Developments

The Personal Scope of the Right to Life Under Article 2(1) of the European Convention on Human Rights After the Judgment in *A, B and C v. Ireland*

By Stefan Kirchner[*]

A. Introduction

The right to private life under Article 8 of the European Convention on Human Rights (the Convention, or ECHR)[1] is one of the widest rights in European human rights law. Applicants often rely on the norm when they seek to justify all kinds of behavior, which may be limited or even outlawed through domestic law. Therefore, it comes as no surprise that in the case of *A, B and C v. Ireland*,[2] which was decided by the European Court of Human Rights in December 2010, the applicants relied on Article 8[3] to complain about the restrictive anti-abortion law in the Republic of Ireland.[4] Contrary to predictions that *A, B and C v. Ireland* could become "*Europe's Roe v. Wade*,"[5] referring to the U.S. case which led to the permissibility of abortion under U.S. law,[6] the European Court of Human Rights (the Court) held that Article 8 did not include a right to have an abortion.[7]

This Article will show that this decision did not come out of the blue and that it has the potential to have far wider implications than a cursory reading of the judgment might reveal.

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5.

[2] A, B and C v. Ireland, 2010 Eur. Ct. H.R. 1.

[3] *Id.* at 47.

[4] For the legal situation in Ireland, see *A, B and C,* 2010 Eur. Ct. H.R. at 6–15.

[5] Shannon Calt, *A., B. & C. v. Ireland: 'Europe's Roe v. Wade'?*, 14 LEWIS & CLARK L. REV. 1189 (2010).

[6] Roe v. Wade, 410 U.S. 113 (1973).

[7] A, B and C v. Ireland, *supra* note 2 at 61.

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B. The Rationale Behind the Limitation of the Right to Private Life

In order to evaluate the Court's judgment, three paragraphs are particularly relevant:

> 212. The Court recalls that the notion of 'private life' within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to personal autonomy and personal development . . . . It concerns subjects such as gender identification, sexual orientation and sexual life . . . a person's physical and psychological integrity . . . as well as decisions both to have and not to have a child or to become genetic parents . . . .
>
> 213. 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 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 . . . .
>
> 214. While Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8. The difference in the substantive complaints of the first and second applicants, on the one hand, and that of the third applicant on the other, requires separate determination of the question whether there has been a breach of Article 8 of the Convention.[8]

[8] *Id.* at 60–61.

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C. Balancing Rights in *A, B and C v. Ireland*

What remains unclear—not least because the European Court of Human Rights is not always as dogmatically clear in its decisions as it could be—is whether the balancing undertaken by Strasbourg is part of the determination of the scope of the right in question or whether it is a problem of justification.

The idea voiced in *X v. United Kingdom*, that there might be "implied limitation[s]"[9] which already limit the scope of the norm, has to be clarified to the effect that it refers to the question whether the Convention as such can imply limitations to rights protected therein. In the case of *A, B and C v. Ireland*, the mother's right under Article 8 has to be seen in light of the rights of others, which are also protected by the Convention.[10] The unspoken rationale behind the limitation in paragraph 213 of the *A, B and C v. Ireland* judgment is that the Court treats the life of the unborn child as a limiting factor of the mother's right to private life, at first sight not unlike a *verfassungsimmanente Schranke* in the German human rights system under the *Grundgesetz*.[11] In *A, B and C v. Ireland* the Court excluded abortion from the scope of Article 8, even though the Court gives the impression that it balances rights or interests which, although unnamed, are assumed to be defined.[12] Therefore, the balancing is a matter of the scope of the norm in question rather than a question of justifying an infringement upon a right. This view is supported by the absence of justifications inherent in Article 2, which could logically apply to unborn children. In this respect, the use of the term "balancing" is somewhat unfortunate from a dogmatic perspective. In particular, does the Court state in paragraph 213 of the 2010 judgment[13] that the rights of the mother and of the unborn child have to be balanced against each other? If this balancing leads to the result that one person's right is more important than the right of another person, that right would have to take precedent. However, this is not how the Court understands the notion of balancing. Rather, the Court jumps directly to the—materially correct—conclusion that abortion is not included in the scope of Article 8. This does not mean that the Court would not accept intra-conventional limitations. The Court has long been balancing conflicting rights or interests,[14] after all the convention right of one person often has to be balanced against rights of another person. Rather than actually balancing the rights of the mother against the rights (and interests) of the child,

[9] X v. United Kingdom, 19 Eur. Ct. H.R. at 244 (1981).

