IN THE EUROPEAN COURT OF HUMAN RIGHTS

(APPLICATION NO. 26499/02)

BETWEEN

D **APPLICANT**

AND

IRELAND **RESPONDENT**

WRITTEN COMMENTS

BY

CENTER FOR REPRODUCTIVE RIGHTS

PURSUANT TO RULE 44, § 2 OF THE RULES OF THE COURT

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I. Introduction

1. These written comments are submitted by the Center for Reproductive Rights pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 and § 4 of the Rules of the Court. They address the question of whether restrictive abortion laws—particularly those that prohibit abortion in cases of fetal impairment—and restrictions on abortion-related information and referrals violate the state's obligations under international law to protect a woman's rights to dignity, privacy, life, health, and nondiscrimination.

2. These comments rely on the legislation and jurisprudence of member states of the Council of Europe, the legislation of countries outside of the Council of Europe, and international and regional human rights standards. They were prepared on the basis of an Information Note supplied by the Court containing information available to the public on this case.

II. Interest of the Center for Reproductive Rights

3. The Center for Reproductive Rights is a non-profit legal advocacy organization dedicated to defending and promoting women's reproductive rights worldwide. The International Legal Program, in collaboration with women's human rights advocates around the world, documents violations of reproductive rights, monitors laws concerning reproductive health care, and advocates at the United Nations and in regional human rights fora. The Center has previously submitted comments before this Court in the case of *Vo v. France*.

III. The Legal Issue

4. This case raises questions for the Court on whether (1) the prohibition of abortion in cases of fetal impairment and (2) restrictions on information and referrals relating to abortion violate Articles 1, 3, 8, 10, and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").

IV. Discussion

5. These written comments assert that Council of Europe member states, countries around the world, and international and regional bodies have recognized—expressly or implicitly—that pregnancy involving the risk of fetal impairment is at least one circumstance that warrants a woman's right to have an abortion. They have also recognized that laws prohibiting abortion in this and other dire circumstances—including where pregnancy resulted from rape or threatens a woman's health or life—implicate a woman's rights to dignity, privacy, life, health, and nondiscrimination.

6. These written comments also assert that European and international human rights standards and the legislation of member states of the Council of Europe attach paramount importance to the right to receive complete and objective information relating to one's health, including a prognosis, evaluation of treatment options and recommendations for care. By prohibiting providers from "advocating or promoting" abortion vis-à-vis their patients, Ireland's Regulation of Information (Services Outside the State for Termination of Pregnancies) Act of 1995 infringes upon this fundamental right. In addition, this Court's findings in its previous jurisprudence, as well as international human rights standards, support the ability of providers to make full referrals for legal abortion services when requested. The Irish Act unlawfully prohibits providers from doing so, which holds serious implications for women's reproductive health and rights. Moreover, by restricting access to information and services that only women need, the Act's provisions are discriminatory.

A. Respect for a woman's fundamental rights to life, health, dignity, and privacy precludes forcing her to carry her pregnancy to term in certain circumstances, including in cases of fetal impairment.

1. The legislation of member states of the Council of Europe

7. Ireland's restrictive stance on abortion, especially in cases of fetal impairment, is inconsistent with the position of almost all of its fellow member states, which permit abortion in at least the following circumstances: (1) where pregnancy involves the risk of fetal impairment; (2) resulted from rape; or (3) poses a risk to the woman's health or life.[1] The broad acceptance of these exceptions across Europe reflects a common understanding of their necessity for protecting women's basic rights. Even countries in the region with relatively restrictive abortion laws, including Poland, Portugal and Spain, permit these exceptions to their general prohibition of abortion. Only six countries—Andorra, Ireland, Liechtenstein, Malta, Monaco, and San Marino—continue to maintain severe restrictions on abortion, with only narrow therapeutic exceptions.[2] Beyond these baseline exceptions of fetal impairment, rape, and risks to the woman's health or life, the majority of member states have defined an even broader right to abortion, permitting a woman to have an abortion on any ground, or on broad therapeutic and socio-economic grounds, during the first stages of pregnancy.[3] The majority permit abortion even beyond the gestational limit prescribed for "ordinary" cases if the pregnancy presents serious indications such as fetal impairment or risks to the woman's health or life.[4]

8. Under some member states' laws, health exceptions for abortion are interpreted to include the distress caused by a diagnosis of fetal impairment, recognizing the serious implications of pregnancies involving fetal impairment for a woman's health in particular.[5] In Italy, for example, abortion is permissible if the continuation of pregnancy, *childbirth or motherhood* would seriously endanger the woman's physical or mental health in light of several factors, including the risk of fetal impairment.[6] The law recognizes that a pregnancy involving such risks not only implicates, but holds potentially far-reaching consequences for a woman's health.

2. Global legislation and trends

9. The generally liberal statutory approaches to abortion in Europe are consistent with a global trend toward abortion law liberalization, with at least 27 countries significantly liberalizing their abortion laws over the past two decades and only a handful restricting women's access to abortion.[7] In addition, countries with restrictive abortion laws are increasingly legislating to permit abortion in cases of fetal impairment.[8] Currently, 86 countries expressly permit abortion on these grounds.[9]

10. The increasing recognition of a woman's fundamental rights in the context of abortion is also occurring at the regional level, notably in Africa, where over 50% of countries prohibit abortion entirely.[10] On 11 July 2003, the African Union adopted the Protocol on the Rights of Women in Africa, which calls upon states to protect women's reproductive rights by authorizing abortion in cases of fetal impairment, sexual assault, rape, and incest, and where the continued pregnancy endangers the mental and physical health or life of a woman.[11] The Protocol supplements the African Charter on Human and Peoples' Rights, adopted in 1981, and will enter into force once it has been ratified by 15 African states.

