IN THE EUROPEAN COURT OF HUMAN RIGHTS

B.B.

Applicant

v.

POLAND

Respondent

Application no. 67171/17

WRITTEN SUBMISSIONS ON BEHALF OF THE CENTER FOR REPRODUCTIVE RIGHTS

24 September 2020

I. INTRODUCTION

The Center for Reproductive Rights (the "Center") makes these written submissions under Rule 44(3) of the Rules of the Court pursuant to leave granted by the Vice-President of the First Section, as confirmed by the First Section Registrar's communication of 1 September 2020.

This submission[1] sets forth international and comparative law and jurisprudence related to the Court's deliberations on Articles 3 and 8 of the European Convention on Human Rights (the "Convention"). First, with reference to recent developments in international standards and jurisprudence, it outlines that denial of access to abortion can give rise to inhuman and degrading treatment in breach of Article 3. Second, it considers principles previously established by the Court that denial of access to abortion can breach the protection afforded to private life enshrined in Article 8 of the Convention, and provides the Court with an overview of the now firmly established European consensus in favour of access to abortion.

In drawing on recent developments in international standards and jurisprudence and comparative European law, the submission relies on two well-established and interrelated principles of Convention interpretation applied by the 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. As a result, the Court will take into account the content of other relevant international legal rules and principles applicable between the Contracting Parties, the interpretation of such elements by competent organs, including the decisions of other international legal bodies on similar questions.[2] Second, that the Convention is a living instrument and thus the Court recognises that the exact content of the rights that the Convention guarantees is not fixed or immutable, but instead evolves over time in response to social developments in the Contracting Parties and developments in international law and jurisprudence.[3]

II. DENIAL OF ACCESS TO ABORTION CAN LEAD TO INHUMAN AND DEGRADING TREATMENT IN BREACH OF ARTICLE 3

As the Court has repeatedly held, ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. Whether a set of circumstances reaches the requisite threshold involves a relative assessment; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[4] Consideration will be given to the state and vulnerability of the victim and the nature of the harm endured.[5] Although the purpose of the treatment may also be a factor for consideration, the Court has clearly established that the absence of any such purpose does not lead to a finding that there has been no violation of Article 3.[6]

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[1] The Center is grateful to Debevoise & Plimpton LLP for their assistance in drafting the submission.

[2] *Demir & Baykara v. Turkey* (2008) 48 EHRR 1272, at [65]-[67]; *Opuz v. Turkey* (2009) 50 EHRR 695, at [185], holding that the Court shall refer to "*the decisions of international legal bodies*".

[3] *Demir and Baykara v. Turkey* (2008) 48 EHRR 1272, at [142]-[143]. In coming to its decision, the European Court reiterated that the ECHR 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*"; *Tyrer v. United Kingdom* (1978) 2 EHRR 1, at [31]; *Christine Goodwin v. the United Kingdom* (2002) 35 EHRR 18, at [85], [93].

[4] See, e.g., *Price v. the United Kingdom* (2001) ECHR 458; *Kupczak v. Poland* (2011) ECHR 127; *Jalloh v. Germany* (2006) ECHR 721; *P. and S. v. Poland* (2012) ECHR 1853, at [157]; *R.R. v. Poland* (2011) 53 EHRR 31, at [148].

[5] *R.R. v. Poland* (2011) 53 EHRR 31, at [148]-[150]; *P and S v. Poland* (2012) ECHR 1853, at [162]-[163].

[6] *P. and S. v. Poland* (2012) ECHR 1853, at [160]; *R.R. v. Poland* (2011) 53 EHRR 31, at [151].

