Communication to the Committee of Ministers in relation to the case of A. B. and C. v Ireland (25579/05).

Dear Sir,

The European Centre for Law and Justice is pleased to submit to the Committee of Ministers, for its 1150th Human Rights meeting, the following communication regarding the implementation of the judgment of the European Court of Human Rights in the case of A, B and C v Ireland (25579/05), under rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

The European Centre for Law and Justice (ECLJ) is an international, Non-Governmental Organization dedicated to the promotion and protection of human rights. The ECLJ has held special Consultative Status before the United Nations/ECOSOC since 2007. The ECLJ bases its action on “the spiritual and moral values which are the common heritage of [European] peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy” (Preamble of the Statute of the Council of Europe). The European Centre for Law and Justice has been authorised to intervene as third party before the European Court of Human Rights in the case of A., B. and C. v. Ireland, as well as in several cases related to the protection of prenatal life, including in the cases of S. H. v Austria (No 57813/00), Costa and Pavan v Italy (No 54270/10), A. K. v Latvia (No 33011/08), P and S. v. Poland (No 57375/08). The ECLJ is an independent NGO receiving no public funding.

We hope that the Committee will find this communication useful in the deliberations on the execution of this judgment.

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Director of the ECLJ.
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Summery

While executing the judgment, the Irish government does not have to address the issue of abortion in general, nor to address specific aspects that do not concern the situation of Applicant C. The A. B. and C. judgment require the government to adopt measures so that applicant C, or any other woman in the same situation, would be able to know whether her medical situation necessitate the termination of her pregnancy on grounds of the risk to her life. The decision taken by the national authorities whether the medical situation of applicant C would or not necessitate the termination of the pregnancy has no incidence provided the right to life of applicant C is protected. In other words, Ireland is not required to make sure that abortion would be available to applicant C, but only to clarify its regulation in one sense or the other. The government is free to choose the most appropriate means of complying with this obligation, such as adopting medical guidelines on the treatment of pathologic pregnancies, as the Court suggested. This clearly means that, stricto sensu, the A. B. and C. judgment does not require the Irish government to liberalize its regulation on abortion. Moreover, because abortion is not a human right and cannot stem from the Convention, such a requirement from the Court would not be legally possible, it would be ultra vires. Ireland can legitimately maintain its constitutional choice to protect the life of the baby and the one of the mother on an equal footing.
The A., B., and C., v. Ireland judgment of the Grand Chamber of the European Court of Human Rights (hereafter the Court or the ECHR) is continuing to cause much debate and discussion. The purpose of this communication is to help clarifying this matter, providing for, on the one hand, a better understanding of the status of abortion within the European Convention on Human Rights (hereafter the Convention) through the presentation of States’ obligations towards life, health and privacy (Part one), and, on the other hand, providing for a better understanding of States’ conventional obligations in the execution of the judgment, taking into account the characteristics of its process of supervision. (Part two).


1. The Convention protects life

International human rights instruments recognize life as a primary right. The "principle of sanctity of life" is "protected under the Convention" and recognized by the Court, which affirms that "the right to life is an inalienable attribute of the human beings and forms the supreme value in the hierarchy of human rights".

It is important to understand properly that the European Convention does not, in itself, exclude the unborn child from its scope of protection. The Convention contains no ratione temporis limitation on the scope of the right to life: it protects "everyone". This is normal, because life is a material reality before becoming an individual right: life either exists or does not. It is a fact that everyone's life is a continuum that begins at conception and advances in stages until death.

