ADDRESSING THE AFTERMATH OF ABORTION DENIAL:

STATE-COMPELLED PREGNANCY AS A NEW APPROACH TO HUMAN RIGHTS LITIGATION

ALICE VIERA

I. INTRODUCTION

Upon learning that she is pregnant, a woman decides that she wants an abortion. According to the process in place in her home country, she must first attend counseling. She agrees, but during counseling, she is asked why she is seeking an abortion. The woman is flustered—she did not expect that she would have to explain herself, given that abortion is legal in her country—but she complies. At the end of her session, she asks for the necessary certification form, but the counselor refuses to give it to her. Apparently, she must spend three days "reflecting" before the process can move forward. After three days, the woman

finds that her convictions have not changed, so she obtains her form and moves on to the next step: a gynecological examination. During the examination, the doctor delivers alarming news. Because of how far along the woman's pregnancy is, she must abort within the next five days or else forfeit her legal right to an abortion. The woman rushes to book her procedure—she may no longer take abortion pills because of how far along she is in her pregnancy—but soon realizes that her nearby clinics are only open one day a week, and that day has already passed. She does not have the money to travel to another clinic in her country, so she is out of options. The woman has been effectively forced by her state's demanding abortion policies to carry her pregnancy to term.[1]

As onerous as this process is, many people in Council of Europe ("COE") member states may face even more obstacles when trying to abort, such as having to obtain the consent of a parent or guardian, if the person is underage,[2] or being denied assistance by an objecting medical professional.[3] To make matters worse, the law on abortion is becoming increasingly restrictive in countries like Poland, Hungary, and Turkey.[4] And, of course,

---

1. This paragraph was modeled on the abortion process in Germany. *See* Hannah West, *Step by Step: Abortion in Berlin*, INTERNATIONAL WOMEN IN BERLIN, https://www.internationalwomeninberlin.com/step-by-step-abortion-in-germany (last visited Dec. 9, 2022); *see also* Sarah-Taïssir Bencharif & Laurenz Gehrke, *Germany Tackles Nazi-era Abortion Law as Women Warn of Growing Obstacles*, POLITICO (June 5, 2022), https://www.politico.eu/article/germany-tackle-nazi-era-abortion-law-women-warn-growing-obstacle/. Both describe the obstacles that people in Germany face when trying to receive an abortion.

2. In 17 COE states, adolescents must obtain consent to receive an abortion. *See* EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, MAPPING MINIMUM AGE REQUIREMENTS CONCERNING CHILDREN'S RIGHTS IN THE EU – ACCESSING ABORTION SERVICES (Apr. 24, 2022), https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements-concerning-rights-child-eu/accessing-abortion-services (listing states where underage people can have an abortion without consent).

3. For example, 70% of gynecologists in Italy object to performing abortion services. Stephanie Kirchgaessner et al., *Seven in 10 Italian Gynaecologists Refuse to Carry Out Abortions*, THE GUARDIAN (Mar. 11, 2016), https://www.theguardian.com/world/2016/mar/11/italian-gynaecologists-refuse-abortions-miscarriages.

4. Poland is one of the European states with the most restrictive legal abortion provisions. The situation became even more dire in 2020 when the legislature repealed the most commonly-invoked grounds for abortion ("severe and irreversible fetal defect or incurable illness that threatens the fetus' life"). AMNESTY INTERNATIONAL, *Poland: Regression on Abortion Access Harms*

in Malta, abortion remains illegal in all circumstances.[5] As a result, innumerable people are left with no option but to continue with pregnancies and give birth when they would have preferred to abort.

The European Court of Human Rights ("ECtHR" or "Court") has failed to grant this problem its due consideration. In *A, B and C. v. Ireland*, the Court adopted a narrow interpretation of the European Convention on Human Rights ("ECHR" or "Convention"), ruling that countries are only required to guarantee people access to an effective abortion when it is already legal.[6] Not only does the decision stop short of recognizing the right to a legal and effective abortion, but it also exemplifies the Court's limited appraisal of the grave harms that a person may suffer when she is forced to continue with a pregnancy and, later, raise a child that she may have preferred not to have. These harms include, but are not limited to, physical and mental suffering, erosion of family ties, interruption of education, diminishment of future prospects, and worsening of socioeconomic status.[7] Moreover, the harms associated with state-compelled pregnancy are not limited to those suffered by child-bearers. Their children may also exhibit difficulties

---

Women (Jan. 26, 2022), https://www.amnesty.org/en/latest/news/2022/01/poland-regression-on-abortion-access-harms-women/. In Hungary, pregnant women are forced to listen to an ultrasound before receiving abortion care. Dunja Mijatović, Comm'r For Human Rights, Statement: Prevent Backsliding and Continue Progress on Access to Safe and Legal Abortion Care, (Sept. 28, 2022), *in* Council of Europe Portal, https://www.coe.int/en/web/commissioner/-/prevent-backsliding-and-continue-progress-on-access-to-safe-and-legal-abortion-care. Lastly, recent administrative changes in Turkey have made it more difficult to book an appointment for an abortion. Marge Berer, *Abortion Law and Policy Around the World,* 19 Health & Hum. Rts. J. 13 (2017).

5. Giovanna Coi, *Abortion Laws in Europe in 4 Charts*, Politico (May 3, 2022), https://www.politico.eu/article/abortion-chart-world-map-europe-law-illegal-roe-v-wade-legislation/.

6. *See* A, B and C v. Ireland, App. No. 25579/05, ¶¶ 267–68 (Dec. 16, 2010), https://hudoc.echr.coe.int/fre?i=001-102332 [hereinafter *A, B and C*] ("the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention.").

7. *See* Diana Greene Foster, The Turnaway Study: The Cost of Denying Women Access to Abortion (2020).

in their family relationships, harm to their sense of identity, and behavioral problems stemming from the circumstances of their birth.[8] Unfortunately, the Court's traditional approach to abortion glosses over these harms, implicitly framing them as unworthy of human rights analysis.

In the face of this inadequacy, this Note advocates for a new approach to abortion litigation before the ECtHR, one that is centered on the vast harms produced by state-compelled pregnancies. It will first examine how the ECtHR and other international institutions have addressed this problem, with the aim of assessing past strategies and identifying where there is room for the law to grow. Next, the Note proposes ways for both childbearer and child applicants to raise human rights claims before the Court by drawing on the various injuries associated with state-compelled pregnancies. Lastly, the Note will assess considerations for remedy-seeking, including the prospect of recovering for future and long-term harms before the Court and the establishment of the causal link between the injury and damages. Ultimately, this Note aspires to present child and childbearing victims of state-compelled pregnancies with a means of recovery for the harms they have suffered and will suffer as a result of abortion denial.

II. Review of Relevant Legal Principles

International law addresses the question of non-consensual pregnancies in at least three main ways. Under international criminal law, "forced pregnancy" is defined as a crime.[9] Forced pregnancy does not align perfectly with the concept of state-compelled pregnancy—forced pregnancy requires that the act of sexual violence be carried out to commit a grave violation of international law, whereas state-compelled pregnancy is motive-agnostic—but there is instructive overlap between the two ideas.[10] Under human rights law, adjudicatory institutions tend to analyze state-compelled pregnancies from the purview of abortion and, thus, as potential violations of the right to

8. Diana Greene Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion,* 172 JAMA Pediatrics 1053, 1058–59 (2018).

9. Rome Statute of the International Criminal Court art. 7(2)(f).

10. *Id.*

private life. In rare circumstances, however, human rights bodies may also consider whether the denial of an abortion constitutes inhuman treatment. All of these approaches are inadequate. The crimes of forced pregnancy and the prohibition of inhuman treatment address only the most extreme circumstances of compulsory pregnancy, while the margin of appreciation often circumvents arguments brought under the right to private life.[11] As a result, the need for alternative modes of assessing state-compelled pregnancy under international law is of paramount importance.

A. *International Criminal Law*

Article 7(2)(f) of the Rome Statute of the International Criminal Court reads: "'[f]orced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."[12]

This crime leaves much to be desired with respect to the criminalization of sexual and reproductive rights violations. First, the *actus reus* of the crime is the confinement of the victim, rather than the non-consensual sexual act.[13] Consequently, forcibly making someone pregnant is not enough to trigger criminal responsibility on its own. The defendant must also intend to commit another grave violation of international law, with attempts at ethnic cleansing being the sample violation provided in the definition.[14] This specialized attention to forced changes of ethnic composition can be explained by the fact that the crime emerged because of the ethnic conflicts in

11. The margin of appreciation is a doctrine that "allow[s] a certain amount of freedom for each signatory state to regulate its own activities and its application of the European Convention on Human Rights without being subject to review by the Court." *See Margin of Appreciation,* A DICTIONARY OF LAW (7 ed. 2009).

