



# 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. 2425/2014\*, \*\*, \*\*\*, \*\*\*\*

<i>Communication submitted by:</i>	Siobhán Whelan (represented by the Center for Reproductive Rights)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Ireland
<i>Date of communication:</i>	9 April 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 16 June 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	17 March 2017
<i>Subject matter:</i>	Access to termination of pregnancy
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Denial of information; cruel, inhuman and degrading treatment; rights to equality and non-discrimination on the ground of sex; arbitrary interference in the right to privacy
<i>Articles of the Covenant:</i>	2 (1), 3, 7, 17, 19 and 26
<i>Article of the Optional Protocol:</i>	None

1.1 The author of the communication is Siobhán Whelan, a national of Ireland born in 1970. She asserts that the State party violated her rights under articles 2 (1), 3, 7, 17, 19 and 26 of the Covenant. She is represented by counsel. The Optional Protocol entered into force for Ireland on 8 March 1990.

\* Adopted by the Committee at its 119th session (6-29 March 2017).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamarian Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany, and Margo Waterval.

\*\*\* Individual opinions by Committee members Yadh Ben Achour, Sarah Cleveland (concurring), Olivier de Frouville (concurring) and Anja Seibert-Fohr (partly dissenting) are annexed to the present Views.

\*\*\*\* The footnotes are reproduced in the language of submission only.



**Facts as presented by the author**

2.1 On 4 January 2010, while in the twentieth week of her second pregnancy, the author underwent an ultrasound scan at Wexford General Hospital in Ireland. The obstetrician believed that the fetus was affected by holoprosencephaly, a congenital brain malformation occurring in approximately 1 in 250 pregnancies. Only 3 per cent of holoprosencephalic fetuses survive to delivery. The obstetrician informed the author and her husband that the baby would likely die in utero, and that if it were carried to term, it would probably die during labour or very soon after birth. Concerns were also raised about the formation of the heart, kidneys and other fetal organs. The obstetrician mentioned that “in another jurisdiction [they] would be offered a termination but obviously not in this country due to Irish law”.<sup>1</sup> The author was not given further information and was not referred to anyone to discuss the diagnosis, the care she would be offered in Ireland or the possibility of travelling abroad to terminate the pregnancy. Instead, the obstetrician stated that the author “would continue with the pregnancy, attend ante-natal appointments ‘as normal’ and wait for nature to take its course”.

2.2 On 7 January 2010, the author underwent an additional scan and an amniocentesis in the National Maternity Hospital in Dublin. The diagnosis of fatal holoprosencephaly was confirmed by the hospital’s doctors, who did not offer the author any information on counselling services, options available to her, or the risk that the condition would recur in a later pregnancy. The doctor gave her a report of the scan “in case [they] wanted to travel”. When she asked where she could go if she wanted “to travel”, she was simply told that there were good reports about Liverpool Women’s Hospital. The author did not discuss with the doctor the possibility of terminating the pregnancy abroad, since the obstetrician in Wexford had told her that the procedure was illegal in Ireland. She indicates that she “felt it was illegal to even discuss this or ask too many questions for fear of having the door slammed in our faces or of not receiving any help whatsoever”. On 12 January 2010, the author received the results of the amniocentesis over the phone, and was told that the baby also suffered from trisomy 13 (Patau’s syndrome), a chromosomal condition associated with severe intellectual disability and physical abnormalities in many parts of the body. The author was told that this condition was “incompatible with life”.

2.3 The author felt she could not continue with the pregnancy only to see her baby suffer and die, and that the continuation of the pregnancy would bring her terrible mental suffering. Thus, she and her husband decided to terminate the pregnancy. They contacted several crisis pregnancy agencies, including Cura and Positive Options, to seek information on traveling to the United Kingdom of Great Britain and Northern Ireland.<sup>2</sup> However, because most agencies were only able to assist women whose pregnancies were no further along than 13 weeks, the author did not receive any information on traveling to the United Kingdom, and “felt lost and totally on [her] own”. Through a friend, the author obtained contact information for the Liverpool Women’s Hospital and fixed an appointment there. The Hospital asked her to send relevant medical records by fax, and this was an additional hurdle for the author to overcome, as she did not have a fax machine. When the author returned to the hospital in Wexford in order to obtain the requested records, several staff members were insensitive towards her, with no regard for the devastating news she had received only a few days earlier. She finally managed to consult a locum doctor, who was very understanding. The author had to share the medical records with an acquaintance, who helped her to send them by fax. She feared the acquaintance would judge her for deciding to terminate the pregnancy.

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<sup>1</sup> In an affidavit dated 4 March 2014, the author stated: “Upon hearing that we would be offered a termination in another country we knew our baby’s problem was very severe. On reflection this was probably the consultant’s way of informally telling us that we could travel to terminate the pregnancy and that there was nothing they could do for us.”

<sup>2</sup> In her affidavit, the author states that she “began to ring around to some ‘crisis’ pregnancy agencies, including Cura and Positive Options .... None of them were able to help or provide the information we needed as most can only help if your pregnancy is 13 weeks or less. We did get the name of a private clinic in London whom we rang but it did not feel right to us to be going to one of these clinics at such a late stage in pregnancy.”

2.4 The author was so consumed with arranging for the journey to England that she did not have time to process her grief. She and her husband had to leave their 20-month-old son with relatives for several days; this was the first time they had left him overnight. They also had to arrange for leave from work and farm relief, as the author's husband is a farmer. The author's manager, whom she trusted, approved a sick note stating that the author had had a miscarriage. On 17 January 2010, feeling like "a criminal leaving [her] country", the author travelled to Liverpool and was joined shortly thereafter by her husband. On 18 January, she underwent scans and tests at Liverpool Women's Hospital, which reiterated the fatal diagnosis for the baby. The author was informed about the procedure for terminating a pregnancy and received an injection of intracardiac potassium chloride to stop the fetal heartbeat. On 20 January, she gave birth to her stillborn son at 21 weeks and 5 days. She and her husband spent the night in the hospital and were able to hold their son and say their goodbyes. On 21 January, a bereavement counsellor gave the author and her husband information about bereavement services in the United Kingdom, but did not have any information on similar services in Ireland.

