DEVELOPMENTS

Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment *Vo v. France*

By Jakob Pichon[*]

A. Introduction

In the July 8, 2004 case of *Vo v. France*[1], the European Court of Human Rights ("ECtHR") dealt with the question of whether the embryo/fetus[2] ("the fetus") enjoys the protection of the right to life provided by Article 2[3] of the European Convention on Human Rights ("the Convention")[4]. Below, a pregnant woman lost her fetus due to an error made by the attending doctor, and the *Cour de Cassation*, the French court of last instance, acquitted the doctor of involuntary homicide on the grounds that a fetus is not a person within the meaning of the French Criminal Code. Claiming a violation of her child's right to life within the meaning of the Convention, the woman appealed to the ECtHR. The ECtHR left open the question whether or not a fetus falls within the scope of Article 2; declaring that, even assuming Article 2 was applicable to a fetus, there had been no failure by France to comply with its obligations under Article 2, because the ECtHR deemed the institution of criminal proceedings unnecessary. Rather, it considered the possibility for the applicant to bring an action for damages as sufficient and therefore found that there had been no violation of the fetus's right to life.

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[1] Eur. Court. H.R., *Vo v France*, Judgment of 8 July 2004, no. 53924/00, not yet published, available at: http://hudoc.echr.coe.int [hereinafter *Vo*].

[2] Until the end of the 2nd month of pregnancy the unborn child is referred to as an embryo and after the beginning of the 3rd month as a fetus.

[3] Article 2, para. 1, sentence 1 states: "Everyone's right to life shall be protected by law."

[4] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, UNTS vol. 213, 221, available at: http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

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B. Background

The case concerned an application made by Mrs. Thi-Nho Vo, who in November 1991 visited the General Hospital of Lyon for a medical examination scheduled during the sixth month of pregnancy. On the same day and at the same hospital another woman, Mrs. Thi Thanh Van Vo, was due to have a coil removed. Due to a mix-up caused by the fact that both women shared the same surname and that Mrs. Thi-Nho Vo was unable to communicate in French, the gynecologist pierced the applicant's amniotic sac, making a therapeutic abortion of the fetus unavoidable.

Following a criminal complaint lodged by the applicant in 1991, the doctor was charged with involuntary homicide. In June 1996 the Criminal Court of Lyon acquitted the doctor, declaring that there was no legal rule determining that a fetus is already a person in the sense of the French Criminal Code. In view of this lack of a legal definition the Criminal Court found it necessary to return to the "known scientific facts". In the opinion of the Criminal Court it had been scientifically established that a fetus becomes viable at six months. As the Criminal Court felt itself obliged to show some respect for that fact (viability at six months) it declared that it could not create law on an issue which the legislators had not yet succeeded in defining. Consequently on no account could a fetus not be considered a human being at 20 or 21 weeks.[5]

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In March 1997 the Lyon Court of Appeal overturned this judgment, declaring that the issue of viability at birth is scientifically uncertain and consequently devoid of all legal effect. Considering a viable fetus as a person, the Court of Appeal convicted the doctor of involuntary homicide, arguing that it would have been classified, without any hesitation, as an offence of unintentionally causing injuries if the assault on the child concerned had inflicted a non-fatal wound. *A fortiori*, an assault leading to the child's death must be classified as involuntary homicide.[6] In June 1999 the *Cour de Cassation* reversed the judgment of the Court of Appeal, refusing to consider the fetus as a human being entitled to protection under criminal law. According to the *Cour de Cassation*, the rule that criminal statutes must be construed strictly pleads against extending the scope of the relevant provision of the French Criminal Code - which makes involuntary homicide an offence - to cover unborn children whose legal status is governed by special provisions concerning embryos and fetuses.[7] Mrs. Vo appealed to the European Court of

[5] *Vo* (note 1), para. 19.

[6] *Id.,* para. 21.

[7] *Id.,* para. 22.

