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Abortion and the European Convention on Human Rights

submitted to the European Committee of Social Rights in the case of *International Planned Parenthood Federation European Network (IPPF EN) v. Italy,* No. 87/2012

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Abstract

In recent years, the European Court of Human Rights has ruled on a number of cases providing a sufficient corpus of jurisprudence which may be analysed in a consistent manner. A number of analysts, on both sides of the abortion debate, are not satisfied with this case law. This article aims not to discuss each ruling of the Court case by case, but to try to find, in an objective and coherent manner, the *ratio juris* of the jurisprudence of the Court, and in doing so, to present a reasoned legal status of abortion under the Convention.

Content

Abortion and the European Convention on Human Rights

By Grégor Puppinck, PhD, Director of the ECLJ[1],

Introduction

The purpose of this article is to present in an objective, complete and coherent manner the status of abortion[2] under the European Convention on Human Rights (hereinafter the Convention). In recent years, the European Court of Human Rights (hereinafter the Court or ECHR) has ruled on a number of cases related to abortion. These rulings provide a sufficient *corpus* of jurisprudence which may be analysed in a consistent manner. A number of analysts, on both sides of the abortion debate, are not satisfied with this case law. It is often said that it is hard to find coherency in the case-law of the Court when it touches upon sensitive matters. This article aims not to discuss each ruling of the Court, but to try to find the coherency of the jurisprudence of the Court, and in doing so, to present a reasoned legal status of abortion under the Convention.

The debate on abortion is still very intense. The countries who have maintained restrictions on abortion have come under strong political pressure, not only internally, but also from a number of international organisations, including the Council of Europe.

In Europe, 30% of pregnancies end up in abortion[3]. After more than thirty years of legal abortion in most European countries, it should be possible to begin addressing this practice in an objective manner: looking more to the practical experience than to the ideological implications of the massive practice of abortion. As a very recent example of such objective attitude, Lord David Steel, the architect of Britain's liberal abortion laws, has said that he "*never envisaged there would be so many abortions*"[4]. "*All we knew was that hospitals up and down the land had patients admitted for septic, self-induced abortions and we had up to 50 women a year dying from them*".[5] Now, he warns Ireland, whose government is executing the A. B. and C. judgement[6], that "*it would be a mistake to try and legislate for abortion in categories such as suicide or rape*".[7] The time when people portrayed abortion as a progress and a liberation for women is almost over. For medical practitioners and law makers, the reality of abortion is less ideological and more complex.

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[2] This article does not deal with freedom of expression in the field of abortion, but it makes reference to the conscientious objection.

[3] According to the *Guttmacher Institute*, "Facts on Induced Abortion Worldwide, in brief", http://www.guttmacher.org/pubs/fb_IAW.pdf, last visited, November 20th 2012.

[4] Gemma O'Doherty, "UK peer warns on suicide clause", *The independent*, December 21 2012.

[5] *Idem*

[6] *A. B. and C. v. Ireland*, [GC] 16 December 2010.

[7] Gemma O'Doherty, "UK peer warns on suicide clause"*, precit.*

The cases submitted to the Court reflect increasingly the variety and complexity of the situations related to abortion. Those cases are not limited to the abstract claim of a "right to access to abortion", but concern various issues such as abortions on minors, eugenic abortion, consent and information of the different people concerned. For example, some women complain because they could not abort their handicapped child, while others complain for having undergone abortion without having been fully informed. A "potential father" complains unsuccessfully because his partner aborted his child while a potential grandmother successfully complained before the Court that her daughter could not access to abortion in satisfactory conditions.

One of the main difficulties for the Court is to determine how to legally handle the matter of abortion: how to introduce the practice of abortion within the internal logic of the Convention and of its case-law. Indeed, when the Convention was drafted, abortion was widely criminalised, because it was considered as a direct violation of the right to life of the unborn child. Only abortion induced in order to save the life of the mother was possible. The central question was and still is whether or not the unborn child is a "person" within the meaning of article 2. The Court keeps this question open in order to allow the States to determine when life begins, and therefore when its legal protection starts.

Those who advocate a right to abortion defend the idea that within the Convention system, "*Member States are free to determine the availability and legal status of abortion"*.[8] While it is true that States have the freedom not to legalize abortion, the Convention has something to say on the right to life of the unborn child and of his mother. At the very least, it should be widely accepted that member States have a duty under the Convention to ban painful, late or forced abortions. Therefore, member States are not totally free to determine the availability and legal status of abortion, but they have to take into account the different legitimate interests and rights involved.

In cases where abortion is legal, the Court has established that its legal framework shall adequately take into account the different legitimate interests involved. The Court has several times recalled that if and "*once the state, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations"*[9]*,* "*the legal framework devised for this purpose should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention*".[10] This wording became the principle underpinning the regulation of abortion by the Court.

Therefore, when the national legislator has decided to legalise abortion, the Court assesses its legal framework by looking whether a fair balance is struck between the various rights and interests involved in the issue. The Court has already identified a number of those rights and interests involved surrounding the status of abortion, such as

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[8] Christina Zampas and Jaime M. Gher, "Abortion as a Human Right —International and Regional Standards", *Human Rights Law Review,* 8:2(2008), p. 276. The authors refer to Krzyanowska-Mierzewska, *How to Use the European Convention for the Protection of Human Rights and Fundamental Freedoms in Matters of Reproductive Law: The Case Law of the European Court of Human Rights*, (Astra, 2004) at Part I (b)–(f).

[9] See *inter alia*, *P. and S. v. Poland*, N° 57375/08*,* 30 October 2012, para. 99, not final.

[10] *A. B. and C. v. Ireland*, [GC] 16 December 2010, § 249 and *R.R. v. Poland*, No. 27617/04, 26 May 2011, § 187; *P. and S. v. Poland*, N° 57375/08, 30 October 2012, § 99 (not final).

the interests and rights of the mother, of the unborn child, of the father, of medical staff, of society, etc. This approach of balancing the interests implies that the ones of the pregnant woman may not always prevail.

Assessing the balance of interest and the proportionality of the decisions of the public authorities is the usual method of analysis of the Court. But a major difficulty with applying this method to abortion is that it is fundamentally not possible to balance someone's life with someone else's right or interest. Therefore, if the State recognises the unborn child as a person, you may only balance his life with the life of another person, the one of the mother. Balancing between the compared value of the will of the mother and the life of the unborn child is not possible. The value of a will cannot be estimated in itself, and therefore be compared with the value of a human life, which also has no value. Therefore, it is important to understand that the question of the status of the unborn child in the national legislation takes precedence over the status of the "woman's right" upon the life of her unborn child, as the value of an individual right upon an object cannot be evaluated if the nature of this object has not been previously determined. Pretending to do the balance between the will of the mother and the life of the unborn is in fact evaluating the power of the women over the life of her child. This explains why almost all the case-law of the Court on abortion concerns *extreme cases*, cases of abortions in the context of medical indications where the life or the health of the mother was at steak.

In the case of *abortion on demand*, (abortions which were not motivated by health reasons, but only by the will of the mother), the Court has never admitted that the autonomy of the woman could, *per se*, suffice to justify an abortion in terms of Conventional requirements. Moreover, the Court explicitly excluded it when it declared that Article 8, which protects individual personal autonomy, does not contain any right to abortion. As this study concludes, the legal arguments supporting the conventionality of carrying out an abortion on demand are very weak or even inexistent because it harms the unborn child and the society interests without any objective proportionate motive.

In a broader perspective, this article ends looking at the massive practice of abortion on demand as a result of a systematic failure by the States to fulfil their obligations in regard to socio-economic rights. Indeed, most abortions are requested because of socio-economic constraints of the mother and family. This constraint and the resulting high number of abortions could be limited if the States endeavoured to really fulfil their socio-economic obligations, according to which "*special protection should be accorded to mothers during a reasonable period before and after childbirth*' and that "*the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society*".[11] The respect by the States of their socio-economic obligations is the way to implement a forgotten right: the "right not to abort".

The analysis of the status of abortion under the Convention and its case-law construed in this study develops the following reasoning: the Convention does not exclude prenatal life from its scope of protection and the Court has never

[11] International Covenant on Economic, Social and Cultural Rights, Article 10 § 2 and 10 § 1.

excluded prenatal life from its field of application (1.). The Convention does not contain, nor create a right to abortion (2.). In most European national legislations, abortion is a derogation to the protection granted in principle to the life of the unborn (3.). If the State allows abortion in it national legislation, it remains subject under the Convention to an obligation to protect and respect competing rights and interests; those rights and interests weight on both sides of the balance, in restricting the scope of the derogation as well as in supporting it (4.). Then, this article observes that abortion on demand is a "blind spot" in the case-law of the Court and draws the conclusion that this practice violates the Convention, because it harms interests and rights guaranteed by it without any proportionate justification (5.).

1. Neither the Convention, nor other European or international human rights instruments exclude prenatal life from their scope of protection

The "*principle of sanctity of life*"[12] is "*protected under the Convention*"[13] and recognized by the European Court, which affirms that "*the right to life is an inalienable attribute of the human beings and forms the supreme value in the hierarchy of human rights".*[14] International human rights instruments recognize life as a primary right.[15] The right to life is the first to be guaranteed in the 1948 Universal Declaration on Human Rights: *"Everyone has the right to life, liberty and security of person"*[16], but also in other instruments, such as the International Covenant on Civil and Political Rights[17] or the European Convention on Human Rights[18] which provides that: "*Everyone's right to life*

[12] *Megan Reeve v. the United Kingdom*, No. 24844/94, (Decision of inadmissibility of the former Commission of the 30 November 1994); *Pretty v. the United Kingdom*, No. 2346/02, Judgment of April 29, 2002, § 65.
[13] *Ibid* at § 65.
[14] *Streletz, Kessler and Krenz v. Germany* [GC], 22 March 2001, nos 34044/96, 35532/97 and 44801/98, §§ 92-94; see also *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147.
[15] 1776 United States Declaration of Independence, Universal Declaration of Human Rights G.A. Res. 217 (III) A. U.N. Doc A/RES/17 (III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, hereinafter International Covenant, United Nations Declaration of the Rights of the Child, UN General Assembly Resolution 1386 (XIV) of 10 December 1959, UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3;1948 Declaration of the Rights and Duties of Man, 9th International Conference of American States, Bogota, Colombia, 1948, Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 (hereinafter the Convention), Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) Cairo Declaration on Human Rights in Islam,Aug. 5, 1990, U.N. GAOR.
[16] Universal Declaration of Human Rights, G.A. Res. 217 (III) A. U.N. Doc A/RES/17 (III) (Dec. 10, 1948), hereinafter Universal Declaration of Human Rights, at Article 3.
[17] Article 6 of the International Covenant .
[18] Article 2 of the Convention .

shall be protected by law".[19] Life is *a public interest*, and not just a *private interest*, which explains why it is particularly protected by criminal law rather than civil law: any violation of life is not only a violation of the private interests of the victim, but also damages the common good of society, including the public order. In this sense, as the Court has recognized: "*pregnancy cannot be said to pertain uniquely to the sphere of private life*",[20] it does not only concern the private life of the mother. The minimum standard established by the former European Commission of Human Rights (hereinafter the Commission) with regards to abortion and the legal protection of the prenatal life states that: "*There can be no doubt that certain interests relating to pregnancy are legally protected*".[21]

The case-law of the Court does not exclude the unborn child from the scope of the protection of the Convention.[22] This is true not only with regard to Article 2, but also with regard to other provisions of the Convention, as well as other norms enshrined in other European and international human rights instruments.

a. With regard to Article 2 of the Convention

The Court says that "*Article 2 of the Convention is silent as to the temporal limitations of the right to life*".[23] Thus, it protects "*everyone*"[24] without any limitation or reduction of the temporal scope of the right to life. This is normal, as life is a material reality before becoming an individual right. Life either exists or does not. It is a fact that everyone's life is a continuum that begins at conception and advances in stages until death.[25]

Determining the limits of physical life is not difficult, however, the development of practices such as *in vitro* fertilization, abortion and euthanasia have impaired the coincidence *ratione temporis* between the physical life itself and its legal protection. The right detaches itself from its object, thus becoming something abstract. We move from a realistic or an objective definition of the *right* to a more

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[19] According to the Convention:

> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
> *(a) in defence of any person from unlawful violence;*
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

[20] *Bruggemann and Scheuten v. Germany*, no. 6959/75, Report of the former Commission of July 12, 1977, p. 138, paras. 59, 60- 61 and *Boso v. Italy*, no. 50490/99, Judgment of September 5, 2002.

[21] *Brüggemann and Scheuten v. Federal Republic of Germany*, 12 July 1977, para 60.

[22] Even the legal advisers of the *Centre for Reproductive Rights,* which is the leading legal organization promoting a right to abortion on demand, recognising this fact. See Christina Zampas and Jaime M. Gher, "Abortion as a Human Right —International and Regional Standards", *Human Rights Law Review,* 8:2(2008), pages 265, 276.

