

## Third Party Intervention by Scholars of Law and Anthropology

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**Third Party Intervention  
by Scholars of Law and Anthropology**

under Article 36, paragraph 2, of the European Convention on Human Rights

K.B. v Poland and 3 other applications (applications nos. 1819/21, 3682/21, 4957/21,  
6217/21)

K.C. v Poland and 3 other applications (applications nos. 3639/21, 4188/21, 5876/21,  
6030/21)

A.L.-B. v Poland and 3 other applications (applications nos. 3801/21, 4218/21, 5114/21,  
5390/21)

17 November 2021

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## Introduction

1. The authors are scholars of law (Professor Fiona de Londras, Professor Sandra Fredman, Dr Atina Krajewska, Dr Natasa Mavronicola, Professor Sheelagh McGuinness, Professor Ruth Rubio Marin, Professor Rosamund Scott) and anthropology (Dr Silvia De Zordo, Professor Joanna Mishtal) with established expertise in the law and practice of abortion, and comparative and international human rights law.
2. On 15 October 2021 the European Court of Human Rights ('ECtHR') granted them leave to intervene in these Applications by way of written submissions in accordance with Article 36(2) of the European Convention on Human Rights ('ECHR') and Rule 44(3) of the Rules of the Court.
3. This submission will provide the ECtHR with information on the following issues of relevance to highly restrictive laws on abortion, including restrictions on abortion in situations of foetal impairment:
  - a. Questions of victim status under Article 3 and Article 8 of the Convention;
  - b. Relevant international human rights standards.

### I. VICTIM STATUS

4. In accordance with Article 34 of the Convention, the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of the Convention or its Protocols. Thus, applicants must meet the requirement of being a victim of a violation (*Vallianatos and Others v Greece*, [2013] ECHR 1110, para. 47); the Court does not provide *in abstracto* review or allow *actio popularis*.
5. The word 'victim' denotes persons directly or indirectly affected by the alleged violation, understood as including anyone to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end (*Vallianatos and Others v Greece* [2013] ECHR 1110 para. 47).
6. Prohibitions and highly restrictive laws on abortion impact on all people with the capacity for pregnancy; they form a critical part of the legal, health, and social environment in which they make decisions on their sexual and reproductive lives.

#### *All Persons who may Become Pregnant*

7. The ECtHR has previously confirmed that "women of child-bearing age" do not need to be pregnant "before they can complain of the legal regulation" relating to abortion (*Open Door and Well Woman v Ireland* (1992) ECHR 68. See also *Brüggemann and Scheuten v Germany* (1981) 3 EHRR 244). Similarly, in *Dudgeon v United Kingdom* (1981) 4 EHRR 149, *Norris v Ireland* (1989) 13 EHRR 186 and *Modinos v Cyprus* (1993) 16 EHRR 485 the Court recognised homosexuals as victims on account of the very existence of laws imposing criminal sanctions for consensual homosexual activity, on the ground that the choice they faced was between refraining from prohibited behaviour or risking prosecution, even though such laws were hardly ever enforced. In *S.L. v Austria* (no. 45330/99, ECHR 2003-I), a seventeen-year-old boy complaining of legislation prohibiting homosexual acts between adults and minors was recognised by

the Court as having victim status, despite the fact that only adult partners were liable to prosecution and no such prosecution was actually at issue. Accordingly, all persons who may become pregnant are affected by the existence of laws imposing criminal sanctions for abortion.

