

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**(Case No. 53924/00)**

**BETWEEN**

**VO**

**Applicant**

**and**

**FRANCE**

**Respondent**

**WRITTEN COMMENTS**

**BY**

**CENTER FOR REPRODUCTIVE RIGHTS**

**PURSUANT TO RULE 44, § 2 OF THE RULES OF THE COURT**

**26 NOVEMBER 2003**

Laura Katzive, Legal Adviser for Global Projects

Christina Zampas, Legal Adviser for Europe

Center for Reproductive Rights

120 Wall Street

New York, N.Y. 10005

United States

Tel: 917-637-3600

Fax: 917-637-3666

Email: [lkatzive@reprorights.org](mailto:lkatzive@reprorights.org) or [czampas@reprorights.org](mailto:czampas@reprorights.org)

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	INTEREST OF THE CENTER FOR REPRODUCTIVE RIGHTS.....	1
III.	THE LEGAL ISSUE .....	1
IV.	DISCUSSION.....	2
A.	THERE IS NO LEGAL SUPPORT FOR HOLDING THAT STATES HAVE AN OBLIGATION TO TREAT UNBORN FOETUSES AS PERSONS UNDER THE LAW.....	2
	1. JURISPRUDENCE OF THE EUROPEAN HUMAN RIGHTS SYSTEM.....	2
	2. THE LAWS OF MEMBER STATES OF THE COUNCIL OF EUROPE.....	3
	3. INTERNATIONAL AND REGIONAL HUMAN RIGHTS STANDARDS.....	5
	4. NATIONAL-LEVEL JURISPRUDENCE FROM SELECTED NON-EUROPEAN STATES.....	6
B.	GRANTING AN UNBORN FOETUS THE STATUS	

OF A PERSON UNDER THE LAW WOULD  
INTERFERE SIGNIFICANTLY WITH WOMEN’S  
BASIC HUMAN RIGHTS.....7

1. RIGHT TO PRIVATE LIFE.....7

2. RIGHT TO LIFE AND SECURITY OF THE PERSON .....8

3. RIGHT TO EQUALITY.....9

C. INJURY TO A FOETUS SHOULD BE RECOGNIZED  
AS AN INJURY TO THE PREGNANT WOMAN.....9

V. CONCLUSION .....10

## **I. Introduction**

1. These written comments are submitted by the Center for Reproductive Rights pursuant to leave granted by the President of the Grand Chamber in accordance with Rule 44 § 2 of the Rules of Court. They address the question of whether an unborn foetus is entitled to the protection granted persons under Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).

2. These comments rely on the jurisprudence of the European Human Rights System, as well as case law and statutes from member states, international and regional standards, and the jurisprudence of national-level courts outside of Europe, including the United States, Canada, and South Africa.

3. Research assistance in the preparation of these comments was provided by the law firms of Debevoise & Plimpton, a United States-based law firm with European offices in London, Paris, and Frankfurt, and the United Kingdom-based law firm of Bindman & Partners, located in London.

## **II. Interest of the Center for Reproductive Rights**

4. The Center for Reproductive Rights is a non-profit legal advocacy organization dedicated to defending and promoting women's reproductive rights worldwide. The International Legal Program, in collaboration with women's human rights advocates around the world, documents violations of reproductive rights, monitors laws concerning reproductive health care, and advocates at the United Nations and in regional human rights fora. In the United States, the Center represents women, physicians and reproductive health care facilities throughout the country in litigation designed to preserve and improve access to a full range of reproductive health services, including abortion, contraception, and reproductive technologies.

5. The case of *Vo v. France* has significant implications for women's reproductive rights. The Court is being asked to grant for the first time an unborn foetus the status of a person with rights under the European Convention. While this case relates to a medical doctor's liability under a criminal statute, the precedent set by a ruling in favor of the applicant would have consequences for pregnant women throughout the Court's jurisdiction. It would lay the theoretical foundation for a claim that the rights of an unborn foetus may take priority over those of a pregnant woman. Such a claim, if upheld, would reverse the long-established jurisprudence of the European human rights system and render the abortion laws of most member states of the Council of Europe invalid under Article 2. It could also lead to regulation and monitoring of women's activities during pregnancy to ensure that the presumed interests of foetuses are upheld. As will be addressed in these comments, women's rights to privacy, life and security, and equality would be severely jeopardized.

## **III. The Legal Issue**

6. This case raises the question of whether Article 2 of the European Convention requires states to treat unborn foetuses as persons under the law. These written comments assert that such

a reading of Article 2 is unwarranted and potentially threatening to women's human rights. Holding that unborn fetuses are persons protected by Article 2 would be inconsistent with the jurisprudence of the European Human Rights system, the laws and jurisprudence of member states, international and regional standards, and the jurisprudence of national-level courts around the world. In addition, finding for the applicant in this case would have serious implications for the human rights of women to privacy, life and security of the person, and non-discrimination. The Court should refrain from expanding the rights of the foetus and, rather, recognize the loss of a wanted foetus as an injury to the expectant mother. Recourse may be sought on behalf of the injured woman, but not the foetus.

