



# **Late Term Abortion & Neonatal Infanticide in Europe**



Petition to the Parliamentary Assembly of the Council of Europe

June 2015

# **Late Term Abortion & Neonatal Infanticide in Europe**

## **Petition for the Rights of Newborns Surviving Their Abortion**

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The *European Centre for Law and Justice* is an international, Non-Governmental Organization dedicated to the promotion and protection of human rights in Europe and worldwide. The ECLJ holds special Consultative Status before the United Nations/ECOSOC since 2007.

The ECLJ engages legal, legislative, and cultural issues by implementing an effective strategy of advocacy, education, and litigation. The ECLJ advocates in particular the protection of religious freedoms and the dignity of the person with the European Court of Human Rights and the other mechanisms afforded by the United Nations, the Council of Europe, the European Parliament, the Organization for Security and Cooperation in Europe (OSCE), and others.

The ECLJ bases its action on “the spiritual and moral values which are the common heritage of European peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy” (Preamble of the Statute of the Council of Europe).

## Summary

When a child is born prematurely, everything is done to save him. If this is not possible, he receives comforting care and is supported until his death. Neonatal palliative care is well developed in many hospitals. The situation is different for those children who are born alive after an abortion. Children are often born alive due to a failed abortion after the 20<sup>th</sup> week of pregnancy in Europe every year. They are abandoned to die without care, struggling to breathe, sometimes for several hours, or they are killed by lethal injection or suffocation, and often thrown away with medical waste.

The method most often used to perform late abortions is called “dilation-evacuation,” where the cervix is dilated to remove the baby with surgical pliers, which is very painful. The child is often extracted in pieces. Generally, analgesia or feticide are not used beforehand.

This report contains official data and testimonies of medical practitioners who witnessed these practices.

Such facts are not exceptional: according to the *British Journal of Obstetrics and Gynaecology*, at 23 weeks of pregnancy 10% of children survive an attempted abortion.

Leaving babies to die without treatment, or actively killing them, simply because they are not wanted is inhuman and contrary to fundamental rights. According to European law, all human beings born alive have the same right to life, to physical integrity and to receive necessary treatment and care, irrespective of the circumstances of their birth.

Through this petition, a collective of NGOs, supported by more than 210,000 European citizens, request that the Parliamentary Assembly of the Council of Europe (PACE) denounce and put an end to these practices, so that all newborns are treated as human beings.

Specifically, the Petition asks the Assembly:

1. To investigate and report on the situation of children born alive during their abortion.
2. To reaffirm that all human beings born alive have the same right to life and must benefit from appropriate and necessary health care, according to human rights.
3. To recommend to Member States to take into account the threshold of viability of human fetuses in their legislation on termination of pregnancy.

While most prefer to ignore these facts, newborns and the medical staff are left helpless in a dreadful situation. It is possible to humanely ameliorate this situation, especially by developing excellent practices in neonatal care for the child and his family. Therefore, we call upon the Council of Europe to uphold the guarantee of fundamental rights to all human beings.

A premature baby, even born during an attempted late term abortion, is a human being.

Grégor Puppink, PhD.  
Director of the ECLJ.

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## Petition for the Rights of Newborns Surviving Their Abortion

Madam President,  
Ladies and Gentlemen, Members of the Parliamentary Assembly,

I have the honour of submitting this petition to the Parliament Assembly of the Council of Europe in accordance with Rule 65 of the Rules of Procedure and Directive n°342 from January 22<sup>nd</sup> 1974 of the Assembly, in my own name, in the name of almost 210,000 petitioners and in the name of diverse NGOs including the *International Catholic Child Bureau*, the *Federation of Catholic Family Associations in Europe* and the *European Centre for Law and Justice* who associate themselves with this petition and support it.

This petition denounces the torture and infanticide inflicted on children born alive following an attempted late term abortion. Every year, numerous babies survive an abortion. In these cases, they are left to die or are actively killed.

This petition denounces these serious and repeated violations of human rights, practiced in various Member States of the Council of Europe, which constitutes a structural problem. A petition such as this has never been brought before the Assembly, or any other European body, and it is not likely to receive a response through the procedure established by the European Convention on Human Rights. The object of this petition primarily concerns health and human rights.

When a child is born prematurely, physicians make every effort to save the life of the baby. If survival is not possible, the baby still receives care and is supported until their death. This conforms with the International Convention on the Rights of the Child which mandates that: “*States Parties shall ensure to the maximum extent possible the survival and development of the child<sup>1</sup>*”. Palliative neo-natal care is developing in hospitals in accordance with Resolution 1649 (2009) of the Parliamentary Assembly of the Council of Europe.

With the advance of medicine, premature babies can be saved as early as 21 weeks, even before the limit of viability as defined by the World Health Organisation (22 weeks or 500g). Figures show that in the United Kingdom,<sup>2</sup> five babies out of 247 who were born alive at less than 22 weeks and have lived at least a year.<sup>3</sup> 11 out of 171 born at 22 weeks and 76 out of 332 born at 23 weeks have survived. In France and in Switzerland, at 24 weeks resuscitation is always undertaken as the chances of survival without complications are high, but it is rare that babies at 22 or 23 weeks are revived.

The situation concerning babies who are born alive *accidentally* after an abortion is quite different from those whose birth is induced because the continuation of the pregnancy poses a major threat to them or to the mother.

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<sup>1</sup> Art. 6 of the International Convention on the Rights of the Child

<sup>2</sup> <http://www.telegraph.co.uk/health/healthnews/9598649/One-in-ten-babies-born-under-abortion-limit-survives.html>

<sup>3</sup> I draw attention here to the case of Amilia, born in October 2006 in the Baptist Children’s Hospital of Miami. This “miracle baby”, according to statements of American doctors who were in charge of her, was born at 22 weeks of pregnancy and at her birth she measured only 24.1 centimetres and weighed only 284 grams. She survived without future difficulties.

Presently, abortion is free on demand until the 18<sup>th</sup> week in Sweden (even if the sole reason for this abortion is the sex of the baby), up to 24 weeks in the United Kingdom and the Netherlands, and under extensive conditions in Spain that are not enforced. In some countries, such as France and the United Kingdom,<sup>4</sup> abortions are performed up until birth in the case of a serious (but non-fatal) anomaly; therefore, abortions are possible in different European countries even if the fetus is viable and healthy. Late term abortions are technically difficult to perform (at 20 weeks, the rate of complications is ten times higher than before 12 weeks according to the official statistics of the United Kingdom). Thus, it can occur that viable babies who were supposed to be aborted are born alive. After 21 weeks, some of those were able to breathe unaided for a long period of time.

When a pregnancy has reached its 16<sup>th</sup> week, the usual termination method employed is birth induction. In most cases the heart of the baby stops during labor and it is born dead. However, some babies survive this procedure, and the number of surviving babies increases as the pregnancy advances. Children are often born alive between the 22<sup>nd</sup> and the 24<sup>th</sup> weeks. Knowing this, physicians often inject foeticide directly into the body of the baby without any anaesthetic. An injection can also be given during delivery when the child is partially born. This act is technically difficult, and can, consequently, have a high failure rate.<sup>5</sup> Therefore, the child is born alive.

**Being born alive after an abortion is not exceptional.** This possibility is listed on the International Classification of Diseases published by the World Health Organisation; Chapter XVI entitled '*Certain conditions originating in the prenatal period*'; section P96-4, '*Termination of pregnancy affecting fetus and newborn*'<sup>6</sup>.

## A Widespread Practice in Europe

**This problem occurs in all countries allowing late term abortions** on demand or for medical reasons.

For example, 622 children were born alive in **Canada** after failed abortions between 2000 and 2011.<sup>7</sup> In the **United States**, 362 children were born alive between 2001 and 2010. The Government passed the *Born-Alive Infants Protection Act* in 2002 to protect these children. In **Norway**, from 2001 to 2009, five babies had been aborted after the 22 week limit; between 2010 and 2011, 12 late abortions were carried out. The hearts of some of the aborted children continued to beat for almost 45 to 90 minutes<sup>8</sup>. Following this, Norway prohibited all abortions after 22 weeks in January 2014. In 2010 in **Italy**, a baby, who was aborted at 22 weeks because

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<sup>4</sup> However, such an anomaly does not necessarily have to be fatal. For example in 2012, according to the official statistics of the United Kingdom, there had been four cases of abortion (before 24 weeks) because of a cleft lip or palate, 191 of anomalies were of the cardiovascular system, many of which could have been treated by surgery, 149 were spina-fida, 5 of which were after the 24<sup>th</sup> week, and 544 were Down Syndrome, 3 of which were after the 24<sup>th</sup> week.

<sup>5</sup> According to a study, the success rate is 87%, in other words there is a 13% failure rate: Nucatola D, Roth N, Gatter M. [A randomized pilot study on the effectiveness and side-effect profiles of two doses of digoxin as fetocide when administered intraamniotically or intrafetally prior to second-trimester surgical abortion.](#) *Contraception.* 2010 Jan;81(1):67-74. doi: 10.1016/j.contraception.2009.08.014. Epub. Available at: <http://www.ncbi.nlm.nih.gov/pubmed/20004276>

<sup>6</sup> <http://apps.who.int/classifications/icd10/browse/2015/en#/P90-P96>

<sup>7</sup> "*Termination of pregnancy, affecting fetus and newborn*" [P96.4]: <http://www5.statcan.gc.ca/cansim/a26>

<sup>8</sup> <http://www.newsenglish.no/2014/01/02/total-ban-on-late-term-abortions/> The side P96-4 is an issue of the International Statistical Classification of Diseases and Related Health Problems published by WHO.

of a cleft palate, was discovered alive 20 hours after birth and continued to survive for one more day. A similar case had already happened in 2007<sup>9</sup>. In the **Netherlands** the situation is even worse: after 24 weeks, in cases of serious malformation, not only is abortion possible but so is infanticide<sup>10</sup>. The majority of these countries do not give any information on these events. It is very difficult to obtain precise data because these States rarely acknowledge this situation let alone provide information.

In **France**, children born before 22 weeks or during a medical termination of pregnancy have no birth certificate but only a record of a lifeless child, even if they were born alive. “*The record drawn up shall be without prejudice to knowing whether the child has lived or not*” according to Article 79-1 of the Civil Code. No information is given on the number of children born alive, how long they survive such procedures nor what is to be done with them. Even parents do not know: sometimes they are given the child, who dies in their arms, but often the child is brought to another room. The parents, therefore, only see (if they wish) the child later, without having been able to be there with their child during those few moments, not knowing how the baby died.

In the **United Kingdom**: In 2005, the *British Journal of Obstetrics and Gynaecology* published the conclusions of Dr. Shantala Vadeyar, a researcher at the St. Mary Hospital (Manchester), who states that children at 18 weeks have survived, for a certain time, outside the uterus after an abortion. Dr. Vadeyar revealed that in the North West between 1996 and 2001, at least 31 children survived attempted abortions<sup>11</sup>. In 2007, a study published in the *British Journal of Obstetrics and Gynaecology*<sup>12</sup> concluded that around one abortion out of 30 beyond 16 weeks of pregnancy results in the birth a living child. At 23 weeks, the level of children born reached 9.7%. According to a Swedish mid-wife, the figure could even reach 25%<sup>13</sup>.

In the CEMACH 2007 “*Perinatal Mortality*,” releasing data from hospitals in England and Wales in 2005, it was revealed that:

“*Sixty-six of the 2235 neonatal deaths notified in England and Wales followed legal termination (predominantly on account of congenital anomalies) of the pregnancy i.e. born showing signs of life and dying during the neonatal period. Sixteen were born at 22 weeks’ gestation or later and death occurred between 1 and 270 minutes after birth (median: 66 minutes). The remaining 50 fetuses were born before 22 weeks’ gestation and death occurred between 0 and 615 minutes after birth (median: 55 minutes)*”, p.28<sup>14</sup>. In other words, one of these newborns breathed without assistance for more than ten hours.

