



**Written Contribution in view of the Preparation by the Human Rights
Committee of the General Comment on Article 6 (Right to life) of the
International Covenant on Civil and Political Rights**

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The *European Centre for Law and Justice* (ECLJ) would like to submit a written contribution for the preparation for the General Comments on Article 6 (right to life) of the International Covenant on Civil and Political Rights (ICCPR) addressing the following issues indicated in the Draft General Comment no. 36 on Article 6 § 1: the meaning of "inherent right" in relation with other international human rights instruments; the applicability of the article to the unborn and other forms of human existence (frozen embryos, clones etc.); the relationship between the right to life and the right to die (e.g., euthanasia); the meaning of "protected by law" (contents of legal protection); and the possible exceptions to the duty to protect life by law (e.g., suicide, abortion).

Thus, our contribution will first present the right to life and the Member States' obligations under the European Convention of Human Rights, which protects human life from its beginning to its natural end (I). Secondly, it will indicate the new threats to the life of the human being (II). Finally, the ECLJ will invite the Human Rights Committee to take into account the European norms that offer an effective and wider protection of human life in its interpretation of Article 6 of the ICCPR, and to encourage the Member States to take measures to address the new threats to the right to life of human beings to prevent violations of the right to life (III.).

I. The Right to Life and the Member States' Obligations under the European Convention of Human Rights¹

1. The Right to Life under the European Convention of Human Rights

Article 2 of the European Convention of Human Rights guarantees the right to life providing that "*Everyone's right to life shall be protected by law*"². The European Court of Human Rights held that the "*principle of sanctity of life*"³ is "*protected under the Convention*"⁴. The same Court affirmed that "*the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights*"⁵. Therefore, for the European legal order, human life is a public interest, and not just a private interest. This is 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 the same way, in the context of abortion, the Court, holding that

¹ Grégor Puppincq, *Abortion and the European Convention on Human Rights*, Irish Journal of Legal Studies, Vol. 3(2) 2013, p 142.

² 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.*

³ *Reeve v. The United Kingdom*, No. 24844/94, (Decision of inadmissibility of the former Commission of 30 November 1994); *Pretty v. The United Kingdom*, No. 2346/02, Judgment of April 29, 2002, para 65.

⁴ *Ibid* at para 65.

⁵ *Streletz, Kessler and Krenz v. Germany* [GC], 22 March 2001, Nos. 34044/96, 35532/97 and 44801/98, paras. 92-94; see also *McCann and Others v. The United Kingdom*, Judgment of 27 September 1995, Series A No. 324, pp. 45-46, para. 147.

“pregnancy cannot be said to pertain uniquely to the sphere of private life”,⁶ recognizes that 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 regard to abortion and the legal protection of prenatal life, states that: “There can be no doubt that certain interests relating to pregnancy are legally protected”.⁷

The case-law of the Court does not exclude, as a matter of principle, the unborn child from the scope of the protection of the Convention⁸, although it allows the States to determine the starting point of the right to life in its internal legal order.

2. The Unborn Child is not Excluded from the Scope of the European Convention of Human Rights

The Court held that “Article 2 of the Convention is silent as to the temporal limitations of the right to life”.⁹ Thus, it protects “everyone”¹⁰ 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 it does not. It is a fact that everyone's life is a continuum that begins at conception and advances in stages until death.¹¹

When the Convention was drafted, there was a broad consensus on the criminal nature of “abortion on demand”.¹² 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.¹³ In *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

⁶ *Bruggemann and Scheuten v. Germany*, No. 6959/75, Report of the former Commission, 12 July 1977, p. 138, paras. 59, 60- 61 and *Boso v. Italy*, No. 50490/99, Judgment of 5 September 2002.

⁷ *Bruggemann and Scheuten v. Federal Republic of Germany*, No. 6959/75, Report of the Commission, 12 July 1977, para 60.

⁸ Even the legal advisors of the *Centre for Reproductive Rights*, which is the leading legal organisation promoting a right to abortion on demand, recognises this fact. See C. Zampas and J. M. Gher, “Abortion as a Human Right —International and Regional Standards”, *Human Rights Law Review*, 8:2(2008), pages 265, 276.

⁹ *Vo v. France*, [GC], No. 53924/00, 8 July 2004, (hereinafter *Vo v. France*) para. 75.