[23] *Vo v. France*, [GC], No. 53924/00, 8 July 2004, (hereinafter *Vo v. France*) para. 75.

[24] This is confirmed by the Consultative Assembly's preparatory work in 1949, which clearly shows that these are rights that one enjoys just because one exists: *"the Committee of Ministers has asked us to establish a list of rights which man, as a human being, would naturally enjoy"* Preparatory work, vol. II, p. 89.

[25] See, *e.g.,* Sadler, T.W. *Langman's Medical Embryology,* 7th edition. Baltimore: Williams & Wilkins 1995, p. 3 noting that "*the development of a human begins with fertilization, a process by which the spermatozoon from the male and the oocyte from the female unite to give rise to a new organism*"; see also Moore, Keith L. and Persaud, T.V.N. *The Developing Human: Clinically Oriented Embryology,* 7th edition. Philadelphia: Saunders 2003, p. 2 noting that "*the union of an ovocyte and a sperm during fertilization" marks "the beginning of the new human being.*"

abstract and subjective one. The temporal application of the right is not determined by its cause but by an external will. Since the legalization of these practices, the right to life does not necessarily protect life fully anymore (life that is considered as an objective reality), but only a part of life, the extent of which varies according to the will of individuals within the framework established by the national legislators.

When the Convention was drafted, there was a broad consensus on the criminal nature of "*abortion on demand"* [26] thus; the Court itself has never redefined, so as to reduce, the scope of Article 2: the Court has never excluded prenatal life from its field of application.[27] In *R. H. v. Norway*, the Commission found "*that it does not have to decide whether the foetus may enjoy a certain protection under Article 2, first sentence as interpreted above, but it will not exclude that in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life*".[28] This position has been consistently upheld by the Court.[29]

Similarly, the Court has never construed Article 2 so as to allow an implicit exception to the right to life regarding prenatal life. "*It would be at variance with both the letter and the spirit of that Article. Firstly, the permissible exceptions formed an exhaustive list*[30]*. Secondly, the exceptions were to be understood and construed strictly"*[31]. More subtly, the Court has in practice permitted to a certain extent States to exclude the unborn from the protection conferred by Article 2, leaving the determination of the scope of this Article in their margin of appreciation,[32] "*so that it would be equally legitimate for a state to choose to consider the unborn to be such a person and to aim to protect that life*".[33] In this way, the Court did not engage itself in the legally impossible creation of a new implicit derogation of Article 2 § 2, nor did it exclude the unborn child from protection under the Convention.

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[26] See *Brüggemann and Scheuten v. Federal Republic of Germany*, No .6959/75, Report of the Commission, Decision of inadmissibility of the former Commission of 12 July 1977, para 64: "*Furthermore, the Commission has had regard to the fact that, when the European Convention of Human Rights entered into force, the law on abortion in all member States was at least as restrictive as the one now complained of by the applicants. In many European countries the problem of abortion is or has been the subject of heated debates on legal reform since. There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution under discussion (…) which was not yet under public discussion at the time the Convention was drafted and adopted.*"

[27] As President Jean-Paul COSTA explained in his Separate Opinion under *Vo v. France*, No. 53924/00, [GC], Judgment of July 8, 2004, "*Had Article 2 been considered to be entirely inapplicable, there would have been no point – and this applies to the present case also – in examining the question of foetal protection and the possible violation of Article 2, or in using this reasoning to find that there had been no violation of that provision.*", para. 11.

[28] *R. H. v. Norway,* No. 17004/90, Decision of inadmissibility of the former Commission of 19 May 1992, p. 167 (hereinafter *R. H. v. Norway. This ruling* is often quoted as *H. v. Norway* in some articles).

[29] See inter multis *Brüggemann and Scheuten v. Federal Republic of Germany*, No .6959/75, Report of the Commission, Decision of inadmissibility of the former Commission of 12 July 1977, papa. 60; *Vo v France*, para. 78.

[30] "[Article 2] *sets out the limited circumstances when deprivation of life may be justified"* (see *Pretty v. the United Kingdom*, No. 2346/02, para. 37.

[31] See *Öcalan v. Turkey*, No. 46221/99, para. 201, 12 March 2003 and para. 54 (abstract from the portion of the ruling dedicated to the presentation of the position of the French government).

[32] *Vo v. France*, para. 82: "*It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere (…)*".

[33] *A., B. and C. v. Ireland*, para. 222.

In fact, the Court preferred to avoid judging and deciding on the conventionality of abortion in principle. This was too sensitive and still is to a large extent. All applications brought by opponents of the legalization of abortion have been deemed inadmissible for lack of *locus standi,* because they were not personally a victim of the legalization of abortion.[34]

But when the Court was called to judge cases were the conventionality of abortion was not directly challenged, the Court has applied in those cases the right to life of the unborn child. For example, in *Megan Reeve v. the United Kingdom* case*[35],* the Commission found it "*reasonably proportionate*" that British law does not allow an action for "*wrongful life",* because it "*pursues the aim of upholding the right to life*". The Court noticed that the British "*law is based on the premise that a doctor cannot be considered as being under a duty to the foetus to terminate it and that any claim of such a kind would be contrary to public policy as violating the sanctity of human life*"[36].

Although in *Vo v. France* the Grand Chamber maintained its conviction *"that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention*""[37], it partially answered the issue raised by the applicant, affirming that: "*it may be regarded as common ground between States that the embryo/foetus belongs to the human race*"[38] and that he/she "*require*[s] *protection in the name of human dignity*".[39] This principle affords protection to the unborn child against violations of his/her dignity, such as inhuman or degrading treatment, which the Court cannot tolerate due to the absolute prohibition of such treatment under the Convention. This principle could also be applied, for example, to practices of late or sex-selective abortions, or when it can be proven that the abortion provokes foetal pain[40]. Proceeding in this way, the Court has followed the line drawn by the former Commission[41] which did not exclude the unborn child from the protection afforded by the right to life.

As a general rule, the Convention should be interpreted in the light of the aim for which it was created, namely to provide further protection of human rights, especially to the vulnerable. Excluding prenatal life from its scope as a matter of principle would go against the aim of the Convention.

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[34] See *Borre Arnold Knudsen v. Norway*, N° 11045/84, Decision of 8 March 1985 on the admissibility of the application; *X. v. Austria*, N° 7045/75, decision of the former Commission of 10 December 1976 on the admissibility. According to this case law, the Commission is competent to examine the compatibility of domestic legislation with the Convention only with respect to its application in a concrete case, while it is not competent to examine *in abstracto* its compatibility with the Convention.

[35] *Megan Reeve v. the United Kingdom*, No. 24844/94, Decision of inadmissibility of the former Commission of the 30 November 1994.

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[37] *Vo v. France*, para. 85.

[38] *Vo v France*, para. 84.

[39] *Idem.*

[40] *R. H. v. Norway*, No. 17004/90, Dec. of the former Commission on May 19, 1992.

[41] The Commission did not exclude the unborn child from the protection of the right to life, it indicated that it was not necessary to decide this question (R. *H. v. Norway*, *Bruggemann and Scheuten v. Germany*, No. 6959/75, Report of the former Commission on July 12, 1977, *X. v. UK*, No. 8416/79, in December of the previous Commission May 13, 1980, para. 7, *Reeve v. UK*, No. 24844/94, Dec. of the former Commission on November 30, 1994, *Boso v. Italy*, No. 50490/99, decision of September 5, 2002) and had referred the matter at the discretion of Member States (*R. H. v. Norway* and *Boso v. Italy*) .

b. With regard to other provisions of the Convention

The Court has recognized the applicability of other provisions of the Convention to prenatal life in several cases. In the case of *R. H. v. Norway,*[42] a complaint was made under Article 3 of the Convention by the father of an aborted child arguing that no measure had been taken to avoid the risk of pain of the fourteen week old foetus during the abortion. On this occasion, the former Commission accepted the applicability of Article 3 of the Convention to the unborn child, and only then considered the complaint ill-founded, for lack of evidence of foetal pain: : "*the Commission has not been presented with any material which could substantiate the applicant's allegations of pain inflicted upon the foetus (...) Having regard to the abortion procedure as described therein the Commission does not find that the case discloses any appearance of a violation of Article 3*" '. This means that if the abortion circumstances had been different, such as, for example, in the case of a late abortion, the complaint could be well founded.

In *X v. the United Kingdom,*[43] the Commission considered that the father of an aborted foetus could be regarded as the "*victim"* of a violation of the right to life, and affirmed that the term '*everyone*' concerns also the foetus, as he '*cannot be excluded*',[44] from the protection afforded by Article 6§1.[45]

Similarly, the foetus may also enjoy protection within the framework of Article 8 § 2[46], even if the Court "*does not…consider it necessary to determine…whether the term "others" in Article 8 § 2 extends to the unborn*".[47]

In fine, the Convention and the case law of the Court demonstrate that the unborn is not excluded from the scope of the Convention, and as we will see further, there are many other arguments proving that the Convention protects prenatal life.

Thus, states like Ireland, Malta, Poland or San Marino that uphold the entire scope of Article 2, recognizing their responsibility to protect life from conception, can invoke this treaty provision guaranteeing the right to life as encompassing State's responsibility to protect the unborn child from abortion. These states fully respect their obligations, beyond the minimum threshold currently required by the Court, pursuant to Article 53 of the Convention[48], which establishes that the state is free to provide wider protection of human rights than the one guaranteed by the Convention. Thus, the means used by those states to protect life (especially the prohibition of abortion, and the adoption of positive measures aiming to support the welcoming of life) contribute to the achievement of voluntary obligations consented to by the state, in accordance with Articles 2 and 53 of the Convention.

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[42] *R. H. v. Norway*.
[43] *X. v. UK*, No. 8416/79
[44] *X v. the United Kingdom,* p. 249, para. 7
[45] For another example of such an application in connection with access to a court, see *Reeve v. the United Kingdom*, no. 24844/94, Commission decision of 30 November 1994, DR 79-A, p. 146
[46] See for example *Odièvre v. France* [GC], no. 42326/98, para. 45. Example cited by Judge Ress in his dissenting opinion under *Vo v. France*, para. 4.
[47] *A., B. and C. v. Ireland*, para. 228.
[48] Article 53 of the Convention reads as follows: "*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a party* ";

c. With regard to other norms enshrined in European and international human rights instruments

Other provisions of European and international human rights instruments also offer protection to the unborn child referring to his/her various stages of development (e.g. embryo and foetus).

Many European human rights instruments relating to bioethics contain provisions on the prenatal life, such as the "Oviedo Convention on Human Rights and Biomedicine", the "Additional Protocol on the Prohibition of Cloning Human Beings" and the "Additional Protocol on Biomedical Research". These legal instruments are unable and unwilling to define the "*human being"* and whether the term *"everyone"* still applies to the embryo and prenatal life, in order to provide them protection. In that sense, the Court has noticed that "*the embryo and/or foetus …are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation*"[49].

As the Court stressed many times, the Convention has to be interpreted in an evolutive manner, "*in the light of present-day conditions*"[50]. The interpretation of the Convention should take into account, *inter alia*, the more recent legal instruments protecting the human dignity and the embryo, as well as the evolution of scientific knowledge and practices. The consideration of the scientific progress should not be limited only to the field of biotechnologies, but should also include the progress in prenatal and neonatal medicine which has considerably improved the viability threshold of the foetus considered as a patient[51] and permitted a better knowledge of the suffering endured by the foetus during the abortion process. There is no reason for the regulation of abortion to remain unaffected by this evolution.

In the European Court of Justice (hereafter ECJ) judgment of 18 October 2011, in the case of *Oliver Brüstle v. Greenpeace e.V*[52], the Grand Chamber of the ECJ, interpreting EU Directive 98/44/EC on the legal protection of biotechnological inventions, ruled that the embryo enjoys protection from its fertilization against patenting, when the patent application requires the prior destruction of human embryos. The principle of dignity and integrity of the person[53] protects the human embryo and the cells derived from it at any stage of its formation or development. The ECJ has defined the "*human embryo*" as "*any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis".* This

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[49] *Vo v France*, para. 84.

[50] see *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, para. 31, and subsequent case-law.

[51] J. L. Lenow*, "*The foetus as a patient: emerging rights as a person?" *Am J Law Med* 1983; 9(1) :1-29.

[52] European Court of Justice, *Oliver Brüstle v. Greenpeace e.V,* 18 October 2011, C-34/10.

