

# Foetal Personhood in the Jurisprudence of Abortion in International and Comparative Law<sup>\*</sup>

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## Abstract

*One of the most disputed issues concerning the foetus particularly vis-à-vis the law on abortion is its personhood. While there is unanimity among scholars on the need to be definitive on what foetal personhood is, there abound diametrically opposing arguments about its legal status. It is imperative to resolve this conundrum because of the effect of the findings thereon on abortion debates. This is because if the foetus is regarded as a legal person abortion would be homicide, except in self-defence. If otherwise, the procedure may be legal, even on request. Thus, determining the status of the foetus is the starting-point for resolving most of the issues on the jurisprudence of abortion. It is against this backdrop that this article examines the laws of selected countries and international and regional instruments on the status of the foetus in comparison with women's right to abortion. The article attempts to resolve the misgivings arising from the ascription to the foetus of certain pre-birth rights even while the foetus - the supposed bearer of those rights - is not yet born and in spite of the retention of the born-alive-rule in most legal systems. The article concludes that though the foetus is considered precious - even from conception - there is no basis for supposing that the foetus in-utero have inherent legal personality a fortiori the right to life as to reject women's right to abortion unless such provision is otherwise unequivocally imputed into the law of a country.*

**Keywords:** Abortion, foetal rights, international law, personhood, women's rights

## Introduction

There has been a serious controversy among scholars on the concept of foetal personhood in relation to the conundrum over women's rights to abortion. Resolving the controversy is inevitably the foundation for solving this foetus-related legal issue in abortion debate. It is in the light of this, and the renewed

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claim of foetal right to life that this article focuses on how the law approaches the question of foetal personhood vis-à-vis abortion.

The article is divided into four main sections. After this introduction, the first main section of the article entitled “theoretical discourse on foetal personhood” reviews the theoretical perspectives on the status of the foetus. In this section the author argues that fetuses are inchoate and not distinctive beings. The second section assesses the significance of the born-alive rule. In that section the author attempts to resolve the recondite arising from certain pre-birth rights that are usually accorded the foetus in spite of the retention of the rule in most legal systems. In the third section styled “overview of national legal systems on the status of the foetus” the author examines the legal systems of some selected jurisdictions on the status of the foetus. This provides informed explanations on the provisions of some national laws and how their domestic courts have construed foetal personhood in diverse situations. Importantly, the author provides statutory and judicial authorities for the supposition that domestic laws do not bestow personhood on the foetus in a way that reject women’s rights to safe abortion. The fourth section designated “foetal’s personhood in international law” brings to fore the developing jurisprudence in international and regional human rights laws on the status of the foetus. Then the author draws conclusions from the study.

## **1. Theoretical discourses on foetal personhood**

This section of the article focuses on the theoretical perspectives to the discourse on what it takes to be regarded as a person. While discussing this, some emphasis is placed on the well-known ‘born-alive’ rule. However, issues regarding foetal personhood, particularly in the context of abortion, inescapably start from addressing another important question: whether fetuses are human beings. This is a question to which if answer thereto is in the negative would render follow-on discussions on personhood pointless. However, there exists a great deal of divergent views on foetal human-hood between the least ceiling of conception and a much higher ceiling of viability.

Genetics makes it known that human-foetus is, from conception possessed of all human cryptograms. John Noonan — a foremost proponent of this position asserted that the claim that it is at conception that the foetus becomes a man is premised on the fact that it is at that moment that “the new being receives [all

human] genetic code”<sup>1</sup> which make it a human being. So its later growth following conception is not developing to a human that it never was but becoming more human that it has always been.<sup>2</sup> Thus it is only plausible, and indeed unmistakable, to hold that the outcome of human copulation — the human foetus could be nothing else but a human-being.<sup>3</sup>

It is also from conception that the probability that semen could continue to develop to baby which was less than one out of well over a hundred million, changed to about eight out of every ten.<sup>4</sup> And it is from conception that the foetus may start to go through an unbroken sequence of developments ranging from make-up, shape and traits<sup>5</sup> with no significant transformation in its feature or traits. Hence, except perhaps for attitudinal explanations there is too little, if any, logically justifiable classification differentiating human foetus from human-beings.

However, more serious difference of opinions persists on foetal personhood. But most scholarly writers agree, more or less with the six psychological standards of personhood, namely, rationality; consciousness; ability to be regarded as person by other persons; capacity to act in response to stimuli; ability to communicate verbally and self-awareness as articulated by Daniel Dennett.<sup>6</sup> The Dennett’s criteria have indeed been applauded by some writers as indispensable

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1. John T. Noonan, An Almost Absolute Value in History, in Ronald Munson, (ed.), *Intervention and Reflection: Basic Issues in Medical Ethics*, Fifth Edition, Wadsworth, Belmont, (1996), pp. 66-69, [hereinafter Ronald, *Intervention and Reflection: Basic Issues in Medical Ethics*].
  2. *Id.*, Robert P. George, Public Reason and Political Conflict: Abortion and Homosexuality, *Yale Law Journal*, vol.106, (1997), p. 2493; Teresa Iglesias, In Vitro Fertilization: The Major Issues, *Journal of Medical Ethics*, vol.10, No.1, (1984) pp.32-37. Cf. Jed Rubenfeld, On the Legal Status of the Proposition That ‘Life Begins at Conception, *Stanford Law Review*, (1991), vol. 43, (1991) p. 625 stating that the contention that it is at conception that the foetus becomes a man is ‘virtually unintelligible’, and noting to the contrary that the foetus only grows to become a man.
  3. As the French geneticist Jerome Lejeune asserted, the fact that after conception “a new human has come into being” is now evident: cited in Norman L. Geisler, *Christian Ethics: Options and Issues*, 2nd edition, Baker Academic, Michigan, (2010), p.49, [hereinafter Norman, *Christian Ethics: Options and Issues*].
  4. Ronald, *Intervention and Reflection: Basic Issues in Medical Ethics*, *supra* note 1; see also George, *supra* note 2.
  5. Machteld Nijsten, *Abortion and Constitutional Law: A Comparative European-American Study*, European University Institute, Florence (1990), p. 59-60.
  6. Daniel C. Dennett, *Brainstorms: Philosophical Essays on Mind and Psychology*, Penguin, (1997), pp. 264-271. Cf. Christian Perring, Degrees of Personhood, *The Journal of Medicine & Philosophy*, vol. 22, No. 2 (1997) pp. 173-197.

attributes of persons<sup>7</sup> for though the specifics of the standard are arguable they offer strong basis for examining the concept of foetal personhood.

However, apart from the third condition stated above, namely, ability to be regarded as a person by other persons, none of the other criteria is met by the foetus. The foetus is not a rational being for lacking in ability to deal with or reflect on multifaceted concepts, and for not having the capacity to choose to work towards achieving any aspiration. For its defaulting in rationality the foetus would likewise be lacking in interest to continue living. Accordingly, abortion cannot generally be said to be detrimental to it. Consciousness requires that a “person” should be cognisant of his deeds and aspirations: the foetus obviously lacks capacity to do either of this. The foetus is also not mentally able to reciprocate others’ act or omission to act with respect to it. The foetus also lacks the ability for verbal communication thus undoubtedly falling short of meeting at least five of the six criteria.

