

**EUROPEAN COURT OF HUMAN RIGHTS
STRASBOURG, FRANCE**

**Application nos: 1819/21; 3039/21; 3801/21
Cases of K.B v. Poland; K.C v. Poland; A.L.-B. v. Poland**

INTERVENTION

**Pursuant to Article 36(2) of the European convention on Human Rights
and Rule 44(3) of the Rules of Court**

By the United Nations (“UN”) Working Group on discrimination against women and girls, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

5 November 2021

Disclaimer

Ms. Melissa Upreti, Chair of the UN Working Group on discrimination against women and girls, Ms. Dorothy Estrada-Tanck Vice-Chair of the UN Working Group on discrimination against women and girls, Ms. Ivana Radačić, member of the UN Working group on discrimination against women and girls, Ms. Elizabeth Broderick member of the UN Working Group on discrimination against women and girls, Ms. Meskerem Geset Techane, member of the UN Working Group on discrimination against women and girls, Ms. Reem Alsalem, United Nations Special Rapporteur on violence against women, its causes and consequences, Ms. Tlaleng Mofokeng, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and Mr. Nils Melzer, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment are mandate-holders appointed by the United Nations Human Rights Council with mandates to make recommendations to address human rights issues from the perspective of their respective mandates.

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INTRODUCTION

- [1]. This written submission is made by the United Nations Working Group on discrimination against women and girls (WGDAWG),¹ the United Nations Special Rapporteur on violence against women, its causes and consequences (Special Rapporteur on Violence against Women), the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Special Rapporteur on torture) and the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur on the right to health), pursuant to Article 36(2) of the European Convention on Human Rights (the Convention) and Rule 44(3) of the Rules of the Court (the Court) following leave granted by the President of the First Section, as confirmed by the First Section Registrar's communication of 15 October 2021.² Its purpose is to outline relevant developments in international human rights law concerning access to abortion (particularly in cases of severe foetal impairment) and explain the impact of highly restrictive abortion laws on women's equality and enjoyment of their human rights.
- [2]. Developments in international human rights law are indisputably relevant to the Court's interpretation of the Convention. Given the Convention's place within a network of international norms, and in line with customary principles of treaty interpretation, the Convention should, as far as possible, be interpreted in harmony with other rules of international law. In particular, "*the Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies*".³ Moreover, the Court recognises that the exact content of Convention rights evolves over time in response to developments in society and in international law, noting the "*increasingly-high standard*" being required in the area of the protection of human rights⁴.

IMPACT OF RESTRICTIVE ABORTION LAWS ON WOMEN

- [3]. Article 34 of the Convention grants an individual standing to bring a claim where they have been affected by the alleged violation. According to the Court's case-law, the concept of "victim" must be interpreted autonomously and irrespective of domestic concepts; it concerns not just the direct victim(s) of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end.⁵ Article 35 entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected, or if they are a member of a class of people who risk being directly affected by the legislation.⁶ The scope of the law and existence of remedies,⁷ and the impact of law with respect to reinforcing prejudice and negatively affecting individuals it applies to are relevant determinations.⁸ Moreover, the Court explained that the principles developed in relation to challenging legislation apply also when the incompatibility of Constitution with the Convention is at stake.⁹
- [4]. The Court has already had an opportunity to interpret Article 34 in the context of abortion. In *Open Door and Dublin Well Women v. Ireland*,¹⁰ which challenged an Irish Supreme Court injunction against the providers of information on abortion, the Court held that all women of child-bearing age

¹ At its fifteenth session in 2010, the Human Rights Council adopted by consensus resolution 15/23 to establish a working group on the issue of discrimination against women in law and in practice. In June 2019 through resolution 41/6, the mandate name was changed from the Working Group on discrimination against women in law and practice to the Working Group on discrimination against women and girls.

² The interveners are grateful to Debevoise & Plimpton LLP for their assistance in drafting the submission.

³ *Opuz v. Turkey*, no. 33401/02, ECtHR 2009 [185].

⁴ *Demir and Baykara v. Turkey*, no. 34503/97, ECtHR 2008 [142].

⁵ *Vallianatos and others v. Greece*, nos. 29381/09 and 32684/09, ECtHR 2013 [47].

⁶ *Klass and others v. Germany*, no. 5029/71, ECtHR 1978 [47]; *S.L. v. Austria*, no. 45330/99, ECtHR 2003 [33]; *Burden and Burden v. the UK*, no. 13378/05, ECtHR 2007 [27].

⁷ *Zaharov v. Russia*, no. 47143/06, ECtHR 2015 [171].

