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INTRODUCTORY NOTE TO MELLET V. IRELAND (H.R. COMM.)

BY FIONA DE LONDRAS*

[June 9, 2016]

Mellet v. Ireland, a decision of the United Nations Human Rights Committee from June 2016, is significant both for Ireland and for international human rights law generally.[1]

In respect of Ireland it establishes the incompatibility of Irish abortion law with Ireland's international obligations. Since 1983, the Irish Constitution has contained a provision (Article 40.3.3) recognizing the equal rights to life of "the unborn" and the "mother" and pledging the state to protect and vindicate those rights "as far as practicable." This has been interpreted to mean that abortion is prohibited unless there is a "real and substantial risk to the life, rather than the health" of a pregnant woman that can only be averted by termination of the pregnancy. As a result, abortion is criminally prohibited in almost all circumstances.[2]

This includes situations of "fatal fetal abnormality," i.e., where the fetus suffers from a condition that means it will die either before or very shortly after the birth. In such cases many, although not all, women decide to terminate the pregnancy, but unless their lives are at "real and substantial risk" they cannot do so in Ireland. Instead, they must leave the state and attempt to access abortion care in another jurisdiction, most commonly the United Kingdom (excluding Northern Ireland), where abortion is available under the Abortion Act 1967.

During her pregnancy, Amanda Mellet received a diagnosis of likely-fatal fetal abnormalities. She made the decision that termination was the right choice for her, but because of the Irish abortion law regime she had to travel abroad to give effect to that decision. She had very limited access to information about abortion in Ireland (due to legal restrictions on the availability of information),[3] and her medical care team in Ireland could not refer her to a clinician in the United Kingdom (due to a criminal prohibition on so doing).[4] She traveled to Liverpool Women's Hospital where the pregnancy was brought to an end and she delivered a stillborn baby girl after a thirty-six-hour labor. Mellet's limited financial means meant that she had to return to Ireland just twelve hours after delivery, and she was not entitled to bereavement support when she returned (as she had had an abortion). In her submission, Irish law effectively stigmatized, criminalized, and abandoned her once she decided that termination was the appropriate course of action.

Mellet argued that the result of Ireland's abortion law was a violation of her rights under Article 7 (the right to be free from torture, cruel, inhuman, or degrading treatment or punishment), Article 17 (protection from arbitrary or unlawful interference with privacy, family, home, or correspondence and from unlawful attacks on honor and reputation), Article 19 (the right to freedom of expression including the freedom to seek, receive, and impact information and ideas), and Articles 2(1), 3, and 26 (the rights to nondiscrimination and to the equal enjoyment of other rights on the grounds of sex and gender) of the International Covenant on Civil and Political Rights (ICCPR).

Prior to this case, the Human Rights Committee,[5] the Human Rights Council,[6] the Committee on Economic, Social and Cultural Rights,[7] the Committee on the Elimination of All Forms of Discrimination Against Women,[8] the Committee on the Rights of the Child,[9] and the UN Committee Against Torture[10] had all encouraged Ireland to revise its constitutional position on abortion. However, *Mellet* was the first substantive individual complaint from Ireland on access to abortion in situations of fatal fetal abnormality to arise under the ICCPR. The Irish government's response largely focused on the assertions that the constitutional protection of fetal life represented the profound moral choice of the Irish people, that Mellet's treatment by Ireland had been compatible with Irish law, and that this was effectively determinative of the complaint.

The Committee found that criminalizing access to abortion in situations of fatal fetal abnormality constituted a violation of Article 7 of the ICCPR as it caused Mellet "intense physical and mental suffering," and subjected her to "the

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shame and stigma associated with the criminalization of abortion of a fatally ill foetus." The restrictions on the provision of information, including on forms of abortion, further exacerbated this so that in sum Amanda Mellet suffered cruel, inhuman, and degrading treatment in violation of Article 7. The Committee also found a violation of Article 17 and of Article 26 but did not consider the further claims of violation of Articles 2(1), 3, and 19. However, in individual concurring opinions Yadh Ben Achour and Sarah Cleveland were more amenable to the substantial claim of discrimination made by Mellet, and the joint concurring opinion of Victor Rodriguez Rescia, Olivier de Frouville, and Fabián Salvioli concluded that Irish law "is, in itself, discriminatory because it places the burden of criminal liability primarily on the pregnant woman."[11]

Mellet is the first decision from the Committee finding that criminalization of abortion per se can violate the ICCPR, and the concurring opinions suggest that a broader finding that criminalization constitutes impermissible discrimination against women is quite possible in the future. At an international level, then, the decision's significance lies in recognizing the impact of criminalization on the pregnant woman and, while the case is about access to abortion in situations of fatal fetal abnormality, its reasoning is clearly applicable beyond those particular situations, especially in hyper-restrictive abortion regimes where stigma, shame, isolation, financial burden, and effective abandonment by the state medical system are characteristic of the attempt to exercise reproductive autonomy.

In response to *Mellet* the Irish government was at pains to point out that the Human Rights Committee's opinion was not binding per se; however, it nevertheless made an ex gratia payment of €30,000 to Mellet approximately six months later. Before the Committee's decision, the Irish government had already committed to a "Citizens Assembly" that would consider potential reform of the constitutional position on abortion and make recommendations to Parliament, which would subsequently recommend potential reform to the government. The Irish Constitution can only be amended by referendum of the people, and a referendum can be called only through an act of Parliament. It is anticipated that a referendum on constitutional law reform will be called in 2018, but there is no firm commitment to that effect from the Irish government. Furthermore, the exact nature of the proposed reform has not yet been decided upon, although it is to be expected that the combined effect of *Mellet v. Ireland*, apparent political support, and consistent polling in support of the availability of abortion in cases of "fatal fetal abnormality" would be to ensure abortion law liberalization at least to that effect.

However, *Mellet* has a potential broader impact. In reaching its conclusion, the Human Rights Committee repeatedly expresses its cognizance of the exacerbated suffering experienced by Amanda Mellet as a result of the fact that her fetus suffered a fatal abnormality, and while this particular fact is material to its finding that Article 26 was violated, the finding as to Article 7 does not rest entirely on the particular circumstance of fatal fetal abnormalities. The Committee notes that the "physical and mental anguish" Mellet suffered at discovering that the pregnancy was not viable was "exacerbated" by the inability to continue to receive medical treatment and health insurance coverage in Ireland, by the expense and isolation of traveling for an abortion, by the need to return to Ireland before she had fully recovered from her abortion, by the "shame and stigma associated with the criminalization of abortion," and by the state's refusal to provide her with necessary post-abortion care. However, even without the particular trauma of a fatal fetal abnormality diagnosis, these are all common experiences of abortion for women in Ireland and there is a strong argument that *Mellet* indicates that comprehensive criminalization of abortion can meet the Article 7 threshold.

Should *Mellet* be developed in this way, it would further highlight its significance in the growing international jurisprudence on abortion and human rights.

ENDNOTES

1 UN Human Rights Committee, Mellet v. Ireland, Comm. No. 2324/2013, UN Doc. CCPR/C/116/D/2324/2013 (2016) [hereinafter Mellet].

2 Protection of Life During Pregnancy Act 2013 (Act No. 35/2013) (Ir.).

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3 Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995 (Act No. 5/1995) (Ir.).

4 *Id.*

5 UN Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Ireland, UN Doc. CCPR/C/IRL/CO/4, ¶ 9 (Aug. 19, 2014).

6 K Holland, *Government to Consider UN Abortion Law Recommendations*, IRISH TIMES, May 13, 2016.

7 Committee on Economic, Social and Cultural Rights, Concluding Observations on the Third Periodic Report of Ireland, UN Doc. E/C.12/IRL/CO/3, ¶ 30 (July 8, 2015).

8 Committee on the Elimination of Discrimination Against Women, Concluding Comments: Ireland, UN Doc. CEDAW/C/IRL/CO/4-5, ¶¶ 38–39 (July 22, 2005).

9 Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Period Reports of Ireland, UN Doc. CRC/C/IRL/CO/3-4, ¶¶ 57–58 (Mar. 1, 2016).

10 Committee Against Torture, Concluding Observations of the Committee Against Torture: Ireland, UN Doc. CAT/C/IRL/CO/1, ¶ 26 (June 17, 2011).

11 Mellet, *supra* note 1, Concurring Opinion of Victor Rodriguez Rescia, Olivier de Frouville, and Fabián Salvioli, ¶ 8.

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MELLET V. IRELAND (H.R. COMM.)*
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United Nations CCPR/C/116/D/2324/2013

International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2324/2013*, **, ***

Communication submitted by:	Amanda Jane Mellet (represented by the Center for Reproductive Rights)
Alleged victim:	The author
State party:	Ireland
Date of communication:	11 November 2013
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 30 December 2013 (not issued in document form)
Date of adoption of Views:	31 March 2016
Subject matter:	Termination of pregnancy in a foreign country
Procedural issues:	None
Substantive issues:	Cruel, inhuman and degrading treatment; right to privacy; right to obtain information; gender discrimination
Articles of the Covenant:	2 (1), 3, 7, 17, 19 and 26
Articles of the Optional Protocol:	None

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* Adopted by the Committee at its 116th session (7-31 March 2016).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval. Five opinions signed by seven Committee members are appended to the present Views.

*** The annexes to the present document are being circulated as received, in the language of submission only.

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1. The author of the communication is Amanda Jane Mellet, an Irish citizen born on 28 March 1974. She claims to be a victim of violations by Ireland of her rights under articles 2 (1), 3, 7, 17, 19 and 26 of the Covenant. The Optional Protocol entered into force for Ireland on 8 March 1990. The author is represented by counsel.

The facts as submitted by the author

2.1 The author lives in Dublin with her husband. They have no children. She became pregnant in 2011. On 11 and 14 November 2011, in the twenty-first week of her pregnancy, she received scans at the Rotunda public hospital in Dublin. She was informed that her fetus had congenital heart defects, but that even if the impairment proved fatal she could not have a termination of her pregnancy in Ireland. The doctor at the hospital stated: "terminations are not available in this jurisdiction. Some people in your situation may choose to travel". The doctor did not explain what "travel" involved, but only that it had to be overseas. She did not recommend a suitable abortion provider in the United Kingdom of Great Britain and Northern Ireland.

