ÅBO AKADEMI – FACULTY OF SOCIAL SCIENCES, BUSINESS AND ECONOMICS

Abstract for Master´s Thesis

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<tr><td colspan="2">Subject: Public International Law, Master´s Degree Programme in International Human Rights Law</td></tr>
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<tr><td colspan="2">The present thesis examines the extent to which sexual and reproductive health and rights are protected and accessible to asylum seekers in Europe, where these rights are enshrined in international human rights law. The thesis demonstrates that where inalienable and universal applicability to asylum seekers of such rights fails on a domestic level, given the case study analysis of abortion legislation in Ireland, the implementation of a rights-based and intersectional approach, guided by international human rights standards, would seek to secure domestic legal protection to SRHR for asylum seekers.

The analysis frames sexual and reproductive health and rights firstly within international human rights law, focusing particularly on the UN human rights framework and the European human rights framework, including key case law pertaining to the progressive nature of enshrining SRHR. The analysis then begins to frame the regional perspective more closely, identifying relevant EU legal acts, as well as the prevalence of sexual and reproductive health and rights as an issue for debate within EU institutions. In analysing both international human rights law and EU law relevant to the promotion and protection of sexual and reproductive health and rights, specific issues that may disproportionately impact asylum-seeking women are highlighted.

In order to accurately assess the applicability and accessibility of sexual and reproductive health and rights for asylum seekers on a domestic level, the case study analysis of abortion in the Republic of Ireland is presented in the thesis. The thesis conveys the transformative nature of the legislation governing abortion in Ireland, as well as the short-falls the current legislation contains, which disproportionately impacts asylum seekers.

Finally, securing sexual and reproductive health and rights for asylum seekers is framed particularly within the use of the principle of non-discrimination, as well as domestic examples of best practices in legislation concerning such rights, which seek to somewhat mitigate inequal access to sexual and reproductive health and rights.</td></tr>
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MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

Christina Challis

Sexual and Reproductive Health and Rights of Asylum Seekers: Accessibility and Protection in a European Context

Master's Thesis in Public International Law

Master's Programme in International Law and Human Rights

Supervisor: Catarina Krause

Åbo Akademi University

2023

Table of Contents

Acronyms

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

CJEU: Court of Justice of the European Union

CRC: Convention on the Rights of the Child

CRPD: Convention on the Rights of Persons with Disabilities

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

HSE: Health Service Executive

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

MISPL Minimum Initial Service Package

SRH: Sexual reproductive health

SRHR: Sexual and reproductive health and rights

1. Introduction

1.1 Research question and background

The present thesis will analyse the accessibility and protection of sexual and reproductive health and rights (SRHR) for asylum seekers in a European context. Several legislative changes to access to sexual and reproductive health services (*e.g.* abortion access) in Europe in recent years has led to asylum-seeking women[1] being disproportionately and adversely impacted, which must be better acknowledged not only in legislative procedures, but also in feminist, pro-choice and human rights discourses. As such, it is the view of the author is that the recognition and discussion of asylum seeking women's SRHR are highly important in the field of international and regional human rights protection, in order to both highlight the difficulties in accessing healthcare for asylum seekers on a broader scale, and the specific needs of asylum seeking women in particular. Such recognition also serves to better apply an intersectional approach to international human rights law and women's rights, as is the view of the author. Vulnerability in access to human rights is "enhanced among those who are subjected to 'the structural violence and marginalisation of migration' and separation from their families."[2] Therefore, the research question for this thesis is: to what extent are SRHR protected and accessible to asylum seekers in Europe, where these rights are enshrined in international human rights law? Failing applicability on a domestic level of such rights to asylum seekers, would a rights-based and intersectional approach, guided by international human rights standards, seek to secure entitlement to SRHR?

The present thesis will specifically focus on the substantive issue of access to abortion services for asylum seeking women, applying a European perspective through providing an analysis of case law from the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), and domestic case law from the Republic of Ireland. Case law on the topic concerning Ireland will be framed within a case study, with an analysis of the progression of the legislation governing abortion in the jurisdiction, as well as the state of the current legislation, and its current applicability in meeting the needs of asylum-seeking women. As there is no inherent "right" to abortion,[3] provisions that exist within international

[1] Throughout the thesis, the terms 'women', 'girls' and 'people' are used interchangeably. This language is intended to include all who can become pregnant, regardless of gender identity.
[2] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 23.
[3] See *A, B & C v. Ireland* (Application no. 25579/05), European Court of Human Rights, Judgment of 16.12.2010, paragraph 214, and; *P. and S. v. Poland* (Application no. 57375/08), European Court of Human Rights, Judgment of 30.10.2012, paragraph 96.

human rights law (such as in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR)), and within European human rights mechanisms (such as the European Convention on Human Rights (ECHR)), that guide state practice on guaranteeing SRHR, will be examined.

The thesis will make reference to hurdles impacting the universal realisation of SRHR, namely the use of conscientious objection and increase in demand of SRH care and services, *e.g.* in international crises and conflicts, causing surges of cross-state movement. Such hurdles are highly relevant when framing analyses of accessibility and protection of SRHR for asylum seekers, as they are often most impacted by such curtailments in access to SRH care and services.

1.2 Method and material

A rights-based approach is applied to analyses throughout, considering health as a human right, rooted in the principle of universality, with the premise of promoting "health and guarantee[ing] access to health care for all independently of any status,"[4] including sexual and reproductive health care. An analysis of case law from the ECtHR and the CJEU will be presented, as well as domestic case law pertaining to access to SRHR in Ireland. However, in order to convey best practices of asylum seeker inclusive legislation and policies on SRHR, domestic accessibility of SRHR in Switzerland, Kazakhstan, Argentina and Uruguay will be presented. The purpose as such is to provide concrete examples, though not perfect, that have accounted for disproportional access to SRHR for asylum-seeking women. Switzerland and Kazakhstan have been selected as examples of non-EU countries, that are geographically strategic for migrant women, such as asylum seekers, seeking access to SRH care, namely from Russia, Ukraine and Belarus. Argentina and Uruguay have been selected as examples of South American countries that have incorporated access to SRH care for migrants, including asylum-seeking women, given the unique circumstances that they may face, namely from Venezuela, Peru, Syria and Afghanistan.

For the purposes of the research topic, the analysis of the accessibility and protection of SRHR will predominantly be limited to that of asylum seekers, however, referenced texts

[4] Ines Keygnaert, *et al*., "Sexual and reproductive health of migrants: Does the EU care?" in *Health Policy*, Vol. 114, 2014, pp. 215-225. Here, page 217.

may also at times refer more widely to 'migrants', 'immigrants', 'refugees' or 'internally displaced persons'. However, accessibility and protection of SRHR for internally displaced persons and refugees with an approved asylum decision will not be explored in-depth in the present analysis. Furthermore, the scope of analysis of SRHR accessibility and protection is predominantly limited to that of access to abortion services, although other forms of sexual and reproductive health care may be examined within analyses as necessary.

Finally, the examination of the accessibility and protection of SRHR is limited to that of asylum-seeking women. As such, the SRHR of male asylum seekers will not be analysed, the reason for this being, that "the particularities of gender subject women to particular human rights violations that require a direct response from international law that acknowledges gender and [sexual and] reproductive health."[5] In summary, the present thesis presents a rights-based approach to analysis of accessibility and protection of SRHR for asylum-seeking women in Europe, with a focus on abortion services.

2. Sexual and reproductive health and rights standards

2.1 Framing SRHR under international and regional human rights frameworks

SRHR were first internationally recognised and confirmed to be inherent in human rights[6] at the 1994 United Nations International Conference on Population and Development (ICPD) in the Programme of Action, and at the 1995 Fourth World Conference on Women in Beijing in the Beijing Platform for Action.[7] While both the Programme of Action and Beijing Platform for Action do not create binding obligations on states, "they are agreed to by governments and thus reflect political will," and provide standards for evaluation of compliance to contextually-related, legally-binding obligations.[8] However, SRHR are now "fully incorporated into the corpus of human rights and have been widely interpreted by UN

[5] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, page 440.
[6] *Ibid.* Here, page 438.
[7] Elena Laporta Hernández, "Legal strategies to protect sexual and reproductive health and rights in the context of the refugee crisis in Europe: a complaint before the European Ombudsperson," in *Reproductive Health Matters*, Vol. 25, No. 51, 2017, pp.151-160. Here, page 151.
[8] Françoise Girard and Wilhelmina Waldman, "Ensuring the Reproductive Rights of Refugees and Internally Displaced Persons: Legal and Policy Issues," in *International Family Planning Perspectives*, Vol. 26, No. 4, 2000, pp. 167-173. Here, page 169.

and regional human rights bodies."[9] This chapter will briefly explore the provisions pertaining to SRHR under international human rights law, focusing on the UN human rights framework and European regional human rights mechanisms.

SRHR include "the right to make free, autonomous, and responsible decisions about one's own body, including whether to have children, and if so, when and how many."[10] They also include having access to information and education concerning sexual and reproductive health, access to pregnancy termination services, and "to enjoy the highest possible level of sexual and reproductive healthcare without coercion, violence, or discrimination and in conditions of dignity and equality."[11] Certain groups may experience hindered access to sexual and reproductive healthcare, *e.g.* women with disabilities, LGBTIQ+ people, sex workers, ethnic minorities, migrants (including asylum seekers) and women living in rural areas.[12] An example of the disproportionate access to sexual and reproductive healthcare for certain groups of women is the lack of "sufficient equipment to provide services to women with disabilities."[13] However, anti-discrimination policies, in conjunction with policies ensuring equal access to SRHR, provides a basis for securing rights for vulnerable groups, which this thesis will briefly highlight in the European context. Furthermore, assessing cases of human rights violations against women requires a gendered analysis. This may seem apparent, however, the gendered language of international human rights law standards, often relying on the gender binary, affords a reading of rights that denotes the rights of one sex, simply using the word 'man' or 'men'. This was acknowledged by Judge Sergio García Ramírez concerning the judgement of the Inter-American Court of Human Rights (IACtHR) in *the Miguel Castro-Castro Prison v. Peru*, whereby Judge Ramírez also highlighted that even referring to rights as 'human' or 'fundamental' rights does not serve to bridge the gap between equal recognition of rights of men and women.[14]

[9] Elena Laporta Hernández, "Legal strategies to protect sexual and reproductive health and rights in the context of the refugee crisis in Europe: a complaint before the European Ombudsperson," in *Reproductive Health Matters*, Vol. 25, No. 51, 2017, pp.151-160. Here, page 151.
[10] *Ibid.* Page 152.
[11] *Ibid.* Page 152.
[12] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Sexual and reproductive health rights and the implication of conscientious objection*, published October 2018. Page 9.
[13] *Ibid.* Page 9.
[14] *Miguel Castro-Castro Prison v. Peru,* Inter-American Court of Human Rights, Judgment of 25 November 2006 (Merits, Reparations and Costs), Concurring Opinion of the Judge Sergio García Ramírez, paragraph 2.

SRHR can be found in at least ten internationally recognised human rights in established treaties and conventions,[15] often falling under the scope of the right to health. There is evidence to support that the human right to health applies universally, due to its inclusion in legally binding international human rights instruments. However, the right to health has not been universally recognised in practice, especially in the context of regional human rights mechanisms, which this chapter will explore in further detail in relation to the UN human rights framework and European human rights mechanisms. In light of this, this chapter will also highlight how SRHR may also fall under the scope of other rights, such as: the right to respect for one's private and family life, his / her home, and his / her correspondence; the right to life, liberty and security; the right to reproductive self-determination; the right to consent to marriage; the right to be free from discrimination; the right to not be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and; the right to be free from sexual violence.[16] Article 7 of the ICCPR, for example, "generates the commitments to end female genital mutilation and sexual violence, and to ensure that legal abortion is safe and accessible."[17]

2.2 The UN human rights framework

In 1994, the UN International Conference on Population and Development (ICPD) affirmed reproductive rights as inherent in human rights, in that:

> [… sexual and] reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.[18]

This view was also shared by the UN Committee on the Elimination of Discrimination against Women, affirming that "access to health care, including reproductive health, is a basic

[15] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, pages 437-438.
[16] *Miguel Castro-Castro Prison v. Peru,* Inter-American Court of Human Rights, Judgment of 25 November 2006 (Merits, Reparations and Costs), Concurring Opinion of the Judge Sergio García Ramírez, paragraph 2.
[16] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, pages 439-440.
[17] Françoise Girard and Wilhelmina Waldman, "Ensuring the Reproductive Rights of Refugees and Internally Displaced Persons: Legal and Policy Issues," in *International Family Planning Perspectives*, Vol. 26, No. 4, 2000, pp. 167-173. Here, page 169.
[18] UN International Conference on Population Development, *Programme of Action*, adopted at the International Conference on Population and Development, Cairo, 5–13 September 1994 . Page 60.

right" under the CEDAW.[19] Furthermore, the Committee acknowledged that it is "discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women," for example, the refusal of a health service provider to provide a service based on "conscientious objection, [therefore] measures should be introduced to ensure that women are referred to alternative health providers."[20] Some UN treaty bodies[21] have also linked high maternal mortality rates to a "lack of access to [sexual and] reproductive health services, including contraception; unsafe abortion; adolescent pregnancy; and child marriage."[22] Such was the case in the CEDAW Committee's concluding observations on Malawi, noting in particular "the number of deaths resulting from unsafe abortions, high fertility rates and inadequate family planning services, especially in rural areas, low rates of contraceptive use and lack of sex education,"[23] as well as in the Committee on Economic, Social and Cultural Rights' concluding observations on El Salvador, highlighting the "the high number of unsafe and illegal abortions, which have serious consequences for health and are still one of the main causes of maternal mortality (art. 12)."[24] Additionally, the UN Committee Against Torture (CAT Committee)[25] and Human Rights Committee (HRC)[26] have found that, "in certain circumstances, denial of access to abortion services can lead to physical or mental suffering that amounts to ill-treatment."[27] The freedom to make decisions about one's own sexual and reproductive health is an integral factor of ensuring bodily

[19] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1, Chapter I. Page 1, paragraph 1.
[20] *Ibid.* Page 3, paragraph 11.
[21] See Human Rights Committee, Concluding Observations: Panama, paragraph 9, U.N. Doc. CCPR/C/PAN/CO/3 (2008); CRC Committee, Concluding Observations: Haiti, paragraph 46, U.N. Doc. CRC/C/15/ Add.202 (2003); Committee Against Torture, Concluding Observations: Yemen, paragraph 31, U.N. Doc. CAT/C/YEM/ CO/2/Rev. 1 (2010); Human Rights Committee, Concluding Observations: Jamaica, paragraph 25, U.N. Doc. CCPR/C/JAM/CO/4 (2016).
[22] Center for Reproductive Rights, *Briefing Paper: Ensuring sexual and reproductive health and rights of women and girls affected by conflict*, published 2017. Page 17.
[23] CEDAW Committee, Concluding Observations: Malawi, paragraph 31, U.N. Doc. CEDAW/C/MWI/CO (2006).
See also CEDAW Committee, Concluding Observations: Bangladesh, paragraph 34, U.N. Doc. CEDAW/C/BGD/CO/8 (2016); CEDAW Committee, Concluding Observations: Argentina, paragraph 32, U.N. Doc. CEDAW/C/ARG/CO/7 (2016).
[24] Committee on Economic, Social and Cultural Rights, Concluding Observations: El Salvador, paragraph 22, U.N. Doc. E/C.12/SLV/ CO/3-5 (2014).
[25] See CAT Committee, Concluding Observations: Poland, paragraph 23, U.N. Doc. CAT/C/POL/CO/5-6 (2013); CAT Committee, Concluding Observations: Sierra Leone, paragraph 17, U.N. Doc. CAT/C/SLE/CO/1 (2014).
[26] See *K.L. v. Peru*, United Nations Human Rights Committee, Views adopted 24 October 2005, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003; *L.M.R. v. Argentina*, United Nations Human Rights Committee, Views adopted 29 March 2011, Communication No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007.
[27] Center for Reproductive Rights, *Briefing Paper: Ensuring sexual and reproductive health and rights of women and girls affected by conflict*, published 2017. Page 20.

autonomy and physical integrity, a principle that stems from international human rights law instruments such as the ICCPR.[28]

In terms of substantive rights, the right to health encompasses SRHR, although a range of UN treaties condemn discrimination in more general terms of health. However, health rights are "an umbrella for a range of others, including the right to health and the right to family planning, equal access to service, freedom from violence and the right to life."[29] The right to highest attainable standard of physical and mental health is provided for in Article 12 of the ICESCR, which emphasises aspects of SRHR in determining that it is also necessary to provide for the "reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child."[30] In providing for the specific right of children not to be deprived of access to healthcare services, Article 24 of the CRC also urges States Parties to ensure "appropriate pre-natal and post-natal health care for mothers," and to develop "preventive health care, guidance for parents and family planning education and services."[31] Article 25 of the Convention on the Rights of Persons with Disabilities (CRPD) also provides for the right of persons with disabilities to the enjoyment of the highest attainable standard of health, without discrimination. It additionally calls on States Parties to provide persons with disabilities the "same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes."[32] These three articles highlight how the safeguarding of health rights is ensured within legally binding provisions of the UN human rights framework, with varying scope of the recognition of SRHR specifically. However, perhaps the most explicit affirmation of the inclusion of SRHR within the scope of the right to health was provided by the Committee on Economic, Social and Cultural Rights, in General Comment No. 22 (2016) on the right to sexual and reproductive health under Article 12 of the ICESCR.[33] Additionally,

[28] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, page 447.
[29] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Sexual and reproductive health rights and the implication of conscientious objection*, published October 2018. Page 17.
[30] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 12 (2)(a).
[31] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 24 (2), (d) and (f).
[32] UN General Assembly, Convention on the Rights of Persons with Disabilities, resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 25 (a).
[33] Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22. Chapter I, paragraph 1.

the Committee had already strengthened the scope of Article 12 (2)(a) in General Comment No. 14 (2000), in that Article 12 (2)(a):

> …may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.[34]

The aforementioned articles also convey the importance of the acknowledgement of patterns of discrimination and disadvantage that may have an effect on access to sexual and reproductive health care, and indeed general health care, *e.g.* for migrant and asylum-seeking women. This has been acknowledged in the CEDAW (Article 12), which provides that States Parties take "all appropriate measures to eliminates discrimination against women in the field of health care in order to ensure […] access to health care services, including those related to family planning."[35] Although CEDAW provides that States Parties shall ensure appropriate services for women during pregnancy, confinement and the post-natal period (Article 12(2)), Article 14 also specifically recognises the disparity in access to adequate health care facilities for rural women, "including information, counselling and services in family planning."[36]

The criminalisation of providing, supplying, seeking or accessing sexual and reproductive health care is potentially the most significant obstacle facing the realisation of SRHR. Criminalisation through directly outlawing "a particular service, such as abortion, or ban[ning] the provision of sexual and reproductive information," may also prevent access to "certain sexual and reproductive health-care goods, such as contraceptive methods."[37] Vague and ever-changing policies relating to SRHR, for example in Poland, create a chilling effect on civil society in advocating for the realisation of these rights.