As the extent and breath of the Court's jurisprudence on Article 3 exemplifies, a broad variety of treatment may result in pain and suffering of sufficient severity to engage the responsibility of a Contracting Party under Article 3. As the Court has acknowledged, the denial of health care or medical treatment, as a matter of health care policy or due to the behaviour of state authorities, may result in suffering of a degree to reach the required threshold of severity and breach Article 3.[7]

In the case of *R.R. v. Poland*, the Court had the opportunity to apply this reasoning to a situation in which a woman was denied access to reproductive health care and information, and specifically to the denial of access to prenatal testing and diagnostic information during pregnancy.[8] There the Court held, that as a pregnant woman who had received a preliminary diagnosis of a severe foetal impairment, the applicant was in a situation of great vulnerability and distress.[9] It found that, when she was subsequently denied timely access to medical information and prenatal testing, and thereby denied the means to make an informed and time-bound decision about whether or not to continue her pregnancy, she suffered "painful uncertainty," "acute anguish" and "humiliation."[10] As a result, the Court concluded that the applicant's suffering reached the minimum threshold of severity and that there was therefore a breach of Article 3.[11]

Although in the earlier case of *A.B.C. v. Ireland,* which concerned denial of access to abortion care, the Court had concluded on the facts of that case that, "the facts alleged do not disclose a level of severity falling within the scope of Article 3 of the Convention,"[12] the Court did not exclude that the denial of access to abortion care can give rise to such a degree of suffering or humiliation as to fall within the scope of Article 3 and engage the responsibility of a Contracting Party thereunder.

In the time since the Court's judgements in *R.R. v. Poland* and *A.B.C. v. Ireland*, seminal developments in international jurisprudence and standards have brought considerable clarity to the matter under international law and have made it clear that denial of abortion and abortion-related health services, whether *de jure* or *de facto,* may give rise to inhuman and degrading treatment under international law. In its decisions in *Mellet v. Ireland* (2016) and *Whelan v. Ireland* (2017), the Human Rights Committee (the Committee) firmly established that the denial of access to abortion care, whether as the result of a national legal prohibition on abortion or because of the behaviour of state authorities or health care staff, can give rise to degrees of pain and suffering sufficient to reach the minimum threshold required by the prohibition on cruel, inhuman or degrading treatment under general international law, and as enshrined in Article 7 of the International Covenant on Civil and Political Rights (ICCPR).[13] This has been reaffirmed in recent international legal pronouncements from the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Council of Europe Commissioner for Human Rights.

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[7] See, e.g., *Powell v. the United Kingdom* (2000) ECHR 703; *P. and S. v. Poland* (2012) ECHR 1853, at [160]; *R.R. v. Poland* (2011) 53 EHRR 31, at [151]; *V.C. v. Slovakia* (2011) ECHR 1888, at [106]-[120].
[8] *R.R. v. Poland* (2011) 53 EHRR 31, at [153]-[162].
[9] *R.R. v. Poland* (2011) 53 EHRR 31, at [159].
[10] *R.R. v. Poland* (2011) 53 EHRR 31, at [159]-[160].
[11] *R.R. v. Poland* (2011) 53 EHRR 31, at [162].
[12] *A, B and C v. Ireland* (2011) 53 EHRR 13, at [164].
[13] *Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013, at [7.4]; *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.5]; *L.M.R. v. Argentina* (2011) U.N. Doc CCPR/C/101/D/1608/2007, at [9.2]. *K.L. v. Peru* (2005) U.N. Doc CCPR/C/85/D/1153/2003, at [6.2].

(a) **Human Rights Committee: *Mellet v. Ireland, Whelan v. Ireland, K.L. v. Peru, L.M.R. v. Argentina***

In 2016 and 2017 respectively, the Human Rights Committee issued decisions in the individual complaints *Mellet v. Ireland* and *Whelan v. Ireland.* In both cases the Committee held that by prohibiting abortion and thus denying both women access to abortion care in their home country, Ireland subjected them to severe levels of suffering and anguish that violated the prohibition on cruel, inhuman or degrading treatment enshrined in Article 7 of the ICCPR.

Both cases concerned pregnant women living in Ireland who received diagnoses of fatal foetal impairment in the course of their pregnancies.[14] Following these diagnoses both women decided to end their pregnancies and asked for abortion care. However, at the time, Irish law prohibited abortion except where the life of a pregnant woman was at risk, and as a result both women were prohibited from obtaining an abortion in Ireland and were informed by their doctors that in order to end their pregnancies they would have to travel to another country for abortion care. As a result, both authors travelled to the United Kingdom where they could obtain legal abortion care.