8. The Court has recognised that an individual may be recognised as a “victim” within the meaning of Article 34 if they are required either to modify their conduct or risk being prosecuted, or if they are a member of a category of persons who risk being directly affected by the measure (see, in particular, *Open Door and Well Woman v Ireland* (1992) ECHR 68; *Marckx v Belgium* (1980) 2 EHRR 330; *Johnston and Others v Ireland* [1986] 9 EHRR 203; *Norris v Ireland*, (1989) 13 EHRR 186, para 31; *Burden v United Kingdom* (2008) 47 EHRR 38, para 34; *Michaud v France*, no. 12323/11, paras. 51-52; *SAS v France*, (2015) 60 EHRR 11, para 54). All people who may become pregnant fall into this category.
9. The ECtHR has recognised that restrictive abortion laws, including prohibitions on abortion in cases of foetal impairment, have chilling effects on health workers involved in the provision of sexual and reproductive health care (*A, B and C v Ireland* (2011) 53 EHRR 1), including specifically in Poland (*Tysi c v Poland* (2007) 45 EHRR 42, paras 114-116 and in *R.R. v Poland* (2011) 53 EHRR 31, para 193). Prohibitions and restrictive laws on abortion also have a chilling effect on people’s intimate sexual lives and intentions as to potential pregnancy. Where such laws are in place, persons who may become pregnant are required either to modify their conduct by avoiding pregnancy where they can, or to endure unwanted continuation of pregnancy, including in cases of foetal impairment. This was recognised by, for example, the Supreme Court of Brazil when it issued a preliminary injunction permitting women to access abortion in cases of foetal anencephaly while the Zika virus was widespread in that jurisdiction.<sup>1</sup>
10. Where provision of or assistance with abortion is a criminal offence, women face a choice between attempting to refrain from pregnancy in order to avoid the risks of criminal liability for their assistants (often partners, parents, friends and loved ones) should they need to avail of abortion, availing of unlawful abortion provided (often by medical professionals) outside of the formal health system,<sup>2</sup> or, if they become pregnant, continuing with a pregnancy that causes them pain or suffering. As recognised by the UN Special Rapporteur Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (‘UNSR’), “[s]hort- and long-term physical and psychological consequences...arise due to unsafe abortions and when women are forced to carry pregnancies to term against their will” (UN Doc. A/HRC/31/57, para. 43; See also Interim Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, (2011) (UN Doc. A/66/254)).

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<sup>1</sup> For analysis see Debora Diniz and Ana Cristina Gonzalez Velez, “Aborto na Suprema Corte: o xaso da anencefalia no Brasil” (2009) 16(2) Rev. Estud. Fem. DOI: 10.1590/S0104-026X2008000200019

<sup>2</sup> On this phenomenon in Poland see, e.g., Federation for Women and Family Planning, *Annual Report 2013* (2013); see also Atina Krajewska, “Revisiting Polish Abortion Law: Doctors and Institutions in a Restrictive Regime (2021) *Social and Legal Studies* forthcoming, DOI: 10.1177/09646639211040171; Joanna Mishtal, “Matters of conscience: The politics of reproductive health and rights in Poland” (2009) 23 *Medical Anthropology Quarterly* 173.

11. The prospect of criminal prosecution is not a matter of suspicion or mere conjecture (*Senator Lines GmbH v fifteen member States of the European Union*, (2004) app. No. 56672/00). As noted by the Council of Europe Commissioner for Human Rights in her intervention to these proceedings, in 2017 the State Prosecutor's Office disseminated an opinion urging more criminal prosecutions of persons assisting pregnant women to avail of abortion (Third Party Intervention by the Council of Europe Commissioner for Human Rights in these proceedings (28 October 2021), para. 19). The number of cases of abortion performed in contravention of the law reported to the police in Poland has increased over the years: in 2000 there were 59 such reports, while in 2017 the number was 289.<sup>3</sup> It is well recognised that fear of criminal prosecution inhibits women from seeking post-abortion care following unlawful or clandestine abortion. Combined with the evident willingness to pursue prosecution, this impacts directly on women who may change their behaviours to avoid pregnancy, or delay in seeking and access post-abortion care where they avail of abortion in informal settings or by means of abortion travel.

