TO LIFE – A GUIDE TO THE IMPLEMENTATION OF ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 1st ed., Council of Europe, Strasbourg (2006), pp. 9 *et seq.*

[705] Saint *John Chrysostom* actually considered abortion a greater crime than murder since a murdered born human had already enjoyed the experience of being a born human, an opportunity which is denied to those who die in the womb, *cf.* John Chrysostom – HOMILIES ON ROMANS, 24, available online at <http://www.ewtn.com/library/PROLIFE/ABORTN.TXT> (last visited 1 February 2011), no. 12.

lows nothing more than that[706] since it is two equal rights of two equal humans which collide here. As soon as intentional abortion becomes the aim of an action or the means to achieve a certain result,[707] it is not only morally detestable[708] but also incompatible with the right to life under the Convention. But to actually rule so would require the Court to accept that the unborn child is indeed human – a conclusion to which it seems to be open since it has entertained that idea as a working hypothesis both in *X v. United Kingdom*[709] and in *Vo v. France*[710] but which it does not yet seem comfortable with, to say the least.

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[706] *Cf.* also S. Kirchner – *Abortion and the Right to Life under Article 2 of the European Convention on Human Rights?,* in: A. Begum (ed.) – MEDICAL TREATMENT AND LAW, 1st ed., Icfai University Press, Hyderabad (2010), pp. 198 *et seq.*, at pp. 204 *et seq.* In this text I had written that states have a margin of appreciation in situations in which the right to life of the child conflicts with the right ot life of the mother (*ibid.*, p. 206). Today I have to clarify this statement and correct myself. My earlier statement was incorrect because procured abortion is always a grave wrong (*cf.* D. DeMarco – THE ROMAN CATHOLIC CHURCH AND ABORTION: AN HISTORICAL PERSPECTIVE – PART I, available online at <http://www.catholicculture.org/culture/library/view.cfm?id=3361 &CFID=103799416&CFTOKEN=95137752> (last visited 2 November 2011); W. E. May – CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE, 2nd ed., Our Sunday Visitor Publishing Division, Huntington (2008), pp. 186 *et seq.*) directed against an innocent human being which can never be justified (*cf.* Pope John Paul II – ENCYCLICAL EVANGELIUM VITAE, available online at <http://www.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html> (last visited 16 November 2011), para. 62) because it entails the absolute violation of the most basic of all human rights. Abortion can never be justified, not even if the life of the mother is at stake because at best two equal rights can conflict and there is no automatism to the effect that the right to life of one human (in this case, the mother) is *per se* to take precedence over the right to life of somebody else (the child). While states enjoy a margin of appreciation on *how* they *prevent* abortions, it has to be clear that they most *not* allow direct abortions under any circumstances but are under a positive obligation to protect every human life from the moment of conception. See also Pope John Paul II – ENCYCLICAL EVANGELIUM VITAE (this note), para. 57 and May (this note), p. 27.

[707] On "direct" as opposed to "indirect" abortion *cf.* P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), pp. 112 *et seq.* and pp. 131 *et seq.* and W. E. May – CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE, 2nd ed., Our Sunday Visitor Publishing Division, Huntington (2008), pp. 168 *et seq.*

[708] CATECHISM OF THE CATHOLIC CHURCH, available online at <http://www.vatican.va/archive/ENG0015/INDEX.HTM> (last visited 1 February 2011), para. 2271; *cf.* W. E. May – CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE, 2nd ed., Our Sunday Visitor Publishing Division, Huntington (2008), p. 166; DIDACHE 2, 2, available online at <http://www.earlychristianwritings.com/text/didache-roberts.html> (last visited 1 February 2011); EPISTULA BARNABAE 19, 5, available online at <http://www.earlychristianwritings.com/ text/barnabas-light foot.html> (last visited 1 February 2011).

[709] EComHR – *X v. United Kingdom*, Application No. 8416/78, Decision of 13 May 1980, in: 19 DECISIONS AND REPORTS (1980), pp. 244 *et seq.*, at p. 253.

[710] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, para. 75; *cf.* also K. Reid – A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3rd ed., Sweet & Maxwell, London (2008), p. 216, and ECtHR – *Vo v. France* (this note), sep. op. *Costa*, para. 10.

It has to be noted, though, that some judges have expressed this opinion before, in particular Judge *Costa* in his separate opinion (in which he was joined by Judge *Traja*) and Judge *Ress* in his dissenting opinion in *Vo*. *Ress* made an excellent point when he wrote that abortion legislation would *per se* be unnecessary if the fetus did not have some right to life[711] while *Costa* explained that assuming that the unborn child has a right to life would require that the right to life of the child would have to be balanced against the interests of the mother.[712] The only right of the mother which would be of equal value to the unborn child's right to life would be the mother's right to life, thus requiring a limitation of abortion to unintentional cases in which the protection of the life of the mother is given precedence, even if it can lead to the death of the child. In *A, B and C v. Ireland*[713] the Court highlighted the view of "[t]he Chairman of the [Irish] Institute of Obstetricians and Gynaecologists, which represents 90%-95% of the obstetricians and gynaecologists in Ireland"[714] to the effect that

> "there is a fundamental difference between abortion carried out with the intention of taking the life of the baby, for example for social reasons, and the unavoidable death of the baby resulting from essential treatment to protect the life of the mother"[715] and that Irish doctors "have never regarded these interventions as abortion. It would never cross an obstetrician's mind that intervening in a case of pre-eclampsia, cancer of the cervix or ectopic pregnancy is abortion. They are not abortion as far as the professional is concerned, these are medical treatments that are essential to protect the life of the mother. So when we interfere in the best interests of protecting a mother, and not allowing her to succumb, and we are faced with a foetus that dies, we don't regard that as something that we have, as it were, achieved by an abortion. Abortion in the professional view to my mind is something entirely different. It is actually intervening, usually in a normal pregnancy, to get rid of the pregnancy, to

[711] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, diss. op. *Ress*, para. 4; *cf.* T. Goldman – Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*, at p. 280.
[712] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, sep. op. *Costa*, para. 13.
[713] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, paras. 72 *et seq.*
[714] *Ibid.*, para. 72.
[715] *Ibid.*

> get rid of the foetus. That is what we would consider the direct procurement of an abortion. In other words, it's an unwanted baby and, therefore, you intervene to end its life. That has never been a part of the practice of Irish obstetrics and I hope it never will be."[716]

By quoting this view at length, the European Court of Human Rights implicitly admitted in *A, B and C v. Ireland* that there is a scientific difference between procured abortion and other measures which unintentionally result in the death of the child. The opinions voiced by *Costa* and *Ress* have been criticized by *Goldman* as "impos[ing] a blanket law on diverse European jurisdictions without authority from the Convention",[717] a criticism which reveals a misunderstanding about how the Court works. Even though it might sometimes have the practical effect that states unaffected by certain proceedings will alter their domestic law in response to a judgment against an other state party where identical laws applied,[718] the Court does not create new laws, rather, it weights the application of domestic laws against the requirements of the Convention. In the case of abortion, few spell out the consequences of a wide interpretation of the *scope ratione personae* of Art. 2 (1) ECHR, that is, that

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[716] *Ibid.*, para. 73.

[717] T. Goldman – Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*, at p. 280; a similar criticism has been voiced by A. Komanovics – *Effective enforcement of human rights: the Tysiac v. Poland case*, in: 143 STUDIA IURIDICA AUCTORITATE UNIVERSITATIS PECS (2009), pp. 186 *et seq.*, at p. 223 with regard to Judge *Borrego Borrego*'s dissenting opinion in *Tysiąc*.

[718] A notable case being the reform of Dutch family and inheritance law in the wake of ECtHR – *Marckx v. Belgium*, Application No. 6833/74, Judgment of 13 June 1979. Other states were not bound by that judgment (A. Isenbeck – TRADITIONELLES NIEDERLÄNDISCHES FAMILIENRECHT UND EUROPÄISCHE EINFLÜSSE, 1st ed., MAKLU Uitgevers, Antwerpen / Apeldoorn (1995), p. 129). because the judgment in *Marckx v. Belgium* of course only applied *inter partes*. Nevertheless, after *Marckx* Dutch courts, unlike Belgian courts (*cf.* ECtHR – *Vermeire v. Belgium*, Application No. 12849/87, Judgment of 29 November 1991, paras. 11 *et seq.*), began to interpret Dutch family law, which was relatively similar to the Belgian law at issue in *Marckx*, in line with the Court's judgment concerning the Belgian legislation (cf. the decision of the Hoge Raad, the Dutch Supreme Court, in *R v. Stichting Valkenhorst*, Judgement of 15 April 1994, in: 82 NEDERLANDSE JURISPRUDENTIE 1994, No. 608, as well as the *Jeroen* case, Hoge Raad, *W. v. R.* (the latter on behalf of *Jeroen*, who was a minor at that time), Judgement of 22 December 1995, in: 83 NEDERLANDSE JURISPRUDENTIE 1996, No. 419, on the latter case see also W. G. Huijgen / A. J. M. Nuytinck / L. C. A. Verstappen / C. F. M. Wortmann (eds.) – PERSONEN- EN FAMILIERECHT, HUWELIJKSVERMOGENSRECHT EN ERFRECHT, 1st ed., Koninglijke Vermande, Lelystad (1999), pp. 58 *et seq.*). Today the bligation of the states parties is to apply the Convention in line with the case law developed by the Court is contained in point 4 *lit.* c) of the Action Plan attached to the INTERLAKEN DECLARATION (available online at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf>, last visited 14 November 2011, there pp. 3 *et seq.*, at p. 3).

the legal situation in many states parties to the Convention is incompatible with the unborn child's right to life under Art. 2 (1) ECHR.[719] And while *Goldman* is correct to note the "divergent domestic abortion laws"[720] of the states parties to the Convention, not only has this divergence of laws been caused by an increasing so called 'liberalization' of national abortion rules after the entry into force of the Convention but it is also hardly "almost impossible to harmonize"[721] these different abortion laws. To begin with, it is not the aim of the Court to achieve any form of European Union-style harmonization of domestic laws. Far from it: an international human rights body only measures whether domestic laws and their application conform with the minimum standard set forth in the documents that international body is called upon to use as a yardstick. But even if the correct application of Art. 2 ECHR would result in virtually identical abortion laws in all member states of the Council of Europe, it would on one hand still not be harmonization in the proper sense of the term because it would not be legislated so by the COE. The COE is different from the EU because it is only an international and not a supranational organization. On the other hand it would not necessarily more difficult (in a technical, certainly not in a political sense) to achieve *de facto* harmonization than any other of the many changes affected in the European landscape of the last decades.

3.8. Consequences of a wide Interpretation of Art. 2 (1) ECHR

Since Art. 2 (1) ECHR also extends to the unborn and since Art. 8 (1) ECHR does not provide for a right to abortion,[722] the logical consequence of the Court's wide application of the margin of appreciation doctrine was that it had to allow Ireland's prohibition of abortion and could only find some fault on matters of domestic procedure.[723] The same result would also have followed without the over-generous ex-

[719] C. Grabenwarter – EUROPÄISCHE MENSCHENRECHTSKONVENTION, 3rd ed., Verlag C. H. Beck, Munich (2008), p. 132; *cf.* also L. Zwaak – *Chapter 6, Right to Life (Article 2)*, in: P. van Dijk / F. van Hoof / A. van Rijn / L. Zwaak (eds.) – THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4th ed., Intersentia, Antwerp / Oxford (2006), pp. 351 *et seq.*, at p. 387.

[720] T. Goldman – Vo v. France *and Fetal Rights: The Decision not to decide*, in: 18 HARVARD HUMAN RIGHTS JOURNAL (2005), pp. 277 *et seq.*, at p. 280.

[721] *Ibid.*

[722] From an ethical perspective see also W. E. May – CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE, 2nd ed., Our Sunday Visitor Publishing Division, Huntington (2008), pp. 188 *et seq.*

[723] *Cf. ibid.*

pansion of the margin of appreciation since the Court only is as competent as the states parties to the Convention had let it become by joining the ECHR and because consequently the Court still has to respect the sovereignty of all member states in so far as they are not in violation of the Convention.[724] Yet, the Court has taken this step without advertising it too loudly. While stating that there exists no such thing as a right to have an abortion, it has failed to paint the whole picture: not only does Art. 8 (1) ECHR not give women a right to abortion, as the Court has now spelled out, Art. 2 (1) ECHR also protects the life of every humans from conception to natural death. For the time being, the Court is hiding behind the margin of appreciation doctrine to avoid having to spell out this truth, the consequence of which is that the Convention in principle forbids abortion like it forbids murder or manslaughter and that none of the written exceptions of Art. 2 ECHR apply to abortion. Only if the life of the mother is at risk can a situation be imagined in which the state's permission to perform an abortion would not run afoul of Art. 2 (1) sentence 1 ECHR. This may be a harsh result, but *de lege lata*, this is what the Convention requires.

The conclusion drawn here is not a popular one, to the contrary. Due to very permissive abortion laws in many states parties to the Convention there is a widespread misconception to the effect that abortion is essentially allowed, despite the fact that this is not really the case in most member states, yet a large number of exceptions and loopholes have contributed to creating this impression. There certainly is no consensus on this matter among the states parties to the Convention. But it has to be taken into account that the Convention is not only considered to be a "living instrument"[725] the interpretation of which can change over time, it is also a standard which unites and guides the countries of Europe in terms of human rights. This standard might not be welcomed by many, but nevertheless it is the law because the states parties have freely accepted the Convention, some as one of the seeds of a new legal order in Western Europe after the end of World War II, other states after they had found freedom from the Communist oppression two decades ago and as

[724] *Cf.* also ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Joint Written Observation of Third Party Interveners: The Alliance Defense Fund on Behalf of the Family Research Council, Washington D.C., United States, The European Centre for Law and Justice on Behalf of Kathy Sinnott, The Society for the Protection of Unborn Children, London. filed on 10 September 2009, <http://www.aul.org/wp-content/uploads/2010/12/ABC_FINAL.pdf> (last visited 1 February 2011), p. 5.