2.2 On 17 November 2011, after further examination at the same hospital the author was informed that the fetus had trisomy 18 and would die in utero or shortly after birth. The midwife indicated to her that she could carry to term knowing that the fetus would most likely die inside her, or she could "travel". The midwife did not explain what "travelling" would entail and did not give her any further information, but advised her to contact an Irish family planning organization for information and counselling. The author was not referred by the hospital to a provider abroad that could terminate her pregnancy, since health providers in Ireland are not permitted to make appointments for pregnancy terminations overseas for their patients. On 18 November, the author informed the hospital of her decision to travel abroad for a termination and made an appointment with a family planning organization. The organization provided her with information about the procedure and gave her the contact information of the Liverpool Women's Hospital. They also faxed her medical records to the hospital, which later contacted the author directly and gave her an appointment for approximately 10 days later.

2.3 The laws of Ireland permit qualified medical professionals to provide aftercare when a woman has miscarried. Before travelling to Liverpool, the author therefore returned to the Irish hospital and visited her general practitioner. The purpose was to obtain scans that would determine if the fetus had died, in which case her care would continue at the Irish hospital. After detecting a heartbeat, the doctor tried to dissuade her from seeking an abortion abroad and insisted that even if she were to continue her pregnancy, "your child might not suffer". The author indicates that her main reason for seeking an abortion was to spare her child suffering.

2.4 On 28 November 2011, she flew with her husband to Liverpool and the following day she received medication at the Women's Hospital to begin the process of terminating her pregnancy. On 1 December, she received further medication to induce labour. She was in labour for 36 hours and on 2 December she delivered a stillborn baby girl. Still feeling weak and bleeding, she had to travel back to Dublin, only 12 hours after the delivery, as they could not afford to stay any longer in the United Kingdom.[1] There is no financial assistance from the State or from private health insurers for women who terminate pregnancies abroad.

2.5 After her return to Dublin, the author did not receive any aftercare at the Rotunda Hospital. She felt that she needed bereavement counselling to cope with the loss of her pregnancy and the trauma of travelling abroad for termination of the pregnancy. While the hospital offers such counselling to couples who have suffered a spontaneous stillbirth, the service does not extend to those who choose to terminate a pregnancy as a result of fatal fetal impairments. Eventually she received post-abortion counselling at the family planning organization, but not bereavement counselling. She still suffers from complicated grief and unresolved trauma and says she would have been able to accept her loss better if she had not had to endure the pain and shame of travelling abroad.[2]

The complaint

Claims under article 7

3.1 The application of the abortion law of Ireland subjected the author to cruel, inhuman and degrading treatment and encroached on her dignity and physical and mental integrity by: (a) denying her the reproductive health care and

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bereavement support she needed; (b) forcing her to continue carrying a dying fetus; (c) compelling her to terminate her pregnancy abroad; and (d) subjecting her to intense stigma.

3.2 Once the author had expressed her decision to terminate her pregnancy, the health-care personnel refused to provide her with the health care and support she needed. The expectation of care that she had formed as a patient of the Rotunda Hospital, her extreme vulnerability upon learning that her baby would die and the prospect of then having to terminate a much-wanted pregnancy abroad, with no support from the Irish health-care system, all illustrate that her mental anguish at being denied abortion services in Ireland rose to the level of cruel, inhuman and degrading treatment. The failure of the hospital to offer her bereavement counselling before and after the termination hampered her ability to cope with her trauma. She was not offered acknowledgement or support to help her to adapt psychologically, grieve normally and rebuild her life. That failure was exacerbated by the fact that the hospital provides bereavement services to women who face fatal fetal impairments but choose to carry to term. The hospital thus makes a distinction and treats women who travel for termination as less deserving of support.

3.3 After learning that the fetus was dying, the author was tormented for the next 21 days by the question of whether it had died within her and the fear that she would go into labour and give birth, only to subject her child to suffering and watch it die. She would have been spared this added level of anxiety had she had timely access to abortion services. The travel abroad was also a significant source of added anxiety and exposed her to obstacles which impinged on her physical and mental integrity and dignity. She had to make preparations for the travel; was deprived of the support of her family; had to stay in a foreign and uncomfortable environment while in Liverpool; and had to spend a sum of money which was difficult for her to raise. While waiting at the airport to fly home, only 12 hours after the termination, she was bleeding, weak and light-headed. The hospital in Liverpool did not offer any options regarding the baby's remains and the author was compelled to leave them behind. She received the ashes, unexpectedly, three weeks later by courier, which deeply upset her. The travel abroad also interfered with her ability to mourn her loss.

3.4 The criminalization in Ireland of the abortion services that she needed overwhelmed the author with shame and stigmatized her actions and person, which served as a separate source of severe emotional pain.

Claims under article 17 of the Covenant

3.5 The author had to choose between, on the one hand, letting the State make the deeply intimate reproductive decision for her to continue with a non-viable pregnancy under conditions of considerable suffering and, on the other hand, having to travel abroad for a termination. Neither option had the potential to preserve her reproductive autonomy and mental well-being. By denying the author the only option that would have respected her physical and psychological integrity (allowing her to terminate her pregnancy in Ireland), the State interfered arbitrarily in her decision-making. Being abroad, she found herself in an unfamiliar setting and craved the privacy of her own home and the support of her family and friends. The abortion ban thus infringed upon her decision-making in regard to how and where she would best cope with the traumatic circumstances she faced.

3.6 The protection of the "right to life of the unborn", as set out in the Irish Constitution, can be seen as a moral issue. Defining the moral interest in protecting fetal life as superior to the author's right to mental stability, psychological integrity and reproductive autonomy, goes against the principle of proportionality and, as such, constitutes a violation of the author's right to privacy under article 17.

3.7 The interference with the author's rights was prescribed by law, since abortion is only legal if the woman's life is in danger. However, the interference was arbitrary. The aim sought by the Irish law (protection of the fetus) was not appropriate or relevant in her situation and the interference with her right to privacy was therefore disproportionate. Even if the Committee accepted that the protection of the fetus can serve as a justification for interfering with a woman's right to privacy in certain situations, in the author's case this could not apply. Limiting her right to privacy by denying her the right to terminate a pregnancy that would never result in a viable child cannot be considered a reasonable or proportionate measure to achieve the aim of protecting the fetus.

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Claims under article 19 of the Covenant

3.8 The right to freedom of information encompasses information concerning health issues, including critical information for making informed choices about one's sexual and reproductive health. In that respect, the author's right to access information was violated.

3.9 The Regulation of Information (Services outside the State for Termination of Pregnancies) Act, 1995 (Abortion Information Act) sets forth the circumstances in which information, advice and counselling about abortion services that are legal in another State can be made available in Ireland. It pertains in particular to information that is likely to be required by women who consider traveling abroad for an abortion and regulates the conduct of providers of such information, such as counsellors and health workers. It indicates that the provision of information, advice or counselling about abortion services overseas is not lawful unless, among other factors, the information, advice or counselling is truthful and objective, fully informs the woman of all the courses of action open to her and does not advocate or promote the termination of pregnancy. The Act prohibits the distribution of written information to the public without solicitation by the recipient and has been interpreted to require that a woman specifically request information, advice or counselling about termination of pregnancy before she can receive it. Under section 10, a person who contravenes the relevant provisions of the Act is guilty of an offence and liable to a fine.

3.10 The Act does not prohibit health-care providers from imparting information about abortion, including the likely benefits and potential adverse effects and alternatives; the limited circumstances in which abortion is legal in Ireland; and information about legal abortion services abroad. Consequently, the author should have received such information. However, in practice, the existence of the Act effectively censored her health-care providers from imparting even legal information, thereby exacerbating her mental distress and violating her right to information. While the Act prohibits health-care providers from advocating or promoting the termination of pregnancy, it lacks any definition of such conduct. That has a chilling effect on health-care providers, who experience difficulty in distinguishing between "supporting" a woman who has decided to terminate a pregnancy and "advocating" or "promoting" abortion.[3]

3.11 The author indicates that after receiving the information that her baby might not live the doctor "only stated when we asked what would happen if the condition was fatal . . . 'terminations are not available in this jurisdiction. Some people in your situation may choose to travel'". Some days later, upon receiving the amniocentesis results, the midwife confirmed that the fetus would die in utero or shortly after birth and provided the author with two options: she could continue with the pregnancy or she could "travel". Rather than providing the author with accurate, evidence-based information about abortion, the midwife avoided even accurately naming the abortion procedure, using the euphemism "travel" instead. She refused to discuss this option in any way, failing to provide the author with information about legal abortion services abroad. Instead, the midwife referred the author to a family planning organization. Thus, in the absence of clear guidelines in the Act about permissible or impermissible speech, the health-care providers with whom the author interacted were hindered from imparting information to her about the medical aspects of abortion, its legal availability in Ireland and legal abortion services abroad.

3.12 The State party's interference with the author's access to information is not a permissible limitation on her right to information under article 19 on the grounds of protection of morals. The State party's understanding of public morals, as enshrined in the Abortion Information Act, and as clear from its application, effectively led to the denial of critical information to the author, was discriminatory and cannot withstand scrutiny under article 19 of the Covenant. Furthermore, the refusal of the State party to provide the author with information was irrelevant to the aim of protecting the "unborn", as the "unborn" in this case had no prospect of life.

3.13 The restrictions on the author's right to information were disproportionate because of their detrimental impact on her health and well-being. They caused her to feel extremely vulnerable, stigmatized and abandoned by the Irish health system at a time when she most needed support.

3.14 Moreover, the prohibition in the Abortion Information Act on publicly imparting information about abortion unless specifically requested was a disproportionate restriction on the author's right to access sexual and reproductive health information. She did not ask for written information about legal termination services abroad, because she did not know what to ask. For instance, she did not know that the 24-week limit on legal abortion in the United Kingdom

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does not apply to pregnancies with fatal anomalies and feared that she would be denied care even if she ventured abroad and would be forced to continue the pregnancy, continuously tormented by the question of whether the fetus had died inside her. She failed to receive key information about the types of termination and the most appropriate service for her, given her advanced gestation. This process would not be acceptable or deemed to be good practice in other health systems.