⁸ *Norris v. Ireland*, no. 10581/83, ECtHR 1988 [33].

⁹ *Sejdić and Finci v. Bosnia and Herzegovina*, nos. 27996/06 and 34836/06, ECtHR 2009 [29].

¹⁰ *Open Door and Dublin Well Woman v. Ireland*, no. 14234/88, ECtHR 1992 [44].

could claim to be victims of the alleged violation of their Convention rights, as all such women could be adversely affected by the restrictions imposed by the injunction.

- [5]. The interveners submit that the criminalisation of abortion affects all women. The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her *dignity* and *fundamental right to equality*. It is also a precondition for the enjoyment and realisation of many other rights, including the rights to health¹¹, privacy, physical integrity and even to life.¹² As explained by the Committee on Elimination of All Forms of Discrimination against Women (the CEDAW Committee), the responsibilities imposed upon women in relation to pregnancy and childcare affect their daily lives, including the “enjoyment of their right of access to education, employment and other activities related to their personal development ... impose inequitable work burdens on women ... and affect their health”.¹³ Denying women access to abortion, a form of healthcare¹⁴ that *only women require*, is therefore an *inherently discriminatory measure*, which undermines women’s agency and prevents them from exercising control over their own bodies and lives.¹⁵ It is a form of instrumentalization and subordination of women to a patriarchal agenda.¹⁶
- [6]. As such there should be no “direct effect” requirement to establish standing in cases of highly restrictive abortion regulations, which prohibit abortion in cases of foetal impairment and against which there is no recourse to legal remedy at the national level. While criminalisation of abortion primarily affects pregnant women and women of child-bearing age, who face a real prospect of being denied autonomous decision-making should they become pregnant in the near future—even in cases of fatal foetal impairment—all women are affected.

DENIAL OF ACCESS TO ABORTION AS TORTURE OR INHUMAN OR DEGRADING TREATMENT

- [7]. According to the Court’s jurisprudence, ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this threshold includes evaluating all of the circumstances of the case, such as (i) the duration and nature of the treatment and its physical and mental effects, and (ii) the state—and in particular, any vulnerability—of the victim.¹⁷ The purpose of the ill treatment may also be a factor for consideration.¹⁸ Each of these three factors has been examined by a number of UN treaty bodies and special procedures in the context of denial of abortion care.

¹¹ As clarified by the Committee on Economic Social and Cultural Rights, the right to health contains the right to control one’s health and body, including sexual and reproductive freedom, General comment No. 14, E/C.12/2000/4, 2000 [8]; and General comment No. 22, E/C.12/GC/22, 2016 [56].

¹² Report of Working Group on discrimination against women and girls on reasserting equality, countering rollbacks, A/HRC/38/46, 2018; CEDAW, General Recommendation No. 21: Equality in Marriage and Family Relations, Committee on the Elimination of Discrimination against Women, A/49/38, 1994 [22]; Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/66/254, 2011 [27].

¹³ General Recommendation No. 21, CEDAW, [22].

¹⁴ Human rights bodies have clarified that access to family planning, contraception including emergency contraception, safe abortion services and post-abortion care is a component of the right to health and, in particular, the right to sexual and reproductive health, recognized in article 12 of the International Covenant on Economic, Social and Cultural Rights. Moreover, these issues also fall under the scope of the private life and can fall under the scope of the right to be free from ill-treatment.

¹⁵ Report of Working Group on discrimination against women and girls on reasserting equality, countering rollbacks [22].

¹⁶ Position paper on Women’s Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends Working Group on the issue of discrimination against women in law and in practice, available at:

<https://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WomensAutonomyEqualityReproductiveHealth.aspx>

¹⁷ See, e.g., *Price v. the United Kingdom*, no. 33394/96, ECtHR 2001[24]; *Kupczak v. Poland*, no. 2627/09, ECtHR 2011[58]; *Jalloh v. Germany*, no. 54810/00, ECtHR 2006[67]; *P. and S. v. Poland*, no. 57375/08, ECtHR 2012[63], [69], [87], [110], [148]-[150], [157], [162], [164], [166]; *R.R. v. Poland*, no. 27617/04, ECtHR, 2011[140], [151], [159], [163], [209].

¹⁸ *P. and S. v. Poland*, no. 57375/08, ECtHR, 2012 [160]; *R.R. v. Poland*, no. 27617/04, ECtHR, 2011 [151]; *Sabalic v. Croatia*, no. 50231/13, ECtHR2021[63]; *Khachaturov v. Armenia*, no59687/717, ECtHR 2021 [82].