The director of the CEMACH Richard Congdon stated that the lethal injection had not been given in the 16 cases when the abortion took place after 22 weeks of pregnancy because death was “inevitable”<sup>15</sup>. Therefore, they were left to die. The following reports do not include any information on the subject matter of child born alive during the termination of a pregnancy.

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<sup>9</sup><http://www.telegraph.co.uk/news/worldnews/europe/italy/7646540/Baby-boy-survives-for-nearly-two-days-after-abortion.html>

<sup>10</sup> <http://leblogdejeannesmits.blogspot.fr/2014/07/pays-bas-vers-lajustement-des-regles-de.html> ; cf. A. Giubilini and F. Minerva, « After birth abortion: why should the baby live? » *J Med Ethics* doi:10.1136/medethics-2011-100411 <http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.full>

<sup>11</sup> <http://www.lifesitenews.com/news/66-british-babies-survived-abortion-all-were-left-to-die-without-medical-ai>

<sup>12</sup> <http://onlinelibrary.wiley.com/doi/10.1111/j.1471-0528.2007.01279.x/abstract>

<sup>13</sup> <http://www.varldenidag.se/nyhet/2014/10/22/Vad-ska-jag-gora-med-fostret-nar-det-lever/>

<sup>14</sup> <http://www.hqip.org.uk/assets/NCAPOP-Library/CMACE-Reports/41.-April-2007-Perinatal-Mortality-2005.pdf>

<sup>15</sup> <http://www.dailymail.co.uk/health/article-512129/66-babies-year-left-die-NHS-abortions-wrong.html>

There is no more recent data on the number of children born alive during an abortion. CEMACH statistics after “*Perinatal Mortality*” 2005 (published in 2007) do not give any information about the children in such a situation. While the Data Sources, p.3 of the 2005 report (published 2007) began with: “*Since 2003, the Confidential Enquiry into Maternal and Child Health (CEMACH) has collected epidemiological and clinical information on: all fetuses delivering after 22 completed weeks of gestation (including legal terminations of pregnancy notifiable under the 1967/1992 Abortion Act)*”, the data source of the following report, which can be found at the end of the report, includes a short paragraph, lost among many others: “*This year, to allow for a more meaningful comparison, a number of exclusions have been applied to the data within the mortality variation chapter (Chapter 2). The exclusions are to remove all terminations of pregnancy, all lethal and severe malformations, all neonatal deaths below 22 weeks’ gestation and all babies with birth weight below 500g.*” (*Perinatal Mortality 2006* (published in 2008), p. 93).

The UK has moved to a change in method so that no mention of neonatal death following abortion appears. In subsequent reports, the data source is at the start of the report and declares that: “*CEMACH collects epidemiological and clinical data on all stillbirths and neonatal deaths (see Glossary) in England, Wales, Northern Ireland, the Crown Dependencies of the Channel Islands and the Isle of Man*”<sup>16</sup>. The fetus and the infant born after a late abortion are not mentioned. All the statistics given are “*excluding notified terminations of pregnancy*”.

In 2004, delegates to the *British Medical Association*’s annual conference in Llandudno voted 65% in favour of a motion that said children born alive after an attempted abortion should be given the same care and treatment as other infants<sup>17</sup>.

The *Royal College of Obstetricians and Gynaecologists* published new recommendations in May 2010. According to them: “*Live birth becomes increasingly common after 22 weeks of gestation and, when a decision has been reached to terminate the pregnancy for a fetal abnormality after 21+6 weeks, feticide should be routinely offered. (...) Where the fetal abnormality is not lethal and termination of pregnancy is being undertaken after 21+6 weeks of gestation, failure to perform feticide could result in live birth and survival, an outcome that contradicts the intention of the abortion. In such situations, the child should receive the neonatal support and intensive care that is in the child’s best interest and its condition managed within published guidance for neonatal practice. A fetus born alive with abnormalities incompatible with life should be managed to maintain comfort and dignity during terminal care*”<sup>18</sup>.

However, these are only recommendations. Resuscitation depends largely on the wishes of the parents, and it is evident that, in the case of a botched abortion, the parents would not want their baby to receive intensive care. Additionally, oversight of their treatment is very difficult because there are not many reported statistics. Do all who have a reasonable chance of survival receive appropriate care? Are relief from suffering and dignity assured when death is inevitable? Does palliative care not sometimes transform into euthanasia?

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<sup>16</sup> *Perinatal Mortality 2007*, published 2009, p.5; see also *Perinatal Mortality 2008*, published 2010, p.6 and *Perinatal Mortality 2009*, published 2011, p.8, identical, except that CEMACH has become CMACE, Centre for Maternal and Child Enquiries. All reports available at <http://www.hqip.org.uk/cmace-reports/>; there are no CMACE reports for 2010, 2011 and 2012; figures on perinatal mortality are available on the Office for National Statistics website, without any mention of children born alive after an abortion.

<sup>17</sup> <http://www.lifesitenews.com/news/66-british-babies-survived-abortion-all-were-left-to-die-without-medical-ai>

<sup>18</sup> *Termination of pregnancy for fetal abnormality*, Chapter 8, p. 31:

<https://www.rcog.org.uk/globalassets/documents/guidelines/terminationpregnancyreport18may2010.pdf>



**Controlling this situation is impossible because of the taboo surrounding these children since** the majority of information originates from news items and witness testimonies. **These children are frequently abandoned without care, put aside in an empty room or closet, where they struggle to breathe, sometimes injured by the abortion, before dying alone.** In certain countries or hospitals, the parents may retrieve the body or burial services can be provided. In other cases, they are incinerated with hospital waste, and even sometimes burnt as fuel used for heating hospitals<sup>19</sup>. According to witness testimonies, some may be asphyxiated or thrown away with waste despite signs of life. In other words, these newborns are killed or left to die, even though in another room, doctors try to save premature babies of the same gestational age. These situations are significantly traumatising for medical personnel.

## Practices that Violate Fundamental Human Rights

**All children born alive, in their capacity as human beings, are entitled to human rights and must benefit from every protection of these rights.** Questioning this principle jeopardises the very system of human rights protection. Leaving newborns to die without care simply because they are unwanted is inhuman; it is a violation of their dignity and of their most fundamental human rights.

Killing infants or leaving them to die alone in agony<sup>20</sup> constitutes infanticide aggravated by torture. These practices manifestly constitute blatant violations of universal human rights, notably the Convention on the Rights of the Child which declares 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*” and by which the States agreed to respect and guarantee the rights of children “*without discrimination of any kind*” particularly “*birth*” (Article 2).

Killing infants or leaving them to die without care is also a blatant violation of the European Convention on Human Rights, in particular their right to life (Article 2) and constitutes inhuman treatment (forbidden by Article 3 of the ECHR). Moreover, it is also discrimination in relation to the access of healthcare services<sup>21</sup> founded on the circumstances of their birth<sup>22</sup> (contrary to Article 14 of the ECHR).

Additionally, according to the European Social Charter, children have the right to special protection against physical and moral hazards, social, legal and economic protection, and the

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<sup>19</sup> British journals revealed in 2014 that the bodies of thousands of fetuses were burned for heating. See <http://au.ibtimes.com/thousands-dead-fetuses-burned-without-parents-permission-heat-british-hospitals-1335740#.UzK4CKh5Ogy>

<sup>20</sup> Numerous studies show that not only newborns, even premature babies and also fetuses feel pain, at least as much, if not more than adults. However, human foetal pain is not always taken into account (see the recommendations of the Royal College of Obstetricians *Foetal Awareness 2010* <http://www.rcog.org.uk/files/rcog-corp/RCOGFetalAwarenessWPR0610.pdf> which denies this pain) even though the foetal suffering of animals is recognised (Directive 2010/63/EU, September 22nd 2010 relating to the protection of animals used for scientific reasons which affirms that animal fetuses can “*express pain, suffering, distress and lasting harm.*”)

<sup>21</sup> See in particular the Convention on the Rights of the Child 1989, Article 24: “*States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*”

<sup>22</sup> Article 14 of the ECHR: “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as (...) birth or other status.*”

right to benefit from any measures enabling them to enjoy the highest standard of health possible.

All premature children must have the same right to life and access to health services without discrimination. All care and medical aid possible must be offered, whatever the conditions of their birth. Even in the case where these infants cannot survive, they must be taken care of up until the moment of their death.

In its declaration on January 15<sup>th</sup> 2014, entitled “*Sex-selective abortions are discriminatory and should be banned*”, the Commissioner for Human Rights recalled the case law of the ECtHR<sup>23</sup> according to which: “*Member States, within their wide margin of appreciation, should find ways to put in place laws, policies and practices that allow the different legitimate interests involved to be taken into account. In the vast majority of Council of Europe member States, where abortion is legal, this includes an adequate framework that reconciles the possibility to have an abortion with the fight against discrimination.*” Numerous States in Europe (notably **Estonia, Finland, Germany, Norway, Russia** and even **Ukraine**) take into account the threshold of viability and ban abortions after 22 weeks of amenorrhoea. These restrictions on abortion should be equally encouraged as they significantly improve the protection of human rights.

## Practices That Must Be Condemned

**It is urgent to reveal the existence of these inhumane practices in order to publicly condemn them and bring them to an end.**

We call on the Parliamentary Assembly of the Council of Europe because these obvious and structural violations of human rights cannot be treated by any other than the Council of Europe. Clearly, the victims, the infants, have no ability to address the ECtHR. Their parents, who could represent them, never decide to appeal because *they* decided to abort the child.

On November 20<sup>th</sup> 2014, the Commissioner for Human Rights refused to examine the problem of children born alive after an abortion, somehow deciding that it did not fall within his mandate.

The Committee of Ministers of the Council of Europe has not managed to resolve this situation. On July 9<sup>th</sup> 2014, the Committee declared that “*owing to a lack of consensus, it has not been possible to adopt a reply to Written Question No. 655 by Mr Pintado*” posed on January 31<sup>st</sup> 2014.<sup>24</sup> The question was the following: “*What specific steps will the Committee of Ministers take in order to guarantee that fetuses who survive abortions are not deprived of the medical treatment that they are entitled to – as human persons born alive – according to the European Convention on Human Rights?*” The Committee of Ministers could not respond because certain governments do not wish to reaffirm these fundamental human rights. This failure is a shame on the Council of Europe, because it manifests its implicit consent to infanticide.

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<sup>23</sup> Nils Muiznieks, Commissioner for Human Rights at the Council of Europe, [declaration on sex-selective abortions](#). This declaration summarises the following principle of the jurisprudence of the ECtHR according to which: “*once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion... [t]he legal framework devised for the purposes of the determination of the conditions for lawful abortion 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”*”. (*P. and S. v. Poland*, n°57375/08, October 30<sup>th</sup> 2012 §99; see also *A., B. and C. v. Ireland*, n° 25579/05, December 16<sup>th</sup> 2010, §249; and *R. R. v. Poland*, n°27617/04 May 26<sup>th</sup> 2011, §187).

<sup>24</sup> <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20509&lang=en>

The Council of Europe cannot renounce the guarantee of fundamental rights to all human beings. A premature baby, even born during an attempted late term abortion, is a human being.

Therefore only the Parliamentary Assembly can act for the protection of these newborn infants, and it must do so, otherwise the purpose “*of safeguarding and realising the ideals and principles which are their common heritage*” in particular by “*the maintenance and further realisation of human rights and fundamental freedoms*” will be in vain.

