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Case Document No. 8

Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden
Complaint No. 99/2013

RESPONSE BY FAFCE TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS

Registered at the Secretariat on 17 April 2014

Reply to the Written Submission of the Swedish government on the merits of Complaint No. 99/2013

Federation of Catholic Family Associations in Europe (FAFCE), Provita and KLM v. Sweden

This reply to the written submission of the Swedish government on the merits of the complaint submits that the following facts constitute instances of non-compliance with the European Social Charter (the Charter). The articles of the Charter which are purported to be violated are the following:

Art. 11 (Right to protection of health):

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;

2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in health matters;

3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Art. E (Non-discrimination):

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health association with a national minority, birth or other status.

A. Conscientious objection and discrimination

1. The Swedish State is responsible for:

- Failing to enact a comprehensive and clear legal and policy framework governing the practice of conscientious objection by healthcare providers in Sweden.
- Failing to secure that health care workers, physicians and medical students that claim their right to conscientious objection, are not treated in a discriminatory way.

The Swedish government holds in § 53 that the mentioned allegations do not fall within the scope of Article 11 of the Charter and in § 55 that the allegations are rather connected to Article 9 of the European Convention on Human Rights and Fundamental Freedoms, and not for the Committee to interpret and apply.

According to the decision by the European Committee of Social Rights (The Committee) in the Complaint No. 87/2012 International Planned Parenthood Federation – European Network (IPPF EN) v. Italy – the Committee holds in § 68: " The Committee is called to rule on how the manner in which sexual and reproductive health care services are organized (in Italy) impacts upon the enjoyment of the right to protection of health provided for under Article 11 of the Charter"

The Committee also considered that "once States introduce statutory provisions allowing abortion in some situations, they are obliged to organize their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are legally entitled under the applicable legislation." (§ 69)

The Complainants hold that the total lack of legal provisions for the right to conscientious objection for health care workers in Sweden, prohibits a fair and necessary balance between the rights of the women requiring abortion and the freedom of conscience of medical practitioners and other health care workers with conscientious objection.

The Swedish government holds that neither the Swedish Association of Local Authorities and Regions, the Swedish Association of Health Professionals, the Swedish Medical association nor the Swedish Society of Obstetrics and Gynecology could give any examples of formal matters in which freedom of conscience had been cited in abortion care. The Swedish government thus holds that this part of the compliant seems to be of mainly theoretical interest. (§ 70)

The Complainants refer to a recent decision from the 10th of April 2014 by the Swedish

Discrimination Ombudsman (DO) *Midwife Ellinor Grimmark v. Jönköping County Council* [1]

Mrs Grimmark lost her job as a midwife at three different hospitals - Höglandssjukhuset in Eksjö, Kvinnokliniken in Ryhov, and Kvinnokliniken in Värnamo - because of her conscientious objection to participate in abortions.[2]

DO initially holds that the decisions have constituted an interference with her right to freedom of religion under article 9 of the European Convention on Human Rights (ECHR). According to article 9 of the ECHR everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, and to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

As a midwife, Ellinor Grimmark has stated that she "wishes to work in a profession that will protect and save lives at any cost" and that "she does not want extinguish human life, neither in its early or final stages".[3]" Because of her Christian faith, she is has a conscientious objection to perform abortions. She

DO notifies correctly in its decision that the conditions of employment as a Swedish midwife – including the task of performing abortions - could be seen as a requirement that may put people with certain religion or creed in a discriminatory position. However, the conclusion of the DO is that Mrs. Grimmark has not been discriminated, and that her conscientious objection is preventing the "availability of abortion care" and the "protection of health" of patients requiring abortion in Sweden.