3. Constitutional court jurisprudence of member states of the Council of Europe

11. Constitutional courts of member states—some with relatively restrictive positions on abortion—have consistently upheld a woman's right to have an abortion where her pregnancy involves the risk of fetal impairment. These courts have recognized that cases of fetal impairment, as well as those where pregnancy results from rape or poses risks to a woman's health or life, implicate a woman's fundamental rights, including the rights to life, health and dignity.

12. Despite its strong protection of the fetus, the German Constitutional Court has consistently recognized pregnancy involving the risk of fetal impairment as a circumstance deeply affecting a woman's fundamental rights and rendering abortion permissible. In a landmark 1975 decision, the Court recognized the right of a woman to have an abortion where pregnancy posed "extraordinary burdens" such as in cases of fetal impairment or conception by rape; endangered her life or health; or created other "social or emergency" situations.[12] In each of these circumstances, the fundamental rights and human dignity of the woman "assert [their] validity with such urgency that the state's legal order cannot require that the pregnant woman must … concede precedence to the right of the unborn."[13] The Court emphasized that the rights of the pregnant woman and the fetus "must be viewed in their relationship to human dignity, the center of the value system of the constitution."[14] In another important ruling on abortion law in 1993, the Court reaffirmed a woman's right to have an abortion where pregnancy imposed "unreasonable demands" on her, defining such demands as the risk of severe fetal impairment, conception by rape, or risks to her life or health.[15] The Court recognized that the state's duty to protect the fetus should not outweigh the woman's constitutionally protected rights in such circumstances, including her rights to life, bodily integrity, personality, and human dignity.

13. Like its German counterpart, the Spanish Constitutional Court has recognized the risk of fetal impairment as implicating a woman's fundamental rights. In a 1985 ruling, the Court upheld the constitutionality of a bill that would permit abortion where pregnancy involved the risk of fetal impairment, resulted from rape, or threatened a woman's life or physical or mental health. The Court recognized that such circumstances implicate the pregnant woman's rights to life, physical integrity and dignity, and preclude forcing her to carry the fetus to term.[16] The Court discussed pregnancy involving fetal impairment as a special burden on the woman and her existing family, holding that such a burden would "exceed[] what normally can be asked of a mother and a family. This statement takes into account the exceptional situation parents find themselves in, and, especially the mother, whose situation is made worse in many cases because of the insufficiency of state and social welfare …."[17]

14. The Constitutional Court in Portugal has consistently upheld laws permitting abortion where pregnancy involves the risk of fetal impairment. The Court has characterized such pregnancies, as well as those resulting from rape, or endangering the woman's life or physical or mental health as "situations where the constitutionally protected good, which is prenatal life, has to give way where it conflicts, not only with other constitutional values or goods, but above all with certain fundamental rights (specifically the rights of the woman to life, health, good name and reputation, dignity, conscious maternity, etc.)."[18]

4. "Wrongful birth" jurisprudence of member states of the Council of Europe

15. Courts of member states have expressly recognized in "wrongful birth" cases the harm suffered by a woman who is deprived of terminating an unwanted pregnancy involving fetal impairment and the serious implications for her fundamental rights, including the right to private and family life. Wrongful birth claims involving fetal impairment are brought by parents seeking damages for having a child born with birth defects or genetic diseases, and rest on a provider's failure to inform the parents about the fetal condition in time for them to make an informed decision about whether to continue the pregnancy. Although the legal option for abortion usually exists in such claims, courts' findings of the distress and suffering a woman experiences from being unable to end an unwanted pregnancy involving fetal impairment, and the rights implicated in such cases—especially the right to private and family life—are instructive in this case.

16. In a 2000 case before the Queen's Bench Division in the United Kingdom, the court found a doctor negligent in failing to inform his patient about a possible fetal impairment in her pregnancy and awarded damages. The court recognized that "the birth of a congenitally handicapped child … is an event which will give rise to distress and suffering by the parents and can therefore harm them… [and] dramatically affect the quality of life of both parents."[19] Invoking the right to private and family life, the court found the plaintiffs "deeply affected in their private lives by having to devote more time to the care and upbringing of [their disabled child] than the care and upbringing of a healthy child would have involved."[20] The court held the defendant guilty "for having failed to protect the claimants from the consequences of the disability … [and] from having to suffer the burdens."[21] In a 2002 case before the Italian Court of Cassation, the court awarded damages to a woman who gave birth to a child with disabilities—a pregnancy she would have terminated but for the doctor's negligence in reading an ultrasound scan. The court held that the doctor's negligence deprived the woman of her right to "responsible and conscious procreation," including control over her decision to terminate the pregnancy.[22]

5. International and regional human rights standards

(i) United Nations treaty monitoring bodies

17. Protecting a woman's fundamental rights by guaranteeing her right to have an abortion in cases of fetal impairment is consistent with standards issued by United Nations treaty monitoring bodies. While these bodies have not explicitly addressed the issue of a woman's right to have an abortion in cases of fetal impairment, they have consistently criticized restrictive abortion laws as violating women's fundamental human rights. They have specifically recognized that women's rights to freedom from torture or cruel, inhuman or degrading treatment or punishment;[23] life;[24] health;[25] and privacy[26] are undermined by restrictive abortion laws. Beyond criticizing and expressing concern over such laws, these bodies have urged states parties to review and liberalize their law and practice on abortion by, *inter alia*, permitting abortions on therapeutic grounds.[27]