#### *All Persons who are Pregnant*

12. All persons who are pregnant, including those who wish to continue with their pregnancy, are impacted by restrictive abortion laws.
13. Human rights bodies, including the Court, have previously recognised the long-standing difficulties in accessing prenatal screening and diagnostic services in Poland (e.g. *R.R. v Poland* (2011) 53 EHRR 31; UN Doc. CCPR/C/SR.3306 and 3308), and empirical evidence suggests that this persists<sup>4</sup> (See also Third Party Intervention by the Council of Europe Commissioner for Human Rights in these proceedings (28 October 2021), paras. 10-14).
14. Prohibiting abortion in cases of foetal anomaly can make it difficult to access prenatal testing, screening, and diagnostic services, and thus to access prenatal diagnostic information which the Court has recognised as information about the woman's health and thus relevant to her autonomy and private life (*RR v Poland* (2011) 53 EHRR 31, para. 197). Such information is integral to one's private life, and to forming a decision about whether to continue with a pregnancy, undertake available treatment, or prepare for the birth of a baby, including in cases where foetal anomaly is detected (*R.R. v Poland* (2011) 53 EHRR 31, para. 197, 205). There is, accordingly a right to obtain available information on one's condition in the form of prenatal screening and testing (*R.R. v Poland* (2011) 53 EHRR 31, para. 197).
15. The Court has previously recognised the chilling effect of criminalisation (*A, B and C v Ireland* (2011) 53 EHRR 1) including specifically in Poland (*Tysiąc v Poland* (2007) 45 EHRR 42, paras 114-116 and in *R.R. v Poland* (2011) 53 EHRR 31, para 193). Such chilling effect can make health workers reluctant to provide diagnostic services or information to women who seek prenatal screening and other services. It can further

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<sup>3</sup> See further analysis in Atina Krajewska, "Revisiting Polish Abortion Law: Doctors and Institutions in a Restrictive Regime (2021) *Social and Legal Studies* forthcoming, DOI: 10.1177/09646639211040171, p.p. 12-14.

<sup>4</sup> Marcin Orzecowski et al, "Access to Prenatal Testing and Ethically Informed Counselling in Germany, Poland and Russia" (2021) 11 *Journal of Personalised Medicine* DOI: 10.3390/jpm11090937

result in restrictive interpretations of applicable grounds or indication for access to lawful abortion, create delays to obstetric care, and make health workers hesitant to provide lawful abortion and post-abortion care.<sup>5</sup> In Poland, for example, research from the Federation for Women and Family Planning suggests a dramatic decrease in therapeutic abortions performed since 1993, with only 42 abortions in 2019 having been performed on health grounds.<sup>6</sup>

16. Criminal prohibition of abortion, including in cases of foetal impairment, thus has a broad and direct effect on all persons who are pregnant, including by restricting their autonomy to make highly personal and intimate decisions about their health and lives, and by depriving them of information and diagnoses that may help them to reach the decision whether or not to continue with a pregnancy, which the Court has recognised as “belonging to the sphere of private life and autonomy” (*R.R. v Poland* (2011) 53 EHRR 31, paras 180-181; See also *Brüggemann and Scheuten v Germany* (1981) 3 EHRR 244, paragraph 59; *X v United Kingdom*, No. 7215/75 Eur. Ct. H. R. (1981); *A, B and C v Ireland* (2011) 53 EHRR 1).

#### *Persons who Receive a Diagnosis of Foetal Impairment*

17. The ECtHR has recognised that “the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy”, so that “legislation regulating the interruption of pregnancy touches upon the sphere of private life” (*R.R. v Poland* (2011) 53 EHRR 31, paras 180-181; See also *Brüggemann and Scheuten v Germany* (1981) 3 EHRR 244, paragraph 59; *X v United Kingdom*, No. 7215/75 Eur. Ct. H. R. (1981)).
18. It follows that the fate of a pregnancy and respect for the pregnant person’s will as to that pregnancy concerns the right to decide how and when one wishes to become a parent. Prohibitions on abortion impact directly on all pregnant persons, and on persons who receive a diagnosis of foetal impairment during pregnancy. While many people who receive such a diagnosis voluntarily continue with their pregnancies, prohibitions of abortion in such situations compel continuation of pregnancy and prevent such persons from obtaining safe and quality abortion care in the domestic health care system.

