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SUBMISSION TO THE RIGHT TO LIFE REVIEW OF THE IRISH HUMAN RIGHTS COMMISSION

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SUBMISSION TO THE RIGHT TO LIFE REVIEW OF THE IRISH HUMAN RIGHTS COMMISISON

Amnesty International (AI) submits the following observations to the Irish Human Rights Commission on the occasion of its public consultation announced on 7 December 2012 on its review of the relevant human rights which pertain in situations of pregnancy where there is a risk to life, with a view to the Commission submitting recommendations to the Irish government.[1]

AI welcomes the publication of the Report of the Expert Group on the judgment of the European Court of Human Rights in *A, B and C v Ireland* (hereinafter Expert Group Report) as a positive step towards compliance with Ireland's human rights obligations to women and girls. AI notes the Irish government's decision on 18 December 2012 to implement the Expert Group Report through a combination of legislation and regulations, rather than by regulations alone.[2] The Expert Group Report contains a number of recommendations which, if implemented, would go some way towards discharging Ireland's human rights obligations. As the Irish government now begins its deliberations on what sort of law and regulations to enact, AI is submitting the following observations and recommendations to the Irish Human Rights Commission to clarify that Ireland will need to take steps that go beyond the Expert Group Report recommendations to bring Ireland's law and practice into compliance with its human rights obligations towards women. The purpose of this submission is to provide some detail of what AI believes should be within the government's consideration at this time. AI has issued an initial submission to the Minister for Health and to the Joint Oireachtas Committee on Health and Children, and will continue to follow up with the Department of Health in this regard.

At the outset, AI would like to take this opportunity to highlight that restrictive abortion laws and practices are gender-discriminatory, denying women and girls treatment, which only they need.[3] Only women and girls risk physical and mental suffering or losing their lives as a result of delays in or denial of medical treatment if complications arise during pregnancy. Only women and girls are compelled to continue a medically dangerous or unwanted pregnancy or face imprisonment. Only women and girls suffer the mental anguish and physical pain of an unsafe abortion, risking their health and life in the process.

The deliberations of the Irish Human Rights Commission concerning its recommendations to the government should be undertaken in this light. The Irish Human Rights Commission should also highlight the importance of the government's moving quickly and without any unnecessary delay to enact the legal framework necessary to respect, protect and fulfil women and girls' right to legal, safe and accessible abortion.

International human rights law applies from the moment of birth. Article 4 of the American Convention on Human Rights is the only international human rights treaty which mentions "conception" in connection with the right to life, in article 4.1 which states that the right to life "shall be protected by law and, in general, from the moment of conception." In December 2012, the Inter-American Court on Human Rights for the first time published guidance on this article in a case concerning access to in vitro fertilization in Costa Rica.

In its judgement, the Inter-American Court noted "with regard to the controversial question of when human life begins [that…] it is a question that can be seen from different perspectives, including biological, medical, ethical, moral, philosophical and religious perspectives, and [that the Court] agrees with international and regional tribunals in the sense that there is no consensus of when life begins."[4]

The Court acknowledged that some view human life as beginning at the moment of conception, but stated that this view cannot be taken as the only basis for the interpretation of article 4 of the American Convention on Human Rights, "as this would result in the imposition of one specific faith on those who do not share it."[5] The Court noted that the current status of international human rights law "does not lead to the conclusion that an embryo must be treated in the same manner as a person, or that it has a right to life"[6] and concluded "that an embryo cannot be understood to be a person within the meaning of article 4.1 [and that…] the protection of the right to life [from the moment of conception] is not absolute but rather progressive and incremental according to the development [of the embryo] and that it does not impose an absolute and unconditional obligation [on the state]…."[7]

The European Court on Human Rights reached a similar conclusion in 2004 in the case of *Vo v France*, in which is noted that "the unborn child is not regarded as a 'person' directly protected by Article 2 of the Convention [on the right to life] and that if the unborn do have a 'right' to 'life', it is implicitly limited by the mother's rights and interests."[8]

Considering this jurisprudence, AI believes states may legitimately regulate access to abortion in a manner that takes into account the evolving protection needs of the foetus and the health needs and autonomy entitlements of the woman. Such legislation, however, must be proportionate to the objective, and cannot substitute foetal considerations for the human rights of women and girls. Gestational limits that provide no exemptions for protecting the life of the woman, for example, would not be considered reasonable by AI.

1. ABORTION WHERE THERE IS A RISK TO LIFE OF THE WOMAN

It is important to note that the human rights dimensions of the Expert Group Report extend beyond the regional European Court of Human Rights remit. The UN Human Rights Committee in its 2008 concluding observations on Ireland "reiterate[d] its concern regarding the highly restrictive circumstances under which women can lawfully have an abortion in the State party" and recommended that Ireland "should bring its abortion laws into line with the Covenant."[9] The UN Committee against Torture in its 2011 concluding observations on Ireland's first report stated:

> "The Committee has noted the concern expressed by the European Court for Human Rights (ECtHR) about the absence of an effective and accessible domestic procedure in the State party for establishing whether some pregnancies pose a real and substantial medical risk to the life of the mother [Case of A, B and C v. Ireland], which leads to uncertainty facing women and their medical doctors, who are also at risk of criminal investigation or punishment if their advice or treatment is deemed illegal. The Committee expresses concern at the lack of clarity cited by the ECtHR and the absence of a legal framework through which differences of opinion could be resolved. Noting the

> risk of criminal prosecution and imprisonment facing both the women concerned and their physicians, the Committee expresses concern that this may raise issues that constitute a breach of the Convention."[10]

The Committee recommended that Ireland "clarify the scope of legal abortion through statutory law and provide for adequate procedures to challenge differing medical opinions as well as adequate services for carrying out abortions in the State party, so that its law and practice is in conformity with the Convention [Against Torture]."