12. Rome Statute of the International Criminal Court art. 7(2)(f).

13. Milan Markovic, *Vessels of Reproduction: Forced Pregnancy and the ICC,* 16 MICH. ST. J. INT'L L. 439, 442 (2007).

14. *Id.* at 442–43.

Rwanda and the former Yugoslavia during the early 1990s.[15] As Milan Markovic explains, this means that a government official himself would not be liable for forced pregnancy, even if he prevented a person who had been sexually assaulted for ethnic cleansing reasons from receiving an abortion, because he would lack the requisite *mens rea*.[16]

Not only are government officials exempt from such liability, but the last sentence of the definition, pertaining to national law, also carves out a state action exception.[17] This statement was included in the definition at the request of the Vatican and anti-abortion states because they feared that the crime of forced pregnancy would be used to advocate for pro-abortion laws and control medical institutions that refused to administer abortions.[18] By leaving the regulation of pregnancy up to state discretion, the Rome Statute frees states of an obligation to allow victims of forced pregnancies to receive abortions, notwithstanding the egregious harm that they have suffered.

Thus, while "criminalization of forced pregnancy evidences respect for a woman's bodily integrity and sexual autonomy," its narrow scope and its refusal to impose obligations on states, even indirectly, demonstrate international criminal law's inability to address the broader issue of state-compelled pregnancy.[19] Other international crimes, such as rape and sexual violence, are also inadequate because they do not capture instances in which an actor is not responsible for the sexual encounter that leads to a person's pregnancy but nevertheless forces the pregnancy to continue by keeping the person from obtaining an

---

15. Amnesty Int'l, Forced Pregnancy: A Commentary on the Crime in International Law 7 (2020), https://www.amnesty.org/en/wp-content/uploads/2021/05/IOR5327112020ENGLISH.pdf.

16. Markovic, *supra* note 13, at 447. Note that, unlike human rights law, which is centered on state accountability, states cannot be convicted for violating international criminal law. Int'l Crim. Ct., Understanding the International Criminal Court 12 (2020), https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf.

17. Markovic, *supra* note 13, at 447.

18. *Id.* at 445.

19. *See id.* at 446, (citing Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 Colum. Hum. Rts. L. Rev. 625, 668 (2001) (detailing how the recognition of forced pregnancy signaled the emergence of consent and its underlying principle, agency, in international law)).

abortion.[20] Therefore, international criminal law, as it stands, is an insufficient foundation upon which to hold states or their agents accountable for compelled pregnancies.

B. *International Human Rights Law*

International human rights law only recognizes state-compelled pregnancy as giving rise to a violation in limited circumstances. First, "women who have suffered the violation of rape" are considered victims of a human rights violation when they are "compelled to endure pregnancy against their will by the coercion of criminal sanctions."[21] This principle is inferred, at least in part, from the Beijing Declaration and Platform for Action, which affirms the importance of allowing women to freely make decisions related to their sexual and reproductive health without suffering coercion, violence, or discrimination.[22] According to the United Nations Human Rights Committee ("UNHRC" or "Committee"), the imposition of criminal sanctions on rape victims seeking an abortion may even be considered incompatible with the right to life and the prohibition of torture and cruel, inhuman, or degrading treatment or punishment.[23]

The refusal to allow an adolescent to abort when the pregnancy threatens her life or that of the fetus she is carrying is also a human rights violation. This principle was set forth by the UNHRC in *K.L. v. Peru*.[24] In that case, the Committee assessed the situation of K.L., a teenage girl who, after learning she was pregnant, also discovered that her fetus was anencephalic.[25] This meant that a continuation of the pregnancy could risk

---

20. Ciara Laverty & Dieneke de Vos, *Reproductive Violence as a Category of Analysis: Disentangling the Relationship Between 'the Sexual' and 'the Reproductive' in Transitional Justice,* 15 Int'l J. Transitional Just. 616, 627 (2021) ("Although in some instances reproductive harm may be the result of other forms of violence – such as unwanted pregnancies resulting from rape – there is more to acts of reproductive violence than simply seeing these as consequents of other forms of violence.").

21. Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25(1) Hum. Rts. Q. 1, 11 (2003).

22. Beijing Declaration and Platform of Action, ¶ 96, Sept. 15, 1995.

23. K.L. v. Peru, CCPR/C/85/D/1153/2003, Comm. No. 1153/2003, ¶ 3.5 (Nov. 22, 2005), https://www.escr-net.org/sites/default/files/caselaw/decision_0.pdf [hereinafter *K.L.*].

24. *Id.* ¶¶ 6.2–6.3.

25. *Id.* ¶ 2.1.

her life, as well as that of the fetus.[26] Despite being advised to abort her fetus, Peruvian state officials denied K.L. an abortion, which forced her to carry the pregnancy to term.[27] Four days after K.L. gave birth, her baby died.[28] In its views, the UNHRC stated that Peru's refusal to grant K.L. an abortion was a violation of the right to private life, the prohibition of ill-treatment, and the right of special protection afforded to children.[29]

Although the UNHRC's invocation of various human rights improves on forced pregnancy by acknowledging that state-compelled pregnancy need not be paired with grave violations of international law to be objectionable, these principles are still not expansive enough. They remain limited to extreme circumstances wherein applicants are vulnerable and/or subject to an arbitrarily vindictive or restrictive legal regime.[30] Nevertheless, they present an opportunity for experimentation by prompting the question: when does state-compelled pregnancy constitute ill-treatment? The Note will address this concept in Part II.

C. *European Human Rights Law*

Unsurprisingly, the ECtHR's approach to state-compelled pregnancies is quite conservative. To illustrate this, the Note will discuss three central cases—*Tysiaç v. Poland*, *A, B and C v. Ireland*, and *R.R. v. Poland*—in which the Court assessed denied abortions.[31] These cases demonstrate how the Court's

---

26. *Id.* ¶ 2.2.
27. *Id.* ¶¶ 2.4, 2.6.
28. *Id.* ¶ 2.6.
29. *Id.* ¶¶ 6.3–6.5.
30. Audrey Chapman, *An Explicit Right to Abortion Is Needed in International Human Rights Law*, Health & Hum. Rts. J. (2023), https://www.hhrjournal.org/2023/06/an-explicit-right-to-abortion-is-needed-in-international-human-rights-law/ ("The UN Human Rights Committee reiterates . . . in its 2018 General Comment 36 on the Right to Life and also prohibits any restrictions that might lead to an unsafe abortion or risk of death from an unsafe abortion . . . What is lacking . . . is the more affirmative grounding that women's rights to health, health care, bodily autonomy, and even to life, require that states recognize and provide the means to fulfill the fundamental right to abortion. This must not just be a corollary to prevent unsafe abortions, as important as that objective is").
31. Tysiaç v. Poland, App. No. 5410/03 (Mar. 20, 2007), https://hudoc.echr.coe.int/eng?i=001-79812 [hereinafter *Tysiaç*]. *A, B and C, supra* note 6.

receptiveness to margin of appreciation arguments has produced a cabining of abortion rights under the ECHR.[32]

The right to private life, located within Article 8 of the Convention, is often invoked in connection with abortion denials, perhaps because it is the right that best captures the core of the abortion issue.[33] In *Tysiaç v. Poland*, the ECtHR recognized that "legislation regulating the interruption of pregnancy touches upon the sphere of private life" because private life encapsulates concepts such as autonomy and personal development.[34] However, the Court also stated that "regulations on abortion relate to the traditional balancing of privacy and the public interest."[35] Accordingly, by invoking the margin of appreciation doctrine and, thus, claiming that other interests outweigh the need for abortion legislation, states have been able to uphold anti-abortion laws.[36] For instance, in *A, B and C*, Ireland's emphasis on the "profound moral view of the Irish people as to the nature of life" justified the state's refusal to grant abortions to two of the three applicants bringing the case.[37] Therefore, the Court did not find that there had been a violation of Article 8 with respect to those applicants.[38] Evidently, the margin of appreciation doctrine poses a significant hurdle to alleged violations of the right to private life, rendering this a sub-optimal strategy through which to push for recognition of the harms of state-compelled pregnancy.

An alternate avenue for formulating state-compelled pregnancy claims is Article 3, which prohibits torture and inhuman or degrading treatment and punishment.[39] The applicants

---

R.R. v. Poland, App. No. 27617/04 (May 26, 2011), https://hudoc.echr.coe.int/fre?i=001-104911 [hereinafter *R.R.*].

32. For a brief explanation of the margin of appreciation doctrine, *see infra* note 11.

33. European Convention on Human Rights art. 8. Daniel Fenwick, *The Modern Abortion Jurisprudence Under Article 8 of the European Convention on Human Rights*, 12 Medical L. Int'l 249, 250 (2013) (describing how, in all three major ECtHR cases on abortion, the complainants invoked the Article 8 right to private life).

34. *Tysiaç*, *supra* note 31, ¶¶ 106–07.