18. Treaty monitoring bodies have specifically criticized Ireland's abortion law and other similarly or even less restrictive laws.[28] The Human Rights Committee, which monitors states parties' compliance with the International Covenant on Civil and Political Rights, has expressed concern over the illegality of abortion in Ireland except to save the woman's life and the lack of exceptions, for example, for pregnancy resulting from rape. The committee has expressly made the connection between Ireland's restrictive abortion law and Article 7 of the covenant, which guarantees the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, urging Ireland to "ensure that women are not compelled to continue with

pregnancies where that is incompatible with obligations arising under the Covenant (art. 7)…."[29] In addition, the committee that monitors compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) addressed Ireland's abortion law in 1999, expressing concern that abortion is illegal in almost all cases and recognizing the burden on women who are compelled to travel abroad to obtain an abortion, especially on such vulnerable groups as female asylum seekers.[30]

(ii) International health and medical organizations

19. The International Federation of Gynecologists and Obstetricians (FIGO)—the only international organization of its kind, with physicians in over 100 territories, including Ireland[31]—has expressly recognized an ethical right to terminate a severely malformed fetus, and that the right to terminate should rest primarily with the parents.[32] The World Health Organization (WHO) has issued standards that relate to national abortion laws more generally, stating that these laws should protect women's rights to free and informed decision-making, autonomy, confidentiality, and privacy.[33] These international standards are further persuasive authority for finding that restrictive abortion laws, including those that prohibit abortion in cases of fetal impairment, violate women's fundamental human rights to dignity, privacy, life, and health.

B. Ensuring women's access to reproductive health care and information mandates removal of legal barriers to information and referrals on abortion.

1. Prohibition on "advocating and promoting" abortion

20. Provisions in Ireland's Regulation of Information (Services Outside the State for the Termination of Pregnancies) Act of 1995 that prohibit a health-care provider from "advocating or promoting"—in essence, expressing a medical opinion about—the termination of pregnancy vis-à-vis her patient violate fundamental rights, duties, and legal and ethical principles in the provider-patient relationship. The prohibition is inconsistent with regional and international human rights standards and the legislation of member states of the Council of Europe. It undermines and chills providers in their ability both to discuss and fully evaluate treatment options with their patients and to recommend courses of action based on independent medical judgment and their patients' best interests. It infringes upon women's right to receive comprehensive and objective information about their health, as well as to make informed decisions on the basis of such information.

(i) Regional standards of the Council of Europe

21. The right to receive comprehensive information about one's health is of paramount importance under regional human rights treaties. Under Article 10 of the European Convention on Human Rights and Biomedicine "[e]veryone is entitled to know any information collected about his or her health."[34] The explanatory report to the convention underscores that "[i]nformation is the patient's right …."[35] The report interprets a person's "right to know" as encompassing "all information collected about his or her health, whether it be a diagnosis, *prognosis or any other relevant fact*" (emphasis added).[36] Furthermore, information may be withheld only in exceptional cases—in the interests of the patient's health, public safety, prevention of crime, protection of public health, or protection of the rights and freedoms of others.[37] Derogation of the right for moral reasons is not permitted, as it was "not … desirable, in the context of this Convention, to make the exercise of fundamental rights chiefly concerned with the protection of a person's rights in the health sphere subject to … public order … [or] morals

…."[38] Where restrictions are permitted, "[they] should not be regarded as justifying an absolute exception to the rights secured by the Convention … [but] must meet the criteria of necessity, proportionality and subsidiarity …."[39]

22. Interfering with a provider's responsibility to impart, and a patient's right and expectation to receive, comprehensive and objective medical information constitutes a serious intrusion in the provider-patient relationship. As the Committee of Ministers of the Council of Europe recognizes in the explanatory note to its recommendation to member states on patient participation in decision-making about health care, "patients' confidence in their doctors is at the heart of the health-care system."[40] The conditions necessary to promote such confidence include "independence of [the medical profession's] judgment … [and] for patients…transparency and information on the relevance of procedures and results obtained …."[41]

(ii) Legislation of member states of the Council of Europe

23. A fundamental principle of medical practice in Europe and worldwide is for patients to be informed of their health status and provided with a diagnosis as well as a prognosis. These guarantees are not only reflected in the European Convention on Human Rights and Biomedicine but are recognized in patients' rights laws across Europe. Such laws provide for patients' right to receive, *inter alia,* a diagnosis, a prognosis, an evaluation of treatment options, and recommendations for courses of treatment.[42] In Norway, for example, patients have a broad right to receive as much information as necessary "in order to gain insight into [their] medical condition," including an evaluation of their medical condition and the need for further health interventions.[43] Like the European Convention on Human Rights and Biomedicine, patients' rights laws in Europe set a high bar for withholding health information from a patient, permitting restrictions only where absolutely necessary, such as where disclosure of information would endanger the patient's life or health.[44]