#### **IV. Discussion**

##### **A. There is no legal support for holding that states have an obligation to treat unborn fetuses as persons under the law.**

###### **1. Jurisprudence of the European Human Rights System**

7. Recognition of a foetus's status as a person under the law would contradict the jurisprudence of the European Human Rights System, including that of its Commission and its Court of Human Rights. The Commission recognized no fewer than three times that the foetus is not a person under Article 2. In fact, as will be discussed in Paragraph 32, in these cases, the Commission recognized that granting a foetus the same rights as persons would place unreasonable limitations on the Article 2 rights of persons already born, in contravention of the Convention.

8. In *Paton v. U.K.*, a husband who had been denied an injunction to prevent his pregnant wife from terminating her pregnancy claimed violations of the foetus's Article 2 right to life. The Commission held that the foetus's right to life did not outweigh the interests of the pregnant woman because usage of the word "everyone" in Article 2, and elsewhere in the Convention, did not include fetuses.<sup>1</sup>

9. Similarly, in *R.H. v. Norway*,<sup>2</sup> the Commission again declined to grant foetal life the protection due persons under Article 2. The applicant in this case claimed that Norway's law authorizing his partner's abortion was contrary to Article 2 of the Convention. The Commission found that the Norwegian legislation permitting abortion on request within the first 12 weeks of pregnancy and between the 12<sup>th</sup> and 18<sup>th</sup> weeks with prior authorization by a board was within the discretion of the state.<sup>3</sup> Accordingly, the Commission dismissed the complaint as manifestly ill-founded.<sup>4</sup>

10. Finally, *RH v. Norway* was most recently reaffirmed in *Boso v. Italy*, in which the Court rejected a claim that Italy's law authorizing abortion was contrary to Article 2 of the Convention.<sup>5</sup> The Court found no violation of Article 2, noting that the abortion in question took place in conformity with Italian law, which strikes a fair balance between the woman's interest and the state's interest in protecting the foetus.<sup>6</sup> Like *RH v. Norway*, the complaint was dismissed as manifestly ill-founded.<sup>7</sup>

11. If the foetus were a person under Article 2, all three of these cases would have been wrongly decided. Recognizing foetal personhood in the case currently before the Court would open the door to eliminating the statutory rights to abortion in all Council of Europe member states.

## 2. The Laws of Member States of the Council of Europe

12. Holding that states have an obligation to treat unborn fetuses as persons under the law would be inconsistent with the jurisprudence and legislation of member states to the Council of Europe. Laws throughout Europe reflect the view that fetuses are not granted the status of persons with rights under the law. In addition, interpretations of Article 2 in national-level courts have consistently excluded fetuses from the protections of the Convention. Similarly, courts have interpreted national-level constitutional guarantees to protect only persons who have been born.

13. In Germany, the jurisprudence that has emerged from criminal cases has not granted fetuses the status of persons. In a decision dated April 22, 1983, the German Federal Supreme Court considered a case in which two doctors were accused of negligent homicide because, having failed to diagnose that their patient was 9 months pregnant and in pre-labor, they prescribed medication to relieve her from cramps, not realizing that these cramps were in fact pre-labor contractions.<sup>8</sup> As a result of the medication, which was taken over several days, the patient gave birth to a still-born child. The Court held that a foetus is only covered by the protection of Section 222 StGB<sup>9</sup> from the moment active labor begins, i.e. in a natural birth scenario, from the beginning of active labor contractions. Before that moment, the foetus is protected solely by the provisions relating to abortion, which penalize only intentional, but not negligent acts. The Court stated:

The chamber realizes that the impunity of negligent prenatal detrimental effects resulting in death caused by negligent violation of professional duties by doctors and their assistants may lead to legally and politically questionable gaps in criminal culpability. Such [gaps], however, can only be closed by the legislature.<sup>10</sup>

In a decision dated July 29, 1988, in considering a similar scenario, the German Constitutional Court confirmed almost verbatim the described legal position of the Federal Supreme Court.<sup>11</sup> The lower courts have also applied the same reasoning.<sup>12</sup>

14. Similarly, under Section 1 of the German Civil Code, a person's ability to hold rights begins at birth. While German tort law recognizes injury to the unborn, damage claims only come into existence if and when a person is born alive. German courts have consistently held that a living person can bring damage claims based on an illegal action harming that person as a foetus, but only if the injury persists in the living person.<sup>13</sup> In cases in which the foetus is dead before it leaves a woman's body, no damage claims may be brought on its behalf.

