

ARTICLE

(EN)GENDERING SUFFERING: DENIAL OF ABORTION AS A FORM OF CRUEL, INHUMAN, OR DEGRADING TREATMENT

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* J.D., 2014, New York University School of Law; Clerk, U.S. District Court for the Eastern District of Pennsylvania. This Article benefited greatly from the insights provided by colleagues at the 2014 Center for Human Rights and Global Justice (“CHRGJ”) Emerging Human Rights Scholarship Conference at New York University School of Law. Special thanks are owed to Sally Burns, Johanna Fine, Ryan Goodman, Alex Kerchner, Amanda Klasing, and the students of the NYU Reproductive Justice Clinic who provided invaluable feedback on the draft Article. Earlier versions of this Article received the 2014 CHRGJ Emerging Scholar Essay Prize and the Virginia Law Human Rights Student Scholars Writing Competition Award. I am also grateful to the editors and staff at the *Fordham International Law Journal* for their hard work and skillful editing. All errors are my own.

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INTRODUCTION

International law has long considered the regulation of abortion to be a prerogative of the State. In recent years, however, international human rights bodies have begun to consider the conformity of domestic abortion regulations with States’ human rights obligations. This Article identifies and examines a notable trend among human rights bodies: namely, their willingness to find that denying or obstructing a woman’s access to abortion can amount to cruel, inhuman, or degrading treatment (“CIDT”) under multiple human rights treaties. This Article identifies two lines of reasoning emerging from human rights bodies in this area. First, human rights bodies have found that States can be responsible for cruel, inhuman, or degrading treatment inflicted on women who are harassed and denied services that are *legally* available to them under the State’s laws. Second, human rights bodies have found that the application of restrictive abortion laws themselves may inflict CIDT by depriving women of an

abortion in cases such as rape or when the woman's life or health is seriously threatened.

I argue that these findings reflect an understanding that certain restrictions on abortion—or the State's failure to act to prevent *de facto* restrictions—are unjustifiable and disproportionate to lawful State aims. They also demonstrate a limited but important recognition that deprivations of autonomy in the reproductive rights context can lead to the kind of pain and suffering that is unacceptable in modern societies. At the same time, I argue that human rights bodies should further strengthen their understanding of women's autonomy interests in this context, particularly the ways in which the frustration of women's reproductive autonomy can inflict severe and unacceptable pain or suffering tantamount to CIDT. Such recognition, I argue, is essential to ensuring that women's human rights are fully recognized and protected in the context of reproductive health and reproductive decision-making.

The prohibition on torture and cruel, inhuman, or degrading treatment is one of the most well established obligations under international law. While traditionally associated with extreme physical or psychological abuse committed against detainees by State actors in State-run facilities, the concept of torture and CIDT has expanded significantly in the past two decades, along with the justifications for holding a State responsible under international law for the commission of such acts. Torture and CIDT are increasingly viewed as acts that occur not only within State detention but also in everyday settings—from public and private healthcare facilities to the home. Human rights bodies have found violations of the right to be free from torture or CIDT in many cases of violence that were once considered outside the scope of the prohibition, including rape,¹ domestic violence,² coercive sterilization,³ female genital mutilation,⁴

1. See, e.g., *Aydin v. Turkey*, Eur. Ct. H.R. No. 23718/94 (1997) (acknowledging for the first time that an act of rape could constitute torture); *Raquel Martí de Mejía v. Peru*, Case 10.970, Inter-Am. Comm'n. H.R., Report No. 5/96, OEA/Ser.L./V/II.91, doc. 7 (1996). See generally ALICE EDWARDS, *VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW* 219–29 (2011) (analyzing human rights standards on rape and torture) [hereinafter EDWARDS, *VIOLENCE AGAINST WOMEN*]; Felice D. Gaer, *Rape as a Form of Torture: The Experience of the Committee Against Torture*, 15 N.Y. CITY. L. REV. 293 (2012); Clare McGlynn, *Rape, Torture and the European Convention on Human Rights*, 58 INT'L & COMP. L.Q. 565 (2009).

2. See, e.g., *Eremia v. Moldova*, Eur. Ct. H.R. No. 3564/11, ¶¶ 48–66 (2013) (applying Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms to a case of domestic violence); *Opuz v. Turkey*, Eur. Ct. H.R. No. 33401/02, ¶¶ 158–76 (2009)

and corporal punishment of children.⁵ Furthermore, while state responsibility for acts of torture or CIDT traditionally attached only when the act was committed by State agents or those under their control, human rights bodies today recognize that States may be held responsible—and accountable—for acts of torture or CIDT committed by private actors when the State has failed to take appropriate steps to prevent and punish these acts.⁶ These changes have set the stage for a recent and novel development in this area of human rights law: namely the recognition that, in certain circumstances, acts by public or private individuals to deny or obstruct a woman's access to abortion can cause such severe pain or suffering that they amount to cruel, inhuman, or degrading treatment, triggering state responsibility under international law.

International law has long considered the regulation of abortion to be an area of domestic concern and a prerogative, at least to some extent, of the State. While the European Court of Human Rights has a long-standing jurisprudence on abortion, primarily under Article 8—

(same); Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). *See generally* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1993–1994).

3. *See, e.g.*, I.G. & others. v. Slovakia, Eur. Ct. H.R. No. 15966/04, ¶¶ 112–26 (2013); N.B. v. Slovakia, Eur. Ct. H.R. No. 29518/10, ¶¶ 71–88 (2012); V.C. v. Slovakia, Eur. Ct. H.R. No. 18968/07, ¶¶ 100–20 (2012); Comm. Against Torture, Concluding Observations of the Committee Against Torture: Slovakia, ¶ 14, U.N. Doc. CAT/C/SVK/CO/2 (2009); Comm. Against Torture, Conclusions and Recommendations of the Committee against Torture: Peru, ¶ 23, U.N. Doc. CAT/C/PER/CO/4 (2006); Comm. Against Torture, Conclusions and Recommendations of the Committee against Torture: Czech Republic, ¶ 6, U.N. Doc. CAT/C/CR/32/2 (2004); Human Rights Comm., Concluding Observations of the Human Rights Committee: Slovakia, ¶ 12, U.N. Doc. CCPR/CO/78/SVK (2003); Human Rights Comm., General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) [hereinafter HRC, General Comment No. 28]; Human Rights Comm., Concluding Observations by the Human Rights Committee: Peru, ¶ 21, U.N. Doc. CCPR/CO/70/PER (2000); Human Rights Comm., Concluding Observations of the Human Rights Committee: Japan, ¶ 31, U.N. Doc. CCPR/C/79/Add.102 (1998).

4. *See, e.g.*, Comm. Against Torture, Concluding Observations of the Committee against Torture: Indonesia, ¶ 16, U.N. Doc. CAT/C/IDN/CO/2 (2008); Comm. Against Torture, Concluding Observations of the Committee against Torture: Kenya, ¶ 27, U.N. Doc. CAT/C/KEN/CO/1 (2008); HRC, General Comment No. 28, *supra* note 3, ¶ 11.

5. *See, e.g.*, A. v. United Kingdom, Eur. Ct. H.R. 25599/94 (1998) (finding that a minor who was repeatedly caned with force by his stepfather had experienced inhuman or degrading treatment under Article 3 of the European Convention on Human Rights).

6. *See infra* Part I.B; *see also* EDWARDS, VIOLENCE AGAINST WOMEN, *supra* note 1, at 237–52 (describing the development of a “due diligence” standard in human rights law to hold States accountable for acts of torture or CIDT committed by private actors).

right to private life—of the European Convention on Human Rights,⁷ it has only been in the last ten to fifteen years that other human rights bodies have begun to consider the legality of domestic abortion regulations under a State’s human rights obligations.⁸ These bodies have not found an explicit “right to choose” in human rights law, but have concluded that certain restrictions or barriers to accessing abortion may seriously undermine a woman’s human rights, including her rights to life, health, privacy, and non-discrimination, and that fulfillment of the associated right may therefore require reforms to domestic laws.⁹

Framing acts that deny or obstruct women’s access to abortion as forms of cruel, inhuman, or degrading treatment is part of a decades-long effort by feminist scholars and advocates to advance international recognition of female-specific forms of pain and

7. The now-defunct European Commission on Human Rights first considered whether domestic abortion regulations violated Article 8 of the European Convention on Human Rights in 1976. *See* Bruggemann and Scheuten v. Federal Republic of Germany, App No. 6959/75, 3 Eur. Comm’n H.R. 244, ¶¶ 61–63 (1976).

8. The 1994 International Conference on Population and Development (“ICPD”) played a significant role in putting reproductive rights on the international human rights agenda. In fact, the ICPD Programme of Action, adopted at the 1994 conference, was the first international consensus documents in which States agreed that reproductive rights were human rights already recognized in domestic and international law. UNITED NATIONS POPULATION FUND (UNFPA), INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, adopted Sept. 1994, at 60, ¶ 7.3, *available at* <http://www.unfpa.org/publications/international-conference-population-and-development-icpd-programme-action>. For an overview of how human rights bodies have addressed the intersection of abortion and human rights, see HUMAN RIGHTS WATCH, DECISIONS DENIED: WOMEN’S ACCESS TO CONTRACEPTIVES AND ABORTION IN ARGENTINA, 66 (June 2005), *available at* <http://www.hrw.org/reports/2005/argentina0605/argentina0605.pdf> (noting in 2005 that UN Treaty Monitoring Bodies had “produced a significant body of jurisprudence regarding abortion in over 122 concluding observations concerning at least ninety-three countries”); Center for Reproductive Rights, *Bringing Rights to Bear: Abortion and Human Rights* (2008), http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF.

9. *See, e.g.*, Comm. on the Elimination of Discrimination Against Women, Commc’n No. 22/2009, L.C. v. Peru, 17 Oct. 2011, U.N. Doc. CEDAW/C/50/D/22/2009 (2011) (finding that under the Convention on the Elimination of all forms of Discrimination Against Women, Peru was obligated to amend its laws to allow women to obtain abortion in cases of rape and sexual assault, establish a mechanism to ensure the availability of those services, and guarantee access to abortion when a woman’s life or health is in danger); Human Rights Comm., Commc’n. No. 1153/2003, K.L. v. Peru, 24 Oct. 2005, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); HRC, General Comment No. 28, *supra* note 3, ¶ 10; Comm. on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Senegal, ¶ 26, U.N. Doc. E/C.12/1/Add.62 (2001).

suffering as serious human rights violations.¹⁰ In particular, feminist scholars have critiqued the prohibition on torture and CIDT as being largely constructed on the basis of a male paradigm—that of “interrogating, punishing or intimidating detainees,” generally male¹¹—and for ignoring the contexts in which women experience comparable pain or suffering. By analyzing women’s experiences as forms of torture or CIDT, scholars and advocates have attempted to reorient the concept to “encompass those forms of violations of dignity and physical integrity that are most relevant to the lived experiences of women.”¹² Given that the prohibition on CIDT is a non-derogable right¹³ and potentially a *jus cogens* norm,¹⁴ framing women’s experiences of pain or suffering as forms of CIDT highlights the imperative of addressing women’s suffering as a human rights issue and demands greater accountability from States for their role in such suffering.¹⁵

10. See RONLI SIFRIS, *REPRODUCTIVE FREEDOM, TORTURE AND INTERNATIONAL HUMAN RIGHTS: CHALLENGING THE MASCULINISATION OF TORTURE* 19–23 (2014). The efforts of human rights advocates to frame denial of abortion as a form of cruel, inhuman, or degrading treatment—or even torture in particularly severe cases—follows a line of thinking put forward by international feminist scholars in the 1990s who argued that rape was sufficiently severe to amount to torture. See, e.g., Catharine MacKinnon, *On Torture: A Feminist Perspective on Human Rights*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* 7 (Kathleen E. Mahoney & Paul Mahoney eds., 1993); Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 628–30 (1991).