2.5 The author had to leave the baby's remains at the Liverpool hospital, and was heartbroken to have to part with him in a foreign country. The baby was cremated in Liverpool three weeks later, and the author and her husband received the ashes by courier a few days later. The termination, cremation, travel and stay in Liverpool cost the author and her husband approximately 2,900 euros.

2.6 It was only after returning home that the author had time to grieve. Her grief was mixed with feelings of anger, as the experience of being forced to leave her country in her situation had been truly demeaning. She returned to work one week after returning to Ireland, as she feared facing questions from colleagues and losing her job. She was not legally entitled to any paid maternity leave. The author attended a check-up with her general practitioner six weeks after the termination procedure, as suggested by the Liverpool hospital. Although the doctor was sympathetic and non-judgmental, and discussed the possibility of future pregnancies, the author was never offered any grief counselling. She felt very isolated during the subsequent months, and suffers from complicated grief due to the traumatic experience she endured and the forced delays in the grieving process.<sup>3</sup>

2.7 The author asserts that domestic remedies were neither effective nor adequate in her case. Under article 40.3.3 of the Constitution, as interpreted by the Supreme Court of Ireland in *Attorney General v. X and Others*,<sup>4</sup> abortion is a crime and is only permitted 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 pregnant woman. At the time of the events in question, the Offences against the Person Act 1861 was the basis for criminal regulation of abortion in Ireland and defined any attempt to procure or perform an abortion as a felony punishable by life imprisonment.<sup>5</sup> The author states that the issues in the complaint are not being examined and have not been examined by any other international body.

## The complaint

### *Claims under article 7*

3.1 The application of the State party's abortion law 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 information she needed and

<sup>3</sup> The author provides an undated affidavit from an associate professor of midwifery who interviewed the author on 12 December 2013. According to the affiant, the author suffers from complicated grief, "which has been compounded by a lack of supportive care around the diagnosis, ongoing frustration at being abandoned by the maternity services when she expressed a wish to terminate the pregnancy, and a sense of shame and feeling judged by society and her community for the decision she made, failure to follow up by maternity services and offer post termination care and a failure to offer appropriate grief counselling."

<sup>4</sup> [1992] 1 IR 1.

<sup>5</sup> The Protection of Life During Pregnancy Act 2013 criminalized abortion, punishable with a prison sentence of up to 14 years.

forcing her to continue carrying a dying fetus; (b) compelling her to terminate her pregnancy abroad; and (c) subjecting her to intense stigmatization for terminating her pregnancy.

3.2 The expectation of care that the author had formed as a patient, her extreme vulnerability upon learning that her baby would die, the complete denial of information from her health-care providers and the prospect of having to terminate a much-wanted pregnancy abroad with no support from the Irish health-care system illustrate the intense mental anguish suffered by the author. The health-care system's abandonment of its care for her, including through its failure to provide her with any counselling services or information about her options, made her feel as if she were entirely undeserving of care, and was not treated with respect for the dignity inherent in her person. Furthermore, no special arrangements were made to offer sensitive, supportive care to her should she have chosen to continue her pregnancy in Wexford, and she would have had to continue attending her medical appointments as if hers was a normal pregnancy.

3.3 Having to travel abroad and be forcibly separated from her family and far from home also exposed the author to certain obstacles to her recovery, which impinged on her physical and mental integrity and dignity. It also interfered with her ability to mourn the loss of her pregnancy. Her emotional distress was prolonged because she had to leave the baby's remains abroad and therefore was denied the rituals that normally accompany loss and grief.<sup>6</sup>

#### *Claims under article 17*

3.4 The prohibition on pregnancy termination constituted a breach of the author's right to privacy, as it compromised her reproductive autonomy and her right to integrity and mental well-being by denying her the support of her family during a moment of trauma and crisis. The Committee's Views in *K.N.L.H. v. Peru* indicate that women's reproductive autonomy is included in the right to privacy and may be at stake when the State interferes with a woman's reproductive decision-making.<sup>7</sup> By banning abortion and preventing the author from exercising the only option that would have respected her physical and psychological integrity (allowing her to terminate her pregnancy in Ireland), the State arbitrarily interfered in her decision-making. The ban on abortion, which prioritized fetal life over the author's right to mental well-being, psychological integrity and reproductive autonomy, constituted a clearly disproportionate interference with the author's right to privacy.

3.5 Furthermore, the physical distance from her well-known surroundings and family, as well as the emotional trauma of feeling abandoned by her own country, interfered with her private life, understood as the relationships and support framework she enjoyed in Ireland. By defining the moral interest in protecting fetal life as superior to the author's right to mental stability, psychological integrity and reproductive autonomy, Ireland breached the principle of proportionality and violated her right to privacy. Even if the Committee accepts that the protection of the life of the "unborn" can serve as a justification for interfering with a woman's right to privacy in certain situations, this cannot apply in the present case. 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 measure to protect the life of the unborn. Thus the interference with her right to privacy was arbitrary.

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<sup>6</sup> The author provides an affidavit dated 4 November 2013 from a consultant psychiatrist who interviewed the author on 29 January 2014. The psychiatrist stated, inter alia, that the author "appears to have trusted the state, and that the betrayal of this trust was in itself a shock to her. She suffered unnecessary distress in relation to the absence of any response from the state services; the trauma of separating her son from his parents for the first time; being forced to travel abroad for the sole purpose of having a physically and psychologically difficult procedure; having to leave her baby's remains in a foreign country and finding the financial resources to fund the travel and the procedure." The psychiatrist was "of the opinion that through the process of deliberate neglect of her care in the Irish health service that she has suffered cruel and inhuman treatment and that this has had a permanent effect on her personality".

<sup>7</sup> Communication No. 1153/2003, Views adopted on 24 October 2005.

*Claims under article 19*

3.6 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 travelling abroad for an abortion and regulates the conduct of providers of such information, such as counsellors and health providers. The Act indicates that the provision of information, advice or counselling about abortion services overseas is unlawful if, *inter alia*, it advocates or promotes the termination of pregnancy. The Act also prohibits the distribution of written information to the public without solicitation by the recipient, and has been interpreted to require that information, advice or counselling about termination of pregnancy can only be provided in a face-to-face counselling session, and not over the phone.