[53] Recital (16) Whereas patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person; whereas it is important to assert the principle that the human body, at any stage in its formation or development, including germ cells, and the simple discovery of one of its elements or one of its products, including the sequence or partial sequence of a human gene, cannot be patented; whereas these principles are in line with the criteria of patentability proper to patent law, whereby a mere discovery cannot be patented.

is the first decision of a European Court which provides a definition of the human embryo. The Court specified that this definition is "*an autonomous concept of European Union law*". This means that in relation to European Union law the meaning and scope of the term "human embryo" must be given a uniform and independent interpretation throughout the European Union. The member States are no longer free to choose their own definition of the "human embryo" when applying the Directive. Within the framework of the ECJ, it does not belong to the national margin of appreciation to determine what an embryo is and when the human embryo deserves legal protection in regard to human dignity and integrity. Such an autonomous definition is necessary in order to permit a uniform interpretation and implementation of the Directive throughout the European Union.[54]

Consequently, the assessment of the ECHR according to which "*there is no European consensus on the scientific and legal definition of the beginning of life*"[55] has to be considered to have lapsed.

In relation to international law, all modern human rights treaties, including the European Convention, originate in the 1948 Universal Declaration on Human Rights according to which "*everyone has the right to life, liberty and the security of person"* under Article 3. Nothing was specified as to the beginning or end of life.

The International Covenant on Civil and Political Rights was meant to implement the Universal Declaration. Article 6 §1 reads: *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".* There is no mention of abortion or of the exclusion of the unborn from the protection of right to life of this Article. However, Article 6 §5 specifies that a death sentence *"shall not be carried out on pregnant women"*, implicitly recognizing the right to life of the unborn, or at least the value of his life. Therefore, Article 6 guarantees the protection of unborn children, at least against the capital punishment of the mother. When the text was adopted in 1966, death penalty was widely legal whereas abortion on demand was a crime everywhere in the world.

With regard to international treaties, the Preamble of the 1989 Convention on the Rights of the Child reiterated a provision of the Declaration of the Rights of the Child of 1959, declaring 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".*

Among regional treaties, the 1969 American Convention on Human Rights expressly protects life from conception. According to Article 4 §1 "*Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life"*.

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[54] See Dr Stephen Blance, "Brüstle v Greenpeace (C-34/10): '*The End for Patents Relating to Human Embryonic Stem Cells in Europe*?' IP Quarterly. Accessible at http://www.avidity-ip.com/assets/pdf/Brustlemar12.pdf, last visited November 20th 2012.

[55] *Vo v France*, para.82.

2. The Convention does not contain a right to abortion

a. There is no right to die or a right to abortion under the Convention

The Court declared in the *Pretty v. UK*[56] case that "*Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination*".[57] Similarly, the Grand Chamber of the Court declared in the *A, B and C v. Ireland* case that "*Article 8 cannot, accordingly, be interpreted as conferring a right to abortion".*[58] In addition to these clear statements, the Court, in *Maria do Céu Silva Monteiro Martins Ribeiro v. Portugal*[59]*,* declared inadmissible an application claiming a right to access to abortion on demand against the national legislation deemed too restrictive by the applicant.

b. There is no right to practice abortion under the Convention

Just as there is no right to have an abortion, there is no right to practice it. The doctors cannot invoke such a right and complain of their conviction for practising illegal abortion. The Commission and the Court have rejected applications brought by physicians for having been convicted for aiding or practicing illegal abortions. In the case of *Jerzy Tokarczyk v. Poland,*[60] the Court held that the complaint of a gynaecologist against his conviction of aiding and abetting abortion was manifestly ill-founded. The applicant offered his assistance to women who wished to have an abortion, to organise their travels to the Ukraine, where they had abortions in a public hospital. In *Jean-Jacques Amy v. Belgium,*[61] the former Commission declared inadmissible an application concerning the penal conviction of a Belgian physician for having practiced an illegal abortion.

However, the Court recognizes that there is a right of health professionals not to perform abortion. In *R. R.* v. *Poland* and *P. and S. v. Poland*[62]*,* the Court acknowledged "*the freedom of conscience of health professionals in the professional context*"[63] in relation to

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[56] *Pretty v. The United Kingdom*, N° 2346/02, Judgment of April 29, 2002 (hereinafter *Pretty v. The United Kingdom*.)

[57] *Pretty v. The United Kingdom,* para. 39 and 40; "*Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe […]* ».

[58] *A., B. and C. v. Ireland*, para. 214.

[59] In *Maria do Céu Silva Monteiro Martins Ribeiro v. Portugal*, 26 October 2004, N° 16471/02. The applicants criticised "*the Portuguese law on abortion and abortion on demand which was considered by the applicants contrary to a number of provisions of the Convention as it prohibits the termination of pregnancy on demand of the pregnant woman*" (unofficial translation).

[60] *Jerzy Tokarczyk v. Poland*, N° 51792/99, decision of inadmissibility of the former Commission of 31 January 2002.

[61] *Jean-Jacques Amy v. Belgium,* N° 11684/85. decision of inadmissibility of the former Commission of 5 October 1988

[62] *P. and S. v. Poland*, N° 57375/08*,* 30 October 2012 (not definitive).

[63] *R. R. v. Poland*, N° 27617/04, 26 May 2011, para. 206: « *For the Court, States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of*

abortion. The Parliamentary Assembly of the Council of Europe adopted a Resolution in 2010, strongly upholding "*the right to conscientious objection in lawful medical care*" declaring 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 foetus or embryo, for any reason*" [64].

In 2010, when the *A. B. and C. v. Ireland* judgment was delivered, some expected the Court to create or recognize a "right" to abortion, as a development of the "women's rights" and of the so-called "sexual and reproductive rights"[65], like several European countries did previously. This was particularly expected because the Parliamentary Assembly of the Council of Europe (hereafter PACE) adopted on 16 April 2008 a Resolution[66] on *Access to safe and legal abortion in Europe* "*invit[*ing*] the member States of the Council of Europe to decriminalise abortion within reasonable gestational limits, if they have not already done so* [and to] *guarantee women's effective exercise of their right of access to a safe and legal abortion*"[67]. However, the PACE Resolutions are not binding neither on States nor on the Court; they only provide for a political interpretation of the Convention, as well as they indicate a trend, in the European public opinion, on a specific matter. Nevertheless, the Court could not follow the PACE as far from the original writing of the Convention.

c. The Court cannot interpret the Convention creating new rights not included in the Convention or which are contrary to the existing rights

The Court cannot create a right to abortion because its interpretive power is limited: "*the Convention and its Protocols must be interpreted in the light of present-day conditions. However, the Court cannot, by means of evolutive interpretation, derive from these instruments a right that was not included at the outset. This is particularly so here, when the omission was deliberate*".[68] Therefore, under no circumstances, and even interpreting the rights enshrined in the Convention in an evolutive manner, can the Court create new human rights which are not included in the Convention.[69] In this respect, the

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health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation ».

[64] Parliamentary Assembly of the Council of Europe, Resolution 1763 (2010) of 7 October 2010 on "*The Right to Conscientious Objection in Lawful Medical Care"*.

[65] Christina Zampas and Jaime M Gher (from the *Center for Reproductive Rights)*, "Abortion as a Human Right, International and Regional Standards", *Human Rights Law Review* (2008) 8 (2): pages 249-294 ; Elizabeth Wicks, "Abortion Law under the European Convention on Human Rights*"*, *Human Rights Law Review* 11:3 (2011), pages 556-566.

[66] Parliamentary Assembly of the Council of Europe adopted on 16 April 2008 a Resolution N°1607 *Access to safe and legal abortion in Europe* (hereinafter Parliamentary Resolution)

[67] Parliamentary Resolution paras 7; 7.1 and 7.2. The Assembly has moderated the original wording of the Draft Resolution introducing a reference to the time limit, and withdrawing the concept of "right to abortion", substituting it by the "*right of access to a safe and legal abortion"*. The Draft resolution (Doc. 11537 rev.2) stated: the Assembly "*invites the member states of the Council of Europe to decriminalise abortion, if they have not already done so [and to] guarantee women's effective exercise of their right to abortion*".

[68] *Johnston and others v. Ireland*, N° 9697/82, Judgment of 18 December 1986, para. 53.

[69] *Johnston and others v. Ireland*, no. 9697/82, judgment of 18 December 1986 para. 53; *Emonet and others v. Switzerland*, N° 39051/03, judgment of 13 December 2007, para. 66: *"the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate"*.

Court cannot oblige States to allow wider access to abortion than they have currently decided to allow.

Moreover, the Court cannot interpret the Convention *contra legem,* creating a new right directly opposed to an existing right guaranteed by the text of the Convention. An alleged right to abortion[70] or to euthanasia,[71] cannot be deduced from the Convention because it would conflict with Article 2 protecting the right to life. Article 2 contains only a limited number of exceptions, and does not allow the Court to create new exceptions. In this respect, the Convention should be "*read as a whole"*[72]. The Court has recognized that it cannot, on one hand, impose an obligation to protect life by law and, on the other hand, condemn a state for not assisting in suicide[73]. What the Court recognized regarding the facilitation of a breach of life by assisted suicide, should also be recognized regarding the facilitation of a breach of life by abortion. The same principles apply with regard to legal euthanasia and abortion.

d. Legality of a practice does not create a right to that practice

When the Court mentions the "*right of access to lawful abortion*",[74] it can only refer to a "right" granted by the national legislation and not by the Convention. It is an abuse of language of the Court to refer to a "*right of access to lawful abortion"* or to a "*right to decide on the termination of a pregnancy*"[75] in the abortion cases against Poland and Ireland, as it is well-established that there is no such "right" neither in the Irish and Polish legislations, nor in the legislation of any other country where abortion is a derogation to the principle of the protection of life. It is inappropriate for the Court to use the term "*right*", because legality does not create a right. The legality of a practice does not entitle individuals to exercise it, nor does it create a positive obligation on the State to provide for this practice or render its exercise effective. For example, the legality of euthanasia, drugs or prostitution does not create a subjective right to be killed or to have drugs or sex. The same can be said of any medical treatment: its legality does not oblige the State to provide it. There is often confusion between legality and entitlement, and in particular in relation to Article 8.

e. Desire does not create a right

In *Costa and Pavan v. Italy* case*,*[76] the Court went even further, finding that the *desire* of the applicants under Article 8 may constitute a *right.* Wishing to have a child free from a genetic disease, the applicants asserted that the legal prohibition of pre-implantation genetic diagnosis infringed their private and family life. In order for this case to come within the scope of the Convention, the Court set forth that the "*wish*" to have a healthy child "*constitutes an aspect of their private and family life which is protected by Article*

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[70] *A., B. and C. v. Ireland*, para. 214.
[71] *Pretty v. UK*, No. 2346/02, Judgment of April 29, 2002, paras. 39-40.
[72] *Haas v. Switzerland*, No. 31322/07, Judgment of January 20, 2011, § 54;
[73] *Haas v. Switzerland*, No. 31322/07, Judgment of January 20, 2011, para. 54.
[74] For example in *P. and S. v. Poland*, N° 57375/08*,* 30 October 2012, para. 99 (not definitive).
[75] *P. and S. v. Poland*, para. 98.
[76] *Rosetta Costa and Walter Pavan v. Italy,* No 54270/10, 28 August 2012.

