# WRITTEN OBSERVATIONS

*Submitted to the European Court of Human Rights*

*in the case*

## *M.L. v. Poland*

(No. 40119/21)

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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 has held 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 for the protection of religious freedoms and the dignity of the person with the European Court of Human Rights and 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.

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**The ECLJ declares that it is acting in this case on its own initiative, on a voluntary basis, and that it has no conflict of interest.**

**Summary of the observations**

**Primarily**

Whereas the Convention, as interpreted by the European Court, allows States "to consider the unborn to be such a person [within the meaning of the Convention] and to aim to protect that life;"[1]

Whereas Poland has made this choice by granting constitutional protection to the life of the unborn child and by recognizing them as a subject of law;

Whereas, therefore, the Court must apply the European Convention, in respect of Poland, as applying to the unborn child, in accordance with Articles 2 and 35;

It follows that the application is incompatible *rationae materiae* with the Convention because it involves the impossibility of terminating the life of an unborn child, considered in this case as a "person" within the meaning of the Convention;

Moreover, since the application aims to reduce the protection and rights of unborn children in Poland, it corresponds to the definition of an abuse of rights prohibited by article 17 of the Convention.

**In the alternative**

Whereas the Convention does not guarantee a right to abortion;

Whereas States that decide to legalize abortion must, in so doing, respect the rights and freedoms guaranteed by the Convention, including protection against discrimination;

Assuming that the Court finds that the abolition of eugenic abortion constitutes an interference with the applicant's treaty rights, such interference would pursue the legitimate aim and would be necessary for the protection of life, respect for the dignity and non-discrimination of persons with disabilities, in accordance with, *inter alia*, the United Nations Convention on the Rights of Persons with Disabilities;

Moreover, the abolition of eugenic abortion is without prejudice to the right to abortion in Poland under the exception provided for in the Family Planning Act of 7 January 1993, which applies when it is medically established that the continuation of the pregnancy would endanger the life or physical or mental health of the woman;

It follows that the applicant could have had an abortion in Poland if she had asked a doctor to establish that the continuation of the pregnancy would endanger her health;

The applicant did not avail herself of this option; nor did she avail herself of domestic remedies.

**Further alternative**

The applicant's distress is not attributable to Poland, but to her desire to abort;

Even if it were, it does not reach the threshold required for the application of Article 3, having been able to have an abortion the day after the scheduled date;

On the other hand, the late abortion performed in the Netherlands by dismemberment of the baby constitutes torture and the real violation of the Convention in this case, in addition to being discrimination.

[1] *A, B and C v. Ireland* [GC], No. 25579/05, 16 December 2010, § 222, upholding *Vo v. France [GC]*, No. 53924/00, 8 July 2004.

**Prior warnings**

1. The ECLJ does not doubt the suffering caused by the news of the applicant's child's disability and her abortion, and sympathizes with her.

2. This case is not about Poland's general restrictions on abortion, but about the consequences for the applicant of the abolition of eugenic abortion.

3. Abortion was first introduced in Poland with a decree by A. Hitler on March 9, 1943 as a "security measure for the German people" in order to limit the demography of the Polish people. Abortion was then promoted during the Soviet occupation with ideological and political intentions. Abortion is therefore not generally considered in Poland as a liberal practice, as it is in Western Europe, but on the contrary as an anti-Polish practice imposed from abroad, by the Nazi and then Soviet occupiers.

**Plan**

4. We shall see first of all that the application is inadmissible *rationae materiae* because Poland recognizes the unborn child as a subject of law, and consequently grants them the protection of their right to respect for life under the Convention (I).

5. We will then see, in the alternative, that Poland can legitimately abolish eugenic abortion under the European Convention, and that this abolition even constitutes an obligation under the Convention on the Rights of Persons with Disabilities (II).



6. Finally, we shall see, in a further alternative, that the applicant's distress can't be attributed to Poland, and if it were, it does not reach the threshold required for the application of Article 3. On the other hand, late-term abortion as performed in the Netherlands by dismemberment of the foetus constitutes torture (III).

7. The stakes in this case are high and deserve a referral to the Grand Chamber. The question is whether eugenic abortion of disabled children is a human right or whether, on the contrary, it can or must still be considered a violation of human rights and of the values of the Convention.

## I. PRIMARILY: THE APPLICATION IS INADMISSIBLE *RATIONAE MATERIAE*

### 1. The Convention and the European Court do not explicitly exclude the unborn child from the scope of the Convention

8. The Court has never held that - in the order of the Convention - the unborn child be not a person. Cautiously, it has always refused, since *Brüggemann and Scheuten v FRG*[2] and *H. v. Norway*[3] to exclude the unborn from the field of application of the Convention and to declare that they be not a person within the meaning of the Convention. declare that the latter is not a person within the meaning of Article 2 of the Convention, considering that "*Article 2 of the Convention is silent as to the temporal limitations of the right to life*."[4] In *H. v. Norway*, the

[2] *Brüggemann and Scheuten c. Federal Republic of Germany* No. 6959/75, 19 May 1976, § 60.
[3] *H. v. Norway* (Dec.), No. 17004/90, 19 May 1992, p. 167.
[4] *Vo, op. cit.*, § 75.

