

ON APPEAL FROM:

HER MAJESTY’S COURT OF APPEAL IN NORTHERN IRELAND

MORGAN LCJ, GILLEN AND WEATHERUP LJ

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION

AND IN THE MATTER OF THE LAW

ON TERMINATION OF PREGNANCY IN NORTHERN IRELAND

WRITTEN SUBMISSIONS

ON BEHALF OF THE UNITED NATIONS WORKING GROUP ON THE ISSUE OF
DISCRIMINATION AGAINST WOMEN IN LAW AND IN PRACTICE¹

I. INTRODUCTION

1. This written submission is served on behalf of the United Nations Working Group on the issue of discrimination against women in law and in practice (“**the Working Group**”) which is a Special Procedures mechanism of the Human Rights Council².
2. Issues 3-5 in the Statement of Facts and Issues (“**SFI**”) raise questions as to the effect of criminalisation of pregnancy in Northern Ireland on the fundamental rights of women and girls in international law: to freedom from torture and cruel, inhuman and degrading treatment; and to enjoy dignity, autonomy and respect for private life on a basis of equality with men, without discrimination.

¹The Working Group is composed of five independent experts in women’s human rights who are recognised regionally and internationally and who are mandated by the United Nations Human Rights Council to advance women’s human rights and combat discrimination in law and practice around the world. Its members are Kamala Chandrakirana, Frances Raday, Emna Aouij, Alda Facio, and Eleonora Zielinska. It was established in 2011 under resolution 15/23 (which has been since twice extended). More information is available here: <http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WGWomenIndex.aspx>

² As explained in the Application to Intervene at §4, this is the independent submission of the Working Group as a Special Procedure of the Human Rights Council. Authorization for it has not been sought or given by the United Nations (UN) or any body of the UN, and the intervention is without prejudice to, and should not be regarded as, an express or implied waiver of the privileges and immunities of the UN, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the UN.

3. The Working Group submits that:

- a. Women have a human right to safe and legal sexual and reproductive health services, which is indivisible from and interdependent with the human rights binding on states under the UN treaty system. These include the right to equality, without discrimination, to dignity, autonomy, information and bodily integrity and respect for private life; and to the highest attainable standard of health, and health-care services, including those related to reproductive and sexual health; as well as the right to freedom from torture and cruel, inhuman and degrading treatment.
- b. States Parties to the UN Convention on the Elimination of Discrimination Against Women (“**CEDAW**”), ratified by the United Kingdom of Great Britain and Northern Ireland (“**United Kingdom**”) on 7 April 1986, have an obligation to repeal laws and reverse policies which discriminate against women.³ This obligation extends to discrimination against women in the field of health care and in access to health care services, including those relating to family planning.
- c. Women’s right to substantive equality in the field of health has been clarified by the Working Group as requiring differential treatment in access to health services, where women’s biological needs are different from men’s.⁴ Hence, criminalising or denying women access to health services that only women require, such as termination of pregnancy, constitutes discrimination against women.
- d. Expert international human rights mechanisms and entities have variously called for decriminalization of abortion; recognition of women’s and girls’ autonomy and freedom of choice regarding their sexual and reproductive health; and the guarantee of effective access to safe and legal abortion.
- e. Denial of access to legal abortion often leads to unsafe abortion, increasing the incidence of maternal mortality. Criminalisation of abortion does not reduce the incidence of abortion but, rather, results in women resorting to illegal and unsafe procedures, with a particularly discriminatory effect on women in poverty.
- f. Expert international human rights mechanisms and entities have repeatedly concluded that, in some situations, failure to provide women access to legal and

³ CEDAW Article 2(g).

⁴ Working Group thematic report on health and safety A/HRC/32/44, paras 22-23 [**Auths/196**].

safe abortion may amount to cruel, inhuman or degrading treatment or punishment or torture, or a violation of their right to life.

4. This submission draws the Court’s attention to the obligations of the United Kingdom as a State Party to the human rights treaties, including the CEDAW, the International Covenant on Civil and Political Rights (“**ICCPR**”), the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”), the Convention against Torture (“**CAT**”) and the Convention on the Rights of the Child (“**CRC**”)⁵; and its commitment to the international standards established by various UN human rights mechanisms and entities, including the Treaty Bodies and Special Procedures, regarding the criminalisation of abortion.
5. The Working Group understands that this submission may be relevant to informing the Court’s interpretation of the criminal statutes before it because (i) specialist international law affects the interpretation of the relevant rights under the European Convention on Human Rights (“**ECHR**”), which the Court will use to interpret the relevant domestic provisions (by virtue of sections 2 & 3 of the Human Rights Act 1998 (“**HRA**”)); (ii) the Supreme Court treats UN General Comments as “authoritative guidance” on issues of international law (*SG* [2015] 1 WLR 1449 per Lord Carnwath at §105 [**Auths/11**] and *ZH (Tanzania) v SSHD* [2011] 2 AC 166 per Baroness Hale at §27; §37 [**Auths/98**]); and (iii) there is a ‘strong presumption’ of interpreting domestic law in a way which does not place the United Kingdom in breach of an international obligation (per Lord Hoffmann in *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, at §27), so international legal standards have an independent bearing on the interpretation of the relevant domestic provisions as a matter of English common law statutory interpretation⁶.

