COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF VO v. FRANCE

(Application no. 53924/00)

JUDGMENT

STRASBOURG

8 July 2004

In the case of Vo v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr L. CAFLISCH,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mr A.B. BAKA,
Mr K. TRAJA,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mr K. HAJIYEV, *judges*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 10 December 2003 and 2 June 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 53924/00) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mrs Thi-Nho Vo ("the applicant"), on 20 December 1999.

2. The applicant was represented by Mr B. Le Griel, of the Paris Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, a violation of Article 2 of the Convention on the ground that the conduct of a doctor who was responsible for the death of her child *in utero* was not classified as unintentional homicide.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber to

which the case had been assigned decided on 22 May 2003 to relinquish jurisdiction in favour of the Grand Chamber with immediate effect, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

6. The applicant and the Government each filed observations on the admissibility and merits of the case. In addition, observations were also received from the Center for Reproductive Rights and the Family Planning Association, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

7. A hearing on the admissibility and merits of the case took place in public in the Human Rights Building, Strasbourg, on 10 December 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr F. ALABRUNE, Deputy Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mr G. DUTERTRE, Drafting Secretary,
Human Rights Section,
Legal Affairs Department,
Ministry of Foreign Affairs,
Mrs J. VAILHE, Drafting Secretary,
European and International Affairs Department,
Ministry of Justice,
Mr P. PRACHE, Department of Criminal Affairs and Pardons,
Ministry of Justice,
Mr H. BLONDET, judge of the Court of Cassation,
Mrs V. SAGANT, European and International Affairs Department,
Ministry of Justice, *Counsel*;

(b) *for the applicant*
Mr B. LE GRIEL, of the Paris Bar, *Counsel*.

The Court heard addresses by Mr Le Griel and Mr Alabrune.

8. In accordance with the provisions of Article 29 § 3 of the Convention and Rule 54A § 3, the Court decided to examine the issue of admissibility of the application with the merits.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1967 and lives in Bourg-en-Bresse.

10. On 27 November 1991 the applicant, Mrs Thi-Nho Vo, who is of Vietnamese origin, attended Lyons General Hospital for a medical examination scheduled during the sixth month of pregnancy.

11. On the same day another woman, Mrs Thi Thanh Van Vo, was due to have a contraceptive coil removed at the same hospital. When Dr G., who was to remove the coil, called out the name "Mrs Vo" in the waiting-room, it was the applicant who answered.

After a brief interview, the doctor noted that the applicant had difficulty in understanding French. Having consulted the medical file, he sought to remove the coil without examining her beforehand. In so doing, he pierced the amniotic sac causing the loss of a substantial amount of amniotic fluid.

After finding on clinical examination that the uterus was enlarged, the doctor ordered a scan. He then discovered that one had just been performed and realised that there had been a case of mistaken identity. The applicant was immediately admitted to hospital.

Dr G. then attempted to remove the coil from Mrs Thi Thanh Van Vo, but was unsuccessful and so prescribed an operation under general anaesthetic for the following morning. A further error was then made when the applicant was taken to the operating theatre instead of Mrs Thi Thanh Van Vo, and only escaped the surgery intended for her namesake after she protested and was recognised by an anaesthetist.

12. The applicant left the hospital on 29 November 1991. She returned on 4 December 1991 for further tests. The doctors found that the amniotic fluid had not been replaced and that the pregnancy could not continue further. The pregnancy was terminated on health grounds on 5 December 1991.

13. On 11 December 1991 the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant entailing total unfitness for work for a period not exceeding three months and unintentional homicide of her child. Three expert reports were subsequently filed.

14. The first, which was filed on 16 January 1992, concluded that the foetus, a baby girl, was between 20 and 21 weeks old, weighed 375 grams, was 28 centimetres long, had a cranial perimeter of 17 centimetres and had not breathed after delivery. The expert also concluded that there was no indication that the foetus had been subjected to violence or was malformed and no evidence that the death was attributable to a morphological cause or

to damage to an organ. Further, the autopsy performed after the abortion and an anatomico-pathological examination of the body indicated that the foetal lung was 20 to 24 weeks old.

15. On 3 August 1992 a second report was filed concerning the applicant's injuries:

> "(a) There is a period of temporary total unfitness for work from 27 November 1991 to 13 December 1991, when the patient was admitted to the Tonkin Clinic with an entirely unconnected pathology (appendectomy)
>
> (b) the date of stabilisation can be put at 13 December 1991
>
> (c) there is no loss of amenity
>
> (d) there is no aesthetic damage
>
> (e) there is no occupational damage
>
> (f) there is no partial permanent unfitness for work
>
> Damage in terms of pain and suffering resulting from this incident still has to be assessed. The assessment should be carried out with a doctor of Vietnamese extraction specialising in psychiatry or psychology."

16. The third report, which was issued on 29 September 1992, referred to the malfunctioning of the hospital department concerned and to negligence on the part of the doctor:

> "1. The manner in which appointments in the departments run by Professors [T.] and [R.] at Lyons General Hospital are organised is not beyond reproach, in particular in that namesakes are common among patients of foreign origin and create a risk of confusion, a risk that is undoubtedly increased by the patients' unfamiliarity with or limited understanding of our language.
>
> 2. The fact that patients were not given precise directions and the consulting rooms and names of the doctors holding surgeries in them were not marked sufficiently clearly increased the likelihood of confusion between patients with similar surnames and explains why, after Dr [G.] had acquainted himself with Mrs Thi Thanh Van Vo's medical file, it was [the applicant] who came forward in response to his call.
>
> 3. The doctor acted negligently, by omission, and relied solely on the paraclinical examinations. He did not examine his patient and by an unfortunate error ruptured the amniotic sac, causing the pregnancy to terminate at five months. He is accountable for that error, although there are mitigating circumstances."

17. On 25 January 1993, and also following supplemental submissions by the prosecution on 26 April 1994, Dr G. was charged with causing unintentional injury at Lyons on 27 November 1991 by:

(i) through his inadvertence, negligent act or inattention, perforating the amniotic sac in which the applicant's live and viable foetus was developing, thereby unintentionally causing the child's death (a criminal offence under

Article 319 of the former Criminal Code – which was applicable at the material time – now Article 221-6 of the Criminal Code);

(ii) through his inadvertence, negligent act, inattention, negligent omission or breach of a statutory or regulatory duty of protection or care, causing the applicant bodily injury that resulted in her total unfitness for work for a period not exceeding three months (a criminal offence under Article R. 40, sub-paragraph 4, of the former Criminal Code – which was applicable at the material time – now Articles R. 625-2 and R. 625-4 of the Criminal Code).

18. By an order of 31 August 1995, Dr G. was committed to stand trial in the Lyons Criminal Court on counts of unintentional homicide and unintentionally causing injuries.

19. By a judgment of 3 June 1996, the Criminal Court found that the accused was entitled as of right to an amnesty under the Amnesty Law of 3 August 1995 in respect of the offence of unintentionally causing injuries entailing temporary unfitness for work of less than three months. As to the offence of unintentional homicide of the foetus, it held:

> "The issue before the Court is whether the offence of unintentional homicide or the unintentional taking of the foetus's life is made out when the life concerned is that of a foetus – if a 20 to 21 week-old foetus is a human person ('another' within the meaning of Article 221-6 of the Criminal Code).
>
> ...
>
> The expert evidence must be accepted. The foetus was between 20 and 21 weeks old.
>
> At what stage of maturity can an embryo be considered a human person?
>
> The Voluntary Termination of Pregnancy Act of 17 January 1975 provides: 'The law guarantees respect of every human being from the beginning of life.'
>
> The Law of 29 July 1994 (Article 16 of the Civil Code) provides: 'The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life'.
>
> The laws of 29 July 1994 expressly employed the terms 'embryo' and 'human embryo' for the first time. However, the term 'human embryo' is not defined in any of them.
>
> When doing the preparatory work for the legislation on bioethics, a number of parliamentarians (both members of the National Assembly and senators) sought to define 'embryo'. Charles de Courson proposed the following definition: 'Every human being shall be respected from the start of life; the human embryo is a human being.' Jean-François Mattéi stated: 'The embryo is in any event merely the morphological expression of one and the same life that begins with impregnation and continues till death after passing through various stages. It is not yet known with precision when the zygote becomes an embryo and the embryo a foetus, the only indisputable fact being that the life process starts with impregnation.'

It thus appears that there is no legal rule to determine the position of the foetus in law either when it is formed or during its development. In view of this lack of a legal definition it is necessary to return to the known scientific facts. It has been established that a foetus is viable at 6 months and on no account, on present knowledge, at 20 or 21 weeks.

The Court must have regard to that fact (viability at 6 months) and cannot create law on an issue which the legislators have not yet succeeded in defining.

The Court thus notes that a foetus becomes viable at the age of 6 months; a 20 to 21 week-old foetus is not viable and is not a 'human person' or 'another' within the meaning of former Article 319 and Article 221-6 of the Criminal Code.

The offence of unintentional homicide or of unintentionally taking the life of a 20 to 21 week-old foetus has not been made out, since the foetus was not a 'human person' or 'another'...

Acquits Dr G. on the charge without penalty or costs ..."

20. On 10 June 1996 the applicant appealed against that judgment. She argued that Dr G. had been guilty of personal negligence severable from the functioning of the public service and sought 1,000,000 French francs (FRF) in damages, comprising FRF 900,000 for the death of the child and FRF 100,000 for the injury she had sustained. The public prosecutor's office, as second appellant, submitted that the acquittal should be overturned. It observed: "By failing to carry out a clinical examination, the accused was guilty of negligence that caused the death of the foetus, which at the time of the offence was between 20 and 24 weeks old and following, normally and inexorably, the path of life on which it had embarked, there being no medical doubt over its future."

21. In a judgment of 13 March 1997, the Lyons Court of Appeal upheld the judgment in so far as it had declared the prosecution of the offence of unintentionally causing injuries time-barred but overturned the remainder of the judgment and found the doctor guilty of unintentional homicide. It imposed a six-month suspended prison sentence and a fine of FRF 10,000, holding:

"... In the instant case Dr [G.]'s negligence is characterised in particular by the fact that the patient's knowledge of French was insufficient to enable her to explain her condition to him, to answer his questions or to give him the date of her last period, circumstances that should have further impressed upon him the need for a thorough clinical examination. The assertion that he was entitled to rely on the medical records alone shows that, though an able scientist, this young doctor was nonetheless unaware of one of the essential skills of the practice of medicine: listening to, getting to know and examining the patient. Indeed, before this Court Dr [G.] said that the accident had impressed upon him how vital it was to take precautions before operating.

There is a clear causal link between this negligent act and omission and the death of the child Mrs Vo was carrying. The accused has himself acknowledged, with

commendable honesty, that a clinical examination would have alerted him to the fact that the patient was pregnant and had been mistaken for another patient.

As regards the classification of the offence as unintentional homicide, it is first necessary to reiterate the legal principles governing this sphere.

Various provisions of international treaties, such as Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 of the International Covenant on Civil and Political Rights and Article 6 of the Convention on the Rights of the Child signed in New York on 26 January 1990, recognise a right to life protected by law for everyone, and notably children.

Under domestic law, section 1 of the Voluntary Termination of Pregnancy Act (Law no. 75-17 of 17 January 1975) specifies: 'The law guarantees respect of every human being from the beginning of life ... this principle may only be derogated from in the event of necessity and in accordance with the conditions set out in this statute.'

Further, Law no. 94-653 of 29 July 1994 on the respect of the human body lays down in Article 16 of the Civil Code: 'The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life.'

These statutory provisions cannot be regarded as mere statements of intent, devoid of any legal effect, since Article 16-9 of the Civil Code indicates that the provisions of Article 16 are mandatory.

For its part the Criminal Division of the Court of Cassation applied these rules of international and domestic law in two judgments it delivered on 27 November 1996, specifying that the Act of 17 January 1975 only permits derogation from the rule stated in section 1 thereof that every human being is entitled to respect from the beginning of life in cases of necessity and subject to the conditions and limitations set out in it.

The Court of Cassation added that, having regard to the conditions laid down by the legislature, the provisions of that statute and of the law of 31 December 1979 on the voluntary termination of pregnancy, taken as a whole, were not incompatible with the aforementioned treaty provisions.

In a different case, moreover, the Court of Cassation pointed out that on signing the Convention on the Rights of the Child in New York on 26 January 1990, France made a declaration concerning interpretation in which it stated that the convention could not be interpreted as constituting any obstacle to the implementation of the provisions of French legislation on the voluntary termination of pregnancy. That reservation shows, by converse implication, that that convention could concern a foetus aged less than 10 weeks, the statutory maximum foetal age in France for a voluntary termination of pregnancy.

It follows that, subject to the provisions on the voluntary termination of pregnancies and therapeutic abortions, the right to respect for every human being from the beginning of life is guaranteed by law, without any requirement that the child be born as a viable human being, provided it was alive when the injury occurred.

Indeed, viability is a scientifically indefinite and uncertain concept, as the accused, who is currently studying in the United States, himself acknowledged, informing the

Court that foetuses born between 23 and 24 weeks after conception could now be kept alive, a situation that was inconceivable a few years ago. In the opinion prepared by Professor [T.] and adduced in evidence by Dr [G.], reference is made to a report by Professor Mattéi in which it is indicated that the embryo is merely the morphological expression of one and the same life that begins with impregnation and continues till death after passing through various stages. It is not yet known with precision when the zygote becomes an embryo and the embryo a foetus, the only indisputable fact being that the life process starts with impregnation. ...