CEDAW, adopted by the General Assembly in 1979[38], was the first UN human rights treaty to affirm the specific right to family planning, an integral concept of SRHR. The Convention requires States Parties to ensure the equal right of men and women to "decide freely and responsibly on the number and spacing of their children and to have access to

[34] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000. Chapter 1, paragraph 14.
[35] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, Article 12 (1).
[36] *Ibid.* Article 14 (b).
[37] UN General Assembly, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/66/254, 3 August 2011. Page 5.
[38] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249.

information, education and means to enable them to exercise these rights" (Article 16).[39] Women as equals to men must also be able to access information concerning sexual and reproductive health, for example, concerning contraceptives, sex education and family planning services. This was affirmed by the UN Committee on the Elimination of Discrimination against Women in General Recommendation No. 21, concerning equality in marriage and family relations, and is provided for in the Convention in Article 10 (h).[40] The UN Committee on the Elimination of Discrimination against Women has routinely raised concerns regarding domestic access to SRHR, *e.g.* in its concluding observations of the country-specific periodic reports of Poland and Ireland. In its concluding observations on the combined seventh and eighth periodic reports of Poland in 2014, the Committee reiterated previous concerns expressed to the State, particularly concerning abortion, which at the time was mostly illegal "as a result of the strict legal requirements contained in the 1993 Act on family planning, human foetus protection and preconditions for the admissibility of abortion."[41] The Committee also expressed its concern about the restrictive application of this law in Poland, and its conscientious objection clause, highlighting its "extensive use, or abuse, by medical personnel."[42] More generally, the Committee highlighted concerns regarding the limited access to information on reproductive health services, including access to modern contraceptives, particularly for adolescent girls.[43] Guided by the Committee's sixth and seventh periodic reports of Ireland,[44] their concluding observations in 2017 also expressed concerns regarding SRHR in Ireland. The Committee recommended that the State Party intensified the implementation of health programmes, particularly with regards to ensuring the "availability, accessibility and use of modern contraceptives."[45] Also among the recommendations were that Ireland should:

> [i]ntegrate compulsory and standardized age-appropriate education on sexual and reproductive health and rights into school curricula, including comprehensive sex education for adolescent girls and boys

[39] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, Article 16 (e).
[40] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994. Paragraph 22.
[41] UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Poland, CEDAW/C/POL/CO/7-8, 14 November 2014. Paragraph 36.
[42] *Ibid.* Paragraph 36.
[43] *Ibid.* Paragraph 36.
[44] UN Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention pursuant to the simplified reporting procedure, Combined sixth and seventh periodic reports of States parties due in 2016, Ireland. CEDAW/C/IRL/6-7, 30 September 2016.
[45] UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ireland CEDAW/C/IRL/CO/6-7, 9 March 2017. Paragraph 43(b).

> covering responsible sexual behaviours and focused on preventing early pregnancies, and ensure that sex education is scientifically objective and its delivery by schools is closely monitored and evaluated.[46]

Furthermore, at the time of the concluding observations, the law in Ireland governing access to abortion was restricted to cases where there was a real and substantial risk to the life of the pregnant woman.[47] Abortion in all other cases was deemed a criminal act, carrying a maximum penalty of 14 years' imprisonment.[48] Similar to its concluding observations regarding Poland, the Committee specifically expressed concerns on the restrictive nature of this law, as well as the criminalisation at the time of healthcare providers sharing information with patients that "advocates and promotes the option of abortion," as per the Regulation of Information Act 1995 (also discussed later in Chapter 4).[49]

In relation to the substantive right to bodily autonomy or the right to control one's own body, the CRPD provides for the right of persons with disabilities to be free from any intervention, medical or otherwise, unless it is with one's full, free and informed consent.[50] Hence, this provision offers the necessary protection of persons with disabilities to decide freely whether to continue with a pregnancy or to retain their fertility, the latter of which the Convention specifically provides for, on an equal basis with others, in Article 23 (c).

2.3 European human rights framework

For the purposes of this thesis, SRHR in the European context will only be analysed under the scope of relevant provisions of the Council of Europe (such as the European Convention on Human Rights (ECHR) and the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)), and within the jurisdiction of the Court of Justice of the European Union (CJEU), interpreting EU Directives relevant to SRHR. Therefore the present sub-chapter only pertains to obligations of states that have ratified the Member States of the Council of Europe and EU Member States.

The ECHR protects SRHR unreservedly under the scope of Article 2 (the right to life), Article 3 (the right to freedom from torture and ill-treatment), Article 8 (the right to private and

[46] [46] UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ireland CEDAW/C/IRL/CO/6-7, 9 March 2017. Paragraph 39(c).
[47] See Protection of Life During Pregnancy Act, 2013. Government of Ireland. Enacted 30 July 2013.
[48] UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ireland CEDAW/C/IRL/CO/6-7, 9 March 2017. Paragraph 42.
[49] *Ibid.* Paragraph 42.
[50] UN General Assembly, Convention on the Rights of Persons with Disabilities, resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106. Article 25 (b).

family life) and Article 14 (the prohibition of discrimination).[51] Despite there being no substantive right to health in the ECHR, including sexual and reproductive health, the case law of the ECtHR has provided for SRHR, and the right to health in general, to be re-enforced in many cases under the aforementioned articles. However, although the Court's rulings have strengthened the protection of SRHR under the ECHR, States Parties have evidently remained conservative on certain SRHR issues before the Court, "for example the conditions under which individuals can access a legal sex change, same-sex marriage and abortion."[52] For example, the ECtHR has established in its practice, that the prohibition of abortion "when sought for reasons of health and/or wellbeing falls within the scope of the right to respect for one's private life and accordingly within Article 8."[53] Although the Court affords States' Parties with a margin of appreciation concerning abortion, the Court considers States' obligations to include "both the provision of a regulatory framework of adjudication and enforcement machinery protecting individuals' rights, and the implementation, where appropriate, of specific measures," allowing for "the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention."[54] The Court has specifically noted in *P. and S. v. Poland* that 'private life', within the meaning of Article 8 (the right to private and family life), also entails the right to decide to become a parent or not.[55] Additionally, the Court has found in its practice that Article 8 also pertains to: home births; medically assisted procreation; pre-natal medical testing, and; sterilisation procedures. As the ECHR has been oft described as a "living instrument which, […] must be interpreted in the light of present-day conditions,"[56] it is the view of the author that the Court's practice could provide a chance for more decisive interpretations of Article 8 in relation to SRHR, specifically regarding reinterpreting the current recommendations relating to abortion under the Convention.

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[51] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Sexual and reproductive health rights and the implication of conscientious objection*, published October 2018. Page 17.
[52] *Ibid.* Page 17.
[53] Referring here to *A, B & C v. Ireland* (Application no. 25579/05), European Court of Human Rights, Judgment of 16.12.2010, §§ 214 and 245.
European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence*. Updated on 31 August 2020. Page 28.
[54] European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence*. Updated on 31 August 2020. Page 28, paragraph 101.
[55] *P. and S. v. Poland* (Application no. 57375/08), European Court of Human Rights, Judgment of 30 October 2012. Paragraph 111.
[56] *Tyrer v. the United Kingdom* (Application no. 5856/72), European Court of Human Rights, Judgment of 25 April 1978, paragraph 31.

The author of the present thesis argues that a reinterpretation of SRHR under Article 8 would prove helpful for bettering state practice, for example, in the case of *Ms. Y and The Health Service Executive* of August 2014. The case concerned a decision by the Irish Health Service Executive (HSE) who refused an abortion to a suicidal, pregnant asylum seeker and rape survivor "on the grounds that a caesarean section and early live delivery were practicable and reasonable alternatives justified by the need to protect fetal life."[57] As an asylum seeker in the Republic of Ireland, the applicant, Ms. Y, received an income of €19 per week and had "little in the way of a support network, and with no freedom of movement given her precarious migration status."[58] The HSE's grounds for refusing an abortion to Ms. Y, which would have been lawful under the Protection of Life During Pregnancy Act, was that it was deemed "reasonable to perform serious abdominal surgery on a woman against her wishes in order to preserve the life of the fetus."[59] The Protection of Life During Pregnancy Act was adopted in 2013 and came into force in 2014, as a response to the ECtHR's decision in *A, B & C v. Ireland*,[60] therefore, Ms. Y could have legally procured an abortion under this act. However, this case portrays how "legal standards of reasonableness and practicality ought to be interpreted in ways that are respectful of the patient's wishes and rights."[61] Ireland had previously received international criticism for its stringent abortion laws, most notably by the UN Human Rights Council (HRC) in 2014 which asserted that Ireland's then reliance on "abortion travel has significant discriminatory effects."[62]

With regards to conscientious objection and SRHR, the ECtHR upheld the State's courts decisions in the case of *Grimmark v. Sweden.* In the case of *Grimmark v. Sweden*, a midwife named Ellinor Grimmark claimed that she was discriminated against by Swedish health, when she was denied employment in several hospitals due to her refusal to perform abortions on religious grounds.[63] Though Grimmark had exhausted all domestic remedies with regards to her claims, the Discrimination Ombudsman (*Diskrimineringsombudsmannen*), the Jönköping District Court, and the Labour Court (*arbetsdomstolen*) all found no grounds for discrimination in her case, as the interference with her freedom of religion under Article 9 of

[57] Ruth Fletcher, "Contesting the cruel treatment of abortion-seeking women," in *Reproductive Health Matters*, Vol. 22, No. 44, 2014, pp. 10-21. Here, page 10.
[58] *Ibid*. Page 11.
[59] *Ibid*. Page 13.
[60] *Ibid.* Page 12.
[61] *Ibid*. Page 10.
[62] *Ibid.* Page 12.
[63] *Grimmark v. Sweden* (Application no. 43726/17), European Court of Human Rights, Judgment of 22 April 2020. Paragraphs 3-6.

the ECHR was proportionate to the right of employers under Swedish legislation to request employees to perform all tasks, such as assist in abortion services.[64] The Labour Court in particular assessed Grimmark's claims with regards to both direct and indirect discrimination. With regards to direct discrimination, the Court found that though "she lost her position because she did not intend to perform all duties inherent to the vacant post [it] did not constitute direct discrimination, nor did it constitute a violation of Article 9 of the Convention."[65] With regards an evaluation of possible indirect discrimination in Grimmark's claim, the Labour Court found that "interference with the applicant's freedom of religion was proportionate and justified with the view of achieving a legitimate aim," that being, the Swedish State's obligation to guarantee access to abortions in accordance with the Act on Abortions and the right to respect for patient's private life under Article 8 of the ECHR.[66]

Ellinor Grimmark subsequently applied to the ECtHR, claiming that her rights under Articles 9, 10 and 14 of the ECHR had been violated by the Swedish State.[67] The ECtHR ultimately deemed the application inadmissible, finding that Grimmark's claims under Articles 9, 10 and 14 were "manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention."[68] The Court stated that although the right to freedom of thought, conscience, and religion is protected under Article 9 of the ECHR, this protection does not extend to a right to refuse to perform professional duties that are part of a healthcare worker's job, particularly where patient welfare is at stake.[69] The Court held that Sweden's requirement for midwives to be able to perform abortions was a legitimate aim in the pursuit of public health and that the interference with Grimmark's right to freedom of religion was proportionate to that aim.[70] Regarding Article 14, the Court held that there was no evidence of discrimination against Grimmark on the grounds of her religious beliefs, noting that "her situation and the situation of other midwives who had agreed to perform abortions are not sufficiently similar to be compared with each other," and therefore she could not "claim to be in the same situation as those midwives."[71] The case of *Grimmark v. Sweden* is particularly significant for the ECtHR's protection of rights relating to SRHR, particularly where the proportionality test is

[64] *Grimmark v. Sweden* (Application no. 43726/17), European Court of Human Rights, Judgment of 22 April 2020. Paragraphs 7-15.
[65] *Ibid.* Paragraph 14.
[66] *Ibid.* Paragraph 15.
[67] *Ibid.* Paragraphs 17-19.
[68] *Ibid.* Paragraphs 28, 37 and 45.
[69] *Ibid.* Paragraph 25.
[70] *Ibid.* Paragraph 26.
[71] *Ibid.* Paragraph 44.

applied. The principle of proportionality is a fundamental tool in international human rights law, and in safeguarding SRHR, providing for a determination of the legality of an action, "depending on the respect of the balance between the objective and the means and methods used as well as the consequences of the action."[72]

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) significantly strengthened the legal framework on violence against women, which was supported by previous case law concerning violence against women of the ECtHR.[73] Violations of SRHR may constitute gender-based violence under the Istanbul Convention, *e.g.*, forced sterilisation.[74] Article 39 of the Istanbul Convention specifically pertains to forced abortion and forced sterilisation, urging States Parties to ensure the criminalisation of a forced abortion and forced termination of a woman's ability to reproduce. However, perhaps the most curious aspect of the Istanbul Convention in this regard, is that it does not provide for consideration of consensual termination procedures, for example, in cases of violence against women such as a pregnancy as a result of rape. However, most significant is the Istanbul Convention's protection of one's sexual history, in that information or evidence on one's sexual history shall only be permitted in civil or criminal proceedings when it is relevant and necessary.[75]

The Council of Europe Commissioner for Human Rights published an issue paper in 2017 concerning 'Women's sexual and reproductive health and rights in Europe'. Most significant for the present analysis of SRHR for asylum-seeking women, the issue paper referred to the principle of non-retrogression and "attempts to weaken gender equality protections and safeguards for women's sexual and reproductive health and rights, introduce new barriers, or remove or scale back women's entitlements," giving rise to violations of international human rights law and standards.[76] The Commissioner for Human Rights particularly urged Member States to "ensure that the principle of non-retrogression is respected by repealing and rejecting laws and policy proposals that seek to introduce new barriers to

[72] Médecins Sans Frontières, "Proportionality," in *The Practical Guide to Humanitarian Law*, published 12 December 2013.
[73] Council of Europe, *Equal access to justice in the case-law on violence against women before the European Court of Human Rights*, published September 2015. Page 36.
[74] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Sexual and reproductive health rights and the implication of conscientious objection*, published October 2018. Page 17.
[75] Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, November 2014, ISBN 978-92-871-7990-6, Article 54.
[76] Council of Europe Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe*, published December 2017. Page 50.

women's access to safe abortion services."[77] Furthermore, the Commissioner noted how challenges and barriers to SRHR in Europe have "exacerbated or distinct implications for marginalised groups of women in Europe, including […] refugees, asylum seekers and undocumented migrant women."[78]

3. EU legal framework and SRHR

3.1 The Court of Justice of the European Union

The challenges to and deficits in access to SRHR in Europe, which will be later conveyed in the case study on Ireland (Chapter 4), have distinct implications for women, particularly those who are disproportionately impacted by lack of access to such health care and information, such as asylum seekers, who face "intersectional discrimination on the grounds of sex combined with other grounds in the realisation of their sexual and reproductive health and rights."[79] Legal restrictions that are often times perpetuated by a cohesion of church and state further "perpetuate and magnify existing social inequalities."[80] Although domestic legislation concerning SRHR in Europe varies, this chapter aims to assess the EU legal framework regarding SRHR, focusing on rights-based obligations that are placed on EU Member States regarding SRHR, which are largely founded in gender equality, non-discrimination, and access to health. This will be achieved through assessing relevant case law of the Court of Justice of the European Union (CJEU) in the present sub-chapter, as well as legally-binding directives and regulations set out by the Council of the European Union in sub-chapter 3.2.

Despite the lack of case law addressing SRHR, including such rights of asylum-seeking women, within the CJEU, the most notable is that of the Court's judgment of 18 October 2011 in *Oliver Brüstle v. Greenpeace e.V*. The CJEU interpreted E.U. Directive 98/44/EC on the legal protection of biotechnical inventions and ruled that "the embryo enjoys protection from the stage of fertilisation against patenting, when the patent application requires the prior destruction of human embryos."[81] This meant that when assessing the Directive under the

[77] Council of Europe Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe*, published December 2017. Page 11.
[78] *Ibid.* Page 6.
[79] *Ibid.* Page 6.
[80] *Ibid.* Page 34.
[81] Dr. Grégor Puppinck, "Abortion and the European Convention on Human Rights," in *Irish Journal of Legal Studies*, Vol 3(2), 2013, pp. 142-193. Here, pages 154-155.

CJEU, Member States are no longer free to define the human embryo, as the term does not belong to the national margin of appreciation of Member States "to determine what an embryo is and when the human embryo deserves legal protection in regard to human dignity and integrity."[82] Therefore, according to EU law, there must be a "uniform and independent interpretation throughout the European Union," of the meaning and scope of the human embryo.[83] This case conveys the power the CJEU may invoke concerning future cases of SRHR in the EU, and the implications that such rulings may have on SRHR under EU law.

Although the CJEU hasn't ruled specifically on whether the right to abortion exists or whether it is protected by EU law, it has, however, ruled on the provision of information concerning abortion services. In 1991, the CJEU made a judgment in the case of *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others* (henceforth *SPUC v. Grogan*). The High Court of Ireland appealed to the CJEU for a preliminary ruling of the case, regarding the defendants' distribution in Ireland of "specific information relating to the identity and location of clinics in another Member State where medical termination of pregnancy is carried out."[84] The High Court of Ireland referred the case to the CJEU, as it had considered in its judgment in October 1989, that the case raised issues of interpretation of Community law. The High Court sought guidance from the CJEU as to whether the activities carried out by the defendants, or carrying out an abortion itself, "come within the definition of 'services' provided for in Article 60 of the Treaty establishing the European Economic Community."[85] The CJEU confirmed that "medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty."[86] Additionally, the High Court of Ireland sought the CJEU's advice as to whether a Member State prohibiting the actions of the defendants is contrary to Community law. To this end, the CJEU duly noted that there was no breach of Community law[87]:

> […] for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State

[82] Dr. Grégor Puppinck, "Abortion and the European Convention on Human Rights," in *Irish Journal of Legal Studies*, Vol 3(2), 2013, pp. 142-193. Here, page 155.
[83] *Ibid.* Page 155.
[84] *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*, Case C-159/90, Court of Justice of the European Union, Judgment of 4 October 1991. Grounds, paragraph 2.
[85] *Ibid.* Grounds, paragraph 9(1).
[86] *Ibid*. Paragraph 21.
[87] Referring here specifically to Articles 59 and 62 of the Treaty establishing the European Economic Community (Rome, 25 March 1957).

where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.[88]

However, the ruling of the CJEU in *SPUC v. Grogan* failed to assess the defendants' claim that such a prohibition of dissemination of information is "in breach of fundamental rights, especially freedom of expression and the freedom to receive and impart information, enshrined in particular in Article 10(1) of the European Convention on Human Rights."[89] Such prohibitions of dissemination of information concerning SRHR disproportionately impact asylum-seeking women, who already may be facing issues accessing information where it is not available in their first language.