It has been argued, disagreeing with the Dennett’s standards, that there are no stages in gestation that the foetus was not a potential person.<sup>8</sup> It has also been stated that all “persona nature” needed as a “person” are acquired at conception.<sup>9</sup> These submissions may be valid, if at all, only in three situations, namely: when not made in the context of abortion; when the harm to the foetus is with respect to weakening of the foetus ability after birth; and thirdly as to be averse to abortion at will. It should be added that, although abortion at will is antithetical to life, it is not akin to murder. In addition, though the fact that the foetus is possessed of human genetic cryptogram may be a basis to confer on it some measure of protection; this cannot match a woman’s right to self-determination. Accordingly, a woman’s claim to a safe abortion ought not to be contingent on the foetus’ lack of legal personality, but enforceable as a matter of course. This is because a woman is, for all intents and purposes more important than the foetus who at best is only a potential person. Thus, notwithstanding the foetus’ supposed potential personhood, the woman ought to be entitled to abort an

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7. Jens David Ohlin, Is the Concept of Person Necessary for Human Rights? *Columbia Law Review*, vol.105, No.1, (2005) pp. 209-249. Bonnie Steinbock, *Life Before Birth: The Moral and Legal Status of Embryo and Fetuses*, Oxford University Press, (1992), p. 42.

8. Iglesias, In Vitro Fertilization: The Major Issues, *supra* note 2, at 32; Bernard N. Nathanson & Richard N. Ostling, *Aborting America*, Doubleday & Company Inc., New York, (1979), p. 216; Robert P. George & Christopher Tollefsen, *Embryo: A Defense of Human Life*, Doubleday, New York (2008) p. 58.

9. Francis J. Beckwith, Explanatory Power of the Substance View of Persons, *Christian Bioethics*, 2004, vol.10, pp. 33-54; Francis J Beckwith, *Defending Life: A Moral and Legal Case against Abortion Choice*, Cambridge University Press, (2007), p. 67.

incursion — unwelcome pregnancy. This, as might be expected, is in line with some countries' laws on abortion.<sup>10</sup>

However, to the extent that Dennett's criteria rules out not only the foetus but even infants, of legal personality on the basis of psychological conditions, it is not without flaw. Otherwise, it would, unimaginably, follow that new-borns can only be regarded as potential persons. Dennett's application of his criteria to infants is stretching his thoughts too far, for it is trite law that a foetus that has been completely detached from the mother, in a living state, is a person. Hence, it is submitted that it is preferable that the application of the criteria be restricted to the foetus.<sup>11</sup> Notwithstanding the supposed shortcoming however, Dennett's conditions have been acclaimed by commentators as important for personhood.<sup>12</sup>

Another perspective to foetal personhood is what has become known as the social recognition standard. This requires that to be recognised as a 'person' the foetus must have been socially recognised as such. Quickening by the foetus and applauding of same by the woman thereby making others to follow suit could be an indication that the foetus is socially recognised as a person. Social recognition standard has been enhanced by medical equipment such as the three-D technology and ultrasounds which make it possible for pregnant-women and medical doctors to, by the fifth month, know the gender of the foetus. So, it is now possible for the foetus to assume the pronoun "he" or "she" instead of "it". Some parents in fact christen their foetus as soon as they ascertained its sexual category. Such practice of naming the foetus has been said to be an indication of personhood.<sup>13</sup> Technology has also made it possible for doctors to distinguish

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10. See the Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation no. 414/2004 (hereinafter the Criminal Code or the Code): Article 551, sub-article 1(a); and the Choice on Termination of Pregnancy Act, No.92 of 1996 of South Africa: §2 (d); (discussed in material detail post) allow abortion in case of rape resulting in pregnancy.

11. Elias N. Stebek, *Ethiopian Law of Persons: Notes and Materials*, Justice & Legal System Research Institute (2007) p.12-3; Henneretha Kruger, *et al.*, *The Law of Persons in South Africa*, Oxford University Press, Southern Africa, (2010), pp. 22, 25; Jacqueline Heaton, *The South African Law of Persons*, 3rd edition, Butterworth, Durban (2008), pp.7-8; Ngaire Naffine, Who Are Laws Persons? From Cheshire Cats to Responsible Subjects, *The Modern Law Review*, vol. 66 No. 3, (2003) p. 346.

12. Jens David Ohlin, Is the Concept of Person Necessary for Human Rights? *supra* note 7; Steinbock, *Life Before Birth: The Moral and Legal Status of Embryo and Fetuses*, *supra* note 7; see also Loren E. Lomasky, *Persons, Rights and the Moral Community*, Oxford University Press, (1987), p.197.

13. Arnold Van Gennep, *The Rite of Passage*, Monika B. Vizedom & Gabrielle L. Caffee (trs.), Routledge, (2010), p. 62.

the foetus as a different entity from the pregnant-mother bearing them thus further enhancing social perception of the foetus.<sup>14</sup>

Accordingly, it has been asserted that what signals foetal personhood is its recognition by the mother and others.<sup>15</sup> A human-being is said to be transformed into a “person” not necessarily by the sum of his genetic materials or age-related capacity, but his being socially recognised. In other words, the foetus becomes a “person” when it is recognised as such by the mother by her decision to bring its gestation to term, thereby making other members of the public to also recognise it as a person.

Conversely, if the woman chooses abortion, then she must have decided also not to recognise the foetus as a person in a social context.<sup>16</sup> If the State purports to confer personhood on the foetus whilst the pregnant-mother chooses otherwise, it follows that the State rejects the mother’s bodily integrity and privacy.<sup>17</sup> However, while progress in medical technology supports social recognition child birth remains the most important landmark.<sup>18</sup> This is because prior to birth the foetus mainly lives in obscurity, and is rarely identified as an independent being. Its birth is its evolution from obscurity to reckoning. In view of this, it is imperative to now turn the discourse to assessing the significance of the famous “born-alive” rule to the question of foetal personhood.

## 2. The significance of the “born-alive” rule

Under the (originally, common law) born-alive-rule, a person may not be liable for killing or harming the foetus in the womb until it is born, and born alive. In other words, to be regarded as a person one must have been wholly detached from its mother and afterwards lived and autonomously functioned.<sup>19</sup> It is

14. Nicole Isaacson, The ‘Fetus-Infant’: Changing Classifications of In Utero Development in Medical Tests, *Sociological Forum*, (1996), vol.11, p. 460; Robert H. Blank, *Mother and Fetus: Changing Notion of Maternal Responsibility*, Greenwood Press, New York, (1992), p. 105.

15. Marjorie R. Maguire, Symbiosis, Biology and Personalization, in Edd Doerr & J.W. Prescott, (eds.), *Abortion Rights and Foetal ‘Personhood’*, Centerline Press, Long Beach, C.A. (1989), p. 13.