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<sup>5</sup> See further STER Foundation, *Report: Allies or Opponents? Medical doctors in the debate on women’s right to abortion in Poland* (2018); Marcin Orzecowski et al, “Access to Prenatal Testing and Ethically Informed Counselling in Germany, Poland and Russia” (2021) 11 *Journal of Personalised Medicine* DOI: 10.3390/jpm11090937, p. 5; Polish Society of Human Genetics (2020) *Stanowisko Polskiego Towarzystwa Genetyki Człowieka (PTGC) dotyczące zasad i warunków podejmowania indywidualnych decyzji prokreacyjnych w przypadkach ryzyka pojawienia się wad wrodzonych lub wystąpienia zaburzeń rozwojowych u potomstwa*; available at: <http://zgm.imid.med.pl/wp-content/uploads/2020/11/Stanowisko-Polskiego-Towarzystwa-Genetyki-Cz%C5%82owieka-PTGC.pdf>; Polish Society of Gynaecologists and Obstetricians (2020) *Stanowisko Polskiego Towarzystwa Ginekologów i Położników odnośnie wyroku Trybunału Konstytucyjnego dotyczącego zgodności z Konstytucją RP art. 4a ust 1 pkt 2 oraz art. 4a ust 2 Ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży z art. 30 Konstytucji Rzeczypospolitej Polskiej*; available at: [https://www.ptgin.pl/sites/default/files/aktualnosci/STANOWISKOPTGIP-TK26.10.2020\\_0.pdf](https://www.ptgin.pl/sites/default/files/aktualnosci/STANOWISKOPTGIP-TK26.10.2020_0.pdf)

<sup>6</sup> Federation for Women and Family Planning, *Annual Report 2019* (2020).

19. Abortion travel from Poland is a long-standing phenomenon. Information provided to us by Abortion Without Borders, a non-governmental organisation that provides logistical and other support to women who seek abortion in restrictive settings,<sup>7</sup> affirms its persistence in the time since the Constitutional Tribunal decision. In a one-year period since the Constitutional Tribunal decision, this organisation received phone calls from 34,000 pregnant people in Poland asking for assistance regarding abortion. It helped 1,080 pregnant persons in the second trimester to obtain abortion abroad, and provided support and assistance to 523 pregnant people who disclosed that their pregnancy had received such a diagnosis. The financial support provided exceeded 700,000 PLN (€155,000). The organisation does not ask people why they seek abortion, thus this represents only the number of people who volunteered this information and the real number of pregnant people falling into this class who were assisted by the organisation may well be higher. As this information is from only one source of assistance, it likely represents only a fraction of the unmet abortion need in Poland.

**It follows from the above that all persons who can become pregnant, all persons who are pregnant, and all persons who receive a diagnosis of foetal impairment are ‘victims’ within the meaning of Article 34 ECHR in respect of measures prohibiting abortion, including in cases of foetal impairment.**

## II. RELEVANT INTERNATIONAL HUMAN RIGHTS LAW

20. The Court has long recognised that the Convention is a “living instrument which must be interpreted in light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights” (*Demir and Baykara v Turkey* (2008) 48 EHRR 1272, paras 142-143. See also *Tyrer v United Kingdom* (1978) 2 EHRR 1, at para 31; *Christine Goodwin v United Kingdom* (2002) 35 EHRR 18, paras 85 and 93; *Bayatyan v Armenia* (2012) 54 EHRR 15 at para 102). In interpreting the Convention, the ECtHR has also confirmed that it “can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the ECtHR when it interprets the provisions of the Convention in specific cases” (*Demir and Baykara v Turkey* (2008) 48 EHRR 1272, para 85).
21. As the Convention does not exist in a vacuum it must be interpreted harmoniously with other rules of international law (*Hassan v United Kingdom* [2014] ECHR 936, para. 77), including international human rights law and the interpretations and decisions of international legal bodies on similar legal questions (*Demir and Baykara v Turkey* (2008) 48 EHRR 1272, paras 65-67; *Opuz v Turkey* (2010) 50 EHRR 28, para 185).
22. Thus, it is apposite to note that international human rights law has evolved over time to now clearly require that abortion be available in cases where the continuation of pregnancy would cause substantial pain or suffering to the pregnant person (HRC, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018) (UN Doc. CCPR/C/GC/36), para. 8).