former Commission *EHR* explained that it "*will not exclude that in certain circumstances*," "*the foetus may enjoy a certain protection under Article 2*."[5] President Jean-Paul Costa explained "*Had Article 2 been considered to be entirely inapplicable, there would have been no point – and this applies to the present case also – in examining the question of foetal protection and the possible violation of Article 2, or in using this reasoning to find that there had been no violation of that provision.*"[6] It must be noted that the Court examines the harm to the life of unborn children on the basis of Article 2.[7]

9. On several occasions has the Court recognized that the embryo - and *a fortiori* the human foetus - is "*another person*" within the meaning of Article 8 § 2 of the Convention, since the protection of the potentiality which they carry can be linked to the aim of protecting the "rights and freedoms of others" (see *Costa and Pavan v. Italy* no. 54270/10, 28 August 2012, § 59 and *Parrillo v. Italy*, [GC], no. 46470/11, 25 August 2015, § 167). As a result, as Judge Pinto de Albuquerque points out, "*that the embryo is an "other", a subject with a legal status that could and should be weighed against the legal status of the progenitors*" (concurring opinion in *Parrillo*, § 31).

10. The Court has also recognized the applicability to the child - before birth - of other treaty provisions, in particular Articles 3 and 8, in cases where the father complained about the torture suffered by the child during the abortion[8] and the violation of the respect for their family life.[9]



11. The Grand Chamber of the Court also ruled unanimously that "human embryos cannot be reduced to "possessions" within the meaning of that provision."

12. Other international human rights instruments refer to the unborn child. The American Convention on Human Rights, adopted on November 22, 1969, states that "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." (art. 4.1). Similarly, the Convention on the Rights of the Child was adopted on November 20, 1989 "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "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"." (preamble of the CRC).

13. At the same time, the World Medical Association[10] took the initiative to update the Hippocratic Oath by adding a Geneva Oath in 1948 in the spirit of the San Francisco Charter. In this text, physicians promise to maintain "the utmost respect for human life from its start" and to refuse to allow "considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient."

14. Moreover, no state involved in the drafting of the European Convention on Human Rights allowed abortion at the time, which was, on the contrary, criminally condemned. In 1979, the

[5] *H. v. Norway*, p. 181 *op. cit.*
[6] Separate Opinion *Vo, op. cit.*, § 11.
[7] See for example *Şentürk v. Turkey*, No. 13423/09, 9 April 2013, § 107.
[8] *H. v. Norway*, *op. cit.*
[9] *Ibid*; *Boso v. Italy*, No. 50490/99, 5 September 2002.
[10] The World Medical Association (WMA) is a Confederation of Professional Associations established in 1947 in the spirit of the Charter of the United Nations and the two Nuremberg Trials. It aims "*to ensure the independence of physicians, and to work for the highest possible standards of ethical behaviour and care by physicians, at all times. This was particularly important to physicians after the Second World War*."

Parliamentary Assembly of the Council of Europe (PACE) still recognised "The rights of every child to life from the moment of conception"[11] and stressed, a few years later, "that, from the moment of fertilisation of the ovule, human life develops in a continuous pattern."[12]

### 2. States may recognize the unborn child as a "person" within the meaning of the Convention and protect them

15. Although the Court does not exclude, as a matter of principle, the unborn child from the scope of the Convention, it does allow States, within their margin of appreciation, to determine in their domestic legal order "when the right to life begins"[13] and therefore of its protection. As a result, it is "legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life."[14] The Court thus refers the question of the starting point of life and its protection to domestic legal orders. The fact that most European States permit abortion is separate from, and has no effect on, the freedom of States to determine the starting point of the right to life and its protection.

16. Article 18 of the Oviedo Convention requires States to ensure "adequate protection of the embryo." The Explanatory Report to the Oviedo Convention states that "The Convention does not define the term "everyone"… In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention." (§ 18). The report adds that "The Convention also uses the expression "human being" to state the necessity to protect the dignity and identity of all human beings. It was acknowledged that it was a generally accepted principle that human dignity and the identity of the human being had to be respected as soon as life began." (§ 19).



17. Poland has chosen to recognise the unborn children as subjects of law and grants them legal protection from the moment of conception. Article 1 of the Act of 7 January 1993 on family planning, the protection of the human foetus and the conditions for carrying out abortions provides that "The right to life shall be protected, including during the prenatal phase, within the limits set by law."[15] This recognition has constitutional value and is based on Articles 30[16] and 38[17] of the Constitution, which respectively guarantee the inalienable dignity of the human being and the right to life. The statement of this legal protection from the moment of conception does not date from the judgment of October 2020 (case K 1/20) but confirms the judgment of 28 May 1997 (case K 26/96), in which the Constitutional Court stated that "*From its beginning, human life thus becomes a constitutionally protected value. This also applies to the prenatal*

[11] APCE, Recommendation 874 (1979) of 4 October 1979 on a European Charter on the Rights of the Child.
[12] APCE, Recommandation 1046 (1986) of 24 September 1986 relating to the use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes.
[13] *Vo*, *op. cit.*, § 82.
[14] *A, B and* C, *op. cit*, § 222, confirming *Vo*, *op. cit.*
[15] "*This provision must ... be read in a declarative manner*": see Constitutional Court, judgment of 22 October 2020, case K 1/20, § 146.
[16] Art. 30 of the Polish Constitution: "*The inherent and inalienable dignity of man is the source of the freedoms and rights of man and of the citizen. It is inviolable and its respect and protection are the duty of the public authorities.*"
[17] Art. 38 of the Polish Constitution: "*The Republic of Poland guarantees every man the legal protection of life*."