16. *Id.*

17. *Id.*

18. See *infra* note 21.

19. Bryan A. Garner (ed.) *Black’s Law Dictionary*, 8th edition, West Publishing Co., Paul Minn. (1990) p.179; Elias N. Stebek, *Ethiopian Law of Persons: Notes and Materials*, Justice & Legal System Research Institute (2007) p.12-3; Henneretha Kruger, *et al.*, *The Law of Persons in South Africa*, Oxford University Press, Southern Africa, (2010), pp. 22, 25; Jacqueline Heaton, *The South African Law of Persons*, 3rd edition, Butterworth, Durban (2008), pp.7-8.

immaterial that it is for a very short while.<sup>20</sup> The rule is applicable in many jurisdictions including Nigeria, Ethiopia and South Africa *et cetera* where the foetus has to be fully born or otherwise completely detached from the mother and alive before it becomes a person.<sup>21</sup> Thus, an incomplete disjunction, no matter the extent, is not satisfactory for personhood. For that reason, it is not homicide to terminate the foetus' life until it has completely proceeded in a living state from the body of its mother<sup>22</sup> although the offender may, for instance (in Nigeria) be punished for other offences such as "killing an unborn child"<sup>23</sup> — a near equivalent of the now abolished crime of "child destruction" in English law.<sup>24</sup>

It is apposite to add however, that the protection afforded the foetus by the offence of "killing an unborn child" does not, in effect, make the foetus a legal person in the real sense of the doctrine. The protection is akin to that which is generally afforded animals against wanton killings,<sup>25</sup> notwithstanding that the law does not regard them as persons. Hence, the foetus too needs not be deemed a legal person before being afforded such kind of safeguard by law.

In addition, it is important to clarify the seeming ambiguity in the provisions of the Nigeria's criminal statutes. While on the one hand, the law provides that the foetus is not "a person capable of being killed" until it "has completely proceeded in a living state from the body of its mother",<sup>26</sup> on the other hand, it

20. Elias N. Stebek, *id.*, Kruger *et al.*, *id.*, Ngairé Naffine, Who Are Laws Persons? From Cheshire Cats to Responsible Subjects, *The Modern Law Review*, vol. 66 No. 3, (2003) p. 346.

21. Penal Code (Northern Nigeria Federal Provisions) Act Chapter P4 Laws of the Federation of Nigeria 2004 (hereinafter Penal Code Act) applicable to the 17 northern of Nigeria and the Federal Capital Territory: §5(2) of the Penal Code Act provide *inter alia* that "a child becomes a person when it has been born alive..." See Criminal Code Act Chapter C38 Laws of the Federation of Nigeria 2004 (hereinafter the Criminal Code Act) applicable to the 17 southern states: § 307 of the Criminal Code Act provide that "A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother". See also Civil Code Proclamation No.165/1960 of Ethiopia (hereinafter the Civil Code), Article 1 of the Civil Code states that "the human person is subject of rights *from its birth*..." By these provisions, the foetus is not regarded as a person. See also the South Africa's case of *S v. Mshumpa & Another* (2008) (1) SACR 126 at 56-62 in which the court held that to be qualify as a person and for a killing to be regarded as a murder the victim must have been born alive.

22. Penal Code Act, *id.*, § 5 (2); Criminal Code Act, *id.*, § 307.

23. Penal Code Act, *id.*, §§ 235-236; Criminal Code Act, *id.*, § 328.

24. Infant Life (Preservation) Act, 1929 of the United Kingdom: § 1(1).

25. Penal Code Act, *supra* note 21, §§ 207-208, 329-330; Criminal Code Act, *supra* note 21, § 495. The sections refer to cruelty, mischief by killing, poisoning or maiming, tortures, infuriates, rendering useless any animal, failure to exercise reasonable care regarding their protection *et cetera*. The punishment thereof is three years imprisonment or fine, or both. Cf. the Criminal Code of the FDRE, *supra* note 10: Article 882, which though also prohibits cruelty or ill-treatment *et cetera* towards animals but only in the public places.

26. See *supra* note 21.

provides that any person who causes the foetus' death from the commencement of the process of labour "would be deemed to have unlawfully killed the child."<sup>27</sup> It is submitted that this does not bestow personhood on the foetus. The intent of the law is only to prohibit wanton killing of a child in the course of child-labour. Otherwise, if the child is killed in the course of delivery (when it cannot be shown to have had a separate existence) it may neither be abortion nor homicide in Nigerian criminal law.<sup>28</sup> The provisions<sup>29</sup> may likewise be used to prosecute for a late abortion.

Furthermore, the law in most legal systems ascribes some other degrees of fictional rights like inheritance rights. This is in particular where a father dies while his wife is still pregnant. This is envisaged in Article 834 of the Ethiopian Civil Code.<sup>30</sup> It may also be applicable when a father dies in a situation that should enable the foetus receive damages or otherwise be indemnified. Those imputed rights inflame discussions as to whether the foetus is by being so attributed regarded as a person given that a non-person is generally not so recognised.

The question relating to the ascription of some degree of protections and rights to the foetus vis-a-vis the born-alive-rule may be construed in two diverse ways. On the one hand, it is possible to adhere to the plain connotation of the rule in order to validate the supposition that the foetus lacks legal personhood, and therefore, as a rule, lacks legal rights or legal capacities being only an addendum to its mother until it is born.<sup>31</sup> On the other hand, the foetus' personality could be regarded as being unique. This is in the sense that it has certain legal rights, though with no corresponding duties, provided that it is ultimately born alive. But foetal personhood in this, second sense, is merely a means of attaining, rather than attainment of rights. Thus, as provided in various legal systems the foetus has personhood only at life birth<sup>32</sup> but in order to safeguard or resolve specific post-birth concerns it is endowed with certain rights before birth. The laws do not, in such cases, see birth on its own as the sole determining factor for ascribing personhood. For example, to resolve issues related to interests at stake<sup>33</sup> of a foetus "(who is) merely conceived" in the bequest of its deceased

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27. See the Criminal Code Act, *supra* note 21: § 328; the Penal Code Act, *supra* note 21: §236.

28. It may neither be abortion under the Penal Code Act: §§ 232 and the Criminal Code Act: § 228; nor homicide under §§ 220-221 of the Penal Code Act and of the Criminal Code Act: §§ 316-317 respectively.

29. That is, §328 of the Criminal Code Act, and the Penal Code Act: §236.

30. See *supra* note 21.

31. Kruger *et al.*, *The Law of Persons in South Africa*, *supra* note 19, p. 22.

32. See *supra* note 21.

33. Article 834 of the Civil Code, *supra* note 21.



father Article 2 of the Ethiopia's Civil Code provides that it "shall be considered born, provided that he is ultimately "born alive and viable".<sup>34</sup>

It should be emphasised, however, that the ascription that the foetus has legal right to the inheritance, not at birth but from the point of the demise of the testator or intestate is purely a legal proposition. The ascription is based on a presumption, albeit rebuttable, that the deceased testator or intestate intended to benefit not just those that are alive prior to his demise but also the unborn foetus<sup>35</sup> so long as conception had occurred at the time of his demise.