15. In France, the *Cour de cassation* has confirmed its decision in *Vo* in subsequent criminal cases, ruling that manslaughter (“*homicide involontaire*”) cannot be committed against an unborn foetus. The first case was handed down on June 29, 2001 and involved an automobile accident in which the drivers and passengers were injured, one of the victims being a woman who was six

months pregnant. She subsequently gave birth to a still-born baby, and it was established that the death of the foetus was a direct result of the injuries sustained by the woman in the car crash. The court did not grant the foetus the status of a person under French criminal law. French case law on the subject is now firmly established.<sup>14</sup>

16. The holding of the *Cour de cassation* is consistent with the distinction made in French law between the concepts of “human being” and “person.” “Human being” is a biological concept, and “human beings” are understood to exist from the beginning of life, generally considered as conception, although there is no firm agreement on when life begins. “Person,” on the other hand, is a legal term. The term “person” is attached to a legal category whose rights take effect and are perfected by birth, although in certain circumstances the rights acquired at birth will be retroactive to conception. The French court’s conclusion is strongly supported by French legal scholars who argue that the distinction between “human being” and “person” is deeply founded in principles of French civil law.<sup>15</sup>

17. The French understanding of “person” is confirmed in domestic legislation. In particular, two laws known together as the “bioethical laws” were passed in 1994: the first relates to the donation and use of elements and products of the human body, medically assisted procreation and prenatal diagnostic; the second relates to the respect of the human body. These two laws rely on the distinction between a “human being” (“*être humain*”), entitled to dignity and respect from the beginning of its life, and a “person” (“*personne*”) who has a legal status carrying rights starting only at the live birth of a child.<sup>16</sup>

18. National level courts have also addressed the legal status of the person in the context of abortion. In 1974, Austria’s Constitutional Court considered a challenge to national legislation that removed restrictions on abortion during the first trimester of pregnancy. The petitioner claimed that the legislation violated Article 2 of the Convention as well as national constitutional protections of the right to life. The Constitutional Court held, *inter alia*, that Article 2 should not be interpreted to protect the unborn.<sup>17</sup> The Constitutional Court of the Netherlands had a similar interpretation of Article 2 in upholding Dutch legislation liberalizing access to abortion.<sup>18</sup> In its Judgment of January 15, 1975, the French *Conseil Constitutionnel* found no conflict between France’s abortion law and the French Constitution’s protection of the child’s right to health, implicitly adopting the view that an unborn foetus is not a child entitled to protection under the French Constitution.<sup>19</sup>

19. This reading of Article 2 and constitutional protections of the right to life and health is consistent with member states’ statutory approach to abortion throughout Europe. The laws on abortion adopted by most European states reflect the primacy of women’s choice during the first trimester of pregnancy, and protect women’s rights to life and health throughout the pregnancy. This statutory approach implicitly weighs the rights of the pregnant woman more heavily than those of the foetus. Of the 45 state members of the Council of Europe, 39 permit a woman to terminate a pregnancy without restriction as to reason during the first trimester or on broad therapeutic grounds. Only a handful – Andorra, Ireland, Liechtenstein, Malta, Poland and San Marino – have maintained severe restrictions on abortion, with only narrow therapeutic exceptions.<sup>20</sup>

### 3. International and Regional Human Rights Standards

20. Holding that states have an obligation to treat unborn fetuses as persons under the law would be contrary to international and regional human rights standards. In particular, the International Covenant on Civil and Political Rights provides no indication that the right to life, protected in Article 6(1) of the Covenant,<sup>21</sup> applies to a fetus. To the contrary, in the context of Article 6, the Human Rights Committee has routinely emphasized the threat to women's lives posed by illegal and unsafe abortion, implicitly indicating that the Covenant's protections do not extend to fetuses.<sup>22</sup>

21. The Committee on the Rights of the Child has followed an identical approach in interpreting Article 6 of the Convention on the Rights of the Child, which states that "every child has the inherent right to life."<sup>23</sup> In its concluding observations to state parties, it has expressed concern about denials of safe abortion services to adolescent girls seeking to terminate pregnancies. On several occasions, the Committee on the Rights of the Child has made the link between unsafe abortion and high rates of maternal mortality,<sup>24</sup> and has expressed concern over the impact of punitive legislation on maternal mortality rates.<sup>25</sup> Again, implicit in the Committee's recommendations is the view that the definition of a "child" for purposes of the Convention does not include a fetus.