Claims under articles 2 (1), 3 and 26 of the Covenant

3.15 Laws criminalizing abortion violate the rights to non-discrimination and equal enjoyment of other rights on the grounds of sex and gender. The rights to equality and non-discrimination compel States to ensure that health services accommodate the fundamental biological differences between men and women in reproduction. Such laws are discriminatory also because they deny women the moral agency that is closely related to their reproductive autonomy. There are no similar restrictions on health services that are needed only by men.

3.16 Criminalization of abortion on the grounds of fatal fetal impairment disproportionately affected the author, because she was a woman who needed that medical procedure in order to preserve her dignity, physical and psychological integrity and autonomy, in breach of articles 2 (1), 3 and 26 of the Covenant. The Irish abortion ban traumatizes and "punishes" women who need to terminate non-viable pregnancies. Male patients in Ireland are not subjected to such ordeals as the author when seeking necessary medical care.

3.17 The author felt judged by her providers. Her general practitioner told her that even if she continued the pregnancy, her child "might not suffer," thus showing disrespect for her decision and autonomy and relegating her health needs to the provider's own personal beliefs about the paramount importance of fetal suffering. There are no situations in which men in Ireland are similarly expected to put their health needs and moral agency aside in relation to their reproductive functions.

3.18 The author's rights to equality and non-discrimination in the enjoyment of her rights under articles 7, 17 and 19 of the Covenant and her rights to be protected against discrimination under article 26 have been violated by the State party's failure to provide her with information. Her right to access sexual and reproductive health information was violated because she was a woman in need of terminating her pregnancy. Male patients in Ireland are not similarly denied critical health information and are not pushed out and abandoned by the health-care system when requiring such information.

3.19 The State party's criminalization of abortion reduced the author to her reproductive capacity by prioritizing the protection of the "unborn" over her health needs and her decision to terminate her pregnancy. She was subjected to a gender-based stereotype that women should continue their pregnancies regardless of the circumstances, their needs and wishes, because their primary role is to be mothers and caregivers. Stereotyping her as a reproductive instrument subjected her to discrimination, infringing her right to gender equality. Under the Irish health-care system, women who terminate non-viable pregnancies are considered not to deserve or need counselling, whereas women whose fetuses die naturally do. This treatment illustrates that there is a stereotypical idea of what a woman should do when her pregnancy is non-viable, namely to let nature run its course regardless of the suffering involved for her.

3.20 The violations to which the author was subjected should be understood in the light of the structural and pervasive discrimination that characterizes the Irish abortion law and practice. The abortion regime discriminates against both the author as an individual woman and against women as a group. It fails to account for women's different reproductive health needs, thus reinforcing their vulnerability and inferior social status. In conclusion, the author's rights to non-discrimination and to enjoy equally her rights to be free from cruel, inhuman and degrading treatment, to privacy, and to access information, guaranteed under articles 2 (1) and 3 in conjunction with articles 7, 17 and 19 of the Covenant were violated, as was her right to equal protection under article 26.

Exhaustion of domestic remedies

3.21 The author would not have had any reasonable prospect of success had she petitioned an Irish court for a termination of her pregnancy. While Ireland has a functioning and independent judiciary and domestic remedies would

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have been available to her, they would have been neither effective nor adequate.

3.22 At the time of the facts and until 2013, section 58 of the Offences Against the Person Act (1861 Act) criminalized abortion for both women and abortion providers, even in cases where it was necessary to save the woman's life. It subjected to life imprisonment any woman who tried to terminate her pregnancy and any doctor who tried to help her. Furthermore, article 40.3.3 of the Constitution, introduced in 1983, reads: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right". Section 22 of the Protection of Life during Pregnancy Act 2013, provides that "(1) It shall be an offence to intentionally destroy unborn human life; (2) A person who is guilty of an offence under this section shall be liable on indictment to a fine or imprisonment for a term not exceeding 14 years, or both".

3.23 In *Attorney General v. X and others*, decided in 1992, the Supreme Court held that article 40.3.3 permits abortion only when "it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy". In 2009, the Supreme Court further clarified the meaning of the constitutional protection of the "unborn". In *Roche v. Roche*, the Court established that once an embryo has been implanted in a woman's womb its relevant attachment with the pregnant woman has been created and it enters a state of "unborn". That decision suggests that the constitutional protection of the "unborn" would extend to a fetus with a fatal anomaly as long as it was alive through being attached to the pregnant woman and having the potential to be born. That was the case for the author, who had received an implanted embryo, which had thus entered the state of "unborn" that is explicitly protected by article 40.3.3.

3.24 As long as the author's fetus was alive she did not have a reasonable prospect of convincing the High Court, only a year after the decision in *Roche v. Roche*, that it was not protected under article 40.3.3, as it clearly had "the potential to be born, the capacity to be born" and its life was attached to hers. The *Roche v. Roche* decision also confirmed that article 40.3.3 was concerned with the balance between the lives of the pregnant woman and the fetus and not with the health or well-being of the woman. Furthermore, during the debate on the Protection of Life During Pregnancy Act (2013), the legislature opposed the inclusion of fatal fetal impairment as a legal ground for abortion.

3.25 Even in the improbable event that the Court would have found that the author's fetus did not constitute "unborn life", the Court would have been highly unlikely to conclude that the author thereby had a constitutional right to a termination of pregnancy. She would have had to invoke other constitutional provisions to claim such a right, most notably article 40.3, which protects unenumerated personal rights. However, such rights may also apply to, and be invoked on behalf of, the fetus. Furthermore, the author was 21 weeks pregnant when she learned that the fetus had a fatal condition. Even if the courts had prioritized her case, it is unlikely that they would have been able to render a decision as swiftly as required in the circumstances.

3.26 Regarding her right to information, the Supreme Court has affirmed that the regulation of the Abortion Information Act is constitutional and has thereby made it immune to future constitutional challenges. It follows that the author could not have had any reasonable prospect of challenging this Act.

3.27 A petition addressed to a court for a termination of her pregnancy would have been ineffective and inadequate. In the extremely unlikely event that a court found that she had a legal right to access abortion in Ireland, the author would have been unable to terminate her pregnancy there. In order to have an abortion, the author would have had to obtain a mandamus order to compel the State to perform a legal duty of a public nature, which must be explicit and unambiguous. Furthermore, the courts would have been extremely reluctant to order the Executive to provide the author with a termination of pregnancy, as this would be incompatible with the separation of powers doctrine. The available remedies would also have been inadequate, in that they would have compounded the author's mental suffering by forcing her to undergo public litigation, which would have exposed her to public hostility.

3.28 Finally, the author could have challenged the abortion ban by making an application under the European Convention on Human Rights Act. However, under the Act the author could only have sought a declaration of incompatibility and for an associated ex gratia award of damages. She would not have been able to seek a mandamus order ensuring her access to a termination, let alone in a timely manner.

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3.29 No effective and adequate domestic remedies were available after the author terminated her pregnancy abroad. She would have had two hypothetical options for challenging the Irish abortion ban. First, she could have petitioned an Irish court to engage in an abstract review of the constitutionality of the ban. The court would most likely have declined to adjudicate her claim on the basis that it was moot, since she no longer needed an abortion. Secondly, she could have complained under the Human Rights Act that the abortion violated her rights. As indicated above, the review could at most have resulted in a declaration of incompatibility and an ex gratia award of compensation, and would not be an effective or adequate remedy.

State party's observations on admissibility and the merits

4.1 The State party submitted observations on 10 July 2014 and 21 July 2015. It indicated that it does not take issue with the admissibility of the author's complaint.

4.2 The State party asserts that article 40.3.3 of the Constitution represents the profound moral choice of the Irish people. Yet, at the same time, the Irish people have acknowledged the entitlement of citizens to travel to other jurisdictions for the purposes of obtaining terminations of pregnancy. The legislative framework guarantees the citizens' entitlement to information in relation to abortion services provided abroad. Thus, the constitutional and legislative framework reflects the nuanced and proportionate approach to the considered views of the Irish electorate on the profound moral question of the extent to which the right to life of the fetus should be protected and balanced against the rights of the woman.

4.3 The State party provided a detailed overview of the Irish legislative and regulatory framework in relation to abortion and termination of pregnancy. It also referred to the judgment of the European Court of Human Rights in the case *A, B and C v. Ireland*.[4] Having regard to the fact that Irish law permitted travel abroad for the purposes of abortion, and appropriate access to information and health care was provided, the European Court did not consider that the prohibition on abortion for reasons of health and/or well-being exceeded the margin of appreciation accorded to Member States. The Court struck a fair balance between the privacy rights of A and B and the rights invoked on behalf of the fetus, which were based upon the profound moral views of the Irish people about the nature of life. The Court found that there had been a violation of the applicant's right to private and family life contrary to article 8 of the European Convention in the case of applicant C, in that there had been no accessible and effective procedure to enable her to establish whether she qualified for a lawful termination of pregnancy.

4.4 Following that judgment the Protection of Life During Pregnancy Act 2013 was adopted. The Act deals with situations, inter alia, where termination of the life of the fetus is permitted in cases of a threat to the life of the woman owing to physical illness and in emergencies, as well as in situations where there is a real and substantial risk of loss of the woman's life by way of suicide. It reaffirms an individual's right to travel to another State and the right to obtain and make available information relating to services lawfully available in another State. It makes it an offence to destroy unborn human life intentionally, which can attract a fine or imprisonment for a term not exceeding 14 years.

4.5 The Irish regime may reflect concerns of which account is taken by article 6 of the Covenant. That provision has the potential to afford the fetus a right to life, which is deserving of protection. It cannot be definitively concluded that no measure of protection in relation to the right to life is afforded to the fetus, as otherwise article 6 (5) would lack sufficiency of meaning, reason and substance. Contrary to the author's opinion, at the current time no conclusion regarding the application of the Covenant to prenatal rights exists in circumstances where relevant and material facts and context have yet to present themselves for consideration by the Committee.