*phase*" (3) and that "life, including prenatal life, is one of the fundamental constitutional values" (4.1).

18. The prenatal protection of human life thus predates the decision of the Constitutional Court of 22 October 2020. The latter applied the existing constitutional law to the issue of eugenic abortion, and consequently abolished this practice.

19. Thus, on 22 October 2020, the Constitutional Court "*confirmed that human life is a value at every phase of development and, as a value deriving from the provisions of the Constitution, it must be protected by the legislator.*" (§ 151), before concluding that "*the unborn child, as a human being - a human - endowed with inherent and inalienable dignity, is a subject with a right to life, and therefore the legal system - in accordance with Article 38 of the Constitution - must guarantee him appropriate protection of this essential interest without which his nature as a subject of law would be denied*" (§ 151). Since Poland recognises the child as a "subject of law" from before birth, it is legitimate to grant him or her the protection of his or her life and dignity, and even the protection of the European Convention, in accordance with the doctrine of the conditional applicability of the Convention.

20. This choice of the Polish legislator is not unique. It is also the case, notably, of Italy, which recognises the embryo as a "subject" (Act No. 40/2004) and of the CJEU, which, in the *Brüstle/Greenpeace eV* judgment, C-34/10, of 18 October 2011, recognised that from the moment of conception, the human embryo enjoys the protection accorded to a human being.

21. Poland's choice is in line with Article 53 of the Convention recalling the principle that States are free to provide a higher degree of protection of human rights,[18] as well as with Article 27 of the Oviedo Convention stating that none of the provisions of the Convention may be interpreted "*as limiting or otherwise affecting the possibility for a Party to grant a wider measure of protection with regard to the application of biology and medicine than is stipulated in this Convention.*" Obviously, Poland can grant more extensive protection to the unborn child than the minimum required by the Court. A consensus in favour of less protection cannot force a State to reduce the protection it grants. The reference to consensus can only serve to raise the overall level of protection of rights, not to reduce it.[19]



22. As a result, unborn children in Poland enjoy the right to respect for life guaranteed in Article 2 of the European Convention. The Court cannot condemn this choice of recognizing the unborn child as a subject with the right to life, and of protecting them.

### 3. The application constitutes an abuse of right

23. The application challenges the abolition of eugenic abortion, and thus aims at reducing the protection and rights of unborn children in Poland.

24. Considering that unborn children in Poland enjoy the protection of the Convention, the present application therefore constitutes an abuse of right prohibited by Article 17 of the

[18] European Convention on Human Rights, art. 53, "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."
[19] *Bayev and Others v. Russia*, No. 67667/09, 20 June 2017, § 70.

Convention, as it seeks "*the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*"

## II. IN THE ALTERNATIVE: POLAND CAN ABOLISH EUGENIC ABORTION

### 1. The absence of a right to abortion under the Convention

25. As long as the embryo or foetus is recognised as a living being "*belonging to the human species*"[20] abortion can neither be a freedom nor a right, but at most a derogation from the right to life. Indeed, it is impossible to have a freedom or a right on the existence of a being belonging to the human species, even less when this being benefits from the quality of "person" in the national legal order. As the Court has repeatedly emphasized, "*pregnancy cannot be said to pertain uniquely to the sphere of private life*"[21] of the woman, and "*Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother*."[22] Abortion does not only concern the private life of the woman, but also and primarily the existence of the unborn child. In its jurisprudence, the European Court has stipulated that the Convention guarantees neither the right to have an abortion[23] nor the right to practise one[24]. It does not even grant the right to have an abortion in another country with impunity.[25] The Court has also ruled that the prohibition of abortion does not violate the Convention.[26] There is thus no right to abortion under the European Convention. Thus, there is no right to abortion under the European Convention. Historically, the question has never been whether the Convention requires states to legalize abortion, but whether it condones it. It is only because an increasing number of States have legalized abortion that the Commission, and then the Court, have considered that they must tolerate the practice under Article 2, as a matter of margin of appreciation.



26. Since the Convention does not contain a right to abortion, it does not, in itself, prevent the restriction of the conditions of access to abortion provided for in national law. The Court can only verify whether the modalities of this restriction do not unduly affect the rights and freedoms guaranteed by the Convention.