The inheritance rights discussed herein may only be regarded as a legal apparition because the supposed right holder is not yet born. This is, in the same way as the naming right which is sometimes ascribed to the foetus by some people is only in theory. There may, however, be justifiable grounds to posit that the foetus or a human being need not be deemed to be persons in order to be accorded naming rights. This is just as certain animals and birds are also sometimes given proper names, although they are, certainly not, deemed to be persons. Thus, personhood in both cases is not, in the real sense of it, conferred on the unborn by virtue of those legal fictions, since those imputed rights are held over till the foetus is born alive when the rights are no longer fictitious.

### 3. Overview of national legal systems on the status of the fetuses

In evaluating legal personality in relation to the foetus, this section reviews some related legislations and judicial decisions of selected jurisdictions. It is important to state at the outset that while most of the cases are embracing and sometimes encompass loads of related and other issues; this section is, as much as practicable, centred on aspects of the decisions pertaining to foetal personhood in relation to abortion rights.

Starting from the United States, the Supreme Court decisions in the case of *Roe v. Wade*,<sup>36</sup> followed by successive cases on the matter reveal what the jurisprudence pertaining to foetal personhood in the U.S. is. The *Roe*'s judgment concerned a single-lady that was disallowed to request for legal abortion. The

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34. A child who lives for up to 48 hours after birth is presumed to be viable. But a child may be still be presumed viable if death occurred before the end of the period, as a result of a cause(s) other than deficiency in bodily makeup or health, since he/she would otherwise have survived but for that other cause(s): Article 4 sub articles 1-2 of the Civil Code, *supra* note 21.

35. Compare the South African case of *Ex Parte Boedel Steenkamp* 1962 (3) SA 954 in which the court stated in strong term that it will be ready to reject the legal apparition where the deceased testator had expressed a clear intention to exclude the foetus in the sharing of his assets.

36 410 US 133 (1973).

proceedings drew global interest and the court was flooded by briefs from *amicus curiae* in defence of the two diametrically opposing sides of the controversy. Briefs opposed to abortion, in the main, contended that the foetus is not only “human” but also a “person” to be safeguarded by the State. On the contrary, briefs in support of the pro-choice contended that the foetus *in utero* is not a person, and that in the circumstance, the woman’s rights to self-determination on abortion should be safeguarded. The court gave judgment denying foetal personality and recognised citizens’ right to a safe legal abortion.

The court, per Blackmun, who wrote the lead judgment, started by a chronological assessment of abortion related policies. This ended with pronouncements rejecting foetal personality and implying that a pregnant-mother had always had a considerable right to abortion. The court affirmed that to confer personality on the foetus would automatically ruin women’s right to privacy and abortion<sup>37</sup> as the foetus’ right to life would thereby have to be constitutionally protected. It affirmed that the phrase “person” as used in the constitution was applicable only after birth of a child<sup>38</sup> and therefore cannot be used for the foetus.

Furthermore, the Court emphasised that exemptions provided in the various abortion laws of the United States (like that of most other countries – Nigeria and Ethiopia inclusive) are to preserve the life or health of the pregnant-woman. It was noted that established laws through the ages have at no time granted personhood to the foetus in the true sense of the phrase.<sup>39</sup> It is apt to hold that if the courts had considered the foetus to be a person, it would have had to regard abortion as culpable homicide in which case the exceptions (apart from for the purpose of saving a woman’s life) would not have been permitted.

Following its decision denying the foetus of personhood, the court went on to declare the law criminalizing abortion as unconstitutional. But after reviewing the State law being contested under the “strict scrutiny” standard – the highest level of judicial review in the U.S.<sup>40</sup> the court overruled the submission that the state should not be concerned with safeguarding the foetus’ “potentiality” to live.<sup>41</sup> The court ruled that the state’s concern increases as the foetus grow,

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37. *Id.*, at 154.

38. *Id.*, at 156-57.

39. *Id.*, at 162.

40. *Regents of the University of California v Bakke*, 438 US 265 (1978); see Evan Gerstmann and Christopher Shortell, The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases, *University of Pittsburgh Law Review*, vol. 72, No. 1, (2010), p. 3.

41. *Id.*, at 159.

subject to constitutional limitations. In other words, the right to abortion is a qualified one that should be considered against the State's interest.<sup>42</sup> The Court recognised two interests which are deemed to be compelling enough to allow States to foist certain limits on the right to terminate a pregnancy; namely, that the State should safeguard maternal health<sup>43</sup> and the "potential life".<sup>44</sup>

The Court formulated a three-trimester framework by which the conflicting right to an abortion and the protection of a potential life is to be determined. Throughout out of the first trimester, when abortion was considered not as risky giving birth, the court held that a woman's right to privacy is at its strongest, and thus the State could not prohibit the procedure for whatever reason; except perhaps to lay down certain least safety measure, like stipulating that only authorised medical personnel may carryout abortion. Throughout of the second trimester, the court held that higher risk of abortion to woman's health gives the state sufficient interest to make health regulations on abortion<sup>45</sup> provided that such regulations were fair, and are made only to safeguard woman's health. From the third trimester when the foetus is believed to be viable,<sup>46</sup> it was held that the State had a "compelling interest" in safeguarding potential human life which interest prevails over the woman's right to privacy. Hence, the State may control or restrict the procedure in order to protect its interest in the potential life unless when the procedure is required to save the mother's life or health.<sup>47</sup>

While *Roe's* judgment was not originally intended to apply to issues unconnected to abortion, it has nonetheless been used as reference in some legal proceedings relating to the foetus other than in abortion. Two years after *Roe's Decision*, precisely in 1975, the court of appeals adjudicated the case of *Toth v. Goree*<sup>48</sup> in which the court laid down the principles for allowing 'viability' in cases involving loss of life and injury. In that case, following a motor accident a pregnant-mother had a miscarriage of a three months old pregnancy. It was held that a foetus which lacks capacity for survival outside the woman's uterus had no legal personality under the Wrongful Death Act. Also, relying on *Roe's decision* the court held in *The People v. Smith*<sup>49</sup> that the foetus having not yet

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42. *Id.*, at 150.

43. *Id.*, at 150 and 163.

44. *Id.*

45. *Id.*, at 163.

46. Viability is a stage in foetal development when the foetus is 'potentially able to live outside the mother's womb, albeit with artificial aid: see *ibid* at 150, 163.

47. *Id.*, 163-164; *Planned Parenthood of Central Missouri v Danforth*, 96 S. Ct. 2831 (1976).

48. 237 NW 2d 297, 65 Mich. App. 296 1975.

49. 59 Cal. App. 3d, 751 1976.

been able to live autonomously from the mother did not meet the elements for indicting the assailant for culpable homicide.