2. The exercise of right to conscientious objection is necessary to promote good health for health care workers.

The Swedish government holds that "it is reasonable to assume, as a rule, that a person who believes on religious grounds, for example, that abortions should not be performed will not actively seek employment in a service in which he or she has to participate in performing abortions, but will instead seek a position in some other part of the health and medial services. If this does nonetheless occur, the issue of any scruples as regards performing abortions can and should be discussed with the employer so as to avoid problems arising later on". (§ 64)

[1] The decision is to be found at the website of the Swedish Discrimination Ombudsman: http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2014/Beslut-i-arende-rorande-diskriminering-som-har-samband-med-religion-barnmorska-/

[2] Interview with Mrs Grimmark and her lawyer on national Swedish Tv4 News: http://www.tv4.se/nyheterna/klipp/st%C3%B6d-till-abortv%C3%A4grande-barnmorska-2546778

[3] http://www.aftonbladet.se/debatt/article18265218.ab

The Complainant holds that this statement could be seen as a requirement that puts health care workers with conscientious objection regarding the protection of life in a discriminatory position. A refusal to deal with abortion – or euthanasia - could be regardless of religion but all the major world religions have teachings about the origins of life and the protection of life.

The Swedish government assumes that only patients who support abortion have a right to access medical care, while other patients have no similar right. This assumption is unwarranted and illogical. Even if patients' desires should trump conscience rights, the desires of patients for medical professionals who are allowed to practice consistent with their consciences would counsel in favor of conscience protection so that such medical staff could exist and not driven out of practice.

According to an academic dissertation at Umeå University, "Gynecologists and midwifes about Swedish abortion care – views, experiences and perceptions" 64 % of male gynecologists and 46 % of female gynecologists answered that gynecologists should have the right to conscientious objection to participate in abortions.[4] A total of 64 % of male gynecologists and 48 % of female gynecologists answered that midwives should have the right to conscientious objection to participate in abortions." Among the surveyed gynecologists, 48% answered that "participation in the so-called late-term abortions, carried out after obtaining permission from the National Board, give me compunction." The figure was the same for both men and women. Among midwives proportion varied between 46% and 51 % depending on the extent to which they participated in abortions.

According to a population based study of Swedish gynecologists' experiences of working in abortion care, every fifth gynecologist have considered quitting his or her job because of the abortions, and 75 % had experienced dubiety or compunction related to the surgical or late term abortions.[5]

Conscience-stress and morality-stress are related to burnout conditions for health care personell. Stress related diseases, such as burnout, has increased dramatically in the Western world the last decade. Working in health care can mean emotional effort and lead to ethical forms of stress. Research on freedom of conscience and morality stress among health care workers is a relatively new phenomenon. It is only in recent years scientists have been interested in addressing the relationship between internal stress and conscience, and these phenomena's effect on burnout.[6]

Health Care Ethics is a subject that has been researched increasingly in recent decades. In a professional discussion the focus has been placed on the nurse as a moral agent with its

[4] Gynecologists and midwives about Swedish abortion care - views, experiences and perceptions. Study 2007: http://umu.diva-portal.org/smash/get/diva2:140824/FULLTEXT01

[5] http://www.lakartidningen.se/EditorialFiles/DC/%5BCEDC%5D/CEDC.pdf Stydy 2006: Hammarstedt M, Lalos A, Wulff M. A population•based study of Swedish gynecologists' experiences of working in abortion care. Acta Obstet Gynecol Scand. 2006;85:229•35.

[6] Is there room for morals and ethics in health care? http://www.livochratt.se/samvetsstress-och-moralstress-far-etiken-plats-i-varden-del-2/

own moral responsibility. This in turn has consequences for the practicing nurse. Applying ethical principles in their daily work can involve a multitude of problems for the nurse when he or she is responsible for the quality of care. Health policy is generally designed and inspired by utilitarian thinking holding that the proper course of action is the one that maximizes utility, the greatest good for the greatest number. The treatment is based on the balance between cost and efficiency perspective on whole groups or even the entire population. The nurse's work however is individualized and nursing care based on a prioritization of care needs of individual patients. This means that nurses often find themselves in ethical conflict situations, which in turn can lead to internal stress. These ethical aspects lead to a responsibility feeling for the patient that cannot be avoided.[7]

The International Federation of Gynaecology and Obstetrics (FIGO), of which the Swedish Society of Obstetrics and Gynaecology (SFOG) is a member, has developed ethical guidelines that regulate conscientious objection. They provide, inter alia, that health care workers have a right to respect for their ethical beliefs and that no one shall be discriminated against because of their beliefs. The International Confederation of Midwives (ICM), of which the Swedish Midwives Association is a member, has developed a Code of Ethics with a guide for midwives where freedom of conscience is enshrined. The World Health Organization (WHO) has stated that the right to freedom of conscience must be regulated. If women's health or life is at risk, the conscientious objectors should refer to caregivers who do not oppose abortion.