35. *Id.* ¶ 107.

36. Julia Kapelańska-Pręgowska, *The Scales of the European Court of Human Rights: Abortion Restriction in Poland, the European Consensus, and the State's Margin of Appreciation*, 12 Med. L. Int'l 213, 218 (2013).

37. *A, B and C*, *supra* note 6, ¶ 241.

38. *Id.* ¶ 242.

39. European Convention on Human Rights, art. 3.

alleged violations under this provision in all three aforementioned cases, but only in *R.R.* did the Court conclude that there had been an Article 3 violation.[40]

R.R. v. Poland concerned a pregnant woman who, upon learning that the fetus she was carrying had a cyst on its neck, wanted to undergo more medical tests to learn how the malformation would affect the fetus's well-being.[41] After visiting ten different medical professionals in almost five weeks, she could not find one who would examine her.[42] Accordingly, the necessary genetic test did not occur until the twenty-third week of gestation.[43] When the results came back two weeks later, R.R. had decided that she wanted to end her pregnancy, but by then, it was too late to abort under Polish law.[44] She had to carry the pregnancy to term.[45]

Although the ECtHR ultimately ruled that Poland had violated Article 3 of the ECHR, the Court's mode of interpreting the right indicates the high standard it applies when assessing abortion denial cases. Its discussion of the prohibition of ill-treatment began with the observation, founded on prior case law, that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3."[46] The Court found that this threshold was met: "the applicant was in a situation of great vulnerability" owing to the "weeks of painful uncertainty" and "acute anguish" she endured, thinking about her future child's ailment.[47] It is unclear if *R.R.* represents the lower end of the "ill-treatment threshold."[48] Certainly, if all victims of state-compelled pregnancy were required to point to harm akin to

---

40. *A, B and C*, *supra* note 6, ¶ 160; *Tysiąc*, *supra* note 31, ¶ 3; *R.R.*, *supra* note 31, ¶ 3.

41. *R.R.*, *supra* note 31, ¶¶ 9–11.

42. *Id.* ¶¶ 7–37. Center for Reproductive Rights, *R.R. v. Poland: Poland's Obligation to Prevent Inhuman and Degrading Treatment in Reproductive Health Care* 1 (2021), https://reproductiverights.org/sites/default/files/documents/RR%20English.pdf.

43. *R.R.*, *supra* note 31, ¶ 28.

44. *R.R.*, *supra* note 31, ¶¶ 30–33.

45. *Id.* ¶ 37.

46. *Id.* ¶ 148.

47. *Id.* ¶ 159.

48. Consider how the Court did not even "indicate whether its decision fell within 'inhuman' or 'degrading' treatment." Elizabeth J. Ireland, *Do Not Abort the Mission: An Analysis of the European Court of Human Rights Case of R.R. v. Poland*, 38 N.C. J. Int'l L. 651, 690 (2012).

weeks of suffering, acute anguish, and painful uncertainty to prove that they had suffered an Article 3 violation, the threshold would be insurmountable except in the most extreme situations.

Tysiaç and *A, B and C* confirm the ECtHR's demanding approach to evaluating allegations of Article 3 violations. In *Tysiaç*, the applicant experienced "anguish and distress" from being "forced to continue with a pregnancy for six months[,] knowing that she would be nearly blind by the time she gave birth."[49] As severe as that anguish and distress must have been, the Court did not consider it ill-treatment. Meanwhile, in *A, B and C*, all three applicants remarked that the "two options open to women" in Ireland were "overcoming taboos to seek an abortion abroad . . . or maintaining the pregnancy in their situations" and that these options "caused an affront to women's dignity and stigmatised women, increasing feelings of anxiety."[50] In response, the Court reaffirmed how harm must meet a minimum level of severity to constitute ill-treatment and then concluded that the applicants' allegations under Article 3 were manifestly ill-founded.[51] This decision was particularly shocking considering that the third applicant's pregnancy could interrupt the chemotherapy she was undergoing because she suffered from a rare form of cancer and thus potentially subject her to considerable pain and risk.[52]

In reviewing these cases, the need for alternative strategies for raising abortion denial claims could not be clearer. Arguments grounded in the right to private life have failed due to the margin of appreciation doctrine, while claims rooted in the prohibition of ill-treatment also falter because the Court may not consider the suffering that applicants experience from not being guaranteed the right to abort to be sufficiently severe. The next part of the Note will present a solution to these issues: a focus on state-compelled pregnancy.

---

49. *Tysiaç*, *supra* note 31, ¶ 65.
50. *A, B and C*, *supra* note 6, ¶ 162.
51. *Id.* ¶¶ 164–65.
52. *Id.* ¶ 23.

III. Legal Strategies for Raising State-Compelled Pregnancy Claims

Focusing on state-compelled pregnancy gives rise to two new strategic opportunities. First, the scope of the harm that victims can point to when asserting violations expands. As the ensuing section on the prohibition of inhuman treatment will demonstrate, child-bearers will not only be able to invoke the anguish and anxiety caused by not knowing whether they would be made to carry a pregnancy to term, but they could also assert the suffering that occurs from giving birth, as well as the ensuing mental harm they may face from having to raise a child against their will. Second, a focus on state-compelled pregnancy expands the range of rights under which both child-bearers and their children can formulate claims. To demonstrate this point, the Note will offer strategies for invoking comparatively underutilized rights, such as the right to family life under Article 8 and the prohibition of discrimination under Article 14, that state-compelled pregnancies may violate. Together, these possibilities may pave the way for new routes to recovery for pregnant people who have been denied abortions and their resultant children.

A. *The Child-Bearer's Right to Be Free From Inhuman Treatment*

The most viable way of asserting an Article 3 violation in the context of state-compelled pregnancy is by alleging a violation of the prohibition of inhuman treatment. Article 3 of the ECHR reads: "[n]o one shall be subject to torture or to inhuman or degrading treatment or punishment."[53] The Council of Europe defines torture as "*deliberate* inhuman treatment causing very serious and cruel suffering."[54] The requirement of intentionality within the definition of torture renders it ill-suited for many state-compelled pregnancy cases, given that the denial of abortion is not always a deliberate attempt to cause pregnant people harm, or at least not evidently. In many cases, it may be more easily explained by an indifference to the difficulties child-bearers

53. European Convention on Human Rights art. 3.

54. Council of Europe, *Prohibition of Torture*, https://www.coe.int/en/web/echr-toolkit/interdiction-de-la-torture (last visited Dec. 9, 2022) (emphasis added).

face from pregnancy or, alternatively, moral, religious, political, and other contrary convictions. Degrading treatment also fails to capture the majority of state-compelled pregnancies because it entails "humiliation and debasement as opposed to physical and mental suffering."[55] While some victims may face humiliation and debasement as a result of their unwanted pregnancies, at the time of writing, the medical literature on the effects of abortion denial are more focused on physical and mental suffering.[56] As such, the argument set forth will center on inhuman treatment, which is not rooted in humiliation or debasement and, moreover, does not require that the responsible party act out of a deliberate intention to cause harm.

To be classified as inhuman treatment, an action which "cause[s] either actual bodily harm or intense mental suffering" must "reach a minimum level of severity."[57] As mentioned in Section I, the severity threshold can be difficult to meet. While the UNHRC concluded that Peru had committed a violation of the prohibition of ill-treatment in *K.L.*, it did so only because of how the applicant, a minor, suffered from "seeing her daughter's marked deformities and knowing that she would die very soon," which "added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy."[58]

As is evident in the applicants' failure to allege Article 3 violations in *Tysiaç* and *A, B and C*, the ECtHR also applies a similarly high threshold for the assessment of inhuman treatment. Historically, the Court has been preoccupied with the immediate anguish and anxiety that emerges from applicants waiting to see whether they will be granted an abortion and consequently has ignored the other types of harm that people can experience when they cannot end a pregnancy.[59] Absent

---

55. *Id.* ¶ 4.

56. For instance, the groundbreaking Turnaway Study highlighted the "serious physical and mental health challenges" faced by people who were denied abortions. This is not to say that arguments under degrading treatment would fail; they may just be more difficult to substantiate because of a lack of scientific research on the subject. Dan Fost, *UCSF Turnaway Study Shows Impact of Abortion Access on Well-Being*, U.C. San Francisco (June 30, 2022), https://www.ucsf.edu/news/2022/06/423161/ucsf-turnaway-study-shows-impact-abortion-access.

57. *Id.* ¶ 5.

58. *K.L.*, *supra* note 23, ¶ 3.4.