According to CJEU case law, discrimination during pregnancy is direct discrimination against women.[90] This has not yet been broadened to include others who may have the capacity to become pregnant, such as trans men, especially considering over 20 EU Member States do not require sterilisation in order to change legal gender.[91] However, the CJEU has established through its case law, that discrimination on the basis of gender reassignment must be considered discrimination based on sex.[92] Thus, the principle of equal treatment and principle of non-discrimination on the grounds of sex applies to transgender people, who have undergone or are in the process of undergoing gender reassignment. However, the CJEU has established in its case law that it is not required for a transgender person to have legally reassigned their gender, to be protected by the principle of non-discrimination on the grounds of sex.[93] This is particularly significant in the context of discrimination of transgender people in healthcare contexts, for example, in accessing and obtaining sexual and reproductive healthcare.

3.2 The Council of the European Union

The principle of non-discrimination and equal treatment of men and women is a fundamental principle of the EU and is equally a vital principle in safeguarding SRHR. Through Council Directive 2004/113/EC, the Council of the European Union provides for the

[88] *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*, Case C-159/90, Court of Justice of the European Union, Judgment of 4 October 1991. Grounds, paragraph 32.
[89] *Ibid.* Grounds, paragraph 30.
[90] See for example: *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum)*, Case C-177/88, Court of Justice of the European Union, Judgment of 8 November 1990. Grounds, paragraph 12.
[91] European Commission, *Trans and intersex equality rights in Europe – a comparative analysis*, published November 2018. Page 101.
[92] See for example: *Sarah Margaret Richards v. Secretary of State for Work and Pensions,* Case C-423/04, Court of Justice of the European Union, Judgment of the First Chamber 27 April 2006. Paragraph 30.
[93] See for example: *MB v. Secretary of State for Work and Pensions*, Case C-451/16, Court of Justice of the European Union, Judgment of the Grand Chamber of 26 June 2018. Paragraph 35.

implementation of the principle of equal treatment between men and women with regards to the access to and supply of goods and services, prohibiting both direct and indirect discrimination. However, the Directive is ambiguous in relation to the provision of sexual and reproductive healthcare.[94] For example, in providing for the consideration of direct and indirect discrimination in the Directive, Article 12 states that "differences between men and women in the provision of healthcare services, which result from the physical differences between men and women, do not relate to comparable situations and therefore, do not constitute discrimination."[95] Additionally, Article 4(2) could be interpreted to neglecting equal treatment, as it "enables more favourable provisions to protect women in the areas of pregnancy and maternity."[96]

Therefore, it is the view of the author that Council Directive 2004/113/EC does not effectively address the issues of unequal treatment of men and women concerning access to health care, particularly sexual and reproductive health care. Should cases of violations of SRHR not accurately be assessed in terms of the principle of non-discrimination, differential treatment of men and women concerning healthcare is therefore equally not accurately assessed, despite physical or biological differences. Furthermore, Council Directive 2004/113/EC did not seek to address those that do not fall within the gender binary of man or woman, for example, trans men and women, or gender non-conforming persons. Reproducing the gender binary in EU gender equality directives is a harmful rhetoric to the advancement and acknowledgment of the full reality of sexual and reproductive health care. Whereas, EU primary legislation does not contain explicit references to gender identity, gender expression or sex characteristics, EU secondary law does contain reference to trans identities. An example of such is Recital 3 of the Recast Directive (2006/54/EC) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, which provides that the Directive also applies to "discrimination arising from the gender reassignment of a person."[97] The recognition of gender identities that do not fall within the binary of male and female in EU gender equality legal directives could greatly improve the

[94] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Sexual and reproductive health rights and the implication of conscientious objection*, published October 2018. Page 17.
[95] Council Directive 2004/113/EC of 13 December 2004 on implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Article 12.
[96] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Sexual and reproductive health rights and the implication of conscientious objection*, published October 2018. Page 30.
[97] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Article 3.

treatment of trans men and women, including trans asylum seekers, in healthcare scenarios, as they are often subjected to inappropriate reproductive practices such as imposed sterilisations.[98]

On 24 March 2021, the Council of the European Union and the EP introduced a Regulation (2021/522) establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027. The EU4Health Programme aims to "emphasise actions in relation to which there are advantages and efficiency gains from collaboration and cooperation at Union level, and actions that have an impact on the internal market," in relation to public health.[99] The Regulation sets out that the Programme should empower people to "take an active role in managing their health by improving their health literacy [which] will have positive effects on health, health inequalities and inequities, access to sexual and reproductive healthcare, quality of life, workers' health, productivity, competitiveness and inclusiveness."[100] The inclusion of this function of the Programme is essential, as it prioritises the educational deficits that may arise with regards to SRHR. The Regulation also stipulates that Member States will be supported with funding for actions to "promote access to sexual and reproductive healthcare and supporting integrated and intersectional approaches to prevention, diagnosis, treatment and care,"[101] in order to enhance "access to quality, patient-centred, outcome-based healthcare and related care services, with the aim of achieving universal health coverage."[102] Furthermore, the Regulation states that the Programme should also "support actions to reduce inequalities in the provision of healthcare, in particular in rural and remote areas, including in the outermost regions, for the purposes of achieving inclusive growth."[103] The application of an universal approach and acknowledgement of inequalities, such as location, in the provision of healthcare is vital, therefore the Regulation in doing so situates itself as a means to minimise the risk of reproducing and exacerbating existing inequalities.

As the European Union's diplomatic service, the European External Action Service (EEAS) has asserted that SRHR are crucial for the advancement of women's and girl's right to

[98] European Commission, *Trans and intersex equality rights in Europe – a comparative analysis*, published November 2018. Page 60.
[99] Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027, and repealing Regulation (EU) No 282/2014 (Text with EEA relevance) (PE/69/2020/REV/1). Paragraph 7.
[100] *Ibid*. Paragraph 19.
[101] *Ibid*. ANNEX I, paragraph 7(c).
[102] *Ibid*. Chapter I, Article 4 (g).
[103] *Ibid*. Paragraph 19.

self-determination.[104] The EEAS specifically notes that being able to decide and control freely and responsibly on one's sexual and reproductive health impacts their ability to lead "healthy lives and to participate in the economy and in social and political life," and recognises the particular need for access to "quality and affordable comprehensive sexual and reproductive health information, education, including comprehensive sexuality education, and health-care services."[105] Drawing on the principle of non-discrimination and equal treatment between men and women, the EEAS further acknowledges the threats to accessibility to SRHR due to "[h]armful gender norms and stereotypes prevent[ing] access to family planning, either through legal barriers or community pressure, harassment and abuse," as well as backlashes against gender equality.[106]

3.3 Advocating for SRHR at the regional level

Advocating for SRHR in Europe and the EU has grown exponentially in response to both international and regional curtailments of such rights, which this sub-chapter will portray through actions of the European Commission and the European Parliament. However, it is worth noting that, the EU and its institutions has no competence for the development and implementation of policies relating to SRHR at a national or international level,[107] therefore, the EU's competence does not go beyond recommendations for Member States concerning SRHR, and are therefore not legally binding. The present sub-chapter will also present intersectional approaches that have been applied in policies or recommendations by European and EU institutions, particularly in equality and inclusion policies, in order to stress the importance of applying such an approach in the context of securing and providing for SRHR more concretely in EU and domestic Member State law.[108] Applying such an approach is fundamental to securing the SRHR of all women, including asylum seekers.

3.3.1 The European Commission

The European Commission has issued numerous communications concerning the protection and promotion of SRHR in recent years, both concerning SRHR in the in the region,

[104] European Union External Action, "Promoting Sexual & Reproductive Health & Rights," 3 March 2022. Available at: https://www.eeas.europa.eu/eeas/promoting-sexual-reproductive-health-rights_en (last visited 29 June 2022)
[105] *Ibid.*
[106] *Ibid.*
[107] European Parliament resolution on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's health in the EU (2022/2742(RSP)), paragraph 1.
[108] Center for Reproductive Rights, *Input on the Initiative setting out the EU post-2020 Roma equality and inclusion policy*, published 16 March 2020. Page 1.

but also globally in the framework of the EU's external action on the topic. In March 2020, the European Commission issued a communication to the European Parliament, the Council of the European Union, the European Economic and Social Committee, and the Committee of the Regions, concerning the adoption of the Gender Equality Strategy 2020-2025. The communication framed the adoption of the Gender Equality Strategy, particularly concerning SRHR, from a gender perspective:

> In health, women and men experience gender-specific health risks. […] Regular exchanges of good practices between Member States and stakeholders on the gender aspects of health will be facilitated, including on sexual and reproductive health and rights.[109]

Furthermore, the European Commission vowed to implement an intersectional approach to gender equality across EU policies, owing to the fact that "[w]omen are a heterogeneous group and may face intersectional discrimination based on several personal characteristics."[110] Overall, the communication assures that the European Commission will "continue supporting women's human rights, its defenders, sexual and reproductive health and rights, and efforts to curb sexual and gender-based violence throughout the world, including in fragile, conflict and emergency situations."[111] Despite the European Commission's acknowledgement of intersecting forms of discrimination, it failed to specifically address groups that may be affected, *e.g.* asylum-seeking women.

In response to the European Commission's plans to implement the EU Gender Equality Strategy 2020-2025, the Center for Reproductive Rights issued recommendations, outlining how the European Commission should "incorporate efforts to advance women's sexual and reproductive health and rights within [their] core priorities."[112] The recommendations outline particular backlashes against gender equality that have targeted women's SRHR, leading to weakened and regressive laws and policies that originally aimed to protect women's SRHR and address gender-based violence (GBV). Such backlashes include: retrogressive legislative initiatives in Member States, impacting SRHR such as access to emergency contraceptives and safe and legal abortions; and a backlash against "the provision of comprehensive evidence-base sexuality education in schools."[113] The Center for Reproductive Rights recommended

[109] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Union of Equality: Gender Equality Strategy 2020-2025," COM(2020) 152 final, 5 March 2020.
[110] *Ibid*.
[111] *Ibid.*
[112] Center for Reproductive Rights, *Recommendations for EU Gender Equality Strategy 2020-2024*, published 3 December 2019. Page 1.
[113] *Ibid.* Pages 2-3.

that the Strategy should definitively highlight the European Commission's concerns regarding backlashes and regressions in the context of gender equality, as well as women's SRHR in the EU, committing to "stem rollbacks, including through awareness raising initiatives and dissemination of good practices."[114] Furthermore, the recommendations urged that the Strategy should commit the European Commission to monitor "proposals by member states that would undermine, restrict or remove existing entitlements and protections for gender equality, including women's sexual and reproductive health and rights."[115] Finally, the recommendations also highlighted the role of civil society organisations (CSOs) and women human rights defenders, working to counter regressive legislation and policies, and advance SRHR. Regressive laws in fact contradict the international legal principle of non-retrogression, which "prohibits regressive steps that undermine, restrict or remove existing rights protections or entitlements."[116] Regression of laws concerning SRHR disproportionately impact asylum-seeking women, particularly where complete bans are introduced for certain SRH care and services, forcing women to seek illegal or lethal alternatives.

In June 2020, the European Commission adopted the first-ever EU Strategy for Victims' Rights 2020-2025. The Strategy contains five main priorities: to empower victims of crime; to improve protection and support of the most vulnerable victims; to facilitate victims' access to compensation; to strengthen cooperation and coordination, and; the international dimension of victims' rights.[117] The Strategy does not detail any recommendations to Member States concerning access to sexual and reproductive health care, in the frame of victims' rights, despite addressing in detail issues such as sexual exploitation and abuse. Victims' access to sexual and reproductive health care is an absolute necessity in cases of sexual exploitation and abuse, which may be the lived experience of asylum-seeking women, particularly where they have been trafficked or have been subjected to sexual violence in their country of origin. The Strategy only goes as far as to recommend that Member States "[f]acilitate cooperation and ensure a coordinated approach to victims' rights between judicial and law enforcement authorities, health care and social workers, among others."[118]

[114] Center for Reproductive Rights, *Recommendations for EU Gender Equality Strategy 2020-2024*, published 3 December 2019. Page 3.
[115] *Ibid.* Page 3.
[116] *Ibid.* Page 2.
[117] European Parliament, "EU Strategy for Victims' Rights / After 2020-3," Le*gislative Train 06.2022 (6 A New Push for European Democracy)*. Pages 1 and 2.
[118] European Commission, *Factsheet – EU Strategy on Victims' Rights (2020-2025)*, published June 2020. Page 3.

Following the European Commission's publication of a roadmap for the Strategy on Victims' Rights, the Center for Reproductive Rights provided feedback, highlighting the need for the new Strategy to "ensure the adoption by Member States of […] strengthened measures to guarantee the right of victims of gender-based violence to justice and reparations and to support services, including the essential package of sexual and reproductive health care."[119]

Finally, in November 2020, the European Commission issued a joint communication to the European Parliament and the Council of the European Union, concerning the EU Gender Action Plan (GAP) III, framing it as "an ambitious agenda for gender equality and women's empowerment in EU external action".[120] Although the joint communication focuses on EU external action and multilateral engagement, it sets a precedent for EU Member State action concerning the promotion of SRHR as a key area of engagement on a global level. The joint communication reaffirms the EU's commitment to promoting and protecting SRHR, stressing that "[h]armful gender norms and stereotypes prevent access to family planning, either through legal barriers or community pressure, harassment and abuse, while a backlash against gender equality is threatening hard-won progress and existing laws."[121] Furthermore, the joint communication stipulates specific EU action in order to promote and protect SRHR, such as: contributing to an enabling environment that protects SRHR, increasing access to services and information; contributing to the elimination of harmful practices by supporting country, regional and / global initiatives, and; helping to increase services in humanitarian settings, "including obstetric care, the provision of the minimum initial service package, HIV/AIDS prevention, reproductive, maternal and new-borns health, family planning, addressing specific nutrition needs and vulnerabilities."[122] Increasing such services in humanitarian settings, especially the provision of the Minimum Initial Service Package, seeks to secure access to SRH care and services for asylum seekers, who are otherwise disproportionately impacted by a lack of access.

Prior to the implementation of the EU GAP III, the Center for Reproductive Rights issued recommendations, particularly concerning: the EU's support of women human rights defenders and CSOs working on SRHR; addressing SRHR needs in the context of conflict and

[119] Center for Reproductive Rights, *Feedback on EU Strategy on Victims' Rights (2020-2024)*, published 2 April 2020. Page 1.
[120] European Commission, Joint Communication to the European Parliament and the Council EU Gender Action Plan (GAP) III – An ambitious agenda for gender equality and women's empowerment in EU external action, published 25 November 2020.
[121] *Ibid.* Section 3.2.
[122] *Ibid.* Section 3.2.

crises, and; strengthening internal EU knowledge and capacity to address gender equality and SRHR issues. Most notably, perhaps, is the recommendation to include a "dedicated section addressing SRHR developments and outlining the EU's responses and activities to promote SRHR," in its annual reports on human rights and democracy in the world.[123]

3.3.2 The European Parliament

The European Parliament has adopted (or attempted to do so) several resolutions concerning SRHR in the EU, Europe, and globally. Most recently, the European Parliament adopted a resolution concerning the U.S. Supreme Courts' decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's health in the EU (2022/2742(RSP)).[124] It is the view of the author that the European Parliament is a vital political advocacy tool for the realisation and promotion of SRHR, that often responds in a timely manner to crises impacting access to SRHR, and legislative changes affecting SRHR. However, the European Parliament must adapt its role in advancing and promoting SRHR as human rights, in that its role has been mainly limited to reproductive rights "within the EU development policy and has not been effectively applied to policies and practices within the EU MS themselves."[125]

On 21 October 2013, the *Estrela Report on Sexual and Reproductive Health and Rights* (henceforth 'the Estrela Report') was put forth as a motion for a resolution by Edite Estrela, Portuguese MEP and Vice-President of the Committee on Women's Rights and Gender Equality (FEMM). Following the rejection of the Estrela Report twice in plenary sessions, the European Parliament stipulated that "the formulation and implementation of policies on SRHR and on sexual education in schools is a competence of the Member States."[126] The Estrela Report was a landmark recognition of SRHR in the EU and Europe, but also highlighted issues, among others, such as the sexualisation of young women and girls as a worrying phenomenon, and the practice of forced or coerced sterilisations of Roma women, women with disabilities,

[123] Center for Reproductive Rights, *Recommendations regarding the EU external action Gender Action Plan (GAP) III 2021-2025*, published 1 May 2020. Page 2.
[124] European Parliament resolution of 7 July 2022 on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's heath in the EU (2022/2742(RSP)).
[125] Marleen Bosmans *et. al*, *Sexual and Reproductive Health and Rights of Refugee Women in Europe: rights, policies, status and needs. Literature review*. January 2005. Page 57.
[126] European Parliament resolution of 10 December 2013 on Sexual and Reproductive Health and Rights (2013/2040(INI)).

and transgender persons.[127] Particularly concerning abortion, the FEMM Committee outlined that, even when abortion is legal, it "is often prevented or delayed by obstacles to the access of appropriate services, such as the widespread use of conscientious objection, medically unnecessary waiting periods or biased counselling."[128] Further to this, the FEMM Committee stressed that Member States should "regulate and monitor the use of conscientious objection in the key professions," ensuring the rights of individuals to adequate, timely and appropriate healthcare.[129] In doing so, Member States could also seek to mitigate the disproportionate impact of the use of conscientious objection, namely for asylum-seeking women. The intricacies of conscientious objection in the context of SRHR, however, were not completely lost on the FEMM Committee, stressing that while it is indeed an individual right, medical personnel may be coerced to refuse SRHR-related services to patients while working in health care facilities with strong religious ideologies.[130]

The FEMM Committee also requested a study from the European Parliament Policy Department for Citizens' Rights and Constitutional Affairs concerning backlashes in gender equality and women's and girl's rights, which was published in June 2018. The study analysed several policy areas on the subject in EU Member States, such as Austria, Hungary and Italy, particularly noting the realities of SRHR in each country. In Austria, the study noted the disproportionate access to abortion and family planning clinics for women in rural areas, as well as the two western provinces of Vorarlberg and Tirol having no public hospitals carrying out abortions.[131] In Hungary, while SRHR have remained relatively unchanged since the era of state socialism, there are significant issues in access to SRH care. An example of such access issues concerns the morning-after pill, which is only available through a prescription from a gynaecologist.[132] Furthermore, abortion pills are not widely considered safe and therefore are not used in state hospitals, "thus women for whom this method is the preferred choice, go to private clinics in Austria."[133] A survey conducted by women's rights NGO, Patent Association, also found that women seeking to procure an abortion are often pressured by their decision

[127] European Parliament Committee on Women's Rights and Gender Equality, Motion for a European Parliament Resolution on Sexual and Reproductive Health and Rights (2013/2040(INI)), 16 September 2013. Parts AH and AI.
[128] *Ibid.* Parts AH and AI. Article 35.
[129] *Ibid*. Article 35.
[130] *Ibid*. Article 35.
[131] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Backlash in Gender Equality and Women's and Girl's Rights*, published June 2018. Page 23.
[132] *Ibid.* Page 34.
[133] *Ibid.* Page 34.

during compulsory counselling sessions by district nurses prior to the procedure.[134] In Italy, abortion is legal, though it is difficult to access, particularly due to the option of conscientious objection enshrined in Italy's abortion law.[135] Enshrining conscientious objection in domestic legislation has disproportionate consequences for asylum-seeking women in accessing their SRHR. While many women may have the option to travel within the jurisdiction (or even outside of it) in order to access such services from another provider in case of conscientious objection, asylum-seeking women are less likely to have ease of mobility, as will be conveyed in sub-chapter 4.3.