Nature and Duration of Treatment and Its Effects

- [8]. The Court's Article 3 jurisprudence establishes that a broad variety of treatment may constitute inhuman or degrading treatment, including denial of reproductive health services, and the imposition of barriers on access to abortion care. In *R.R. v. Poland*, the Court found that Poland's denial of access to prenatal testing and diagnostic information during pregnancy, had caused the applicant "painful uncertainty", "acute anguish" and "humiliation".¹⁹ In *P. and S. v. Poland*, it found that Poland had violated Article 3 where an adolescent girl, who became pregnant following rape, encountered multiple barriers to a legal abortion.²⁰
- [9]. International jurisprudence clearly establishes that the denial of access to abortion services may cause severe mental, emotional and physical suffering, particularly in cases concerning fatal foetal impairment. For example, in *Mellet v. Ireland* and *Whelan v. Ireland*, in which the applicants were denied access to abortion following a diagnosis of fatal foetal impairment, the Human Rights Committee (HRC) established that denying access to abortion care may constitute cruel, inhuman or degrading treatment.²¹ In response to State's objections, the HRC rendered that the legislation prohibiting abortion itself was the primary cause of the applicants' suffering: "[b]y virtue of the existing legislative framework, the State party subjected the author to conditions of intense physical and mental suffering".²² In the preceding case of *K.L. v. Peru*, it held that forcing an adolescent to carry an anencephalic foetus to term inflicted severe mental suffering on the victim.²³ In addition, in its General Comment No. 36, the HRC reiterated that "restrictions on the ability of women or girls to seek abortion must not, inter alia, [...] subject them to physical or mental pain or suffering which violates article 7 (ICCPR)".²⁴ It also affirmed that States have an obligation to ensure that women have "safe, legal and effective access to abortion where ... carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable".²⁵
- [10]. The CEDAW Committee' has underlined that, "criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, [...] are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment".²⁶ It has specifically expressed concern about the prevalence of illegal abortions in Poland as a result of the strict and restrictive domestic legal requirements and recommended that Poland's restrictive abortion legislation should be amended to comply with Poland's human rights obligations.²⁷
- [11]. The United Nations Special Rapporteur on torture emphasised that "highly restrictive abortion laws that prohibit abortions even in cases of incest, rape or foetal impairment or to safeguard the life or health of the woman violate women's right to be free from torture and ill-treatment".²⁸ While he made clear that physical pain is not necessary to engage a State's responsibility for cruel, inhuman or degrading treatment, he also noted that the denial of safe abortion services (including through criminalisation) has a direct link to women and girls seeking clandestine abortions, which in turn

¹⁹ *R.R. v. Poland*, no. 27617/04, ECtHR, 2011 [159]-[160].

²⁰ *P. and S. v. Poland*, no. 57375/08, ECtHR 2012 58.

²¹ *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, Human Rights Committee 2016 [7.4]; *Whelan v. Ireland*, CCPR/C/119/D/2425/2014, Human Rights Committee 2017[7.5]; *L.M.R. v. Argentina*, CCPR/C/101/D/1608/2007, Human Rights Committee 2011 [9.2]. *K.L. v. Peru*, CCPR/C/85/D/1153/2003, Human Rights Committee 2005 [6.2].

²² *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, Human Rights Committee [7.6], see also *Whelan v. Ireland*, CCPR/C/119/D/2425/2014, Human Rights Committee 2017 [7.7].

²³ *K.L. v. Peru*, CCPR/C/85/D/1153/2003, Human Rights Committee 2005 [6.5].

²⁴ General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Human Rights Committee, CCPR/C/GC/36, 2018 [8].

²⁵ *Ibid.*

²⁶ General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (2018), CEDAW Committee, CEDAW/C/GC/35, 2017 [18].

²⁷ Concluding observations on the combined seventh and eighth periodic reports of Poland (2014), CEDAW Committee, CEDAW/C/POL/7-8, 2014 [36] and [37 (a-e)].

²⁸ Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/22/53, 2016.

may endanger their lives as well as their physical and mental health. Indeed, unsafe abortion is the third leading cause of maternal death globally.²⁹

- [12]. The Special Rapporteur on the right to health has also observed that “(c)riminal laws penalizing and restricting induced abortion...consistently generate poor physical health outcomes, resulting in deaths that could have been prevented, morbidity and ill-health”,³⁰ while the WGDAWG in its position paper reaffirmed that States violate the right to be free from inhuman treatment in cases where abortion is illegal in cases of severe foetal impairment.
- [13]. Finally, the Council of Europe Commissioner on Human Rights has stated that the right to freedom from ill-treatment obliges States to guarantee women’s access to sexual and reproductive health care, when failures to do so could “cause them considerable physical or mental suffering, anguish, or feelings of degradation”. The Commissioner has called on member States of the Council of Europe to ensure both, “that abortion is legal ... to protect women’s health and lives and ensure freedom from ill-treatment” and that legal abortion services are accessible and available in practice.³¹
- [14]. International human rights bodies therefore unambiguously affirm that women may endure cruel, inhuman or degrading treatment, engaging State responsibility under international law, where they are denied timely access to abortion care in cases of foetal abnormality in their country of residence, consisting of trauma, severe anguish, physical suffering and endangered lives.