4 Idem.
5 Streletz, Kessler and Krenz v. Germany [GC], Nos 34044/96, 35532/97 and 44801/98, at paras 92-94.
6 This is confirmed by the Consultative Assembly’s preparatory work in 1949, which clearly shows that these are rights that one enjoys just because one exists: "the Committee of Ministers has asked us to establish a list of rights which man, as a human being, would naturally enjoy." Preparatory work, vol. II, page 89.
If determining the limits of physical life is not difficult to assess, however, the development of practices such as *in vitro* fertilization, abortion and euthanasia\(^7\) have impaired the coincidence *ratione temporis* between the physical life itself and its legal protection: the right “detaches” itself from its real object. Since the legalization of those practices, the right to life does not necessarily protect life anymore, but only a part of life whose extent varies according to national legislation. Some countries, allowing abortion, provide for a limited or minimal protection of the unborn child during the first three or four months, others fully protect the embryo against the biotechnological manipulations only from the sixth or the fourteenth day. The same can be said about euthanasia, where a limited number of countries even exclude the bedridden from the scope of the protection of life by allowing active euthanasia. The European Court of Justice, in the recent judgment of 18 October 2011 in the case C-34/10 Oliver Brüstle v. Greenpeace e.V. has ruled that the embryo is protected, since its fertilization, against patenting.

Few countries, preserving an acute awareness of the value of human life, do not want to detach the right from its object: they continue to protect life from its beginning to its end, by prohibiting, as much as possible, the creation of *in vitro* embryos without implantation, voluntary abortion and active euthanasia.

While, when the Convention was drafted, there was a coincidence between the limits of physical life and the right to life, and therefore a consensus on the criminal nature of abortion and euthanasia, the Court has gradually accepted this “separation” by leaving open the possibility for States, to determine when life begins and subsequently to reduce the scope of article 2.

Thus, the Court itself has never redefined (as to reduce) the scope of Article 2: it has never excluded in principle prenatal life (neither the dying life) from its field of application\(^8\). More subtly, the Court has allowed States to derogate from the protection conferred by article 2 leaving (to a limited extent) the determination of the scope of this article in their margin of appreciation\(^9\). However, the Court affirmed that the unborn (embryo and foetus) belongs to the human species\(^10\), potentially protecting them against inhuman treatments that the Court would not wish to tolerate. (In doing so, the Court follows the line drawn by the former Commission\(^11\).)

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\(^7\) The resuscitation techniques are situated in another context.

\(^8\) *Boso v. Italy*, No. 50490/99, decision of 5 September 2002: "*In the Court’s opinion, such provisions strike a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman’s interests* " *and Vo v. France*, No. 53924/00, [GC], Judgment of July 8, 2004, §§ 86 and 95 " *the unborn child’s lack of a clear legal status does not necessarily deprive it of all protection under French law. However, in the circumstances of the present case, the life of the foetus was intimately connected with that of the mother and could be protected through her*" and "*even assuming that Article 2 was applicable in the instant case, there has been no violation of Article 2 of the Convention* ".

\(^9\) *Vo v. France*, No. 53924/00, [GC], Judgment of July 8, 2004, at para 82.

\(^10\) *Idem*, at para 84.

With regard to other provisions of the Convention, it should be noted that, in several cases, the Court has recognized their applicability to prenatal life\textsuperscript{12}.

Thus, States that uphold the entire scope of Article 2, recognizing their responsibility to protect life from conception to natural death, can invoke this treaty provision "guaranteeing the right to life as encompassing a state responsibility to protect the unborn child from abortion"\textsuperscript{13} : these States fully respect their obligations, beyond the minimum threshold currently required by the Court, pursuant to Article 53 of the Convention\textsuperscript{14} which establishes that the State is free to provide wider protection of human rights than the one guaranteed by the Convention. Thus, the means used by those States to protect life (especially the prohibition of abortion) contribute to the achievement of voluntary obligations consented by the State, in accordance with Articles 2 and 53 of the Convention.