3.7 While the Act prohibits health-care providers from advocating or promoting the termination of pregnancy, it lacks any definition of the types of speech that would constitute “advocacy” or “promotion.” This deficiency has a chilling effect on health-care providers’ speech. The author’s treating physicians in Ireland denied her the information she needed. They did not offer her any leaflets or phone numbers that could have allowed her to obtain further information about the fetal diagnosis. Nor was she offered any information about termination or travel options. The doctor who treated her in Dublin handed her a report with the words, “in case [you] want to travel”, but did not elaborate on what travelling for a pregnancy termination would entail. Believing that health-care providers were legally precluded from providing her with further information, the author felt abandoned and feared she would face judgment or legal repercussions if she requested relevant information.

3.8 The restrictions on sexual and reproductive health information that the author experienced cannot be characterized as being provided for by law for the purpose of the test under article 19 (3). The State’s interference with her access to sexual and reproductive health information was also not a permissible limitation on her right to information under article 19 on the ground of protection of morals and was discriminatory. The restrictions were directly related to the perceived need to protect the right to life of the “unborn” in the Constitution. However, in the author’s situation, the “unborn” had no prospect of life. The denial of information was therefore irrelevant to the aim of protecting the “unborn”.<sup>8</sup>

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<sup>8</sup> The author provides a report issued by the Irish Family Planning Association, a non-governmental organization that provides sexual and reproductive health consultations nationwide. The report addresses the experiences of Irish women who have received a diagnosis of fatal fetal anomaly and seek to terminate the pregnancy. The report states that the abortion information act, which is interpreted conservatively, has a chilling effect on information provision by health-care professionals, who assume or fear that they are precluded from discussing abortion with patients. While doctors are free to engage in the normal communication of information and advice with patients and other professionals, in reality most doctors do not discuss abortion with their patients, perhaps out of fear of possible repercussions, including damage to their reputation and career prospects, malpractice complaints or allegations of a breach of the law or of professional ethics guidelines. Women who receive diagnoses of fatal fetal anomaly need information on the process and the appropriate aftercare and associated procedural risks; on the post-abortion treatment of fetal remains; on issues such as post-mortem examination, chaplaincy services, cremation and funeral arrangements; and on costs and visa requirements, if applicable. Many women seeking to terminate pregnancy feel anger at the experience of being expelled and exiled from a health service they trust — and pay for through taxes. The author also provides a statement from a general practitioner physician and spokesperson for Doctors for Choice Ireland, an alliance of medical professionals advocating for comprehensive reproductive health services in Ireland. According to the statement, a scientific paper published in September 2012 noted that 87 per cent of the 500 physicians surveyed in Ireland are in favour of providing abortion services in cases of fatal fetal abnormalities. The study also indicated that the requirement to travel overseas for an abortion causes the patient physical, psychological and social ill-health, an impaired doctor-patient relationship and an impaired doctor-doctor relationship.

*Claims under articles 2 (1), 3 and 26*

3.9 The author suffered several violations of her rights to equality and non-discrimination. Under the country's highly restrictive abortion law, she was denied on the basis of her sex access to medical services that she needed in order to preserve her autonomy, dignity and physical and psychological integrity. In contrast, male patients and patients in other situations in Ireland are never expected to disregard their health needs and moral agency in relation to their reproductive functions, or to leave their family and country in order to receive health care. The rights to equality and non-discrimination require States to ensure that health services accommodate the fundamental biological differences between men and women in reproduction.

3.10 In addition, the author's rights to equality and non-discrimination under articles 2 (1) and 3 read in conjunction with articles 7, 17 and 19 of the Covenant were violated because, due to her sex, she was not fully informed by Irish health providers of the options available to her, including the use of legal abortion services abroad. In contrast, male patients and patients in other situations are not denied critical health information and are not abandoned by the health care system in this regard. The author received discriminatory treatment from the Irish health-care providers, who treated her as if her pregnancy were progressing normally, without offering the support and care that her particular circumstances required. This treatment was not based on objective or reasonable grounds.

3.11 The author was also subjected to gender-based discrimination insofar as she was stereotyped as a reproductive instrument whose needs were subordinate to those of her unborn, non-viable fetus. Restrictive abortion laws constitute a form of discrimination against women. Because the author's health was not endangered by the pregnancy, she was expected to sacrifice her own mental health and well-being for her dying fetus, and was not treated according to her particular medical needs. The rights to equality and non-discrimination require States parties to take affirmative measures to eliminate gender stereotypes in reproductive health care.

*Remedies requested*

3.12 The author requests that the State party: (a) provide her with appropriate compensation; (b) review relevant provisions of the Constitution, as necessary, to conform with articles 2, 3, 7, 17, 19 and 26 of the Covenant; (c) amend the Protection of Life During Pregnancy Act 2013 to conform with articles 2, 3, 7, 19 and 26 of the Covenant; (d) take measures necessary to ensure effective, timely and accessible procedures for legal pregnancy termination in Ireland; and (e) amend the abortion information act to bring it into line with article 19 of the Covenant, and ensure its proper implementation.

**State party's observations on the admissibility and merits**

4.1 In its observations dated 19 January 2015 and 14 October 2015, the State party does not contest the admissibility of the communication. It explains in detail the country's laws and regulations concerning termination of pregnancy. The Supreme Court has interpreted article 40.3.3 of the Constitution as permitting termination of the life of the unborn where there is a real and substantial risk to the life, as distinct from the health, of the mother.<sup>9</sup> The article reflects the profound moral choices of the people, as expressed through several popular referenda. Yet the Irish people have acknowledged that citizens are entitled to travel to other jurisdictions in order to terminate pregnancies, and Irish law guarantees the right to information on abortion services provided abroad. Thus, the constitutional and legislative framework reflects a nuanced and proportionate approach to the views of the Irish electorate on the highly politicized and divisive question of the extent to which the right to life of the fetus should be protected and balanced against the rights of the woman. The people's choices, which are based on deeply held and considered views, should be respected.

4.2 The Committee's jurisprudence permits limitations and allowances with respect to the right to privacy (where limitations are proportional) and the right to non-discrimination

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<sup>9</sup> The State party cites *Attorney General v. X and Others*.

