

**Application no. 1819/21 – K.B. v. Poland and 3 other applications**

**Written comments**

**on behalf of Amnesty International, the Center for Reproductive Rights,  
Human Rights Watch, the International Commission of Jurists (ICJ),  
the International Federation for Human Rights (FIDH), the  
International Planned Parenthood Federation European Network,  
Women Enabled International, Women’s Link Worldwide and the  
World Organisation Against Torture (OMCT)**

**19 November 2021**

## I. Introduction

These written comments are presented on behalf of Amnesty International, the Center for Reproductive Rights, Human Rights Watch, the International Commission of Jurists (ICJ), the International Federation for Human Rights (FIDH), the International Planned Parenthood Federation European Network, Women Enabled International, Women’s Link Worldwide and the World Organisation Against Torture (OMCT) pursuant to the permission granted by the President of the First Section of the Court as notified in a letter dated 15 October 2021 from the Section Registrar. Please see the annex for a brief overview of the organisations.

These written comments examine how prohibitions on abortion: (i) directly affect people who can become pregnant and can cause them grave harm (Section II); (ii) may lead to prohibited ill-treatment in violation of Article 3 of the European Convention on Human Rights (“the Convention”) (Section III); and (iii) may violate the right to respect for private life guaranteed by Article 8 of the Convention (Section IV).

These comments address the ways in which prohibitions on abortion can affect *all* persons who can become pregnant, including all women, girls, non-binary persons and transgender men, regardless of their age. Throughout, these written comments use the term ‘women and girls of reproductive age’ in a non-exclusionary manner to denote all of these persons and discuss the impacts on them.

The term ‘prohibitions on abortion’ is used throughout these written comments to refer to highly restrictive abortion laws that broadly ban or strictly limit legal abortion to very restrictive circumstances and only allow women and girls of reproductive age to obtain abortion care in certain exceptional and limited circumstances.<sup>1</sup>

In drawing on recent developments in international human rights law and standards, and in comparative European law, these written comments rely on two well-established and interrelated principles of Convention interpretation developed by this Court. First, that the Convention cannot be interpreted in a vacuum and should, as far as possible, be interpreted in harmony with other rules of international law, and second, that the Convention is a living instrument for the protection of human rights in light of present-day conditions and, therefore, that the content of the rights guaranteed by the Convention evolves over time in response to, among other things, social developments in the Contracting Parties and developments in international law and jurisprudence.

## II. Prohibitions on abortion directly affect women and girls of reproductive age and cause them grave harm

It is well established that individuals will be considered to be victims with standing, under Article 34 of the Convention, entitled to submit a claim that a law or legal position violates their Convention rights, even in the absence of an individual measure of implementation of the law, where: (i) they run the risk of being directly affected by it;<sup>2</sup> or (ii) must modify their behaviour as a result of it;<sup>3</sup> or (iii) are indirectly harmed by its consequences and have a valid personal interest in seeing it brought to an end.<sup>4</sup> Ensuring that the rights protected by the Convention are not at risk of being nullified or rendered illusory, or that violations are made effectively unchallengeable, are also key considerations of any Article 34 assessment.<sup>5</sup>

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<sup>1</sup> Highly restrictive legal frameworks on abortion is generally the terminology used to describe laws that do not allow abortion on request or on broad social grounds but that instead only permit abortion where the life or health of a pregnant individual is at risk, where the pregnancy results from sexual assault or where a pregnancy involves a severe foetal impairment or is non-viable. Highly restrictive *is not* used to describe laws on abortion that allow abortion on request or broad social grounds but regulate abortion and place limits, such as time-limits, and other procedural requirements, on access. Among Contracting Parties only six States (Andorra, Liechtenstein, Malta, Monaco, Poland and San Marino) maintain such prohibitions on abortion.

<sup>2</sup> *Marckx v. Belgium* (1979), App. no. 6833/74, Eur. Ct. H.R., para. 27; *Open Door and Dublin Well Woman v. Ireland* (1992), App. nos. 14234/88, 14235/88, Eur. Ct. H.R., para. 44; *Johnston and Others v. Ireland* (1986), App. no. 9697/82, Eur. Ct. H.R., para. 42; *Norris v. Ireland* (1988), App. no. 10581/83, Eur. Ct. H.R., para. 31.

<sup>3</sup> *Dudgeon v. the United Kingdom* (1981), App. no. 7525/76, Eur. Ct. H.R., paras. 40-46; *Marckx v. Belgium* (1979), App. no. 6833/74, Eur. Ct. H.R., para. 27; *Klass and others v. Federal Republic of Germany* (1978), App. no. 5029/71, Eur. Ct. H.R., para. 33; *Tănase v. Moldova* (2010), App. no. 7/08, Eur. Ct. H.R. [GC], para. 105; *Burden and Burden v. the United Kingdom* (2008), App. no. 13378/05, Eur. Ct. H.R., para. 34; *S.A.S. v. France* (2014, GC), App. no. 43835/11, Eur. Ct. H.R. [GC], para. 57; *Norris v. Ireland* (1988), App. no. 10581/83, Eur. Ct. H.R., para. 32; *Modinos v. Cyprus* (1993), App. no. 15070/89, Eur. Ct. H.R., para. 24.

<sup>4</sup> *Roman Zakharov v. Russia* (2015), App. no. 47143/06, Eur. Ct. H.R. [GC], para. 169; *Vallianatos and Others v. Greece* (2013), App. nos. 29381/09, 32684/09, Eur. Ct. H.R. [GC], para. 47; *Tanrikulu and Others v. Turkey* (1999), App. no. 23763/94, Eur. Ct. H.R. [GC]; *Open Door and Dublin Well Woman v. Ireland* (1992), App. nos. 14234/88, 14235/88, Eur. Ct. H.R., para. 43.

<sup>5</sup> *Roman Zakharov v. Russia* (2015), App. no. 47143/06, Eur. Ct. H.R. [GC], paras. 165, 169, 171; *Klass and others v. Federal Republic of Germany* (1978), App. no. 5029/71, Eur. Ct. H.R., para. 34.

In *Open Door and Dublin Well Woman v. Ireland*, this Court recognised that women of reproductive age were at risk of being adversely affected by a prohibition on the provision of information in Ireland about abortion care in other countries. The Court held that two women in Ireland, who were not pregnant, belonged to a class of women of reproductive age who ran the risk of being directly prejudiced by the prohibition on information about abortion.<sup>6</sup>

In line with Article 34 criteria and this case-law, and for the reasons outlined below, women and girls of reproductive age belong to a class of people who are at risk of being directly affected and seriously prejudiced by legal prohibitions on abortion, whether or not they are currently pregnant or seeking an abortion. The harmful impacts that prohibitions on abortion have on women and girls of reproductive age are manifold and multi-layered and often severe.

***Prohibitions on abortion have unique and distinct effects on women and girls of reproductive age as a class of people***

Women and girls of reproductive age belong to a class of people who are directly affected by prohibitions on abortion because of their specific reproductive capacity. Abortion care is essential health care that only women and girls of reproductive age need;<sup>7</sup> only women and girls of reproductive age can become pregnant and only pregnant individuals can undergo an abortion procedure. As such, prohibitions on abortion forbid a form of health care that only women and girls of reproductive age need and have distinct and specific impacts on this class of people; they have effects that are entirely particular to, and that can only be experienced by women and girls of reproductive age. The maintenance of prohibitions on abortion systematically affects intimate aspects of the identities, health and lives of women and girls of reproductive age because only they can become pregnant. These legal measures deny individual reproductive autonomy and violate personal dignity. They undermine women and girls' ability to make decisions about their own bodies, their health, their families, their futures and their lives, all of which have far-reaching consequences for them as individuals. While the harmful impacts of prohibitions on abortion affect all women and girls of reproductive age, they often disproportionately and most severely affect women and girls belonging to marginalised communities, including women and girls with disabilities, migrants, those belonging to ethnic minorities, or of lower socio-economic status and those living in rural communities.<sup>8</sup>

Prohibitions on abortion that are introduced as a retrogressive measure - that is, where a previous legal entitlement to obtain abortion care is removed - nullify and invalidate human rights protections for a class of persons who are solely and uniquely affected. In those circumstances, women and girls of reproductive age have a valid personal interest in seeking an end to the resulting human rights violations.

***Prohibitions on abortion expose women and girls of reproductive age to a risk of significant harm and other human rights violations***

When women and girls are prohibited by law from obtaining abortion care, they are exposed to the risk of grave harm to their health and well-being, threats to their lives and survival, as well as other violations of their human rights, should they become pregnant and decide to end the pregnancy. Public health evidence shows that in such situations prohibitions on abortion compel women and girls of reproductive age to seek clandestine and often unsafe abortions, carry a pregnancy to term against their will, or where possible travel abroad to obtain abortion care, all of which expose them to risks to their health, exacerbate social inequities and violate their human rights.<sup>9</sup>

When women and girls are compelled to have recourse to unsafe abortion, they are placed at considerable risk of maternal mortality and morbidity, including lasting or temporary impacts on their physical and mental health, as well as major financial and emotional burdens.<sup>10</sup> When women and girls are forced to travel to another country to

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<sup>6</sup> *Open Door and Dublin Well Woman v. Ireland* (1992), App. nos. 14234/88, 14235/88, Eur. Ct. H.R., paras. 43, 44.

<sup>7</sup> See, e.g., Inter-Agency Working Group on Reproductive Health in Crises, *Inter-Agency Field Manual on Reproductive Health in Humanitarian Settings* (2018).

<sup>8</sup> See, e.g., World Health Organization (WHO), *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 18. WHO is expected to publish updated guidelines by the end of 2021. See also Committee on the Elimination of Discrimination against Women (CEDAW), *General recommendation No. 34 (2016) on the rights of rural women*, para. 38, CEDAW/C/GC/34 (2016); Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, para. 60, CRC/C/GC/20 (2016); Working Group on the issue of discrimination against women in law and in practice, A/HRC/32/44 (2016), para. 107(b).

<sup>9</sup> See, e.g., WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 90.

<sup>10</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 23, 87.

obtain safe and legal abortion care, it subjects them to significant hardship and distress and leads to delays in care that can result in increased health risks and inability to access care within legal time limits. Furthermore, needing to travel for abortion care severs the continuum of care and forces women and girls who need abortion care out of the health care system they are familiar with causing them uncertainty and anguish. Only women and girls with the financial means, travel documents and other resources and support will be able to avail of this option. When prohibitions on abortion compel women and girls to carry a pregnancy to term against their will, public health evidence shows that they are at greater risk of experiencing adverse physical and mental health effects.<sup>11</sup> Medical evidence also clearly shows that carrying a pregnancy to term and giving birth entails significantly greater health risks than having a safe abortion.<sup>12</sup> Moreover, where women and girls are compelled to continue a pregnancy against their will this can entail important adverse socioeconomic consequences and may negatively impact their social and family relations as well as their educational and professional opportunities.<sup>13</sup>

International human rights bodies have consistently and repeatedly recognised the many grave harms, including the physical, mental, emotional and socioeconomic harm detailed above, that are caused to women and girls of reproductive age by prohibitions on abortion. They have recognised that prohibitions on abortion prevent women and girls from making fundamental personal decisions about their health and lives and may give rise to severe mental or physical suffering by forcing women and girls to continue a pregnancy against their will, seek clandestine and often unsafe abortion or travel to a foreign country to obtain legal care. They have also emphasised the suffering that predictably afflicts pregnant women and girls in vulnerable positions who have decided to end a pregnancy and are denied access to abortion care in their home country, and endure a severance in the continuum of health care provision as a result. Moreover, they have underscored that for many women and girls delays in access to safe abortion care that are often caused by prohibitions on abortion predictably exacerbate suffering and anguish.

In light of these findings, international human rights bodies have held that prohibitions on abortion expose women and girls to severe mental or physical suffering, anguish, uncertainty, humiliation and disregard for their personal decisions that are so severe as to breach the international prohibition on ill-treatment.<sup>14</sup> They have also repeatedly recognised that prohibitions on abortion deny women's and girls' reproductive autonomy, decision-making and dignity, and result in violations of their right to respect for private life.<sup>15</sup> They have found that prohibitions on abortion constitute interferences with the right to privacy that cannot be justified as necessary and proportionate.<sup>16</sup> They have recognised that prohibitions on abortion are discriminatory based on sex and gender, and deny women and girls equality before the law,<sup>17</sup> and that they often have disproportionate and discriminatory impacts on

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<sup>11</sup> M. Antonia Biggs, U. D. Upadhyay, Ch. E. McCulloch et al, *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, JAMA Psychiatry (2017), 74(2):169–178.

<sup>12</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 49.

<sup>13</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 64; *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009, para. 8.18.

<sup>14</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 65; *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35 (2018), para. 18; Human Rights Committee (HRC), *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.3; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (2013), para. 46; Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/31/57 (2016).

<sup>15</sup> See, e.g., HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, paras. 7.7-7.8; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, paras. 7.8-7.9; CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), paras. 65, 72; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., paras. 180, 181, 214; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., paras. 96, 112; *Tysiąc v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., paras. 106-107, 130.

<sup>16</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.7; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.8.

<sup>17</sup> CEDAW, *General Recommendation No. 24 on Article 12 of the Convention (women and health)* (1999), paras. 14, 31(c); *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009, para. 8.16; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.11; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.12; Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 34, E/C.12/GC/22 (2016); Working Group on the issue of discrimination against women in law and in practice, A/HRC/38/46 (2018), para. 35; CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 59.

marginalised groups of women and girls. They have also recognised that prohibitions on abortion subject women and girls to gender-based stereotypes.<sup>18</sup>

***Prohibitions on abortion compel women and girls of reproductive age to modify their behaviour due to risk of life-changing consequences***

Prohibitions on abortion prevent women and girls of reproductive age from exercising personal autonomy and decision-making about their bodies, health, families and lives, and affect their legitimate exercise of their human rights, including those guaranteed by the Convention, even where they are not currently pregnant or seeking an abortion. This is the case even where criminal penalties do not apply to individuals who obtain abortion care outside the scope of the law. Prohibitions on abortion affect the fundamental life choices and decisions of women and girls of reproductive age in a myriad of significant ways. These include decisions about if and when to engage in sexual intercourse, to use contraception and the choice of contraceptive method, to become pregnant or to have a child. Women and girls of reproductive age who, for a wide range of reasons and at different times in their lives, do not want to become pregnant or have a child, always need to consider the risk of becoming pregnant and will often modify their behaviour accordingly. While they may be able to use modern methods of contraception to prevent pregnancy, public health evidence demonstrates that no form of contraception is completely effective,<sup>19</sup> and in many countries data indicates that a majority of women seeking abortion were using a method of contraception when they became pregnant.<sup>20</sup> Furthermore, evidence shows that rates of unintended pregnancy are higher in contexts where abortion is prohibited.<sup>21</sup> As such, the only fully effective means available to women and girls of reproductive age to avoid pregnancy is to entirely abstain from sexual intercourse.

Pregnancy and having a child have enormous consequences on women's and girls' bodies, health, lives and futures. The implications of having a child are life-changing for women of reproductive age regardless of whether they already have children or not. Public health evidence demonstrates that in many countries the majority of women who have an abortion already have at least one child.<sup>22</sup> In those circumstances, women will also consider the impact of having another child on their families. The responsibilities associated with caring for a child are significant, and often fall disproportionately on women and girls and have considerable consequences for their social, family, educational and professional situation. As such, prohibitions on abortion affect and determine women's and girls' decisions about highly intimate aspects of their lives and compel them to modify their behaviour, so as to minimise or avoid the risk of the many life-changing consequences of becoming pregnant in contexts where abortion is prohibited.

Moreover, even in situations where women and girls wish to become pregnant and have a child, a range of complex circumstances can arise in the course of pregnancy that may cause them to seek access to abortion care. Where prohibitions on abortion are in place, women and girls of reproductive age may actively decide to delay or avoid pregnancy due to well-founded fears of being unable to end the pregnancy should the need arise.

***The time-sensitive nature of abortion and related medical procedures***

Women and girls of reproductive age, who are affected by prohibitions on abortion, face particular challenges in seeking to vindicate their rights before international and regional fora. The Court has rightly recognised the vulnerability of women and girls who are seeking to vindicate their rights to abortion care and related services,<sup>23</sup> and the critical importance of the time factor in cases involving a pregnant woman or girl's decision to end a pregnancy.<sup>24</sup> Where abortion is prohibited, the time-sensitive nature of abortion care will often be an important barrier that significantly constrains the ability of pregnant women and girls who need abortion care to challenge the prohibition before this Court, as also demonstrated by the existing case-law. To date, all the cases concerning

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<sup>18</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.11; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; CEDAW, *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009, para. 8.15.

<sup>19</sup> WHO & Johns Hopkins Bloomberg School of Public Health, *Family Planning: A Global Handbook for Providers* (2018), 3<sup>rd</sup> ed.

<sup>20</sup> See, e.g., British Pregnancy Advisory Service, *Women cannot control fertility through contraception alone: bpas data shows 1 in 4 women having an abortion were using most effective contraception* (2017); R. K. Jones, *Reported contraceptive use in the month of becoming pregnant among U.S. abortion patients in 2000 and 2014*, *Contraception* 97(4):309-312 (2018).

<sup>21</sup> J. Bearak, A. Popinchalk, B. Ganatra, A.-B. Moller, Ö. Tunçalp, C. Beavin et al., *Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990–2019*, *The Lancet Global Health*, Vol. 8, Issue 9, E1152-E1161 (2020).

<sup>22</sup> *Id.*

<sup>23</sup> *Tysiāc v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., para. 127.

<sup>24</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 111.

access to abortion that have come before international and regional fora have been brought by women and girls after the fact, namely after they were denied abortion and forced to carry a pregnancy to term,<sup>25</sup> or after they travelled out of the country to obtain abortion care,<sup>26</sup> or after they obtained an illegal abortion,<sup>27</sup> or after they finally obtained legal abortion care after being subjected to harassment, manipulation and obstruction.<sup>28</sup> As such, no challenge to a prohibition on abortion has ever been filed before this Court or any other international human rights body by a woman or girl who at the time of filing was pregnant and needing abortion care. Requiring women and girls of reproductive age - who are *per se* at risk of being directly affected by a prohibition on abortion - to prove that they are pregnant and in need of abortion care to be recognised as victims under Article 34 would present an insurmountable obstacle, and would deny them the Convention's effective protection, and effectively deprive them of access to a remedy that is preventive and the opportunity to vindicate their rights before the Court until it is too late.

Furthermore, where prohibitions on abortion arise from final decisions by domestic judicial bodies, and where no domestic remedies are available or effective, women and girls of reproductive age are at even greater risk of being denied access to the Court's machinery were they not to be recognised as victims under Article 34. They could see their rights nullified and prohibitions on abortion rendered effectively unchallengeable. The protection of their Convention rights would be theoretical or illusory, as opposed to practical and effective. The need for the Court's supervision is made even more pressing where prohibitions on abortion are newly introduced as a retrogressive measure that has removed existing human rights protections for women and girls of reproductive age.

### *The harmful stigma and chilling effect of prohibitions on abortion*

Prohibitions on abortion treat a form of health care that only women and girls of reproductive age need as morally reprehensible by prohibiting it and making it liable to administrative or criminal sanctions. This causes significant social stigma, which generates stress, anxiety and uncertainty for women and girls of reproductive age. Laws that criminalise health care providers who perform abortion outside the scope of the law also generate significant chilling effects, irrespective of their actual implementation, and result in a range of barriers in women's and girls' access to relevant information and health care, and detrimentally affect their health care-seeking behaviour. In particular, women and girls may be reluctant to seek life-saving post-abortion care out of fear of social opprobrium and uncertainty about the legal ramifications for those who assisted them in obtaining clandestine abortions.<sup>29</sup> Fear of prosecution may also deter or halt the provision of legal abortion care even in the narrow circumstances in which abortion is not prohibited, and hence lead to denial of or delays in life-saving treatment, which, in turn, may result in severe health consequences or even death.