8"[77]. Therefore, according to the Court, the legal impossibility to fulfil this wish through artificial procreation techniques gives the applicants the status of "victims" and infringes their right to respect for private and family life. The Court believes that this respect for private and family life encompasses a "*right* [of parents] *to give birth to a child who does not suffer from the disease they are carriers of*",[78] meaning they have a right to give birth to a healthy child. Thus, the *wish* to have a child free from disease constitutes a *right* which imposes obligations on the state. Transforming the "parent's *wish* to have a child" or the "woman's *will* to abort a child" into a "right" gives a false conception of human rights, namely a projection of the individual will into the social order.[79] Following this approach, every individual desire will fall within the ambit of Article 8 and will become a "right", because, fundamentally, any restriction to an individual's desire is perceived as an offence. With this mind set, abortion, euthanasia, drugs or sexual activity (incest[80] or sadomasochism[81]) tend to be analysed as individual freedoms stemming from Article 8.

f. Choice does not create a right

The Court followed the same logic in regard to assisted suicide. Considering that '*the choice of the applicant to avoid what would, in her view, constitute an undignified and distressing death falls within the scope of Article 8 of the Convention*"[82], the Court established in the case of *Haas v. Switzerland* "*that the right of an individual to decide how and when life should end, provided that he is able to determine of his own free will and act accordingly, is one aspect of the right to respect for private life under Article 8 of the Convention*'[83]. Here, the personal *choice* becomes a *right*, more precisely, a *freedom* which can be subject to limitations and, like any other freedom, does not need the intervention of a third party (i.e. the holder of the freedom has the ability to determine his own free will and to act accordingly by himself). Meanwhile, a woman who wants to have an abortion cannot act alone. Its performance cannot be attained by an individual acting independently, but it requires the direct intervention of the State and of the medical practitioners and it also involves the unborn child. Therefore, it is impossible to consider abortion a *freedom,* even more than any other contentious practice.

g. The creation of a right to abortion would change the philosophy of the Convention

When the Court speaks of a *right to abortion*, a *right to have a child* or a *right to assisted suicide*, it follows current dominant individualistic ideology. These assertions may be satisfactory ideologically speaking, but they are legally inconsistent with the Convention

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[77] *Idem,* para. 57.
[78] *Ibid,* para. 55.
[79] See Grégor Puppinck, « Procréation médicalement assistée, Interdiction du diagnostic préimplantatoire : la CEDH censure le législateur italien », *Droit de la famille, JurisClasseur-LexisNexis*, N° 11, novembre 2012, p. 27
[80] *Stübing v. Germany*, No*. 43547/08,* 12 April 2012.
[81] *K. A. and A. D. v. Belgium,* Nos 42758/98 and 45558/99, 17 February 2005.
[82] *Pretty v. The United Kingdom*, para. 50.
[83] *Haas v. Switzerland*, Application No. 31322/07 judgment of 20 January 2011, (para. 51), *unofficial translation*.

which does not confer a *right to have a child*[84], a *right to abortion*[85] or a *right to assisted suicide*.[86] This inconsistency appears clearer and clearer with every judgment of the Court on sensitive issues. Fundamentally, the evolutive interpretation cannot reconcile the wording of the Convention with postmodern ideology. To consider abortion as a *right* or a *freedom* not only would be an *ultra vires act,* but it would also change the philosophy of the Convention as it would no longer *protect* the human being, but it would instead *free* the individual. Such an approach does not apprehend the fact that *individual autonomy* is not the source of *individual rights*, but, and only to a certain extent, of *individual freedoms*. More specifically, *individual autonomy* is a set of capacities by which each person determines how to use his or her faculties and abilities, i.e. freedom of action. It is the matrix of the person's judgments and actions and not a matrix of rights, of the ultimate and superseding rights, for which society would be liable.

Such a change would induce a change of anthropology. The wording of the Convention, especially that of Articles 8, 9 and 12, expresses an underlying anthropology based on natural law which was inherited from the Humanistic Age. This anthropology would be considered out-of-date and replaced by the liberal anthropology, which considers the individual free well as the ultimate and only good and right. Indeed, the right to abortion implies the domination of individual will over life, subjectivity over objectivity. It would resettle the Convention into a liberal and individualistic philosophy where the "individual", instead of the "human being" and the "human nature", is the ultimate source of the legitimacy of the norm.

3. Abortion is a derogation from the right to life

a. Abortion cannot constitute a right in itself

Most States which permit abortion allow it as a derogation from the right to life in their national law.[87] In France, for example, the *Civil Code* states that: *"Legislation ensures the primacy of the person, prohibits any infringement of the latter's dignity and safeguards the respect of the human being from the outset of life".*[88]The *Code of Public Health* reiterates this statement and specifies that the only exceptions must be necessary and prescribed by law.[89] Therefore, those States do not question the applicability of the right to life to the period of life before birth, though they allow a limited

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[84] The Court stated in *Sijakova v. The Former Yugoslav Republic of Macedonia*, n° 67914/01, decision of 6 March 2003, that neither the right to marry and to found a family, nor the right to private and family life or any other right guaranteed by the Convention imply a right to procreation.
[85] *A., B. and C. v. Ireland*, para. 214.
[86] *Pretty v. The United Kingdom*, N° 2346/02, Judgment of April 29, 2002 (hereinafter *Pretty v. The United Kingdom*.)
[87] See, amongst others, the legislation of Italy, Poland and Germany.
[88] French Civil Code at Article 16.
[89] *Ibid*, at Article L. 2211-1 : « *La loi assure la primauté de la personne, interdit toute atteinte à la dignité de celle-ci et garantit le respect de l'être humain dès le commencement de sa vie* ». Article L2211-2 : « *Il ne saurait être porté atteinte au principe mentionné à l'article L. 2211-1 qu'en cas de nécessité et selon les conditions définies par le présent titre. (…)* ».

possibility to detract from this rule. This means that for all States allowing abortion as a derogation, the right to life, in principle, covers and protects life before birth. This is the reason why abortion needs a law to be legally practised. If the foetus or the embryo were *nothing,* or nothing more than an insignificant element produced by the body of the woman, like the hair, there would be no need of a law to permit abortion.

Abortion being a derogation of the right to life, cannot constitute a right in itself, it cannot become an autonomous right. As a derogation, its scope is limited by the principle to which it refers. President Costa explained in this regard that "*I believe (as do many senior judicial bodies in Europe) that there is life before birth, within the meaning of Article 2, that the law must therefore protect such life, and that if a national legislature considers that such protection cannot be absolute, then it should only derogate from it, particularly as regards the voluntary termination of pregnancy, within a regulated framework that limits the scope of the derogation*"[90]. For example, we can presume that the Court would not consider proportionate a practice such as partial-birth abortion or selective abortion according to the sex or colour of the skin. Thus, abortion is limited and cannot be considered as an absolute and autonomous right. From a more fundamental point of view, this respects the principle that a positive right can only pursue a good *per se*. It cannot be aimed at the realization of a wrong, even if this wrong is permitted by law, because of its supposed inevitability or necessity.

b. The "conditional applicability" of the Convention to the unborn child

According to the doctrine of "*conditional applicability*" of the Convention,[91] when a State chooses to establish a right which is not *per se* guaranteed by the Convention, it can fall to a certain extent under the protection of the Convention. For example, the Court applied this doctrine in cases related to article 8 of the Convention when States recognize a "right" to abortion in the national legislation. Therefore, if States recognize in their internal legal order that the right to life covers, in principle, life before birth, this recognition should have consequences not only on the State's obligations deriving from Article 2 of the Convention, but also for Court when assessing cases concerning the right to life of the unborn child. In those cases, the Court should not limit itself to merely observing the absence of a European consensus on the beginning of life, but it should also look whether the national legislation recognizes (at least at a certain extent) the right to life of the unborn child. If the Court applied this doctrine to Article 8 concerning abortion, although abortion is not a right, but a derogation, why it should not apply it to Article 2 concerning the principle of the right to life of the unborn child, which at least at a certain stage of development, is a right clearly protected?

[90] Jean-Paul Costa, Separate opinion under *Vo v. France*, para. 17.
[91] Applied, for example, to the right to a fair trial guaranteed by Article 6 of the Convention would means that although States are not required to establish a second degree of jurisdiction in civil matters, if they are doing so, the requirements of this Article will apply also to this second degree of jurisdiction.

c. The "margin of appreciation"

The fact that abortion derogates from the legal protection of life before birth and is not a right *per se* explains perfectly the way the Court used the doctrine of the "*margin of appreciation*" in *A. B. C. v. Ireland*. It has not been understood by some commentators[92] and therefore needs to be explored further.

In *A. B. C.,* the Court considered that a broad margin of appreciation should be accorded to Ireland because of the "*acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake"*[93]*.* The Court did *"not consider that this consensus ['amongst a substantial majority of the contracting states of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law'*[94]*] decisively narrows the broad margin of appreciation of the state".*[95]

In a dissenting opinion, six judges[96] expressed their disagreement with the decision of the Grand Chamber in this case, considering that the existence of a consensus on abortion among Member States of the Council of Europe should have been used to narrow the width of the margin of appreciation enjoyed by Ireland when regulating abortion in order to straighten the dynamic interpretation of the Convention[97] towards the development of a right to wider access to abortion. This opinion has been shared by several commentators of this judgment.[98] The dissenting judges pointed out that it is "*the first time that the Court has disregarded the existence of a European consensus on the basis of "profound moral views""*. They argued that the fact that these "*moral views*" "*can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law*".[99] Such fear is understandable when it comes from judges impregnated by liberal philosophy. They cannot accept that "*profound moral views*" may impede the dynamic extension of human rights[100] created by the Court through its doctrine of the Convention as a "*living instrument"*, according to which the Convention shall be interpreted in the light of present-day conditions[101]. Such approach of the margin of appreciation of the States would severely hinder the possibilities of activism in moral and sensitive matters. Such a

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[92] See for example Paolo Ronchi, "*A, B and C v Ireland* Europe's *Roe v Wade* Still Has to Wait", *Law Quarterly Review*, 2011, 127(3), pages 365-369.
[93] *A, B, C v Ireland*, para. 233.
[94] *A, B, C v Ireland*, para. 235.
[95] *A, B, C v Ireland*, para. 236.
[96] *Ibid*, see the partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelia, Malinverni and Poalelungi who considered that the acknowledgment of this consensus should have reduced Ireland's margin of appreciation.
[97] *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, para. 41; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, para. 60; *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, para. 102; *L. and V. v. Austria*, nos. 39392/98 and 39829/98, para. 50, and *Christine Goodwin v. the United Kingdom* [GC], cited above, para. 85
[98] See also, among others, Elizabeth Wicks, *Abortion Law under the European Convention on Human Rights*, Human Rights Law Review 11:3 (2011), pages 556-566.
[99] Ibid., Partly Dissenting Opinion at para 9.
[100] Referring to the preamble of the Convention: "*Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms*".
[101] *Tyrer v. the United Kingdom*, 25 April 1978, para. 31.

restraint was embraced shortly by the Grand Chamber after the *A., B. and C. v. Ireland* judgment in another ruling on bioethics[102].

It is true that a large number of Member States have more or less a similar view on the "woman's right" over the life of her unborn child, but there is no general consensus on the other side[103], namely on the right to life of the unborn child, which depends on "*the question of when the right to life begins*".[104] It is not sufficient for the Court to assess the proportionality of the Irish law on abortion by looking whether a fair balance has been struck between the interests of the mother and the other rights and interests involved in the issue. Such a balance is not possible if the State recognises that the unborn child as a person: you cannot strike a balance between the lives of two persons. Therefore, it is important to understand that the question of the legal status of the unborn child takes even precedence over the status of the "woman's right" upon the life of her unborn child, as the value of an individual right upon an "object" cannot be evaluated if the nature of this object has not been previously determined.

Whereas, according to the doctrine of the conditional applicability, the Court should have applied the Convention to the unborn child, the Grand Chamber preferred to reaffirm that it is "*impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2*", therefore "*the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother*"[105].

In *A., B. and C. v. Ireland* judgment, it is not only the "*moral views*" against abortion that have overridden the European *consensus* in favour of abortion. For the Court, the consensus in favour of abortion is not sufficient, as it also has to answer the question of the status of the unborn child in the internal legal order.

When balancing different interests at stake in the *A., B. and C.* case, the dissenting judges looked only to the "*moral and ethical issues raised by the question of abortion"* and did not consider *"the public interest at stake*" [106] which is deemed important by the Court to justify the restrictions on abortion. Within the notion of "*public interest* [is] *notably the protection accorded under Irish law to the right to life of the unborn*".[107] The

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[102] *S. H. and others v. Austria,* [G C], N° 57813/02, 3 November 2011. The Grand Chamber judged that the Austrian government has a wide margin of appreciation because the matter "*continues to give rise today to sensitive moral and ethical issues*" para. 97.

[103] *Idem :* "*in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the (…) applicants to respect for their private lives under Article 8 of the Convention*" (para. 233).

[104] *A, B, C v Ireland*, para. 237.

[105] *A, B, C v Ireland*, para. 237: "*Of central importance is the finding in the above-cited Vo case, referred to above, that the question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected (see the review of the Convention case law at paragraphs 75-80 in the above-cited Vo v. France [GC] judgment), the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother*".

[106] *A, B, C v Ireland*, para. 233.

[107] *Idem.*

protection of the "*right to life of the unborn*" is not only a moral view; it is a constitutional obligation consistent with the Convention.

d. The ambivalent use of the notion of "consensus"

It is also necessary to highlight that the Court generally uses the concept of consensus in a specific way, different from its definition in international law. In the Court's view, there is a consensus when a large majority of Member States shares a common view on a certain issue. However, in international law[108], as well as within the other bodies of the Council of Europe[109], consensus is an agreement by absence of explicit opposition. A consensus is a method of reaching an agreement on international law based on "*qui tacet consentire videtur".*[110]

Sometimes we may be surprised by the way the Court uses this notion. When only three or four States prohibit abortion, the Court has found a broad consensus in favor of the legalization of abortion, but when four States allow euthanasia,[111] the Court has not found a broad consensus in favor of the ban, but an absence of consensus in favor of its legalization.[112] The areas in which the Court uses the notion of consensus are precisely those that not always have been consensual and which are still not. Whereas it can be used to describe objectively the legal situation in European countries, the notion of consensus is departing from this objective utilisation to become an element of the liberal and progressive understanding of human rights. Within this new perspective, the notion of consensus is used as a sociological indicator of the degree of acceptance of a new freedom in the collective consciousness.