However, the decision in *Roe v Wade* is not an authority for the supposition that it is impossible for a foetus to suffer unlawful fatality, or that the mother is not entitled to damages on its behalf. This is because there exist, in that circumstance, no clash between the woman and her foetus; the injury is rather to, or against both of them. Therefore, the decisions in *Toth v. Goree*<sup>50</sup> and *The People v. Smith*<sup>51</sup> were drawbacks to both the pregnant-woman who is assaulted and the foetus, especially because the woman's determination to carry the foetus to term has been sabotage. Thus, by causing miscarriage of the pregnancy other than in cases of abortion, the mother is bereaved. The mother may hence be entitled to damages; and to see that the assailant is penalised. Thus, it is inapt to allude to *Roe's case* as an authority in circumstances unrelated to abortion.

It is apposite to emphasise however, that while the court in *Webster v. Reproductive Health Services*<sup>52</sup> seems to have laid down some limitations on the right to seek abortion when a majority's decision held that abortion was a "liberty interest" and not a basic right, but none of the Justices on the panel suggested that the foetus is a person. The court ruled that what the law at issue did was only to "promote state's interest in safeguarding (potential) life". The decision neither negates *Roe's decision* nor departed from the original opinion that the foetus is not a person.

Jurisprudential developments in Canadian courts have also declined to impute legal personality to the foetus. *Medhurst v. Medhurst & others*<sup>53</sup> is a case concerning a father who tried, on behalf of a foetus, to stop his wife from terminating their pregnancy. On appeal, it was held that a father is not legally entitled to sue on behalf of a foetus because he — the father may only act in a representative capacity for a person. The same issue was dealt with in *Joseph Borowski v. Attorney General of Canada*<sup>54</sup> where it was contended that a clause of the Canadian Charter of Rights and Freedoms availed the foetus of right to life because the phrase "everyone" as used therein encompasses the foetus. On appeal, it was held that, as far as the Canadian law was concerned, foetuses had at no time ever been regarded as persons; and that if the Parliament had intended

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50. *Supra* note 48.

51. *Supra* note 49.

52. 492 US 490 (1989).

53. [1984] 9 DLR (4th) 252.

54. [1989] 1SCR 342.

to bring about a change in law, then its choice of words would have been unequivocal.

Furthermore, a unanimous decision of the full panel of the Canadian Supreme Court in *Chantal Daigle v. Jean-Guy Tremblay*<sup>55</sup> is an authority for the supposition that the foetus supposed rights are intimately attached to that of the mother. In that case, a man took his erstwhile girlfriend Ms. Daigle to court seeking an injunction to stop the girl from going on with an intended abortion. On further appeal to the Canadian Supreme Court which upturned the order, it was held that though the foetus is at times treated like persons especially when the need arises to safeguard its post-birth concerns, it is not a person in law. Regarding the question as to the “father’s right” it was held that, if any, it is not as to override the girl’s determination. The court considered how the foetus’ rights was treated under the Anglo-Canadian law, and found that it has always been indispensable that the foetus is born-alive in order to be considered as a person or granted the right to life.

In *R v. Mary C Sullivan & Another*,<sup>56</sup> two persons were engaged as midwives despite the fact that they were not registered as such. In the course of childbirth which was done at home instead of at a hospital, contractions ceased after the baby’s head had become visible. The two “midwives” made unsuccessful efforts to stimulate contractions. After the woman was injured in the process, she was taken to a hospital where the child was severed from the women but dead. They were charged with negligence with respect to both the child and the woman. It was held that as negligence may only be committed with regard to persons, and that the defendants/mid-wives could not be liable regarding the child who died before birth since the child was not completely severed from its mother alive.

Similarly, in English law the foetus is not accorded rights as an independent being aside from the pregnant woman. In *Re F. (in utero)*,<sup>57</sup> concerned about the wellbeing of the foetus of a mentally unsettled pregnant-woman a local authority applied to the court to give order making the foetus a ward of the court. The application was declined for want of jurisdiction. It was held that until after live birth which turns the foetus into a “person” the foetus lacked independent life beyond that of its mother and hence not bound by guardianship order, and so it could not be made a ward.<sup>58</sup> The Nigeria’s law, as embodied in the two principal

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55. [1989] 2 SCR 530.

56. [1991] 1 SCR 489, 502; *R v Henry Morgentaler & Others* 1 SCR 30 (1988), [1988] 44 DLR 385 SC (Canada).

57. [1988] 2 WLR 1288.

58. See also *Paton v Trustees of the British Pregnancy Advisory Service* [1978] 2 All ER 987.

penal statutes prohibits abortion<sup>59</sup> except for the purpose of “saving” the life of a woman.<sup>60</sup> The court in *R v. Edgal*<sup>61</sup> following the English decision in *R v. Bourne*<sup>62</sup> broadly defined the word “unlawfully” as used in section 228 of the criminal code to except efforts to save a woman’s life and mental health. This is consistent with the principle in most jurisdictions where the phrase saving or preserving the life of a pregnant-woman has been construed as including efforts to save mental health, though it may not have been expressly stated in the law.<sup>63</sup>

Abortion may, on paper, be regarded as unlawful in Ethiopia. It is unlawful to the extent that it is regulated by the country’s Criminal Code<sup>64</sup> and disallowed on request.<sup>65</sup> The law, strengthened by a procedural guideline<sup>66</sup> made pursuant to Article 552 sub-article 1 of the Code exceedingly liberalised the procedure. This is in the sense that the law permits the procedure on a number of, mainly women centred grounds such as, where a pregnancy is a result of rape or incest<sup>67</sup>; or when the woman, due to a physical or mental deficiency, or her

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59. See the Penal Code Act, *supra* note 21, §232, which provide that “whoever voluntarily causes a woman with child to miscarry shall if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment for a term which may extend to 14 years or with fine or both”. See also the Criminal Code Act, *supra* note 21: §228, which provide that “any person who with intent to procure miscarriage of a woman...is guilty of a felony, and is liable to imprisonment for fourteen years”.

60. The Penal Code *ibid*.

61. [1938] 4 WACA 133.

62. [1938] 2 All ER 615, where it was held that though there may not be an instant threat to the life of a girl who became pregnant following a gang-rape; but because she could be mentally wreck if compelled to continue with the pregnancy an abortion may be allowed.

63. For more on Nigeria’s law on abortion: see O. Odunsi, Abortion and the Law, in I.O. Irehobhude and R.N. Nwabueze (eds.), *Comparative Health Law and Policy: Critical Perspectives on Nigerian and Global Health Law*, Routledge, (2016) pp.197-216; TBE Ogiamen, *Abortion Law in Nigeria: The Way Forward* (Occasional Working Paper Series) (Women’s Health and Action Research Centre, Benin 2000); R.J. Adebimpe, Liberalization of Nigeria’s Abortion Laws with Focus on Pregnancies Arising from Rape: An Empirical Analysis, *African Human Right Law Journal*, vol. 20, No. 2, (2020) (forthcoming).