AI wishes to emphasize that the Irish government has an immediate obligation to give effect to its current legal framework on abortion, by facilitating access to abortion for women whose lives are endangered by their pregnancies. AI urges the Irish Human Rights Commission to recommend that no legislative action be taken that falls short of affirming the 1992 judgement of the Supreme Court in *Attorney General v X* (hereinafter *X case*)[11] or seeks to restrict lawful abortion further, as this would be impermissible from the perspective of Ireland's obligations under international human rights law as it would constitute a retrogressive step.[12]

Where the life of the woman or girl is at risk, AI considers that access to safe abortion services should be provided for in law and practice (see below for AI's views on other circumstances in which such services should be available). Furthermore, regional and international human rights and other entities have made it clear that, where abortion is legal, it must be accessible and safe. The most resounding call for this was in the consensus document that was the result of the International Conference on Population and Development in 1994, where states noted: "In circumstances where abortion is not against the law, such abortion should be safe."[13]

AI would also like to highlight the following issues as central to ways of implementing the Expert Group Report that would go the farthest to discharge Ireland's human rights obligations where the life of the woman or girl is at risk.

A) MEDICAL REGULATIONS/GUIDELINES

Firstly, the Expert Group Report reiterates, in the language of the Irish Supreme Court in the *X case*, that the appropriate standard to determine the legality of abortion in current Irish law is where there is a "real and substantial" risk to the life of the pregnant woman. This risk does not, the Report clarifies, need to be "imminent and inevitable."

This should be read in light of United Nations human rights treaty body jurisprudence and comments. Thus, the Human Rights Committee has explained that the right to life should not be understood in a restrictive manner, and that states must adopt positive measures to protect this right.[14] In the Human Rights Committee decision in the case of *KNLH v Peru* concerning an adolescent who had been denied a legal abortion, the Argentine member of the Committee noted that "[i]t is not only taking a person's life that violates article 6 [right to life] of the Covenant but also placing a person's life in grave danger, as in this case."[15]

It will be important for any guidelines developed on access to legal abortion in Ireland to reflect the fact that medicine is not an exact science and that any delay in the provision of abortion services may in fact contribute to a deterioration in the health situation of the

pregnant woman. Therefore, guidelines should incentivize swift decision-making and access to services, and must not punish medical service providers for prioritising the health and life of their patient over seeking to intervene only where all medical providers everywhere would agree the risk was real and substantial. There cannot be any justification for allowing a situation of real and substantial risk to the pregnant woman's life to deteriorate to a situation of imminent and inevitable risk, if an effective course of medical action is known and can be taken.

B) CONSCIENTIOUS OBJECTION

Secondly, AI calls attention to the Expert Group Report's assertion that medical providers may be allowed the right to object to providing services. While the right to express one's freedom of thought, conscience, religion or belief potentially includes the right to object to personally providing certain care, this right is not unlimited and must be weighed against the various human rights of a patient needing urgent care. AI welcomes the Expert Group Report's acknowledgment that "[a] balance ought to be achieved between ensuring a patient's access to lawful medical treatment whilst also recognising an individual's conscientious objection, insofar as possible."[16] Bearing this in mind, any regulation should clarify that a review board of women's right to access treatment should never include an individual who objects to the treatment in question on grounds of personal conscience.

In this connection, the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) has stated, with regard to reproductive health services generally, "if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers."[17]

The Human Rights Committee has recommended, specifically in the context of guaranteeing access to legal abortion in Poland, that the Polish government "introduce regulations to prohibit the improper use and performance of the 'conscience clause' by the medical profession."[18] Likewise, when Colombia's High Court mandated access to legal abortion in a variety of cases, the Human Rights Committee noted that "[t]he State party must ensure that health providers and medical professionals act in conformity with the ruling of the Court and do not refuse to perform legal abortions."[19] In his 2011 report to the United Nations General Assembly, the Special Rapporteur on the right to health cites inadequate regulation of conscientious objection as a legal restriction that contributes to making legal abortions inaccessible: "Conscientious objection laws create barriers to access by permitting health-care providers and ancillary personnel, such as receptionists and pharmacists, to refuse to provide abortion services, information about procedures and referrals to alternative facilities and providers."[20] He recommends that states "ensure that conscientious objection exemptions are well-defined in scope and well-regulated in use and that referrals and alternative services are available in cases where the objection is raised by a service provider."[21]

Guidelines must clarify that, in emergency situations where no referral or alternative service is available, accessible or adequate, there can be no room for conscientious objection. The right to conscientious objection is linked to the right to manifest one's freedom of thought, conscience, religion or belief, protected, for example, in article 18(3) of the International Covenant on Civil and Political Rights. This right is not absolute however, and may be subject

to certain limitations as stipulated in the ICCPR. It is incumbent upon states to regulate the right to conscientious objection in the health field in such a way as to balance and protect both the health practitioner's rights and the rights of her/his patients to life, health, non-discrimination, and other rights of those potentially denied services.