Despite the lack of success in adoption of the Estrela Report, on 24 June 2021, the European Parliament adopted a resolution on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health (2020/2215(INI)),[136] following approval in the FEMM Committee. The landmark resolution called on all EU Member States to "guarantee universal enjoyment of sexual and reproductive health and rights and remove all barriers in access to health services, information and education."[137] In its resolution, the European Parliament affirmed that SRHR are fundamental human rights that must be protected by EU Member States, demonstrating the EU's commitment to advancing SRHR. The resolution is the first SRHR resolution that has been passed by the European Parliament in almost 20 years and "calls for removal of all barriers in access to abortion, modern contraception, quality maternal health care, assisted reproductive technologies and comprehensive sexuality education."[138] Furthermore, the resolution called on all EU institutions, including the European Commission, to react to regressive actions hindering access to SRHR. Most notably, the resolution called on EU interlocutors to harbour their support for women's rights through collaboration with SRHR CSOs and women human rights defenders working in Member States, and to "address the disruptions and limitations in access to sexual and reproductive health care services as a result of the COVID-19 pandemic."[139]

[134] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Backlash in Gender Equality and Women's and Girl's Rights*, published June 2018. Page 34.
[135] *Ibid.* Page 46.
[136] European Parliament resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health (2020/2215(INI)).
[137] Center for Reproductive Rights, *Advocating for SRHR at the European Union and the Council of Europe*, published 8 July 2021. Available at: https://reproductiverights.org/center-reproductive-rights-advocating-srhr-european-union-council-europe/ (last visited 19 June 2022)
[138] Center for Reproductive Rights, *EU Resolution Calls for Full Realization of SRHR in the EU*, published 24 June 2021. Available at: https://reproductiverights.org/eu-srhr-resolution/ (last visited 3 July 2022)
[139] *Ibid.*

The European Parliament's adoption of this particular resolution was critical in condemning regressive measures against SRHR in many Member States, while also reaffirming the EU's commitment to the advancement of SRHR. The resolution particularly focuses on ensuring the provision of SRHR services, based on the principle of non-discrimination, noting that related national policies and legislation must be non-discriminatory on the grounds of age, race, gender identity, sexual orientation, ethnicity, and national origin, among others.[140] Resolutions urging Member States to include the principle of non-discrimination in SRHR legislation is paramount to securing the equal access to SRHR, particularly for asylum seekers. The European Parliament also urged Member States to ensure access to sexual and reproductive health care through "removing legal, policy, financial and other barriers and securing adequate funding for SRHR services," including access to information and education on SRHR.[141] However, regarding abortion, the FEMM Committee did not address the issue of conscientious objection in the provision of abortion services in this resolution. Instead, the resolution on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health, solely urged Member States to remove any obstacles to safe and legal abortion services, in line with international human rights standards, including the decriminalisation of abortion and access timely care.[142]

The FEMM Committee requested a study concerning the implication of conscientious objection on SRHR, seeking to investigate the "extent to which conscientious objection affects access," to SRHR.[143] Though the EU has no "clear competence to regulate the harmonisation of the right to conscientious objection in access to SRH goods and services,"[144] it has to date adopted a legal measure concerning non-discrimination in the employment sector based on religion or belief. The Employment Equality Directive (Directive 2000/78/EC) guarantees "equal treatment irrespective of religion and belief […] in employment and occupation in both public and private sectors."[145] Therefore, the Directive protects the employment of those who exercise their right to freedom of religion or belief, for example, in cases of conscientious objection in medical or health care work environments. However, should the activity in question be an occupational requirement, that is both proportionate and legitimate in nature, a

[140] Center for Reproductive Rights, *EU Resolution Calls for Full Realization of SRHR in the EU*, 24 June 2021. Available at: https://reproductiverights.org/eu-srhr-resolution/ (last visited 3 July 2022)
[141] *Ibid.*
[142] *Ibid.*
[143] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Sexual and reproductive health rights and the implication of conscientious objection*, published October 2018. Abstract.
[144] *Ibid.* Page 95.
[145] *Ibid.* Page 95.

health care professional could be inhibited from exercising their conscientious objection.[146] In terms of domestic practices, 22 Member States recognise the right to conscientious objection, particularly in the assistance of an abortion as a medical or health care professional.[147] Recognising conscientious objection in domestic legislation concerning the provision of SRH care, such as abortion services, has implications with regards to accessibility, disproportionately impacting those such as asylum seekers.

Concerning recent developments concerning SRHR in Europe, the European Parliament has been extremely vocal concerning the legal rollbacks concerning procuring an abortion in both Poland and the United States of America. In November 2020, the European Parliament adopted a resolution on the de facto ban on the right to abortion in Poland (2020/2876(RSP)), which strongly condemned the Polish Constitutional Tribunal's ruling resulting in a detrimental regression of women's SRHR in Poland. The European Parliament affirmed that the ruling puts women's lives at risk, recalling that most legal abortions in Poland are only permitted where there is a "severe and irreversible foetal defect or an incurable illness that threatens the foetus's life."[148] Concerning the US Supreme Court's decision to overturn *Roe v. Wade* in June 2022, the European Parliament adopted a resolution on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's heath in the EU (2022/2742(RSP)). The decision to overturn *Roe v. Wade* meant an end to the federal constitutional right to abortion in the United States, "allowing states to ban abortion at any point during pregnancy and opening up the possibility of complete bans on abortion."[149] The ramifications of this decision could potentially have an extremely detrimental impact on abortion access globally, which the European Parliament acknowledged in its resolution: "the overturning of *Roe v Wade* could embolden the anti-abortion movement in the European Union."[150] The European Parliament resolution also proposed that the right to safe and legal abortion be included in the Charter of Fundamental Rights of the European Union.[151] Such inclusion is proposed to be achieved by amending Article 7 of the Charter of Fundamental Rights of the European Union, concerning the right to

[146] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Sexual and reproductive health rights and the implication of conscientious objection*, published October 2018. Page 95.
[147] *Ibid.* Page 108.
[148] European Parliament resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland (2020/2876(RSP)). Article P.
[149] European Parliament resolution of 7 July 2022 on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's heath in the EU (2022/2742(RSP)). Article A.
[150] *Ibid.* Article G.
[151] *Ibid.* Article 2.

respect for private and family life.[152] This could be achieved, through the implementation of a Convention to revise EU treaties, such as the Charter of Fundamental Rights of the European Union, which would also seek to strengthen "the procedure to protect the EU's founding values and clarifying the determination and consequences of breaches."[153] Lastly, the resolution contains a strong intersectional approach to restrictions on abortion, highlighting that they disproportionately affect migrant women, including asylum-seeking women.[154]

4. Case study: Abortion in the Republic of Ireland

4.1 History of abortion access and progressive changes to legislation

The following sub-chapters will present a case study concerning the Republic of Ireland, and the domestic legal framework regarding abortion, as a means to focus on not only one substantive health issue concerning SRHR, but also as means to frame the legal discussion of the present thesis in terms of applicability of the domestic legal framework to asylum seekers in the Republic of Ireland. The main question that will be addressed is, to what extent are SRHR applicable to and accessible for asylum seekers in the Republic of Ireland, and if so, how do the domestic laws influence or secure recognition of and access to SRHR in this context. This study also examines the progressive nature of legislation concerning abortion in the Republic of Ireland, and how, despite the progression, certain groups of women, such as asylum-seeking women, may be disproportionately affected by the current legal limitations, such as gestational limits.

The prohibition and criminalization of abortion in Ireland effectively came into force through the Eighth Amendment of the Constitution in 1983 (henceforth the Eighth Amendment), which recognised the equal right to life of the pregnant woman and the unborn.[155] However, the 1861 Offences Against the Person Act remained the basis of criminal law in Ireland concerning the administration and procurement of abortion services in Articles 58 and

[152] European Parliament, *Include the right to abortion in EU Charter of Fundamental Rights, demand MEPs*, published 7 July 2022. Available at: https://www.europarl.europa.eu/news/en/press-room/20220701IPR34349/include-the-right-to-abortion-in-eu-charter-of-fundamental-rights-demand-meps (last visited 29 April 2023)

[153] European Parliament, *Parliament activates process to change EU Treaties*, published 9 June 2022. Available at: https://www.europarl.europa.eu/news/en/press-room/20220603IPR32122/parliament-activates-process-to-change-eu-treaties (last visited 29 April 2023)

[154] European Parliament resolution of 7 July 2022 on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's heath in the EU (2022/2742(RSP)). Article 5.

[155] Eighth Amendment of the Constitution Act, 1983, Amendment of Article 40 of the Constitution of Ireland.

59.[156] The Eighth Amendment passed by means of referendum, initiating a 35-year period of vague and extremely stringent laws and regulations regarding abortion.

In 1992, the case of *Attorney General v. X. and Others* was brought before the Irish Supreme Court, concerning a 14-year-old girl, known as X, who became pregnant as a result of rape. The authorities were informed of the circumstances of her pregnancy, of the girl's intent to travel to England to obtain an abortion, and of the possibility of carrying out tests on the dead foetus in order to ascertain the identity of the rapist.[157] In this regard, the Irish authorities sought a legal opinion from the Director of Public Prosecutions as to the admissibility of evidence against the father, should such a test be carried out. Following this, interim injunctions were obtained through the Irish High Court by the Attorney General in order to: restrain the girl and her parents "from interfering with the right to life of the unborn," as per the Eighth Amendment; restrict them from leaving Ireland for the duration of the pregnancy, and; restrain them "from procuring or arranging an abortion within or outside the jurisdiction."[158] The girl and her parents had already travelled to England, in order for her to obtain an abortion, when they were notified of the interim injunctions against them, and therefore ceased the arrangements they had made. The girl and her parents returned to Ireland and sought to contest the measures against them, on the grounds that: procuring an abortion in England was legal, and they had the right to travel from the jurisdiction in this regard; that the mother's right to life was in danger, as there was a risk that she might commit suicide, and; "that such injunctions were unprecedented and ought to have not been granted."[159] The Supreme Court ruled that there was a "real and substantial risk to the life of the mother by self-destruction which can only be avoided by termination of her pregnancy."[160] This meant, that X was in fact entitled to procure an abortion as per the Eighth Amendment, due to the consideration of the "due regards to the equal right to life of the mother" enshrined in the Amendment.[161] The X case highlighted the ambiguity as to which the Eighth Amendment of the Irish Constitution applied to reconciling the right to life of the unborn with the right to life of the mother, as well as highlighting the failure of the State to implement guiding legislation in such cases to this end. The ruling of the Supreme Court in the X case meant the law gained

[156] Offences Against The Person Act, 1861, Constitution of Ireland. Articles 58 and 59 concerning *Attempts to procure Abortion*.
[157] *Attorney General v. X. and Others* (1992 No. 846P), Supreme Court of Ireland, Judgment 5 March 1992. Page 1.
[158] *Ibid.* Page 1.
[159] *Ibid.* Page 1.
[160] *Ibid.* Page 55.
[161] Eighth Amendment of the Constitution Act, 1983, Amendment of Article 40 of the Constitution of Ireland.

more clarity in terms of the risk to the life of the pregnant woman, *i.e.,* that the risk to life may arise on the grounds of physical or mental health. The case ruling also influenced the adoption of subsequent amendments to Article 40.3.3° of the Constitution via referendum in 1992, which specifically allowed for the freedom to travel outside the jurisdiction to obtain an abortion and the freedom to obtain or provide information on abortion services.[162] However, the government's focus on the issue of being unable to travel to access abortion care abroad neglected the real issue at hand that was exposed in the case of *Attorney General v. X. and Others*: "the imposition of unacceptable burdens on reproductive agency."[163]

The criminalisation of obtaining an abortion was not the only result of the Eighth Amendment, as it also affected the dissemination of information concerning procuring a safe abortion, as highlighted above with regards to the case of *Attorney General v. X. and Others*. Also in 1992, the case of *Open Door and Dublin Well Woman v. Ireland* was brought before the ECtHR, concerning a complaint by Open Door Counselling Ltd and Dublin Well Woman Centre Ltd under the right to respect for private and family life (Article 8 of the ECHR). Both Open Door and Dublin Well Woman provided counselling to pregnant women in Dublin and other parts of Ireland, but also provided services relating to "counselling and marriage, family planning, procreation and health matters."[164] The applicants received an injunction from the Hight Court of Ireland, prohibiting them from providing information to pregnant women concerning the procurement of an abortion "outside the jurisdiction of Ireland by way of non-directive counselling."[165] The injunction, as a result of private proceedings originally brought against both parties by Society for the Protection of Unborn Children (Ireland) Ltd, refers to pamphlets dispersed by Dublin Well Woman in the lead up to the referendum on the Eighth Amendment to the Constitution in 1983.[166] The High Court found that the activities of Open Door and Dublin Well Woman "in counselling pregnant women […] to travel abroad to obtain an abortion or to obtain further advice on abortion within a foreign jurisdiction were unlawful," as per Article 40.3.3° of the Irish Constitution.[167] Open Door and Dublin Well Woman subsequently applied to appeal the decision of the High Court to the Supreme Court of Ireland,

[162] See Thirteenth Amendment of the Constitution Act, 1992 and Fourteenth Amendment of the Constitution Act, 1992, Amendments of Article 40 of the Constitution of Ireland.
[163] Fiona de Londras, "'A Hope Raised and Then Defeated'? The continuing harms of Irish abortion law", in *Feminist Review*, Issue 124, 2020, pp. 33-50. Here, page 36.
[164] *Open Door and Dublin Well Woman v. Ireland* (Application no. 14234/88; 14235/88), European Court of Human Rights, Judgment of 29 October 1992, paragraph I (A)(9).
[165] *Ibid.* Paragraph I (A)(9).
[166] *Ibid.* Paragraph I (B)(1)(11).
[167] *Ibid*. Paragraph I (B)(1)(15).

which was unanimously rejected and hence, the injunction was upheld. The applicants alleged that the injunction violated the right to freedom of expression under the ECHR (Article 10), read in conjunction with Articles 2, 17 and 60. The ECtHR concluded there was a violation Article 10, as the injunction imposed against the applicants did not pass the proportionality test with regards to the applicants' freedom of expression under Article 10, read in conjunction with Articles 17 and 60.[168] Furthermore, the applicants alleged a violation of the right to respect for private life (Article 8), in conjunction with Article 14 (the prohibition of discrimination), due to the interference of the State in the privacy rights of clients accessing the services provided, but also due to the interference of both parties carrying out their work.[169] However, the ECtHR did not find it necessary to examine these claims. As a direct result of *Open Door and Dublin Well Woman v. Ireland*, the Irish State introduced the Regulation of Information (Services Outside of the State for Termination of Pregnancies) Act, 1995, which permits persons to provide "information relating to services lawfully available outside the State for the termination of pregnancies [which] may be given to individual women or the general public."[170]

In 2010, the ECtHR issued its judgment in the case of *A, B & C v. Ireland (Application no. 25579/05)*, which had a direct impact on further legislation regarding abortion in Ireland. The Grand Chamber of the ECtHR unanimously ruled that, owing to the State's failure to implement existing legislation and amendments to the Irish Constitution concerning abortion access, there was a violation of Article 8 (the right to respect for family and private life) of the ECHR in the case of applicant C. Most notably, the Court reflected that in the context of abortions, the protection of life "was practically indistinguishable from the protection of health," and therefore, "distinctions between life and health protection could not be meaningfully drawn in a clinical context."[171] As a response to the ECtHR decision in *A, B & C v. Ireland*,[172] and owing to the State's failure to implement existing legislation, the Protection of Life During Pregnancy Act was adopted in 2013 and came into force in 2014, giving pregnant people in Ireland the specific right to an abortion if her life is in danger, or if there is

[168] *Open Door and Dublin Well Woman v. Ireland* (Application no. 14234/88; 14235/88), European Court of Human Rights, Judgment of 29 October 1992, Paragraph III (D)(4)(80).
[169] *Ibid*. Paragraph IV (81).
[170] Regulation of Information (Services Outside of the State for Termination of Pregnancies) Act, 1995. Government of Ireland. Enacted 12 May 1995.
[171] *A, B & C v. Ireland* (Application no. 25579/05), European Court of Human Rights, Judgment of 16 December 2010, paragraph 209.
[172] Ruth Fletcher, "Contesting the cruel treatment of abortion-seeking women," in *Reproductive Health Matters*, Vol. 22, No. 44, 2014, pp. 10-21. Here, page 12.

a risk of suicide.[173] However, the Protection of Life During Pregnancy Act did not cover cases of rape, incest or fatal foetal abnormalities, nor did it take into account the Court's reflection on distinguishing between the protection of health and life in the context of abortion. Furthermore, the introduction of the Protection of Life During Pregnancy Act still did not appropriately mitigate the lack of clarity regarding the circumstances in which an abortion could be procured, which is evident from the fact that "no more than thirty-two women ever accessed abortion care per year under this law."[174]

Domestic case law in Ireland has not only indicated that mobility issues hinder access to abortion for "Irish citizens [who] are legal minors, wards of the state and/or travellers," but such is also the case for asylum-seeking women, where mobility has at times made access to abortion impossible.[175] The ECtHR's interpretation of reproductive rights, particularly concerning abortion, under Article 8 would prove helpful for bettering state practice, for example, in a case such as the *Ms. Y v. Ireland*, in August of 2014. The case concerned a decision by the HSE who refused an abortion to a suicidal, pregnant asylum seeker and rape survivor "on the grounds that a caesarean section and early live delivery were practicable and reasonable alternatives justified by the need to protect fetal life."[176] As an asylum seeker in Ireland, Ms. Y received an income of €19 per week and had "little in the way of a support network, and with no freedom of movement given her precarious migration status."[177] Ms. Y was forced to continue the pregnancy, delivering a live birth by caesarean section, which was achieved through the delay of adequate abortion care until a point of foetal viability, including through means of hospitalisation.[178] The premature infant was placed under state care. The HSE's grounds for refusing an abortion to Ms. Y, which would have in fact been lawful to procure under the Protection of Life During Pregnancy Act, was they thought "it was reasonable to perform serious abdominal surgery on a woman against her wishes in order to preserve the life of the fetus."[179] Though Ms. Y's circumstances provided for a legal abortion