Human Rights in December 1999. In May 2003 the Chamber transferred jurisdiction to the Grand Chamber.[8]

C. The Majority's Decision

In the first part of the judgment the Court confines itself to relevant existing case law, including cases decided by the Commission.[9] Thus the Commission, having initially found it unnecessary to decide whether the unborn child is protected by Article 2,[10] considered that the term "everyone" in several Articles of the Convention could not ordinarily apply prenatally, but observed that such application in a rare case, specifically in regard to Article 2,[11] cannot be excluded.[12] However, this opinion necessarily leads to the objection that abortion does not constitute one of the exceptions expressly listed in Article 2, para. 2 and would therefore consequently have to be forbidden if Article 2 applies to the fetus. To this argument the Commission answered that abortion is compatible with Article 2, para. 1, sentence 1 in the interests of protecting the mother's life and health because this provision – assuming the applicability of Article 2 at the initial stage of the pregnancy - contains an implied limitation on the fetus's right to life, to protect the life and health of the woman at that stage.[13] However, the Commission ruled out an *absolute* right to life of the fetus, having regard for the need to protect the mother's life. According to the Commission, giving priority to the protection of the fetus would mean the life of the fetus was regarded as being of a higher value than the life of the pregnant woman.[14] As to the question when life begins, the Commission

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[8] According to Article 43 of the European Convention a case shall be referred to the Grand Chamber if it "raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance."

[9] See for the following arguments *Vo,* para. *75-80.*

[10] Eur. Comm. H.R., *Brüggemann and Scheuten v. the Federal Republic of Germany*, Decision of 17 March 1978, Decision and Reports vol. 10, 100, 116, para. 60.

[11] Eur. Comm. H.R., *H. v. Norway*, Decision of 19 May 1992, Decision and Reports vol. 73, 155, 167, para. 1.

[12] Eur. Comm. H.R., *X. v. the United Kingdom*, Decision of 5 November 1981, Decision and Reports vol. 19, 244, 249, para. 7.

[13] Eur. Comm. H.R., *X. v. the United Kingdom,* (note 12), 252-53, para. 22.

[14] *Id.,* 252, para. 19.

noted diverging viewpoints[15] and conceded some discretion in this area to the Contracting States.[16]

In the rare cases that the ECtHR has had occasion to consider the application of Article 2 to the fetus, using the "even assuming" formula, it did not consider it relevant to determine whether the fetus is covered by the right to life.[17] Taking existing caselaw into consideration, the Court declared that the issue of when life begins comes within the States' margin of discretion[18] for two reasons. First, because the issue has not been decided within the majority of the Contracting States; thus, French caselaw and an inconclusive parliamentary debate on the question of creating an offence of unintentional termination of pregnancy clearly showed that the manner in which the fetus was to be protected would be determined in different ways by different elements of French society.[19] Second, because there is no European consensus on the scientific and legal definition of the beginning of life.[20]

Regarding these considerations, the ECtHR was convinced that it is neither desirable, nor possible, to answer in the abstract the question whether an unborn child is covered by the concept "everyone" for the purposes of Article 2 of the Convention.[21] Even assuming Article 2 to be applicable, the ECtHR held that France had not failed in its positive obligation to protect life within the meaning of Article 2. The Court found that 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. Thus, if the infringement of the right to life is not caused intentionally, the obligation may also be satisfied by remedies in the civil courts or even by disciplinary measures.[22] According to the ECtHR the applicant in this case could have brought an action for damages in the administrative courts which would have

[15] *Id.*, 250, para. 12.

[16] Eur. Comm. H.R., *H. v. Norway*, (note 11), 168, para. 1.

[17] See e.g. Eur. Court. H.R., *Open Door and Dublin Well Woman v. Ireland*, Judgment of 29 October 1992, Series A, No. 246-A, 1, 28, para. 66; Eur. Court. H.R., *Boso v. Italy*, Jugdment of 5 September 2002, Reports of Judgments and Decisions 2002-VII, 451, 458, para. 1.

[18] *Vo* (note 1), para. 82.

[19] *Id.*, para. 83.

[20] *Id.*, para. 84.

[21] *Id.*, para. 85.

[22] *Id.*, para. 90.

had a reasonable prospect of success.[23] The unborn child was consequently not deprived of all protection under French law; there had therefore been no need to institute criminal proceedings. The ECtHR accordingly found by 14 votes to 3 that, even assuming that Article 2 was applicable in the case before it, there had been no violation of that provision.