3. The Swedish government completely sets aside the Council of Europe Resolution 1763 (2010) regulating the rights to freedom of conscience in lawful medical care.

A position of the Member States of the Council of Europe concerning the right to freedom of conscience for health care workers with regard to abortion and euthanasia, is enshrined in Resolution 1763. This means that Sweden enjoys only a very limited margin of appreciation to justify a violation and an interference with the right to freedom of conscience for health care workers.

Resolution 1763 (2010) of the Parliamentary Assembly of the Council of Europe states that:

"No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human fetus or embryo, for any reason.

[7] Is there room for morals and ethics in health care? http://www.livochratt.se/samvetsstress-och-moralstress-far-etiken-plats-i-varden-del-2/

The Parliamentary Assembly emphasized the need to affirm the right of conscientious objection together with the responsibility of the state to ensure that patients are able to access lawful medical care in a timely manner. The Assembly is concerned that the unregulated use of conscientious objection may disproportionately affect women, notably those with low incomes or living in rural areas.

In the vast majority of Council of Europe member states, the practice of conscientious objection is adequately regulated. There is a comprehensive and clear legal and policy framework governing the practice of conscientious objection by health-care providers ensuring that the interests and rights of individuals seeking legal medical services are respected, protected and fulfilled.

In view of member states' obligation to ensure access to lawful medical care and to protect the right to health, as well as the obligation to ensure respect for the right of freedom of thought, conscience and religion of health-care providers, the Assembly invites Council of Europe member states to develop comprehensive and clear regulations that define and regulate conscientious objection with regard to health and medical services, and which:

4.1. guarantee the right to conscientious objection in relation to participation in the medical procedure in question;

4.2. ensure that patients are informed of any conscientious objection in a timely manner and referred to another health-care provider; ensure that patients receive appropriate treatment, in particular in cases of emergency".

In the case of *Bayatyan v. Armenia*,[8] the European Court of Human Rights held that: *"The Court has already pointed out above that almost all the Member States of the Council of Europe which ever had or still have compulsory military service have introduced alternatives to such service in order to reconcile the possible conflict between individual conscience and military obligations. Accordingly, a State which has not done so enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any interference. In particular, it must demonstrate that the interference corresponds to a "pressing social need.""* In other words, when there is an almost total consensus by the Council of Europe member states to accept conscientious objection regarding a certain area, the State that has not done so have minimal opportunity to justify a violation of an interference with the right to freedom of conscience.

[8] Application no. 23459/03 Judgment 7 July 2011.

4. The issue of discrimination

The Swedish Discrimination Act 2008 (DL) contains rules on active measures in Chapter 3. These are not limited to mere protection against discrimination but impose labor providers a general obligation to cooperate with the workers "to achieve equal rights and opportunities in working life regardless of ... religion or other beliefs" (chapter 3 § 1). Chapter 3 § 4 states that employers "shall implement such measures with respect to the employer's resources and other circumstances." The work conditions should be suitable for all employees regardless of religion or belief."

The reference in 3:4 DL follows from practices regarding the superior standards of practice concerning the European Convention and the Charter. Read literally 3:4 DL means an obligation to consider the worker's religious situation in the particular case. This expression has not only a collective meaning, but also an individual. The obligation applies in relation to "everybody. This has relevance to religious practices such as daily prayer but also for what tasks a worker can be required to accomplish. In the legislative history it was not discussed how personalized the active measures should be. Reference was made to the Equal Opportunities Act.

Some interests have higher hierarchical rank than a conflicting interest. Patients may have conflicting interests of equally high rank as an interest not to extinguish human life - in the case of a request for adequate medical treatment to preserve life. This situation would however in practice be extremely rare, quite apart from that it is a duty for health care workers to save lives.

The Swedish DO has not put forward any concrete case where a patient has not been able to undergo an abortion necessitated by their state of health or any case where patient has not been able to undergo an abortion on request. There is no probability or likelihood that this would be the case, because of the total lack of comprehensive and clear legal framework for conscience objection for health care workers in Sweden.