C) INVOLVEMENT OF WOMEN IN DECISION-MAKING

Finally, the Expert Report Group indicates that, in the current legal framework in Ireland, medical professionals are necessarily the ultimate decision-makers on the termination of a pregnancy. Accordingly, the role of the woman is one restricted to giving informed consent "once a clinical decision has been made as to the appropriate treatment."[22]

International human rights standards are clear that individuals must have the main and final say in their health care.[23] The CEDAW Committee has put this in the strongest terms possible: "Decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government."[24] The UN Committee on Economic, Social and Cultural Rights has likewise noted that autonomy is key to the realisation of the right to health: "The right to health … includes the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference."[25]

Affirming "the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies", the Parliamentary Assembly of the Council of Europe has stated that "the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way."[26] It has invited member states of the Council of Europe to "allow women freedom of choice and offer the conditions for a free and enlightened choice without specifically promoting abortion."[27]

2. DECRIMINALIZATION

AI notes that international and regional human rights bodies mandated by states to give authoritative interpretations of human rights law have long emphasized that criminal sanctions for the procurement or provision of voluntary abortion information or services raise serious human rights concerns. At risk are the human rights to life, health, non-discrimination, liberty, privacy, information, security of person, and freedom from cruel, inhuman, and degrading treatment and punishment, as well as the right to decide on the number and spacing of children, to benefit from scientific progress, and to freedom of thought, conscience and religion.

In this regard, AI draws particular attention to General Recommendation 24 of the CEDAW Committee on women and health. In this General Recommendation—which should assist states in their implementation of the Convention on the Elimination of All Forms of Discrimination against Women—the CEDAW Committee affirms states' obligation to respect women's access to reproductive health services and to "refrain from obstructing action taken by women in pursuit of their health goals."[28] It explains that impermissible "barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures."[29] Abortion is clearly a medical procedure only needed by women.

The CEDAW Committee specifically recommends that "[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion."[30] This serious concern with the criminalization of abortion has been repeated in various concluding observations with regard to numerous countries by the Human Rights Committee[31] and the Committee on Economic, Social and Cultural Rights.[32]

In the Platform for Action resulting from the Fourth World Conference on Women in 1995, states committed to "consider reviewing laws containing punitive measures against women who have undergone illegal abortions."[33] The United Nations Special Rapporteur on the right to health has noted:

> "Criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women's right to health and must be eliminated. These laws infringe women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health. Moreover, such laws consistently generate poor physical health outcomes, resulting in deaths that could have been prevented, morbidity and ill-health, as well as negative mental health outcomes, not least because affected women risk being thrust into the criminal justice system. Creation or maintenance of criminal laws with respect to abortion may amount to violations of the obligations of States to respect, protect and fulfil the right to health."[34]

Based on this analysis, the Special Rapporteur has called for the removal of punitive sanctions against women who have had abortion, and for the full decriminalization of abortion.[35]

Several studies on access to abortion in countries with partial decriminalization—such as in Ireland—have concluded that as long as abortion is generally criminalized, medical service providers will be deterred from even providing care that is legal.[36] In its ruling in the case of *A, B and C v Ireland*, the European Court of Human Rights said it considered it "evident" that the criminal provisions on abortion "would constitute a significant chilling factor for both women and doctors in the medical consultation process" and that women would be deterred from seeking legal and necessary care, and doctors from providing it, because of this chilling effect.[37]

In the context of these repeated and forceful calls for the removal of punitive sanctions for all abortion, guaranteeing access to abortion services that have been legal (but inaccessible) in Ireland for decades is, while positive, clearly an insufficient step. The government should decriminalize abortion in all circumstances. Women and girls must not be subject to criminal sanctions for seeking or obtaining an abortion under any circumstances. While the government considers what sort of legal framework to enact in respect of access to abortion, an immediate parallel step should be decriminalization as this should not require broad-based consultation.

3. THE RIGHT TO ACCESS ABORTION SERVICES IN OTHER CIRCUMSTANCES

AI notes that the Irish Human Rights Commission's review of relevant human rights appears to be confined to those "which pertain in situations in situations of pregnancy where there is

a risk to life."[38] With particular regard to its consideration of "whether residual legal risks may accrue to the State in relation to its international human rights obligations under international conventions it has ratified" should the Expert Group Report recommendations be implemented, AI encourages the Irish Human Rights Commission to take this opportunity to look more comprehensively at the situations in which the Irish government should provide access to safe and legal abortion services, in line with Ireland's human rights obligations. AI encourages the Irish Human Rights Commission to urge that the government's deliberations not be constrained by existing provisions in the Irish Constitution, Bunreacht na hÉireann, and that the government should suggest what, if any, constitutional amendment may be required to comply fully with international human rights law.

The CEDAW Committee, in its 2005 concluding observations on Ireland stated: "The Committee reiterates its concern about the consequences of the very restrictive abortion laws under which abortion is prohibited except where it is established as a matter of probability that there is a real and substantial risk to the life of the mother that can be averted only by the termination of her pregnancy."[39] It urged Ireland "to continue to facilitate a national dialogue on women's right to reproductive health, including on the very restrictive abortion laws." AI believes that states must provide legal access to safe abortion services not only where the life of the woman or girl is at risk, but also where there is a grave risk to their health or where the pregnancy is the result of rape or incest.