22. The jurisprudence of the Inter-American regional system has been consistent with that of the United Nations bodies. Article 4 of the American Convention on Human Rights, which goes so far as to protect the right to life "in general, from the moment of conception,"<sup>26</sup> has been interpreted by the Inter-American Commission not to provide absolute protection to a fetus before birth. The Inter-American Commission interpreted Article 4 not to preclude liberal national-level abortion legislation in the 1981 *Baby Boy* case, which originated in the state of Massachusetts in the United States.<sup>27</sup> *Baby Boy* arose from the case of a Massachusetts doctor who was prosecuted for manslaughter after providing an abortion in 1973 to a teenage girl, at the request of the girl and her mother. The doctor was convicted at trial, but the highest court in Massachusetts reversed his conviction in 1976. The following year, members of an anti-abortion organization submitted a petition to the Commission on behalf of the aborted fetus, referred to as "Baby Boy." Because the United States was not a party to the American Convention, the challenge was brought under the American Declaration of Rights and Duties of Man, which protects the right to life without reference to the "moment of conception."<sup>28</sup> The language of Article 4 of the Convention was relied upon to assist in interpretation of the Declaration.

23. The Commission rejected the petitioners' claims under the American Declaration, noting that an absolute protection of the right to life would have conflicted with the laws regulating abortion and the death penalty in most American states.<sup>29</sup> The Commission then turned to Article 4 of the American Convention. Examining the drafting history of Article 4, the Commission found that the drafters chose not to include an unequivocal protection of the right to life from the moment of conception. Rather, they inserted the phrase "in general" to qualify that protection. The Commission concluded that:

In the light of this history, it is clear that the petitioner's interpretation of the definition given by the American Convention on the right to life is incorrect. The addition of the phrase, "in general, from the moment of conception" does not

mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed in Bogota, when they approved the American Declaration. The legal implications of the clause, “in general, from the moment of conception” are substantially different from the shorter clause, “from the moment of conception” as appears repeatedly in the petitioner’s briefs.<sup>30</sup>

24. On July 11, 2003, the African Union adopted the Protocol on the Rights of Women in Africa to supplement the African Charter on Human and Peoples’ Rights, adopted in 1981. The Protocol, which will enter into force once it has been ratified by 15 African states, provides broad protection for African women’s human rights in numerous domains. Among other provisions, states are called upon to protect women’s reproductive rights by authorizing abortion in cases of sexual assault, rape, incest, and foetal impairment and where the continued pregnancy endangers the mental and physical health or life of a woman.<sup>31</sup> The Protocol’s broad protections of women’s right to terminate a pregnancy co-exist with the African Charter on the Rights and Welfare of the Child, a regional instrument that entered into force in 1999, which provides in Article 5(1), “Every child has an inherent right to life. This right shall be protected by law.”<sup>32</sup> Read together, the two instruments indicate that the right to life referred to in the African Charter is not meant to provide absolute protection to an unborn foetus.

#### **4. National-Level Jurisprudence from Selected Non-European States**

25. National-level courts around the world have declined to treat unborn foetuses as persons under the law. The Supreme Court of Canada ruled against recognition of foetal personhood in the case of *Winnipeg Child Family Services (Northwest Area) v. G.*<sup>33</sup> In this case, social services sought an injunction to detain a pregnant woman against her will in a health center for treatment until she gave birth, on the basis that she was addicted to glue sniffing and was therefore endangering the unborn foetus. At issue was the legal status of the foetus, and whether it possessed rights independent of the mother. The court held that granting the injunction sought by social services was not within its power to make orders for the protection of “children.” It found that a contrary ruling would have required it to take such unprecedented and highly consequential action as: (i) overturning the rule that rights accrue to a person only at birth (the ‘live-birth’ rule); (ii) recognizing a foetal right to sue the mother carrying the foetus; (iii) recognizing a cause of action for lifestyle choices which may adversely affect others; and (iv) recognizing an injunctive remedy which deprives a defendant of important liberties, including her involuntary confinement.<sup>34</sup>

26. The *Winnipeg* case is consistent with the Canadian Supreme Court’s ruling on abortion in the case of *R v. Morgenthaler*. Declining to rule that a foetus is entitled to the protections of persons under the Canadian Charter of Rights and Freedoms, it struck down Canada’s restrictive abortion law on the grounds that it unduly interfered with Canadian women’s basic right to security of the person.<sup>35</sup>

27. In the United States in 1973, the Supreme Court’s decision in *Roe v. Wade* struck down a Texas law criminalizing abortion, ruling that a foetus is not a “person” entitled to protection under the Fourteenth Amendment of the Federal Constitution.<sup>36</sup> *Roe* has been reaffirmed by the United States Supreme Court numerous times, most recently in *Stenberg v. Carhart*, in which the Court struck down a state law banning certain methods of abortion and failing to include

protections for women's health.<sup>37</sup> Moreover, in *Ferguson v. City of Charleston*, the Supreme Court rejected the argument that the state's interest in the foetus justified a policy of nonconsensual drug testing of pregnant women that had been designed to gather evidence of criminal activity for use in criminal prosecutions. Instead, the Court held, the United States Constitution's 4<sup>th</sup> Amendment protections against unreasonable searches by the state applied equally to pregnant women and required that searches only be conducted based on well-established standards of individualized suspicion.<sup>38</sup> In the context of tort law, many states have recognized a civil action for injury caused to a foetus, but have limited these claims to circumstances where the foetus is "born alive."<sup>39</sup>