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<sup>7</sup> <https://abortion.eu/>

Furthermore, the UN Human Rights Committee has concluded that measures analogous to those in Poland breach the absolute prohibition on torture and ill treatment and violate the right to privacy (*Mellet v Ireland*, HRC, Communication no. 2324/2013, (2016) and *Whelan v Ireland*, HRC, Communication no. 2425/2014, (2017)).

### *Criminalisation of Abortion is not compatible with Human Rights*

23. Numerous treaty bodies and special procedures have made clear that laws criminalising abortion are incompatible with human rights and must be repealed. As outlined further below, criminal laws on abortion can violate the right to privacy (below, paras. 27-28) and the right to be free from torture, cruel, inhuman and degrading treatment (below, paras. 29-34).
24. Accordingly, multiple human rights bodies have called for laws criminalizing abortion to be repealed and reformed (CEDAW, General Recommendation No. 34 on the rights of rural women (2016) (UN Doc. CEDAW/C/GC/34); 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) (2016) (UN Doc. E/C/12/GC/22); Joint Statement by CEDAW and CRPD, Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities (2018)), as has the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Interim Report to the General Assembly (2011) (UN Doc. A/66/254)) and the UN Working Group on the Issue of Discrimination against Women in Law and in Practice (“Women’s Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends” (October 2017)). The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has described criminal laws that penalise abortion as “paradigm examples of impermissible restrictions on women’s rights” (Special Rapporteur, Interim Report to the General Assembly (2011) (UN Doc. A/66/254), para. 21).
25. The rights-based argument for decriminalisation goes beyond the right to health, and incorporates also an acknowledgment that prohibitions on abortion violate the right to equality and non-discrimination, and that the criminalisation of abortion is a form of “gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment” (CEDAW, General Comment No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19 (2017) (UN Doc. CEDAW/C/GC/35), para. 18). Furthermore, and as outlined below, the Human Rights Committee, UN Committee against Torture, and UNSRT have all confirmed that criminal laws on abortion expose women to torture and ill-treatment, and in many circumstances—including in cases of diagnosed foetal impairment—violate the right not to be ill-treated (below, paras. 29-34).

### *The Obligation to make Abortion Available where Carrying a Pregnancy to Term would Cause Substantial Pain or Suffering*

26. The UN Human Rights Committee has made clear that states “must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl

is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering”, including where the pregnancy is not viable (HRC, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018) (UN Doc. CCPR/C/GC/36), para. 8). The UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has stated that “[s]tates have an affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care” (UN Doc. A/HRC/31/57, para. 44), and that “[t]he effective protection of persons from torture and other cruel, inhuman or degrading treatment or punishment entails affirmative obligations to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women free, safe and legal reproductive healthcare, and to facilitate access to reproductive healthcare, including abortion services, for all”. It is thus clear as a matter of international human rights law that states must make abortion lawful, available, and accessible where carrying a pregnancy to term would cause the woman substantial pain and suffering, including in cases of foetal impairment.

### *Prohibition of Abortion violates the Right to Privacy*

27. As summarised by the UN Working Group on the Issue of Discrimination against Women in Law and in Practice, “The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrity” (“Women’s Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends” (October 2017)). That this is so, is widely recognised.
28. The UN Human Rights Committee has long made it clear that a woman’s decision to terminate a pregnancy is an issue that falls within the scope of the right to privacy under Article 17 of the International Covenant on Civil and Political Rights (*KL v Peru* (2005) (UN Doc. CCPR/C/85/D/1153/2003)). It has made clear that the denial of therapeutic abortion may interfere arbitrarily with the right to privacy (*KL v Peru* (2005) (UN Doc. CCPR/C/85/D/1153/2003)). In the cases of *Mellet v Ireland* (HRC, Communication no. 2324/2013, (2016)) and *Whelan v Ireland* (HRC, Communication no. 2425/2014, (2017)), the Committee expressly found that the criminalisation of abortion in cases of foetal impairment violates the right to privacy. In particular, it concluded that “the balance that the State party has chosen to strike between protection of the fetus and the rights of the woman in the present case cannot be justified” (*Mellet v Ireland*, HRC, Communication no. 2324/2013, (2016), para 7.8) because the pregnant woman’s “much-wanted pregnancy was not viable...the options open to her were inevitably a source of intense suffering and...her travel abroad to terminate her pregnancy had significant negative consequences for her...that could have been avoided if she had been allowed to terminate her pregnancy in Ireland” (HRC, Communication no. 2324/2013, (2016), para 7.8; see also *Whelan v Ireland* HRC, Communication no. 2425/2014, (2017), para 7.9). In this way the Committee made clear its view that the criminal prohibition of abortion in cases of fatal foetal impairment cannot be considered a proportionate limitation on the right to privacy (See also *KL v Peru* (2005) (UN Doc. CCPR/C/85/D/1153/2003)).