### 2. If a state decides to legalize abortion, it must do so within a legal framework that respects the rights and freedoms guaranteed by the Convention

27. While states may legalise abortion, the protection of life and the prevention of abortion are international obligations. Indeed, at the 1994 Cairo Conference, governments committed to "*take appropriate steps to help women avoid abortion, which should in no case be promoted as a method of family planning*" (7.24) and to "*reduce the recourse to abortion*" (8.25). This commitment was renewed the following year at the Fourth World Conference on Women, with

[20] *Vo v. France*, [GC], No. 53924/00, 8 July 2004, § 84.
[21] *Brüggemann*, *op. cit.*, §§ 59- 61 and *Boso*, *op. cit.*
[22] *Ibid*, § 61.
[23] *Silva Monteiro Martins Ribeiro v. Portugal*, No. 16471/02, 26 October 2004.
[24] *Jean-Jacques Amy v. Belgium* No. 11684/85, 5 October 1988.
[25] *Jerzy Tokarczyk v. Poland*, No. 51792/99, 31 January 2002.
[26] See notably in *A, B and C v. Ireland op. cit.*, applicants A and B who unsuccessfully challenged the ban on abortion on grounds of health and welfare.

states affirming that "*every effort should be made to eliminate the need for abortion*" (§ 160.k).[27] PACE also called on European states "*promote a more pro-family attitude in public information campaigns and provide counselling and practical support to help women where the reason for wanting an abortion is family or financial pressure.*" (PACE, 2008).

28. While, according to the European Court, "*a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted*,"[28] the legal framework devised for this purpose should be "*shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention*".[29] Thus, if a State decides to allow abortion, then its legal framework must comply with the Convention. When dealing with a particular case, it is then for the Court to "*supervise whether the interference constitutes a proportionate balancing of the competing interests involved*."[30]

28. The Court has already identified several competing rights and interests in the case of abortion.

First, there are the rights of the unborn child. As the Court has repeatedly emphasised, "*The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child*"[31] or against "*the legitimate need to protect the foetus*."[32] As mentioned above, the Court applies articles 2, 3, and 8 of the Convention to the unborn child. Numerous European and international texts recognize that the dignity of the embryo and fetus must be respected. For example, the **Grand Chamber of the Court of Justice of the European Union** (CJEU), in the *Brüstle/Greenpeace eV* judgment, C-34/10, of 18 October 2011, recognised that from the moment of conception, the human embryo enjoys the protection accorded to a human being.



29. Abortion is not simply a question of the rights of the mother versus the rights of the unborn child; it also involves the rights of third parties and the interests of society. The Court has been able to identify the legitimate interest of society in limiting the number of abortions[33] or in protecting morals.[34]

30. The Court also recognises that the right to respect for the family life of the "potential father"[35] and the potential grandmother[36] is affected by the abortion of their child or grandchild. It also recognised the State's obligation to inform women of the risks associated with abortion.[37]

[27] Programme of Action of the United Nations International Conference on Population and Development, Cairo, 5-13 September 1994.
[28] *A., B. and C.*, *op. cit.*, § 249.
[29] *Ibid,* § 249; *R. R. v. Poland*, No. 27617/04, 26 May 2011, § 187; *P. and S. v. Poland op. cit.*, § 99; *Tysiac v. Poland*, No. 5410/03, 20 March 2007, § 116.
[30] *A., B. and C., op. cit.*, § 238.
[31] *Tysiac*, *op. cit.*, § 106 ; *Vo*, *op. cit.* §§ 76, 80 et 82; *A., B. and C., op. cit.*, § 213.
[32] *H. v. Norway*, op. cit. p. 182.
[33] *Odièvre v. France* [GC], No. 42326/98, 13 February 2003, § 45.
[34] *Open Door and Dublin Well Woman v. Irlande*, Nos. 14234/88, 14235/88, 29 October 1992, § 63; *A., B. and C., op. cit.*, §§ 222-227.
[35] *X. v. The United Kingdom*, No. 7215/75, 5 November 1981.
[36] *P. and S., op. cit.*
[37] *Csoma v. Romania*, No. 8759/05, 15 January 2013.

It also recognised that other rights may be affected in specific situations, such as the freedom of conscience of health professionals[38] and the autonomy and ethics of medical institutions.[39]

### 3. Abortion on the basis of disability violates the principle of non-discrimination and violates the dignity of persons with disabilities

31. The principle of non-discrimination applies almost autonomously, without the need to demonstrate a violation of the Convention, as long as the matter in question "falls" within the scope of the Convention.[40] It is therefore not necessary to consider the foetus a person under the Convention in order to apply the principle of non-discrimination to the practice of abortion on grounds of disability. It is sufficient to consider that their life, and this practice, fall within the scope of the Convention, which is the case.

32. Therefore, the practice of abortion must not be discriminatory, in particular on the basis of the sex, "race" or health status of the unborn child. The Court has never had occasion to find such abortions discriminatory for the simple reason that the direct victims of this practice are dead, and their parents have no personal interest in obtaining a finding of this violation. This is not the case with the United Nations Committee on the Rights of Persons with Disabilities, whose mandate allows it to comment directly on national legislation and practices.