11. SIFRIS, *supra* note 10, at 19.

12. *Id.* at 10.

13. See International Covenant on Civil and Political Rights art. 4(2), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (prohibiting derogations from Article 7); see also Human Rights Comm., Gen. Comment No. 20: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment), ¶ 3, U.N. Doc. HRI/GEN/1/Rev.1 (1994) (noting that Article 7 of the ICCPR cannot be limited, even by public emergency, extenuating circumstances, or orders from a public authority). The European Court of Human Rights (“ECtHR”) has held that the European Convention on Human Rights prohibits torture or inhuman or degrading treatment or punishment, regardless of the conduct of the victim, the nature of the offense, or the existence of a threat to national security. See *D. v. United Kingdom*, 30240/96, Eur. Ct. H.R., ¶ 47 (1997); see also CAT, General Comment No. 2, *supra* note 2, ¶¶ 5–6.

14. See RESTATEMENT (THIRD) ON FOREIGN RELATIONS OF THE UNITED STATES § 702 cmt. d-i, §102 cmt. k (1987); see also Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331, 331 (2009).

15. For example, Catharine MacKinnon has noted that relying on the “recognized profile” of torture could advance women’s rights because torture carries effective legal sanctions and penalties. See EDWARDS, *VIOLENCE AGAINST WOMEN*, *supra* note 1, at 212 (citing MacKinnon, *On Torture*, *supra* note 10, at 25).

Human rights bodies have become increasingly receptive to claims that denying or obstructing a woman's access to abortion—or related services that are legal prerequisites for abortion¹⁶—amounts to CIDT in a number of circumstances. Yet there has been little critical assessment of these emerging standards or attempts to understand how human rights bodies evaluate the pain or suffering that women experience when they are denied an abortion. This Article seeks to fill that gap. Part I begins by providing an overview of the prohibition against CIDT in international human rights law as well as State obligations to prevent, punish, and redress victims for such violations of their human rights. Part II examines a number of cases, individual communications, and other standard-setting documents, such as Concluding Observations to States, in which human rights bodies have addressed the nexus between denying a woman access to an abortion and the infliction of CIDT. I identify two key trends in this area. First, human rights bodies, particularly the European Court of Human Rights, have concluded in several cases that CIDT can arise in situations where women are denied access to, or are obstructed in, their attempts to obtain abortions or related health services that are legally available to them under domestic law. In these cases, human rights bodies have not recognized a substantive right to access abortion under international law, but have urged States to address a *procedural* deficit in their own laws that make women vulnerable to abuse while seeking an abortion.¹⁷ Second, the UN Human Rights Committee and the UN Committee Against Torture—two UN Treaty Monitoring Bodies¹⁸—have found that States have an international legal obligation to reform particularly restrictive abortion laws or risk

16. See *infra* Part II.A.2 for a discussion of *R.R. v. Poland* and efforts to deny the applicant prenatal genetic testing, a prerequisite to obtaining a legal abortion in cases of fetal impairment in Poland.

17. See *infra* Part II.A.

18. The UN Human Rights Committee is a body of independent experts created by States parties' agreement in the ICCPR. See ICCPR, *supra* note 13, art. 28. The U.N. Committee Against Torture is a body of independent experts created by States parties' agreement in the Convention Against Torture ("CAT"). Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 17, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. Both Committees monitor State compliance with their respective treaty, provide authoritative interpretations of their treaty, and, under optional protocols, are empowered to hear individual communications on alleged violations of the ICCPR and the CAT. See UNITED NATIONS, HUMAN RIGHTS COMMITTEE: INTRODUCTION, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> (last visited May 1, 2014); UNITED NATIONS, COMMITTEE AGAINST TORTURE, www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx (last visited May 1, 2014).

inflicting CIDT on women when these laws are applied, including in cases of rape or incest, when a woman's life is at stake, or when the fetus is severely deformed.¹⁹

While these human rights bodies have acknowledged the nexus between CIDT and the denial of abortion in different ways, I observe in Part III that they appear to rely on similar underlying considerations in finding that denying or obstructing a woman's access to abortion amounts to CIDT. First, I argue that human rights bodies may engage in an implicit "justifiability" threshold test to determine whether the infliction of pain or suffering resulting from a State's abortion regulations is proportionate to the achievement of a lawful State aim—and thus is a justifiable regulation that does not inflict CIDT. Second, human rights bodies have focused on the presence of "autonomy deficits"—such as youth, diminished mental capacity, or sexual violence—that compromise a woman's ability to consent to the sex that leads to her pregnancy. In this view, a woman's pain and suffering stems not only from being compelled to continue with a pregnancy that she does not want but also from the violation of her own bodily integrity. Additionally, human rights bodies give particular consideration to the presence of "maternal suffering," or heightened pain stemming from the woman's fear that her fetus will be born with an abnormality that will cause it suffering. Finally, I argue that human rights bodies would benefit from developing a stronger understanding of the autonomy interests that are implicated by a woman's decision to have an abortion and the pain or suffering she may experience when that autonomy is frustrated. Further incorporating women's autonomy interests into the CIDT analysis would be an important step forward in strengthening international legal protections for women's reproductive rights.

I. *CRUEL, INHUMAN, OR DEGRADING TREATMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW*

In this Part, I outline the elements of cruel, inhuman, or degrading treatment under international human rights law as well as the ways in which state responsibility attaches for these violations. I focus on the understanding of CIDT under the treaty regimes discussed in Part II, namely the European Convention on Human

19. *See infra* Part II.B.

Rights (“ECHR”),²⁰ the International Covenant on Civil and Political Rights (“ICCPR”),²¹ and the Convention Against Torture (“CAT”).²²

A. *Establishing the Level of Suffering Required for CIDT*

The CAT, ICCPR, and ECHR treaty regimes all recognize that CIDT involves acts that inflict severe physical or mental²³ suffering on the victim. Determining whether the minimum level of suffering has been met is a fact-specific inquiry, and human rights bodies consider both objective and subjective factors in making this determination.²⁴ Both the European Court of Human Rights and the Human Rights Committee have noted that they consider all the circumstances of the case in their analysis, such as “the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.”²⁵ Additionally, the level of suffering required to constitute CIDT may change over time. The European Court has acknowledged that, under an “evolutive interpretation” of the European Convention on Human Rights, an act that at one time was deemed to be a form of inhuman or degrading treatment might in the future be classified as torture due to changes in the social context.²⁶ This principle suggests that acts once considered not to meet the threshold of suffering for CIDT could come to be

20. See European Convention on Human Rights art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

21. See ICCPR, *supra* note 13, art. 7.

22. See CAT, *supra* note 18, arts. 1, 16.

23. The Convention Against Torture explicitly acknowledges that mental suffering may amount to torture or CIDT. *Id.* art. 1. Furthermore, both the European Court and the Human Rights Committee have interpreted the ECHR and the ICCPR, respectively, to cover psychological torture and CIDT. See, e.g., Ireland v. United Kingdom, Eur. Ct. H.R. No. 5310/71, ¶ 167 (1978); Human Rights Committee, General Comment No. 20, *supra* note 13, ¶ 5.

24. See Manfred Nowak, *Torture and Enforced Disappearance*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 151, 155 (Catarina Krause & Martin Scheinin eds., 2009).

25. Ireland v. United Kingdom, Eur. Ct. H.R. No. 5310/71, ¶ 162 (1978); see also Fehér v. Hungary, Eur. Ct. H.R. No. 69095/10, ¶ 18 (2013); Vuolanne v. Finland, U.N. Human Rights Comm., Comm’n No. 265/1987, ¶ 9.2, U.N. Doc. Supp. No. 40 (A/44/40) (1989).

26. See Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GER. L.J. 1731 (2011) (describing the use of evolutive interpretation by the European Court of Human Rights); accord Selmouni v. France, Eur. Ct. H.R. No. 25803/94, ¶ 101 (1999). Other human rights bodies have also used dynamic interpretive techniques. See Birgit Schlütter, *Aspects of Human Rights Interpretation by the UN Treaty Bodies*, in UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 261, 282 (Helen Keller & Geir Ulfstein eds., 2012).

recognized as CIDT over time as societal understandings change.²⁷ In short, there is no hard and fast test for determining when conduct rises to the level of CIDT; instead, human rights bodies will consider the treatment in light of the physical and mental impact on the victim and the social and political circumstances.

Human rights bodies further distinguish between cruel/inhuman treatment and degrading treatment, based on whether the conduct severely humiliates the victim. The European Court of Human Rights has defined degrading treatment as conduct that humiliates and debases the victim, either in his own eyes or in the eyes of others.²⁸ Intent to humiliate the victim is not required under the European Court's jurisprudence;²⁹ conduct that inflicts a minimum level of humiliation and discloses a "callous disregard for [the victim's] vulnerability and distress" can be enough to constitute degrading treatment.³⁰ Further, under the Convention Against Torture, acts aimed at humiliating the victim constitute degrading treatment, regardless of whether severe pain is inflicted.³¹

Finally, human rights bodies often define CIDT by distinguishing it from torture. In part, this distinction is based on the severity of the pain, suffering, or humiliation inflicted on the victim, with a higher threshold of suffering needed for an act to amount to torture. However, torture may also be distinguished by the presence of a particular *mens rea* that is not generally considered necessary for a finding of CIDT. The Convention Against Torture, for example, requires that torture be *intentionally* inflicted for one of several impermissible purposes,³² but does not require either intentional

27. See CORNELIS WOLFRAM WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULMENT 9 (2009), available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/13756/000-wouters-B-25-02-2009.pdf?sequence=2> (discussing evolutive interpretation of human rights treaties).

28. See, e.g., *Campbell & Cosans v. United Kingdom*, Eur. Ct. H.R. No. 7511/76, ¶ 28 (1982); *Tyrer v. United Kingdom*, Eur. Ct. H.R. No. 5856/72, ¶¶ 30, 32 (1978).

29. See, e.g., *Peers v. Greece*, Eur. Ct. H.R. No. 28524/95, ¶¶ 74–75 (2001) (holding that the authorities' failure to improve unacceptable prison conditions for a patient with a psychiatric condition demonstrated an objective "lack of respect for the applicant" and thus constituted degrading treatment, despite the fact that there was no "positive intention of humiliating or debasing the applicant").

30. *R.R. v. Poland*, Eur. Ct. H.R. No. 27617/04, ¶ 151 (2011); *Campbell & Cosans v. United Kingdom*, Eur. Ct. H.R. No. 7511/76, ¶ 28 (1982).

31. Comm'n on Human Rights, Report of the Special Rapporteur on the question of Torture, Manfred Nowak, ¶ 35, U.N. Doc. E/CN.4/2006/6 (Dec. 23, 2005).

32. These impermissible purposes include but are not necessarily limited to: obtaining information or a confession; punishing a person for an act that the victim or a third person

infliction or the presence of an impermissible purpose for CIDT. Instead, the Committee Against Torture's CIDT analysis focuses on the level of pain, suffering, or humiliation inflicted on the victim.³³ The European Court of Human Rights similarly defines torture as inhuman treatment that is both *deliberate* and "causing very serious and cruel suffering,"³⁴ while noting that inhuman or degrading treatment is conduct that, while still serious, falls below that threshold.³⁵ The Human Rights Committee, in contrast, does not focus on the intent or purpose of the perpetrator in distinguishing between torture and CIDT but instead engages in a holistic evaluation of the treatment in question.³⁶

In sum, across human rights regimes, CIDT analysis focuses on the level of suffering inflicted on the victim, measured in both subjective and objective terms. If a human rights body does not deem the conduct to be sufficiently severe, it will not be considered to have crossed the threshold into CIDT, even if pain or discomfort has been inflicted. The inquiry tends to be fact and context specific, and human rights bodies' understanding of what conduct constitutes CIDT may evolve over time.