Claims under article 7

4.6 The author was not subjected to cruel, inhuman or degrading treatment. In *K.L. v. Peru*, the specific actions of State agents were the direct causal action found to be arbitrary interference with the rights of the author, which denied her access to a lawfully available therapeutic abortion.[5] In the present case, the author was not denied access to lawful abortion. She could not avail herself of such a procedure and that was communicated to her clearly and properly by the relevant State agents. She was then appropriately referred to the family planning facility to exercise her existing

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legal options. Accordingly, and contrary to what occurred in the case of *K.L. v. Peru*, there were no actions on the part of State agents that were or could be described as having been based on the personal prejudices of officials in the health system.[6] Thus, it cannot be stated that there was any arbitrary interference with any right of the author and which led to or resulted in cruel, inhuman and degrading treatment.

4.7 If any finding were made in this case, in the absence of the actual actions of State agents, on the basis of evolved constitutional and legal principles, that would represent a significant difference in kind (as opposed to a difference in degree), in the jurisprudence of the Committee. That would be contrary to paragraph 2 of the Committee's general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, in which the Committee stipulates that it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. There was no act of "infliction" by any person or State agent and therefore there was no cruel, inhuman or degrading treatment.

4.8 The State party states that it has not engaged in cruel, inhuman or degrading treatment on the basis that:

(a) The communication is actually and factually distinct from the cases relied on by the author;

(b) In circumstances in which the author's life was not in danger, the procedure for obtaining a lawful abortion in Ireland was clear. The decision was made by a patient in consultation with her doctor. If the patient did not agree, she was free to seek another medical opinion and, in the last resort, she could make an emergency application to the High Court. There is no factual evidence that State agents were responsible for any arbitrary interference with the decision-making process, or that they were responsible for any act of "infliction";

(c) The grounds for lawful abortion were well known and applied by virtue of article 40.3.3 of the Constitution, the grounds as elucidated by the Supreme Court in the case of *Attorney General v. X and others*, the Medical Council guidelines and the crisis pregnancy guidelines;

(d) While the author states that she was aware that abortion was not allowed, but had no idea that a termination on medical grounds would fall into the same category, that was her subjective understanding of the law;

(e) The hospital and its staff were clear in their view that a termination was not possible in Ireland and therefore no arbitrary decision-making processes or acts of infliction can be suggested which caused or contributed to cruel, inhuman or degrading treatment;

(f) The State party's position and stance in relation to its law sought to achieve a reasonable, careful and difficult balance of competing rights as between the fetus and the woman;

(g) The State party sought that balance in accordance with article 25 of the Covenant.

Claims under article 17

4.9 The author's privacy rights under article 17 of the Covenant were not violated. If there was any interference with her privacy it was neither arbitrary nor unlawful. Rather, it was proportionate to the legitimate aims of the Covenant, taking into account a careful balance between the right to life of the fetus with due regard to that of the woman. The advice given to the author by the hospital was properly and lawfully given. The State party is permitted to create laws, in accordance with and in the spirit of article 25 of the Covenant, which allow for a balancing of competing rights.

4.10 In the case of *A, B and C v. Ireland*, the European Court of Human Rights found the following: "having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons,

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based as it is on the profound moral views of the Irish people as to the nature of life . . . and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn." The balance to be achieved has been considered by the Irish electorate on numerous occasions.

4.11 In *K.L. v. Peru* and *L.M.R. v. Argentina*, where the Committee found violations of article 17, legislation existed which allowed for the therapeutic termination of a pregnancy. The authors were initially told that they qualified for a termination, but that was then arbitrarily interfered with and not protected by the States in question. In the present case, no such conflict arose, as the hospital gave its clear opinion that a termination of pregnancy would not be available in Ireland. Therefore, the arbitrary interference which occurred in those cases did not occur in the present communication.

Claims under article 19

4.12 Sufficient information has not been produced to substantiate the claims. Certain unsubstantiated allegations are made by the author, for example in relation to the midwife. By claiming that the midwife "refused to discuss" options she suggests an intention on the part of the midwife, without any further information being put before the Committee. In referring the author to the appropriate organization from which she could obtain the information she required, the midwife was not engaged in censorship, Nor was there a violation of article 19 in circumstances where the referral allowed the author to receive all information permissible, in fulfilment of article 19 (2). Therefore, in circumstances where the hospital gave advice to the author to see a counsellor, which referral led to a discussion of all the available options, there was no violation of article 19. Further, the crisis pregnancy programme of the Health Service Executive provides a rich resource of information available to the public at large in relation to crisis pregnancy and abortion. This resource is free of charge and was available to the author.

Claims under articles 2 (1), 3 and 26

4.13 The State party contends that there has been no discrimination, but that if there has, it should be regarded as a reasonable and objective differentiation to achieve a purpose which is legitimate under the Covenant. There can be no "invidious discrimination" in relation to a pregnant woman, as her physical capacity or circumstances in a state of pregnancy are inherently different to that of a man. That differentiation is a matter of fact and can only be accepted as axiomatic.

4.14 There is no basis for considering that the legal framework complained of, article 40.3.3 of the Constitution and the relevant provisions of the 1861 Offences against the Person Act, discriminate against women on grounds of sex. The framework is gender neutral. If a man procures or carries out an abortion in circumstances not contemplated by the Constitution, he may be guilty of an offence. Even if the legal framework did discriminate on grounds of gender, any such discrimination would be in pursuit of the legitimate aim of protecting the fetus and be proportionate to that aim. The measures at issue are not disproportionate, as they strike a fair balance between the rights and freedoms of the individual and the general interest. Again in this area, in accordance with the judgment of the European Court of Human Rights, the State party enjoys a margin of appreciation. Therefore, the differentiation is reasonable and objective and achieves a legitimate end.

4.15 The State party disputes the claim that its laws stereotyped the author as a reproductive instrument, subjecting her to gender discrimination. Rather, the inherent differentiation between a man and a pregnant woman requires the careful balancing of rights of the fetus, which is capable of being born alive, and the rights of the woman.

Author's comments on the State party's observations

5.1 The author submitted comments on the State party's observations on 12 December 2014. She contests the State party's portrayal of the Irish people's view on abortion and their "choice" as to when it should be available in Ireland. For many years, opinion polls have indicated that a significant majority of the Irish people support legalizing access

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to abortion in cases of non-viable pregnancies and fatal fetal impairments. A similarly large majority support legalizing abortion when the pregnancy results from sexual assault or a woman's health is at risk. Moreover, the constitutional referendums do not support the State party's description of the Irish people's profound "moral choice". The Irish electorate has never been provided with an opportunity to vote on a proposal to expand the situations in which access to abortion is legal. At no time have the Irish people been provided with the opportunity to express their view that abortion should be made available to women in circumstances other than when there is a risk to a woman's life. In fact, two proposals put to the electorate in 1992 and 2002, which would have further restricted access to abortion by making abortion illegal where a woman is at risk of suicide, were rejected. Furthermore, in the three constitutional referendums on the matter of abortion, less than 35 per cent of the eligible electorate voted in favour of restrictions.

5.2 The Protection of Life During Pregnancy Act 2013 has no bearing on the author's complaint, as it applies only to the regulation of procedures to be followed when an abortion is sought by a woman in a situation where there is a real and substantial risk to her life.

Claims under article 7

5.3 As a result of the absolute nature of the right enshrined in article 7, a State party may not seek to justify its conduct with reference to a need to balance the rights protected under it with the "rights of others". Furthermore, requiring arbitrary action by State agents as a constituent element of ill-treatment has no basis in the wording of article 7. Whether the State party's conduct caused ill-treatment through arbitrary action or not is irrelevant to the protection afforded by article 7. When a claim is made that article 7 has been violated, the matter for enquiry is whether the harm suffered amounted to ill-treatment and whether the conduct from which the harm resulted was attributable to the State. Whether or not the conduct was arbitrary is immaterial.

5.4 By extension of its assertions regarding "arbitrary action", the State party implies that the domestic illegality of the abortion sought by the author is determinative and reason in and of itself for the dismissal of her claims under article 7. It suggests that because the abortion sought was illegal under domestic law, the State party's denial of the medical procedure could not be considered to amount to ill-treatment. That reasoning undermines the principle that domestic law may never be invoked to justify a failure to discharge obligations under the Covenant and contradicts the absolute nature of the protection afforded by article 7. To accept it would be to tacitly accept the assertion that by criminalizing or legally prohibiting certain medical procedures, a State may avoid responsibility under article 7, even where withholding such procedures causes individuals severe pain and suffering. When the author was denied an abortion, her suffering was made no more tolerable to her for the knowledge that the denial conformed with domestic law. In fact, the criminalization of abortion increased, rather than diminished, her suffering.

5.5 The author rejects the State party's categorization of the facts as excluding State conduct that could contravene the prohibition of ill-treatment. Her medical team, who were public employees, failed to provide her with the abortion she sought. She was denied an abortion by agents of the State, acting in accordance with State laws and policies. That caused the author severe mental anguish. Her pain and suffering reached the threshold required by article 7.

Claims under article 17

5.6 The State party's denial of access to abortion constitutes an arbitrary interference in the author's exercise of her right to privacy for the following reasons:

(a) The interference discriminated against her because she was woman, thereby contravening the prohibition of discrimination on the basis of sex enshrined in articles 2 and 3 of the Covenant;

(b) The interference was not necessary or proportionate to a legitimate aim. The State party has not presented arguments specific to the author's circumstances that would demonstrate the necessity and proportionality of its conduct towards her.

(c) The State party failed to demonstrate that its interference with her right to privacy was necessary for achieving the legitimate aim invoked. As indicated above, the State party's characterization of the

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"profound moral choices" of the Irish people is misrepresentative of the views of a majority of the Irish people;

(d) The State party has failed to demonstrate that its interference in the author's right to privacy was appropriate or effective in achieving its aim. A criminal legal regime, which prohibits women in all circumstances from obtaining an abortion in the jurisdiction, except where there is a real and substantial risk to their lives, and threatens them with significant prison terms in the name of protecting alleged moral choices concerning "the right to life of the unborn", yet simultaneously includes an explicit provision providing for a right to travel out of the State to obtain an abortion is not a means to an end. Rather, it is a contradiction in terms and calls into question the genuine nature of the State party's claims;

(e) The State party has failed to demonstrate that the interference was proportionate. The trauma and stigma the author endured as a result of the attack on her physical and psychological integrity, dignity and autonomy combined to give rise to serious mental pain and suffering. In that context, the State party's laws cannot be described as proportionate or as achieving a careful "balance of competing rights as between the unborn child and its mother". Instead, the State party prioritized its interest in protecting "the unborn" and offered no protection to the author's right to privacy. In fact, the author could have faced a severe criminal sentence had she obtained an abortion in Ireland.