In practice, the examination of the *consensus* is often more a study of the evolution of the public opinion on a sensitive matter. Such examination of the existence of a consensus is accomplished with the belief that practices such as assisted suicide, abortion or artificial procreation are new individual freedoms and will be recognised ineluctably as such against all social prohibitions. This liberal perspective explains why the Court concludes with opposite stands on the matter of abortion and assisted suicide, while in term of comparative law, the situation is identical.

The case of *Schalk and Kopf v. Austria*[113] shows how the concept of consensus can be used to develop human rights with this progressist vision. Addressing the question whether the right to marry can benefit to same-sex couples, the Court noticed that "*there*

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[108] Hervé Cassan, « Le consensus dans la pratique des Nations Unies », *Annuaire français de droit international,* 1974, Vol. 20, No 20, pp. 456-485

[109] Such as in the rules of the Committee of Ministers See CM/Del/Dec(92)472/44 et Annexe 19.

[110] Silence gives or implies consent. The consensus also designates the result of this method, the agreement itself.

[111] In *Ulrich KOCH v. Germany*, No. 479/09, 19 July 2012, the Court noted that "*only four States examined allowed medical practitioners to prescribe a lethal drug in order to enable a patient to end his or her life.*" The Court concluded that "*State Parties to the Convention are far from reaching a consensus in this respect, which points towards a considerable margin of appreciation enjoyed by the State in this context*" (para. 70).

[112] Today in Europe, there is a broad agreement against euthanasia, with four exceptions. However, the Court reversed the perspective by adopting a liberal logic according to which States must justify restrictions laid down on the exercise of euthanasia as if euthanasia was a new breeding ground for human rights. Yet there is no doubt that the drafters of the Convention, at the end of WWII and the Nuremberg trials, precisely wanted to fight against such practices.

[113] *Schalk and Kopf v. Austria*, 24 June 2010 (n°. 30141/04)

is an emerging European consensus towards legal recognition of same-sex couples", but that there is not "*yet*"[114] a majority of States providing for legal recognition of same-sex couples. The Court recognises consequently that it "*must not rush to substitute its own judgment in place of that of the national authorities"*[115]*.* As a consequence, the Court declared that this question must therefore be regarded as one of "*evolving rights*"[116] and that States are "*still free*"[117] to restrict access to marriage to different-sex couples. In conclusion, States enjoy a margin of appreciation, but this margin is limited to "*the timing*" of the legal recognition.

The detailed discussion in the *A., B. and C.* case on the opinion in Ireland on abortion is also an example, among many others, on how the Court takes into account the public opinion. Indeed, the status of the opinion can even determine the outcome of a judgment, because the Court views human rights also as a matter of timing: it will recognise new human rights and impose new obligations progressively, according to the ability of public opinion to accept it. This approach implies that the Court has a "vision" on what human rights are, and progressively realise it through its case law.

The Court uses the consensus in order to develop the Convention by recognizing new rights that were not originally guaranteed by this treaty. As any other dynamic process of interpretation which constantly needs to prove its legitimacy, the Court seeks guidance in the legal and social landscape of the Member States, particularly when it wants to give a new meaning to the rights guaranteed by the Convention. In this process of interpretation of the provisions of the Convention, the Court relies on the trends of domestic laws, as well as on any other legal instrument. Although the Court states that it cannot create a right that is not already included in the Convention,[118] and that it cannot interpret the Convention against its own wording, as it would be an *ultra vires* act, its case-law indicates the opposite. In reality, the Court interprets the Convention extensively,[119] sometimes even against the original intention of its authors,[120] or even against the wording of the Convention.[121] The Court feels authorized to follow such an interpretation when a trend among the Member States on this new development can be found in the national legislations, in the recommendations of the Committee of Ministers, or in other legal instruments of the Council of Europe posterior to the Convention. Such an extensive interpretation becomes clearly an *ultra vires* act if it is *contra legem* or if there is no real and full agreement within <u>all</u> Member States, *i.e.* when there is no consensus, *stricto sensu*. In this situation, the notion of consensus is used in order to override

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[114] *Idem*, para 105.
[115] *Idem*, para. 62.
[116] *Idem*, para. 105.
[117] *Idem,* para 108
[125] *Johnston and others v. Ireland*, no. 9697/82, judgment of 18 December 1986, paragraph 53; *Emonet and others v. Switzerland*, no. 39051/03, judgment of 13 December 2007, paragraph 66; "*the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate*."
[126] This is particularly evident in the interpretation of Article 8 on privacy.
[127] For example, by extending the application of Article 12 (family life) to situations not covered by its wording. *Schalk and Kopf v. Austria*, June 24, 2010, paras 101, 105. Also see *Bayatyan v. Armenia*, no. 23459/03, 7 July 2011 recognising the right of conscientious objection to military service
[8] For example see the recent judgment in the case of *Sindicatul Pastorul Cel Bun v. Romania*, Ap. 2330/09 of 31 January 2012. The Court decides, against the first sentence of Art. 11-2 that under Article 11, the State may only impose restrictions of union liberty to the three groups mentioned in paragraph 2 of this provision, namely members of the armed forces, of the police or of the administration of the State, provided these restrictions are lawful.

residual resistance of some States to the recognition of new developments of the Convention.[122] This explains why the dissenting judges in *A., B. and C. v. Ireland* judgment would have liked, especially after the adoption if the PACE Resolution on abortion[123], to have this European *consensus* in favour of abortion override the persistent decision of Irish people to strictly limit abortion.

4. If the State allows abortion, it remains subject to the obligation to protect and respect competing rights and interests

a. The right to life implies negative and positive obligations of the State

In the case of *R. H. v. Norway,*[124] which concerned an abortion carried out against the father's wishes, the Commission stated "*that Article 2 required the state not only to refrain from taking a person's life intentionally, but also to take appropriate steps to safeguard life*".[125] Therefore, the right to life implies positive and negative obligations on the State, as it has been reiterated many times after this decision[126]. As regards the negative obligation, the State must absolutely refrain from taking a person's life intentionally, meanwhile considering the positive obligation, the State enjoys a margin of appreciation in determining the means by which the life of those within its jurisdiction will be safeguarded. The role of the Court, analysing on a case by case basis, is to assess, according to the circumstances of each case, whether the State took the necessary steps to secure "*everyone's right to life*".[127]

b. When abortion is legal, "its legal framework shall adequately take into account the different legitimate interests involved"

If the State decides to permit abortion, it remains subject to the obligation to protect and respect competing rights and interests. Therefore, the fact that a State permits a derogation from a right does not wave the State's obligations under the Convention with respect to this right and to other rights affected by this measure. The "*margin of*

[122] The normal way to introduce new rights, that were not recognised in the Convention and can not stem from it, is the adoption of optional protocols, such as the one on abolition of the death penalty.
[123] PACE Resolution on *Access to safe and legal abortion in Europe* recognized: "*Abortion must, as far as possible, be avoided*", *precit*.
[124] *R. H. v. Norway at* p. 167
[125] *R. H. v. Norway*, at p. 167. See also, for example, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, para. 36.
[126] *R. H. v. Norway*, *LCB v. UK*, Judgment of 9 June 1998, para. 36 and *Pretty v. UK*, No. 2346/02, Judgment of April 29, 2002, para. 38;
[127] Article 2 of the Convention.

appreciation is not unlimited"[128] "*as to how it* [the State] *balances the conflicting rights of the mother*"[129] with the "*protection of the unborn*"[130].

The Court has several times recalled that if and *"once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations",*[131] "*the legal framework devised for this purpose should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention".*[132] Therefore, the legalization of abortion does not exempt the State from its responsibility to respect the fundamental rights and interests which are protected by the Convention, and also those that are affected by the decision to allow abortion. When abortion is legal, the fair balance between the regulation of abortion in order to secure the life and health of the mother and the other competing rights and interests; among which the protection of the unborn child, has become the main principle underpinning the reasoning of the Court on abortion.

The Court, as well as the Commission, has always assessed the proportionality of abortion taking into account the various competing interests. In the case of *Boso v Italy,*[133] for example, the Court assessed the balance *"between, on the one hand, the need to ensure protection of the foetus and, on the other hand, the woman's interests"*[134] and concluded that there was no violation of Article 2. As judge Jean-Paul Costa has explained: "*It would have had to reach the opposite conclusion had the legislation been different and not struck a fair balance between the protection of the foetus and the mother's interests. Potentially, therefore, the Court reviews compliance with Article 2 in all cases in which the "life" of the foetus is destroyed*"[135].

In the *Haas v. Switzerland*[136] case, concerning assisted suicide (which is legal under certain conditions in Switzerland), the Court held that respect for the right to life compels the national authorities to take positive measures to protect individuals from making a hasty decision and, to prevent abuse of the system. The Court underlined in particular that the risk of abuse inherent in a system which facilitates assisted suicide cannot be underestimated, and concluded that the restriction on access to assisted suicide was intended to protect health and public safety and to prevent crime.[137] Therefore, even when assisted suicide is allowed, as in Switzerland, the state must prevent the abuse of this facility because of the State's obligation to protect life, particularly as it concerns vulnerable people. This should also apply regarding abortion. Women undergoing abortion are in distress and therefore vulnerable, especially if they are minors, disabled, struggling financially or seeking an abortion for psychological

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[128] *A. B. and C. v. Ireland*, para. 238.
[129] Ibid at para. 237.
[130] *Idem.*
[131] See, *inter alia*, *P. and S. v. Poland*, N° 57375/08, 30 October 2012, para. 99 (not definitive).
[132] *A. B. and C. v. Ireland*, para. 249 and *R. R. v. Poland*, No. 27617/04, Judgment of May 26, 2011, para. 187; *P. and S. v. Poland*, N°. 57375/08, 30 October 2012, para. 99 (not definitive).
[133] *Boso v. Italy,* No. 50490/99, decision of 5 September 2002 (hereinafter *Boso v. Italy*)
[134] *Boso v. Italy*,"*In the Court's opinion, such provisions [regarding abortion] strike a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests*".
[135] Jean-Paul Costa, Separate opinion under *Vo v. France*, para. 13.
[136] *Haas v. Switzerland*, N° 31322/07, Judgment of 20 January 2011, para. 54;
[137] *Ibid* at para. 58;

reasons.The same principle applies when considering the mother's interest under the scope of Article 8 of the Convention.[138]

As the Grand Chamber reiterated in *Vo v. France* case, "*It is also clear from an examination of these cases* [of the Commission and Court] *that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms*"[139].

The Court has already had the opportunity to identify a number of these fundamental rights and "*legitimate interests involved*"[140] which the State must consider when legislating on access to abortion.

These rights and legitimate interests frame the actions of the State while defining, within its margin of appreciation, the legal framework of abortion. Many of these interests, among which the protection of life comes first, limit the scope of the derogation and reduce the possibility of legal abortion in regard to the Convention requirements.

In fact, the only justification in favour of securing access to treatments that may result in abortion are the interests related to the protection of life and health of the mother, the other competing interests and rights advocate for the ban of abortion as we will see now. Indeed, it is a general principle of the Court's case law that a fundamental right guaranteed by the Convention (i.e. the right to life) cannot be subordinated or put on the same footing with an alleged right not guaranteed by the Convention, but only allowed in the internal legal order (i.e. abortion). As the Court made clear, "*where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein: in such a case only indisputable imperatives can justify interference with enjoyment of a Convention right*"[141].

c. The "legitimate interests" restricting the scope of the derogation

In its case-law, the Court has already had the opportunity to identify a number of rights and interests justifying or requiring restrictions to the practice of abortion when abortion is legal. For example, the Court has recognized in addition to interest of protecting the right to life of the unborn child[142], the legitimate interest of society in limiting the number of abortions[143], the interests of society in relation to the protection of morals[144], the

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[138] *A. B. and C. v. Ireland*, "The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child (*Tysiąc v. Poland* judgment, para. 106; and *Vo v. France* [GC], paras. 76, 80 and 82)" (para. 213).
[139] *Vo v. France*, para. 80.
[140] ECHR, *A., B. and C. v. Ireland*, N° 25579/05, [GC], Judgment of 16 December 2010, para. 249 and *R.R. v. Poland*, N° 27617/04, Judgment of May 26, 2011, para. 187;
[141] *Chassagnou and others v. France* [GC], Nos 25088/94, 2833/95 and 2844/95, Judgment of April 29, 1999, para. 113: *"where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein: in such a case only indisputable imperatives can justify interference with enjoyment of a Convention right"*.
[142] *R. H. v. Norway*, *Boso v. Italy* and *Vo v. France*, at paras 86 and 95.
[143] *Odièvre v. France* [GC], N° 42326/98, Judgment of February 2003, para 45;
[144] *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, para. 63, and *A, B. and C. v. Ireland* at paras. 222 and 227;

parental rights and the freedom and dignity of the woman.[145] The Court has also recognized the interest of the father,[146] the right to freedom of conscience of health professionals[147] and institutions based on ethical or religious beliefs[148], and the freedom and dignity of the woman[149].