Prohibitions on abortion that are introduced as retrogressive measures and remove legal grounds for access to abortion care can exacerbate harmful stigma and deepen existing uncertainties and anxieties for women and girls of reproductive age, and further compound the chilling effects on health care providers.

### **III. Prohibitions on abortion can lead to prohibited ill-treatment in breach of Article 3 of the Convention**

International human rights bodies have unambiguously and repeatedly affirmed that women and girls who are denied access to abortion care due to prohibitions on abortion may endure severe anguish, and mental and physical suffering reaching the minimum level of severity necessary to engage the absolute prohibition of torture and other ill-treatment.<sup>30</sup> They have established that prohibitions on abortion predictably expose women to severe suffering.

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<sup>25</sup> *Tysic v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R.; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R.; HRC, *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003.

<sup>26</sup> *A, B and C v. Ireland* (2010), App. no. 25579/05, Eur. Ct. H.R. [GC]; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014.

<sup>27</sup> HRC, *L.M.R. v. Argentina* (2011), CCPR/C/101/D/1608/2007.

<sup>28</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R.

<sup>29</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 20, 23.

<sup>30</sup> See, e.g., HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R.; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R.; HRC, *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003, para. 6.3; *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); CEDAW, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/OP.8/GBR/1 (2018), para. 65; *General recommendation No. 35 on gender-based violence against women, updating*

They have recognised the many ways in which prohibitions on abortion cause women and girls of reproductive age considerable pain and suffering, including severe mental anguish and painful stigma, by denying them the ability to end their pregnancies safely and legally in their country of residence and thereby compelling them to continue pregnancies against their will, to travel out of their own country to seek health care abroad, or to undergo an illegal and often unsafe abortion. They have specifically held that laws that prohibit women and girls of reproductive age from obtaining abortion care in situations of non-viable pregnancy, severe foetal impairment, where a pregnancy is the result of sexual assault or where a woman or girl's life or health is at risk subject them to severe mental and physical suffering and anguish amounting to ill-treatment.<sup>31</sup>

The Human Rights Committee has found in the context of examining the harm caused by a prohibition on abortion that, “[t]he legality of a particular conduct or action under domestic law does not mean that it cannot infringe article 7 of the Covenant.”<sup>32</sup> It explicitly recognised that “[b]y virtue of the existing legislative framework which prohibited abortion, the State party subjected the author to conditions of intense physical and mental suffering,” which violated the right to be free from torture and other ill-treatment.<sup>33</sup> The Committee recognised that the physical and mental anguish and suffering caused by a legal prohibition on abortion was compounded by the resulting break-down in the continuum of care and the conditions under which two women had to travel to a foreign country to obtain legal abortion care.<sup>34</sup> The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has found that a prohibition on abortion resulted in State responsibility for grave and systematic violations of the Convention on the Elimination of All Forms of Discrimination against Women as a result of the State’s “[d]eliberate maintenance of criminal laws disproportionately affecting women and girls, subjecting them to severe physical and mental anguish that may amount to cruel, inhuman and degrading treatment.”<sup>35</sup>

Under international law, States have positive obligations to take measures to ensure that individuals are not subjected to torture and other ill-treatment.<sup>36</sup> In particular, they must take steps to ensure effective protection against torture and other ill-treatment for individuals at increased risk of the same, including when it could reasonably be expected.<sup>37</sup> International human rights authorities have affirmed that, as a result of these positive obligations, States may not regulate abortion care in a manner that could subject women and girls to physical or mental pain or suffering amounting to torture and other ill-treatment.<sup>38</sup> This Court has also acknowledged that acts and omissions on the part of State authorities in the field of health care policy may reach the required threshold to engage Article 3 due to the failure to provide appropriate medical care.<sup>39</sup> Prohibitions on abortion predictably cause women and girls suffering that breaches the absolute prohibition on torture and other ill-treatment, in particular, where they affect individuals in especially vulnerable situations, including adolescents, survivors of sexual assault and pregnant individuals who have received a diagnosis of a non-viable pregnancy or severe foetal impairment.<sup>40</sup> States have a duty of care and protection towards women and girls of reproductive age in these highly vulnerable

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*general recommendation No. 19*, CEDAW/C/GC/35 (2017), para. 18; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (2013), para. 46; Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/31/57 (2016), paras. 42-44.

<sup>31</sup> See, e.g., HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 72(a).

<sup>32</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5.  
<sup>33</sup> *Id.*

<sup>34</sup> HRC, *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4.

<sup>35</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 72(a).

<sup>36</sup> *Z and Others v. the United Kingdom* (2001), App. no. 29392/95, Eur. Ct. H.R. [GC], para. 73; *A. and Others v. the United Kingdom* (2009), App. no. 3455/05, Eur. Ct. H.R. [GC], para. 22; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2006), App. no. 13178/03, Eur. Ct. H.R., paras. 53-54.

<sup>37</sup> *Osman v. the United Kingdom* (1998), App. no. 23452/94, Eur. Ct. H.R. [GC], para. 116; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2006), App. no. 13178/03, Eur. Ct. H.R., paras. 53-54.

<sup>38</sup> HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); Council of Europe, Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe* (2017), at 52-53.

<sup>39</sup> See, e.g., *R.R. v. Poland* (2011), App. No. 27617/04, Eur. Ct. H.R., para. 152; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 160; *V.C. v. Slovakia* (2012), App. no. 18968/07, Eur. Ct. H.R., paras. 106-120.

<sup>40</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., paras. 161-162, 166-168; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., paras. 159-161; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003, para. 6.2.

situations. As such, prohibitions on abortion violate positive obligations to prevent ill-treatment. In particular, prohibitions on abortion that ban access to abortion in situations of a non-viable pregnancy or severe foetal impairment, pregnancy resulting from sexual assault or involving a risk to a pregnant woman or girl's health or life should be considered a violation of States' positive obligations.

#### **IV. Prohibitions on abortion can violate the right to respect for private life enshrined in Article 8 of the Convention**

It is well-established that prohibitions on abortion undermine women's reproductive autonomy and decision-making, dignity, physical and psychological integrity and fall within the scope of, and constitute an interference with, the right to respect for private life enshrined in Article 8.<sup>41</sup> In order to be permissible under the Convention, any interference with the right to respect for private life must be "in accordance with the law," "necessary in a democratic society" and "proportionate to one of the legitimate aims."<sup>42</sup> As outlined in the sub-sections below, prohibitions on abortion do not meet these criteria, and international human rights bodies have repeatedly held that prohibitions on abortion violate women's right to respect for private life.<sup>43</sup>

In addition, although Article 8 mainly seeks to protect individuals against arbitrary interferences with the right to respect for private life, it also entails certain positive obligations on States to ensure effective respect for the right to private life, including by establishing a legal framework guaranteeing the effective enjoyment of the rights guaranteed by Article 8.<sup>44</sup> Prohibitions on abortion reflect a discordance between the law and the social reality that women and girls of reproductive age need, and will obtain, abortion care, regardless of whether it is prohibited or legally restricted.<sup>45</sup> Such prohibitions are therefore also contrary to States' positive obligations under Article 8.

##### **a. Interferences arising from rulings by a court that is not independent and impartial cannot be considered to meet the requirement of "in accordance with the law"**

For an interference with the right to respect for private life to meet the "in accordance with law" requirement, the interference must not only comply with national law and be clear, foreseeable and adequately accessible, it must also be compatible with the rule of law.<sup>46</sup> These requirements aim to limit the scope for arbitrary interferences with rights protected by Article 8, and ensure that they conform to the legal standards of the Council of Europe. The concept of the rule of law requires "a measure of legal protection in domestic law against arbitrary interferences by public authorities."<sup>47</sup> The independence and impartiality of the judiciary is a prerequisite and core requirement of the rule of law. Where an interference with the right to respect for private life arises from the ruling of a national judicial body, the assessment of the quality of the law and compliance with the rule of law test in Article 8(2) requires an examination of the judicial body's independence and impartiality. Where the national judicial body does not meet the standards of independence and impartiality required for a "tribunal established by law",<sup>48</sup> the quality, character and legality of its rulings may be compromised and vitiated so as to fall short of what the rule of law requires, and thus may not be "in accordance with the law" under the Convention.<sup>49</sup> Moreover, when such rulings constitute retrogressive measures that remove existing human rights protections under domestic law, their legality is even more questionable as under international human rights law, the introduction of retrogressive measures - deliberately backward steps in law or policy that directly or indirectly impede or restrict enjoyment of

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<sup>41</sup> See, e.g., *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., paras. 180-181; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 96; *Tysiaç v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., paras. 106-107; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.7; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.8.

<sup>42</sup> See, e.g., *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., para. 183.

<sup>43</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.8; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.9; *Tysiaç v. Poland* (2007), App. no. 5410/03 Eur. Ct. H.R.; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R.; *P. and S. v. Poland* (2013), App. no. 57375/08 Eur. Ct. H.R.; *A, B and C v. Ireland* (2010), App. no. 25579/05, Eur. Ct. H.R. [GC]; HRC, *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003, para. 6.4; *L.M.R. v. Argentina* (2011), CCPR/C/101/D/1608/2007.

<sup>44</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 95; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., para. 184; *Tysiaç v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., para. 110; *Fedotova and Others v. Russia* (2021), App. nos. 40792/10, 30538/14, 43439/14, Eur. Ct. H.R., para. 44.

<sup>45</sup> *Hämäläinen v. Finland* (2014), App. no. 37359/09, Eur. Ct. H.R. [GC], para. 66; *Christine Goodwin v. the United Kingdom* (2002), App. no. 28957/95, Eur. Ct. H.R. [GC], paras. 77-78; *R.R. v. Poland* (2011), App. No. 27617/04, Eur. Ct. H.R., para. 210.

<sup>46</sup> *Halford v. the United Kingdom* (1997), App. no. 20605/92, Eur. Ct. H.R., para. 49.

<sup>47</sup> *Malone v. the United Kingdom* (1985), App. no. 8691/79, Eur. Ct. H.R., para. 67.

<sup>48</sup> *Guðmundur Andri Ástráðsson v. Iceland* (2020), App. no. 26374/18, Eur. Ct. H.R.; *Xero Flor v. Poland* (2021), App. no. 4907/18, Eur. Ct. H.R., paras. 287, 289-91.

<sup>49</sup> *Dolinska-Ficek and Ozimek v. Poland* (2021), App. nos. 49868/19, 57511/19, Eur. Ct. H.R., para. 319.



a right - will almost never be permissible.<sup>50</sup> As such, a judicial body's introduction of new legal restrictions on access to abortion will immediately call into question compliance with international human rights law and standards.<sup>51</sup>

#### **b. Highly restrictive abortion laws cannot be considered necessary in a democratic society**

To be permissible under the Convention, any interference with the right to respect for private life must serve a legitimate aim, be necessary for achieving that aim, be proportionate and not give rise to discrimination on prohibited grounds.<sup>52</sup> As such, the interference must be appropriate and relevant to achieving the aim, the least intrusive possible, proportionate to the interest to be protected, and consistent with other human rights.<sup>53</sup> As further outlined below, prohibitions on abortion cannot be considered necessary in a democratic society. Such interferences affect core aspects of the existence, dignity and identity of women and girls of reproductive age, constitute discrimination on prohibited grounds and impugn their equality before the law. They do not advance a legitimate aim and are not capable of achieving any pressing social need. Retrogressive prohibitions are inherently suspect.

In the eleven years that have passed since this Court's decision in *A, B and C v. Ireland*, significant developments in international law and jurisprudence have repeatedly confirmed the impermissible nature of the interferences with the right to respect for private life posed by prohibitions on abortion, and almost all Contracting Parties have now repealed prohibitions on abortion and legalised abortion on broad grounds.

#### ***Prohibitions on abortion engage core elements of the existence and identity of women and girls of reproductive age, cause them grave harm and discriminate on prohibited grounds***

Interferences with the right to respect for private life that engage a particularly important facet of an individual's existence or identity will rarely be permissible.<sup>54</sup> As detailed in Sections II and III above, women and girls' decisions regarding pregnancy and whether or not to have a child necessarily engage particularly important facets of their existence and identity. Prohibitions on abortion restrict a form of health care that only women and girls of reproductive age require and prevent them from making fundamental decisions about their bodies, health, lives, families and futures with far reaching consequences for their existence and identity. Such prohibitions can cause women and girls of reproductive age grave harm, including physical and mental suffering and anguish, by forcing them to choose between carrying a pregnancy to term against their will, traveling to a foreign country to obtain a legal abortion or undergoing an illegal abortion. By denying women and girls of reproductive age the ability to end a pregnancy legally and safely in their country of residence, under the care of medical professionals they know and trust, such prohibitions expose them to significant risks to their physical and mental health and well-being. Prohibitions on abortion do not take account of the right to respect for private life of women and girls of reproductive age who may need access to abortion care to preserve and protect their autonomy, dignity and personal, bodily and psychological integrity.

Furthermore, where an interference with the right to respect for private life gives rise to discrimination on prohibited grounds, such as on the basis of sex or gender, very weighty reasons have to be advanced for that interference to be compatible with the Convention.<sup>55</sup> Women and girls of reproductive age have historically suffered considerable discrimination on the basis of their sex and gender. Prohibitions on abortion have been found to be discriminatory as they affect health care that only women and girls of reproductive age need and prevent

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<sup>50</sup> See CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1)*, para. 9, E/1991/23 (1990); HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Guideline 14(e): Violations through Acts of Commission (1997); *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Principle 72, E/CN.4/1987/17 (1987).

<sup>51</sup> See CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1)*, para. 9, E/1991/23 (1990); *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, paras. 32, 48, 50, E/C.12/2000/4 (2000); *General Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 38, E/C.12/GC/22 (2016).

<sup>52</sup> See, e.g., *Dudgeon v. the United Kingdom* (1981), App. no. 7525/76, Eur. Ct. H.R., para. 43.

<sup>53</sup> *Dudgeon v. the United Kingdom* (1981), App. no. 7525/76, Eur. Ct. H.R., paras. 43, 54; *Olsson v. Sweden* (no. 1) (1988), App. no. 10465/83, Eur. Ct. H.R., para. 68; *K. and T. v. Finland* (2001), App. no. 25702/94, Eur. Ct. H.R. [GC], para. 154.

<sup>54</sup> *Parrillo v. Italy* (2015), App. no. 46470/11, Eur. Ct. H.R. [GC], para. 169; *Fedotova and Others v. Russia* (2021), App. nos. 40792/10, 30538/14, 43439/14, Eur. Ct. H.R., para. 47.

<sup>55</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (1985), App. nos. 9214/80; 9473/81; 9474/81, Eur. Ct. H.R., para. 78; *Burghartz v. Switzerland* (1994), App. no. 16213/90, Eur. Ct. H.R., para. 27.

them from exercising reproductive choice, affront their autonomy and right to self-determination and offend their equal status.<sup>56</sup>

***International human rights mechanisms have repeatedly held that prohibitions on abortion give rise to violations of the right to respect for private life and constitute discrimination on prohibited grounds***

In light of these concerns, over the past decade, there have been very significant developments in international human rights law and standards, which attest to and affirm that the right to privacy requires the repeal of prohibitions on abortion and the enactment of legal frameworks that allow women and girls of reproductive age to obtain safe abortion care. International human rights bodies have issued numerous landmark decisions,<sup>57</sup> General Comments/Recommendations,<sup>58</sup> Concluding Observations,<sup>59</sup> and reports<sup>60</sup> that firmly recognise that in order to comply with their obligations under international human rights law, States should decriminalise abortion in all circumstances, repeal prohibitions on abortion, including specifically in situations of risk to health or life, severe foetal impairment and non-viable pregnancies, and pregnancies resulting from sexual assault, and remove other legal and policy barriers that hinder access to safe abortion care. They have also called on States to refrain from adopting any retrogressive legislative reforms that would restrict access to safe abortion.<sup>61</sup>

***The overwhelming majority of Contracting Parties have legalised abortion on broad grounds***

Today, almost all Contracting Parties have removed prohibitions on abortion and have legalised abortion on broad grounds.<sup>62</sup> Only six Council of Europe Member States – Andorra, Liechtenstein, Malta, Monaco, Poland, and San Marino – currently maintain broad or total prohibitions on abortion.<sup>63</sup> Following a referendum in September 2021, San Marino is also expected to enact reforms to legalise abortion on broad grounds. In the decade since the Court's decision in *A, B and C v. Ireland*, prohibitions on abortion have been removed in Cyprus, Gibraltar, Iceland, Ireland, Isle of Man and Northern Ireland, demonstrating clear social developments towards the broad legalisation of abortion. Over the same timeframe, Poland is the only Contracting Party that has expanded its highly restrictive law on abortion by removing an existing legal ground for abortion.

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<sup>56</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), paras. 59, 65; *see also* footnote 17.

<sup>57</sup> *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014; CEDAW, *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009; Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018).

<sup>58</sup> *See, e.g.*, CESCR, *General Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, paras. 10, 13, 28, 34, 40, 41, 45, 49(a), E/C.12/GC/22 (2016); HRC, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); CRC, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, para. 60, CRC/C/GC/20 (2016); *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/C/GC/15 (2013); CEDAW, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, paras. 18, 29(c)(i), CEDAW/C/GC/35 (2018); *General Recommendation 33 (2015) on women's access to justice*, para. 51(I), CEDAW/C/GC/33 (2015).

<sup>59</sup> *See, e.g.*, CRC, *Concluding Observations: Poland*, para. 35, CRC/C/POL/CO/5-6 (2021); *Malta*, para. 33, CRC/C/MLT/CO/3-6 (2019); Committee against Torture, *Concluding Observations: Poland*, paras. 33-34, CAT/C/POL/CO/7 (2019); *United Kingdom of Great Britain and Northern Ireland*, paras. 46-47, CAT/C/GBR/CO/6 (2019); HRC, *Concluding Observations: Poland*, paras. 23-24, CCPR/C/POL/CO/7 (2016); *United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7 (2015); *San Marino*, paras. 14-15, CCPR/C/SMR/CO/3 (2015); *Italy*, paras. 16-17, CCPR/C/ITA/CO/6 (2017); *Ireland*, CCPR/C/IRL/CO/4 (2014); CEDAW, *Concluding Observations: Andorra*, paras. 35-36, CEDAW/C/AND/CO/4 (2019); *Macedonia*, paras. 37(d), 38(d), CEDAW/C/MKD/CO/6 (2018); *Germany*, paras. 37(b), 38(b), CEDAW/C/DEU/CO/7-8 (2017); CESCR, *Concluding Observations: Spain*, paras. 43-44, E/C.12/ESP/CO/6 (2018); *Poland*, paras. 46-47, E/C.12/POL/CO/6 (2016).

<sup>60</sup> *See, e.g.*, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Sexual and reproductive health rights: challenges and opportunities during the COVID-19 pandemic, paras. 22, 40-41, A/76/172; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (2013), para. 46; Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/31/57 (2016); Council of Europe, Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe* (2017).

<sup>61</sup> HRC, *Concluding Observations: Poland*, para. 24(b), CCPR/C/POL/CO/7 (2016); CESCR, *Concluding Observations: Slovakia*, para. 42(e), E/C.12/SVK/CO/3 (2019).

<sup>62</sup> Center for Reproductive Rights, *European Abortion Laws: A Comparative Overview* (2019), at 3, <https://bit.ly/3028tZy>; Council of Europe, Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe* (2017).

<sup>63</sup> Andorra, Malta, and San Marino do not allow abortion at all. Liechtenstein and Poland allow abortion only when a woman's life or health is at risk or the pregnancy is the result of sexual assault. Monaco allows it only when a woman's life or health is at risk, the pregnancy is the result of sexual assault or involves a non-viable pregnancy. Center for Reproductive Rights, *European Abortion Laws: A Comparative Overview* (2019), at 4.