59. In its consideration of Article 3 in the three key abortion cases in its jurisprudence, the Court is either completely silent on the long-term effects

in the Court's discussion in *Tysiaç*, *A, B and C*, and even *R.R.*, where an Article 3 violation *was* found, is any recognition of the pains of childbirth, which may be amplified by the fact that it is occurring involuntarily.[60] The Court also ignores the post-pregnancy mental anguish that people may face knowing that they will have to raise a child in suboptimal circumstances, as well as other difficulties that occur after childbirth, such as postpartum depression.[61]

One solution to the Court's narrow conception of the harms of abortion denial could be to apply Article 3 from the broadened purview of state-compelled pregnancy. That way, victims could point to forms of pain and suffering that, had they modeled their claims off of the Court's traditional approach to abortion analysis, would have appeared irrelevant. Thus, their allegations of Article 3 violations will enjoy a greater chance of surmounting the minimum severity threshold.

Although each child-bearer's experience will differ, the expanded focus on state-compelled pregnancy allows applicants before the ECtHR to point to the considerable harms documented to stem from being forced to continue an unwanted pregnancy. Scientific analysis demonstrates how people can suffer considerable pain and suffering from being forced to be pregnant against their will. This pain and suffering was the subject of the Turnaway study, an analysis of the health outcomes of almost a thousand people who visited abortion clinics in the United States between 2008 and 2010.[62] The study found that, compared to people who had been granted abortions, people who were denied the opportunity to abort exhibited heightened rates of anxiety and a lowered sense of self-esteem and life satisfaction in the period shortly after the denial.[63] Over the long term, people who had been turned away also reported

---

of abortion denial or, as in *Tysiaç*, acknowledges but subsequently disregards them. *See A, B and C*, *supra* note 6, ¶¶ 160–65; *R.R.*, *supra* note 31, ¶¶ 153–62; and *Tysiaç*, *supra* note 31, ¶¶ 62–66.

60. *See A, B and C*, *supra* note 6, ¶¶ 160–65; *R.R.*, *supra* note 31, ¶¶ 153–62; and *Tysiaç*, *supra* note 31, ¶¶ 62–66.

61. *See A, B and C*, *supra* note 6, ¶¶ 160–65; *R.R.*, *supra* note 31, ¶¶ 153–62; and *Tysiaç*, *supra* note 31, ¶¶ 62–66.

62. *See* Christina Caron, *Does Being Denied an Abortion Harm Mental Health?*, The New York Times (May 24, 2022), https://www.nytimes.com/2022/05/24/well/mind/abortion-access-mental-health.html (describing the major findings of the study). For the study proper, *see* Foster, *supra* note 7.

63. Caron, *supra* note 62.

higher rates of life-threatening complications, such as postpartum hemorrhage and eclampsia, both of which occur due to pregnancy.[64] An applicant could point to manifestations of harm such as these to demonstrate how, by compelling her to be pregnant, a state has subjected her to mental and physical harm.

In addition to emphasizing how state-compelled pregnancy has given rise to pain and suffering in her particular case, an applicant could reinforce her claims by analogizing to other, similar forms of harm that human rights institutions have been found to surpass the minimum severity threshold. For instance, just like enforced disappearances of one's relatives, state-compelled pregnancy can likewise result in "uncertainty and apprehension . . . over a prolonged and continuing period."[65] Similarly, the European Court of Human Rights has recognized how rape can constitute torture. In *Aydin v. Turkey*, the Court recognized the "deep psychological scars" and sense of "debase[ment] and violat[ion] both physically and emotionally" that such assault could inflict on a person—sentiments that victims of state-compelled pregnancy could surely experience as well.[66]

By drawing parallels between the Court's analysis in those cases and state-compelled pregnancy, one could argue that the latter gives rise to harms that also violate Article 3.[67] State-compelled pregnancy certainly bears a strong resemblance to the forced placement of an unwanted object in, or permanent manipulations of, a person's body. Admittedly, the level of

64. *Id.*

65. Orhan v. Turkey, App. No. 25656/94, ¶ 360 (June 18, 2002), https://hudoc.echr.coe.int/eng?i=001-60509. *See also* Musayev and Others v. Russia, App. Nos. 57941/00, 58699/00, and 60403/00 (July 26, 2007), ¶¶ 169–170, https://hudoc.echr.coe.int/eng?i=001-81908 (describing how the shock that the applicant experienced after witnessing the "extrajudicial execution of several of his relatives and neighbours," "coupled with the authorities' wholly inadequate and inefficient response in the aftermath of the events," amounted to a violation of Article 3).

66. Aydin v. Turkey [GC], App. No. 23178/94, ¶ 83 (Sept. 25, 1997), https://hudoc.echr.coe.int/eng?i=001-58371.

67. European Court of Human Rights, Guide on Article 3 of the European Convention on Human Rights ¶ 17 (2022), https://www.echr.coe.int/documents/d/echr/Guide_Art_3_ENG ("The distinction between torture, inhuman treatment or punishment and degrading treatment or punishment derives principally from a difference in the intensity of the suffering inflicted.").

physical and mental discomfort that victims of state-compelled pregnancy endure may not always reach the heights of the suffering experienced by victims of acts like genital manipulation in any single moment. Still, the accumulation of suffering that people experience as a result of carrying a fetus within their body could be comparable to that act of torture.[68] Additionally, a victim of state-compelled pregnancy may experience vast stretches of uncertainty that do not merely start at the moment when she first vocalizes her desire to receive an abortion and end at the final rejection of her request. It may continue for the rest of her pregnancy, as she prepares to adapt for the birth of a child. And, furthermore, her injuries could stretch past childbirth, as she struggles to make space for a new life within the context of her own, be it by resolving to care for the child, putting the child up for adoption, or choosing another option altogether. These examples make clear that the pain and suffering associated with state-compelled pregnancy may not be so divorced from traditional Article 3 violations, which justifies its classification, in such instances, as inhuman treatment if not torture.

Despite these parallels, there may be hesitation to view state-compelled pregnancies as being in a similar league with the aforementioned acts. For one, when pregnancy results from a consensual sexual act, to classify the state's refusal to reverse the "natural" consequences of that action as an Article 3 violation may seem like an unwarranted expansion of the definition of inhuman treatment. In response, it is worth considering how this line of reasoning reflects the particularized attention that human rights institutions pay to "masculine" forms of harm at the expense of more "feminine" varieties of harm, reflecting the patriarchal underpinnings of the regime. Feminists have argued that "human rights norms were initially articulated,

---

68. *See* Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 43–44, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016) (acknowledging how "[s]hort- and long-term physical and psychological consequences also arise due to unsafe abortions and when women are forced to carry pregnancies to term against their will" and that "[t]he denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in . . . contexts of extreme vulnerability and where timely health care is essential amount to torture or ill-treatment.").

and continue to be interpreted and applied, to reflect men's experiences, while overlooking the harms that most commonly or disproportionately affect women."[69] For instance, the traditional conception of torture involves a male victim, typically a common criminal or political dissident, who is mistreated by a male perpetrator associated with the state.[70] Women figure into this analysis only as "the wives, mothers, or daughters of these male victims."[71] Because of this male-centered analysis, scholars often criticize human rights institutions for their tendency to discount or ignore "feminine" forms of suffering.[72]

It is no wonder, then, that the ECtHR has historically neglected the injuries that arise from something that only biological females can experience: pregnancy.[73] Not only do male analyses of harm fail to capture the unique physical and mental agonies directly associated with pregnancy, but they also neglect the medical conditions that may follow pregnancy, like postpartum hemorrhage, depression, and eclampsia.[74] Another factor to consider is how women may disproportionately experience economic challenges following childbirth, particularly if they must raise their children alone.[75] The

---

69. Alice Edwards, *The 'Feminizing' of Torture Under International Human Rights Law*, 19 LEIDEN J. INT'L LAW 349, 349 (2006).

70. *Id.* at 353.

71. *Id.* at 353.

72. *See id.* at 349–50 (describing a common criticism, voiced principally by feminists, that international human rights law "privilege[es] the realities of men's lives while ignoring or marginalizing those of women," and that this is particularly evident in the context of torture).

73. In all three of the major abortion cases before the ECtHR, the Court's analysis of the harms that emerge from being pregnant is scant. *See A, B and C*, *supra* note 6, ¶¶ 160–65; *R.R.*, *supra* note 31, ¶¶ 153–62; and *Tysiąc*, *supra* note 31, ¶¶ 62–66.

74. For a more comprehensive list of the medical conditions that stem from pregnancy, *see What Are Some Common Complications of Pregnancy?*, NATIONAL INSTITUTE OF HEALTH, https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/complications (last modified Apr. 20, 2021), and Pamela Berens, *Overview of the Postpartum Period: Disorders and Complications*, UPTODATE, https://www.uptodate.com/contents/overview-of-the-postpartum-period-disorders-and-complications (last modified Sept. 5, 2023).