The Committee considered that both authors were in highly vulnerable positions after learning that their pregnancies involved fatal foetal impairments. It held that they had suffered great anguish and suffering as a result of being denied access to abortion care in Ireland, that the state party's responsibility was engaged, and that no justifications or extenuating circumstances could be invoked by the state party under Article 7.

In very similar findings in both cases the Committee underlined that, "*the author, as a pregnant woman in a highly vulnerable position after learning that her much-wanted pregnancy was not viable.*"[15] In one it considered that, "*[she] had her physical and mental anguish exacerbated by not being able to continue receiving medical care and health insurance coverage for her treatment from the Irish health-care system,*"[16] and in the other that *"her physical and mental situation was exacerbated by the following circumstances arising from the prevailing legislative framework in Ireland and by the author's treatment by some of her health care providers in Ireland.*"[17]

In both cases the Committee considered the nature of the harm each woman endured as a result of the denial of access to abortion and held that, "*many of the negative experiences described that she went through could have been avoided if the author had not been prohibited from terminating her pregnancy in the familiar environment of her own country and under the care of the health professionals whom she knew and trusted.*"[18]

The Committee also underlined in both cases that the fact that the denial of abortion care stemmed from the country's law on abortion in no way absolved the State party from responsibility under Article 7. Instead it held that, *"that the legality of a particular conduct or action under domestic law does not mean that it cannot infringe article 7 of the Covenant. The Committee notes that in the present case, the author's claims appertain to her treatment in State health facilities, which was the direct result of the legislation in place in Ireland. The existence of such legislation engages the responsibility of the State party for the treatment of*

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[14] *Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013, at [7.4]; *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.5].
[15] *Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013, at [7.4]; *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.5].
[16] *Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013, at [7.4].
[17] *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.5].
[18] *Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013, at [7.4]; *see also Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.5].

the author, and cannot be invoked to justify a failure to meet the requirements of article 7,"[19] and that *"by virtue of the existing legislative framework, the State party subjected the author to conditions of intense physical and mental suffering."*[20]

In both decisions the Committee also stressed that, "*the text of article 7 may not be limited, and no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reason. Accordingly, it cannot accept as a justification or extenuating circumstances the State party's explanations concerning the balance between moral and political considerations that underlies the legal framework existing in Ireland.*"[21]

Following these landmark decisions, the Irish Government provided compensation and rehabilitation support to the authors within the deadlines specified by the Committee.[22] It took measures to guarantee non-repetition by ensuring the repeal of the constitutional ban on abortion through a referendum of the electorate in 2018 and the subsequent adoption of legislation legalising abortion on a broad range of grounds in 2018.[23]

The Committee decisions in *Mellet v. Ireland* and *Whelan v. Ireland* followed its earlier decisions in *K.L. v. Peru*[24] and *L.M.R. v. Argentina.*[25] In both those cases the Committee had previously held that the State parties' failures to ensure the authors could access abortion care gave rise to physical and mental suffering in violation of Article 7 of the ICCPR.

(b) CEDAW Committee UK Inquiry and General Recommendation No. 35

Similar conclusions have been reached by the CEDAW Committee affirming that the denial of abortion can cause women severe anguish and suffering of a degree to breach the minimum threshold of severity required by the international prohibition on torture or other ill treatment and give rise to state responsibility.

In 2018, the CEDAW Committee issued its findings in an inquiry into whether the United Kingdom had committed grave and systematic violations of rights protected under the Convention on the Elimination of All forms of Discrimination Against Women (the CEDAW Convention) as a result of the restrictive law on abortion in Northern Ireland. In its findings the CEDAW Committee found that the denial of access to abortion experienced by some women in Northern Ireland, as a result of the jurisdiction's highly restrictive legal framework

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[19] *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.4]; *see also Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013.