B. Establishing State Responsibility for CIDT: Actions of State Officials and the Requirement of Due Diligence

Even if conduct reaches the level of severity necessary to constitute CIDT, it may not amount to a violation of international law unless the conduct is attributable in some way to the State. States bear international responsibility for CIDT in two ways: through the direct acts or omissions of their officials or by failing to exercise due

committed or is suspected of committing; intimidating or coercing the victim or a third person; for "any reason based on discrimination of any kind." CAT, *supra* note 18, art. 1(1).

33. See Comm. Against Torture, General Comment No. 2, *supra* note 2, ¶ 10; Report of the Special Rapporteur, *supra* note 31, ¶ 35 ("Acts which fall short of [the definition of torture], particularly acts without the elements of intent or acts not carried out for the specific purposes outlined, may comprise CIDT under article 16 of the Convention.")

34. Ireland v. United Kingdom, Eur. Ct. H.R. No. 5310/71, ¶ 167 (1978).

35. See *id.*; INTERRIGHTS, PROHIBITION OF TORTURE, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14–22 (2008), available at <http://www.interights.org/files/105/Article%203%20Manual%20Final%20March%202009.pdf>.

36. HRC, General Comment No. 20, *supra* note 13, ¶ 4 (noting that the distinction between torture and CIDT "depend[s] on the nature, purpose and severity of the treatment applied").

diligence to prevent, investigate, prosecute, and punish acts of private persons that amount to CIDT.

Generally, States are responsible under international law for the commission of torture or CIDT when the relevant acts are performed by or with the consent of public officials. The Convention Against Torture, for example, provides that a State may be held responsible for an act of torture if it is inflicted by a public official or by a private actor at the instigation or with the consent of a public official.³⁷ The Committee Against Torture has further emphasized that States are responsible for those persons acting “on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law.”³⁸ The European Court of Human Rights has held that States are responsible for acts of torture or ill treatment committed by public officials, even if the official’s superiors claim not to have knowledge of the conduct.³⁹ States are also responsible for ill treatment occurring within institutions exercising a public function, particularly those that exert some form of custody or control over individuals, such as prisons or detention facilities.⁴⁰ State responsibility may even result when these facilities are run by private actors, if these institutions are responsible for carrying out a traditional public function.⁴¹

States may also bear responsibility for acts of torture or CIDT committed by *private* actors if the State does not take adequate steps to prevent and provide redress for these acts. The European Court, Committee Against Torture, and Human Rights Committee all require States parties to enact and enforce adequate legal provisions to protect individuals from torture or CIDT.⁴² Criminalizing such acts, while

37. CAT, *supra* note 18, art. 1(1).

38. Comm. Against Torture, General Comment No. 2, *supra* note 2, ¶ 15.

39. Ireland v. United Kingdom, Eur. Ct. H.R. No. 5310/71, ¶ 159. However, a “State may avoid liability for Article 3 treatment where there appears to be individual acts of ill discipline in respect of which the State takes appropriate action. The State must take rigorous steps to discipline those responsible and adopt measures to ensure there is no repetition of such actions.” INTERIGHTS, *supra* note 35, at 48.

40. See, e.g., Comm. Against Torture, General Comment No. 2, *supra* note 2, ¶ 15 (recommending that States take action to prohibit, prevent, and redress torture or CIDT in prisons, hospitals, schools, military service, institutions that provide care to children, the elderly, the mentally ill, or the disabled, as well as institutions or contexts “where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm”).

41. See *id.* ¶ 17.

42. See, e.g., A v. United Kingdom, Eur. Ct. H.R. 25599/94, ¶ 24 (1998) (holding that the English law “did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3” and recommending that the State amend the law); CAT,

important, is not generally sufficient;⁴³ States parties must instead work to ensure that legal provisions are actually effective, including by investigating and prosecuting alleged acts of torture or CIDT.⁴⁴ In particular, States must intervene when officials “know or have reasonable grounds to believe” that private parties are engaging in torture or ill treatment,⁴⁵ otherwise their failure to act may amount to encouragement or “*de facto* permission.”⁴⁶ Overall, these provisions aim to ensure that the right not to be subjected to CIDT is realized in practice, not just on paper, and to ensure that victims receive adequate remedies whether the offending treatment is inflicted by a public or a private actor.⁴⁷

Human rights experts like the UN Special Rapporteur on Torture have also recognized that health care facilities can be sites of mistreatment that amounts to CIDT, and that women may be particularly vulnerable to abuse in the healthcare context.⁴⁸ State responsibility for such mistreatment may attach directly if the health

supra note 18, art. 2 (requiring States parties to take “effective legislative, administrative, judicial or other measures” to prevent acts of torture and CIDT within their jurisdiction); Comm. Against Torture, General Comment No. 2, *supra* note 2, ¶ 3 (extending the obligation under CAT Article 2 to CIDT); Human Rights Comm., General Comment No. 20, *supra* note 13, ¶¶ 2, 8 (noting that legislative, administration, judicial, or “other measures” may be required to prevent and punish torture or CIDT).

43. See Human Rights Comm., General Comment No. 20, *supra* note 13, ¶ 8.

44. See Comm. Against Torture, General Comment No. 2, *supra* note 2, ¶ 18. Aisling Reidy, *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights*, HUMAN RIGHTS HANDBOOKS NO. 6, 40–43 (2002), available at [http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-06\(2003\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-06(2003).pdf) (discussing States’ positive obligation under Article 3 to investigate allegations of torture and ill-treatment).

45. Comm. Against Torture, General Comment No. 2, *supra* note 2, ¶ 18; see also *Z & others v. United Kingdom*, Eur. Ct. H.R. No. 29392/95 ¶ 73 (2001) (holding that States must take measures that provide effective protection against ill-treatment of which “the authorities had or ought to have had knowledge”).

46. Comm. Against Torture, General Comment No. 2, *supra* note 2, ¶ 18.

47. Positive obligations under the European Convention on Human Rights arise from the principle that rights should be “practical and effective,” and from Article 13, which requires effective remedies for violations of the Convention. See A.R. MOWBRAY, *THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 5 (2004).

48. U.N. Human Rights Council, Report of the Special Rapporteur on Torture, Cruel, Inhuman and Degrading Treatment: Torture and Ill-Treatment in Health Facilities, U.N. Doc A/22/53 (Feb. 1, 2013) (describing forms of torture of ill-treatment that have been documented in healthcare facilities); U.N. Gen. Assembly, Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, U.N. Doc. A/66/254 (Aug. 3, 2011) (describing the rights violations that women suffer when reproductive healthcare is criminalized).

care facility is State-run, possibly even if the staff act of their own initiative rather than under a State policy that condones their conduct.⁴⁹ In private health facilities, state responsibility for torture or CIDT may attach directly if the facility is seen as performing a traditional State function; otherwise, responsibility may still attach if the State has not taken adequate steps to prevent, investigate, prosecute, and punish ill treatment in these facilities, especially when the State has knowledge that this treatment is likely occurring. In practice, human rights bodies have relied on these standards to find States responsible for ill treatment inflicted by doctors and other actors in both public and private facilities when they deny or obstruct women's access to abortion or related healthcare services in certain serious circumstances. Furthermore, they have recognized that States may be responsible for women's suffering under domestic laws that sharply circumscribe access to abortion. These cases are the focus of Part II.

II. *DENIAL OF ABORTION AND RELATED PROCEDURES AS A FORM OF CRUEL, INHUMAN, OR DEGRADING TREATMENT*

The European Court of Human Rights, the Committee Against Torture, and the Human Rights Committee have all recognized that denying women access to abortion or obstructing their access to abortion-related services can in certain circumstances amount to cruel, inhuman, or degrading treatment under international law. In this Part, I identify two broad circumstances in which these human rights bodies have recognized that denial of abortion may amount to CIDT: first, when women are harassed, obstructed, and denied access to services when attempting to obtain an abortion that is legally permitted under the State's domestic law and second, when restrictive abortion laws themselves compel women to continue with pregnancies that would have serious and often irrevocable consequences for the women's physical or mental health. In the former situation, human rights bodies have held States responsible for not putting in place procedural mechanisms that would allow women to vindicate their rights under domestic law free of harassment. In the latter, human rights bodies have called on States to reform their substantive abortion laws and to provide sufficient exceptions for the life, health, or well-being of the woman. In the following Sections, I

49. *See supra* notes 39–40 and accompanying text.

outline the development of these standards, first by the European Court of Human Rights and then by UN Treaty Monitoring Bodies.

A. Inhuman or Degrading Treatment Within the “Margin of Appreciation”: The European Court of Human Rights’ Jurisprudence on Abortion and CIDT

In the past decade, the European Court of Human Rights (the “European Court” or the “Court”) has issued four decisions on access to abortion that have significantly developed its doctrine in this area. In each case, the applicants argued that their Article 3 right to be free from inhuman or degrading treatment had been violated because they had been denied access to or were seriously harassed in their efforts to obtain an abortion or prenatal genetic testing necessary to qualify for an abortion. The European Court found Article 3 violations in two cases where access to abortion or prerequisite health services was clearly legal in the applicants’ cases, while in the other two cases, where the applicants did not have a clear right to an abortion under domestic laws, the Court either found no violation of Article 3 or concluded that there were no grounds to address the issue.

In this Section, I argue that the different outcomes in these cases are best explained by the fact that the Court considers abortion issues primarily under the right to private life enshrined in Article 8 of the European Convention on Human Rights. Article 8, as interpreted by the European Court, grants States what is known as a “margin of appreciation” for choosing how to regulate abortion, and the European Court has allowed States broad discretion under this doctrine to restrict access to abortion. In fact, the European Court has never held that the substance of a State’s abortion laws violates the European Convention, and instead has only found that procedural deficits in enforcing State abortion laws run afoul of Article 8. Consequently, I argue that the European Court’s Article 8 jurisprudence implicitly circumscribes when and how the Court will address Article 3 issues in the abortion context. Thus, the relationship between Article 8 and Article 3 helps to explain why the European Court has only found that denial of abortion or related services amounted to inhuman or degrading treatment in cases where women were denied services to which they were legally entitled.

The European Court’s focus on procedure in these cases could be interpreted to suggest that the applicants’ pain and suffering arose primarily from the procedural deficits themselves—meaning, what the

Court cared about was the humiliation and anguish the women experienced in being obstructed from accessing a legal right. Such an interpretation, however, falters upon a careful reading of the Court's opinions. As I argue below, these opinions demonstrate a concern with the suffering that women experience when their reproductive autonomy is denied and have substantive implications with respect to the development of the Court's jurisprudence in this area.

1. No Article 3 Violation: *Tysic v. Poland* and *A, B, & C v. Ireland*

In 2007 and 2010, the European Court decided two cases that have formed the backbone of its abortion jurisprudence—*Tysic v. Poland* and *A, B, & C v. Ireland*. While the Court made seminal findings under Article 8—right to private life—in both cases, it failed to find an Article 3—right to be free from torture and inhuman or degrading treatment—violation, despite recognizing that the applicants experienced pain and suffering when they were denied access to abortion.

Tysic v. Poland concerned a Polish woman, Alicja Tysic, who was denied an abortion despite the fact that her doctors told her that continuing the pregnancy could lead to the loss of her eyesight due to a preexisting health condition. In Poland, abortion is legal if continuing the pregnancy endangers the woman's life or health.⁵⁰ Although multiple doctors acknowledged that continuing the pregnancy posed a risk to Tysic's eyesight, they refused to issue the certification for the abortion on the basis that the risk to her health was not certain.⁵¹ Tysic was unable to obtain an abortion. After giving birth, Tysic's eyesight deteriorated rapidly and she was subsequently declared to be significantly disabled.⁵² In her application before the European Court, Tysic claimed that the Polish State had unduly interfered with her Article 8 right to private life by failing to provide her with a legal therapeutic abortion and by failing to provide a comprehensive legal framework to guarantee her rights.⁵³ Furthermore, Tysic claimed that the State's failure to make a legal

50. *Tysic v. Poland*, Eur. Ct. H.R. No. 5410/03, ¶ 38 (2007) (citing Poland's 1993 Law on Family Planning, Section 4a). Abortion is also legal when there is a high risk that the fetus will be "severely and irreversibly damaged or suffering from an incurable life-threatening disease" and if there are "strong grounds" to believe that the pregnancy is the result of a criminal act (e.g., rape). *Id.*

51. *See id.* ¶ 9.