(iii) United Nations treaty monitoring bodies

24. United Nations treaty monitoring bodies have urged states parties to refrain from censoring or withholding health-related information, and preventing participation in health-related matters.[45] The Committee on Economic, Social and Cultural Rights (CESCR), which monitors states parties' compliance with the International Covenant on Economic, Social and Cultural Rights, has specifically recognized a violation of states parties' obligation to respect the right to health by "deliberate[ly] withholding or misrepresent[ing] [] information vital to health protection or treatment."[46] The CEDAW Committee has stated that to ensure equality of access to health care under Article 12 of CEDAW, states parties have an obligation to guarantee that "[w]omen... be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including *likely benefits* and potential adverse effects of proposed procedures and available alternatives" (emphasis added).[47] The committee has urged states to ensure that all health services comply with women's right to informed choice and consent.[48]

(iv) International health and medical organizations

25. Standards issued by international health and medical organizations unequivocally support a patient's right to receive complete and accurate information relating to their health.
One of the core rights of the WHO Declaration on the Promotion of Patients' Rights in Europe, which was drafted in consultation with European governments, is to be fully informed about one's health status, including medical facts about one's condition, proposed medical procedures and their potential risks and benefits, alternatives to proposed procedures including the effect of

non-treatment, and the diagnosis, prognosis and progress of treatment.[49] The declaration echoes concerns in regional and national-level laws in Europe with respect to restrictions on health information, permitting information to be withheld "exceptionally where there is good reason to believe that this information would without any expectation of obvious positive effects cause [the patient] serious harm."[50] FIGO has issued similar recommendations specifically on a woman's right to informed choice in the context of sexual and reproductive health.[51]

2. Restrictions on abortion referrals

26. The Regulation of Information (Services Outside the State for the Termination of Pregnancies) Act of 1995 prohibits health-care providers from fulfilling their internationally-recognized duty to ensure that their patients receive, at a minimum, full referrals for the care they need. Provisions in the act make it unlawful for providers to "make an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the State for the termination of pregnancies."[52] Legal restrictions on the ability of providers to fulfill this obligation in the context of abortion services undermine women's access to reproductive health care and time-sensitive services, with potentially grave consequences for their lives and health.

(i) Jurisprudence of the European Court of Human Rights

27. This Court's findings in its previous jurisprudence implicitly recognize the critical need for providers to be able to provide full referrals to women seeking abortion, especially in certain circumstances. In *Open Door Counseling and Dublin Well Woman v. Ireland,*[53] the Court found that an injunction preventing two women's health clinics from disseminating information to women in Ireland on legal abortion services in England violated Article 10 of the European Convention.[54] The Court recognized that restrictions on such information could cause some women to seek or obtain abortion at a later stage in their pregnancy, thereby threatening their health.[55] This finding reflects the Court's understanding of the imperative need for timely access to abortion services, which is undermined when providers are restricted from providing full referrals, including making arrangements. The Court recognized also in *Open Door* that the injunction at issue "may have had more adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information."[56] Similarly, the impact of Ireland's restrictions on referrals will fall most heavily on women who face literacy, language or other barriers to accessing abortion information and services, and for whom a provider's assistance in making arrangements for abortion may be critical to ensuring their health and well-being.

(ii) Analogous national standards

28. While there is in general a dearth of national-level legal standards and jurisprudence on the duty to refer in countries with restrictive abortion laws, conscientious objection clauses and their legal interpretations are instructive and provide a useful analogy for the instant case. Conscientious objection refers to the refusal by individuals or entities to provide or cover certain health services based on religious or moral objections.[57] Such decisions are regulated by laws or regulations commonly known as "conscience" or refusal clauses that both shield providers from liability for refusing to provide services their patients are otherwise legally entitled to receive and also place obligations on health care providers to ensure that the patient receives the medical care she is seeking. Most conscientious objection clauses either explicitly state or have been interpreted to apply only to *actual performance* of procedures, and not to justify the refusal of an appropriate referral.[58] Providers' failure or refusal to give patients under their care referrals to alternate providers has been found to constitute a breach of the duty of care and abandonment of

patients.[59] A state that is "unwilling" to allow performance of abortion procedures—just as an individual provider or health institution may claim to be on grounds of conscience—should not prohibit the provision of full referrals to other providers who are willing and able to perform the procedure. In the instant case, the referrals would be to providers in other countries where abortion is legal.

(iii) United Nations treaty monitoring bodies

29. United Nations treaty monitoring bodies have called upon states parties to ensure that women receive appropriate referrals in cases where providers are unwilling to perform requested reproductive health procedures.[60] With respect to legal abortion services, the CEDAW Committee has made clear that it considers it an infringement of women's reproductive rights when a government fails to ensure access to another provider willing to perform the procedure,[61] underscoring the importance of the duty to refer. The CESCR has recognized that timeliness and accessibility of care are important components of the right to sexual and reproductive health care,[62] both of which are undermined by restrictions on referrals for services.