Thus the issue of viability at birth, a notion that is uncertain scientifically, is in addition devoid of all legal effect, as the law makes no distinction on that basis.

In the instant case it has been established that when the scan was performed on 27 November 1991 – before the amniotic fluid was lost later that day – the [applicant's] pregnancy had been proceeding normally and the child she was carrying was alive. When the therapeutic abortion was performed on 5 December 1991, it was noted that a comparison of the child's measurements with published tables suggested that the foetus was between 20 and 21 weeks old and possibly older, as it is not certain that the tables take into account the specific morphology of children of Vietnamese origin. Dr [G.], when questioned on this point at the hearing, was unable to provide any further information. The conclusion from the anatomo-pathological examination was that the foetal lung indicated an age of between 20 and 24 weeks, its measurements suggesting that an age at the lower end of that range was the most likely. In any event, as Dr [G.] said in evidence, the age of the foetus was very close to that of certain foetuses that have managed to survive in the United States. The photographs at page D 32 of the trial bundle show a perfectly formed child whose life was cut short by the accused's negligence.

As the Douai Court of Appeal observed in its judgment of 2 June 1987, had the assault on the child concerned inflicted a non-fatal wound, it would have been classified without any hesitation as an offence of unintentionally causing injuries. *A fortiori*, an assault leading to the child's death must be classified as unintentional homicide.

Thus, the strict application of the legal principles, established scientific fact and elementary common sense all dictate that a negligent act or omission causing the death of a 20 to 24 week-old foetus in perfect health should be classified as unintentional homicide.

Consequently, the impugned judgment must be overturned ...

While [the applicant's] civil action is admissible, if only to corroborate the prosecution case, this Court has no jurisdiction to hear the claim for reparation. This is because despite the serious nature of the negligent act and omission of Dr [G.], a doctor in a public hospital, they do not constitute personal misconduct of such exceptional gravity entailing a total disregard for the most elementary principles and duties inherent in his function as to make them severable from public service.

Nonetheless, it is appropriate to order Dr [G.] to pay to this civil party compensation in the sum of 5,000 francs under Article 475-1 of the Code of Criminal Procedure on account of costs which she has incurred, but which have not been paid by the State.

..."

22. On 30 June 1999, on an appeal on points of law by the doctor, the Court of Cassation reversed the judgment of the Lyons Court of Appeal and ruled that there was no reason to remit the case for retrial:

> "Having regard to Article 111-4 of the Criminal Code:
>
> Criminal-law provisions must be strictly construed.
>
> ...
>
> In convicting [the doctor] of unintentional homicide, the appellate court noted that Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 6 of the International Covenant on Civil and Political Rights recognise the existence for all persons of a right to life protected by law. The appellate court stated that the Voluntary Termination of Pregnancy Act of 17 January 1975 establishes the rule that the life of every human being must be respected from the beginning of life. That rule is now restated in Article 16 of the Civil Code as worded following the amendment made by the Law of 29 July 1994. The appellate court went on to state that, by operating without performing a prior clinical examination, the doctor was guilty of a negligent act or omission that had a definite causal link with the death of the child the patient was carrying.
>
> However, by so holding, when the matters of which the defendant was accused did not come within the definition of the offences set out in former Article 319 and Article 221-6 of the Criminal Code, the Court of Appeal misinterpreted the aforementioned provisions.
>
> ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Criminal Code

23. The provision dealing with the unintentional taking of life at the material time and until 1 March 1994 was Article 319 of the Criminal Code, which read as follows:

> "Anyone who through his or her inadvertence, negligent act, inattention, negligent omission or breach of regulation unintentionally commits homicide or unintentionally causes death, shall be liable to imprisonment of between three months and two years and a fine of between 1,000 and 30,000 francs."

24. Since 1 March 1994, the relevant provision has been Article 221-6 of the Criminal Code (as amended by Law no. 2000-647 of 10 July 2000 and Order no. 2000-916 of 19 September 2000), which is to be found in Section II ("Unintentional taking of life") of Chapter I ("Offences against the life of the person") of Part II ("Offences against the human person") of

Book II ("Serious crimes (*crimes*) and other major offences (*délits*) against the person"). Article 221-6 provides:

> "It shall be an offence of unintentional homicide punishable by three years' imprisonment and a fine of 45,000 euros to cause the death of another in the conditions and in accordance with the distinctions set out in Article 121-3 by inadvertence, negligent act, inattention, negligent omission or breach of a statutory or regulatory duty of safety or care.
>
> In the event of a manifestly deliberate breach of a special statutory or regulatory duty of safety or care, the maximum sentences shall be increased to five years' imprisonment and a fine of 75,000 euros."

25. Article 223-10 of the Criminal Code, which concerns the voluntary termination of pregnancy by a third party without the mother's consent, is to be found in Section V under the heading "Unlawful termination of pregnancy" of Chapter III, entitled "Endangering the person", in Part II of Book II. It reads as follows:

> "It shall be an offence punishable by five years' imprisonment and a fine of 75,000 euros to terminate a pregnancy without the mother's consent."

26. Section III entitled "Protection of the human embryo" of Chapter I ("Offences against biomedical ethics") of Part I ("Public-health offences") of Book V ("Other serious crimes (*crimes*) and other major offences (*délits*)") prohibits various types of conduct on grounds of medical ethics (Articles 511-15 to 511-25), including the conception of human embryos *in vitro* for research or experimental purposes (Article 511-18).

B. The Public Health Code

27. At the material time the limitation period for an action in damages in the administrative courts was four years, while the period in which a pregnancy could be voluntarily terminated lawfully was ten weeks following conception.

28. The provisions of the Public Health Code as worded since the Patients' Rights and Quality of the Health Service Act (Law no. 2002-303 of 4 March 2002) came into force read as follows:

Article L. 1142-1

> "Save where they incur liability as a result of a defect in a health product, the medical practitioners mentioned in Part IV of this Code and all hospitals, clinics, departments and organisations in which preventive medicine, diagnosis or treatment is performed on individuals shall only be liable for damage caused by preventive medicine, diagnosis or treatment if they have been at fault.
>
> ..."

Article L. 1142-2

“Private medical practitioners, the hospitals, clinics, health services and organisations mentioned in Article L. 1142-1 and any other legal entity other than the State that is engaged in preventive medicine, diagnosis or treatment and the producers and suppliers of and dealers in health products in the form of finished goods mentioned in Article L. 5311-1 with the exception of sub-paragraph 5 thereof, subject to the provisions of Article L. 1222-9, and sub-paragraphs 11, 14 and 15, that are used in connection with such activities shall be under a duty to take out insurance in respect of any third-party or administrative liability they may incur for damage sustained by third parties as a result of an assault against the person in the course of that activity taken as a whole.

...”

Article L. 1142-28

“The limitation period for actions against medical practitioners and public or private hospitals or clinics in respect of preventive medicine, diagnosis or treatment shall be ten years from the date the condition stabilises.”

Article L. 2211-1

“As stated in Article 16 of the Civil Code as hereafter reproduced: ‘

‘The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life.’ ”

Article L. 2211-2

“The principle referred to in Article L. 2211-1 may only be derogated from in the event of necessity and in accordance with the conditions set out in this Part. It shall be the nation’s duty to educate society on this principle and its consequences, [to provide] information on life’s problems and on national and international demography, to inculcate a sense of responsibility, to receive children into society and to uphold family life. The State, aided by the local and regional authorities, shall perform these obligations and support initiatives that assist it to do so.”

Article L. 2212-1

“A pregnant woman whose condition causes her distress may ask a doctor to terminate her pregnancy. The pregnancy may only be terminated within the first twelve weeks.”

Article L. 2213-1

“A pregnancy may be voluntarily terminated at any time if two doctors from a pluridisciplinary team certify, after the team has issued a consultative opinion, that either the woman’s continued pregnancy puts her health at serious risk or that it is

highly likely that the unborn child is suffering from a particularly serious affection which is recognised as incurable at the time of diagnosis.

...”

C. The position taken by the Court of Cassation

29. The Court of Cassation has followed its decision in the instant case (see paragraph 22 above) on two occasions (in its judgments of 29 June 2001 (full court), *Bulletin* no. 165, and of 25 June 2002 (Criminal Division), *Bulletin* no. 144), despite submissions from the advocates-general concerned to the contrary.

1. Judgment of the full court of 29 June 2001

“As regards the two grounds of appeal of the public prosecutor at the Metz Court of Appeal and of Mrs X which have been joined together ... :

On 29 July 1995 a vehicle being driven by Mr Z collided with a vehicle being driven by Mrs X, who was six months pregnant. She was injured and as a result of the impact lost the foetus she was carrying. In the impugned judgment (Metz Court of Appeal, 3 September 1998), Mr Z was convicted of unintentionally injuring Mrs X, aggravated by the fact that he was under the influence of drink. However, he was acquitted of the unintentional killing of the unborn child.

The grounds of appeal against that decision are, firstly, that Article 221-6 of the Criminal Code, which makes it an offence to cause the death of another, does not exclude from its scope a viable unborn child and that, by holding that this provision applied only to a child whose heart was beating at birth and who was breathing, the Court of Appeal had added a condition that was not contained in the statute, and, secondly, unintentionally causing the death of an unborn child constituted the offence of unintentional homicide if the unborn child was viable at the material time, irrespective of whether or not it breathed when it was separated from the mother, with the result that there had been a violation of Articles 111-3, 111-4 and 221-6 of the Criminal Code and Article 593 of the Code of Criminal Procedure.

The rule that offences and punishment must be defined by law, which requires that criminal statutes be construed strictly, pleads against extending the scope of Article 221-6 of the Criminal Code, which makes unintentional homicide an offence, to cover unborn children whose status in law is governed by special provisions concerning embryos and foetuses.

...”

2. Judgment of the Criminal Division of 25 June 2002

"...

Having regard to former Article 319, Article 221-6 and Article 111-4 of the Criminal Code:

The rule that offences and punishment must be defined by law, which requires that criminal statutes be construed strictly, pleads against a charge of unintentional homicide lying in the case of a child that is not born alive.

The impugned judgment established that Z, whose pregnancy under the supervision of X came to term on 10 November 1991, attended the clinic in order to give birth on 17 November. She was placed under observation at about 8.30 p.m. and drew the attention of the midwife, Y, to an anomaly in the child's cardiac rhythm. Y refused to call the doctor. A further test carried out at 7 a.m. the following morning showed a like anomaly and subsequently that the heart had stopped beating altogether. At about 8 a.m., X pronounced the baby dead. In the evening he proceeded to extract the stillborn child by caesarean section. According to the autopsy report, the child did not present any malformation but had suffered from anoxia.

In finding Y guilty of unintentional homicide and X, who was acquitted by the Criminal Court, liable for the civil consequences of that offence, the Court of Appeal held that the child's death was a result of the negligent acts and omissions of both the doctor in failing to place the patient, who was beyond term, under closer observation and of the midwife in failing to notify an unequivocal anomaly noted when the child's cardiac rhythm was recorded.

After noting that the stillborn child did not present any organic lesion capable of explaining its death, the Court of Appeal stated: 'This child had reached term several days previously and, but for the fault that has been found, would have been capable of independent survival, with a human existence separate from its mother's.'

However, by so holding, the Court of Appeal misapplied the provisions referred to above and the aforementioned principles.

It follows that this appeal on points of law is allowed. The case will not be remitted, as the facts are not capable of coming within the definition of any criminal offence.

..."

30. The Criminal Division of the Court of Cassation has held that a court of appeal gave valid reasons for finding a defendant guilty of the unintentional homicide of a child who died an hour after its birth on the day of a road traffic accident in which its mother, who was eight months' pregnant, was seriously injured, when it held that, by failing to control his vehicle, the driver had caused the child's death an hour after birth as a result of irreversible lesions to vital organs sustained at the moment of impact (Court of Cassation, Criminal Division, 2 December 2003).

31. An article entitled "Unintentional violence on pregnant women and the offence of unintentional homicide" (*Recueil Dalloz* 2004, p. 449) notes that in twenty-eight out of a total of thirty-four articles commenting on the Criminal Division of the Court of Cassation's judgment of 2 December 2003 (see paragraph 30 above) the authors are critical of the Court of Cassation's case-law (see paragraph 29 above).

The criticism includes: the laconic reasoning of the Court of Cassation's judgments and incoherence of the protection afforded, as a person causing unintentional injury is liable to criminal prosecution while a person who unintentionally causes the death of the foetus goes unpunished; the fact that a child who has lived for a few minutes is recognised as having standing as a victim, whereas a child that dies *in utero* is ignored by the law; and the fact that freedom to procreate is less well protected than freedom to have an abortion.

D. The Garraud amendment

32. On 27 November 2003 the National Assembly adopted on its second reading a bill to adapt the criminal justice system to changes in criminality. The bill included the Garraud amendment, so named after the member of parliament who introduced it, which created an offence of involuntary termination of pregnancy (ITP).

33. The adoption of this amendment gave rise to fierce controversy and, after a week of consultations, the Minister of Justice, Mr Perben, declared on 5 December 2003 that the member's proposal "caused more problems than it solved" and that he was in favour of abandoning it. On 23 January 2004 the Senate unanimously deleted the amendment. This was the second time the senators had rejected such a proposal, as they had already opposed it in April 2003 when examining the Reinforcement of Protection against Road Violence Act, passed on 12 June 2003.