[20] *Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013 at [7.4]; *see also Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014.

[21] *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.7]; *see also Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013, at [7.6].

[22] In December 2016 and 2017 respectively, within six months of each ruling, the Irish Government paid compensation of €30,000 to each author and agreed to cover the costs of psychological rehabilitation. Both authors also received apologies from the Irish Minister for Health.

[23] A law reform process initiated after the 2016 decision culminated in 2017 with a recommendation from the Joint Parliamentary Committee on the Eight Amendment of the Constitution that a referendum be held to repeal the constitutional ban on abortion and that legislation be passed to legalise abortion in Ireland in a range of situations (on a woman's request in the first 12 weeks of pregnancy, and thereafter in order to safeguard a woman's health or life or in situations of fatal foetal impairment). The Joint Parliamentary Committee identified three critical reasons for its recommendation to repeal the constitutional ban on abortion, one of which was: "*the continuing and ongoing breach of Ireland's international human rights obligations as evidenced in the cases of Mellet v. Ireland and Whelan v. Ireland, in which the United Nations Human Rights Committee found Ireland to be in violation of the International Covenant on Civil and Political Rights (ICCPR).*" *See* Report of the Joint Committee on the Eighth Amendment of the Constitution, Houses of the Oireachtas, December 2017, p. 5. A referendum was held on 25 May 2018 and carried, and legislation was adopted to allow abortion in Ireland in line with the Parliamentary Committee's recommendations.

[24] *K.L. v. Peru* (2005) U.N. Doc CCPR/C/85/D/1153/2003, at [6.3].

[25] *L.M.R. v. Argentina* (2011) U.N. Doc CCPR/C/101/D/1608/2007, at [9.2].

on abortion, *"involves mental or physical suffering constituting violence against women and potentially amounting to torture or cruel, inhuman and degrading treatment."*[26] The inquiry then specifically considered the situation of women who are, *"forced to carry to term a non-viable fetus (in cases of fatal fetal abnormality) or where the pregnancy results from rape or incest*,"[27] and the Committee's held that the United Kingdom was responsible for grave and systematic violations of the CEDAW Convention due to its, *"deliberate 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."*[28]

In response to the CEDAW Committee inquiry report, abortion has since been decriminalised in Northern Ireland and legislation has been adopted legalising abortion on broad grounds.[29]

In its General Recommendation No. 35, CEDAW Committee again affirmed that, *"criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, […] are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment."*[30]

(c) UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has also recognised that the denial of abortion care, whether as the result of a legal prohibition on abortion or because of the conduct of state authorities or health care officials, can give rise to severe suffering and anguish in breach of the international prohibition on ill-treatment. The Special Rapporteur has stated that *"abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender,"* and has noted that gender-specific forms of ill-treatment may include, "*denial of legally available health services such as abortion and post-abortion care."*[31] In 2016 the Special Rapporteur underlined that *"highly 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."*[32]

(d) Human Rights Committee General Comment No. 36

In its General Comment No. 36 the Human Rights Committee also underlined state obligations under the ICCPR to guarantee access to abortion to ensure freedom from ill

[26] Committee on the Elimination of Discrimination Against Women (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) U.N. Doc. CEDAW/C/OP.8/GBR/1, at [65].
[27] Id.
[28] Id. at [72].
[29] In 2019, the UK Parliament adopted legislative amendments requiring that effect be given to the CEDAW Committee recommendations on abortion law in Northern Ireland. As a result, abortion was decriminalized in Northern Ireland in 2019 and in 2020 it was legalized on a woman's request in early pregnancy and later in pregnancy to safeguard a woman's health and life and in situations of severe or fatal foetal impairment. See Explanatory Memorandum to the Abortion (Northern Ireland) Regulations 2020 No. 345, available at https://bit.ly/301d3XF.
[30] CEDAW Committee, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, (2018) U.N. Doc. CEDAW/C/GC/35, at [18].
[31] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, (2013) U.N. Doc. A/HRC/22/53, at [46].
[32] Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment, U.N.Doc. A/HRC/22/53, (2016).