The article E of the Charter clearly states that the enjoyment of the rights set forth in the Charter (article 11) shall be secured without discrimination on any ground such as religion, political our other opinion.

The Complainant holds that in a case where a person for genuine conscientious or religious reasons does not wish to participate in abortion or euthanasia the person has a right under the European Convention, the Swedish Discrimination Act and the Charter, to have their will respected. In the case of *Midwife Ellinor Grimmark v. Jönköping County Council* the Swedish DO decided Mrs. Grimmark has not been discriminated although she lost three jobs because of her conscientious objection to perform abortions as a midwife. One of Sweden´s leading labour law professors, Mr. Reinhold Fahlbeck, holds that if the case *Midwife Ellinor Grimmark v. Jönköping County Council* is brought to the European Court of Human Rights, Sweden will be found to be violating the European Convention on Human

Rights.[9]

5. Unregulated Conscientious Objection

Rights of conscience are explicitly recognized in international law, and among the commitments Sweden has accepted through the treaty and convention ratification process. The Grand Chamber of the European Court of Human Rights has itself explicitly affirmed rights of conscience for sincerely held religious and moral beliefs as falling within the gambit of Article 9 of the Convention.[10] Also In the recent cases of *Federal Republic of Germany v Y* (Case C-71/11) and *Federal Republic of Germany v Z* (Case C-99/11) before the Court of Justice of the European Union ("CJEU"), the Advocate General gave his opinion on the correct understanding of Article 9 of the Convention. The Advocate General stated that if the so-called "core area" of religious belief comprised only of "private conscience", it would render any protections of "the external manifestation of that freedom" effectively "meaningless".[11] In its final ruling the CJEU held that the right to act upon sincerely held religious or moral beliefs is clearly extended to public manifestations of those beliefs. The Council of Ministers of the Council of Europe also affirms rights of conscience. [12]

The UNHRC has similarly recognized the importance of rights of conscience as a seminal component of freedom of thought, conscience and religion. In General Comment 22 the Committee notes that while *"…the Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18..."*[13] Accordingly, the Committee held in *Frédéric Foin v France*[14] that the applicant "was discriminated against on the basis of his conviction of conscience" and in 2006, in two cases against South Korea concerning conscientious objectors, found a violation of Article 18.[15]

6. Conscientious objection - balancing between different legitimate interests

The Swedish government, in its written submissions, draws a false balance between the provision of abortions, an elective service and the actual legal obligations of Sweden under the European Social Charter to protect health as well as employment rights. While Article 8 of the Convention does protect bodily integrity within the sphere of private life where abortion has already been legislated (and only where it has been legislated)[16], this fact alone has no bearing on Sweden's positive obligations under either the Convention and the

[9] http://www.varldenidag.se/nyhet/2014/02/21/Professor-Sverige-lar-fa-samvetsfrihet/
[10] ECHR, *Bayatan v. Armenia* [GC], (2012) 54 E.H.R.R. 15.
[11] Advocate General opinion at § 46.
[12] See Recommendation R(87)8 and Recommendation CM/Rec(2010)4.
[13] General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/1993 at § 11.
[14] Communication No. 666/1995, 9 November 1999, at § 10.3.
[15] *Yoon v Republic of Korea* and *Choi v Republic of Korea*, Communications 1321/2004 and 1322/2004, UN Doc.CCPR/C/88/D/1321-1322/2004, January 23, 2007.
[16] ECHR: *A, B and C v. Ireland* [GC], Application No. 25579/05, Judgment of 16 December 2010.

European Social Charter to protect life and health and to ensure a minimum standard of care for all patients.

No right to abortion exists in international law. The European Court of Human Rights has explicitly stated that the Convention does not contain a right to abortion.[17] The Court further recognizes that with the advancement of scientific progress and various forms of research involving the embryo, greater protections are now being afforded the pre-born child in international law.[18]

In December 2010, the Grand Chamber of the European Court of Human Rights, in *A., B., and C. v. Ireland* held that abortion was not a "right" under the Convention.[19] In October 2011, the Grand Chamber took the identical position in finding that Austria did not violate the Convention by prohibiting the use of sperm from a donor for in vitro fertilisation and ova donation in general.[20] Its reasoning, in part, was that the best interests of the unborn child were compelling enough to prohibit these two forms of artificial procreation.