28. In South Africa, in *Christian Lawyers Association of South Africa and others v. Minister of Health and others*, the High Court of South Africa, Transvaal Provincial Division considered a constitutional challenge to the recently enacted Choice on Termination of Pregnancy Act, which permits abortion without restriction as to reason during the first trimester and on broad grounds at later stages of pregnancy. Plaintiffs argued that the law was in conflict with Section 11 of the Constitution, which guarantees that "everyone has the right to life." In considering whether the constitution's reference to "everyone" was intended to include the foetus, the court held that such an interpretation was untenable. It continued:

Moreover, if s 11 were to be interpreted as affording constitutional protection to the life of a foetus far-reaching and anomalous consequences would ensue. The life of the foetus would enjoy the same protection as that of the mother. Abortion would be constitutionally prohibited even though the pregnancy constitutes a serious threat to the life of the mother. The prohibition would apply even if the pregnancy resulted from rape or incest, or if there were a likelihood that the child to be born would suffer from severe physical or mental abnormality...If the plaintiff's contentions are correct then the termination of a woman's pregnancy would no longer constitute the crime of abortion, but that of murder. In my view, the drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms. For the above reasons...I consider that under the Constitution the foetus is not a legal persona.<sup>40</sup>

**B. Granting an unborn foetus the status of a person under the law would interfere significantly with women's basic human rights**

29. Recognition of foetal rights has potentially far-reaching implications for the rights of pregnant women. Interpreting Article 2 of the European Convention to protect a foetus's right to life lays the theoretical foundation for interference with women's reproductive health and autonomy. Human rights bodies have addressed this interference in the context of abortion, considering women's human rights to private life, to life and security of the person, and to equality and non-discrimination.

**1. Right to Private Life**

30. Under Article 8, the European Court and the European Commission have acknowledged that the regulation of abortion is an interference with women's right to a private life. In one of the earliest abortion cases to come before the European Commission, *Brüggemann and Scheuten*

*v. Germany*,<sup>41</sup> the applicants challenged as a violation of Article 8 the West German Federal Constitutional Court's revision of a statute criminalizing abortion after the 12<sup>th</sup> week of pregnancy. While the Commission recognized the woman's privacy interests at stake, the majority upheld the law, finding that not every restriction on the termination of an unwanted pregnancy constitutes an interference with the right to respect for the private life of the pregnant woman under Article 8(1).<sup>42</sup> However, before finding that the German law did not violate Article 8, the Commission examined the law's specific provisions, including the fact that it permitted abortion when the health or the life of the woman was in danger.<sup>43</sup> Implicit in the Commission's holding was the position that an absolute prohibition on abortion would be an impermissible interference with privacy rights under Article 8.<sup>44</sup>

31. The European Commission and Court since the *Brüggemann* decision have increasingly recognized a pregnant women's right to terminate a pregnancy under Article 8. These decisions have followed the liberalization of abortion laws in almost all of Europe in the late 1970s. The cases of *Paton v. U.K.*, *R.H. v. Norway*, *Boso v. Italy*, in addition to having rejected the suggestion that Article 2 protects the right to life of foetuses, support and further develop women's privacy rights under Article 8. All three cases involved a "father's" claim that Article 8 of the Convention granted him rights regarding the foetus when the woman sought to terminate her pregnancy. The Commission, in all three cases, rejected this claim and recognized that respect for the private life of the pregnant woman as "the person primarily concerned by the pregnancy and its continuation or termination"<sup>45</sup> supersedes any rights of the 'father.'

## 2. Right to Life and Security of the Person

32. Recognition of foetal rights opens the door to limitation of interventions that might be necessary for preserving the life and health of a pregnant woman. The European Court and Commission's jurisprudence have consistently recognized the right of a pregnant woman to terminate her pregnancy when her life or health is threatened by the pregnancy.<sup>46</sup> In *Paton*, the Commission gave precedent to the rights of the pregnant woman under Article 2, finding:

The life of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman.<sup>47</sup>

The Court has also addressed the right to health and life of a pregnant woman when addressing her rights under Article 10, which protects the right to receive and impart information. In *Open Door Counseling and Dublin Well Woman v. Ireland*,<sup>48</sup> the Court found that an injunction that prevented two women's health clinics from disseminating information to women in Ireland on how and where to obtain an abortion in England violated Article 10 of the Convention.<sup>49</sup> The Court found that restricting exchange of abortion information created a risk to the health of women whose pregnancies posed a threat to their lives.<sup>50</sup> The Court ruled that the injunction was

“disproportionate to the aims pursued,”<sup>51</sup> implicitly recognizing that a woman’s health interest supersedes a state’s declared moral interest in protecting the rights of a foetus.