treatment.[33] There the Committee recognised that, *"restrictions on the ability of women or girls to seek abortion must not, inter alia, [...] subject them to physical or mental pain or suffering which violates article 7."*[34] The Committee affirmed that states have an obligation to ensure that women have, *"safe, legal and effective access to abortion where ... carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable."*[35]

(e) Council of Europe Commissioner for Human Rights

The Council of Europe Commissioner for Human Rights has also addressed women's access to abortion care in the context of the right to freedom from torture and other ill-treatment. The Commissioner has stated that the right to freedom from ill-treatment obliges states to guarantee women's access to sexual and reproductive health care, when failures to do so could *"cause them considerable physical or mental suffering, anguish, or feelings of degradation."* [36] Therefore the Commissioner has called on member states of the Council of Europe to ensure both, *"that abortion is legal ... to protect women's health and lives and ensure freedom from ill-treatment,"* and that legal abortion services are accessible and available in practice.[37]

(f) Conclusion

As the jurisprudence and standards set out above confirm, there are a range of circumstances in which pregnant women may find themselves in situations of great vulnerability. International authorities have unambiguously affirmed that as a result they may endure severe anguish, pain and mental and physical suffering in situations where they decide to end a pregnancy but are denied access to abortion care in their country of residence, either by virtue of national legislative or policy frameworks or because of the conduct of state authorities and health care officials. They have recognised the trauma that predictably affects pregnant women in very vulnerable positions, who are denied access to abortion care and endure a severance in the continuum of health care provision as a result. They have recognised that for many women delays in access to abortion care predictably exacerbate suffering and anguish. These decisions and materials confirm that the degree of mental anguish and physical and mental suffering experienced can reach the minimum level of severity necessary to engage the international prohibition on inhuman or degrading treatment and establish State responsibility under international law, either where the denial of care and resulting suffering derives from state laws and policies prohibiting abortion, or from the behavior of state authorities, medical or health care officials.

III. DENIAL OF ACCESS TO ABORTION CAN VIOLATE THE RIGHT TO RESPECT FOR PRIVATE LIFE, ENSHRINED IN ARTICLE 8

According to the Court's established case-law, the notion of "private life" is a broad concept that includes elements such as personal autonomy and personal development, physical and psychological integrity, access to information about health as well as the decision to have or not to have a child or to become a parent.[38] The Court has specifically recognised that, *"the*

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[33] Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/GC/36, at [8].
[34] Id.
[35] Id.
[36] Council of Europe, Commissioner for Human Rights, Women's sexual and reproductive health and rights in Europe (2017), at [52]-[53].
[37] Id., at [11]-[12].
[38] *R.R. v. Poland* (2011) 53 EHRR 31, at [180].

decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy [and] legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus."[39] Although the right to respect for private life can permissibly be subject to limitation under Article 8(2) of the Convention, the Court has underscored that any such interferences must be "in accordance with the law," "necessary in a democratic society" and "proportionate to one of the legitimate aims pursued by the authorities."[40]

(a) <u>Denial of access to abortion, *de jure* or *de facto*, can give rise to an impermissible interference in the right to private life</u>

In line with the general principles summarised above, the Court has repeatedly found that denial of access to abortion care can give rise to a violation of the right to private life as enshrined in Article 8 of the Convention. In *Tysiac v. Poland*, *R.R. v. Poland* and *P. and S. v. Poland,* the Court reiterated that Contracting Parties have positive obligations under Article 8 to adopt measures designed to secure respect for private life.[41] The Court held that *"[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it."*[42] It underscored that Contracting Parties have, *"a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion."*[43] In those three cases the Court found that Poland's failure to ensure practical and enforceable access to legal abortion and prenatal diagnostic testing amounted to violations of the state's positive obligations under Article 8 of the Convention.[44]