[173] Protection of Life During Pregnancy Act, 2013.Government of Ireland. Enacted 30 July 2013. See paragraphs 7 to 9.
[174] Fiona de Londras, "'A Hope Raised and Then Defeated'? The continuing harms of Irish abortion law", in *Feminist Review*, Issue 124, 2020, pp. 33-50. Here, page 37.
[175] Katherine Side, "A geopolitics of migrant women, mobility and abortion access in the Republic of Ireland," in *Gender, Place & Culture*, Issue 23(12), pp. 1,788-1,799. Here, page 1,789.
[176] Ruth Fletcher, "Contesting the cruel treatment of abortion-seeking women," in *Reproductive Health Matters*, Vol. 22, No. 44, 2014, pp. 10-21. Here, page 10.
[177] *Ibid.* Page 11.
[178] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 22.
[179] Ruth Fletcher, "Contesting the cruel treatment of abortion-seeking women," in *Reproductive Health Matters*, Vol. 22, No. 44, 2014, pp. 10-21. Here, page 13.

in Ireland, her suicidal state was overlooked and a caesarean section was used in order to "allegedly circumvent suicide."[180] This case conveys how "legal standards of reasonableness and practicality ought to be interpreted in ways that are respectful of the patient's wishes and rights."[181] It also conveys how "state agencies are similarly networked across liminal spaces," whereby the Irish and UK police, and other relevant authorities cooperated in both countries to restrict Ms. Y's mobility.[182] Ireland had also received international criticism for its stringent abortion laws, most notably by the UNHRC in 2014, which asserted that Ireland's then reliance on "abortion travel has significant discriminatory effects."[183]

In November 2016, the United Nations Human Rights Committee issued their adoption of views concerning the case of *Mellet v. Ireland*, regarding her pregnancy in 2011. The author, Amanda Mellet, was informed that her foetus would likely die in utero or shortly after birth, due to foetal abnormalities.[184] The author decided to travel to the United Kingdom, in order to procure an abortion, following which she endured labour for 36 hours to deliver a stillborn child and returned to Ireland a mere 12 hours later.[185] She was not provided with clinical aftercare upon her return to Ireland, nor was she provided with counselling for her loss and the trauma of travelling abroad in order to terminate her pregnancy, as such services were not offered at the time to those who decided to seek an abortion.[186] The claimed violations in the case under the ICCPR were Articles 7 (freedom from torture or cruel, inhuman or degrading treatment), 17 (right to privacy) and 19 (freedom of expression), as well as discrimination on the grounds of sex and gender according to Articles 2(1), 3 and 26. The Human Rights Committee adopted the views that the author's rights were infringed upon under Articles 7, 17 and 26 of the ICCPR, due to the State's denial of abortion services to the author under the circumstances of the case.[187]

In a landmark decision in 2018, the Eighth Amendment was repealed via referendum, replacing the wording of Article 40.3.3° of the Irish Constitution, stipulating that "provision

[180] Katherine Side, "A geopolitics of migrant women, mobility and abortion access in the Republic of Ireland," in *Gender, Place & Culture*, Issue 23(12), pp. 1,788-1,799. Here, page 1,794.
[181] Ruth Fletcher, "Contesting the cruel treatment of abortion-seeking women," in *Reproductive Health Matters*, Vol. 22, No. 44, 2014, pp. 10-21. Here, page 10.
[182] Katherine Side, "A geopolitics of migrant women, mobility and abortion access in the Republic of Ireland," in *Gender, Place & Culture*, Issue 23(12), pp. 1,788-1,799. Here, page 1,794.
[183] Ruth Fletcher, "Contesting the cruel treatment of abortion-seeking women," in *Reproductive Health Matters*, Vol. 22, No. 44, 2014, pp. 10-21. Here, page 12.
[184] *Mellet v. Ireland*, United Nations Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2324/2013, 17 November 2016. Paragraph 2.2.
[185] *Ibid.* Paragraph 2.4.
[186] *Ibid.* Paragraph 2.5.
[187] *Ibid.* Paragraph 8.

may be made by law for the regulation of termination of pregnancy"[188] by the Thirty Sixth Amendment of the Constitution Act 2018. However, even during the lead up to the referendum, "at the highest political levels, the discourse of abortion law reform failed in the main to frame repeal as a matter of freedom, agency or rights."[189] The Thirty-sixth Amendment of the Constitution of Ireland (2018) permits the Oireachtas (the legislature) to legislate for abortion access in Ireland, which has in turn granted access to abortion services in a wide range of circumstances. The Regulation of Termination of Pregnancy Act 2018 signed into law by President Michael D Higgins on 20 December, which provides the legislative framework for the provision of abortion care in defined circumstances. Abortion care is now permitted: on request up to 12 weeks of pregnancy, subject to a 3-day waiting period and a medical certification of gestational age; for reasons of risk to a woman's life or of serious harm to her health, and; in cases of fatal foetal abnormality. However, in order to procure an abortion prior to 12 weeks of pregnancy, pregnant people must attend a maternity hospital for certification of gestational age, which is "especially arduous for those who live in rural and underserviced areas and those limited by personal circumstances."[190]

4.2 Limitations of current legislation governing abortion

Abortion in the Republic of Ireland remains criminalised in all other circumstances (*e.g.* on request in cases outside of the 12 week gestational limit, or where the foetus has reached viability, although there is a risk to the pregnant person's life), although the criminal provisions do not apply to a woman in respect of her own pregnancy, rather on those who carry out the procedures.[191] The continued lack of clarity contained within the Regulation of Termination of Pregnancy Act 2018 with regards to the criminalisation of practitioners providing abortions outside of the defined circumstances creates a chilling effect, "constructing a further legal limitation on access especially for people in 'borderline' cases."[192] The focus of the current legislation on physicians not only creates tensions with international best practices, but also means that "under the [Regulation of Termination of Pregnancy] Act [2018], medical procedures and supervision serve as proxies for political decisions with spatial

[188] Article 40.3.3° of the Constitution of the Republic of Ireland, enacted 1 July 1937, in force 29 December 1937.
[189] Fiona de Londras, "'A Hope Raised and Then Defeated'? The continuing harms of Irish abortion law", in *Feminist Review*, Issue 124, 2020, pp. 33-50. Here, page 38.
[190] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 20.
[191] Irish Family Planning Association, *History of Abortion in Ireland*. Available at: https://www.ifpa.ie/advocacy/abortion-in-ireland-legal-timeline/ (last visited 25 July 2022)
[192] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 19.

consequences."[193] Furthermore, this focus adds "medical paternalism to the existing structures of state paternalism that shapes processes of reproduction, migration and citizenship."[194] The reliance of the law on the judgment of medical practitioners regarding access to lawful abortion further hinders a pregnant person's ability "to exercise and enjoy their constitutional rights."[195] Where legal reform governing abortion has occurred, it has always been "foetocentric and punitive, exceptionalising abortion and conceptualising law as a means of discouraging it," further distancing the law from recognition of pregnant people as full constitutional rights bearers.[196] Therefore, rather than the constitutional responsibility of ensuring a rights-based approach to abortion regulation in Ireland lying with policy makers, it rather lies with those seeking an abortion and reproductive rights activists and defenders.[197]

An additional hurdle in the full realisation of accessing abortion care, the Irish legislation "makes no provision for remedy where a person is denied abortion care, even though at the time of requesting it she may have been 'qualified' under the [Regulation of Termination of Pregnancy] Act."[198] Remedies aid in enforcing rights, whereas in this context, the absence of an appropriate mechanism for remedies "communicates either a lack of state openness to being compelled to provide abortion care, or a failure to see rights as implicated in abortion law, or both."[199] The only cause for remedy, although only applicable to few circumstances,[200] contained within the Regulation of Termination of Pregnancy Act is that of the pregnant person being informed of their right to seek a review, having not met the requirements to access an abortion.[201] A review panel of medical practitioners must then be established by the Health Executive, no more than three days after an application for review has been sought by the pregnant person, with a decision of the review within seven days of establishment of the review panel.[202] Not only does the review only consider certain conditions under which an abortion may be obtained, it also only assesses whether the pregnant person is eligible for an abortion

[193] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 20.
[194] *Ibid.* Page 22.
[195] Fiona de Londras, "'A Hope Raised and Then Defeated'? The continuing harms of Irish abortion law", in *Feminist Review*, Issue 124, 2020, pp. 33-50. Here, pages 41-42.
[196] *Ibid.* Page 33.
[197] *Ibid.* Page 35.
[198] *Ibid.* Page 42.
[199] *Ibid.* Page 42.
[200] See Health (Regulation of Termination of Pregnancy) Act 2018. Dublin, Houses of the Oireachtas, Government of Ireland. Enacted 2018. Section 16(2).
[201] *Ibid*. Section 13(2).
[202] *Ibid.* Sections 14(1), 15(1) and 16(1).

at the time of the review, rather than at the time of first assessment by a medical practitioner prior to the application for review.[203]

Additionally, the specific provisions of the legislation require urgent clarity, applying a rights-based approach. An example of such is where the pregnant person's circumstance falls within the 12 week gestational limit, but there is an imposed delay to receiving an abortion, there is no available remedy under the Regulation of Termination of Pregnancy Act, thus asserting that such a case "is not conceptualised as a rights-based entitlement."[204] Such a delay may include the mandatory 3-day waiting period applicable to an abortion up to 12 weeks, which "exacerbates the unequal distribution of reproductive freedom throughout the country," particularly and disproportionately affecting those with limited resources, including asylum-seeking women.[205] Additionally, with regards to the provision of obtaining an abortion where there are reasons of risk to a woman's life or of serious harm to her health, "serious harm" is not defined in the Regulation of Termination of Pregnancy Act, nor is it a standard medical term with a common meaning.[206]

A review clause was included in the Regulation of Termination of Pregnancy Act 2018, committing the Irish Government to reviewing the legislation "not later than 3 years after the commencement," of the Act.[207] While there is no timeline for the Minister for Health to publish the review upon receiving it, the review was due to be submitted to the Minister on 7 February 2023, "having [already] been delayed from the original 2022 submission date."[208] The review consisted of inputs from service users, service providers and a public consultation. As part of the public consultation, the Abortion Working Group[209] including the National Women's

[203] Fiona de Londras, "'A Hope Raised and Then Defeated'? The continuing harms of Irish abortion law", in *Feminist Review*, Issue 124, 2020, pp. 33-50. Here, page 43.
[204] *Ibid.* Pages 43-44.
[205] *Ibid.* Page 44.
[206] Abortion Rights Campaign, *Submission to the Oireachtas Committee on Justice and Equality on the Urgent Need to Abolish Direct Provision and Promote the Health and Human Rights of People Seeking Asylum*, published 31 May 2019. Page 3.
[207] Government of Ireland, *Review of the operation of the Health (Regulation of Termination of Pregnancy) Act 2018: Public consultation*, published 8 December 2021, updated 27 April 2022. Available at: https://www.gov.ie/en/publication/67c5c-review-of-the-operation-of-the-health-regulation-of-termination-of-pregnancy-act-2018-public-consultation/ (last visited 11 April 2022)
[208] National Women's Council, *NWC: abortion review findings must be published without delay*, published 2 February 2023. Available at: https://www.nwci.ie/news/article/nwc_abortion_review_findings_must_be_published_without_delay (last visited 11 April 2023)
[209] "The Abortion Working Group is a group of civil society organisations and healthcare providers established in early 2019 and chaired by the National Women's Council of Ireland (NWC). The purpose of the Working Group is to provide a space for information sharing and collective advocacy for groups working to ensure safe access to abortion in Ireland. The working group is comprised of Abortion Access Campaign West, Abortion Rights Campaign; Abortion Support Network; Action for Choice; Alliance for Choice; Amnesty International Ireland;

Council (NWC) – the leading national representative organisation for women and women's groups in Ireland – published its submission to the Minister for Health in 2022. The Abortion Working Group highlighted concerns regarding the threat of criminalisation on anyone supporting access to abortion care, particularly medical practitioners "determining when and whether the statutory criteria for access to care have been met."[210] The criminalisation of providing essential and emergency SRH care "has a chilling effect that undermines clinical judgement and professional expertise, as well as access to needed healthcare."[211] Another concern conveyed through the Abortion Working Group's submission is that of the mandatory 3-day waiting period, which in reality could delay essential abortion care. This mandatory provision of the current Regulation of Termination of Pregnancy Act places undue and "additional emotional, logistical, and financial stress on women and pregnant people, particularly those facing additional structural barriers," such as those living with a disability[212] and migrant women.[213] The World Health Organization (WHO) has critiqued mandatory waiting periods in order to access an abortion, in that they often delay care, jeopardising "women's ability to access safe, legal abortion services and demeans women as competent decision-makers."[214]

The Abortion Working Group's submission to the review of the Regulation of Termination of Pregnancy Act also expressed concerns that women and pregnant people are still restricted to access to abortion, resulting in the need to travel to another jurisdiction in order to access care. This is evidenced by the 63 women and pregnant people who travelled to procure an abortion in 2020, "despite the risk to their health of travelling during the

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BelongTo; Cairde; Coalition to Repeal the Eighth Amendment; Disabled Women Ireland; Doctors for Choice; Dublin Well Woman Centre; Irish Council for Civil Liberties (ICCL); Irish Family Planning Association; Inclusion Ireland; Lawyers for Choice; Leitrim for Choice; National Collective of Community Based Women's Networks (NCCWN); National Women's Council of Ireland; START Doctors (GP providers of medical abortion in the community); Transgender Equality Network Ireland (TENI); Termination for Medical Reasons; Together for Safety; Union of Students in Ireland (USI); Women's Aid."
National Women's Council, *NWC: abortion review findings must be published without delay*, published 2 February 2023. Available at: https://www.nwci.ie/news/article/nwc_abortion_review_findings_must_be_published_without_delay (last visited 11 April 2023)

[210] Abortion Working Group, *Submission to Public Consultation: Review of the operation of the Health (Regulation of Termination of Pregnancy) Act 2018*, published 2022. Page 3.

[211] *Ibid.* Page 3.

[212] *Ibid.* Page 3.

[213] National Women's Council, *NWC: abortion review findings must be published without delay*, published 2 February 2023. Available at: https://www.nwci.ie/news/article/nwc_abortion_review_findings_must_be_published_without_delay (last visited 11 April 2023)

[214] World Health Organization, *Safe Abortion Guidance: Technical and Policy Guidance for Health Systems*, 2nd Edition, published 2012. Page 96.

pandemic."[215] A public opinion poll carried out by Opinions Market Research found that 80% of participants agreed that no pregnant person should still have to travel to another jurisdiction in order to access abortion care.[216] Furthermore, concerns were expressed in the submission regarding the disproportionate access to abortion throughout the Republic of Ireland, as evidenced by medical abortions only being available in one third of general practitioner surgeries.[217] The Abortion Working Group also expressed that of the 405 general practitioners that provide early medical abortion, only 246 are currently listed in the public health system's abortion support service, My Options.[218] The remaining general practitioners only "provide[s] services to their existing patients and will not take referrals," indicating that general practitioners who provide early medical abortion access "for the general public is just 7% of the overall GP population."[219] Such disparity in access to essential early medical abortion services particularly disproportionately impacts asylum-seeking women, who also most commonly live in rural, underserviced areas of the country.

While there are many other concerns conveyed by the Abortion Working Group in their submission, the collective of over 20 civil society organisations and healthcare providers particularly expressed the Irish Government's need to address the additional barriers in accessing abortion services that trans men, intersex and non-binary people face. The Interpretation Act 2005 allows for interpretation of legislation, where a "literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole,"[220] thus applicable to the Regulation of Termination of Pregnancy Act. While the Interpretation Act allows for access to abortion services for trans men, intersex and non-binary people under the Regulation of Termination of Pregnancy Act, "the original language of the Act can inadvertently instantiate the erroneous idea that abortion care is only for women."[221] Applying the principle of non-discrimination in the Regulation of Termination of Pregnancy Act would seek to protect those from "the dignitary harm […] [of] being mis-gendered as [a] 'pregnant

[215] Abortion Working Group, *Submission to Public Consultation: Review of the operation of the Health (Regulation of Termination of Pregnancy) Act 2018*, published 2022. Page 8.
[216] National Women's Council, *Public opinion of abortion shows 80% agree no woman should have to travel abroad for abortion care*, published 15 March 2022. Available at: https://www.nwci.ie/learn/article/public_opinion_of_abortion_shows_80_agree_no_woman_should_have_to_travel_ab (last visited 11 April 2023)
[217] Abortion Working Group, *Submission to Public Consultation: Review of the operation of the Health (Regulation of Termination of Pregnancy) Act 2018*, published 2022. Page 12.
[218] *Ibid*. Page 12.
[219] *Ibid.* Page 12.
[220] Interpretation Act, 2005. Government of Ireland. Enacted 17 October 2005. Part 2, Article 5(2)(b).
[221] Abortion Working Group, *Submission to Public Consultation: Review of the operation of the Health (Regulation of Termination of Pregnancy) Act 2018*, published 2022. Page 16.

woman' as a result of the government's refusal to add 'pregnant person' to the statutory descriptor of those accessing care under the law."[222]

Irish media confirmed that the Irish Minister for Health, Stephen Donnelly, had received the final review in March 2023, which is expected to be published in mid-April 2023. While the review could result in relieving restrictions on access to abortion in the legislation, this could also prove challenging "as the referendum on the Eighth Amendment was won under particular terms that were presented to the public," outlining what the legislation governing abortion would be should the Eighth Amendment be repealed.[223]

It is clear from the above examination of the Regulation of Termination of Pregnancy Act that shortcomings, such as delays in the provision of abortion services, are not adequately accounted for. Therefore, the current legislation does not adequately prevent similar scenarios from happening again, *e.g.* the case of Ms Y pre-repeal of the Eighth Amendment. The review of the Regulation of Termination of Pregnancy Act offers the Irish Government a chance to implement the calls for change from service users, service providers and civil society, taking into account the shortcomings of the legislation, as evidenced in the present sub-chapter. Furthermore, the Irish Government now has the opportunity to instantiate a rights-based approach throughout upon review of the current legislation, as the Regulation of Termination of Pregnancy Act in its current form "does not frame abortion as an essential reproductive health right which all women and pregnant people are entitled to."[224] Applying a definitive rights-based approach to the legislation upon review would aid in mitigating other concerns expressed in the current sub-chapter. Furthermore, it would seek to see women as bearers of reproductive rights and freedoms, with the ability to control their reproduction, rather than their rights having a legislative stronghold on the ability of medical professionals to carry out procedures.[225]

[222] Fiona de Londras, "'A Hope Raised and Then Defeated'? The continuing harms of Irish abortion law", in *Feminist Review*, Issue 124, 2020, pp. 33-50. Here, page 44.
[223] The Irish Times, *Donnelly receives final report on review of State's abortion laws*, published 16 March 2023. Available at: https://www.irishtimes.com/ireland/social-affairs/2023/03/16/donnelly-receives-final-report-on-review-of-states-abortion-laws/ (last visited 11 April 2023)
[224] Abortion Working Group, *Submission to Public Consultation: Review of the operation of the Health (Regulation of Termination of Pregnancy) Act 2018*, published 2022. Page 17.
[225] Fiona de Londras, "'A Hope Raised and Then Defeated'? The continuing harms of Irish abortion law", in *Feminist Review*, Issue 124, 2020, pp. 33-50. Here, page 42.