52. *See id.* ¶ 18.

53. *See id.* ¶ 67.

abortion possible in circumstances that threatened her health—essentially forcing her to continue with a pregnancy knowing that her health could seriously deteriorate—resulted in “anguish and distress” amounting to inhuman or degrading treatment under Article 3.⁵⁴

The European Court found a violation of Article 8 but not of Article 3. In examining the Article 8 claim, the Court declined to interpret the European Convention to guarantee access to any specific medical services as part of the right to private life.⁵⁵ However, the Court found that once a State has chosen to make abortion legal in certain circumstances, it could not “structure its legal framework in a way which would limit real possibilities to obtain it.”⁵⁶ Thus, the Court held that Article 8 required Poland to establish a procedural framework that would allow women to vindicate their right to a legal abortion while it was still possible for them to obtain one.⁵⁷ As the Court noted, “[c]ompliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention.”⁵⁸ Thus, while the Court did not find that Tysi c had a right under Article 8 to obtain a legal abortion, it did find that Article 8 required an effective procedure to determine her eligibility for an abortion under Polish law.

With regard to Article 3, however, the European Court found that the “facts alleged did not disclose a breach,” despite Tysi c’s argument that she had experienced “anguish and distress” knowing that continuing her pregnancy could lead to the loss of her eyesight.⁵⁹ The Court dismissed Tysi c’s claim in a brief paragraph that simply referred to the Court’s “case-law on the notion of ill-treatment and the circumstances in which the responsibility of a Contracting State may be engaged . . . by reason of the failure to provide appropriate medical treatment.”⁶⁰ The Court cited, without explanation, its decision in

54. *Id.* ¶ 65.

55. *See id.* ¶¶ 107–08.

56. *Id.* ¶ 116.

57. *See id.* ¶ 121. The procedure must, at least, guarantee a pregnant woman the chance to be heard in person and to have her views considered; issue written grounds for its decisions; and act in a timely manner in order to “limit or prevent damage to a woman’s health which might be occasioned by a late abortion.” *Id.* ¶ 118.

58. *Id.* ¶ 112.

59. *Id.* ¶¶ 65–66.

60. *See id.* ¶ 66.

İlhan v. Turkey, which concerned a Kurdish man who was severely beaten by Turkish security forces during the course of his arrest and who was then denied access to medical services for a significant period of time after the beatings.⁶¹ The *İlhan* case was, in many ways, a paradigmatic Article 3 violation. It involved physical injuries that were inflicted by State actors and subsequent failure by the State to provide the applicant with appropriate medical care while he was in custody. The reference to *İlhan* suggests that the suffering Tysiác experienced was too far outside the traditional understanding of inhuman or degrading treatment to constitute a violation of Poland's obligations under Article 3.

The second case, *A, B, & C v. Ireland* (“ABC” or the “ABC case”),⁶² involved three Irish women who traveled to England to terminate their pregnancies due to Ireland's restrictive abortions laws. Abortion is completely prohibited in Ireland except when there is a “real and substantial” risk to the life of the woman.⁶³ At the time of the ABC case, however, it was unclear whether this limited exception had any practical effect since it had no statutory basis, and Irish law criminalized women who attempted or underwent an illegal abortion.⁶⁴ Applicants A and B traveled to England to terminate their pregnancies due to physical and mental health concerns while C sought an abortion out of fear that continuing the pregnancy would threaten her life.⁶⁵ All three claimed that their right to private life, including their physical integrity, had been unjustifiably interfered

61. See *id.* (discussing *İlhan v. Turkey*, No. 22494/93 Eur. Ct. H.R. (2004)).

62. See *A, B, & C v. Ireland*, No. 25579/05 Eur. Ct. H.R. (2010).

63. See *Att'y Gen. v. X*, [1992], 1 I.R. 1 (Ir.) (recognizing an exception to Ireland's prohibition against abortion where there is a “real and substantial” risk to the life of the woman). Ireland reformed its abortion law in 2013, creating a statutory exception to Ireland's prohibition on abortion in cases where the woman's life is at risk. See Henry McDonald, *Ireland Passes Law Allowing Limited Rights to Abortion*, THE GUARDIAN (July 11, 2013), <http://www.theguardian.com/world/2013/jul/12/ireland-law-abortion-rights>. Ireland's prohibition against abortion stems from Article 40.3.3 of the Constitution, which reads: “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.” IR. CONST., 1937, Art. 40.3.3.

64. See Daniel Fenwick, *The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights*, 12 MED. L. INT'L 249, 252, nn.12–13 (2013).

65. A sought an abortion for reasons of “health and well-being.” She was a recovering alcoholic and she feared that her pregnancy would prevent her reunification with her existing children (at the time in social care) and delay her recovery. B, who was a teenager at the time of the abortion, initially sought the procedure because she was told that her pregnancy was likely ectopic and later, when this proved not to be the case, because she did not feel that she could support a child at that time. See *A, B, & C v. Ireland*, No. 25579/05 Eur. Ct. H.R.

with by the Irish government's restrictions on access to abortion.⁶⁶ Furthermore, they argued that they had experienced inhuman or degrading treatment in that Ireland's criminalization of abortion stigmatized women who sought abortions and undermined their dignity, while the option of traveling abroad and seeking post-abortion care in Ireland—which was legal, was “degrading and a deliberate affront to their dignity.”⁶⁷

The European Court ultimately held that only C's rights had been violated; and, since abortion was technically legal to save a woman's life in Ireland, the Court held, as in *Tysiqc*, that Article 8 obligated Ireland to put in place a mechanism to allow C to vindicate her right to an abortion under Irish law. The Court, however, concluded that neither A's nor B's right to private life was violated since, under Article 8, Ireland could permissibly restrict access to abortion in cases involving physical or mental health concerns.⁶⁸ With regard to Article 3, the Court declined to even consider the issue.⁶⁹ Although the Court acknowledged that it was “physically and psychologically arduous” for the applicants to travel to England for an abortion, it concluded that the fact that the women had to travel abroad for the procedure did not implicate Article 3.⁷⁰ The Court did not provide further support for its conclusion.

The European Court's consideration of the Article 3 issue in *Tysiqc* and *ABC* suggested that a woman's access to abortion was too far removed from traditional understandings of inhuman or degrading treatment to be a viable claim. However, shortly after its decision in *ABC*, the European Court handed down its decision in *R.R. v. Poland*, where it held that the State's failure to provide the applicant with an adequate procedure for accessing prenatal genetic testing—a prerequisite for a legal abortion in Poland—not only amounted to a violation of the State's obligations under Article 8, but also amounted to inhuman and degrading treatment under Article 3. This decision provided the first glimpse into when the Court would be willing to consider access to abortion as an Article 3 issue.

66. *See id.* ¶ 168; Fenwick, *supra* note 64, at 20.

67. *See A, B, & C v. Ireland*, No. 25579/05 Eur. Ct. H.R., ¶ 162.

68. *See infra* notes 104–105 and accompanying text on the Court's Article 8 analysis regarding A and B.

69. The Court found that the Article 3 claim was “manifestly ill-founded” under Article 35 §§ 3–4 of the European Convention and thus inadmissible. *See A, B, & C v. Ireland*, No. 25579/05 Eur. Ct. H.R. ¶¶ 163–65.

70. *See id.* ¶¶ 163–64.

2. Article 3 Violations: *R.R. v. Poland* and *P & S v. Poland*

R.R. concerned a Polish woman (“*R.R.*”) who was repeatedly denied access to prenatal genetic testing, presumably because the doctors she consulted were concerned that she would obtain an abortion if the tests confirmed a suspected fetal abnormality. *R.R.* was eighteen weeks pregnant when her doctor performed an ultrasound and informed her that it was likely that her fetus was suffering from a malformation.⁷¹ The doctor recommended that *R.R.* undergo prenatal genetic testing in order to confirm or dispel his concern.⁷² Over the following eight weeks, *R.R.* visited sixteen doctors, underwent five sonograms, and was hospitalized twice.⁷³ Still, she was unable to obtain a referral for the genetic testing. Eventually, *R.R.* entered a hospital without a referral, as an emergency patient, and received the testing.⁷⁴ *R.R.* waited two weeks for the test results, which confirmed that her fetus had Turner syndrome, a rare genetic condition among females that leads to abnormal development.⁷⁵ At that point, *R.R.* attempted to obtain an abortion under the exception in Polish law for fetal abnormalities. However, doctors refused, claiming that it was too late for a legal abortion since the fetus was, by then, viable outside the mother’s body.⁷⁶ *R.R.* was forced to continue with the pregnancy and gave birth to a daughter with Turner syndrome.

The Court held that Poland was responsible for the violation of *R.R.*’s rights under both Article 8 and Article 3 because it did not ensure *R.R.* access to a procedural framework to vindicate her legal right to prenatal genetic testing under Polish law. Drawing on its holding in *Tysic*, the Court concluded that, where domestic law allows for abortion in cases of fetal malformation, the State has a positive obligation under Article 8 to ensure that there is “an adequate legal and procedural framework to guarantee that relevant, full and

71. See *R.R. v. Poland*, Eur. Ct. H.R. No. 27617/04, ¶ 12 (2011).

72. See *id.*

73. See Litigation Briefing Series, *R.R. v. Poland, P&S v. Poland, and Z v. Poland*, CENTER FOR REPRODUCTIVE RIGHTS, <http://reproductiverights.org/en/tr-v-poland-st-v-poland-z-v-poland> (last visited May 1, 2014).

74. See *R.R. v. Poland*, Eur. Ct. H.R. No. 27617/04, ¶¶ 27–28.

75. See *id.* ¶ 33. *R.R.* also claimed that, prior to genetic testing, she had been informed that her fetus could have Edwards syndrome, which the Court described as “[a] rare genetic chromosomal syndrome . . . more severe than . . . Down syndrome. Causes mental retardation and numerous physical defects that often cause an early infant death.” *Id.* ¶ 16 n.2.

76. See *id.* ¶ 33.

reliable information on the foetus' health is available to pregnant women."⁷⁷

The European Court, however, went farther than it had in *Tysic*, concluding that, in the process of being denied prenatal genetic testing, R.R. had experienced inhuman or degrading treatment under Article 3. In its analysis, the Court described the multiple and senseless delays that R.R. experienced in her attempts to access the testing.⁷⁸ Furthermore, the Court noted that the State did not dispute that the testing was clearly necessary to confirm the initial diagnosis of fetal impairment, that the diagnostic services were available at all times, and that R.R. was legally entitled under Polish law to those services.⁷⁹ The Court also emphasized that, as a pregnant woman, R.R. was in a position of great vulnerability and that, due to the obstruction of her doctors, she was forced for weeks to endure the anguish of not knowing the health of her fetus or how she and her family would care for a severely disabled child.⁸⁰ Ultimately, the Court noted, R.R. received the results after it was too late to make a decision to undergo a lawful abortion.⁸¹ The Court also concluded that the treatment R.R. received at the hands of her doctors—who refused to provide her with accurate information or referrals for the genetic testing—was humiliating.⁸² Taking into account R.R.'s legal right to the testing, her humiliation by the doctors, and her mental anguish at not being able to make an informed choice about accessing a legal abortion, the Court found that Poland had violated its obligations under Article 3.

In 2012, the Court followed *R.R.* with its decision in *P & S v. Poland*, where once again it found that Poland had failed to fulfill its obligations under Articles 3 and 8 of the European Convention on Human Rights. *P & S* involved a fourteen-year-old girl ("P") who was raped by a classmate and subsequently became pregnant.⁸³ In order to obtain an abortion, P received a certificate from the District Prosecutor confirming that the pregnancy was the result of unlawful sexual intercourse, one of the permitted reasons for abortion under

77. *Id.* ¶ 200.