¹⁰ 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.

¹¹ 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 ovocyte 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.”

¹² See *Bruggemann 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.”

¹³ As President Jean-Paul Costa explained in his Separate Opinion under *Vo v. France*, No. 53924/00, [GC], Judgment of 8 July 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.

Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life".¹⁴ This position has been consistently upheld by the Court.¹⁵

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.*"¹⁶ *Secondly, the exceptions were to be understood and construed strictly*".¹⁷ More subtly, the Court has in practice permitted 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,¹⁸ "*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*".¹⁹ 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.

When the Court was called to judge cases where the conventionality of abortion was not directly challenged, the Court has applied the right to life of the unborn child in those cases. For example, in *Reeve v. The United Kingdom*,²⁰ 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*".²¹

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*",²² it partially answered the issue raised by the applicant. Indeed, it affirmed that: "*it may be regarded as common ground between States that the embryo/foetus belongs to the human race*"²³ and that the "*potentiality of that being and its capacity to become a person ... require protection in the name of human dignity*".²⁴ If embryos/foetus belongs to the human race, he also belongs to the "*human family*"²⁵.

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.

¹⁴ *H. v. Norway*, No. 17004/90, Decision of inadmissibility of the former Commission of 19 May 1992, p. 167 (hereinafter *H. v. Norway*.)

¹⁵ See *inter multos: 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. 60; *Vo v. France*, para. 78.

¹⁶ "[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).

¹⁷ See *Öcalan v. Turkey*, No. 46221/99, 12 March 2003, paras. 54 and 201 (abstract from the portion of the ruling dedicated to the presentation of the position of the French government).

¹⁸ *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 (...)"

¹⁹ *A., B. and C. v. Ireland*, para. 222.

²⁰ *Reeve v. The United Kingdom*, No. 24844/94, Decision of inadmissibility of the former Commission of 30 November 1994.

²¹ *Idem*.

²² *Vo v. France*, para. 85.

²³ *Vo v. France*, para. 84.

²⁴ *Idem*.

²⁵ Preamble of the Universal Declaration on Human Rights.

Excluding prenatal life from its scope as a matter of principle would go against the aim of the Convention.

3. The State's Determination of "*the Starting Point of the Right to Life*"

Although the Court did not exclude the unborn child from the scope of article 2, it authorises States, within their limited margin of appreciation, to determine "*the starting point of the right to life*"²⁶ in their domestic legal system.

Determining the starting point of the right to life is a matter of both fact and law. The question of fact is relative to the point at which the life begins which, in turn, determines the question of law relative to the point at which the right to life begins. In the case of *A.B.C. v. Ireland*, the Court ruled that there was no European consensus as to the scientific and legal definition of the starting point of the life of a person, which as a consequence grants States a margin of appreciation as to the definition of the starting point of the *right to life*: given "*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*".²⁷ Note that the "*legal definition of the beginning of life*" is none other than "*the starting point of the right to life*".

Therefore, for the Court, it can be "*legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life*"²⁸, simply because the State can determine the moment from which an unborn child is a *person* benefitting from the protection of the Convention. This determination is initially a question of fact: the determination of the beginning of life.

Thus, States like Ireland, Malta, Poland or San Marino that uphold the entire scope of Article 2, recognising their responsibility to protect life from conception, can invoke this treaty provision guaranteeing the right to life as encompassing the 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,²⁹ 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.

4. The Convention does not Contain a Right to Abortion

Article 8 of the European Convention of Human Rights which guarantees the right to respect for private and family life does not mention a right to abortion. The Grand Chamber of the Court declared that "*Article 8 cannot, accordingly, be interpreted as conferring a right to abortion*".³⁰ It also held that the Convention does not guarantee a right to access to abortion

²⁶ *Vo v. France*, [GC], N°53924/00, 8 July 2004, paragraph 82. Hereafter *Vo*.

²⁷ *A. B. C., v. Ireland*, [GC], N°25579/05, 16 December 2010, paragraph 237. Hereafter *A. B. C.*

²⁸ *A. B. C.*, paragraph 222, confirms *Vo*.

²⁹ 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".

³⁰ *A., B. and C. v. Ireland*, para. 214.

on demand against the national legislation³¹. The Convention should be read as a whole, it cannot on one hand impose the obligation to protect life by law and on the other to institute an obligation to bring death to certain human beings³².