Vulnerability

- [15]. The Court has recognized that the state of the victim, and particularly their vulnerability, is a key consideration in determining whether inhuman or degrading treatment has been established. Different factors are relevant in this respect, including the sex and age of the victim. For example, in *P. S. v. Poland*, the Court noted one of the applicant’s young age and her unwanted pregnancy, finding that she was “in a situation of great vulnerability” as a result.³²
- [16]. Gender is also one of the key characteristics to be taken into account in assessing vulnerability in the jurisprudence of the Special Rapporteur on torture. He noted that women’s lack of power is exacerbated by “society’s indifference to or even support for the subordinate status of women, together with the existence of discriminatory laws and a pattern of State failure to punish perpetrators and protect victims”.³³ He made clear that: “lack of legal and policy frameworks that effectively enable women to assert their right to access reproductive health services enhances their vulnerability to torture and ill-treatment”.³⁴ In determining whether cruel, inhuman or degrading treatment amounts to torture, vulnerability is also assessed more specifically in terms of powerlessness in its jurisprudence: the victim’s de facto inability to resist or escape the infliction of severe physical or mental pain or suffering is “the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment”.³⁵
- [17]. The WGDAWG has similarly explained that impeding “(t)he decision as to whether to continue a pregnancy or terminate it” denies women a choice that “shapes her whole future life and has a

²⁹ Guttmacher Institute and World Health Organization, Facts on Induced Abortion Worldwide (2012).

³⁰ Ibid. [35].

³¹ The Council of Europe Commissioner for Human Rights, Women’s sexual and reproductive health and rights in Europe 2017, [11]-[12], [52]-[53].

³³ Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment, A/HRC/7/3, 2008, [29].

³⁴ Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment, A/HRC/31/57, 2016, [42].

³⁵ Special Rapporteur on torture and other cruel, inhuman and degrading treatment, E/CN.4/2006/6 (2005), [39] A/72/178, at para. 31. In order to constitute torture suffering must be inflicted intentionally and either pursues a particular purpose or – significantly – occurs “for any reason based on discrimination of any kind”, including gender-based discrimination, see also definition of torture: art. 1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

crucial impact on women's enjoyment of other human rights".³⁶ Women requiring reproductive health care, including abortion care, are hence generally in a position of relative powerlessness and vulnerability vis a vis the state and its health services. This vulnerability is particularly enhanced in cases in cases of pregnant women with a diagnosis of a severe foetal impairment. The HRC has found in cases of *Whelan v Ireland* and *Mellet v. Ireland*, "*the author, as a pregnant woman (is) in a highly vulnerable position after learning that her much-wanted pregnancy was not viable*".³⁷ Similar conclusion has been reached by the Court *R.R. v. Poland*, where it found that the applicant was in a situation of great vulnerability and distress.³⁸

- [18]. The inherent vulnerability of pregnant women facing such diagnosis of fatal foetal impairment is compounded by the fact that now the only way to terminate their non-viable pregnancy in Poland³⁹ is to obtain an unsafe, illegal abortion, with the associated risks to their physical and mental health, or to travel abroad, which option will depend on her socio-economic situation. Indeed, the WGDAWG has noted how Polish restrictive framework particularly affects women who are socioeconomically disadvantaged and migrant women in irregular situation.⁴⁰

Purpose and Intent

- [19]. The Court has also made clear that "*the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it*" is a factor to be taken into account, in particular where the purpose "*is to humiliate and debase*".⁴¹ While showing purpose or intent is not necessary to establish a breach of Article 3,⁴² it can be powerful evidence of inhuman or degrading treatment.
- [20]. In the context of torture, which explicitly requires a purposive element, the Special Rapporteur on Torture has noted that these elements "*are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex, gender identity, real or perceived sexual orientation or nonadherence to social norms around gender and sexuality*".⁴³ He has recognised that discrimination against women and girls "*often underpins their torture and ill-treatment in health-care settings*" and that "[t]his is particularly true when seeking treatments such as abortion that may contravene socialised gender roles and expectations".⁴⁴
- [21]. As explained above in section II, criminalising access to abortion constitutes sex and gender discrimination. The CEDAW Committee has explained that "*it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women*".⁴⁵ The WGDAWG has explained further that "*equality in reproductive health services requires access, without discrimination, to ... access to safe termination of pregnancy...*", and, therefore, that denial of access to abortion care is linked to structural discrimination.