[725] ECtHR – *Tyrer v. United Kingdom*, Application no. 5856/72, Judgment of 25 April 1978, para. 31.

they moved closer to the part of Europe which had already been united in freedom. It has to be kept in mind that it is not the consensus of member states on the individual question of abortion which establishes the legal obligation of the member states, rather, it was their consent to the Convention as an international treaty. At the time the Convention was created, all member states but one allowed abortion when it was necessary to abort the child in order to save the life of the mother.[726] This is the consensus which the Court should have been looking for. That many member states today allow abortion in a wider range of circumstances[727] is not relevant for determining the obligation of the member states, rather, it is indicative of their failure to comply with the Convention. The Convention is often perceived as reaching far into the domestic legal order.[728] Nevertheless, the Convention is in essence an international treaty and the normal rules of treaty interpretation apply to it, too. The consensus which is relevant is not the elusive consensus on abortion, which is improbable to attain in such a large and politically and culturally diverse group of member states but the consensus which lead to the Convention more than half a century ago. These are the rules which still apply today. Parties to the Convention would be well advised to adhere to them, thereby ensuring greater protection for human life.

The Court's decision in *A, B and C v. Ireland* to deny the existence of a 'right to abortion' under Art. 8 (1) ECHR does not come as a surprise, if one takes into account the earlier jurisprudence of the Convention organs and in retrospect any expectations of a top-down 'liberalization' of Ireland's abortion laws by Strasbourg had been wishful thinking of the those in support of abortion. Contrary to *Calt*'s prediction,[729] *A, B and C v. Ireland* will not have the same consequences for Europe as *Roe v. Wade* had for the United States. As of now, most judges seem to continue to drag their feet which appear to be stuck in the mainstream culture of permissive-

[726] G. Douglas – The Family and the State under the European Convention on Human Rights, in: 2 INTERNATIONAL JOURNAL OF LAW AND FAMILY (1988), pp. 76 *et seq.*, at p. 86.
[727] *Ibid.*
[728] This point is made also in support of the position of the Irish Republic by S. A. Low – *Europe threatens the Sovereignty of the Republic of Ireland: Freedom of Information and the Right to Life*, in: 15 EMORY INTERNATIONAL LAW REVIEW (2001), pp. 175 *et seq.*, who calls for deference to the Irish legislature since the current anti-abortion laws in Ireland are the result of that country's democratic process, *ibid.*, at pp. 204 *et seq.* A similar note is struck by S. Pentz Bottini – *Europe's Rebellious Daughter: Will Ireland Be Forced to Conform Its Abortion Law to That of Its Neighbors*, in: 49 JOURNAL OF CHURCH AND STATE (2007), pp. 211 *et seq.*, at p. 249.
[729] *Cf.* S. K. Calt – *A., B. & C. v. Ireland*: „Europe's *Roe v. Wade*"?, in: 14 LEWIS & CLARK LAW REVIEW (2010), pp. 1189 *et seq.*

ness. It is fortunate, that the loss of courageous voices in the Strasbourg court, such as *Antonella Mularoni* or *Javier Borrego Borrego*, seems not to have led to a turn towards further infringements upon the rights of unborn children. In the current age of relativism, abortion often has become the norm and in many places more pregnancies end in abortion than in birth. But this "culture of death"[730] is not the culture the Convention is rooted in. The ECHR may be a "living instrument",[731] but like some of the decisions, separate and dissenting opinions discussed in this article, the Court's judgment in *A, B and C v. Ireland* might very well be a sign that the tide of judicial activism, is turning back in Strasbourg. The low point of judicial activism had certainly been reached in the 2009 judgment in *Lautsi v. Italy*,[732] a judgment which showed how much Strasbourg had been turned into an ivory tower and disconnected from the reality of most of the more than 800 million people in the member states of the Council of Europe[733] and which has been repealed in 2011 by the Grand Chamber.[734] It may still be too early to tell but it might be that future lawyers will see *A, B and C v. Ireland* as the moment the Court stepped back from the brink before loosing acceptance with the general public and abandoned its former judicial activism in favor of a more moderate, common sense approach. The notion of the Convention as a "living instrument"[735] stands in the way of strict constructivism but rather calls for a pragmatic originalism, applying the original meaning of the Convention to contemporary issues. The notion of autonomous concepts[736] does not pose a threat of a too

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[730] Pope John Paul II – ENCYCLICAL EVANGELIUM VITAE, available online at <http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html> (last visited 10 October 2011), # 7; W. E. May – CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE, 2nd ed., Our Sunday Visitor Publishing Division, Huntington (2008) p. 35.

[731] ECtHR – *Tyrer v. United Kingdom*, Application no. 5856/72, Judgment of 25 April 1978, para. 31.

[732] ECtHR – *Lautsi v. Italy*, Application No. 30814/06, Judgment of 3 November 2009.

[733] A critique which sees the Court's recent case law as out of touch with the people had been offered by *cf.* J. Borrego Borrego – *Estrasburgo y el crucifijo en las escuelas*, in: EL MUNDO, 17 December 2009, available online at <http://www.elmundo.es/opinion/tribuna-libre/2009/12/21559042.html> (last visited 1 February 2011), *cf.* also J. C. von Krempach – *Does the European Court on Human Rights still have the confidence of the public? A former judge expresses his doubt.*, in: CATHOLIC FAMILY AND HUMAN RIGHTS INSTITUTE, UN BLOG, 22 December 2009, available online at <http://www.c-fam.org/blog/id.44/blog_detail.asp> (last visited 1 February 2011).

[734] ECtHR – *Lautsi v. Italy*, Application No. 30814/06, Judgment of 18 March 2011.

[735] P. Leach – TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, 2nd ed., Oxford University Press, Oxford and other locations (2005), p. 164.

[736] *Cf.* also in general A. von Ungern-Sternberg – *Autonomie und funktionale Grundrechtskonzeptionen – Unter besonderer Berücksichtigung der Rechtsprechung des EGMR*, in: 38 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (2011), pp. 199 *et seq.*, at p. 200.

far-reaching judicial activism since it merely resolves a legal dispute[737] – and who is to say that the Court refraining from solving a dispute put before it would not amount to an even greater risk, a kind of judicial activism by complacency? With regard to abortion, there seems to have been enough of that, since it was also the inaction of the Court which has contributed to the mistaken idea that abortion is something 'normal'.

As far as the issue of abortion and the scope *ratione personae* of Art. 2 (1) ECHR are concerned, the *lex lata* has been summed up by Judge *Costa* who was joined by Judge *Traja* in his separate opinion in *Vo v. France*.[738] Judge *Costa* held

> "that there is life before birth, within the meaning of Article 2 [ECHR], [and] that the law must therefore protect such life, and that if a national legislature considers that such protection cannot be absolute, then it should only [be able to] derogate from it".[739]

In as far as the judge allows such a derogation also beyond the need to save the life of the mother,[740] it has to be noted that such a derogation still would have to comply with the general rules of the Convention on derogation which are rather restrictive and would seem not to allow abortion merely at the will of the mother. In particular Art. 15 (2) ECHR obviously would not apply to such situations,[741] only allowing derogrations from Art. 2 ECHR in times of emergency with regard to lawful killings during armed conflicts. Lacking a change of the Convention to allow for other derogations from Art. 2 ECHR, this brings us back to the only remaining option, that is, the merely incidental, non-intentional, death of the child during an attempt to rescue the life of the mother, severely limiting the practical usefulness of the opening

[737] G. Letsas – *The Truth in Autonomous Concepts: How to Interpret the ECHR*, in: 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2004), pp. 279 *et seq.*, at p. 289.

[738] This passage was also reprinted verbatim by A. Mowbray – *Institutional Developments and Recent Strasbourg Cases*, in: 5 HUMAN RIGHTS LAW REVIEW (2005), pp. 169 *et seq.*, at p. 176.

[739] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, separate opinion Judge *Costa*.

[740] *Ibid.*, para. 17.

[741] *Cf.* T. Abdel-Monem – *How far do the lawless areas of Europe extend? Extraterritorial Application of the European Convention on Human Rights*, in: 14 JOURNAL OF TRANSNATIONAL LAW AND POLICY (2005), pp. 159 *et seq.*, at p. 199; S. Kirchner – *Human Rights Guarantees in States of Emergency: The European Convention on Human Rights*, in: 3 BALTIC JOURNAL OF LAW & POLITICS (2010), No. 2, pp. 1 *et seq.*, at pp. 9 *et seq.*

identified by Judge *Costa* for states which wish to allow for abortion beyond this medical need. Many will take issue with the interpretation of Art. 2 ECHR offered here. But as the guardian of the Convention, the Court has to do its work and to interpret the Convention without fear of repercussions from the states parties on which it depends at the end of the day for financial support. The Court's failure to apply the Convention and its tendency to hide behind the doctrine of the margin of appreciation, which was never intended to be as far reaching as the Court claims it to be when it comes to abortion, does a disservice both to the heritage of the Court and to the respect for the Convention. In the case of the right to life, any wavering on the part of the Court only opens the door to death a bit more. Failing to express the wide scope of Art. 2 ECHR is neither "a wise act of judicial self-restraint in a politically controversial question",[742] nor merely a "missed [...]chance to express [...] the legal status of a fetus under the Convention".[743] For millions of unborn children, death is the result of the continued inaction of the Court and the failure of most member states to restrict abortion in compliance with the ECHR. This failure has serious consequences as a look at the number shows: Only a small number of abortions are necessary to save the life of the mother. This is indicated by statistics available from Poland. Since there are some 160 reported abortions per year in Poland,[744] this would amount to about 1 abortion per 250,000 inhabitants for the purpose of saving the life of the mother. Because current abortion statistics were not available for all member states, the 2008 data for Russia,[745] Germany,[746] Spain,[747] England and

[742] J. Pichon – *Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France*, in: 7 GERMAN LAW JOURNAL (2006), pp. 433 *et seq.*, at p. 444.

[743] *Ibid.*

[744] W. R. Johnston – DATA ON ABORTION DECREASE IN POLAND, 26 May 2008, available online at <http://www.johnstonsarchive.net/policy/abortion/polandlaw.html> (last visited 1 February 2011).

[745] W. R. Johnston – RUSSIA ABORTIONS AND LIVE BIRTHS BY FEDERAL SUBJECT AREA, 1992-2008, 20 March 2010, available online at <http://www.johnstonsarchive.net/policy/abortion/ russia/ab-rusreg.html> last visited 1 February 2011).

[746] W. R. Johnston – GERMAN ABORTIONS AND LIVE BIRTHS BY STATE, 1996-2008, 20 March 2010, available online at <http://www.johnstonsarchive.net/policy/abortion/germany/ab-ges.html> (last visited 1 February 2011).

[747] W. R. Johnston – SPAIN ABORTIONS AND LIVE BIRTHS BY AUTONOMOUS COMMUNITY, 1987-2008, 2 April 2010, available online at <http://www.johnstonsarchive.net/poli cy/abortion/spain/ab-spac.html> (last visited 1 February 2011). The numbers for Spain, though, will have to be taken with a grain of salt due to the significant changes in Spain's abortion legislation in early 2011 which has created one of Europe's most permissive abortion laws, making abortion accessible even to minors without the consent of the parents. Spain's domestic abortion laws might soon become the subject of law reform after the general elections of 20 November 2011, which brought the conservatives back to power.

Wales,[748] Italy[749] and the 2007 data for France[750] were extrapolated to the total population of those states parties to the ECHR which (unlike Poland, Ireland, San Marino, Malta and Andorra[751]) have relatively permissive abortion legislation. Although interesting from a legal perspective, Turkey, an other major state party to the Convention, was not included the base data but was among the states for which numbers were extrapolated due to the small number of data available, which in turn has its origins in an apparent five-year reporting cycle in Turkey, rather than yearly reports.[752] This approach seemed justifiable since Turkey's 17 % abortion ratio in 2008[753] does not deviate fundamentally from other major European countries such as Italy (17.6 % in 2008[754]), Spain (18.2 % in 2008,[755] although that rate is likely to climb due to this year's new legislation[756]), Germany (14.3 % in 2008[757]), or France (21.7 % in 2007[758]). For the more 'liberal' member states which are home to some 750 million people, this number would amount to a very rough estimate of 3,440,392 abortions per year. While the situation in predominantly Muslim states parties to the

[748] W. R. Johnston – HISTORICAL ABORTION STATISTICS, ENGLAND AND WALES (UK), 30 January 2010, available online at <http://www.johnstonsarchive.net/policy/abortion/uk/ab-ukenglandwales.html> (last visited 1 February 2011).

[749] W. R. Johnston – ITALY ABORTIONS AND LIVE BIRTHS BY REGION, 1980-2008, 9 January 2010, available online at <http://www.johnstonsarchive.net/policy/abortion/italy/ab-italyr.html> (last visited 1 February 2011).

[750] W. R. Johnston – FRANCE ABORTIONS AND LIVE BIRTHS BY REGION, 1976-2007, 20 March 2010, available online at <http://www.johnstonsarchive.net/policy/abortion/france/ab-frr.html> (last visited 1 February 2011).

[751] The latter three prohibit abortion under all circumstances, *cf.* also ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para. 112.

[752] *Cf.* W. R. Johnston – HISTORICAL ABORTION STATISTICS, TURKEY, 21 November 2010, available online at <http://www.johnstonsarchive.net/policy/abortion/ab-turkey.html> (last visited 1 February 2011).

[753] *Ibid.*

[754] W. R. Johnston – ITALY ABORTION PERCENTAGES BY REGION, 1979-2008, 9 January 2010, available online at <http://www.johnstonsarchive.net/policy/abortion/italy/ab-italyr2. html> (last visited 1 February 2011).

[755] W. R. Johnston – SPAIN ABORTION PERCENTAGES BY AUTONOMOUS COMMUNITY, 1987-2008, 2 April 2010, available online at <http://www.johnstonsarchive.net/policy/abortion/spain/ ab-spac2.html> (last visited 1 February 2011).

[756] At the time of writing, it was too early to tell which consequences the 2011 election would have on abortion legislation in Spain.