D. Separate Opinions

As part of a separate opinion Judge Rozakis, joined by Judges Caflisch, Fischbach, Lorenzen and Thomassen, declared that Article 2 does not apply to the fetus. According to Judge Rozakis, unborn life is considered to be worthy of protection. This protection, however, is distinct from that given to a child after birth. Judge Rozakis criticized the fact that the majority's procedure, in applying repeatedly the "even assuming" formula, presupposes the *prima facie* applicability of Article 2 to a fetus.[24]

This concern was taken up by another separate opinion, that of Judge Costa joined by Judge Traja, who declared Article 2 applicable to the fetus. Judge Costa explained that if Article 2 had been considered to be entirely inapplicable, it would not have been necessary to examine the possible violation of Article 2 in any of the decisions of Commission and the ECtHR that used the "even assuming" formula. To any objections that the right to abortion is under threat, he referred to courts in Germany, Norway and Spain that recognize the right to life of the fetus while holding the national legislation on voluntary termination of pregnancy to be consistent with the relevant domestic Constitution, and even with Article 2 of the Convention.[25] In addition, Judge Costa declared that the present inability to reach a consensus on what is a person does not prevent the law from defining these terms, for it is the task of judges to identify the notions that correspond to the words in the relevant legal instruments.[26]

In a dissenting opinion Judge Ress first rejected the majority's opinion that an action for damages in the administrative courts is equivalent to criminal proceedings. According to Judge Ress, it is not retribution that makes protection by the criminal law desirable, but deterrence. He confirmed his opinion relying on the

[23] *Id.*, para. 94.

[24] See the separate opinion of Judge Rozakis, para. 5.

[25] See the separate opinion of Judge Costa, para. 12.

[26] See the separate opinion of Judge Costa, para. 7.

fact that hospitals and doctors are usually insured against such risks, so that the "pressure" placed on them by an action for damages is reduced.[27] Beyond that, he approved the applicability of Article 2 to the fetus. In addition to Judge Costa's argument with regard to the "even assuming" formula, Judge Ress explained that specific laws on voluntary abortion, as they exist in all the Contracting States, would not have been necessary if the fetus did not have a life to protect.[28] This argument was also supported by the other dissenting opinion of Judge Mularoni. Finally, Judge Ress criticized the majority's opinion that the issue of when life begins comes within the margin of discretion. In Judge Ress' opinion, the question of the applicability of Article 2, an absolute right, cannot be dependent on a margin of discretion that may at best exist to determine the measures that should be taken to discharge the positive obligation that arises because Article 2 is applicable.[29]

Also dissenting, Judge Mularoni, joined by Judge Stráznická, accepted that the fetus has the right to life. This opinion was based on the ECtHR's view of the necessity of an evolutive interpretation of the Convention as a living instrument which is to be interpreted in light of presentday conditions. With regard to the *Vo*-Case, according to Judge Mularoni, the interpretation of Article 2 must evolve so that the great dangers currently facing human life, such as genetic manipulation and the risk that scientific results will be used for a purpose undermining the dignity and identity of the human being, can be confronted.[30] In addition, Judge Mularoni argued that the French legal system did not afford the applicant any "effective" remedy. She referred to the ECtHR's caselaw which declared that where there is a choice of remedies open to the applicant, the applicant must have made only normal use of domestic remedies which are likely to be effective and sufficient. When a remedy has been pursued, use of another remedy which has essentially the same objective is not required. Since, according to Judge Mularoni, the criminal remedy was not obviously ineffective, as the decision of the Court of Appeal shows, it followed for her that there was no more need to have recourse to action in the administrative courts.[31]

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[27] See the dissenting opinion of Judge Ress, para. 1.

[28] *Id.*, para. 4.

[29] *Id.*, para. 8.

[30] See the dissenting opinion of Judge Mularoni, para. 28.

[31] See the dissenting opinion of Judge Mularoni, para. 5.

E. Critical Discussion

The case raises many issues regarding the protection afforded by Article 2 of the Convention to unborn life. By way of comment, three questions only shall be addressed here, namely: whether the fetus is covered by "everyone" within the meaning of Article 2; what effect the application of Article 2 to the fetus will have on European laws on abortion; and whether France has satisfied its positive obligations pursuant to Article 2.

I. Is the Fetus Covered by the Term "Everyone" Within the Meaning of Article 2 of the Convention?

Since the *European* Convention, unlike the *American* Convention on Human Rights,[32] does not expand explicitly on the scope of Article 2 as applied to unborn children, this question is certainly one of the most disputed among the 46 Contracting States. The ECtHR did not answer the question in the abstract. Assuming that Article 2 was applicable, it declared that there had been no violation of the right to life. The ECtHR did not give satisfactory reasons for its decision to stay silent on this point[33] and avoided making a desirable decision.