(where limitations are based on reasonable and objective grounds.) The State party urges the Committee to follow the approach of the European Court of Human Rights, as set forth in *A, B and C v. Ireland*.<sup>10</sup> Noting that Irish law permits travel abroad for the purposes of abortion, and provides for appropriate access to information and health care, the Court considered that the prohibition on abortion for reasons of health and/or well-being did not exceed the margin of appreciation accorded to member States. The Court struck a fair balance between the applicants' privacy rights 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 a violation of applicant C's right to private and family life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), in that no accessible and effective procedure enabled her to establish whether she qualified for lawful termination of pregnancy. Academic analyses and discussions indicate that many of the Committee's decisions reveal choices that are consistent with the doctrine of margin of appreciation.<sup>11</sup>

4.3 Following the above-mentioned judgment, the Protection of Life During Pregnancy Act 2013 was adopted in Ireland. Under the Act, abortion is permitted where there is a threat to the life of the woman due to physical illness and in emergencies. The Act also addresses situations where there is a real and substantial risk of loss of the woman's life by way of suicide. The Act 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 country. Under the Act, intentional destruction of unborn human life is an offence punishable by a fine or imprisonment for a term not exceeding 14 years.

4.4 The gradual evolution of Irish law on abortion, produced by the democratic process of consultation, debate and direct action of inclusion, has at all times attempted to seek a careful balance between the constitutional right to life of the unborn with equal regard to that of the mother. Moreover, any measures the State party has taken have not been disproportionate to the legitimate aim pursued of protecting life. While the author argues that prenatal rights and life are excluded from protection under the Covenant, article 6 (5) prohibits imposition of the death penalty for pregnant women. Thus, it cannot be concluded that the Covenant does not afford any protection to the right to life of the unborn child.

#### *Claims under article 7*

4.5 In *K.N.L.H. v. Peru*, the State party had allegedly denied the author access to a lawfully available therapeutic abortion when she was pregnant with an anencephalic fetus. In the absence of observations from the State party, the Committee deemed that this constituted arbitrary interference with the author's right to privacy. However, in the present case, the State party did not deny the author access to lawful abortion procedures. Such a procedure was not available to the author, and she was clearly and properly informed of this by the relevant State agents. Accordingly, and contrary to what occurred in *K.N.L.H. 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.<sup>12</sup> Thus, in the present case, none of the author's rights was arbitrarily interfered with so as to result in cruel, inhuman and degrading treatment.

4.6 According to the State party: "If any findings were made in this case, in the absence of arbitrary actions of agents of the State, but on the basis of evolved constitutional and legal principles, this would represent a significant difference in kind (as opposed to a difference in degree) in the jurisprudence of the Committee." Such a finding would be contrary to paragraph 2 of general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, according to which it is the

<sup>10</sup> Application No. 25579/05, judgment of 16 December 2010.

<sup>11</sup> The State party cites, inter alia, Yuval Shany, "Toward a general margin of appreciation doctrine in international law?", *The European Journal of International Law*, vol. 16, No. 5 (2005), p. 929.

<sup>12</sup> According to the State party, the same argument applies with respect to the Views of the Committee on the Elimination of Discrimination against Women on communication No. 22/2009, *L.C. v. Peru*, adopted on 17 October 2011, and those of the Human Rights Committee on communication No. 1608/2007, *L.M.R. v. Argentina*, adopted on 29 March 2011.

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. In the present case, there was no act of “infliction” by any person or State agent; therefore, there was no cruel, inhuman or degrading treatment.

4.7 The State party has not engaged in cruel, inhuman or degrading treatment, given that:

(a) There are significant and material factual differences between the cases the author relies upon and her own situation;

(b) In circumstances where 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 this decision-making process, or that they were responsible for any act of “infliction”;

(c) The grounds for lawful abortion were well-known in Ireland and were applied in accordance with 40.3.3 of the Constitution, the grounds as elucidated by the Supreme Court in the *X* case, the Medical Council guidelines and the Crisis Pregnancy Agency 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, this was her subjective understanding of the law;

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

(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*

4.8 The State party did not violate the author’s rights to privacy or integrity under article 17 of the Covenant. If there were any interference with her privacy, this 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.

4.9 In the aforementioned *A, B and C* case, the European Court of Human Rights considered 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.

4.10 In *K.N.L.H. v. Peru* and *L.M.R. v. Argentina*, in which the Committee found violations of article 17, existing legislation allowed for therapeutic terminations of pregnancy. The authors in those cases were initially told that they qualified for lawful terminations, but these rights were then not protected by the States in question. In the instant 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 that occurred in those cases did not occur in the present case.

*Claims under article 19*

4.11 The author has not substantiated her claim that her right to receive information under article 19 was violated. Non-directive information on termination services in other countries is available under Irish law, in accordance with the abortion information act. The author states that the consultant's remark at the hospital in Wexford (mentioning that in another country, she would be offered a termination of pregnancy, whereas this was not possible in Ireland) was an informal way of telling her and her husband that they could travel to terminate the pregnancy. Further, at the hospital in Dublin, the author was given the name of a hospital in the United Kingdom. The author also states that she felt she could not even raise the issue of terminating the pregnancy because it was illegal. She further states that she called several crisis pregnancy agencies, and that none was able to assist because her pregnancy was over 13 weeks along. She also states that she obtained the name of a private clinic in London, though she did not feel comfortable calling the clinic. The full nature and context of the discussions between the author and these services is not at all clear, and the Committee is not in a position to evaluate factual issues. The legislative framework in place entitled the author to certain information. The author does not specify how exactly this framework was not respected. Any failure to ascertain information she was clearly legally entitled to seems to have been based on misapprehensions on the author's part as to the effect of Irish law. In making available to the author, on a public basis, appropriate organizational information from where the author could ascertain all of the relevant information she required, no censorship can be said to exist. Further, the crisis pregnancy programme of the Health Service Executive provides to the public a rich resource of free online information concerning crisis pregnancies and abortion. At the website of Positive Options, for example, it is explained that it is legal under certain specified conditions for a woman to be given contact information on abortion services outside Ireland.<sup>13</sup> This information was available to the author at the relevant time.