E. The laws on bioethics

34. On 11 December 2003 the National Assembly adopted on its second reading a bill on bioethics with a view to reforming the 1994 laws on the donation and use of parts and products of the human body, medically assisted procreation and prenatal diagnosis, as envisaged by the legislature at the time, in order to take into account subsequent scientific and medical progress and new issues with which society was confronted. In view of the speed with which technological advances are made, the bill reinforces the guarantees on the provision of information and on seeking and obtaining consent, prohibits certain practices that are technically feasible (reproductive cloning) and provides a framework for those with a proven medical interest (research on embryos *in vitro*). It establishes a regulatory

and supervisory body (the Procreation, Embryology and Human Genetics Agency) whose functions also include acting as a watchdog and providing support and expert guidance in these spheres (http://www.assemblee-nationale.fr/dossiers/bioethique.asp).

III. EUROPEAN LAW

A. The Oviedo Convention on Human Rights and Biomedicine

35. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, also known as the Convention on Human Rights and Biomedicine, which was opened for signature on 4 April 1997 in Oviedo, came into force on 1 December 1999. In this convention, the member States of the Council of Europe, the other States and the European Community signatories to it,

> "...
>
> Resolving to take such measures as are necessary to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine,
>
> ... agreed as follows:
>
> **Chapter I – General provisions**
>
> **Article 1 – Purpose and object**
>
> Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.
>
> Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention.
>
> **Article 2 – Primacy of the human being**
>
> The interests and welfare of the human being shall prevail over the sole interest of society or science.
>
> ...

Chapter V – Scientific research

...

Article 18 – Research on embryos *in vitro*

1. Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo.

2. The creation of human embryos for research purposes is prohibited.

...

Chapter XI – Interpretation and follow-up of the Convention

Article 29 – Interpretation of the Convention

The European Court of Human Rights may give, without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of the present Convention at the request of:

– the Government of a Party, after having informed the other Parties;

– the Committee set up by Article 32, with membership restricted to the Representatives of the Parties to this Convention, by a decision adopted by a two-thirds majority of votes cast.

...”

36. The commentary on Article 1 (see paragraphs 16 to 19 of the explanatory report on the convention) states:

Article 1 – Purpose and object

“16. This Article defines the Convention’s scope and purpose.

17. The aim of the Convention is to guarantee everyone’s rights and fundamental freedoms and, in particular, their integrity and to secure the dignity and identity of human beings in this sphere.

18. The Convention does not define the term ‘everyone’ (in French ‘*toute personne*’). These two terms are equivalent and found in the English and French versions of the European Convention on Human Rights, which however does not define them. 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.

19. 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.

...”

B. Additional Protocol to the Convention on Human Rights and Biomedicine, on the Prohibition of Cloning Human Beings (12 January 1998)

37. Article 1 of the Protocol provides:

“1. Any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited.

2. For the purpose of this Article, the term human being ‘genetically identical’ to another human being means a human being sharing with another the same nuclear gene set.”

C. Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research

38. The draft Protocol was approved by the Steering Committee on Bioethics on 20 June 2003. It was submitted for approval to the Committee of Ministers of the Council of Europe, which sought a consultative opinion from the Parliamentary Assembly. On 30 April 2004 the Assembly issued an opinion (no. 252 (2004)) in which it declared itself in favour of the draft Protocol. On 30 June 2004 the Committee of Ministers adopted the text.

Article 1 – Object and purpose

“Parties to this Protocol shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to any research involving interventions on human beings in the field of biomedicine.”

Article 2 – Scope

“1. This Protocol covers the full range of research activities in the health field involving interventions on human beings.

2. This Protocol does not apply to research on embryos *in vitro*. It does apply to research on foetuses and embryos *in vivo*.

...”

Article 3 – Primacy of the human being

"The interests and welfare of the human being participating in research shall prevail over the sole interest of society or science."

Article 18 – Research during pregnancy or breastfeeding

"1. Research on a pregnant woman which does not have the potential to produce results of direct benefit to her health, or to that of her embryo, foetus or child after birth, may only be undertaken if the following additional conditions are met:

(i) the research has the aim of contributing to the ultimate attainment of results capable of conferring benefit to other women in relation to reproduction or to other embryos, foetuses or children;

..."

The explanatory report repeats the terms of the explanatory report on the convention.

D. The Working Party on the Protection of the Human Embryo and Foetus: protection of the human embryo *in vitro* (2003)

39. The Working Party on the Protection of the Human Embryo and Foetus set up by the Steering Committee on Bioethics reached the following conclusion in a report drawn up in 2003:

"This report aimed at giving an overview of current positions found in Europe regarding the protection of the human embryo *in vitro* and the arguments supporting them.

It shows a broad consensus on the need for the protection of the embryo *in vitro*. However, the definition of the status of the embryo remains an area where fundamental differences are encountered, based on strong arguments. These differences largely form the basis of most divergences around the other issues related to the protection of the embryo *in vitro*.

Nevertheless, even if agreement cannot be reached on the status of the embryo, the possibility of re-examining certain issues in the light of the latest developments in the biomedical field and related potential therapeutic advances could be considered. In this context, while acknowledging and respecting the fundamental choices made by the different countries, it seems possible and desirable with regard to the need to protect the embryo *in vitro* on which all countries have agreed, that common approaches be identified to ensure proper conditions for the application of procedures involving the creation and use of embryos *in vitro*. The purpose of this report is to aid reflection towards that objective."

E. The European Group on Ethics in Science and New Technologies at the European Commission

40. The Group has issued, *inter alia*, the following opinion on the ethical aspects of research involving the use of human embryos in the context of the 5th Framework Programme (23 November 1998):

"...

Legal background

Controversies on the concept of beginning of life and 'personhood'

Existing legislation in the Member States differs considerably from one another regarding the question of when life begins and about the definition of 'personhood'. As a result, no consensual definition, neither scientifically nor legally, of when life begins exists.

Two main views about the moral status of the embryo and thus regarding the legal protection afforded to them with respect to scientific research exist:

(i) human embryos are not considered as human beings and consequently have a relative worth of protection;

(ii) human embryos have the same moral status as human beings and consequently are equally worthy of protection.

The discussion of common rules on embryo research is continuing. Recently many European countries, when discussing and signing the Council of Europe Convention on Human Rights and Biomedicine, failed to reach a consensus concerning the definition of the embryo, and, therefore, were unable to find common ground on which to place the admissibility of human embryo research within the Convention. Hence, it is up to the Member States to legislate in this area. Yet, nevertheless, Article 18.1 of the Convention stipulates 'where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo'.

...

Different approaches regarding the definition of the human embryo

In most Member States there is presently no legal definition of the human embryo (Belgium, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal and Sweden). Among those Member States which define the embryo in their legislation, the existing definitions vary considerably from one country to another (Austria, Germany, Spain and the United Kingdom) ...

...

Different scope of national legislation

Among the Member States with legal provisions on embryo research, there are many differences regarding the activities allowed and prohibited.

There are countries where embryo research is allowed only for the benefit of the particular embryo (Austria, Germany). There are Member States where embryo research is exceptionally allowed (France, Sweden), or allowed under strict conditions (Denmark, Finland, Spain, United Kingdom).

...

Diversity of views

The diversity of views regarding the question whether or not research on human embryos *in vitro* is morally acceptable, depends on differences in ethical approaches, philosophical theories and national traditions, which are deeply rooted in European culture. Two contrasting approaches exist: a deontological approach, in which duties and principles control the ends and consequences of our actions; and utilitarian or consequentialist approaches in which human actions are evaluated in terms of means and ends or consequences.

...

The group submits the following opinion

In the preamble it appeared crucial to recall that the progress of knowledge of life sciences, which in itself has an ethical value, cannot, in any case, prevail over fundamental human rights and the respect which is due to all the members of the human family.

The human embryo, whatever the moral or legal status conferred upon it in the different European cultures and ethical approaches, deserves legal protection. Even if taking into account the continuity of human life, this protection ought to be reinforced as the embryo and the foetus develop.

The Treaty on European Union, which does not foresee legislative competence in the fields of research and medicine, implies that such protection falls within the competence of national legislation (as is the case for medically assisted procreation and voluntary interruption of pregnancy). However, Community authorities should be concerned with ethical questions resulting from medical practice or research dealing with early human development.

However, when doing so, the said Community authorities have to address these ethical questions taking into account the moral and philosophical differences, reflected by the extreme diversity of legal rules applicable to human embryo research, in the 15 Member States. It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code.

The respect for different philosophical, moral or legal approaches and for diverse national culture is essential to the building of Europe.

From an ethical point of view, the multicultural character of European society requires mutual tolerance to be shown by the citizens and political figures of the European Nation States that have chosen uniquely to tie their destiny together, while at the same time ensuring mutual respect for different historical traditions which are exceedingly strong.

From a legal point of view, this multiculturalism is based upon Article 6 of the Amsterdam Treaty (ex Article F of the Treaty on European Union) which recognises fundamental rights at Union level notably based on 'constitutional traditions common to the Member States'. It also declares that 'the Union shall respect the national identity of its Member States'.

It results from the aforementioned principles, that, in the scope of European research programmes, the question of research on the human embryo has to be approached, not only with regard to the respect for fundamental ethical principles, common to all Member States, but equally taking into consideration diverse philosophical and ethical conceptions, expressed through the practices and the national regulations in force in this field.

..."

IV. COMPARATIVE LAW

41. In the majority of the member States of the Council of Europe, the offence of unintentional homicide does not apply to the foetus. However, three countries have chosen to create specific offences. In Italy a person who negligently causes a pregnancy to terminate is liable to a prison sentence of between three months and two years under section 17 of the Abortion Act of 22 May 1978. In Spain Article 157 of the Criminal Code makes it a criminal offence to cause damage to the foetus and Article 146 an offence to cause an abortion through gross negligence. In Turkey Article 456 of the Criminal Code lays down that a person who causes damage to another shall be liable to a prison sentence of between six months and one year; if the victim is a pregnant woman and the damage results in premature birth, the Criminal Code prescribes a sentence of between two and five years' imprisonment.

THE LAW

I. ADMISSIBILITY OF THE APPLICATION

42. The Government's main submission was that the application was incompatible *ratione materiae* with the provisions of the Convention in that Article 2 did not apply to the unborn child. They further submitted that the

applicant had had a legal remedy capable of redressing her complaint, namely an action for damages against the hospital in the administrative courts. Accordingly, she had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. In the alternative, they considered that the application should be rejected as being manifestly ill-founded.

43. The applicant complained of the lack of protection of the unborn child under French criminal law and argued that the State had failed to discharge its obligations under Article 2 of the Convention by not allowing the offence of unintentional homicide to cover injury to an unborn child. She further submitted that the remedy available in the administrative courts was ineffective as it was incapable of securing judicial acknowledgment of the homicide of her child as such. Lastly, the applicant asserted that she had had a choice between instituting criminal and administrative proceedings and that, while her recourse to the criminal courts had, unforeseeably, proved unsuccessful, the possibility of applying to the administrative courts had in the meantime become statute-barred.

44. The Court observes that an examination of the application raises the issue whether Article 2 of the Convention is applicable to the involuntary termination of pregnancy and, if so, whether that provision required a criminal remedy to be available in the circumstances of the case or whether its requirements were satisfied by the possibility of an action for damages in the administrative courts. Considered in those terms, the objections that the application is incompatible *ratione materiae* with the provisions of the Convention and that the applicant failed to exhaust domestic remedies are very closely linked to the substance of the applicant's complaint under Article 2. Consequently, the Court considers it appropriate to join them to the merits (see, among other authorities, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 11, § 19).

45. The application cannot therefore be declared inadmissible either as being incompatible *ratione materiae* with the provisions of the Convention or for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. The Court further considers that the application raises issues of fact and law which require examination of the merits. It accordingly concludes that the application is not manifestly ill-founded. Having also established that no other obstacle to its admissibility exists, the Court declares it admissible.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

46. The applicant complained of the authorities' refusal to classify the taking of her unborn child's life as unintentional homicide. She argued that the absence of criminal legislation to prevent and punish such an act breached Article 2 of the Convention, which provides:

> “1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

A. The parties’ submissions

1. The applicant

47. The applicant asserted that the point at which life began had a universal meaning and definition. Even though that was in the nature of things, it was now scientifically proven that all life began at fertilisation. That was an experimental finding. A child that had been conceived but not yet born was neither a cluster of cells nor an object, but a person. Otherwise, it would have to be concluded that in the instant case she had not lost anything. Such an argument was unacceptable for a pregnant woman. Accordingly, the term “everyone” (“*toute personne*”) in Article 2 of the Convention was to be taken to mean human beings rather than individuals with the attributes of legal personality. Indeed, that had been the position taken by the *Conseil d’Etat* and the Court of Cassation, which, having agreed to review the compatibility of the Termination of Pregnancy Act with Article 2, had been compelled to accept that, from the first moments of its life in the womb, the unborn child came within the scope of that provision (*Conseil d’Etat* (full court), 21 December 1990, *Recueil Lebon*, p. 368; Court of Cassation (Criminal Division), 27 November 1996, *Bulletin criminel* no. 431).