There are some cases currently pending before the Court regarding other interests and rights affected by abortion. These include the State's duty to properly inform women of the risks associated with abortions,[150] and the connection between abortion, eugenics and discrimination of disabled people ("wrongful birth" and "wrongful life cases")[151] .This list is not exhaustive, but in continuous development. An example of such development is the issue of late abortions. Those abortions, practiced after the first semester of pregnancy, will probably arrive before the Court. In the USA, the Supreme Court upheld the ban on partial birth abortion, considering that even when abortion is legal, not every method is acceptable: "*The State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn*"[152]. The question of the "human foetus" that are born alive, surviving some minutes or hours to late term abortions, and who received no care until death, may also come before the Court or the Council of Europe.

Other institutions, such as the Parliamentary Assembly of the Council of Europe, have identified other rights and interests which justify or necessitate limitations on access to abortion, such as the interest of society to ban sex selective abortion[153], also called "gendercide". The United-Nations has, for many years, raised concern about this issue for demographic and discriminative reasons. The Cairo Conference on Population and Development associates prenatal sex-selection with female infanticide.[154]

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[145] See *mutatis mutandis* the ECHR acknowledgment of the violation of women's dignity by forced sterilization.

[146] In *Boso v. Italy* and *X v. the United Kingdom, precit*. The Court acknowledged that the "potential fathers" were victims of the abortion, but that the abortion was justified by medical indications. *A contrario,* the proportionality test should have been different in case of abortion on demand.

[147] *Tysiac v. Poland*, N° 5410/03, Judgment of September 24, 2007, at para 121 and *R.R. v. Poland*, N° 27617/04, Judgment of May 26, 2011, at para 206.

[148] *Rommelfanger v. FRG*, N° 12242/86, Dec. of the former Commission on September 6, 1989.

[149] See *mutatis mutandis* the ECHR acknowledgment of the violation of women's dignity by forced sterilization.

[150] *Csoma v. Roumania*, N° 8759/05, *pending*.

[151] *K. v. Latvia,* N° 33011/08 pending; *M. P. v. Romania,* N° 39974/10, pending.

[152] *Gonzales*, *Attorney General v. Carhart et al.* No. 05-380. April 18, 2007

[153] On October 3, 2011, the Parliamentary Assembly of the Council of Europe adopted Resolution1829 (2011) and Recommendation 1979 (2011) on sex selective abortion, admitting that abortion has negative effects on society, and therefore abortion cannot but be limited, and where it is legal, it must be regulated.

[154] 1994 Cairo Conference on population on development,
"4.16. The objectives are:
(a) To eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection". See also *Missing*, booklet by the UNFPA, 2005 http://india.unfpa.org/drive/MissingBookletEnglish.pdf and *Preventing gender-biased sex selection***,** An interagency statement OHCHR, UNFPA, UNICEF, UN Women and WHO**,** 2011 http://www.who.int/reproductivehealth/publications/gender_rights/9789241501460/en/index.html

Forced abortion has been identified as a crime against humanity since the Nuremberg trials. Ten Nazi leaders were indicted for *"encouraging and compelling abortions".*[155] More recently, the European Parliament adopted a Resolution which *"condemns the practice of forced abortions and sterilisations globally, especially in the context of the one-child policy".*[156] Coerced or compelled abortion is also impossible to justify under the Convention and this is clearly a violation of both rights of the mother and of the child. According to the Guttmacher Institute[157], 75% of women undergoing an abortion say they cannot afford a child; 75% say that having a baby would interfere with work, school or the ability to care for dependents; and 50% say they do not want to be a single parent or are having problems with their husband or partner. All those reasons invoked by women show that their choice is not free, but actually under social coercion. According to the International Conference on Population and Development Plan of Action, *"the aim of family planning programmes must be to enable couples and individuals to make free, responsible and informed decisions about childbearing"*[158]. In many cases, the consent of the mother is far from freely given. Hence those situations are sometimes comparable to forced abortion.

In fine, the Court could find a violation of the Convention if the legal framework of abortion does not allow the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention[159]. These violations do not only address legislation which does not oppose or prevent extreme practices such as sex-selective or forced abortion, but also legislation permitting abortion without "proportionate" motives. In this regard, the causes of abortion, in particular, its social causes, should be viewed in light of the State's obligation to protect life, family and human dignity and to adopt positive measures supporting them.

d. The "legitimate interests" justifying the derogation

The recent case-law of the Court suggests that, when abortion is legal, it should be considered both as a subjective '*right of access to lawful abortion*'[160] and as a medical practice. Such an assertion is a desire rather than a reality, as it is well-established that the Convention does not guarantee to individuals a right to have access to a certain medical practice[161]. In reality, it is clear that abortion is neither a subjective right, as we saw above, nor a real medical practice, unless it has a "therapeutic" purpose necessary

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[155] Pr John Hunt, St Joseph University, Philadelphia, "Abortion and the Nuremberg Prosecutors, a Deeper Analysis" http://www.uffl.org/vol%207/hunt7.pdf The author supports that, in the Nuremberg trial, abortion *per se* is considered a crime against humanity.

[156] European Parliament, Resolution 2012/2712(RSP) of 5 July 2012 on the forced abortion scandal in China.

[157] http://www.guttmacher.org/pubs/fb_induced_abortion.html

[158] See the European Parliament resolution of 5 July 2012 on the forced abortion scandal in China (2012/2712(RSP)).

[159] *A. B. and C. v. Ireland*, para. 249 and *R. R. v. Poland*, No. 27617/04, Judgment of May 26, 2011, para. 187; *P. and S. v. Poland*, N°. 57375/08, 30 October 2012, para. 99 (not definitive).

[160] *P. and S. v. Poland, cited above*. para 99: "*In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion*". See also *Tysiąc v. Poland*, paras. 116-124, *R.R. v. Poland*, para. 200.

[161] *Tysiac v. Pologne*, N° 5410/03; *Cyprus v. Turkey,* [GC], N° *25781/94; Nikky Sentges v.Netherlands* N° 27677/02.

to preserve the mother. It is only in this specific circumstance that a patient may allege for the termination of her pregnancy under the Convention.

Indeed, when the continuation of the pregnancy puts the life of the mother at risk, the balancing of interests may be difficult. However, such cases rarely occur. On the contrary, the mother's physical or mental *health* may not prevail, when the *life* of the child is at stake and this for the following reasons:

- The right to life is an absolute and inherent right, it is at the very core of human rights; and as we saw above, the Court has never denied the quality of "person" of the unborn child, and therefore has never excluded him from the scope of the Convention. The frequent assertion that the relative right to health (of the mother) outweighs the absolute right to life (of the unborn child) implies considering that the unborn child is not a person, that he is ontologically different and inferior to his mother.

- The right to health is only a goal, not even mentioned in the European Convention on Human Rights. The international treaties only *'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'*[162] and encourage States to take steps to achieve this goal. In the case-law of the Court, the protection of "*health*" falls within the scope of Article 8 of the Convention securing the right to respect for one's private life. It does not constitute an autonomous right stemming from the Convention. There is no general "right to health" under the Convention, such a right may exist, for example for a pregnant woman, only if her health is concretely endangered by the prohibition of abortion in the domestic law[163]. This prohibition is not *per se* contrary to the Convention, but it has to be a proportionate measure. The proportionality of this prohibition is assessed according to the circumstances of the case, *i.e.* the medical situation of the mother and whether the State had other means to pursue the legitimate aim sought through the prohibition.

It is to be noted that the notion of "*well-being*" introduced in *A. B. and C. v. Ireland* judgment has yet to be defined by the Court. Moreover, the Convention cannot create a "*right to well-being*" as this notion is very subjective, the Court itself stated that "*the applicant's subjective perception is not in itself sufficient to establish a breach of [the Convention]*[164].

With regard to abortion practiced in order to save the life of the mother, it has to be understood that this issue is not directly connected with the matter of the existence of a "right" to abortion. The prohibition of abortion is not an obstacle to the delivery of the necessary medical treatments that should be carried out to save the life of a pregnant woman, even if such treatment results in the loss of life of her unborn child, *i.e.* in the unintended termination of the pregnancy.[165] A group of 140 gynaecologists and physicians underlined this in a common declaration on maternal healthcare in Dublin,

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[162] Art. 12 of the 1966 International Covenant on Economic, Social and Cultural Rights
[163] *A, B and C v. Ireland*, para. 214; *P. and S. v. Poland,* para. 96.
[164] *Lautsi and others v. Italy*, GC, No. 30814/06, judgment of 18 March 2011, para. 66 *in fine*.
[165] *A. B. and C. v. Ireland*, "*A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature."* para. 238. *A contrario*, this sentence means that "in principle" a prohibition of abortion to protect unborn life is justified under the Convention.

Ireland[166]. The same can be said of the prohibition of euthanasia and the medical treatments that may have the unintended, but expected, effect of shortening the life of the patient (doctrine of the double effect). The right of the woman which is pursued through such termination of the pregnancy is not a right to abortion, but her right to life.[167] The Commission noted "*that, already at the time of the signature of the Convention (4 November 1950), all High Contracting Parties, with one possible exception, permitted abortion when necessary to save the life of the mother*"[168]. Therefore, it was and it is not a matter of public and ethical debate. In relation to other medical matters, the Court held that an issue could arise under Article 2 of the Convention where it could be shown that the authorities put the individual's life at risk through the denial of health care available to the population generally[169]. The same principle applies to abortion when the woman's life is at risk.

A difficulty which arises in these cases is to assess whether the threat to the health of the mother is severe or not, and whether abortion is a claim of convenience.[170] Mental health may be used as an easy way of describing the inconvenience of an unexpected pregnancy and the threat of suicide may be abused.

Abortion promoters insist that abortion is necessary to protect women's health and that many women die due to illegal abortions. It is true that maternal mortality is high in Africa where abortion is usually illegal or strictly limited. Yet, this maternal mortality is not limited to abortion, it includes miscarriages and births, and it is linked to the generally poor quality of health services. In Latin America, the legal situation of abortion is comparable to that of Africa but maternal health services are of a better quality. In Europe, Ireland holds one of the best records in the world concerning maternal health (n° 1 in 2005, n° 3 in 2008)[171], as well as Poland (n° 4 in 2005 and n° 10 in 2010)[172]. At the other end of the scale, a modern country like Latvia (n° 46 in 2005)[173] with liberal laws on abortion has a rate of maternal mortality five times higher than Ireland. The United-States was n° 35 in 2012. This factual information is of a primary importance. It shows that, at least in Europe, there is no link between illegal abortions and high rates of maternal mortality. This contradicts the allagation of the promoters of a "right" to abortion who affirm that restrictions on abortion on demand lead to maternal

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[166] See :*The Irish Times*, September 10, 2012, "Forum in Dublin on Maternal Health":
"As experienced practitioners and researchers in Obstetrics and Gynecology, we affirm that direct abortion is not medically necessary to save the life of a woman.
We uphold that there is a fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child.
We confirm that the prohibition of abortion does not affect, in any way, the availability of optimal care to pregnant women."
[167] *A. B. and C. v. Ireland*, para. 245.
[168] *X. v. the United Kingdom*, No. 8416/78, Commission decision of 13 May 1980, para. 20.
[169] *Nitecki v. Poland*, 21 March 2002 (inadmissibility decision).
[170] In the *A, B and C* case, one of the women said she had been diagnosed with cancer while pregnant and had to abort in order to begin treatment. However, she did not give any evidence of her state of health, not even a medical certificate.
[171] See http://www.unicef.org/infobycountry/ireland_statistics.html, last consulted on September10th 2012.
[172] See *Trends in Maternal Mortality: 1990-2010*. Estimates Developed by WHO, UNICEF, UNFPA and the World Bank, http://data.worldbank.org/indicator/SH.STA.MMRT (*last visited 20th November 2012*).
[173] See *Trends in Maternal Mortality: 1990-2010*. Estimates Developed by WHO, UNICEF, UNFPA and the World Bank, http://data.worldbank.org/indicator/SH.STA.MMRT (*last visited 20th November 2012*).

mortality[174]. They advocate that "[w]*omen's right to abortion should be expanded to include abortion on request or for socio-economic reasons, as denial of which may significantly affect women's mental or physical health*"[175]. Affirming that abortion should be legalized because the illegality of abortion can lead to unsafe abortions is a weak argument when confronted with the figures of maternal mortality. It is based on the logic of the politics of the lesser of two evils. This argument is also used in favour of legalisation of drugs and prostitution. It can be summarized as follows: we recognize that drugs and prostitution are evil, but people will always use drugs or prostitution, therefore, "*restrictive laws may force people to seek illegal, and hence, unsafe* [drugs or prostitution] *which threaten their lives"*[176]. Thus, according to their obligation to protect people's life, States should legalize drugs and prostitution and afford an effective right of access to lawful drugs and prostitution, which will include a positive obligation on the State to provide it. Yet, nobody would suggest that access to safe and legal sex or drugs is a human right, even when this practice comes within the ambit of private life and endangers individual life or health and well-being.