Asked by a Member of the Parliamentary Assembly of the Council of Europe if the Convention sets out a right to abortion, the Committee of Ministers of the Council of Europe refused to answer in July 2013³³, and declared that there is no consensus among European Member States on abortion.

To consider abortion as a right would be *ultra vires*. It would ultimately constitute a diametric shift of the Convention from protecting the human being in his very nature to protecting his autonomous will.

Abortion, being a derogation of the right to life, cannot constitute an autonomous right; it derives necessarily from distinct and superior rights where it originates (such as the mothers right to life). 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*".³⁴

5. If the State Allows Abortion, it Remains Subject to the Obligation to Protect and Respect Competing Rights and Interests

If the State decides to permit abortion, it remains subject to the obligation to protect and respect competing rights and interests. 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*",³⁵ "*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*".³⁶ Therefore, the legalisation 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 is the protection of the unborn child, becomes the main principle underpinning the reasoning of the Court on abortion.

³¹ In *Maria do Céu Silva Monteiro Martins Ribeiro v. Portugal*, 26 October 2004, No. 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).

³² *Haas c. Suisse*, n° 31322/07, arrêt du 20 janvier 2011, § 54 ;

³³ [Response by the Committee of Ministers of the Council of Europe](#), 3 July 2013 to the Written Question No. 633: "Does the European Convention on Human Rights set out a right to abortion?"

³⁴ Jean-Paul Costa, Separate opinion under *Vo v. France*, para. 17.

³⁵ See, *inter alia*, *P. and S. v. Poland*, No. 57375/08, 30 October 2012, para. 99.

³⁶ *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*, No. 57375/08, 30 October 2012, para. 99.

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*,³⁷ 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”³⁸ 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*”.³⁹

The Court has already had the opportunity to identify a number of these fundamental rights and “*legitimate interests involved*”⁴⁰ which the State must consider when legislating on the access to abortion. For example, the Court has recognised in addition to the interest of protecting the right to life of the unborn child,⁴¹ the legitimate interest of society in limiting the number of abortions,⁴² the interests of society in relation to the protection of morals,⁴³ the parental rights and the freedom and dignity of the woman.⁴⁴ The Court has also recognised the interest of the father,⁴⁵ the right to freedom of conscience of health professionals⁴⁶ and institutions based on ethical or religious beliefs,⁴⁷ the freedom and dignity of the woman⁴⁸, and the State’s duty to properly inform women of the risks associated with abortions.⁴⁹ All of these rights and interests justify, in the eyes of the Court, restrictions to abortion.

Regarding the issue of “*wrongful birth*” and “*wrongful life*”, and the connection between abortion, eugenics and discrimination of disabled people, the Court, for the moment, took a precautionary stand⁵⁰.

This list is not exhaustive, but is in continuous development.

³⁷ *Boso v. Italy*, No. 50490/99, decision of 5 September 2002 (hereinafter *Boso v. Italy*)

³⁸ *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”.

³⁹ Jean-Paul Costa, Separate opinion under *Vo v. France*, para. 13.

⁴⁰ *A., B. and C. v. Ireland*, para. 249 and *R.R. v. Poland*, No. 27617/04, 26 May 2011, para. 187.

⁴¹ *H. v. Norway*, *Boso v. Italy* and *Vo v. France*, at paras. 86 and 95.

⁴² *Odièvre v. France* [GC], No. 42326/98, Judgment of February 2003, para. 45.

⁴³ *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.

⁴⁴ See *mutatis mutandis* the ECHR acknowledgment of the violation of women’s dignity by forced sterilisation.

⁴⁵ 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.

⁴⁶ *Tysiac v. Poland*, No. 5410/03, Judgment of 24 September 2007, at para. 121 and *R.R. v. Poland*, No. 27617/04, Judgment of 26 May 2011, at para. 206.

⁴⁷ *Rommelfanger v. FRG*, No. 12242/86, Decision of the former Commission of 6 September 1989.

⁴⁸ See *mutatis mutandis* the ECHR acknowledgment of the violation of women’s dignity by forced sterilisation.

⁴⁹ *Csoma v. Roumania*, No. 8759/05, 15 January 2013.