[757] W. R. Johnston – GERMANY ABORTION PERCENTAGES BY STATES, 1996-2008, 19 February 2010, available online at <http://www.johnstonsarchive. net/policy/abortion/germany/ab-ges2.html> (last visited 1 February 2011).

[758] W. R. Johnston – FRANCE ABORTION PERCENTAGES BY REGION, 1976-2007, 20 March 2010, available online at <http://www.johnstonsarchive.net/policy/abortion/france/ab-frr2.html> (last visited 1 February 2011).

Convention like Turkey and Azerbaijan might skew these numbers a bit (that is, if Albania can serve as an example, where the official number of abortions has been declining around the turn of the millennium[759]), although current statistics were not available for Turkey and Azerbaijan.

In fact, the true number will be significantly higher since the available statistics do not include unreported abortions, which practically always will be abortions of choice rather than medical necessity. The number of abortions which could be prevented every year if the Court's judgment in *A, B and C v. Ireland* as well as its balancing approach to conflicting human rights is understood in the way presented in this article would therefore come close or exceed the population of major European cities such as the German capital Berlin (which on 31 December 2009 had a population of 3,442,671[760]). Considering that Art. 2 ECHR entails a positive obligation on the part of the states parties to the Convention, stronger measures to prevent unreported abortions from occurring in the first place would be necessary as well, again raising the number of deaths which could be prevented. *Norman Borlaug* is said to have saved more than a billion lives.[761] One might expect a few dozen judges at what is expected to be the world's foremost human rights institution to develop at least a tiny fraction of that ambition (assuming they will get the chance to do so in the first place).

While many decision makers might not feel affected by abortion, undermining the right to life will not end at abortion but will open the door wide for euthanasia, putting those at risk who no longer are able to articulate their wishes concerning medical treatments. In this sense, ensuring compliance with the Convention on the issue of abortion is not only in the interest of the unborn but in the interest of all. The fact that the Court excluded abortion from the scope *ratione materiae* of the right to

[759] W. R. Johnston – ALBANIA ABORTIONS AND LIFE BIRTHS BY PREFECTURES 2000-2004, 21 November 2010, available online at <http://www.johnstonsarchive.net/policy/abortion/albania/ab-albaniar.html> (last visited 2 November 2011).

[760] Statistische Ämter des Bundes und der Länder – BEVÖLKERUNGSSTAND: BEVÖLKERUNG NACH GESCHLECHTV - STICHTAG 31.12. - REGIONALE TIEFE: BUNDESLÄNDER, via DESTATIS Database, available online at <https://www.regionalstatistik.de/genesis/online;jsessionid=06FE08EE91F1E481C6D08065FFC3956F> (last visited 1 February 2011).

[761] United States Congress, Congressional Tribute to Dr. Norman E. Borlaug Act of 2006, Public Law 109-395, 14 December 2006, 109th Congress, Sec. 2, subsec. (8), available online at

private life under Art. 8 (1) ECHR makes it more likely that the debate on abortion under the Convention will intensive, not the least because the Court has not yet completed the picture by ruling on the scope *ratione personae* of Art. 2 ECHR.

If we assume that the unborn child not only has interests which are worth being considered but is actually protected under Art. 2 ECHR, we have to balance the rights of the mother with those of the child, which will have to mean that states parties to the Convention may allow medical procedures which result in the unintended death of the child only in rare cases in which the life of the mother is at stake. It has to be noted though, that states may not allow for abortion *per se*. They may refrain from punishment if the death of the child was not intended. States may not balance the *life* of the child versus the life of the mother, that would be inhumane, but they may, and indeed have to, balance *rights* – a balance which can lead states to conclude that a doctor who performs a life-saving operation on a pregnant woman which unintentionally results in the death of her unborn is excused from criminal liability. States not only have to take into account the *status negativus* function of human rights, they also have a positive obligation to protect rights,[762] including the right to life.[763]

Although the obligation of the states which have ratified the Convention to actually comply with it already follows from the general principle of *pacta sunt servanda*, which also applies to Public International Law, the issue has been seriously debated domestically.[764] In extreme cases, their obligation to protect might not necessarily translate into an obligation to provide punishment through means of criminal

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<http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ395.109> (last visited 1 February 2011).

[762] Which already follows from the words "shall secure" in Art. 1 ECHR. See also ECtHR – *Airey v. Ireland*, Application no. 6289/73, Judgment of 9 October 1979, para. 32.

[763] ECtHR – *Makaratzis v. Greece*, Application no. 50385/99, Judgment of 20 December 2004, paras. 56 *et seq.*

[764] *Cf. e.g.* the decision of the German Federal Constitutional Court, Bundesverfassungsgericht – *Görgülü*, Case no. 2 BvR 1481/04, Decision of 14 October 2004, in: 111 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 307 *et seq.* regarding a controversial case (see in particular *ibid.*, at pp. 315 et seq.) in which German authorities failed to comply with an ECtHR judgment, even after having been ordered to do so by the highest courts in Germany, a rare case of non-compliance with a Strasbourg judgment on the part of a member state. See also L. Viellechner – *Berücksichtigungspflicht als Kollisionsregel*, in: 38 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (2011), pp. 203 *et seq*.

law. Intentional abortion on the other hand is always incompatible with the right to life of the unborn child. Neither Art. 2 ECHR nor Art. 15 ECHR allow for limitations, be they in the form of a derogation, direct, implied or otherwise. The artificial distinction between means and ends which some try to make[765] cannot conceal the fact that abortion is always a grave evil and morally problematic. In the same vein, from a legal perspective, there are no justifications for excluding the unborn child from the scope *ratione personae* of Art. 2 (1) ECHR.

Likewise, reservations against Art. 2 ECHR would be incompatible with the spirit of the Convention and therefore without legal effect by virtue of Art. 19 (c) VCLT, a norm which codifies the longstanding customary international law on this subject matter. Therefore, states parties to the Convention are under a positive obligation to penalize all intentional killings of unborn children as well as negligent killings if the act which resulted in the unintended death of the child was not meant to save the life of the mother. Taking into account the autonomy of the patient, states may not force a mother to undergo such a procedure even if this would mean increasing the risk to her own life. Every pregnant woman has the right to decide to sacrifice her life for her child, thus following the example of St. *Gianna Beretta Molla*, an Italian pediatrician who refused a potentially life-saving operation which would have led to the death of her unborn daughter in order to give birth to her child and who died shortly thereafter, or, more recently, *Jessica Council*,[766] a young American woman who met a very similar fate in 2011. To construct such a right at first sight seems to be difficult, given that the Court seems to have just excluded the issue of abortion from the scope of Art. 8 (1) ECHR – but medical treatment is still an issue of private life. In this respect the distinction between intentional abortion (which is incompatible with the Convention) and medical measures which are necessary to save the life of the mother and which might lead, as an unintended side effect, to the death of the child has to be repeated again. All the Court did in *A, B and C v. Ireland* was to refuse a right to abortion under Art. 8 (1) ECHR. Health care is still a matter of private life. Taking such a risk to her own life is as much part of the mother's right

[765] *Cf.* P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), pp. 113 *et seq.*

[766] kath.net – *Die Mutter starb, Baby Jessi lebt*, in: KATH.NET, 21 October 2011, available online at <http://www.kath.net/detail.php?id=33594> (last visited 21 October 2011).

to private life under Art. 8 (1) ECHR as is any consent to medical treatment – or any other form of risky behavior which is commonly accepted by society.

The Court's decision in *A, B and C v. Ireland* not to assume a right to abortion under Art. 8 (1) ECHR already severely restricts the possibility to obtain an abortion in accordance with the Convention, even though the Court does not share the view expressed in this text as regards the scope *ratione personae* of Art. 2 (1) ECHR. Since the balancing of rights proposed here has its roots in the earlier jurisprudence of the Convention organs, a dogmatically coherent approach which differentiates between rights and mere interests requires a wide understanding of Art. 2 ECHR. The right to life cannot be limited by recourse to the doctrine of the margin of appreciation.[767]

3.9. The Debate after *A, B and C v. Ireland*

Until now, the scientific reality of life before birth has either been ignored or it has been held that unborn life is somehow worth less than born life. The German Federal Constitutional Court is a key example of this erroneous thinking: although admitting that born life is as human as unborn life[768] and acknowledging a duty of the state to protect the unborn child[769] both in general[770] also against the mother,[771] and to utilize criminal law for this purpose,[772] the *Bundesverfassungsgericht* allows abortion to go unpunished in many cases.[773] This has led to the perception that at-will abortion is legally permissible. While it could have been hoped in December of 2010 when the European Court of Human Rights issued the judgment in *A, B and C v.*

[767] ECtHR – *Vo v. France*, Application No. 53924/00, Judgment of 8 July 2004, dissenting opinion Judge *Ress*, para. 8.

[768] *Cf.* Bundesverfassungsgericht – *First Abortion Judgment, Joined* Cases nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, para. 151.

[769] Bundesverfassungsgericht – *Second Abortion Judgment*, Joined cases 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, Judgment of 28 May 1993, in: 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 203 *et seq.*, guiding sentence 6.

[770] *Cf. ibid.*, guiding sentence 10.

[771] Bundesverfassungsgericht – *First Abortion Judgment, Joined* Cases nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, guiding sentence 3.

[772] Bundesverfassungsgericht – *Second Abortion Judgment*, Joined cases 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, Judgment of 28 May 1993, in: 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 203 *et seq.*, guiding sentence 8.

[773] *Cf. ibid.*, guiding sentence 11.

Ireland,[774] that this widespread misperception could receive some correction, this seems not to have happened.

Reactions to *A, B and C* includes complaints that only five of the seventeen judges in this case were women and that among those five were the judges from Ireland and Andorra,[775] although neither the nationality nor the gender of the judges will have played a role in the decision of the Court.

It is illustrating that the same author writes (with reference to the Chamber's judgment in *S. H. and others v. Austria*,[776] although it has to be noted that this case has been before the Grand Chamber[777] after *Rey* made her comment on *A, B and C v. Ireland*, the Grand Chamber finding no violation of the Convention in the case of *S. H. and others v. Austria*[778]) that "[i]t looks like in the eyes of the Strasbourg judges the desire to have a child was more existentially important than the wish NOT to become a mother",[779] adding to say that she would prefer it to be the other way around.[780] But isn't it exactly like this? Isn't it part of the very existence of every living creature to have a desire to procreate? Procreation is the norm, not in a legal-normative sense of the term but in an even more basic biological sense. This is why celibacy is considered a sacrifice in some religions. It is the wish to destroy one's own offspring which is the deviation from the natural norm which is common to all living beings. Also the claim that legal barriers to abortion amount to "servitude"[781] cannot be sustained. The fact that the term used in the (unofficial[782]) German trans-

[774] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010.

[775] A.-M. Rey – COERCED CHILDBEARING IS TANTAMOUNT TO SERVITUDE – COMMENT ON THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS OF 16 JANUARY [sic! The judgment was issued on 16 December, S.K.] 2010, 28 January 2011, available online at <http://www.europeanprochoicenetwork.wordpress.com/2011/01/28/comment-abourt-abc-judgment-coerced-childbearing-is-tantamount-to-servitude> (last visited 28 January 2011).

[776] ECtHR – *S. H. and Others v. Austria*, Application no. 57813/00, Judgment of 1 April 2010.

[777] ECtHR – *S. H. and Others v. Austria*, Application no. 57813/00, Judgment of 3 November 2011.

[778] *Ibid.*, para. 115.

[779] A.-M. Rey – COERCED CHILDBEARING IS TANTAMOUNT TO SERVITUDE – COMMENT ON THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS OF 16 JANUARY 2010, 28 January 2011, available online at <http://www.europeanprochoicenetwork.wordpress.com/2011/01/28 /comment-abourt-abc-judgment-coerced-childbearing-is-tantamount-to-servitude> (last visited 28 January 2011) – again, the emphasis is as it appears in the original text.

[780] *Ibid.*

[781] *Ibid.*

[782] *Cf.* the penultimate sentence of the ECHR, immediately after Art. 59 ECHR: " Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy

lation of Art. 4 ECHR is "*Leibeigenschaft*", which literally translates to "ownership of the body" of the person held in servitude, does not make this argument any more sound because the unborn child does not claim ownership over the body of the mother. This argument is rather ironic, given that pro-abortion activists often claim that the unborn child is merely a part of the woman's body[783] and that she can do with the child what she wants. In doing so, the pro-choice camp claims ownership of the mother over the body of her child.[784] Either the child is a person who can at least hypothetically have a legal position *vis-á-vis* somebody else (in this case: "ownership" over the body of the mother[785]) or just a mere thing without any capabilities of this kind. While the law is clear as to the fact that the unborn child is not a mere object, it is often treated as such: for many, including the parents, embryos (especially when they are *ex utero*) have become objects and even a commodity, which goes so far that there is talk about the "possession"[786] of embryos.[787]

Finally, the notion that in English the term 'labor' is used to describe the process of giving birth[788] does not make labor in the gynecological sense a form of labor in the sense of being forced to work against one's will, which would trigger the applicability of Art. 4 ECHR. Such an interpretation of the term "forced or compulsory labour" as it is used in Art. 4 (2) ECHR would be incompatible with the ordinary meaning of the term as well as with the purpose of Art. 4 (2) ECHR. This comparison

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which shall remain deposited in the archives of the Council of Europe." from which it follows that only the English and French texts are binding but not translations to other languages.

[783] It used to be that also born children were thought to simply belong to their parents, R. K. Smith – TEXTS AND MATERIALS ON INTERNATIONAL HUMAN RIGHTS, 2nd ed., Routledge, London / New York (2010), p. 438.

[784] The term is also used in a wider sense in the context of biotechnology, *cf.* S. Safrin – *Hyperownership in a Time of Biotechnological Promise: The International Conflict to Control the Building Blocks of Life*, in: 98 AMERICAN JOURNAL OF INTERNATIONAL LAW (2004), pp. 641 *et seq.*

[785] *Cf.* A.-M. Rey – COERCED CHILDBEARING IS TANTAMOUNT TO SERVITUDE – COMMENT ON THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS OF 16 JANUARY 2010, 28 January 2011, available online at <http://www.europeanprochoicenetwork.wordpress.com/2011/01/28/comment-abourt-abc-judgment-coerced-childbearing-is-tantamount-to-servitude> (last visited 28 January 2011).