Although in these cases the facts pertained to situations in which the abortion sought was legal under domestic law, in *Whelan v. Ireland* and *Mellet v Ireland,* the Human Rights Committee held that the denial of access to abortion care resulting from a legislative prohibition on abortion also constituted an arbitrary interference in the right to privacy, in violation of Article 17 of the ICCPR.[45]

In those decisions the Committee considered that the denial of access to abortion experienced by both authors had constituted an interference with the right to privacy and thus considered whether the interference could be justified under the lawfulness and proportionality requirements enshrined in Article 17 of the ICCPR. It noted in both cases that the interference was lawful as it was *"provided for under article 40.3.3 of the Constitution and therefore was not unlawful under the State party's domestic law."*[46] However, it then rejected the State party's argument that the, *"interference was proportionate to the legitimate aims of the ICCPR, taking into account a carefully considered balance between protection of the foetus and the rights of the woman."*[47] Instead, the Committee held that, *"the balance that the State party has chosen to strike between protection of the foetus and the rights of the woman in this*

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[39] *R.R. v. Poland* (2011) 53 EHRR 31, at [180]-[181].
[40] See e.g. *R.R. v. Poland* (2011) 53 EHRR 31, at [183].
[41] *Tysiąc v. Poland* (2007) 45 EHRR 42, at [110]; *R.R. v. Poland* (2011) 53 EHRR 31, at [185]; *P. and S. v. Poland* (2013) ECHR 1853 at [95]-[96]; see also *A, B and C v. Ireland* (2011) 53 EHRR 13, at [244]-[246].
[42] *Tysiąc v. Poland* (2007) 45 EHRR 42, at [116].
[43] *R.R. v. Poland* (2011) 53 EHRR 31, at [200].
[44] *P. and S. v. Poland* (2013) ECHR 1853, at [100]; *R.R. v. Poland* (2011) 53 EHRR 31, at [214]; *Tysiąc v. Poland* (2007) 45 EHRR 42, at [130].
[45] *Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013, at [7.7], [7.8]; *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.8], [7.9].
[46] *Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013, at [7.7]; *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.8].
[47] *Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013, at [7.7]; *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.8].

case cannot be justified; […] even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[48] As a result, it found that, *"preventing the author from terminating her pregnancy in Ireland […] constituted an intrusive interference in her decision as to how best to cope with her pregnancy, notwithstanding the non-viability of the fetus. On this basis, the Committee considers that the State party's interference in the author's decision is unreasonable and that it thus constitutes an arbitrary interference in the author's right to privacy, in violation of article 17 of the Covenant."*[49]

These decisions built on earlier jurisprudence from the Human Rights Committee, where the Committee considered that, *"[i]n the circumstances of the case, the refusal to act in accordance with the author's decision to terminate her pregnancy was not justified and amounted to a violation of article 17 of the Covenant."*[50] Additionally, in its General Comment No. 36, the Human Rights Committee also recognised that although states may regulate women's access to abortion any, "restrictions on the ability of women or girls to seek abortion must not, inter alia, [...] arbitrarily interfere with their privacy."[51]

(b) There is now an overwhelming European consensus in favour of access to abortion on broad grounds

In 2013, in the *P. and S.* case, the Court already recognised that *"there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion and that most Contracting Parties have in their legislation resolved the conflicting rights of the foetus and the mother in favour of greater access to abortion."*[52]

However, since then the European consensus to allow abortion on broad grounds has grown significantly. Additional Contracting Parties and jurisdictions, including Iceland, Ireland, Cyprus, and Northern Ireland, have adopted legislation legalising abortion on broad grounds.

Almost all the Contracting Parties have now legalised abortion on broad grounds.[53] Only six Council of Europe Member States, Andorra, Liechtenstein, Malta, Monaco, Poland, and San Marino,[54] now retain highly restrictive abortion laws only permitting abortion in a few narrowly defined circumstances. Within the European Union member states only Malta and Poland have not legalised abortion on request or broad socio-economic grounds.