[10] A, B and C v. Ireland, *supra* note 2 at 61.

[11] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], MAY 23, 1949, BGBL. I (GER.).

[12] A, B and C v. Ireland, *supra* note 2 at 61.

[13] *Id*.

[14] Odièvre v. France, 2003-III Eur. Ct. H.R. 1 .

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the Court interprets the rights of the mother in light of the rights of the child.[15] The latter indeed have to be rights and not only interests (as the Court has stated),[16] because the rights of mother cannot be limited by recourse to mere interests. By interpreting the scope of the mother's right under Article 2 in light of the (undefined) rights of the unborn child, *A, B and C v. Ireland* is a logical consequence of *Brüggemann and Scheuten v. Germany*,[17] in which it had been found that "pregnancy cannot be said to pertain uniquely to the sphere of private life".[18] The next question, therefore, has to be the one hinted at but not answered by the Court, i.e., the question whether the unborn child has a right to life. As appears from the judgment in *A, B and C v. Ireland*, this seems to be the case—after all, the right of the child has been found to be limiting the rights of the mother under Article 8.[19]

D. The Personal Scope of Article 2(1) of the ECHR

The key question that the balancing, required in *Boso v. Italy*,[20] will have to answer is whether the unborn child has only interests or also rights within the meaning of the Convention. In *A, B and C v. Ireland*, the Court ignored this differentiation and appears to have been purposely vague in paragraph 213. This ambiguity is important in itself because prior to *A, B and C v. Ireland* scholars were only rarely open to the possibility that the unborn child might have rights under the Convention.[21] A few times, the argument in favor of the right to life of the unborn child was made in dissenting opinions.[22] It could be argued that a distinction needs to be made between rights and "freedoms,"[23] and that the Court would only take into account interests and freedoms, but not human rights which are not freedoms, e.g., those rights included in Article 2 or 14 of the ECHR). At first glance, the official title of the ECHR, the Convention for the Protection of Human Rights and Fundamental Freedoms, might allow for such a differentiation between rights and freedoms, if one assumes (e.g., based on the German term *Freiheitsgrundrechte* as a subset of the term *Grundrechte*) that the term freedoms is more narrow than the term

[15] A, B and C v. Ireland, *supra* note 2 at 61.

[16] *Id.*

[17] Brüggemann and Scheuten v. Germany, App. No. 6569/75, 3 Eur. H.R. Rep. 244 (1977).

[18] *Id.* at 116.

[19] A, B and C v. Ireland, *supra* note 2 at 61.

[20] Boso v. Italy, 2002-VII Eur. Ct. H.R. 451.

[21] CHRISTOPH GRABENWARTER, EUROPÄISCHE MENSCHENRECHTSKONVENTION 132 (2d ed. 2008).

[22] Vo v. France, 2004-VIII Eur. Ct. H.R. at 54.

[23] A, B and C v. Ireland, *supra* note 2 at 61.

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rights, the latter including equal treatment rights. Apart from the fact that Article 14 ECHR, which only refers to the discriminatory application of Convention norms, does not allow such a transfer of all considerations which are valid in the context of the *Grundgesetz* to the ECHR, any balancing on the part of the Court, though, would be incomplete, and therefore erroneous, should the Court fail to take all potentially conflicting rights under the Convention and all protocols applicable to it into account when engaging in the balancing described in paragraph 213 of the judgment in *A, B and C v. Ireland*.