48. In the applicant’s submission, French law guaranteed all human beings the right to life from conception, subject to certain exceptions provided for by law in the case of abortion. In that connection, she added that all forms of abortion, with the exception of therapeutic abortion, were incompatible with Article 2 of the Convention on account of the interference with the right to life of the conceived child. Even if it were accepted that, subject to certain conditions, States could allow women to have an abortion if they requested one, the Contracting States were not at liberty to exclude the unborn child from the protection of Article 2. A

distinction should be made between the rule and the exception. Section 1 of the Voluntary Termination of Pregnancy Act of 1975 (reproduced in Article 16 of the Civil Code and Article L. 2211-1 of the Public Health Code – see paragraph 28 above) laid down the rule, namely respect for every human being from the beginning of its life, and subsequently provided for an exception in case of necessity and in accordance with conditions defined by law. The legislature had also implicitly accepted that life began at the moment of conception by laying down a number of rules protecting the embryo *in vitro* in the laws on bioethics of 29 July 1994 (see paragraph 34 above). Accordingly, although death could in exceptional cases prevail over life, life remained the fundamental value protected by the Convention. The exception should not rule out the possibility of punishing a third party who, through negligence, caused an unborn child to die. The mother's wishes could not be equated with negligence on the part of a third party. The Court could therefore validly hold that the Contracting Parties' legislation should ensure the protection of the conceived child by making unintentional homicide of the latter a criminal offence, even if their legislation also permitted abortion.

49. The applicant pointed out that, as the Court had held, States had "a primary duty ... to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions" (see *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 85, ECHR 2000-III). In her submission, the new line of case-law adopted by the Court in *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, § 51, ECHR 2002-I), to the effect that where the right to life had been infringed unintentionally the judicial system did not necessarily require the provision of a criminal-law remedy, could not be followed in the instant case, because a civil remedy did not "satisfy the requirement of expressing public disapproval of a serious offence, such as the taking of life" (see the partly dissenting opinion of Judge Rozakis joined by Judges Bonello and Strážnická in the above-mentioned case). That would amount to debasing the right to life protected by Article 2. The applicant therefore considered that creating the offence of involuntary termination of pregnancy would fill the vacuum created by the Court of Cassation and would compensate for the State's failure to fulfil its duty to protect the human being at the earliest stages of its development (see paragraph 32 above).

50. The applicant argued that she had had the option of instituting criminal or administrative proceedings and had been able to choose between the two types of court. She explained that she had chosen to bring criminal proceedings because, firstly, they were the only remedy capable of securing judicial acknowledgment of the unintentional homicide of her child as such and, secondly, because a criminal investigation aided in the task of

establishing responsibility. In her submission, there had been nothing to suggest that the criminal proceedings were bound to fail, as the position adopted by the Court of Cassation in her case in 1999 and subsequently confirmed in 2001 and 2002 had by no means been definitively established, in view of the resistance shown in decisions by courts of appeal and the virtually unanimous criticism by legal writers (see paragraph 31 above). For example, in a judgment of 3 February 2000 (Reims Court of Appeal, *Dalloz* 2000, case-law, p. 873), the Court of Appeal had convicted a motorist of unintentional homicide for driving into another vehicle, seriously injuring the driver, who was eight months' pregnant, and subsequently causing the death of the baby (see also Versailles Court of Appeal, 19 January 2000, unreported). The applicant submitted in conclusion that, on the face of it, she had had no reason to apply to the administrative courts and contended that she could not have known whether to do so until Dr G. had been acquitted by the Criminal Court. However, by that time an action against the administrative authorities had already become statute-barred. The remedy in the administrative courts could not therefore be regarded as effective within the meaning of Article 35 § 1 of the Convention.

2. The Government

51. After emphasising that neither metaphysics nor medicine had given a definitive answer to the question whether and from what moment a foetus was a human being, the Government asserted that from a legal standpoint Article 2 of the Convention did not protect the foetus's right to life as a person. The use of the term "everyone" ("*toute personne*") in Article 2 and in Articles 5, 6, 8 to 11 and 13 of the Convention was such that it could apply only postnatally (see *X v. the United Kingdom*, no. 8416/79, Commission decision of 13 May 1980, Decisions and Reports (DR) 19, p. 244). The same observation applied to Article 2 taken separately, as all the restrictions on "everyone's" right to life provided for in paragraph 2 concerned, by their very nature, persons who had already been born.

52. Nor could the "right to life" referred to in the same Article be construed as applying to the foetus; it concerned only the life of persons who had already been born alive, since it would be neither consistent nor justified to detach that right from the entity in which it was vested, namely the person. Whereas, by contrast, Article 4 § 1 of the 1969 American Convention on Human Rights provided: "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", the signatories to the Convention would not have envisaged such an extension of Article 2 of the Convention since by 1950 virtually all the Contracting Parties had already authorised abortion in certain circumstances. To acknowledge that the foetus had the right to life within the meaning of Article 2 would place the mother's life and that of the foetus on an equal footing. Furthermore, prioritising the protection of the

foetus's life or restricting it solely in the event of a severe, immediate and insurmountable risk to the mother's life would constitute a step backwards historically and socially and would call into question the legislation in force in many States Parties to the Convention.

53. The Government pointed out that the Commission had considered whether it was appropriate to recognise the foetus as having the right to life subject to certain restrictions relating to the protection of the mother's life and health (see *X. v. the United Kingdom*, cited above). They submitted that such a limitation would not allow recourse to abortion for therapeutic, moral or social reasons, which at the time when the text of the Convention was being negotiated had nonetheless already been authorised by the legislation of a number of countries. It would amount to penalising States that had opted for the right to abortion as an expression and application of a woman's autonomy over her own body and her right to control her maternity. The States Parties had not intended to confer on the expression "right to life" a meaning that extended to the foetus and was manifestly contrary to their domestic legislation.

54. Having regard to the foregoing, the Government considered that the Convention was not designed to cover the foetus and that if the European States wished to ensure effective protection of the foetus's right to life, a provision separate from Article 2 would have to be drawn up. To construe Article 2 as allowing implicit exceptions to the right to life would be at variance with both the letter and the spirit of that Article. Firstly, the permissible exceptions formed an exhaustive list, there being no other option where such a fundamental right was concerned; here, the Government referred to the *Pretty* case in which the Court had stated: "[Article 2] sets out the limited circumstances when deprivation of life may be justified" (see *Pretty v. the United Kingdom*, no. 2346/02, § 37, ECHR 2002-III). Secondly, the exceptions were to be understood and construed strictly (see *Öcalan v. Turkey*, no. 46221/99, § 201, 12 March 2003).

55. The Government observed that in the instant case the applicant had undergone a therapeutic abortion as a result of acts carried out by the doctor outside the statutory period within which abortion was permitted, which had been ten weeks at the time and was now twelve weeks (see paragraphs 27-28 above). However, if the Court were to take the view that that factor rendered Article 2 applicable, and that the foetus should therefore be regarded as a person protected by that provision, they pointed out that in several European States the statutory period for abortion was more than twenty weeks, for example in the Netherlands or in England (where abortions could be carried out at up to twenty-four weeks). Unless domestic legislation and the national authorities' margin of appreciation in this sphere were to be called into question, Article 2 could consequently not apply to the unborn child. That also meant, in the Government's submission, that the issue of the viability of the foetus was irrelevant in the instant case. It would

be paradoxical for States to have a margin of appreciation allowing them to exclude the foetus from protection under Article 2 where a pregnancy was terminated intentionally with the mother's consent – and sometimes on that condition alone – if they were not granted the same margin of appreciation in excluding the foetus from the scope of that provision where a pregnancy was interrupted on account of unintentional negligence.

56. In the alternative, the Government pointed out that in French law the foetus was protected indirectly through the pregnant woman's body, of which it was an extension. That was the case where abortion was carried out intentionally but not in one of the cases exhaustively listed in the relevant legislation (Article 223-10 of the Criminal Code – see paragraph 25 above), or in the event of an accident. In the latter case, the ordinary remedies for establishing civil liability could be used, and the mother could be awarded compensation for personal, pecuniary and non-pecuniary damage, her pregnant state being necessarily taken into account. Furthermore, under the criminal law, anyone who through inadvertence caused a pregnancy to be terminated could be prosecuted for causing unintentional injury, the destruction of the foetus being regarded as damage to the woman's organs.

57. The Government argued that the applicant could have sought damages from the hospital for the doctor's negligence within the four-year limitation period for actions for damages in the administrative courts. They explained that victims of damage caused by public servants had two distinct remedies available. If the damage resulted from personal negligence on the part of the public servant, not intrinsically connected with the performance of his or her duties, the victim could obtain compensation by suing the person concerned in the ordinary courts, whereas if the damage resulted from negligence that disclosed failings on the part of the authority in question, the matter would be classified as official negligence and come within the jurisdiction of the administrative courts. The Government submitted that in *Epoux V.* (judgment of 10 April 1992) the *Conseil d'Etat* had abandoned its position that a hospital department could incur liability only in cases of gross negligence. Furthermore, an exception to the rule that the hospital was liable in the event of medical negligence occurred where negligence was deemed to be severable from the public service, either because it was purely personal and thus wholly unrelated to the performance of official duties – which had not been the case in this instance – or because it was intentional or exceptionally serious, amounting to inexcusable professional misconduct of such gravity that it ceased to be regarded as indissociable from the performance of the official duties in question. The Government explained that personal and official negligence were in fact usually interlinked, particularly in cases of unintentional injury or homicide. For that reason, the *Conseil d'Etat* had accepted long ago that the personal liability of a public servant did not exclude the liability of the authority to which he or she was attached (*Epoux Lemonnier*, 1918). The Government

therefore considered that the applicant had had the possibility of seeking redress in the administrative courts as soon as the damage had occurred, without having to wait for the criminal proceedings to end. Such an action would have been all the more likely to succeed as, for the hospital to be held liable, only ordinary negligence had to be made out, and the expert reports ordered by the courts had referred precisely to the hospital department's organisational problems. The administrative courts could therefore legitimately have been expected to reach the same conclusion.

58. The Government asserted that that remedy had been effective and adequate in terms of the positive obligations under Article 2 of the Convention (see *Calvelli and Ciglio*, cited above) and that the applicant had, through her own inaction or negligence, deprived herself of a remedy which had nonetheless been available to her for four years from the time when the damage had occurred, and in respect of which she could have received advice from her lawyers. In *Calvelli and Ciglio* there had been no doubt that Article 2 of the Convention was applicable to a newborn child. In the instant case, in which the applicability of Article 2 was questionable, there were therefore additional reasons for considering that the possibility of using civil or administrative remedies to establish liability was sufficient. In the Government's submission, such an action for damages could have been based on the taking of the life of the child the applicant was carrying, since the relevant case-law of the administrative courts did not appear thus far to preclude the possibility of affording embryos protection under Article 2 of the Convention (*Conseil d'Etat* (full court), *Confédération nationale des associations familiales catholiques et autres*, judgment of 21 December 1990 – see paragraph 47 above). At the material time, in any event, the issue had not been clearly resolved by the *Conseil d'Etat*.

59. In conclusion, the Government considered that, even supposing that Article 2 was applicable in the instant case, that provision did not require the life of the foetus to be protected by the criminal law in the event of unintentional negligence, as was the position in many European countries.

B. Third-party interventions

1. *Center for Reproductive Rights*

60. The Center for Reproductive Rights (CRR) submitted that unborn foetuses could not be treated as persons under the law and hence covered by Article 2 of the Convention because there was no legal basis for such an approach (i), and because granting them that status would interfere with women's basic human rights (ii). Lastly, they argued that it would be inadvisable to extend rights to the foetus because the loss of a wanted foetus constituted an injury to the expectant mother (iii).

61. (i) The assertion that a foetus was a person ran counter to the case-law of the Convention institutions, the legislation of the member States of the Council of Europe, international standards and the case-law of courts throughout the world. Relying on the decisions in *X v. the United Kingdom* (Commission decision cited above), *H. v. Norway* (no. 17004/90, Commission decision of 19 May 1992, DR 73, p. 155) and, most recently, *Boso v. Italy* (no. 50490/99, ECHR 2002-VII), in which the Commission and the Court had held that granting a foetus the same rights as a person would place unreasonable limitations on the Article 2 rights of persons already born, the CRR saw no reason to depart from that conclusion unless the right to abortion in all Council of Europe member States were to be called into question.

62. The foetus was not recognised as a person in European domestic legislation or by the national courts interpreting it. The CRR drew attention to the Court of Cassation's settled position (see paragraph 29 above), which was consistent with the distinction made in French law between the concepts of "human being" and "person", the former being a biological concept and the latter a legal term attached to a legal category whose rights took effect and were perfected at birth, although in certain circumstances the rights acquired at birth were retroactive to conception. The national courts had also addressed the issue of the legal status of the person in the context of abortion. For example, the Austrian and Netherlands Constitutional Courts had held that Article 2 should not be interpreted as protecting the unborn child, and the French Constitutional Council had found no conflict between legislation on the voluntary termination of pregnancy and the constitutional protection of the child's right to health (decision no. 74-54 of 15 January 1975). That reading was consistent with the relevant legislation throughout Europe: thirty-nine member States of the Council of Europe – the exceptions being Andorra, Ireland, Liechtenstein, Malta, Poland and San Marino, which had maintained severe restrictions on abortion (with only very narrow therapeutic exceptions) – permitted a woman to terminate a pregnancy without restriction during the first trimester or on very broad therapeutic grounds.

63. With regard to international and regional standards, the CRR observed that the International Covenant on Civil and Political Rights provided no indication that the right to life applied to a foetus. It added that the Human Rights Committee had routinely emphasised the threat to women's lives posed by illegal abortions. The same was true of the Convention on the Rights of the Child and the interpretation by the Committee on the Rights of the Child of Article 6, which provided: "Every child has the inherent right to life." On several occasions the Committee had stated its concern about the difficulties of adolescent girls in having their pregnancies terminated in safe conditions and had expressed its fears as to the impact of punitive legislation on maternal mortality rates. The case-law

of the Inter-American regional system, notwithstanding Article 4 of the American Convention on Human Rights (see paragraph 52 above), did not provide absolute protection to a foetus before birth. The Inter-American Commission on Human Rights had held in *Baby Boy* (1981) that Article 4 did not preclude liberal national-level abortion legislation. Furthermore, the Organisation of African Unity had adopted the Protocol on the Rights of Women on 11 July 2003 to supplement the African Charter on Human and Peoples' Rights of 27 June 1981, broadening the protection of the right of women to terminate a pregnancy.