***Prohibitions on abortion do not advance a legitimate aim or pressing social need and are not proportionate***

Prohibitions on abortion are unsuitable and detrimental measures and cannot be considered appropriate or relevant interferences with the right to respect for private life capable of achieving a “pressing social need.” Public health evidence demonstrates that “[l]egal restrictions on abortion do not result in fewer abortions,” nor do they decrease the need for abortion care.<sup>64</sup> In fact, in contexts where abortion is broadly prohibited, evidence shows that a higher proportion of unintended pregnancies end in abortions.<sup>65</sup> Furthermore, prohibitions on abortion are “likely to increase the number of women seeking illegal and unsafe abortions,” or the number of women traveling to obtain safe abortion in other countries.<sup>66</sup> As such, prohibitions on abortion do not contribute to reducing abortion but only lead to increased health risks for those who need abortion care.

Where interferences with the right to respect for private life are purportedly justified with reference to the protection of morals, the reasons for the interference should be particularly carefully scrutinised given the vague and ill-defined concept of morals. As outlined above, careful scrutiny of prohibitions on abortion reveals the grave forms of harm they inflict on women and girls of reproductive age, without any regard for their right to respect for private life. Given the severity of the harm caused, prohibitions on abortion can never be considered a proportionate interference with the right to respect for private life.

Furthermore, prohibitions on abortion cannot be justified with reference to the protection of the rights and freedoms of others, including the rights of persons with disabilities. In particular, no international human rights treaty or mechanism provides that the right to life or any other right enshrined in international human rights treaties applies before birth.<sup>67</sup> Similarly, this Court has repeatedly declined to find that fetuses enjoy a right to life under Article 2 of the Convention.<sup>68</sup> The CEDAW Committee has specified that while States may have a legitimate interest in protecting prenatal life, prohibitions on abortion do not further that purpose,<sup>69</sup> whereas the Human Rights Committee has explicitly recognised that prohibitions on abortion in situations of non-viable pregnancies cannot be considered reasonable.<sup>70</sup> Reducing disability-related stigma is critically important, however, prohibiting abortion, including in cases of a non-viable pregnancy or severe foetal impairment, is not justified because it is never an effective means for achieving this aim. Indeed, the CEDAW Committee and the Committee on the Rights of Persons with Disabilities have jointly called on all States to decriminalise abortion and “to take a human rights based approach that safeguards the reproductive choice and autonomy of all women, including women with disabilities.”<sup>71</sup> In order to effectively reduce disability-related stigma, States must tackle the root causes of that stigma, including by ensuring equal rights for persons with disabilities as outlined in the Convention on the Rights of Persons with Disabilities.<sup>72</sup>

Finally, the assessment of whether an interference is necessary in a democratic society should also take account of the basis of that interference. As discussed above, where an interference with the right to respect for private life results from a decision of a court that cannot be considered “a tribunal established by law” and where such a ruling constitutes a retrogressive measure that removes existing rights protections, it cannot be considered to meet the requirement of being necessary in a democratic society as it is contrary to fundamental rule of law principles.<sup>73</sup>

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<sup>64</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 90; J. Bearak, A. Popinchalk, B. Ganatra, A.-B. Moller, Ö. Tunçalp, C. Beavin et al., *supra* note 21.

<sup>65</sup> J. Bearak, A. Popinchalk, B. Ganatra, A.-B. Moller, Ö. Tunçalp, C. Beavin et al., *supra* note 21.

<sup>66</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 90.

<sup>67</sup> While on regional treaty, the American Convention on Human Rights in Article 4 states that the right to life, “shall be protected by law and, in general, from the moment of conception,” both the Inter-American Court and Commission on Human Rights have clearly underlined that this is intended to afford conditional forms of protection that are not absolute, and as a result, they have held that laws allowing abortion are fully compatible with the right to life as enshrined in Article 4.

<sup>68</sup> See, e.g., *Vo v. France* (2004), App. no. 53924/00, Eur. Ct. H.R., para. 82; *Boso v. Italy* (2002), App. no. 50490/99, Eur. Ct. H.R.; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., para. 186. Furthermore, the history of negotiations of the Universal Declaration of Human Rights indicates that “born” in Article 1 was used intentionally to preclude application of the protected rights prenatally [U.N. GAOR 3rd Comm., 99th Mtg., paras. 110-124, A/PV/99 (1948)]. The *travaux préparatoires* to the International Covenant on Civil and Political Rights, also indicate that the drafters specifically rejected a proposal to provide protection to prenatal life or recognise a right to life prior to birth from the moment of conception [U.N. GAOR Annex, 12th Sess., Agenda Item 33, para. 96, 113, 119, A/C.3/L.654].

<sup>69</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 68.

<sup>70</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.8; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.9.

<sup>71</sup> *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities*, Joint statement by the Committee on the Rights of Persons with Disabilities and the CEDAW Committee (2018).

<sup>72</sup> Women Enabled International, *Abortion and Disability: Towards an Intersectional Human Rights-Based Approach* (2020).

<sup>73</sup> *A.-M.V. v. Finland* (2017), App. no. 53251/13, Eur. Ct. H.R., paras. 82-84.

## **Annex – Submitting Organisations**

**Amnesty International** is an international non-governmental, non-profit organization representing the largest grassroots human rights movement in the world with more than ten million members and supporters. Amnesty International's mission is to advocate for global compliance with international human rights law, the development of human rights norms, and the effective enjoyment of human rights by all persons. It monitors state compliance with international human rights law and engages in advocacy, litigation, and education to prevent and end human rights violations and to demand justice for those whose rights have been violated. Amnesty International has researched, documented and campaigned on the human rights violations due to criminalisation of abortion and restrictive abortion laws in different countries, and engaged in strategic litigation before international and regional human rights bodies in cases challenging restrictive abortion laws and their application. Amnesty International has also long-standing experience of research work on the situation of the independence of the judiciary in Poland in 2017, 2018, 2019, and 2020 and continues to monitor the issue.

The **Center for Reproductive Rights** is a global non-governmental human rights organisation dedicated to ensuring respect and legal protection for women's human rights in the sphere of reproductive health. The Center works across Europe to advance women's sexual and reproductive health and rights and its expertise on comparative European law on reproductive rights and the harmful impact of highly restrictive abortion laws is regularly requested by the Council of Europe Commissioner for Human Rights and the United Nations human rights mechanisms. It has represented the applicants or intervened as a third party in many of the seminal legal proceedings regarding abortion laws in Europe. The Center was an advisor to the applicants' representatives in *R.R. v. Poland* (2011) and *P. and S. v. Poland* (2013) and was granted leave by the Court to submit third party interventions in *B.B. v. Poland* (App. no. 67171/17), *A, B and C v. Ireland* (2010), *Tysic v. Poland* (2007), *D. v. Ireland* (2006), and *Vo v. France* (2004). The Center also represented the applicants in the seminal cases of *Mellet v. Ireland* (2016) and *Whelan v. Ireland* (2017) before the United Nations Human Rights Committee and has recently intervened in relevant domestic proceedings before the Supreme Court of the United Kingdom, the High Court of Northern Ireland, and the Constitutional Court of the Republic of Croatia.

**Human Rights Watch** is a non-profit, non-governmental human rights organization that advocates around the globe in defense of human rights. Founded in 1978, we now work in over 100 countries conducting human rights fact-finding and publishing our findings and recommendations in a variety of formats. Human Rights Watch has been granted permission to intervene in many cases before the European Court of Human Rights, as well as other regional human rights courts, international courts, international human rights bodies, and domestic courts. In cases in which Human Rights Watch has not sought to intervene as a third party, applicants before the European Court of Human Rights, and the Court itself, have drawn on Human Rights Watch reporting in deliberating the issues.

The **International Commission of Jurists** is a non-governmental organization working to advance understanding and respect for Rule of Law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva, Switzerland. It is made up of some 60 eminent jurists representing different justice systems worldwide and has 90 national sections and affiliated justice organizations. The ICJ has consultative Status at the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe and the African Union. The organization also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. Since its founding, the ICJ has maintained a focus on the rights to equality and non-discrimination, including through its thematic program of work on women's human rights.

The **International Federation for Human Rights (FIDH)** is an international human rights non-governmental organisation founded in 1922 and headquartered in Paris, France. It brings together 192 national human rights organisations from 117 countries across the world. FIDH's mandate is to defend all human rights enshrined in the UDHR. FIDH is involved in strategic litigation before domestic, regional and international/ised courts and bodies. FIDH's mission is to document and expose human rights abuse, seek accountability for perpetrators and contribute to further developing human rights norms and standards at the regional and international level, through research, advocacy and strategic litigation, and to build its members' capacity in those areas. FIDH has documented sexual and reproductive rights' violations, including abortion, in [Poland](#), Senegal, Chile, Nicaragua and other countries in Europe, Africa, MENA and the Americas. It engaged in strategic litigation before national and regional courts in cases challenging restrictive abortion laws and their application. FIDH has extensively researched rule of law violations in Europe, including in [Poland](#), and advocated for State accountability before regional courts and bodies,

while attempting to expose the interlinkages between rule of law and human rights, including women's rights violations.

The **International Planned Parenthood Federation European Network (IPPF EN)** is one of the regional networks of the International Planned Parenthood Federation (IPPF), an international, non-governmental, membership-led organisation, championing sexual and reproductive health and rights for all. IPPF EN and its national members and partners work in over 40 countries across Europe and Central Asia to empower everyone, especially the most socially excluded, to lead safe and dignified reproductive lives, free from harm and discrimination. IPPF EN advocates towards the EU and the Council of Europe to ensure all women, men, children, and young people have access to sexual and reproductive health and rights. In 2014, IPPF EN won a [collective complaint](#) against the Italian government in front of the European Committee of Social Rights. In 2017, following a joint [report](#) by IPPF EN, its Italian partners and the Center for Reproductive Rights, the U.N. Human Rights Committee expressed serious concerns about the difficulties women face in accessing abortion care across Italy, due to the government's failures. IPPF EN is working since many years in Poland to support its partners on the ground, who are leading the fight for access to abortion care for Polish women, and respect for the rule of law in Poland.

**Women Enabled International (WEI)** is an international, non-governmental organization that works to advance rights at the intersection of gender and disability to respond to the lived experiences of women and girls with disabilities, promote inclusion and participation, and achieve transformative equality. WEI works with organizations of persons with disabilities led by women and gender non-conforming persons--including through long-standing partnerships with organizations of women with disabilities in Poland--to document systemic human rights violations and seek redress through U.N. human rights experts and bodies. To this end, WEI has engaged in [cutting-edge international human rights legal analysis on abortion](#) and legal advocacy to ensure that the rights and perspectives of women and gender non-conforming persons with disabilities are considered and included in all discussions around sexual and reproductive health and rights.

**Women's Link Worldwide (WLW)** is an international non-governmental organization working to advance women's rights, especially those facing multiple inequalities through the domestic implementation of international human rights law and the use of comparative law and strategic litigation. As an organization dedicated to eliminating discrimination and violence against women and girls, WLW works to remove barriers to access sexual and reproductive health services, including abortion with an intersectional lens. WLW has extensive expertise engaging in litigation in countries with restrictive abortion laws such as Uganda, Dominican Republic, El Salvador or Honduras and in legal proceedings regarding abortion laws in Spain, Chile or Colombia. WLW's amicus briefs have been accepted into national courts (High Court of Kenya at Bungoma (obstetric violence and lack of maternal health services); High Court of Kenya at Nairobi (unprocedural closure of clinics providing safe and legal abortion services); Supreme Court of Rwanda (life imprisonment for infanticide); Constitutional Court of Dominican Republic (therapeutic abortion); Constitutional Court of Colombia (discrimination in accessing IVF services) and regional courts (cases *Gonzalez and Others v. Mexico*, *López Sotos and Others vs. Venezuela*, or *Manuela vs. El Salvador* at the Inter-American Court of Human Rights and *M. vs. the United Kingdom* at the European Court of Human Rights).

The **World Organisation Against Torture (OMCT)**, established 1986 in Geneva, is the world's largest Network of NGOs fighting against torture, summary executions, enforced disappearances and all other cruel inhuman or degrading treatment or punishment. It operates the SOS-Torture network composed of more than 200 affiliated organisations and maintains working relations with a large number of local and regional NGOs. It ensures the daily dissemination of urgent interventions across the world in order to prevent serious human rights violations, to protect individuals and to fight against impunity, and provides victims of torture with medical, social and/or legal assistance. Furthermore, the OMCT frequently represents torture victims seeking redress before national and international courts and has filed numerous amicus briefs in international and domestic courts. OMCT has documented violence against women and girls around the globe since 1996 and has integrated a gender perspective in its anti-torture work. In particular, the OMCT provides legal and material support to women and girls who are victims of torture or threatened with torture and other forms of ill-treatment taking into account the specific nature of the violence used against them and the availability of remedies. The OMCT further ensures that human rights violations that are specific to women and girls are taken into consideration by relevant U.N. bodies and are granted greater attention.

**Application no. 3639/21 – K.C. v. Poland and 3 other applications**

**Written comments**

**on behalf of Amnesty International, the Center for Reproductive Rights, Human Rights Watch, the International Commission of Jurists (ICJ), the International Federation for Human Rights (FIDH), the International Planned Parenthood Federation European Network, Women Enabled International, Women’s Link Worldwide and the World Organisation Against Torture (OMCT)**

**19 November 2021**

## I. Introduction

These written comments are presented on behalf of Amnesty International, the Center for Reproductive Rights, Human Rights Watch, the International Commission of Jurists (ICJ), the International Federation for Human Rights (FIDH), the International Planned Parenthood Federation European Network, Women Enabled International, Women’s Link Worldwide and the World Organisation Against Torture (OMCT) pursuant to the permission granted by the President of the First Section of the Court as notified in a letter dated 15 October 2021 from the Section Registrar. Please see the annex for a brief overview of the organisations.

These written comments examine how prohibitions on abortion: (i) directly affect people who can become pregnant and can cause them grave harm (Section II); (ii) may lead to prohibited ill-treatment in violation of Article 3 of the European Convention on Human Rights (“the Convention”) (Section III); and (iii) may violate the right to respect for private life guaranteed by Article 8 of the Convention (Section IV).

These comments address the ways in which prohibitions on abortion can affect *all* persons who can become pregnant, including all women, girls, non-binary persons and transgender men, regardless of their age. Throughout, these written comments use the term ‘women and girls of reproductive age’ in a non-exclusionary manner to denote all of these persons and discuss the impacts on them.

The term ‘prohibitions on abortion’ is used throughout these written comments to refer to highly restrictive abortion laws that broadly ban or strictly limit legal abortion to very restrictive circumstances and only allow women and girls of reproductive age to obtain abortion care in certain exceptional and limited circumstances.<sup>1</sup>

In drawing on recent developments in international human rights law and standards, and in comparative European law, these written comments rely on two well-established and interrelated principles of Convention interpretation developed by this Court. First, that the Convention cannot be interpreted in a vacuum and should, as far as possible, be interpreted in harmony with other rules of international law, and second, that the Convention is a living instrument for the protection of human rights in light of present-day conditions and, therefore, that the content of the rights guaranteed by the Convention evolves over time in response to, among other things, social developments in the Contracting Parties and developments in international law and jurisprudence.

## II. Prohibitions on abortion directly affect women and girls of reproductive age and cause them grave harm

It is well established that individuals will be considered to be victims with standing, under Article 34 of the Convention, entitled to submit a claim that a law or legal position violates their Convention rights, even in the absence of an individual measure of implementation of the law, where: (i) they run the risk of being directly affected by it;<sup>2</sup> or (ii) must modify their behaviour as a result of it;<sup>3</sup> or (iii) are indirectly harmed by its consequences and have a valid personal interest in seeing it brought to an end.<sup>4</sup> Ensuring that the rights protected by the Convention are not at risk of being nullified or rendered illusory, or that violations are made effectively unchallengeable, are also key considerations of any Article 34 assessment.<sup>5</sup>

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<sup>1</sup> Highly restrictive legal frameworks on abortion is generally the terminology used to describe laws that do not allow abortion on request or on broad social grounds but that instead only permit abortion where the life or health of a pregnant individual is at risk, where the pregnancy results from sexual assault or where a pregnancy involves a severe foetal impairment or is non-viable. Highly restrictive *is not* used to describe laws on abortion that allow abortion on request or broad social grounds but regulate abortion and place limits, such as time-limits, and other procedural requirements, on access. Among Contracting Parties only six States (Andorra, Liechtenstein, Malta, Monaco, Poland and San Marino) maintain such prohibitions on abortion.

<sup>2</sup> *Marckx v. Belgium* (1979), App. no. 6833/74, Eur. Ct. H.R., para. 27; *Open Door and Dublin Well Woman v. Ireland* (1992), App. nos. 14234/88, 14235/88, Eur. Ct. H.R., para. 44; *Johnston and Others v. Ireland* (1986), App. no. 9697/82, Eur. Ct. H.R., para. 42; *Norris v. Ireland* (1988), App. no. 10581/83, Eur. Ct. H.R., para. 31.

<sup>3</sup> *Dudgeon v. the United Kingdom* (1981), App. no. 7525/76, Eur. Ct. H.R., paras. 40-46; *Marckx v. Belgium* (1979), App. no. 6833/74, Eur. Ct. H.R., para. 27; *Klass and others v. Federal Republic of Germany* (1978), App. no. 5029/71, Eur. Ct. H.R., para. 33; *Tănase v. Moldova* (2010), App. no. 7/08, Eur. Ct. H.R. [GC], para. 105; *Burden and Burden v. the United Kingdom* (2008), App. no. 13378/05, Eur. Ct. H.R., para. 34; *S.A.S. v. France* (2014, GC), App. no. 43835/11, Eur. Ct. H.R. [GC], para. 57; *Norris v. Ireland* (1988), App. no. 10581/83, Eur. Ct. H.R., para. 32; *Modinos v. Cyprus* (1993), App. no. 15070/89, Eur. Ct. H.R., para. 24.

<sup>4</sup> *Roman Zakharov v. Russia* (2015), App. no. 47143/06, Eur. Ct. H.R. [GC], para. 169; *Vallianatos and Others v. Greece* (2013), App. nos. 29381/09, 32684/09, Eur. Ct. H.R. [GC], para. 47; *Tanrikulu and Others v. Turkey* (1999), App. no. 23763/94, Eur. Ct. H.R. [GC]; *Open Door and Dublin Well Woman v. Ireland* (1992), App. nos. 14234/88, 14235/88, Eur. Ct. H.R., para. 43.

<sup>5</sup> *Roman Zakharov v. Russia* (2015), App. no. 47143/06, Eur. Ct. H.R. [GC], paras. 165, 169, 171; *Klass and others v. Federal Republic of Germany* (1978), App. no. 5029/71, Eur. Ct. H.R., para. 34.

In *Open Door and Dublin Well Woman v. Ireland*, this Court recognised that women of reproductive age were at risk of being adversely affected by a prohibition on the provision of information in Ireland about abortion care in other countries. The Court held that two women in Ireland, who were not pregnant, belonged to a class of women of reproductive age who ran the risk of being directly prejudiced by the prohibition on information about abortion.<sup>6</sup>

In line with Article 34 criteria and this case-law, and for the reasons outlined below, women and girls of reproductive age belong to a class of people who are at risk of being directly affected and seriously prejudiced by legal prohibitions on abortion, whether or not they are currently pregnant or seeking an abortion. The harmful impacts that prohibitions on abortion have on women and girls of reproductive age are manifold and multi-layered and often severe.