*Prohibition of Abortion can constitute Torture, Cruel, Inhuman and Degrading Treatment*

29. It is well established that the denial of health care or medical treatment to individuals can result in suffering that reaches the minimum level of severity to be recognised as a breach of the Article 3 prohibition of torture, cruel, inhuman or degrading treatment (*Powell v United Kingdom* (2000) ECHR 703; *V.C. v Slovakia* [2011] ECHR 1888; *İlhan v Turkey* (2002) 34 EHRR 36). This is so whether the denial results from law or policy, or from the behaviour of state authorities. Pursuant to this, the ECtHR has acknowledged that denial of access to abortion can engage Article 3 (*A, B and C v Ireland* (2011) 53 EHRR 13, paragraphs 164-165; *R.R. v Poland* (2011) 53 EHRR 31; *P and S v Poland* [2012] ECHR 1853).
30. The Committee against Torture has repeatedly expressed concerns that highly restrictive laws on abortion, including criminal laws on abortion, may violate the prohibition of torture and ill-treatment (e.g. UN Doc. CAT/C/PER/CO/4, para. 23), and indicated that such restrictions can violate the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Accordingly, it has found that states must provide access to abortion for women whose health or life is at risk, who are the victims of sexual violence, or who are carrying non-viable foetuses (see, eg, UN Doc. CAT/C/PRY/CO/4-6 (2011), para 22; UN Doc. CAT/C/PHL/CO/3 (2016), para 40).
31. The UN Special Rapporteur Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has also recognised that women are vulnerable to torture and ill-treatment when seeking abortion care, stressing that “the lack of legal and policy frameworks that effectively enable women to assert their right to access reproductive health services enhances their vulnerability to torture and ill-treatment” (UN Doc. A/HRC/31/57, para. 42). In particular, he has made it clear that “[h]ighly restrictive abortion laws that prohibit abortions even in cases of incest, rape or fetal impairment or to safeguard the life or health of the woman violate women’s right to be free from torture and ill-treatment” (ibid, para. 43). In different circumstances the ECtHR has recognised the relevance of Article 3 in the context of abortion. *R.R. v Poland* (2011) 53 EHRR 31 concerned the failure to guarantee the applicant’s access to prenatal diagnostic testing and information, which would have enabled her to decide whether to seek a legal abortion under the Polish law as it then was. *R.R.* did not have sufficient resources to access private testing, and the ECtHR recognised the distress she experienced following the preliminary diagnosis and the “painful uncertainty”, “acute anguish”, and “humiliation” she experienced in seeking and being denied access to healthcare services antecedent to accessing abortion care (*R.R. v Poland* (2011) 53 EHRR 31, paras 159-160). Poland had thus violated Article 3, as well as Article 8.
32. The decisions of the UN Human Rights Committee since 2011 affirm that the prohibition of abortion, including in cases of foetal impairment, causes painful uncertainty, acute anguish, humiliation, pain, and suffering. Building on its earlier decision in *KL v Peru* (1153/2003), CCPR/C/85/D/1153/2003(2005); 13 IHRR 355 (2006), in *Mellet v Ireland*, HRC, Communication no. 2324/2013, (2016) and *Whelan v Ireland*, HRC, Communication no. 2425/2014, (2017) the United Nations Human Rights Committee found that prohibitions on access to abortion in cases of fatal foetal anomaly constitute violations of the ICCPR and in particular the prohibition on cruel, inhuman and degrading treatment under Article 7 thereof. Importantly, the Committee

concluded that denying access to abortion on the basis that it is illegal violates the prohibition on ill treatment in Article 7 of the Covenant (*Mellet v Ireland*, HRC, Communication no. 2324/2013, (2016) para 3.7; *Whelan v Ireland*, HRC, Communication no. 2425/2014, (2017), para 3.5). As prohibiting abortion in such cases subjects persons to pain and suffering of a severity sufficient to violate Article 7 of the Covenant, states must ensure abortion is lawful and effectively available in such cases.