³⁶ UN Amicus Brief Submission to the Constitutional Court of the Republic of Korea Ref: Review of the constitutionality of the country's criminal law on abortion, Case 2017Hun-Ba127, 2019, [18].

³⁷ *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, Human Rights Committee 2016 [7.4]; *Whelan v. Ireland*, CCPR/C/119/D/2425/2014, Human Rights Committee 2017 [7.5].

³⁸ *P. and S. v. Poland*, no. 57375/08, ECtHR 2012[108].

³⁹ It is worth noting that 98% of all legal abortions in Poland prior to the Constitutional Court decision were performed in cases of severe and irreversible impairment of the fetus. *Poland has slammed door shut on legal and safe abortions - UN Experts Statement 27/10/2020*.

⁴⁰ Report of the Working Group on the issue of discrimination against women in law and in practice, visit to Poland, A/HRC/41/33/Add.2, 2019, [52].

⁴¹ *Feilazoo v. Malta*, no.6865/19, ECtHR 2021 [80].

⁴² *P. and S. v. Poland*, no. 57375/08, ECtHR 2012 [160]; *R.R. v. Poland*, no. 27617/04, ECtHR, 2011 [151].

⁴³ Report of the Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment, A/HRC/31/57, 2016 [8].

⁴⁴ *Ib.* [42].

⁴⁵ General recommendation No. 24: Article 12 of the Convention (Women and Health), Committee on the Elimination of Discrimination against Women, A/54/38/Rev.1, chap. I, 1999 [11]. See also Working Group on discrimination against women in law and in practice, A/HRC/32/44: "*Denying women access to services which only they require and failing to address their specific health and safety, including their reproductive and sexual health needs, are inherently discriminatory and prevent women from exercising control over their own bodies and lives*", [28].

- [22]. The CEDAW Committee specifically addressed gender stereotyping, which is often linked to the denial of abortion. In *L. C. v. Peru*, the case where a pregnant woman was denied an abortion and medically necessary spinal surgery to avoid paralysis during pregnancy, the Committee found that the State perpetuated a stereotype of women as mothers, by privileging the “*protection of the foetus ... over the health of the [woman]*” and recommended it to address “*stereotypes roles for men and women*”.⁴⁶
- [23]. Restrictive abortion laws have particularly negative effect on women who experience intersectional discrimination. As the HRC made clear in *Mellet* and *Whelan*, imposing an economic burden on a pregnant woman seeking an abortion (by forcing her to travel abroad to seek care) may also constitute discrimination on socio-economic grounds.
- [24]. It is a fundamental premise of human rights law that discrimination undermines respect for human dignity,⁴⁷ and is therefore likely to “*arous[e] “feelings” of “inferiority” or “humiliation”*”. Denying women’s reproductive choice, especially in the case of fatal or severe foetal impairment, undermines their autonomy, violates their dignity and equality and puts their lives and health (and that of their families) at risk.⁴⁸ It is, by definition, degrading, and designed to subordinate women to a specific concept of gender identity.

DENIAL OF ACCESS TO ABORTION AS A VIOLATION OF THE RIGHT TO PRIVATE LIFE

- [25]. Article 8 of the Convention guarantees “everyone” “*the right to respect for his private and family life, his home and his correspondence*”. It further elaborates that any interference with the right to privacy must be (i) “*in accordance with the law,*” and (ii) “*necessary in a democratic society*”.⁴⁹ The Court has explained that “*the essential object of Article 8 is... to protect individuals against arbitrary interference by public authorities*”.⁵⁰

Interference with the right to private life

- [26]. The Court’s jurisprudence defines “private life” broadly to include the decision to have or not to have a child or to become a parent.⁵¹ In *R.R v Poland*, the Court affirmed that “*the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy [and] legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus*”.⁵²
- [27]. The decisions of other international human rights bodies echo this position. In its General Comment No. 36, the HRC recognised that although states may regulate women’s access to abortion any “*restrictions on the ability of women or girls to seek abortion must not, inter alia, [...] arbitrarily interfere with their privacy*”.⁵³ In *Whelan v. Ireland* and *Mellet v Ireland*, the HRC held that a legislative prohibition that denied access to abortion care in the case of serious foetal impairment constituted “*an intrusive interference in her decision as to how best to cope with her pregnancy,*

⁴⁶ *L.C. v. Peru*, CEDAW/C/50/D/22/2009, Committee on Elimination of All Forms of Discrimination against Women 2011, [8.15].