Because the Court will have to take all potential rights into account, it will have to answer, if only implicitly, whether Article 2(1) of the Convention extends *ratione personae* also to unborn children. As evidenced by the fact that this issue has been widely avoided,[24] the question does not have easy answers.

I. Wording

The problem begins with the fact that while both the French and English versions of the Convention are "equally authentic,"[25] the French version of Art. 2(1) ECHR refers to "*toute personne*" ("every person"), whereas the English version refers to "everyone." While Article 31 of the Vienna Convention on the Law of Treaties[26] and the corresponding rule of customary international law[27] require recourse to the ordinary meanings of terms, this basic rule for the interpretation of legal norms does not lead to an obvious answer.

II. Precedents

The institutions in Strasbourg appear to have been open to the idea that the child could be protected[28] under Article 2, and at least did not exclude this possibility.[29] In *X v. United*

[24] Tanya Goldman, Vo v. France *and Fetal Rights: The Decision Not to Decide*, 18 HARV. HUM. RTS. J. 277, 277, 279 (2005); Jakob 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, 7 GERMAN L.J. 433, 444 (2006); The issue had been avoided by the Strasbourg organs as early as in *Brüggemann and Scheuten v. Germany*, App. No. 6569/75, 3 Eur. H.R. Rep. 244, para. 60 (1977).

[25] European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

[26] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[27] Not all states that are a party to the ECHR are also parties to the VCLT. For those states, the rule of customary international law requiring that interpretation of treaties takes into account the ordinary meaning of the terminology used in the treaty applies. *See* Stefan Kirchner, *Medical and Biotechnological Challenges to Human Rights: The Personal Scope of Article 2 Section 1 Sentence 1 of the European Convention on Human Rights* 139 (unpublished manuscript) (on file with author).

[28] H. v. Norway, 73 Eur. Comm'n H.R. Dec. & Rep. 155 (1992).

[29] X v. United Kingdom, 19 Eur. Ct. H.R. at 244 (1981).

Kingdom[30] the Commission assumed an "implied limitation"[31] of the scope of the right to life of the unborn child, and the Commission assumed that if there was 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."[32] In *A, B and C v. Ireland*, on the other hand, other interests, which were only covered by the right to private life, were thought not to provide a sufficient justification for having an 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 shied away from explicitly applying Art. 2 ECHR to unborn children.[33]

This change is certainly not sudden, but it 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,"[34] which refers back to the paragraph before where the Court had cited its earlier judgments in *Vo v. France*[35] and *Tysiąc v. Poland*.[36] After the German Federal Constitutional Court had decided that mere necessity was an insufficient reason for allowing an abortion,[37] in *Brüggemann and Scheuten v. Germany* the Commission determined that there is no unlimited right to abortion.[38] Pregnancy is a highly intimate matter,[39] but the embryo is not merely a part of the pregnant woman's body.[40] The phrase that "[w]henever a woman is pregnant her private life becomes closely

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Kirchner, *supra* note 28, at 70.

[34] *Id.*

[35] Vo v. France, 2004-VIII Eur. Ct. H.R. at 54.

[36] Tysiąc v. Poland, 2007-I Eur. Ct. H.R. 1.

[37] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case Nos. 1 BvF 1, 2, 3, 4, 5, 6/74, Feb. 25, 1975, 39 BVERFGE 1 (Ger.).

[38] Brüggemann and Scheuten v. Germany, App. No. 6569/75, 3 Eur. H.R. Rep. 244 (1977).

[39] *See* BRUNO SCHMIDT-BLEIBTREU & FRANZ KLEIN, KOMMENTAR ZUM GRUNDGESETZ 142 (1999).