⁵⁰ *A. K. v. Latvia*, No. 33011/08, 24 June 2014; *M. P. v. Romania*, No. 39974/10, 14 April 2014. See a comment Gregor Puppinc & Andreea Popescu, “Human Rights And Eugenics: The More Precautious Approach Of The ECHR”, Short comments on *A.K. v. Latvia* (no. 33011/08) and *M. P. and others against Romania*, no. 39974/10, 15/04/2014”, *ECLJ*, June 27, 2014, available at <http://eclj.org/Releases/Read.aspx?GUID=99f0fd59-b54e-45b7-a970-f3c908188032>.

6. Other Forms of Human Existence (e.g. Embryos) are Protected by the European Norms

Many European human rights instruments relating to bioethics contain provisions on 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 unwilling to define the “*human being*” and determine 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*”.⁵¹

The Oviedo Convention provides in Article 18 that “[w]here the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo. The creation of human embryos for research purposes is prohibited.”

The Explanatory Report of the Oviedo Convention states that “[t]he Convention does not define the term “*everyone*” (in French “*toute personne*”). (...) In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention” (§ 18). The Report adds that “[t]he Convention also uses the expression “*human being*” to state the necessity to protect the dignity and identity of all human beings. It was acknowledged that it was a generally accepted principle that human dignity and the identity of the human being had to be respected as soon as life began” (§ 19). No distinction is made between the embryo *in vivo* and *in vitro* - both benefit from this protection.

The Explanatory Report of the Additional Protocol to the Oviedo Convention states that “*research on embryos in vitro is excluded [from the scope of application], this type of research being covered by Article 18 of the Convention*” (§ 19). Thus, the fact that this Protocol does not apply to research on embryos *in vitro*, does not therefore mean that the protection they enjoy under the Oviedo Convention has been withdrawn.

The Parliamentary Assembly of the Council of Europe (PACE) has adopted a number of Resolutions and Recommendations granting genuine protection to the embryo. Here are the most relevant extracts:

- In Recommendation 874 (1979) relating to a European Charter on the Rights of the Child, PACE notes that “[c]hildren must no longer be considered as parents’ property, but must be recognised as individuals with their own rights and needs;” and recognises “[t]he rights of every child to life from the moment of conception (...) and national governments should accept as an obligation the task of providing for full realisation of such rights.”
- In Recommendation 1046 (1986) on the use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes, PACE stated that “*human embryos and foetuses must be treated in all circumstances with the respect due to human dignity, and that use of materials and tissues therefrom must be strictly limited and regulated (see appendix) to purposes which are clearly therapeutic and for which no other means exist;*” (§10) and therefore recommends that the Committee of Ministers “*forbid anything that could be considered as undesirable use or deviations of these techniques, including ... research on viable human embryos [and] experimentation on living human embryos, whether viable or not*” (§14).

⁵¹ *Vo v. France*, para. 84.

- In Recommendation 1100 (1989) on the use of human embryos and fetuses in scientific research, PACE recommended that the Committee of Ministers define a framework of principles within which:

“4. In accordance with Recommendations 934 (1982) and 1046 (1986), investigations of viable embryos in vitro shall only be permitted: for applied purposes of a diagnostic nature or for preventative or therapeutic purposes;

21. The intentional creation and/or keeping alive of embryos or fetuses whether in vitro or in utero for any scientific research purpose, for instance to obtain genetic material, cells, tissues or organs therefrom, shall be prohibited”.

- In Resolution 1352 (2003) on human stem cell research, PACE affirms that *“The destruction of human beings for research purposes is against the right to life of all humans and against the moral ban on any instrumentalisation of humans”* (§10) and consequently calls on member States: *“to promote stem cell research as long as it respects the life of human beings in all states of their development ... to respect the decision of countries not to take part in international research programmes which are against ethical values enshrined in national legislation and not to expect such countries to contribute either directly or indirectly to such research; [and] to give priority to the ethical aspects of research over those of a purely utilitarian and financial nature”.*

It is also appropriate to highlight Principle 17 § 1 of the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI), published in 1989: *“[n]o act or procedure shall be permitted on any embryo in vitro other than those intended for the benefit of the embryo and for observational studies which do no harm to the embryo.”*, as well as the report of the Steering Committee on Bioethics (CDBI) on the Protection of the Human Embryo *in vitro* (CDBI-CO-GT3 (2003) 13) stating that *“even if positions differ on the status of the embryo and the creation of embryos in vitro, there is general agreement on the need for protection... [the] measures provided usually offer protection of the embryo in vitro from the fertilisation stage onwards. ... One of the aims of protection is to ensure that the embryo is not subjected to experimental procedures that could damage it or put at risk its developmental potential.”*

Finally, one should note Recommendation R (90) 3 of the Committee of Ministers (CM) concerning medical research on human beings at the end of which the CM said it was *“convinced that medical research should never be carried out contrary to human dignity”*.