The Court has repeatedly emphasised that the Convention is a living instrument, "*which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions.*"[55] The important evolution in laws on abortion within the Contracting Parties, when seen in light of the above-mentioned developments in international human rights jurisprudence, affirm that denial of access to abortion, *de jure* or *de facto*, engages the Convention obligations of Contracting Parties and that a narrow margin of appreciation must be applied.

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[48] *Mellet v. Ireland* (2016) U.N. Doc CCPR/C/116/D/2324/2013, at [7.8]; *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.9].

[49] *Whelan v. Ireland* (2017) U.N. Doc. CCPR/C/119/D/2425/2014, at [7.9].

[50] *K.L. v. Peru* (2005) U.N. Doc CCPR/C/85/D/1153/2003, at [6.4]; see also, *L.M.R. v. Argentina* (2011) U.N. Doc CCPR/C/101/D/1608/2007, at [9.2] – [9.3].

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

[52] *P. and S. v. Poland* (2013) ECHR 1853, at [97].

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

[54] Center for Reproductive Rights, *European Abortion Laws: A Comparative Overview* (2019), available at https://bit.ly/3028tZy.

[55] *Demir and Baykara v. Turkey* (2008) 48 EHRR 1272, at [142]-[143].

(c) **Article 8 requires Contracting Parties to ensure that refusals of care on grounds of conscience or religion do not jeopardise access to abortion care**

As part of its analysis in *R.R. v. Poland* and *P. and S. v. Poland*, the Court observed that *"States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation."*[56] Similarly, in the recent cases of *Grimmark v. Sweden* and *Steen v. Sweden*, the Court reaffirmed that the Contracting Parties have a positive obligation under the Convention to ensure that *"the effective exercise of freedom of conscience of health professionals in the professional context does not prevent the provision of [nationwide abortion] services."*[57] In those two cases the Court considered communications from two midwives, who had refused to assist in abortion care due to their personal religious faith, that their rights under Article 9 had been violated when, as a result, they were denied employment within the Swedish health system, and found both complaints inadmissible as manifestly ill-founded. The Court considered that, *"under Swedish law, an employee is under a duty to perform all work duties given to him or her [...]"*[58] and thus found that the denial of employment to midwives, who refused to assist in abortion care due to their personal religious faith and conscience, *"pursued the legitimate aim of protecting the health of women seeking an abortion,"* and was necessary in a democratic society and proportionate.[59]

Other international human rights mechanisms have also underlined that states have a human rights obligation to ensure that medical professionals' refusals of care on grounds of conscience or religion do not jeopardise or impede women's access to legal reproductive health care services, including abortion. They have held that when states fail to guarantee that such refusals of care do not jeopardise women's access to legal services they breach their international human rights obligations to guarantee women's access to legal reproductive health care.

These mechanisms have stressed that when, as a matter of domestic law or policy, states *choose* to permit medical professionals to refuse to provide legal abortion care or other forms of reproductive health care on grounds of conscience or religion, they must establish and implement an effective regulatory, oversight and enforcement framework so as to guarantee that such refusals do not undermine or hinder women's access to legal reproductive health care in practice.[60] They have outlined that, at a minimum, such measures must:

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[56] *P. and S. v. Poland* (2012) ECHR 1853, at [106]-[107]; *R.R. v. Poland* (2011) 53 EHRR 31, at [206].
[57] *Grimmark v. Sweden* (2020) App. No. 43726/17, at [26]; *Steen v. Sweden* (2020) App. No. 62309/17, at [21].
[58] *Grimmark v. Sweden* (2020) App. No. 43726/17, at [25]; *Steen v. Sweden* (2020) App. No. 62309/17, at [20].
[59] *Grimmark v. Sweden* (2020) App. No. 43726/17, at [25]-[26]; *Steen v. Sweden* (2020) App. No. 62309/17, at [20]-[21].
[60] *See, e.g.,* Committee on Economic, Social and Cultural Rights (CESCR Committee), *General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, at [14], [43], U.N. Doc. E/C.12/GC/22 (2016); CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, at [11], [13], U.N. Doc. A/54/38/Rev.1, chap. I (1999); Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Interim rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,* at [65(m)], U.N. Doc. A/66/254 (2011); CEDAW Committee, *Concluding Observations: Hungary*, at [30], [31(d)], U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013); *Concluding Observations: Poland*, at [37(b)-(c)], U.N. Doc. CEDAW/C/POL/CO/7-8 (2014); *Concluding Observations: Argentina*, at [33(c)], U.N. Doc. CEDAW/C/ARG/CO/7 (2016); *Concluding Observations: Italy*, at [41(d)], [42 (d)], U.N. Doc. CEDAW/C/ITA/CO/7 (2017); Human Rights Committee, *Concluding Observations: Argentina*, at [11]-[12], U.N. Doc. CCPR/C/ARG/CO/5 (2016); *International Planned Parenthood Federation – European Network (IPPF-EN) v. Italy* (2014) ECSR Complaint No. 87/2012, paras. [68]-[70], [161] et seq; *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy* (2016) ECSR Complaint No. 91/2013, paras. [165], [168], [179].