⁴⁷ For example, CEDAW, Preamble.

⁴⁸ ‘Beijing Platform for Action’ Fourth World Conference on Women (Beijing 4-15 September 1995) (15 September 1995), A/CONF.177/20/Add.1, [97].

⁴⁹ See e.g. *R.R. v. Poland*, no. 27617/04, ECtHR, 2011 [183].

⁵⁰ *ABC v Ireland*, no. 25579/05, ECtHR, 2010 [244].

⁵¹ *R.R. v. Poland*, no. 27617/04, ECtHR, 2011 [180].

⁵² *Ibid.* [180]-[181].

⁵³ General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Human Rights Committee, CCPR/C/GC/36, 2018 [8].

notwithstanding the non-viability of the foetus which thus constituted an arbitrary interference in the author's right to privacy, in violation of article 17 of the Covenant".⁵⁴

- [28]. WGDAWG has emphasised that access to sexual and reproductive health services is integral to the exercise of a number of civil and political rights "that underpin the physical and mental integrity of individuals and their autonomy", including the right to privacy.⁵⁵ It has made it clear that "patriarchal negation of women's autonomy in decision-making" leads to violation of women's rights, including the right to privacy.⁵⁶

The requirement of lawfulness and necessity

- [29]. In analysing whether interference is "in accordance with law", the Court will consider not only the status of the contested measures under domestic law, but also the practical effect of that measure. Moreover, the law must be adopted in accordance with lawful procedures, which in cases of court's decisions means that the court must be independent and impartial. The Court, in establishing violations of Article 8, has emphasised that domestic law "must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention" and that "[t]here must be safeguards to ensure that the discretion left to the executive is exercised in accordance with the law and without abuse of powers".⁵⁷
- [30]. This position comports with other international human rights jurisprudence. In *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius* the HRC held that the impugned legislation constituting interference with the right to privacy was discriminatory on the basis of sex and hence arbitrary.⁵⁸ As argued in section II, laws criminalising abortion are discriminatory and hence are to be considered arbitrary.
- [31]. Constitutional provision on abortion was found to constitute an arbitrary interference with the right to private life in *Mellet*. While accepting that the provision in question could not be considered unlawful, HRC emphasised the need to "guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances".⁵⁹ It found the interference arbitrary and unreasonable.
- [32]. Under Article 8 of the Convention, a measure is arbitrary, unless it qualifies as "necessary in a democratic society". Inherent in this test is a requirement that the measures be "proportionate to one of the legitimate aims pursued by the authorities".
- [33]. It is first to be noted that the restrictive abortion regulations are often justified on the ground of the protection of "the right to life of a foetus". However, there is no such right under international human rights law: international human rights treaties provide that human rights are accorded to those who have been born.⁶⁰

⁵⁴ *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, Human Rights Committee 2016 [7.8]; *Whelan v. Ireland*, CCPR/C/119/D/2425/2014, Human Rights Committee 2017 [7.9].

⁵⁵ Report of the Working Group on discrimination against women and girls on women's and girls' sexual and reproductive health rights in crisis, A/HRC/47/38, 2021, [18].

⁵⁶ Report of the Working Group on the issue of discrimination against women in law and in practice on Thematic analysis: eliminating discrimination against women in the area of health and safety, with a focus on the instrumentalization of women's bodies, A/HRC/32/44, 2016 [63]; see also General comment No. 22 on the Right to sexual and reproductive health, Committee on Economic, Social and Cultural Rights, E/C.12/GC/22, 2016; General recommendation No. 24: Article 12 of the Convention (Women and Health), Committee on the Elimination of Discrimination against Women, A/54/38/Rev.1, chap. I, 1999

⁵⁷ *Gillan and Quinton v. The United Kingdom*, no.4158/05, ECtHR, 2010 [77].

⁵⁸ *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*, CCPR/C/12/D/35/1978, Human Rights Committee, 1984.

⁵⁹ *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, Human Rights Committee 2016 [7.8].

⁶⁰ Copelon R, Zampas C, Brusie E, Devore J. Human rights begin at birth: international law and the claim of fetal rights. *Reprod Health Matters*. 2005 Nov;13(26):120-9 [121-122].; see also The United Nations Declaration on Human Rights states in its article 1: "(a)ll human beings are born free and equal in dignity and rights."