[786] N. P. Tery – *"Alas! Poor Yorick," I knew him Ex Utero: The Regulation of Embryo and Fetal Experimentation and Disposal in England and the United States*, in: 39 VANDERBILT LAW REVIEW (1986), pp. 419 *et seq.*, at p. 456.

[787] See instructively ECJ – *Oliver Brüstle v. Greenpeace e.V*, Case C-34/10, Judgment of 18 October 2011.

[788] A.-M. Rey – COERCED CHILDBEARING IS TANTAMOUNT TO SERVITUDE – COMMENT ON THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS OF 16 JANUARY 2010, 28 January 2011, available online at

downplays the plight of the approximately 27 million[789] people who live in slavery today.

But *Rey* is not alone in invoking rather creative understandings of human rights in order to support her view: while the concept of the denial of a 'right' to have an abortion can make sense from a theoretical perspective (*i.e.*, if one is willing to accept the existence of such a right to begin with), other claims appear to be significantly more outlandish. Among them is not only *Rey*'s view of pregnancy as servitude,[790] one of the more bizarre ideas put forward in defense of abortion is the notion that the prohibition of abortion would violate women's rights under Art. 14 ECHR.[791] Art. 14 ECHR prohibits discrimination in applying the Convention:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[792]

As a cursory reading should make clear, the norm does not require states to treat all cases alike, even those which are not alike. In so far, Art. 14 ECHR differs from Art. 1 CEDAW and Art. 12 CEDAW[793] - not to mention that CEDAW does nor provide any legal basis for a 'right' to have an abortion. On one hand, obviously only women can become pregnant. On the other hand can nobody, also no state, be legally under an obligation to perform something which is plainly impossible. No laws

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<http://www.europeanprochoicenetwork.wordpress.com/2011/01/28 /comment-abourt-abc-judgment-coerced-childbearing-is-tantamount-to-servitude> (last visited 28 January 2011).

[789] H. Dodson – *Slavery in the Twenty-First Century*, in: UN CHRONICLE ONLINE EDITION (2005), Issue 3, pp. 28 *et seq.*, available online (with new page numbering) at <http://www.smfcdn.com/assets/pubs/un_chronicle.pdf> (last visited 14 November 2011), p. 1 (new page numbering).

[790] *Ibid.*

[791] L. Kavitze / C. Zampas – IN THE EUROPEAN COURT OF HUMAN RIGHTS (CASE NO. 53924/00) BETWEEN VO APPLICANT AND FRANCE RESPONDENT WRITTEN COMMENTS BY CENTER FOR REPRODUCTIVE RIGHTS PURSUANT TO RULE 44, § 2 OF THE RULES OF THE COURT, 26 November 2003, available online at <http://www.sideme.org/revista/num5/TEDU_feto-04.pdf> (last visited 13 November 2011), p. 9.

[792] Art. 14 ECHR.

[793] But see also L. Kavitze / C. Zampas – IN THE EUROPEAN COURT OF HUMAN RIGHTS (CASE NO. 53924/00) BETWEEN VO APPLICANT AND FRANCE RESPONDENT WRITTEN COMMENTS BY CENTER FOR REPRODUCTIVE RIGHTS PURSUANT TO RULE 44, § 2 OF THE RULES OF THE COURT, 26 November 2003, available online at <http://www.sideme.org/revista/num5/TEDU_feto-04.pdf> (last visited 13 November 2011), p. 9.

can change the basic biological fact of sexual dimorphism in humans. Finally, the argument to equality also ignores that allowing abortion will in many cases also lead to discrimination against women, specifically, against unborn girls.

Rather than settling the abortion debate in European human rights law, *A, B and C v. Ireland* has opened a new round. Given that the right to private life has long been a key argument of abortion proponents, it might very well be that the next judgment by the Court on abortion might be its most important one. The judges have to apply legal truths, rooted in factual truth, even if doing so will not endear them to the very states who pay their salaries – but "legal truth transcends communal understanding and acceptance".[794] The judges have to dare to speak the truth, even if doing so comes at a price. At times, the Court will have to be counter-cultural:

> "[T]he greatest danger of human rights violations in history has been the majority itself. As long as it can be shown historically that political majorities have it in their interest to restrict the rights of the individual, it makes no sense to assign them the power t to decide on the content of these rights. [...] If it makes no sense to let the majorities decide what rights individuals have, then it makes no sense either to resolve legal disagreements in human rights cases by appealing to what the majorities now believe or have legislated."[795]

To answer the question posed by *George Letsas*:[796] truth matters more than consensus. It does not matter, indeed, it must not matter for the Court whether the overwhelming majority of states parties to the Convention allow for abortion in a wide range of situations which do not involve a risk to the life of the mother which could not be dealt with in any other way. The Court has to apply the Convention as a "living instrument".[797] The ECHR is to be "interpret[ed] in the light of present day conditions and situations [including today's scientific knowledge concerning life the prenatal development of the unborn child], rather than to assess [only] what was intended by the original drafters of the Convention in the late 1940s. [Therefore, the

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[794] G. Letsas – *The Truth in Autonomous Concepts: How to Interpret the ECHR*, in: 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2004), pp. 279 *et seq.*, at p. 292. Emphasis ommitted.
[795] *Ibid.*, at pp. 303 *et seq.*
[796] *Ibid.*, at p. 295.
[797] P. Leach – TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, 2nd ed., Oxford University Press, Oxford and other locations (2005), p. 164.

Court] applies a dynamic, rather than historical approach"[798] in interpreting the Convention.[799]

Because an interpretation of Art. 2 (1) ECHR which takes into account the scientific evidence as to the beginning of human life as well as the *ratio* of the norm calls for a wide understanding of the term "life", it will have to say so, if an other case concerning abortion is put before it the next time. Given the overwhelming importance of the right in question, the gravity of the risk to the child and the lack of alternative protective mechanisms at the service of the unborn, the Court cannot take the risk of granting states any margin of appreciation in the definition of the beginning of human life.

In its 2011 judgment[800] in *Lautsi v. Italy* the Great Chamber eventually backed away from the judicial activism which had characterized the 2009 judgment in the same case.[801] It is time the judges return to the original meaning of the Convention also on other issues. It must not matter to the Court that many Europeans consider abortion to be a right. In *A, B and C v. Ireland*, that step at least has been taken by the judges. The Court has just begun to cross the Rubicon, but until the judges reach the other shore by clearly pronouncing a right to life for the unborn, the river they stand in might as well be Phlegeton or Cocytus. The choice suggested in this thesis is certainly not one which would be overly popular from a political perspective, but it appears to me to be the solution which would be most consistent with the overall aim and purpose of the Convention.

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[798] *Ibid.*

[799] ECtHR – *Loizidou v. Turkey (preliminary objections)*, Application no. 15318/89, Judgment of 23 March 1995, para. 71; ECtHR – *Matthews v. The United Kingdom*, Application no. 24883/94, Judgment of 18 February 1999, para. 39; ECtHR – *Tyrer v. The United Kingdom*, Application no. 5856/72, Judgment of 25 April 1998, para. 31; ECtHR – *Soering v. The United Kingdom*, Application no. 14038/88, Judgment of 7 July 1989, para. 102; ECtHR – *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999, para. 101.

[800] ECtHR – *Lautsi v. Italy*, Application no. 30814/06, Judgment of 18 March 2011, para. 77.

[801] *Cf.* ECtHR – *Lautsi v. Italy*, Application no. 30814/06, Judgment of 3 November 2009, paras. 50 and 59.

3.10. Protecting the Weakest Humans

3.10.1. Taking Human Rights Seriously

If we want to take human rights seriously, we have to apply them to the weakest of all humans, too. The Republic of Ireland is already doing so, thanks to the values enshrined in the Irish Constitution which in turn are based on the faith of the majority of the people of the Republic of Ireland. At a time when faith plays a greater role again in the lives of many while the majority in Europe has surrendered to a culture of moral relativism, the impact of religion is vital in ensuring the effective enforcement of human rights law. Any convention, in fact any legal rule, is at risk of becoming empty words on paper, and might even fall into *desuetudo*, if the societies to which it is meant to apply is diverting too far from the values on which the legal rule in question is based. In *A, B and C v. Ireland*, the European Court has taken an important step in turning back the tide. To say the truth is not always popular and in times like these it is often also counter-cultural. In the case of the right to life of the unborn, the continued stance of the people of Ireland has made it easier to do so everywhere where the ECHR applies. From Svalbard to the South Sandwich Islands, from French Guiana to Russia's Far East, from Greenland to French Polynesia, unborn children are a little closer to being protected against abortion because of the laws of the people of Ireland and the wisdom of the judges in Strasbourg. The battle against abortion is far from won, but the Court in Strasbourg has denied pro-abortion activists the European equivalent to *Roe v. Wade*[802] they might have hoped for and has created an option to put the abortion legislation of other states before the Court. Along with the reversal brought by the ECtHR's Grand Chamber's 2011 judgment in *Lautsi v. Italy*,[803] which overturned a controversial 2009 judgment against Italy, requiring the predominantly Catholic country to remove crucifixes from classrooms in public schools,[804] the judgment in *A, B and C v. Ireland* is a reminder of the fact that the religious roots of Europe are still a force to be reckoned with. In the case of Ire-

[802] S. K. Calt, *A., B. & C. v. Ireland*: „Europe's *Roe v. Wade*"?, in: 14 LEWIS & CLARK LAW REVIEW (2010), pp. 1189 *et seq.* A similar terminology is also used by E. Finney – *Shifting to a European* Roe v. Wade*: Should Judicial Activism create an international right to abortion with* A., B. and C. v. Ireland*?*, in: 72 UNIVERSITY OF PITTSBURGH LAW REVIEW (2010), pp. 389 *et seq*., it has to be noted, though, that Finney is opposed to a right to abortion (*ibid.*, p. 430).

[803] ECtHR – *Lautsi v. Italy*, Application No. 30814/06, Judgment of 18 March 2011.

[804] ECtHR – *Lautsi v. Italy*, Application No. 30814/06, Judgment of 3 November 2009.

land, the religious convictions of one people, by leading to the ECtHR's ruling that the right to private life under Art. 8 (1) ECHR does not entail a right to abortion, might have started to change the laws in many countries, thus saving the lives of millions.

3.10.2. Changing the Jurisprudence of the Court and the Role of Precedent in the European Human Rights System

Although it gained some attention recently due to the reversal of the Chamber's 2009 judgment in *Lautsi v. Italy* in 2011, the notion of precedent[805] in the Strasbourg system has so far received fairly little attention.[806] Although there is no strict, formal,[807] doctrine of precedent[808] like *stare decisis et quieta non movere*,[809] a key principle of Common Law,[810] under the ECHR,[811] Rule 72 of the Rules of Court[812] makes it clear that it appears to be preferable, although not strictly required, that it is the Grand Chamber which decides:

> "1. In accordance with Article 30 of the Convention, where a case pending before a Chamber raises a serious question affecting the interpreta-

[805] On the earlier case law of the ECtHR before *A, B and C v. Ireland* see the summary provided by J. Murdoch / D. I. Straisteanu / D. Vedernikova – THE RIGHT TO LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ARTICLE 2), INTERRIGHTS MANUAL FOR LAWYERS, Interrights, London (2008), at pp. 7 *et seq.*

[806] A. Mowbray – *An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law*, in: 9 HUMAN RIGHTS LAW REVIEW (2009), pp. 179 *et seq.*, at p. 179.

[807] P. Leach – TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, 2nd ed., Oxford University Press, Oxford and other locations (2005), p. 164; *cf.* ECtHR – *Beard v. United Kingdom*, Application No. 24882/94, Judgment of 18 January 2001, para. 81.

[808] ECtHR – *Goodwin v. United Kingdom*, Application no. 28957/95, Judgment of 11 July 2002, para. 74.

[809] On the Common Law origins of the concept *cf.* D. Blumenwitz – EINFÜHRUNG IN DAS ANGLO-AMERIKANISCHE RECHT, 6th ed., Verlag C. H. Beck, Munich (1998), pp. 25 *et seq.*; C. Graf von Bernstorff – EINFÜHRUNG IN DAS ENGLISCHE RECHT, 1st ed., Verlag C. H. Beck, Munich (1996), pp. 7 *et seq.*

[810] On mutual misunderstandings between Continental and lawyers trained in Common Law, who after all share the same human rights system in Strasbourg, *cf.* A. Mowbray – *An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law*, in: 9 HUMAN RIGHTS LAW REVIEW (2009), pp. 179 *et seq.*, at pp. 180 *et seq*.

[811] Y. Lupu / E. Voeten – *The Role of Precedent at the European Court of Human Rights: A Network Analysis of Case Citations*, Southern Illinois University Carbondale Conference Proceedings 2010, available online at <http://opensiuc.lib.edu/pnconfs_2010/12> (last visited 4 November 2011), p. 1.

[812] ECtHR – RULES OF COURT (July 2009), available online at <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/ RulesOfCourt.pdf> (last visited 10 November 2011).

tion of the Convention or the Protocols thereto or where the resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case has objected in accordance with paragraph 2 of this Rule. Reasons need not be given for the decision to relinquish.

2. The Registrar shall notify the parties of the Chamber's intention to relinquish jurisdiction. The parties shall have one month from the date of that notification within which to file at the Registry a duly reasoned objection. An objection which does not fulfil these conditions shall be considered invalid by the Chamber."