- Ensure adequate availability and geographic coverage of providers committed to provide care;[61]
- Prohibit institutional refusals of care;[62]
- Establish effective referral systems;[63]
- Disseminate information on legal entitlements to abortion care;[64]
- Impose clear limits on the legality of refusals, including the timing of refusals;[65]
- Implement adequate monitoring, oversight, and enforcement mechanisms to ensure compliance with relevant regulations.[66]

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[61] See, e.g., CESCR Committee, *General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, at [14], U.N. Doc. E/C.12/GC/22 (2016); Council of Europe, Commissioner for Human Rights, Women's sexual and reproductive health and rights in Europe (2017), at [11]-[12].

[62] CEDAW Committee, *Concluding Observations: Romania*, at [33(c)], U.N. Doc. CEDAW/C/ROU/CO/7-8 (2017); *Hungary*, at [30]-[31], CEDAW/C/HUN/CO/7-8 (2013); Committee on the Rights of the Child (CRC Committee), *Concluding Observations: Slovakia*, at [41(f)], U.N. Doc. CRC/C/SVK/CO/3-5 (2016); Council of Europe, Commissioner for Human Rights, Women's sexual and reproductive health and rights in Europe (2017), at [11].

[63] CESCR Committee, *General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, at [43], U.N. Doc. E/C.12/GC/22 (2016); Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Interim rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,* at [65(m)], U.N. Doc. A/66/254 (2011); CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, at [11], U.N. Doc. A/54/38/Rev.1, chap. I (1999); CEDAW Committee, *Concluding Observations: Romania*, at [33(c)], U.N. Doc. CEDAW/C/ROU/CO/7-8 (2017); *Slovakia*, at [43], U.N. Doc. A/63/38 (2008); CESCR Committee, *Concluding Observations: Poland*, at [28], U.N. Doc. E/C.12/POL/CO/5 (2009); *see also P. and S. v. Poland* (2012) ECHR 1853, at [107], [111]; Council of Europe, Commissioner for Human Rights, Women's sexual and reproductive health and rights in Europe (2017), at 11.

[64] *P. and S. v. Poland* (2012) ECHR 1853, at [108], [111]; CESCR Committee, *General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, at [18], U.N. Doc. E/C.12/GC/22 (2016).

[65] Council of Europe, Commissioner for Human Rights, Women's sexual and reproductive health and rights in Europe (2017), at [11]; CESCR Committee, *General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, at [43], U.N. Doc. E/C.12/GC/22 (2016).

[66] See, e.g., Council of Europe, Commissioner for Human Rights, Women's sexual and reproductive health and rights in Europe (2017), at [11]-[12]; CEDAW Committee, *Concluding Observations: Hungary*, at [30]-[31], U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013); CRC Committee, *Concluding Observations: Slovakia*, at [41(f)], U.N. Doc. CRC/C/SVK/CO/3-5 (2016); CEDAW Committee, *Concluding Observations: Poland*, at [37(b)], U.N. Doc. CEDAW/C/POL/CO/7-8 (2014).