EUROPEAN CENTRE FOR LAW AND JUSTICE

April 20th, 2018

Dear WMA Members,

The Workgroup on Therapeutic Abortion considered some changes in the WMA's ethical policy statements, through a "*Declaration on Medically-Indicated Abortion*" revising the "*WMA Declaration on Therapeutic Abortion*." As a WMA member, you had the opportunity to submit your comments on the proposal of the workgroup. A final draft of the "*Declaration on Medically-Indicated Abortion*" will apparently be discussed on the occasion of the 209th WMA Council Session in Riga (Latvia) on April 26-27th, 2018 and of the General Assembly in Reykjavik (Iceland) on October 3-6th, 2018. As you know, the proposal of the workgroup includes a limitation of the right of physicians to conscientious objection and the deletion of the duty to "maintain respect for human life."

The *European Centre for Law and Justice* (*ECLJ*), a non-profit organization, would like to analyze the proposal at issue on the basis of both the mission of the WMA and international law. In its current wording, the "*Declaration on Medically-Indicated Abortion*" violates the independence of physicians and their freedom of conscience (I) and excludes the unborn child from the protection offered by human rights (II).

I- The draft "*Declaration on Medically-Indicated Abortion*" violates the independence of physicians and their freedom of conscience

A) The proposal endorses the coercion of physicians by the States

According to its own website, the WMA was created to "*ensure the independence of physicians*" and it "*has and continues to extend its help and influence on behalf of physicians who are being hindered in applying ethical practices*." That is why, the WMA has always considered that coercion is not legitimate to impose to physicians a collaboration on some practices violating their conscience. The "*Declaration on Therapeutic Abortion*" respects this principle by stating that their "*attitudes towards the life of the unborn child*" are "*a matter of individual conviction and conscience that must be respected*" (article 3).

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Nevertheless, the proposal of a new "*Declaration on Medically-Indicated Abortion*" sets out some exceptions in which physicians would be forced to refer women to professionals performing abortions or even to perform abortions themselves. This endorsement of a coercion of physicians by the States violates their independence and their freedom of conscience. Whereas the WMA should assume a leadership based on the respect of the highest possible standards of ethics, the proposal reduces its role as an acknowledgment of choices made by States. Indeed, the proposal refers to "*national laws*" that violate the right to conscientious objection (art. 8).

The violation of the independence of physicians has practical implications. In some States, physicians face the crucial choice of either violating their conscience and ethics or incurring professional sanctions. They are sometimes laid off because of their moral convictions or they decide to resign from their job to preserve their conscience. In other words, they have a choice between protecting their deeply grounded convictions and continuing to care for their patients. This choice is hard to make for them, because it is both their convictions and their job that give a meaning to their lives. Some States thus force them to sacrifice one of these two inseparable aspects of their identity. The ECLJ has collected many complaints of physicians facing moral dilemmas.

Instead of endorsing the coercion of physicians by States, the WMA should reassert physicians' independence in conformity with its goals.

B) The proposal guarantees less protection to the physician's rights than international law

Freedom of conscience is protected in all human rights instruments, especially in Article 18 of the International Covenant on Civil and Political Rights and Article 9 of the European Convention on Human Rights. According to these articles, limits can be brought only to the *manifestation* of a belief, under strict conditions, never on the *substance* of the right. A restriction of conscientious objection does not concern the manifestation of a belief, but the belief itself. Conscientious objection concerns in international law every "*profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives*,"[1] especially "*within a context in which it may be necessary to deprive another human being of life*."[2] It thus applies to abortion and other such non-therapeutic activities for which medical staff is sometimes expected to participate.[3]

While freedom of conscience is one of the most fundamental human rights, abortion cannot be claimed as a human right at the international level. Indeed, no treaty admits abortion as a right and

[1] Parliamentary Assembly of the Council of Europe (PACE), Resolution 337, 1967.

[2] Human Rights Council, *Keun-tae Kim v. Republic of Korea,* Communication No. 574/1994; U.N. Doc. CCPR/C/56/D/574/1994, March 14th, 1996, § 7.3

[3] The Parliamentary Assembly of the Council of Europe (PACE) has solemnly recalled in Resolution 1763 (2010): "*No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human fetus or embryo, for any reason.*" This soft law document reflects the consensus on the state of the law and practice in Europe.