33. According to the **UN Committee on the Rights of Persons with Disabilities** (CRPD), "*Laws that explicitly permit abortion on the basis of disability violate the Convention on the Rights of Persons with Disabilities*," in particular because such abortion "*perpetuates notions of stereotyping disability as incompatible with a good life.*"[41] For the Committee, abortion on the grounds of disability is in itself discrimination that stigmatises people with disabilities.

34. Since 2011, this Committee has already ruled regarding Spain, Austria and Hungary that fetal impairment should not be the subject of a specific abortion regime, particularly with regard to the legal time limit which, in some countries, can be very late in case of disability.[42] In 2019, the Committee reiterated its recommendation to Spain to "*Abolish any distinction made in law to the period within which a pregnancy can be terminated based on a potential fetal impairment,... as such provisions contribute to the stigmatization of disability, which can lead to discrimination.*" (CRPD/C/ESP/CO/2-3). The Committee also recommended that the United Kingdom "*amend its abortion law accordingly*," finding that "*Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of foetal deficiency*."[43]

35. Regarding other countries, the CRPD also denounced "*Discriminatory attitudes against life with a disability and biased information to expectant parents by counselling services, leading*

[38] *Tysiac, op. cit.*, § 121 ; *R. R., op. cit.*, § 206.
[39] *Rommelfanger v. The Federal Republic of Germany* (Dec.), No. 12242/86, 6 September 1989.
[40] See, for example, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003. § 53; *A.H. and Others v. Russia*, Nos. 6033/13 and 15 Others, 17 January 2017, § 380.
[41] Committee on the Rights of Persons with Disabilities (CRPD), Comments on the draft General Comment No36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights, 2018.
[42] CRPD, Conclusion of the comments on Spain, 2011, §17 and §18 ; Conclusion of comments on Austria, 2013, §14 and §15; Conclusion of the comments on Hungary, 2012, §17 and §18.
[43] CRPD, Conclusion of the comments on the United Kingdom and Northern Ireland, 2017, § 12 and § 13.

*to termination of pregnancy, particularly in cases of a diagnostic of Down syndrome and spina bifida*" (Turkey 2019 CRPD/C/TUR/CO/1).

36. All member states of the Council of Europe have ratified the Convention on the Rights of Persons with Disabilities, of which the Committee is the authentic interpreter.

37. Very explicitly, the **UN Special Rapporteur on the Rights of Persons with Disabilities**, Ms. Catalina Devandas Aguilar, denounced in her 2020[44] report to the Human Rights Council the ideology that there are "*Lives not worth living*," echoing the title of Binding and Hoche's famous 1920 book that founded Nazi eugenics policy. Ms. Devandas Aguilar herself has spina bifida, a major cause for abortion. She was herself one of the main drafters of the Convention on the Rights of Persons with Disabilities.

38. The Convention on the Rights of Persons with Disabilities, for example, opposes disability or health status as a specific ground for abortion, as this constitutes discrimination on the basis of disability. Abortion legislation must apply equally to unborn children, regardless of their health status. There must be equal treatment, whether access to abortion is restricted, as in Poland, or very broad, notably regarding time limits. However, the CRPD notes that this prohibition is binding on the State, but does not prevent parents from aborting a child, considering the child's disability, especially when the child's disability endangers the life or health of the mother.



39. This position is in line with the intention of the drafters of the Convention on the Rights of Persons with Disabilities, but also of the Universal Declaration of Human Rights. Indeed, during the drafting of the Universal Declaration, the Danish diplomat Bodil Begtrup, recommended providing for exceptions to the respect for the right to life in order to allow "*the prevention of the birth of mentally handicapped children*" and of children "*born of parents suffering from mental illness*."[45] This proposal was rejected, notably because of its similarity to Nazi legislation. Indeed, in a secret circular of September 13, 1934, the Nazi regime authorized abortions on women who were likely to produce "*hereditarily ill offspring.*"[46] This circular was part of the Nazi eugenics policy, along with sterilization and euthanasia of disabled people. It was abolished after the war, out of respect for human rights.

40. The position of the CRPD does not differ from that of the Polish Constitutional Court, which in its judgment of October 22, 2020, affirmed in substance that the mere fact of an incurable disability or illness of the child in the prenatal phase, linked to considerations of a eugenic nature or relating to the possible discomfort of the life of the sick child, cannot alone decide on the admissibility of the abortion.[47]

[44] Human Rights Council, 43rd session, 24 February-20 March 2020, Report of the Special Rapporteur on the rights of persons with disabilities, doc. A/HRC/43/41.
[45] UN Women, Proposal of the Working Group of the Commission on the Status of Women, Travaux préparatoires, E/CN.4/SR.35, p. 1266.
[46] Benoît Massin, « Stérilisation eugénique et contrôle médico-étatique des naissances en Allemagne nazie : la mise en pratique de l'Utopie médicale », in Alain Giami, Henri Leridon, *Les enjeux de la stérilisation*, INED, 2000, p. 65.
[47] See Constitutional Court, judgment of 22 October 2020, case K 1/20, § 163.