[40] *Id.*

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connected with the developing foetus,"[41] which the Court now repeated in *A, B and C v. Ireland*,[42] is found also in *Brüggemann*.[43] However, it is the context in which the phrase stands in *Brüggemann* which is decisive. Even in 1977, the Commission indicated that the Convention would not allow for a right to abortion under Article 8(1).[44] The cited phrase immediately follows the aforementioned conclusion by the Commission that "pregnancy cannot be said to pertain uniquely to the sphere of private life,"[45] which can be found almost verbatim in *A, B and C v. Ireland*.[46] The Commission (and also the Court, which repeated the emphasis on the connection between mother and child in *Boso*)[47] is therefore to be understood as interpreting Article 8(1) to the effect that pregnancy (and hence abortion) is not covered by the protective scope, or *Schutzbereich*, of Article 8(1), 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 Article 8(1), they logically have to assume that the child is an individual being with its own life.[48]

III. The Protection of Unborn Humans in the European Context

1. The Convention on Human Rights and Biomedicine

Article 2 of the Convention on Human Rights and Biomedicine[49] "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."[50] The reference to human beings in Article 2 of that Convention allows for an application *ante natum*.[51]

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[41] *Brüggemann and Scheuten*, at para. 59.

[42] A, B and C v. Ireland, *supra* note 2 at 61.

[43] *Brüggemann and Scheuten*, at para. 59.

[44] *Id.*

[45] *Id.*

[46] A, B and C v. Ireland, *supra* note 2 at 61.

[47] Boso v. Italy, 2002-VII Eur. Ct. H.R. 451, para. 2.

[48] Kirchner, *supra* note 28, at 65.

[49] Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Apr. 4, 1997, CETS No. 164. *See also* Eibe Riedel, *Global Responsibilities and Bioethics: Reflections on the Council of Europe's Bioethics Convention*, 5 IND. J. GLOBAL LEGAL STUD. 179 (1997).

[50] Vo v. France, 2004-VIII Eur. Ct. H.R. at 9, 54–58.

[51] *See id.*

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> [While] 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.[52]

2. The EU Charter of Fundamental Rights

Since early last year, the European Court of Human Rights and the European Court of Justice (ECJ) have agreed that the rights in the Convention and those in the EU Charter of Fundamental Rights[53] are to be understood in the same sense.[54] This position, which can also be found in Article 52(3) of the EU Charter and Article 6(2)1 of the EU Treaty,[55] calls for the EU's ratification[56] of the ECHR.[57] Because Article 3(2) of the Charter of Fundamental Rights of the European Union protects the unborn child,[58] the new parallel interpretation indicates that the Court's interpretation of Article 2(1) might have to move towards the ECJ's interpretation of Article 3(2) of the Charter. Such a move is more likely than the ECJ abandoning its understanding, because the wording of Article 3(2) of the EU Charter is rather explicit, and the ECJ cannot interpret Article 3(2) of the EU Charter more narrowly

[52] *Id.*

[53] Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1 [hereinafter EU Charter].

[54] Joint communication from Presidents Costas and Skouris (Jan.17, 2011), *available at* http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf (last visited Apr. 29, 2012).

[55] 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 Michael O'Boyle, *The Future of the European Court of Human Rights*, 12 GERMAN L.J. 1862, 1862–66, 1875–76 (2011).

[56] On the EU's potential accession to the Convention see Noreen 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*, 12 GERMAN L.J. 1813 (2011).

[57] On the emerging conflict of laws rules between the ECHR and EU law see Heiko Sauer, *Bausteine eines Grundrechtskollisionsrechts für das europäische Mehrebenensystem*, 38 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 195, 197 (2011).