The new version of Art. 35 ECHR after the entry into force of Protocol 14 to the ECHR introduced the possibility filtering,[813] *i.e.* the possibility to throw out obviously unfounded cases,[814] which already includes more than 90 % of all applications[815] which have numbered almost 140,000 in the year 2010.[816] In a sense, Protocol 14, like the pilot procedures,[817] together with other measures such as decisions by single judges[818] and the Interlaken Declaration and Action Plan[819] codify an important aspect of the factual notion of precedent in the Convention system. These measures, which appear necessary to deal with a backlog of now 140,000[820] and

[813] On filtering see M. O'Boyle – *The Future of the European Court of Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1862 *et seq.*, at pp. 1870 *et seq.*

[814] J. Meyer-Ladewig / H. Petzold – *Trivialbeschwerdem in der Rechtsprechung des EGMR – De minimis non curat praetor*, in: 64 NEUE JURISTISCHE WOCHENSCHRIFT (2011), pp. 3126 *et seq.*, at p. 3126.

[815] *Ibid.*

[816] *Ibid.*

[817] See M. O'Boyle – *The Future of the European Court of Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1862 *et seq.*, at p. 1870 and pp. 1873 *et seq.*

[818] See *ibid.*, at p. 1870.

[819] See also M. O'Boyle – *The Future of the European Court of Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1864 *et seq.*, at pp. 1869 *et seq.* and p. 1871.

[820] A. Tickell – *Dismantling the Iron-Cage: the Discursive Persistence and Legal Failure of a „Bureaucratical Rational" Construction of the Admissibility Decision-Making of the European Court of Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1786 *et seq.*, at p. 1788.

soon 200,000 cases at the Court,[821] now contribute to making European Human Rights Law even more coherent.

De facto, precedent of course matters significantly in European Human Rights Law[822] and the role of precedent in the context of the European Convention on Human Rights can be compared to its role in the Common Law system. In effect, the Court will need a "good reason"[823] to change its jurisprudence. So far it has not said that the unborn child does not fall within the personal scope of Art. 2 (1) ECHR but has granted the states a margin of appreciation in this matter. I believe that the arguments presented here, in particular the argument from continuous development and the existence of an alternative to the margin of appreciation in the form of the autonomous concepts and that therefore the Court should move away from the existing jurisprudence and rule in favor of the right to life of the unborn child in future cases.

3.11. Intermediate Conclusions

As we have seen, unborn children have a right to life under Art. 2 (1) ECHR. In order to implement this conclusion effectively the Court should move away from its reliance on the margin of appreciation to an autonomous concept with regard to the question when human life begins.

Ordinarily, one would assume that the unborn child's right to life includes a right to be born[824] as birth is a natural event in the overall life-time of a human being. In case of a pregnancy, this is obviously still the case – but what about frozen embryos? Is there a right on the part of the embryo to be implanted into his or her biological mother and brought to term? The mere storage in cryostasis is life, but it is

[821] M. O'Boyle – *The Future of the European Court of Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1862 *et seq.*, at p. 1870.
[822] Y. Lupu / E. Voeten – *The Role of Precedent at the European Court of Human Rights: A Network Analysis of Case Citations*, Southern Illinois University Carbondale Conference Proceedings 2010, available online at <http://opensiuc.lib.edu/pnconfs_2010/12> (last visited 4 November 2011), p. 3.
[823] ECtHR – *Goodwin v. United Kingdom*, Application no. 28957/95, Judgment of 11 July 2002, para. 74; see also A. Mowbray – *An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law*, in: 9 HUMAN RIGHTS LAW REVIEW (2009), pp. 179 *et seq.*, at p. 183
[824] *Cf.* L. Palazzani – INTRODUZIONE ALLA BIOGIURIDICA, 1st ed., G. Giappichelli Editore, Torino (2002), pp. 127 *et seq.*

also nothing short of a prison for a completely innocent human being. The correct treatment of frozen embryos is a topic which exceeds the scope of this thesis but it requires attention. For the time being, the only model which appears to be helpful in the short term is the volunteer model of embryo adoptions which is practiced in the United States but which is illegal elsewhere (*e.g.* in Germany), even though this approach is far from perfect and raises numerous ethical questions, for example, may the embryo be exposed to the life-threatening thawing procedure? Who can or has to consent? Which role do the biological parents play? Does the husband of the volunteering woman have to consent to the implantation? Is not the unborn child turned into a mere object again? How can those who perform the necessary measures be compensated without turning embryo adoptions into a form of selling a human being? – to give just a few examples. Until a functioning system has been implemented, there ought to be a moratorium on all forms of *in vitro*-fertilization as well as pre-implantation and pre-natal diagnostics. It is also necessary to ensure that no embryo is destroyed only because the biological parents fail to pay their dues to the institution where their child is stored. Failure to take such measures would trigger the states responsibility under Art. 2 ECHR in accordance with the principles outlined in *Makaratzis*,[825] *i.e.* the duty to take positive measures to protect human life.

As we have seen especially with regard to the scope *ratione personae* of Art. 2 (1) ECHR, the margin of appreciation afforded to states parties to the European Convention on Human Rights is insufficient to protect the right to life when we are most vulnerable. The fact that states are given that much leeway in applying the Convention despite the importance of the subject matter of the right to life can lead to results which are incompatible with human dignity and the right to life. The European Convention on Human Rights – as it is understood by the Court and the majority of academics at this time – is therefore not helpful with regard to the protection of human life at the extremes of life, between conception and birth and at the end of life. Yet, it can become a valuable tool for the right to life movement, if the idea of autonomous concepts is also applied to the term human life. The notion as such exists and has been applied by the Court before. In fact, the issue of when human life begins, a question which can be answered scientifically, is ideally suited for the application of an autonomous concept while the idea to apply the concept of a margin

[825] ECtHR – *Makaratzis v. Greece*, Application no. 50385/99, Judgment of 20 December 2004, paras. 56 *et seq.*

of appreciation to a scientifically answerable question not only makes no sense but is also incompatible with the concept of the margin of appreciation itself: states parties to the Convention are given a margin of appreciation if there is no consensus among states, but this lack of consensus can only exist in political matters, such as the question how to regulate the relation between the state and religious communities. In matters which are open to scientific exploration, it is scientific truth which matters rather than political views which may or may not be identical. The question when life begins is not a question for politicians, not even for parliamentarians, it is a question of science. Already for this reason, the margin doctrine does not fit the question of the extent of the personal scope of Article 2 (1) of the European Convention on Human Rights. It is up to the Court to make the move away from the margin jurisprudence to an autonomous concept of the beginning of human life within the meaning of the personal scope of Article 2 (1) of the Convention. Only then can states which ignore the rights of the unborn child be forced to change their domestic abortion legislation.

4. Final Considerations

4.1. Outlook: Personhood and the Right to Life in the Context of New Technologies – Current and Future Challenges

The fact that the unborn child has a right to life from the moment of conception has implications far beyond the issue of abortion. The same right to life limits the permissibility of both in vitro fertilization and pre-implantation genetic diagnosis because it forbids the killing of embryos also *ex utero*. Since PID is based on the assumption that not all embryos will be implanted and brought to term, PID is incompatible with the Convention. Therefore all states parties to the ECHR have to ban PID and, keeping in mind the precautionary principle, ought to refrain from IVF because they cannot guarantee that no embryo will be killed in the process of IVF. This conclusion is particularly difficult for couples who cannot conceive children but while the Convention guarantees the right to family life in Art. 8 (1) ECHR, it does not include a right to have children at all costs. There is no positive obligation incumbent upon the state to provide services in reproductive medicine for the purpose of every couple being able to conceive a child regardless of the medical difficulties involved. In a sense, the Convention therefore reflects the fact that children are indeed a gift from God and that it is not the task of the state to cater to every whim and desire of anybody under its jurisdiction. There may be a positive obligation on the part of states parties to the Convention under Art. 2 (1) ECHR to protect the lives of those under their jurisdiction,[826] an obligation which can include a duty to provide medical services, hospitals and the like, but there is no obligation to provide non-essential services, i.e. medical services which go beyond saving lives and healing diseases or injuries.

Also, the question of the right to life and who is a human person within the meaning of Art. 2 (1) ECHR is not limited to unborn children and the recent and current technological advanced make it more and more important to find legal answers to new challenges:

[826] ECtHR – *Osman v. The United Kingdom*, Case No. (87/1997/87/871/1083), Judgment of 28 October 1998, para. 116.

> "We are in the midst of a biotechnology revolution which enables ever increasing control over what is natural about human life and death. [Today, t]he beginning of life can be controlled, selected and designed."[827]

As societies begin to deal with the consequences of technological progress, they also have to answer this and similar questions.[828] In particular reproductive services have become big business.[829] It is therefore appropriate to give a brief look at the issue of personhood in the context of modern (bio-)technology and some issues which will have to be answered either already today or at the very least in the near future. These difficult biotechnological issues can bring any national parliament to its limits,[830] which makes compliance with elementary international human rights obligations even more important:

> "The more intense the controversy, the more important it is to penetrate behind the putative issue of disagreement and explore the unspoken and often unrecognized meta-questions at the root of the debate."[831]

4.1.1. Pre-Implantation Genetic Diagnostics[832]

PID inherently leads to selection and opens the door wide for eugenics, which would then eventually lead to forced euthanasia,[833] as it already happens with newborns or

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[827] A. Trew – *Regulating Life and Death: The Modification and Comodification of Nature*, in: 29 UNIVERSITY OF TOLEDO LAW REVIEW (1997-1998), pp. 271 *et seq.*, at p. 271.

[828] *Cf.* K. A. Moore – *Embryo Adoption: The Legal and Moral Challenges*, in: 1 UNIVERSITY OF ST. THOMAS JOURNAL OF LAW AND PUBLIC POLICY (2007), pp. 100 *et seq.*, at p. 121.

[829] M. Brackmann / J. Münchrath / P. Thelen – *Reproduktionsmedizin – Die lautlose Expansion der Gott AG*, in: HANDELSBLATT, 8/9 July 2011, p. 1.

[830] G. P. Hefty – *Der Schutz des Staates*, in: FRANKFURTER ALLGEMEINE ZEITUNG, 8 July 2011, p. 1; A. Mihm – *Bundestag beschließt begrenzte Zulassung der PID – 326 Abgeordnete stimmen nach kontroverser Debatte für Flach-Hintze-Antrag*, in: FRANKFURTER ALLGEMEINE ZEITUNG, 8 July 2011, pp. 1 *et seq.*, at p. 1; A. Mihm – *Momente der Stille, Augenblicke der Empörung*, in: FRANKFURTER ALLGEMEINE ZEITUNG, 8 July 2011, p. 2.

[831] N. M. de S. Cameron – *Biotechnology and the Future of Humanity*, in: 22 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY (2005-2006), pp. 413 *et seq.*, at p. 423.

[832] The following parts 1. – 4. are based on research undertaken for my article *Personhood and the Right to Life under the European Convention on Human Rights: Current and Future Challenges of Modern (Bio-)Technology*, in: 3 UNIVERSITY OF WARMIA-MAZURY LAW REVIEW (2011), pp. 44 *et seq*.

[833] *Cf.* M. D. Martin III. – *The Dysfunctional Progeny of Eugenics: Autonomy gone AWOL*, in: 15 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2007), pp. 371 *et seq.*; D. Avila –

small children with serious handicaps[834] in the Netherlands[835] or with "terminal sedation"[836] which is used in many countries, including the Netherlands and Belgium, where – unlike in the case of euthanasia – does not require the consent of the patient,[837] which opens the door wide for abuse.[838] This issue becomes even more urgent when one knows that even children who were diagnosed as stillborn might show heartbeats and breaths,[839] indicating that they were hardly stillborn at all. It does not seem far-fetched to assume that the child in question, were he or she able to make that decision him- or herself, would choose to receive medical treatment,[840] rather than being abandoned and left to die.

These interests of the child, though, are often ignored. In fact, supporters of PID practically advertise their position with the argument that "the diagnostic is done for the purpose of preventing the birth of a handicapped or sick child".[841] This indicates that proponents of PID are fully aware of the fact that the unborn child is just that, a child rather than a mere thing. Today's society might not yet resemble the world depicted in the 1997 movie *Gattaca*,[842] but PID is nothing but eugenics and

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Assisted Suicide and the Inalienable Right to Life, in: 16 ISSUES IN LAW & MEDICINE (2000), No. 2, pp. 111 *et seq.*

[834] *Cf.* E.-H. W. Kluge – *The Euthanasia of Radically Defective Neonates: Some Statutory Considerations*, in: 6 DALHOUSIE LAW JOURNAL (1980-1981), pp. 229 *et seq.*; R. Cooper – *Delivery Room Resuscitation of the High-Risk Infant: A Conflict of Rights*, in: 33 CATHOLIC LAWYER (1990), pp. 325 *et seq.*

[835] On this issue see E. Verhagen / P. J. J. Sauer – *The Groningen Protocol – Euthanasia in Severely Ill Newborns*, in: 352 NEW ENGLAND JOURNAL OF MEDICINE (2005), pp. 959 *et seq.*, available online at <http://www.nejm.org/doi/full/10.1056/NEJMp058026> (last visited 15 October 2011).

[836] R. Cohen-Almagor – *Euthanasia Policy and Practice in Belgium, in: Critical Observations and Suggestions for Improvement*, in: 24 ISSUES IN LAW & MEDICINE (2009), No. 3, pp. 187 *et seq.*, at p. 200.

[837] *Ibid.*

[838] *Ibid.*

[839] R. Cooper – *Delivery Room Resuscitation of the High-Risk Infant: A Conflict of Rights*, in: 33 CATHOLIC LAWYER (1990), pp. 325 *et seq.*, at p. 329.

[840] E. D. Pellegrino / D. C. Thomasma – *The Conflict between Autonomy and Beneficience in Medical Ethics: Proposal for a Resolution*, in: 3 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY (1987), pp. 23 *et seq.*, at p. 30.

[841] H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENSEN IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 149.