2. The Convention does not create a right to abortion

The European Court declared in the Pretty v UK case that "Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination"\textsuperscript{15}, as well as the Court declared in the A B & C v Ireland case that "Article 8 cannot, accordingly, be interpreted as conferring a right to abortion"\textsuperscript{16}. In addition to those clear statements, on several occasions, the Court declared inadmissible applications claiming a right to a general access to abortion, against their national legislation\textsuperscript{17}.

\begin{itemize}
\item \textsuperscript{12} H. v. Norway, No. 17004/90, Dec. of the former Commission on May 19, 1992. The father of a foetus complained to the Court under Article 3 of the Convention, showing that no measure had been taken to avoid the risk of suffering of the fourteen week old foetus during an abortion. With this occasion, the former Commission applied this provision of the Convention and considered the complaint ill-founded, for lack of evidence of foetal distress, "having regard to the abortion procedure as described".
\item \textsuperscript{13} See San Jose Articles, Article 8: "Under basic principles of treaty interpretation in international law, consistent with the obligations of good faith and pacta sunt servanda, and in the exercise of their responsibility to defend the lives of their people, states may and should invoke treaty provisions guaranteeing the right to life as encompassing a state responsibility to protect the unborn child from abortion."\textsuperscript{14}
\item \textsuperscript{14} Article 53 of the Convention reads as follows: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a party ";
\item \textsuperscript{15} Pretty v. UK, No. 2346/02, Judgment of April 29, 2002, at paras 39-40; "Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe[...]
\item \textsuperscript{16} A., B. and C. v. Ireland, No. 25579/05, [GC], Judgment of 16 December 2010, at para 214.
\item \textsuperscript{17} In Maria do Céu Silva Monteiro Martins Ribeiro v. Portugal, 26 October 2004, No. 16471/02, the Court declared inadmissible an application against "the Portuguese law on abortion and on abortion on demand which was considered by the applicants contrary to a number of provisions of the Convention because it prohibits the termination of pregnancy on request of the pregnant woman".
\end{itemize}
The Court cannot create a right to abortion because its interpretive power is not unlimited: even if "the Convention and its Protocols must be interpreted in the light of present-day conditions. However, the Court cannot, by means of evolutive interpretation, derive from these instruments a right that was not included at the outset. This is particularly so here, when the omission was deliberate"\(^{18}\). Therefore, under no circumstances, and even interpreting the rights enshrined in the Convention in an evolutive manner, can the Court create new human rights which are not included in the Convention\(^{19}\). In this respect, the ECHR cannot either oblige States to allow wider access to abortion than they currently decided to allow.

More than that and in any case, the Court cannot interpret the Convention contra legem creating a new right diametrically opposed to an existing right guaranteed by the text of the Convention. Such a right, such as a right to abortion\(^{20}\) or to euthanasia\(^{21}\), could not be deduced from the Convention because it would conflict with article 2 protecting the right to life. Article 2 contains only a limited number of exceptions, and does not allow the State to create new exception.

In this respect, the Convention should be read as a whole. The Court recognized that it cannot, on the one hand, impose an obligation to protect life by law and, on the other hand, condemn a State for not assisting in suicide\(^{22}\). What the Court recognized as true regarding the facilitation of a (legal) breach of life by suicide, should also be recognized regarding the facilitation of a (legal) breach of life by abortion. The same principles apply with regard to legal euthanasia (or assisted suicide) and abortion.

### 3. The State has a positive obligation to protect life

The Convention protects every human life by providing in Article 2 the right to "anyone" within the jurisdiction of a Member State to have his life protected "by law"\(^{23}\). Life is a "public good", and not just a "private good", which explains why it is particularly protected through criminal law rather than civil law: any violation of life inflicts not only a violation of a private good of the victim, but also hurts the common good of the society, including the public order. In this sense, as the Court recognized it, pregnancy does not only concern the private life of the mother\(^{24}\). The obligation to protect everyone's life requires the State not only to refrain from intentional and unlawful taking of life ("negative obligation" of the State requiring it not to interfere), but also to take appropriate steps to

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\(^{18}\) Johnston and others v. Ireland, No. 9697/82, Judgment of 18 December 1986, at para 53.

\(^{19}\) Johnston and others v. Ireland, No. 9697/82, judgment of 18 December 1986 at para 53; Emonet and others v. Switzerland, no.39051/03, judgment of 13 December 2007, at para 66: "the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate".


safeguard the lives of those within its jurisdiction ("positive obligation" of the State requiring to guarantee individuals the effective enjoyment of this right)\textsuperscript{25}. The State has a margin of appreciation in determining the means by which this positive obligation will be fulfilled. The role of the Court, analysing on a case by case basis, is to assess, according to the circumstances of each case, whether the State took the necessary steps to secure "everyone’s right to life".