**Consequently, we ask the Parliamentary Assembly of the Council of Europe:**

- 1. To investigate and report on the situation of children born alive during their abortion.**
- 2. To reaffirm that all human beings born alive have the same right to life guaranteed by Article 2 of the European Convention on Human Rights, and that all human beings must benefit from appropriate and necessary health care<sup>25</sup>, without discrimination based on the circumstances of their birth, in accordance with Articles 3, 8 and 14 of the ECHR.<sup>26</sup>**
- 3. To recommend to Member States to take into account the threshold of viability of human fetuses in their legislation on termination of pregnancy.**

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<sup>25</sup> See in particular the Convention on the Rights of the Child of 1989, Article 24: “*States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. [...]*”

<sup>26</sup> Article 14 of the Convention: “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as [...] birth or other status.*”

## Testimonies of Midwives and Physicians

In the past few weeks, the *European Centre for Law and Justice* has gathered several testimonies, especially in France, from midwives and medical doctors. They may confirm their testimonies to the PACE and give further details, should they be asked to.

### **Testimony of a student in midwife school (22 years old, North of France):<sup>27</sup>**

“I am a midwife student in my last year, and saw, during an internship in a maternity department of the North of France, a child born alive from an abortion on medical grounds. He was 24 weeks of gestation and the midwife left the child struggling to breathe, by leaving the baby alone on the resuscitation table. He died within 10 minutes, greatly weakened by labor contractions (triggered).

We did not check the heart sounds during labor, to “spare” the mother. The midwife told me that in these cases, “it is born dead if he is lucky, otherwise ... well ... we have no choice ... for the parents...”

I saw a baby struggle against death, in total indifference to his suffering ... A chilling inhumanity ... This leads to situations of horror ... I saw this at 19, I’m 22, I’ll never forget ... I have the desire to become a doctor in order to treat those who no longer have “the right” to be cared for...”

I assisted from a distance, because midwives prefer to take care of only the patients in this case, in several abortions on medical grounds between 18 and 24 weeks of gestation, but most children would die as a result of contractions.

Here, the term being 23 weeks + 5 days gestation, there was no feticide in accordance with the Protocol: the active gesture of fetal euthanasia, or stopping life with prenatal analgesia.

So, I think that the patient had been informed of the likelihood that the child is born alive during the consultation before the abortion; but we have not shown the child to her, occupying her until the time the child dies (“a matter of minutes”). We showed her the baby once it had died.

The midwife did not give me figures, but in her speech, it seemed to be recurring for those delicate terms between 18 and 24 weeks of gestation...

Not having finished my studies, I still prefer to remain anonymous for a while...”

### **Testimony of Mrs. M.B., midwife:<sup>28</sup>**

A midwife for almost 9 years, I can testify that babies born from late abortions (case of abortion on medical grounds) without feticide, usually between 20 and 24 weeks gestation, may be born alive. The medical team is then often uncomfortable and either puts the baby in a tray in a separate room until he stops showing signs of life, or asks a gynecologist, anesthetist or pediatrician for a morphine injection in the cord that some accept ... or not.

For my part, I have already proposed to concerned couples that if the baby was alive at birth, to lay him on the woman’s stomach for him to die with dignity. Two couples agreed.

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<sup>27</sup> On file with author.

<sup>28</sup> On file with author.

I recently decided not to participate in abortions on demand or abortions on medical grounds and to apply my conscience clause, which I can do because I am incumbent. I will probably leave the relevant services, including the delivery room. Those contractual employees who would apply their conscience clause are threatened with not having their contracts renewed.

In my experience, I've come to the conclusion that in order to protect the right to abortion, an embryo or fetus is considered to be a person by medical practitioners under two conditions:

1. The child must be wanted by the parents and
2. The child must be "normal" and not "disabled" (with all the risks that such a subjective term permits).

As soon as the fetus fails to meet these conditions, it is just considered to be waste... It's terrible to say, but that is the truth.

### **Testimony of M.K., a Student Midwife in 3<sup>rd</sup> Year, Ile de France:<sup>29</sup>**

It happened in 2015, in the hospital delivery room. One patient was present, she was 22 weeks +3 days amenorrheic and was there for a late miscarriage.

The child was born alive, and to prevent it from crying, the doctor quickly covered his face. He was then taken into a side room (baby resuscitation room) where I could join him. I was able to find that there was no apparent defect, he struggled to breathe and he had some slight gestures. He was fully formed, had eyelashes, hair, nails ... (He had even slightly long nails!) He weighed 565g and was about 27cm. The doctor came in and asked me if he was still breathing, or else we would make an injection for that "to be resolved." Five minutes later he came back and grabbed a syringe KCl (lethal injection for this premature baby). Somewhat bewildered, I asked him if we cannot do something "more natural", but he answers my question by sweeping he prefers not to let the child suffer. He then pierced the baby in the heart, and injected the product. The child, during the injection, moved all its members. I do not know what that meant, but perhaps he suffered. The little boy lived just a quarter of an hour.

The medical team told the parents of the child that he was stillborn. This is why we did not want him to cry at birth: it would be too traumatic for them.

What shocked me personally, is the cold-blooded doctor (head of department) that had injected the child in the heart. The fact that the child was alive was a problem that needed to be addressed: it has never been contemplated to tell the parents what really happened.

### **Testimony of Mr. X.B., Physician:<sup>30</sup>**

I would like to express to you some revealing anecdotes of what I saw during my external internship (4<sup>th</sup> year medical) in the maternity of the Hospital of X. It's been over 10 years but these are scenes that we do not forget.

In a multidisciplinary meeting in "video-conference" between the main Hospital and different obstetrical services of peripheral hospitals, I saw the geneticist of the Hospital make very sharp and scathing reproaches to an obstetrician in a peripheral hospital. The latter had not been able to obtain histological diagnosis on the brain of a fetus after an abortion on medical grounds in the 3<sup>rd</sup> trimester because the expulsion was too long and

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<sup>29</sup> On file with author.

<sup>30</sup> On file with author.

the brain tissue was not histologically interpretable. The geneticist had entered a kind of fury, asking how often he should say that we should not commit feticides in utero, but to kill the baby after it was born (those are of course not the words that were used, but I do not remember the euphemism).

At the end of my internship of three months, during the validation, I was invited by the clinician who looked after me to give my impressions about the internship. I then said that despite all the wonderful things that can be seen in a maternity hospital, I was shocked by some things I had seen, especially feticide. She then told me that it was true that it was sometimes difficult. And I again see this young woman gaze into space, saying: "It is true that sometimes there's a little murder among friends" (these are the words that she said). She then tells me a case where the baby had time to scream before being hastily brought into the next room. These cases are not uncommon, and are dramatic because the mother hears her child, and the moment she realizes that he is alive, the child is being killed. But in the case told by the head of my clinic, what made her uncomfortable is that three doctors (an anesthesiologist, an obstetrician and a pediatrician) took an hour to kill a newborn. Because as it was alive, the child struggled vigorously and they could not give him the lethal injection.

Unfortunately I have many friends who could bring you more stories, some may be direct witnesses.

### **Testimony of Mrs. A., midwife in a University Hospital in Finistère, France:<sup>31</sup>**

In my first year of studying to become a midwife, I witnessed once again the birth of a child born alive after an abortion on medical grounds. This took place in 2000 in a Hospital in the West of France. Under most abortions on medical grounds, the fetus dies during labor, but exceptionally, this time the fetus was born alive. He survived a few minutes without being treated and died.

Moreover, fetuses aborted following an abortion on medical grounds are most of the time "born dead"; a doctor comes to draw up the administrative act and performs a pathological anatomy. In these cases I was repeatedly shocked by the lack of respect doctors had for these bodies born lifeless.

Since I'm a midwife, I accompanied pregnancies many times with "accidental" premature births. In these cases we have accompanying procedures planned for the parents to mourn. There was then respect for a fetus 20 to 24 weeks who is considered as the body of a human person. In the case of a termination of pregnancy, there is no respect for the child born dead, which are thrown away.

### **Testimony of Mrs. L.M., Former Anesthetic Nurse<sup>32</sup>:**

I want to testify to infanticide, not that we have actually killed a newborn of 28 weeks but worse: we have not had humanity come to his aid.

It was in a maternity of Paris suburbs (South) in 1987. I was an anesthetic nurse at the time and I intervened in monitoring the epidural composed by the Anesthetist. Medicine thought to be born from HIV positive mothers necessarily implied that the child would

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<sup>31</sup> On file with author.

<sup>32</sup> On file with author.

be contaminated (We now know that the child can “negate” a few months after and not be suffering from AIDS).

The young mother was an HIV positive drug addict who discovered her pregnancy late. Gynecologists convinced her to abort but the baby was born alive.

Midwives simply put it in an empty box, naked in a stainless steel tub, cold, without any care.

His mother was conscious during labor and delivery of the baby; she was crying and wanted to see her little one but the doctors decided that this child should die. They did not give the child to the mother to spare her. This baby was viable, he was breathing on his own and cried vigorously. I honestly think it was just left to die of cold ... it was horrible...! We were harnessed in our gloves, overshirts, headwear, masks, “overshoes” because we were afraid of getting AIDS, and the baby, naked, abandoned by all, and so vulnerable. He took a long time to stop whining.

I almost picked him up to comfort, warm, and save him, but I did not do anything... They all looked so sure that this was the solution. The whole team was nevertheless extremely uncomfortable. The Obstetrician was the decision maker, seeing that he had medically agreed to perform an abortion, and united the midwives by force.

I had a little girl of four months at home and I was afraid for her. Why do they fight to save some premature babies while others are given death without humanity?

We do not want to actively kill them but passively do!

I stopped anesthesia because I could not stand being obliged to put women to sleep for an abortion on demand or medical abortion.

### **Testimony of Mr. J.C., Physician, 46 years old:**

I am a doctor in adult resuscitation, a profession that I practiced for a little over 10 years, and I have intensive care anesthetist training. I would like to testify to what I experienced when I was an anesthesia intern in maternity training; it was about 16 years ago, in a university hospital.

I was in charge of the delivery room that day having the telephone (tone) of the internal anesthesia guard. I was under the responsibility of an anesthesiologist who was also in charge of the delivery room that day. I was called to perform an epidural for a young woman who was to vaginally deliver induced after a medical termination of pregnancy (MTP) at a fairly advanced stage; around six months. Her husband was present.

This late abortion was decided following the protocol in force in the service, after the necessary multidisciplinary consultations, but I can no longer remember the cause that led to the decision to terminate the pregnancy. I remember very clearly not wanting to know what happened in the abortion itself, and I clearly told the responsible anesthetic physician that I no longer wanted to enter the room after the installation of the epidural anesthesia. I had expressed the wish not to attend terminations of pregnancy (abortions, abortions on medical grounds).

That same day, a few hours later, I found myself sitting in the anesthetists' office, not far from the delivery room. My guard phone began to ring. And while it rang, I was seized with an inability to respond to this call. It's a little hard to explain, because I never imagined doing such a thing. Not answering the phone-call from the delivery room is something serious. This had never happened to me; this has never happened to me again. Yet at that moment I was seized by immobility in my seat listening to the phone ring.

After a delay may be about 15 to 30 minutes, I got up towards the delivery room and was sharply questioned by the midwife who cared for the young woman to whom I posed the epidural earlier in the day. She was nervous and uncomfortable, blaming me for not answering, and then the anesthetic doctor who was responsible for the delivery room that day came. He had been called by the midwife.