[842] L. A. Vacco – *Preimplantation genetic diagnosis: from preventing disease to customizing children. Can the technology be regulated based on the parents' intent?*, in: 49 ST. LOUIS UNIVERSITY LAW JOURNAL (2004-2005), pp. 181 *et seq.*, at p. 1181.

from there it is just a small step to allow selection based on gender[843] or desired physical traits and to a society in which there no longer is a place for people with disabilities.[844] After a few decades of PID and pre-natal screening, we might be closer to *Gattaca* than we might think possible today. *Leenen* and *Gevers* even go so far as to claim that there is a right to selection of their offspring on the part of the parents,[845] arguing that the state must have serious reasons for limiting this alleged right to eugenics.[846]

The equalitarian dimension of human dignity becomes particularly evident in the case of PID which leads to the death of specifically those children who are at risk of disease or handicap. The handicapped unborn child is therefore discriminated against when compared to the healthy unborn child, which, because both have the right to life under Article 2 (1) ECHR, appears to be incompatible with Art. 14 ECHR. While Art. 14 ECHR does not mention handicaps *expressis verbis*, the categories mentioned in Art. 14 ECHR are merely *Regelbeispiele*, examples which regularly indicate a violation of the norm but which do not describe the full extent of the norm, meaning that Art. 14 ECHR also prohibits discriminations for other reasons, which already follows from the words "on any ground" as well as the limiting phrase "such as", which indicates that the following causes of discrimination are only examples. Therefore, Art. 14 ECHR also prohibits the discrimination on the basis of handicaps, health or genetic information. From this it follows that, because every unborn child has the right to life and PID leads to a denial of this right for children who are genetically more likely to be handicapped or sick, PID, in connection with the possibility to let those children who are not to be implanted die, constitutes a violation of Art. 14 ECHR in connection with the right to life under Art. 2 (1) ECHR.

That neither the handicapped and sick, nor those who merely have a genetic predisposition for such medical issues, may be discriminated against is also a consequence of the Council of Europe's Convention on Human Rights and Biomedicine

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[843] *Cf.* H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENSEN IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 149.
[844] T. Harvey Paredes – *The Killing Words? How the New Quality-of-Life Ethic Affects People with Severe Disabilities*, in: SMU LAW REVIEW (1992-1993), pp. 805 *et seq.*
[845] H. J. J. Leenen / J. K. M. Gevers – HANDBOEK GEZONDHEIDSRECHT, DEEL I: RECHTEN VAN DE MENSEN IN DE GEZONDHEIDSZORG, 4th ed., Bohn Stafleu Van Loghum, Houten / Diegem (2000), p. 149.
[846] *Ibid.*

(the so called Biomedicine Convention),[847] which prohibits discrimination on genetic grounds.[848] The selection of embryos after PID for the purpose of IVF is nothing but discrimination on the basis of the genetic information.[849] The fact that there have been "wrongful life" cases – in analogy to "wrongful death", although the notion that any life could be wrong sounds very much like the Nazi ideology of 'life not worthy of living' ('*lebensunwertes Leben*'), to mention only the most obvious of problems with the concept – for some time now[850] indicates that the procreation has become a service, that the child has been turned into a product – and if a service is not to the liking of the customer or the product is "defective" one can expect to get one's money back. This might be exaggerated somewhat, but it describes the attitude of many with regard to the technologization of the reproductive process.

That allowing PID is weakening the protection of the right to life in general is being evidenced in demands by the German Federal Chamber of Physicians (*Bundesärztekammer*)[851] as well as academics to lift the rule of three for all cases of IVF, not just for cases of PID.[852] But the legalization of PID raises even more questions: can embryos who have been discarded as a result of the PID be used for stem cell research?[853] They are of big,[854] and growing[855], scientific interest, even though

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[847] EUROPEAN TREATY SERIES No. 164.

[848] L. Honnefelder – *Was macht Genomanalyse und Genetik zur Herausforderungen für den Menschen?*, in: K. Amelung / W. Beulke / H. Lilie / H. Rosenau / H. Rüping / G. Wolfslast (eds.) – STRAFRECHT – BIORECHT – RECHTSPHILOSOPHIE, FESTSCHRIFT FÜR HANS-LUDWIG SCHREIBER ZUM 70. GEBURTSTAG AM 10. MAI 2003, 1st ed., C. F. Müller Verlag, Heidelberg (2003), pp. 711 *et seq.*, at p. 715.

[849] On the question whether the selection of embryos violates their human dignity (which I believe it does because such a selection requires the embryos to be treated like a mere object which can be thrown away if it is not needed), see in more detail D. Beyleveld / R. Brownsword – HUMAN DIGNITY IN BIOETHICS AND BIOLAW, 1st ed., Oxford University Press, Oxford and other locations (2001), pp. 156 *et seq.*

[850] See e.g. already M. Skolnik – *Expanding physician duties and patient rights in wrongful life: Harbeson v. Parke-Davis, Inc.*, in: 4 MEDICINE AND LAW (1985), pp. 283 *et seq.*; H. Teff – *The action for "wrongful life" in England and the United States*, in: 34 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (1985), pp. 423 *et seq.*; C. J. J. M. Stolker – *Wrongful life: the limits of liability and beyond*, in: 43 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (1994), pp. 521 *et seq.*

[851] Vorstand der Bundsärztekammer – *(Muster-)Richtlinie zur Durchführung der assistierten Reproduktion – Novelle 2006*, in: 103 DEUTSCHES ÄRZTEBLATT (2006), pp. A 1393 *et seq.*, at p. A 1401.

[852] *E.g.* H. Kreiß – *Präimplantationsdiagnostik: Anschlussfragen für das Embryonenschutz- und Gendiagnostikgesetz und Auswirkungen auf das Stammzellgesetz*, in: 44 ZEITSCHRIFT FÜR RECHTSPOLITIK (2011), pp. 68 *et seq.*, at p. 68.

[853] *Ibid.*, at p. 69.

adult stem cell researchers have reported a number of breakthroughs in recent years and embryonic stem cell research has become an outdated approach since it became possible in 2009 to use the patient's skin cells to reach the same results by reprogramming them.[856] Nevertheless, this scientific breakthrough seems not to have reached lawmakers yet because now it is suggested that those embryos (who, it might be argued cynically, are left to die anyway) ought to be legally usable for stem cell research.[857] This view completely disregards the human dignity of unborn children and turns embryos into commodities. Also, in PID, depending on the circumstances of the case, it is necessary to examine seven embryos in order to find one who has the desired properties and who then is to be implanted.[858] The other embryos are left to die.[859] Even if they are been kept in cryostasis, without implantation they are going to die sooner or later. Yet, this 'technical' need to create more embryos than will be implanted (which is inherent in PID, otherwise it would not make any sense at all) conflicts with the so called "rule of three" (the "*Dreierregel*"[860]) contained in § 1 (1) no. 3 ESchG.[861] The laws of other countries have similar limitations. It is therefore true that allowing PID does indeed open the door for a "normalization" of the disregard for human dignity and the right to life.

The debate about PID should be reason enough to reconsider the need for pre-natal diagnostics. Is it really necessary to make all information available to parents? In particular information which cannot be acted upon without harming the child or which does not serve the benefit of the child? In many fields governments are concerned about data protection, but the unborn child does not have a say regarding which data about him or her is made available. In a sense, not only pre-implantation but all form of pre-natal diagnostics can be used to the detriment of the unborn child

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[854] *Ibid.*

[855] *Ibid.*

[856] I. Sample – *Scientists' stem cell breakthrough ends ethical dilemma – Experts in Britain and Canada find way to make stem cells without destroying embryos*, in: THE GUARDIAN, 1 March 2009, available online at <http://www.guardian.co.uk/science/2009/mar/01/stem-cells-breakthrough> (last visited 4 November 2011).

[857] H. Kreiß – *Präimplantationsdiagnostik: Anschlussfragen für das Embryonenschutz- und Gendiagnostikgesetz und Auswirkungen auf das Stammzellgesetz*, in: 44 ZEITSCHRIFT FÜR RECHTSPOLITIK (2011), pp. 68 *et seq.*, at p. 69.

[858] *Ibid.*, at p. 68.

[859] *Ibid.*

[860] *Ibid.*

[861] *Ibid.*

and can pave the way for selection and eugenics. The positive obligations[862] incumbent upon the states with regard to the protection of the right also against individuals,[863] such as the mother,[864] to life make it necessary to (re-)evaluate existing and potential procedures in order to limit the risks to the child while ensuring that the existing medical technology is used to provide the greatest benefits possible to both the mother and her child from the moment of conception.

> "[S]uch eugenics views the individual only as a means for purposes of the society at large and does not look at his benefit but at that of the collective. […] Nothing makes this as obvious as do pre-implantation diagnostics and germline therapy. On one hand does the diagnosis prior to the implantation of the child who was conceived in vitro allow parents with a high genetic risk to have children without having to take recourse to the problematic combination of pre-natal diagnostics and abortion. On the other hand does the opening of in-vitro-fertilisation stand for a conditional procreation which is contradictory to the protection of life and an unwanted preventive eugenics resulting from it with all its untested consequences."[865]

4.1.2. *In vitro*-Fertilization

Already in normal IVF, "[t]o increase success rates, doctors fertilize all of the eggs, allow them to develop for several days, and then select the healthiest (generally the most mobile) for implantation".[866] This problem will be amplified significantly if the embryos are being screened for specific genetic information indicative of disease.

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[862] K. Freeman – *Comments: The Unborn Child and the European Convention on Human Rights: to whom does "everyone's right to life" belong?*, in: 8 EMORY INTERNATIONAL LAW REVIEW (1994), pp. 615 *et seq.*, at p. 624.

[863] *Ibid.*

[864] From a German perspective: Bundesverfassungsgericht – *First Abortion Judgment, Joined* Cases nos. 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of 25 February 1975, in: 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS, pp. 1 *et seq.*, guiding sentence 3.

[865] L. Honnefelder – *Was macht Genomanalyse und Genetik zur Herausforderungen für den Menschen?*, in: K. Amelung / W. Beulke / H. Lilie / H. Rosenau / H. Rüping / G. Wolfslast (eds.) – STRAFRECHT – BIORECHT – RECHTSPHILOSOPHIE, FESTSCHRIFT FÜR HANS-LUDWIG SCHREIBER ZUM 70. GEBURTSTAG AM 10. MAI 2003, 1st ed., C. F. Müller Verlag, Heidelberg (2003), pp. 711 *et seq.*, at p. 716.

[866] J. Carbone / N. Cahn – *Embryo Fundamentalism*, in: 18 WILLIAM & MARY BILL OF RIGHTS JOURNAL (2009-2010), pp. 1015 *et seq.*, at p. 1016, fn. ommitted.

Interestingly enough success seems to be measured by the number of couples who can bring a child to term as opposed to the number of couples in which IVF does not lead to a live birth – not the rate of embryos who survive vs. those who die before birth. This neglect highlights the current attitude to the unborn child.

Given that states which are parties to the Convention are under a positive obligation to protect life, said states not only have to prohibit PID (and, in order to provide a truly effective protection of the right to life, also IVF procedures in which more embryos are 'produced' than are to be implanted) are also under an obligation to ensure the life of those unborn children who are not implanted due to the results of the pre-implantation genetic screenings which have already occurred prior to the required prohibition of PID on the domestic level. At first sight, one might think that the unborn child, who is alive after all, could remain frozen, i.e. that the state would fulfill its obligation by ensuring that the un-implanted embryo is not destroyed but remains in cryostasis. Keeping a human being in cryostasis without him or her having had a say in the matter, without informed consent, that is, turns this human being into a mere object. Treating somebody like an object constitutes a violation of his or her human dignity.[867] The cryostasis of an un-implanted embryo cannot be compared to a medical procedure to which the parents[868] could consent for their child because the child is unable to do so and the medical procedure would be meant to be helpful for the child. Therefore the parents' consent to keep the un-implanted child in cryostasis cannot justify such as measure – just like the wishes of the parent cannot justify the killing (often merely referred to as 'destruction' or 'disposal', which again shows the language of things rather than the language of humans dealing with one another) of the preborn child.[869]

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[867] *Cf.* already I. Kant – [METAPHYSIK DER SITTEN, ZWEITER TEIL:] METAPHYSISCHE ANFANGSGRÜNDE DER TUGENDLEHRE, 2nd ed., Friedrich Niclovius, Königsberg (1803), p. 119.

[868] On the role of parents in the context of PID see H. Haker – *Elternschaft und Präimplantationsdiagnostik – Desiderate der öffentlichen Diskussion*, in: K. Hilpert / D. Mieth (eds.), KRITERIEN BIOMEDIZINISCHER ETHIK – THEOLOGISCHE BEITRÄGE ZUM GESELLSCHAFTLICHEN DISKURS, 1st ed., Herder, Freiburg im Breisgau (2006), pp. 255 *et seq.*

[869] This problem is anything but new: already in the 1950s and 1960s there was a major philosophical debate as to how language shapes philosophical thought, P. Kemp – *The Bioethical Turn*, in: 7 STUDIES IN ETHICS AND LAW (June 1998), pp. 9 *et seq.*, at p. 9.

4.1.3. Cryostasis

The question when human life begins is therefore also significant for follow-up issues such as the treatment of non-implanted children who are kept in cryostasis and the questions associated with this issue. With regard to the rights and interests of the biological parents is has to be noted that their link to the unborn child appears to be much weaker than it would be were the biological mother pregnant with the child. For many biological parents who have children in cryostasis, these children are almost an abstraction, a thing while other biological parents struggle with the fact that they have more children in cryostasis than they could possible bring to term, in particular when the parents are already at an age when future pregnancies would mean a significant risk to the health of both mother and child. While some parents might be open to embryo adoptions, others simply do not care what happens to the embryos, a phenomenon which is not uncommon in case a couple separates after having the embryos placed in cryostasis. Any regulation has to address all these different concerns. From the perspective of Art. 2 (1) ECHR, the right to life of the unborn child does not depend on the wishes of the parents. To the contrary, the parents are responsible for the well-being of the child, also already before birth, by virtue of their performing the creative act which led to the conception of the child in the first place.[870] In cryostasis the life of the unborn child is at risk due to thawing – followed by the high risk during the embryo transfer. Not all embryos survive IVF.[871] All this has to happen before the child is exposed to the risks involved with every pregnancy. The only alternative scenario apart from being thrown away is to remain in cryostasis: even though embryos have survived cryostasis for more than ten years and have been implanted and brought to term successfully,[872] there is a risk that the child who is kept in cryostasis dies there if he or she is not implanted. Because the unborn child is not the property of the parents, they cannot simply destroy, *i.e.* kill, the child. The unborn child has human dignity because he or she is human. While a

[870] P. Lee – ABORTION AND UNBORN HUMAN LIFE, 1st ed., 2nd printing, The Catholic University of America Press, Washington D.C. (1997), p. p. 120.