Both the 1994 International Conference on Population and Development in Cairo and the Fourth World Conference on Women that took place in Beijing in 1995 held that governments have an obligation to eliminate and reduce abortions and to help women avoid repeated abortions.[21] The outcome documents also hold that abortion should never be promoted as a method of family planning.[22] If abortion was indeed a "right", clearly international law would not be dictating that it was something governments need to reduce or eliminate.

In Sweden, there is no balance at all that allows the different legitimate interest of the life and health of the unborn, health care workers with a conscientious objection and women requiring abortion. The case of *Midwife Ellinor Grimmark v. Jönköping County Council* shows that there is a pressing need for a comprehensive and clear legal and policy framework governing the practice of conscientious objection by health-care providers in Sweden.

In Sweden´s neighboring country Norway, the right to conscientious objection for health care workers, was established more than 30 years ago. Therefore, Mrs. Ellinor Grimmark has now been forced to apply for a job as a midwife in Norway. Pending further legal action in Sweden, she is now granted a job in Norway as a midwife with the right to freedom of conscience.

Ellinor Grimmarks conscientious objection is about her right to protect life and health and not to be forced to extinguish human life. Her conscientious objection does not relate to

[17] *Id*.
[18] ECHR: *Vo v. France*, Application No. 53924/00, Judgment of 08/07/2004, § 84.
[19] ECHR, *A., B., and C. v. Ireland* [G.C.], application no. 25579/05, [2010] ECHR 2032, §§ 233-237.
[20] ECHR, *S.H. and others v. Austria* [G.C.], App. no. 57813/00, judgment of 03 Nov 2011 §§ 105, 115.
[21] ICPD Programme of Action at § 8.25.
[22] ICPD Programme of Action at § 7.24.

other people's "right to abortion" and threatens neither the "right to abortion" in Sweden or the "availability of abortion" in Sweden according to the Swedish Abortion Act (1974:595).

Sweden's failure to provide rights of conscience to its medical personnel is simply out of step with the remainder of Europe. Furthermore, in the name of the democratic values of tolerance and pluralism, reasonable accommodations for sincerely held religious or moral beliefs must be made. This is particularly pertinent to the issue of performance or assistance in abortion, where among the general population of medical professionals great controversy abounds. For example, according to the Guttmacher Institute, a research organization affiliated with Planned Parenthood, the number of hospitals in the United States offering abortions dropped from 1,654 in 1977 to 603 in 2000.[23] This coincided with a roughly 50 percent drop in the number of surgical abortionists. As clearly established by these statistics, the abortion issue raises tremendous moral controversy among medical professionals. In light of such strong moral opposition to abortion among medical professionals, it would be wholly inappropriate to require medical staff to go against such strongly held views.

The Written Submission of the Swedish government establishes a false correlation between the obligation to provide health care and the creation of regulations limiting the right of conscience for medical professionals. First, the right to receive medical and health services is not absolute. Health care is often balanced by the doctor's professional perception of the patient's needs, the availability of resources, the patient's desires and hospital or clinic policy. Frequently physicians refuse to do elective procedures where they feel it is not in the patient's best interest or where they feel participating in the procedure would go against their professional or moral convictions. This widespread practice is universally accepted. The Written Submissions however ignores this customary practice and is clearly only interested in furthering agenda based procedures such as abortion.

The prohibition of conscientious objection removes safe-havens for pro-life medical practitioners from the market. It further closes the market place to patients specifically seeking treatment by medical professionals who share the same value system.

In a January 2009 poll conducted by The Polling Company, Inc., WomenTrend, 88 percent of respondents said it is either very or somewhat important to them that they share a similar set of morals as their healthcare providers.[24] To maintain patient confidence and satisfaction among women, conscientious objection must be maintained.