64. The Criminal Code, *supra* note 10, section II – Crimes against Life Unborn; Abortion: Articles 545 to 552.

65. Article 545, sub-article 1 *id*.

66. FDRE-FHD, Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia (Family Health Department, Addis Ababa 2006).

67. Article 551, sub-articles 1(a). A woman seeking abortion under this heading is relieved of the evidentiary burden of proving rape or incest, or identifying of the offender: Article 552, sub-article 2.

minority, is unfit to bring up the child.<sup>68</sup> The Code also provide for mitigation<sup>69</sup> of the punishment for abortion done due to “extreme poverty”.<sup>70</sup>

The case of *Christian Lawyers Association of South Africa & Others v. Minister of Health & Others*<sup>71</sup> is an authority for the supposition that the law does not regard the foetus as a person. It was a case in which the validity of the South Africa’s Choice on Termination of Pregnancy Act<sup>72</sup> was contested. The Act permits abortion on request till the end of the 12th week of pregnancy.<sup>73</sup> Thereafter, abortion is allowed till the end of the 20th week on other specific grounds to wit rape, incest, and if the pregnancy would seriously affect the socio-economic condition of the mother.<sup>74</sup> The challenge to the Act was based on the ground that section 11 of the Constitution of the Republic of South Africa 1996<sup>75</sup> which provides that “everyone has the right to life” is applicable to the foetus. The question was whether the foetus was a holder of rights under the Constitution. The Court held that the phrase “everyone” in the contentious clauses exclude the foetus until after live birth. It was held further that to enable the foetus to bear the right to life would contravene some of the women’s constitutional rights<sup>76</sup> that are clearly inalienable.

The fact that the law in most jurisdictions permit abortion of rape and incest related pregnancies accentuate the fact that what inspired lawmakers into penalizing abortion in those jurisdictions are mostly moral and perhaps religious considerations.<sup>77</sup> It is not aimed at protecting the foetus’ right to life. A study of

68. Article 551, sub-article 1(d). A minor and a mentally disabled person cannot be required to sign a consent form to obtain an abortion. Also, all that is required to allow an abortion on the ground of age is to simply state that the girl is under the age of 18, see the Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia, *supra* note 66.

69. Under Article 180 of the Code

70. Article 550. For fuller discussion on the Ethiopia’s law on abortion, see Astrid Blystad *et al.*, The Access Paradox: Abortion Law, Policy and Practice in Ethiopia, Tanzania and Zambia, *International Journal of Equity in Health*, vol.18, No.126 (2019); Abadir M. Ibrahim, Rooting Life in the Ethiopian Constitution and Positive Law: A Holistic Approach to Rights Legislation *Journal of Civil Legal Science* vol. 3, No.126, (2014). Tsehai Wada, Abortion Law in Ethiopia: A Comparative Perspective, vol. 2, No. 1 *Mizan Law Review* (2008) 1-32.

71. (1998) (4) SA 1113, (1998) 50 BMLR 241, (1998) (11) BCLR 1434.

72. See *supra* note 10.

73. *Id.*, §2 (1) (a). Note that neither spousal nor parental consent is required to have an abortion during this period, *id.*, 5(1).

74. *Id.*, 2 (1) (b).

75. Act No.108 of 1996.

76. These include the right to human dignity: §10, right to life: §11; right to control over one’s body including right to make decision concerning reproduction: §12(2) (a); right to privacy: §14; right of access to health care including reproductive health care: § 27 of the Constitution *Id.*

77. Abadir M. Ibrahim, Rooting Life in the Ethiopian Constitution and Positive Law: A Holistic Approach to Rights Legislation, *supra* note 70, p. 6.

the exceptions to those laws makes this evident. The law, for example in Ethiopia and South Africa do not penalise abortion of incestuous and rape related pregnancies.<sup>78</sup> Such exceptions hint on the purpose of the law. Or what else, apart from moral considerations, could have inspired criminalization of incest which, without more to it, is no more than a moral offence, and in which nobody suffers?

Furthermore, while the exceptions to the abortion law on grounds such as for protection of women's mental or physical incapacity; due to rape; being under age; and even mitigation of the stipulated punishment for abortion done on ground of "an extreme poverty"<sup>79</sup> are well thought-out, these importantly, further confirm that the laws are, if at all, only sparsely, intended to protect the foetus. It would be incongruous to suppose otherwise, for it would imply, and wrongly too, that the law has, by those exceptions ultimately given up the foetal right to life because of the stigma associated with rape, or because of being underage.

It is important to emphasise that most abortion laws provide for more severe punishment for providers than for a woman who procured her own abortion.<sup>80</sup> Also, in most jurisdictions, those who perform the procedure with the consent of the woman are less culpable than when it is done without the woman's consent.<sup>81</sup> If the foetus is regarded as a legal person then punishment for a woman who procured her own miscarriage; and that of the provider or anyone else who performed abortion with her consent would not have been any different because abortion would have been homicide. The whole essence of the born-alive rule validates this standpoint.

#### 4. Foeta's personhood in international law

Findings from the review of the legislations and case laws emanating from the selected countries in the preceding part of this paper indicates that municipal laws do not accord personhood to the foetus vis-à-vis its pregnant woman. This part of the article analyses the provisions of related international and regional legal instruments.

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78. See Choice on Termination of Pregnancy Act, *supra* note 10, §2(1); the Criminal Code of the FDRE, *supra* note 10, Article 551(1) (a).

79. See the Criminal Code, *supra* note 10, article 550; cf. with the Choice on Termination of Pregnancy Act, *supra* note 10, §2(1)(b) (iv) relating to the social and economic circumstances of a woman as a ground for abortion in South Africa.

80. See the Criminal Code, *supra* note 10, Article 546 (1); cf. with Article 548.

81. See the Criminal Code *supra* note 10, Article 547(1)-(2).



The leading human right instrument in respect hereof is the ground norm of human rights — the Universal Declaration of Human Rights.<sup>82</sup> The remarkable first clause of Article 1 thereof declares that “all human beings are *born* free and equal in dignity and rights”. The purport of the word “*born*” as used in the clause is that enjoyment of human rights is after birth.<sup>83</sup> The intentional use of neither male nor female phrase “everyone” in the Declaration to refer to beneficiaries of human rights also has a post-natal application.<sup>84</sup> Likewise, that the phrase “*born* free” is relevant only after birth is in line with the rule requiring that provisions of treaties should be given “ordinary meanings” in the context in which they are used, and considering the intent of the treaty.<sup>85</sup> It is submitted that the “ordinary” connotation of lexis such as “everyone” and “all” as used in the Declaration such as “*everyone* has the right to life...”<sup>86</sup> and “*all* are equal before the law...”<sup>87</sup> *et cetera*<sup>88</sup> are inchoate until after birth. Therefore, that the right to life provision is not applicable to the foetus is not in contravention of Article 7 of the Declaration relating to equality and non-discrimination.

Moreover, a study of the *travaux preparatoires* of the Declaration showed that the choice of the word “born” in the clause “all human beings are *born* free...” was to leave out pre-birth usage of the rights enshrined in the instrument. It is instructive to add that a suggestion that would have removed the term “born” in order to safeguard pre-birth right to life was declined.<sup>89</sup> It was contended *inter alia* that right to life ought to be safeguarded from conception.<sup>90</sup> But prior to the rejection of the proposed modification, French delegates had clarified that the proclamation “all human beings are *born* free and equal...” implied that rights enshrined in the Declaration are applicable only “from the moment of birth”.<sup>91</sup>

82. Universal Declaration of Human Rights (UDHR), United Nations, Treaty Resolution 217, UN Doc. A/810 (1948).

83. Ronda Copelon, *et al.*, Human Rights Begins at Birth: International Law and the Claim of Fetal Rights, *Reproductive Health Matters*, vol.13, No. 26, (2005), p.121; Johannes Morsink, Women’s Rights in the Universal Declaration, *Human Rights Quarterly*, vol.13, No.2, (1991) p. 233.