5.7 The margin of appreciation doctrine invoked by the State party applies exclusively to the jurisprudence of the European Court of Human Rights and has not been accepted by any other international or regional human rights mechanisms. Furthermore, the Court has never considered the application of the margin of appreciation doctrine to a set of facts similar to those experienced by the author.

Claims under article 19

5.8 The Abortion Information Act can be described as a system of strict State control governing the manner in which information must be given. Doctors are barred from referring their patients to an abortion provider abroad and failure to comply with the requirements of the Act is an offence and subject to a fine. As a result, the right to information is not treated as a positive right, the realization of which is in the public good and requires action by the State to remove barriers to its exercise. The punitive framework in operation in the State party, resulting from the broad criminalization of abortion and the related lack of clarity as to what is permissible under the Act deterred both the author's doctor and midwife from providing the information she sought.

5.9 The author rebuts the assertion that through directing her to the Irish Family Planning Association, the State party discharged its obligations under article 19. The euphemistic advice given by State employees to contact the Association represented a breach in the continuum of doctor-patient care that was not based on her health needs, but was the result of prevailing stigma and fears or uncertainty as to the consequences of providing the information directly.

5.10 As to the crisis pregnancy programme, according to its own website it does not provide counselling or medical services directly to the public. Instead, it funds other organizations to provide counselling or medical services that are in line with its objectives. The programme is mandated to work towards a "reduction in the number of women with crisis pregnancies who opt for abortion by offering services and support which make other options more attractive".

5.11 The restriction on the author's right to information did not comply with article 19 (3) of the Covenant. The State party has not justified the restrictions. The restrictions were not prescribed by law, since the Abortion Information Act does not meet the Covenant requirement that a restriction of article 19 must be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly".[7] Furthermore, the restriction was neither necessary nor proportional to a legitimate aim. There was no purpose other than to impair the author's enjoyment of her right to information related to abortion services abroad and was disproportionate in the light of the detrimental impact on her dignity and well-being.

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Claims under articles 2, 3 and 26

5.12 Article 40.3.3 of the Constitution does not "balance" the right to life of men, or their enjoyment of other rights. In this way, the State party's assertion that the provision is gender-neutral cannot be supported. Furthermore, the first part of section 58 of the Offences Against the Person Act applies to women only and is therefore not gender-neutral. The legal framework has a distinct and specific impact on women and the consequences of the legislation on the personal integrity, dignity, physical and mental health and well-being of women are severe.

5.13 State parties to the Covenant cannot invoke women's biological difference to men and their reproductive capacity as a basis for permissibly restricting their rights. Ireland has failed to discharge its burden to disprove a prima facie case of discrimination on sex and justify differential treatment as proportionate to a legitimate aim. It did not explain how the withholding of abortion services from the author in the circumstances of a fatal fetal impairment and the adverse impact that had on her was proportionate to the aim of protecting "the unborn". The aim of "protecting the rights of the unborn" was placed above the author's dignity and well-being. She was treated as inferior and subjected to wrongful gender stereotyping. The prohibition of abortion in cases of fatal fetal impairments and non-viable pregnancies cannot be considered proportionate to the aim of protecting the fetus.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required by article 5 2 (a) of the Optional Protocol, that the same matter is not being examined under another international procedure of investigation or settlement.

6.3 The Committee notes that the State party does not dispute the admissibility of the communication. All admissibility criteria having been met, the Committee considers the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

7.2 The author in the present communication was informed by public medical professionals, in the twenty-first week of her pregnancy, that the fetus had congenital defects and would die in utero or shortly after birth. As a result of the prohibition of abortion in Irish law, she was confronted with two options: carrying to term, knowing that the fetus would most likely die inside her, or having a voluntary termination of pregnancy in a foreign country. Article 40.3.3 of the Constitution of Ireland stipulates in that respect that "the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right". The State party argues that its constitutional and legislative framework reflects the nuanced and proportionate approach to the considered views of the Irish electorate on the profound moral question of the extent to which the interests of a fetus should be protected and balanced against the rights of the woman.[8] The State party also indicates that article 40.3.3 of the Constitution, as interpreted by the Supreme Court, provides that it is lawful to terminate a pregnancy in Ireland only if it is established as a matter of probability that there is a real and substantial risk to the life of the woman (as distinct from her health), which can only be avoided by a termination of the pregnancy.

7.3 The author claims to have been subjected to cruel, inhuman and degrading treatment as a result of the legal prohibition of abortion, as she was, inter alia, denied the health care and bereavement support she needed in Ireland; compelled to choose between continuing to carry a dying fetus and terminating her pregnancy abroad; and subjected to intense stigma. The State party rejects the author's claim by arguing, inter alia, that the prohibition seeks to achieve a balance of competing rights between the fetus and the woman; that her life was not in danger; and

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that there were no arbitrary decision-making processes or acts of "infliction" by any person or State agent that caused or contributed to cruel, inhuman or degrading treatment. The State party also states that the legislative framework guarantees citizens' entitlement to information in relation to abortion services provided abroad.

7.4 The Committee considers that the fact that a particular conduct or action is legal under domestic law does not mean that it cannot infringe article 7 of the Covenant. By virtue of the existing legislative framework, the State party subjected the author to conditions of intense physical and mental suffering. The author, as a pregnant woman in a highly vulnerable position after learning that her much-wanted pregnancy was not viable, and as documented, inter alia, in the psychological reports submitted to the Committee, 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; the need to choose between continuing her non-viable pregnancy or travelling to another country while carrying a dying fetus, at her personal expense and separated from the support of her family, and returning while not fully recovered; the shame and stigma associated with the criminalization of abortion of a fatally ill fetus; the fact of having to leave the baby's remains behind and later having them unexpectedly delivered to her by courier; and the State party's refusal to provide her with the necessary and appropriate post-abortion and bereavement care. 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, and if she had been afforded the health benefits she needed that were available in Ireland, were enjoyed by others, and could have been enjoyed by her, had she continued her non-viable pregnancy to deliver a stillborn child in Ireland.

7.5 The Committee considers that the author's suffering was further aggravated by the obstacles she faced in receiving the information she needed about her appropriate medical options from known and trusted medical providers. The Committee notes that the Abortion Information Act legally restricts the circumstances in which any individual may provide information about lawfully available abortion services in Ireland or overseas and criminalizes advocating or promoting the termination of pregnancy. The Committee further notes the author's unrefuted statement that the health professionals did not deliver such information in her case and that she did not receive key medically indicated information about the applicable restrictions on overseas abortions and the most appropriate types of terminations, given her period of gestation, thereby disrupting the provision of medical care and advice that the author needed and exacerbating her distress.

7.6 The Committee additionally notes, as stated in paragraph 3 of its general comment No. 20, that the text of article 7 allows of no limitation and no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reason. Accordingly, the Committee considers that, taken together, the above-mentioned facts amounted to cruel, inhuman or degrading treatment in violation of article 7 of the Covenant.

7.7 The author claims that by denying her the only option that would have respected her physical and psychological integrity and reproductive autonomy under the circumstances of the case (allowing her to terminate her pregnancy in Ireland), the State interfered arbitrarily in her right to privacy under article 17 of the Covenant. The Committee recalls its jurisprudence to the effect that a woman's decision to request termination of pregnancy is an issue which falls under the scope of this provision.[9] In the present case, the State party interfered with the author's decision not to continue her non-viable pregnancy. The interference in this case was provided for under article 40.3.3 of the Constitution and therefore was not unlawful under the State party's domestic law. However, the question before the Committee is whether such interference was unlawful or arbitrary under the Covenant. The State party argues that there was no arbitrariness, since the interference was proportionate to the legitimate aims of the Covenant, taking into account a carefully considered balance between protection of the fetus and the rights of the woman.

7.8 The Committee considers that the balance that the State party has chosen to strike between protection of the fetus and the rights of the woman in the present case cannot be justified. The Committee recalls its general comment No. 16 (1988) on the right to privacy, according to which the concept of arbitrariness is intended to guarantee that 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. The Committee notes that the

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author's much-wanted pregnancy was not viable, that the options open to her were inevitably a source of intense suffering and that her travel abroad to terminate her pregnancy had significant negative consequences for her, as described above, that could have been avoided if she had been allowed to terminate her pregnancy in Ireland, resulting in harm contrary to article 7. On that basis, the Committee considers that the interference in the author's decision as to how best cope with her non-viable pregnancy was unreasonable and arbitrary in violation of article 17 of the Covenant.

7.9 The author claims that criminalization of abortion on the grounds of fatal fetal impairment violated her rights to equality and non-discrimination under articles 2 (1), 3 and 26. The State party rejects this claim and contends that its legal regime regarding termination of pregnancy is not discriminatory.

7.10 The Committee notes that under the legal regime in the State party, women pregnant with a fetus with a fatal impairment, who nevertheless decide to carry the fetus to term continue to receive the full protection of the public health-care system. Their medical needs continue to be covered by health insurance and they continue to benefit from the care and advice of their public medical professionals throughout the pregnancy. After miscarriage or delivery of a stillborn child, they receive any post-natal medical attention and bereavement care they need. By contrast, women who choose to terminate a non-viable pregnancy must rely on their own financial resources to do so entirely outside the public health-care system. They are denied health insurance coverage for that purpose; they must travel abroad at their own expense to secure an abortion and incur the financial, psychological and physical burdens that such travel imposes; and they are denied post-termination medical care and bereavement counselling they need. The Committee further notes the author's uncontested allegations that in order to secure a termination of her non-viable pregnancy, she was required to travel abroad, incurring financial costs that were difficult for her to raise. She also had to travel back to Dublin only 12 hours after the delivery, as she and her husband could no longer afford to stay in the United Kingdom.