33. Similarly, the CEDAW Committee has made clear that “[b]eing forced to either continue a pregnancy, particularly in grievous situations of FFA...or to travel to receive intimate care in unfamiliar surroundings in the absence of support networks, do not represent reasonable or acceptable options. Both avenues entail significant physical and psychological suffering” (CEDAW Committee, 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 (2018) (UN Doc. CEDAW/C/OP.8/GBR/1), para. 42).
34. Such pain suffering is a predictable and established result of restrictive abortion laws and, as with state failure to make prenatal diagnostic testing and information available (*R.R. v Poland* (2011) 53 EHRR 31), it reaches the minimum level of severity necessary to constitute a violation of Article 3. As Article 3 is an absolute right it cannot be balanced against any other right, interest, or concern (e.g. *Saadi v Italy* (2009) 49 E.H.R.R. 30).

#### *States’ Obligations to Reform Restrictive Abortion Law*

35. Multiple international human rights bodies and special procedures have made clear that states are obliged to reform restrictive abortion laws to ensure the full and effective protection on pregnant people’s rights.
36. The Committee on Economic, Social and Cultural Rights has encouraged states to “repeal, and refrain from enacting, laws and policies that create barriers to access to sexual and reproductive health services” and prescribed that states must reform laws that limit sexual and reproductive health, including laws criminalizing abortion (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) (2016) (UN Doc. E/C/12/GC/22)). The UN Human Rights Committee has been express in providing that “[s]tates parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions, and they should revise their abortion laws accordingly”. Accordingly, the Human Rights Committee makes clear that “restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering which violates article 7, discriminate against them or arbitrarily interfere with their privacy” (HRC, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018) (UN Doc. CCPR/C/GC/36), para, 8). It is therefore clear that, as a matter of international human rights law, states must ensure respect for pregnant people’s rights when regulating the provision and availability of abortion.
37. The UN Committee on Economic, Social and Cultural Rights recognises the criminalisation of abortion or restrictive abortion laws undermine autonomy and the

right to equality and non-discrimination, and has made clear that “[s]tates parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual and reproductive health”, including by repealing or reforming laws and policies “that nullify or impair the ability of certain individuals and groups to realize their right to sexual and reproductive health” (CESCR, General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc. E/C.12/GC/22, para 34).

38. Accordingly, states are required “to liberalize restrictive abortion laws” and address barriers such as criminalization of women undertaking abortion (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) (2016) (UN Doc. E/C.12/GC/22), para. 28), should remove existing, and should not implement new, “barriers that deny effective access by women and girls to safe abortion” (HRC, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018) (UN Doc. CCPR/C/GC/36), para. 8). Moreover, states “should remove undue restrictions on access to safe and legal abortions that may threaten women and girls’ right to life and to health” (UN Special Rapporteur on extrajudicial, summary or arbitrary executions, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings* (2017) (UN Doc. A/HRC/35/23)).

**It follows from the above that the prohibition and criminalisation of abortion, including in cases of foetal impairment, is clearly incompatible with international human rights law to which the ECtHR should have recourse in interpreting the ECHR as a living instrument.**

## **Conclusion**

39. In conclusion we respectfully submit that
- a. All persons who can become pregnant, all persons who are pregnant, and all persons who receive a diagnosis of foetal impairment are ‘victims’ within the meaning of Article 34 ECHR in respect of measures prohibiting abortion, including in cases of foetal impairment.
  - b. The prohibition and criminalisation of abortion, including in cases of foetal impairment, is clearly incompatible with international human rights law to which the ECtHR should have recourse in interpreting the ECHR as a living instrument.