4.3 The adverse impacts of current legislation on asylum seekers

National legislation in Europe varies in providing healthcare to asylum seekers. For example, countries such as Austria, Italy, Portugal and Sweden only afford emergency health care to asylum seekers, however, Finland affords health care specifically to children and pregnant asylum seekers.[226] Although providing emergency care to asylum seekers is in line with legally binding EU Directives, this requirement does not ensure access to all reproductive services in EU Member States.[227] Legislative oversights heavily increase the disproportionate access to health care for non-citizens, such as asylum seekers, particularly where citizens are more appropriately provided for in legislation governing health care access.[228] Considering the current existing legislation in Ireland regarding access to abortion care, there are several issues, which have been of growing concern since the decriminalisation of abortion in the circumstances highlighted in sub-chapter 4.1. Though the current legislative framework alleviates some previous vulnerabilities, it also maintains other vulnerabilities, "perpetuating 'abortion inequity'," [229] particularly for asylum-seeking women. The present sub-chapter will analyse to what extent the limitations of the current legislation disproportionately and adversely impact the accessibility of abortion care in Ireland for asylum seekers, framed within the current level of care the Irish State affords to asylum seekers.

Asylum seekers' access to abortion care under the current legislative framework in Ireland does not accurately address "medical, geopolitical and socio-economic limitations or their spatial consequences."[230] In 2018, asylum seekers gained the right to work in Ireland, however, only under certain conditions, *i.e.* if they have not yet received a first instance recommendation on their international protection application after 6 months.[231] However, this stipulates that at least for the first 6 months as an asylum seeker in Ireland, one does not have the right to work, although the average length of time in the system awaiting an asylum decision is 24 months, and in some circumstances, residents have spent up to 12 years in the system due to significant delays in the asylum process.[232] Therefore, considering such delays, asylum seekers should be given the right to work in Ireland after at least 3 months, should one have

[226] Marleen Bosmans, *et al.*, *Sexual and Reproductive Health and Rights of Refugee Women in Europe: rights, policies, status and needs. Literature review*. January 2005. Page 56.
[227] *Ibid.* Page 57.
[228] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 22.
[229] *Ibid.* Pages 16-17.
[230] *Ibid.* Page 17.
[231] UNHCR Ireland, *Living in Ireland: Employment and Education.* Available at: https://help.unhcr.org/ireland/living-in-ireland/employment-and-education/ (last visited 26 July 2022)
[232] Doras, *Direct Provision*. Available at: http://doras.org/direct-provision/ (last visited 29 July 2022)

not yet received their first instance recommendation on their international protection. Doing so could alleviate the financial constraints of being an asylum seeker under the Direct Provision system in Ireland, as asylum-seeking adults receive an allowance of only €38.80 per week. Should an asylum seeker be eligible to work under the current conditions, there are also several factors that may impact accessing the labour market in practicality, *e.g.* Direct Provision[233] centres being commonly located in rural areas, with limited transport options.[234] Therefore, considering these factors, should an asylum-seeking woman wish to procure an abortion, having limited access to the right to work, receiving an inadequate weekly allowance, and living in a Direct Provision centre in a remote area highly impact the accessibility of procuring an abortion within the jurisdiction, should the woman meet the legislative requirements to acquire an abortion. The cost of public transport alone may be a limiting factor, or where abortion care is not covered by the State, and the woman is obligated to pay for the services.[235] Should an asylum-seeking woman not meet the legislative requirements to acquire an abortion in Ireland, the only option is to travel to another jurisdiction, for example, the United Kingdom, in order to do so. However, this is unlikely to be a viable option either due to lack of financial freedom, curtailment of mobility by others and / or restrictions of movement for asylum seekers in Ireland.[236]

Restricted movement for asylum seekers in Ireland poses a serious threat to access to abortion services, both within and outside of the jurisdiction. As previously stated, many Direct Provision centres are based in rural or remote areas, with little access to adequate public transport. Although this is not a directly imposed restriction of movement, it has serious implications for asylum-seeking women attempting to procure an abortion in Ireland. According to a recent analysis carried out by the National Women's Council of Ireland of HSE data, 50% of the counties in Ireland have less than 10 general practitioners that offer abortion

[233] In 2000, Ireland established the Direct Provision system as a reception mechanism for asylum seekers, who are "accommodated across the country in communal institutional centres or former hotel style settings."
Doras,
Direct Provision. Available at: http://doras.org/direct-provision/ (last visited 29 July 2022)
[234] *Ibid.*
[235] "The Health Act 2018 states that abortion care is free for anyone resident in Ireland. However, in practice, those without a PPSN (Personal Public Services Number) are often obligated to pay for abortion care themselves. Some GPs will provide care at no cost, or provide care and then seek reimbursement from the HSE. This gap between the law and practice can prevent people without PPSNs from accessing abortion care free of cost, especially asylum seekers who have recently arrived in Ireland."
Abortion Rights Campaign and Lorraine Grimes, *Too Many Barriers: Experiences of Abortion in Ireland After Repeal*, published September 2021. Page 43.
[236] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 18.

services, with a strong rural divide in accessibility.[237] Whereby provision of services is strong in the counties of Cork, Galway and Dublin, it is much less developed and underserved in Mayo, Wexford, Westmeath, Longford and Carlow.[238] Furthermore, only 11 of 19 maternity hospitals in Ireland provide full abortion services in line with the current legislation.[239] Considering the disparity in provision of services by both individual general practitioners and maternity hospitals, it is unsurprising that in a survey in 2021, 30% of respondents travelled between 4 and 6 hours in order to access abortion services, and "57% of respondents stated that they had to spend longer travelling than they usually would to access medical care."[240] With these statistics alone in mind, it is highly probable that many asylum-seeking women seeking to acquire an abortion would be among those travelling for longer periods of time, due to the factors outlined above. This is also compounded by the fact that medical practitioners "are permitted to declare their conscientious objection to providing care, which they are not required to disclose to the Department of Health."[241] The lack of transparency provided by the Department of Health regarding medical practitioners who are willing to provide abortion services disproportionately impacts asylum-seeking women, given the already lack of services in more rural areas, as well as the restricted financial freedoms of asylum seekers.

Should an asylum-seeking woman require an abortion but does not meet the gestational or otherwise requirements stipulated by the current legislation, other measures may need to be taken, such as importing pills or travelling to another jurisdiction. Due to their immigration and residency status in Ireland, asylum-seeking women face a unique set of barriers when it comes to alternative methods of procuring an abortion, outside of the limitations of the legislation. While asylum seekers in Ireland do not have a constitutional right to mobility, citizens of the State do, and also have access to domestic legal remedies where there is prevention of such mobility.[242] Many may not have the option to leave Ireland due to VISA restrictions, in order to avail of an abortion in a different jurisdiction. Asylum seekers in Ireland

[237] National Women's Council of Ireland, *GP Regional Breakdown of Data*, May. Available at: https://www.nwci.ie/images/uploads/GP_regional_breakdown_data_-_May_2022.pdf (last visited 29 July 2022)
[238] National Women's Council of Ireland, *Half of counties in Ireland have less than 10 GPs offering abortion care*, published 24 May 2022. Available at: https://www.nwci.ie/learn/article/half_of_counties_in_ireland_have_less_than_10_gps_offering_abortion_care (last visited 29 July 2022)
[239] *Ibid.*
[240] Abortion Rights Campaign and Lorraine Grimes, *Too Many Barriers: Experiences of Abortion in Ireland After Repeal*, published September 2021. Page 8.
[241] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 17.
[242] Katherine Side, "A geopolitics of migrant women, mobility and abortion access in the Republic of Ireland," in *Gender, Place & Culture*, Issue 23(12), pp. 1,788-1,799. Here, page 1,789.

who need to leave the State for any reason, including in order to access an abortion, can only do so upon receiving consent from the Minister for Justice and Equality for travel and re-entry, although there is no appropriate mechanism for obtaining this consent.[243] Additionally, temporary travel documents for asylum seekers can take up to eight weeks to process, and fees incurred to process them cost approximately €200.[244] Hence, in reality the option to travel to another jurisdiction to procure an abortion is monetarily impossible for asylum-seeking women, as to do so means foregoing other expenses for over one month, based on an adult asylum seeker's allowance. The Irish Government has in the past selectively facilitated "abortion access for some women from vulnerable communities, including asylum seekers and Travellers," whereby between 2000 and 2004 approximately sixty asylum-seeking women were granted temporary travel documents in order to access an abortion outside of the jurisdiction.[245] Furthermore, it is a criminal offence for an asylum seeker to travel outside of Ireland for any reason, without the Minister for Justice and Equality's consent. Therefore, the criminalisation of movement without this consent has a chilling effect on asylum-seeking women in need of an abortion in a different jurisdiction, where their circumstances do not meet those of the Irish legislation on abortion. During this process, the asylum-seeking woman must also disclose the reason for travel to the relevant authorities and the embassy of the country she intends to travel to, which may be "a deterrent for vulnerable women, particularly as there is still considerable stigma associated with abortion."[246] Such disclosure of reason for travel also has implications for the right to privacy of the asylum-seeking woman.

The Irish Family Planning Association (IFPA) carried out an audit in this regard, prior to the introduction of the Regulation of Termination of Pregnancy Act 2018. The IFPA identified 26 cases of asylum seekers and women with travel restrictions, who did not receive the required consent from the Minister for Justice and Equality for travel and re-entry, and therefore had to resort to a then illegal abortion with medication, or carry the pregnancy to full term.[247] Furthermore, although it is not a criminal offence to self-manage an abortion, anyone

[243] Irish Council for Civil Liberties, *Migrants and the 8th: A Joint Statement from 4 Organisations Working with Migrants on the Disproportionate Impact of the 8th Amendment on Migrants*. Available at: https://www.iccl.ie/equality/womens-rights/equality/migrantsthe8th/ (last visited 26 July 2022)
[244] Katherine Side, "A geopolitics of migrant women, mobility and abortion access in the Republic of Ireland," in *Gender, Place & Culture*, Issue 23(12), pp. 1,788-1,799. Here, page 1,793.
[245] Katherine Side, "A. B. and C. versus Ireland: A New Beginning to Access Legal Abortion in the Republic of Ireland?", in *International Feminist Journal of Politics*, 13:3 September 2011, pp. 390-412. Here, page 402.
[246] Irish Council for Civil Liberties, *Migrants and the 8th: A Joint Statement from 4 Organisations Working with Migrants on the Disproportionate Impact of the 8th Amendment on Migrants*. Available at: https://www.iccl.ie/equality/womens-rights/equality/migrantsthe8th/ (last visited 26 July 2022)
[247] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 21.

who assists an individual in procuring an abortion outside the bounds of the current legislation would be subject to criminal penalties, including the importation of the abortion pill.[248] Asylum seekers' status in Ireland may depend on not breaking the law, therefore, criminalisation practices such as these are acutely felt by asylum-seeking women seeking an abortion, and whoever may help them to do so. Further to the issue of securing the right to privacy of asylum-seeking women seeking an abortion, shared accommodation for asylum seekers in Direct Provision centres "are unsuitable for the self-management of medication abortion."[249] Direct Provision centres and emergency accommodation often require an individual to share a room with other people, be it family members or strangers. Therefore, asylum-seeking women seeking to procure an abortion should be given the option of a vacuum aspiration abortion in lieu of taking medication alone, safeguarding "individual dignity, which is essential for asylum seekers' long-term integration into the country."[250]

It is vital that Member States, such as Ireland, implement rehabilitation and response measures in order to safeguard the reproductive rights of asylum seekers, *e.g.* through the UN Minimal Initial Service Package (MISP). The MISP for SRH in crisis situations is "a series of crucial, lifesaving activities required to respond to the [SRH] needs of affected populations at the onset of a humanitarian crisis."[251] Furthermore, the MISP provides for norms of service such as:

> [the] prevention of maternal and infant mortality; prevention and treatment of sexually transmitted infections (STIs) and HIV; prevention and response to pregnancy-associated complications; and provision of family planning commodities and information.[252]

Although national governments' duties to provide non-nationals or immigrants with social services or entitlements varies greatly, "it is well-established that there are certain norms of treatment that are accorded to all," regardless of status, therefore, asserting that asylum seeking women's SRHR can be based on improving existing norms and obligations within

[248] Abortion Rights Campaign and Lorraine Grimes, *Too Many Barriers: Experiences of Abortion in Ireland After Repeal*, published September 2021. Page 26.
[249] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 21.
[250] Abortion Rights Campaign, *Submission to the Oireachtas Committee on Justice and Equality on the Urgent Need to Abolish Direct Provision and Promote the Health and Human Rights of People Seeking Asylum*, published 31 May 2019. Page 3.
[251] United Nations Population Fund, *Minimum Initial Service Package (MISP) for SRH in Crisis Situations*. Available at: https://www.unfpa.org/resources/minimum-initial-service-package-misp-srh-crisis-situations (last visited 27 April 2021)
[252] UN High Commissioner for Refugees (UNHCR), *Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis - Greece and the former Yugoslav Republic of Macedonia*, published 20 January 2016. Page 16.

international human rights law.[253] National policies and legislation protecting these rights must be "designed and implemented with a gender perspective based on human rights, taking into account women's specific needs and risk factors."[254] Strengthening European jurisprudence regarding asylum seeker's rights, particularly in the context of SRHR, will aid in "increasing the pressure on national governments to [further] attend to the reproductive health of persons within their borders."[255] Considering that asylum-seeking women in the Direct Provision system in Ireland are adversely impacted by the gestational limits of the Irish legislation concerning abortion, the Irish Government must in turn recognise this in its review of the legislation.

Though Ireland's *National Intercultural Health Strategy* "aims to reduce health inequalities and enhance health services for disadvantaged populations through mainstreaming and targeted approaches," it does not appropriately "recognise the differentially constructed health needs among Ireland's migrant populations."[256] This is particularly true in the provision of sexual and reproductive health care. In 2019, the Abortion Rights Campaign highlighted several inequalities in the provision and accessibility of abortion care for asylum seekers, including practical issue such as many general practitioners often being closed to new patients in rural areas, where Direct Provision centres are often located.[257]

5. Asylum seekers and SRHR

5.1 Achieving realisation of SRHR for asylum seekers

While international awareness of the importance of adequately providing for the SRHR of asylum seekers has been "spurred on by the worsening of the HIV and AIDS pandemic, and by the increasing recognition that sexual violence is often used deliberately as a weapon of

[253] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, page 438.
[254] Elena Laporta Hernández, "Legal strategies to protect sexual and reproductive health and rights in the context of the refugee crisis in Europe: a complaint before the European Ombudsperson," in *Reproductive Health Matters*, Vol. 25, No. 51, 2017, pp.151-160. Here, page 155.
[255] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, page 431.
[256] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 23.
[257] Abortion Rights Campaign, *Submission to the Oireachtas Committee on Justice and Equality on the Urgent Need to Abolish Direct Provision and Promote the Health and Human Rights of People Seeking Asylum*, published 31 May 2019. Page 2.

war,"[258] there are still significant obstacles to full realisation of SRHR and care. There are several factors that contribute to these obstacles, including: patient experiences of clinical encounters, the scope and responsiveness of the health care system in the host country, and the sociocultural context of the asylum seeker.[259] This chapter will discuss the protection of SRHR for asylum seekers in the context of the principle of non-discrimination (sub-chapter 5.2), and presenting practices of health care accessibility inclusive of asylum seekers (sub-chapter 5.3). Domestic health care examples include Switzerland, Kazakhstan, Argentina and Uruguay, where the particular SRH needs of asylum-seeking or migrant women has been accounted for. Furthermore, the present chapter will highlight the need to provide for timely accessibility and protection of SRHR for asylum seekers, particularly in response to international crises (sub-chapter 5.4). An example of such is the impact of Russia's full-scale war on Ukraine, which has seen thousands of Ukrainians fleeing the country, many in need of access to SRH care and services.

According to the UN High Commissioner for Refugees (UNHCR), pregnant asylum seekers should have "the same access to medical care as nationals of the host state," therefore, "[w]omen in reception centres should also be informed or receive counselling about their reproductive health rights in that Member State."[260] Particularly with regards to accessing safe and legal abortion, asylum-seeking women "face immense bureaucratic and financial barriers," which may result in seeking out illegal methods of terminating their pregnancy.[261] Besides the threat of criminalisation, illegal abortion methods are often unsafe and can have serious and lasting implications for the health of the woman, such as: "incomplete abortion, haemorrhage, sepsis, uterine perforation, intra-abdominal injury, psychological trauma and death."[262] In terms of health care services more widely, asylum-seeking women in host countries "typically bear the heaviest responsibility for sick family members and children, but at the same time they have less access to information and resources than their male counterparts."[263] However,

[258] Françoise Girard and Wilhelmina Waldman, "Ensuring the Reproductive Rights of Refugees and Internally Displaced Persons: Legal and Policy Issues," in *International Family Planning Perspectives*, Vol. 26, No. 4, 2000, pp. 167-173. Here, page 167.
[259] Natasha Davidson *et al.*, "Access to preventive sexual and reproductive health care for women from refugee-like backgrounds: a systematic review," in *BMC Public Health*, Issue 22(403), 2022. Page 31.
[260] Directorate-General for Internal Policies, Policy Department Citizen's Rights and Constitutional Affairs, *Reception of female refugees and asylum seekers in the EU: Case study Germany, Study for the FEMM Committee,* European Parliament, 2016. Page 14.
[261] Irish Family Planning Association, *Sexual Health & Asylum: Handbook for People Working with Women Seeking Asylum in Ireland*, published 2010. Page 25.
[262] *Ibid*. Page 25.
[263] Elisabeth Kurth *et al*., "Reproductive health care for asylum-seeking women - a challenge for health professionals," in *BMC Public Health*, Issue 10, Article 659, 2010. Page 1.

examinations of asylum-seeking women's health are limited, "due to there being few instruments which are validated across languages and ethno cultural groups."[264]

5.1 The principle of non-discrimination in realising SRHR for asylum seekers

Those who flee conflict and crises often have limited access to reproductive health services, and as such, are also particularly vulnerable to sexual violence, human trafficking and forced marriages, therefore leading to higher rates of "unintended pregnancies, and in turn can lead to high rates of unsafe abortion and maternal mortality."[265] Asylum seekers are often "unaccounted for by national rights frameworks and national health care systems," therefore, they often do not benefit from the receiving state's health benefits in the same sense as nationals of the state in question.[266] This is particularly evident from the above case study regarding abortion legislation in the Republic of Ireland, and the applicability to those seeking asylum.