7.11 In paragraph 13 of its general comment No. 28 (2000) on the equality of rights between men and women, the Committee states that: "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant". The Committee notes the author's claim that the State party's criminalization of abortion subjected her to a gender-based stereotype of the reproductive role of women primarily as mothers, and that stereotyping her as a reproductive instrument subjected her to discrimination. The Committee considers that the differential treatment to which the author was subjected in relation to other similarly situated women failed to adequately take into account her medical needs and socioeconomic circumstances and did not meet the requirements of reasonableness, objectivity and legitimacy of purpose. Accordingly, the Committee concludes that the failure of the State party to provide the author with the services that she required constituted discrimination and violated her rights under article 26 of the Covenant.

7.12 In the light of the above findings, the Committee will not examine separately the author's allegations under articles 2 (1), 3 and 19 of the Covenant.

8. The Committee, acting under article 5 (4), of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the author's rights under articles 7, 17 and 26 of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the Committee considers that the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide the author with adequate compensation and to make available to her any psychological treatment she needs. The State party is also under an obligation to take steps to prevent similar violations in the future. To that end, the State party should amend its law on the voluntary termination of pregnancy, including if necessary its Constitution, to ensure compliance with the Covenant, ensuring effective, timely and accessible procedures for pregnancy termination in Ireland, and take measures to ensure that health-care providers are in a position to supply full information on safe abortion services without fearing they will be subjected to criminal sanctions, as indicated in the present Views of the Committee.[10]

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10. Bearing in mind that by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Views.

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Annex I

Opinion individuelle (concurrente) du membre du Comité Yadh Ben Achour

1. J'adhère totalement aux conclusions du comité des droits de l'homme qui constate que les faits de l'espèce *Amanda Jane Mellet* (Communication 2324/2013), font apparaître une violation des articles 7, 17 et 26 du pacte. Le comité a cependant décidé de ne pas examiner séparément les allégations de l'auteure au titre des articles 2 (par. 1) et 3 du pacte.

2. Je considère que le comité aurait dû recevoir et accepter sur le fond l'argument défendu par l'auteure de la communication (voir paragraphes 3.15 à 3.19 des constatations) selon lequel la loi irlandaise érigeant l'avortement en infraction pénale contrevient également aux articles 2 (par. 1) et 3 du pacte.

3. Déniant aux femmes leur liberté sur une question qui touche leur fonction procréative, ce type de législation est contraire au droit de ne pas faire l'objet de discrimination sur le fondement du sexe, parce qu'il dénie aux femmes leur libre arbitre dans ce domaine. Aucune restriction similaire ne s'impose aux hommes.

4. L'interdiction de l'avortement en Irlande, par son effet contraignant, indirectement punitif et stigmatisant, vise les femmes *en tant que telles* et les place dans une situation spécifique de vulnérabilité, discriminatoire par rapport aux personnes de sexe masculin. En application de cette législation, l'auteure a effectivement été victime du stéréotype sexiste, selon lequel la grossesse des femmes devrait, sauf en cas de danger mortel pour la mère, se poursuivre, quelles que soient les circonstances, car leur rôle se limite exclusivement à celui de mères procréatrices. Le fait de réduire l'auteure à un instrument procréatif constitue une discrimination et porte atteinte à la fois à sa liberté de disposer d'elle-même et à son droit à l'égalité des sexes.

5. Sur le fondement des considérations qui précèdent, j'estime par conséquent que le fait pour l'État, en application de sa législation interne, de ne pas permettre à l'auteure de procéder à l'interruption de sa grossesse constitue une discrimination de genre (qui est l'une des formes de discrimination à raison du sexe prévue par les articles 2 §1 et 3 du pacte).

6. La loi de l'État partie porte ainsi atteinte aux droits que l'auteure tient des articles 2 § 1 et 3 du pacte, lus conjointement avec l'article 26.

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Annex II

Individual opinion of Committee member Sarah Cleveland (concurring)

1. I concur in the Committee's Views in this case. I also agree with the separate opinion of my colleagues that the Committee should have found a violation of article 19 of the Covenant and articulated a comprehensive finding of gender discrimination under articles 2(1), 3 and 26. I write separately to set forth my views on the finding of a violation of article 26.

2. In paragraphs 7.10 and 7.11, the Committee notes the disproportionate socio-economic burdens that the Irish legal system imposes on women who decide not to carry a fetus to term, including those imposed on the author in particular. It also notes the author's claim that Ireland's criminalization of abortion discriminatorily subjected her to gender-based stereotypes. The Committee concludes that the distinctions drawn by the State party "failed to adequately take into account her medical needs and socio-economic circumstances and did not meet the requirements of reasonableness, objectivity and legitimacy of purpose" under article 26. The Committee thus identifies two prohibited grounds for finding a violation of article 26: discrimination on grounds of socio-economic status and gender discrimination.

3. With respect to socio-economic status, the Committee previously has expressed specific concern in relation to article 26 regarding the highly restrictive Irish legal regime, which requires women to travel to a foreign jurisdiction to obtain a lawful termination of pregnancy in most contexts, and the resulting "discriminatory impact of the Protection of Life During Pregnancy Act on women who are unable to travel abroad to seek abortions"[11]. Article 26, of course, "guarantee[s] to all persons equal and effective protection against discrimination" on the grounds of both "property" and "other status."[12] It therefore prohibits the unequal access to reproductive health care for low-income and vulnerable populations that results from Ireland's legal restrictions on reproductive health services.

4. The author further contends that Ireland's criminalization of abortion stereotyped her as a reproductive instrument and thus subjected her to discrimination. She explains that by prioritizing protection of the "unborn" over a woman's health and personal autonomy, Ireland subjected her to a gender-based stereotype that women should continue their pregnancies regardless of circumstances, because their primary role is to be mothers and caregivers, thus infringing on her right to gender equality. In particular, the author contends that Ireland's differential treatment of women who decide to carry a pregnancy with a fatal impairment to term, versus women who terminate such pregnancies, reflects a stereotypical idea that a pregnant woman should let nature run its course, regardless of the suffering involved for her (para. 3.19).

5. The State party in turn contends that the criminalization of abortion cannot discriminate against women, *per se*, because any differential treatment is based on factual biological differences between men and women. It argues alternatively that any gender-based differential treatment of woman pursues the legitimate aim of protecting the foetus, is proportionate to that aim, and thus is not discrimination (paras. 4.13-4.15).

6. The view that differences in treatment that are based on biological differences unique to either men or women cannot be sex discrimination is inconsistent with contemporary international human rights law and the positions of this Committee. Under such an approach, apparently it would be perfectly acceptable for a State to deny health care coverage for essential medical care uniquely required by one sex, such as cervical cancer, even if all other forms of cancer (including prostate cancer for men) were covered. Such a distinction would not, under this view, treat men and women differently, because only women contract cervical cancer, as a result of biological differences unique to women. Thus there would be no comparable way in which men were treated differently.

7. Modern gender discrimination law is not so limited. The right to sex and gender equality and non-discrimination obligates States to ensure that State regulations, including with respect to access to health services, accommodate the fundamental biological differences between men and women in reproduction and do not *directly or indirectly* discriminate on the basis of sex. They thus require States to protect on an equal basis, in law and in practice, the unique needs of each sex. In particular, as this Committee has recognized, nondiscrimination on the basis of sex and gender obligates States to adopt measures to achieve the "*effective and equal empowerment of women*"[13].

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8. Article 26 requires "equal and effective" protection against discrimination on grounds of sex. The Committee has drawn upon the Race Convention and CEDAW to define discrimination as prohibiting "any distinction, exclusion, restriction or preference which is based on any ground such as . . . sex . . ., and which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms"[14]. Article 26 prohibits discrimination in law or in fact in any field regulated and protected by public authorities[15], and does not require an intent to discriminate. Violations can "result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate"[16]. Thus, "indirect discrimination" contravenes the Covenant "if the detrimental effects of a rule or decision exclusively or disproportionately affect persons" with a protected characteristic and the "rules or decisions with such an impact" are not "based on objective and reasonable grounds"[17].

9. State policies that treat or impact men and women differently as a result of biological differences are obviously "based on . . . sex"[18]. Such distinctions necessarily constitute discrimination unless they are supported by reasonable and objective criteria and a legitimate purpose[19].

10. This Committee has long recognized that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment of men and women in every instance and may require differential treatment in order to overcome conditions that cause or help to perpetuate discrimination[20]. The Committee accordingly has recognized that interference with women's access to reproductive health services can violate their rights to equality and nondiscrimination[21]. Protection of sex and gender equality obligates States parties to respect women's privacy in relation to their reproductive functions, including prohibiting States from imposing restrictions on women's access to sterilization and from requiring health personnel to report women who have undergone abortion. It also prohibits employers from requesting pregnancy tests before hiring women[22]. Gender equality requires that pregnant women in State custody receive appropriate care, obligates States to afford access to safe abortion services to women who have become pregnant as a result of rape, and obligates them to ensure that women are able to access information necessary for equal enjoyment of their rights[23].

11. This approach comports with that of the CEDAW Committee, which has emphasized that a State's failure or refusal to provide reproductive health services that only women need constitutes gender discrimination[24]. Even facially identical treatment of men and women may discriminate if it fails to take into account women's different needs[25].

12. Women's unique reproductive biology traditionally has been one of the primary grounds for *de jure* and *de facto* discrimination against women. This is true when women are treated differently from men based on stereotyped assumptions about their biology and social roles, such as the claim that women are less able to take full time or demanding jobs than men.[26] It is equally true when apparently gender-neutral laws disproportionately or exclusively burden women because they fail to take into account the unique circumstances of women. Both types of laws subject women to discrimination.

13. Ireland's near-comprehensive criminalization of abortion services denies access to reproductive medical services that only women need, and imposes no equivalent burden on men's access to reproductive health care. It thus clearly treats men and women differently on the basis of sex for purposes of article 26. Such differential treatment constitutes invidious sex and gender discrimination unless it reasonable and objective to a legitimate purpose under the Covenant – requirements that the Committee found were not satisfied here.