The midwife told me how quickly the gynecologist had ended the life of the child in the womb, making an ultrasound location and injecting the product to make the child's heart stop beating. Then the vaginal delivery was induced. By the time the child came out, the midwife was alone. When the child was completely out, he cried; he was alive. The midwife told how she was seized and choked the child's cries with her hand and hurried out so the parents would not hear their child. She walked to the neonatal intensive care unit. It was at that precise moment she called me on the guard telephone and I could not answer. The anesthetist said in turn that he was called by the midwife in the neonatal resuscitation room.

The midwife had to go back to the woman who had just given birth and the anesthetist was alone with the child. He did not resuscitate the child, and after several maneuvers, they killed the child.

Barely an hour or two later, another young woman came for threatened pre-term labor at six months of pregnancy. Quickly, she gave birth. Her child was taken immediately into the neonatal resuscitation room. It was a difficult resuscitation; pediatricians soon arrived to help us because things were not going the way we wanted. After a long resuscitation, the child was stabilized and he went to the neonatal intensive care unit.

I realized then that this child we had to resuscitate was the same age as the other child, a few hours before, who had not had the right to live.

At the end of the day, the midwife invited the team to meet in the break room. She took out a bottle of champagne from the fridge. She invited everyone to take a glass, not to rejoice, but to help everyone to forget what had happened.

I saw how many people altogether balanced, could be induced to do things they would have refuted in another context, detached by this notion of emergency and the psychological gearing that was set in place from the beginning of this abortion procedure. I can attest to the discomfort, to say the least, rather the torpor in the medical and paramedical team at the end of the day. I remain deeply appalled by this and I see how our medical facilities can sometimes lead us to achieve what we would not want to do.



### **Testimony of Mrs. D.F., Physician:<sup>33</sup>**

I have been a physician for 8 years. Here are two testimonies dating back to my studies: the first when I was a student, the second during my internship.

At the guard in the delivery room, a woman was in labor as part of an abortion on medical grounds at 5 months pregnant. The birth was imminent, and the gynecology interns were prepared. The senior gynecologist of the guard who is about to return to her bed, approaches the interns and said in a low voice, but loud enough for me to hear: "If the child is breathing on arrival, you press hard here on the trachea until it completely stops breathing," and turning to me: "And you, you did not hear anything."

A new night in the guard, but this time in pediatrics. I am interning in pediatric emergencies. The senior pediatrician of the guard called me and asked me to join him in the neonatal resuscitation room juxtaposed to delivery rooms. A child who has just been born is intubated and ventilated. The child presented multi-system organ failure and the morphotype of a child carrying Down's syndrome (none of these signs had been detected during prenatal ultrasounds). My boss asked me to tell him what I think of the features of this baby. After my answer, he asked the present anesthesiologist if any of the mother's epidural product remained, which was the case. He took it and then injected the child, who died in a minute or two alone. As the child lay dying, the two doctors were talking, without any discomfort and with no regard for this baby. As for the parents, they were informed about the health status of their child after his death!

### **Testimony of Mrs. Siv Bertilsson, midwife:<sup>34</sup>**

"Hello. I have worked 36 years as a midwife in maternity and obstetric care. Now there is a reorganization at the women's clinic, which means that the late term abortions after week 12 will be performed at the maternity ward. I have during my professional career worked with both gynecology and maternity care.

Therefore, I have horrible memories from my time at the gynecology ward where I participated in late term abortions, most around week 16 where the fetus struggled and tried to breathe for 5-15 minutes.

Because there are no rules or regulations on what one should do with a fetus that is struggling for life, you leave the fetus to die by itself in a round bowl or a basin. Horribly inhumane, I think. And this is not an unusual event. Approximately 25% in week 16-17 live for a certain time.

Now I am reintroduces to this. I had decided to never ever concern myself with this chore. I am now forced to stop working as a midwife? How should I act? And if I'm forced to continue to bring myself to do this again, what do I do with the fetus when it is alive?

I read in the Animal Welfare Act how to kill kittens, puppies or other small animals, and there are clear rules for how the killing should be done in a way that does not cause anxiety or pain to the animal..."

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<sup>33</sup> On file with author.

<sup>34</sup> Email sent at the Swedish office for Public Health and Social Care, September, 29<sup>th</sup> 2014 Sunderby Hospital, Luleå, Sweden

### **Testimony of Mr. Andrea Kischkel, Physician at the Hospital of Gällivare, Sweden, 2014:**

He reported on an abortion, authorized by the Socialstyrelsen, ended at 22 weeks + 3 days at the hospital of Gällivare. Informed shortly before, Dr Kischkel tried to have the mother transferred to the 3rd level Neonatal Intensive Care Unit of Umeå where neonatologists try to save premature born babies' lives from gestational age 22 + 0 weeks. That was refused because it was an abortion. A little girl was born alive on 1<sup>st</sup> March 2014 at 7:55 pm. The midwives were not allowed to contact the paediatrician on call. Therefore, the child was given no medication, no pain relief although she had been pulled out by vacuum extraction. A midwife swept the baby into warm towels and waited until she had died, nearly half-an-hour later.

### **Testimony of the discovery of a surviving baby, reported in *The Telegraph*:<sup>35</sup>**

The 22-week infant died one day later in intensive care at a hospital in the mother's home town of Rossano in southern Italy. The mother, pregnant for the first time, had opted for an abortion after prenatal scans suggested that her baby was disabled. However, the infant survived the procedure, carried out on Saturday in the Rossano Calabro hospital, and was left by doctors to die. He was discovered alive the following day – some 20 hours after the operation – by Father Antonio Martello, the hospital chaplain, who had gone to pray beside his body.

He found that the baby, wrapped in a sheet with his umbilical cord still attached, was moving and breathing. The priest raised the alarm and doctors immediately arranged for the infant to be taken to a specialist neo-natal unit at the neighboring Cosenza hospital, where he died on Monday morning. Italian police are investigating the case for "homicide" because infanticide is illegal in Italy. The law means that doctors have had an obligation to try to preserve the life of the child once he had survived the abortion. The Italian government is also considering an inquiry into the conduct of the hospital staff.

Eugenia Roccella, the under-secretary of state in the health department, on Wednesday night promised a government inquiry into the incident. "The minister of health will send inspectors to the hospital in Rossano Calabro to investigate what actually happened, and to see if the Law 194, which prohibits abortion when there is a possibility of the fetus living separately from the mother, and permits it only when the continuation of the pregnancy would result in life-threatening danger to the mother." She said that if initial information is correct, "this would be a case of deliberate abandonment of a seriously premature neonate, possibly also with some form of disability, an act contrary to any sense of human compassion but also of any accepted professional medical practice". She added: "We must remember that a baby, once born, is an Italian citizen equal to all the others, and is entitled to all fundamental rights, including the right to health and therefore to be given full support."

[...] Most abortions at 22 weeks simply involve the induction of the birth which normally results in the death of a young fetus.

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<sup>35</sup> Simon Caldwell, Baby boy survives for nearly two days after abortion, *The Telegraph*, 28 April 2010, available at: <http://www.telegraph.co.uk/news/worldnews/europe/italy/7646540/Baby-boy-survives-for-nearly-two-days-after-abortion.html>

The case is causing uproar in Italy because it is the second involving a fetus of that age surviving the procedure in just three years. The other involved a baby in Florence who weighed just 17oz when he was aborted at 22 weeks because of a suspected genetic disorder, but lived for three days. [...]

### **Testimony of Mrs. M.J., Midwife, France:<sup>36</sup>**

It was in 1973, I was beginning my second year at the nursing school and it was my first day of my internship in the maternity department. At 4:30 p.m. a nurse hastily came in the treatment room with a white sheets rolled like a ball, holding it to us and said “*check that there are no instruments in it, take the compresses and put the drape in the laundry.*”

I was with a classmate I did not know because he was not from my school. He seemed older than me. Delicately we opened the sheet, removed all the compresses and discovered a lot of clotted blood: we discovered within the blood, a mass, that was a fetus, and he was still breathing. We were shocked.

Another nurse arrived at that moment and we told her that the fetus was breathing. As a response she said: “*Well, put it in a basin, and wait!*” It all felt so frigid!

The nursing student and I talked and agreed to say that he was alive and that we had to do something immediately. So, we wiped and washed the little body and wrapped him in a “cloth diaper.” We delicately placed him on the tray and covered him. I do not know what his gestational age was, but he was a boy and his members were well formed.

Another nurse arrived, and she saw us near the fetus. She said we did well and we took this opportunity to question her:

- “*What happened to the mother?*”

- “*She did what she had to do to abort and lost a lot of blood by expelling the fetus. She is now in the operating room and it is unclear if she will make it!*”

My colleague and I stayed near the fetus who was breathing heavily with increasing spaces between each breathe. It felt like time had stopped. We were there to look at him, this little living being, talking to him and stroking his little body through the drape for 45 minutes at least.

[...]

He finally stopped breathing and we left him on his tray. It was the end of the first day of the internship. I must say that the 15 days of internship were difficult. The nurses were running around like “a chicken with its head cut off,” and it was not possible to talk about this event with them.

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<sup>36</sup> On file with author.

## Statistics on Late Abortion in Different Countries

Official statistics of the number of late abortions.

### Denmark

In 2012, there were 15,608 performed abortions.<sup>37</sup> Of these, 738 were performed during the second trimester until 27 weeks of gestation. In 2013, there were 680 abortions performed during the second trimester.<sup>38</sup>

The Danmarks Statistik shows the official total of 15,202 abortions in 2006, 15,660 in 2007, 16,355 in 2008, 16,736 in 2009, 16,709 in 2010, 15,974 in 2011, 15,608 in 2012, 15,834 in 2013, 15,097 in 2014 (provisional);<sup>39</sup> translated into national figures from 2010, during **which 877 fetuses were terminate after the 12th week; the statistical figure for life signs in aborted fetuses would be 140.**<sup>40</sup>

The Statistics from Denmark's second largest maternity clinic at the Aarhus University Hospital Skejby show that out of **70 late terminations between August 2011 and November 2012, 11 – or 16 per cent – showed signs of life.**<sup>41</sup>

### Finland

In 2013, there were 10,120 performed abortions.<sup>42</sup> Of these, 195 were performed between 18 and 22 weeks of gestation. In 2012, there were 10,178 performed abortions. Of these abortions, 213 were performed between 18 and 22 weeks of gestation.<sup>43</sup>

### France

In 2010, there were 3,245 performed abortions after 15 weeks.<sup>44</sup> According to a study,<sup>45</sup> 73% of French neonatologists would declare having administered drugs to newborns with the intention to kill the babies. For the same question, the result would be 47% in the Netherlands, 4% in Germany and in the United-Kingdom and 2% in Spain, Sweden and Italy.

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<sup>37</sup> Statistics Denmark, *Abortion by age*, Jun 15, 2015, [www.statbank.dk/ABORT](http://www.statbank.dk/ABORT) and <http://www.statbank.dk/statbank5a/SelectVarVal/saveselections.asp>.

<sup>38</sup> Øjvind Lidegaard, *Early Pregnancy and Abortion: Annual Report for the Year 2013*, LANDSDÆKKENDE KLINISK KVALITETSDATABASE [NATIONWIDE CLINICAL DATABASE]. [https://www.sundhed.dk/content/cms/67/4667\\_14-07-11-%C3%A5rsrapport-2013.pdf](https://www.sundhed.dk/content/cms/67/4667_14-07-11-%C3%A5rsrapport-2013.pdf) (November 7, 2014).