As the European Court of Human Rights stressed many times, the European Convention on Human Rights has to be interpreted in an evolutive manner, *“in the light of present-day conditions”*.⁵² The interpretation of the Convention should take into account, *inter alia*, the more recent legal instruments protecting human dignity and the embryo, as well as the evolution of scientific knowledge and practices. The consideration of 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 as a patient⁵³, and permitted a better knowledge of the suffering endured by the foetus during the abortion process. The regulation of abortion should be affected by this evolution.

⁵² See *Tyrer v. The United Kingdom*, Judgment of 25 April 1978, Series A no. 26, pp. 15-16, para. 31 and subsequent case-law.

⁵³ J. L. Lenow, “The foetus as a patient: emerging rights as a person?” *Am J Law Med* 1983; 9(1) :1-29.

In the Court of Justice of the European Union (hereafter CJEU) judgment of 18 October 2011, in the case of *Oliver Brüstle v. Greenpeace e.V.*,⁵⁴ 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 the stage of fertilisation against patenting, when the patent application requires the prior destruction of human embryos. The principle of dignity and integrity of the person⁵⁵ protects the human embryo and the cells derived from it at any stage of its formation or development. The CJEU 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 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 CJEU, 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.⁵⁶

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*”⁵⁷ has to be considered to have lapsed.

7. The Protection of Human Life at its End⁵⁸

The right to life is the first of the rights and it conditions all the others. Euthanasia, or assisted suicide, clearly constitutes an attack on life. Article 2, which exhaustively lists the exceptions to this right tolerated by the Convention, does not mention the request or the consent of the interested parties. The prohibition of euthanasia is a permanent feature of medical ethics, at least since Hippocrates. Its prohibition is regularly recalled by the Parliamentary Assembly of the Council of Europe. Recommendation 779 (1976) reads “*that the doctor must make every effort to alleviate suffering, and that he has no right, even in cases which appear to him to be desperate, intentionally to hasten the natural course of death*” (para 7). In Recommendation 1418 (1999), this same Assembly affirms with force that the right to life of the sick and dying must be guaranteed even when they express the desire to die. Resolution 1859 (2012) of 25

⁵⁴ European Court of Justice, *Oliver Brüstle v. Greenpeace e.V.*, 18 October 2011, C-34/10.

⁵⁵ 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.

⁵⁶ 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 on May 10th 2013).

⁵⁷ *Vo v. France*, para. 82.

⁵⁸ Gregor Puppink & Claire de La Hougue, “[The right to assisted suicide in the case law of the European Court of Human Rights](#)”, *The International Journal of Human Rights*, Volume 18, Issue 7-8, 2014 ;

January 2012⁵⁹ recalled, that “*Euthanasia, in the sense of the intentional killing by act or omission of a dependent human being for his or her alleged benefit, must always be prohibited.*”

The Court declared in the *Pretty v. United Kingdom*⁶⁰ 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*”.⁶¹ Similarly, in the *Haas v. Switzerland* case,⁶² 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.⁶³ Therefore, even when assisted suicide is allowed, as in Switzerland, the State must prevent its abuse.

II. The new threats to the life of the human being

Among the new threats to the human life at its beginning, the ECLJ mentions the following practices: the sex-selective abortion, the abortion of handicapped children, the neonatal infanticide, and the donation of embryos to the research and their destruction.

1. Sex-Selective Abortion (“*Gendercide*”)

In 2002, the Council of Europe Committee of Ministers has called upon governments to adopt national legislation prohibiting pre-natal sex selection⁶⁴. In a 2011 resolution on prenatal sex selection⁶⁵, the Parliamentary Assembly of the Council of Europe stressed that “*the social and family pressure placed on women not to pursue their pregnancy because of the sex of the embryo/foetus is to be considered as a form of psychological violence and that the practice of forced abortions is to be criminalised.*”

In an official statement⁶⁶ in 2014, the Council of Europe Commissioner on Human Rights, Nils Muižnieks, declared that “*sex-selective abortions must be criminalised*”. He

⁵⁹ ⁵⁹ Council of Europe, Resolution 1859 ‘*Protecting human rights and dignity by taking into account previously expressed wishes of patients*’ (January 25, 2012).