4.12 The affidavit provided by the representative of the Irish Family Planning Association refers to certain opinions that are not supported by empirical evidence. These include the statements that many health-care professionals assume or fear that they are precluded from discussing abortion; and that they avoid using the word "abortion" in favour of euphemisms that are entirely inappropriate and insensitive in doctor-patient communication concerning crisis pregnancies. Similarly, in the affidavit of the general practitioner, additional statements of personal opinion are made without reference to empirical evidence (concerning the alleged uncertainty of Irish doctors about how much information and support they can give to a patient who wants an abortion).

*Claims under articles 2 (1), 3 and 26*

4.13 The State party did not subject the author to discrimination. If there were any discrimination, it should be considered a reasonable and objective differentiation to achieve a purpose that is legitimate under the Covenant. There can be no "invidious discrimination" in relation to a pregnant woman, as her physical circumstances are inherently different from those of a man. This differentiation is a matter of fact and can only be accepted as axiomatic.

4.14 The challenged legal framework, namely article 40.3.3 of the Constitution and the relevant provisions of the Offences against the Person Act does not discriminate against women on the ground of sex. This framework is gender neutral. If a man procured or carried 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 the ground of gender, any such discrimination would be in pursuit of the legitimate aim of protecting the fetus and would 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 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.

<sup>13</sup> The State party refers to [www.positiveoptions.ie/abortion-the-law/](http://www.positiveoptions.ie/abortion-the-law/).

4.15 The State party disputes 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 In her comments dated 22 May 2015, the author contests the State party's portrayal of the Irish people's views on abortion. For many years, opinion polls have indicated that a significant majority of the Irish people support legalizing access to abortion in cases of non-viable pregnancies and fatal fetal impairments. A similarly high majority support legalizing abortion where the pregnancy results from sexual assault, or where a woman's health is at risk. The results of the country's constitutional referenda do not confirm the State party's description of the Irish people's profound "moral choice", because the Irish electorate has never voted on a proposal to increase the number of situations in which access to abortion is legal. Indeed, the Irish people have never had the opportunity to express the view that abortion should be made available to women in circumstances other than where there is a risk to a woman's life. In fact, voters rejected two proposals that would have made abortion illegal where a woman is at risk of suicide. Furthermore, in the three constitutional referenda on abortion, the percentage of the eligible electorate voting in favour of restrictions was less than 35 per cent.

5.2 The Protection of Life During Pregnancy Act 2013 is irrelevant to the author's complaint, since it merely regulates procedures to be followed when a woman who faces a real and substantial risk to her life seeks an abortion.

#### *Claims under article 7*

5.3 Because the prohibition of cruel, inhuman or degrading treatment or punishment is absolute, no derogations are permitted, and a State party may not seek to justify its conduct by balancing an individual's rights under article 7 with the "rights of others". The notion of a margin of appreciation, which the Committee has explicitly rejected, is irrelevant in an appraisal of article 7 protections.<sup>14</sup> Also irrelevant is whether the State party's conduct caused ill-treatment through arbitrary action. Rather, the determinative issue under article 7 is whether harm suffered amounted to ill-treatment and whether the conduct from which the harm resulted was attributable to the state.

5.4 The State party suggests that because the abortion the author sought was illegal under domestic law, the State party's denial of this procedure cannot be considered to amount to ill-treatment. However, because the protections under article 7 are absolute, domestic law may never be invoked to justify a failure to discharge obligations under the Covenant. When the author was denied an abortion, her suffering was aggravated, not alleviated, by the knowledge that abortion is a crime in Ireland.

5.5 Omissions may constitute ill-treatment, and the public employees who provided the author's medical care omitted to administer the abortion she sought. Because she was denied an abortion by State agents acting in accordance with State laws and policies, the author endured severe pain and suffering reaching the threshold required by article 7. Although some health-care professionals were kind to her, on the whole she felt abandoned and ostracized by the Irish health-care system.

#### *Claims under article 17*

5.6 By denying the author access to an abortion procedure, the State party arbitrarily interfered with her right to privacy in a manner that is not permissible under the Covenant for the following reasons:

(a) By criminalizing and prohibiting abortion, the State party discriminated against the author because she is a woman, thereby contravening the prohibition of discrimination on the basis of sex enshrined in articles 2 and 3 of the Covenant;

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<sup>14</sup> The author cites general comment No. 34 (2011) on the freedoms of opinion and expression, para. 36.

(b) The interference with the author's right to privacy 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 the author's right to privacy was necessary towards achieving the legitimate aim invoked. As indicated above, the State party's characterization of the Irish people's "profound moral choices" is misrepresentative of the views of a majority of 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 that 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 its 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 gave rise to serious mental pain and suffering. In this 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. Rather, 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 encountered by the author.

#### *Claims under article 19*

5.8 The author rejects the State party's claim that it respected her right to information under article 19 by promulgating laws on abortion and establishing crisis pregnancy websites and agencies, and by making indirect and vague allusions to abortion services abroad during her medical consultations. The publicly employed medical professionals treating the author failed to provide her with clear evidence-based medical information on how to obtain a legal abortion in another jurisdiction. The State party is responsible for providing this information and may not shift this burden onto the author or fulfil its obligations in this regard by merely establishing websites with publicly available information.

5.9 The abortion information act represents a system of strict State control governing the manner in which information must be given. Under the Act, doctors may not refer patients to abortion providers abroad. Failure to comply with the Act is an offence subject to a fine. This punitive legal framework deterred the author's doctors from providing the information she sought, and made her feel like a criminal.

5.10 The author rejects the State party's claim that her allegations concerning the right to information are unsubstantiated. The author stated in a sworn affidavit that the medical staff at the hospitals in Ireland failed to provide her with the medical information she needed. Her testimony was corroborated by that of several other medical professionals, who noted the serious chilling effect of the abortion information act on health-care professionals in Ireland.

5.11 The State party has not justified its restrictions on the author's right to information. These restrictions were not prescribed by law and did not comply with article 19 (3) of the Covenant, since they were not formulated with sufficient precision to enable an individual

to regulate his or her conduct accordingly.<sup>15</sup> The restrictions had no purpose other than to impair the author's enjoyment of her right to information on abortion services abroad. The restrictions were also disproportionate in the light of their detrimental impact on the author's dignity and well-being.