**4. Abortion is a derogation to the right to life**

Most of states allowing abortion (including France or Poland) allow it as a derogation to the right to life in their national law. Therefore, they do not question the principle of the applicability of the right to life to the period of life before birth: they maintain this applicability, but allow only a limited possibility to derogate to the rule. This means that for all States allowing abortion as derogation, the right to life, in principle, covers life before birth. This is why the life of the foetus in the womb of his mother (and even of the \textit{in vitro} embryo in some States), is protected by law against its accidental or voluntary killing or destruction.

Abortion being a derogation to the right to life, it can not constitute a right in itself. As a derogation or an exception, its scope is \textit{limited} by the principle to which it refers. This limitation expresses itself by the impossibility, under the Convention, to allow, for example, "partial-birth abortion", or selective abortion according to the sex or colour of the skin.

Thus, abortion is necessarily limited and can not become an autonomous right. From a more fundamental point of view, this is in conformity with the principle that a positive right (a right to do something) can only pursue a good \textit{per se}; it can not be aimed at the realization of an evil, even if this evil is permitted by law, because of its supposed inevitability or necessity.

**5. If the State allows abortion, it remains subject to the positive obligation to protect life and to respect the other rights and legitimate interests affected by the authorisation of abortion.**

The fact that a State permits a derogation to a right does not wave the State’s obligations under the Convention with respect to this right and to other rights affected by this measure. The examples of partial-birth abortion or sex selective abortion are explicit in this sense: such abortions do not affect only Article 2, but also Articles 3 and 14. The Court recalled several times that if and once the State decides to allow abortion, "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. \(^{26}\) Therefore, the legalization of abortion does not exempt the State of its responsibility to respect the fundamental rights and interests that are protected by the Convention and are also impacted by the decision to allow abortion and its practical modalities. The Court has already had the opportunity to identify a number of these fundamental rights and "legitimate interests involved" that the State must consider while organizing the access to abortion.

In its case law, the Court pointed in particular:

- the right to life of the unborn child \(^{27}\),
- the interests of society, including the protection of morals \(^{28}\),
- the legitimate interest to limit the number of abortions \(^{29}\),
- the right to freedom of conscience of individuals, health professionals \(^{30}\) and institutions based on ethical or religious beliefs \(^{31}\),
- the parental rights,
- the freedom and dignity of the woman \(^{32}\),
- The right to respect of the private life of the woman, which includes the right to physical and mental health.

Other institutions, such as the Parliamentary Assembly of the Council of Europe, have identified other rights and interests justifying or necessitating a limitation of access to abortion, such as the interest of society to ban sex selective abortion \(^{33}\). Some cases are currently pending before the ECHR regarding other interests and rights affected by abortion, such as the States duty properly to inform the women on the risks caused by abortion \(^{34}\), and to protect women against forced abortion \(^{35}\), etc. The list is not limitative and is under continuous development.

The Court may find a violation of the Convention in a legislation that would not respect those rights and interests. Those violations do not only address legislation that would not oppose or prevent sex-selective or forced abortion, but also legislation permitting abortion on demand without valid motives, etc.

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\(^{31}\) Rommelfanger v. FRG, No. 12242/86, Dec. of the former Commission on September 6, 1989.

\(^{32}\) See mutatis mutandis the ECHR acknowledgment of the violation of women’s dignity by forced sterilisation.

\(^{33}\) On October 3, 2011, the Parliamentary Assembly of the Council of Europe adopted Resolution1829 (2011) and Recommendation 1979 (2011) on sex selective abortion, admitting that abortion has negative effects on society, and therefore abortion cannot but be limited, and where it is legal, it must be regulated.

\(^{34}\) Csoma v. Roumania, No. 8759/05, pending.