41. It can be observed that the same approach is taken by the Committee on the Elimination of Discrimination against Women (CEDAW) against sex-selective abortion (gendercide),[48] which is condemned as discrimination.[49]

42. Similarly, the United Nations Population Fund (UNFPA) explicitly recognizes that abortion on the basis of sex is "a form of discrimination." The same is true of the WHO, which states, jointly with other organizations, "Imbalanced sex ratios are an unacceptable manifestation of gender discrimination against girls and women and a violation of their human rights."[50] PACE has also condemned abortion on the basis of the sex of the child.[51]

43. The **United Nations Human Rights Committee** has changed its position on eugenic abortion, gradually abandoning the reference to disability as a specific ground for exception to abortion, in favour of the reference to non-viability alone. Indeed, its previous position was that States are not under a treaty obligation to legalize abortion, but must make exceptions "*in cases of rape, incest, danger to the life or health of the mother, or fetal unviability due to an abnormality*."[52] In more recent Observations, the Human Rights Committee no longer refers to malformation, indicating that abortion should be possible when the child is "non-viable."[53]



44. The Human Rights Committee's position falls short of the requirements of the Committee on the Rights of Persons with Disabilities, which opposes the view that lethal foetal impairment should be a specific ground for abortion, noting that "*Even if the condition is considered fatal, there is still a decision made on the basis of impairment. Often it cannot be said if an impairment is fatal. Experience shows that assessments on impairment conditions are often false*."[54]

45. The abolition of eugenic abortion is also in line with, and even imposed by, Article 3.2 of the EU Charter of Fundamental Rights, which states that "*In the fields of medicine and biology, the following must be respected in particular: (...) - the prohibition of eugenic practices, in particular those aiming at the selection of persons.*"

46. The abolition of eugenic abortion is also consistent with, and imposed by, the Universal Declaration on the Human Genome and Human Rights (1997), which prohibits discrimination based on genetic characteristics, stating that "*No one shall be subjected to discrimination based*

[48] Committee on the Elimination of Discrimination against Women, Concluding Observations: China, §17-18, UN. UN Doc. CEDAW/C/CHN/CO/6 (2006); Carole J. Petersen, Justice Reproductive, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities, 28 J.L. & Health 121 (2015) available at http://engagedscholarship.csuohio.edu/jlh/vol28/iss1/7

[49] United Nations Population Fund, *Gender-Biased Sex Selection* (15 March 2017), https://www.unfpa.org/gender-biased-sex-selection.

[50] *Preventing Gender-Biased Sex Selection: An Interagency Statement OHCHR, UNFPA, UNICEF, UN Women, and WHO, World Health Organization*, 12 (2011), http://apps.who.int/iris/bitstream/handle/10665/44577/9789241501460_eng.pdf;jsessionid=0C79EB7E35E177A7353F3CC83FADBF24?sequence=1; see also Nandini Oomman and Bela R. Ganatra, Sex Selection: The Systematic Elimination of Girls, Reproductive Health Matters: An International Journal on Sexual and Reproductive Health and Rights, 183, (2002), https://tinyurl.com/y23n2ezq.

[51] APCE, Res. 1829 03/10/2011 and Rec. 1979 03/10/2011, *La sélection prénatale en fonction du sexe*.

[52] Human Rights Committee, Conclusion of the comments on Honduras, 2017, § 17.

[53] Human Rights Committee, Conclusions of the observations on Jordan, 2017, § 21; Conclusion of observations on Mauritius, 2017, § 16; Conclusion of comments on Cameroon, 2017, §22; Conclusion of the observations on DRC, 2017, § 22; Conclusion of the observations on the Dominican Republic, 2017, § 16.

[54] CRPD, Comments on the draft General Comment No36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights, 2018.

*on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity*." (art. 6).

47. According to treaty law and ECHR practice, the European Convention must be interpreted and applied in the light of its object and purpose, taking into account "any relevant rules of international law applicable in the relations between the parties." (Vienna Convention on the Law of Treaties, Art. 31(3)(c)). The CRPD, Article 3.2 of the Charter of Fundamental Rights and the Universal Declaration on the Human Genome are relevant rules that should be taken into account in order to clarify international obligations regarding eugenics and the protection of persons with disabilities.

48. It is also important to avoid imposing conflicting international obligations on a State, which would be the case if the ECHR ruled in favour of the applicant, as Poland could only implement this ruling by violating its other international obligations.

49. The position of the Polish Constitutional Court is not isolated. It is shared not only by the United Nations Committee on the Rights of Persons with Disabilities (CRPD), but also by a growing number of states, particularly in the **United States of America**, which prohibit abortion on the basis of gender, race or genetic characteristics.

50. Thus, in May 2021, 12 federal states will ban abortion on the basis of a diagnosis of Down syndrome: Arizona, Arkansas, North Dakota, South Dakota, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Ohio, Tennessee and Utah.[55]



51. As an illustration, the Ohio statute provides:

> "*[n]o person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of … [a] test result indicating Down syndrome, … [a] prenatal diagnosis of Down syndrome, … [or a]ny reason to believe the unborn child has Down syndrome*." Ohio Revised Code § 2919.10(B).