14. The author also articulates an alternative basis for a finding of gender discrimination – that Ireland's legal regime is based on traditional stereotypes regarding the reproductive role of women, by placing the woman's reproductive function above her physical and mental health and autonomy. The fact that the State party may have pointed to a facially nondiscriminatory purpose for its legal regime does not mean that its laws may not also be informed by such stereotypes. Indeed, the State's laws appear to take such stereotypes to an extreme degree where, as here, the author's pregnancy was nonviable and any claimed purpose of protecting a foetus could have no purchase. Requiring the author to carry a fatally impaired pregnancy to term only underscores the extent to which the State party has prioritized (whether intentionally or unintentionally) the reproductive role of women as mothers, and exposes its claimed justification in this context as a *reductio ad absurdum*.

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15. The Committee has recognized that "[i]nequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes" and has admonished States parties to ensure that such attitudes are not used to justify violations of women's rights[27]. In numerous prior cases, the Committee has invalidated as discriminatory both legislation and practices that reflected gendered stereotypes of women's social and biological role. For example, the Committee found that a law that imposed greater obstacles to choosing the wife's name as the family name could not be justified based on arguments of "long-standing tradition" and violated article 26[28], as did a law that required married women, but not married men, to establish that they were the "breadwinner" to receive unemployment benefits[29]. More directly relevant here, in *L.N.P. v. Argentina,* the Committee found that the conduct of police, medical, and judicial personnel aimed at casting doubt on the morality of an indigenous minor rape victim based on stereotypes of virginity and sexual morality violated article 26[30]. And in *V.D.A (L.M.R.) v. Argentina,* the Committee concluded that failure to provide a legally available abortion to a mentally impaired minor constituted gender discrimination[31]. Similarly, in *L.C. v. Peru* the CEDAW Committee found that a hospital's decision to defer needed surgery in preference for preserving a rape victim's pregnancy "was influenced by the stereotype that protection of the foetus should prevail over the health of the mother"[32] and thus violated CEDAW. Recognition that differential treatment of women based on gender stereotypes can give rise to gender discrimination is also in accord with the approach of other human rights bodies.[33]

16. The Committee's finding of a violation of article 26 in the author's case is consistent with these decisions and is fully justified on grounds of discrimination arising from gender stereotyping.

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Annex III

Individual opinion of Committee member Sir Nigel Rodley (concurring)

1. I entirely support the findings of the Committee in this sad case. I wish, however, to underline that the refusal of the State party to allow for terminations even in the case of fatal foetal abnormality cannot even be justified as being for the protection of the (potential) life of the foetus. In addition, not only has article 7 been violated cumulatively (see paragraph 7.6), but by the very requirement that a pregnant woman carrying a doomed foetus is subjected to the anguish of having to carry the pregnancy to term.

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Annex IV

Voto separado parcialmente disidente de los miembros Víctor Rodríguez Rescia, Olivier de Frouville y Fabian Salvioli

1. Aún cuando estamos de acuerdo con el resultado de la admisibilidad y del fondo de la comunicación No. 2324/2013, en relación con la violación a los artículos 7, 17 y 26 del Pacto en perjuicio de la autora, consideramos que debió haberse analizado si existía también una violación separada del artículo 19 y no haberse soslayado esa discusión en la forma en que quedó indicado en el párrafo 7.12 de la comunicación.

2. La autora señaló que, debido al régimen jurídico vigente por el que se prohíbe el aborto, los profesionales de la salud que se ocuparon de ella en el Hospital Rotunda no le proporcionaron información esencial sobre los aspectos médicos del aborto y los servicios de aborto legal existentes en el extranjero, lo que vulneró su derecho a recabar y recibir información conforme lo establece el artículo 19 del Pacto. Haber remitido a la autora a una orientadora privada para recibir la información pertinente no eximía al Estado de esa obligación positiva.

3. Consideramos que en materia de salud, incluyendo temas como derechos sexuales y reproductivos, donde además podría estar en riesgo la vida e integridad de las personas, el acceso a la información debe ser de carácter público y debe ser parte de una política pública de Estado que permita estandarizar criterios que faciliten a las personas usuarias tomar decisiones personales, en relación con un tema tan complejo como el aborto, el cual está además prohibido en Irlanda.

4. Toda la información que recibió la autora de parte de los profesionales de la salud que la atendieron fue tímida y opaca. Cuando se confirmó la malformación del feto incompatible con la vida, su médico le indicó que "en esta jurisdicción no se pueden practicar abortos. Algunas personas en su situación pueden optar por viajar". La matrona le comunicó que en ese caso la autora podía continuar con su embarazo y se negó a hablarle de la segunda opción ("viajar").

5. Está claro para los suscritos que la Ley de Información sobre el Aborto restringe legalmente las circunstancias en las que los funcionarios pueden proporcionar información sobre los servicios lícitos de aborto disponibles en Irlanda o en el extranjero, y prohíbe que se propugne o promueva la interrupción del embarazo; todo lo cual tiene un efecto disuasorio en el personal de salud para no verse inmiscuido en alguna conducta que pudiera interpretarse como contraria a la ley, o peor aún, que pudieran temer ser acusados penalmente de "promover" el aborto.

6. Por lo anterior somos de la opinión de que el marco legal vigente promueve prácticas de omisión de información clara y oportuna para que las personas que podrían optar a practicarse un aborto legal fuera de Irlanda, puedan tomar las decisiones personales sobre su salud reproductiva. Esa normativa y la falta de información fidedigna y transparente, no es proporcionada para justificar alguno de los límites que establece el artículo 19.3 del Pacto, por lo cual, consideramos que la comunición también debió de haber declarado que el Estado infrinjió una violación del derecho de la autora a recabar y recibir información en virtud del artículo 19.2 del Pacto.

7. *Violación del artículo 26 del Pacto*. Compartimos la conclusión del Comité del párrafo 7.11 respecto de la violación del artículo 26 sobre la base de que hubo una discriminación en relación con otras mujeres embarazadas con mejores condiciones socioeconómicas, así como a la luz del argumento de la autora respecto de estereotipos de género. Sin embargo, consideramos que el abordaje debió ampliarse no sólo a que hubo una discriminación respecto de otras mujeres embarazadas que podrían estar en mejores condiciones sociales y económicas para abortar en el extranjero. Somos de la opinión que también se presentó una discriminación respecto de la autora y el tratamiento que la normativa y la práctica otorgan en el tema de la penalización del aborto, en relación con los hombres (discriminación por sexo y género). Por lo tanto, no compartimos el argumento reduccionista del Estado de que no existe discriminación debido a que existe una diferenciación biológica entre un hombre y una mujer embarazada como una cuestión de hecho.

8. La tipificación de la prohibición del aborto en la forma en que lo hace la normativa de Irlanda es en sí misma discriminatoria porque redirecciona toda la responsabilidad penal a la mujer embarazada.

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9. El hecho de que un hombre no pueda concebir por razones biológicas, no implica que ello permita una diferenciación razonable y objetiva repecto de la mujer embarazada que queda prácticamente aislada y desamparada respecto de la información y de los servicios limitados que la obligan a tomar una decisión compleja que oscila entre la comisión de un delito o de tener que ir a abortar en el extranjero cuando ello sea legalmente permitido.

10. Por otra parte, en las conclusiones del Comité en el párrafo 7.11 se toma nota de la afirmación de la autora "de que la penalización del aborto en Irlanda la sometió a un estereotipo basado en el género sobre la función reproductiva de la mujer principalmente como madre, y que al estereotiparla como instrumento reproductivo se la sometió a discriminación". Sobre esta base, el Comité debió haber determinado una violación expresa del párrafo 1 del artículo 2 y el artículo 3, en relación con los artículos 7, 17 y 19 del Pacto. Como lo ha señalado la autora, esas violaciones deben ser analizadas a la luz de la discriminación estructural y sistemática que caracteriza a la legislación irlandesa y la práctica del aborto en violación de la obligación del Estado parte de respetar y garantizar los derechos en virtud del Pacto, sin distinción de sexo, y el derecho de las mujeres a disfrutar, al igual que los hombres, de sus derechos civiles y políticos.

11. Por lo anterior, nuestro razonamiento nos conlleva a ampliar la violación del artículo 26 debido a una discriminación por sexo y género en perjuicio de la autora, así como a una violación de párrafo 1 del artículo 2 y del artículo 3 en relación con los artículos 7, 17 y 19 del Pacto.

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Annex V

Individual opinion of Committee member Anja Seibert-Fohr (partly dissenting)

1. I am writing separately because I do not agree with the finding of a violation of article 26 and the reasoning in paragraphs 7.10-7.11.

2. I appreciate that the Views apply only to the particular facts of the present case in which the foetus according to the uncontested submission by the author was not viable. Accordingly the recommendation in paragraph 9 is confined to fatal foetal impairment.[34] But I fail to recognize why it was necessary and appropriate to find a violation of article 26 after the Committee concluded that articles 7 and 17 were violated.

3. The central issue in the present case resides in the prohibition on abortion in Irish law in situations where a foetus is fatally ill. The grounds which are outlined in paragraph 7.4 leading to the finding of an article 7 violation are substantially the same as those on which the Committee finds a violation of article 26 and which are again outlined in paragraph 7.4: the author's denial of health care and bereavement support which is available to women who carry the foetus to term and the need to travel abroad at personal expense. These claims were already absorbed by the wider issue decided under articles 7 and 17 and there was no useful legal purpose served in examining them under article 26.[35]

4. Furthermore I cannot agree with the conclusion under article 26. According to the Committee's standing jurisprudence "the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[36] Difference in treatment requires comparable situations in order to give rise to discrimination.[37] But the Committee has failed to explain in the present case where the difference in treatment resides and to what extent such difference was based on a ground which is impermissible under article 26.

5. With respect to the concrete medical treatment the medical needs of a woman pregnant with a foetus with a fatal impairment who undergoes abortion is substantially different in comparison to the situation of women who decide to carry a fatally-ill foetus to term. Therefore, in order to find a discrimination of a woman who undergoes abortion in comparison to those carrying the foetus to term it is insufficient to refer, as the Committee does in paragraph 7.10, to the denial of "health insurance coverage *for these purposes*". The subject of the treatment for which health insurance is sought in case of abortion is fundamentally different from obstetrics.