\(^{35}\) P. and S. v Poland, No. 57375/08, pending.
It is mainly within the scope of the right to private life that the ECHR has found grounds for a violation of women’s rights in relation to abortion in the recent abortion cases. In the A. B. and C. case, as well as in the Tysiac and R. R. v. Poland cases, the Court found that the national legal frameworks were not shaped in a manner ensuring clarity of the pregnant woman’s legal position. So, for the Court, the violation of the right to privacy of the applicants is not caused by the State’s decision to forbid or strictly limit abortion, but by the fact that the personal situation of the women considering having an abortion is excessively uncertain and unforeseeable because of the legislation. It is this situation caused by the imprecision of the legislation that harms the privacy of the applicants, according to the Court.

These rights and legitimate interests frame the actions of the State while defining, within its margin of appreciation, the legal framework of abortion. In this regard, two parameters should be reminded when a State assesses various legitimate interests:

− First, the right to life is usually considered as superseding the other rights guaranteed by the Convention;

− Second, a State cannot subordinate or put on equal footing a fundamental right, such as the right to life and to health, with an (alleged) right not guaranteed by the Convention. As the Court made clear, “where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect “rights and freedoms” not, as such, enunciated therein: in such a case only indisputable imperatives can justify interference with enjoyment of a Convention right”.

6. The positive obligation of the State to protect life and health is enhanced when it involves vulnerable people

When life is threatened, the State has not only the right but also the duty to intervene, to check and ensure that the lives and health of individuals are protected, including in relations between individuals. This obligation is reinforced when it involves vulnerable people, such as teenagers. This obligation can go as far as to protect the individual against his family

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

37 Chassagnou and others v. France [GC], Nos 25088/94, 2833/95 and 2844/95, Judgment of April 29, 1999, at para 113: “where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect “rights and freedoms” not, as such, enunciated therein: in such a case only indisputable imperatives can justify interference with enjoyment of a Convention right”.


39 Keenan c. Royaume-Uni, No 27229/95, at para 91.
environment\textsuperscript{40}, against "any pressure which may be exercised in the domestic environment"\textsuperscript{41} aiming to submit them to practices contrary to their fundamental rights, and especially to their physical integrity.

In the \textit{Haas v. Switzerland}\textsuperscript{42} case, concerning assisted suicide (which is legal in Switzerland), the Court held that respect for the right to life compels the national authorities to take positive measures to protect individuals from taking a hasty decision and to prevent abuse. The Court underlined in particular that the risk of abuse inherent in a system which facilitates assisted suicide cannot be underestimated, and concluded that the restriction on access to assisted suicide was intended to protect health and public safety and to prevent crime\textsuperscript{43}. Therefore, even when assisted suicide is allowed, as in Switzerland, the State must prevent abuse in the use of this faculty because of his obligation to protect life, especially because it concerns vulnerable people.

This should also apply regarding abortion on vulnerable people, such as minors, disabled and poor peoples, as well as on women asking for an abortion for a mental or financial reason.

Therefore, a State which decides to permit abortion not only has the obligation to control access to abortion in regard to its duty to protect health and public safety and to prevent crime (such as coerced abortion), but it should also have the duty to take positive measures in order to avoid the recourse to abortion, and therefore to fully respect its positive obligations stemming from the right to life.

\textit{In fine}, noticing that Article 40.3.3 of the Irish Constitution provides that "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right", the choice of Irish people to guarantee an equal protection to the life of the baby and to the one of the mother is perfectly consistent with the European Convention.