II. THE WORKING GROUP AND ITS MANDATE

6. The United Nations Human Rights Council is an inter-governmental body of the United Nations responsible for strengthening the promotion and protection of human rights. The Council appoints independent experts within its Special Procedures mechanism to

⁵ The United Kingdom ratified the ICCPR and the ICESCR on 20 May 1976, the CAT Convention on 8 December 1988, and the CRC on 16 December 1991. A list of the applicable international human rights law commitments which have been ratified by the United Kingdom is set out in the attached **Appendix**.

⁶ See Application to Intervene, §§14-15. The Working Group does not duplicate submissions which it understands will be made by the parties as to how international human rights standards are applied as a matter of national law.

monitor and report to it on thematic or country issues relating to human rights; and to formulate recommendations regarding the human rights situations in specific countries. The system of Special Procedures is a central element of the human rights machinery and covers all human rights: civil, cultural, economic, political and social.

7. The Working Group is a Special Procedure of the Human Rights Council, as noted above⁷. The Working Group reports annually to the Council and one of its latest reports, in June 2016 [Auths/196]⁸, was specifically focused on the issue of discrimination against women with regard to health and safety. This is referred to in more detail below.

III. INTERNATIONAL LAW CONTEXT: The positive obligation on states to protect, respect and ensure dignity, autonomy and equality for women

8. At the core of all the international human rights instruments are the principles of dignity and equality. Article 1 of the Universal Declaration on Human Rights provides that “All human beings are born free and equal in dignity and rights”.
9. Yet, in law and practice, women continue to be discriminated against. To give practical effect to the underpinning principles of the Universal Declaration, women’s rights to dignity, autonomy and freedom from gender-based violence and other forms of sex discrimination are expressly articulated and given special protection throughout all the international human rights instruments. They are further articulated in the CEDAW. In order to eliminate discrimination against women in law and practice and to empower them, as required by the Human Rights Council Resolution establishing the Working Group,⁹ it is essential to overcome gender bias in law and practice under the prior status quo, which was acknowledged in the Preamble to CEDAW in 1980, which states that “extensive discrimination against women continues to exist.”
10. The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and

⁷ Its role and mandate are set out at footnotes 1 and 2 above.

⁸ Working Group on discrimination against women in law and in practice, A/HRC/32/44 [Auths/196].

⁹ United Nations Human Rights Council Resolution A/HRC/RES/15/23.

privacy, concerning intimate matters of physical and psychological integrity, as protected under Article 17 of the ICCPR¹⁰. Further, the right to the highest available standard of healthcare is also given specific protection under Article 12 of the ICESCR¹¹. This comprises sexual and reproductive health including family planning (see Committee on Economic, Social and Cultural Rights (“CESCR”) General Comment 14, §14, §21)¹². And women’s right to non-discrimination in access to health care services, including those related to family planning, is required under Article 12 of the CEDAW¹³.

11. In its concluding observations to State Parties, the CEDAW Committee has frequently observed that highly restrictive abortion laws result in women obtaining illegal and unsafe abortions, and are a major cause of maternal mortality¹⁴. The Committee has also specifically recommended that the Northern Ireland legislation criminalising abortion should be amended.¹⁵
12. The Working Group has resolved that denial of access to abortion violates women’s human rights to health, privacy, equality in access to health services which are differentially suited to their biological needs, and to physical integrity and even to life¹⁶. At the heart of each of these standards is the principle of autonomy. Negation of women’s autonomy in decision-making regarding their own bodily integrity leads to violation of their human right to equality and dignity.
13. The Working Group’s recent report¹⁷ summarises the relevant international human rights law and standards as follows:

“Women’s rights to equality and to the highest attainable standards of health, to enjoy the benefits of scientific progress and to health-care services, including those related to reproductive and sexual health, are enshrined in international and regional human

¹⁰ [Auths/38]

¹¹ [Auths/170]

¹² [Auths/181]

¹³ [Auths/39]

¹⁴ See e.g. CEDAW Committee, Concluding Observations regarding Chile, 25th August 2006, at §19;

¹⁵ CEDAW Committee, General Recommendation No. 24, at §31(c) [Auths/177]; CEDAW Committee, Concluding Observations regarding the United Kingdom, 10th July 2008, at §289; CEDAW Committee, Concluding Observations regarding the United Kingdom, 30th July 2013, at §51 [Auths/174]. See also CESCR, concluding observations on the United Kingdom in 2009, at §25 [Auths/180]; CESCR, General Comment No. 22, at §10; §28; §34 and §40 [Auths/183]; CRC, Concluding observations on the combined third and fourth periodic reports of Ireland, at §58; Parliamentary Assembly of the Council of Europe, Resolution 1607, at §7.1.