Conscience rights do not threaten patient access, they protect patient access. Many patients want to be able to access doctors and nurses who practice with integrity by obeying their consciences, and who share the patients' values about the right to life. But

[23] *See*: Finer LB and Henshaw SK, Abortion incidence and services in the United States in 2000, *Perspectives on Sexual and Reproductive Health*, 2003, 35(1):6–15.
[24] *See*: http://www.freedom2care.org/docLib/200905011_Pollingsummaryhandout.pdf.

Sweden's restrictions on conscience rights exclude all abortion opponents from the medical field by forcing them to assist or refer for abortion, and would therefore deny the right to medical access of patients who desire pro-life medical staff. The Hippocratic Oath's directives against certain medical practices exist so as to give patients access to medical staff who do not harm human life in their medical practice.

B. The failures to prevent serious incidents and deficiencies

1. The Swedish government, it its written submission, holds that "as much as such incidents are regrettable, there is no indication that the doctors have not acted in good faith or contrary to generally accepted medical expertise and science. Furthermore, the given examples do not provide support for an infringement of the right to health (§75)." The government further holds that "not all cases reported to the Inspectorate lead to demands that measures are to be taken." And finally "In Sweden, high priority is given to patient safety."

The European Court of Human Rights has held that where abortion legislation exists, a country is thereafter under a positive obligation to ensure a legal and procedural framework whereby a mother may have access to all relevant information regarding her pregnancy including accurate data about the health of her unborn child.[25]

According to a study from Uppsala University about women and men´s experiences and needs in relation to induced abortion, 61 % of all the women who expressed their wish for dealing with existential thoughts related to the abortion were not satisfied. Other *experiences* related to the abortion were "humanisation of the foetus" (67 %). A higher presence of existential components correlated with difficulty in deciding to abort and poor psychological wellbeing after the abortion.

Sweden has categorically failed in its obligations on several fronts as presented in the initial complaint. These failures include, among others, failing to properly inform women about the viability of their unborn child, failing to protect viable foetuses and failing to prevent serious incidents and deficiencies. The government has not presented any guidelines of how to prevent the serious incidents and deficiencies to continue. The examples provided in the initial complaint, are serious violations of the right to health according to the Charter.

[25] *Tysiac v. Poland*, Complaint No. 5410/03, §§ 116-124, ECHR 2007-IV.

C. Unlawful permits to late term abortions in cases when the foetus is viable. Failure to protect fetuses/infants born viable.

1. The Swedish government holds that there is no European consensus on the scientific and legal definition of the beginning of life" (§ 86).

The Complainant refers to the Court of Justice of the European Union [CJEU] in the case of *Oliver Brüstle v. Greenpeace e.V.*[26], adopting the opinion of the Advocate General,[27] holding that in the context of patent law, life must be counted as beginning from conception.[28] Thus, the concept of the human embryo must be understood in a wide sense.[29] Precisely, the Court held that any human ovum must, as soon as fertilised, be regarded as a human embryo, since fertilisation is such as to commence the process of development of a human being. Moreover, the Court held that the same classification must apply to a non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and a non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis.[30]

The importance of the *Brüstle* decision is two-fold: first, it is the first intergovernmental court ruling stating that life must be protected from conception [even if the context is only within the sphere of patent law]. This judgment has never been contradicted in international law either by treaty, directive, regulation or judicial decision. Therefore it should be given significant weight by this Committee when analyzing the deficiencies in Swedish law relating to late-term abortions and Sweden's wholly inappropriate definition of viability.

Second, the judgment helps to inform how the European Community is to define human dignity within Article 1 of the Charter of Fundamental Rights of the European Union.[31] To this extent, we must also look to the Oviedo Convention on Human Rights and Bio-medicine.[32] Article 1 of that treaty calls for the protection of human dignity and guarantees to everyone respect for their physical integrity within the context of biology and medicine.

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[26] Case C-34/10, 18 October 2011. Available at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-34/10.
[27] Yves Bots, 10 March 2011. Available at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-34/10.
[28] For example, recital 16 of the Directive states that "patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person".
[29] §34.
[30] The Court noted that "although those organisms have not, strictly speaking, been the object of fertilisation, due to the effect of the technique used to obtain them they are, as is apparent from the written observations presented to the Court, capable of commencing the process of development of a human being just as an embryo created by fertilisation of an ovum can do so." § 36.
[31] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), available at: http://www.unhcr.org/refworld/docid/3ae6b3b70.html [accessed 9 November 2011].
[32] Council of Europe, *Convention on Human Rights and Biomedicine*, Oviedo, 4.IV.1997 (ETS 164). Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm.