64. Lastly, with regard to non-European States, the CRR noted that the Supreme Courts of Canada and the United States had declined to treat unborn foetuses as persons under the law (in *Winnipeg Child Family Services v. G.* (1997) and *Roe v. Wade* (1973)). The United States Supreme Court had reaffirmed that position in a recent case in 2000 (*Stenberg v. Carhart*), in which it had declared unconstitutional a State law prohibiting certain methods of abortion and providing no protection for women's health. Similarly, in South Africa, ruling on a constitutional challenge to the recently enacted Choice on Termination of Pregnancy Act, which permitted abortion without restriction during the first trimester and on broad grounds at later stages of pregnancy, the High Court had considered that the foetus was not a legal person (*Christian Lawyers Association of South Africa and Others v. Minister of Health and Others*, 1998).

65. (ii) In the CRR's submission, recognition of the foetus's rights interfered, in particular, with women's fundamental right to a private life. In *Brüggemann and Scheuten v. Germany* (no. 6959/75, Commission's report of 12 July 1977, DR 10, p. 100), the Commission had implicitly accepted that an absolute prohibition on abortion would be an impermissible interference with privacy rights under Article 8 of the Convention. Subsequently, while rejecting the suggestion that Article 2 protected the right to life of foetuses, the Convention institutions had further recognised that the right to respect for the private life of the pregnant woman, as the person primarily concerned by the pregnancy and its continuation or termination, prevailed over the father's rights (see paragraph 61 above). In addition to respect for private life, the preservation of the pregnant woman's life and health took precedence. In holding that restrictions on the exchange of information on abortion created a risk to the health of women whose pregnancies posed a threat to their lives, the Court had ruled that the injunction in question had been "disproportionate to the aims pursued" and that, consequently, a woman's health interest prevailed over a State's declared moral interest in protecting the rights of a foetus (see *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246-A).

66. (iii) In the CRR's submission, declining to recognise the foetus as a person under Article 2 did not preclude a remedy for injuries such as the one

that had given rise to the instant case. The loss of a wanted foetus was an injury suffered by the expectant mother. Consequently, the rights that were entitled to protection in the instant case were those of the applicant and not those of the foetus she had lost. It was within the power of the legislature of every Council of Europe member State to recognise both civil and criminal offences committed by individuals who injured a woman by causing the termination of a wanted pregnancy.

2. Family Planning Association

67. The Family Planning Association (FPA) set out primarily to argue that the right to life enshrined in Article 2 of the Convention should not be interpreted as extending to the unborn (i). In support of that argument, the FPA provided the Court with information on the current legal position on abortion in the member States of the Council of Europe (ii), and a summary of the legal status of the unborn in United Kingdom law (iii).

68. (i) The FPA pointed out that Article 2 was drafted in such a way as to allow only very limited exceptions to the prohibition it imposed on intentional deprivation of life. Voluntary termination of pregnancy was not one of those exceptions; nor could any of the exceptions be interpreted to include that practice. Recent evidence showed that voluntary termination of pregnancy on request in the first trimester was now widely accepted across Europe, as was termination on certain grounds in the second trimester. If Article 2 were interpreted as applying to the unborn from the moment of conception, as contended by the applicant, the Court would be calling into question the laws on abortion enacted in most Contracting States. Furthermore, that would render illegal the majority of methods of contraception currently in use throughout Europe, since they acted or could act after conception to prevent implantation. There would therefore be devastating implications in terms of both individual choices and lives and social policy. The English High Court had recently acknowledged that that would be the undesirable consequence if it were to accept the argument of the Society for the Protection of Unborn Children that emergency hormonal contraceptives were abortifacients because pregnancy began at conception (see *Society for the Protection of Unborn Children v. Secretary of State for Health* [2002] High Court, Administrative Court (England and Wales)).

69. The possibility that Article 2 applied to the foetus but with certain implied limitations, for example only after a critical point in time (viability or some other gestational stage) should likewise be rejected. Recent evidence showed that, beyond the broad consensus identified above, there was a complete lack of any generally accepted standard in relation to the gestational limit on the availability of abortion, the grounds on which termination was available after that point in time, or the conditions that had to be satisfied.

70. (ii) Recent survey information was available (*Abortion Legislation in Europe*, International Planned Parenthood Federation (IPPF) European Network, July 2002, and *Abortion Policies: a Global Review*, United Nations Population Division, June 2002) in relation to the legal position on abortion in the Council of Europe member States with the exception of Serbia and Montenegro. The surveys showed that four States essentially prohibited abortion, except where the pregnant woman's life was endangered (Andorra, Liechtenstein, San Marino and Ireland), whereas the great majority of member States provided for much wider access to abortion services. Such evidence of the availability of abortion across Europe was in keeping with the general trend towards the liberalisation of abortion laws. No general consensus emerged from the practice of the member States as to the period during which abortion was permitted after the first trimester or the conditions that had to be satisfied for abortion to be available in the later stages of pregnancy. Furthermore, the grounds on which abortion was permitted without a time-limit were many and varied. The FPA accordingly contended that if Article 2 were interpreted as applying to the unborn from some particular point in time, that would call into question the legal position in a number of States where termination was available on certain grounds at a later stage than that determined by the Court.

71. (iii) It was now a settled general principle of the common law that in the United Kingdom legal personality crystallised upon birth. Up until that point, the unborn had no legal personality independent of the pregnant woman. However, despite that lack of legal personality, the interests of the unborn were often protected while they were in the womb, even though those interests could not be realised as enforceable rights until the attainment of legal personality on birth.

72. In the civil law, that specifically meant that prior to birth the unborn had no standing to bring proceedings for compensation or other judicial remedies in relation to any harm done or injury sustained while in the womb, and that no claim could be made on their behalf (see *Paton v. British Pregnancy Advisory Service Trustees* [1979] Queen's Bench Reports 276). Efforts had been made to persuade the courts dealing with such cases that according to the law of succession, the unborn could be deemed to be "born" or "persons in being" whenever their interests so demanded. However, *Burton* confirmed that that principle was also subject to the live birth of a child ([1993] Queen's Bench Reports 204, 227).

73. In the criminal law, it was well established that the unborn were not treated as legal persons for the purpose of the common-law rules of murder or manslaughter. In *Attorney-General's Reference* (no. 3, 1994), the House of Lords had concluded that injury of the unborn without a live birth could not lead to a conviction for murder, manslaughter or any other violent crime. The rights of the unborn were further protected by the criminal law on abortion. Sections 58 and 59 of the Offences against the Person Act 1861

had introduced the statutory offences of procuring abortion and procuring the means to cause abortion. Similarly, by section 1 of the Infant Life (Preservation) Act 1929 the destruction of the unborn, where capable of live birth, was a serious offence. Those Acts were still in force. Abortion and child destruction remained illegal, subject to the application of the Abortion Act 1967.

C. The Court's assessment

74. The applicant complained that she had been unable to secure the conviction of the doctor whose medical negligence had caused her to have to undergo a therapeutic abortion. It has not been disputed that she intended to carry her pregnancy to full term and that her child was in good health. Following the material events, the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant and unintentional homicide of the child she was carrying. The courts held that the prosecution of the offence of unintentional injury to the applicant was statute-barred and, quashing the Court of Appeal's judgment on the second point, the Court of Cassation held that, regard being had to the principle that the criminal law was to be strictly construed, a foetus could not be the victim of unintentional homicide. The central question raised by the application is whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention.

1. Existing case-law

75. Unlike Article 4 of the American Convention on Human Rights, which provides that the right to life must be protected "in general, from the moment of conception", Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define "everyone" ("*toute personne*") whose "life" is protected by the Convention. The Court has yet to determine the issue of the "beginning" of "everyone's right to life" within the meaning of this provision and whether the unborn child has such a right.

To date it has been raised solely in connection with laws on abortion. Abortion does not constitute one of the exceptions expressly listed in paragraph 2 of Article 2, but the Commission has expressed the opinion that it is compatible with the first sentence of Article 2 § 1 in the interests of protecting the mother's life and health because "if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the

woman at that stage, of the 'right to life' of the foetus" (see *X v. the United Kingdom*, Commission decision cited above, p. 253).

76. Having initially refused to examine *in abstracto* the compatibility of abortion laws with Article 2 of the Convention (see *X v. Norway*, no. 867/60, Commission decision of 29 May 1961, Collection of Decisions, vol. 6, p. 34, and *X v. Austria*, no. 7045/75, Commission decision of 10 December 1976, DR 7, p. 87), the Commission acknowledged in *Brüggemann and Scheuten* (cited above) that women complaining under Article 8 of the Convention about the Constitutional Court's decision restricting the availability of abortions had standing as victims. It stated on that occasion: "... pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus" (ibid., p. 116, § 59). However, the Commission did not find it "necessary to decide, in this context, whether the unborn child is to be considered as 'life' in the sense of Article 2 of the Convention, or whether it could be regarded as an entity which under Article 8 § 2 could justify an interference 'for the protection of others' " (ibid., p. 116, § 60). It expressed the opinion that there had been no violation of Article 8 of the Convention because "not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother" (ibid., pp. 116-17, § 61), while emphasising: "There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution" (ibid., pp. 117-18, § 64).

77. In *X v. the United Kingdom* (cited above), the Commission considered an application by a man complaining that his wife had been allowed to have an abortion on health grounds. While it accepted that the potential father could be regarded as the "victim" of a violation of the right to life, it considered that the term "everyone" in several Articles of the Convention could not apply prenatally, but observed that "such application in a rare case – e.g. under Article 6, paragraph 1 – cannot be excluded" (p. 249, § 7; for such an application in connection with access to a court, see *Reeve v. the United Kingdom*, no. 24844/94, Commission decision of 30 November 1994, DR 79-A, p. 146). The Commission added that the general usage of the term "everyone" ("*toute personne*") and the context in which it was used in Article 2 of the Convention did not include the unborn. As to the term "life" and, in particular, the beginning of life, the Commission noted a "divergence of thinking on the question of where life begins" and added: "While some believe that it starts already with conception, others tend to focus upon the moment of nidation, upon the point that the foetus becomes 'viable', or upon live birth" (*X v. the United Kingdom*, p. 250, § 12).

The Commission went on to examine whether Article 2 was "to be interpreted: as not covering the foetus at all; as recognising a 'right to life'

of the foetus with certain implied limitations; or as recognising an absolute ‘right to life’ of the foetus” (ibid. p. 251, § 17). Although it did not express an opinion on the first two options, it categorically ruled out the third interpretation, having regard to the need to protect the mother’s life, which was indissociable from that of the unborn child: “The ‘life’ of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the ‘unborn life’ of the foetus would be regarded as being of a higher value than the life of the pregnant woman” (ibid., p. 252, § 19). The Commission adopted that solution, noting that by 1950 practically all the Contracting Parties had “permitted abortion when necessary to save the life of the mother” and that in the meantime the national law on termination of pregnancy had “shown a tendency towards further liberalisation” (ibid., p. 252, § 20).

78. In *H. v. Norway* (cited above), concerning an abortion carried out on non-medical grounds against the father’s wishes, the Commission added that Article 2 required the State not only to refrain from taking a person’s life intentionally but also to take appropriate steps to safeguard life (p. 167). It considered that it did not have to decide “whether the foetus may enjoy a certain protection under Article 2, first sentence”, but did not exclude the possibility that “in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life” (ibid.). It further noted that in such a delicate area the Contracting States had to have a certain discretion, and concluded that the mother’s decision, taken in accordance with Norwegian legislation, had not exceeded that discretion (p. 168).

79. The Court has only rarely had occasion to consider the application of Article 2 to the foetus. In *Open Door and Dublin Well Woman* (cited above), the Irish Government relied on the protection of the life of the unborn child to justify their legislation prohibiting the provision of information concerning abortion facilities abroad. The only issue that was resolved was whether the restrictions on the freedom to receive and impart the information in question had been necessary in a democratic society, within the meaning of paragraph 2 of Article 10 of the Convention, to pursue the “legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect” (pp. 27-28, § 63), since the Court did not consider it relevant to determine “whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2” (p. 28, § 66). Recently, in circumstances similar to those in *H. v. Norway*

(cited above), where a woman had decided to terminate her pregnancy against the father's wishes, the Court held that it was not required to determine "whether the foetus may qualify for protection under the first sentence of Article 2 as interpreted [in the case-law relating to the positive obligation to protect life]", and continued: "Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention, ... in the instant case ... [the] pregnancy was terminated in conformity with section 5 of Law no. 194 of 1978" – a law which struck a fair balance between the woman's interests and the need to ensure protection of the foetus (see *Boso*, cited above).

80. It follows from this recapitulation of the case-law that in the circumstances examined to date by the Convention institutions – that is, in the various laws on abortion – the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that "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" (see *Brüggemann and Scheuten*, cited above, pp. 116-17, § 61) and by the Court in the above-mentioned *Boso* decision. It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child.

2. Approach in the instant case

81. The special nature of the instant case raises a new issue. The Court is faced with a woman who intended to carry her pregnancy to term and whose unborn child was expected to be viable, at the very least in good health. Her pregnancy had to be terminated as a result of an error by a doctor and she therefore had to have a therapeutic abortion on account of negligence by a third party. The issue is consequently whether, apart from cases where the mother has requested an abortion, harming a foetus should be treated as a criminal offence in the light of Article 2 of the Convention, with a view to protecting the foetus under that Article. This requires a preliminary examination of whether it is advisable for the Court to intervene in the debate as to who is a person and when life begins, in so far as Article 2 provides that the law must protect "everyone's right to life".