***Prohibitions on abortion have unique and distinct effects on women and girls of reproductive age as a class of people***

Women and girls of reproductive age belong to a class of people who are directly affected by prohibitions on abortion because of their specific reproductive capacity. Abortion care is essential health care that only women and girls of reproductive age need;<sup>7</sup> only women and girls of reproductive age can become pregnant and only pregnant individuals can undergo an abortion procedure. As such, prohibitions on abortion forbid a form of health care that only women and girls of reproductive age need and have distinct and specific impacts on this class of people; they have effects that are entirely particular to, and that can only be experienced by women and girls of reproductive age. The maintenance of prohibitions on abortion systematically affects intimate aspects of the identities, health and lives of women and girls of reproductive age because only they can become pregnant. These legal measures deny individual reproductive autonomy and violate personal dignity. They undermine women and girls' ability to make decisions about their own bodies, their health, their families, their futures and their lives, all of which have far-reaching consequences for them as individuals. While the harmful impacts of prohibitions on abortion affect all women and girls of reproductive age, they often disproportionately and most severely affect women and girls belonging to marginalised communities, including women and girls with disabilities, migrants, those belonging to ethnic minorities, or of lower socio-economic status and those living in rural communities.<sup>8</sup>

Prohibitions on abortion that are introduced as a retrogressive measure - that is, where a previous legal entitlement to obtain abortion care is removed - nullify and invalidate human rights protections for a class of persons who are solely and uniquely affected. In those circumstances, women and girls of reproductive age have a valid personal interest in seeking an end to the resulting human rights violations.

***Prohibitions on abortion expose women and girls of reproductive age to a risk of significant harm and other human rights violations***

When women and girls are prohibited by law from obtaining abortion care, they are exposed to the risk of grave harm to their health and well-being, threats to their lives and survival, as well as other violations of their human rights, should they become pregnant and decide to end the pregnancy. Public health evidence shows that in such situations prohibitions on abortion compel women and girls of reproductive age to seek clandestine and often unsafe abortions, carry a pregnancy to term against their will, or where possible travel abroad to obtain abortion care, all of which expose them to risks to their health, exacerbate social inequities and violate their human rights.<sup>9</sup>

When women and girls are compelled to have recourse to unsafe abortion, they are placed at considerable risk of maternal mortality and morbidity, including lasting or temporary impacts on their physical and mental health, as well as major financial and emotional burdens.<sup>10</sup> When women and girls are forced to travel to another country to

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<sup>6</sup> *Open Door and Dublin Well Woman v. Ireland* (1992), App. nos. 14234/88, 14235/88, Eur. Ct. H.R., paras. 43, 44.

<sup>7</sup> See, e.g., Inter-Agency Working Group on Reproductive Health in Crises, *Inter-Agency Field Manual on Reproductive Health in Humanitarian Settings* (2018).

<sup>8</sup> See, e.g., World Health Organization (WHO), *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 18. WHO is expected to publish updated guidelines by the end of 2021. See also Committee on the Elimination of Discrimination against Women (CEDAW), *General recommendation No. 34 (2016) on the rights of rural women*, para. 38, CEDAW/C/GC/34 (2016); Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, para. 60, CRC/C/GC/20 (2016); Working Group on the issue of discrimination against women in law and in practice, A/HRC/32/44 (2016), para. 107(b).

<sup>9</sup> See, e.g., WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 90.

<sup>10</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 23, 87.



obtain safe and legal abortion care, it subjects them to significant hardship and distress and leads to delays in care that can result in increased health risks and inability to access care within legal time limits. Furthermore, needing to travel for abortion care severs the continuum of care and forces women and girls who need abortion care out of the health care system they are familiar with causing them uncertainty and anguish. Only women and girls with the financial means, travel documents and other resources and support will be able to avail of this option. When prohibitions on abortion compel women and girls to carry a pregnancy to term against their will, public health evidence shows that they are at greater risk of experiencing adverse physical and mental health effects.<sup>11</sup> Medical evidence also clearly shows that carrying a pregnancy to term and giving birth entails significantly greater health risks than having a safe abortion.<sup>12</sup> Moreover, where women and girls are compelled to continue a pregnancy against their will this can entail important adverse socioeconomic consequences and may negatively impact their social and family relations as well as their educational and professional opportunities.<sup>13</sup>

International human rights bodies have consistently and repeatedly recognised the many grave harms, including the physical, mental, emotional and socioeconomic harm detailed above, that are caused to women and girls of reproductive age by prohibitions on abortion. They have recognised that prohibitions on abortion prevent women and girls from making fundamental personal decisions about their health and lives and may give rise to severe mental or physical suffering by forcing women and girls to continue a pregnancy against their will, seek clandestine and often unsafe abortion or travel to a foreign country to obtain legal care. They have also emphasised the suffering that predictably afflicts pregnant women and girls in vulnerable positions who have decided to end a pregnancy and are denied access to abortion care in their home country, and endure a severance in the continuum of health care provision as a result. Moreover, they have underscored that for many women and girls delays in access to safe abortion care that are often caused by prohibitions on abortion predictably exacerbate suffering and anguish.

In light of these findings, international human rights bodies have held that prohibitions on abortion expose women and girls to severe mental or physical suffering, anguish, uncertainty, humiliation and disregard for their personal decisions that are so severe as to breach the international prohibition on ill-treatment.<sup>14</sup> They have also repeatedly recognised that prohibitions on abortion deny women's and girls' reproductive autonomy, decision-making and dignity, and result in violations of their right to respect for private life.<sup>15</sup> They have found that prohibitions on abortion constitute interferences with the right to privacy that cannot be justified as necessary and proportionate.<sup>16</sup> They have recognised that prohibitions on abortion are discriminatory based on sex and gender, and deny women and girls equality before the law,<sup>17</sup> and that they often have disproportionate and discriminatory impacts on

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<sup>11</sup> M. Antonia Biggs, U. D. Upadhyay, Ch. E. McCulloch et al, *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, JAMA Psychiatry (2017), 74(2):169–178.

<sup>12</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 49.

<sup>13</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 64; *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009, para. 8.18.

<sup>14</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 65; *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35 (2018), para. 18; Human Rights Committee (HRC), *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.3; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (2013), para. 46; Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/31/57 (2016).

<sup>15</sup> See, e.g., HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, paras. 7.7-7.8; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, paras. 7.8-7.9; CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), paras. 65, 72; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., paras. 180, 181, 214; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., paras. 96, 112; *Tysiąc v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., paras. 106-107, 130.

<sup>16</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.7; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.8.

<sup>17</sup> CEDAW, *General Recommendation No. 24 on Article 12 of the Convention (women and health)* (1999), paras. 14, 31(c); *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009, para. 8.16; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.11; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.12; Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 34, E/C.12/GC/22 (2016); Working Group on the issue of discrimination against women in law and in practice, A/HRC/38/46 (2018), para. 35; CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 59.

marginalised groups of women and girls. They have also recognised that prohibitions on abortion subject women and girls to gender-based stereotypes.<sup>18</sup>

***Prohibitions on abortion compel women and girls of reproductive age to modify their behaviour due to risk of life-changing consequences***

Prohibitions on abortion prevent women and girls of reproductive age from exercising personal autonomy and decision-making about their bodies, health, families and lives, and affect their legitimate exercise of their human rights, including those guaranteed by the Convention, even where they are not currently pregnant or seeking an abortion. This is the case even where criminal penalties do not apply to individuals who obtain abortion care outside the scope of the law. Prohibitions on abortion affect the fundamental life choices and decisions of women and girls of reproductive age in a myriad of significant ways. These include decisions about if and when to engage in sexual intercourse, to use contraception and the choice of contraceptive method, to become pregnant or to have a child. Women and girls of reproductive age who, for a wide range of reasons and at different times in their lives, do not want to become pregnant or have a child, always need to consider the risk of becoming pregnant and will often modify their behaviour accordingly. While they may be able to use modern methods of contraception to prevent pregnancy, public health evidence demonstrates that no form of contraception is completely effective,<sup>19</sup> and in many countries data indicates that a majority of women seeking abortion were using a method of contraception when they became pregnant.<sup>20</sup> Furthermore, evidence shows that rates of unintended pregnancy are higher in contexts where abortion is prohibited.<sup>21</sup> As such, the only fully effective means available to women and girls of reproductive age to avoid pregnancy is to entirely abstain from sexual intercourse.

Pregnancy and having a child have enormous consequences on women's and girls' bodies, health, lives and futures. The implications of having a child are life-changing for women of reproductive age regardless of whether they already have children or not. Public health evidence demonstrates that in many countries the majority of women who have an abortion already have at least one child.<sup>22</sup> In those circumstances, women will also consider the impact of having another child on their families. The responsibilities associated with caring for a child are significant, and often fall disproportionately on women and girls and have considerable consequences for their social, family, educational and professional situation. As such, prohibitions on abortion affect and determine women's and girls' decisions about highly intimate aspects of their lives and compel them to modify their behaviour, so as to minimise or avoid the risk of the many life-changing consequences of becoming pregnant in contexts where abortion is prohibited.

Moreover, even in situations where women and girls wish to become pregnant and have a child, a range of complex circumstances can arise in the course of pregnancy that may cause them to seek access to abortion care. Where prohibitions on abortion are in place, women and girls of reproductive age may actively decide to delay or avoid pregnancy due to well-founded fears of being unable to end the pregnancy should the need arise.

***The time-sensitive nature of abortion and related medical procedures***

Women and girls of reproductive age, who are affected by prohibitions on abortion, face particular challenges in seeking to vindicate their rights before international and regional fora. The Court has rightly recognised the vulnerability of women and girls who are seeking to vindicate their rights to abortion care and related services,<sup>23</sup> and the critical importance of the time factor in cases involving a pregnant woman or girl's decision to end a pregnancy.<sup>24</sup> Where abortion is prohibited, the time-sensitive nature of abortion care will often be an important barrier that significantly constrains the ability of pregnant women and girls who need abortion care to challenge the prohibition before this Court, as also demonstrated by the existing case-law. To date, all the cases concerning

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<sup>18</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.11; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; CEDAW, *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009, para. 8.15.

<sup>19</sup> WHO & Johns Hopkins Bloomberg School of Public Health, *Family Planning: A Global Handbook for Providers* (2018), 3<sup>rd</sup> ed.

<sup>20</sup> See, e.g., British Pregnancy Advisory Service, *Women cannot control fertility through contraception alone: bpas data shows 1 in 4 women having an abortion were using most effective contraception* (2017); R. K. Jones, *Reported contraceptive use in the month of becoming pregnant among U.S. abortion patients in 2000 and 2014*, *Contraception* 97(4):309-312 (2018).

<sup>21</sup> J. Bearak, A. Popinchalk, B. Ganatra, A.-B. Moller, Ö. Tunçalp, C. Beavin et al., *Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990–2019*, *The Lancet Global Health*, Vol. 8, Issue 9, E1152-E1161 (2020).

<sup>22</sup> *Id.*

<sup>23</sup> *Tysiāc v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., para. 127.

<sup>24</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 111.

access to abortion that have come before international and regional fora have been brought by women and girls after the fact, namely after they were denied abortion and forced to carry a pregnancy to term,<sup>25</sup> or after they travelled out of the country to obtain abortion care,<sup>26</sup> or after they obtained an illegal abortion,<sup>27</sup> or after they finally obtained legal abortion care after being subjected to harassment, manipulation and obstruction.<sup>28</sup> As such, no challenge to a prohibition on abortion has ever been filed before this Court or any other international human rights body by a woman or girl who at the time of filing was pregnant and needing abortion care. Requiring women and girls of reproductive age - who are *per se* at risk of being directly affected by a prohibition on abortion - to prove that they are pregnant and in need of abortion care to be recognised as victims under Article 34 would present an insurmountable obstacle, and would deny them the Convention's effective protection, and effectively deprive them of access to a remedy that is preventive and the opportunity to vindicate their rights before the Court until it is too late.

Furthermore, where prohibitions on abortion arise from final decisions by domestic judicial bodies, and where no domestic remedies are available or effective, women and girls of reproductive age are at even greater risk of being denied access to the Court's machinery were they not to be recognised as victims under Article 34. They could see their rights nullified and prohibitions on abortion rendered effectively unchallengeable. The protection of their Convention rights would be theoretical or illusory, as opposed to practical and effective. The need for the Court's supervision is made even more pressing where prohibitions on abortion are newly introduced as a retrogressive measure that has removed existing human rights protections for women and girls of reproductive age.

### *The harmful stigma and chilling effect of prohibitions on abortion*

Prohibitions on abortion treat a form of health care that only women and girls of reproductive age need as morally reprehensible by prohibiting it and making it liable to administrative or criminal sanctions. This causes significant social stigma, which generates stress, anxiety and uncertainty for women and girls of reproductive age. Laws that criminalise health care providers who perform abortion outside the scope of the law also generate significant chilling effects, irrespective of their actual implementation, and result in a range of barriers in women's and girls' access to relevant information and health care, and detrimentally affect their health care-seeking behaviour. In particular, women and girls may be reluctant to seek life-saving post-abortion care out of fear of social opprobrium and uncertainty about the legal ramifications for those who assisted them in obtaining clandestine abortions.<sup>29</sup> Fear of prosecution may also deter or halt the provision of legal abortion care even in the narrow circumstances in which abortion is not prohibited, and hence lead to denial of or delays in life-saving treatment, which, in turn, may result in severe health consequences or even death.

Prohibitions on abortion that are introduced as retrogressive measures and remove legal grounds for access to abortion care can exacerbate harmful stigma and deepen existing uncertainties and anxieties for women and girls of reproductive age, and further compound the chilling effects on health care providers.

### **III. Prohibitions on abortion can lead to prohibited ill-treatment in breach of Article 3 of the Convention**

International human rights bodies have unambiguously and repeatedly affirmed that women and girls who are denied access to abortion care due to prohibitions on abortion may endure severe anguish, and mental and physical suffering reaching the minimum level of severity necessary to engage the absolute prohibition of torture and other ill-treatment.<sup>30</sup> They have established that prohibitions on abortion predictably expose women to severe suffering.

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<sup>25</sup> *Tysic v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R.; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R.; HRC, *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003.

<sup>26</sup> *A, B and C v. Ireland* (2010), App. no. 25579/05, Eur. Ct. H.R. [GC]; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014.

<sup>27</sup> HRC, *L.M.R. v. Argentina* (2011), CCPR/C/101/D/1608/2007.

<sup>28</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R.

<sup>29</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 20, 23.

<sup>30</sup> See, e.g., HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R.; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R.; HRC, *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003, para. 6.3; *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); CEDAW, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/OP.8/GBR/1 (2018), para. 65; *General recommendation No. 35 on gender-based violence against women, updating*

They have recognised the many ways in which prohibitions on abortion cause women and girls of reproductive age considerable pain and suffering, including severe mental anguish and painful stigma, by denying them the ability to end their pregnancies safely and legally in their country of residence and thereby compelling them to continue pregnancies against their will, to travel out of their own country to seek health care abroad, or to undergo an illegal and often unsafe abortion. They have specifically held that laws that prohibit women and girls of reproductive age from obtaining abortion care in situations of non-viable pregnancy, severe foetal impairment, where a pregnancy is the result of sexual assault or where a woman or girl's life or health is at risk subject them to severe mental and physical suffering and anguish amounting to ill-treatment.<sup>31</sup>

The Human Rights Committee has found in the context of examining the harm caused by a prohibition on abortion that, “[t]he legality of a particular conduct or action under domestic law does not mean that it cannot infringe article 7 of the Covenant.”<sup>32</sup> It explicitly recognised that “[b]y virtue of the existing legislative framework which prohibited abortion, the State party subjected the author to conditions of intense physical and mental suffering,” which violated the right to be free from torture and other ill-treatment.<sup>33</sup> The Committee recognised that the physical and mental anguish and suffering caused by a legal prohibition on abortion was compounded by the resulting break-down in the continuum of care and the conditions under which two women had to travel to a foreign country to obtain legal abortion care.<sup>34</sup> The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has found that a prohibition on abortion resulted in State responsibility for grave and systematic violations of the Convention on the Elimination of All Forms of Discrimination against Women as a result of the State’s “[d]eliberate maintenance of criminal laws disproportionately affecting women and girls, subjecting them to severe physical and mental anguish that may amount to cruel, inhuman and degrading treatment.”<sup>35</sup>

Under international law, States have positive obligations to take measures to ensure that individuals are not subjected to torture and other ill-treatment.<sup>36</sup> In particular, they must take steps to ensure effective protection against torture and other ill-treatment for individuals at increased risk of the same, including when it could reasonably be expected.<sup>37</sup> International human rights authorities have affirmed that, as a result of these positive obligations, States may not regulate abortion care in a manner that could subject women and girls to physical or mental pain or suffering amounting to torture and other ill-treatment.<sup>38</sup> This Court has also acknowledged that acts and omissions on the part of State authorities in the field of health care policy may reach the required threshold to engage Article 3 due to the failure to provide appropriate medical care.<sup>39</sup> Prohibitions on abortion predictably cause women and girls suffering that breaches the absolute prohibition on torture and other ill-treatment, in particular, where they affect individuals in especially vulnerable situations, including adolescents, survivors of sexual assault and pregnant individuals who have received a diagnosis of a non-viable pregnancy or severe foetal impairment.<sup>40</sup> States have a duty of care and protection towards women and girls of reproductive age in these highly vulnerable

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*general recommendation No. 19*, CEDAW/C/GC/35 (2017), para. 18; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (2013), para. 46; Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/31/57 (2016), paras. 42-44.

<sup>31</sup> See, e.g., HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 72(a).

<sup>32</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5.

<sup>33</sup> *Id.*

<sup>34</sup> HRC, *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4.

<sup>35</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 72(a).

<sup>36</sup> *Z and Others v. the United Kingdom* (2001), App. no. 29392/95, Eur. Ct. H.R. [GC], para. 73; *A. and Others v. the United Kingdom* (2009), App. no. 3455/05, Eur. Ct. H.R. [GC], para. 22; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2006), App. no. 13178/03, Eur. Ct. H.R., paras. 53-54.

<sup>37</sup> *Osman v. the United Kingdom* (1998), App. no. 23452/94, Eur. Ct. H.R. [GC], para. 116; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2006), App. no. 13178/03, Eur. Ct. H.R., paras. 53-54.

<sup>38</sup> HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); Council of Europe, Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe* (2017), at 52-53.

<sup>39</sup> See, e.g., *R.R. v. Poland* (2011), App. No. 27617/04, Eur. Ct. H.R., para. 152; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 160; *V.C. v. Slovakia* (2012), App. no. 18968/07, Eur. Ct. H.R., paras. 106-120.

<sup>40</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., paras. 161-162, 166-168; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., paras. 159-161; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003, para. 6.2.

situations. As such, prohibitions on abortion violate positive obligations to prevent ill-treatment. In particular, prohibitions on abortion that ban access to abortion in situations of a non-viable pregnancy or severe foetal impairment, pregnancy resulting from sexual assault or involving a risk to a pregnant woman or girl's health or life should be considered a violation of States' positive obligations.

#### **IV. Prohibitions on abortion can violate the right to respect for private life enshrined in Article 8 of the Convention**

It is well-established that prohibitions on abortion undermine women's reproductive autonomy and decision-making, dignity, physical and psychological integrity and fall within the scope of, and constitute an interference with, the right to respect for private life enshrined in Article 8.<sup>41</sup> In order to be permissible under the Convention, any interference with the right to respect for private life must be "in accordance with the law," "necessary in a democratic society" and "proportionate to one of the legitimate aims."<sup>42</sup> As outlined in the sub-sections below, prohibitions on abortion do not meet these criteria, and international human rights bodies have repeatedly held that prohibitions on abortion violate women's right to respect for private life.<sup>43</sup>

In addition, although Article 8 mainly seeks to protect individuals against arbitrary interferences with the right to respect for private life, it also entails certain positive obligations on States to ensure effective respect for the right to private life, including by establishing a legal framework guaranteeing the effective enjoyment of the rights guaranteed by Article 8.<sup>44</sup> Prohibitions on abortion reflect a discordance between the law and the social reality that women and girls of reproductive age need, and will obtain, abortion care, regardless of whether it is prohibited or legally restricted.<sup>45</sup> Such prohibitions are therefore also contrary to States' positive obligations under Article 8.