¹⁶ Working Group on discrimination against women in law and in practice, A/HRC/32/44, §63 [Auths/196]

¹⁷ *Ibid*, A/HRC/32/44, §13, 14 and 18 [Auths/196]. See also CESCR General Comment 22 [Auths/183] and also the 2011 report of the Special Rapporteur on the right to the enjoyment of the highest attainable standard health specifically on women’s right to sexual and reproductive health in international law at §6-10.

rights instruments, reaffirmed in consensus agreements, including the Programme of Action of the International Conference on Population and Development and the Beijing Platform for Action adopted at the Fourth World Conference on Women and the outcome documents of the review and appraisal conferences, and recognized by international, regional and national mechanisms and jurisprudence. The International Conference on Population and Development, held in 1994, recognized women's rights to reproductive and sexual health as being key to women's health. Discrimination against women in the area of health and safety and denial of their right to control their own bodies severely violate their human dignity, which, along with equality, is recognized in the Universal Declaration of Human Rights as the foundation of freedom, justice and peace in the world.

States are obliged to secure women's rights to the highest attainable standard of health and safety, including their underlying determinants, and women's equal access to health-care services, including those related to family planning, as well as their rights to privacy, information and bodily integrity. The obligation to respect, protect and fulfil women's right to equal access to health-care services and to eliminate all forms of discrimination against women with regard to their health and safety is violated by neglecting women's health needs, failing to make gender-sensitive health interventions, depriving women of autonomous decision-making capacity and criminalizing or denying them access to health services that only women require. In some situations, failure to protect women's rights to health and safety may amount to cruel, inhuman or degrading treatment or punishment or torture, or even a violation of their right to life.

[...]

Women's bodies are instrumentalized for cultural, political and economic purposes rooted in patriarchal traditions. Instrumentalization occurs within and beyond the health sector and is deeply embedded in multiple forms of social and political control over women. It aims at perpetuating taboos and stigmas concerning women's bodies and their traditional roles in society, especially in relation to their sexuality and to reproduction. As a result, women face continuous challenges in accessing health care and in maintaining autonomous control in decision-making about their own bodies. Understanding and eliminating the instrumentalization of women's bodies, which is based on harmful cultural norms and stereotypes, and its detrimental impact on women's health, is critical for change to occur.”

14. It is in this context of a woman's right to dignity, autonomy and equality, enshrined in international law, that the Working Group considers the issues in this case must be approached: “Autonomous access to health care means ensuring a woman's right to make decisions concerning her health, fertility and sexuality free of coercion and violence. Key to this is the notion of choice.”¹⁸

¹⁸ Working Group's Report, A/HRC/32/44, at §86 [Auths/196].

IV. ISSUE 3 IN THE SFI: COMPATIBILITY WITH ARTICLE 3 ECHR

15. The Working Group supports the Appellant's submission that the Northern Irish legislation, which makes termination of pregnancy except to preserve the life of the mother, a criminal offence punishable by life imprisonment, is incompatible with the right to freedom from torture and other cruel, inhuman and degrading treatment. The stark evidence from the women affected which is before the Court (summarised in the Appellant's Case at §68) demonstrates this.
16. International human rights treaties which the United Kingdom has ratified, as interpreted and applied by UN mechanisms and entities, establish: (1) criminalising abortion can amount to torture or cruel, inhuman or degrading treatment (2) legality in national law is no justification for provisions which can amount to torture or cruel, inhuman or degrading treatment; (3) that rights to be free from torture and cruel, inhuman and degrading treatment are absolute: moral or political considerations cannot justify limits to them or exceptions; and (4) protection from torture or cruel, inhuman or degrading treatment extends to mental, not just physical suffering.
17. Torture and other cruel, inhuman or degrading treatment or punishment are prohibited under the CAT and Article 7 of the ICCPR. These provisions are non-derogable¹⁹:
*"The prohibition of torture is absolute and can never be justified in any circumstance. This prohibition is non-derogable, which means that a State is not permitted to temporarily limit the prohibition on torture under any circumstance whatsoever, whether a state of war, internal political instability or any other public emergency. Further, the prohibition of torture is also recognized as a peremptory norm of international law, or jus cogens. In other words, it overrides any inconsistent provision in another treaty or customary law."*²⁰
18. Article 1 of CAT establishes that "the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person [...] for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

¹⁹ ICCPR Article 4(2) [**Auths/38**]; CAT Article 2(2) [**Auths/191**] and see Appendix at §29 and §24 respectively.

²⁰ http://www.ohchr.org/Documents/Countries/NHRI/Torture_Prevention_Guide.pdf

19. There is a significant body of international legal opinion in i) treaty bodies' individual complaint decisions, ii) concluding observations, iii) general comments or general recommendations,²¹ iv) reports by Special Procedure mandate holders, and v) reports by other UN Agencies, that the criminalisation of abortion in some circumstances violates Article 7 of the ICCPR and/or the CAT. These are taken in turn.

i) **Human Rights Committee Decisions on Individual Complaints**

20. The United Nations Human Rights Committee (“**Human Rights Committee**”), which is charged with monitoring and interpreting the ICCPR, has found that the denial of an abortion constituted a violation of Article 7 of the ICCPR in the following individual complaints under the optional protocol to the ICCPR:

- a. *Whelan v. Ireland*, CCPR/C/119/D/2425/2014, 12 June 2017 [**Auths/27**]. The Human Rights Committee found a violation of Article 7 of the ICCPR in the case of a woman whose foetus was diagnosed with a fatal brain abnormality (holoprosencephaly) at 20 weeks and who, because she could not obtain a legal abortion in Ireland, had to travel to England for a termination. The Committee found that the level of “mental anguish” caused to Ms W constituted a violation of Article 7 (see §7.5-7.7), arising from a variety of circumstances including the shame and stigma associated with the criminalisation of abortion, the fact of having to travel without her family to another country to unknown medical practitioners, having to travel home when not fully recovered, and the lack of post-abortion and bereavement care on her return.
- b. *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, 17 November 2016 [**Auths/144**]. The pregnant claimant, in Ireland, after learning that the foetus would die in utero as a result of a congenital heart condition, was told by medical providers that she would

²¹ The Working Group endorses the summary explaining the source and authority of these general comments which is set out in the Appellant’s International Law Annex at §3.5. At domestic law, Lord Carnwath in *SG v SSWP* [2015] 1 WLR 1449 [**Auths/11**] referred to the UNCRC’s General Comment No 14 on the best interests of the child as “the most authoritative guidance” §105; Lord Hughes also holding that although not binding, it was entitled to careful consideration §152. Lord Wilson cited this part of Lord Carnwath’s speech with approval in *Mathieson v SSWP* [2015] 1 WLR 3250 §39-44 [**Auths/4**]. The UK Supreme Court has also considered general comments of international treaty bodies on a number of other occasions in considering the scope of ECHR convention rights: see e.g. Baroness Hale considered two of the UNCRC’s General Comment in *ZH Tanzania* [2011] 2 AC 166 at §27; §37 [**Auths/98**]; and see also in *AL Serbia* [2008] 1 WLR 1434, §32 *per* Baroness Hale.

have to travel out of the country in order to obtain an abortion. She travelled to Liverpool to terminate her pregnancy and was denied post-abortion care upon her return to Ireland²². The Human Rights Committee found that the suffering she endured as a result of being forced to travel, being denied necessary physical and mental health care, and being subjected to intense stigma, amounted to cruel, inhuman, or degrading treatment in violation of article 7 (§7.4);

- c. *KL v. Peru*, CCPR/C/85/D/1153/2003, 22 November 2005 [**Auths/141**]. The pregnant claimant, aged 17, was unable to obtain a legal abortion in Peru, when the foetus was diagnosed with anencephaly, a condition incompatible with life outside the womb, and where the continuation of the pregnancy presented risks to her life. She was forced to carry the pregnancy to term and to breastfeed the baby for four days before it died. She suffered a marked deterioration in her mental health. Peruvian law criminalised abortion in most circumstances, but allowed abortion to preserve a woman's life or to prevent permanent damage to her health. However, in spite of these exceptions, the medical service providers refused to carry out an abortion, claiming that it was unlawful because of the near total criminalisation of the procedure. The Committee found a violation of the prohibition of torture or cruel, inhuman or degrading treatment (§6.3), bearing in mind the severe psychological consequences on her and her status as a minor.
- d. *VDA v. Argentina*, CCPR/C/101/D/1608/2007, 28 April 2011 [**Auths/143**]. VDA was a young mentally impaired woman in Argentina who became pregnant as a result of rape by her uncle. Argentine law criminalised abortion but allowed exceptions related to the life or health of the woman and in cases of rape of a woman with a "mental disability." However, the Claimant had to obtain a ruling from the Supreme Court to obtain an abortion, by which time the hospital stated that it was too late in the pregnancy to obtain a legal termination. The claimant obtained an illegal termination. The Committee found that the denial of abortion in these circumstances constituted a violation of the prohibition of torture or cruel, inhuman and degrading treatment, particularly as a result of the mental suffering caused to the victim (see § 9.2).

²² Post-abortion care is now available in Northern Ireland but this has only been the case since March 2016.

ii) **Concluding Observations by UN Treaty Bodies**

21. There are significant recommendations in the concluding observations of UN Treaty Bodies calling for the decriminalisation of abortion. These recommendations include concluding observations that the Northern Irish law needs urgent amendment to bring it in line with international human rights law.

22. In 2013, the CEDAW Committee in its concluding observations²³ at §51 called on the United Kingdom to:

*“expedite the amendment of the anti-abortion law in Northern Ireland with a view to decriminalising abortion” [as well as ensuring] “that legal abortion covers not only cases of threats to the life of a pregnant woman but also other circumstances, such as threats to her health and in cases of rape, incest and serious malformation of the foetus.”*²⁴

23. The Human Rights Committee reviewed the United Kingdom in August 2015²⁵. In its concluding observations, the Committee noted and recommended as follows:

“Termination of pregnancy in Northern Ireland

17. *The Committee is concerned about the highly restricted circumstances in which termination of pregnancy is permitted by law in Northern Ireland and about the severe criminal sanctions for unlawful abortion, which put women’s life and health at risk and force them to travel in order to seek an abortion. The Committee notes with concern that the Department of Justice for Northern Ireland, after having held a consultation on the possible decriminalization and legalization of abortion in cases of fatal foetal abnormality and pregnancy as a result of rape or incest, indicated in April 2015 that it would propose legislation to legalize termination of pregnancy only in circumstances of fatal foetal abnormality, due to “complex issues” raised by pregnancy occurring as a result of sexual crimes (arts. 3, 6, 7 and 17).*

The State party should, as a matter of priority, amend its legislation on abortion in Northern Ireland with a view to providing for additional exceptions to the legal ban on abortion, including in cases of rape, incest and fatal foetal abnormality. The State party should also ensure access to information on abortion, contraception and sexual and reproductive health options.” (emphasis in original)

24. The CESCR reviewed the United Kingdom the following year in June 2016. In its Concluding Observations of 14 July 2016 [**Auths/180**], the Committee noted and recommended as follows (albeit in the context of Art 12 CESCR):

²³ 30 July 2013, CEDAW/C/GBR/CO/7 [**Auths/174**]. The CEDAW’s earlier concluding observations on this issue in 1999 and 2008 are set out in the Appendix at §7i).