78. *See id.* ¶ 153.

79. *See id.* ¶¶ 153–56, 160.

80. *See id.* ¶ 159.

81. *See id.*

82. *See id.* ¶ 160.

83. *P & S v. Poland*, No. 57375/08, Eur. Ct. H.R., ¶¶ 6, 8 (2012).

Polish law.⁸⁴ P and her mother (“S”) approached the Ministry of Internal Affairs and doctors at several hospitals, seeking a referral for an abortion.⁸⁵ Their requests were repeatedly refused.⁸⁶ In the following days, medical personnel undertook a range of measures to dissuade P from obtaining an abortion, including invoking conscientious objection without referring P to another provider, pressuring P to sign a statement that she did not want an abortion, and disclosing P’s personal and medical data to the press and the general public, leading to repeated harassment of P.⁸⁷ Furthermore, after concerns were raised that S was pressuring P to have an abortion, P was temporarily removed from her parents’ custody against her will and put in a juvenile shelter.⁸⁸ Ultimately, the Ministry of Health intervened and assisted P in obtaining an abortion in a hospital 500 kilometers from her home.⁸⁹ However, P claimed that the abortion was still carried out in a clandestine manner even though she had met the legal requirements for an abortion.⁹⁰ P and S also discovered that their travel information had been leaked and that the Catholic Information Agency had posted it online that same day.⁹¹

The European Court again held that the State had violated its obligations under both Articles 3 and 8. In its Article 8 analysis, the Court emphasized its holdings in *Tysic* and *R.R.*, particularly that the State was obligated to put in place a “procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion.”⁹² Even though the State had ultimately assisted P in obtaining an abortion, the Court held that this was not sufficient to fulfill its positive obligations under Article 8, given the delays and other abuses P faced prior to receiving the procedure.⁹³

In concluding that P had suffered a violation of her rights under Article 3, the Court emphasized P’s particular vulnerability as both a minor and a rape victim.⁹⁴ The Court observed that, despite her

84. *See id.* ¶ 10.

85. *See id.* ¶¶ 11–15.

86. *See id.*

87. *See id.* ¶¶ 19, 26, 28, 32.

88. *See id.* ¶¶ 33, 34.

89. *See id.* ¶ 40.

90. *See id.* ¶ 41.

91. *See id.*

92. *Id.* ¶ 99.

93. *See id.*

94. *Id.* ¶ 162 (“In light of [her age and status as a rape victim], the Court has no choice but to conclude that the first applicant was in a situation of great vulnerability.”).

vulnerability, P had faced repeated pressure from medical personnel and others not to undergo an abortion.⁹⁵ The Court further noted that P's information had been released to the public without her or her parents' consent and that she had faced serious harassment. Additionally, the Court highlighted the fact that the authorities had not only failed to provide P with protection in her vulnerable state, but had compounded the situation by arresting and placing her in juvenile detention against her will after she complained about harassment from anti-abortion activists.⁹⁶ The Court also expressed dismay that the authorities had pursued a criminal investigation against P for unlawful sexual intercourse even though she "should have been considered to be a victim of sexual abuse."⁹⁷ Finally, the Court found that "[o]n the whole . . . no proper regard was had to [P's] vulnerability and young age and her *own views and feelings*."⁹⁸ Given the totality of the circumstances—including her difficulties obtaining a legal abortion and her detention—the Court held that the authorities had treated P in a "deplorable manner," and that her suffering amounted to a violation of Article 3.⁹⁹

The Court's decisions in *R.R.* and *P & S* were notable developments in recognizing the pain and suffering women can experience when their attempts to access abortion or related health services are obstructed. In particular, the Court's decisions highlighted the pain and suffering that arises when women face repeated harassment in attempting to obtain abortion services that are already legally available to them. In the following Section, I argue that the fact that the European Court has only found Article 3 violations in such cases is in part an outgrowth of the Court's abortion jurisprudence under Article 8, which to date has served as an important guide and possible limit on the development of the Court's Article 3 jurisprudence in this area.

3. The Interaction Between Articles 3 and 8 in the European Court's Abortion Jurisprudence

Despite the importance of the European Court's Article 3 findings in *R.R.* and *P & S*, the Court's abortion jurisprudence has

95. *See id.* ¶ 163.

96. *See id.* ¶ 164.

97. *Id.* ¶ 165.

98. *Id.* ¶ 166 (emphasis added).

99. *Id.* ¶¶ 168–69.

primarily developed under the Article 8 right to private life. The European Court has long recognized that the regulation of abortion implicates a woman's right to private life while at the same time acknowledging that access to abortion may also touch on the State's interest in the development of the fetus.¹⁰⁰ Thus, the Court has given States a wide "margin of appreciation"¹⁰¹ under Article 8 to balance a woman's interest in obtaining an abortion against other competing State values such as protecting fetal life.¹⁰² Both the now-defunct European Commission of Human Rights and the European Court have consistently upheld State restrictions on access to abortion, finding that these restrictions were within the State's margin of appreciation to regulate abortion and thus did not violate the right to private life.¹⁰³

The Court's decision in *A, B, & C v. Ireland* illustrates its deferential approach to domestic abortion regulations and signals that the Court will be unwilling to strike down even extremely restrictive abortion laws as long as some measures are still technically available to women to safeguard their well-being. In reviewing Ireland's abortion regulations, which prohibit abortion even in cases where the woman's health or well-being is at stake, the Court concluded that they did not violate Article 8 because the value that Ireland was protecting—its asserted interest in fetal life—was legitimate and within the State's margin of appreciation to balance against the woman's interests.¹⁰⁴ At the same time, the Court noted approvingly that Ireland's law still allowed women to safeguard their health by traveling to England for an abortion and then seeking legal post-abortion care back in Ireland, though it did not inquire into the difficulties Irish women may face in accessing these options.¹⁰⁵ The

100. See *Bruggemann and Scheuten v. Federal Republic of Germany*, App No. 6959/75, 3 Eur. Comm'n H.R. 244, ¶¶ 61 (1976) (finding that Germany's law restricting access to abortion law concerned the applicant's private life but did not unduly interfere with the right since it allowed abortion in certain situations).

101. See Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 NYU J. INT'L L. & POL. 843 (1999). The term "margin of appreciation" does not appear in the text of the ECHR or in the *travaux préparatoires* but is a judge-made doctrine applied to certain Convention rights. *Id.*

102. *Vo v. France*, Eur. Ct. H.R. No. 53924/00 ¶ 82 (2004) (leaving it up to States to decide the point at which life in pregnancy begins.)

103. See *A, B, & C v. Ireland*, No. 25579/05 Eur. Ct. H.R. (2010); *Bruggemann*, App No. 6959/75, 3 Eur. Comm'n H.R. 244.

104. See *A, B, & C v. Ireland*, No. 25579/05 Eur. Ct. H.R., ¶¶ 222, 237, 241.

105. See *id.* ¶¶ 239, 241.

Court left open the question of whether a domestic law that blocked all access to abortion in cases where the mother's life, health, or well-being were at stake could stand under the margin of appreciation test, and thus did not foreclose substantive review of other abortion laws in the future. Yet the decision did showcase an unwillingness on the part of the Court to strike down even extremely restrictive abortion laws on substantive grounds.

Instead, the European Court has focused on procedural deficits that prevent women from accessing services that are legally available under a State's own domestic law and the way these deficits impinge on women's Article 8 rights. In *Tysic*, *ABC, R.R.*, and *P & S*, the Court failed to find that the applicants had any substantive right to access abortion or related health services but did hold that the respondent States had violated the applicants' right to private life by failing to provide them with procedural mechanisms to vindicate rights granted to them under domestic law. Joanna Erdman has described this as the "procedural turn" in the European Court's abortion jurisprudence, a move that has protected Article 8 interests against "interference on bad faith, for an improper purpose, or in light of irrelevant considerations," but without explicitly defining what those interests actually are in the abortion context.¹⁰⁶

In each of the cases discussed above, Article 8 was the primary vehicle for finding a violation of the applicants' human rights while the Article 3 holdings, at least in *R.R.* and *P & S*, served as an important, but subsidiary finding. Why then did the Court choose to make Article 3 holdings in *R.R.* and *P & S* if Article 8 primarily determined the outcomes? It is important to note that *Tysic*, *R.R.*, and *P & S* all concerned the same set of Polish laws and policies and that *R.R.* and *P & S* highlighted Poland's failure to effectively implement the Court's decision in *Tysic*. The Article 3 holdings in both cases allowed the Court to powerfully reiterate to Poland the importance of following through on the requirements of the *Tysic* decision. This is not to suggest a purely political motivation on the part of the Court but a sensible incremental approach: In *Tysic*, the Court considered Article 8 to be sufficient to resolve the issue, which

106. Joanna N. Erdman, *The Procedural Turn: Abortion at the European Court of Human Rights*, in *ABORTION LAW IN TRANSNATIONAL PERSPECTIVE* 121, 137 (Rebecca J. Cook, Joanna N. Erdman & Bernard M. Dickens eds., 2014).

was presenting itself to the Court for the first time.¹⁰⁷ When the issue of procedural fairness under Article 8 arose again in *R.R.* and *P & S*, the Court recognized that the Article 8 violation was sufficiently serious and entrenched to warrant examining the related Article 3 issue more closely.

These cases may also be distinguished in that *R.R.* and *P* both sought medical services that were *clearly legal* in their circumstances while the applicants in *ABC* and *Tysic* sought services under conditions that made the procedure questionably legal, at best. Thus, the European Court's opinions in *R.R.* and *P & S* could be seen as recognizing that women who are obstructed in their efforts to obtain legal and available medical services suffer a particularly acute form of pain that is more likely to amount to inhuman or degrading treatment. The obstructive acts of health care providers, the State, and other actors could be seen as particularly harmful and degrading precisely because the women were only seeking what the State had already guaranteed to them by law.

At the same time, it would be too simplistic to conclude that *R.R.* and *P*'s pain and suffering stemmed only or even primarily from the fact that the services they sought were legally available. Instead, the European Court's opinions put forward a broader understanding of the women's pain and suffering—one stemming from the frustration of their ability to make important decisions about their bodies and their futures.¹⁰⁸ In *R.R.*, for example, the Court emphasized the suffering that *R.R.* experienced when she was not given the information needed to make crucial choices about the future of her pregnancy and the well-being of her family, while in *P & S*, the Court highlighted that *P*'s suffering was exacerbated by the fact that her "own views and feelings" were not taken into account in her

107. Joanna Erdman has argued that the "procedural turn" in the European Court's abortion jurisprudence under Article 8 may have emerged as a way to "reengage rather than alienate the state" in ensuring that rights under the European Convention on Human Rights are upheld. *Id.* at 133 ("By turning to positive obligations and to procedural rights—by enlisting the state and its laws in making rights *effective*—the European Court works *through* rather than *against* the national legal order."). Thus, it is plausible that in *Tysic*, an early effort by the Court to engage the Polish State in the protection of Article 8 procedural rights in the abortion context, the European Court felt that it was not necessary to go further to find a violation of Article 3 in order to enlist the cooperation of the State in this regard.

108. In both *R.R.* and *P & S*, the applicants were clearly entitled to the medical services they sought; thus, the European Court was able to explore the substantive impact that the denial of these services had on the applicants without having to make any conclusions with respect to the substantive obligations enshrined in Article 8 itself.

attempts to obtain an abortion. The Court's reasoning in both cases suggests a *substantive* concern with the State's frustration of a woman's reproductive autonomy, which moves beyond the procedural focus of its Article 8 analysis.¹⁰⁹

The substantive component of the European Court's Article 3 reasoning suggests that the Court could eventually find that a State's legal restrictions on abortion resulted in the infliction of inhuman or degrading treatment on a woman seeking access to prohibited services. Again, however, the Court will likely only find that the implementation of a State's substantive abortion law has violated Article 3 if it also concludes that the law has exceeded the margin of appreciation under Article 8. In short, an expansion of the Court's Article 3 jurisprudence in this area is likely contingent on a shift in its application of the margin of appreciation doctrine to evaluating State abortion laws.