e. Procedural obligations of the State

In *A. B. C. v. Ireland* case (as well as *mutatis mutandis* in *Tysiac*[177], *R. R.* and *P. and S. v. Poland*[178] cases concerning Articles 3 and 8 of the Convention), the Court found a violation of the right to respect for private life of the third applicant[179] because she could not gain access to an effective procedure to establish whether she fulfilled the conditions established by Article 40.3.3 of the Constitution[180], article which permits abortion on the grounds of a relevant and serious risk to a woman's life. The Court concluded that the applicant found herself in an "*uncertain situation*"[181] which amounted to a violation of her right to respect for her private life. This judgment required the Irish Government to adopt measures so that applicant C, or any other woman in the same situation, would be able to know whether her medical situation would necessitate the termination of her

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[174] The strategy of the promoters of a right to abortion on request is to affirm that restriction to abortion on demand leads to maternal mortality. See Christina Zampas and Jaime M. Gher, "Abortion as a Human Right —International and Regional Standards", *Human Rights Law Review* 8:2(2008), p. 255: "*The recognition by treaty-monitoring bodies that restrictive abortion laws may force women to seek illegal, and hence, unsafe abortions which threaten their lives, can be used by advocates to support abortion on request or for socio-economic reasons*." See also Ronli Sifris, *"Restrictive regulation of abortion and the right to health"*, *Med Law Rev* (2010) 18 (2): pages 185-212. see also Rie Yoshida, *Ireland's restrictive abortion law: a threat to women's health and rights?* Clin Ethics (2011) 6(4): pages 172-178.

[175] Christina Zampas and Jaime M. Gher, "Abortion as a Human Right — International and Regional Standards", *precit,* p. 269.

[176] *Idem.*

[177] *Tysiac v. Poland, N°. 5410/03, judgment of 20 March 2007. precit.*

[178] *P. and S. v. Poland*, N° 57375/08, 30 October 2012 (not definitive).

[179] Applicant C. affirmed (without any medical evidence submitted to the Court) that she had a rare form of cancer and, on discovering she was pregnant, had feared for her life as she believed that her pregnancy increased the risk of her cancer returning. She would not obtain treatment in Ireland while pregnant, without indicating what kind of cancer she had and without bringing any medical certificate proving at least that she consulted a doctor. Before the Court she complained about the failure by the Irish State to implement Article 40.3.3 of the Constitution by legislation and, notably, to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life due to her pregnancy (para 243).

[180] *Bunreacht na hEireann*

[181] *A. B. C. v. Ireland*, GC, § 267

pregnancy, as her pregnancy constitutes a risk to her life[182]. In summary, the Court found that the national legal framework was not shaped in a manner which clarified the pregnant woman's legal position.[183] Therefore, according to the Court, the violation of the right to private life of the applicants is not caused by the State's decision to forbid or strictly limit abortion, but by the fact that the legislation puts women who are considering having an abortion in an excessively uncertain situation. For the Court, the respect for private life implies an obligation on the State to clarify the pregnant woman's legal position.

Additionally, when it is established that the pregnant woman fulfils the legal conditions allowing access to abortion, the Court ruled that the state *"must not structure its legal framework in a way which would limit real possibilities to obtain an abortion*"[184]*.* It must enable "*a pregnant woman to effectively exercise her right of access to lawful abortion"*[185]. *In fine*, state's obligations are therefore mainly procedural in regard to a legal abortion carried out to save the life or preserve the health of a pregnant woman. The determination of the threshold of danger for the life or health of the woman justifying such an abortion belongs to the state.

In *A. B. and C. v. Ireland,* the Grand Chamber reiterated its well-established case law while specifying that "*it is not for this Court to indicate the most appropriate means for the state to comply with its positive obligations*"[186]. Therefore, it is for the Government to determine the most appropriate measures to adopt in order to prevent similar violations of the Convention in the future. This is a consequence of the subsidiary nature of the system of the Convention.[187] The task of the Irish Government is to consider in which circumstances there is a "*real and serious risk to the life of the mother*" and to provide for an "*accessible and effective procedure*" by which a pregnant woman can establish whether or not she fulfils the conditions for a lawful abortion according to Article 40.3.3 of the Constitution, *i.e.* whether the risk to her life is real and makes the abortion necessary[188]. In the language of the Court, "*procedural and institutional procedures"* do not imply legislation or regulation. The real requirement is that this procedure shall not be too complex *in concreto*. Within the Convention's system[189], it is for each individual State

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[182] The decision taken by the national authorities on whether the medical situation of applicant C would or not necessitate the termination of the pregnancy has in no incidence provided for protection of the right to life of applicant C. In other words, this ruling does not require Ireland to make sure that abortion would be available to applicant C, but to clarify its regulation in one sense or the other, in order to respect the competing interest of the pregnant woman to know where she stands.

[183] According to the Court,, the procedural safeguards for situations where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case should be the following: first, they should take place before an independent body competent to review the reasons for the measures and the relevant evidence and to issue written grounds for its decision; second, the pregnant woman should be heard in person and have her views considered; third, the decisions should be timely, and fourth, the whole decision-making procedure should be fair and afford due respect to the various interests safeguarded by it.

[184] *P. and S. v.Poland*, para. 99; see also *Tysiac* v. *Poland* and *R. R.* v. *Poland*.

[185] *P. and S. v.Poland*, para. 99, *Tysiąc v. Poland, paras 116-124, R.R. v. Poland, para. 200)*

[186] *A. B. C.* v. Ireland at para 266, cited above, see also the previous references given by the Court.

[187] It is true that in the *A. B. and C.* ruling the Court went very much into the details of the Irish law while identifying some problematical points as to effectiveness of the existing procedures (paras 252-264), but those considerations are not binding: they have only an informative and explanatory purpose. The Court explains the reasons of its judgment. By indicating those reasons, the Court also makes some suggestions, but Ireland does not have to answer to each of those points.

[188] *A. B. C. v. Ireland* at para 267

[189] The Court can assess, after the exhaustion of domestic remedies by the applicants, on a case by case basis, and decide by a binding judgment whether in a specific situation there has been a violation of the

to determine the most appropriate remedy, keeping in mind, in the field of medical care, that a balance also has to be struck between the competing interests of the individual and of the community as a whole, and that the margin of appreciation is wide when the issue involves "*an assessment of the priorities in the context of the allocation of limited State resources*".[190]

At first glance, this procedural approach obliges Ireland and Poland only to clarify the concrete conditions of access to abortion; in actual practice, however, it goes far beyond that obligation. In order to execute the judgments, as the Court recommends[191] (a recommendation which is not compulsory), Ireland[192] and Poland will institute a decision-making mechanism to which women wishing to have an abortion will be able to address their demands. Ireland will probably follow the example of Poland, which in order to carry out the *Tysiac v. Poland* judgment established a committee of experts in charge of deciding on a case by case basis whether the conditions of access to an abortion are fulfilled. This committee will necessarily interpret and change those conditions. The composition of this committee is decisive and is debated within the Council of Europe: the pro-abortion lobbies[193] would like to reduce the number of doctors on such committees in favour of other professions and categories (lawyers, representatives of NGOs, etc). This request was backed by the UN Special Rapporteur for the right to health who affirms that "*a commission composed exclusively of health professionals presents a structural flaw which is detrimental to its impartiality*"[194]. This issue is important, as doctors have a scientific, objective and concrete approach to the causes justifying a possible abortion. By contrast, lawyers and political organizations view abortion under the abstract angle of individual freedoms. What is at stake in the debate on the composition of those committees is the definition of the nature of abortion; on one side it is considered from a concrete and medical point of view and, on the other side, from an abstract point of view and as an individual freedom. If abortion is a freedom, its exercise inevitably clashes with the doctors' assessment which is perceived as an illegitimate interference. This confrontation is stronger when the doctors invoke their freedom of conscience to refuse to carry out an abortion.

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individual rights guaranteed by the Convention. But it does not belong to the Court to indicate which general measures a State should adopt in order to prevent similar violations of the Convention in the future. The Court only indicates why a certain human right was violated and the State against which the Court has given a judgment remains free to choose the means that it considers necessary to ensure and implement the rights prescribed by the Convention to comply with the judgment. Similarly, during the supervision process of the execution, it belongs to the Committee of Ministers to decide whether the measures adopted can be considered as satisfactory, but not to indicate which general measures the State should have adopted.

[190] See *Zehnalovà and Zehnal v. the Czech Republic*, No. 38621/97, (Dec.) 14 May 2002 ; *O'Reilly and Others v. Ireland* (dec.), no. 54725/00; Sentges v. the Netherlands, No.27677/02, (Dec.) 8 July 2003.

[191] *Tysiąc v. Poland, cited above, para 117.*: "*The Court has already held that in the context of access to abortion the relevant procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered. The competent body or person should also issue written grounds for its decision".*

[192] See the Report of the official group of experts instituted by the Irish Government to propose ways of executing the judgment, published in November 2012 et accessible to this address: http://www.dohc.ie/publications/pdf/Judgment_ABC.pdf?direct=1

[193] See the communication of the « Centre for reproductive rights » to the Committee of Ministers of the Council of Europe and the answer of the Polish Government DH-DD(2010)610E

[194] See the Report on Poland of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, M. Anand Grover, 20 May 2010, Human Rights Council, document n° A/HRC/14/20/Add.3).

The decisions of this committee should be timely, reasoned and in writing, to be challenged in the court system. Thus, the final decision to authorize abortion will belong no longer to the doctors or even to the committee of experts, but to the judge who will ultimately interpret the criteria for access to abortion. At present, no procedure has been proposed to challenge in the courts a decision authorizing abortion In practice, only a decision of refusal can go before the courts. Will the unborn child have a lawyer to represent and defend him/her in this committee? Will safeguards be provided against the abusive interpretation by this committee of the legal conditions for access to abortion? However, the pressure to liberalize abortion is very strong, especially from the European[195] and international institutions[196].

Thus, the final interpretative power of the conditions for access to abortion will be transferred to the judicial power and ultimately to the European Court of Human Rights. With such a mechanism, the European Court would soon be called on to decide on the reasons for decisions of refusal of those committees. This could likely be a new opportunity to advance a "right to abortion". This procedural approach allows, uultimately, to take away the control of the framework of abortion from the legislator and to the doctor. This result is achieved while recognizing the absence of a right to abortion under the Convention, and without its being necessary for the Court to comment on the prohibition in principle of abortion in Irish law. In order to impose this procedural obligation, it suffices to affirm, starting from an exception from the prohibition on the ground of danger to the life of the mother, that there is a 'right' to abortion and that this 'right' falls within the scope of the Convention.

5. Abortion on demand: a "blind spot" in the case law of the Court and a violation of the Convention

It is uncontested[197] that there is no direct, indirect or implicit right to abortion for socio-economic reasons or on demand in any international or regional treaty, including the

[195] During its 6th December 2012 meeting, the delegates to the Committee of Ministers invited Ireland to answer the issue of the '*general prohibition of abortion in criminal law*', as it constitutes '*a significant chilling factor for women and doctors because of the risk of criminal conviction and imprisonment*', inviting '*the Irish authorities to expedite the implementation of the judgment (…) as soon as possible*'. 1157DH meeting of the Ministers' Deputies 04 December 2012, Decision concerning the execution of *A., B. and C. v. Ireland* judgment.

[196] See the Report of the Human Rights Commissioner on his visit in Ireland (26-30 November 2007), adopted on 30 April 2008 (CommDH(2008)9), the Report of the Committee for the elimination of discrimination against women (« CEDAW »), of the High Commissioner Office of Human Rights of July 2005 (A/60/38(SUPP), the Periodical Report of the Human Rights Committee on the observance of the UN Covenant on civil and political rights (CCPR/C/IRL/CO/3, 30 July 2008).

[197] Even the legal advisers of the *Center for Reproductive Rights* agree with this statement. See Christina Zampas and Jaime M. Gher, "Abortion as a Human Right—International and Regional Standards", *Human Rights Law Review* 8:2(2008): "*No international or regional treaty explicitly recognise women's right to*

Convention. Such abortion is illegal in three quarters of the countries in the world.[198] Moreover, legal arguments supporting the conventionality of the practice of "abortion on demand" are very weak; in fact, they cannot resist to a strict and coherent analysis.

a. Abortion on demand remains a blind spot in the case-law of the Court

The Court did not yet have the courage to determine if its practice violates the Convention. The Court answered half of the question judging that the prohibition of abortion on demand does not violate the Convention[199], but the Court never took the occasion to answer the second half of the question: whether the practice of abortion on demand violates the Convention or not. Consequently, abortion on demand still remains a *blind spot* in the case-law of the Court. However, it is not difficult to deduce how the existing case-law of the Court should apply to it, if the Court were coherent in its case-law.