²⁴ See also the CEDAW Committee’s Concluding Observations in respect of the restrictive regime in the Republic of Ireland dated 9 March 2017. These are set out in the Appellant’s International Law Annex.

²⁵ CCPR/C/GBR/CO/7 [**Auths/193**].

“61. The Committee is concerned that termination of pregnancy in Northern Ireland is still criminalized in all circumstances except when the life of the woman is in danger, which could lead to unsafe abortions and disproportionately affects women from low-income families who cannot travel to other parts of the United Kingdom (art. 12).

62. The Committee recommends that the State party amend the legislation on termination of pregnancy in Northern Ireland to make it compatible with other fundamental rights, such as women’s rights to health, life and dignity. In this respect, the Committee draws the attention of the State party to its general comment No. 22 (2016) on the right to sexual and reproductive health.”

25. Human rights treaty bodies, namely the CEDAW Committee, the Human Rights Committee, the CESCR and the UNCRC²⁶, have also frequently called, in their concluding observations regarding States Parties other than the United Kingdom, for decriminalisation of abortion²⁷. The Committee Against Torture has also found in its concluding observations a violation of the prohibition on torture and other forms of cruel, inhuman and degrading treatment when abortion services have been denied in cases of rape, incest and non-viable fetuses (see §31 of Appendix).²⁸

iii) General Comments of Treaty Bodies

26. A number of Treaty Bodies have also addressed issues relating to the criminalisation of abortion in their General Comments or General Recommendations.²⁹

27. The CEDAW Committee has stated clearly in its General Comment 35 on gender-based violence that criminalisation of abortion and denial or delay of safe abortion and post-abortion care are forms of gender-based violence that may in some circumstances amount to torture or cruel, inhuman or degrading treatment (§17-18) [**Auths/178**]:

“The Committee endorses the view of other human rights treaty bodies and special procedures mandate-holders that in making the determination of when acts of gender-based violence against women amount to torture or cruel, inhuman or degrading treatment, a gender sensitive approach is required to understand the level of pain and suffering experienced by women, and that the purpose and intent requirement of torture

²⁶ The Working Group notes that the Committee on the Rights of Persons with Disabilities in its UK Report dated 29 August 2017 recommends that the UK should change its abortion law, albeit stating that “*women’s rights to reproductive and sexual autonomy should be respected without legalising selective abortions on ground of foetus deficiency.*”

²⁷ By way of example only, CEDAW/CAGO/CO/6 para 32(g); e.g. UNHRC/MCO/Co/2, para 10; e.g. CESCR E/C.12/PHL/CO/5-6 para 52; e.g. CRC CRC/C/NIC/CO/4 para 59b. The Appellant has provided further details for the various bodies in its International Law Annex.

²⁸ CAT/C/BOL/CO/2, CAT/C/PRY/CO/4-6, CAT/C/SLE/CO/1, CAT/C/POL/CO/5-6, CAT/C/PER/CO/5-6, CAT/C/KEN/CO/2, CAT/C/NIC/CO/1, CAT/C/POL/CO/5-6, CAT/C/PER/CO/4 (see Appendix at §30).

²⁹ These are collected in the Appendix.

are satisfied when acts or omissions are gender specific or perpetrated against a person on the basis of sex.

Violations of women's sexual and reproductive health and rights, such as forced sterilizations, forced abortion, forced pregnancy, criminalisation of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment."³⁰

28. The CEDAW Committee recommends that State parties should repeal "provisions that allow, tolerate or condone forms of gender-based violence against women...[such as] legislation that criminalises abortion".³¹

iv) Reports of Special Procedure mandate holders:

29. Various Special Procedure mandate holders have concluded that the denial of legal abortion may force women to carry pregnancies to term against their will, causing them tremendous and lasting physical and emotional suffering, which is inflicted on the basis of gender. They have concluded that the criminalisation of abortion discriminates against women, severely discriminates against women in poverty and may amount to torture or cruel, inhuman or degrading treatment.

30. The Special Rapporteur on torture and other cruel, inhuman or degrading punishment in his 2016 report³² [**Auths/171**] stated:

"International human rights law increasingly recognizes that abuse and mistreatment of women seeking reproductive health services cause tremendous and lasting physical and emotional suffering, which is inflicted on the basis of gender (A/HRC/22/53). Health-care providers tend to exercise considerable authority over clients, placing women in a position of powerlessness, while the lack of legal and policy frameworks that effectively enable women to assert their right to access reproductive health services enhances their vulnerability to torture and ill-treatment. ...