75. The brunt of unpaid work, including childcare and household work, typically falls on women. This makes them "more financially dependent on men, which in turn restricts their ability to control their own lives, creating a hierarchical relationship of subordination." Ana Marija Sikirić, *The Effect of Childcare Use on Gender Equality in European Labor Markets*, 27 FEM. ECON. 90, 91 (2021). "Lone mothers are commonly perceived as being among the most

mental anguish experienced in anticipation of these hardships should not be discounted either. Recognizing the pain and suffering attributed to state-compelled pregnancy as ill-treatment would be a much-needed step toward the "feminization" of human rights law. Such a stance could be justified by the ECtHR's recognition that the definition of ill-treatment depends on the specific circumstances of the alleged victim.[76] By drawing on this context-dependent inquiry to emphasize the influence of sex in its analysis of pain and suffering, the Court could conclude that the effects of a denied abortion meet the threshold of severity necessary for a finding of inhuman treatment.

Were the injuries associated with state-compelled pregnancy recognized as ill-treatment, Article 3 would furnish applicants with a robust means to assert these claims before the ECtHR. As opposed to Article 8 rights, which can be limited by a state's pursuit of legitimate and proportionate alternative aims, the non-derogability of the prohibition of ill-treatment means that states cannot point to justifications such as moral sensitivity to avoid their Article 3 obligations. This is not to say that it will be easy for applicants to prove to the Court that feminine harms are as worthy of respect as more masculine forms of harm. Nevertheless, the plight will be worth it, for recognizing state-compelled pregnancy as inhuman treatment would pave the way for a further revelation: that states are obligated to ensure the right to an abortion in all circumstances.

---

vulnerable groups in many societies, facing inadequate resources, employment, and policies. As mothers often have physical custody of children in post-separation it is difficult for them to increase their workload to compensate for former partners' income; thus, many lone mothers live in poverty." Mia Hakovirta & Merita Mesiäislehto, *Lone Mothers and Child Support Receipt in 21 Countries*, 38 J. INT'L COMP. SOC. POL'Y 36, 36 (2022).

76. *See, e.g.*, Ireland v. The United Kingdom, App. No. 5310/71, ¶ 162 (Jan. 18, 1978), https://hudoc.echr.coe.int/eng?i=001-57506 ("ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.").

B. *The Child-Bearer's Right to Family Life*

Although Article 8 has been invoked in abortion cases various times before the ECtHR, litigation under this provision tends to focus on the right to private life. This part of the Note will instead focus on arguments based on the right to family life. This right "implies an obligation for the State to act in a manner calculated to allow ties between close relatives to develop normally" both by protecting family relationships and by not interfering in their development.[77] Thus, state-compelled pregnancy can constitute a violation of a person's right to family life because it can have negative implications on a person's ties with the people who constituted her family unit prior to giving birth, as well as with her newborn child.

First, an applicant could claim that state-compelled pregnancy constitutes a violation of her right to family life because it harms her ties with her pre-pregnancy family members, such as her parents, romantic partner, or previous children. In some cases, state-compelled pregnancies can force child-bearers into difficult situations, such as economic strain.[78] This could physically isolate applicants from their family members if, for instance, the applicant is forced to move into a new residence, apart from her other family members, to care for her new child. Such interferences in one's family unit could be framed as a violation of either the right of family members to be physically close to one another or of the broader obligation that the state has to allow family ties to develop normally.[79]

---

77. Draon v. France, App. No. 1513/03, ¶ 106 (Oct. 10, 2005), https://hudoc.echr.coe.int/fre?i=001-70447. I wish to begin the following discussion with an acknowledgement that there is no such thing as a "abnormal" (or "normal") family; the discussion of family life insofar as normalcy is meant to be a legal discussion of what the ECtHR and not a normative estimation of what constitutes a normal family, if such a thing exists.

78. "[U]nintended births affect the overall quality of the home environment because of the strain it places on social and financial resources, and because mothers of unintended births on average lack the resources to successfully cope with the unintended birth." Jennifer S. Barber & Patricia L. East, *Children's Experiences After the Unintended Birth of a Sibling*, 48(1) DEMOGRAPHY 101,113 (Mar. 27, 2012).

79. *See* Nasr and Ghali v. Italy, App. No. 44883/09, ¶¶ 308–310 (Feb. 23, 2016), https://hudoc.echr.coe.int/eng?i=001-161245 (holding that arbitrarily isolating a person from his family violates Article 8).

A child-bearer may also assert an Article 8 violation when the compulsory circumstances of her pregnancy produce fractured ties between herself and her newborn child. To assess the viability of this strategy, one can look to the ECtHR's reasoning in *Marckx v. Belgium*.[80] In that case, the Court noted that states have a positive obligation to provide legal safeguards "that render possible as from the moment of birth the child's integration in his family."[81] Because each positive obligation has its negative counterpart, it follows that the state also has a duty not to interfere in the child's integration into his family.[82] Were state-compelled pregnancy considered an interference in the child-bearer's ability to develop family ties with her child, a violation of Article 8 would be found.

The negative consequences of state-compelled pregnancies on child-bearer-child relationships are manifold. Research has found that people who give birth following unwanted pregnancies exhibit high rates of maternal depressive symptoms compared to mothers of planned pregnancies.[83] This depression is associated with heightened rates of conflict and hostility between mothers and their children over the long-term.[84] Even in cases where child-bearers do not suffer from depression, the mere fact of giving birth to a child unwillingly may cause the child-bearer to harbor resentment for or feel regret about her circumstances.[85] Accordingly, in cases of unplanned and

---

80. Marckx v. Belgium, App. No. 6833/74 (June 13, 1979), https://hudoc.echr.coe.int/eng?i=001-57534.

81. *Id.* ¶ 31.

82. *See* S.H. and Others v. Austria, App. No. 57813/00, ¶ 87 (Nov. 11, 2011), https://hudoc.echr.coe.int/eng?i=001-107325 ("[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life.").

83. Jackie A. Nelson & Marion O'Brien, *Does an Unplanned Pregnancy Have Long-Term Implications for Mother-Child Relationships?*, 33 J. FAM. ISSUES 506, 506 (2011).

84. *Id.* at 506.

85. *See* Diana Karklin, *The Women Who Wish They Weren't Mothers: 'An Unwanted Pregnancy Lasts a Lifetime*,' THE GUARDIAN (July 16, 2022) https://www.theguardian.com/lifeandstyle/2022/jul/16/women-who-wish-they-werent-mothers-roe-v-wade-abortion (describing the regret, resentment, and other negative emotions experienced by various women who carried unwanted pregnancies to term).

unwanted pregnancies, poorer prenatal and postnatal mother-child attachment may ensue.[86] As a result, state-compelled pregnancies may cause the child-bearer-child relationship to develop "abnormally," therefore supporting a finding of a violation of the right to family life.

Bringing claims under this right could increase an applicant's chances of defeating margin of appreciation arguments by raising new interests before the Court. These interests may outweigh those that a respondent state purports to be protecting by implementing anti-abortion policies and thus lead to a finding of a violation. Furthermore, if family life arguments are paired with private life arguments, the cumulative weight of the applicant's affected interests may be even more likely to surmount the state's interests in promulgating and upholding anti-abortion regulation. Furthermore, under the Universal Declaration of Human Rights, the bedrock of international human rights law, the family is regarded as the fundamental unit of society, which means that it merits the utmost protection.[87] The ECtHR exhibits an especially pronounced concern for the mother-child relationship, as evident in *Abdi Ibrahim v. Norway*, wherein the Court determined that Norway's decision to place the applicant's child up for adoption, despite the applicant's desire to remain in contact with her son, was a violation of the right to family life.[88] Therefore, when faced with family life arguments, the Court may find itself obligated to pay greater deference to the applicant's interests and, thus, resolve margin of appreciation questions in a light more favorable to the child-bearer.

---

86. *See* Fatemeh Ekrami et al., *Effect of Counseling on Maternal-Fetal Attachment in Women With Unplanned Pregnancy: A Randomized Controlled Trial*, 38 J. Reprod. Infant Psych. 151, 153 (2020) ("the maternal-fetal attachment level in unplanned pregnancies is weaker than their planned counterparts").

87. "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." *Universal Declaration of Human Rights*, art. 16(3), GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810, at 71 (1948).

88. Abdi Ibrahim v. Norway, App. No. 15379/16, ¶¶ 143, 149 (Dec. 10, 2021), https://hudoc.echr.coe.int/eng?i=001-214433 ("The Court reiterates that an adoption will as a rule entail the severance of family ties to a degree that, according to its case-law, is permissible only in *very exceptional* circumstances and could only be justified if motivated by an overriding requirement pertaining to the child's best interests") (emphasis added).

C. *The Child's Right to Private Life*

Despite the frequency with which Article 8 arguments are invoked in the abortion context, jurisprudence from the child's perspective under this right appears non-existent. Considering how being born of a state-compelled pregnancy may detrimentally impact a child's sense of identity and family, this oversight is striking.