33. Human rights bodies have also considered the risks to life and security of the person associated with restrictions on abortion. As discussed in paragraph 20, the United Nations Human Rights Committee has addressed such restrictions as potential violations of Article 6 of the International Covenant on Civil and Political Rights, drawing the link between illegal and unsafe abortions and high rates of maternal mortality.<sup>52</sup> In several sets of concluding observations, the Committee has criticized legislation that criminalizes or severely restricts access to abortion.<sup>53</sup> It has issued more specific recommendations to several states parties – including Argentina, Chile and Costa Rica – advising that they review or amend legislation criminalizing abortion, often referring to such legislation as a violation of the right to life.<sup>54</sup>

### **3. Right to Equality**

34. Recognition of a foetus’s status as a person under law would also pose a threat to women’s right to equality and non-discrimination, which is protected under Article 14 of the Convention. While the European Court and Commission have not addressed this issue, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) has provided some analysis of the effect of restrictions on abortion on women’s right to equality. It has noted that “laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures” constitute a barrier to appropriate health care for women, compromising the right to non-discrimination in the area of health.<sup>55</sup> Indeed, the health consequences of unsafe abortion are suffered only by women, as are the physical and psychological effects of carrying an unwanted pregnancy to term.

#### **C. Injury to a Foetus Should be Recognized as an Injury to the Pregnant Woman**

35. Declining to recognize the foetus as a person under Article 2 does not preclude a remedy for injuries such as the one that gave rise to this case. The loss of a wanted foetus is an injury suffered by the expectant mother. Accordingly, the rights that are entitled to vindication in this case are those of the applicant, and not those of the foetus that she lost. It is within the power of the legislature of every Council of Europe member state to recognize both civil and criminal offenses committed by individuals who injure a woman by causing the termination of a wanted pregnancy.

36. One such statutory response could be to treat the termination of a wanted pregnancy as an aggravating factor in a charge of assault. In the United States, the State of North Carolina has taken such an approach, including in its criminal statute the following provision:

A person who in the commission of a felony causes injury to a woman, knowing the woman to be pregnant, which injury results in a miscarriage or stillbirth by the woman is guilty of a felony that is one class higher than the felony committed.<sup>56</sup>

A similar approach has been endorsed by French jurists, including Labbé, who has suggested that in legislating on liability for injury to a pregnant woman, treating additional injury to a foetus as an aggravating factor would be a means of filling the legal void between the French concepts of “human life” and “personhood.”<sup>57</sup>

37. Recognizing the injury caused to the pregnant woman when a wanted pregnancy is lost is consistent with human rights standards relating to women’s health and physical integrity. When addressing issues of violence against pregnant women, international human rights bodies have recognized such violence as an infringement of the rights of the pregnant woman, not on the rights of the foetus. For example, the CEDAW Committee has addressed the subject in the context of involuntary abortion. It recognized this violent offense as a violation of women’s human rights, stating “[c]ompulsory...abortion adversely affects women’s physical and mental health, and infringes the right of women to decide on the number and spacing of their children.”<sup>58</sup> Similarly, the United Nations Special Rapporteur on Violence against Women has described the practice of forced abortion as a violation of “a woman’s right to physical integrity and security of the person, and the rights of women to control their reproductive capacities.”<sup>59</sup> Again, the offense recognized here is to the pregnant woman and not to the unborn foetus, whose rights have not been acknowledged under international law.

#### **IV. Conclusion**

38. Interpreting Article 2 of the European Convention to require states to treat unborn foetuses as persons under the law would be inconsistent with the jurisprudence of the European Human Rights system, the laws and jurisprudence of member states, international and regional standards, and the jurisprudence of national-level courts around the world. In addition, granting the foetus the rights of a person would have serious implications for the human rights of women to privacy, life and security of the person, and non-discrimination. Finally, declining to recognize a foetal right to life would not preclude a legal remedy for women who lose wanted pregnancies as the result of another’s actions. We hope that the Court will uphold the decision of the French *Cour de cassation* and find no violation of Article 2 of the European Convention.