*Claims under articles 2, 3 and 26*

5.12 The State party incorrectly asserts that article 40.3.3 of the Constitution is gender neutral. However, this provision does not "balance" the right to life of men, or their enjoyment of other rights. Furthermore, the first part of article 58 of the Offences against the Person Act applies only to women. The legal framework has a distinct and wholly disproportionate impact on women such as the author.

5.13 States parties may not invoke women's biological differences from men and their reproductive capacity as a basis for restricting their rights. The prohibition of abortion in cases of fatal fetal impairments and non-viable pregnancies is not proportionate to the aim of protecting the fetus. The author, who found herself in these circumstances, was treated as inferior to the fetus and was subjected to wrongful gender stereotyping.

**Issues and proceedings before the Committee**

*Consideration of admissibility*

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

6.2 Recalling article 5 (2) (a) of the Optional Protocol, the Committee notes that the same matter is not being examined and has not been examined under another procedure of international investigation or settlement.

6.3 The Committee takes note of the author's claim that she has exhausted all effective domestic remedies available to her. In the absence of any objection by the State party in this connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met. The Committee further notes that the State party does not dispute on any other grounds the admissibility of the communication. Because all admissibility criteria have been met, the Committee considers the communication admissible and proceeds to examine it 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 for under article 5 (1) of the Optional Protocol.

7.2 The author of the present communication was informed by public medical professionals during the twentieth week of her pregnancy that her fetus had a fatal condition and would in all likelihood die in utero or shortly after birth. Because of the legal prohibition of abortion in Ireland, the author had to either carry the pregnancy to term, knowing that the fetus would most probably die inside of her, or voluntarily terminate the pregnancy abroad. Article 40.3.3 of the Constitution provides in this 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 indicates that under article 40.3.3, as interpreted by the Irish Supreme Court, it is lawful to terminate a pregnancy in Ireland 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). The State party argues that its constitutional and legislative framework,<sup>16</sup> which contains a single exception to the legal prohibition against

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<sup>15</sup> Ibid., para. 25.

<sup>16</sup> At the time of the events at issue, the Offences against the Person Act imposed the criminal penalty of life imprisonment for a woman or a physician who attempted to terminate a pregnancy. (See para. 2.7 above.)

abortion (risk to life) and arrangements for provision of information about obtaining abortion outside the country in other circumstances, reflects the nuanced and proportionate approach to the deeply held 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 women.

7.3 The author claims that the legal prohibition of abortion caused her to suffer cruel, inhuman and degrading treatment, in that she was denied the health care and bereavement support she needed in Ireland; felt pressurized to carry to term a dying fetus; had to terminate her pregnancy abroad without emotional support from her family; and was subjected to intense stigmatization and loss of dignity. The State party contests the author's claims by arguing, *inter alia*, that the prohibition on abortion seeks to balance the competing rights between the fetus and the woman; and 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 maintains that its laws guarantee access to information about abortion services provided abroad and constitute part of the balance it struck between the competing rights.

7.4 The Committee recalls that the legality of a particular conduct or action under domestic law does not mean that it cannot infringe article 7 of the Covenant.<sup>17</sup> The Committee notes that in the present case, the author's claims appertain to her treatment in State health facilities, which was the direct result of the legislation in place in Ireland. The existence of such legislation engages the responsibility of the State party for the treatment of the author, and cannot be invoked to justify a failure to meet the requirements of article 7.

7.5 The Committee considers it well established that the author was in a highly vulnerable position after learning that her much-wanted pregnancy was not viable. As documented in the psychological reports submitted to the Committee, her physical and mental situation was exacerbated by the following circumstances arising from the prevailing legislative framework in Ireland and by the author's treatment by some of her health-care providers in Ireland: being unable to continue to receive medical care and health insurance coverage for her treatment from the Irish health-care system; feeling abandoned by the Irish health-care system and having to gather information on her medical options alone; being forced to choose between continuing her non-viable pregnancy or travelling to another country while carrying a dying fetus, at personal expense and separated from the support of her family; suffering the shame and stigma associated with the criminalization of abortion of a fatally ill fetus; having to leave the baby's remains in a foreign country; and failing to receive necessary and appropriate bereavement counselling in Ireland. Much of the suffering the author endured could have been mitigated if she had been allowed to terminate her pregnancy in the familiar environment of her own country and under the care of health professionals whom she knew and trusted, and if she had received necessary health benefits that were available in Ireland, which she would have enjoyed had she continued her non-viable pregnancy to deliver a stillborn child in Ireland.

7.6 The Committee considers that the author's suffering was further aggravated by the obstacles she faced in receiving information she needed about appropriate medical options from her 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 statements that the health professionals in Ireland did not provide her with clear and detailed information on how to terminate her pregnancy in another jurisdiction or from which other health-care providers she could obtain such information, thereby disrupting the provision of medical care and advice that she needed and exacerbating her distress.

7.7. The Committee considers that, taken together, the facts described in paragraphs 7.5-7.6 above establish a high level of mental anguish that was caused to the author by a

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<sup>17</sup> See communication No. 2324/2013, *Mellet v. Ireland*, Views adopted on 31 March 2016, para. 7.4. See also the Vienna Convention on the Law of Treaties, art. 27.

combination of acts and omissions attributable to the State party, which violates the prohibition against cruel, inhuman or degrading treatment found in article 7 of the Covenant. The Committee also notes in this regard, as stated in paragraph 3 of general comment No. 20, that the text of article 7 may not be limited, and no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reason. Accordingly, it cannot accept as a justification or extenuating circumstances the State party's explanations concerning the balance between moral and political considerations that underlies the legal framework existing in Ireland.

7.8 The author further claims that by denying her the only option that would have respected her physical and psychological integrity and reproductive autonomy under the circumstances of this case (allowing her to terminate her pregnancy in Ireland), the State party interfered arbitrarily with her right to privacy under article 17 of the Covenant. The Committee recalls its jurisprudence according to which the scope of article 17 encompasses a woman's decision to request termination of pregnancy.<sup>18</sup> In the present case, the State party interfered with the author's decision not to continue her non-viable pregnancy, pursuant to article 40.3.3 of the Constitution and the Offences against the Person Act. Under these circumstances, the question before the Committee is not whether such interference has a legal basis in domestic law, but rather whether or not the application of domestic law was arbitrary under the Covenant, as 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.<sup>19</sup> The State party argues, in this connection, that the interference was not arbitrary, since it 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 women.