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the 1994 Cairo Conference on Population and Development repeatedly called on States to prevent abortion.[4] The European Court of Human Rights (ECHR) has also repeated that "*Article 8 cannot be interpreted as conferring a right to abortion.*"[5] The balancing required by the ECHR is not applicable where a right protected by the Convention conflicts with rights not so protected.[6] It is thus quite clear that an alleged right to abortion, with no existence in international law, cannot prevail over one of the most fundamental human rights, namely freedom of conscience.

In States where abortion is legal, international law requires an effective access to abortion lawful services. The ECHR indeed judged that "S*tates are obliged to organize the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation*"[7] The responsibility to guarantee an effective access is thus imposed to the States in international law, and not to the physicians themselves. The States do not have the right to force physicians to perform abortions, even in order to guarantee this effective access.

The "*Declaration on Therapeutic Abortion*" puts limitations to the right to conscientious objection and impose to physicians the obligation to guarantee the access to abortion services. It means that the WMA would paradoxically grant less rights and require more obligations for physicians than international law.

If the rights of the physicians are depreciated, we will see that those of the unborn child are for the first time completely ignored in the proposal.

II- The "*Declaration on Therapeutic Abortion*" excludes the unborn child from the protection offered by human rights

A) The proposal is a radical change of the ethical policy of the WMA regarding human life

The Declaration of Geneva adopted by the General Assembly of the WMA in 1948 asserts the duty of physicians to "*maintain the utmost respect for human life from the time of conception*." The

[4] Paragraphs 7.24, 7.6 and 8.25.

[5] ECHR, *A. B. C. v. Ireland [GC]*, 25579/05, December 16th, 2010, § 214; ECHR, *P. and S. v. Poland*, 57375/08, October 30th, 2012, § 96.

[6] ECHR, *Chassagnou and others v. France [GC]*, 25088/94, 2833/95, and 2844/95, April 29th, 1999, § 113: "*It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect 'rights and freedoms' not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right.*"

[7] ECHR, *R.R. v Poland*, 27617/08, May 26th, 2011, § 206; ECHR, *P. and S. v. Poland*, 57375/08, October 30th, 2012, § 106.

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International Code of Medical Ethics adopted in 1949 states also that "*a doctor must always bear in mind the obligation of preserving human life*." The moral responsibility of physicians towards human life has been a principle guiding the decisions of the WMA since its creation. As an illustration, the article one of the "*Declaration on Therapeutic Abortion*" declares that "*the WMA requires the physician to maintain respect for human life*." This Declaration also makes reference to the "*unborn child*" (art. 3).

However, the proposal of a new "*Declaration on Medically-Indicated Abortion*" includes a deletion of these two sentences. This deliberate change shows that the limitation of the right to conscientious objection goes hand in hand with a denial of the connection between care and the respect of human life. Article one of the proposal defines "*medically-indicated abortion*" as an "*interruption of pregnancy due to health reason*," without mentioning the respect of human life. Instead of an exception to a principle (right to life), abortion would become a right in itself, considered as a "*medication*" in some cases.

The supposed universal scope of this new definition of abortion is very far from facts. In countries where abortion has become legal, it is clearly an exception. Indeed, States sometimes consider abortion as an exception to the right to life, but never life as an exception to a "*right to abortion.*" For example, in France, the Code of public health first recalls the principle of respect of human life from its beginning, then admits abortion as an exception only under the circumstances and conditions mentioned in the law. The Code of medical ethics insists on this exceptional character (Article R4127-18 CSP). In the same way, the Belgian Criminal code in article 350 prohibits abortion, except under conditions restrictively listed.

For that reasons, such a change of the ethical policy of the WMA regarding life would compromise its historical mission since World War II.