- 
- <sup>1</sup> *Paton v. UK*, App. No. 8416/78, Eur. Comm. H.R., 13 May 1980, 3 EHRR 408 (1981), Dec. paras. 7-9 (also cited as *X v. UK*).
- <sup>2</sup> *R.H. v. Norway*, decision on admissibility, App. No. 17004/90, Eur. Comm. H.R., 19 May 1992.
- <sup>3</sup> *Id.*; see also *Paton v. U.K.*, *supra* note 1, para. 23.
- <sup>4</sup> *R.H. v. Norway*, *supra* note 2.
- <sup>5</sup> *Boso v. Italy*, App. No. 50490/99, Eur. Comm. H.R., 5 September 2002.
- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> BGHSt 31, 348.
- <sup>9</sup> Sec. 222 StGB (providing “*Who negligently causes the death of a person will be punished by up to five years [imprisonment] or by a monetary fine.*”).
- <sup>10</sup> BGHSt 31, 348 at 353.
- <sup>11</sup> BVerfGE NJW 1988, 2945.
- <sup>12</sup> See OLG Bamberg NJW 1988, 2963 and OLG Karlsruhe MDR 1984, 686.
- <sup>13</sup> See, e.g., German Federal Supreme Court (1972) BGHZ 58, 48; BGH NJW 1985, 1390.
- <sup>14</sup> See, e.g., Grégoire Loiseau, “*Histoire d'une vie volée: le fœtus n'est pas une personne,*” DROIT ET PATRIMOINE, novembre 2001, chron. Droits des personnes, p.99 (summarizing the 2001 case).
- <sup>15</sup> *Id.*
- <sup>16</sup> Loi n° 94-653 du 29 juillet 1994 relative au respect du corps humain; Loi n° 94-654 du 29 juillet 1994 relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal “*bioéthique.*”
- <sup>17</sup> *Decision of the Constitutional Court of 11 October 1974*, 39 Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes (1974), summarized in ANNUAL REVIEW OF POPULATION LAW, Vol. I, 49 (1974).
- <sup>18</sup> *Juristenvereniging Pro Vita v. De Staat der Nederlanden*, summarized in ANNUAL REVIEW OF POPULATION LAW, 1991, Vol. 19, No. 5, 179-80 (1991).
- <sup>19</sup> *Décision n° 74-54 du 15 janvier 1975*, Loi relative à l'interruption volontaire de la grossesse, available at <http://www.conseil-constitutionnel.fr/decision/1974/7454dc.htm> (last viewed Nov. 5, 2003).
- <sup>20</sup> CENTER FOR REPRODUCTIVE RIGHTS, THE WORLD'S ABORTION LAWS (2003) (wallchart).
- <sup>21</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>st</sup> Sess., art. 6(1), Supp. No. 16, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
- <sup>22</sup> See e.g., *Concluding Observations of the Human Rights Committee: Bolivia*, 01/04/97, U.N. Doc. CCPR/C/79/Add.74, ¶ 22; *Concluding Observations of the Human Rights Committee: Colombia*, 01/04/97, U.N. Doc. CCPR/C/79/Add.76, ¶ 24; *Concluding Observations of the Human Rights Committee: Mongolia*, 25/05/2000, U.N. Doc. CCPR/C/79/Add.120, ¶ 8(b); *Concluding Observations of the Human Rights Committee: Peru*, 15/11/2000, U.N. Doc. CCPR/CO/70/PER, ¶ 20; *Concluding Observations of the Human Rights Committee: Poland*, 29/07/99, U.N. Doc. CCPR/C/79/Add.110, ¶ 11; *Concluding Observations of the Human Rights Committee: Senegal*, 19/11/97, U.N. Doc. CCPR/C/79/Add 82, ¶ 12.
- <sup>23</sup> Convention on the Rights of the Child, adopted Nov. 20, 1989, G.A. Res. 44/25, annex, U.N. GAOR, 44<sup>th</sup> Sess., art. 6, Supp. No. 49, at 166, UN Doc. A/44/49 (1989), reprinted in 28 I.L.M. 1448 (entered into force Sept. 2, 1990).
- <sup>24</sup> See e.g., Committee on the Rights of the Child, *General Comment 4*, CRC/GC/2003/4, 1 July 2003, 33<sup>rd</sup> Sess., para. 24.
- <sup>25</sup> See e.g., *Concluding Observations of the Committee on the Rights of the Child: Chad*, 24/08/99, U.N. Doc. CRC/C/15/Add.107, ¶ 30; *Concluding Observations of the Committee on the Rights of the Child: Guatemala*, 09/07/2001, U.N. Doc. CRC/C/15/Add.154, ¶ 40.
- <sup>26</sup> American Convention on Human Rights, Nov. 22, 1969, art. 4, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (entered into force July 18, 1978).
- <sup>27</sup> *Baby Boy*, Case 2141, Inter-Am. C.H.R. 25/OEA/ser. L./V./II.54, doc. 9 rev. 1 (1981).
- <sup>28</sup> American Declaration of Rights and Duties of Man, art. 1, O.A.S. Off. Rec. OEA/Ser.L/V/II.82 doc. 6, rev. 1, at 17 (1948).
- <sup>29</sup> *Baby Boy*, *supra* note 27, para. 18.
- <sup>30</sup> *Id.* para. 30.