52. Very recently, this law was found to be consistent with the U.S. Constitution by the U.S. Court of Appeals (6th Circuit) in *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021). Tennessee's nearly identical law is also under review by the same Court of Appeals, and the Court has already vacated the stay of enforcement pending its decision on the merits of the case.

53. More generally, six states have banned abortions based on any genetic or chromosomal defect in the unborn child[56] and six states have banned abortions requested on the basis of the race of the unborn child.[57] These are policy bans, based on the fight against racial discrimination and eugenics. They primarily concern medical personnel who must not perform abortions when they know that the mother is seeking an abortion for the prohibited discriminatory reason.

[55] K. Beck Johnson, J.D. and L. Grossberndt, Prenatal Nondiscrimination Acts: Why They Are Essential, *Family Research Council*, Issue Analysis, No. IS21E01, May 2021, p. 5.
[56] North Dakota, Indiana, Kentucky, Louisiana, Mississippi and Oklahoma. *Ibid*, p. 6.
[57] Arizona, Indiana, Kentucky, Mississippi, Missouri and Tennessee, *Ibid*. p. 7.

### 4. Abortion is still possible in Poland to save the life of the mother

54. The Family Planning Act of 7 January 1993 allows abortion, by exception, when the continuation of the pregnancy endangers the life or health of the mother, including her mental health.

55. This exception is compatible with the application of Article 2 to the unborn child, because in this case death is not inflicted "intentionally:" it is a *secondary*, unwanted effect of a medical act aimed at the primary, legitimate and proportionate aim of saving the mother. An abortion to save the life of the mother is compatible with Article 2.

56. However, this exception does not apply when the abortion is requested because of the particular characteristics of the child, such as their state of health, "race" or sex. Such an abortion with the *primary purpose* of eliminating the child would be a violation of the child's right to life, coupled with discrimination on the basis of the child's health status, "race" or sex.

57. For a better understanding, it should be remembered that an exception must always ultimately serve the purpose of the rule to which it is an exception. Thus, the exception of self-defence is aimed at respecting the prohibition against (being) killed. Similarly, the exception to the respect for the life of the child must aim at respect for the life of the mother, not at the destruction of the child for itself.

58. By abolishing abortion based on the child's state of health, the Polish judge ensured the consistency and effectiveness of the protection of the child's right to life, without, however, prohibiting the possibility of carrying out an abortion to save the mother.



59. As a result, the applicant could have had an abortion in Poland, had she requested and obtained a doctor's opinion that the continuation of the pregnancy endangered her mental health. Experience shows that doctors do issue such medical certificates.

60. The applicant did not make use of this option; nor did she make use of domestic remedies. She cannot therefore reproach Poland *a posteriori* for not having taken her mental state into account to allow her to have an abortion in Poland.

## III. FURTHER ALTERNATIVE: THE APPLICANT'S DISTRESS IS NOT ATTRIBUTABLE TO POLAND

### 1. The applicant's distress is not attributable to Poland

61. The causes of the applicant's distress are her fear and her rejection of her child's disability. Perhaps she would have been less afraid if the population had been more aware of the acceptance of disabled people and informed about Down's syndrome. Faced with the fear of disability, it is not the disabled people who should be eliminated, but the prejudices.

62. When on January 12, 2021, the applicant was informed about her child's Down's syndrome, she could not ignore the judgment of the Polish Constitutional Court of October 2020. She

therefore decided to have an abortion, knowing that this practice was unconstitutional and that the ban on it would come into effect imminently with the publication of this judgment.

63. The applicant did not have a right to keep eugenic abortion legal in Poland. It was the circumvention of the Polish ban on eugenic abortion by going abroad to have an abortion that caused the applicant additional inconvenience and expense. However, this decision to circumvent the Polish ban was in no way attributable to Poland.

64. Abortion is not the only answer to the fear of disability. Like countless parents before her, the petitioner could have continued her pregnancy, she would then have benefited from assistance in raising her child or could have given them up for adoption or to an institution. She did not have to have an abortion; that was her decision. But the child's interest was to live, and people with Down's Syndrome testify widely to their joy of living.

65. In its decision of October 2020, the Constitutional Court asks the legislator to introduce measures to support families raising a disabled child, judging that "*the legislator cannot place the burden of raising a child with a serious and irreversible disability or an incurable disease on the mother alone, because it is primarily the responsibility of the public authorities and society as a whole to care for people in the most difficult situations*" (§ 184). In addition to financial aid for people with disabilities, particularly within the framework of the "Rodzina 500 +" program,[58] awareness-raising campaigns are being developed, with the support of the Government, to promote the reception, training, employment and non-discrimination of people with disabilities. This is particularly the case with the campaigns "Stop Barierom," "Niewidzialna Niepełnosprawność" (Invisible Disability), "Poczta Polska bez barrier."



## 2. Assuming that the applicant's anguish be attributable to the Polish authorities, it does not reach the threshold required for the application of Article 3

66. Assuming that the applicant's distress be attributable to the Polish authorities, it should be noted, firstly, that it is relative and, secondly, that the measure at issue has only had a limited material impact on the applicant.