Research reveals how being born to an unwanted pregnancy can, in some cases, infringe on a child's sense of identity and, therefore, right to private life. A longitudinal study of children born between 1961 and 1963 to women who had been denied abortions found that the children's sense of being "unwanted" had negative impacts on their psychosocial development.[89] Among these harms were social rejection, worse school performance, early exit from school, contentious relationships with their parents and co-workers, decreased job satisfaction, lack of mental well-being, and displeasure with their romantic and platonic partners.[90] Children can also suffer negative impacts from the context in which their mothers became pregnant. People born of rape may lack a sense of belonging and, consequently, suffer from mental health difficulties after learning about the circumstances of their birth.[91] Children born of genocidal rape in particular may also exhibit impeded senses of belonging, as well as private guilt at the circumstances of their existence.[92] While the exact harms that a particular child may suffer can differ from these examples in form and severity, these phenomena demonstrate the multiple ways that state-compelled pregnancy can be connected to the concept of identity and, thus, family life. While the state may not be responsible for the child-bearer's impregnation, had it allowed for the pregnancy to be interrupted, her child would never have suffered such considerable disruptions to his private life. A survey of ECtHR jurisprudence involving child claimants suggests that framing a person's

89. Henry P. David, *Born Unwanted: Long-Term Developmental Effects of Denied Abortion*, 38 J. Soc. Issues 163 (1992).

90. *Id.* at 172–175.

91. Julie Bindel, *Why Children Born of Rape Must Be Recognised as Victims*, The Guardian (Aug. 6, 2019), https://www.theguardian.com/commentisfree/2019/aug/06/children-conceived-rape-legally-recognised-as-victims.

92. Glorieuse Uwizeye et al., *Children Born of Genocidal Rape: What Do We know About Their Experiences and Needs?*, 39 Pub. Health Nurs. 350, 355 (2021).

birth as the source of their injuries and imputing that birth to the state is unprecedented before the Court.[93] Nevertheless, the strength of the causal link between the state's act and the aforementioned panoply of harms a child may subsequently experience renders this a compelling method of holding states responsible for compelled pregnancies. By basing claims on these various injuries, this Note presents a novel avenue for child applicants to assert claims founded on state-compelled pregnancies before the ECtHR. This section will discuss claims emerging under the child's right to private life before moving on in the next section to the right to family life.

Throughout the ECtHR's case law, the importance attributed to knowledge of one's origins and, as a result, one's sense of identity, cannot be understated.[94] In its adoption decisions, the Court has repeatedly emphasized the importance of being informed about the circumstances of one's origins. A central case on this point is *Odièvre v. France*, in which the ECtHR stated that people "have a vital interest . . . in receiving the information necessary to know and to understand their childhood and early development."[95] Considering how highly the Court values the knowledge concerning one's origins, it can be inferred that detrimental interferences to those origins would not be taken lightly by the ECtHR. The dissenting opinion further supports this proposition. The judges opined that an individual's right to an identity "is within the *inner core* of the right to respect for one's private life," which is notable for two reasons.[96] This quotation locates the right to knowledge of one's identity within the

93. *Draon v. France*, *supra* note 77, may have been the case that came closest to discussing this point. The circumstances preceding the case were the negligence of medical officials when conducting medical examinations, which led to the birth of children with disabilities. *Id.* ¶ 3. However, the central issue was whether a French law concerning disability compensation was a deprivation of the parents' right to possessions under Article 1 of Additional Protocol 1, not whether the state itself could be held responsible for the negligent birth of the child with disabilities. *Id.* ¶ 59.

94. Mariana De Lorenzi & Verónica B. Piñero, *Assisted Human Reproduction Offspring and the Fundamental Right to Identity: The Recognition of the Right to Know One's Origins Under the European Convention of Human Rights*, 6 J. Pers. Med. 79, 79, 80 (2008) ("an individual's right to knowledge of their genetic origins is implicitly recognized by article 8").

95. Odièvre v. France, App. No. 42326/98, ¶ 42 (Feb. 13, 2003), https://hudoc.echr.coe.int/eng?i=001-60935.

96. *Id.* ¶ 11 of Dissenting Opinion (emphasis added).

right to private life and, thus, Article 8. And, more importantly, the concept of identity being at the "inner core" of the right to private life substantially narrows the limitations that states can legally impose on this right.

Therefore, by taking advantage of the weight that the Court has afforded to identity, applicants born to state-compelled pregnancies could thus frame the harms caused by the circumstances of their birth as family life violations under Article 8. Given how fundamental one's right to identity is in the view of the Court, this argument could evade the margin of appreciation obstacles that have previously thwarted Article 8 claims rooted in the right to private life.

D. *The Child's Right to Family Life*

Another way of framing an Article 8 violation from the child's perspective would be by asserting a violation of the right to family life. This section will discuss how child applicants could raise claims by invoking the right to family life in parallel with the Article 14 prohibition on discrimination.[97] As noted in Section B, under the right to family life, the state is obligated to "act in a manner calculated to allow ties between close relatives to develop normally."[98] Article 14, in turn, states that "[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as . . . birth."[99] Combined Article 8 and 14 claims have been raised to guarantee that children born out of wedlock receive identical inheritance rights as children born within legal marriages.[100] This section will raise an alternative

97. The parallel analysis is necessary because, whereas the Court may not find an Article 8 violation alone due to its cautious and conservative stance with respect to the right to private life, the markedly impaired family relationships experienced by children born from state-compelled pregnancies, compared to their consensually-born counterparts, could give rise to a finding of discrimination. *See* Claire Fenton-Glynn, *Family Formation and Parenthood*, in CHILDREN AND THE EUROPEAN COURT OF HUMAN RIGHTS 220, 220 (2020).

98. *See, e.g.*, Draon v. France, *supra* note 77, ¶ 106 (holding that, despite that obligation on the part of the state, a law which foreclosed applicants for receiving compensation for the negligence in discovering their as-yet-unborn child's disability did not violate Article 8).

99. European Convention on Human Rights, art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 (emphasis added).

100. *See, e.g.*, Marckx v. Belgium, *supra* note 80.

use of these rights, characterizing the state's failure to grant child-bearers abortions as having discriminatory effects on children born of state-compelled pregnancies, who may develop hampered family ties that they would not otherwise have as a result of the circumstances of their birth.

During their upbringings and possibly even into adulthood, the relationships that people born from unwanted pregnancies have with their parents and their broader maternal family may be fractured. This phenomenon could partially be explained by the fact that "[d]enying women desired abortions may be associated with poorer maternal bonding . . . than enabling women to postpone childbearing," which can hamper the relationship between mother and child.[101] The families that children born to unwanted pregnancies form later in life may also be more fractured than families born to children resulting from "accepted" pregnancies. In his longitudinal study, Henry P. David found that female children were more likely to have difficult marital relations with their spouses, as reported by their male partners.[102] Meanwhile, male children's female partners were likelier to characterize their marital lives as either "very harmonious" or "very problematic," compared with their "accepted" counterparts, who framed their relationships "more often at midpoint of the scale."[103] Ultimately, this research indicates that, throughout childhood, marriage, and parenthood, the offspring of state-compelled pregnancies may suffer fractured family ties compared to their "wanted" counterparts. This finding warrants their consideration, where these conditions exist, as victims of a violation of the right to family life.

Despite this evidence, it may be challenging to mount family life claims owing to the difficulties associated with ascribing fractured family ties to the state's compulsion of a pregnancy. This is especially true as the family ties in question form further in time from the initial pregnancy. For example, linking a child's fractured relationship with his mother to the compulsory

---

101. *See generally* Diana Greene Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 JAMA Pediatr. 1053 (2018) (revealing the results of a five-year longitudinal observational study comparing the children born to women denied an abortion to those born to women who, five years earlier, had aborted an earlier pregnancy).

102. David, *supra* note 89, at 179.

103. *Id.* at 178.

circumstances of the mother's pregnancy might be easier to accomplish from an evidentiary standpoint than connecting that same pregnancy with the child's difficulties forming romantic relationships later on in life. This could be because, as people progress through life, they may experience other events that *also* impact their ability to form romantic relationships, rendering it challenging to tie that difficulty to the conditions of one's birth. Therefore, a claim that a person's inability to form robust family relationships due to the state's involvement in his birth may fail to meet the Court's oft- but inconsistently-invoked "proof beyond reasonable doubt" standard.[104]

This issue is even more complicated from the perspective of joint Article 8 and 14 allegations because the discrimination between compelled and non-compelled offspring would be considered indirect by the ECtHR. Policies are *indirectly* discriminatory when they have "disproportionately prejudicial effects on a particular group" but are "not specifically aimed or directed at that group."[105] Because state-compelled pregnancies result from state actions taken against child-bearers, rather than their future offspring, the discrimination that ensues from such actions would most aptly be described as indirect. Specifically, this discrimination consists of the impaired family ties that children born from state-compelled pregnancies develop but that children born in other circumstances may not.