(iv) International health and medical organizations

30. Standards issued by other international bodies stress the importance of timely referrals, especially with respect to reproductive health services. According to WHO guidelines, a well-functioning referral system is critical to the provision of safe abortion services; all health personnel should be able to direct women to appropriate services if they are unavailable on site.[63] The guidelines declare further, "training and equipping health professionals at the primary level to provide early abortion services and to make appropriate referrals may thus be one of the most important investments to consider."[64] If no alternative provider is available, the guidelines instruct that a health worker should perform an abortion in cases where a woman faces risks to her life or health.[65] WHO recognizes the right to conscientious objection to abortion for health workers, but adds that they have "an ethical obligation to follow professional ethical codes, which usually require health professionals to refer women to skilled colleagues who are not, in principle, opposed to termination of pregnancy allowed by law."[66] Recommendations by FIGO and the World Medical Association provide similar guidelines.[67]

C. Denying women access to reproductive health-care services and information is discriminatory.

31. In restricting reproductive health information and services that only women need, and leaving women vulnerable to the risks associated with illegal and unsafe abortion, restrictive abortion laws and barriers to abortion information and referrals disproportionately disadvantage women over men, and violate women's right to non-discrimination in the enjoyment of their other human rights.[68] Article 12 of CEDAW guarantees the right to equality in access to health care, specifically requiring states to ensure access to services exclusively or disproportionately needed by women. These include family planning and appropriate services in connection with pregnancy, confinement and the post-natal period.[69] Article 16 of the convention protects women's right to decide the number and spacing of their children and have access to the information and means to do so.[70] States' failure to ensure such rights, which address women's distinct biological needs and interests, is discriminatory against women.

32. The CEDAW Committee has explicitly recognized that "[i]t is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women."[71] The committee has considered the effect of restrictions on abortion on women's right

to equality, noting that "laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures" constitute a barrier to appropriate health care for women, compromising the right to nondiscrimination in the area of health.[72] Indeed, the health consequences of unsafe abortion are suffered only by women, as are the physical and psychological effects of carrying an unwanted pregnancy to term. The Human Rights Committee has recognized that restrictive and criminal abortion laws undermine women's right to enjoy their human rights—including freedom from torture or other cruel, inhuman or degrading treatment or punishment, privacy and life—on an equal basis with men.[73]

V. Conclusion

33. The survey of international and regional human rights standards and of legislation and jurisprudence of member states of the Council of Europe and countries around the world demonstrate that the majority of jurisdictions protect a woman's right to terminate her pregnancy based on fetal impairment. Such laws and jurisprudence have been predicated on recognition that restrictions of this kind would violate a woman's rights to dignity, privacy, life, health, and nondiscrimination. These comments also demonstrate that European and international human rights standards and legislation of member states of the Council of Europe strictly guarantee a patient's right to complete and accurate information on their health status and support health care providers' duty to make full referrals for health care services, including abortion. For the reasons set forth in these comments, this Court should find that the law on abortion in Ireland and restrictions under § 5 and § 8 of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act of 1995 violate women's fundamental rights, specifically those guaranteed under Articles 1, 3, 8, 10, and 14 of the European Convention.

[1] *See* CENTER FOR REPRODUCTIVE RIGHTS, THE WORLD'S ABORTION LAWS 2005 (Wallchart, 2005).
[2] *See id.*
[3] In 32 of the 46 member states of the Council of Europe, abortion is permitted without restriction as to reason during at least the first 12 weeks of pregnancy or, in the case of Turkey, during the first 10 weeks of pregnancy. In an additional five countries, abortion is permitted on broad socio-economic grounds (countries in this category include abortion to protect the woman's life or physical or mental health). *See* THE WORLD'S ABORTION LAWS 2005, *supra* note 1.
[4] *See e.g.,* the abortion laws of Albania, France and Hungary. 1–2 DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS POPULATION DIVISION, ABORTION POLICIES: A GLOBAL REVIEW 19–21, 51–53, 150–152 (2002) [hereinafter UN Abortion Policies Global Review]. Abortion is expressly permitted at any time during the pregnancy in cases of fetal impairment, or risks to the woman's health or life. *Id.*
[5] *See e.g.,* Changes in the Pregnancy and Family Assistance Law (SFHÄndG, 1995 BGB1. 1056, art. 8, para. 219) (F.R.G.); Law No. 194 of 22 Mar. 1978 (Italy) and Law No. 350 of 13 June 1973 (Den.) *in* UN Abortion Policies Global Review, *supra* note 4, at 73–75, 124–125. *See also* WORLD HEALTH ORGANIZATION (WHO), SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS § 3.4, at 86 (2003) [hereinafter WHO Safe Abortion Guidelines].
[6] *See* Law No. 194 of 22 Mar. 1978 (Italy).
[7] Anika Rahman et al., *A Global Review of Laws on Induced Abortion, 1985–1997*, 24 INT'L FAM. PLAN. PERSP., 56, 60 tbl.2 (1998); CENTER FOR REPRODUCTIVE RIGHTS, ABORTION AND THE LAW: TEN YEARS OF REFORM (2005).
[8] WHO Safe Abortion Guidelines, *supra* note 5. In 1996, Burkina Faso amended its penal code to permit abortion to protect a woman's life or health and in cases of fetal impairment. Anika Rahman et al., *supra* note 7. In 2002, Chad authorized similar exceptions. *See id.* tbl. 1, at 58. Other countries with highly restrictive abortion laws that permit exceptions in cases of fetal impairment are Panama, Benin, Ethiopia, Guinea, Kuwait, Poland, the Republic of Korea, and Zimbabwe. *See* THE WORLD'S ABORTION LAWS 2005, *supra* note 1.
[9] Sixty-eight countries permit abortion without restriction as to reason or on broad therapeutic and socio-economic grounds. THE WORLD'S ABORTION LAWS 2005, *supra* note 1. Sixty-nine countries explicitly permit abortion where pregnancy poses a threat to a woman's life or physical health, and another 20 countries permit consideration also of a woman's mental health. *Id.*
[10] *Id*.
[11] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, art. 14(2)(c), *available at* http://www.africa-union.org/home/Welcome.htm.
[12] Entscheidungen des Bundesverfassungsgerichts [BverfGE] (F.R.G.) *translated in* Robert E. Jonas & John D. Gorby, trans., *West German Abortion Decision: A Contrast to* Roe v. Wade, 9 JOHN MARSHALL J. PRAC. & PROC. 648 (1976).
[13] *Id.*
[14] *Id*. at 643.
[15] Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 280 (1995).
[16] Sentencia del Tribunal Constitutional [STC] [Constitutional Court], Apr. 11, 1985 (B.O.E., No. 53) (Spain), *available at* http://www.boe.es/g/es/bases_datos_tc/doc.php?coleccion=tc&id=SENTENCIA-1985-0053.
[17] *Id.*
[18] TCP, May 29, 1985, (D.R., No. 85, p. 5844) (Port.).
[19] *Rand v. East Dorset Health Authority,* 56 BMLR 39 (2000) Lloyd's Rep Med 181.
[20] *Id.*
[21] *Id.*
[22] Case No. 6735 of May 10, 2002, *available at* http://www.aogoi.it/Programmi/RivistaAbstract.asp?ID=639 (last visited April 5, 2005).
[23] *See Concluding Observation of the Human Rights Committee: Ireland*, 69th Sess., 1858th mtg., paras. 23–24, U.N. Doc. A/55/40 (2000); *see also Morocco*, 82nd Sess., 2249th mtg., para. 29, U.N. Doc. CCPR/CO/82/MAR (2004); *Sri Lanka*, 79th Sess., 2164th mtg., para. 12, U.N. Doc. CCPR/CO/79/LKA