82. As is apparent from the above recapitulation of the case-law, the interpretation of Article 2 in this connection has been informed by a clear desire to strike a balance, and the Convention institutions' position in relation to the legal, medical, philosophical, ethical or religious dimensions

of defining the human being has taken into account the various approaches to the matter at national level. This has been reflected in the consideration given to the diversity of views on the point at which life begins, of legal cultures and of national standards of protection, and the State has been left with considerable discretion in the matter, as the opinion of the European Group on Ethics in Science and New Technologies at the European Commission appositely puts it: "the ... Community authorities have to address these ethical questions taking into account the moral and philosophical differences, reflected by the extreme diversity of legal rules applicable to human embryo research ... It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code" (see paragraph 40 above).

It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions" (see *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31, and subsequent case-law). The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate (see paragraph 83 below) and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life (see paragraph 84 below).

83. The Court observes that the French Court of Cassation, in three successive judgments delivered in 1999, 2001 and 2002 (see paragraphs 22 and 29 above), considered that the rule that offences and punishment must be defined by law, which required criminal statutes to be construed strictly, excluded acts causing a fatal injury to a foetus from the scope of Article 221-6 of the Criminal Code, under which unintentional homicide of "another" is an offence. However, if, as a result of unintentional negligence, the mother gives birth to a live child who dies shortly after being born, the person responsible may be convicted of the unintentional homicide of the child (see paragraph 30 above). The first-mentioned approach, which conflicts with that of several courts of appeal (see paragraphs 21 and 50 above), was interpreted as an invitation to the legislature to fill a legal vacuum. That was also the position of the Criminal Court in the instant case: "The court ... cannot create law on an issue which [the legislature has] not yet succeeded in defining." The French parliament attempted such a definition in proposing to create the offence of involuntary termination of pregnancy (see paragraph 32 above), but the bill containing that proposal was lost, on account of the fears and uncertainties that the creation of the offence might arouse as to the determination of when life began, and the

disadvantages of the proposal, which were thought to outweigh its advantages (see paragraph 33 above). The Court further notes that alongside the Court of Cassation's repeated rulings that Article 221-6 of the Criminal Code does not apply to foetuses, the French parliament is currently revising the 1994 laws on bioethics, which added provisions to the Criminal Code on the protection of the human embryo (see paragraph 25 above) and required re-examination in the light of scientific and technological progress (see paragraph 34 above). It is clear from this overview that in France the nature and legal status of the embryo and/or foetus are currently not defined and that the manner in which it is to be protected will be determined by very varied forces within French society.

84. At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus (see paragraphs 39-40 above), although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom (see paragraph 72 above) – require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2. The Oviedo Convention on Human Rights and Biomedicine, indeed, is careful not to give a definition of the term "everyone", and its explanatory report indicates that, in the absence of a unanimous agreement on the definition, the member States decided to allow domestic law to provide clarification for the purposes of the application of that Convention (see paragraph 36 above). The same is true of the Additional Protocol on the Prohibition of Cloning Human Beings and the Additional Protocol on Biomedical Research, which do not define the concept of "human being" (see paragraphs 37-38 above). It is worth noting that the Court may be requested under Article 29 of the Oviedo Convention to give advisory opinions on the interpretation of that instrument.

85. Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention ("*personne*" in the French text). As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant's pregnancy falls within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere. With regard to that issue, the Court has considered whether the legal protection afforded the applicant

by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in Article 2 of the Convention.

86. In that connection, it observes that 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, especially as there was no conflict between the rights of the mother and the father or of the unborn child and the parents, the loss of the foetus having been caused by the unintentional negligence of a third party.

87. In *Boso*, cited above, the Court said that even supposing that the foetus might be considered to have rights protected by Article 2 of the Convention (see paragraph 79 above), Italian law on the voluntary termination of pregnancy struck a fair balance between the woman's interests and the need to ensure protection of the unborn child. In the present case, the dispute concerns the involuntary killing of an unborn child against the mother's wishes, causing her particular suffering. The interests of the mother and the child clearly coincided. The Court must therefore examine, from the standpoint of the effectiveness of existing remedies, the protection which the applicant was afforded in seeking to establish the liability of the doctor concerned for the loss of her child *in utero* and to obtain compensation for the abortion she had to undergo. The applicant argued that only a criminal remedy would have been capable of satisfying the requirements of Article 2 of the Convention. The Court does not share that view, for the following reasons.

88. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, for example, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36).

89. Those principles apply in the public-health sphere too. The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V, and *Calvelli and Ciglio*, cited above, § 49).

90. Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, "the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged" (see *Calvelli and Ciglio*, cited above, § 51; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII).

91. In the instant case, in addition to the criminal proceedings which the applicant instituted against the doctor for unintentionally causing her injury – which, admittedly, were terminated because the offence was covered by an amnesty, a fact that did not give rise to any complaint on her part – she had the possibility of bringing an action for damages against the authorities on account of the doctor's alleged negligence (see *Kress v. France* [GC], no. 39594/98, §§ 14 et seq., ECHR 2001-VI). Had she done so, the applicant would have been entitled to have an adversarial hearing on her allegations of negligence (see *Powell*, cited above) and to obtain redress for any damage sustained. A claim for compensation in the administrative courts would have had fair prospects of success and the applicant could have obtained damages from the hospital. That is apparent from the findings clearly set out in the expert reports (see paragraph 16 above) in 1992 – before the action had become statute-barred – concerning the poor organisation of the hospital department in question and the serious negligence on the doctor's part, which nonetheless, in the Court of Appeal's opinion (see paragraph 21 above), did not reflect a total disregard for the most fundamental principles and duties of his profession such as to render him personally liable.

92. The applicant's submission concerning the fact that the action for damages in the administrative courts was statute-barred cannot succeed in the Court's view. In this connection, it refers to its case-law to the effect that the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain

margin of appreciation in this regard (see, among other authorities, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports* 1997-VIII, p. 2955, § 33). These legitimate restrictions include the imposition of statutory limitation periods, which, as the Court has held in personal injury cases, "serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time" (see *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV, pp. 1502-03, § 51).

93. In the instant case, a four-year limitation period does not in itself seem unduly short, particularly in view of the seriousness of the damage suffered by the applicant and her immediate desire to prosecute the doctor. However, the evidence indicates that the applicant deliberately turned to the criminal courts, apparently without ever being informed of the possibility of applying to the administrative courts. Admittedly, the French parliament recently extended the time allowed to ten years under the Law of 4 March 2002 (see paragraph 28 above). It did so with a view to standardising limitation periods for actions for damages in all courts, whether administrative or ordinary. This enables the general emergence of a system increasingly favourable to victims of medical negligence to be taken into account, an area in which the administrative courts appear capable of striking an appropriate balance between consideration of the damage to be redressed and the excessive "judicialisation" of the responsibilities of the medical profession. The Court does not consider, however, that these new rules can be said to imply that the previous period of four years was too short.

94. In conclusion, the Court considers that in the circumstances of the case an action for damages in the administrative courts could be regarded as an effective remedy that was available to the applicant. Such an action, which she failed to use, would have enabled her to prove the medical negligence she alleged and to obtain full redress for the damage resulting from the doctor's negligence, and there was therefore no need to institute criminal proceedings in the instant case.

95. The Court accordingly concludes that, even assuming that Article 2 was applicable in the instant case (see paragraph 85 above), there has been no violation of Article 2 of the Convention.

FOR THESE REASONS, THE COURT

1. *Joins to the merits* unanimously the Government's preliminary objections of the application's incompatibility *ratione materiae* with the provisions of the Convention and of failure to exhaust domestic remedies, and *dismisses* them;

2. *Declares* unanimously the application admissible;

3. *Holds* by fourteen votes to three that there has been no violation of Article 2 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 2004.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) separate opinion of Mr Rozakis joined by Mr Caflisch, Mr Fischbach, Mr Lorenzen and Mrs Thomassen;
(b) separate opinion of Mr Costa joined by Mr Traja;
(c) dissenting opinion of Mr Ress;
(d) dissenting opinion of Mrs Mularoni joined by Mrs Strážnická.

L.W.
P.J.M.

SEPARATE OPINION OF JUDGE ROZAKIS JOINED BY JUDGES CAFLISCH, FISCHBACH, LORENZEN AND THOMASSEN

I have voted, together with the majority of the Grand Chamber, in favour of finding that there has been no violation of Article 2 of the Convention in the instant case. Yet, my approach differs in certain respects from that of the majority and I would therefore like to append to the judgment this separate opinion setting out the points on which my assessment of the law is at variance with that of the majority.

The Court in this case correctly stresses that research into French domestic law shows that the nature and legal status of the embryo and/or foetus are currently not defined in France and that the manner in which it is to be protected will ultimately be determined by very varied forces within French society (see paragraph 83 *in fine* of the judgment). It also stresses (and this was a forceful argument in the eyes of the Court) that at European level there is no consensus on the nature and status of the embryo and/or foetus and, at best, "it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom – require protection in the name of human dignity, without making it a 'person' with the 'right to life' for the purposes of Article 2" (see paragraph 84 of the judgment).

Despite these findings, with which I readily agree, the Court refuses to draw the relevant conclusions, namely that in the present state of development of science, law and morals, both in France and across Europe, the right to life of the unborn child has yet to be secured. Even if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after its birth. This does not mean that the unborn child does not enjoy any protection by human society, since – as the relevant legislation of European States, and European agreements and relevant documents show – the unborn life is already considered to be worthy of protection. But as I read the relevant legal instruments, this protection, though afforded to a being considered worthy of it, is, as stated above, distinct from that given to a child after birth, and far narrower in scope. It consequently transpires from the present stage of development of the law and morals in Europe that the life of the unborn child, although protected in some of its attributes, cannot be equated to postnatal life, and, therefore, does not enjoy a right in the sense of "a right to life", as protected by Article 2 of the Convention. Hence, there is a problem of applicability of Article 2 in the circumstances of the case.

Instead of reaching that unavoidable conclusion, as the very reasoning of the judgment dictated, the majority of the Grand Chamber opted for a neutral stance, declaring: "the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention" (see paragraph 85 of the judgment).

What also seems problematic with the majority's reasoning is that, despite their obvious doubts or, at any rate, their reluctance to accept that Article 2 was applicable in this case, the majority ended up abandoning their neutral stance and based their finding of no violation on the argument that the procedural guarantees inherent in the protection of Article 2 had been satisfied in the circumstances of the case. By using the "even assuming" formula as to the applicability of Article 2, and by linking the life of the foetus to the life of the mother ("the life of the foetus was intimately connected with that of the mother and could be protected through her ..." – see paragraph 86 of the judgment), the majority surreptitiously brought Article 2 of the Convention to the fore of the case. Yet, it is obvious from the case-law that reliance on the procedural guarantees of Article 2 to determine whether or not there has been a violation presupposes the prima facie applicability of that Article (and using the "even assuming" formula does not alter the position if, in the end, the only real ground for the Court's findings is the hypothesis referred to in the formula); and in the circumstances of the case there was not even the remotest threat to the mother's right of life such as would justify bringing the procedural guarantees of Article 2 of the Convention into play.

For the reasons explained above, I am unable to agree with the reasoning of the majority and conclude that, as matters presently stand, Article 2 is inapplicable in this case.

SEPARATE OPINION OF JUDGE COSTA JOINED BY JUDGE TRAJA

(*Translation*)

1. In this case, in which a doctor's negligence caused a pregnancy to be terminated after almost six months against the wishes of the woman carrying the unborn child, the Court has found no violation of Article 2 of the Convention.

2. Its reasoning, however, is cautious: the Court decided that it was unnecessary to determine whether Article 2 was applicable, holding that even assuming it was, there has been no violation on the facts.

3. I voted in favour of finding no violation of Article 2, but would have preferred the Court to hold that Article 2 was applicable, even if such a conclusion is not self-evident. As I will attempt to demonstrate, such a decision would perhaps have been clearer with only minimal inconvenience as regards the scope of the judgment.

4. It seems to me, firstly, that it is not the Court's role *as a collegiate body* to consider cases from a primarily ethical or philosophical standpoint (and, in my view, it has successfully avoided this pitfall in this judgment). The Court must endeavour to remain within its own – legal – sphere of competence, although I accept that law does not exist in a vacuum and is not a chemically pure substance detached from moral or societal considerations. Whether or not they choose to express their personal opinions as Article 45 of the Convention entitles (but does not oblige) them to do, individual judges are not, in my opinion, subject to the same constraints. The present case enters into the realm of deep personal convictions and for my part I thought it necessary and perhaps helpful to set out my views. As the reader will have understood, they differ slightly from those of the majority.

5. From the ethical standpoint, the most natural way to attempt to interpret Article 2 of the Convention ("[e]veryone's right to life shall be protected by law" – "*le droit de toute personne à la vie est protégé par la loi*" in the French text) is to ask what is meant by "everyone" ("*toute personne*") and when life begins. It is very difficult to obtain unanimity or agreement here, as ethics are too heavily dependent on individual ideology. In France, the National Advisory Committee, which has been doing a remarkable job for the past twenty years and has issued a number of opinions on the human embryo (a term it generally prefers to "foetus" at all stages of development), has not been able to come up with a definitive answer to these questions. This is only to be expected, particularly bearing in mind the Committee's composition, which President Mitterrand decided at its inception should be pluralist. To say (as the Committee has done since issuing its first opinion in 1984) that "the embryo must be *recognised as* a *potential* human person" does not solve the problem because a being that is

recognised as potential is not necessarily a being and may in fact, by converse implication, not be one. As to life and, therefore, the point at which life begins, everybody has his or her own conception (see the Committee's fifth opinion, issued in 1985). All this shows is that there perhaps exists a right for a potential person to a potential life; for lawyers, however, there is a world of difference between the potential and the actual.