The *Brüstle* judgment was not drafted in a vacuum. The guidelines of the European Patent Office were amended several years ago to have the identical protections put in place to protect the human embryo and not to commoditize components of the human body.[33] The Oviedo Convention, noted above, in a similar vein prohibits the commoditization of the human embryo and forbids the creation of embryos for research purposes.[34] What we are therefore seeing in the development of law for the scientific community is an ever-increasing and robust protection of the unborn child from conception and an extremely conservative definition of human dignity.

2. Complainants take issue with the parts of the Observations of the Swedish government referring to abortion as a "right", particularly in the context of eliminating rights for the unborn child in even extreme cases of late-term abortions. Complainants find it wholly inappropriate for the Swedish government to be comparing its provision of health services to those of developing nations in Latin America and Africa. A proper examination of this complaint requires comparison of the Swedish model with those of other signatories to the Social Charter and other Scandinavian countries.

Unlike the Swedish government and the Swedish Board of Health and Welfare, the Norwegian government tabled draft legislation that would ban all abortions after 21 weeks and 6 days gestation. The legislation was drafted after several complaints had been made by midwives about late-term abortions.

According to the Norwegian Broadcasting (NRK) statistics from the country's Public Health Institute (Folkehelseinstituttet) showed that from 2001 to 2009, five babies were aborted at 22 or 23 weeks. Between 2010 and 2011, 12 such late-term abortions were carried out. Some of the aborted children's hearts continued beating for between 45 and 90 minutes.[35]

The Swedish government holds in § 94 that in 2010, 2011 and 2012, permission where the pregnancy period exceeded 22 weeks of pregnancy, was granted in nine cases. Permission to "terminate the pregnancy" was granted in four cases.

3. It is shocking to read the arguments by the Swedish government that "the fact that a fetus displays reflex signs of life, like gasping for breath, does not mean that the fetus is viable." The Complainant, in seeking to define fetal viability, shocks the conscience with its statements in § 93 of its Observations suggesting that the "drawbacks" of the anti-

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[33] *Convention on the Grant of European Patents*, signed at Munich on 5 October 1973. Article 53 states: "European patents shall not be granted in respect of: (a) inventions the commercial exploitation of which would be contrary to "ordre public" or morality; such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States."

[34] *Convention on Human Rights and Biomedicine*, Oviedo, 4.IV.1997 (ETS 164). Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm. Article 18 states: (1) Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo. (2) The creation of human embryos for research purposes is prohibited."

[35] http://www.newsinenglish.no/2014/01/02/total-ban-on-late-term-abortions/

progesterone pill used in late term abortions is that the unborn child may show signs of life such as gasping for breath or reflexive movements (i.e. defensive movements). Under its definition of viability, the Swedish government basically argues, beyond logic and good taste, that viability can only be determined at the moment of birth.

In conclusion, the Complainant reasserts that, as is amply clear from its Written Submissions, the government of Sweden has failed in protecting the rights of health care workers, mothers and children.

D. The failure to draw up official guidelines on how to reduce the extremely high number of abortions performed on the youngest age group, without parental or informed consent or supportive consultation.

1. In Sweden there are over 35,000-38 000 abortions annually. The National Board for Health and Welfare decided to stop the statistics from spring 2013 to January 2014 and the new statistics are less informative than the former statistics.[36]

According to a Swedish study, Sweden has the highest abortion number among all the Northern countries, repeated abortions among the youngest age group continues to grow and 40 % of all women requiring abortions have had at least one other abortion.[37]

Sweden has categorically failed in its obligations on several fronts as presented in the initial complaint. These failures include, among others, failing to actively deal with the epidemic of abortions performed among Sweden's youngest female age cohorts.