##### **a. Interferences arising from rulings by a court that is not independent and impartial cannot be considered to meet the requirement of "in accordance with the law"**

For an interference with the right to respect for private life to meet the "in accordance with law" requirement, the interference must not only comply with national law and be clear, foreseeable and adequately accessible, it must also be compatible with the rule of law.<sup>46</sup> These requirements aim to limit the scope for arbitrary interferences with rights protected by Article 8, and ensure that they conform to the legal standards of the Council of Europe. The concept of the rule of law requires "a measure of legal protection in domestic law against arbitrary interferences by public authorities."<sup>47</sup> The independence and impartiality of the judiciary is a prerequisite and core requirement of the rule of law. Where an interference with the right to respect for private life arises from the ruling of a national judicial body, the assessment of the quality of the law and compliance with the rule of law test in Article 8(2) requires an examination of the judicial body's independence and impartiality. Where the national judicial body does not meet the standards of independence and impartiality required for a "tribunal established by law",<sup>48</sup> the quality, character and legality of its rulings may be compromised and vitiated so as to fall short of what the rule of law requires, and thus may not be "in accordance with the law" under the Convention.<sup>49</sup> Moreover, when such rulings constitute retrogressive measures that remove existing human rights protections under domestic law, their legality is even more questionable as under international human rights law, the introduction of retrogressive measures - deliberately backward steps in law or policy that directly or indirectly impede or restrict enjoyment of

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<sup>41</sup> See, e.g., *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., paras. 180-181; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 96; *Tysiaç v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., paras. 106-107; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.7; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.8.

<sup>42</sup> See, e.g., *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., para. 183.

<sup>43</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.8; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.9; *Tysiaç v. Poland* (2007), App. no. 5410/03 Eur. Ct. H.R.; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R.; *P. and S. v. Poland* (2013), App. no. 57375/08 Eur. Ct. H.R.; *A, B and C v. Ireland* (2010), App. no. 25579/05, Eur. Ct. H.R. [GC]; HRC, *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003, para. 6.4; *L.M.R. v. Argentina* (2011), CCPR/C/101/D/1608/2007.

<sup>44</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 95; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., para. 184; *Tysiaç v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., para. 110; *Fedotova and Others v. Russia* (2021), App. nos. 40792/10, 30538/14, 43439/14, Eur. Ct. H.R., para. 44.

<sup>45</sup> *Hämäläinen v. Finland* (2014), App. no. 37359/09, Eur. Ct. H.R. [GC], para. 66; *Christine Goodwin v. the United Kingdom* (2002), App. no. 28957/95, Eur. Ct. H.R. [GC], paras. 77-78; *R.R. v. Poland* (2011), App. No. 27617/04, Eur. Ct. H.R., para. 210.

<sup>46</sup> *Halford v. the United Kingdom* (1997), App. no. 20605/92, Eur. Ct. H.R., para. 49.

<sup>47</sup> *Malone v. the United Kingdom* (1985), App. no. 8691/79, Eur. Ct. H.R., para. 67.

<sup>48</sup> *Guðmundur Andri Ástráðsson v. Iceland* (2020), App. no. 26374/18, Eur. Ct. H.R.; *Xero Flor v. Poland* (2021), App. no. 4907/18, Eur. Ct. H.R., paras. 287, 289-91.

<sup>49</sup> *Dolinska-Ficek and Ozimek v. Poland* (2021), App. nos. 49868/19, 57511/19, Eur. Ct. H.R., para. 319.

a right - will almost never be permissible.<sup>50</sup> As such, a judicial body's introduction of new legal restrictions on access to abortion will immediately call into question compliance with international human rights law and standards.<sup>51</sup>

### **b. Highly restrictive abortion laws cannot be considered necessary in a democratic society**

To be permissible under the Convention, any interference with the right to respect for private life must serve a legitimate aim, be necessary for achieving that aim, be proportionate and not give rise to discrimination on prohibited grounds.<sup>52</sup> As such, the interference must be appropriate and relevant to achieving the aim, the least intrusive possible, proportionate to the interest to be protected, and consistent with other human rights.<sup>53</sup> As further outlined below, prohibitions on abortion cannot be considered necessary in a democratic society. Such interferences affect core aspects of the existence, dignity and identity of women and girls of reproductive age, constitute discrimination on prohibited grounds and impugn their equality before the law. They do not advance a legitimate aim and are not capable of achieving any pressing social need. Retrogressive prohibitions are inherently suspect.

In the eleven years that have passed since this Court's decision in *A, B and C v. Ireland*, significant developments in international law and jurisprudence have repeatedly confirmed the impermissible nature of the interferences with the right to respect for private life posed by prohibitions on abortion, and almost all Contracting Parties have now repealed prohibitions on abortion and legalised abortion on broad grounds.

#### ***Prohibitions on abortion engage core elements of the existence and identity of women and girls of reproductive age, cause them grave harm and discriminate on prohibited grounds***

Interferences with the right to respect for private life that engage a particularly important facet of an individual's existence or identity will rarely be permissible.<sup>54</sup> As detailed in Sections II and III above, women and girls' decisions regarding pregnancy and whether or not to have a child necessarily engage particularly important facets of their existence and identity. Prohibitions on abortion restrict a form of health care that only women and girls of reproductive age require and prevent them from making fundamental decisions about their bodies, health, lives, families and futures with far reaching consequences for their existence and identity. Such prohibitions can cause women and girls of reproductive age grave harm, including physical and mental suffering and anguish, by forcing them to choose between carrying a pregnancy to term against their will, traveling to a foreign country to obtain a legal abortion or undergoing an illegal abortion. By denying women and girls of reproductive age the ability to end a pregnancy legally and safely in their country of residence, under the care of medical professionals they know and trust, such prohibitions expose them to significant risks to their physical and mental health and well-being. Prohibitions on abortion do not take account of the right to respect for private life of women and girls of reproductive age who may need access to abortion care to preserve and protect their autonomy, dignity and personal, bodily and psychological integrity.

Furthermore, where an interference with the right to respect for private life gives rise to discrimination on prohibited grounds, such as on the basis of sex or gender, very weighty reasons have to be advanced for that interference to be compatible with the Convention.<sup>55</sup> Women and girls of reproductive age have historically suffered considerable discrimination on the basis of their sex and gender. Prohibitions on abortion have been found to be discriminatory as they affect health care that only women and girls of reproductive age need and prevent

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<sup>50</sup> See CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1)*, para. 9, E/1991/23 (1990); HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Guideline 14(e): Violations through Acts of Commission (1997); *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Principle 72, E/CN.4/1987/17 (1987).

<sup>51</sup> See CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1)*, para. 9, E/1991/23 (1990); *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, paras. 32, 48, 50, E/C.12/2000/4 (2000); *General Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 38, E/C.12/GC/22 (2016).

<sup>52</sup> See, e.g., *Dudgeon v. the United Kingdom* (1981), App. no. 7525/76, Eur. Ct. H.R., para. 43.

<sup>53</sup> *Dudgeon v. the United Kingdom* (1981), App. no. 7525/76, Eur. Ct. H.R., paras. 43, 54; *Olsson v. Sweden* (no. 1) (1988), App. no. 10465/83, Eur. Ct. H.R., para. 68; *K. and T. v. Finland* (2001), App. no. 25702/94, Eur. Ct. H.R. [GC], para. 154.

<sup>54</sup> *Parrillo v. Italy* (2015), App. no. 46470/11, Eur. Ct. H.R. [GC], para. 169; *Fedotova and Others v. Russia* (2021), App. nos. 40792/10, 30538/14, 43439/14, Eur. Ct. H.R., para. 47.

<sup>55</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (1985), App. nos. 9214/80; 9473/81; 9474/81, Eur. Ct. H.R., para. 78; *Burghartz v. Switzerland* (1994), App. no. 16213/90, Eur. Ct. H.R., para. 27.

them from exercising reproductive choice, affront their autonomy and right to self-determination and offend their equal status.<sup>56</sup>

***International human rights mechanisms have repeatedly held that prohibitions on abortion give rise to violations of the right to respect for private life and constitute discrimination on prohibited grounds***

In light of these concerns, over the past decade, there have been very significant developments in international human rights law and standards, which attest to and affirm that the right to privacy requires the repeal of prohibitions on abortion and the enactment of legal frameworks that allow women and girls of reproductive age to obtain safe abortion care. International human rights bodies have issued numerous landmark decisions,<sup>57</sup> General Comments/Recommendations,<sup>58</sup> Concluding Observations,<sup>59</sup> and reports<sup>60</sup> that firmly recognise that in order to comply with their obligations under international human rights law, States should decriminalise abortion in all circumstances, repeal prohibitions on abortion, including specifically in situations of risk to health or life, severe foetal impairment and non-viable pregnancies, and pregnancies resulting from sexual assault, and remove other legal and policy barriers that hinder access to safe abortion care. They have also called on States to refrain from adopting any retrogressive legislative reforms that would restrict access to safe abortion.<sup>61</sup>

***The overwhelming majority of Contracting Parties have legalised abortion on broad grounds***

Today, almost all Contracting Parties have removed prohibitions on abortion and have legalised abortion on broad grounds.<sup>62</sup> Only six Council of Europe Member States – Andorra, Liechtenstein, Malta, Monaco, Poland, and San Marino – currently maintain broad or total prohibitions on abortion.<sup>63</sup> Following a referendum in September 2021, San Marino is also expected to enact reforms to legalise abortion on broad grounds. In the decade since the Court's decision in *A, B and C v. Ireland*, prohibitions on abortion have been removed in Cyprus, Gibraltar, Iceland, Ireland, Isle of Man and Northern Ireland, demonstrating clear social developments towards the broad legalisation of abortion. Over the same timeframe, Poland is the only Contracting Party that has expanded its highly restrictive law on abortion by removing an existing legal ground for abortion.

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<sup>56</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), paras. 59, 65; *see also* footnote 17.

<sup>57</sup> *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014; CEDAW, *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009; Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018).

<sup>58</sup> *See, e.g.*, CESCR, *General Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, paras. 10, 13, 28, 34, 40, 41, 45, 49(a), E/C.12/GC/22 (2016); HRC, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); CRC, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, para. 60, CRC/C/GC/20 (2016); *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/C/GC/15 (2013); CEDAW, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, paras. 18, 29(c)(i), CEDAW/C/GC/35 (2018); *General Recommendation 33 (2015) on women's access to justice*, para. 51(I), CEDAW/C/GC/33 (2015).

<sup>59</sup> *See, e.g.*, CRC, *Concluding Observations: Poland*, para. 35, CRC/C/POL/CO/5-6 (2021); *Malta*, para. 33, CRC/C/MLT/CO/3-6 (2019); Committee against Torture, *Concluding Observations: Poland*, paras. 33-34, CAT/C/POL/CO/7 (2019); *United Kingdom of Great Britain and Northern Ireland*, paras. 46-47, CAT/C/GBR/CO/6 (2019); HRC, *Concluding Observations: Poland*, paras. 23-24, CCPR/C/POL/CO/7 (2016); *United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7 (2015); *San Marino*, paras. 14-15, CCPR/C/SMR/CO/3 (2015); *Italy*, paras. 16-17, CCPR/C/ITA/CO/6 (2017); *Ireland*, CCPR/C/IRL/CO/4 (2014); CEDAW, *Concluding Observations: Andorra*, paras. 35-36, CEDAW/C/AND/CO/4 (2019); *Macedonia*, paras. 37(d), 38(d), CEDAW/C/MKD/CO/6 (2018); *Germany*, paras. 37(b), 38(b), CEDAW/C/DEU/CO/7-8 (2017); CESCR, *Concluding Observations: Spain*, paras. 43-44, E/C.12/ESP/CO/6 (2018); *Poland*, paras. 46-47, E/C.12/POL/CO/6 (2016).

<sup>60</sup> *See, e.g.*, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Sexual and reproductive health rights: challenges and opportunities during the COVID-19 pandemic, paras. 22, 40-41, A/76/172; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (2013), para. 46; Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/31/57 (2016); Council of Europe, Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe* (2017).

<sup>61</sup> HRC, *Concluding Observations: Poland*, para. 24(b), CCPR/C/POL/CO/7 (2016); CESCR, *Concluding Observations: Slovakia*, para. 42(e), E/C.12/SVK/CO/3 (2019).

<sup>62</sup> Center for Reproductive Rights, *European Abortion Laws: A Comparative Overview* (2019), at 3, <https://bit.ly/3028tZy>; Council of Europe, Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe* (2017).

<sup>63</sup> Andorra, Malta, and San Marino do not allow abortion at all. Liechtenstein and Poland allow abortion only when a woman's life or health is at risk or the pregnancy is the result of sexual assault. Monaco allows it only when a woman's life or health is at risk, the pregnancy is the result of sexual assault or involves a non-viable pregnancy. Center for Reproductive Rights, *European Abortion Laws: A Comparative Overview* (2019), at 4.

***Prohibitions on abortion do not advance a legitimate aim or pressing social need and are not proportionate***

Prohibitions on abortion are unsuitable and detrimental measures and cannot be considered appropriate or relevant interferences with the right to respect for private life capable of achieving a “pressing social need.” Public health evidence demonstrates that “[l]egal restrictions on abortion do not result in fewer abortions,” nor do they decrease the need for abortion care.<sup>64</sup> In fact, in contexts where abortion is broadly prohibited, evidence shows that a higher proportion of unintended pregnancies end in abortions.<sup>65</sup> Furthermore, prohibitions on abortion are “likely to increase the number of women seeking illegal and unsafe abortions,” or the number of women traveling to obtain safe abortion in other countries.<sup>66</sup> As such, prohibitions on abortion do not contribute to reducing abortion but only lead to increased health risks for those who need abortion care.

Where interferences with the right to respect for private life are purportedly justified with reference to the protection of morals, the reasons for the interference should be particularly carefully scrutinised given the vague and ill-defined concept of morals. As outlined above, careful scrutiny of prohibitions on abortion reveals the grave forms of harm they inflict on women and girls of reproductive age, without any regard for their right to respect for private life. Given the severity of the harm caused, prohibitions on abortion can never be considered a proportionate interference with the right to respect for private life.

Furthermore, prohibitions on abortion cannot be justified with reference to the protection of the rights and freedoms of others, including the rights of persons with disabilities. In particular, no international human rights treaty or mechanism provides that the right to life or any other right enshrined in international human rights treaties applies before birth.<sup>67</sup> Similarly, this Court has repeatedly declined to find that fetuses enjoy a right to life under Article 2 of the Convention.<sup>68</sup> The CEDAW Committee has specified that while States may have a legitimate interest in protecting prenatal life, prohibitions on abortion do not further that purpose,<sup>69</sup> whereas the Human Rights Committee has explicitly recognised that prohibitions on abortion in situations of non-viable pregnancies cannot be considered reasonable.<sup>70</sup> Reducing disability-related stigma is critically important, however, prohibiting abortion, including in cases of a non-viable pregnancy or severe foetal impairment, is not justified because it is never an effective means for achieving this aim. Indeed, the CEDAW Committee and the Committee on the Rights of Persons with Disabilities have jointly called on all States to decriminalise abortion and “to take a human rights based approach that safeguards the reproductive choice and autonomy of all women, including women with disabilities.”<sup>71</sup> In order to effectively reduce disability-related stigma, States must tackle the root causes of that stigma, including by ensuring equal rights for persons with disabilities as outlined in the Convention on the Rights of Persons with Disabilities.<sup>72</sup>

Finally, the assessment of whether an interference is necessary in a democratic society should also take account of the basis of that interference. As discussed above, where an interference with the right to respect for private life results from a decision of a court that cannot be considered “a tribunal established by law” and where such a ruling constitutes a retrogressive measure that removes existing rights protections, it cannot be considered to meet the requirement of being necessary in a democratic society as it is contrary to fundamental rule of law principles.<sup>73</sup>

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<sup>64</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 90; J. Bearak, A. Popinchalk, B. Ganatra, A.-B. Moller, Ö. Tunçalp, C. Beavin et al., *supra* note 21.

<sup>65</sup> J. Bearak, A. Popinchalk, B. Ganatra, A.-B. Moller, Ö. Tunçalp, C. Beavin et al., *supra* note 21.

<sup>66</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 90.

<sup>67</sup> While on regional treaty, the American Convention on Human Rights in Article 4 states that the right to life, “shall be protected by law and, in general, from the moment of conception,” both the Inter-American Court and Commission on Human Rights have clearly underlined that this is intended to afford conditional forms of protection that are not absolute, and as a result, they have held that laws allowing abortion are fully compatible with the right to life as enshrined in Article 4.

<sup>68</sup> See, e.g., *Vo v. France* (2004), App. no. 53924/00, Eur. Ct. H.R., para. 82; *Boso v. Italy* (2002), App. no. 50490/99, Eur. Ct. H.R.; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., para. 186. Furthermore, the history of negotiations of the Universal Declaration of Human Rights indicates that “born” in Article 1 was used intentionally to preclude application of the protected rights prenatally [U.N. GAOR 3rd Comm., 99th Mtg., paras. 110-124, A/PV/99 (1948)]. The *travaux préparatoires* to the International Covenant on Civil and Political Rights, also indicate that the drafters specifically rejected a proposal to provide protection to prenatal life or recognise a right to life prior to birth from the moment of conception [U.N. GAOR Annex, 12th Sess., Agenda Item 33, para. 96, 113, 119, A/C.3/L.654].

<sup>69</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 68.

<sup>70</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.8; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.9.

<sup>71</sup> *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities*, Joint statement by the Committee on the Rights of Persons with Disabilities and the CEDAW Committee (2018).

<sup>72</sup> Women Enabled International, *Abortion and Disability: Towards an Intersectional Human Rights-Based Approach* (2020).

<sup>73</sup> *A.-M.V. v. Finland* (2017), App. no. 53251/13, Eur. Ct. H.R., paras. 82-84.



## **Annex – Submitting Organisations**

**Amnesty International** is an international non-governmental, non-profit organization representing the largest grassroots human rights movement in the world with more than ten million members and supporters. Amnesty International's mission is to advocate for global compliance with international human rights law, the development of human rights norms, and the effective enjoyment of human rights by all persons. It monitors state compliance with international human rights law and engages in advocacy, litigation, and education to prevent and end human rights violations and to demand justice for those whose rights have been violated. Amnesty International has researched, documented and campaigned on the human rights violations due to criminalisation of abortion and restrictive abortion laws in different countries, and engaged in strategic litigation before international and regional human rights bodies in cases challenging restrictive abortion laws and their application. Amnesty International has also long-standing experience of research work on the situation of the independence of the judiciary in Poland in 2017, 2018, 2019, and 2020 and continues to monitor the issue.

The **Center for Reproductive Rights** is a global non-governmental human rights organisation dedicated to ensuring respect and legal protection for women's human rights in the sphere of reproductive health. The Center works across Europe to advance women's sexual and reproductive health and rights and its expertise on comparative European law on reproductive rights and the harmful impact of highly restrictive abortion laws is regularly requested by the Council of Europe Commissioner for Human Rights and the United Nations human rights mechanisms. It has represented the applicants or intervened as a third party in many of the seminal legal proceedings regarding abortion laws in Europe. The Center was an advisor to the applicants' representatives in *R.R. v. Poland* (2011) and *P. and S. v. Poland* (2013) and was granted leave by the Court to submit third party interventions in *B.B. v. Poland* (App. no. 67171/17), *A, B and C v. Ireland* (2010), *Tysic v. Poland* (2007), *D. v. Ireland* (2006), and *Vo v. France* (2004). The Center also represented the applicants in the seminal cases of *Mellet v. Ireland* (2016) and *Whelan v. Ireland* (2017) before the United Nations Human Rights Committee and has recently intervened in relevant domestic proceedings before the Supreme Court of the United Kingdom, the High Court of Northern Ireland, and the Constitutional Court of the Republic of Croatia.