<sup>39</sup> Statistics Denmark, *Abortion by age*, Jun 15, 2015, [www.statbank.dk/ABORT](http://www.statbank.dk/ABORT) and <http://www.statbank.dk/statbank5a/SelectVarVal/saveselections.asp>

<sup>40</sup> Julian Isherwood, Dec 4, 2012, *Abortion: Every sixth fetus showed signs of life*, complete article: <http://politiken.dk/newsinenglish/ECE1842893/abortion-every-sixth-fetus-showed-signs-of-life/>

<sup>41</sup> Kirsten Andersen, Dec 18, 2012, *As many as 1 in 6 babies aborted after 12 weeks born alive: Danish study*, complete article: <https://www.livesitenews.com/news/as-many-as-1-in-6-babies-aborted-after-12-weeks-born-alive-danish-study>

<sup>42</sup> Official Statistics of Finland, Oct 16, 2014, *Raskaudenkeskeytykset 2013 (Induced abortions 2013)*, [http://www.julkari.fi/bitstream/handle/10024/116832/Tr25\\_14.pdf?sequence=1](http://www.julkari.fi/bitstream/handle/10024/116832/Tr25_14.pdf?sequence=1).

<sup>43</sup> *Induced Abortions*, NATIONAL INSTITUTE FOR HEALTH AND WELFARE, available at: [https://sampo.thl.fi/sampo\\_prod/cgi-bin/cognos.cgi?b\\_action=powerPlayService&ui.action=run&TARGET=%2Fcontent%2Ffolder%5B%40name%3D%27amor\\_prod%27%5D%2Ffolder%5B%40name%3D%27ab%27%5D%2Fpackage%5B%40name%3D%27amor\\_ab\\_kokomaa\\_ab\\_kokomaa\\_en\\_prod%27%5D](https://sampo.thl.fi/sampo_prod/cgi-bin/cognos.cgi?b_action=powerPlayService&ui.action=run&TARGET=%2Fcontent%2Ffolder%5B%40name%3D%27amor_prod%27%5D%2Ffolder%5B%40name%3D%27ab%27%5D%2Fpackage%5B%40name%3D%27amor_ab_kokomaa_ab_kokomaa_en_prod%27%5D) (May 12, 2015).

<sup>44</sup> *Avortements suivant la durée de gestation et le motif médical*, INED, Tableau 23, France entière, 2010, updated 23 January 2013.

<sup>45</sup> Euronic group (2000), "End-of-life decisions in neonatal intensive care: physicians' self-reported practices in seven European countries", *The Lancet*, Vol. 355 (9221): 2112 - 2118.

## Russia

In 2012, there were 1,070,980 performed abortions.<sup>46</sup> Of these, 6,600 were performed between 12 and 21 weeks gestation.<sup>47</sup> In 2011, there were 989,375 performed abortions.<sup>48</sup> Over 16,000 of these were performed as late abortions between 22 and 27 weeks gestation.<sup>49</sup>

## Italy

In 2010, there were 115,372 performed abortions.<sup>50</sup> Of these, 900 were performed after the 21st week of gestation representing 0.8% of the country's abortions.<sup>51</sup> In 2008, there were 121,406 performed abortions.<sup>52</sup> Of these, 869 were performed after the 21st week of gestation representing 0.7% of the country's abortions.<sup>53</sup>

## Sweden

In 2012, there were 37,366 performed abortions. Of these, 2,551 were performed after 12 weeks gestation<sup>54</sup>. Sweden does not report more precise figures on late term abortions.

## Netherlands

In 2012, there were 30,577 performed abortions. Of these, 2,352 were performed between 18 and 23 weeks gestation.<sup>55</sup>

## Norway

In 2012, there were 124 abortions performed between 19 and 21 weeks of gestation, and there were 11 late abortions performed after the 22<sup>nd</sup> week of gestation.<sup>56</sup>

## Spain

In 2013, there were 108,690 performed abortions. Of these, 1.33% were performed at 21 weeks gestation or later totalling to 1145 late abortions. In 2012, there were 112,390 performed

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<sup>46</sup> Robert Johnston, *Historical Abortion Statistics, Italy*, available at

<http://www.johnstonsarchive.net/policy/abortion/ab-italy.html> (December 2014).

<sup>47</sup> Boris Denisov & Viktor Sakevich, *АБОРТЫ В ПОСТСОВЕТСКОЙ РОССИИ: ЕСТЬ ЛИ ОСНОВАНИЯ ДЛЯ ОПТИМИЗМА* [*Abortion in Post-Soviet Russia: Are there any Grounds for Optimism?*] 154 available at [www.hse.ru/data/2014/07/15/1312456972/5\\_Денисов\\_Сакевич\\_Аборты%20в%20России.pdf](http://www.hse.ru/data/2014/07/15/1312456972/5_Денисов_Сакевич_Аборты%20в%20России.pdf) (2014).

<sup>48</sup> Единая межведомственная информационно-статистическая система, [United Interagency Information-Statistical System: The Number of Abortions, Federation of Russia], available at <http://www.fedstat.ru/indicator/data.do?id=41696>

<sup>49</sup> Boris Denisov & Viktor Sakevich, *АБОРТЫ В ПОСТСОВЕТСКОЙ РОССИИ: ЕСТЬ ЛИ ОСНОВАНИЯ ДЛЯ ОПТИМИЗМА* [*Abortion in Post-Soviet Russia: Are there any Grounds for Optimism?*] 154 available at [www.hse.ru/data/2014/07/15/1312456972/5\\_Денисов\\_Сакевич\\_Аборты%20в%20России.pdf](http://www.hse.ru/data/2014/07/15/1312456972/5_Денисов_Сакевич_Аборты%20в%20России.pdf) (2014).

<sup>50</sup> <http://www.johnstonsarchive.net/policy/abortion/ab-italy.html> (February 2008).

<sup>51</sup> Carlo Principe, *Boom degli aborti tardivi: triste segnale di una società sempre più eugenetica* (*Boom of the late abortions: sad sign of a increasingly eugenic society*), ROMA available at <http://www.marciaperlavita.it/articoli/boom-degli-aborti-tardivi-triste-segnale-di-una-societa-sempre-piu-eugenetica/>

<sup>52</sup> Robert Johnston, *Historical Abortion Statistics, Italy*, available at <http://www.johnstonsarchive.net/policy/abortion/ab-italy.html> (December 2014).

<sup>53</sup> Renzo Puccetti, *ABORTO: i neonati fortemente prematuri, portatori di pieni diritti* [*ABORTION: The Extremely Preterm Infants Having Full Right*], ROMA, available at <http://www.lucisullest.it/aborto-i-neonati-fortemente-prematuri-portatori-di-pieni-diritti/>

<sup>54</sup> Statistics on abortions in Sweden in 2012, corrected May 2014, <http://www.socialstyrelsen.se/statistik/statistikefteramne/aborter>.

<sup>55</sup> IGZ, Dec. 2013, "Jaarrapportage 2012 van de wet afbreking zwangerschap," IGZ (Netherlands), on line at: <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2013/12/06/jaarrapportage-2012-van-de-wet-afbreking-zwangerschap/jaarrapportage-2012-van-de-wet-afbreking-zwangerschap.pdf>

<sup>56</sup> Folkehelseinstituttet, Norway, March 2015 "Rapport om svangerskapsavbrot for 2014" (Report of the abortion in 2014), see complete: <http://www.fhi.no/dokumenter/c8d6191ba2.pdf>

abortions. Of these abortions, 1.28% were performed at 21 weeks gestation or later totalling to 1,438 late abortions.<sup>57</sup>

### Germany

In 2012, there were 106,815 performed abortions. Of these, 443 were performed between 19 and 21 weeks of gestation. Additionally, 447 were performed as late abortions after 22 weeks of gestation. In 2011, there were 502 abortions performed between 19 and 21 weeks gestation, while there were 480 late abortions after the 22<sup>nd</sup> week of gestation.<sup>58</sup> A German midwife, Dorothea Fürst was able to confirm for us that the official procedure is to euthanize a baby that is born alive.<sup>59</sup>

### United Kingdom

In 2005, *British Journal of Obstetrics and Gynaecology* published the conclusions of Dr. Shantala Vadeyar, researcher at the St. Mary Hospital (Manchester), who confirms that children after the age of 18 weeks have survived, for a certain time, outside the uterus after a failed abortion. Dr. Vadeyar has revealed that in the North West, between 1996 and 2001, that at least 31 children survived failed abortions<sup>60</sup>. In 2007, a study published in the *British Journal of Obstetrics and Gynaecology*<sup>61</sup> concluded that around one abortion of out thirty beyond 16 weeks of pregnancy results in the birth a living child. At 23 weeks, the level of children born reached 9.7%. According to Swedish mid-wife, the figure has even reached 25%<sup>62</sup>.

In the CEMACH 2007 « *Prenatal Mortality report* », releasing data from hospitals in England and Wales in 2005; it has been revealed that:

“Sixty-six of the 2235 neonatal deaths notified in England and Wales followed legal termination (predominantly on account of congenital anomalies) of the pregnancy i.e. born showing signs of life and dying during the neonatal period. Sixteen were born at 22 weeks’ gestation or later and death occurred between 1 and 270 minutes after birth (median: 66 minutes). The remaining 50 fetuses were born before 22 weeks’ gestation and death occurred between 0 and 615 minutes after birth (median: 55 minutes)”, p28<sup>63</sup>.

Figures show that in the United Kingdom,<sup>64</sup> five babies out of 247 who were born alive at less than 22 weeks have lived at least a year.<sup>65</sup> 11 out of 171 born at 22 weeks and 76 out of 332 born at 23 weeks have survived.

Department of Health figures show<sup>66</sup> that 185.122 abortions were carried out in England and Wales in 2012, including 2860 at 20 weeks or more. 160 abortions were done after 24 weeks, including 38 between 28 and 31 weeks, and 28 after 32 weeks. 66 babies were thus aborted

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<sup>57</sup> [http://www.msssi.gob.es/profesionales/saludPublica/prevPromocion/embarazo/tablas\\_figuras.htm#Tabla5](http://www.msssi.gob.es/profesionales/saludPublica/prevPromocion/embarazo/tablas_figuras.htm#Tabla5)

<sup>58</sup> Gesundheit, Schwangerschaftsabbrüche, 2011, Destatis, Statistisches Bundesamt, 2012. Available at: <https://www.gbe-bund.de/stichworte/SPAETABTREIBUNGEN.html>

<sup>59</sup> On File with Author.

<sup>60</sup> <http://www.lifesitenews.com/news/66-british-babies-survived-abortion-all-were-left-to-die-without-medical-ai>

<sup>61</sup> <http://onlinelibrary.wiley.com/doi/10.1111/j.1471-0528.2007.01279.x/abstract>

<sup>62</sup> <http://www.varldenidag.se/nyhet/2014/10/22/Vad-ska-jag-gora-med-fostret-nar-det-lever/>

<sup>63</sup> Free Transaltion <http://www.hqip.org.uk/assets/NCAPOP-Library/CMACE-Reports/41.-April-2007-Perinatal-Mortality-2005.pdf>

<sup>64</sup> <http://www.telegraph.co.uk/health/healthnews/9598649/One-in-ten-babies-born-under-abortion-limit-survives.html>

<sup>65</sup> See case of Amilia, born in October 2006 in the Baptist Children’s Hospital of Miami. This “miracle baby”, according to statements of American doctors who were in charge of her, was born at 22 weeks of pregnancy and at her birth she measured only 24.1 centimetres and weighed only 284 grams. She survived without future difficulties.

<sup>66</sup> « *Abortion Statistics, England and Wales: 2012* », Department of Health, April 2014. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/307650/Abortion\\_statistics\\_\\_Engl\\_and\\_and\\_Wales.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307650/Abortion_statistics__Engl_and_and_Wales.pdf)

after 28 weeks, which was the viability limit defined by the WHO until 1975: an infant born at that gestational age can survive without medical help. Among the 160 late abortions, 43% were by dilatation and evacuation, 22% by feticide with surgical evacuation, 17% medical (mostly antiprogesterone) and 17% feticide and medical evacuation.