6. I recognize that the author also claims a difference in treatment with respect to subsequent medical care and bereavement counselling. Though such a difference constitutes a distinction which is relevant for a non-discrimination analysis, the author has neither submitted that local remedies have been exhausted in this respect nor that there is objectively no prospect of success to challenge the denial of bereavement support and needed post-abortion medical care in domestic proceedings[38]. Pursuant to article 5 2 (b) Optional Protocol the Committee is therefore prevented from finding a violation of article 26 on this ground.

7. There is another aspect in the Committee's reasoning which I cannot agree with. The Committee has failed to specify the grounds for the alleged discrimination. In order to support a finding of an article 26 violation a distinction must relate to one of the personal characteristics which are specified in article 26. That the author was adversely affected by the prohibition on abortion in Ireland by virtue of her financial situation is insufficient to ground a claim under article 26. Neither can the State party's prohibition on abortion be described as a discrimination based on gender. While it is true that it only affects women, the distinction is explained with a biological difference between women and men that objectively excludes men from the applicability of the law and does not amount to discrimination.

8. The author claims that the prohibition is based on a gender-based stereotype which considers women's "primary role ... to be mothers and self-sacrificing caregivers" and stereotypes the author "as a reproductive instrument"(3.19). She also claims that the abortion regime was "reinforcing women's ... inferior social status"

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(3.20'). But these allegations which are contested by the State party are not supported by any relevant facts. According to the State party the legal framework is the result of a balancing of the right to life of the unborn and the rights of the woman. Though the Committee disagrees in its findings under article 17 with the outcome of the balancing in the case of a fatally-ill foetus, this finding does not warrant the conclusion that the prohibition on abortion is based on gender stereotypes. It is rather grounded on moral views on the nature of life which are held by the Irish population.

9. I appreciate that the Committee does not rely on the allegation of gender stereotypes in its finding under article 26. Instead it refers only to "differential treatment to which the author was subjected *in relation to other similarly situated women*". Nevertheless, the Committee has failed to specify on which other status the distinction is grounded.

10. Unless the Committee wants to find a violation of article 26 every time it finds a violation of one of the rights and freedoms protected under the Covenant and deprive this provision of any autonomous meaning and value, the Committee would be well advised to engage with such claims in a more meaningful way giving due account to the notion of discrimination and the prohibited grounds in the future.

ENDNOTES

1 The author states that they spent €3,000 in total, including the €2,000 fee they paid for the procedure.

2 The author submits a declaration by Joan Lalor, Associate Professor of Midwifery at Trinity College Dublin in which she concludes "that the current legal situation regarding the prohibition of termination of pregnancy for women with a diagnosis of fetal abnormality has led to intense suffering in Amanda's case and has severely impacted her ability to process her complicated grief. This situation will continue to cause additional unnecessary trauma leading to complicated grief for women in Ireland which is not experienced by women domiciled in countries where termination of pregnancy is legal". A medico-legal report by a clinical psychologist, Dr. Patel, was also submitted, indicating the psychological difficulties suffered by the author as a result of the trauma surrounding the end of her pregnancy.

3 The author provided a report by the Irish Family Planning Association, a non-governmental organization that provides sexual and reproductive health consultations in 11 centres nationwide. The report indicates that "health-care professionals are acutely aware of the possible repercussions, including damage to their reputation and career prospects, of a complaint alleging negligence, malpractice or breach of the law or of the Irish Medical Council's Guide to Professional Conduct and Ethics. . . . They are also aware of the stigma and opprobrium that attaches to abortion in much political and media discourse. Doctors working in small and, especially, rural communities may fear that publicity linking them with abortion in any way will affect their livelihood and reputation . . . and lead to personal harassment. Many health-care professionals evade the potential or perceived repercussions of falling foul of the law by declining to discuss abortion or to provide information to their patients. . . . In the absence of binding guidelines, protocols and processes of accountability . . . the attitudes of health-care professionals are influenced by a complex set of factors. These include the personal values and beliefs of health-care practitioners, their training, their understanding of the law, their level of knowledge about abortion and the ethos and culture of the institutions in which they train and work".

4 Application No. 25579/05, 16 December 2010.

5 See communication No. 1153/2003, *K.L. v. Peru*, Views adopted on 24 October 2005.

6 According to the State party, the same argument applies with respect to the Views of the Committee on the Elimination of Discrimination against Women in communication No. 22/2009, *L.C. v. Peru*, adopted on 17 October 2011 and the Human Rights Committee in communication No. 1608/2007, *L.M.R. v. Argentina*, Views adopted on 29 March 2011.

7 See the Committee's general comment No. 34 (2011) on the freedoms of opinion and expression, para. 25.

8 At the time of the events at issue, the provisions of the Offences Against the Person Act imposed a criminal penalty of life imprisonment for a woman or a physician who attempted to terminate a pregnancy (see para. 3.22 above).

9 See *K.L. v. Peru*, para. 6.4, *L.M.R. v. Argentina*, Views adopted on 29 March 2011, para. 9.3. See also the Committee's general comment No. 28 (2000) on the equality of rights between men and women, para. 10.

10 See also CCPR/C/IRL/CO/4, para. 9.

11 CCPR/C/IRL/CO/4, concluding observations adopted by the Committee at its 111th session (7-25 July 2014), para. 9. See also E/C.12/IRL/CO/3, CESCR, Concluding observations on the third periodic report of Ireland (July 2015), para. 30 (expressing concern at "the discriminatory impact on women who cannot afford to obtain an abortion abroad or access to the necessary information").

12 Cf. Communication No. 1306/04, *Haraldsson and Sveinsson v. Iceland* (Views adopted 24 Oct. 2007), para. 10.3 (distinction between groups of fishermen was "based on grounds equivalent to property" under article 26); CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (2009), para. 35 (recognizing "other status" as including differential treatment on grounds of economic and social situation, which can lead to unequal access to health care services). Cf. *Artavia Murillo, et al. v. Costa Rica*, IACHR (2012), paras. 303-304 (ban on *in vitro* fertilization discriminated

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against persons who lacked financial resources to seek IVF treatment abroad).

13 General Comment No. 28, Equality of rights between men and women (article 3) (2000), para. 8.

14 General Comment No. 18, Non-discrimination (1994), paras. 6-7 (emphasis added).

15 Id., para. 12.

16 Communication No. 998/2001, *Althammer v. Austria* (Views adopted 8 August 2003), para. 10.2; see also Communication No. 172/1984, *Broeks v. The Netherlands* (Views adopted 9 April 1987), paras. 15-16 (finding a violation of article 26 although the "the State party had not intended to discriminate against women").

17 Ibid.

18 Cf. *Dekker v. Stichting Vormingscentrum voor Jong Volwassensen (VJV-Centrum) Plus*, [1990] 1 E.C.R. 3941, [1991] I.R.L.R. 27 ("[O]nly women can be refused employment on the grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex"); *Brooks v. Canada Safeway Ltd.,* [1989] 1 S.C.R. 1219 ("Discrimination on the basis of pregnancy is discrimination on the basis of sex.").

19 General Comment No. 18, para. 13.

20 General Comment No. 18, paras. 8, 10.

21 General Comment No. 28, paras. 10, 11, 20.

22 Id., para. 20.

23 Id., paras. 11, 15, 22.

24 CEDAW Committee, General Recommendation No. 24, *Article 12: Women and health* (1999), paras. 11-12. The CEDAW Committee has recognized that it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women, and that health care policies must addresses distinctive factors which differ for women in comparison to men, including biological factors and psychosocial factors such as post-partum depression. Ibid. See also CEDAW Communication No. 22/2009, *L.C. v. Peru* (Views adopted 17 Oct. 2011), para. 8.15 (State's failure to provide a minor rape victim with a therapeutic abortion denied her "access to medical services that her physical and mental condition required", in violation of her rights to non-discrimination and equal access to health care).

25 CEDAW Committee, General Recommendation No. 28 on the core obligations of States parties under article 2 (2010), para. 5 ("[I]dentical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face.").

26 CESCR, General Comment No. 20, *supra*, para. 20. Cf. *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding restrictions on working hours of women based on gender stereotypes).

27 General Comment No. 28, para. 5.

28 Communication No. 919/2000, *Müller and Engelhard v. Namibia* (Views adopted 26 March 2002), para. 6.8.

29 Communication No. 172/1984, *Broeks v. The Netherlands* (Views adopted 9 April 1987), para. 15; *accord* Communication No. 182/1984, *F. H. Zwaan-de Vries v. The Netherlands* (Views adopted 9 April 1987), paras. 14-15 ("a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men"). See also Communication No. 415/1990, *Pauger v. Austria* (Views adopted 26 March 1992), para. 7.4 (pension law imposing an income requirement on widowers but not widows unreasonably differentiated on the basis of sex in violation of article 26).

30 Communication No. 1610/2007 (Views adopted 18 July 2011), para. 13.3.

31 Communication No. 1608/2007 (Views adopted 29 March 2011), para. 9.4 (finding a violation of article 2(3) in relation to articles 3, 7, and 17).

32 *L.C. v. Peru, supra*, para. 8.15 (finding violations of CEDAW articles 5 and 12).

33 See CESCR, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3) (2005), para. 5 (women often experience discrimination resulting from the subordinate status ascribed to them by tradition and custom). The ESCR Committee has further explained as follows:
The notion of the prohibited ground "sex" ... cover[s] not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfillment of ... rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.
CESCR, General Comment No. 20, *supra*, para. 20. Cf. *Artavia Murillo et al v. Costa Rica*, IACHR (2012), paras. 294-301 (ban on *in vitro* fertilization constituted gender discrimination as a result of stereotypes regarding fertility).

34 The reference "as indicated in these Views of the Committee" in para. 9 applies to all aspects of the recommendations. See also the preceding reference to the "obligation to take steps to prevent *similar violations* occurring in the future".

35 See mutatis mutandis ECtHR, *Dudgeon v. United Kingdom* (1981), paras. 67-69.

36 General Comment No. 18, para. 7.

37 *Šmíde v. Czech Republic*, Communication No. 1062/2002, para. 11.5.

38 The author only submitted that she would not have had any reasonable prospect of success had she petitioned an Irish court for a termination of her pregnancy.

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