B. Pushing the Boundaries of Domestic Law: The Human Rights Committee and the Committee Against Torture

Like the European Court of Human Rights, the Human Rights Committee has recognized that a woman can experience CIDT when she is faced with harassment that obstructs her access to a legally available abortion and when she lacks access to an effective mechanism to vindicate her rights. Additionally, the Human Rights Committee and the Committee Against Torture have also urged States to consider revising their restrictive abortion laws or risk inflicting CIDT on women seeking abortions in cases of rape or serious threat to a woman's life or well-being.

1. The UN Human Rights Committee: *K.L. v. Peru* and *L.M.R. v. Argentina*

Beginning in the late 1990s, the UN Human Rights Committee, through its General Comments and Concluding Observations to States, expressed its concern that States' restrictive abortion laws could run afoul of their obligations to prevent torture or CIDT under

109. This is not to say that the Court's Article 8 analysis is wholly devoid of concern for women's substantive autonomy interests. Erdman argues that the *Tysiqc* opinion did introduce one substantive norm under Article 8, namely, the right to be heard within procedural mechanisms governing access to legal abortion. As Erdman noted, "Within a right to be heard sits a respect for personal autonomy and development, substantive interests associated with the most liberal of abortion regimes." *Id.* at 140.

Article 7 of the ICCPR, particularly when the pregnancy was the result of rape or the woman's life was threatened.¹¹⁰ The Committee has also used its Concluding Observations to urge States to reform restrictive abortion laws to ensure their compliance with Article 7. For example, in its Concluding Observations to Peru in 2013, the Committee observed that Peru's criminalization of abortion was incompatible with its obligations under Article 7 and recommended that Peru revise its laws to allow abortion in cases of rape or incest.¹¹¹ Furthermore, in its most recent Concluding Observations to Ireland, the Committee, citing to Article 7, expressed its concern that Ireland continued to prohibit abortion in most circumstances and highlighted the "severe mental suffering caused by the denial of abortion services to women seeking abortions due to rape, incest, fatal foetal abnormality or serious risks to health."¹¹² The Committee concluded by recommending that Ireland undertake significant reforms, namely that it "[r]evis[e] its legislation on abortion, *including its Constitution*, to provide for additional exceptions in cases of rape, incest, serious risks to the health of the mother, or fatal foetal abnormality"¹¹³ to comply with its obligations under the ICCPR.¹¹⁴

The Human Rights Committee has further elaborated on its understanding of the nexus between restrictive abortion laws and

110. *See, e.g.*, Human Rights Comm., General Comment No. 28, *supra* note 3, ¶ 11 (noting that in assessing a State's compliance with Article 7 of the ICCPR, the Committee would examine whether States provided access to safe abortion for women who became pregnant as a result of rape); Human Rights Comm., Concluding Observations to Peru, ¶ 20, U.N. Doc. CCPR/CO/70/PER (2000) (observing that the criminalization of abortion is incompatible with Article 7 of the ICCPR and recommending that Peru revise its abortion law).

111. Human Rights Comm., Concluding Observations to Peru, ¶ 14, U.N. Doc. CCPR/C/PER/CO/5 (2013).

112. Human Rights Comm., Concluding Observations to Ireland, ¶ 9, U.N. Doc. CCPR/C/IRL/CO/4 (2014).

113. *Id.* ¶ 9(a) (emphasis added).

114. As of this writing, two petitions are pending before the UN Human Rights Committee on behalf of Irish women who traveled to the United Kingdom to obtain abortion services after discovering that they were carrying fetuses with fatal anomalies. The petitioners claim that Ireland's abortion laws, which make it illegal for women to obtain abortions in cases of fetal abnormality, violate their right to be free from cruel, inhuman, or degrading treatment under Article 7 of the ICCPR, among other claims. *See* Press Release, *Center for Reproductive Rights Brings Second Case Against Ireland Abortion Laws to United Nations*, CENTER FOR REPRODUCTIVE RIGHTS (Mar. 13, 2014), available at <http://reproductiverights.org/en/press-room/CRR-brings-second-Ireland-case>; Press Release, *Irish Woman Forced to Travel Abroad for Abortion Brings Case to United Nations*, CENTER FOR REPRODUCTIVE RIGHTS (Nov. 13, 2013), available at <http://reproductiverights.org/en/press-room/irish-woman-forced-to-travel-abroad-for-abortion-brings-case-to-united-nations>.

CIDT in two individual communications where it found that denying or obstructing a woman's access to an abortion amounted to CIDT: *K.L. v. Peru* and *L.M.R. v. Argentina*.

In *K.L. v. Peru*, the author of the communication was a 17-year-old girl who was diagnosed as pregnant with an anencephalic fetus, a rare condition in which the fetus develops without a significant part of its brain, skull, or scalp. The doctors told K.L. that the fetus would not survive long after delivery and that she faced risks to her life if she continued with the pregnancy.¹¹⁵ They advised K.L. to terminate the pregnancy. However, the hospital director refused to provide K.L. with the abortion on the grounds that the Peruvian Penal Code criminalized abortion in cases where the fetus was likely to be born with a severe deformity and only permitted the procedure when abortion was the *only* way to save the life of the pregnant woman or to avoid "serious or permanent damage to her health."¹¹⁶ The Ministry of Health medical personnel also refused K.L.'s request for an abortion authorization. K.L. subsequently gave birth to a daughter and nursed her for four days until the baby died.¹¹⁷

The Human Rights Committee found that Peru had violated its obligations under Article 7 by not allowing K.L. to obtain an abortion. The Committee noted that K.L. had endured pain and distress from being forced to carry her pregnancy to term and then witnessing her daughter's deformities, all while knowing the child would die shortly after birth.¹¹⁸ The Committee also accepted K.L.'s assertion that she had fallen into a deep depression after her delivery as well as a report from a psychiatrist and member of the Peruvian Medical Association averring that denying K.L. an abortion had "substantially contributed to triggering the symptoms of depression" and had severely impacted K.L.'s mental health.¹¹⁹ The Committee further noted that K.L. was particularly vulnerable to this suffering since she was a minor.¹²⁰ Given the early diagnosis of the fetus's condition, the Committee concluded that K.L.'s mental suffering was foreseeable and that the

115. Human Rights Comm., Commc'n., *K.L. v. Peru*, *supra* note 9, ¶ 2.2.

116. *See id.* ¶ 2.3.

117. *See id.* ¶ 2.6.

118. *See id.* ¶ 6.3.

119. *Id.* ¶ 2.5.

120. *See id.* ¶ 6.3. (finding that Peru had violated Articles 2, 17, and 24 of the ICCPR.); *id.* ¶ 8 (ordering the State to provide compensation to K.L. and to "take steps to ensure that similar violations do not occur in the future.").

State's refusal to allow the abortion was the cause of K.L.'s suffering.¹²¹

The *K.L.* decision—the first international decision to find that denial of abortion amounted to CIDT¹²²—was particularly notable for recognizing the severity of the mental suffering K.L. experienced as the result of carrying a seriously deformed fetus to term and for placing this suffering at the center of its analysis. Furthermore, the Human Rights Committee's Article 7 finding rested on Peru's failure to provide K.L. with a therapeutic abortion, without any reference to the lawfulness of the procedure. In contrast, the Committee accepted and relied explicitly on K.L.'s claim that she qualified for a legal abortion in Peru when finding a violation of Article 17—right to private life.¹²³ The contrast between the Committee's reasoning under Article 7 and Article 17 suggests that the Committee understood K.L.'s suffering as arising from being compelled to continue with her pregnancy, not from being denied a right recognized under domestic law. Furthermore, the Committee's focus on the harm to K.L.'s mental health implied that Peru was required to either amend its abortion law or interpret its health exception broadly to include threats to mental health in order to avoid future inflictions of CIDT on young women in positions similar to K.L.¹²⁴

The Human Rights Committee built on *K.L. v. Peru* when it decided *L.M.R. v. Argentina* in 2011. L.M.R. was a young, mentally disabled girl who became pregnant as a result of rape. Although Argentine law allows for mentally disabled women who are rape victims to access abortion,¹²⁵ L.M.R. faced multiple hurdles to obtaining an abortion: the first hospital she and her family approached

121. *See id.* ¶ 6.3.

122. *See* Luisa Cabal & Jaime M. Todd-Gher, *Reframing the Right to Health: Legal Advocacy to Advance Women's Reproductive Rights*, in *REALIZING THE RIGHT TO HEALTH* 120, 128 (Andrew Clapham & Mary Robinson eds., 2012).

123. *See* Pardiss Kebriaei, *UN Human Rights Committee Decision in KL v. Peru*, 15 *INTERIGHTS BULL.* 101, 151–52 (2006), available at http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/Interights_KL_v_Peru.pdf. This suggests that the Committee's omission of this detail in its Article 7 analysis was deliberate rather than inadvertent. *See* Human Rights Comm., Commc'n., *K.L. v. Peru*, *supra* note 9, ¶ 6.4.

124. *See* Kebriaei, *supra* note 123.

125. Código Penal [Cód. Pen.] [Criminal Code] art. 86(2) (Abeledo Perrot, Buenos Aires, 1971) (Arg.); Human Rights Comm., Commc'n No. 1608/2007, *L.M.R. v. Argentina*, ¶ 2.2, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).

refused to perform the abortion, even though it was legal;¹²⁶ the matter was brought before a juvenile court judge who issued an injunction to prevent the hospital from performing the abortion, despite the fact that Argentine law does not provide for judicial intervention in determining whether an abortion is legally available;¹²⁷ and even though the judge's order was eventually overruled by a higher court,¹²⁸ multiple hospitals and health centers still refused to provide the abortion.¹²⁹ L.M.R. and her family also faced public pressure not to undergo the abortion, including pressure from the Catholic University, the Corporation of Catholic Lawyers, and from the public who sent threatening letters to the hospital where L.M.R. was seeking medical care.¹³⁰ Ultimately, L.M.R. obtained a clandestine abortion, even though the Supreme Court of Justice of Buenos Aires had ruled that her termination could proceed legally.¹³¹

The Human Rights Committee found multiple violations of L.M.R.'s rights under the ICCPR, including her right to be free from CIDT under Article 7. The Committee focused on the State's procedural omission, noting that it was this omission "in failing to guarantee L.M.R.'s right to a termination of pregnancy [as provided under domestic law] . . . [that] caused L.M.R. physical and mental suffering" amounting to a violation of Article 7.¹³² Like the European Court in *R.R. and P & S*, the Human Rights Committee recognized that L.M.R. had experienced particularly severe humiliation and pain from being repeatedly denied access to a legal procedure. The fact that L.M.R. ultimately had to obtain a clandestine procedure—which is often less safe than a legal procedure¹³³—may also have contributed to the finding. The Committee further recognized that L.M.R.'s vulnerability as a young rape victim with a diminished

126. See Human Rights Comm., Commc'n., *K.L. v. Peru, L.M.R. v. Argentina*, ¶ 2.2, *supra* note 114.

127. See *id.* ¶ 2.4.

128. See *id.* ¶ 2.6.

129. See *id.* ¶¶ 2.7–2.8.

130. See *id.* ¶¶ 2.7, 2.9.

131. See *id.* ¶ 2.8.

132. *Id.* ¶ 9.2.