[871] See *e.g.* J. H. Check / D. Brittingham / K. Swenson / C. Wilson / D. Lurie - Transfer of refrozen twice-thawed embryos do not decrease the implantation rate, in: 28 Clinical and Experimental Obstetrics & Gynecology (2001), pp. 14 *et seq.*, at p. 15.

[872] K. Horsey – *'Twins' born 16 years apart*, in: BIONEWS, 29 May 2006, available online at <http://www.bionews.org.uk/page_12734.asp> (last visited 24 November 2011).

violation of the right to life is not necessarily a violation of human dignity,[873] for example if somebody is killed in self-defense, human dignity also has an equalitarian dimension,[874] a problem which is highlighted by the fact that potentially handicapped children do not even get a chance to be born. This raises a number of questions which go beyond the scope of this thesis, such as the question whether it is licit and compatible with the human dignity of the unborn child to allow adoptions of embryos who will not be implanted anymore otherwise.[875] As soon as the chances involved in the pregnancy (minus the risks associated with the embryo transfer and thawing) are better than continued cryostasis, it would seem to be licit[876] to allow embryos to be adopted.

While everybody has a right to bodily integrity, *i.e.* a right to one's own body,[877] the unborn child, *in* or *ex utero*, is not a mere bodypart of the mother but has its own body. Keeping in mind furthermore that cryostasis is not a permanent solution. The frozen embryo will die sooner or later in cryostasis since no such system is perfect. In addition, although implanted embryos have been brought to term successfully after more than a decade in cryostasis,[878] as even IVF service providers admit, up to half the embryos do not even survive the thawing process,[879] which is necessary before implantation, which means essentially that even if the cryostasis were to work perfectly, the frozen unborn children might either be frozen indefinitely (i.e. as long as there is no technical malfunction and as long as the bills for the storage are being

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[873] P. Reichenbach – *Ist die medizinisch-embryopathische Indikation bei dem Schwangerschaftsabbruch nach § 218a II StGB verfassungswidrig?*, in: 22 JURA – JURISTISCHE AUSBILDUNG (2000), pp. 622 *et seq.*, at p. 624.

[874] *Ibid.*, at pp. 625 et seq.

[875] On this issue *cf.* J. R. Gorny – *The Fate of Surplus Cryopreserved Embroys: What is the Superior Alternative for their Disposition?*, in: 37 SUFFOLK UNIVERSITY LAW REVIEW (2004), pp. 459 *et seq.*; on the U.S. perspective see also C. M. Browne / B. J. Hynes – *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, in: 17 JOURNAL OF LEGISLATION (1990-1991), pp. 97 *et seq.*

[876] On the Catholic bioethical perspective *cf.* W. E. May – CATHOLIC BIOETHICS AND THE GIFT OF HUMAN LIFE, 2nd ed., Our Sunday Visitor Publishing Division, Huntington (2008), pp. 95 *et seq.*; E. Breburda – *Darf man tiefgefrorene Embryonen adoptieren?*, in: KATH.NET, 16 August 2011, <http://www.kath.net/detail.php?id=32695> (last visited 24 November 2011).

[877] H. Forkel – *Das Persönlichkeitsrecht am Körper, gesehen besonders im Lichte des Transplantationsgesetzes*, in: 23 JURA – JURISTISCHE AUSBILDUNG (2001), pp. 73 *et seq.*, at p. 73.

[878] K. Horsey – *'Twins' born 16 years apart*, in: BIONEWS, 29 May 2006, available online at <http://www.bionews.org.uk/page_12734.asp> (last visited 24 November 2011).

[879] The Miracles Waiting, Inc. Team – *Embryo Facts*, in: MIRACLES WAITING, available online at <http://miracleswaiting.org/factembryos.html> (last visited 4 November 2011).

paid, that is, assuming that there were no damage to the embryo from the freezing itself) or would be at risk of death by thawing and only a fraction of all implanted embryos is actually brought to term. If PID is employed, it is implied that for every implanted embryo there will be others who (after all, they are already embryos, hence human beings) have been created but then are dismissed as unfit for implantation and will be discarded as medical waste. Even if they are not discarded as waste immediately (and which parents would be willing to pay for the storage of embryos whom they never intend to implant anyway?), they would face essentially a lifeterm sentence in an early embryonic stage (already alive, nevertheless), in cryostasis – merely because their genetic information did not fit the demands of their parents, the very people from whom they inherited said genetic information in the first place.

The states which are a party to the Convention have the positive obligation to ensure that these children are not put at risk of death, which includes the risk to die in cryostasis. As soon as (and this point might already have been reached by the time this thesis is published) the chance to survive the thawing and implantation process is better than the chance of survival in cryostasis, this will result in a positive obligation on the part of the state to allow these embryos to be adopted into the wombs of volunteer women – if necessary also against the express wishes of the biological parents who after all are not entitled to put their children at risk of certain death in *de facto* permanent cryostasis, not to mention the inherent violation of human dignity associated with involuntary cryostasis.

4.1.4. Germline Therapy

Germline therapy is prohibited under the COE's Biomedicine Convention.[880] PID is not prohibited *expressis verbis* but is incompatible with the spirit of the convention. Outside the Biomedicine Convention, genetic selection based on PID is incompatible with the right to life as well as with the non-discrimination clause just as abortion based on pre-natal diagnostics or PND. Also from a Christian-Jewish religious perspective, we have to refrain from interfering in this process in which paternal and

[880] L. Honnefelder – *Was macht Genomanalyse und Genetik zur Herausforderungen für den Menschen?*, in: K. Amelung / W. Beulke / H. Lilie / H. Rosenau / H. Rüping / G. Wolfslast (eds.) – STRAFRECHT – BIORECHT – RECHTSPHILOSOPHIE, FESTSCHRIFT FÜR HANS-LUDWIG SCHREIBER ZUM 70. GEBURTSTAG AM 10. MAI 2003, 1st ed., C. F. Müller Verlag, Heidelberg (2003), pp. 711 *et seq.*, at p. 717.

maternal cells merge because the Bible[881] refers to human fertilization as the work of God who "knits [the unborn child] together in [the] mother's womb"[882] and while the Old Testament refers to "knit[ting the unborn child] together",[883] *i.e.* "with bones and sinews",[884] literally, what is inside of us, today we might think of the fusing of the paternal and maternal DNA as a kind of "knit[ting the child] together in the womb".[885] Keeping in mind that this is the work of God rather than man[886] also religious considerations provide a reason not to meddle with the genetic design of human beings.

4.1.5. Stem Cell Research[887]

As mentioned, embryonic stem cells are no longer necessary because normal body cells can be reprogrammed to do practically anything.[888] The embryonic stem cell debate will therefore come to an end sooner or later because it is infinitely easier to get normal body cells (essentially, we are loosing skin and hair cells all the time) than embryonal stem cells. Yet, this does not relieve pro-life activists of the duty to speak out against 'destructive' embryonic stem cell research, *i.e.* stem cell research which requires the death of the embryo in question.

[881] PSALM 139:13; JOB 10:11.
[882] PSALM 139:13 (New International Version).
[883] JOB 10:11 (The New American Bible).
[884] *Ibid.*
[885] PSALM 139:13 (New International Version).
[886] PSALM 139:13.
[887] See also in more detail C. Starck – *Embryonic Stem Cell Research according to German and European Law*, in: 7 GERMAN LAW JOURNAL (2006), pp. 625 *et seq.*
[888] I. Sample – *Scientists' stem cell breakthrough ends ethical dilemma – Experts in Britain and Canada find way to make stem cells without destroying embryos*, in: THE GUARDIAN, 1 March 2009, available online at <http://www.guardian.co.uk/science/2009/mar/01/stem-cells-breakthrough> (last visited 4 November 2011).

4.1.6. Cloning[889]

Human cloning is practically banned world wide.[890] While there is a significant aversion to human cloning,[891] cloning, while immoral, is in so far less problematic from a our legal perspective because the clone is a human being[892] – although it raises of course a plethora of other legal,[893] ethical and moral questions with regard to the person who is cloned as well as with regard to the place of man in the context of creation which is the main reason why human cloning is widely considered immoral and therefore prohibited or at least legally restricted, although it appears that it will be only a matter of time until a human clone will be brought to term.

4.2. The End of the Margin of Appreciation regarding Abortion?

What does the current situation mean for current issues, such as IVF or PID? The same that it means for abortion: the margin of appreciation doctrine is important and does not need to be abandoned *per se*. But when it comes to the question of what human life is, states must not be given a margin of appreciation. Rather, the concept should be replaced in those cases by an autonomous concept of the definition of human life which needs to be based on the best available medical and scientific knowledge. In political discourse, at times scientific knowledge is ignored. The notion that the embryo is just a collection of cells and not yet human is a leftover of the idea

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[889] See also H. Rosenau – *Reproduktives und therapeutisches Klonen*, in: K. Amelung / W. Beulke / H. Lilie / H. Rosenau / H. Rüping / G. Wolfslast (eds.) – STRAFRECHT – BIORECHT – RECHTSPHILOSOPHIE, Festschrift für Hans-Ludwig Schreiber zum 70. Geburtstag am 10. Mai 2003, 1st ed., C. F. Müller Verlag, Heidelberg (2003), pp. 761 *et seq.*, at pp. 765 *et seq.*

[890] *Ibid.*, at p. 761.

[891] M. Z. Grigg – SOCIETY'S REJECTION OF HUMAN CLONING, available online at <http://www.scribd.com/doc/3164045/Society-Rejection-of-Human-Cloning> (last visited 4 November 2011), p. 5.

[892] The dignity of the cloned person may be at stake while the dignity of the clone cannot be violated though the act of cloning itself because there is no 'victim' yet when the cloning takes place (for the opposing view see H. Rosenau – *Reproduktives und therapeutisches Klonen*, in: K. Amelung / W. Beulke / H. Lilie / H. Rosenau / H. Rüping / G. Wolfslast (eds.) – STRAFRECHT – BIORECHT – RECHTSPHILOSOPHIE, Festschrift für Hans-Ludwig Schreiber zum 70. Geburtstag am 10. Mai 2003, 1st ed., C. F. Müller Verlag, Heidelberg (2003), pp. 761 *et seq.*, at pp. 766 *et seq.*). It is the subsequent treatment of the clone, though, which infringes upon his or her human dignity, *e.g.* the process of in-vitro-fertilisation. Therefore the clone is also a true victim of the violation of human dignity which is inherent in human cloning.

[893] On human cloning in the context of the Council of Europe see J. Kersten – DAS KLONEN VON MENSCHEN, 1st ed., Mohr Siebeck, Tübingen (2004), pp. 49 *et seq.*

of the biogenetic principle, according to which, it was thought that every human child in the womb repeats the evolution of the entire species, hence that we start as a kind of small fish and only later develop into a child. This idea was discredited already almost half a century ago,[894] yet it seems to persist in the minds of many. This ignorance of scientific knowledge must not spill over into legal discourses. If law is to remain relevant, it has to be rooted in reality and while law sometimes can be considered a tool to change reality, this is not the case when it comes to simple biological facts. As long as states are unwilling to adapt their domestic laws to the biological reality of the continuous development of the unborn child and of the fully humanness of the old, sick, elderly and handicapped, the Court is called to take action. At the same time, and this is the other side of the medal, will states be free to act in this manner as long as the Court grants the states which are parties to the European Convention on Human Rights the wide margin of appreciation which they currently enjoy.

It would not only be wise were the Court to abandon the margin of appreciation in the context of the right to life in favor of an autonomous concept – the Court is even obliged to do so: ignoring scientifically proven reality to avoid unpleasant obligations by recourse to the doctrine of the margin of appreciation is simply *abus de droit*, which is prohibited by general principles of law[895] which are part and parcel of Public International Law by virtue of Article 38 (1) *lit.* c of the Statute of the International Court of Justice[896] and which therefore in turn have to be taken into account by the Court because, even though the ECHR is a self-contained regime, it is still part of Public International Law as a whole.

Moreover does the application of a margin of appreciation to the right to life run counter to the spirit and aim of the Convention, which is the most effective protection of human rights, what already follows from the full title of the Convention, the Convention for the Protection of Human Rights and Fundamental Freedoms. Article

[894] E. Blechschmidt – WIE BEGINNT DAS MENSCHLICHE LEBEN?. VOM EI ZUM EMBRYO, now available in the 8th ed., Christiania-Verlag, Stein am Rhein (2008); see also the interview which the late Prof. Dr. Erich Blechschmidt gave to PUR Magazin, available online at <http://www.aktion-leben.de/Abtreibung/Embryonal-Entwicklung/sld01.html> (last visited 8 November 2011).

[895] M. Byers – *Abuse of Rights: An Old Principle, A New Age*, in: 47 MCGILL LAW JOURNAL / REVUE DE DROIT DE MCGILL (2002), pp. 389 *et seq.*, at p. 397, available online at <http://lawjournal.mcgill.ca/documents/47.2.Byers.pdf> (last visited 4 November 2011).

31 (1) of the Vienna Convention on the Law of Treaties, which in this respect only codifies the existing customary law,[897] requires the term "everyone" in Art. 2 (1) ECHR to be interpreted not only in the ordinary meaning of the word – which might leave some room for doubts – but also "in good faith"[898] as well as "in the light of [the Convention's] object and its purpose".[899] The purpose of the Convention is the protection of human rights against abuses, which requires a human rights-friendly interpretation of the Convention and therefore a wide interpretation of the personal scope of Article 2 (1) ECHR. Such a general human rights-friendly approach in interpreting the applicability of a norm does also not burden the states too much because it does not limit their ability to place limitations on said rights as far as the Convention allows them to do so. Also, the effective protection of human rights makes it necessary to ensure that the core of human rights is protected in any case and there is no human right more fundamental than the right to life. The scope *ratione personae* of the most fundamental of all human rights certainly is the wrong place for states to claim a more narrow interpretation of the Convention.