6. What is true for the ethical bodies of States such as the respondent State is also true internationally. The judgment rightly notes that the Oviedo Convention on Human Rights and Biomedicine (a Council of Europe sponsored instrument signed in 1997) does not define what is meant by "everyone". Nor does it provide any definition of "human being", despite the importance it attaches to the dignity, identity, primacy, interests and welfare of human beings. Nor is there any reference to the beginning of life.

7. Does the present inability of ethics to reach a consensus on what is a person and who is entitled to the right to life prevent the law from defining these terms? I think not. It is the task of lawyers, and in particular judges, especially human rights judges, to identify the *notions* – which may, if necessary, be the autonomous notions the Court has always been prepared to use – that correspond to the words or expressions in the relevant legal instruments (in the Court's case, the Convention and its Protocols). Why should the Court not deal with the terms "everyone" and the "right to life" (which the European Convention on Human Rights does not define) in the same way it has done from its inception with the terms "civil rights and obligations", "criminal charges" and "tribunals", even if we are here concerned with philosophical, not technical, concepts?

8. Indeed, the Court has already embarked upon this course in the sphere of Article 2, at least as regards the right to life, for instance, by imposing positive obligations on States to protect human life, or holding that in exceptional circumstances the use of potentially lethal force by State agents may lead to a finding of a violation of Article 2. Through its case-law, therefore, the Court has broadened the notions of the right to life and unlawful killing, if not the notion of life itself.

9. Conversely, I do not believe that it is possible to take the convenient way out by saying that Mrs Vo, a "person", had a right to life (of her unborn child). It is true that the notion of who constitutes a victim has been enlarged by the case-law: a complaint by a nephew alleging a violation of Article 2 on account of his uncle's murder has thus been declared admissible (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI). However, in the instant case, the Court is concerned with a pleaded right to life of the unborn child and this type of decision can only apply to the applicant's case if it is accepted that the unborn child itself has a right to life, since, in order to be a victim within the meaning of Article 34 of the Convention, Mrs Vo must also be a victim of a violation that is recognised by the Convention, *quod est demonstrandum*.

10. Indeed, it seems to me that the Commission and the Court have already worked on the assumption that Article 2 is applicable to the unborn child (without, however, affirming that the unborn child *is* a person). In a number of cases they have held that, even if they did not have to decide the question of applicability, there was in any event no violation of Article 2 on the facts, for instance in the case of a termination of pregnancy in accordance with legislation "which struck a fair balance between the woman's interests and the need to ensure protection of the foetus" (see *Boso v. Italy* (dec.), no. 50490/99, ECHR 2002-VII, which is cited in the judgment; but also, in less forthright terms, the Commission's decision of 19 May 1992 in another cited case, *H. v. Norway*, no. 17004/90, Decisions and Reports 73). 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.

11. It is possible to turn to the law of the respondent State, not because it is a model to be imposed on others, but because it is directly in issue in the present case. As far back as 1990, the *Conseil d'Etat* held that the French Voluntary Termination of Pregnancy Act (which the Constitutional Council had declared in its decision no. 74-54 DC of 15 January 1975 was not unconstitutional, while at the same time declining jurisdiction to examine its compatibility with the Convention) was not incompatible with Article 2 of the Convention or Article 6 of the International Covenant on Civil and Political Rights (which provides: "Every human being has the inherent right to life. This right shall be protected by law ..."). Above all, the *Conseil d'Etat* thereby recognised unambiguously, albeit implicitly, that that Act came within the scope of Article 2 (see its decision of 21 December 1990, *Confédération nationale des associations familiales catholiques*, *Recueil Lebon*, p. 369, and the submissions of Mr Bernard Stirn, which clarify it).

12. To my mind, this judgment of the highest French administrative court demonstrates that a decision by the European Court of Human Rights in which it is plainly stated that the "end of life" of an unborn child is within the scope of Article 2 of the Convention would not threaten – at least not in essence – the domestic legislation of a large number of European countries that makes the voluntary termination of pregnancy lawful, subject, of course, to compliance with certain conditions. In a number of European States, such legislation has been held to be consistent with the domestic Constitution and even with Article 2 of the Convention. The Norwegian Supreme Court so found in 1983. The German Federal Constitutional Court and the Spanish Constitutional Court have also accepted that the right to life, as protected by Article 2 of the Convention, can apply to the embryo or the foetus (the question whether that right is *absolute* being a separate issue). These are examples of decisions in which the highest courts of

individual countries have recognised that the right to life, whether set out in Article 2 of the European Convention on Human Rights or enshrined in domestic constitutional principles of like content and scope, *applies* to the foetus, without being absolute. Is there any reason why the Court, which aspires to the role of a constitutional court within the European human rights order, should be less bold?

13. Obviously, were the Court to rule that Article 2 was applicable, either on its wording or in substance, it would have to examine *in any event* (and not just on the facts of the individual case as here) whether or not it had been complied with. This, though, should not be of concern to it either. In the aforementioned *Boso* decision, it applied the "fair balance" test to the impugned statute, so that it would have had to reach the opposite conclusion had the legislation been different and not struck a fair balance between the protection of the foetus and the mother's interests. Potentially, therefore, the Court reviews compliance with Article 2 in all cases in which the "life" of the foetus is destroyed.

14. Similarly, it might be contended that, since Article 15 of the Convention states that no derogation may be made from Article 2, it would be preposterous for the Court to find that Article 2 is not absolute, or is subject to implied exceptions other than those exhaustively set out in the second paragraph thereof. This would militate in favour of holding that Article 2 does not apply to the unborn child (as the unborn child is not one of the exceptions set out in the second paragraph). However, I am not persuaded by either of these two arguments. The non-derogation rule only prohibits States Parties that derogate from the Convention in time of war or other public emergency, as they are entitled to do by Article 15, from infringing Article 2. However, quite clearly situations and exceptional circumstances of this kind are quite unrelated to the killing of an unborn child. More disconcerting from a logical perspective is an argument based on the actual wording of Article 2. However, not only has the Court already decided the point (as it indisputably did in *Boso*), Article 2 cannot be conclusively construed as clearly prohibiting all voluntary terminations of pregnancy, if only because a number of Contracting States have ratified the Convention without any apparent problem, despite already possessing legislation permitting voluntary termination in certain circumstances. Even more persuasive when it comes to an evolutive interpretation of Article 2 is the fact that a large number of European countries passed legislation in the 1970s permitting the voluntary termination of pregnancy within a strict framework.

15. As regards the potential effects of finding Article 2 applicable, it could perhaps be objected, conversely, that the present case can be distinguished from the voluntary termination of pregnancy cases and that the destruction of a foetus as a result of medical error, or any other negligent act or omission, is different from termination at the request of the mother in

distress herself. In other words, those who, in the name of women's freedom of choice, defend the principle of voluntary termination of pregnancy might fear that such legislation would indirectly be at risk if Article 2 were found to be applicable. It is true that the "Garraud amendment", which is mentioned in the judgment and was finally withdrawn from Parliament, was fiercely opposed by sections of French society, in particular (but not only) supporters of the Voluntary Termination of Pregnancy Act, precisely for this reason (as it was intended to create an offence of involuntary termination of pregnancy).

16. However, I do not believe that such fears are legitimately justified, if only because a woman who loses her unborn child against her wishes and sees her hopes of maternity dashed is in an entirely different situation from a woman resigned – albeit likewise in circumstances of suffering and bereavement – to ask for her pregnancy to be brought to an end. In any event, it is not a judicial decision (on the applicability or otherwise of Article 2 of the Convention) which will resolve this ethical debate, still less justify society's policy choices. In addition, since *Vo v. France* does not require States to afford *criminal-law* protection against the risk of the loss of the foetus (and on that I agree), it does not, in any event, plead in favour of making the involuntary termination of pregnancy a criminal offence.

17. In sum, I see no good legal reason or decisive policy consideration for not applying Article 2 in the present case. On a general level, I believe (as do many senior judicial bodies in Europe) that there is life before birth, within the meaning of Article 2, that the law must therefore protect such life, and that if a national legislature considers that such protection cannot be absolute, then it should only derogate from it, particularly as regards the voluntary termination of pregnancy, within a regulated framework that limits the scope of the derogation. The actual circumstances of Mrs Vo's case made it all the more appropriate to find that Article 2 was applicable: she was six months' pregnant (compare this – purely for illustration purposes – with the German Federal Constitutional Court's view that life begins after fourteen days' gestation), there was every prospect that the foetus would be born viable and, lastly, the pregnancy was clearly ended by an act of negligence, against the applicant's wishes.

18. I have nothing further to add, since, with minor differences, I agree with what the judgment has to say in finding that there has been no violation of Article 2.

DISSENTING OPINION OF JUDGE RESS

(*Translation*)

1. France's positive obligation to protect unborn children against unintentional homicide, that is to say against negligent acts that could cause a child's death, can only be discharged if French law has effective procedures in place to prevent the recurrence of such acts. On this point, I am unable to agree with the opinion expressed by the majority that an action in damages in the administrative courts (on account of the hospital doctor's alleged negligence) afforded the unborn child adequate and effective protection against medical negligence. As Judge Rozakis, joined by Judges Bonello and Strážnická, pointed out in his partly dissenting opinion in *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, ECHR 2002-I), an action in pecuniary and even non-pecuniary damages will not in all circumstances be capable of protecting against the unintentional taking of life, especially in a case such as the present one in which a mother lost her child as a result of a doctor's negligence. Even though I accepted the outcome in *Calvelli and Ciglio*, which was based on the fact that the applicants had agreed to compensation under a friendly settlement, criminal proceedings were commenced in that case (although they were not continued because prosecution of the offence became time-barred).

It is not retribution that makes protection by the criminal law desirable, but deterrence. In general, it is through the criminal law that society most clearly and strictly conveys messages to its members and identifies values that are most in need of protection. Life, which is one of the values, if not the main value, protected by the Convention (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, §§ 92-94, ECHR 2001-II, and *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), will in principle require the protection of the criminal law if it is to be adequately safeguarded and defended. Financial liability to pay compensation is only a secondary form of protection. In addition, hospitals and doctors are usually insured against such risks, so that the "pressure" on them is reduced.

2. One might consider that imposing a disciplinary penalty on a doctor could be regarded as equivalent to imposing a criminal penalty in certain circumstances. Disciplinary measures were viewed as an alternative means of discouraging negligence in *Calvelli and Ciglio* (cited above, § 51). However, it is equally clear that, as unpleasant as the consequences may be professionally, a disciplinary penalty does not amount to general condemnation (*Unwerturteil*). Disciplinary penalties depend on conditions that are entirely specific to the profession concerned (the bodies being self-regulating) and in general do not afford the deterrence necessary to protect such an important value as life. Nevertheless, the question has to be asked

whether in the present case a disciplinary penalty for such a serious error could have provided sufficient deterrence. Here, though, is where the problem lies, as the authorities at no stage brought disciplinary proceedings against the doctor. For an error as serious as that committed by Dr G., such disciplinary proceedings accompanied by an adequate measure could at least have sent an appropriate signal to the medical profession to prevent the recurrence of such tragic events. I do not think it necessary to say that France requires criminal legislation. However, it does need to take strict disciplinary action in order to meet its obligation to afford effective protection of the life of the unborn child. In my opinion, therefore, there was no effective protection.

3. In order to reach that conclusion, it seems necessary to find out whether Article 2 applies to the unborn child. I am prepared to accept that there may be acceptable differences in the level of protection afforded to an embryo and to a child after birth. Nevertheless, that does not justify the conclusion (see paragraph 85 of the judgment) that it is not possible to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention. All the Court's case-law and the Commission's decisions (see paragraphs 75-80) are based on the "assuming that" argument (*in eventu*). Yet the failure to give a clear answer can no longer be justified by reasons of procedural economy. Nor can the problem of protecting the embryo through the Convention be solved solely through the protection of the mother's life. As this case illustrates, the embryo and the mother, as two separate "human beings", need separate protection.

4. The Vienna Convention on the Law of Treaties (Article 31 § 1) requires treaties to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose. The ordinary meaning can only be established from the text as a whole. Historically, lawyers have understood the notion of "everyone" ("*toute personne*") as including the human being before birth and, above all, the notion of "life" as covering all human life commencing with conception, that is to say from the moment an *independent existence* develops until it ends with death, birth being but a stage in that development.

The structure of Article 2 and, above all, the exceptions set out in paragraph 2 thereof, appear to indicate that persons are only entitled to protection thereunder once they have been born and that it is only after birth that they are regarded as having rights under the Convention. In view of the "aim" of the Convention to provide extended protection, this does not appear to be a conclusive argument. Firstly, a foetus may enjoy protection, especially within the framework of Article 8 § 2 (see *Odièvre v. France* [GC], no. 42326/98, § 45, ECHR 2003-III). In addition, the decisions of the Commission and the Court contain indications that Article 2 is applicable to

the unborn child. In all the cases in which that issue has been considered, the Commission and the Court have developed a concept of an implied limitation or of a fair balance between the interests of society and the interests of the individual, that is to say the mother or the unborn child. Admittedly, these concepts were developed in connection with legislation on the voluntary, but not the involuntary, termination of pregnancy. However, it is clear that they would not have been necessary if the Convention institutions had considered at the outset that Article 2 could not apply to the unborn child. Even though the Commission and the Court have left the question open formally, such a legal structure proves that both institutions were inclined to adopt the ordinary meaning of "human life" and "everyone" rather than the other meaning.