In the past, the ECtHR has been reluctant to recognize cases of indirect discrimination, largely because it is difficult to satisfy the stringent "beyond reasonable doubt" standard of proof when alleging indirect discrimination.[106] However, the decision in *D.H. and others v. the Czech Republic* evinced the

---

104. *See* Christine Bicknell, *Uncertain Certainty? Making Sense of the European Court of Human Rights' Standard of Proof*, 8 Int'l Hum. Rts. Law Rev. 155, 155, 161–63 (2019) (noting the frequency with which the Court applies the beyond a reasonable doubt standard, but its inconsistency in doing so).

105. Case of Hugh Jordan v. The United Kingdom, App. No. 24746/94, ¶ 154 (May 4, 2001), https://hudoc.echr.coe.int/eng?i=001-59450.

106. Gabriella Szilagyi-Krenner, *Evidentiary Standards on the European Court of Human Rights – Proving Indirect Discrimination Based on Association with a National Minority*, Åbo Akademi 51 (2021). *See* Rory O'Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR*, 29 Leg. Stud. 211, 220 (2009) ("[T]he ECtHR will not presume, from the existence of a general social problem of discrimination against a minority, that any ill treatment of a member of that minority is motivated by prejudice. The applicant must refer to specific aspects of his or her case.").

Court's desire to ease evidentiary standards when assessing allegations of indirect discrimination.[107] As a result of these relaxed standards, the ECtHR has viewed statistics more persuasively in indirect discrimination cases. For instance, in *Hoogendijk v. the Netherlands*, "undisputed official statistics" showing "that a specific rule—although formulated in a neutral manner—in fact affects a clearly higher percentage of woman than men" was considered a persuasive way of proving sex-based discrimination.[108] What types of figures classify as "official" statistics, as well as what other forms of data the ECtHR may be willing to accept, is unclear; the Court has simply maintained that statistics must be reliable, significant, and conclusive.[109]

To clear this evidentiary hurdle, applicants should make use of official statistics wherever possible, with the aim of painting a comprehensive and compelling picture of the differences in family life between children born to state-compelled pregnancies, compared to those that were not. Unfortunately, because research on the discriminatory effects of state-compelled pregnancies is limited, this strategy may only be available in countries where interest and resources align to produce a substantial body of knowledge on this topic. But even where robust official statistics are not available, the relaxing of the evidentiary standard, especially in situations where a significant power imbalance exists between the applicants and the relevant authorities, suggests that the ECtHR may be increasingly receptive to other modes of evaluating evidence of indirect discrimination.[110]

---

107. D.H. and Others v. the Czech Republic [GC], App. No. 57235/00, ¶ 186 (Nov. 13, 2007), https://hudoc.echr.coe.int/eng?i=001-209124 ("the Court has noted in previous cases that applicants may have difficult in proving discriminatory treatment . . . In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination.").

108. Hoogendijk v. the Netherlands, App. No. 58641/00, 20–22 (Jan. 6, 2005), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-68064&filename=001-68064.pdf.

109. D.H. and Others v. the Czech Republic, *supra* note 107, ¶¶ 187–88 ("The Court recognized the importance of official statistics . . . and has shown that it is prepared to accept and take into consideration various types of evidence. . . . This does not, however, mean that indirect discrimination cannot be proved without statistical evidence."). Szilagyi-Krenner, *supra* note 106, at 53–56 ("The Court's assessment practice regarding statistical evidence shows that there is no general guideline on what data is sufficient to establish a rebuttable presumption in individual cases.").

110. Szilagyi-Krenner, *supra* note 106, at 58–59.

One last consideration relevant to this argument is whether the ECtHR would be willing to accept the possibility that state policies can be discriminatory toward unborn beings. Because the state policy restricting access to abortion precedes the birth of the applicant, child applicants would have to argue that said policy was discriminatory to them before they were even born—not to mention it being the reason *why* they were born. The Court has most clearly weighed in on the question of unborn beings' rights under the ambit of Article 2.[111] In *Vo v. France*, the ECtHR did not "rule . . . out the possibility that in certain circumstances safeguards may *be* extended to the unborn child."[112] Consequently, it is possible that the right to protection from discrimination could precede one's existence. Therefore, joint family life and discrimination claims are worth raising, but, given how they raise novel questions that the Court may respond to in an unpredictable manner, they should be raised alongside claims solely grounded in the right to family life to maximize applicants' chances of successfully demonstrating a violation of the ECHR.

IV. Recovering for the Violations Caused by State-Compelled Pregnancy

Now that the Note has presented various strategies that applicants could use to raise claims before the ECtHR, it is appropriate to consider issues that may emerge when applicants try to recover for the violations they have suffered as a result of state-compelled pregnancy. The section will begin with an analysis of how the Court has addressed damages in previous abortion jurisprudence, taking notice of how it has restricted the scope of recoverable harms in such cases. A discussion of two considerations that applicants could take into account when formulating their requests for damages—the prospective nature of certain injuries and the type of violation being alleged—will then follow.

---

111. Spyridoula Katsoni, *The Right to Abortion and the European Convention on Human Rights*, Völkerrechtsblog (Mar. 19, 2021), https://voelkerrechtsblog.org/the-right-to-abortion-and-the-european-convention-on-human-rights/.

112. Vo v. France [GC], App. No. 53924/00, ¶ 80 (July 8, 2004), https://hudoc.echr.coe.int/eng?i=001-61887.

A. *The Court's Current Approach to Remedies*

As mentioned in Part II, being compelled to retain a pregnancy can cause a person intense physical and mental suffering and ruptured family ties, not to mention financial expenditures in the form of prenatal medical care, childbirth expenses, and childcare. Despite these considerable costs, there has been a large discrepancy between how money much it costs to have a child and the amount of damages the ECtHR has historically awarded to applicants who have been denied abortions.

Take, for instance, *R.R. v. Poland*. After determining that the applicant had suffered a violation of Articles 3 and 8 of the ECHR, the Court awarded her EUR 45,000 in 2011 currency.[113] In assessing how much compensation the applicant was due, the ECtHR specifically noted the anxiety the applicant suffered over how "she and her family would be able to ensure [her] child's welfare, happiness and appropriate long-term medical care," given that her child would suffer from a potentially deadly syndrome.[114] The Court awarded the applicant EUR 45,000 to redress the "considerable anguish and suffering" that she would experience from being *confronted* with "the challenge of educating another child who was likely to be affected with a lifelong medical condition and to ensure its welfare and happiness."[115] Considering that the average cost of raising a child from infancy to age eighteen in Poland in 2011 was likely somewhere around EUR 45,000, if not lower, this award may seem acceptable.[116] However, this average does not account for the increased medical and educational expenses that the applicant would have to pay to raise a child suffering from a chronic medical condition. Therefore, the ECtHR's ultimate damages award fails to compensate the applicant for the increased expenses that she would have to bear as a result of being made to give birth; rather, her

113. *R.R.*, *supra* note 31, ¶ 225.

114. *Id.* ¶ 159.

115. *Id.* ¶ 225.

116. In 2014, the cost of raising a child to age 18 was about EUR 45,000. Given that, from 2014 to 2021, the cost of raising a child to adulthood rose every year, it can be estimated that, in 2011, the cost of raising a child was, at most, EUR 45,000 in Poland. Adriana Sas, *Costs of Raising a Child Up to 18 Years Old in a Family With One Child in Poland From 2014 to 2021*, STATISTA (June 3, 2022), https://www.statista.com/statistics/1122221/costs-of-raising-a-child-up-to-18-years-old-in-a-2-1-family-poland/.

damages solely account for the harm she suffered in *pondering* those expenses, overlooking the other forms of hardship she would take on upon the birth of her child. Had the applicant been adequately compensated for her anguish and suffering, as well as the costs of being made to give birth to and raise a child, she would have received at least double the amount of money she was actually awarded by the Court.[117]

A similar calculation was made in *Tysiaç*, where the applicant was forced to continue with a pregnancy that she knew could, and ultimately did, leave her blind. There, the ECtHR acknowledged the applicant's "fear about her physical capacity to take care of another child and to ensure its welfare and happiness," but only considered the "anguish and suffering" she experienced from those fears to determine her non-pecuniary damage.[118] The figure that the Court ultimately reached was EUR 25,000, which was insufficient to cover childcare costs for eighteen years, not to mention the applicant's permanent blindness.[119] Absent from the Court's analysis was any awareness that, had the state allowed the applicant to receive the abortion, none of these harms would have materialized.