Short- and long-term physical and psychological consequences also arise due to unsafe abortions and when women are forced to carry pregnancies to term against their will (A/66/254). Such restrictive policies disproportionately impact marginalized and disadvantaged women and girls. 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

³⁰ in General Comment 35 on Gender-Based Violence, 14 July 2017 [**Auths/178**].

³¹ General Comment 35, see §31(a) [**Auths/178**].

³² Report of the Special Rapporteur on torture, 05 January 2016 on "Gender perspectives on torture and other cruel, inhuman and degrading treatment or punishment" A/HRC/31/57 at §42 – 44 [**Auths/171**] also cross-referring also to his earlier report to similar effect, A/HRC/22/53.

woman violate women's right to be free from torture and ill-treatment (A/HRC/22/53, CEDAW/C/OP.8/PHL/1). ...

The denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill-treatment. States have an affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care.”

31. The Working Group, in its 2016 Thematic Report³³, concluded that:

- a. “The criminalization of behaviour that is attributed only to women is discriminatory per se and generates and perpetuates stigma” (§78);
- b. “The threat of criminal punishment restricts women’s access to sexual and reproductive health-care services and information, and acts as a deterrent to health-care professionals, thus barring women’s and girls’ access to healthcare services” (§78);
- c. “Criminalization of termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women’s bodies and lives, subjecting them to risks to their lives or health in order to preserve their function as reproductive agents and depriving them of autonomy in decision-making about their own bodies.” (§79)

32. The 2011 report³⁴ of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health reiterated the severe impacts of criminalisation of abortion on women and girls (§17):

“Criminalisation generates and perpetuates stigma; restricts [women’s] ability to make full use of available sexual and reproductive health-care goods, services and information denies their full participation in society; and distorts perceptions among health-care professionals which, as a consequence, can hinder their access to health-care services. Criminal laws and other legal restrictions disempower women, who may be deterred from taking steps to protect their health in order to avoid liability and out of fear of stigmatization...these laws can also have a discriminatory effect in that they disproportionately affect those in need of such resources, namely women. As a result women and girls are punished both when they abide by these laws, and are thus subjected to poor physical and mental health outcomes, and when they do not, and thus face incarceration.”

³³ A/HRC/32/44, April 2016 [Auths/196]

³⁴ A/66/254. Not in authorities bundles but available at <http://undocs.org/A/66/254>

33. The Special Rapporteur on extrajudicial, summary, or arbitrary executions reported in 2017³⁵ on a gender sensitive approach to arbitrary killings and noted (§§ 93-94):

“The deaths of women and girls from unsafe abortion has been repeatedly linked to the right to life. Treaty bodies and special procedures mandate holders have consistently condemned countries that criminalize and restrict access to abortion, making direct links between the criminalization of abortion, maternal mortality and the right to life. Noting that such laws violate the right to life of pregnant women and other rights, the Human Rights Committee⁷⁹ and the Committee against Torture, for example, have expressed concerns about restrictive abortion laws, including absolute bans on abortion, as violating the right to life and prohibition of torture and other ill-treatment.

Yet some States choose to impose an absolute ban on abortion and criminalize it. Under the above analysis, the death of a woman, where it can be medically linked to a deliberate denial of access to life-saving medical care because of an absolute legal ban on abortion, would not only constitute a violation of the right to life and an arbitrary deprivation of life, but would also amount to a gender-based arbitrary killing, only suffered by women, as a result of discrimination enshrined in law.”

v) UN Agencies

34. The World Health Organization (“WHO”) has reported that there are approximately 22 million unsafe abortions annually, resulting in 47,000 deaths.³⁶ WHO data has clearly demonstrated that criminalising termination of pregnancy does not reduce women’s resort to abortion procedures. *“Rather, it is likely to increase the number of women seeking clandestine and unsafe solutions. Countries in Northern Europe, where women gained the right to termination of pregnancy in the 1970s or 1980s and are provided with access to information and to all methods of contraception, have the lowest rates of termination of pregnancy. Ultimately, criminalization does grave harm to women’s health and human rights by stigmatizing a safe and needed medical procedure. In countries where induced termination of pregnancy is restricted by law and/or otherwise unavailable, safe termination of pregnancy is a privilege of the rich, while women with limited resources have little choice but to resort to unsafe providers and practices. This results in severe discrimination against economically disadvantaged women [...]”*: Working Group’s 2016 thematic report, (§80) [Auths/196].

³⁵ A/HRC/35/23. Not in authorities bundles but available at <https://undocs.org/en/A/HRC/35/23>

³⁶ WHO, Safe abortion: technical and policy guidance for health systems (Geneva, 2012), page 1.