B) The proposal ignores the protection of the unborn child required by international law

The right to life is the first to be guaranteed in the 1948 Universal Declaration on Human Rights: "*everyone has the right to life, liberty and security of person*."[8] It is also declared in other instruments, such as the International Covenant on Civil and Political Rights[9] or the European Convention which provides that: "*everyone's right to life shall be protected by law*."[10] The "*principle of sanctity of life*" is "*protected under the Convention*"[11] and recognized by the ECHR, which affirms that "*the right to life is an inalienable attribute of the human beings and forms the supreme value in*

[8] Universal Declaration of Human Rights, G.A. Res. 217 (III) A. U.N. Doc A/RES/17 (III) (Dec. 10, 1948), Article 3.
[9] Article 6 of the International Covenant.
[10] Article 2 of the Convention.
[11] ECHR, *Reeve v. The United Kingdom*, 24844/94, (Decision of inadmissibility of the former Commission of 30 November 1994); ECHR, *Pretty v. The United Kingdom*, 2346/02, Judgment of April 29th, 2002, § 65.

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the hierarchy of human rights."[12] In its General Comment on the right to life, the Human Rights Committee declared that "*it is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.*"[13]

The international treaties do not exclude prenatal life from their scope of protection and the case-law of the ECHR has never excluded it from its field of application.[14] The ECHR has recently confirmed that "*human embryos cannot be reduced to 'possessions'*".[15] Since Roman law, only two categories exist, therefore it can safely be deduced that, if embryos do not belong to the category of things, they necessarily belong to that of persons. The ECHR had already stated that "*it may be regarded as common ground between States that the embryo/fœtus belongs to the human race. The potentiality of that being and its capacity to become a person (...) require protection in the name of human dignity.*"[16] The previous president of the ECHR even declared that "*there is life before birth, within the meaning of Article 2*" of the Convention.[17] The Court of Justice of the European Union (CJEU) also recalled that human life is a continuum from the moment of fertilization.[18] It cannot therefore be contested that abortion consists in ending a human life.

The ECHR has in practice permitted States to exclude the unborn child from the protection conferred by the Convention, leaving the determination of the scope of Article 2 in their margin of appreciation,[19] "*so that it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life*".[20] This permission is a derogation to the right to life. Indeed, "*if a national legislature considers that such protection cannot be absolute, then it should only derogate from it (...) within a regulated framework that limits the scope of the derogation.*"[21] States are thus never obliged by international law to allow abortion, whatever is the context. As we have seen the States which allow abortion do consider this practice as an exception to the right to life, in conformity with international law, and not as a right in itself independent from human life.

The "*Declaration on Therapeutic Abortion*" contradicts international law by ignoring the right

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[12] ECHR, *Streletz, Kessler & Krenz v. Germany [GC]*, March 22nd, 2001, 34044/96, 35532/97 and 44801/98, § 92-94; see also McCann & Others v. The United Kingdom, Judgment of 27 September 1995, Series A no. 324, pp. 45-46 at para. 147.

[13] Human Rights Committee, *General Comment 6, Article 6* (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994), § 1.

[14] As President Jean-Paul Costa explained in his Separate Opinion under *Vo v. France, [GC]*, 53924/00, July 8th, 2004 at para. 75, at para. 11., "*[h]ad 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.*".

[15] ECHR, *Parrillo c. Italy [GC]*, 46470/11, 27 August 2015, § 215.

[16] ECHR, *Vo v. France*, 53924/00, GC 8 July 2004, § 84.

[17] Jean-Paul Costa, Separate opinion under *Vo v. France*, § 17.

[18] CJEU, *Oliver Brüstle v Greenpeace e.V [GC]*, C-34/10, 18 October 2011, § 35.

[19] *Vo v. France*, para. 82: "*[i]t 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 (...)*".

[20] *A., B. & C.*, para. 222.

[21] Jean-Paul Costa, Separate opinion under *Vo v. France*, § 17.

to life of the unborn child and by implying that abortion is a right in some situations. Whereas the respect for human life is at the heart of the ethics of the WMA, the association should not ignore today the right to life protected by international law.

For all these reasons, I urge you to defend the right to conscientious objection concerning abortion, without exception. Following its legacy and in conformity with international law, the WMA should reassert the obligation of the States to guarantee the independence of physicians and to protect human life.

We remain at your disposal for any further information.

Please accept the expression of our highest consideration,

Grégor Puppinck
ECLJ Director