II. The execution of the \textit{A., B. and C. v. Ireland} judgment and its supervision

To understand the scope of an ECHR judgment, the nature of the obligations it creates upon the States, and the mechanism of the supervision of its execution by the member States, it is important to remind that the European Convention on Human Rights is an international treaty and not a constitution. It is a multilateral international treaty, an instrument of public international law, the interpretation and the application of which are subject both to the Vienna Convention on the Law of Treaties and to the basic customs and principles of international law, as has been repeatedly recognized and emphasized by the

\begin{itemize}
\item \textit{Dewinne v. Belgium}, No. 56024/00, decision of March 10, 2005,\textsuperscript{40}
\item \textit{Zakharova v. France}, No. 57306/00, decision of 13 December 2005,\textsuperscript{40}
\item \textit{Kutzner v. Germany} at para 68, and \textit{Morselli and Covezzi v. Italy}, No. 52763/99, Judgment of 9 May 2003,\textsuperscript{40}
\item Mutatis mutandis \textit{Covezzi and Morselli v. Italy}, No 52763/99, § 112, May 9, 2003;\textsuperscript{41}
\item \textit{Haas v. Switzerland}, No. 31322/07, Judgment of 20 January 2011, at para 54.\textsuperscript{42}\textsuperscript{42}
\item \textit{Haas v. Switzerland}, No. 31322/07, Judgment of 20 January 2011, at para 58.\textsuperscript{43}\textsuperscript{43}
\end{itemize}

\textsuperscript{41} Mutatis mutandis Covezzi and Morselli v. Italy, No 52763/99, § 112, May 9, 2003;
\textsuperscript{42} Haas v. Switzerland, No. 31322/07, Judgment of 20 January 2011, at para 54.
\textsuperscript{43} Haas v. Switzerland, No. 31322/07, Judgment of 20 January 2011, at para 58.
Court itself\textsuperscript{44}. The State remains the basic actor of international law and the locus of the legal power and legitimacy, therefore the competence of the European Court of Human Rights is restricted by the general limits of the powers that the Contracting States, by their sovereign will, have decided to delegate to it by signing and ratifying the Convention. This is why it is primarily the task of member States to ensure the respect for the rights enshrined in the Convention and their interpretation\textsuperscript{45}.

The Court can assess, after the exhaustion of domestic remedies by the applicants, on a case by case basis, and decide by a binding judgment whether in a specific situation there has been a violation of the individual rights guaranteed by the Convention. But it does not belong to the Court to indicate which general measures a State should adopt in order to prevent similar violations of the Convention in the future. The ECHR only indicates why a certain human right was violated and the State against which the Court has given a judgment remains free to choose the means that it considers necessary to ensure and implement the rights prescribed by the Convention to comply with the judgment.

Similarly, during the supervision process of the execution, it belongs to the Committee of Ministers to decide whether the measures adopted can be considered as satisfactory, but not to indicate which general measures the State should have adopted.

\section{1. Summery of the judgment}

In the \textit{A., B. and C. v. Ireland} case, the Court found a violation of the right to respect of the private life of the third applicant\textsuperscript{46} because the third applicant who wanted to have an abortion for life threatening reasons could not access to an effective procedure to establish whether she fulfilled the conditions established by article 40.3.3 of the Constitution which, according to the ECHR, permits abortion on grounds of relevant risk to a woman’s life. The ECHR concluded that therefore, the applicant found herself in an uncertain situation (§ 267) that amounted to a violation of her right to respect of her private life (art.8). In addition, the Court described in its judgment why the existing procedures in Ireland were not effective and accessible for the third applicant. The ground for the condemnation of Ireland is primarily article 40.3.3 of the Constitution. Without this provision, the condemnation of Ireland would not have been possible, since the European Convention itself does not contain any right to abortion.

\begin{footnotesize}
\begin{footnotes}{\textsuperscript{44}} Demir and Baykara v. Turkey, [GC], No. 34503/97, judgment of 12 November 2008.
\textsuperscript{45} Articles 1 and 19 of the Convention, as well as the ECHR case-law: “Belgian language” case, judgment of 23 May 1968, at para 10, Scordino v. Italy (no. 1) [GC], No. 36813/97, judgment of 26 May 2006, at para 140, Varnava and others v. Turkey, [GC], No. 16064/90, judgment of 18 September 2009, at para 164.
\textsuperscript{46} Applicant C. affirmed that she had a rare form of cancer and, on discovering she was pregnant, had feared for her life as she believed that her pregnancy increased the risk of her cancer returning and that she would not obtain treatment in Ireland while pregnant, without indicating what kind of cancer she had and without bringing any medical certificate proving at least that she consulted a doctor. Before the ECHR she complained about the failure by the Irish State to implement Article 40.3.3 of the Constitution by legislation and, notably, to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life due to her pregnancy (para 243).
\end{footnotes}
\end{footnotesize}
The conclusion of the ECHR was the following:

“the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution” (§ 267).