The positive obligation under Article 7 to provide safe abortion in cases of rape

35. The Working Group also supports the Appellant's submission³⁷ (based *inter alia* on the Strasbourg case of *MC v Bulgaria* (2003) 40 EHRR 20) that the right to freedom from torture and inhuman and degrading treatment encompasses a particular positive obligation on states to provide a legal right to a termination procedure for the survivor in cases of rape and sexual violence.
36. This is clear from §11 of UN Human Rights Committee's General Comment 28 [Auths/194] which refers to the requirement on states to give access to safe abortion to women who have become pregnant as a result of rape, and is reflected in the Committee's decision in *VDA v Argentina* [Auths/143] in which the Committee found that the State's omission in failing to guarantee the right to termination in a case of rape was a breach of Article 7 ICCPR (see §9.2).
37. This positive obligation flows from the state's duty to ensure effective protection for victims of crime. As the Committee against Torture puts it in General Comment 2 at §18 [Auths/173]:
- “Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission, The Committee has applied this principle to State parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”*
38. The Committee against Torture has expressed its concern in cases where there is an absence of abortion rights for rape victims in a number of cases (cited in full in the Appendix at §31). For example, in relation to Paraguay, the Committee's concern arose from the fact that:
- “This means that the women concerned are constantly reminded of the violation committed against them, which causes serious traumatic stress and carries a risk of long-lasting psychological problems. The Committee also notes with concern that women who request an abortion under the circumstances described above are punished. The Committee is also concerned about the denial of medical care to women who have decided to have an abortion, which could seriously jeopardize their physical and mental health and could constitute cruel and inhuman treatment.”³⁸*

³⁷ Appellant's Written Case at §75-79.

³⁸ CAT/C/PRY/CO/4-6, fourth to sixth periodic reports of Paraguay 14 December 2011, §22: Appendix §31b).

39. Similarly, in relation to Nicaragua, the Committee against Torture was deeply concerned by the: “general prohibition of abortion even in cases of rape, incest or apparently life-threatening pregnancies that in many cases are the direct result of crimes of gender-violence. For the women in question, this situation entails constant exposure to the violation committed against her....”³⁹

40. The ill-treatment of women is particularly acute because the victims of crime are themselves criminalised. There is a close analogy here to the special protection given in international law to other victims of crime such as trafficking⁴⁰. The Special Rapporteur on trafficking recommended in 2016 that:

“69. All States, particularly those hosting potential victims of trafficking among persons fleeing conflict, should:

(j) Not detain, prosecute or punish victims of trafficking for violations of immigration laws or for unlawful activities they were involved in as a direct consequence of their situation as trafficked persons, including violations and offences linked with prostitution, petty crime and irregular entry/stay in the host country.”

V. ISSUE 4 IN THE SFI: COMPATIBILITY WITH ARTICLE 8 ECHR

41. Denial of access to safe and lawful abortion services violates the right to ‘respect’ for private life. This right is protected in international human rights law and standards, analogous to Article 8, and recognises the right to autonomous reproductive choices. As the Working Group has emphasized, denial of women’s “right to control their own bodies severely violate[s] their human dignity, which, along with equality, is recognized in the Universal Declaration of Human Rights as the foundation of freedom, justice and peace in the world.”⁴¹

42. The Human Rights Committee has found in all four of the cases outlined in section IV(i) above that failure in those instances to provide safe and lawful abortion violated the right

³⁹ CAT/C/NIC/CO/1 (CAT 2009) §16 – see Appendix 31a).

⁴⁰ See the Report of the Special Rapporteur on trafficking in persons especially women and children: A/71/303 (<https://undocs.org/A/71/303>), August 2016, §69(j) and OHCHR’s Recommended Principles and Guidelines on Human Rights and Human Trafficking 2002

(<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/401/68/PDF/N0240168.pdf?OpenElement>), §7

⁴¹ A/HRC/32/44 at §13 [**Auths/196**].

to be free from arbitrary interference with private life protected by Article 17 of the ICCPR⁴².

43. The Special Rapporteur on the right to attain the highest standard of health summarised the point thus in his report in 2011⁴³ in relation to sexual and reproductive rights:

“Criminal laws penalising and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women’s right to health and must be eliminated. These laws infringe women’s dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health.” (§21)

44. As to the justification on public health or public morality grounds for any such measures, the Special Rapporteur’s view is (§18):

“Public morality cannot serve as a justification for enactment or enforcement of laws that may result in human rights violations including those intended to regulate sexual health and reproductive conduct and decision-making. Although securing particular public health outcomes is a legitimate State aim, measures taken to achieve this must be both evidence-based and proportionate to ensure respect of human rights. When criminal laws and legal restrictions used to regulate public health are neither evidence-based nor proportionate, States should refrain from using them to regulate sexual and reproductive health, as they not only violate the right to health of affected individuals but also contradict their own public health justification.”

45. The material cited above (at §29-33) shows that not only does criminalising abortion reduce public health outcomes for highly vulnerable women but it does not in any event decrease the number of terminations, and hence deconstructs any argument made to the effect that an abortion prohibition prevents abortions. Nothing in the material put forward by the Respondents begins to provide a tenable justification for the interferences with women’s autonomy and the right to health in this case.

VI. ISSUE 5 SFI: CRIMINALISATION OF ABORTION AS DISCRIMINATION AGAINST WOMEN, AND THE MARGIN OF APPRECIATION

46. The human rights law and international human rights standards which bind the United Kingdom at international level make it clear that the duty imposed by Article 14 ECHR to “secure” equal enjoyment of Convention rights must be interpreted as imposing positive obligations on states parties to address and remove the obstacles faced by

⁴² *KL v. Peru* (above) at §6.4 [Auths/141]; *VDA v. Argentina* (above), at §9.3 [Auths/143]; *Mellet v. Ireland* (above), at §7.8 [Auths/144]; *Whelan v. Ireland* (above) at §7.9 [Auths/7].