**Human Rights Watch** is a non-profit, non-governmental human rights organization that advocates around the globe in defense of human rights. Founded in 1978, we now work in over 100 countries conducting human rights fact-finding and publishing our findings and recommendations in a variety of formats. Human Rights Watch has been granted permission to intervene in many cases before the European Court of Human Rights, as well as other regional human rights courts, international courts, international human rights bodies, and domestic courts. In cases in which Human Rights Watch has not sought to intervene as a third party, applicants before the European Court of Human Rights, and the Court itself, have drawn on Human Rights Watch reporting in deliberating the issues.

The **International Commission of Jurists** is a non-governmental organization working to advance understanding and respect for Rule of Law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva, Switzerland. It is made up of some 60 eminent jurists representing different justice systems worldwide and has 90 national sections and affiliated justice organizations. The ICJ has consultative Status at the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe and the African Union. The organization also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. Since its founding, the ICJ has maintained a focus on the rights to equality and non-discrimination, including through its thematic program of work on women's human rights.

The **International Federation for Human Rights (FIDH)** is an international human rights non-governmental organisation founded in 1922 and headquartered in Paris, France. It brings together 192 national human rights organisations from 117 countries across the world. FIDH's mandate is to defend all human rights enshrined in the UDHR. FIDH is involved in strategic litigation before domestic, regional and international/ised courts and bodies. FIDH's mission is to document and expose human rights abuse, seek accountability for perpetrators and contribute to further developing human rights norms and standards at the regional and international level, through research, advocacy and strategic litigation, and to build its members' capacity in those areas. FIDH has documented sexual and reproductive rights' violations, including abortion, in [Poland](#), Senegal, Chile, Nicaragua and other countries in Europe, Africa, MENA and the Americas. It engaged in strategic litigation before national and regional courts in cases challenging restrictive abortion laws and their application. FIDH has extensively researched rule of law violations in Europe, including in [Poland](#), and advocated for State accountability before regional courts and bodies,

while attempting to expose the interlinkages between rule of law and human rights, including women's rights violations.

The **International Planned Parenthood Federation European Network (IPPF EN)** is one of the regional networks of the International Planned Parenthood Federation (IPPF), an international, non-governmental, membership-led organisation, championing sexual and reproductive health and rights for all. IPPF EN and its national members and partners work in over 40 countries across Europe and Central Asia to empower everyone, especially the most socially excluded, to lead safe and dignified reproductive lives, free from harm and discrimination. IPPF EN advocates towards the EU and the Council of Europe to ensure all women, men, children, and young people have access to sexual and reproductive health and rights. In 2014, IPPF EN won a [collective complaint](#) against the Italian government in front of the European Committee of Social Rights. In 2017, following a joint [report](#) by IPPF EN, its Italian partners and the Center for Reproductive Rights, the U.N. Human Rights Committee expressed serious concerns about the difficulties women face in accessing abortion care across Italy, due to the government's failures. IPPF EN is working since many years in Poland to support its partners on the ground, who are leading the fight for access to abortion care for Polish women, and respect for the rule of law in Poland.

**Women Enabled International (WEI)** is an international, non-governmental organization that works to advance rights at the intersection of gender and disability to respond to the lived experiences of women and girls with disabilities, promote inclusion and participation, and achieve transformative equality. WEI works with organizations of persons with disabilities led by women and gender non-conforming persons--including through long-standing partnerships with organizations of women with disabilities in Poland--to document systemic human rights violations and seek redress through U.N. human rights experts and bodies. To this end, WEI has engaged in [cutting-edge international human rights legal analysis on abortion](#) and legal advocacy to ensure that the rights and perspectives of women and gender non-conforming persons with disabilities are considered and included in all discussions around sexual and reproductive health and rights.

**Women's Link Worldwide (WLW)** is an international non-governmental organization working to advance women's rights, especially those facing multiple inequalities through the domestic implementation of international human rights law and the use of comparative law and strategic litigation. As an organization dedicated to eliminating discrimination and violence against women and girls, WLW works to remove barriers to access sexual and reproductive health services, including abortion with an intersectional lens. WLW has extensive expertise engaging in litigation in countries with restrictive abortion laws such as Uganda, Dominican Republic, El Salvador or Honduras and in legal proceedings regarding abortion laws in Spain, Chile or Colombia. WLW's amicus briefs have been accepted into national courts (High Court of Kenya at Bungoma (obstetric violence and lack of maternal health services); High Court of Kenya at Nairobi (unprocedural closure of clinics providing safe and legal abortion services); Supreme Court of Rwanda (life imprisonment for infanticide); Constitutional Court of Dominican Republic (therapeutic abortion); Constitutional Court of Colombia (discrimination in accessing IVF services) and regional courts (cases *Gonzalez and Others v. Mexico*, *López Sotos and Others vs. Venezuela*, or *Manuela vs. El Salvador* at the Inter-American Court of Human Rights and *M. vs. the United Kingdom* at the European Court of Human Rights).

The **World Organisation Against Torture (OMCT)**, established 1986 in Geneva, is the world's largest Network of NGOs fighting against torture, summary executions, enforced disappearances and all other cruel inhuman or degrading treatment or punishment. It operates the SOS-Torture network composed of more than 200 affiliated organisations and maintains working relations with a large number of local and regional NGOs. It ensures the daily dissemination of urgent interventions across the world in order to prevent serious human rights violations, to protect individuals and to fight against impunity, and provides victims of torture with medical, social and/or legal assistance. Furthermore, the OMCT frequently represents torture victims seeking redress before national and international courts and has filed numerous amicus briefs in international and domestic courts. OMCT has documented violence against women and girls around the globe since 1996 and has integrated a gender perspective in its anti-torture work. In particular, the OMCT provides legal and material support to women and girls who are victims of torture or threatened with torture and other forms of ill-treatment taking into account the specific nature of the violence used against them and the availability of remedies. The OMCT further ensures that human rights violations that are specific to women and girls are taken into consideration by relevant U.N. bodies and are granted greater attention.

**Application no. 3801/21 – A.L. – B. v. Poland and 3 other applications**

**Written comments**

**on behalf of Amnesty International, the Center for Reproductive Rights, Human Rights Watch, the International Commission of Jurists (ICJ), the International Federation for Human Rights (FIDH), the International Planned Parenthood Federation European Network, Women Enabled International, Women’s Link Worldwide and the World Organisation Against Torture (OMCT)**

**19 November 2021**

## I. Introduction

These written comments are presented on behalf of Amnesty International, the Center for Reproductive Rights, Human Rights Watch, the International Commission of Jurists (ICJ), the International Federation for Human Rights (FIDH), the International Planned Parenthood Federation European Network, Women Enabled International, Women’s Link Worldwide and the World Organisation Against Torture (OMCT) pursuant to the permission granted by the President of the First Section of the Court as notified in a letter dated 15 October 2021 from the Section Registrar. Please see the annex for a brief overview of the organisations.

These written comments examine how prohibitions on abortion: (i) directly affect people who can become pregnant and can cause them grave harm (Section II); (ii) may lead to prohibited ill-treatment in violation of Article 3 of the European Convention on Human Rights (“the Convention”) (Section III); and (iii) may violate the right to respect for private life guaranteed by Article 8 of the Convention (Section IV).

These comments address the ways in which prohibitions on abortion can affect *all* persons who can become pregnant, including all women, girls, non-binary persons and transgender men, regardless of their age. Throughout, these written comments use the term ‘women and girls of reproductive age’ in a non-exclusionary manner to denote all of these persons and discuss the impacts on them.

The term ‘prohibitions on abortion’ is used throughout these written comments to refer to highly restrictive abortion laws that broadly ban or strictly limit legal abortion to very restrictive circumstances and only allow women and girls of reproductive age to obtain abortion care in certain exceptional and limited circumstances.<sup>1</sup>

In drawing on recent developments in international human rights law and standards, and in comparative European law, these written comments rely on two well-established and interrelated principles of Convention interpretation developed by this Court. First, that the Convention cannot be interpreted in a vacuum and should, as far as possible, be interpreted in harmony with other rules of international law, and second, that the Convention is a living instrument for the protection of human rights in light of present-day conditions and, therefore, that the content of the rights guaranteed by the Convention evolves over time in response to, among other things, social developments in the Contracting Parties and developments in international law and jurisprudence.

## II. Prohibitions on abortion directly affect women and girls of reproductive age and cause them grave harm

It is well established that individuals will be considered to be victims with standing, under Article 34 of the Convention, entitled to submit a claim that a law or legal position violates their Convention rights, even in the absence of an individual measure of implementation of the law, where: (i) they run the risk of being directly affected by it;<sup>2</sup> or (ii) must modify their behaviour as a result of it;<sup>3</sup> or (iii) are indirectly harmed by its consequences and have a valid personal interest in seeing it brought to an end.<sup>4</sup> Ensuring that the rights protected by the Convention are not at risk of being nullified or rendered illusory, or that violations are made effectively unchallengeable, are also key considerations of any Article 34 assessment.<sup>5</sup>

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<sup>1</sup> Highly restrictive legal frameworks on abortion is generally the terminology used to describe laws that do not allow abortion on request or on broad social grounds but that instead only permit abortion where the life or health of a pregnant individual is at risk, where the pregnancy results from sexual assault or where a pregnancy involves a severe foetal impairment or is non-viable. Highly restrictive *is not* used to describe laws on abortion that allow abortion on request or broad social grounds but regulate abortion and place limits, such as time-limits, and other procedural requirements, on access. Among Contracting Parties only six States (Andorra, Liechtenstein, Malta, Monaco, Poland and San Marino) maintain such prohibitions on abortion.

<sup>2</sup> *Marckx v. Belgium* (1979), App. no. 6833/74, Eur. Ct. H.R., para. 27; *Open Door and Dublin Well Woman v. Ireland* (1992), App. nos. 14234/88, 14235/88, Eur. Ct. H.R., para. 44; *Johnston and Others v. Ireland* (1986), App. no. 9697/82, Eur. Ct. H.R., para. 42; *Norris v. Ireland* (1988), App. no. 10581/83, Eur. Ct. H.R., para. 31.

<sup>3</sup> *Dudgeon v. the United Kingdom* (1981), App. no. 7525/76, Eur. Ct. H.R., paras. 40-46; *Marckx v. Belgium* (1979), App. no. 6833/74, Eur. Ct. H.R., para. 27; *Klass and others v. Federal Republic of Germany* (1978), App. no. 5029/71, Eur. Ct. H.R., para. 33; *Tănase v. Moldova* (2010), App. no. 7/08, Eur. Ct. H.R. [GC], para. 105; *Burden and Burden v. the United Kingdom* (2008), App. no. 13378/05, Eur. Ct. H.R., para. 34; *S.A.S. v. France* (2014, GC), App. no. 43835/11, Eur. Ct. H.R. [GC], para. 57; *Norris v. Ireland* (1988), App. no. 10581/83, Eur. Ct. H.R., para. 32; *Modinos v. Cyprus* (1993), App. no. 15070/89, Eur. Ct. H.R., para. 24.

<sup>4</sup> *Roman Zakharov v. Russia* (2015), App. no. 47143/06, Eur. Ct. H.R. [GC], para. 169; *Vallianatos and Others v. Greece* (2013), App. nos. 29381/09, 32684/09, Eur. Ct. H.R. [GC], para. 47; *Tanrikulu and Others v. Turkey* (1999), App. no. 23763/94, Eur. Ct. H.R. [GC]; *Open Door and Dublin Well Woman v. Ireland* (1992), App. nos. 14234/88, 14235/88, Eur. Ct. H.R., para. 43.

<sup>5</sup> *Roman Zakharov v. Russia* (2015), App. no. 47143/06, Eur. Ct. H.R. [GC], paras. 165, 169, 171; *Klass and others v. Federal Republic of Germany* (1978), App. no. 5029/71, Eur. Ct. H.R., para. 34.

In *Open Door and Dublin Well Woman v. Ireland*, this Court recognised that women of reproductive age were at risk of being adversely affected by a prohibition on the provision of information in Ireland about abortion care in other countries. The Court held that two women in Ireland, who were not pregnant, belonged to a class of women of reproductive age who ran the risk of being directly prejudiced by the prohibition on information about abortion.<sup>6</sup>

In line with Article 34 criteria and this case-law, and for the reasons outlined below, women and girls of reproductive age belong to a class of people who are at risk of being directly affected and seriously prejudiced by legal prohibitions on abortion, whether or not they are currently pregnant or seeking an abortion. The harmful impacts that prohibitions on abortion have on women and girls of reproductive age are manifold and multi-layered and often severe.

***Prohibitions on abortion have unique and distinct effects on women and girls of reproductive age as a class of people***

Women and girls of reproductive age belong to a class of people who are directly affected by prohibitions on abortion because of their specific reproductive capacity. Abortion care is essential health care that only women and girls of reproductive age need;<sup>7</sup> only women and girls of reproductive age can become pregnant and only pregnant individuals can undergo an abortion procedure. As such, prohibitions on abortion forbid a form of health care that only women and girls of reproductive age need and have distinct and specific impacts on this class of people; they have effects that are entirely particular to, and that can only be experienced by women and girls of reproductive age. The maintenance of prohibitions on abortion systematically affects intimate aspects of the identities, health and lives of women and girls of reproductive age because only they can become pregnant. These legal measures deny individual reproductive autonomy and violate personal dignity. They undermine women and girls' ability to make decisions about their own bodies, their health, their families, their futures and their lives, all of which have far-reaching consequences for them as individuals. While the harmful impacts of prohibitions on abortion affect all women and girls of reproductive age, they often disproportionately and most severely affect women and girls belonging to marginalised communities, including women and girls with disabilities, migrants, those belonging to ethnic minorities, or of lower socio-economic status and those living in rural communities.<sup>8</sup>

Prohibitions on abortion that are introduced as a retrogressive measure - that is, where a previous legal entitlement to obtain abortion care is removed - nullify and invalidate human rights protections for a class of persons who are solely and uniquely affected. In those circumstances, women and girls of reproductive age have a valid personal interest in seeking an end to the resulting human rights violations.

***Prohibitions on abortion expose women and girls of reproductive age to a risk of significant harm and other human rights violations***

When women and girls are prohibited by law from obtaining abortion care, they are exposed to the risk of grave harm to their health and well-being, threats to their lives and survival, as well as other violations of their human rights, should they become pregnant and decide to end the pregnancy. Public health evidence shows that in such situations prohibitions on abortion compel women and girls of reproductive age to seek clandestine and often unsafe abortions, carry a pregnancy to term against their will, or where possible travel abroad to obtain abortion care, all of which expose them to risks to their health, exacerbate social inequities and violate their human rights.<sup>9</sup>

When women and girls are compelled to have recourse to unsafe abortion, they are placed at considerable risk of maternal mortality and morbidity, including lasting or temporary impacts on their physical and mental health, as well as major financial and emotional burdens.<sup>10</sup> When women and girls are forced to travel to another country to

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<sup>6</sup> *Open Door and Dublin Well Woman v. Ireland* (1992), App. nos. 14234/88, 14235/88, Eur. Ct. H.R., paras. 43, 44.

<sup>7</sup> See, e.g., Inter-Agency Working Group on Reproductive Health in Crises, *Inter-Agency Field Manual on Reproductive Health in Humanitarian Settings* (2018).

<sup>8</sup> See, e.g., World Health Organization (WHO), *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 18. WHO is expected to publish updated guidelines by the end of 2021. See also Committee on the Elimination of Discrimination against Women (CEDAW), *General recommendation No. 34 (2016) on the rights of rural women*, para. 38, CEDAW/C/GC/34 (2016); Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, para. 60, CRC/C/GC/20 (2016); Working Group on the issue of discrimination against women in law and in practice, A/HRC/32/44 (2016), para. 107(b).

<sup>9</sup> See, e.g., WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 90.

<sup>10</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 23, 87.

obtain safe and legal abortion care, it subjects them to significant hardship and distress and leads to delays in care that can result in increased health risks and inability to access care within legal time limits. Furthermore, needing to travel for abortion care severs the continuum of care and forces women and girls who need abortion care out of the health care system they are familiar with causing them uncertainty and anguish. Only women and girls with the financial means, travel documents and other resources and support will be able to avail of this option. When prohibitions on abortion compel women and girls to carry a pregnancy to term against their will, public health evidence shows that they are at greater risk of experiencing adverse physical and mental health effects.<sup>11</sup> Medical evidence also clearly shows that carrying a pregnancy to term and giving birth entails significantly greater health risks than having a safe abortion.<sup>12</sup> Moreover, where women and girls are compelled to continue a pregnancy against their will this can entail important adverse socioeconomic consequences and may negatively impact their social and family relations as well as their educational and professional opportunities.<sup>13</sup>

International human rights bodies have consistently and repeatedly recognised the many grave harms, including the physical, mental, emotional and socioeconomic harm detailed above, that are caused to women and girls of reproductive age by prohibitions on abortion. They have recognised that prohibitions on abortion prevent women and girls from making fundamental personal decisions about their health and lives and may give rise to severe mental or physical suffering by forcing women and girls to continue a pregnancy against their will, seek clandestine and often unsafe abortion or travel to a foreign country to obtain legal care. They have also emphasised the suffering that predictably afflicts pregnant women and girls in vulnerable positions who have decided to end a pregnancy and are denied access to abortion care in their home country, and endure a severance in the continuum of health care provision as a result. Moreover, they have underscored that for many women and girls delays in access to safe abortion care that are often caused by prohibitions on abortion predictably exacerbate suffering and anguish.

In light of these findings, international human rights bodies have held that prohibitions on abortion expose women and girls to severe mental or physical suffering, anguish, uncertainty, humiliation and disregard for their personal decisions that are so severe as to breach the international prohibition on ill-treatment.<sup>14</sup> They have also repeatedly recognised that prohibitions on abortion deny women's and girls' reproductive autonomy, decision-making and dignity, and result in violations of their right to respect for private life.<sup>15</sup> They have found that prohibitions on abortion constitute interferences with the right to privacy that cannot be justified as necessary and proportionate.<sup>16</sup> They have recognised that prohibitions on abortion are discriminatory based on sex and gender, and deny women and girls equality before the law,<sup>17</sup> and that they often have disproportionate and discriminatory impacts on

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<sup>11</sup> M. Antonia Biggs, U. D. Upadhyay, Ch. E. McCulloch et al, *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, JAMA Psychiatry (2017), 74(2):169–178.

<sup>12</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 49.

<sup>13</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 64; *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009, para. 8.18.

<sup>14</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 65; *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35 (2018), para. 18; Human Rights Committee (HRC), *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.3; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (2013), para. 46; Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/31/57 (2016).

<sup>15</sup> See, e.g., HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, paras. 7.7-7.8; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, paras. 7.8-7.9; CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), paras. 65, 72; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., paras. 180, 181, 214; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., paras. 96, 112; *Tysiąc v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., paras. 106-107, 130.

<sup>16</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.7; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.8.