[58] Vo v. France, 2004-VIII Eur. Ct. H.R. at 50-53. *See also* Dirk Ehlers, *Die Grundrechte des europäischen Gemeinschaftsrechts*, 24 JURA – JURISTISCHE AUSBILDUNG 468, 472 (2002).

than the wording implies. If Article 3(2) of the EU Charter were to apply only to born humans, there would have been no need for the phrase "human beings" in Article 3(2) of the EU Charter. While the use of the phrase in older human rights documents might sometimes have been used to include both men and women,[59] the use of the same phrase in a modern human rights document has to be seen in a different light. After all, the EU Charter dates from a time when the equality of both genders before the law has not only become evident but even a basic rule of EU law. Therefore, the term "human beings" in Article 3(2) of the EU Charter refers to unborn children as well as born humans. Consequently, the future interpretation of Article 2(1) will have to reflect this reality as well. Otherwise, the agreed upon parallel interpretation of the Charter and the Convention will become meaningless, and the ECJ and the Court will have to fight over the privilege of interpretation.

E. Conclusions and Outlook

The unborn child has a right to life under Article 2. This right has to be weighed against the rights of the mother.[60] Because Article 14 prohibits discrimination in the application of the Convention, this will lead to serious restrictions of measures which threaten the life of the unborn child. Abortion at-will—the destruction of "surplus" embryos in the context of in vitro-fertilization and similarly lethal measures—is incompatible with the Convention. The fact that many states might have to change their domestic laws to ensure compliance with the Convention is also only the next step in an already existing development. After all, why would there be abortion legislation on the domestic level if states would not assume that the unborn child has a right to life?[61]

The jump from the last sentence of paragraph 213 to the first sentence of paragraph 214 can be explained. The balancing between the rights of the mother and the child, which is not reflected in the judgment, does indeed happen. The court implicitly assumes that the unborn child has a right to life and this right is more important than the mother's right to privacy under Article 8. The logical consequence is that Article 8 can *never* include a right to have an abortion because the unborn child's right to life is always more important. At the end of paragraph 213 the court appears to be about to balance rights, hence it is on the justification level, but in the next sentence it takes a step back, even jumps back, to the issue of the scope of Article 8. Though the result the court reaches is correct, the presentation makes the result appear dogmatically unsound. However, the Court's reasoning is coherent. What is missing is the explanation between the last sentence of

[59] *See* Declaration on the Elimination of Violence against Women, G.A. Res. 48/014, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

[60] *Vo,* 2004-VIII Eur. Ct. H.R. at 9, 48.

[61] *Id.* at 51. *See also* Goldman, *supra* note 25, at 280.

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paragraph 213 and the first sentence of paragraph 214, to the effect that the unborn child does have a right to life under Article 2. The Court must have made this implicit assumption, otherwise it could not have come to the conclusion it drew in paragraph 214.

In *A, B and C v. Ireland* the Court was not asked to explicitly rule on the question whether the unborn child has a right to life, but the judges implicitly answered this question in the affirmative by allowing rights of the unborn child to influence their interpretation of the scope of the mother's right under Article 8. In so far, *A, B and C v. Ireland* includes a deviation from *Evans v. United Kingdom*[62] and reaffirms the course which was already laid out in *Brüggemann and Scheuten v. Germany,*[63] and hinted at in *X v. United Kingdom,*[64] as well as in *Vo v. France*.[65] Far from engaging in judicial activism, the Strasbourg Court has hinted at an aspect which has always been inherent in Article 2(1). Determining why the judges declined to spell out their apparent logic is less relevant than the literal reasoning of *A, B and C v. Ireland*. The logic could—and should—have been more explicit, but strictly speaking, it did not have to be so, because the implied assumption remains the same. It is now up to the States which have ratified the Convention to implement this understanding of the personal scope of the right to life on the domestic level.

[62] *See* Evans v. United Kingdom, 2007-I Eur. Ct. H.R. at para.71; *see also* Mary Ford, Evans v United Kingdom*: What Implications for the Jurisprudence of Pregnancy?*, 8 HUM. RTS. L. REV. 171 (2008).

[63] Brüggemann and Scheuten v. Germany, App. No. 6569/75, 3 Eur. H.R. Rep. 244, para. 59 (1977).

[64] X v. United Kingdom, 19 Eur. Ct. H.R. at 244, 253 (1981).

[65] Vo v. France, 2004-VIII Eur. Ct. H.R. at 33.

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