⁶⁰ *Pretty v. The United Kingdom*, No. 2346/02, Judgment of 29 April, 2002 (hereinafter *Pretty v. The United Kingdom*).

⁶¹ *Pretty v. The United Kingdom*, paras. 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 [...] ».

⁶² *Haas v. Switzerland*, No. 31322/07, Judgment of 20 January 2011, para. 54;

⁶³ *Ibid* at para. 58;

⁶⁴ [Recommendation Rec\(2002\)5 of the Committee of Ministers](#) to member states on the protection of women against violence adopted by the Committee of Ministers on 30 April 2002 at the 794th meeting of the Ministers’ Deputies.

⁶⁵ On October 3, 2011, the Parliamentary Assembly of the Council of Europe adopted Resolution 1829 (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.

⁶⁶ Nils Muižnieks, “*Sex-selective abortions are discriminatory and should be banned*”, [January 15, 2014](#)

recalled that the Council of Europe Convention on Human Rights and Biomedicine (Oviedo Convention) prohibits the use of techniques of medically assisted procreation “*for the purpose of choosing a future child’s sex, except where serious hereditary sex-related disease*” (Article 14).

For many years, the United-Nations has also raised concerns about this issue for demographic and discriminative reasons. The Cairo Conference on Population and Development associates prenatal sex-selection with female infanticide.⁶⁷ The Fourth World Conference on Women held in Beijing in 1995, described prenatal sex-selection as an act of violence against women. Three years later, the UN General Assembly Resolution on the Girl Child⁶⁸ concurred and urged States to “enact and enforce legislation”. The UN Committee on the Elimination of Discrimination against Women (CEDAW) has also called upon governments to adopt national legislation prohibiting pre-natal sex selection⁶⁹.

2. Abortion of the Handicapped Children

People with disabilities still experience discrimination in their daily lives. The type and extent of discrimination varies depending on the cultures. They are perceived and treated differently, often considered inferior. People with disabilities suffer various forms of discrimination, including being rejected by and segregated from mainstream society.

In technologically advanced societies, people with genetic disabilities increasingly suffer from a new widespread prejudice: eugenic ideology which considers their very existence as a medical error. In some European countries, over 90% of fetuses diagnosed as Down syndrome are routinely eliminated before birth. Eugenics is a reality in countries where prenatal screening has become systematic, in turn leading to the stigmatization of persons with genetic disability and their families, in particular those with Down syndrome.

European and international law has repeatedly condemned eugenic ideology since the Nuremberg trials in Articles 4 and 10 of the UN Declaration on the Rights of Disabled Persons. Other European and international norms, such as the Universal Declaration on the Human Genome and Human Rights, the Convention of the Rights of the Child as well as the Oviedo Convention, contain similar provisions.

3. Neonatal Infanticide Resulted from Late Term Abortions

In 2007, a study⁷⁰ concluded that about 1 in 30 abortions after 16 weeks gestation result in a born-alive newborn. One study published in the *British Journal of Obstetrics and Gynaecology* has concluded that at 23 weeks of pregnancy, the level of children surviving

⁶⁷ 1994 Cairo Conference on population on development, “4.16. The objectives are: 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 at:

<http://india.unfpa.org/drive/MissingBookletEnglish.pdf> and *Preventing gender-biased sex selection*, An interagency statement OHCHR, UNFPA, UNICEF, UN Women and WHO, 2011 at: http://www.who.int/reproductivehealth/publications/gender_rights/9789241501460/en/index.html (last visited on May 10th 2013).

⁶⁸ [Resolution on the girl child](#), General Assembly, 11 February 1998, Doc N° 52/106.

⁶⁹ See for exemple U.N. Doc. CRC/C/CHN/CO/2 (2005).