On the contrary, none of the separate and dissenting opinions which represent 10 of 17 judges, left open the question of applicability and there are strong arguments that the fetus, at least a *viable* one, is in fact covered by "everyone" within the meaning of Article 2. First, neither the ECtHR nor the former Commission have ever completely excluded the possibility of application of Article 2 to the fetus.[34] Instead, the ECtHR has repeatedly applied the "even assuming" formula which would not have been necessary if Article 2 had been considered to be entirely inapplicable.[35] Second, there is no crucial difference between a fetus and a child already born, because both are similarly dependent upon their mother.[36] The mere

[32] American Convention on Human Rights, 22 November 1969, UNTS vol. 1144, 123, available at: http://www.oas.org/juridico/english/Treaties/b-32.htm; its Article 4, para. 1 of the states: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

[33] Cf. for this Judge Costa's opinion, *supra* note 26.

[34] Cf. *Vo* para. 85.

[35] This irrefutable fact is also admitted by those who decline a right to life of the fetus; cf. the separate opinion of Judge Rozakis, *supra* D.

[36] Cf. the dissenting opinion of Judge Mularoni, para. 25.

fact that the fetus does not have an independent existence from its mother does not lead to a different result and, as this case illustrates very well, separate protection is needed at least for the viable fetus and its mother. On the same tenor, specific laws on voluntary abortion existing in all the Contracting States would not have been necessary if the fetus did not have a life to be protected.[37] Third, today new dangers threaten both human life itself and the legal concept of its protection.[38] So it is not possible to ignore the major debate that has taken place on the national and international level 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 prohibit techniques such as the reproductive cloning of human beings and provide a strict framework for techniques with a proven medical interest.[39] Consequently the interpretation of Article 2 must evolve with these new developments, requiring now the inclusion of the right to life of the fetus.

II. Would the Application of Article 2 to the Fetus Call Into Question All European Laws on Abortion?[40]

This argument, in regard to para. 2,[41] is underscored by the fact that nearly all Contracting States already had legislation permitting abortion *before* ratifying the Convention, and did not make any reservation under Article 64 of the Convention with respect to Article 2.[42] Nevertheless, Judge Costa's remarks demonstrated that the application of Article 2 to the fetus would not necessarily threaten this domestic

[37] See the dissenting opinion of Judge Ress, *supra* note 28.

[38] Cf. for the mentioned dangers the dissenting opinion of Judge Mularoni, *supra* note 30.

[39] Cf. e.g. the debate in the European Parliament about the legal protection of biotechnological inventions, available at: http://www.europarl.eu.int/news/expert/background_page/008-1777-300-10-43-901-20051024BKG01776-27-10-2005-2005--false/default_p001c012_en.htm; see further *Vo*, para. 32 with a summary of the debates in and Laws of the French National Assembly; see further the results of the European Group on Ethics in Science and New Technologies at the European Commission, *Vo* para. 40; see further summaries of the parliamentary debate in the *Deutscher Bundestag* (German Federal Parliament) about Law and Ethics of modern medicine and biotechnology, available at: http://www.berlinews.de/archiv/1997.shtml.

[40] This was the main fear of the supporters of abortion; cf. the non-governmental organization Family Planning Association, to whom the Court had given the right to intervene as third party, *Vo* para. 68.

[41] See Otto Lagodny, in: Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Art. 2, para. 46 (Wolfram Karl ed., 6th delivery 2004).

[42] See further for the example of Austria the judgment of the Austrian Constitutional Court of 11 October 1974, 1 Europäische Grundrechte-Zeitschrift [EuGRZ] 74 (1975).

legislation.[43] In addition, one can look to the Commission's decision in *H v. Norway;* there the Commission, while explicitly *not* excluding the possibility that a fetus falls within the scope of Article 2,[44] declared that an abortion made in the 14th week of pregnancy did not violate the Convention.[45] Both the national courts[46] and the Commission specifically referred to the serious conflict between the mother's rights and those of the unborn child, which led to the duty to balance the interests of mother and fetus. According to the courts and the Commission, in this delicate area the Contracting State legislature must have some discretion that, in the cases in question, had not been exceeded.