- [34]. The Court has also refused to recognise any foetal rights. Hence, it assesses the balance struck by the abortion law with the right to private life through the lens of the general public interest in the protection of morals.⁶¹ While States have an interest in protecting prenatal life, this is best insured by the provision of pregnancy health-care and a range of socio-economic measure, rather than denying women equality and depriving them of their rights. As the WGDAWG has explained: “(i)ntervention to promote any societal interest that there may be in the process of gestation of a possible future person must stop short of violating the human rights of the pregnant woman in whose body the gestation is to take place”.⁶² Any understanding of ‘morality’ must be in line with the human rights standards.
- [35]. The jurisprudence of international human rights mechanisms makes it clear that the blanket criminalisation of abortion in the case of serious foetal abnormality cannot qualify as “necessary” or “proportionate” to a legitimate aim. Human rights bodies have “repeated(ly) call(ed) for the legalization of termination of pregnancy on certain grounds, especially in cases where pregnancy constitutes a risk to the life or health, including in cases of severe foetal impairment” and have made it clear that a blanket denial on abortion in these circumstances is a serious breach of human rights. Moreover, they have argued for liberalisation of abortion laws and allowing for abortion on broad grounds and have called for decriminalization of abortion in all circumstances.⁶³ For instance, HRC has emphasised that the States have a duty to provide “safe, legal and effective access to abortion”, including where a pregnancy is “not viable”, and “may not regulate pregnancy or abortion” in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions”.⁶⁴ Moreover, the Special Rapporteur on the right to health has underlined States’ obligations to decriminalize abortion, to prevent unsafe abortion and to provide safe, legal and effective access to abortion, in a manner that does not result in the violation of women’s rights to life and other human rights.⁶⁵ The WGDAWG has repeatedly called on States to allow for abortion on request in the first trimester.⁶⁶ It explained that “countries where women have the right to termination of pregnancy and are provided with access to information and to all methods of contraception have the lowest rates of termination of pregnancy”.⁶⁷ It further noted that, “in countries where induced termination of pregnancy is restricted by law and/or otherwise unavailable ... women with limited resources have little choice but to resort to unsafe providers and practices”.⁶⁸ In relation to Poland, after its visit in 2018, it expressed concern over restrictive framework and called for liberalisation of the law.⁶⁹

Margin of Appreciation

⁶¹ See, e.g., *Reeve v. United Kingdom*, no. 2844/94, ECommHR,1994 [51].

⁶² UN Amicus Brief Submission to the Constitutional Court of the Republic of Korea Ref: Review of the constitutionality of the country’s criminal law on abortion, Case 2017Hun-Ba127, 2019 [20].

⁶³ Ibid.

⁶⁴ Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/GC/36, at [8].

⁶⁵ A/76/172, para 40-41.

⁶⁶ Report of the Working Group on the issue of discrimination against women in law and in practice on Thematic analysis: eliminating discrimination against women in the area of health and safety, with a focus on the instrumentalization of women’s bodies, A/HRC/32/44, 2016, Report of the Working Group on the issue of discrimination against women in law and in practice on Women’s and girl’s sexual and reproductive health rights in crisis, A/HRC/47/38, 2021.

⁶⁷ Report of the Working Group on the issue of discrimination against women in law and in practice on Thematic analysis: eliminating discrimination against women in the area of health and safety, with a focus on the instrumentalization of women’s bodies, A/HRC/32/44, 2016 [80].

⁶⁸ Ibid. [80] According to the WHO unsafe abortion leaves women and girls vulnerable to severe suffering: An estimated 810 maternal deaths occur each day globally, and 25 million unsafe abortions take place annually, resulting in approximately 47,000 deaths every year, primarily in developing countries and among members of socioeconomically disadvantaged and marginalized populations. WHO, “Safe abortion: technical and policy guidance for health systems”, 2012 and WHO, “Maternal mortality”, evidence brief, 2019.

⁶⁹ Report of the Working Group on the issue of discrimination against women in law and in practice, visit to Poland (2019), A/HRC/41/33/Add.2, at para. 52.