(2003). The aim of Article 7 of the covenant is to "protect both the dignity and the physical and metal integrity of the individual." Human Rights Committee, *General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, 44th Sess., para. 2 (1992), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003).

[24] The Human Rights Committee has consistently addressed restrictive abortion laws resulting in illegal and unsafe abortions as potential violations of Article 6 of the Covenant—the right to life—often making the link to high rates of maternal mortality. *See* Human Rights Committee*, General Comment No. 28: Equality of rights between men and women (Art. 3)*, 68th Sess., para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 179 (2003) [hereinafter Human Rights Committee General Comment 28]; *see also Concluding Observation of the Human Rights Committee: Chile*, 65th Sess., 1740th mtg., para. 15, U.N. Doc. CCPR/C/79/Add.104 (1999); *Costa Rica*, 65th Sess., 1751st mtg., para. 11, U.N. Doc. CCPR/C/79/Add.107 (1999); *Guatemala*, 72nd Sess., 1954th mtg., para. 19, U.N. Doc. CCPR/CO /72/GTM (2001); *Mongolia*¸ 68th Sess., 1835th mtg., para. 8(b), U.N . Doc . CCPR/C/79/Add.120 (2000); *Peru*, 70th Sess., 1892nd mtg., para. 20, U.N . Doc . CCPR/CO/70/PER (2000). The committee recently addressed Poland's abortion law, reiterating "deep concern [over the law] … which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health," and urging the state party to liberalize its legislation and practice on abortion. *See Concluding Observation of the Human Rights Committee: Poland*, 82nd Sess., 2251th mtg., para. 8, U.N. Doc. CCPR/CO/82/POL (2004).

[25] The Committee on Economic, Social and Cultural Rights (CESCR), which interprets and monitors states parties' compliance with the International Covenant on Economic, Social and Cultural Rights, has interpreted Article 12 of the covenant, which guarantees the right to the highest attainable standard of health, as including the right to maternal, child, and reproductive and sexual health. The committee has defined "reproductive health" to include the "freedom to decide if and when to reproduce," and has called for the "removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health." The committee has underlined the need for state parties to provide a full range of safe, effective, affordable, appropriate and confidential sexual and reproductive health services. *See* Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, 22nd Sess., paras. 12, 14, 21, 23, 44(a), n.12, U.N. Doc. E/C.12/2000/4 (2000), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003) [hereinafter CESCR General Comment 14]. In recent Concluding Observations on state reports, the committee has expressed deep concern over the relationship between high rates of maternal mortality and illegal, unsafe, clandestine abortions, specifically recognizing that restrictive abortion laws contribute significantly thereto. *See e.g., Concluding Observation of the Committee on Economic, Social and Cultural Rights: Cameroon*, 21st Sess., 54th mtg., para. 25, U.N. Doc. E/C.12/1/Add.40 (1999); *Mexico*, 21st Sess., 54th mtg., para. 29, U.N. Doc. E/C.12/1/Add. 41 (1999); *Nepal*, 26th Sess., 55th mtg., paras. 32, 55, UN.Doc. E/C.12/1/Add.66 (2001); *Panama*, 26th Sess., 51st mtg., para. 20, U.N. Doc. E/C.12/1/Add.64 (2001); *Poland*, 18th Sess., 10–12th mtg., paras. 12, 20, U.N. Doc. E/C.12/1/Add.26 (1998); *Senegal*, 26th Sess., 53rd mtg., paras. 26–27 U.N. Doc. E/C.12/1/Add.62 (2001); *Bolivia*, 25th Sess., 28th mtg., para. 43, U.N. Doc. E/C.12/1/Add.60 (2001). In some cases, states parties have been called upon to liberalize their abortion laws. *See e.g.*, *Concluding Observation of the Committee on Economic, Social and Cultural Rights: Nepal*, 26th Sess., 55th mtg., paras. 33, 55, UN.Doc. E/C.12/1/Add.66 (2001); *Concluding Observations of the Committee Against Torture: Chile*, 14/06/2004, U.N. Doc. CAT/C/CR/32/5 ¶7(m). The CEDAW Committee has interpreted the right to health similarly as the CESCR and has also recognized laws that criminalize medical procedures only needed by women and punish women who undergo those procedures as barriers to women's access to appropriate health care. It has expressly urged states parties to amend legislation criminalizing abortion. Committee on the Elimination of Discrimination Against Women, *General Recommendation 24: Women and health*, 20th Sess., paras. 14, 22, 31(c), U.N. Doc. A/54/38 (1999), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 271 (2003) [hereinafter CEDAW Committee General Recommendation 24].