A) ACCESS TO ABORTION WHEN PREGNANCY POSES A GRAVE RISK TO THE HEALTH OF THE WOMAN

In 2008, the United Nations Human Rights Committee reiterated "its concern regarding the highly restrictive circumstances under which women can lawfully have an abortion" in Ireland.[40] This indicates that, in the Committee's view, it is insufficient for Irish law to allow for access to abortion only in cases where there is a risk to the life of the woman and that abortion must be lawfully accessible in a broader set of circumstances.

It is not possible, in medical science, to definitely distinguish between risk to health and risk to life: the health risk arising from a relatively minor infection, for example, can be threatening to a person's life, depending on the overall health of the patient, contextual issues such as access to medicine and trained care, and many other factors. Moreover, the denial of health care can put a person's life at risk without ultimately resulting in death. In the context of abortion, it is uncontested that denial of access to abortion on health grounds can put women's lives at risk (see section 1 (A) above on medical regulation). Conversely, limiting abortion access to cases of real and substantive risk to life can lead to prolonged physical and mental pain and suffering, as well as preventable risk of ill-health and death.

In other words, where legislators insist that medical providers draw a distinction between risk to health and risk to life in the context of abortion, doctors are prevented from properly advising their patients where abortion is an effective action to prevent risk to health that may deteriorate to threaten their life. In this manner, the law contributes to generating preventable and unnecessary risk to life of pregnant women.

As a result, laws that prohibit abortion access on health grounds require health professionals to prioritize the foetus over the pregnant woman in all cases, regardless of the impact on the woman's health or life. This situation was countered by the Colombian Constitutional Court in

2006. The Court was considering the constitutionality of Colombia's, until then, blanket ban on abortion and argued thus: "[H]ealth, life and bodily integrity [are] limits on the discretion of the legislature over criminal matters … and therefore … it is not proportionate or reasonable for the Colombian state to obligate a person to sacrifice her or his health in the interest of protecting third parties [the foetus], even when those interests are also constitutionally relevant."[41]

Human rights bodies have provided guidance on states' obligations in respect of abortion not just in terms of the right to life but also in respect of the right to the highest attainable standard of health. The CEDAW Committee has characterised "laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures" – among which criminal abortions laws must be counted – as "barriers to women's access to appropriate health care" contravening states' human rights obligation in the context of women's right to non-discrimination and equality relating to the right to the highest attainable standard of health.[42]

The CEDAW Committee has expressed specific concern with abortion legislation that restricts access to care where the pregnant woman's health is in danger. For example, the CEDAW Committee expressed regret at the failure of Chile to decriminalise abortion "including those [sic] where the health or life of the mother are at risk, in cases of serious foetus malformation or rape" and called for abortion to be decriminalised "in cases of rape, incest or threats to the health or life of the mother."[43]

The Committee on Economic, Social and Cultural Rights has urged Nicaragua "to review its legislation on abortion and to study the possibility of providing for exceptions to the general prohibition on abortion in cases of therapeutic abortion or pregnancies resulting from rape or incest."[44] Prior to the total ban on abortion which the Committee thus criticised, Nicaraguan law had recognised "therapeutic abortion" as legal. The law was interpreted in practice to permit abortion to be performed when the life or health of the woman or girl was at risk from continuation of pregnancy and, on particular occasions, in cases of pregnancy as a result of rape.[45]

The Committee on Economic, Social and Cultural Rights also noted its concern that the Philippines' legal system made abortion illegal "in all circumstances, even when the woman's life *or health* is in danger or pregnancy is the result of rape or incest."[46] (italics added)

The Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the CEDAW Committee and the Committee on the Rights of the Child have all welcomed the Colombian Constitutional Court ruling which decriminalised abortion in cases when pregnancy poses a serious risk to the woman's life or health and when the foetus displays signs of serious malformations that make its life outside the womb unviable (as well as when the woman is a victim of rape or incest).[47]

The obligation to give effect to women's human rights by allowing them to access abortion on health grounds requires states to structure their domestic legal system appropriately.[48] Ireland's human rights obligations can only be fully discharged by legislative change.

Ireland cannot rely on the fact that some women seek and get access to needed care outside

of Ireland. Rather, Ireland's compliance with its human rights obligations must be assessed by the laws, policies and practices, which govern the lives of women in Ireland. The Committee on Economic, Social and Cultural Rights has called for domestic measures to prevent women having to travel abroad in order to obtain abortion access.[49]

Where the law does not actively pose an obstacle for women to travel for the purposes of abortion access, other factors directly related to the need for international travel can pose insurmountable barriers for particular groups of women. Some women lack the financial means to travel or access to the information they would need in order to access abortion services abroad. Relying on travel creates de facto discrimination between those women who have the financial and informational resources to travel and those who do not. Some women are unable to travel because of their immigration status, their health status, their care responsibilities, because they are in state custody, because they live in a state institution or are a ward of court, or are otherwise prevented from travelling. The only real option open to these women is to continue a pregnancy that places their health at risk.

All women in Ireland are entitled to equal access to the care they need. Failure to provide for abortion access on health grounds in Ireland results in unequal outcomes for different groups of women – those able to travel and those unable to do so. Relying on travel for women to exercise their rights creates inequity in access that the state has an obligation to overcome. In addition to giving effect to women's rights to life and the highest attainable standard of health, making abortion legal in cases of grave risk to the health of the woman furthers the enjoyment of the right to equality and non-discrimination in Ireland. The Committee on Economic, Social and Cultural Rights has stressed that "the Covenant [on Economic, Social and Cultural Rights] proscribes any discrimination in access to health care and underlying determinants of health, *as well as to means and entitlements for their procurement*, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health."[50] (italics added)

Abortions sought on health grounds are subject to severe sanctions if undertaken in Ireland. To meet its human rights obligations, Ireland cannot demand that women take actions abroad that – if taken in Ireland – would expose them to criminal investigation, prosecution and punishment.