84. Morsink, *id.*

85. Vienna Convention on the Law of Treaties (VCLT), United Nations, Treaty Series, vol. 1155, (1969), Article 31(1).

86. See United Nations Universal Declaration of Human Rights (UDHR) *supra* note 80, Article 3,

87. *Id.*, Article 7.

88. *Id.* Article 6 stating that ‘*everyone* has the right to recognition everywhere as a person before the law’.

89. UN GAOR 3rd Comm., 99th mtg. at 110-124 UN Doc. A/PV/99 [1948] 116; William A. Schabas, *The Abortion of the Death Penalty in International Law*, 2nd edition, Cambridge University Press, Cambridge (1997), p. 25.

90. *Id.*

91. UN GAOR 3rd Comm., 99th mtg. at 110-124, UN Doc. A/PV/99 [1948] 116 *ibid.*

The clause as thereafter adopted, that is, that the rights are applicable from birth was adopted by forty-five votes in its favour, nil against and nine abstentions.<sup>92</sup> It follows that foetuses are not intended to be accorded personhood *a fortiori* right to life in the Universal Declaration.

Successive legal instruments also support the supposition that international law does not regard the foetus as a legal person; and indeed holds that women's right trumps over that of the foetus as far as abortion is concerned. For instance, the history of negotiations leading to the adoption of Article 6(1) of the International Covenant on Civil and Political Rights<sup>93</sup> which guarantees rights to life to "every human being" shows that the right is not related to the foetus as far as abortion by a pregnant-woman is concerned. Record reveal that a proposal for modifications which averred otherwise, that is, that "the right to life" should "be inherent in human person from the moment of conception"<sup>94</sup> met outright rejection by 55 votes to none, and 17 abstentions.<sup>95</sup> This reveals that the right as entrenched in Article 6 was not intended to be prenatally applicable.

It is instructive to add that the Human Rights Committee, the body entrusted with the responsibility to monitor the implementation of the Covenant, has severally called attention to dangers to women's rights such as maternal deaths caused by unsafe abortions owing to outlawing of abortion by countries;<sup>96</sup> and it has acknowledged that laws prohibiting abortion infringe women's right.<sup>97</sup> In addition, the committee has implored state-parties to relax their restrictive penal legislations on abortion.<sup>98</sup> These standpoints would not have been taken if personhood is regarded as prenatally applicable.

Article 6 of the Convention on the Rights of the Child (the Convention or the CRC)<sup>99</sup> declares that "every child has the inherent right to life".<sup>100</sup> However, The Convention is silent about when precisely a human being becomes a child, and whether the provision applies prenatally. It is clear that the phrase "every

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92: UN GAOR 3rd Comm., 183rd mtg. at 119, UN Doc. A/PV/183 [1948].

93. 16 December 1966, 993 UNTS 171 entered into force 23 March 1976.

94. UN GAOR Annex, 12th Session, Agenda Item 33, at 96, UN Doc. A/C.3/L654.

95: *Id.* at 113 & 119 (q).

96. Human Rights Committee, General Comment 28 on Equality of Rights Between Men and Women (68th Session 2000) para.10 (UN Doc. HRI/GEN/Rev.7).

97. *Id.*

98. Concluding Observations of the Human Rights Committee: Argentina, U.N. Doc. CCPR/CO/70/ARG, Para.14; Tanzania U.N. Doc. CCPR/C/79/Add.97, Para.15; Venezuela, UN Doc. CCPR/CO/71/VEN, para. 19.

99. General Assembly Resolution 44/25, Annex, UN GAOR 44th Session, Suppl. no. 49 166, U.N. Doc. A/44/49 (1989) entered into force on 2nd September 2 1990.

100. Cf. African Charter on the Rights and Welfare of the Child: Article 5(1) which provides that "every child has an inherent right to life...." O.A.U. Doc. CAB/LEG/24.9/49 (1990).

child” as used throughout the Convention does not apply before birth. It is required in construing words used in treaties to know the context in which they are made<sup>101</sup> and to look at the scope and purpose of a treaty. That approach will lead to the conclusion that the word “child” as used in the CRC is to be given its ordinary, rather than broad meaning. The ordinary connotation of the word “child”, considering the intent of the treaty and the context in which the provisions are made excludes the foetus. It is submitted that if the drafters of the Convention had intended that the relevant clause is to be prenatally applied, they would have, as in practice, unequivocally stated so. Furthermore, it is submitted that the ninth paragraph of the Preamble to the Convention which states *inter alia* that “the child...by reason of his physical and mental immaturity needs special safeguard and care, including appropriate legal protection *before* as well as after birth” does not ascribe personhood to the foetus. On the question concerning the purport of the phrase “before birth”, it is submitted that the clause, at most, only recognises the states’ duty to support the child to be able to survive, grow and stay healthy after birth and this duty can be fulfilled by supporting antenatal care.<sup>102</sup> In any case, while preambular provisions of an instrument serve as an aid to its interpretation, they are not, on their own legally binding.<sup>103</sup> The Preamble to the Convention may therefore not be resorted to in aid to understanding of a clear term such as “child” which has its ordinary meaning stated in the Convention.<sup>104</sup> It is incongruous with the canon of interpretation that an aspect of the preamble which is not repeated on the body of the Convention could be resorted to unaided in lieu of the ordinary connotation of words as used in operative parts. Consequently, the word “child” as implied in the preamble purportedly requiring states to safeguard the child prior to birth cannot be relied on as a basis for affirming that the foetus has prenatal right to life.

Furthermore, the history of negotiations leading to ratification of the CRC shows that the obligation to take “special safeguards and care” of the child was not intended to preclude safe abortion. As initially written, the Preamble had no

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101. Vienna Convention, *supra* note 83, Article 31 (1).

102. Ronda Copelon, *et al.*, Human Rights Begins at Birth: International Law and the Claim of Fetal Rights, *supra* note 83, p.122.

103. *South West Africa (Ethiopia v. South Africa; Liberia v South Africa)* 1966 ICJ 6, (July 18) holding that though the preamble to the UN Charter represents ethical principles for legal stipulations outlined in the relevant articles they do not in themselves constitute rule of law; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures of Protection*, Order of 8 April 1993, ICJ 325, 391 (Sept.13): noting that the resolves and intents of member-states are condensed into Article1 of the UN Charter rather than in the preambles in order to ensure that they are justiciable.