67. The applicant has not provided any objective evidence to assess her distress and to demonstrate that she reached the threshold required for the application of article 3.[59]

68. Moreover, the fact that the applicant was able to have an abortion abroad the day after (January 29) the abortion was initially scheduled to take place in Poland (January 28), greatly relativizes the harm alleged by the applicant and proves that the entry into force of the judgment on January 27 only had a very limited impact on the applicant's situation. The extreme speed with which the applicant obtained an abortion abroad clearly indicates that she was not distressed by the entry into force of the judgment, nor was she surprised by it, since the entry into force was imminent.

[58] See, e.g., Marlena Słupińska-Strysik, „500 plus dla niepełnosprawnych," 4 May 2021 (online); Luiza Bebłot, „Zamiast 500+ nawet 1500+. Kto może skorzystać na zmianach?", Dzien dobry tvn, 29 January 2021: https://dziendobry.tvn.pl/newsy/1500-na-dziecko-niepelnosprawne-poslowie-proponuja-zmiane-w-programie-500-da326705-5317578

[59] Muršić v. Croatia [GC], No. 7334/13, 20 October 2016, § 97.

69. Finally, the Grand Chamber of the Court has accepted the fundamental ethical choice made by France to refuse any compensation for the alleged damage resulting from not having been able to abort a disabled child (*Maurice v. France* [GC], no. 11810/03, and *Draon v. France* [GC], no. 1513/03).

### 3. The suffering caused by late-term abortion may constitute torture

70. The prohibition of torture and inhuman treatment requires the prohibition of eugenic abortion, as it is most often performed late in life, after the diagnosis of disability.

#### a. Article 3 protection benefits the unborn child

71. In the case of *H. v. Norway*,[60] the former European Commission, when seized by a father complaining of the suffering inflicted on his unborn child by the latter's abortion, agreed to apply Article 3 to the child. It considered the application unfounded for lack of proof of suffering of the foetus: "*the Commission has not been presented with any material which could substantiate the applicant's allegations of pain inflicted upon the fetus (...) Having regard to the abortion procedure as described therein the Commission does not find that the case discloses any appearance of a violation of Article 3*."



72. This suffering of the foetus is nowadays scientifically proven, especially in the case of eugenic abortion, which is generally performed late in pregnancy, up to the time of delivery.

#### b. Late-term abortion is torture

73 In this case, the abortion was performed in the 17th week of pregnancy in the Netherlands. At this point, the child is 19 cm long and weighs about 200 g, and its organs are already well-formed. Scientific studies show that the foetus is sensitive to touch as early as 8 weeks and that it feels pain as early as the 14th week.[61] A study published in 2020 in the Journal of Medical Ethics proves that the foetus can feel pain as early as the fourth month of pregnancy. Its lead author, Prof. Stuart Derbyshire, has worked as a consultant for Planned Parenthood and the *Pro-choice forum* in the United Kingdom.[62] Another study, published in 2020 in *Nature*, confirms the ability of foetuses to feel pain, even in the absence of cerebral cortex, as long as the subcortical structures for pain perception are present.[63]

74. In the Netherlands (as well as in the United Kingdom and Canada), the method used for abortion beyond 16 weeks is "dilation and evacuation."[64] This involves dilating the cervix and then removing the fetus' limbs with pliers. If there was no prior injection to cause foeticide, or

[60] *H. v. Norway*, *op. cit.*
[61] Pain of the Unborn: Hearing before the Subcomm. on the Constitution, Comm. on the Judiciary House of Rep. 109th Congress, 1st Session, No. 109-57, 15 (Nov. 1, 2005); Pain-capable Unborn Child Protection Act, H.R. 36, 114th Congress, 1st Session, §2 (6) (May 14, 2015).
[62] Derbyshire SWG, Bockmann JC, Reconsidering fetal pain, J Med Ethics 2020;46:3-6.
[63] Bellieni, C.V. "Analgesia for fetal pain during prenatal surgery: 10 years of progress," Pediatric Research (2020) (online).
[64] UK Department of Health, Abortions Statistics, England and Wales: 2013, Table 7a p. 25, published 2014.

if the injection did not cause the death of the fetus, it means that the fetus was alive while it was being dismembered.

75. In other countries, delivery is initiated, and the contractions generally result in the death of the baby. However, some children do survive, and their number increases with gestational age. Being born alive after an abortion is not exceptional. This possibility is included in the list of diseases published by the WHO, in chapter XVI *entitled Certain conditions originating in the perinatal period, item P96-4, Termination of pregnancy affecting fetus and newborn*.[65]

76. Foetal and even embryonic suffering in mammals is recognized in European law. Directive 2010/63/EU on the protection of animals used for scientific purposes[66] recognizes that "scientific knowledge is available" that "foetal forms of mammals" have "the capacity … to sense and express pain, suffering, distress and lasting harm." This justifies applying the protection of Directive 2010/63/EU to them from before birth. Thus, late-term abortion, performed on humans, would not be accepted if it were performed on animals.



[65] The document is available on the WHO website.

[66] Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, OJEU 20 October 2010, L 276/33.

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