Despite this, many human rights bodies have asserted that a state's obligations extend to "all individuals in its territory or under its effective control, including refugees and asylum-seekers within its territory," with limited exceptions.[267] For example, the CEDAW Committee has interpreted the Convention as requiring states to grant women seeking asylum the right to health care and other forms of support particular to the needs of women, without discrimination.[268] The CEDAW Committee has noted in General Recommendation no. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, that the "experiences of women during displacement, from asylum to integration, return or settlement in a third country, in addition to those of stateless women, are shaped by the action or inaction of various actors."[269] The Committee acknowledged that it is the responsibility of States parties to ensure that asylum seeking women who are within their territory, or "under their effective control or jurisdiction, […], are not exposed to violations of their rights under the Convention, including when such violations are committed by private

[264] Elisabeth Kurth *et al*., "Reproductive health care for asylum-seeking women - a challenge for health professionals," in *BMC Public Health*, Issue 10, Article 659, 2010. Page 1.
[265] Center for Reproductive Rights, *Briefing Paper: Ensuring sexual and reproductive health and rights of women and girls affected by conflict*, 2017. Page 6.
[266] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, page 431.
[267] Center for Reproductive Rights, *Briefing Paper: Ensuring sexual and reproductive health and rights of women and girls affected by conflict*, 2017. Page 13.
[268] *Ibid.* Page 17.
[269] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32. Page 3, paragraph 7.

persons and non-State actors."[270] This obligation of states regarding the principle of non-discrimination also obliges them to provide repatriations to those who are victims of discrimination.[271] The Committee's recognition of the intersection of gender-related claims to asylum with other grounds of discrimination, such as health, is also note-worthy.[272]

The Committee on Economic, Social and Cultural Rights considered in General Comment no. 14 that Article 12(2) of the ICESCR creates "a right to maternal, child and reproductive health, including sexual and reproductive health services,"[273] that is inclusive of asylum seekers through the ICESCR's principle of non-discrimination.[274] However, in practice, it is clear that reliance on the principle of non-discrimination is not enough to secure and protect SRHR, as reproductive healthcare for asylum-seeking women is noticeably inadequate, including "prenatal and postnatal care, family planning, prevention and treatment for sexually transmitted diseases, care for unwanted pregnancies, and abortion aftercare."[275] The failure of states to recognise the specific needs of women seeking asylum may lead to the creation of policies that "expose female asylum seekers to human rights abuse, discrimination, and health risks."[276] A distinct example of the effects of policies is that of the detention of asylum seekers pending a confirmed asylum decision, during which time, "accessing reproductive rights is difficult because their status and the threat of deportation deters their willingness to demand their rights."[277] Reproductive rights, specifically in the context of access to abortion services, are difficult to realise for asylum-seeking women, as "many […] rely on health services in temporary camps, which rarely, if ever, offer abortion services, even if they are legally permitted […], leaving them at risk of seeking services from untrained providers."[278]

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[270] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32. Page 3, paragraph 7.
[271] *Ibid.* Page 3, paragraph 8.
[272] *Ibid.* Page 6, paragraph 16.
[273] Françoise Girard and Wilhelmina Waldman, "Ensuring the Reproductive Rights of Refugees and Internally Displaced Persons: Legal and Policy Issues," in *International Family Planning Perspectives*, Vol. 26, No. 4, 2000, pp. 167-173. Here, page 168.
[274] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, Chapter 1, paragraph 34.
[275] Elena Laporta Hernández, "Legal strategies to protect sexual and reproductive health and rights in the context of the refugee crisis in Europe: a complaint before the European Ombudsperson," in *Reproductive Health Matters*, Vol. 25, No. 51, 2017, pp.151-160. Here, pages 155-156.
[276] Patrick Emmenegger and Katarina Stigwal, "Women-Friendliness in European Asylum Policies: The Role of Women's Political Representation and Opposition to Non-EU Immigration", in *Comparative Political Studies*, Vol. 52(9), 2019, pp. 1293-1327. Here, page 1295.
[277] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, page 436.
[278] Traci L. Baird *et al*., "Shifting focus to the woman: Comprehensive Abortion Care in Central and Eastern Europe," in *Entre Nous: The European Magazine for Sexual and Reproductive Health*, Vol. 59, 2005, pp. 13-16. Here, page 14.

When one analyses the intersection between ethnicity and gender for asylum-seeking women in the context of SRHR, it is evident that these women "may suffer from particular discrimination within general and SRH care."[279] However, "[m]igrant women's reproductive rights are routinely compromised because of discrimination across lines of gender, national origin, or status,"[280] although the principle of non-discrimination in human rights law applies to asylum seekers, regardless of their status, and "are accorded certain rights and standards of treatment."[281] Therefore, the actual application of the principle of non-discrimination is crucial when assessing and advocating for the reproductive rights of asylum-seeking women in human rights law.[282]

The case of *V.C v. Slovakia* in the ECtHR is an example where the examination of the principle of non-discrimination with regards to reproductive rights was not adequately assessed by the Court. The Court determined in this case, that States have a positive obligation "to ensure effective legal safeguards to protect women from non-consensual sterilisation, with a particular emphasis on the protection of reproductive health for women of Roma origin," due to a history of non-consensual sterilisation against the vulnerable ethnic minority.[283] Following fact-finding missions to Slovakia, the Commissioner for Human Rights of the CoE indicated that the Roma population of eastern Slovakia has been at particular risk to sterilisation without proper consent.[284] Despite this and further evidence submitted in the case, the Court found violations of Articles 3 and 8 of the Convention regarding the applicant's sterilisation, but they found that there was no need for a separate examination of the complaint under Article 14 (non-discrimination). This was contested by Judge Mijociv's dissenting opinion, stating that the complaint under Article 14 "was the very essence of this case and should have been dealt with on its merits, with a finding of a violation of Article 14."[285] A thorough investigation of alleged violations of reproductive rights must also include an appropriate investigation of the merits of any presence of discrimination. Neglect in doing so creates a chilling precedent for similar

[279] Ines Keygnaert, *et al*., "Sexual and reproductive health of migrants: Does the EU care?" in *Health Policy*, Vol. 114, 2014, pp. 215-225. Here, page 218.
[280] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, page 442.
[281] *Ibid.* Here, page 442.
[282] *Ibid.* Page 442.
[283] European Court of Human Rights*, Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence*. Updated on 31 August 2020. Page 29, paragraph 106.
[284] *V.C. v. Slovakia* (Application no. 18968/07), European Court of Human Rights, Judgment of 8 November 2011. Paragraph 78.
[285] *Ibid*. Dissenting Opinion of Judge Mijovic.

cases, *e.g.,* where the applicant is an asylum-seeking woman seeking remedy for the protection and enjoyment of her SRHR.

5.2 Domestic SRHR legislation inclusive of asylum seekers

While the following domestic examples of medical and legal practices convey attempts in realising asylum seekers' SRHR, particularly regarding access to abortion, some provisions lack in either clarity of applicability to asylum seekers specifically, or capacities of medical professionals to attend to the specific needs of migrant or asylum-seeking women. Domestic examples include Switzerland, Kazakhstan, Argentina and Uruguay. Though they are non-EU countries, Switzerland and Kazakhstan are geographically strategic for migrant women seeking access to SRH care, such as asylum seekers, namely from Russia, Ukraine and Belarus. Such is also the case in Argentina and Uruguay, where intra-regional legislation concerning access to SRH vary greatly. All four countries have specifically made references to access to SRH care for migrants, including asylum-seeking women, in their legislative frameworks, given the unique circumstances that migrants and asylum-seeking women may face.

In Switzerland, the Health maintenance organisation (HMO) was established for asylum seekers, though physicians, nursing staff and midwives have reported that there is little information is available to them regarding the specific health needs of asylum-seeking women.[286] In an assessment of the HMO in the University Women's Hospital, Basel, language barriers and the cost of contraceptives (which are not covered by health insurance in Switzerland) were noted as obstacles for asylum-seeking women in accessing contraceptives.[287] The study found a correlation in some cases between "limited resources, making contraception inaccessible even for [asylum-seeking] women who wanted it, and the lack of contraception resulting in unwanted pregnancies and abortion," whereby the abortion rate per conception was 2.5 times higher than that of the local population.[288] Though the Swiss medical system provides for SRH health care access for asylum seekers, it has not yet sought to resolve the issue of language barriers through providing well-trained profession interpreters available on-demand, as well as ongoing training and support for medical practitioners,

[286] Elisabeth Kurth *et al*., "Reproductive health care for asylum-seeking women - a challenge for health professionals," in *BMC Public Health*, Issue 10, Article 659, 2010. Page 2.
[287] *Ibid.* Page 4.
[288] *Ibid.* Page 8.

particularly where "no health professionals specialised in the care of asylum seekers, in psychosomatics or in intercultural issues are available in an institution."[289]

In Kazakhstan, abortion is legal: up to twelve weeks on request; from twelve weeks up to twenty-two weeks on economic or social grounds, or where there is foetal malformation, and; with no limit where there "are medical indications threatening the life of the pregnant woman, with her consent."[290] Accessing abortion care between twelve and twenty-two weeks on economic or social grounds includes those with a refugee status or a forced migrant.[291] While the economic or social grounds do not specifically refer to access to abortion for asylum seekers, it is definitely a step in the correct direction, accounting for the particular vulnerabilities of migrant women with varying immigration status.

In Argentina, the State has provided that all asylum seekers, refugees and migrants have equal access to the public health system.[292] This includes access to SRH care, including abortion. The State of Argentina affirmed the equal access to SRH care of migrants, including asylum seekers, in its submission to the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The State highlighted that all SRH services are guaranteed under the public health system throughout the country, and that they must be provided without any discrimination to migrants regardless of their status or the regularity of their stay in the country.[293] Furthermore, Argentina has implemented non-discrimination clauses in its laws concerning SRHR, asserting that the National Program of Sexual and Reproductive Health (*el Programa Nacional de Salud Sexual y Reproductiva*) ensures that the entire population has access to SRH health information, counselling, methods and services, without discrimination.[294]

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[289] Elisabeth Kurth *et al*., "Reproductive health care for asylum-seeking women - a challenge for health professionals," in *BMC Public Health*, Issue 10, Article 659, 2010. Pages 9-10.
[290] International Planned Parenthood Federation, *Abortion Legislation in Europe*, updated January 2009. Page 45.
[291] World Health Organization, Global Abortion Policies Database – Country Profile: Kazakhstan. Page 2. Available at: https://abortion-policies.srhr.org/generate-pdf?country_id=74 (last visited 10 April 2023)
[292] "El Estado en todas sus jurisdicciones, asegurará el acceso igualitario a los inmigrantes y sus familias en las mismas condiciones de protección, amparo y derechos de los que gozan los nacionales, en particular lo referido a […] salud […]."
Ley Migraciones No. 25871, Decreto 616/2010, Ministro del Interior y Transporte, Argentina. Artículo 6.
[293] "En ese sentido todas las prestaciones de salud sexual y reproductiva garantizadas en el sistema de salud pública de todo el país deben atender sin discriminación alguna a las personas migrantes independientemente de su condición o la regularidad de su permanencia."
State submission to Questionnaire of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 23 June 2022. Page 3, Question 3.
[294] "En se sentido, la DNSSR en cumplimiento de los objetivos asignados por la Ley 25.673 de

Argentina legalised abortion in 2020 up to fourteen weeks of gestation, and after fourteen weeks if the pregnancy is the result of rape, or it poses a risk to the life and health of the pregnant person.[295] The Argentinian public health system has committed that SRH counselling for termination of pregnancy must include information that is up-to-date, understandable, truthful and provided in accessible language formats, concerning all methods of abortion available, their scope and consequences, as well as the rights contained within such care.[296] It commits to providing such information insofar as it is compatible with the needs of the individual, taking into consideration individual factors such as age, gender, language skills, educational level, disability, among others.[297] This commitment not only applies a rights-based approach to SRH care, but also applies an intersectional approach, considering distinctive aspects, that could result in disproportionate access to SRH care, *e.g.* for asylum seekers. However, the National Campaign for the Right to Legal, Safe and Free Abortion (*la Campaña Nacional por el Derecho al Aborto Legal, Seguro y Gratuito*) drafted a Bill for the Voluntary Termination of Pregnancy (*El Proyecto de Ley de Interrupción Voluntaria del Embarazo* – IVE) in 2023, that included stronger references than the current law particular to the rights of non-nationals. It references more specific guarantees that every woman or pregnant person would not be subject to restrictions on abortion access connected to nationality or residence in Argentina, particularly without distinction of nationality, origin, immigration status and / or residency / citizenship status.[298] The case of "Elizabeth", a Paraguayan migrant in Argentina,

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Creación del Programa Nacional de Salud Sexual y Reproductiva, promueve con distintas acciones y líneas de trabajo: "[…] f) Garantizar a toda la población el acceso a la información, orientación, métodos y prestaciones de servicios referidos a la salud sexual y [reproductiva]" (art. 2) sin discriminación."
State submission to Questionnaire of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 23 June 2022. Page 3, Question 2.

[295] "En la Argentina, desde 2020, la interrupción voluntaria del embarazo es un derecho para niñas, mujeres y todas las personas con capacidad de gestar hasta las 14 semanas de gestación. Así lo establece la Ley 27.610. Más allá de las 14 semanas, solo permite el acceso a la práctica si el embarazo es producto de una violación o ante el peligro de la vida y la salud de la persona gestante."
Available at: https://www.cels.org.ar/abortolegal/ (last accessed 10 April 2023)

[296] "La información entregada por el personal sanitario, en el marco de la consejería u orientación en salud sexual y reproductiva para la interrupción del embarazo, tiene que comprender los distintos métodos disponibles para llevarla a cabo, sus alcances y consecuencias, las estrategias de atención antes, durante y después de la práctica, así como los derechos involucrados en la atención."
Protocolo para la Atención Integral de las Personas con Derecho a la Interrupción Voluntaria y Legal del Embarazo, Ministerio de Salud, Argentina. Actualización 2022. Page 18.

[297] "Dicha información debe ser actualizada, comprensible, veraz y brindada en lenguaje con formatos accesibles, y debe proporcionarse de una manera compatible con las necesidades de la persona, tomando en consideración factores individuales como la edad, el género, los conocimientos lingüísticos, el nivel educativo, la discapacidad, entre otros."
Ibid. Page 18.

[298] "Esta ley garantiza a toda mujer o persona gestante, sin distinción de nacionalidad, origen, condición de tránsito y/o estatus de residencia/ciudadanía, todos los derechos reconocidos en la Constitución Nacional y los tratados de derechos humanos ratificados por la República Argentina, en especial, los derechos sexuales y reproductivos."

highlights the need for more specific guarantees regarding access to abortion for non-nationals.[299] Elizabeth died from septic shock, following an unsafe abortion in 2018. Though Elizabeth's death occurred before the legalisation of abortion in Argentina, the case highlights the conditions and the type of abortion that migrant women had access to, as well as the degree of vulnerability that migrant women have in Argentina. Therefore, the current law should better provide for the better recognition of migrants' SRHR.

In Uruguay, Article 7 of the Comprehensive Law against Gender Violence (*la Ley Integral contra la Violencia de Género*) provides that migrant women who are subject to GBV may procure an abortion, even where they have not been resident in the country for one year.[300] While it is not necessary for the pregnant person to file a criminal complaint, the acts of violence must have occurred in Uruguay. Though this limits access to abortion of migrant women, who have been subject to GBV prior to their arrival in Uruguay, this specific provision allows for an understanding of GBV, in that nationals of the State may not be the only victims of it. This particular provision is also significant, as the Law on Voluntary Termination of Pregnancy (*la Ley sobre Interrupción Voluntaria del Embarazo – Ley No. 18987*) only provides for a legal abortion for Uruguayan citizens, natural or legal, or non-nationals who can prove their habitual residence in the country for a period of no less than one year.[301]

5.3 Crises response and SRHR in Europe

International crises have an unsurmountable impact on access to and provision of sexual and reproductive health services, particularly when crises involve the widespread fleeing of those facing persecution. Such movement of persons means there are heightened risks to their safety and integrity, that may need medical attention when seeking asylum in a host country,

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Campaña Nacional por el Derecho al Aborto Legal, Seguro y Gratuito, *Proyecto de Ley Interrupción Voluntaria del Embarazo*, 2023. Article 2.

[299] See: Grupo de Estudios Sociales sobre Paraguay (GESP), *Comunicado por la muerte de "Elizabeth", migrante paraguaya, en Argentina a causa de un aborto clandestino*, 24 August 2018. Available at: http://paraguay.sociales.uba.ar/2018/08/comunicado-por-la-muerte-de-elizabeth-migrante-paraguaya-en-argentina-a-causa-de-un-aborto-clandestino/ (last visited 10 April 2023)

[300] "Al respeto y protección de sus derechos sexuales y reproductivos, incluso a ejercer todos los derechos reconocidos por las leyes de Salud Sexual y Reproductiva […] y de Interrupción Voluntaria del Embarazo […], cualquiera sea su nacionalidad y aunque no haya alcanzado el año de residencia en el país, siempre que los hechos de violencia hayan ocurrido en el territorio nacional, lo que constituye una excepción al artículo 13 de la Ley N° 18.987, de 22 de octubre de 2012."
La Ley Integral contra la Violencia de Género, Ley No. 19.580, Government of Uruguay, Enacted 27 December 2017. Article 7(i).

[301] "(Requisito adicional).- Solo podrán ampararse a las disposiciones contenidas en esta ley las ciudadanas uruguayas naturales o legales o las extranjeras que acrediten fehacientemente su residencia habitual en el territorio de la República durante un período no inferior a un año."
La Ley sobre Interrupción Voluntaria del Embarazo, Ley No. 18987, Government of Uruguay, Enacted 22 October 2012. Article 13.

thus creating pressure on the host countries health sector, should they be able to provide the services required.