As long as the risk of abortion hangs over a human life, as long as the Court remains committed to allowing the states great freedoms in applying the Convention and as long as even a single state party to the Convention has not enacted domestic legislation aimed at protecting the right to life under all circumstances, the way we make use of the European Human Rights system is flawed. The system itself can work and can become a valuable tool for the right to life movement. From a legal or rational perspective, the arguments presented here might provide a first step towards a complete end to all abortions and a fuller protection of every human life.

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[896] 33 UNITED NATIONS TREATY SERIES 993.

[897] *Cf.* in general C. Schrever – *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 7 February 2006, available online at <http://www.univie.ac.at/intlaw/pdf/cspubl_85.pdf> (last visited 4 November 2011).

[898] Art. 31 (1) VCLT.

[899] *Ibid.*

4.3. Conclusions

There are three major arguments against abortion as well as PID and IVF as also the latter two endanger the life of unborn children. The two key arguments, which leads to the applicability of the Art. 2 (1) ECHR to unborn children, are the human nature of the unborn child and his or her continuous development from the moment of conception after which there is no intervening force which would alter the identity of the unborn child. These two arguments are derivative arguments.[900] They are derived from an original argument which is that human life is intrinsically valuable.[901] The latter is nothing else but the idea of the sanctity of all human life. From this inherent value of all human life qua human follow the right to life as well as human dignity.[902] In this way, moral values lead to legal rules. Law is derived from ethics and values. Many of these values are faith-related, including the respect for human life.[903] *Dworkin* might be concerned that mixing legal and moral (or ethical) arguments might be confusing[904] and in a less clear case I would agree with him because recourse to extra-legal arguments can lead to confusion between the *lex lata* and a desired *lex ferenda*. But it also has to be noted that no legal norm can be seen without its ethical background, not the least because at the end of the day it is not the mere wording of a norm or its drafting history but the teleological interpretation of a norm which in many cases will bring us closest to the correct understanding of the law. The purpose of the law can be derived from the ethical and moral values on which it is based. Likewise, the right to life follows from the inherent value of every human life. Therefore, one, the legal argument, follows from the other, the moral ar-

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[900] R. Dworkin – DIE GRENZEN DES LEBENS – ABTREIBUNG, EUTHANASIE UND PERSÖNLICHE FREIHEIT, 1st ed., Rowohlt, Reinbek bei Hamburg (1994), p. 20.

[901] *Ibid.*

[902] On human dignity from a legal as well as a theological perspective, *cf.* P. Bahr / H. M. Heinig (eds.) – MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG – RECHTSWISSENSCHAFTLICHE UND THEOLOGISCHE PERSPEKTIVEN, 1st ed., Mohr Siebeck, Tübingen (2006). For a theological as well as bioethical approach see S. Schardien – *Menschenwürde. Zur Geschichte und theologischen Deutung eines umstrittenen Konzepts*, in: P. Dabrock / L. Klinnert / S. Schardien – MENSCHENWÜRDE UND LEBENSSCHUTZ – HERAUSFORDERUNGEN THEOLOGISCHER BIOETHIK, 1st ed., Gütersloher Verlagshaus, Gütersloh (2004), pp. 57 *et seq.* as well as P. Dabrock – *Bedingungen des Unbedingten. Zum problematischen aber notwendigen Gebrauch der Menschenwürde-Konzeption in der Bioethik*, in: Dabrock / Klinnert / Schardien (this note), pp. 147 *et seq.*

[903] On religious perspectives on the right to life see E. Wicks – THE RIGHT TO LIFE AND CONFLICTING INTERESTS, 1st ed., Oxford University Press, Oxford and other locations (2010), pp. 22 *et seq*.

[904] R. Dworkin – DIE GRENZEN DES LEBENS – ABTREIBUNG, EUTHANASIE UND PERSÖNLICHE FREIHEIT, 1st ed., Rowohlt, Reinbek bei Hamburg (1994), p. 22.

gument. The only real question therefore has to be, whether the moral argument is sound, i.e. whether every human life has an intrinsic value.[905] Although we have answered this question in the positive and have concluded that accordingly the right to life applies to all humans during the entire time of their existence, the protection offered by many domestic laws falls short of an effective protection of the right to life of the unborn child. At the end of the day, though, it has to be kept in mind that the state has to protect these children because their parents fail to do so. Among the main reasons for abortions is the unwillingness of fathers to live up to their responsibility. It has to be kept in mind that first of all, it is the responsibility of the parents to protect their children – both born and unborn. The state and its arsenal of legal tools can only play a secondary rule to this most fundamental responsibility.

This is one reason why it is so important that the core of the ECtHR's judgment in *A, B and C v. Ireland* that there is no right to at-will abortion under the right to private life (Art. 8 ECHR),[906] has to be brought to the attention of the general public.[907] What is necessary is to change the perception that the life of the unborn child is at the disposal of the parents. Changing domestic laws in order to bring them in line with the interpretation of Art. 2 (1) ECHR which has been presented in this thesis will be an important step in this direction.

As if the millions of children who are killed in their mothers' wombs were not enough, the *de facto* if not *de jure* permissibility of abortion in many European states raises far more serious issues which put Europe's civilization standing in doubt: without equality before the law, the law becomes a mere tool in the hands of the powerful and political rule can quickly become arbitrary.[908] Just like the concept of human dignity, the idea of the equality before the law is aimed at ensuring that those in power cannot treat others in any way they wish, thus marking a departure from the dictatorships and absolute monarchies of Europe's past. Art. 14 ECHR demands that

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[905] *Ibid.*

[906] ECtHR – *A, B and C v. Ireland*, Application No. 25579/05, Judgment of 16 December 2010, para 214.

[907] From a religious perspective, it is also an obligation for Christians to stand out of the crowd in spreading the Christian message and following up on the Great Commission, *cf.* A. Kissler – DER JAHRHUNDERTPAPST – SELIGER JOHANNES PAUL II., 1st ed., Pattloch, Munich (2011), p. 12.

[908] *Cf.* also S. Kirste – *Recht als Transformation*, in: W. Brugger / U. Neumann / S. Kirste (eds.) – RECHTSPHILOSOPHIE IM 21. JAHRHUNDERT, 1st ed., Suhrkamp Verlag, Frankfurt am Main (2008), pp. 134 *et seq.*, at p.139.

the rights under the Convention are applied equally. Yet, at the same time, the majority of states which are parties to the Convention, which after all is the vanguard of international human rights protection on a regional scale, seems to have no problem with denying the most basic of all human rights, the right to life, to the weakest and most dependent of all humans, unborn children. If we were to continue down this slippery slope, we will not only soon kill the old, infirm or handicapped who do not contribute to society, neither as workers nor as consumers,[909] and who are unable to defend themselves. A general acceptance of abortion can pave the way to (unwanted) euthanasia and pro-euthanasia advocates use pro-abortion case law to further their claims.[910] Ending abortion can therefore indirectly protect all of us when we become old and frail.

With regard to human rights, the COE has been a trailblazer and the ECHR and the ECtHR have been models for other parts of the world. Europe therefore should continue to lead the way in terms of human rights in the future. The European Court of Human Rights has been criticized before and in 2011 there have even been suggestions that Britain should withdraw from the ECHR[911] but a ruling by the ECtHR to the that Art. 2 (1) ECHR actually does apply to unborn children would in all likelihood trigger unprecedented protests but the work of the Convention organs in the last half century inspires me with confidence that ultimately such political considerations will not prevent the Strasbourg judges from ruling in the manner suggested in this thesis. In implementing the suggestions made in this thesis, Europe can contribute to ending abortion worldwide. This, though, requires the political courage to act up on the findings presented here. If we as a legal community, which in the 20th century has experienced wars and dictatorships on a scale which had been unimaginable at few generations ago and which claims to have learned from the mistakes of the past, do not use the current historic situation of peace and (despite the ongoing economic crisis compared to many other parts of the world continuing) prosperity in Europe to ensure human rights for everybody, we will not be able to respond to the

[909] From an economic perspective, which often informs the creation of legal rules, the population is seen merely as a commercial factor, *cf.* A. Whitcomb – COMPREHENSIVE BUSINESS STUDIES, 5th ed., Longman, Harlow (1999), 7th impression (2009), p. 372.

[910] John B. Mitchell – *My Father, John Locke, and Assisted Suicide: The Real Constitutional Right*, in: 3 INDIANA HEALTH LAW REVIEW (2006), pp. 45 *et seq*., at p. 54.

[911] *Cf.* M. O'Boyle – *The Future of the European Court of Human Rights*, in: 12 GERMAN LAW JOURNAL (2011), pp. 1862 *et seq*., at p. 1863.

challenges of the future because we will have cut off our society not only from its moral and ethical roots but also from the most fundamental law which follows from nature itself: whether consciously or unconsciously, every living being wants[912] to be alive. A plant will grow towards the sunlight, a predator will kill its prey and the prey will run faster to try to escape. We are meant to be alive and to continue the creation by procreating. The "elementary fact of the will to life"[913] requires societies employ legal rules, if necessary supported by the means and force available to the –society in question, the protect life as far as possible. The protection of life itself is the highest purpose of the law. Biolaw is therefore not just the law referring to Life Sciences but the core of its purpose is the protection of life as such and it is appropriate to refer to concepts of Natural Law when dealing with the right to life because at the end of the day the unborn child is, in the truest sense of the term *nascitura* or *nasciturus*: the one who is to be born. In other words: the one who is to live the fullness of his or her life.

The uncertainty, which exists even among bioethicists[914] and biolawyers, about life in the womb might have been resolved thanks to scientific progress but this is not yet fully reflected in the way we talk about the unborn child and the uncertainty in language is reflected even in the parlance of lawyers.[915] This continued usage of the language of things rather than the language of humans is a remnant of the now bygone times of uncertainty about conception and pre-natal life. It also reflects the uncertainty which still exists – despite scientific knowledge on life before birth – the unseen life in the womb.

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[912] The term "want" is obviously used in a rather loose way, in order to include no-sentient beings – but see also T. Latty / M. Beekman – *Irrational decision-making in an amoeboid organism: transitivity and context-dependent preferences*, in: 278 PROCEEDINGS OF THE ROYAL SOCIETY B (2010), no. 1703, pp. 307 *et seq.*, available online at <http://rspb.royalsocietypublishing.org/content/278/1703/307.full.pdf+html> (last visited 11 November 2011).

[913] A. Kulenkampff – *Zu einigen Grenzfragen der Begründung von Rechtsnormen*, in: K. Lüderssen / F. Sack (eds.) – VOM NUTZEN UND NACHTEIL DER SOZIALWISSENSCHAFTEN FÜR DAS STRAFRECHT – ZWEITER TEILBAND, 1st ed., Suhrkamp Verlag, Frankfurt am Main (1980), pp. 386 *et seq.*, at p. 387.

[914] See *e.g.* J. D. Rendtorff – *Towards a European Biolaw*, in: 7 STUDIES IN ETHICS AND LAW (June 1998), pp. 60 *et seq.*, at p. 68.

[915] Take *e.g.* J. Schweppe – *Mothers, Fathers, Children and the Unborn – Abortion and the Twenty-Fifth Amendment to the Constitutional Bill*, in: 9 IRISH STUDENT LAW REVIEW (2001), pp. 136 *et seq.*, who first differentiates between "children and the Unborn" (*ibid.*, at p. 136), only to correctly refer to the pregnant woman as "the mother" (*ibid.*, at p. 142), which Schweppe could not do, would she not believe the unborn child to be a child rather than a mere thing because one cannot be the mother of a thing.

The way we phrase problems already influences the way we think about problems. Even pro-life activists sometimes speak of the unborn child as 'it' rather than as 'him' or 'her', an error I hope to have avoided here (if not, it is in no way intended to indicate that I would consider the unborn child a thing rather than a human being, which I would assume becomes also evident in the context of this thesis anyway, although the way we use language in the right to life debate deserves more attention than it commonly receives today). Even scholars who are in favor of a right to life of the unborn child refer to it, e.g. in German, as '*keimendes Leben*', literally 'germinating life', which could also be translated as 'emerging life',[916] that is as some kind of human life which is not yet life but in the process of becoming life, or at least some kind of incomplete human.[917] Given that we all develop physically from the moment of conception to the time of our death, both views are mistaken and terms like this one should be avoided in order to prevent confusion on the part of the readers – after all, language leads to implied assumptions and "[t]oday's implicit assumptions dive tomorrow's decisions on the same or similar topics and the law rapidly reaches issues which, only a few years before, would have been unthinkable for judicial resolution".[918]

The personal scope of Art. 2 (1) ECHR includes not only born but also unborn humans. While this view is not yet shared by many, it is supported by the existing law. The interpretation of Art. 2 (1) ECHR which has been presented in this thesis will also prepare Europe for future challenges as to the question of who is a human. Advocating this pro-life position for religious reasons is legitimate even in multi-religious society as is constituted by the totality of the states which are parties to the ECHR. The European Court of Human Rights should change its jurisprudence and no longer grant states a margin of appreciation in this respect in order to ensure that the domestic laws of the states which have ratified the Convention reflects the fact that under Art. 2 (1) ECHR, also the unborn child has a right to life.

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[916] The term "*keimendes Leben*" is also employed by the German Federal Consitutional Court, *e.g.* in Bundesverfassungsgericht – *Kind als Schaden*, Joined Cases nos. 1 BvR 479/92 and 1 BvR 307/94, Decision of 12 November 1997, para. 10.

[917] *Cf.* also O. Hohmann – *Darf ein Staat töten? Überlegungen anläßlich der Aktualität der Todesstrafe*, in: 22 JURA – JURISTISCHE AUSBILDUNG (2000), pp. 285 *et seq.*, at p. 292.

[918] R. A. Destro – *Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, in: 2 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY (1996), pp. 71 *et seq.*, at p. 72.

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