133. According to the World Health Organization, 47,000 women die from complications of unsafe abortion each year while deaths due to unsafe abortion make up close to 13% of all maternal deaths. See WORLD HEALTH ORG., UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008 1 (6th ed. 2011), available at http://whqlibdoc.who.int/publications/2011/9789241501118_eng.pdf?ua=1.

mental capacity contributed to L.M.R.'s pain and suffering.¹³⁴ Finally, the Committee recognized that L.M.R. did not have access to an effective remedy under Article 2 of the ICCPR with respect to Article 7—CIDT, among other rights; although L.M.R. was eventually able to obtain an abortion, “to achieve this result, [she] had to appear before three separate courts, during which period the pregnancy was prolonged by several weeks, with attendant consequences for L.M.R.'s health that ultimately led [her] to resort to illegal abortion.”¹³⁵ The Committee concluded by calling on Argentina to take steps to prevent similar violations in the future.¹³⁶

2. The Committee Against Torture: Concluding Observations on Access to Abortion

While the Committee Against Torture has not heard an individual communication on access to abortion under the Convention Against Torture, it has noted in its Concluding Observations to States that restrictive abortion laws may lead to suffering tantamount to CIDT and has urged States to reform their abortion laws as part of their obligation to prevent CIDT. In its Concluding Observations to Nicaragua, for example, the Committee noted with concern that Nicaragua completely prohibits abortion, even in cases of rape, incest, or a life-threatening pregnancy.¹³⁷ The Committee noted that when a woman's pregnancy is the result of gender-based violence, denying the woman access to abortion could cause her to constantly relive the violation against her and would “cause[] serious traumatic stress and a risk of long-lasting psychological problems such as anxiety and depression.”¹³⁸ It further acknowledged that, since Nicaragua's abortion ban had been implemented, several women had died from “lack of timely medical intervention to save [their lives], in clear violation of numerous ethical standards of the medical profession.”¹³⁹

134. *L.M.R.*, *supra* note 125, ¶ 9.2.

135. *Id.* ¶ 9.4.

136. *Id.* ¶ 11.

137. *See* Comm. Against Torture, Concluding Observations of the Committee Against Torture: Nicaragua, ¶ 16, U.N. Doc. CAT/C/NIC/CO/1 (2009); *see also* AMNESTY INT'L, THE TOTAL ABORTION BAN IN NICARAGUA: WOMEN'S LIVES ENDANGERED, MEDICAL PROFESSIONALS CRIMINALIZED 7–9 (July 2009), *available at* www.amnestyusa.org/sites/default/files/pdfs/nicaragua_abortion_ban_report_english.pdf (discussing the legal framework around abortion in Nicaragua).

138. Comm. Against Torture, Concluding Observations to Nicaragua, *supra* note 137, ¶ 16.

139. *Id.*

The Committee urged Nicaragua to reform its abortion law, at least to provide exceptions in cases where pregnancy was the result of rape or incest.¹⁴⁰ Similarly, in its Concluding Observations to El Salvador, the Committee noted, that the State's criminal abortion ban had resulted in "serious harm to women, including death"¹⁴¹ and urged the State to take all legal and other measures necessary to prevent, investigate, and punish "all acts" that endanger the health of women and girls, including "by providing the required medical treatment."¹⁴²

In sum, the European Court of Human Rights, the Human Rights Committee, and the Committee Against Torture all recognize that denying or obstructing a woman's access to an abortion—in many cases, compelling her to continue with a pregnancy against her will—amounts to CIDT in certain contexts. These bodies have looked to a number of factors in determining whether women have experienced CIDT, including whether access to abortion is extra-legally obstructed and the manner in which it is obstructed; whether the woman is particularly vulnerable to abuse—for example, if she is a minor or a rape victim; and whether the woman has experienced serious physical or mental health consequences from continuing with the pregnancy. In the following Part, I examine these cases and standards further to distill some common guiding principles that appear to be at work in human rights bodies' consideration of when denial of abortion amounts to CIDT.

III. UNDERSTANDING HUMAN RIGHTS BODIES' APPROACHES TO IDENTIFYING CIDT IN THE ABORTION CONTEXT

As described above, human rights bodies have found that both substantive legal provisions that restrict access to abortion as well as procedural deficits that obstruct women from accessing legal reproductive health services can lead to the infliction of pain or suffering amounting to cruel, inhuman, or degrading treatment. But while human rights bodies have cited numerous factors to support these findings, they have not put forward a clear conceptualization of when the physical or psychological pain experienced by women in this context crosses the threshold to become CIDT. This issue is

140. *See id.*

141. Comm. Against Torture, Concluding Observations of the Committee Against Torture: El Salvador, ¶ 23, U.N. Doc. CAT/C/SLV/CO/2 (2009).

142. *Id.*

common to the CIDT analysis more generally, which consists primarily of fact-specific, case-by-case inquiries rather than an application of bright line rules. At the same time, human rights bodies have not generally found that denials of other forms of healthcare amount to CIDT, even when they result in severe pain or suffering, instead analyzing these issues under other human rights such as the right to health. Thus, it is important to understand why abortion, in certain circumstances, is different and what implications this holds for the protection of women's human rights in the healthcare context.

A. Human Rights Bodies Appear to Consider the Justifiability or Proportionality of the State Regulation Restricting Access to Abortion in Determining Whether the Regulation Inflicts CIDT on a Woman Denied an Abortion

As discussed in Part I, human rights bodies' CIDT analysis focuses primarily on whether the conduct in question meets a minimum severity threshold. It is not always clear, however, how this threshold is determined. Some commentators have suggested that the minimum severity threshold is actually determined, at least in part, by an examination of whether the infliction of pain or suffering is justifiable in light of lawful State purposes. If it is justifiable, then it cannot amount to CIDT, despite the infliction of serious pain or suffering;¹⁴³ conversely, if the treatment is not justifiable, then it is more likely to constitute CIDT.

The former UN Special Rapporteur on Torture, Manfred Nowak, is a proponent of using a justifiability test to determine whether conduct meets the threshold for CIDT. Nowak has argued that the infliction of pain or suffering may be justifiable, and thus *not* an act of CIDT, if the action is legal under domestic law, aimed at a lawful purpose, and not excessive but necessary in the particular circumstances to achieve any of the State's lawful purposes.¹⁴⁴

143. See Frederick Piggott, *Justification Doctrine in the Prohibition on Torture, Cruel, Inhuman or Degrading Treatment*, 18 *TORTURE* 116, 119 (2008). The European Commission on Human Rights suggested that CIDT is in part defined as treatment that is unjustifiable in a particular situation. See *Greek Case*, 12 Y.B. EUR. CONV. ON H.R., ¶ 186 (Eur. Comm'n on H.R.) (1969).

144. See Manfred Nowak & Elizabeth McArthur, *The Distinction Between Torture and Cruel, Inhuman or Degrading Treatment*, 16 *TORTURE* 147, 149 (2006). While Nowak applies this test to the use of police force outside of State custody, he does not limit it to such contexts but instead proposes it as a general threshold test for determining when conduct amounts to CIDT. See *id.*

Nowak argues that the infliction of severe pain or suffering deserves particularly strong moral condemnation in contexts of custody or control where the victim is powerless to resist her imprisoner. Thus, in those circumstances, the infliction of severe pain or suffering by the State can never be proportional and always amounts at least to CIDT, if not torture.¹⁴⁵ However, outside of custody, the victim's powerlessness is reduced and thus the decision of the State to use or condone force poses less of a threat to the individual, who now has the power to resist.¹⁴⁶ Given the increased autonomy of the individual outside of custody, the State has greater latitude to use lawful but coercive measures against its citizens, within the bounds of the proportionality analysis. Nowak does, however, qualify his test by noting that situations of powerlessness may also arise outside of custody and in such circumstances the proportionality threshold should not apply to the CIDT determination.¹⁴⁷

While human rights bodies do not generally cite Nowak's justifiability/proportionality test as part of their CIDT analysis, an implicit use of this test may help explain why these bodies have found the denial of abortion to amount to CIDT in some cases, but not in others. In *ABC*, for example, the European Court determined that A and B were denied abortions pursuant to domestic law and that Ireland's regulation of abortion was an appropriate and lawful State function under Article 8 of the European Convention.¹⁴⁸ Furthermore, the Court concluded that the restrictions were burdensome but not excessive since the women were still able to travel to England to obtain abortions and could seek post-abortion care at home in Ireland. Therefore, the European Court appears to have interpreted Ireland's abortion law to be proportionate and justifiable, and thus chose not to engage the question of inhuman or degrading treatment at all.

In *K.L. v. Peru*, on the other hand, the Human Rights Committee may have found that the application of Peru's restrictive abortion law

145. See U.N. Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, ¶¶ 37–38, U.N. Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010).

146. See *id.*

147. See *id.* ¶ 188.

148. See *A, B, & C v. Ireland*, No. 25579/05 Eur. Ct. H.R. (2010). But it was *not* clear that C was denied an abortion pursuant to domestic law since it was possible that she was legally entitled to an abortion to preserve her life. Thus, the justifiability theory is not fully explanatory in this case. See *id.*

to K.L. exceeded what was necessary to achieve a lawful State purpose. Presumably, States enact restrictions on abortion in order to protect what they believe to be the life of the fetus or to show respect for “life” generally. However, in cases of severe fetal impairment, where there is little to no chance that the child will survive long after birth, denying a woman access to an abortion does not seem to advance either of these State interests. In light of the severe mental anguish that K.L. experienced in carrying her pregnancy to term, forcing her to do so seemed extremely disproportionate to the minimal State interest at stake and thus crossed the threshold into CIDT.

The use of a justifiability threshold may provide human rights bodies with greater guidance for understanding when the denial of an abortion is sufficiently serious to constitute CIDT. The strongest cases will be those like *R.R.*, *P & S*, and *L.M.R.*, where public or private actors unlawfully harass or obstruct a woman’s access to a lawful abortion or related procedure. Even if certain individuals act lawfully in declining to provide abortion services or referrals—for example, under a conscientious objection law, the State’s failure to guarantee domestically recognized rights is an omission that cannot be seen as aimed at a lawful purpose and thus violates the second prong of the justifiability test. Assessment of the third prong—basically, determining when regulation is excessive to the lawful aim—is less apparent and returns to difficult but necessary questions about how to assess the level of pain or suffering that women experience when denied access to an abortion. To some extent, a categorical approach may be useful: for example, adopting the view that denying access to abortion to a rape victim or a woman whose life is at stake is always excessive to lawful State aims. However, while human rights bodies have also found that lesser—but still severe—forms of physical and mental suffering can amount to CIDT in the abortion context, the justifiability test provides little guidance for determining *why* State regulation is excessive in those contexts and to what extent this doctrine may restrict States’ authority to regulate access to abortion. The following Sections describe some factors human rights bodies already consider or *should* take into account in making that determination.

B. Human Rights Bodies Consider Certain Autonomy Deficits in their CIDT Analysis but Should Examine Autonomy-Based Harms More Broadly

Human rights bodies may be more likely to find that the denial of an abortion or related services is excessive to lawful State aims, and amounts to CIDT, when the pregnancy is the result of a situation that compromises the woman's ability to consent to sexual intercourse. In such cases, the pain or suffering of a woman who is denied an abortion is perceived as heightened by this "autonomy deficit." Human rights bodies have noted the particular vulnerability of women who are minors, rape victims, or mentally disabled, all conditions that diminish or eliminate their ability to consent to sex, and thus the possibility of pregnancy. With regard to minors like K.L., denying access to a desired abortion may force them to live with the consequences of an act that they did not fully consent to, inflicting severe pain or suffering.¹⁴⁹ The autonomy deficit with regard to rape victims may be even starker: women who become pregnant as a result of rape do not make an autonomous choice to engage in the sex act that results in pregnancy. Furthermore, human rights bodies increasingly classify rape as torture,¹⁵⁰ suggesting that the pregnancy itself is the result of a torturous act and that continuing the pregnancy can compound a woman's pain and suffering by forcing her to relive the violence against her.¹⁵¹ Given that such pregnancies may be seen as the consequence of an act of torture or CIDT—and thus an ongoing manifestation of those acts¹⁵²—it is not surprising that the UN Treaty Monitoring Bodies have urged States to reform their laws to allow for abortion in cases of rape and the European Court of Human Rights has stressed that, when abortion is lawful for rape victims, the procedure must be accessible.