⁴³ A/66/254 at §11-20 and §21-28. Not in authorities bundles but available at <http://undocs.org/A/66/254>

women to equal enjoyment of reproductive health services. The stigma, moral hazard, and deterrent effect of criminalisation of abortion constitute a barrier to the equal enjoyment by women of mental and physical integrity, dignity and autonomy and freedom from suffering. Accordingly, a law which criminalises abortion in the circumstances of these cases cannot be considered within the margin of legitimate democratic policy.

47. This analysis is supported by the wider body of international law. Women's equality is enshrined in Article 3 of both the ICCPR⁴⁴ and the ICESCR – “States are required to ensure the equal right of men and women to the enjoyment” of the rights set out in the conventions. Article 26 of the ICCPR also enshrines the principle of non-discrimination including on grounds of sex [**Auths/38**].

48. Article 2 of CEDAW requires States Parties to:

*“(a) embody the principle of equality of men and women in ... appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle; and ...
(g) repeal all national penal provisions which constitute discrimination against women.”*

49. Article 2 CEDAW should also be read in the light of Article 3 which provides that States Parties shall take:

“in all fields ... all appropriate measures including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and freedoms on a basis of equality with men”.

50. The CEDAW Committee held in *L.C. v. Peru*⁴⁵, at §7.11, that the protection of a foetus should not prevail over the health of the pregnant woman. *L.C* was a child abused from the age of 11 by a man in his 30s. As a result, she became pregnant at the age of 13 and, in a state of depression, attempted suicide on 31 March 2007 by jumping from a building. Surgery required as a result of her injuries was delayed due to her pregnancy. She eventually miscarried and her surgery was carried out but she was paralysed from the neck down. The Committee found (at §8.15) a violation of article 5 of CEDAW, because

⁴⁴ [**Auths/38**]

⁴⁵ CEDAW/C/50/D/22/2009 04 November 2011 [**Auths/142**]

the denial of abortion was based on a stereotype that the protection of a foetus should prevail over the health of the mother⁴⁶.

51. Since then, the CEDAW Committee has confirmed in its General Comment 35 at §18 [Auths/178] (cited above at §27) that the criminalisation of abortion, denial or delay of safe abortion and post-abortion care and forced continuation of pregnancy are forms of gender-based violence.⁴⁷

52. The issue was summarised as follows by the Working Group in its 2016 report at §76 [Auths/196]:

“The discriminatory use of criminal law, punitive sanctions and legal restrictions to regulate women’s control over their own bodies is a severe and unjustified form of State control.... The enforcement of such provisions generates stigma and discrimination and violates women’s human rights. It infringes women’s dignity and bodily integrity by restricting their autonomy to make decisions about their own lives and health.”

VII. CONCLUSIONS

53. Enforcement of the statutes in question before the Court contravenes the treaty undertakings which the UK has made, as a matter of international law, to remove laws which discriminate against women. According to significant international legal opinion expressed by UN mechanisms and entities, the criminalisation of abortion in these statutes constitutes discrimination. Criminalization of behaviour that is attributed only to women is discriminatory per se and generates and perpetuates stigma.

54. The Working Group further submits:

- a. Interference with a woman’s autonomy in the exercise of her reproductive rights strikes at the very core of the privacy protected under Article 17 ICCPR, for the reasons set out above.

⁴⁶See also the decisions of the UNHRC in the *Whelan & Mellett* cases above **Auths/27**; **Auths/144**; and the decision of the CEDAW Committee in *Da Silva Pimentel v Brazil* Communication 17/2008 CEDAW/C/49/D/17/2008 17 September 2011 in which the Committee found a breach of Arts 2 and 12 of CEDAW in respect of the complainant’s daughter who had died in the six month of her pregnancy (following the still-birth of her baby) because of a failure to provide her with appropriate healthcare in hospital, including discrimination on grounds of sex and African origin.

⁴⁷ This is also reflected in CESCR General Comment 22 on the right to sexual and reproductive health of 02 May 2016, §27 [Auths/183] and in the position of the CRC in its General Comments (see Appendix at §18-22).

- b. Denying women access to reproductive services, including abortion, is the epitome of the “instrumentalisation” of the bodies of women and girls, characterised by the Working Group; and violates the guarantee of equality for women in the enjoyment of their rights under the ICCPR, CEDAW, the UNCAT, CESCRC and UNCRC.
- c. Additionally, significant judicial decisions of UN mechanisms and entities summarised in the above materials have characterised the criminalisation of abortion in cases of rape, incest, and fatal foetal impairment as cruel, inhuman and degrading treatment in violation of the ICCPR Article 7 and the CAT Article 1, which establish a non-derogable obligation of states parties.

55. In summary, the Working Group respectfully wishes to draw the attention of the Court to the fact, recognised by international human rights mechanisms and entities, that criminal laws which highly restrict access to abortion raise numerous human rights concerns including potential violations of women’s rights to health and life, to the rights to non-discrimination and equality, and to the prohibition of gender-based violence, torture and cruel, inhuman and degrading treatment.

56. For all these reasons, the Working Group supports the appeal on all grounds.

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& Member of the Working Group

Matrix Chambers, 11 October 2017