⁷⁰ MP Wyldes* and AM Tonks, “Termination of pregnancy for fetal anomaly: a population-based study 1995 to 2004”, *An International Journal of Obstetrics & Gynaecology*, Volume 114, Issue 5, pages 639–642, May 2007.

abortion is at 10%. In the UK for instance, it is reported that 66 babies in a year were born alive and left to die after their abortions⁷¹. Every year, children are born alive at the time of the abortion procedure after the 20th week of pregnancy in Europe. They are often abandoned to die without care, struggling to breathe, sometimes for several hours, or they are killed by the lethal injection or suffocation, then thrown away with organic waste. The question of newborn that are born alive, surviving to late term abortions for some minutes or hours, and who receive no care raises a right to life issue. In 2014, a written question has been addressed in this matter to the Committee of Ministers of the Council of Europe⁷².

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*”⁷³. In Europe, several States have decided not allowing abortion after the threshold of viability (among which Estonia, Finland, Germany, Netherland, Norway, Russia, and Ukraine).

4. Destruction of Embryos and their Donation to Research

The medically assisted procreation is not without consequence for the life and health of the human embryo, as for one birth are created around nineteen embryos⁷⁴. Three embryos are used for each pregnancy, one of two of them being generally suppressed in the womb of the mother to avoid multiple pregnancies. The other embryos are kept frozen for another implantation, if the first one is not successful. If the implantation was successful, the remaining embryos are frozen. In the best case they can be the object of a later donation to a couple to found a family, but usually they are donated to research as a material for research or suppressed, as they are not considered healthy enough or as they are not useful anymore. As the research on the human embryos destroys them without exception, this practice raises a serious human rights issue, as human beings cannot be treated contrary to the human dignity and in violation of their right to life and physical integrity. Moreover, after more than twenty years of research, research on human embryos has not led to any successful therapeutic results.

III. Recommendation of Principles to be Adopted in the General Comment and of Measures that Should be Taken by the Member States to Prevent Violations of the Right to Life

Taking into account those new threats to the human life, the ECLJ invite the Human Rights Committee to consider the European norms that offer an effective and wider protection of human life in its interpretation of Article 6 of the ICCPR and to include the following principles in the General Comment on Article 6, encouraging the Member States to take measures to address them in order to prevent violations of the right to life:

⁷¹ Daily Mail, *66 babies in a year left to die after NHS abortions that go wrong*, <http://www.dailymail.co.uk/health/article-512129/66-babies-year-left-die-NHS-abortions-wrong.html#ixzz2rKnulOW6> ;

⁷² See the (pending) Written question No. 655 to the Committee of Ministers by Mr Ángel PINTADO, on the “*The issue of late term abortions*” asking “What specific steps will the Committee of Ministers take in order to guarantee that fetuses who survive abortions are not deprived from the medical treatment that they are entitled to -as human persons born alive- according to the European Convention?”.

⁷³ *Gonzales, Attorney General v. Carhart et al.* No. 05-380, 18 April 2007.

⁷⁴ In France, in 2007 and the following years, 19 embryos were used for a birth (278 505 embryos for 14 487 born children), 165 591 embryos were frozen, 34% of them without a “parental project”.

1. The right to life is an inalienable attribute of the human beings and forms the supreme value in the hierarchy of human rights. Thus, according to the principle of sanctity of human life everyone's right to life shall be protected by law.
2. Because the human embryo belongs to the human race, he enjoys protection by law from the stage of fertilisation against any violation of his dignity, integrity, life, and especially against patenting, when the patent application requires the prior destruction of human embryos.
3. Member States are invited to adopt measures in order to implement their commitment that every human being has the inherent right to life and to ensure its effective enjoyment by persons with disabilities or caring a disease on an equal basis with others. In this regard, eugenic procedure of prenatal "screening-elimination" of children with Down syndrome, for example, should be abolished.
4. Member States are called to enact and enforce legislation criminalizing the practice of gendercide as it represents an act of violence against women.
5. Member States are encouraged to take concrete measures to guarantee that children born alive (viable and non-viable), irrespective of the circumstances of their birth and of their parents' desire, enjoy the right to life and receive medical care and treatment that they are entitled to as human persons born alive.
6. Underlining the risk of abuse inherent in a system which facilitates assisted suicide, national authorities should take positive measures to protect individuals from making a hasty decision and to prevent abuse of such a system.
7. Euthanasia, in the sense of the intentional killing by act or omission of a dependent human being for his or her alleged benefit, must always be prohibited.

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