Like all international conventions, the Convention has to be interpreted in accordance with the Vienna Convention on the Law of Treaties[47] ("Vienna Convention"), especially Article 31, which 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 object and purpose. In this respect it should be noted that a number of recent conventions[48] and the prohibition on the reproductive cloning of "human beings" under the Charter of Fundamental Rights of the European Union[49] show that the protection of life extends to the initial phase of human life.[50] Consequently, the ECtHR must take such a development into account in order to define the *ordinary meaning* of the right to life.

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[43] See the separate opinion of Judge Costa, *supra* note 25. Cf. for the European states mentioned by Judge Costa e.g. the judgments of the *Bundesverfassungsgericht* (German Federal Constitutional Court) of 28 May 1993, 20 EuGRZ 229 (1993); and of the *Tribunal Constitucional* (Spanish Constitutional Court) of 11 April 1983, 12 EuGRZ 611 (1985).

[44] See *supra* note 11.

[45] Eur. Comm. H.R., *H. v. Norway,* (note 11), 168-69, para. 1.

[46] See *supra* note 43.

[47] Unites Nations Converence on the Law of Treaties, 23 May 1969, UNTS vol. 1155, 331, available at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp.

[48] See e.g. the Oviedo Convention on Human Rights and Biomedicine, ETS 164, 4 April 1997, available at: http://conventions.coe.int/treaty/en/treaties/html/164.htm, the Additional Protocol to the Convention on Human Rights and Biomedicine, on the Prohibition of Cloning Human Beings, ETS 168, 12 January 1989, available at: http://conventions.coe.int/treaty/en/treaties/html/168.htm, and the Draft additional Protocol to the Convention on Human Rights and Biomedicine, on biomedical research 31 March 2004, available at: http://assembly.coe.int/Documents/WorkingDocs/Doc04/

EDOC10121.htm.

[49] Available at: http://www.europarl.eu.int/charter/default_en.htm; see Article 3, para. 2, final subparagraph.

[50] See the dissenting opinion of Judge Ress, para. 5.

III. Has France Failed its Positive Obligation Pursuant to Article 2?

Human rights are - because of their negative formulation - in their original meaning, protective shields against state intrusion through negative obligations;[51] thus, the notion of a "positive obligation", used by the ECtHR in the context of human rights, might seem unusual.

In contrast to the US Supreme Court, which refuses, in cases similar to the Judgment,[52] to recognize positive obligations,[53] the ECtHR has been developing positive obligations with regard to human rights since 1968. In 1968 the Court decided that the right to education also implied certain positive obligations.[54] Having confirmed this tendency with regard to a number of other rights,[55] including Article 2,[56] which refer to the need for positive obligations for effective protection of human rights[57], the ECtHR has in the meantime undisputedly recognized positive obligations. The duty to make criminal remedies generally available constitutes such a positive obligation. According to the Court, in the instant case, there was no need to make criminal proceedings available.

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[51] See Eur. Court. H.R., *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, Judgement of 23 July 1968, Series A, No. 6-A, 31, para. 3.

[52] That is cases with two individuals without any state intrusion; see e.g. *DeShaney* v *Winnebago County Dept. of Social Services,* 489 U.S. 189 (1989), where local authorities knowing of a father's mistreatment of his child did not intervene in favor of the critically injured child, and *Castle Rock v. Gonzales*, 545 U.S. ___ (2005), Docket No. 04-278, not yet published, where police officers failed to respond to repeated reports of a woman that her estranged husband had taken their three children in violation of her restraining order against him. Ultimately, the husband murdered the children.

[53] See William Kelly, The Duty to Protect and to Ensure Human Rights under the U.S. Constitution, in: The Duty to Protect and to Ensure Human Rights 93, 125 (Eckart Klein ed., 2000). See further, including other areas of positive obligations in the U.S., David P. Currie, Positive and Negative Constitutional Rights, U. Chi. L. Rev. 864, 867-72 (1986).

[54] Eur. Court. H.R., *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, (note 51) (in regard to Article 8, the right to respect for private and family life).

[55] See e.g. Eur. Court. H.R., *Airey v. Ireland*, Jugdment of 9 October 1979, Series A, No. 32-A, 17, para. 32 (in regard to Article 8 of the Convention: right to respect for private and family life); Eur. Court. H.R., *Plattform "Ärzte für das Leben" v. Austria,* Judgment of 21 June 1988, Series A, No. 139-A, 12, para. 32 (in regard to Article 11: freedom of assembly and association).