- [36]. While a margin of appreciation will be afforded to States in assessing where a “fair balance” lies, that margin is narrower where “*particularly important facet of an individual’s existence or identity is at stake*” and where there is a consensus amongst the member States of the Council of Europe or international consensus.⁷⁰ In assessing what is “necessary in a democratic society”, the Court has explained that it will pay attention to “*clear and uncontested evidence of a continuing international trend*”.⁷¹
- [37]. The repeated reminders from human rights mechanisms that States have a duty to regulate abortion services to ensure that women “*do not have to undertake unsafe abortions*”,⁷² as well as changes in domestic legal frameworks—particularly in Europe—is evidence that abortion access should be available as a woman chooses up until the end of the first trimester.⁷³ Over a decade ago, the Parliamentary Assembly of the Council of Europe adopted a resolution emphasising that abortion should not be banned “*within reasonable gestational limits*” and that the “*ultimate decision on whether or not to have an abortion should be a matter for the woman concerned*”.⁷⁴ Moreover, there is a clear consensus in UN human rights system that States must provide for abortion in cases of severe foetal impairment. Therefore, in cases concerning very restrictive abortion laws the margin of appreciation is very narrow.
- [38]. The Court has already recognized in *P. and S. v Poland* in 2013 that “*there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion*.”⁷⁵ Since then, there is a stronger consensus amongst Council of Europe States to allow abortion on broad grounds and almost all the Contracting Parties have now legalised abortion on broad grounds.⁷⁶ The Parliamentary Assembly of the Council of Europe’s position is also evidence of this trend.
- [39]. Moreover, as this submission makes clear, the UN human rights treaty bodies and special procedures have described time and again that restrictions on access to abortion go to the heart of women’s identity and dignity, affecting agency, autonomy and women’s choices about how they can and will live their future lives. In the words of the CEDAW Committee: “*A human rights-based approach to sexual and reproductive health acknowledges that women’s decisions on their own bodies are personal and private, and places the autonomy of the woman at the center of policy and law-making related to sexual and reproductive health services, including abortion care....Health policies and abortion laws that perpetuate deep-rooted stereotypes and stigma undermine women’s reproductive autonomy and choice, and they should be repealed because they are discriminatory*”.⁷⁷ As discussed in section II, discriminatory nature of abortion laws has also been recognised by the WGDAWG. Moreover, the Special Rapporteur on the right to health has considered that criminal and other legal restrictions on abortion infringe human dignity by restricting the freedoms to which individuals are entitled, particularly in respect of decision-making and bodily integrity.”

CONCLUDING REMARKS

⁷⁰ *Polat v Austria*, no.12886/16, ECtHR, 2021 [78].

⁷¹ *Christine Goodwin v. the United Kingdom*, no. 28957/95, ECtHR, 2002 [85].

⁷² See also: Human Rights Committee, general comment No. 36 (2011) [8], Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016), [28] [49 a and e]; and A/76/172, [41]; A/66/254 [25-26] [30].

⁷³ Brief of European Legal Scholars as Amici Curiae in support of Neither Party, Thomas E. Dobbs, State Health Officer Of The Mississippi Department Of Health, Et Al., v. Jackson Women’s Health Organization, et Al., available at: https://www.supremecourt.gov/DocketPDF/19/19-1392/185153/20210728162714090_European%20Legal%20Scholars%20Amici%20Brief.pdf (accessed on 2 November 2021).

⁷⁴ Council of Europe, Access to Safe and Legal Abortion in Europe, Resolution 1607, 2008 [6].

⁷⁵ *P. and S. v. Poland*, no. 57375/08, ECtHR 2012[97].

⁷⁶ Center for Reproductive Rights, *European Abortion Laws: A Comparative Overview* (2019), available at <https://bit.ly/3028tZy> (accessed on 2 November 2021); Council of Europe, Commissioner for Human Rights, Women’s sexual and reproductive health and rights in Europe (2017).

⁷⁷ Joint statement by the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), 29 August 2018.

[40]. This brief has outlined international human rights standards on regulating abortion, focusing on access to abortion in cases of severe foetal impairment. It has shown that there is a clear international consensus that States must provide for abortion on broad grounds, including in cases of severe foetal impairment, and must decriminalise abortion in all circumstances, as otherwise they breach not only right to privacy but also the right to be free from inhuman and degrading treatment as well as the right to equality and non-discrimination. Moreover, there is a clear trend towards liberalizing abortion laws and allowing for abortion on request in early pregnancy, as consistently argued by the intervener.

[41]. Initiatives that further restrict abortion, with the concurrent retrogressive impacts on the human rights of women and girls, are prohibited under international law and do not align with the Convention. The recent trend in a minority of countries placing increasing limits on reproductive rights⁷⁸ arises in the context of increasing fundamentalism and conservatism which seriously affects women's rights.⁷⁹ Responding to these trends, the WGDAWG has recommended that the human rights system maintains "existing international law guarantees of women's human rights, their right to equality in all fields of life and their right not to be discriminated against, and resist all attempts to derogate from them, including by conservative or religious lobbies".⁸⁰

⁷⁸ Brief of Int'l and Compar. Legal Scholars as *Amici Curiae* Supporting Respondents, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (cert. granted May 17, 2021), p. 36.

⁷⁹ 2018 report.

⁸⁰ *Ibid*, para 92(a).