Abortion where the foetus presents malformations incompatible with life outside the uterus is a health issue and is treated as such in jurisdictions that make abortion legal in cases of foetal impairment under health exception.[51] In some cases, such as with anencephalic pregnancies, the pregnant woman presents an additional risk for health complications such as polyhydramnios and increased amniotic fluid. Anencephaly is foetal malformation incompatible with life, in which the brain and spinal cord fail to develop in utero. When the outcome is not a stillbirth, death usually occurs within hours or days after birth.[52] Carrying an anencephalic foetus can be a great source of mental anguish and pose physical risks for the pregnant woman.[53] The adequate therapeutic indication in such cases in medical experience may be termination and certainly palliative care. In addition, Amnesty International operates within the World Health Organization's definition of health, which clarifies that "health is a

state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." AI knows, from its research and experience, that the emotional distress that accompanies a wanted but severely unhealthy pregnancy is such that women often desire a termination. AI believes that women's right to health in such cases can only meaningfully be upheld where doctors can legally apply a full range of therapeutic tools to address the health needs and wishes of the patient.

Human rights bodies have addressed access to abortion in the case of pregnancy where the foetus presents malformations incompatible with life outside the uterus as a health issue. In a landmark decision in 2005 – *KNLH v Peru* – the Human Rights Committee responded to the case of a 17-year-old Peruvian girl pregnant with an anencephalic foetus, who was denied an abortion and compelled to bring the pregnancy to term, even though Peruvian law permits abortion when it is the only means to save the life of the pregnant woman or to avoid serious and permanent damage to her health. In the case before the Human Rights Committee, the infant died four days after birth, and KNLH became severely depressed as a result of the experience—including being compelled by hospital nurses to breastfeed the infant during its short life. The depression was so severe it required psychiatric treatment. The Committee found Peru in violation of Covenant Articles 2 (respect for and guarantee of rights); 7 (freedom from torture and cruel, inhumane, and degrading treatment); 17 (right to privacy); and 24 (special measures for minors), for denying access to a legal abortion and for putting the woman's health at risk.[54]

The CEDAW Committee has supported legislation to permit termination of pregnancy in the case of "congenital abnormality of the foetus."[55] The Committee against Torture noted with concern "the general prohibition of abortion in article 109 of the Criminal Code, which applies even to cases of sexual violence, incest *or when the foetus is not viable, with the sole exception of cases where the foetus dies as an indirect result of an intervention that is necessary to avert a serious threat to the life of the mother*." (italics added) The Committee recommended that the country concerned, Paraguay, "consider providing for further exceptions to the general prohibition of abortion, *in particular for cases of therapeutic abortion* and pregnancy resulting from rape or incest."[56] (italics added)

Adopted almost 25 years after UN Convention on the Elimination of Discrimination against Women and indicating the progress of international law on women's human rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted in 2003, entered into force in 2005)[57] commits states parties to protecting the reproductive rights of women by authorising medical abortion in cases of grave foetal defects that are incompatible with life – "where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."[58]

B) ACCESS TO ABORTION WHEN PREGNANCY RESULTS FROM RAPE OR INCEST

The fact that the law denies women and girls pregnant as a result of rape or incest access to abortion, subjects them to criminal investigation, prosecution and punishment when they do access abortion services and thus potentially compelled to carry their pregnancies to full term is a violation of their human rights. The involuntary continuation of pregnancy causes untold physical and mental suffering for the woman or girl. For example, in its 2009 report on

Nicaragua, the UN Committee against Torture expressed deep concern with the general prohibition of abortion "even in cases of rape, incest or apparently life-threatening pregnancies that in many cases are the direct result of crimes of gender violence." The Committee noted "this situation … causes serious traumatic stress and a risk of long-lasting psychological problems such as anxiety and depression."[59]

The Human Rights Committee has criticised Ecuador for failing to "address the resulting problems faced by adolescent girls, in particular rape victims, who suffer the consequences of such acts for the rest of their lives." The Committee linked its concerns to the prohibition of torture and other cruel, inhuman or degrading treatment, stating: "Such situations are, from both the legal and practical standpoints, incompatible with articles 3, 6 (right to life) and 7 (prohibition of torture) of the Covenant, and with article 24 when female minors are involved." It recommended that Ecuador "adopt all necessary legislative and other measures to assist women, and particularly adolescent girls, faced with the problem of unwanted pregnancies to obtain access to adequate health and education facilities."[60]

The Beijing Declaration and Platform for Action, adopted by the Fourth UN World Conference on Women on 15 September 1995, states: "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence." Rape is the ultimate denial of this right. In specific circumstances it constitutes a form of torture and other cruel, inhuman or degrading treatment.[61] In its General Comment No. 28, for example, the Human Rights Committee states:

> "To assess compliance with article 7 (prohibition of torture) of the Covenant, as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape. It also needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape."[62]

Ireland is obligated under article 2 of the Convention against Torture to take "effective legislative, administrative, judicial or other measures to prevent acts of torture." In its General Comment 2, the Committee against Torture has explained that article 2 requires states to ensure "implementation of … positive measures of prevention and protection."[63] These are to be motivated by "continual evaluation" to "identify, compare and take steps to remedy discriminatory treatment that may otherwise go unnoticed and unaddressed."[64] In the context of the regulation of abortion, positive measures of prevention and protection against torture and other cruel, inhuman or degrading treatment include ensuring women and girl's access to safe and legal abortion services.