Similarly, the practice of the Contracting States, virtually all of which had constitutional problems with their laws on abortion (voluntary termination of pregnancy), clearly shows that the protection of life also extends in principle to the foetus. Specific laws on voluntary abortion would not have been necessary if the foetus did not have a life to protect and was fully dependent till birth on the unrestricted wishes of the pregnant mother. Nearly all the Contracting States have had problems because, in principle, the protection of life under their constitutional law also extends to the prenatal stage.

5. It is obvious that the premise of the debate on genetic safeguards in a number of recent conventions and the prohibition on the reproductive cloning of "human beings" in the Charter of Fundamental Rights of the European Union (Article 3 § 2, final sub-paragraph) is that the protection of life extends to the initial phase of human life. The Convention, which was conceived as a living instrument to be interpreted in the light of present-day conditions in society, must take such a development into account in order to confirm the "ordinary meaning", in accordance with Article 32 of the Vienna Convention.

Even if it is assumed that the ordinary meaning of "human life" in Article 2 of the Convention is not entirely clear and can be interpreted in different ways, the obligation to protect human life requires more extensive protection, particularly in view of the techniques available for genetic manipulation and the unlimited production of embryos for various purposes. The manner in which Article 2 is interpreted must evolve in accordance with these developments and constraints and confront the real dangers now facing human life. Any restriction on such a dynamic interpretation must take into account the relationship between the life of a person who has been born and the unborn life, which means that protecting the foetus to the mother's detriment would be unacceptable.

6. The fact that various provisions of the Convention contain guarantees which by their nature cannot extend to the unborn cannot alter that position. If, by their very nature, the scope of such provisions can only extend to

natural persons or legal entities, or to persons who have been born or are adults, that does not preclude the conclusion that other provisions such as the first sentence of Article 2 incorporate protection for the lives of human beings in the initial stage of their development.

7. It should be noted that the present case is wholly unrelated to laws on the voluntary termination of pregnancy. That is a separate issue which is fundamentally different from interference, against the mother's wishes, in the life and welfare of her child. The present case concerns wrongdoing by a third party resulting in the loss of a foetus, if not the death of the mother, whereas voluntary abortion is solely concerned with the relationship between the mother and the child and the question of their protection by the State. Although holding that Article 2 applies to human life before birth may have repercussions on the laws regulating the voluntary termination of pregnancy, that is not a reason for saying that Article 2 is not applicable. Quite the opposite.

Furthermore, it is not necessary in the instant case to decide when life begins. It was noted that the 21-week-old foetus was viable, although I believe that the notion of viability cannot limit the States' positive obligation to protect the unborn child against interference and negligence by doctors.

8. There can be no margin of appreciation on the issue of the applicability of Article 2. A margin of appreciation may, in my opinion, exist to determine the measures that should be taken to discharge the positive obligation that arises because Article 2 is applicable, but it is not possible to restrict the applicability of Article 2 by reference to a margin of appreciation. The question of the interpretation or applicability of Article 2 (an absolute right) cannot depend on a margin of appreciation. If Article 2 is applicable, any margin of appreciation will be confined to the effect thereof.

9. Since I consider that Article 2 applies to human beings even before they are born, an interpretation which seems to me to be consistent with the approach of the Charter of Fundamental Rights of the European Union, and since France does not afford sufficient protection to the foetus against the negligent acts of third parties, I find that there has been a violation of Article 2 of the Convention. As regards the specific measures necessary to discharge that positive obligation, that is a matter for the respondent State, which should either take strict disciplinary measures or afford the protection of the criminal law (against unintentional homicide).

DISSENTING OPINION OF JUDGE MULARONI JOINED BY JUDGE STRÁŽNICKÁ

(*Translation*)

I am unable to concur with the majority's finding that there has been no violation of Article 2 of the Convention because the applicant could have brought an action in negligence in the administrative courts for the damage caused by the hospital doctor (see paragraph 91 of the judgment). According to the majority, since the applicant did not bring such an action, there was no violation of Article 2.

I agree with the majority that it is necessary to consider "whether the legal protection afforded the applicant by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in Article 2 of the Convention" (see paragraph 85 of the judgment) and that "the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), requires the State not only to refrain from the 'intentional' taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, among other authorities, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36)" (see paragraph 88 of the judgment).

However, I come to entirely different conclusions.

I note that in December 1991, when the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant entailing total unfitness for work for a period not exceeding three months and unintentional homicide of her child, the *Conseil d'Etat* had not yet abandoned its position that a hospital department could incur liability only in cases of gross negligence (see paragraph 57 of the judgment – the Government's submissions).

It is true that, as the majority note, the applicant could have tried to bring an action in damages against the authorities before it became time-barred. However, it seems to me that the Court may be demanding too much of this applicant when it is recalled that the position taken by the Court of Cassation in its judgment of 30 June 1999, and which it subsequently followed in its judgments of 29 June 2001 (sitting as a full court) and 25 June 2002 (see paragraph 29 of the judgment), was far from established, as witnessed by the court of appeal decisions to the contrary, the submissions of the advocates-general at the Court of Cassation and, lastly, the almost universal criticism it attracted from legal commentators (see paragraph 31 of the judgment). Since it was doubtful that she would be

successful in an action in the administrative courts, the applicant brought criminal proceedings under the only two provisions of the Criminal Code that were open to her. She told the Court that she chose that course of action because a criminal investigation would aid in the task of establishing responsibility (see paragraph 50 of the judgment). That explanation is entirely logical: it is precisely what most victims of crime do in countries that offer a choice between proceedings in the criminal courts or in the civil or administrative courts.

It could be argued that the French legal system did not afford the applicant any "effective" remedy when these sad events took place.

Nevertheless, let us assume that the applicant had a choice between criminal and administrative remedies. Since a victim cannot claim compensation for his or her damage twice over, it would to my mind be disproportionate to criticise the applicant for not having exercised both remedies simultaneously. It would also represent a departure from the Court's case-law.

Under the case-law of the Convention institutions, where there is a choice of remedies open to the applicant, Article 35 must be applied to reflect the practical realities of the applicant's position in order to ensure the effective protection of the rights and freedoms guaranteed by the Convention (see *Allgemeine Gold- und Silberscheideanstalt A.G. v. the United Kingdom*, no. 9118/80, Commission decision of 9 March 1983, Decisions and Reports (DR) 32, p. 165). The applicant must have made normal use of domestic remedies which are likely to be effective and sufficient. When a remedy has been attempted, use of another remedy which has essentially the same objective is not required (see *Wójcik v. Poland*, no. 26757/95, Commission decision of 7 July 1997, DR 90-A, p. 28; *Günaydin v. Turkey* (dec.), no. 27526/95, 25 April 2002; and *Anagnostopoulos v. Greece*, no. 54589/00, § 32, 3 April 2003). Furthermore, the applicant is only required to have recourse to such remedies as are both available and sufficient, that is to say capable of providing redress for his or her complaints (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 11, § 19, and *Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, p. 16, § 29).

I would also note that the amount at stake in *Anagnostopoulos* (cited above) was 15,000 drachmas (approximately 44 euros), whereas in the present case we are dealing with an unborn child.

The majority make a number of references to *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, ECHR 2002-I), in which the Court stated (in paragraph 51): "[I]f the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by

Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy." It added: "In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged."

I consider that the differences between the solutions afforded by the two domestic legal systems must outweigh the similarities. In *Calvelli and Ciglio*, the applicants – the father and mother of a newborn child who died two days after birth – had brought criminal proceedings which ended when the offence of involuntary manslaughter with which the obstetrician was charged became time-barred. However, the applicants were able to summon the doctor to appear in the civil courts after he was convicted at first instance in the criminal courts almost seven years after the death of the child and, with the civil proceedings still pending, they reached a settlement with the doctor's and clinic's insurers in respect of the damage they had sustained. The Court recognised that the Italian legal system afforded the applicants an effective alternative to criminal proceedings (*Calvelli and Ciglio*, cited above, §§ 54-55) that enabled the respondent State to discharge its positive obligations under Article 2 of the Convention. In my opinion, the same cannot be said of its French counterpart in the present case.

I must confess that, had I been sitting in *Calvelli and Ciglio*, I would undoubtedly have concurred with the partly dissenting opinion of Judges Rozakis, Bonello and Strážnická. However, even if I had agreed with the majority, it does not seem to me that their conclusion in *Calvelli and Ciglio* can be transposed to the present case, in which the limitation period for an action in the administrative courts, which at the time was four years from the date of stabilisation of the damage, had expired by the time the criminal proceedings ended. The applicant received no reparation for her loss, not even for the offence of unintentionally causing injuries, for which the doctor was given an amnesty by the law of 3 August 1995.

I conclude that, in the light of the loss of the child she was carrying, the legal protection France afforded the applicant did not satisfy the procedural requirements inherent in Article 2 of the Convention.

Obviously, since I do not accept the reasoning that led the majority to hold that there had been no violation of Article 2 on procedural grounds and that it was therefore unnecessary to determine whether Article 2 was applicable, I must explain why I consider that that provision is applicable and has been violated.

Until now, while the Convention institutions have refrained from deciding whether or not Article 2 applies to unborn children (see paragraphs 75-80 of the judgment), they have not excluded the possibility

that the foetus may enjoy a certain protection under Article 2, first sentence (see *H. v. Norway*, no. 17004/90, Commission decision of 19 May 1992, DR 73, p. 167, and *Boso v. Italy* (dec.), no. 50490/99, ECHR 2002-VII).

Firstly, I think it necessary to bear in mind that the task of the national and international judge is not always easy, especially when a text may be construed in ways that are diametrically opposed.

The *travaux préparatoires* on the Convention are silent on the scope of the words "everyone" and "life" and as to whether Article 2 is applicable prior to birth.

Yet, since the 1950s, considerable advances have been made in science, biology and medicine, including at the prenatal stage.

The political community is engaged at both national and international level in trying to identify the most suitable means of protecting, even prenatally, human rights and the dignity of the human being against certain biological and medical applications.

I consider that it is not possible to ignore the major debate that has taken place within national parliaments in recent years on the subject of bioethics and the desirability of introducing or reforming legislation on medically assisted procreation and prenatal diagnosis, in order to reinforce guarantees, prohibit techniques such as the reproductive cloning of human beings and provide a strict framework for techniques with a proven medical interest.

The aim of the Convention on Human Rights and Biomedicine, which was opened for signature on 4 April 1997 in Oviedo and came into force on 1 December 1999, is to protect the dignity and identity of human beings and to guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine. It protects the dignity of everyone, including the unborn, and its main concern is to ensure that no research or intervention may be carried out that would undermine respect for the dignity and identity of the human being. Although this convention is very recent, it does not define the terms "everyone" and "human being" either, although it affirms their primacy in Article 2 in these terms: "The interests and welfare of the human being shall prevail over the sole interests of society or science." As to the problem of defining the term "everyone", the explanatory report produced by the Directorate General of Legal Affairs at the Council of Europe states, in paragraph 18: "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."

Furthermore, I note that this convention unquestionably contains provisions on the prenatal phase (see, for instance, Chapter IV – Human Genome). Requests may be made to the European Court of Human Rights under Article 29 of the convention for advisory opinions on its interpretation. The Contracting States did not impose any restriction on the

scope of such referrals confining the Court's jurisdiction to questions arising postnatally.

Although the texts are either silent or full of cross-references, the applicant is nevertheless entitled to an answer.

Secondly, I would stress that the Court must deliver a decision on the concrete case before it. The application concerns the termination of a pregnancy as a result of medical negligence that caused the loss of a foetus aged between 20 and 24 weeks, against the mother's wishes.

In that connection, I consider that one should not overlook the fact that the foetus in the instant case was almost as old as foetuses that have survived and that scientific advances now make it possible to know virtually everything about a foetus of that age: its weight, sex, exact measurements, and whether it has any deformities or problems. Although it does not yet have any independent existence from that of its mother (though having said that, in the first years of its life, a child cannot survive alone without someone to look after it either), I believe that it is a being separate from its mother.

Although legal personality is only acquired at birth, this does not to my mind mean that there must be no recognition or protection of "everyone's right to life" before birth. Indeed, this seems to me to be a principle that is shared by all the member States of the Council of Europe, as domestic legislation permitting the voluntary termination of pregnancy would not have been necessary if the foetus was not regarded as having a life that should be protected. Abortion therefore constitutes an exception to the rule that the right to life should be protected, even before birth.

In any event, this case is wholly unconcerned with the States' domestic abortion laws, which have long been the subject matter of applications to the Convention institutions and have been found to be consistent with the Convention (see paragraphs 75-80 of the judgment).

I consider that, as with other Convention provisions, Article 2 must be interpreted in an evolutive manner so that the great dangers currently facing human life can be confronted. This is made necessary by the potential that exists for genetic manipulation and the risk that scientific results will be used for a purpose that undermines the dignity and identity of the human being. The Court has, moreover, often stated that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, among other authorities, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31; *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, p. 26, § 71; and *Mazurek v. France*, no. 34406/97, § 49, ECHR 2000-II).

I therefore find that Article 2 of the Convention is applicable in the present case and has been violated, as the right to life has not been protected by the law of the respondent State.