Such is the case in Poland since Russia's full-scale war on Ukraine began in February 2022, where those fleeing Ukraine have faced heightened risks and further barriers in accessing SRH care, including Ukrainian refugee women in Poland. The barriers that Ukrainian women in Poland are facing in accessing SRH care in Poland are emblematic of the same barriers that asylum-seeking women may face in the country. Though Ukrainian women are given temporary international protection in the EU, their situation is not dissimilar to the realities for many women seeking asylum in host countries due to conflict. In just the first two weeks of April 2022, Ukraine's Ombudsman for Human Rights, Lyudmyla Denisova, reported that her office received 400 reports of rape committed by Russian soldiers.[302] A recent survey has revealed that approximately 20% of Ukrainian women may have experienced GBV perpetrated by armed men,[303] whereas Polish medical records from February to 2022 documented a "high percentage of subjects hospitalized due to diseases related to pregnancy, childbirth, and the puerperium (228 [39%])."[304] Therefore, the need for comprehensive and adequate emergency contraception and safe abortion is tantamount. However, in Poland there is a near-total ban on abortion since the ruling of the Polish Constitutional Court in October 2020, although the "bioethical, social, and political debate on abortion has been fervent for many years."[305] Though pregnancy as a result of rape qualifies for an abortion in Poland, this can only be procured at the end of a criminal proceeding confirming that the victim has been raped, though in such cases, many medical practitioners refuse to carry out an abortion on ethical grounds.[306] Therefore, in practice, Ukrainian women cannot have an abortion in Poland, where they have been a victim of rape. Ukrainian women's SRHR in Poland are two-fold severely at a loss due Poland's stringent legislation on abortion, as well as the loss or reduction of SRH services due to the conflict in Ukraine.

As a response to the ongoing crisis, the EP urged host and transit Member States to ensure that those fleeing Ukraine, including rape survivors, are given access to SRHR services,

[302] https://twitter.com/KyivIndependent/status/1519320459115966466 (last visited 3 March 2023)
[303] Olena Zimba *et al.*, "Refugee Health: A Global and Multidisciplinary Challenge," in *j Korean Med Sci.*, Issue 38(6), 2023. Page 3.
[304] *Ibid*. Page 3.
[305] Andrea Cioffi *et al.*, "Violation of the right to abortion at the time of the war in Ukraine," in *Sexual & Reproductive Healthcare*, Volume 33, 2022. Page 1.
[306] *Ibid*. Page 1.

including emergency contraception, post-exposure prophylaxis and abortion care.[307] It also called for funding to be provided for essential SRH care in line with the UN MISP.[308] Furthermore, Polish politicians have also called on the Government to "expedite the legal abortion access for women have been sexually assaulted by Russian soldiers and to ensure that rape victims are able to terminate their pregnancy in any public hospital," as medical practitioners are currently able to use conscientious objection in carrying out an abortion.[309] Additionally, the European Parliamentary Forum (EPF) for Sexual & Reproductive Rights[310] carried out a mission in June 2022 to investigate sexual violence resulting from Russia's full-scale war on Ukraine. The EPF mission visited seven refugee reception centres in Poland and Ukraine, where the delegation met victims of sexual violence, politicians from both Ukraine and Poland, law enforcement institutions, psychologists, NGOs and activists.[311] During the mission, delegates met with the Commissioner for Gender Policy at the Ukrainian Government, Kateryna Levchenko, who informed the delegation that the General Prosecutor's office was "handling 40 cases of wartime rape, and that everyone is aware that, most often, the victims simply do not come forward."[312] Following the mission, the EPF issued recommendations to the EU and Member States, including, the creation of mechanisms "which would more efficiently help survivors of sexual violence who are seeking refuge in Europe," such as international cooperation in order to investigate such cases.[313] Other recommendations urged Member State authorities to "inform the community of available services and the importance of seeking immediate medical care following sexual violence," as well as providing training for those working in refugee reception centres.[314]

[307] The European Parliament, Resolution on the impact of the war against Ukraine on women, adopted 5 May 2022, (2022/2633(RSP)). Paragraph 6.
[308] *Ibid*. Paragraph 11.
[309] NPR, *Why Poland's restrictive abortion laws could be problematic for Ukrainian refugees*, published 17 May 2022. Available at: https://www.npr.org/sections/goatsandsoda/2022/05/17/994654590/u-n-and-advocates-raise-concerns-of-abortion-access-for-ukrainian-refugees-in-po (last visited 3 March 2023)
[310] "The European Parliamentary Forum for Sexual and Reproductive Rights is a network of Members of Parliament throughout Europe who are committed to protecting the sexual and reproductive rights (SRHR) of all people, both at home and overseas."
https://www.epfweb.org/node/46 (last visited 11 April 2023)
[311] European Parliamentary Forum for Sexual & Reproductive Rights, *EPF Mission to Investigate Sexual Violence Resulting from the Russian Aggression Against Ukraine - June 2022*, published 12 September 2022. Page 1.
[312] *Ibid*. Page 10.
[313] *Ibid*. Page 10.
[314] *Ibid.* Page 11.

The EPF for Sexual & Reproductive Rights also published a joint policy paper with the Academic Network for Sexual and Reproductive Health and Rights Policy (ANSER)[315] on "Ensuring Sexual and Reproductive Health and Rights of Ukrainian Refugees". The policy paper highlights the responsibilities of host countries and the international community in ensuring access to SRH care and rights for Ukrainian women. While the EU Temporary Protection Policy (adopted on 4 March 2022 by the Council of the European Union, in response to Russia's full-scale war on Ukraine[316]) "ensures access to medical care and social welfare or means of subsistence for displaced persons from non-EU countries and those unable to return to their countries of origin," legislation governing access to SRHR in host countries has restricted access to essential services for Ukrainian refugee women.[317] The policy paper specifically references limited access to contraceptives in Slovakia, where:

> legal provisions explicitly prohibit the coverage of contraceptive methods under public health insurance when used for the purpose of preventing unintended pregnancy, thereby contravening World Health Organization (WHO) standards that define contraceptives as essential medicines.[318]

Furthermore, ANSER and the EPF expressed concerns regarding the risks to Ukrainian women's health where host countries have "restrictive abortion laws or where access to abortion is restricted for socio-economic reasons."[319]

In February 2023, MEPs issued a parliamentary question to the European Commission concerning the lack of abortion access for Ukrainian women fleeing the war. The parliamentary question referenced Poland's abortion laws, stating that while Ukrainian women who are victims of rape should have access to abortion in Poland under its legislation, "cases of rape in war zones are almost impossible to prove, resulting in many women still being denied access to abortion."[320] MEPs signatory to the parliamentary question sought clarity from the European Commission on how it will "ensure that Ukrainian women and girls who have become pregnant as a result of rape have access to reproductive care, including abortion, in

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[315] "ANSER is an international thematic network initiated by the Ghent University that brings together 39 academic and non profit institutions from all over the world to build evidence for sexual and reproductive health policies."
https://www.ugent.be/anser/en (last visited 11 April 2023)

[316] The Council of the European Union, *Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection*, ST/6846/2022/INIT.

[317] ANSER and European Parliamentary Forum for Sexual & Reproductive Rights, *Policy Paper: Ensuring Sexual and Reproductive Health and Rights of Ukrainian Refugees*, published 25 March 2022. Page 1.

[318] *Ibid*. Page 2.

[319] *Ibid*. Page 4.

[320] Ukrainian women fleeing the war lack access to abortion, Question for oral answer O-000006/2023, European Parliament, 20 February 2023.

accordance with Polish law."[321] The European Commission has not issued its response to the parliamentary question to date.

The ODIHR and OSCE have duly noted that while national legal frameworks of participating states and OSCE commitments pertaining to gender equality and women's rights exist, "*[d]e jure* declarations of equality have yet to be transformed into *de facto* reality across the OSCE region."[322] The OSCE Parliamentary Assembly Special Representative on Gender Issues, Hedy Fry, pointed to this in her op-ed in December 2022 concerning GBV and Russia's full-scale war in Ukraine. The Special Representative urged for assurances to be made by participating states, so that Ukrainian women who may have been subjected to sexual exploitation and violence are provided with "everything they need to ensure their safety, physical and mental well-being, especially sexual and reproductive health and rights, as well as recovery from the trauma of war."[323]

However, Poland is not the only host country with legal and policy restrictions on SRHR. Restrictive laws and policies on SRHR, as well as cost-barriers, in Hungary, Romania and Slovakia are seriously "impeding access to urgent and essential sexual and reproductive health care for those fleeing Ukraine."[324] Affected services include access to contraceptives, including emergency contraception, abortion, antenatal care, post-exposure prophylaxis and treatment for STIs.[325] The Center for Reproductive Rights particularly highlighted the disproportionate impact of barriers to SRH care, such as Roma women, African women and women of African descent, whereby the curtailment of their SRHR is "exacerbated by racism and other forms of discrimination."[326]

Host countries' legislation providing for SRHR must be more flexible in their application in response to crises, particularly where there is a need for swift and unfaltering access to free, safe and legal abortion, as well as unfettered access to other SRH care, for those

[321] Ukrainian women fleeing the war lack access to abortion, Question for oral answer O-000006/2023, European Parliament, 20 February 2023.
[322] Organization for Security and Cooperation in Europe, *ODIHR, Gender Equality & Women's Rights*, published 8 March 2017. Page 2. Available at: https://www.osce.org/files/f/documents/3/5/303541_0.pdf (last visited 11 April 2023)
[323] Organization for Security and Cooperation in Europe Parliamentary Assembly Special Representative on Gender Issues, *Gender-based violence in armed conflicts and gendered effects of post-pandemic economic recovery*, published 6 December 2022. Available at: https://www.oscepa.org/en/news-a-media/op-eds/gender-based-violence-in-armed-conflicts-and-gendered-effects-of-post-pandemic-economic-recovery (last visited 11 April 2023)
[324] Center for Reproductive Rights, *Call to Action: The sexual and reproductive health and rights of women and girls and marginalized populations affected by the conflict in Ukraine*, published March 2022. Page 1.
[325] *Ibid*. Pages 1-2.
[326] *Ibid*. Page 2.

seeking refuge in their country. Should domestic legislation and policies not account for accessible SRH services for those fleeing crises contexts, particularly for those who are victims of sexual violence, every reception centre should have medical practitioners who are trained to assist those in need of SRH care. Furthermore, as abortion is practically inaccessible for Ukrainian women in several host countries, such as Poland, Hungary, Romania and Slovakia, it is then vital that civil society and Member States of the EU ensure their rapid transfer to a country where abortion is not restricted.[327] The facilitation of cross-border access to SRH care, such as early medical abortion, is vital in order to "overcome national legal barriers and sever restrictions in transit and host countries."[328] The above example indicates that whether Ukrainian refugee or asylum seeker, access to SRHR and related care can still remain restricted, even where there is an urgent need for such care or services. In the case of Poland, the MISP has not been effectively applied in response to the increased demand for abortion services for Ukrainian women fleeing the war, and may amount to violations of fundamental rights, such as the right to be free from cruel, inhuman or degrading treatment according to Article 7 of the ICCPR[329] and the right to be free from torture or inhuman or degrading treatment or punishment under Article 3 of the ECHR.[330]

6. Conclusion

Although national governments' duties to provide non-nationals or immigrants with social services or entitlements may be disputed, "it is well-established that there are certain norms of treatment that are accorded to all," regardless of status. Therefore, asylum-seeking women's SRHR can be based on improving existing norms and obligations within international human rights law,[331] EU law, and domestic law, *e.g.* in the Republic of Ireland. Policies protecting these rights must be "designed and implemented with a gender perspective based on

[327] Andrea Cioffi *et al.*, "Violation of the right to abortion at the time of the war in Ukraine," in *Sexual & Reproductive Healthcare*, Volume 33, 2022. Page 1.
[328] Center for Reproductive Rights, *Call to Action: The sexual and reproductive health and rights of women and girls and marginalized populations affected by the conflict in Ukraine*, published March 2022. Page 2.
[329] See *Mellet v. Ireland*, United Nations Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2324/2013, 17 November 2016. Paragraph 7.6.
[330] *R.R. v. Poland* (Application no. 27617/04), European Court of Human Rights, Judgment 26 May 2011. Paragraph 161.
[331] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, page 438.

human rights, taking into account women's specific needs and risk factors."[332] Furthermore, strengthening European jurisprudence regarding asylum seekers' SRHR will also aid in "and increasing the pressure on national governments to attend to the reproductive health of persons within their borders."[333]

The case study of abortion in the Republic of Ireland conveys that while asylum-seeking women may be entitled SRHR, in practice the entitlement does not amount to ease of accessibility to SRH care and services, and hence universal and inalienable protection of SRHR. Furthermore, the Irish State's neglect of the particular needs of asylum-seeking women while reforming the legislation governing abortion is directly compounded by the State's negligence in promptly reforming the Direct Provision system. The case study also conveys that, even where there is transformative legislative change concerning SRHR, notably abortion, this "does not necessarily indicate the displacement of pronatalist repronormativity […] as the dominant frame for […] regulation."[334] The legislation governing abortion in Ireland remains ambiguous in its application, to the extent that pregnant people, including asylum-seeking women, still lack clarity as to what they are entitled to within the law and therefore may not receive the abortion care that they require.[335] This has been shown to be particularly true for asylum-seeking women in Ireland, due to the lack of an intersectional approach to the legislation on abortion which is compounded by the restricted economic freedoms, and freedom of movement of asylum seekers both within and outside of the jurisdiction. Legislative oversights impacting the SRHR of asylum-seeking women have persisted even after the Eighth Amendment was repealed, "despite the fact that maternal deaths are disproportionately higher among migrant and ethnic minority groups living in Ireland."[336] The Irish legislation must include assurances for asylum seekers, such as "clear publicly available procedures for people in Direct Provision to access abortion, with guarantees of confidentiality and coverage of transportation and all related costs."[337] Furthermore, in cases where an asylum seeker needs to

[332] Elena Laporta Hernández, "Legal strategies to protect sexual and reproductive health and rights in the context of the refugee crisis in Europe: a complaint before the European Ombudsperson," in *Reproductive Health Matters*, Vol. 25, No. 51, 2017, pp.151-160. Here, page 155.
[333] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, page 431.
[334] Fiona de Londras, "'A Hope Raised and Then Defeated'? The continuing harms of Irish abortion law", in *Feminist Review*, Issue 124, 2020, pp. 33-50. Here, page 35.
[335] *Ibid*. Page 41.
[336] Katherine Side, "Abortion Im/mobility: Spatial Consequences in the Republic of Ireland," in *Feminist Review*, Issue 124, 2020, pp. 15-31. Here, page 23.
[337] Abortion Rights Campaign, *Submission to the Oireachtas Committee on Justice and Equality on the Urgent Need to Abolish Direct Provision and Promote the Health and Human Rights of People Seeking Asylum*, published 31 May 2019. Page 2.

travel to a different jurisdiction in order to procure an abortion, the process by which consent is obtained from the Minister of Justice and Equality must be more flexible and accessible. Finally, there is an urgent need of respect for the right to privacy of asylum-seeking women who opt to take abortion medication. There have been persistent public calls to end the Direct Provision system, noting the lack of privacy as just one of the many concerns of the public. Though the Irish Government committed to ending the Direct Provision system by 2024, replacing it with a "new International Protection accommodation policy, centred on a not-for-profit approach,"[338] this was delayed due to the need to accommodate for the influx of Ukrainian refugees fleeing Russia's invasion.[339]

The examination of domestic legislation providing for equal access to SRHR in Switzerland, Kazakhstan, Argentina and Uruguay conveys that, domestic legislation can respond to the particular SRH needs of asylum seekers. Though the policies and legislative frameworks examined fall short of expectations in certain aspects, they portray the intersectional scope possible for securing SRHR for asylum seekers in domestic legislation in Europe. Inclusive, rights-based SRHR policy and legislation can also seek to improve European and EU countries' crisis response, such as that of Russia's full-scale war in Ukraine and the demands for appropriate and timely access to SRH care for Ukrainian women fleeing the war.

In summation, the present thesis has shown that, even where international human rights law, EU law and domestic legislative frameworks provide for access to SRHR, commonly based on the principle of non-discrimination, entitlement does not amount to ease of accessibility to rights for asylum seekers, and hence, the universal application and protection of SRHR. This has been particularly shown to be true in the case study of asylum-seeking women's accessibility to abortion services in the Republic of Ireland. The examination of the lived experiences of asylum-seeking women with regards to their SRHR necessitates further "considerations of women's legal, procedural and physical mobility as gendered, racialized, classed, mobility-enhanced and mobility-restricted subjects."[340] Human rights litigation is

[338] Government of Ireland, *Press Release: Minister O'Gorman publishes the White Paper on Ending Direct Provision*, published 26 February 2021. Available at: https://www.gov.ie/en/press-release/affd6-minister-ogorman-publishes-the-white-paper-on-ending-direct-provision/ (last visited 11 April 2023)
[339] Newstalk, *Ending Direct Provision delayed because of Ukraine crisis*, published 8 August 2022. Available at: https://www.newstalk.com/news/ending-direct-provision-delayed-because-of-ukraine-crisis-1370682 (last visited 11 April 2023)
[340] Katherine Side, "A geopolitics of migrant women, mobility and abortion access in the Republic of Ireland," in *Gender, Place & Culture*, Issue 23(12), pp. 1,788-1,799. Here, page 1,795.

essential to legislating for equity in the realisation of SRHR for asylum-seekers, as "human rights litigation is how legal subjects negotiate and emerge from this state of interstitiality."[341] Should laws governing SRHR account for how gender, mobility, residency status and access to SRH services intersect, the state in question would be better prepared to analyse related issues such as clandestine abortions and migrant deportation. [342] Furthermore, should a rights-based and intersectional legislative approach effectively strengthen entitlement to SRHR for asylum seekers, such rights would be better protected and enshrined for all within a state's borders.[343] It is paramount that states understand and legally account for "migrant women's dissimilar reproductive experiences, including decision-making and care related to health-related counselling, contraception, birth, birth spacing, mothering, miscarriage and abortion."[344]

[341] Fiona de Londras, "'A Hope Raised and Then Defeated'? The continuing harms of Irish abortion law", in *Feminist Review*, Issue 124, 2020, pp. 33-50. Here, page 45.
[342] Katherine Side, "A geopolitics of migrant women, mobility and abortion access in the Republic of Ireland," in *Gender, Place & Culture*, Issue 23(12), pp. 1,788-1,799. Here, page 1,795.
[343] Aliya Haider, "Out of the shadows: Migrant women's reproductive rights under international human rights law," in *Georgetown Immigration Law Journal*, Vol. 22(3), 2008, pp. 429-458. Here, page 431.
[344] Katherine Side, "A geopolitics of migrant women, mobility and abortion access in the Republic of Ireland," in *Gender, Place & Culture*, Issue 23(12), pp. 1,788-1,799. Here, page 1,795.

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