149. But while a person's status as minor seems to be important for the CIDT analysis, no human rights body has found that a State must provide a minor with an abortion in any circumstances simply because she is a minor.

150. See *supra* note 1 and accompanying text.

151. See *supra* note 138 and accompanying text.

152. In *L.M.R. v. Argentina*, for example, the applicants framed L.M.R.'s access to abortion as a way to mitigate the harm caused by the sexual abuse that led to her pregnancy. See Lisa M. Kelly, *Reckoning with Narratives of Innocent Suffering in Transnational Abortion Litigation*, in *ABORTION LAW IN TRANSNATIONAL PERSPECTIVE* 303, 317–18 (Rebecca J. Cook, Joanna N. Erdman & Bernard M. Dickens eds., 2014) (citing *L.M.R.*, *supra* note 125, ¶ 3.1).

The recognition that it can be cruel to force a woman to continue with a pregnancy resulting from an autonomy deficit is a significant development in human rights law. At the same time, as Lisa Kelly has pointed out, it risks singling out a small category of women as “deserving” access to abortion due to their own “innocent” role in the sex act while branding women who choose to have sex as undeserving of the same access.¹⁵³ In other words, women who become pregnant but did not consent to sex may be seen as suffering due to the shattering of their sexual innocence, *not* because their autonomy over their bodies and reproductive futures has been frustrated or denied. As Kelly points out, the view of who deserves access to an abortion “risks reinforcing a particular form of sexual discipline through law”: namely, in the words of Drucilla Cornell, that “[w]omen who suffered incest and rape did not choose to have sex, and therefore should not be punished with an unwanted pregnancy; those who chose to have sex should expect such a punishment.”¹⁵⁴

Denying a woman access to an abortion or related health services also implicates a broad range of autonomy interests, regardless of whether the woman is a minor, a rape victim, or mentally incapacitated, which should receive greater consideration in human rights bodies’ CIDT analysis. Pregnancy poses very real and particular risks to a woman’s life and health, stemming from the fact that a woman carries the fetus within her own body. By denying a woman the opportunity to make decisions about continuing a pregnancy, particularly when her health is threatened, a State can impose serious physical consequences on her. This may also result in severe mental suffering when a woman anticipates a physical harm from continuing a pregnancy but is prevented from taking medical steps to address that possibility. Human rights bodies could improve their CIDT analysis by recognizing that the deprivation of autonomous choice, coupled with the possibility of serious health effects from continuing the pregnancy,¹⁵⁵ could in turn lead to mental

153. Kelly, *Narratives of Innocent Suffering*, *supra* note 152, at 317.

154. *Id.* (citing DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY, AND SEXUAL HARASSMENT* 81 (1995)).

155. Although this paragraph focuses on potential harm to a woman’s physical health in cases like *Tysiqc*, our conception of good health should not be confined to the “absence of disease or infirmity” but should be understood as a “state of complete physical, mental and social well-being.” See Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946, signed on July 22, 1946 by the representatives of 61 States (Official Records of the World Health

pain or suffering on the same level as that experienced by women like R.R. or K.L. In *Tysiāc*, for example, the European Court may have found a violation of Article 3 if it had fully considered and recognized the mental suffering that Tysiāc experienced fearing that she could lose her eyesight if she continued with her pregnancy.

Furthermore, denying a woman autonomy over her body and her reproduction can have other social consequences that inflict severe pain and suffering on her. Human rights bodies have already recognized this type of autonomy-based harm in the reproductive rights context, in particular with respect to coercive sterilization. In *V.C. v. Slovakia* and *N.B. v. Slovakia*, the European Court of Human Rights found that sterilizing a woman without her informed consent amounted to degrading treatment in large part because it interfered with her autonomy in her reproductive choices.¹⁵⁶ The Court noted that coercive sterilization “was liable to arouse in [the women] feelings of fear, anguish and inferiority and to entail lasting suffering,”¹⁵⁷ and that the doctors’ interference with the applicants’ ability to have children deprived them of an important life choice, leading to depression, the deterioration of their personal relationships, and the loss of status in their communities.¹⁵⁸

The abortion context raises similar autonomy interests. While coercive sterilization may be distinguished from abortion in that it involves the doctor’s direct bodily intrusion on her patient, this should be recognized as a relatively minor difference. Although the bodily intrusion itself is offensive, it is ultimately the fact that the doctor—or society—has usurped the woman’s reproductive decision-making that transforms both coercive sterilization and denial of abortion into acts

Organization, no. 2, p. 100) and entered into force on April 7, 1948. Compelling a woman to continue with an unwanted pregnancy can have serious health consequences not only with respect to a woman’s physical well-being but also with respect to her mental health and socioeconomic welfare. By depriving women of the opportunity to make decisions about their bodies in a full range of circumstances, States impose consequences on women that may lead to severe pain and suffering—not only because a woman may suffer physical harm from continuing the pregnancy but because she may not have the socioeconomic means to bear and raise a child. These considerations should not be overlooked in human rights bodies’ CIDT analysis, and deserve further consideration in the relevant literature. I am indebted to Johanna Fine for these insights.

156. See *V.C. v. Slovakia*, Eur. Ct. H.R. No. 18968/07, ¶¶ 106–20 (2012); *N.B. v. Slovakia*, Eur. Ct. H.R. No. 29518/10, ¶¶ 71–88 (2012).

157. *V.C. v. Slovakia*, Eur. Ct. H.R. No. 18968/07, ¶ 118; *N.B. v. Slovakia*, Eur. Ct. H.R. No. 29518/10, ¶ 80.

158. *V.C. v. Slovakia*, Eur. Ct. H.R. No. 18968/07, ¶ 118; *N.B. v. Slovakia*, Eur. Ct. H.R. No. 29518/10, ¶ 80.

that “arouse . . . feelings of fear, anguish and inferiority” in women. Furthermore, the personal and social consequences that the European Court identified in the context of coercive sterilization, such as depression and social isolation, often arise in situations when women are denied an abortion, perhaps especially in contexts where abortion is heavily restricted and where attempting to access abortion for any reason is highly stigmatized.¹⁵⁹ By recognizing that restrictive abortion laws contribute to social conditions that stigmatize and debase women for seeking an abortion, regardless of the reason, human rights bodies could significantly strengthen their understanding of the serious harms women experience in this context and improve human rights protections for women seeking to exercise their reproductive autonomy.

C. Human Rights Bodies Have Recognized the Particular Pain Experienced by Women as Mothers Who Must Confront Their Future Child's Potential Suffering

In finding that denial of abortion or related services amounted to CIDT in specific cases, human rights bodies have repeatedly focused on the mental suffering of the women concerned, including that stemming specifically from their status as expectant mothers. The decisions in both *K.L.* and *R.R.* highlighted this particular type of suffering, at least in part because these were arguments raised by the applicants themselves.¹⁶⁰ The Human Rights Committee and the European Court, respectively, picked up on both of these arguments, with the European Court fleshing it out more extensively in its analysis:

Like any other pregnant woman in her situation, [R.R.] was deeply distressed by information that the foetus could be affected with some malformation. It was therefore natural that she wanted to obtain as much information as possible so as to find out whether the initial diagnosis was correct, and if so, what was the exact nature of the ailment. She also wanted to find out about the options available to her. As a result of the procrastination of the

159. For a case study of how restrictive abortion laws can lead to stigma, discrimination, and abuse against women seeking abortions, see *Forsaken Lives: The Harmful Impact of the Philippine Criminal Abortion Ban*, CENTER FOR REPRODUCTIVE RIGHTS (2010), <http://reproductiverights.org/en/forsakenlives>.

160. See Human Rights Comm., Commc'n., *K.L. v. Peru*, *supra* note 9, ¶¶ 3.4, 6.3; *R.R. v. Poland*, Eur. Ct. H.R. No. 27617/04, ¶ 147 (2011).

health professionals as described above, she had to endure weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment.¹⁶¹

This passage from the *R.R.* opinion is notable for strategically framing R.R. as a mother concerned with the well-being of her unborn child, and whose pain and anguish arose in part from her concern for her family and its future, not necessarily from the denial of her autonomous decision-making. Certainly, the European Court of Human Rights was concerned with how R.R. herself was treated by the doctors—finding that they had humiliated her¹⁶²—but the narrative of “woman as mother” is particularly strong in this case, as it is in *K.L.*¹⁶³

The narrative of maternal pain or suffering is a fraught one. Feminist commentators have criticized international bodies for essentializing women as mothers and homemakers, framing them in “procreative and heterosexual terms.”¹⁶⁴ Other commentators, however, have asserted that the “woman as mother” narrative might actually provide a fuller and more contextualized understanding of women's lives than a concept of women as “free, independent, [and] individual,”¹⁶⁵ unattached to family or community.¹⁶⁶ Thus, the recognition of maternal pain in the context of CIDT may actually reveal an important dimension of female pain or suffering. It becomes problematic, however, if human rights bodies do not also recognize and address the independent pain or suffering a woman may experience from being denied the autonomous choice to terminate a pregnancy. Such a failure risks perpetuating stereotypes within

161. *R.R. v. Poland*, Eur. Ct. H.R. No. 27617/04, ¶ 159.

162. See *supra* note 82 and accompanying text.

163. The Human Rights Committee in *K.L. v. Peru* observed that, “The author also claims that, owing to the refusal of the medical authorities to carry out the therapeutic abortion, she had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon . . . due weight must be given to the author's complaints.” *K.L.*, *supra* note 9, ¶ 6.3.

164. Dianne Otto, *A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women*, in *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 115, 118 (Kelly Askin & Dorean Koenig eds., 1999); see also EDWARDS, *VIOLENCE AGAINST WOMEN*, *supra* note 1, at 71–73 (providing an overview of feminist critiques of human rights law as framing women as primarily mothers and homemakers).

165. Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity and the Discourse of Rights*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 43, 55 (Rebecca J. Cook ed., 1994).

166. See EDWARDS, *VIOLENCE AGAINST WOMEN*, *supra* note 1, at 73.

international law about the proper role of women in society rather than providing a fuller understanding of how different situations implicate their human rights. This failure may be seen in the European Court of Human Rights cases: while the Court acknowledged the pain and suffering that R.R. experienced as an expectant mother concerned with her child's well-being, it failed to recognize the severity of the pain and suffering that Tysi c experienced when she feared the permanent loss of her eyesight yet could not obtain an abortion.

CONCLUSION

Human rights bodies' recognition that State-sanctioned or State-tolerated denials of abortion can amount to cruel, inhuman, or degrading treatment is an important development in human rights law; indeed, there do not appear to be many other examples where the denial of healthcare has been deemed to rise to the level of CIDT outside of detention contexts. Significantly, human rights bodies have found that States must take a number of steps to ensure that women are not subjected to cruel, inhuman, or degrading treatment in the process of seeking reproductive healthcare, particularly abortion. First, States should ensure that rights guaranteed under domestic law are practically available and that women can vindicate their rights through a neutral procedural mechanism that reduces the risk of abuse in the healthcare system. Second, States that prohibit and criminalize abortion in most or all circumstances should enact exceptions to allow for abortion in cases where continuing with the pregnancy poses severe risks of physical or mental harm to the woman, such as in cases of rape, fetal abnormalities, or when the woman's life is at stake. These findings reflect an understanding that certain restrictions on abortion—or the State's failure to act to prevent *de facto* restrictions from arising—are unjustifiable and disproportionate to lawful State aims. Furthermore, they signal a growing recognition by human rights bodies that deprivations of autonomy in the reproductive rights context can lead to the kind of pain and suffering that is unacceptable and intolerable in modern societies. While these bodies have not embraced a fully developed understanding of the ways in which depriving women of autonomous decision-making in the abortion context can implicate CIDT, they have made important strides and have established a foundation for further development of this doctrine.