Concretely, the Court has not yet examined the compatibility of the abortion on demand with the Convention, because until now, all such cases were introduced under (the cover of[200]) an *extreme situation,* such as therapeutic or eugenic abortions[201] or abortions following a rape[202]. Moreover, all applications brought by opponents to the legalization of abortion have been deemed inadmissible for lack of *locus standi,* because they were not personally a victim of the legalization on abortion[203]. But who can claim before the Court to be a victim of an abortion of demand? The real victim had no chance to gain legal personality.

The only applicant the Court has recognized as a victim of an abortion is the father: "*as a potential father…he could claim to be a victim*".[204] However, in the two cases accepted by the Court, the abortions were justified by a "*medical indication*"[205] and were not on

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abortion for socio-economic reasons or on request and no treaty-monitoring body has interpreted any provision of any treaty to require as such" (p. 287) "*nor have they explicitly called for the legalization of abortion on those grounds*" (p. 255).

[198] See *L'avortement dans le monde*, INED, ***www.ined.fr/fr/tout_savoir_population/fiches_pedagogiques/naissances_natalite/avortement_monde/*** (last visited on November 20th 2012).

[199] See *Maria do Céu Silva Monteiro Martins Ribeiro v. Portugal,* n° 16471/02, 26 October 2004. See also *A. B. C. v. Ireland*, where the Grand Chamber found no violation of article 8 in the case of the first two applicants who complained of the prohibition of abortion on demand. *See* Elizabeth Wicks, "Abortion Law under the European Convention on Human Rights*"*, *Human Rights Law Review* 11:3 (2011), page 565.

[200] The factual basis of each of those cases was not clearly established or proved by the applicants. In *A. B. and C. v. Ireland*, applicant C did not present any medical certificates, whereas in *P. and S. v. Poland,* the man occused of the rape had not been prosecuted.

[201] *Tysiac v. Poland*, *R. R. v. Poland and A. B. and C. v. Ireland.*

[202] *P. and S. v. Poland.*

[203] See *Borre Arnold Knudsen v. Norway*, N° 11045/84, Decision of 8 March 1985 on the admissibility of the application; *X. v. Austria*, N° 7045/75, decision of 10 December 1976 on the admissibility; *X . v. Norway*, N° 867/60, Commission decision of 29 May 1961. According to this case law, the Commission is competent to examine the compatibility of domestic legislation with the Convention only with respect to its application in a concrete case, while it is not competent to examine *in abstracto* its compatibility with the Convention.

[204] The "*applicant, as a potential father, was so closely affected by the termination of his wife's pregnancy that he could claim to be a victim*", *Boso v. Italy*, No. 50490/99, decision of 5 September 2002, see also *X. v. the United Kingdom*, No. 8416/78, Commission decision of 13 May 1980, Decisions and Reports (DR) 19, p. 244.

[205] In the *X. v. the United Kingdom* case, the Commission explicitly underlined that no other indications for abortion (the Commission mentions ethic, eugenic and social indications) or matter of time limitation arose in the case.

demand. As the abortions were necessary for the health of the mothers, the balance with the fathers' interests were deemed acceptable by the Court. Maybe the Court will accept one day to consider a case brought by a "potential father" against his partner's decision to undergo an abortion on demand. If the father can contest the *way* the abortion is performed, why not recognizing his right concerning the *fact* that the abortion is performed? Very recently, in *P. and S. v. Poland* case, the Court also recognized that the pregnant woman's mother had *locus standi* in the case[206]. This opens also perspectives.

b. Abortion on demand finds no justification under the Convention

In order for the Court to analyse the conventionality of the practice of abortion, the case should have, at least apparently, an objective motive that may outweigh the interests in favour of the protection of the life of the unborn child. Examining its case-law, it appears that the Court has never admitted that the autonomy of the woman could, on its own, suffice to justify an abortion. Indeed, it is difficult to identify which "legitimate interest" may be adequately protected by an abortion motivated mainly by free will. Only the right to personal autonomy may potentially encompass such practice of abortion, as it is the case in numerous European States, where the justification of such abortion is the demand itself. That would imply that a right to abortion stems from the right to personal autonomy. But, as reaffirmed recently in *P. and S. v. Poland*, the Grand Chamber of "*the Court has held that Article 8 cannot be interpreted as conferring a right to abortion*"[207]. Therefore, abortion on demand finds no justification under the Convention; it cannot be balanced with, and justified by any "legitimate interest" and right guaranteed by the Convention[208]. Therefore abortion on demand violates the Convention[209] and affected by the abortion. This violation is even more flagrant when we consider the positive obligations of States not only to protect life, but also to provide a social support for pregnant women and for families.

Therefore, we have to conclude that, having regard to the Convention and the case-law of the Court, the practice of abortion on demand is not justified within the Convention, and therefore violates the Convention, although it represents the vast majority of all abortions performed. The only way for the Court to conclude that abortion on demand would not violate the Convention would be to renounce to apply the Convention to the unborn child, declaring that the Convention ignores the reality of the unborn child and to renounce to offer protection also to the various public interests involved. For that the Court would have to transform the *blind spot* into a *legal gap*. But until now, the Court has exercised its jurisdiction on abortion and refused to ignore the unborn child.

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[206] *P. and S. v. Poland*, N°. 57375/08, 30 October 2012, para. 99. The Court asserted that "*it cannot be overlooked that the interests and life prospects of the mother of a pregnant minor girl are also involved in the decision whether to carry the pregnancy to term or not. Likewise, it can be reasonably expected that the emotional family bond makes it natural for the mother to feel deeply concerned by issues arising out of reproductive dilemmas and choices to be made by the daughter.*" (para. 109)

[207] *A, B and C v. Ireland* at para. 214.

[208] *A. B. and C. v. Ireland*, para. 249 and *R. R. v. Poland*, No. 27617/04, Judgment of May 26, 2011, para. 187; *P. and S. v. Poland*, N°. 57375/08, 30 October 2012, para. 99 (not definitive).

[209] *A. B. and C. v. Ireland*, para. 249 and *R. R. v. Poland*, No. 27617/04, Judgment of May 26, 2011, para. 187; *P. and S. v. Poland*, N°. 57375/08, 30 October 2012, para. 99 (not definitive).

People may think that abortion on demand is acceptable under the Convention because the Convention does not oppose to abortion for health and life reasons. This is clearly not the case because only those abortions can pretend to pursue a legitimate interest guaranteed by the Convention. Meanwhile, it is true that once the life of the unborn child has already been sacrificed for the protection of some other interests, it has become impossible to determine the value of this life in a non-arbitrary manner. The only way to have a clear-cut threshold and not to undermine the value of life would be to accept that the right to life of the unborn child can only be balanced with the equal right to life of his mother. Any other balance has an arbitrary component and it is ultimately the manifestation of the power of the strong over the weak. The domination of the power of the strong over the weak, of the born over the not-yet-born, has its own legitimacy, as Jean de La Fontaine wrote: *"la raison du plus fort est toujours la meilleure"*[210], but this legitimacy should not be covered up with the one of human rights.

Conclusion: the necessary implementation of the women's *"right not to abort"*

Neither the Convention, nor the Court when interpreting the Convention, excludes prenatal life from the scope of the protection of the Convention, which contains a right to life and not a right to abortion. In most European States, abortion is a derogation from the right to life. If the State decides to allow abortion, the Court points out that the State is obliged to protect and respect competing rights and interests. Therefore, a State that decides to permit abortion not only has an obligation to frame access to abortion, but also to take positive measures to avoid the recourse to abortion, and therefore to fully respect its positive obligations stemming from the right to life[211] and the other legitimate rights and interests.

In many cases, abortion is decided because the mother or the parents do not have the means to rear the child. However, the State has the duty to protect life and the duty to promote economic and social rights. As 75% of abortions are caused by economic constraints, it is obvious that this matter should also be considered under the scope of socio-economic rights. The practice of abortion caused by economic and social pressure contradicts various provisions of the European Social Charter (ESC) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), such as its Article 10 recognising that: "*[S]pecial protection should be accorded to mothers during a reasonable period before and after childbirth*" (Article 10 § 2) and that "*[T]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society*". Similarly, when someone aborts a child for

[210] "*The opinion of the strongest is always the best",* Jean de La Fontaine, *Le Loup et l'agneau.*1668.
[211] See ECHR, *L. C. B. v. the United Kingdom*, judgment of 9 June 1998, No. 14/1997/798/1001: *"the Court considers that the first sentence of Article 2 para. 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (cf. the Court's reasoning in respect of Article 8 in the Guerra and Others v. Italy judgment of 19 February 1998, Reports 1998-I, p. 227, para. 58, and see also the decision of the Commission on the admissibility of application no. 7154/75 of 12 July 1978, Decisions and Reports 14, p. 31)".*

economic reasons, it is obvious that the State has failed to respect *"the right of everyone to an adequate standard of living for himself and his family"* guaranteed by the ESC and the ICESCR. A woman who is forced to abort her child because she has financial difficulties, housing problems, or because her partner is violent is a victim. In these cases, not only the right to life of her baby has been injured, but she has also endured the suffering and the degrading practice of abortion. She is a victim of the State's breach of its socio-economic obligations. The State does not fulfil its obligations when its only real answer to the mother's financial and social difficulties is to offer her an abortion.

The State is under the legal and positive obligation to provide the best possible circumstances so that women are not coerced to abort for social and economic reasons. In many cases, information would be sufficient for the mother to know her real choices in order to keep her baby or to let him live. The State should inform the mother of existing ways of getting the help she needs, such as financial, material and moral aid (e.g. houses for pregnant mothers in distress, subsidized day-care, the possibility of giving the child up for adoption, NGOs catering for mothers and children etc). In some countries, like Latvia[212] and France[213], the State renounced to the systematic pre-abortion consultation in order to respect the "*freedom of choice"* of the women. In this way, women are deprived of the information on alternatives to abortion (e.g. adoption, various available supports for pregnant women like shelter houses, crisis centres, financial support, etc)[214]. Such legislation is likely to violate the European Social Charter.

In other words, the State should implement the "woman's right not to choose abortion". This is consistent with the International Conference on Population and Development Programme of Action which called on Governments to *"take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning"*[215]. As Mrs. Gisela Wurm, Rapporteur of the PACE Resolution on *Access to safe and legal abortion in Europe* recognized: "*Abortion must, as far as possible, be avoided*". [216] It is unfortunate to note that, speaking of the women's right to choose; many efforts are made to promote a "*human right to abortion",* whereas very few care about women's "*right not to abort"*. Abortion is not a human right, whereas, the protection of life, dignity, physical integrity and family are authentic human rights.

Despite the fact that abortion has been considered an absolute right in the United States since the *Roe v. Wade* judgement in 1973,[217] a growing number of American States are progressively restricting access to abortion (e.g. limiting the time limit of access) and are taking measures to permit the enjoyment of the "*right not to abort"*, by introducing social

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[212] See Latvian Sexual and Reproductive Health Law, 29 January 2004; accessible http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Sexual_and_Reproductive_Health_Law.doc

[213] In France, such information was provided until 2001, when it was suppressed together with the preliminary consultation on the pretence that it infringed the right to abortion of the mother or would make her feel guilty.

[214] In regard to the issue of information on abortion, the Court has only established for the moment that the State may not oppose the diffusion of information favorable to abortion. See *Open Door and Dublin Well Woman v Ireland*, No 14234/88, 29 October 1992; see also *Women on Waves and others v. Portugal*, No. 31276/05, 3 February 2009.

[215] Programme of Action of the International Conference on Population and Development, (UN General Assembly document A/S-21/5/Add.1), ICPD+5, 8-12 February 1999. para 7.24.

[216] *Explanatory memorandum* by Mrs Gisela Wurm, Rapporteur, para. 31.

[217] Norma McCorvey, alias Jane Roe, told her story in *Won by Love* in 1998 and showed how she had been manipulated by abortion activists.

support, compulsory pre-abortion consultations, implementing a reflection period, etc. Also in Europe, some countries with a very high abortion rate and a catastrophic demography, like Hungary, are now willing to raise the degree of protection of the unborn child. An example is Article II of the recent Hungarian Constitution on human dignity and the right to life which states that *"embryonic and foetal life shall be subject to protection from the moment of conception"*[218]. This is in line with the Preamble of the Convention on the Rights of the Child which, quoting the 1959 Declaration of the Rights of the Child, recalls 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"*.

[218] Section 3 of *Act CCXI of 2011 on the Protection of Families* repeats this statement.