7.9 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 refers in this regard to its Views in *Mellet v. Ireland*, which dealt with a similar refusal to allow for termination of pregnancy involving a fetus suffering from fatal impairment.<sup>20</sup> The Committee notes that, like in *Mellet v. Ireland*, preventing the author from terminating her pregnancy in Ireland caused her mental anguish and constituted an intrusive interference in her decision as to how best to cope with her pregnancy, notwithstanding the non-viability of the fetus. On this basis, the Committee considers that the State party's interference in the author's decision is unreasonable and that it thus constitutes an arbitrary interference in the author's right to privacy, in violation of article 17 of the Covenant.

7.10 The author claims that by criminalizing abortion on the ground of fatal fetal impairment through legislation that only restricts the rights of women, the State party violated her rights to equality and non-discrimination under articles 2 (1), 3 and 26. The State party maintains that its laws regarding termination of pregnancy are gender-neutral and non-discriminatory.

7.11 The Committee notes that under the laws of the State party, pregnant women who decide to carry to term their fatally impaired fetuses 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 needed post-natal medical attention as well as bereavement care. By contrast, women who choose to terminate a non-viable pregnancy must do so in reliance on their own financial resources, entirely outside of the public health-care system. They are denied health insurance coverage for these purposes; 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 needed post-termination medical care and bereavement counselling. The Committee further notes the author's uncontested allegations

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<sup>18</sup> See *Mellet v. Ireland*, para. 7.7; *K.N.L.H. v. Peru*, para 6.4; and 1608/2007, para 9.3. See also general comment No. 28 (2000) on the equality of rights between men and women, para. 10.

<sup>19</sup> See general comment No. 16 (1988) on the right to privacy, para. 4.

<sup>20</sup> See *Mellet v. Ireland*, para. 7.8.

that in order to terminate her non-viable pregnancy, she was required to travel abroad at her own expense.

7.12 The Committee recalls paragraph 13 of its general comment No. 18 (1989) on non-discrimination, in which it 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 she was denied on the basis of her sex access to medical services that she needed in order to preserve her autonomy, dignity and physical and psychological integrity; that, in contrast, male patients and patients in other situations in Ireland are not expected to disregard their health needs and travel abroad in relation to their reproductive functions; and that the State party's criminalization of abortion subjected her to a gender-based stereotype according to which the primary role of women is reproductive and maternal. The Committee considers that the differential treatment to which the author was subjected in relation to other women who decided to carry to term their unviable pregnancy created a legal distinction between similarly situated women that 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.

7.13 In the light of the findings above, the Committee will not separately examine 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 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 to, inter alia, provide the author with adequate compensation and to make available to her any needed psychological treatment. The State party is also under an obligation to take steps to prevent similar violations occurring in the future. To this end, the State party should amend its law on voluntary termination of pregnancy, including, if necessary, its Constitution, to ensure compliance with the Covenant, including with respect to 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 being subjected to criminal sanctions,<sup>21</sup> as indicated in the present Views.

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 and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or 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 present Views.

<sup>21</sup> See also CCPR/C/IRL/CO/4, para. 9.

## Annex I

[Original: French]

### **Separate opinion of Committee member Yadh Ben Achour**

1. I agree with the findings of the Human Rights Committee that the facts in the present case (communication No. 2425/2014) disclose a violation of articles 7, 17 and 26 of the Covenant. In paragraph 7.13 of its Views, the Committee decided nevertheless not to examine separately the author's allegations under articles 2 (1) and 3 of the Covenant.

2. I am of the opinion that, in its consideration of the merits, the Committee should have upheld the author's claim that, in Ireland restrictive abortion laws constitute a form of discrimination against women. The author points out that, in contrast, male patients and patients in other situations in Ireland are never expected to disregard their health needs and moral agency in relation to their reproductive functions, or to leave their family and country in order to receive health care. The rights to equality and non-discrimination require States to ensure that health services accommodate the fundamental biological differences between men and women in reproduction (see paragraph 3.9). According to the author, the Irish legislation that makes abortion a criminal offence also violates articles 2 (1) and 3 of the Covenant.

3. In paragraph 7.12 of its Views, the Committee begins by referring to this problem in the same terms as the author, noting that male patients in Ireland are not expected to disregard their health needs and travel abroad in relation to their reproductive functions and that the State party's criminalization of abortion subjected the author to a gender-based stereotype according to which the primary role of women is reproductive and maternal.

4. But then, abandoning this logic and shifting its perspective, the Committee addresses the author's claim on the basis of another ground, taken from another sphere, that differs in nature from the ground invoked by the author. In fact, the type of discrimination to which the Committee refers is no longer that of gender-based discrimination between men and women but rather discrimination on the basis of economic factors among women. It considers that the differential treatment to which the author was subjected created a legal distinction between similarly-situated women and that the existing legal situation in the State party, which allows women to seek, at their own expense, termination of pregnancy in foreign countries, imposes an exceptionally heavy burden on women of low socioeconomic status when compared to other women with superior economic means.

5. While I agree with this point of view, which is based on article 26, I nevertheless consider that the author was right to believe that, because of its effects, the Irish legislation in question also constituted a violation of articles 2 (1) and 3 of the Covenant. By denying women their freedom with regard to a matter concerning their reproductive functions, this type of legislation runs contrary to the right to non-discrimination on the basis of sex because it denies women the ability to exercise their free will in this area. No similar restrictions are imposed on men. This type of legislation imposes a disproportionate, abnormal and unjust existential burden on women, by virtue of being women.

6. Through its binding, indirectly punitive and stigmatizing effects, the prohibition of abortion in Ireland targets women, by virtue of being women, and places them in a specific situation of vulnerability that is discriminatory in comparison with men. As a result of the application of this legislation, the author was, in fact, subjected to a gender-based stereotype according to which a woman's pregnancy should be continued no matter what the circumstances, except where her life is endangered, since the role of women is limited exclusively to that of procreative motherhood. The act of reducing the author to an instrument of procreation constitutes discrimination and simultaneously infringes her freedom of self-determination and her right to gender equality and personal autonomy.