Rape victims are entitled to the fullest rehabilitation possible.[65] To ensure a gender-inclusive approach to torture, the UN Special Rapporteur on torture has underlined "the need to perceive it [torture] as a process", explaining that mental trauma and stigma attached to sexual violence and its impact are continuous in nature.[66] The means of the fullest possible rehabilitation for the rape victim need to respond to the continuous impact of the initial violation and its sequelae, including pregnancy which the concerned woman or girl may or may not want to bring to term.

The Council of Europe Parliamentary Assembly has urged member states to "recognise the inalienable right of women who have been raped to undergo voluntary termination of pregnancy if they wish, this right arising automatically from the rape."[67]

In its decision to end the criminalization of abortion, the Constitutional Court of Colombia commented as follows on the right of rape victims to have the option to have a safe and legal abortion if they decide that they do not want to continue with the pregnancy:

> "It is hard to imagine a more serious violation and a conduct more blatantly against social harmony among equals. A woman who becomes pregnant as a result of rape cannot be legally required to act as a heroine and take on the burden that continuing with the pregnancy entails. Nor can her fundamental human rights be disregarded as would be the case if she were required to carry the pregnancy to term against her will, turning her into a mere instrument of procreation."[68]

Further, the Court stated, "[S]he cannot be obligated to procreate nor be subjected to criminal sanctions for exercising her constitutional rights while trying to lessen the consequences of the crime of which she was victim."[69]

Any woman who has become pregnant as a result of sexual violence, including incest, must have the option of accessing safe and legal abortion as part of a range of support services, including treatment and follow-up care for physical injuries, pregnancy prevention and management, treatment for sexually transmitted infections and counseling and social support.[70]

CONCLUSION

Amnesty International urges the Irish Human Rights Commission to take the opportunity presented by its deliberations on the Expert Group Report's recommendations to ensure that Irish law and policy on abortion is in line with Ireland's international human rights obligations to women and girls. While assisting the Irish government to implement the judgment of the European Court of Human Rights in *A, B and C v Ireland,* the Irish Human Rights Commission must go further than the path outlined in the Expert Group Report. Additionally, it must go further than the *A, B and C v Ireland* judgement and advise the government on how to enact the legal framework necessary to respect, protect and fulfil women and girls' right to legal, safe and accessible abortion in circumstances more widely than the *X case* decision or risk to life of the mother. In view of Ireland's laudable international role in promoting gender equality, Ireland should be encouraged to demonstrate this commitment strongly at the domestic level too. It is important for the Irish government's human rights credibility that it ensures that women's human rights are comprehensively protected in its domestic law. This is particularly so in view of Ireland's recent election to the UN Human Rights Council and its pledge to the UN before its election to the Council that it would "play a full role in efforts to combat all forms of discrimination and to promote gender equality." In light of its recent assumption of the European Union presidency in January 2013, Ireland should ensure a progressive commitment to women's rights at home. At a minimum, Ireland must be urged to decriminalize abortion in all circumstances. Additionally it must reform legislation to provide access to abortion not only in cases where there is a risk to life of the woman or girl, but also in cases of pregnancy resulting from rape or incest and in circumstances where continuation of pregnancy would put the health of the woman or girl at

risk. Any such reforms must ensure that safe abortion is accessible in practice without unreasonable restrictions. We encourage the Irish Human Rights Commission to give careful and favourable consideration to the observations and recommendations we outline in this submission.

ENDNOTES

[1] http://www.ihrc.ie/download/pdf/right_to_life_review.pdf, visited 9 January 2013.

[2] “Government decision on ABC Expert Group option”, 18 December 2012 available at http://www.dohc.ie/press/releases/2012/20121218.html?lang=en, visited 19 December 2012.

[3] See Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (women and health) (1999), UN Doc. A/54/38/Rev.1, chap. I, paras. 14 and 31 (c).

[4] Inter-American Court on Human Rights, Case of Artavia Murillo and others (In Vitro Fertilization) vs. Costa Rica, Judgment of 28 November 2012, para. 185, in Spanish only, AI’s translation, footnotes in original text eliminated.

[5] Ibid.

[6] Ibid., para. 253.

[7] Ibid., para. 264.

[8] European Court on Human Rights, Case of Vo v. France, Application no. 53924, judgment of 8 July 2004, para. 80.

[9] Human Rights Committee, concluding observations on Ireland, 30 July 2008, U.N. Doc. CCPR/C/IRL/CO/3.

[10] It further said: “The Committee appreciates the intention of the State party, as expressed during the dialogue with the Committee, to establish an expert group to address the ECtHR's ruling. The Committee is nonetheless concerned further that despite the already existing case law allowing for abortion, no legislation is in place and that this leads to serious consequences in individual cases, especially affecting minors, migrant women, and the indigent. (articles 2 and 16)”

[11] [1992] 2 I.R. 1.

[12] Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health (2000), U.N. Doc. E/C.12/2000/4, para. 48.