[56] See e.g. Eur. Court. H.R., *Osman* v *the United Kingdom,* Judgment of 28 October 1998, 1998-VIII Reports of Judgments and Decisions 3159, para. 115; *Vo,* para. 88: Article 2 "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."

[57] Eur. Court. H.R., *Plattform "Ärzte für das Leben" v. Austria,* (note 55).

This opinion, however, must be rejected for several reasons.[58] First, financial liability to pay compensation does not have the same effect on the victims as a conviction in a criminal case.[59] In this context it should be mentioned that the ECtHR itself[60] has repeatedly declared that an effective protection of the individual in its relations with other private persons requires the state to impose criminal law sanctions,[61] for example, in *X and Y v. the Netherlands* this obligation concerned Article 8.[62] If this can be said about the right to respect for private and family life, it holds true even more forcefully for the right to life. It is true that the reasoning of the ECtHR only concerned *serious* infringements of Article 8, but Article 2 may be the main right protected by the Convention[63] and therefore of higher standing than Article 8. Thus, even less serious infringements of Article 2 may require criminal law sanctions. Furthermore, if the involuntary homicide of a child *already born* is punished by the means of criminal law, the same must go for the *unborn* child.

In addition, in this case, an action in the administrative courts was no longer possible because the statute of limitations had expired by the time the criminal proceedings ended.[64] Above that, even if the applicant had tried to bring such an action against the authorities, it is doubtful that her action would have been successful; in December 1991, when the applicant lodged her criminal complaint, the French *Conseil d'Etat* still took the view that a hospital department could incur liability only in cases of gross negligence.[65] Thus, by choosing the criminal remedy the applicant had done everything that one could expect of her, even assuming that in this case a criminal law remedy was not available.[66]

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[58] Cf. the judgment of the *Bundesverfassungsgericht* of 28 May 1993 (note 43), 229.

[59] See for further arguments with the same objective the dissenting opinion of Judge Ress, *supra* D.

[60] Beginning with Eur. Court. H.R., *X. and Y. v. the Netherlands,* Judgment of 26 March 1985, Series A, No. 91-A, 1.

[61] Cf. Georg Ress, The Duty to Protect and to Ensure Human Rights under the European Convention on Human Rights, in: The Duty to Protect and to Ensure Human Rights 165, 191 (Eckart Klein ed., 2000).

[62] Eur. Court. H.R., *X. and Y. v. the Netherlands,* (note 60), 13, para. 27.

[63] Eur. Court. H.R., *Streletz, Kessler and Krenz* v *Germany*, Judgment of 22 March 2001, 2001-II Reports of Judgments and Decisions 409, 448, para. 92-94.

[64] At the time the limitation period amounted to four years from the date of stabilization of the damage; see the dissenting opinion of Judge Mularoni, para. 14.

[65] It was not until April 1992 when the *Conseil d'Etat* abandoned this position.

[66] Cf. the dissenting opinion of Judge Mularoni, *supra* D.

IV. Conclusion

A fetus falls, notwithstanding the existence of the Contracting States' laws on abortion, into the scope of Art. 2 of the Convention. Art. 2 implies – like other rights of the Convention – positive obligations. In the *Vo* case, France, by not making possible a criminal prosecution of the doctor, has failed its positive obligation pursuant to Art. 2.

F. Evaluation

At first glance the judgment seems like a wise act of judicial self-restraint in a politically controversial question. So it is on the one hand certainly comprehensible that the ECtHR should avoid a decision in this difficult domain if possible. Who could hold this against the ECtHR in view of the difficult moral task which the judges are charged with on this issue?
On the other hand, 10 of 17 judges expressed explicitly their opinions on the applicability of Art. 2 on a fetus. This shows that the delicate circumstances did not keep the majority from deciding this question. Above that, the attitude of the ECtHR in *Vo v. France* does not correspond to the principle of interpreting the Convention as a living instrument. On the contrary the ECtHR has once again held on to the status quo, which has been established by the ECtHR since the 1970s. This status quo, however, leaves the Contracting States in the dark about the dealings with fetuses. Only a clear decision of the ECtHR in this area would bring legal certainty into this situation, which is the more desirable given current developments in the field of genetic manipulation.

The ECtHR has missed yet another chance to express its clear opinion on the legal status of a fetus unter the Convention. A judgment has been delivered, but the conflict continues.