7. On the basis of these considerations, I am therefore of the opinion that the fact that the State, in applying its internal legislation, did not allow the author to terminate her

pregnancy in accordance with her own, free assessment of the whole of her situation constitutes gender-based discrimination, which is one of the forms of discrimination on the grounds of sex referred to in articles 2 (1) and 3 of the Covenant.

8. The State party's legislation therefore violates the rights to which the author is entitled under articles 2 (1) and 3 of the Covenant, read in conjunction with article 26.

## **Annex II**

### **Individual opinion of Committee member Sarah Cleveland (concurring)**

I concur in the decision of the Committee, both for the reasons set forth by the Committee in its Views, and for the reasons stated in my separate opinion in *Mellet v. Ireland*, communication No. 2324/2013, Views adopted on 31 March 2016.

## **Annex III**

### **Individual opinion of Committee member Olivier de Frouville (concurring)**

While in agreement with the conclusions of the Committee in the present communication, I wish to reiterate the position I held, together with my former colleagues Fabián Salvioli and Víctor Rodríguez Rescia, in the Views of 31 March 2016 concerning communication No. 2324/2013, *Mellet v. Ireland*.

## Annex IV

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

1. The Committee's Views are not about the prohibition of abortion in general but relate to the particular facts of this case. The holding and the recommendations therefore apply only to the case in which the fetus, according to the uncontested submission by the author, was not viable.<sup>a</sup>
2. The denial of postnatal medical attention, as well as the failure to provide the author with bereavement care that is available to women who carry their non-viable fetus to term, contributed, inter alia, to the author's suffering, which led the Committee to find a violation of article 7 in her case (see paras. 7.5-7.7 of the Views). While I agree with this holding, I fail to recognize why it was necessary and appropriate to find on the same grounds also a violation of article 26 after the Committee had already concluded that articles 7 and 17 had been violated. Not only are the claims on which the majority of the Committee based its findings under article 26 already absorbed by the wider issue decided under articles 7 and 17, such that there is no useful legal purpose served in examining them under article 26 (see paragraph 7.12 of the Views),<sup>b</sup> they are also insufficient to sustain a violation of article 26.
3. I recognize that the Committee limited its holding to the difference in treatment "in relation to other women who decided to carry to term their unviable pregnancy" (see para. 7.12 of the Views) and did not find a discrimination based on sex and gender. Nevertheless, I cannot agree with the majority's conclusion under article 26 for the following reasons.
4. 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.<sup>c</sup> Difference in treatment requires comparable situations in order to give rise to discrimination.<sup>d</sup>
5. With respect to abortion, the medical needs and services sought by the author are fundamentally different from obstetrics. Thus, in regard to termination of pregnancy, women are not in a comparable medical situation with respect to those who carry the pregnancy to term. For this reason, there are no grounds for finding the denial of abortion services to be discriminatory.
6. The situation is different with respect to post-partum care. I recognize that the post-pregnancy situation of women who have carried and lost a non-viable fetus is comparable irrespective of whether they carried the pregnancy to term. They suffer from the loss of a fatally ill fetus. It is cruel to deny bereavement support to women who, due to the non-viability of their fetus have undergone an abortion, whereas such support is available to women who have carried the pregnancy to term. But in the context of article 26 the issue remains whether this difference in treatment is based on any of the grounds specified therein, that is, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This is doubtful in the present case because the State party's regulatory framework does not have its origin in the status of a woman who undergoes an abortion but is based on moral views on the nature of life, which are held by the Irish population. One may disagree with the sustainability of protecting a fatally ill fetus.

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<sup>a</sup> See the references to "as indicated in present Views" and "similar violations" in paragraph 9 of the Views.

<sup>b</sup> See also European Court of Human Rights, *Dudgeon v. United Kingdom*, application No. 7525/76, judgment of 22 October 1981, paras. 67-69.

<sup>c</sup> See general comment No. 18 (1989) on non-discrimination, para. 7.

<sup>d</sup> See communication No. 1062/2002, *Šmidek v. Czech Republic*, decision of inadmissibility adopted on 25 July 2006, para. 11.5.

But this does not render moot the State party's intent to protect any fetal life until death. After all, we would never accept a death sentence carried out on a pregnant woman, irrespective of whether the pregnancy is viable or not.<sup>e</sup> Though the Committee in its findings under article 17 does not agree with the outcome of the State party's balancing of the right to life of the unborn and the rights of the woman because the fetus was fatally ill in the present case, this does not warrant the conclusion that the difference in treatment of women who undergo an abortion and those who carry to term is based on a personal characteristic of the woman concerned. The Committee thus has failed to explain why the difference in treatment was based on an impermissible ground.

7. Even if we assumed that the denial of bereavement support was based on an impermissible ground, 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 post-abortion medical care in domestic proceedings.<sup>f</sup> Pursuant to article 5 (2) (b) of the Optional Protocol the Committee is therefore prevented from finding a violation of article 26 in this regard.

8. Finally, for the reasons given in my separate opinion in *Mellet v. Ireland* I do not agree with those members who would have preferred if the Committee had found a violation on the basis of sex and gender. I refer to my previous opinion.<sup>g</sup> I also repeat that the Committee should preserve the autonomous meaning of article 26 by giving due account to the notion of discrimination and to the grounds prohibited thereunder rather than presuming a violation of this provision whenever a violation of one of the other rights protected under the Covenant are found. An overbroad reading is unnecessary under our Covenant<sup>h</sup> and would deprive article 26 of its particular value.

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<sup>e</sup> See article 6 (5) of the Covenant.

<sup>f</sup> The author only submitted that she had no reasonable prospect of success had she petitioned an Irish court for a termination of her pregnancy.

<sup>g</sup> See communication No. 2324/2013, *Mellet v. Ireland*, Views adopted on 31 March 2016.

<sup>h</sup> The Covenant provides not only for non-discrimination but also for substantive rights. The Committee, therefore, can deal with violations irrespective of whether they involve discrimination.