<sup>17</sup> CEDAW, *General Recommendation No. 24 on Article 12 of the Convention (women and health)* (1999), paras. 14, 31(c); *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009, para. 8.16; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.11; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.12; Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 34, E/C.12/GC/22 (2016); Working Group on the issue of discrimination against women in law and in practice, A/HRC/38/46 (2018), para. 35; CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 59.

marginalised groups of women and girls. They have also recognised that prohibitions on abortion subject women and girls to gender-based stereotypes.<sup>18</sup>

***Prohibitions on abortion compel women and girls of reproductive age to modify their behaviour due to risk of life-changing consequences***

Prohibitions on abortion prevent women and girls of reproductive age from exercising personal autonomy and decision-making about their bodies, health, families and lives, and affect their legitimate exercise of their human rights, including those guaranteed by the Convention, even where they are not currently pregnant or seeking an abortion. This is the case even where criminal penalties do not apply to individuals who obtain abortion care outside the scope of the law. Prohibitions on abortion affect the fundamental life choices and decisions of women and girls of reproductive age in a myriad of significant ways. These include decisions about if and when to engage in sexual intercourse, to use contraception and the choice of contraceptive method, to become pregnant or to have a child. Women and girls of reproductive age who, for a wide range of reasons and at different times in their lives, do not want to become pregnant or have a child, always need to consider the risk of becoming pregnant and will often modify their behaviour accordingly. While they may be able to use modern methods of contraception to prevent pregnancy, public health evidence demonstrates that no form of contraception is completely effective,<sup>19</sup> and in many countries data indicates that a majority of women seeking abortion were using a method of contraception when they became pregnant.<sup>20</sup> Furthermore, evidence shows that rates of unintended pregnancy are higher in contexts where abortion is prohibited.<sup>21</sup> As such, the only fully effective means available to women and girls of reproductive age to avoid pregnancy is to entirely abstain from sexual intercourse.

Pregnancy and having a child have enormous consequences on women's and girls' bodies, health, lives and futures. The implications of having a child are life-changing for women of reproductive age regardless of whether they already have children or not. Public health evidence demonstrates that in many countries the majority of women who have an abortion already have at least one child.<sup>22</sup> In those circumstances, women will also consider the impact of having another child on their families. The responsibilities associated with caring for a child are significant, and often fall disproportionately on women and girls and have considerable consequences for their social, family, educational and professional situation. As such, prohibitions on abortion affect and determine women's and girls' decisions about highly intimate aspects of their lives and compel them to modify their behaviour, so as to minimise or avoid the risk of the many life-changing consequences of becoming pregnant in contexts where abortion is prohibited.

Moreover, even in situations where women and girls wish to become pregnant and have a child, a range of complex circumstances can arise in the course of pregnancy that may cause them to seek access to abortion care. Where prohibitions on abortion are in place, women and girls of reproductive age may actively decide to delay or avoid pregnancy due to well-founded fears of being unable to end the pregnancy should the need arise.

***The time-sensitive nature of abortion and related medical procedures***

Women and girls of reproductive age, who are affected by prohibitions on abortion, face particular challenges in seeking to vindicate their rights before international and regional fora. The Court has rightly recognised the vulnerability of women and girls who are seeking to vindicate their rights to abortion care and related services,<sup>23</sup> and the critical importance of the time factor in cases involving a pregnant woman or girl's decision to end a pregnancy.<sup>24</sup> Where abortion is prohibited, the time-sensitive nature of abortion care will often be an important barrier that significantly constrains the ability of pregnant women and girls who need abortion care to challenge the prohibition before this Court, as also demonstrated by the existing case-law. To date, all the cases concerning

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<sup>18</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.11; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; CEDAW, *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009, para. 8.15.

<sup>19</sup> WHO & Johns Hopkins Bloomberg School of Public Health, *Family Planning: A Global Handbook for Providers* (2018), 3<sup>rd</sup> ed.

<sup>20</sup> See, e.g., British Pregnancy Advisory Service, *Women cannot control fertility through contraception alone: bpas data shows 1 in 4 women having an abortion were using most effective contraception* (2017); R. K. Jones, *Reported contraceptive use in the month of becoming pregnant among U.S. abortion patients in 2000 and 2014*, *Contraception* 97(4):309-312 (2018).

<sup>21</sup> J. Bearak, A. Popinchalk, B. Ganatra, A.-B. Moller, Ö. Tunçalp, C. Beavin et al., *Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990–2019*, *The Lancet Global Health*, Vol. 8, Issue 9, E1152-E1161 (2020).

<sup>22</sup> *Id.*

<sup>23</sup> *Tysic v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., para. 127.

<sup>24</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 111.

access to abortion that have come before international and regional fora have been brought by women and girls after the fact, namely after they were denied abortion and forced to carry a pregnancy to term,<sup>25</sup> or after they travelled out of the country to obtain abortion care,<sup>26</sup> or after they obtained an illegal abortion,<sup>27</sup> or after they finally obtained legal abortion care after being subjected to harassment, manipulation and obstruction.<sup>28</sup> As such, no challenge to a prohibition on abortion has ever been filed before this Court or any other international human rights body by a woman or girl who at the time of filing was pregnant and needing abortion care. Requiring women and girls of reproductive age - who are *per se* at risk of being directly affected by a prohibition on abortion - to prove that they are pregnant and in need of abortion care to be recognised as victims under Article 34 would present an insurmountable obstacle, and would deny them the Convention's effective protection, and effectively deprive them of access to a remedy that is preventive and the opportunity to vindicate their rights before the Court until it is too late.

Furthermore, where prohibitions on abortion arise from final decisions by domestic judicial bodies, and where no domestic remedies are available or effective, women and girls of reproductive age are at even greater risk of being denied access to the Court's machinery were they not to be recognised as victims under Article 34. They could see their rights nullified and prohibitions on abortion rendered effectively unchallengeable. The protection of their Convention rights would be theoretical or illusory, as opposed to practical and effective. The need for the Court's supervision is made even more pressing where prohibitions on abortion are newly introduced as a retrogressive measure that has removed existing human rights protections for women and girls of reproductive age.

### *The harmful stigma and chilling effect of prohibitions on abortion*

Prohibitions on abortion treat a form of health care that only women and girls of reproductive age need as morally reprehensible by prohibiting it and making it liable to administrative or criminal sanctions. This causes significant social stigma, which generates stress, anxiety and uncertainty for women and girls of reproductive age. Laws that criminalise health care providers who perform abortion outside the scope of the law also generate significant chilling effects, irrespective of their actual implementation, and result in a range of barriers in women's and girls' access to relevant information and health care, and detrimentally affect their health care-seeking behaviour. In particular, women and girls may be reluctant to seek life-saving post-abortion care out of fear of social opprobrium and uncertainty about the legal ramifications for those who assisted them in obtaining clandestine abortions.<sup>29</sup> Fear of prosecution may also deter or halt the provision of legal abortion care even in the narrow circumstances in which abortion is not prohibited, and hence lead to denial of or delays in life-saving treatment, which, in turn, may result in severe health consequences or even death.

Prohibitions on abortion that are introduced as retrogressive measures and remove legal grounds for access to abortion care can exacerbate harmful stigma and deepen existing uncertainties and anxieties for women and girls of reproductive age, and further compound the chilling effects on health care providers.

### **III. Prohibitions on abortion can lead to prohibited ill-treatment in breach of Article 3 of the Convention**

International human rights bodies have unambiguously and repeatedly affirmed that women and girls who are denied access to abortion care due to prohibitions on abortion may endure severe anguish, and mental and physical suffering reaching the minimum level of severity necessary to engage the absolute prohibition of torture and other ill-treatment.<sup>30</sup> They have established that prohibitions on abortion predictably expose women to severe suffering.

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<sup>25</sup> *Tysic v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R.; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R.; HRC, *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003.

<sup>26</sup> *A, B and C v. Ireland* (2010), App. no. 25579/05, Eur. Ct. H.R. [GC]; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014.

<sup>27</sup> HRC, *L.M.R. v. Argentina* (2011), CCPR/C/101/D/1608/2007.

<sup>28</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R.

<sup>29</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 20, 23.

<sup>30</sup> See, e.g., HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R.; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R.; HRC, *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003, para. 6.3; *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); CEDAW, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/OP.8/GBR/1 (2018), para. 65; *General recommendation No. 35 on gender-based violence against women, updating*



They have recognised the many ways in which prohibitions on abortion cause women and girls of reproductive age considerable pain and suffering, including severe mental anguish and painful stigma, by denying them the ability to end their pregnancies safely and legally in their country of residence and thereby compelling them to continue pregnancies against their will, to travel out of their own country to seek health care abroad, or to undergo an illegal and often unsafe abortion. They have specifically held that laws that prohibit women and girls of reproductive age from obtaining abortion care in situations of non-viable pregnancy, severe foetal impairment, where a pregnancy is the result of sexual assault or where a woman or girl's life or health is at risk subject them to severe mental and physical suffering and anguish amounting to ill-treatment.<sup>31</sup>

The Human Rights Committee has found in the context of examining the harm caused by a prohibition on abortion that, “[t]he legality of a particular conduct or action under domestic law does not mean that it cannot infringe article 7 of the Covenant.”<sup>32</sup> It explicitly recognised that “[b]y virtue of the existing legislative framework which prohibited abortion, the State party subjected the author to conditions of intense physical and mental suffering,” which violated the right to be free from torture and other ill-treatment.<sup>33</sup> The Committee recognised that the physical and mental anguish and suffering caused by a legal prohibition on abortion was compounded by the resulting break-down in the continuum of care and the conditions under which two women had to travel to a foreign country to obtain legal abortion care.<sup>34</sup> The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has found that a prohibition on abortion resulted in State responsibility for grave and systematic violations of the Convention on the Elimination of All Forms of Discrimination against Women as a result of the State’s “[d]eliberate maintenance of criminal laws disproportionately affecting women and girls, subjecting them to severe physical and mental anguish that may amount to cruel, inhuman and degrading treatment.”<sup>35</sup>

Under international law, States have positive obligations to take measures to ensure that individuals are not subjected to torture and other ill-treatment.<sup>36</sup> In particular, they must take steps to ensure effective protection against torture and other ill-treatment for individuals at increased risk of the same, including when it could reasonably be expected.<sup>37</sup> International human rights authorities have affirmed that, as a result of these positive obligations, States may not regulate abortion care in a manner that could subject women and girls to physical or mental pain or suffering amounting to torture and other ill-treatment.<sup>38</sup> This Court has also acknowledged that acts and omissions on the part of State authorities in the field of health care policy may reach the required threshold to engage Article 3 due to the failure to provide appropriate medical care.<sup>39</sup> Prohibitions on abortion predictably cause women and girls suffering that breaches the absolute prohibition on torture and other ill-treatment, in particular, where they affect individuals in especially vulnerable situations, including adolescents, survivors of sexual assault and pregnant individuals who have received a diagnosis of a non-viable pregnancy or severe foetal impairment.<sup>40</sup> States have a duty of care and protection towards women and girls of reproductive age in these highly vulnerable

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*general recommendation No. 19*, CEDAW/C/GC/35 (2017), para. 18; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (2013), para. 46; Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/31/57 (2016), paras. 42-44.

<sup>31</sup> See, e.g., HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 72(a).

<sup>32</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5.  
<sup>33</sup> *Id.*

<sup>34</sup> HRC, *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4.

<sup>35</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 72(a).

<sup>36</sup> *Z and Others v. the United Kingdom* (2001), App. no. 29392/95, Eur. Ct. H.R. [GC], para. 73; *A. and Others v. the United Kingdom* (2009), App. no. 3455/05, Eur. Ct. H.R. [GC], para. 22; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2006), App. no. 13178/03, Eur. Ct. H.R., paras. 53-54.

<sup>37</sup> *Osman v. the United Kingdom* (1998), App. no. 23452/94, Eur. Ct. H.R. [GC], para. 116; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2006), App. no. 13178/03, Eur. Ct. H.R., paras. 53-54.

<sup>38</sup> HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); Council of Europe, Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe* (2017), at 52-53.

<sup>39</sup> See, e.g., *R.R. v. Poland* (2011), App. No. 27617/04, Eur. Ct. H.R., para. 152; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 160; *V.C. v. Slovakia* (2012), App. no. 18968/07, Eur. Ct. H.R., paras. 106-120.

<sup>40</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., paras. 161-162, 166-168; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., paras. 159-161; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.4; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.5; *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003, para. 6.2.

situations. As such, prohibitions on abortion violate positive obligations to prevent ill-treatment. In particular, prohibitions on abortion that ban access to abortion in situations of a non-viable pregnancy or severe foetal impairment, pregnancy resulting from sexual assault or involving a risk to a pregnant woman or girl's health or life should be considered a violation of States' positive obligations.

#### **IV. Prohibitions on abortion can violate the right to respect for private life enshrined in Article 8 of the Convention**

It is well-established that prohibitions on abortion undermine women's reproductive autonomy and decision-making, dignity, physical and psychological integrity and fall within the scope of, and constitute an interference with, the right to respect for private life enshrined in Article 8.<sup>41</sup> In order to be permissible under the Convention, any interference with the right to respect for private life must be "in accordance with the law," "necessary in a democratic society" and "proportionate to one of the legitimate aims."<sup>42</sup> As outlined in the sub-sections below, prohibitions on abortion do not meet these criteria, and international human rights bodies have repeatedly held that prohibitions on abortion violate women's right to respect for private life.<sup>43</sup>

In addition, although Article 8 mainly seeks to protect individuals against arbitrary interferences with the right to respect for private life, it also entails certain positive obligations on States to ensure effective respect for the right to private life, including by establishing a legal framework guaranteeing the effective enjoyment of the rights guaranteed by Article 8.<sup>44</sup> Prohibitions on abortion reflect a discordance between the law and the social reality that women and girls of reproductive age need, and will obtain, abortion care, regardless of whether it is prohibited or legally restricted.<sup>45</sup> Such prohibitions are therefore also contrary to States' positive obligations under Article 8.

##### **a. Interferences arising from rulings by a court that is not independent and impartial cannot be considered to meet the requirement of "in accordance with the law"**

For an interference with the right to respect for private life to meet the "in accordance with law" requirement, the interference must not only comply with national law and be clear, foreseeable and adequately accessible, it must also be compatible with the rule of law.<sup>46</sup> These requirements aim to limit the scope for arbitrary interferences with rights protected by Article 8, and ensure that they conform to the legal standards of the Council of Europe. The concept of the rule of law requires "a measure of legal protection in domestic law against arbitrary interferences by public authorities."<sup>47</sup> The independence and impartiality of the judiciary is a prerequisite and core requirement of the rule of law. Where an interference with the right to respect for private life arises from the ruling of a national judicial body, the assessment of the quality of the law and compliance with the rule of law test in Article 8(2) requires an examination of the judicial body's independence and impartiality. Where the national judicial body does not meet the standards of independence and impartiality required for a "tribunal established by law",<sup>48</sup> the quality, character and legality of its rulings may be compromised and vitiated so as to fall short of what the rule of law requires, and thus may not be "in accordance with the law" under the Convention.<sup>49</sup> Moreover, when such rulings constitute retrogressive measures that remove existing human rights protections under domestic law, their legality is even more questionable as under international human rights law, the introduction of retrogressive measures - deliberately backward steps in law or policy that directly or indirectly impede or restrict enjoyment of

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<sup>41</sup> See, e.g., *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., paras. 180-181; *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 96; *Tysiaç v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., paras. 106-107; HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.7; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.8.

<sup>42</sup> See, e.g., *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., para. 183.

<sup>43</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.8; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.9; *Tysiaç v. Poland* (2007), App. no. 5410/03 Eur. Ct. H.R.; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R.; *P. and S. v. Poland* (2013), App. no. 57375/08 Eur. Ct. H.R.; *A, B and C v. Ireland* (2010), App. no. 25579/05, Eur. Ct. H.R. [GC]; HRC, *K.L. v. Peru* (2005), CCPR/C/85/D/1153/2003, para. 6.4; *L.M.R. v. Argentina* (2011), CCPR/C/101/D/1608/2007.

<sup>44</sup> *P. and S. v. Poland* (2013), App. no. 57375/08, Eur. Ct. H.R., para. 95; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., para. 184; *Tysiaç v. Poland* (2007), App. no. 5410/03, Eur. Ct. H.R., para. 110; *Fedotova and Others v. Russia* (2021), App. nos. 40792/10, 30538/14, 43439/14, Eur. Ct. H.R., para. 44.

<sup>45</sup> *Hämäläinen v. Finland* (2014), App. no. 37359/09, Eur. Ct. H.R. [GC], para. 66; *Christine Goodwin v. the United Kingdom* (2002), App. no. 28957/95, Eur. Ct. H.R. [GC], paras. 77-78; *R.R. v. Poland* (2011), App. No. 27617/04, Eur. Ct. H.R., para. 210.

<sup>46</sup> *Halford v. the United Kingdom* (1997), App. no. 20605/92, Eur. Ct. H.R., para. 49.

<sup>47</sup> *Malone v. the United Kingdom* (1985), App. no. 8691/79, Eur. Ct. H.R., para. 67.

<sup>48</sup> *Guðmundur Andri Ástráðsson v. Iceland* (2020), App. no. 26374/18, Eur. Ct. H.R.; *Xero Flor v. Poland* (2021), App. no. 4907/18, Eur. Ct. H.R., paras. 287, 289-91.

<sup>49</sup> *Dolinska-Ficek and Ozimek v. Poland* (2021), App. nos. 49868/19, 57511/19, Eur. Ct. H.R., para. 319.

a right - will almost never be permissible.<sup>50</sup> As such, a judicial body's introduction of new legal restrictions on access to abortion will immediately call into question compliance with international human rights law and standards.<sup>51</sup>

#### **b. Highly restrictive abortion laws cannot be considered necessary in a democratic society**

To be permissible under the Convention, any interference with the right to respect for private life must serve a legitimate aim, be necessary for achieving that aim, be proportionate and not give rise to discrimination on prohibited grounds.<sup>52</sup> As such, the interference must be appropriate and relevant to achieving the aim, the least intrusive possible, proportionate to the interest to be protected, and consistent with other human rights.<sup>53</sup> As further outlined below, prohibitions on abortion cannot be considered necessary in a democratic society. Such interferences affect core aspects of the existence, dignity and identity of women and girls of reproductive age, constitute discrimination on prohibited grounds and impugn their equality before the law. They do not advance a legitimate aim and are not capable of achieving any pressing social need. Retrogressive prohibitions are inherently suspect.

In the eleven years that have passed since this Court's decision in *A, B and C v. Ireland*, significant developments in international law and jurisprudence have repeatedly confirmed the impermissible nature of the interferences with the right to respect for private life posed by prohibitions on abortion, and almost all Contracting Parties have now repealed prohibitions on abortion and legalised abortion on broad grounds.

#### ***Prohibitions on abortion engage core elements of the existence and identity of women and girls of reproductive age, cause them grave harm and discriminate on prohibited grounds***

Interferences with the right to respect for private life that engage a particularly important facet of an individual's existence or identity will rarely be permissible.<sup>54</sup> As detailed in Sections II and III above, women and girls' decisions regarding pregnancy and whether or not to have a child necessarily engage particularly important facets of their existence and identity. Prohibitions on abortion restrict a form of health care that only women and girls of reproductive age require and prevent them from making fundamental decisions about their bodies, health, lives, families and futures with far reaching consequences for their existence and identity. Such prohibitions can cause women and girls of reproductive age grave harm, including physical and mental suffering and anguish, by forcing them to choose between carrying a pregnancy to term against their will, traveling to a foreign country to obtain a legal abortion or undergoing an illegal abortion. By denying women and girls of reproductive age the ability to end a pregnancy legally and safely in their country of residence, under the care of medical professionals they know and trust, such prohibitions expose them to significant risks to their physical and mental health and well-being. Prohibitions on abortion do not take account of the right to respect for private life of women and girls of reproductive age who may need access to abortion care to preserve and protect their autonomy, dignity and personal, bodily and psychological integrity.

Furthermore, where an interference with the right to respect for private life gives rise to discrimination on prohibited grounds, such as on the basis of sex or gender, very weighty reasons have to be advanced for that interference to be compatible with the Convention.<sup>55</sup> Women and girls of reproductive age have historically suffered considerable discrimination on the basis of their sex and gender. Prohibitions on abortion have been found to be discriminatory as they affect health care that only women and girls of reproductive age need and prevent

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<sup>50</sup> See CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1)*, para. 9, E/1991/23 (1990); HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Guideline 14(e): Violations through Acts of Commission (1997); *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Principle 72, E/CN.4/1987/17 (1987).