[13] Programme of Action of the International Conference on Population and Development, U.N. Doc. A/CONF.171/13/Rev.1 (1994), para. 8.25. Importantly, states further emphasised that “[i]n all cases, women should have access to quality services for the management of complications arising from abortion”.

[14] Human Rights Committee, General Comment 6 on Article 6 (right to life) (1982), UN Doc. para. 5.

[15] Human Rights Committee, Views, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003/Rev.1 (2006), Appendix.

[16] Expert Group Report, p. 42.

[17] CEDAW Committee, General Recommendation 24 on women and health (1999), para. 11.

[18] Human Rights Committee, concluding observations on Poland, U.N. Doc.

CCPR/C/POL/CO/6, para. 12.

[19] Human Rights Committee, concluding observations on Colombia, U.N. Doc. CCPR/C/COL/CO/6, para. 19.

[20] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. A/66/254, para. 24.

[21] Ibid., para 65(m).

[22] Expert Group Report, p. 19.

[23] There may be narrow limitations to this principle where an individual is temporarily or permanently unable to make decisions for herself or himself.

[24] CEDAW Committee, General Recommendation 21 on Equality in Marriage and Family Relations (1994), para. 22.

[25] Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (2000), para. 8.

[26] Parliamentary Assembly of the Council of Europe Resolution 1607 (2008) Access to safe and legal abortion in Europe, para. 6

[27] Parliamentary Assembly of the Council of Europe Resolution 1607 (2008) Access to safe and legal abortion in Europe, para. 7.3

[28] CEDAW Committee, General Recommendation 24, Women and Health (Article 12), U.N. Doc. No. A/54/38/Rev.1 (1999) (hereinafter General Recommendation 24), para. 14.

[29] Ibid., para. 14.

[30] Ibid., para. 31(c).

[31] See e.g. Human Rights Committee, concluding observations on Ireland, U.N. Doc. CCPR/C/IRL/CO/3 (2008), para. 13; the Philippines (advanced unedited version), U.N. Doc. CCPR/C/PHL/CO/4 (2012), para. 13; Dominican Republic, U.N. Doc. CCPR/C/DOM/CO/5 (2012), para. 15; Guatemala, U.N. Doc. .CCPR/C/GTM/CO/3 (2012), para. 20; Jamaica, U.N. Doc. CCPR/C/JAM/CO/3 (2011) para. 14; Kazakhstan, U.N. Doc. CCPR/C/KAZ/CO/1 (2011), para. 11; El Salvador, U.N. Doc. CCPR/C/SLV/CO/6 (2010), para. 10; Poland, U.N. Doc. CCPR/C/POL/CO/6 (2010), para. 12; Cameroon, U.N. Doc. CCPR/C/CMR/CO/4 (2010), para. 13; and Mexico, U.N. Doc. CCPR/C/MEX/CO/5 (2010), para. 10. Similar calls have been made in many other concluding observations dating further back.

[32] See e.g. CESCR, concluding observations on Ecuador, U.N. Doc. E/C.12/ECU/CO/3 (Advanced unedited version) (2012), para. 29; Peru, U.N. Doc. E/C.12/PER/CO/2-4 (2012), para. 21; Chile, U.N. Doc. E/C.12/1/Add.105 (2004), para. 25 and Kuwait, U.N. Doc. E/C.12/1/Add.98 (2004), para. 43. The Committee on Economic Social and Cultural Rights has made repeatedly calls for states to facilitate access to abortion, including by legalizing the procedure, lowering the cost of abortions, and implementing broad-ranging policies to prevent unwanted pregnancies.

[33] Platform for Action of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995), para. 106k.

[34] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. A/66/254, para. 21

[35] Ibid., para. 65(h) and Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. E/CN.4/2004/49 (2004), para. 30.

[36] Human Rights Watch, A State of Isolation: Access to Abortion for Women in Ireland, January 2010; Human Rights Watch, The Second Assault: Obstructing Access to Abortion after Rape in Mexico, March 2006.

[37] European Court of Human Rights, Case of A, B and C v. Ireland, Judgement of 16 December 2010, para 254.

[38] Note 1 above.

[39] CEDAW concluding observations on Ireland's combined fourth and fifth periodic report, U.N. Doc. CEDAW/C/IRL/4-5.

[40] Human Rights Committee, concluding observations on Ireland, 30 July 2008, U.N. Doc. CCPR/C/IRL/CO/3, para. 13

[41] Colombian Constitutional Court Decision C-355/2006, AI's translation from Spanish, para. 8.1. See also Excerpts of the Constitutional Courts Ruling, published by Women's Link Worldwide, http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf, visited 7 January 2013.

[42] CEDAW Committee, General Recommendation 24 on women and health (1999), para. 14

[43] CEDAW/C/CHL/CO/5-6, 12 November 2012

[44] CESCR concluding observations on Nicaragua, UN Doc E/C.12/NIC/CO/4, para. 26

[45] Amnesty International, Nicaragua: The total abortion ban in Nicaragua: Women's lives and health endangered, medical professionals criminalized, AI Index AMR 43/001/2009, 27 July 2009, footnote 3

[46] CESCR concluding observations on the Philippines, UN Doc E/C.12/PHL/CO/4 (2008), para. 31

[47] Human Rights Committee concluding observations on Colombia, UN Doc. CCPR/C/COL/CO/6 (2010), para. 19. Committee on Economic, Social and Cultural Rights concluding observations on Colombia, UN Doc. E/C.12/COL/CO/5 (2010), para. 5, CEDAW Committee concluding observations on Colombia, UN Doc. CEDAW/C/COL/CO/6 (2007), para. 22; Committee on the Rights of the Child concluding observations on Colombia, UN Doc. CRC/C/COL/CO/3(2006), para. 3c and 70

[48] See CESCR, General Comment 14 (the right to the highest attainable standard of health (art. 12)), UN Doc E/C.12/2000/4, para. 36: "The obligation to *fulfil* requires States parties, *inter alia*, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health."

