

A Right to Life of the Unborn Life

By Jet Dorhout

Some babies are born addicted. When the cause is maternal drug use, the question isn't just medical, it's criminal. This blog explores the controversial but critical question: should a mother be charged with manslaughter if her unborn child dies because of drug abuse during pregnancy? [Lack of consensus](#) about the question 'When does life begin?' between contracting parties of the Convention on the Rights of the Child (CRC) results in indecisiveness regarding the treaty substance. I will discuss the lack of legal protection afforded to the unborn child by article 6 of the Convention on the Rights of the Child (CRC), and the implications this has for the Netherlands to comply with international obligations deriving from this Convention.

Introduction

When is 'Lady Justice' in utter and absolute balance? The answer to this question may differ from time to time and from society to society. This becomes frequently clear during the deliberation on provisions of international treaties, as has also been the case regarding the consultation of article 6 of the CRC. Differences in opinion between convention signatories result in a large [margin of appreciation](#) regarding the topic the provision concerns. As a result, the threshold for compliant interpretation of international law in such instances is low. Therefore, it's conceivable that divergent regulations from various member states all comply with the same treaty at the same time.

[Equally](#), this is the case within the sensitive, thought-provoking matter of pregnant women that want to preserve their freedom of making choices regarding their own body on the one hand, versus the protection of the unborn life on the other hand. Namely, apart from the matter of abortion, these two interests come into conflict in the case of drug abuse by the mother. Should the bodily integrity and therefore the freedom of decision-making of the mother prevail relative to the right to life of the unborn child, or should the scale of Lady Justice tip the other way? Each contracting party can make up this balance differently and still comply with article 6 of the CRC, as is outlined below.

The protection of the unborn child under the Convention on the Rights of the Child (CRC)

[Article 6](#) of the Convention on the Rights of the Child (CRC) states that the contracting parties recognise that every child has the inherent right to life. However, the convention does not explicitly define what constitutes a '[child](#),' leaving unclear from what point this right applies. This open wording [allows](#) for a traditional view in which the unborn child is not granted any rights. [Since](#) there was no consensus among the state parties on when life begins, they have a certain margin of appreciation to determine this themselves. [The Netherlands](#) explicitly stated in the Explanatory Memorandum accompanying the ratification of Article 6 CRC that it was not intended to grant the right to life to a child before birth.

Nevertheless, [the preamble](#) of the CRC may, at first glance, leave room for a different interpretation. It states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." If this passage were to influence the interpretation of the convention, the term 'child' could also include the unborn child. [However](#), the *Open-Ended Working Group*, which drafted the convention's text, addressed this issue in an interpretative statement: "In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by State Parties." It follows that it was not intended for the preamble to be interpreted in such a way that member states are required to include the unborn child under the term 'child'. In short, the preamble does not cast any shadow forward on the provisions of the CRC regarding prenatal protection.

A Dutch case

In august 2024, [Omroep Brabant](#) announced that the Dutch public prosecutor (Openbaar Ministerie (OM)) has initiated prosecution against a mother from Rijsbergen for attempt to endanger the life of an unborn child through substance abuse and secondary, aggravated assault of her unborn child. The mother is alleged to have used GHB, [‘Flakka’](#) and alcohol during the final five months of her pregnancy. In its statement, the prosecutor acknowledges that such a case – where a mother is charged with attempted manslaughter or aggravated assault of her unborn child due to substance abuse – has no precedent in Dutch legal history, making it a groundbreaking legal development. This pioneering prosecution decision raises questions about the extent of criminal

protection afforded to the unborn child under the current Dutch Penal code, as well as how the Convention on the Rights of the Child (CRC) interprets relevant provisions in this context. In the following, I will explore what implications the (lack of) obligations deriving from article 6 of the CRC have for Dutch law.

Implications of the recognition of the right to life of the unborn child by the OM

With its decision to prosecute in the Rijsbergen-case, the OM, a legal authority in the Netherlands, has shown its opinion that the unborn child should be afforded legal protection regarding the right to life and even the right to bodily integrity. The CRC grants state parties in determining whether they assign a right to life to the unborn child, the OM, with its prosecution decision, complies with international obligations. In this paragraph, I will briefly outline a key question that arises from this prosecution decision. A thorough discussion of these questions would exceed the scope of this blog, but it does give food for thought.

The question arises as to how the recognition of the unborn child's right to life relates to the mother's right to abortion. Up until the point of viability – which is set at twenty-two weeks within the Netherlands-, the conscious decision to terminate the pregnancy – which entails the right to bodily integrity – outweighs the unborn child's right to life. However, when the prosecution requirement is followed, the unborn child also has a right to life before this point of viability. To conclude, the child has no right to life and does have a right to life at the exact same time. Whether or not the child can claim its right to life,

depends on the internal affairs of the mother. The question is whether this is explicable and justifiable.

Conclusion

This blog examines the legal protection of the unborn child considering a Dutch case where a mother was prosecuted for harming her unborn child through substance abuse. While the Convention on the Rights of the Child (CRC) recognizes the right to life, it leaves room for interpretation regarding the unborn,

with no clear consensus among contracting parties. The prosecution decision aligns with international obligations by acknowledging the unborn child's right to life and bodily integrity, yet it raises key questions. The lack of consensus between contracting parties' results in lack of clarity for legal institutions regarding the extent to which the right to life should be granted to the unborn child. The case underscores the need for clearer, more consistent legal frameworks regarding prenatal protection.

References

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