<sup>51</sup> See CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1)*, para. 9, E/1991/23 (1990); *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, paras. 32, 48, 50, E/C.12/2000/4 (2000); *General Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 38, E/C.12/GC/22 (2016).

<sup>52</sup> See, e.g., *Dudgeon v. the United Kingdom* (1981), App. no. 7525/76, Eur. Ct. H.R., para. 43.

<sup>53</sup> *Dudgeon v. the United Kingdom* (1981), App. no. 7525/76, Eur. Ct. H.R., paras. 43, 54; *Olsson v. Sweden* (no. 1) (1988), App. no. 10465/83, Eur. Ct. H.R., para. 68; *K. and T. v. Finland* (2001), App. no. 25702/94, Eur. Ct. H.R. [GC], para. 154.

<sup>54</sup> *Parrillo v. Italy* (2015), App. no. 46470/11, Eur. Ct. H.R. [GC], para. 169; *Fedotova and Others v. Russia* (2021), App. nos. 40792/10, 30538/14, 43439/14, Eur. Ct. H.R., para. 47.

<sup>55</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (1985), App. nos. 9214/80; 9473/81; 9474/81, Eur. Ct. H.R., para. 78; *Burghartz v. Switzerland* (1994), App. no. 16213/90, Eur. Ct. H.R., para. 27.

them from exercising reproductive choice, affront their autonomy and right to self-determination and offend their equal status.<sup>56</sup>

***International human rights mechanisms have repeatedly held that prohibitions on abortion give rise to violations of the right to respect for private life and constitute discrimination on prohibited grounds***

In light of these concerns, over the past decade, there have been very significant developments in international human rights law and standards, which attest to and affirm that the right to privacy requires the repeal of prohibitions on abortion and the enactment of legal frameworks that allow women and girls of reproductive age to obtain safe abortion care. International human rights bodies have issued numerous landmark decisions,<sup>57</sup> General Comments/Recommendations,<sup>58</sup> Concluding Observations,<sup>59</sup> and reports<sup>60</sup> that firmly recognise that in order to comply with their obligations under international human rights law, States should decriminalise abortion in all circumstances, repeal prohibitions on abortion, including specifically in situations of risk to health or life, severe foetal impairment and non-viable pregnancies, and pregnancies resulting from sexual assault, and remove other legal and policy barriers that hinder access to safe abortion care. They have also called on States to refrain from adopting any retrogressive legislative reforms that would restrict access to safe abortion.<sup>61</sup>

***The overwhelming majority of Contracting Parties have legalised abortion on broad grounds***

Today, almost all Contracting Parties have removed prohibitions on abortion and have legalised abortion on broad grounds.<sup>62</sup> Only six Council of Europe Member States – Andorra, Liechtenstein, Malta, Monaco, Poland, and San Marino – currently maintain broad or total prohibitions on abortion.<sup>63</sup> Following a referendum in September 2021, San Marino is also expected to enact reforms to legalise abortion on broad grounds. In the decade since the Court's decision in *A, B and C v. Ireland*, prohibitions on abortion have been removed in Cyprus, Gibraltar, Iceland, Ireland, Isle of Man and Northern Ireland, demonstrating clear social developments towards the broad legalisation of abortion. Over the same timeframe, Poland is the only Contracting Party that has expanded its highly restrictive law on abortion by removing an existing legal ground for abortion.

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<sup>56</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), paras. 59, 65; *see also* footnote 17.

<sup>57</sup> *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014; CEDAW, *L.C. v. Peru* (2011), CEDAW/C/50/D/22/2009; Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018).

<sup>58</sup> *See, e.g.*, CESCR, *General Comment No. 22: on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, paras. 10, 13, 28, 34, 40, 41, 45, 49(a), E/C.12/GC/22 (2016); HRC, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 8, CCPR/C/GC/36 (2018); CRC, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, para. 60, CRC/C/GC/20 (2016); *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/C/GC/15 (2013); CEDAW, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, paras. 18, 29(c)(i), CEDAW/C/GC/35 (2018); *General Recommendation 33 (2015) on women's access to justice*, para. 51(I), CEDAW/C/GC/33 (2015).

<sup>59</sup> *See, e.g.*, CRC, *Concluding Observations: Poland*, para. 35, CRC/C/POL/CO/5-6 (2021); *Malta*, para. 33, CRC/C/MLT/CO/3-6 (2019); Committee against Torture, *Concluding Observations: Poland*, paras. 33-34, CAT/C/POL/CO/7 (2019); *United Kingdom of Great Britain and Northern Ireland*, paras. 46-47, CAT/C/GBR/CO/6 (2019); HRC, *Concluding Observations: Poland*, paras. 23-24, CCPR/C/POL/CO/7 (2016); *United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7 (2015); *San Marino*, paras. 14-15, CCPR/C/SMR/CO/3 (2015); *Italy*, paras. 16-17, CCPR/C/ITA/CO/6 (2017); *Ireland*, CCPR/C/IRL/CO/4 (2014); CEDAW, *Concluding Observations: Andorra*, paras. 35-36, CEDAW/C/AND/CO/4 (2019); *Macedonia*, paras. 37(d), 38(d), CEDAW/C/MKD/CO/6 (2018); *Germany*, paras. 37(b), 38(b), CEDAW/C/DEU/CO/7-8 (2017); CESCR, *Concluding Observations: Spain*, paras. 43-44, E/C.12/ESP/CO/6 (2018); *Poland*, paras. 46-47, E/C.12/POL/CO/6 (2016).

<sup>60</sup> *See, e.g.*, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Sexual and reproductive health rights: challenges and opportunities during the COVID-19 pandemic, paras. 22, 40-41, A/76/172; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (2013), para. 46; Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, A/HRC/31/57 (2016); Council of Europe, Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe* (2017).

<sup>61</sup> HRC, *Concluding Observations: Poland*, para. 24(b), CCPR/C/POL/CO/7 (2016); CESCR, *Concluding Observations: Slovakia*, para. 42(e), E/C.12/SVK/CO/3 (2019).

<sup>62</sup> Center for Reproductive Rights, *European Abortion Laws: A Comparative Overview* (2019), at 3, <https://bit.ly/3028tZy>; Council of Europe, Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe* (2017).

<sup>63</sup> Andorra, Malta, and San Marino do not allow abortion at all. Liechtenstein and Poland allow abortion only when a woman's life or health is at risk or the pregnancy is the result of sexual assault. Monaco allows it only when a woman's life or health is at risk, the pregnancy is the result of sexual assault or involves a non-viable pregnancy. Center for Reproductive Rights, *European Abortion Laws: A Comparative Overview* (2019), at 4.

***Prohibitions on abortion do not advance a legitimate aim or pressing social need and are not proportionate***

Prohibitions on abortion are unsuitable and detrimental measures and cannot be considered appropriate or relevant interferences with the right to respect for private life capable of achieving a “pressing social need.” Public health evidence demonstrates that “[l]egal restrictions on abortion do not result in fewer abortions,” nor do they decrease the need for abortion care.<sup>64</sup> In fact, in contexts where abortion is broadly prohibited, evidence shows that a higher proportion of unintended pregnancies end in abortions.<sup>65</sup> Furthermore, prohibitions on abortion are “likely to increase the number of women seeking illegal and unsafe abortions,” or the number of women traveling to obtain safe abortion in other countries.<sup>66</sup> As such, prohibitions on abortion do not contribute to reducing abortion but only lead to increased health risks for those who need abortion care.

Where interferences with the right to respect for private life are purportedly justified with reference to the protection of morals, the reasons for the interference should be particularly carefully scrutinised given the vague and ill-defined concept of morals. As outlined above, careful scrutiny of prohibitions on abortion reveals the grave forms of harm they inflict on women and girls of reproductive age, without any regard for their right to respect for private life. Given the severity of the harm caused, prohibitions on abortion can never be considered a proportionate interference with the right to respect for private life.

Furthermore, prohibitions on abortion cannot be justified with reference to the protection of the rights and freedoms of others, including the rights of persons with disabilities. In particular, no international human rights treaty or mechanism provides that the right to life or any other right enshrined in international human rights treaties applies before birth.<sup>67</sup> Similarly, this Court has repeatedly declined to find that fetuses enjoy a right to life under Article 2 of the Convention.<sup>68</sup> The CEDAW Committee has specified that while States may have a legitimate interest in protecting prenatal life, prohibitions on abortion do not further that purpose,<sup>69</sup> whereas the Human Rights Committee has explicitly recognised that prohibitions on abortion in situations of non-viable pregnancies cannot be considered reasonable.<sup>70</sup> Reducing disability-related stigma is critically important, however, prohibiting abortion, including in cases of a non-viable pregnancy or severe foetal impairment, is not justified because it is never an effective means for achieving this aim. Indeed, the CEDAW Committee and the Committee on the Rights of Persons with Disabilities have jointly called on all States to decriminalise abortion and “to take a human rights based approach that safeguards the reproductive choice and autonomy of all women, including women with disabilities.”<sup>71</sup> In order to effectively reduce disability-related stigma, States must tackle the root causes of that stigma, including by ensuring equal rights for persons with disabilities as outlined in the Convention on the Rights of Persons with Disabilities.<sup>72</sup>

Finally, the assessment of whether an interference is necessary in a democratic society should also take account of the basis of that interference. As discussed above, where an interference with the right to respect for private life results from a decision of a court that cannot be considered “a tribunal established by law” and where such a ruling constitutes a retrogressive measure that removes existing rights protections, it cannot be considered to meet the requirement of being necessary in a democratic society as it is contrary to fundamental rule of law principles.<sup>73</sup>

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<sup>64</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 90; J. Bearak, A. Popinchalk, B. Ganatra, A.-B. Moller, Ö. Tunçalp, C. Beavin et al., *supra* note 21.

<sup>65</sup> J. Bearak, A. Popinchalk, B. Ganatra, A.-B. Moller, Ö. Tunçalp, C. Beavin et al., *supra* note 21.

<sup>66</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012), 2nd Ed., at 90.

<sup>67</sup> While on regional treaty, the American Convention on Human Rights in Article 4 states that the right to life, “shall be protected by law and, in general, from the moment of conception,” both the Inter-American Court and Commission on Human Rights have clearly underlined that this is intended to afford conditional forms of protection that are not absolute, and as a result, they have held that laws allowing abortion are fully compatible with the right to life as enshrined in Article 4.

<sup>68</sup> See, e.g., *Vo v. France* (2004), App. no. 53924/00, Eur. Ct. H.R., para. 82; *Boso v. Italy* (2002), App. no. 50490/99, Eur. Ct. H.R.; *R.R. v. Poland* (2011), App. no. 27617/04, Eur. Ct. H.R., para. 186. Furthermore, the history of negotiations of the Universal Declaration of Human Rights indicates that “born” in Article 1 was used intentionally to preclude application of the protected rights prenatally [U.N. GAOR 3rd Comm., 99th Mtg., paras. 110-124, A/PV/99 (1948)]. The *travaux préparatoires* to the International Covenant on Civil and Political Rights, also indicate that the drafters specifically rejected a proposal to provide protection to prenatal life or recognise a right to life prior to birth from the moment of conception [U.N. GAOR Annex, 12th Sess., Agenda Item 33, para. 96, 113, 119, A/C.3/L.654].

<sup>69</sup> CEDAW, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/OP.8/GBR/1 (2018), para. 68.

<sup>70</sup> HRC, *Mellet v. Ireland* (2016), CCPR/C/116/D/2324/2013, para. 7.8; *Whelan v. Ireland* (2017), CCPR/C/119/D/2425/2014, para. 7.9.

<sup>71</sup> *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities*, Joint statement by the Committee on the Rights of Persons with Disabilities and the CEDAW Committee (2018).

<sup>72</sup> Women Enabled International, *Abortion and Disability: Towards an Intersectional Human Rights-Based Approach* (2020).

<sup>73</sup> *A.-M.V. v. Finland* (2017), App. no. 53251/13, Eur. Ct. H.R., paras. 82-84.

## Annex – Submitting Organisations

**Amnesty International** is an international non-governmental, non-profit organization representing the largest grassroots human rights movement in the world with more than ten million members and supporters. Amnesty International's mission is to advocate for global compliance with international human rights law, the development of human rights norms, and the effective enjoyment of human rights by all persons. It monitors state compliance with international human rights law and engages in advocacy, litigation, and education to prevent and end human rights violations and to demand justice for those whose rights have been violated. Amnesty International has researched, documented and campaigned on the human rights violations due to criminalisation of abortion and restrictive abortion laws in different countries, and engaged in strategic litigation before international and regional human rights bodies in cases challenging restrictive abortion laws and their application. Amnesty International has also long-standing experience of research work on the situation of the independence of the judiciary in Poland in 2017, 2018, 2019, and 2020 and continues to monitor the issue.

The **Center for Reproductive Rights** is a global non-governmental human rights organisation dedicated to ensuring respect and legal protection for women's human rights in the sphere of reproductive health. The Center works across Europe to advance women's sexual and reproductive health and rights and its expertise on comparative European law on reproductive rights and the harmful impact of highly restrictive abortion laws is regularly requested by the Council of Europe Commissioner for Human Rights and the United Nations human rights mechanisms. It has represented the applicants or intervened as a third party in many of the seminal legal proceedings regarding abortion laws in Europe. The Center was an advisor to the applicants' representatives in *R.R. v. Poland* (2011) and *P. and S. v. Poland* (2013) and was granted leave by the Court to submit third party interventions in *B.B. v. Poland* (App. no. 67171/17), *A, B and C v. Ireland* (2010), *Tysic v. Poland* (2007), *D. v. Ireland* (2006), and *Vo v. France* (2004). The Center also represented the applicants in the seminal cases of *Mellet v. Ireland* (2016) and *Whelan v. Ireland* (2017) before the United Nations Human Rights Committee and has recently intervened in relevant domestic proceedings before the Supreme Court of the United Kingdom, the High Court of Northern Ireland, and the Constitutional Court of the Republic of Croatia.

**Human Rights Watch** is a non-profit, non-governmental human rights organization that advocates around the globe in defense of human rights. Founded in 1978, we now work in over 100 countries conducting human rights fact-finding and publishing our findings and recommendations in a variety of formats. Human Rights Watch has been granted permission to intervene in many cases before the European Court of Human Rights, as well as other regional human rights courts, international courts, international human rights bodies, and domestic courts. In cases in which Human Rights Watch has not sought to intervene as a third party, applicants before the European Court of Human Rights, and the Court itself, have drawn on Human Rights Watch reporting in deliberating the issues.

The **International Commission of Jurists** is a non-governmental organization working to advance understanding and respect for Rule of Law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva, Switzerland. It is made up of some 60 eminent jurists representing different justice systems worldwide and has 90 national sections and affiliated justice organizations. The ICJ has consultative Status at the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe and the African Union. The organization also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. Since its founding, the ICJ has maintained a focus on the rights to equality and non-discrimination, including through its thematic program of work on women's human rights.

The **International Federation for Human Rights (FIDH)** is an international human rights non-governmental organisation founded in 1922 and headquartered in Paris, France. It brings together 192 national human rights organisations from 117 countries across the world. FIDH's mandate is to defend all human rights enshrined in the UDHR. FIDH is involved in strategic litigation before domestic, regional and international/ised courts and bodies. FIDH's mission is to document and expose human rights abuse, seek accountability for perpetrators and contribute to further developing human rights norms and standards at the regional and international level, through research, advocacy and strategic litigation, and to build its members' capacity in those areas. FIDH has documented sexual and reproductive rights' violations, including abortion, in [Poland](#), Senegal, Chile, Nicaragua and other countries in Europe, Africa, MENA and the Americas. It engaged in strategic litigation before national and regional courts in cases challenging restrictive abortion laws and their application. FIDH has extensively researched rule of law violations in Europe, including in [Poland](#), and advocated for State accountability before regional courts and bodies,

while attempting to expose the interlinkages between rule of law and human rights, including women's rights violations.

The **International Planned Parenthood Federation European Network (IPPF EN)** is one of the regional networks of the International Planned Parenthood Federation (IPPF), an international, non-governmental, membership-led organisation, championing sexual and reproductive health and rights for all. IPPF EN and its national members and partners work in over 40 countries across Europe and Central Asia to empower everyone, especially the most socially excluded, to lead safe and dignified reproductive lives, free from harm and discrimination. IPPF EN advocates towards the EU and the Council of Europe to ensure all women, men, children, and young people have access to sexual and reproductive health and rights. In 2014, IPPF EN won a [collective complaint](#) against the Italian government in front of the European Committee of Social Rights. In 2017, following a joint [report](#) by IPPF EN, its Italian partners and the Center for Reproductive Rights, the U.N. Human Rights Committee expressed serious concerns about the difficulties women face in accessing abortion care across Italy, due to the government's failures. IPPF EN is working since many years in Poland to support its partners on the ground, who are leading the fight for access to abortion care for Polish women, and respect for the rule of law in Poland.

**Women Enabled International (WEI)** is an international, non-governmental organization that works to advance rights at the intersection of gender and disability to respond to the lived experiences of women and girls with disabilities, promote inclusion and participation, and achieve transformative equality. WEI works with organizations of persons with disabilities led by women and gender non-conforming persons--including through long-standing partnerships with organizations of women with disabilities in Poland--to document systemic human rights violations and seek redress through U.N. human rights experts and bodies. To this end, WEI has engaged in [cutting-edge international human rights legal analysis on abortion](#) and legal advocacy to ensure that the rights and perspectives of women and gender non-conforming persons with disabilities are considered and included in all discussions around sexual and reproductive health and rights.

**Women's Link Worldwide (WLW)** is an international non-governmental organization working to advance women's rights, especially those facing multiple inequalities through the domestic implementation of international human rights law and the use of comparative law and strategic litigation. As an organization dedicated to eliminating discrimination and violence against women and girls, WLW works to remove barriers to access sexual and reproductive health services, including abortion with an intersectional lens. WLW has extensive expertise engaging in litigation in countries with restrictive abortion laws such as Uganda, Dominican Republic, El Salvador or Honduras and in legal proceedings regarding abortion laws in Spain, Chile or Colombia. WLW's amicus briefs have been accepted into national courts (High Court of Kenya at Bungoma (obstetric violence and lack of maternal health services); High Court of Kenya at Nairobi (unprocedural closure of clinics providing safe and legal abortion services); Supreme Court of Rwanda (life imprisonment for infanticide); Constitutional Court of Dominican Republic (therapeutic abortion); Constitutional Court of Colombia (discrimination in accessing IVF services) and regional courts (cases *Gonzalez and Others v. Mexico*, *López Sotos and Others vs. Venezuela*, or *Manuela vs. El Salvador* at the Inter-American Court of Human Rights and *M. vs. the United Kingdom* at the European Court of Human Rights).

The **World Organisation Against Torture (OMCT)**, established 1986 in Geneva, is the world's largest Network of NGOs fighting against torture, summary executions, enforced disappearances and all other cruel inhuman or degrading treatment or punishment. It operates the SOS-Torture network composed of more than 200 affiliated organisations and maintains working relations with a large number of local and regional NGOs. It ensures the daily dissemination of urgent interventions across the world in order to prevent serious human rights violations, to protect individuals and to fight against impunity, and provides victims of torture with medical, social and/or legal assistance. Furthermore, the OMCT frequently represents torture victims seeking redress before national and international courts and has filed numerous amicus briefs in international and domestic courts. OMCT has documented violence against women and girls around the globe since 1996 and has integrated a gender perspective in its anti-torture work. In particular, the OMCT provides legal and material support to women and girls who are victims of torture or threatened with torture and other forms of ill-treatment taking into account the specific nature of the violence used against them and the availability of remedies. The OMCT further ensures that human rights violations that are specific to women and girls are taken into consideration by relevant U.N. bodies and are granted greater attention.