The Court also specified:

“As to the burden which implementation of Article 40.3.3 would impose on the State, the Court accepts that this would be a sensitive and complex task. However, while it is not for this Court to indicate the most appropriate means for the State to comply with its positive obligations (Marckx v. Belgium judgment, § 58; Airey v. Ireland judgment, § 26; and B. v. France, § 63, all cited above), the Court notes that legislation in many Contracting States has specified the conditions governing access to a lawful abortion and put in place various implementing procedural and institutional procedures (Tysiac v. Poland judgment, § 123). Equally, implementation could not be considered to involve significant detriment to the Irish public since it would amount to rendering effective a right already accorded, after referendum, by Article 40.3.3 of the Constitution” (§ 266).

In its judgment, the ECHR identified the following problematical points as to effectiveness of the existing procedures (§§ 252-264):

- As to the ordinary medical consultation process between a woman and her doctor (§ 252):
  - the ground upon which a woman can seek a lawful abortion in Ireland is expressed in broad terms: Article 40.3.3, as interpreted by the Supreme Court in the X case, provides that an abortion is available in Ireland if it is established as a matter of probability that there is a real and substantial risk to the life of the mother (§ 253);
  - no criteria or procedures have been subsequently laid down in Irish law, whether in legislation, case-law or otherwise, by which that risk is to be measured or determined, leading to uncertainty as to its precise application (§ 253);
  - Irish professional medical guidelines do not provide any relevant precision as to the criteria by which a doctor is to assess that risk (§ 253);
  - No framework whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk to a woman’s life such that a lawful abortion might be performed (§ 253);
  - Criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act. Doctors also risked professional disciplinary proceedings and serious sanctions. (§ 254);
- As to the constitutional action to determine her qualification for a lawful abortion in Ireland, and compensation:
• constitutional courts are not the appropriate fora for the primary determination, which would largely be based on medical evidence, as to whether a woman qualifies for an abortion which is lawfully available (§ 258);
• It would be inappropriate to require women to take on such complex constitutional proceedings when the necessity to terminate the pregnancy in the case of a qualifying risk to life was not disputable (§ 259);
• It is not clear how the courts would have enforced a mandatory order requiring doctors to carry out an abortion (§ 260);
• It is not clear on what basis the provisions of the 1861 Act could be declared unconstitutional because those provisions have not been affected by the adoption of Article 40.3.3 of the Constitution (§ 260).

The A. B. and C. judgment must be read and understood within the general framework of States’ obligations towards life, health and privacy, in particular having in mind that Ireland can legitimately maintain its constitutional choice to protect the life of the baby and the one of the mother on an equal footing.

2. The obligations of the government depend on the specificities of each case

The judgment Scorzzari and Giunta v. Italy\(^{47}\) gives a good synthesis of States obligations in the execution of a judgment:

“The Court points out that by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, inter alia, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment”.

Following the Court, a State has the duty not only to pay the just satisfaction, but also to adopt measures in order to put an end to the violation found by the Court and to redress the effects so far as possible. The Irish government has the conventional obligation to adopt measures addressing the specific situation causing the violation of the Convention in the case of applicant C for the future.

\(^{47}\) Scorzzari and Giunta v. Italy, Nos. 39221/98 and 41963/98, judgment of 13 July 2000, at para 249.
In other terms, the government is required to adopt measures so that applicant C, or any other woman in the same situation, would be able to know whether her situation qualifies (i.e. requires) for a lawful abortion on grounds of the risk to her life caused by the pregnancy. The decision taken by the national authorities whether applicant C would or not eventually qualify for a legal abortion has no incidence, assuming that no woman is let die because of her pregnancy. Ireland is not required to make sure that abortion would be available to applicant C, but only to clarify its regulation in one sense or the other.