[49] "[...] the State party should adopt measures to assist women in avoiding unwanted

pregnancies, so that they do not have to resort to potentially life-threatening illegal or unsafe abortions, or have abortions abroad." (CEDAW concluding observations on Nicaragua, UN Doc E/C.12/NIC/CO/4, para. 26)

[50] CESCR, General Comment 14 (the right to the highest attainable standard of health (art. 12)), UN Doc E/C.12/2000/4, para. 18

[51] World Health Organisation, Safe Abortion Guidelines: Technical and policy guidance for health systems (Second edition), p. 93. At: http://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241548434/en/, visited 7 January 2013

[52] Jerrold B. Leikin, MD and Martin S. Lipsky, MD (eds.), American Medical Association Complete Medical Encyclopedia (New York: Random House Reference, 2003), p. 160.

[53] Polyhydramnios, postural hypotension, hypertension, premature membrane rupture, breech birth or other forms of dystocia, and amniotic embolisms are some of the physical consequences that an anencephalic pregnancy can have on maternal health. Equally important are the potential consequences on the emotional health of the pregnant woman, including anxiety, severe depression, and post-traumatic stress disorder (PTSD). For PTSD, one-third of women may recover within one year, while another third still experience symptoms 10 years after having received the diagnosis. See Luis Távara Orozco, *Why fatal congenital malformations and rape justify a legal abortion (Porqué las malformaciones congénitas letales y la violación justifican un aborto legal*) (Lima: Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX), 2008), p. 11.

[54] Human Rights Committee, Views, Communication No. 1153/2003, U.N. Doc. CPR/C/85/D/1153/2003/Rev.1 (2006)

[55] CEDAW concluding observation on Sri Lanka, UN Doc A/57/38, Part I (2002), para. 283

[56] Committee against Torture, concluding observations on Paraguay, UN Doc. CAT/C/PRY/CO/4-6 (2011), para. 22

[57] Article 14.2(c)

[58] In addition, several European countries have expressed concern concerns regarding Ireland's abortion law in the context of the Universal Periodic Review. Two countries specifically call for abortion to be made legal in circumstances other than risk to life. Denmark called on Ireland to "take measures to revise the law on abortion with a view to permitting termination of pregnancy in cases where pregnancy is a result of rape or incest, or in situations where the pregnancy puts the physical or mental health or well-being of the pregnant woman or the pregnant girl in danger." Slovenia called on Ireland to "allow abortion at least when pregnancy poses a risk to the health of the pregnant woman. Report of the Working Group on the Universal Periodic Review, UN Doc A/HRC/19/9, 21 December 2011, para. 108.7.

[59] Committee against Torture, Concluding Observations on Nicaragua, 10 June 2009, U.N. Doc. CAT/C/NIC/CO/1, para. 16.

[60] See concluding observations of the Human Rights Committee on Ecuador, UN Doc. CCPR/C/79/Add.92, 18 August 1998, at para.11.

[61] "It is widely recognized, including by former Special Rapporteurs on torture and by regional jurisprudence, that rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials." (Report of the UN Special Rapporteur on torture, Manfred Nowak, to the 7th Session of the Human Rights Council, U.N. Doc. A/HRC/7/3 15 January 2008, paragraph 34.) The Special Rapporteur on torture has also recognized domestic violence as one of the "forms of violence that may constitute torture or cruel, inhuman and degrading treatment" (id, paragraph 44) and elaborated on different manifestations of state acquiescence in domestic violence (id, paragraph 46). He has further drawn attention to the feeling of protection from social stigmatization which victims of sexual violence in Guatemala have reported when the crime is defined as torture rather than rape, forced impregnation or sexual slavery (id, paragraph 66).

[62] Human Rights Committtee, General Comment 28: Equality of rights between men and women (article 3), 29 March 2000, U.N. Doc. CCPR/C/21/Rev.1/Add.10, para. 11.

[63] UN Committee against Torture, General Comment no. 2, Implementation of article 2 by States parties, UN Doc CAT/C/GC/2, 24 January 2008, para. 21

[64] Id., para. 23

[65] UN Convention against Torture Article 14

[66] Report of the UN Special Rapporteur on torture, Manfred Nowak, to the 7th Session of the Human Rights Council, UN Doc. A/HRC/7/3 15 January 2008, paragraph 70

[67] Council of Europe Parliamentary Assembly Resolution 1212 (2000) Rape in Armed Conflicts. At

http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta00/ERES1212.htm (accessed 7 January 2013)

[68] Colombian Constitutional Court Decision C-355/2006, AI's translation from Spanish, para. 8.1. See also Excerpts of the Constitutional Courts Ruling, published by Women's Link Worldwide, http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf, visited 7 January 2013.

[69] Ibid, para. 10.1.

[70] WHO, Guidelines for medico-legal care for victims of sexual violence, http://www.who.int/violence_injury_prevention/publications/violence/med_leg_guidelines/en/index.html, visited 19 December 2012.

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