### **Canada**

622 children were born alive in Canada after interrupted pregnancies between 2000 and 2011.<sup>67</sup> In 2011, 549 fetus were aborted from the 21<sup>st</sup> week, or later.<sup>68</sup> According to the same Institute, 1226 abortions in 2010 and 1341 in 2011 used the method of Dilatation and evacuation in Canadian hospitals (except Quebec and not including clinics).

### **United-States of America**

362 babies died after surviving their abortion between 2001 and 2010.<sup>69</sup>

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<sup>67</sup> “Termination of pregnancy, affecting fetus and newborn” [P96.4]. <http://aclj.org/planned-parenthood/362-infants-born-alive-result-botched-abortions-died-decade>

<sup>68</sup> Induced Abortions Reported in Canada in 2011, *Canadian Institute for Health Information*, Pre-formatted Table, Table 4, page 6. Available at: [http://www.cihi.ca/CIHI-ext-portal/pdf/internet/TA\\_11\\_ALLDATATABLES20130221\\_EN](http://www.cihi.ca/CIHI-ext-portal/pdf/internet/TA_11_ALLDATATABLES20130221_EN).

<sup>69</sup> <http://aclj.org/planned-parenthood/362-infants-born-alive-result-botched-abortions-died-decade>

## International Regulations on Late Term Abortion

### Norway

Some midwives facing this situation complained to the Norway's Health Ministry about late abortions taking place in the country. In response, the Norwegian government has tabled draft legislation that would ban all abortions after 21 weeks and 6 days gestation.<sup>70</sup>

### Romania

According to the Ministry of Health Order no. 359/2012 regarding the criteria of registration and declaration of the newborn, if after the expulsion or extraction, the newborn has one of the vital signs (spontaneous respiration, cardiac activity, voluntary contraction of one muscle), irrespective of the gestational age, the newborn will be declared as "born alive" (Article 1). After the gestational age of 24 weeks, the newborn will be registered in the birth registry (Article 2 § 1). Before the age of 24 weeks the newborn will be registered in a special register and he will benefit from neonatal intensive care (Article 2 § 2).

### Switzerland

In Switzerland, in 2011, new recommendations<sup>71</sup> were approved by the Swiss Society of Neonatology and other related bodies in order to better take into account the best interest of the child and of the pregnant woman in the perinatal care of pregnant women at high risk for preterm delivery and of preterm infants born at the limit of viability (22–26 completed weeks of gestation). According to these recommendations, other factors than the gestational age and fetal weight should be taken into account to establish the life expectancy, such as fetal lung maturation. They set a decision-making procedure concerning their care (existence of an experienced interdisciplinary perinatal team that will decide of the care to be given, the dialogue with the parents). They indicate that the preterm new born at <24 weeks should benefit from palliative care, and in certain cases, after the 23<sup>rd</sup> complete week from obstetrical measures (such as caesarean section), provisory neonatal intensive care measures and palliative care. Therapeutic obstinacy is forbidden. Nevertheless, these recommendations exclude from care the viable and non-viable infants that survived their late-term abortion.

### United-States of America

The law of the United States recognizes the importance of protecting the most vulnerable among us. In 2002, the United States enacted the Born-Alive Infants Protection Act, which protects infants by defining born alive as "*after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, caesarean section, or induced abortion.*"<sup>72</sup> This legislation unequivocally recognizes that infants born alive from abortion procedures are entitled to the same care and protection as infants born in childbirth.

Several states in the US have statutes that come into effect as soon as the baby exits the womb. These statutes categorize the killing of an infant who has been born alive as murder, regardless of the procedure that induced the birth. A total of 43 states ban abortion after the fetus has

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<sup>70</sup> Norway tightens law after late abortions revealed, *The Local*, 2 January 2014. Available at: <http://www.thelocal.no/20140102/norway-to-tighten-law-after-late-abortions-revealed>

<sup>71</sup> *Perinatal care at the limit of viability between 22 and 26 completed weeks of gestation in Switzerland*, Swiss Med Wkly. 2011;141:w13280

<sup>72</sup> 1 USCS § 8



reached a certain age.<sup>73</sup> Of these states, 19 ban abortions after 20 weeks, citing the ability of the infant to survive outside of the womb.<sup>74</sup> A total of 13 states require a second physician to attend the abortion procedure, specifically to care for the infant if it is born alive.<sup>75</sup> These physicians are required to give quality neonatal medical care to the infant as any other premature baby at that age, disregarding the mother's original intent to abort. In these cases, infants born alive from an abortion procedure are treated as human beings with rights to liberty and life.<sup>76</sup>

In the *Gonzales v. Carhart* decision, the Supreme Court upheld a Federal ban on partial-birth abortion, a procedure where the fetus' life is terminated after the delivery in the birth canal called "*intact D&E*."<sup>77</sup> The Court argued that, because the United States government recognizes a fetus as "*living*" at birth, "*Congress could nonetheless conclude that the type of abortion requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.*"<sup>78</sup>

The Illinois Supreme Court, in *People v. Greer*<sup>79</sup> held that the killing of a fetus aborted alive may be punished as murder under section 9-1 of the Criminal Code of 1961.<sup>80</sup> If a physician intentionally terminates a pregnancy knowing that the fetus is viable and the fetus dies because the physician intentionally failed to take the life-support measures that would be employed if the fetus were intended to be born rather than aborted, then the physician is criminally culpable but only to the extent of a Class 2 felony in Illinois.<sup>81</sup>

## **United-Kingdom**

### British Medical Association (BMA)<sup>82</sup>

The BMA, at their annual conference in Llandudno in 2004, called for proper medical treatment to be given to babies born alive after late abortions. They stated that "*babies born alive as a result of termination of pregnancy procedures receive the full neonatal care as that available to other babies.*"<sup>83</sup>

### Scottish Council on Human Bioethics (SCHB)<sup>84</sup>

The SCHB stated that they are "*mindful of cases where babies survived the chemical injections which were supposed to terminate pregnancies at around 23 weeks. This is an age at which babies can survive in special care units. In this regard, a 10-year study at 20 UK hospitals has found that one in 30 fetuses aborted for medical reasons were born alive. The study looked at the outcomes of 3,189 abortions performed between 1995 and 2004 because the fetus had a disability of some kind. It showed that 102—or around one in 30—were born alive. Most of these babies with disabilities were born between 20 and 24 weeks of pregnancy and all lived for no more than a few hours. If these babies do survive an abortion, the SCHB is of the view*

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<sup>73</sup> [http://www.guttmacher.org/statecenter/spibs/spib\\_PLTA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf)

<sup>74</sup> [http://www.guttmacher.org/statecenter/spibs/spib\\_PLTA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf)

<sup>75</sup> [http://www.guttmacher.org/statecenter/spibs/spib\\_PLTA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf)

<sup>76</sup> [http://www.guttmacher.org/statecenter/spibs/spib\\_PLTA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf)

<sup>77</sup> *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007).

<sup>78</sup> *Id.* at 158.

<sup>79</sup> 79 Ill. 2d 103 (1980).

<sup>80</sup> Ill. Rev. Stat. 1977, ch. 38, par. 9-1.

<sup>81</sup> *Id.* at 115-16.

<sup>82</sup> Townshend, Liz, *British Doctors Support Equal Care for Abortion Survivors*,

[http://www.nrlc.org/archive/news/2004/NRL07/british\\_doctors\\_support\\_equal\\_ca.htm](http://www.nrlc.org/archive/news/2004/NRL07/british_doctors_support_equal_ca.htm).

<sup>83</sup> *Id.*

<sup>84</sup> Memorandum 16, House of Commons- Science and Technology Committee, *Scientific Development Relating to the Abortion Act 1967*, 12th Report 2006-07, Volume II, p. 102, [https://books.google.fr/books?id=G9ui-I1bMREC&pg=PA103&lpg=PA103&dq=abortion+survivors+uk+law&source=bl&ots=Xmn4RYncyO&sig=RI4s6oehoTP9xLwriebNUoyIYhc&hl=en&sa=X&redir\\_esc=y#v=onepage&q=abortion%20survivors%20uk%20law&f=true](https://books.google.fr/books?id=G9ui-I1bMREC&pg=PA103&lpg=PA103&dq=abortion+survivors+uk+law&source=bl&ots=Xmn4RYncyO&sig=RI4s6oehoTP9xLwriebNUoyIYhc&hl=en&sa=X&redir_esc=y#v=onepage&q=abortion%20survivors%20uk%20law&f=true).

*that they should be given the same degree of care as any other baby born prematurely at the same age.*"<sup>85</sup>

British Association of Perinatal Medicine (BAPM)<sup>86</sup>

The BAPM stated that there is a criminal problem, and a decision needs to be brought to light regarding babies born alive after abortion: "*It is BAPM's understanding that following the institution of a late termination of pregnancy beyond 23 weeks of gestation, if the baby is born alive and subsequently dies from the effects of prematurity, rather than the reason for which the termination was being performed, it is our understanding from my obstetric colleagues that there could be the serious accusation of attempted manslaughter. It would appear that Coroners are taking a varying view on the issue. It would, therefore, seem appropriate that this clinical situation is addressed in a more formal sense within any central guidance. BAPM would have expected the RCOG to have given views on this issue.*"<sup>87</sup>

Royal College of Obstetricians and Gynaecologists (RCOG)<sup>88</sup>

The RCOG gives guidelines on when the doctor must give neonatal care for a baby born alive in a failed abortion: "*Where the fetal abnormality is not lethal and termination of pregnancy is being undertaken after 22 weeks of gestation, failure to perform feticide could result in live birth and survival, an outcome that contradicts the intention of the abortion. In such situations, the child should receive the neonatal support and intensive care that is in the child's best interest and its condition managed within published guidance for neonatal practice.*"<sup>89</sup> The College's final consensus was that "*A fetus born alive with abnormalities incompatible with life should be managed to maintain comfort and dignity during terminal care (section 8).*"<sup>90</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> Memorandum 43, House of Commons- Science and Technology Committee, *Scientific Development Relating to the Abortion Act 1967*, 12th Report 2006-07, Volume II, p. 210, [https://books.google.fr/books?id=G9ui-I1bMREC&pg=PA103&lpg=PA103&dq=abortion+survivors+uk+law&source=bl&ots=Xmn4RYncyO&sig=RI4s6oehoTP9xLwriebNUoyIYhc&hl=en&sa=X&redir\\_esc=y#v=onepage&q=abortion%20survivors%20uk%20law&f=true](https://books.google.fr/books?id=G9ui-I1bMREC&pg=PA103&lpg=PA103&dq=abortion+survivors+uk+law&source=bl&ots=Xmn4RYncyO&sig=RI4s6oehoTP9xLwriebNUoyIYhc&hl=en&sa=X&redir_esc=y#v=onepage&q=abortion%20survivors%20uk%20law&f=true).

<sup>87</sup> *Id.* at 210–11.

<sup>88</sup> Royal College of Obstetricians and Gynaecologists, Report of a Working Party, *Termination of Pregnancy for Fetal Abnormality in England, Scotland and Wales*, May 2010, Chapter 8, p. 29–31, <https://www.rcog.org.uk/globalassets/documents/guidelines/terminationpregnancyreport18may2010.pdf>.

<sup>89</sup> *Id.* at 31.

<sup>90</sup> *Id.* at ix.

## The Ability of the Fetus to Feel Pain

### Methods of Abortion

Methods of abortion should also be investigated.