E. Failure to actively prevent eugenic and sex-selected abortion

1. In § 119 the Swedish government holds that, "the risk of an abortion being performed for sex-selective reasons that are not linked to medical factors cannot be entirely excluded"

The Council of Europe Commissioner on Human Rights made a statement on this issue on 15th January 2014[38] As the Commissioner states, the European Court of Human Rights case law does not yet provide guidance on sex-selective abortion. However, there are some international bodies, which have taken a stand on the issue. The Council of Europe Convention on Human Rights and Biomedicine prohibits the use of techniques of medically assisted procreation "for the purpose of choosing a future child's sex, except where serious

[36] http://www.socialstyrelsen.se/statistik/statistikefteramne/aborter
[37] http://www.lakartidningen.se/EditorialFiles/DC/%5BCEDC%5D/CEDC.pdf
[38] http://humanrightscomment.org/2014/01/15/sex-selective-abortions-are-discriminatory-and-should-be-banned/

hereditary sex-related disease is to be avoided.'' However, out of 47 member states only 29 have joined and ratified the Convention. The Fourth World Conference on Women held in Beijing in 1995, described prenatal sex-selection as an act of violence against women. Three years later the UN General Assembly resolution on the girl child concurred and urged States to "enact and enforce legislation". Both the UN Committee on the Elimination of Discrimination against Women (CEDAW) and the Council of Europe Committee of Ministers has called upon governments to adopt national legislation prohibiting pre-natal sex selection.

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) does not contain any explicit reference to sex-selective abortion. However, it requires that state parties criminalize the performance of "an abortion on a woman without her prior and informed consent" (Article 39) as well as psychological violence, i.e. the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats (Article 33). Given that in many situations women are under psychological and sometimes physical pressure to undergo a sex-selective abortion, these provisions of the Convention can potentially provide some safeguards against sex-selective abortions.

The Commissioner on Human Rights underlines the 2011 resolution on prenatal sex selection where the Parliamentary Assembly of the Council of Europe stressed that "the social and family pressure placed on women not to pursue their pregnancy because of the sex of the embryo/foetus is to be considered as a form of psychological violence and that the practice of forced abortions is to be criminalized."

The Commissioner holds that this approach frames sex-selective abortions as a form of violence against the pregnant woman rather than as violence against the unborn child and suggests several action points.

- Besides legislation, several UN bodies, such as UNICEF, UN Women and WHO, have listed a number of actions that governments and civil society need to engage in:
- Reliable data needs to be collected.
- Guidelines on the ethical use of the relevant technologies should be developed and promoted through associations of health professionals.
- Support measures for girls and women should be put in place.
- States should develop legislation and policy frameworks to address the root causes of the inequalities that drive sex-selection.
- States should support the equal value of girls and boys.
- New awareness and laws needed

The Swedish government has not in any way supported an adequate framework that reconciles the possibility to fight against prenatal sex selective discrimination. Sweden has categorically failed in its obligations to actively prevent eugenic and sex selective abortions. The government has not presented any guidelines on how to prevent this further. The examples provided in the initial complaint, are serious violations of the right to health and protection from discrimination according to the Charter.

CONCLUSION

To summarize the flawed reasoning in the Written Observations of the Swedish government, they dubiously make the argument that this application is merely about the legalization of abortion rather than about having proper procedures in place to prevent unlawful or unnecessary abortions, particularly among the most vulnerable segments of the female population. It stands clear that the Swedish government contends to confuse the issue at hand by engaging in the abortion legalization debate. The present complaint does not address the question of the legality of abortion, nor does the Committee have competency to address such a question. This complaint however does address the health issue of under-regulated abortions and its direct and net impact on vulnerable woman, based on factors such as youth and manipulation relating to negligent diagnoses of disability or inviability. The respondent state, once it has legalized abortion, does have positive obligations to ensure an appropriate standard of care to both the mother and unborn child.[39]

With the question of conscientious objection, Sweden falls outside of the normative consensus in failing to regulate rights of conscience for medical staff. This glaring legislative omission has already had real life consequences for medical professionals who have been dismissed for simply desiring to follow their well founded moral beliefs with regard to life. On both points it is clear that Sweden is in material breach of its obligations under the European Social Charter.

Strasbourg, 15 April 2014

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[39] *Cf.* ECHR, *A., B., and C. v. Ireland* [G.C.], application no. 25579/05, [2010] ECHR 2032, §245.