104. Vienna Convention, *supra* note 85, Article 31.

mention of the need to take safeguards “before as well as after birth”. It was the State of Vatican City that proposed the clause, but swift to add that the objective “was not to preclude the possibility of an abortion”.<sup>105</sup> Hence, while the Convention acknowledges that the foetus is supposed to be protected, there is no basis to hold that it confer personhood or prenatal right to life on the foetus if doing so will deny a girl-child’s rights to life,<sup>106</sup> health,<sup>107</sup> or to act in her best interest<sup>108</sup> and particularly when a pregnancy possesses threat to her health<sup>109</sup> which are all safeguarded in many other international instruments and retained by Article 41 of the Convention.

The above position is strengthened by the declaration made by the treaty’s ad hoc committee that the phrase “before as well as after birth” is not meant to negate the purport of Article 1 of the CRC which defines the “child” as a person “below the age of eighteen years”. It is for this rejection of foetal personhood that makes it possible for the treaty’s committee to support safe abortion care<sup>110</sup> and to have appealed to state-parties to liberalise aspects of their restrictive laws on abortion.<sup>111</sup> The committee has also acknowledged that safe abortion is one of teenagers’ rights to health by virtue of Article 24 of the Convention.<sup>112</sup> These would have been absurd if the foetus is regarded as a legal person under the Convention.

The European Convention on Human Rights (the Convention or the ECHR)<sup>113</sup> founded its right to life in Article 2 on the Universal Declaration.<sup>114</sup> The preamble to the ECHR amply refer to the Declaration, and proclaimed that the its aim is to take steps for the “collective enforcement” of rights stated in the Universal Declaration”<sup>115</sup> In view of this, it is apparent that the phrase

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105. UN Commission on Human Rights, *Question of a Convention on the Rights of a Child: Report of the Working Group*, 36th Session, UN Doc. E/CN.4/L/1542 (1980).

106. *Id.*, Article 6.

107. *Id.*, Article 24.

108. *Id.*, Article 3.

109. *Id.*, Articles 1 and 24.

110. Committee on the Rights of the Child, General Comment no.4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child (33rd Session 2003), para.31.

111. Concluding Observations of the Committee on the Rights of the Child: Chad, UN GAOR Committee on the Rights of the Child, 21st Session, 557th mtg. para.30 UN Doc. CRC/C/15/Add.107; Nicaragua, UN GAOR, Committee on the Rights of the Child, 21st Session, 557th mtg. para.35 UN Doc. CRC/C/15/Add.108.

112. Concluding Observations of the Committee on the Rights of the Child: Guatemala, UN Committee on the Rights of the Child, 27th Session 40, U.N. Doc. CRC/C/15/Add.154.

113. 312 UNTS 221 (1953), as amended by Protocols 11 and 14, supplemented by Protocols 1, 4, 6, 7, 12, 13 and 16.

114. See *supra* note 82.

115. Para. 6, *supra* note 113.

“everyone”, in the context in which it is used in Article 2 and all over the European Convention, does not have a prenatal application.

In addition, the established jurisprudence of the European Convention on abortion as contained in the decisions of the Commission and the Court have repeatedly held that the foetus is not covered by the “right to life” under Article 2(1) of the ECHR. Further, it has been held that to confer the right to the foetus is to put unreasonable restraints on women’s rights to safe abortion. In *X v UK*,<sup>116</sup> a husband sought to stop his wife’s abortion. The Husband’s claim that the right to life in Article 2(1) protected the foetus was unequivocally rejected. It was held that the phrase “everyone” in Article 2 and throughout the ECHR, did not cover foetuses.<sup>117</sup> Also, in *Vo. v. France*,<sup>118</sup> a doctor, while mistaking the applicant who was pregnant, for a different patient with almost the same name, did surgery that was meant for that other patient. In the course of the mistaken surgical operation, the doctor carelessly cut the applicant’s embryo sac resulting in her miscarriage. The applicant pleaded that the doctor should be tried for unpremeditated homicide rather than trial for negligence or breach of regulation as laid down in French law. The European Court declined to regard the foetus as a “person” protected by Article 2 of the ECHR.<sup>119</sup> Thus, the Court refused to order trial for homicide.

As a final point, there is no basis to construe Article 4 of the African Charter on Human and Peoples’ Rights<sup>120</sup> which provides that “every human being shall be entitled to respect for his life and the integrity of his person” as relating to the foetus. The clause is with respect to inviolability of right to life, but the phrase “every human being” mentioned in Article 4 is stated in Article 24 of same Charter as applicable to “individuals”. This standpoint has been confirmed in the language of the Protocol to the Charter on the Rights of Women in Africa.<sup>121</sup> Article 14(2) (C) of the Protocol specifically requires state-parties to do the

116. Also cited as *Paton v. UK*, App. No. 8317/78, European Commission on Human Rights, 13 May 1980, 3, European Human Rights (Commission) Report, 408 (1981).

117. *Id.*, paras. 7-9 and 19. The decision in *X Case* was followed by the Commission in *R.H. v Norway*, App. No. 17004/90.73, ECHR Dec. & Rep. 155 (19 May 1992); and in *Boso v Italy*, App. No. 50490/99, ECHR (September 2002). Both cases were also by the husbands, to stop their wives from terminating pregnancies, on the ground of the foetus’ right to life.

118. App. No. 53924/00, European Court of Human Rights, 8 July 2004.

119. *Id.*, para. 80. See generally Tanya Goldman, ‘Vo v France and Foetal Rights: The Decision Not to Decide’ *Harvard Human Rights Journal*, (2005), vol. 18, pp. 277-282.

120. OAU Doc. CAB/LEG/67/3/rev.5, adopted 2 June 1981, entered into force 21 October 1986.

121. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women Africa AHG/Res.240 (XXXI), 31st Session CAB/LEG/66.6 adopted July 11 2003, entered into force in 25 November 2005.

needful to safeguard “rights of women by authorising medical abortion in cases of sexual assault, rape, incest and where continued pregnancy endangers mental and physical health of the mother, or the life of the mother or foetus”. This clearly accentuates the view that the foetus does not enjoy personhood or right to life before birth. It would be incongruous for the Protocol to safeguard women’s reproductive rights by allowing medical abortions in the circumstances mentioned while purporting to recognise the foetus prevailing right to life.

## **Conclusion**

This article has examined the laws of a number of selected jurisdictions and the legislative histories, texts and/or as construed by treaty monitoring bodies, of relevant international instruments. This was with a view to determining whether the foetus is regarded as a legal person or otherwise conferred with the right to life vis-à-vis the woman’s right to safe abortion. It is contended that national and international laws do not recognize foetal’s personhood *a fortiori* a prevailing right to life against a pregnant-mother. It is not suggested however that the law should altogether disregard prenatal life. It is indeed thought as valid to suppose that the foetus need not be regarded as a “person” to be protected by the law, in the same way as the lives of certain animals and birds are protected, though they are not considered as “persons”. In the same way, that the law could regard the foetus as a person, and yet allow abortion when its rights clashes with that of the pregnant-mother, in which case the law must take a position between the conflicting rights. But unless otherwise provided in domestic laws the foetal’s legal standing is, and should be intricately tied to the pregnant- woman, though it may be able to seek redress for loss or harm felt in the uterus. This is effective only after live-birth.