[26] The Human Rights Committee has specifically addressed the right to privacy in the context of women's reproductive capacity and restrictive abortion laws, recognizing that "[s]tates may fail to respect women's privacy [with respect to] their reproductive functions, for example … where States impose a legal duty

upon doctors and other health personnel to report cases of women who have undergone [illegal] abortion." Human Rights Committee General Comment 28, *supra* note 25, para. 20.

[27] *See e.g., Concluding Observation of the Human Rights Committee: Poland*, 82nd Sess., 2251th mtg., para. 8, U.N. Doc. CCPR/CO/82/POL (2004); *Mali*, 77th Sess., 2095–2096th mtg., para. 14, U.N. Doc. CCPR/CO/77/MLI (2003); *El Salvador*, 78th Sess., 2125th mtg., para. 14, U.N. Doc. CCPR/CO/78/SLV (2003); *Chile*, 33rd Sess., 56th mtg., paras. 25, 52, U.N. Doc. E/C.12/1/Add.105 (2004); *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Malta*, 33rd Sess., 56th mtg., paras. 23, 41, U.N. Doc. E/C.12/1/Add.105 (2004).

[28] *See e.g., Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Uruguay*, 26th Sess., 541–542nd mtg., paras. 196–197, U.N. Doc. CEDAW/C/2002/I/CRP.3/Add.6 (2002); *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Poland*, 29th Sess., 33–34th mtg., para. 29, U.N. Doc. E/C.12/1/Add.82 (2002); *Concluding Observation of the Human Rights Committee: Morocco*, 82nd Sess., 2249th mtg., para. 29, U.N. Doc. CCPR/CO/82/MAR (2004); *Poland*, 82nd Sess., 2251th mtg., para. 8, U.N. Doc. CCPR/CO/82/POL (2004); *Gambia*, 82nd Sess., 2035th mtg., para. 17, U.N. Doc. CCPR/CO/75/GMB (2004); *Mali*, 77th Sess., 2095–2096th mtg., para. 14, U.N. Doc. CCPR/CO/77/MLI (2003); *Sri Lanka*, 79th Sess., 2164th mtg., para. 12, U.N. Doc. CCPR/CO/79/LKA (2003).

[29] *Concluding Observation of the Human Rights Committee: Ireland*, 69th Sess., 1858th mtg., paras. 23–24, U.N. Doc. A/55/40 (2000). *See also e.g., Concluding Observation of the Human Rights Committee: Peru*, 58th Sess., 1555th mtg., para. 15, U.N. Doc. CCPR/C/79/Add.72 (1996); *Morocco*, 82nd Sess., 2249th mtg., para. 29, U.N. Doc. CCPR/CO/82/MAR (2004); *Sri Lanka*, 79th Sess., 2164th mtg., para. 12, U.N. Doc. CCPR/CO/79/LKA (2003).

[30] *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Ireland*, 21th Sess., 440–441st mtg., para. 185, U.N. Doc. CEDAW/C/1999/L.2/Add.4 (1999).

[31] INTERNATIONAL FEDERATION OF GYNECOLOGY AND OBSTETRICS (FIGO), ABOUT FIGO – MEMBER SOCIETIES, *at* http://www.figo.org/societies.asp (last visited April 5, 2005).

[32] FIGO, ETHICAL ASPECTS IN THE MANAGEMENT OF THE SEVERELY MALFORMED FETUS (1995), *in* FIGO, RECOMMENDATIONS ON ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY BY THE FIGO COMMITTEE FOR THE ETHICAL ASPECTS OF HUMAN REPRODUCTION AND WOMEN'S HEALTH 43–44 (2003).

[33] WHO Safe Abortion Guidelines, *supra* note 5, § 2.4, at 65 (2003).

[34] Convention for the Protection of Human Rigths and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, art. 10(2) (1997) [hereinafter European Convention on Human Rights and Biomedicine].

[35] European Convention on Human Rights and Biomedicine, explanatory report, para. 40 (1997).

[36] *Id.*, para. 66.

[37] *Id.*, paras. 68–69.

[38] *Id.*, para. 156.

[39] *Id.*, para. 159.

[40] Council of Europe, Explanatory memorandum to Recommendation Rec(2000)5 of the Committee of Ministers to member states on the development of structures for citizen and patient participation in the decision-making process affecting health care § 3(a) (2000).