In France, the child or the fetus is usually killed by lethal injection in the heart or in the umbilical cord, and then the birth is induced. Sometimes this injection is badly done or does not produce its effect and the child is born alive. The most often used method of late abortion in certain countries is called the method of “dilatation-evacuation”: the cervix is dilated then the “content of the uterus” is pulled out with a clamp (in England and Wales the method of “dilatation-evacuation” is used in 76% of abortions between 15 and 19 weeks and 44% after 20 weeks<sup>91</sup>). In the end, the pieces are examined to make sure everything has been removed. This means that the body is gathered like a puzzle, because in many cases it has been dismembered during the operation. If there was no feticide injection first, or if the injection did not cause death<sup>92</sup>, the fetus was alive while its members were being torn off one after the other. This frightfully cruel method is inhumane and constitutes torture.

### Medical Evidence of Fetal Pain

There has been a long-standing position taken by many in the medical community that infants are not capable of experiencing pain during invasive procedures, such as abortions, until 29 to 30 weeks of development.<sup>93</sup> Therefore, medical personnel have traditionally performed abortions on infants as late as 20 weeks with little to no regard for the potential suffering or pain inflicted on the infant. However, since 2007, there has been substantial medical research performed that has changed the way in which the medical community should view the ability of an unborn child of 20 weeks or younger to experience pain.<sup>94</sup>

Those that argue that the fetus is incapable of feeling pain before 29 to 30 weeks of development base their argument on 3 factors: (1) the requirement of a functioning cortex, or connections from the periphery to the cortex, in order to experience pain. This functioning of the cortex is argued to not occur until 23 to 24 weeks. (2) The behavioral reactions of premature infants to pain can be stimulated without pain and therefore is not evidence of the infant experiencing pain and (3) no evidence that premature infants can remember and interpret pain like an adult.<sup>95</sup> There have been several studies conducted that directly contradict these findings, one of the most prominent was conducted by Dr. K.J.S. Anand who is one of the key experts asked to testify in front of the House of Representatives Committee on the Judiciary in relation to the

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<sup>91</sup> Department of Health, Abortions Statistics, England and Wales: 2013, Table 7a p. 25, published June 2014.

<sup>92</sup> According to a study, the injection effectively induced fetal death in 87%. This means that 13 % survived. Nucatola D, Roth N, Gatter M. [A randomized pilot study on the effectiveness and side-effect profiles of two doses of digoxin as fetocide when administered intraamniotically or intrafetally prior to second-trimester surgical abortion](http://www.ncbi.nlm.nih.gov/pubmed/20004276). *Contraception*. 2010 Jan;81(1):67-74. doi: 10.1016/j.contraception.2009.08.014. Epub . Available at <http://www.ncbi.nlm.nih.gov/pubmed/20004276>

<sup>93</sup> Lee SJ, Ralston HJP, Drey EA, Partridge, JC, Rosen, MA, *A Systematic Multidisciplinary Review of the Evidence*, 294 *JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION* 8, 947-954 (2005).

<sup>94</sup> *Pain of the Unborn: Hearing before the Subcomm. on the Constitution, Comm. on the Judiciary House of Rep.*, 109<sup>th</sup> Cong., 1<sup>st</sup> Session, No. 109-57, 15 (Nov. 1, 2005); Pain-capable Unborn Child Protection Act, H.R. 36, 114<sup>th</sup> Cong., 1<sup>st</sup> Session, §2 (6) (May 14, 2015).

<sup>95</sup> Lee SJ, Ralston HJP, Drey EA, Partridge, JC, Rosen, MA, *A Systematic Multidisciplinary Review of the Evidence*, 294 *JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION* 8, 947-954 (2005); *Fetal Awareness: Review of Research and Recommendations for Practice, Report of a Working Party, ROYAL COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS*, (March 2010).

Pain-Capable Unborn Child Protection Act in 2005.<sup>96</sup> Dr. Anand found that “*The neural pathways for pain may be traced from sensory receptors in the skin to sensory areas in the cerebral cortex of newborn infants. The density of nociceptive nerve endings in the skin of newborns is similar to or greater than that in adult skin. Cutaneous sensory receptors appear in the perioral area of the human fetus in the 7th week of gestation; they spread to the rest of the face, the palms of the hands, and the soles of the feet by the 11th week, to the trunk and proximal parts of the arms and legs by the 15th week, and to all cutaneous and mucous surfaces by the 20th week. The spread of cutaneous receptors is preceded by the development of synapses between sensory fibers and interneurons in the dorsal horn of the spinal cord, which first appear during the sixth week of gestation. Recent studies using electron microscopy and immunocytochemical methods show that the development of various types of cells in the dorsal horn (along with their laminar arrangement, synaptic interconnections, and specific neurotransmitter vesicles) begins before 13 to 14 weeks of gestation and is completed by 30 weeks.*”<sup>97</sup>

Fetuses and neonates can feel pain as much or more than adults<sup>98</sup>. Other scientific studies also show that the fetus is responsive to touch by 8 weeks<sup>99</sup>, and he feels suffering by 14th week<sup>100</sup>. At 20 weeks it has the “*physical structures necessary to experience pain*”<sup>101</sup>. Researchers ‘*have observed that the fetus reacts to intrahepatic vein needling with vigorous body and breathing movements, which are not present during placental cord insertion needling*’<sup>102</sup>. In the U.S., the medical community now has the prevailing view<sup>103</sup> that “*...current knowledge suggests that humane considerations should apply as forcefully to the care of neonates and*

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<sup>96</sup> Other prominent doctors with years of experience with newborns testified to the evidence that newborns 20 weeks or younger are capable of experiencing pain including: Dr. Jean Wright (Mercer University Pediatrics) and Dr. Arthur Caplan (Center for bioethics, Chair of the Department of Medical Ethics-University of Pennsylvania). *Pain of the Unborn: Hearing before the Subcomm. on the Constitution, Comm. on the Judiciary House of Rep., 109<sup>th</sup> Cong., 1<sup>st</sup> Session, No. 109-57, 15 (Nov. 1, 2005).*

<sup>97</sup> In addition, Dr. Anand found that the lack of myelination used as a pretext for the lack of maturity in the neonatal nervous system only implies a slower conduction velocity rather than the total inability to feel pain. Furthermore, that slower connection is offset by the shorter distance the pain impulse must travel in the body of the infant. Not only are there biological indicators that pain can and is experienced by premature infants before 20 weeks, but also other factors such as: the presence of substance P used in the transmission and control of pain impulses in the spinal cord at 12 to 16 weeks of development, cardio respiratory changes in heart rate and blood pressure in response to painful stimuli, hormonal and metabolic changes in reaction to stress, and motor responses such as moving limbs, crying, grimacing, etc. Anand KJS & Hickey PR, *Pain and its Effects in the Human Neonate and Fetus*, 317 NEW ENGL. J. MED. 21, 1321-1329 (1987); see also Vivette Glover & Nicholas M. Fisk, *Fetal Pain: Implications for Research and Practice*, 106 BRIT. J. OBSTETRICS & GYNAECOLOGY 881 (1999).

<sup>98</sup> Anand and Hickey, “Pain And Its Effects In The Human Neonate And Fetus” *The New England Journal Of Medicine*, Volume 317, Number 21: Pages 1321-1329, 19 November 1987. Available at <http://www.cirp.org/library/pain/anand/>

<sup>99</sup> “A motor response can first be seen as a whole body movement away from a stimulus and observed on ultrasound from as early as 7.5 weeks’ gestational age. The perioral area is the first part of the body to respond to touch at approximately 8 weeks, but by 14 weeks most of the body is responsive to touch.” Myers LB, Bulich LA, Hess, P, Miller, NM. Fetal endoscopic surgery: indications and anaesthetic management. *Best Practice & Research Clinical Anaesthesiology*. 18:2 (2004) 231-258.

<sup>100</sup> See notably Anand KJS, Palmer FB, Papanicolaou AC. Repetitive neonatal pain and neurocognitive abilities in ex-preterm children. *Pain* [Epub] doi:pii: S0304-3959(13)00335-7. 10.1016/j.pain.2013.06.027, 2013. PMID: 23792285 : N.M. Miller, R.P. Smith and N.M. Fisk, “The Fetal Patient,” in Myers and Bulich, *Anesthesia for Fetal Intervention and Surgery*, BC Decker, Inc. (2005)

<sup>101</sup> For instance : Glover V. "The fetus may feel pain from 20 weeks" ; in *The Fetal Pain Controversy, Conscience*. 25:3 (2004) 35-37.

<sup>102</sup> Giannakouloupoulos X, Sepulveda W, Kourtis P, Glover V, Fisk NM. Fetal plasma cortisol and  $\beta$ -endorphin response to intrauterine needling. *Lancet*. 344 (1994) 77-81, p.77, col.2, para.3.

<sup>103</sup> Note, *The Science, Law, and Politics of Fetal Pain Legislation*, 115 HARV. L. REV. 2011 (2002).

young nonverbal infants as they do to children and adults in similar painful stressful situations.”<sup>104</sup> U.S. doctors also show recognition of the premature infant’s ability to experience pain by commonly administering anesthesia before performing surgery on infants in the womb.<sup>105</sup>

### Animal Fetuses Better Protected Than Humans

European law protects better animals than human beings. [Directive 2010/63/EU](#) of the European Parliament and of the Council of the European Union<sup>106</sup> established the protection of animals used for experimental or scientific purposes due to the recognition by scientific research that animals can feel and experience pain and suffering.<sup>107</sup> Therefore, because animals are considered to have “*intrinsic value which must be respected*,”<sup>108</sup> the European Union agreed that animals must be treated in a beneficial manner. Further, the directive also considered animals to be “*sentient*” creatures, including the fetus. The Directive is not applicable to human beings. However, it recognises that it is “*scientifically shown*” that the “*foetal forms of mammals*” (which comprises also the human beings) can “*experience pain, suffering and anguish*” even before the third term of the pregnancy.<sup>109</sup>

In light of the many legislative and judicial considerations recognizing an infant’s ability to feel pain by 20 weeks, Europe should also consider this important issue in relation to abortions. In addition to what other countries such as the U.S., are implementing in relation to the pain experienced by the unborn, it is also relevant to compare existing legislation which protects unborn animals. If scientific evidence shows that animals can experience pain in the womb, and that is recognized and protected in Europe, why should the same evidence not be considered in relation to the ability of a human to experience pain in the womb, which can harm further development?<sup>110</sup>

### Legislation in the United States

In response to this new awareness in the U.S. medical community, the U.S. House of Representatives Committee on the Judiciary held a hearing in which various medical experts presented evidence, both from research and from extensive field experience, that unborn infants

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<sup>104</sup> Anand KJS & Hickey PR, *Pain and its Effects in the Human Neonate and Fetus*, 317 NEW ENGL. J. MED. 21, 1329 (1987).

<sup>105</sup> *Complex Science at Issue in Politics of Fetal Pain*, Pam Belluck, NEW YORK TIMES, [http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html?\\_r=0](http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html?_r=0) (Sept. 16, 2013).

<sup>106</sup> Council Common Position (EC) 2010/63 of 22 Sept. 2010, Art. 4, 6, 2010 O.J. (L 276) 33-79 available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434097733354&uri=CELEX:32010L0063#ntr3-L\\_2010276EN.01003301-E0003](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434097733354&uri=CELEX:32010L0063#ntr3-L_2010276EN.01003301-E0003).

<sup>107</sup> *Id.* at ¶ 6.

<sup>108</sup> *Id.* at ¶ 12.