- 
- <sup>31</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* 11 July 2003, art. 14(2)(c).
- <sup>32</sup> African Charter on the Rights and Welfare of the Child, art. 5(1), OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.
- <sup>33</sup> 3 S.C.R. 925 (1997).
- <sup>34</sup> *Id.* at 941.
- <sup>35</sup> 1 S.C.R. 30 (1988).
- <sup>36</sup> *Roe v. Wade*, 410 U.S. 113, 163 (1973).
- <sup>37</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).
- <sup>38</sup> *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).
- <sup>39</sup> *See, e.g. Day v. Nationwide Mut. Ins. Co.*, 328 So. 2d 560 (Fla. 2d DCA 1976) (applying the “born-alive rule” to sustain tort claim against a third party tortfeasor in automobile accident where foetus sustained injury and then was born alive).
- <sup>40</sup> *Christian Lawyers Association of South Africa and others v. Minister of Health and others*, the High Court of South Africa, Transvaal Provincial Division, 50 BMLR 241, 10 July 1998.
- <sup>41</sup> *Brüggemann and Scheuten v. Germany*, App. No. 6959/75, Eur. Comm. H.R., 3 EHRR 244 (1977)(Commission Report).
- <sup>42</sup> *Id.* para. 61.
- <sup>43</sup> *Id.* para. 62.
- <sup>44</sup> Dinah Shelton, *International Law on Protection of the Foetus*, in ABORTION AND PROTECTION OF THE HUMAN FOETUS 7 (S.J. Fraukowski et al. eds., 1987).
- <sup>45</sup> *RH v. Norway*, *supra* note 2, para. 4; *Boso v. Italy*, *supra* note 5, para. 2.
- <sup>46</sup> *Bruggeman*, *supra* note 41; *Paton v. UK*, *supra* note 1; *Boso v. Italy*, *supra* note 5.
- <sup>47</sup> *Paton v. UK*, *supra* note 1, para 19.
- <sup>48</sup> 15 ECHR (Ser. A) (1992).
- <sup>49</sup> *Id.* para. 80.
- <sup>50</sup> *Id.* paras. 73-77.
- <sup>51</sup> *Id.* para. 80.
- <sup>52</sup> *See* note 22.
- <sup>53</sup> *See e.g. Concluding Observations of the Human Rights Committee: Bolivia*, *supra* note 22, ¶ 22; *Concluding Observations of the Human Rights Committee: Chile*, 30/03/99, U.N. Doc. CCPR/C/79/Add.104, ¶ 15; *Concluding Observations of the Human Rights Committee: Lesotho*, 08/04/99, U.N. Doc. CCPR/C/79/Add.106, ¶ 11; *Concluding Observations of the Human Rights Committee: Peru*, *supra* note 22, ¶ 20; *Concluding Observations of the Human Rights Committee: Poland*, *supra* note 22, ¶ 11; *Concluding Observations of the Human Rights Committee: Senegal*, *supra* note 22, ¶ 12.
- <sup>54</sup> *See e.g., Concluding Observations of the Human Rights Committee: Argentina*, 03/11/2000, U.N. Doc. CCPR/CO/70/ARG, ¶ 14; *Concluding Observations of the Human Rights Committee: Chile*, *supra* note 53, ¶ 15; *Concluding Observations of the Human Rights Committee: Costa Rica*, 08/04/99, U.N. Doc. CCPR/C/79/Add.107, ¶ 11; *Concluding Observations of the Human Rights Committee: Peru*, *supra* note 22, ¶ 20; *Concluding Observations of the Human Rights Committee: United Republic of Tanzania*, 18/08/98, U.N. Doc. CCPR/C/79/Add.97, ¶ 15; *Concluding Observations of the Human Rights Committee: Venezuela*, 26/04/2001, U.N. Doc. CCPR/CO/71/VEN, ¶ 19.
- <sup>55</sup> Committee on the Elimination of Discrimination against Women, *Women and Health*, General Rec. 24, 20<sup>th</sup> Session, para. 14.
- <sup>56</sup> N.C. Gen. Stat. § 14-18.2 (2003).
- <sup>57</sup> *See, e.g.,* Grégoire Loiseau, “*Histoire d'une vie volée: le foetus n'est pas une personne*,” DROIT ET PATRIMOINE, novembre 2001, chron. Droits des personnes, p.99. Loiseau suggests filling the gap between a life and a person not by granting “personhood” to foetuses, but by creating a separate crime for involuntarily causing the death of an unborn child. Xavier Labbée, criticizing a Court of Appeal decision of 1987 that had failed to make the distinction between a human being and a person with respect to a foetus killed in a car accident when it was nearly at term, strongly defended the difference between a human being and a legal person. *In* note X. Labbée, JCP 1989. II. 21250.
- <sup>58</sup> Committee on the Elimination of Discrimination against Women, *Violence against Women*, General Rec. 19, A/47/38, 11<sup>th</sup> Session, para. 22.

---

<sup>59</sup> Integration of the Human Rights of Women and the Gender Perspective, Violence against Women, Report of the Special Rapporteur on Violence against Women, its causes and consequences, Ms. Rhadika Coomaraswamy, in accordance with Commission on Human Rights resolution 1997/44, E/CN.4/1999/68/add.4, 21 January 1999, para 49.