[41] *Id.*

[42] *See e.g.,* The Law on Medical Treatment, Law No. 167, art. 20 (1997) (Lat.); The Law of Georgia on the Rights of Patients, ch. III, art. 18 (2000) (Geor.); Health Act, No. CLIV, § 13 (1997) (Hung.); Safeguarding and Protection of the Patients' Rights Law, § 10 (2004) (Cyprus).

[43] The Patients' Rights Act, No. 63 §§ 2-2, 3-2 (1999) (Nor.).

[44] *See e.g., id.,* § 3-2.

[45] *See* CESCR General Comment 14, *supra* note 26, para. 34.

[46] *Id,* para. 50.

[47] CEDAW Committee General Recommendation 24, *supra* note 26, para. 20.

[48] *Id.,* para. 31(e).

[49] WHO, A DECLARATION ON THE PROMOTION OF PATIENTS' RIGHTS IN EUROPE, sec. 2.2 (1994).

[50] *Id.*, sec. 2.3.

[51] FIGO, *FIGO Professional and Ethical Responsibilities Concerning Sexual and Reproductive Rights*, *in* 26 J. of Obstetrics and Gynaecology Can. 1095, 1095–1099 (2004),

http://sogc.medical.org/JOGC/pdfs/december/1095.pdf. The recommendation urges health professionals to support women in their decision-making process without bias or coercion, and provide adequate information and education on the nature, management implications, options and outcomes of women's choices. *Id.* § B(1). In this way, health professionals create the conditions necessary for women "to consider and evaluate treatment options in the context of their own life circumstances and culture," and ultimately make informed choices regarding their sexual and reproductive health. *Id.*

[52] Regulation of Information (Services outside the State for Termination of Pregnancies) Act, § 8(1) (1995) (Ir.).

[53] Open Door and Dublin Well Woman v. Ireland, 246 Eur. Ct. H.R. (ser. A) (1992).

[54] *Id.* para. 80.

[55] *Id.* para. 77.

[56] *Id.* para 77.

[57] REPRODUCTIVE FREEDOM PROJECT, AMERICAN CIVIL LIBERTIES UNION, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS 6 (2002).

[58] *See* REBECCA COOK & BERNARD DICKENS, CONSIDERATIONS FOR FORMULATING REPRODUCTIVE HEALTH LAWS, ch. 1, pt. 4. (1999). For example, The British Medical Association—a professional association of over 130,000 physicians across the United Kingdom, which has been consulted frequently for its opinion on the scope of the conscience clause of the UK's 1967 Abortion Act—has advised that general practitioners may not claim exemption from giving advice or performing preparatory steps to arrange an abortion if the request for abortion meets legal requirements. Such steps include providing an appropriate referral to another doctor. BRITISH MEDICAL ASSOCIATION, THE LAW AND ETHICS OF ABORTION, BMA VIEWS (rev. 1999), *available at* http://www.bma.org.uk/ap.nsf/Content/abortion?OpenDocument&Highlight=2,conscientious,objection#Conscientiousobjectionclause.

[59] *See* REBECCA COOK & BERNARD DICKENS, *supra* note 58. ch. 1.

[60] CEDAW Committee General Recommendation 24, *supra* note 25, para. 11.

[61] *See Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Croatia*, 53rd Sess., 383rd mtg., para. 109, U.N. Doc. A/53/38 (Part I) (1998).

[62] CESCR General Comment 14, *supra* note 25, para. 11.

[63] WHO Safe Abortion Guidelines, *supra* note 5, § 2.3, at 64.

[64] *Id.,* § 2.1, at 59.

[65] *Id.,* § 2.4.1, at 66.

[66] *Id.*

[67] The Recommendations on Ethical Issues in Obstetrics and Gynecology by the FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health states in part that providers who are "unable or unwilling to provide a desired medical service for non-medical reasons … should make every effort to achieve appropriate referral." FIGO, ETHICAL FRAMEWORK FOR GYNECOLOGIC AND OBSTETRIC CARE (1994) *in* FIGO, RECOMMENDATIONS ON ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY BY THE FIGO COMMITTEE FOR THE ETHICAL ASPECTS OF HUMAN REPRODUCTION AND WOMEN'S HEALTH 10 (2003) [hereinafter FIGO Ethical Framework for Gynecologic and Obstetric Care Recommendations]. The International Code of Medical Ethics provides, "A doctor owes to his patient complete loyalty and all the resources of his science. Whenever an examination or treatment is beyond his capacity he should summon another doctor who has the necessary ability." *See* WORLD MEDICAL ASSOCIATION, INTERNATIONAL CODE OF MEDICAL ETHICS, DUTIES OF DOCTORS TO THE SICK (1949); *see also* FIGO Ethical Framework for Gynecologic and Obstetric Care Recommendations; FIGO, GUIDELINES REGARDING INFORMED CONSENT *in* FIGO, RECOMMENDATIONS ON ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY BY THE FIGO COMMITTEE FOR THE ETHICAL ASPECTS OF HUMAN REPRODUCTION AND WOMEN'S HEALTH 11–12 (2003).

[68] *See* REBECCA COOK & BERNARD DICKENS, *supra* note 58, at 196–198.

[69] Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, art. 12, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 20378 (*entered into force* Sept. 3, 1981).

[70] *Id.* art. 16.

[71] CEDAW Committee General Recommendation 24, *supra* note 25, para. 11.

[72] *Id.*, para. 14.

[73] Human Rights Committee General Comment 28, *supra* note 24, paras. 10, 11, 20.