<sup>109</sup> In its preamble para (9), it states : “*This Directive should also cover foetal forms of mammals, as there is scientific evidence showing that such forms in the last third of the period of their development are at an increased risk of experiencing pain, suffering and distress, which may also affect negatively their subsequent development. Scientific evidence also shows that procedures carried out on embryonic and foetal forms at an earlier stage of development could result in pain, suffering, distress or lasting harm, should the developmental forms be allowed to live beyond the first two thirds of their development.*”

<sup>110</sup> Some U.S. state statutes have used this comparison between sentient animals and human unborn children, as the U.S. also has laws that regulate the use of laboratory animals, methods of killing livestock, and laws regarding hunting methods. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability and the Constitution*, Harvard Law School, Public Law and Legal Theory (Harvard Law Working Paper Series, Paper No.11-26, 2011) available at <http://dash.harvard.edu/bitstream/handle/1/12025606/SSRN-id1805904.pdf?sequence=1>; Leg. Bill. 1103 § 3 (6) (Neb. Jan. 1, 2010) available at <[nebraskalegislature.gov/FloorDocs/101/PDF/Intro/LB1103.pdf](http://nebraskalegislature.gov/FloorDocs/101/PDF/Intro/LB1103.pdf)>.

younger than 20 weeks are able to feel pain during abortions.<sup>111</sup> The House of Representatives then passed the Pain-Capable Unborn Child Protection Act,<sup>112</sup> which, if enacted would recognize that children can experience pain by no later than 20 weeks, and there is a compelling governmental interest in protecting the lives of unborn children who are capable of feeling pain.<sup>113</sup> The Act also states that an abortion will not be performed or attempted if the child is age 20 weeks or greater.<sup>114</sup> Furthermore, if the child has the potential to survive outside the womb, or does survive the abortion, the physician is required to ensure that the child receives the same neonatal care as provided to other children.<sup>115</sup>

In the U.S., thirteen states have already adopted legislation modeled after the Pain-Capable Unborn Child Protection Act including: Alabama, Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Nebraska, North Carolina, North Dakota, Oklahoma, Texas, and West Virginia.<sup>116</sup> These states therefore currently prohibit abortions of children 20 weeks or older which “*medical evidence indicates...are capable of experiencing pain.*”<sup>117</sup> Other states such as New York and California, have also introduced similar bills in 2001.<sup>118</sup> The issue of fetal pain is one which many states in the U.S. are discussing.

Due to the relatively recent adoption of legislation preventing abortion after 20 weeks, the U.S. Supreme Court has not heard yet many cases on fetal pain.<sup>119</sup> Idaho and Georgia have issued judgments on such legislation.<sup>120</sup> Also, performing abortions on children, who can experience pain as medical evidence suggests, falls under the ethical and moral concerns that justify special prohibition. With the amount of research conducted and first-hand experience given in testimonies of those in the medical field, an ethical and moral problem, as we saw above, is presented in relation to the experience of the infant during an abortion procedure that cannot be ignored.

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<sup>111</sup> *Pain of the Unborn: Hearing before the Subcomm. on the Constitution, Comm. of the Judiciary, House of Rep.*, 109<sup>th</sup> Cong., 1<sup>st</sup> Session, No. 109-57, 15-39 (Nov. 1, 2005).

<sup>112</sup> Pain-Capable Unborn Child Protection Act, H.R. 36, 114<sup>th</sup> Cong., 1<sup>st</sup> Session, (passed May 13, 2015).

<sup>113</sup> *Id.* at 4.

<sup>114</sup> *Id.* at 6.

<sup>115</sup> *Id.* at 8-9.

<sup>116</sup> *Constitutionality of West Virginia Bill “Protecting Unborn Children who are Capable of Experiencing Pain by Prohibiting Abortion after 20 Weeks,”* ALLIANCE DEFENDING FREEDOM, available at <http://www.adfmedia.org/files/HB4588letter.pdf> (March 18, 2014); *Pain Capable Unborn Child Protection Act Fact Sheet*, NATIONAL RIGHT TO LIFE, available at <http://www.nrlc.org/uploads/stateleg/PCUCPAfactsheet.pdf> (June 1, 2015).

<sup>117</sup> *The State of Abortion in the United States*, NATIONAL RIGHT TO LIFE, pg. 29 available at <http://www.nrlc.org/uploads/communications/stateofabortion2015.pdf> (January 2015).

<sup>118</sup> *Note: The Science, Law, and Politics of Fetal Pain Legislation*, 115 HARV. L. REV. 2019 (2002).

<sup>119</sup> The U.S. Supreme Court denied a writ of certiorari submitted on September 27, 2013 from an Arizona case challenging the United States Court of Appeals of the Ninth Circuit’s finding that the Arizona law prohibiting abortions after 20 weeks (because of the child’s ability to feel pain) as unconstitutional. *Horne v. Isaacson*, 884 F. Supp. 2d 961 (D. AZ), 716 F.3d 1213 (9<sup>th</sup> Cir. 2013), *cert. denied* Jan. 13, 2014; *see also Constitutionality of West Virginia Bill “Protecting Unborn Children who are Capable of Experiencing Pain by Prohibiting Abortion after 20 Weeks,”* ALLIANCE DEFENDING FREEDOM, available at <http://www.adfmedia.org/files/HB4588letter.pdf> (March 18, 2014).

<sup>120</sup> The Court decided to grant a preliminary injunction against the Georgia statute. *Lathrop, et al. v. Deal, et al.* No. CV224423, (Sup. Ct. of Fulton Cnty., GA., Dec. 21, 2012) (order granting preliminary injunction); and to hold the statute in Idaho as unconstitutional. *McCormack v. Herzog*, No. 13-35401, 2015 U.S. App. LEXIS 8936, 4-34 (9<sup>th</sup> Cir., May 29, 2015); *Pain-Capable Unborn Child Protection Act Fact Sheet*, NATIONAL RIGHT TO LIFE, available at <http://www.nrlc.org/uploads/stateleg/PCUCPAfactsheet.pdf> (June 1, 2015).

## Observations on the Existence of a Legitimate Interest to the Assembly to Review the Petition for the Rights of Newborns Surviving their Abortion

Following the Rules of Procedure, and after verification of the formal admissibility of the petition and registration, the Bureau of the Parliamentary Assembly of the Council of Europe has decided at its meeting on Friday, April 24<sup>th</sup> 2015 to communicate the Petition for the rights of newborns surviving their abortion to the Committee on Legal Affairs and Human Right “to make sure that there is a legitimate Assembly interest in the matter<sup>121</sup>.”

**Rule 65.3 of the Rules of the Procedure of the Assembly**, completed by Directive number 342 of January 22<sup>nd</sup>, 1974 and the note of the Secretariat of the Assembly, doc. 9036 of April 17<sup>th</sup>, 2001 lists the “criteria relating to the registration and the admissibility of addressed petitions to the President of The Assembly.”

### Examination of the criteria:

#### 1 - The petition must bear on a matter within the competence of the Council of Europe

*“In the report on which the current arrangements for petitions were based (Doc. 3370 (1973)) the Committee on Rules of Procedure and Immunities stated that, in order to be admissible, a petition must:*

*- contribute to fulfilling the aims of the Assembly and of the Council of Europe in general, as laid down in Article 1 of the Statute.”<sup>122</sup>*

Indeed, at the end of Article 1(b) of the Statute of the Council of Europe, “*the maintenance and further realisation of human rights and fundamental freedoms*” are among the three fundamental objectives of the Council of Europe.

This petition concerns the respect of rights in Europe, and therefore is within the jurisdiction of the Council of Europe. Obviously, legal issues to life and to health care and the treatment inflicted to these newborns are relevant for human rights, in particular Articles 2 (right to life) and 3 (prohibition of torture) of the European Convention of Human Rights.

Therefore, the purpose of protecting children who survive an abortion falls well within the competence of the Council of Europe and contributes to the fulfillment of the mandate of the Assembly.

#### 2 - The petition must bear on a matter or grievance calling for general corrective measures rather than redress of a particular wrong

This petition is not designed to repair one or more particular situations, but expose a structural problem, frequently occurring in member States of the Council of Europe. The situation of

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<sup>121</sup> *Addendum to the activity report of the Bureau and the Standing Committee, criteria relating to the registration and the admissibility of addressed petitions to the President of the Meeting*, Note of the Secretary of The Assembly, Doc. 9036, (April 17<sup>th</sup>, 2001).

<sup>122</sup> *Id.*

children surviving abortions requires general corrective measures to resolve the violations against them.

In the instant case, the petition requests further investigation into the fate of these children and two general remedies:

*1. To reaffirm that all living human beings have the same right to life as guaranteed by Article 2 of the European Convention on Human Rights, and that all human beings should be guaranteed appropriate and necessary health care without discrimination founded on the circumstances of their birth, in accordance with Articles 3, 8 and 14 of the Convention.*

*2. To recommend Member States to consider the threshold of sustainability of human fetuses in their legislation relating to abortion.*

### **3 - The petition must be of legitimate interest to the Assembly in its areas of competence**

Under Articles 1.a, 1.b and 23a. of the Statute of the Council of Europe, the Assembly has jurisdiction “*to investigate to reveal the new facts of violations of human rights.*”<sup>123</sup>

At the signing of the founding Statute of the Council of Europe in 1949, abortion was banned. Today conversely, while many countries in Europe allow abortion up to an advanced period, the survival of children in late abortions is frequent, and fetal and neonatal medicine is capable of providing care to these children. The situation of these children has not yet been the object of a European political review and represents a legitimate interest for the Assembly which should “[c]onduct probes to uncover new facts about human rights violations.”<sup>124</sup>

**The second part of the second note lists several situations in which the petition could be declared inadmissible. In this case, brief responses are required.**

**A petition will be declared inadmissible by the Bureau if:**

#### **1 - The matter it concerns is being dealt with in the competent national courts**

That is not the case.

#### **2 - The matter it concerns is under consideration in the relevant national parliament**

That is not the case. No national parliament among the 47 member States of the Council of Europe is currently reviewing or has considered this issue. Moreover, the consideration of this matter by a national parliament is not likely to solve this problem on a European scale.

#### **3 - The petitioner has the possibility to use local remedies and subsequently to seize the European Court of Human Rights**

This is not the case. The petitioner cannot exhaust domestic remedies because he is not himself a direct victim or a relative of a victim and would have no personal interest to act before the Court.

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<sup>123</sup> [http://website-pace.net/en\\_GB/web/apce/powers](http://website-pace.net/en_GB/web/apce/powers)

<sup>124</sup> [http://website-pace.net/en\\_GB/web/apce/powers](http://website-pace.net/en_GB/web/apce/powers)



**4 - The subject-matter of the petition is being considered by the European Court of Human Rights or if the Court has already delivered a substantive decision on it and found no violation of the ECHR**

That is not the case. The European Court of Human Rights has not dealt with a case and never made a decision concerning the situation of an infant surviving an abortion and abandoned to die or killed. The ECHR is also unlikely to rule on these facts since the victims, the children born and abandoned to death, are not able to appear before the Court.

**5 - If an identical petition has already been submitted to the Assembly or to another European parliamentary body, the Bureau may postpone forwarding the new petition to an Assembly committee or decide not to forward it**

This is not the case. No similar petition has been submitted to the Assembly or another European parliamentary body.

In conclusion, the ECLJ considers that the review of the situation of newborns surviving their abortion constitutes a legitimate interest for the Assembly with regard to the criteria laid down by its Rules of Procedure and its implementing legislation. Indeed, this petition raises serious violations of the most basic human rights and calls for recommendations to the Member States to safeguard and develop the protection of human rights in Europe, one of the three fundamental objectives of the Council of Europe. It has also been filed on behalf of more than 210,000 European citizens.

The ECLJ respectfully invites your Committee to declare that the Assembly has a legitimate interest in examining the present petition.

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