This clearly means that, *stricto sensu*, the *A. B. and C.* judgment doesn’t require the Irish government to liberalize its regulation on abortion. Moreover, because abortion is not a human right and cannot stem from the Convention, such a demand from the Court would be *ultra vires*.

Moreover, the Convention does not provide for the possibility to introduce *actio popularis* before the Court, as well as it is not for the Court to decide on a general situation, and in the absence of special procedure before the domestic courts, but on whether the decisions of the domestic authorities are not arbitrary or manifestly unreasonable. Therefore, while executing the judgment, the Irish government does not have to address the issue of abortion in general, nor to address specific aspects that do not concern the situation of Applicant C, such as for example the issue of abortion requested for psychological reasons. Nevertheless, the government is free to adopt measures addressing other issues, but it has no duty to do so and to report on those *ultra petita* measures during the supervision process.

3. The government is free to choose the most appropriate means to comply with its obligations

The Grand Chamber reiterated its well established case law in the *A. B. and C.* judgment while specifying that "it is not for this Court to indicate the most appropriate means for the State to comply with its positive obligations". Therefore, it is for the government to determine the most appropriate measures to adopt in order to prevent similar violations of the Convention in the future. This is a consequence of the subsidiary nature of the system of the Convention.

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

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48 See *Sejdic and Finci v. Bosna-Herzegovina*, [GC], Nos. 27996/06 and 34836/06, December 22, 2009, at para 28 and *Burden v. U-K*, [GC], No. 13378/05, April 29 2008, §§ 33-34: "The Convention does not, therefore, envisage the bringing of an actio popularis for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (Norris, cited above, § 31). It is, however, open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risk being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation".

49 *A. B. C.* at para 266, cited above, see also the previous references given by the Court.
The task of the Irish Government is to consider the situation where there is a “real and serious risk to the life of the mother” and to provide for an “accessible and effective procedure” by which the pregnant woman can establish whether or not she fulfils the conditions for a lawful abortion according to Article 40.3.3 of the Constitution, i.e. whether the risk for her life is real and makes the abortion necessary (§ 267). In the language of the ECHR, “procedural and institutional procedures” do not imply legislation or regulation. The real requirement is that this procedure shall not be too complex, in concreto.

As the Court suggested (§ 253), this procedure could be presented as professional medical guidelines providing relevant precisions as to the procedure and criteria by which a doctor/or a medical committee is to assess that risk and a procedure in case of difference of opinion between the woman and her doctor or between different doctors consulted. This procedure in case of difference of opinion could be another medical committee of a superior degree. This medical committee should be strictly tied to deciding whether or not the physical life of the mother is at risk. Those professional medical guidelines could formalize the procedure of treatment of women with a pathologic pregnancy, endangering their lives. The requirements that the European Convention and the A. B. and C. judgment can impose on Ireland would be fulfilled by formalizing how Ireland guarantee that no woman is let to die because she is pregnant.

On this medical aspect, the recent so-called “Dublin Declaration on Maternal Healthcare”50 provides useful clarification regarding the medical necessity of abortion to save the life of a pregnant woman. According to the 140 medical experts supporting this declaration, inter alia, “the prohibition of abortion does not affect, in any way, the availability of optimal care to pregnant women”. This information is corroborated by the UNICEF statistics assessing that Ireland has one of the lowest maternal mortality rates in the world (n°1 in 2005, n°3 in 2008)51. This factual information is of a primary importance for the accuracy and realism of regulation.

Respectfully submitted,

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“As experienced practitioners and researchers in Obstetrics and Gynaecology, we affirm that direct abortion is not medically necessary to save the life of a woman. We uphold that there is a fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child. We confirm that the prohibition of abortion does not affect, in any way, the availability of optimal care to pregnant women.”