Together, *R.R.* and *Tysiaç* reveal the conservative approach that the Court has taken to redressing the harms caused by abortion denials. By focusing litigation on the broader consequences of state-compelled pregnancy, the scope of remedies available to applicants alleging harm would similarly expand. From the child-bearer's perspective, the Court could begin looking past the narrow circumstances of the abortion denial, and consider how being pregnant, giving birth, and raising a child all have substantial impacts on a child-bearer's life. As for the child, abortion denial has never been raised as injurious to the child before the ECtHR; therefore, a focus on state-compelled

---

117. I came to this conclusion by adding the cost of raising a child to adulthood, which I estimate to be at most EUR 45,000 in 2011, to the actual damages that the Court awarded the applicant, also EUR 45,000.

118. *Tysiaç*, *supra* note 31, ¶ 152.

119. This earliest available data that I could find estimated the average cost of raising a child from birth to age 18, in 2014, at 211,340 złoty, or about EUR 45,000 in 2022. EUR 25,000 in 2014 would be worth about EUR 31,000 in 2022. While it is unclear what childcare costs would have been in 2007, the year in which *Tysiaç*, was ahead, it is much more likely than not that they would not have been more than EUR 45,000 in 2022. Therefore, the damages that the Court awarded to the applicant could not have been sufficient to cover childcare costs. Sas, *supra* note 116.

pregnancy would open up a path to recovery for a new applicant class. With both of these possibilities established, the rest of the section will center on two considerations that may affect applicants' chances of recovery before the ECtHR.

B. *The Prospect of Recovering for Future Harm*

The first challenge that applicants seeking to recover for the harms of state-compelled pregnancy may face is the prospective nature of their injuries. For instance, a child-bearer may wish to receive pecuniary damages for the money that she will foreseeably spend on childcare. This creates a difficult situation, for as certain as it is that the applicant will spend money such an activity, the total extent of that sum of money could be unclear for eighteen years, if she provides for her child till age eighteen, or longer. Generally, damages in human rights law "are inevitably retrospective; an *ex post* remedy that is gained after harm has occurred."[120] But if applicants are made to wait until their children mature to receive compensation for the costs of childcare, they would have to bear all of those costs themselves upfront, in the hope of being recompensed later. Considering that a common reason for desiring an abortion is socioeconomic inability to care for a child,[121] this delay in remediation could create an immense economic burden for some applicants and be an absolute impossibility for others. Furthermore, given how the passage of time can undermine the link between the violation and the claimed damage, this strategy may limit the amount of recovery an applicant can request.[122] Hence, the possibility of recovering for prospective harm—including allowing an applicant to request damages for the childcare costs that she has not

120. Dinah Shelton, *Compensation*, *in* Remedies in International Human Rights Law 291, 291 (Dinah Shelton eds., 2d ed., 2006).

121. *See* Laia Font-Ribera et al., *Socioeconomic Inequalities in Unintended Pregnancy and Abortion Decision*, 85 J. Urban Health 125, 126 (2007) ("[S]tudies [have] found that some determinants were age[,] . . . being unmarried, *having a low income level*, a low educational level, and not using contraception or using a now very effective method.").

122. Sargsyan v. Azerbaijan, App. No. 40167/07, ¶ 56 (Dec. 12, 2017), https://hudoc.echr.coe.int/eng?i=001-179555 ("[T]he time element makes the link between a breach of the Convention and the damage less certain." However, "[a]n award may still be made notwithstanding the large number of imponderable involved.").

yet, but will likely have to spend—would be highly beneficial for child-bearers.

The question of prospective damages has recently come up before the ECtHR and will likely be discussed at greater length in the future. In a recent climate change case, *Duarte Agostinho and Others v. Portugal and Others*, the six youth applicants argued that they should be allowed to recover from states for the *future* human rights violations they will experience as a result of climate change.[123] Specifically, the applicants claimed that global warming, which they attribute to state behavior, will continue to endanger their lives and health.[124] They emphasized the illnesses that they could contract from exposure to raging fires in their areas, as well as the damage that could be done to their homes as a result of severe winter storms.[125] While the Court ultimately struck the case for a failure to exhaust domestic remedies in Portugal and a lack of jurisdiction with respect to the other respondent states,[126] future climate cases alleging prospective harms may have a significant influence on the nature of damages in state-compelled pregnancy cases.

For now, several indications suggest the Court's amenability to permitting recovery for future harms. First, the ECtHR already recognizes prospective harm in limited instances: for example, applicants can recover for alleged loss of future profit.[127] In a similar vein, victims of state-compelled pregnancies could frame their childcare expenses as a loss of their future earnings. The possibility for expanding the doctrine in such a manner was indirectly raised in *Hardy and Maile v. United Kingdom*.[128] In that case, applicants challenged the United Kingdom's decision to grant planning permits for liquefied natural gas ("LNG") terminals in a harbor without first assessing

123. Duarte Agostinho et Autres c. Portugal et 32 Autres États, App. No. 39371/20, at 1 (Nov. 11, 2020), https://hudoc.echr.coe.int/eng?i=001-206535.

124. *Id.*

125. *Id.* at 1–2.

126. Duarte Agostinho and Others v. Portugal and 32 Others [GC], App. No. 39371/20, ¶ 231 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng#_Toc162284528.

127. Registry of the Eur. Ct. Hum. Rts., Rules of Court of the European Court of Human Rights 79 (Oct. 30, 2023), https://www.echr.coe.int/documents/d/echr/rules_court_eng [hereinafter Rules of the Court].

128. Hardy and Maile v. The United Kingdom, App. No. 31965/07, ¶ 186, (Feb. 14, 2012), https://hudoc.echr.coe.int/eng?i=001-109072.

the risks of a potential collision.[129] They argued that the Court should apply Article 8 "in a precautionary way" and identify a violation *before* actual harm had manifested.[130] In response, the ECtHR remarked that the risks associated with a possible collision, including "the escape of a large quantity of LNG and the potential for an explosion or a fire as a result," sufficiently imperiled the applicants' homes and private lives to render Article 8 applicable.[131] This argumentative turn, along with the Committee of Ministers' recent emphasis on "the need for intergenerational equity" and "the principle of precaution" in a 2022 recommendation on environmental protection,[132] may suggest that the Court will become increasingly flexible in the near future when it grants damages for prospective harm.

Assuming that the ECtHR does elect to allow recovery for prospective injury, the question arises of how the Court will calculate the full sum of future damages. When claiming pecuniary damages, the Rules of the Court instruct applicants to "submit relevant evidence to prove, as far as possible, . . . the amount or value of the damage."[133] In the absence of concrete evidence quantifying pecuniary damages, the ECtHR aspires to arrive at the most accurate figure possible.[134] Applicants could try relying on estimates based on how much money they have spent caring for their other children, but this approach is fallible because child-rearing is an unpredictable endeavor that can involve highly variable expenditures across individuals.[135] Parents of

129. *Id.* ¶¶ 1–3.

130. *Id.* ¶ 186.

131. *Id.* ¶¶ 190, 192. Note, though, that the ECtHR did not ultimately find that the state has violated the ECHR for reasons of subsidiarity. *Id.* ¶¶ 231–232.

132. Eur. Comm. Ministers, Recommendation CM/Rec(2022)20 of the Committee of Ministers to Member States on Human Rights and the Protection of the Environment 3 (Sept. 27, 2022), https://rm.coe.int/0900001680a83df1.

133. Rules of the Court, *supra* note 127, at 79.

134. *Id.* at 79 ("If the actual damage cannot be precisely calculated, . . . the Court will make an as accurate as possible estimate, based on the facts at its disposal.").

135. Organisation for Economic Co-Operation and Development (OCED), Net Childcare Costs in EU Countries ¶ 39 (2021), https://www.oecd.org/els/soc/benefits-and-wages/Net%20childcare%20costs%20in%20EU%20countries_2021.pdf ("[T]here is variation in net childcare costs across . . . family types . . . Two-earner couples with median earnings generally have higher net childcare costs than other family types, particularly lone parents with low earnings").

greater wealth may be disposed to spend more money on their children than poorer ones so, were the aforementioned calculation strategy applied, it could result in higher damages for such parents from the Court. To avoid creating such inequalities, the ECtHR may prefer a more objective approach. If applicants rely instead on statewide measures of average childcare expenditures, they may be able to combat the Court's aversion to uncertainty in damage calculation, while also avoiding the dangerous precedent that would be set were damages awarded based on victims' wealth.

In the event that the ECtHR refuses to grant damages based on prospective harms, applicants may nevertheless be able to recover on the basis of punitive damages. The official stance of the Court is that it does not award punitive damages;[136] however, scholars have noted that the practice of the ECtHR indicates otherwise.[137] One of the instances in which the Court tends to award punitive damages is when it orders "just satisfaction for a 'potential violation'" of the ECHR, the purpose being "to censure and punish the respondent State's conduct, rather than to compensate for damage, which has not yet occurred."[138] In this case, the mere circumstances of the state's refusal to permit an applicant to terminate a pregnancy may be reason enough for a reward. The ECtHR has also awarded punitive damages when a violation may result in a loss of opportunity for the victim, even when it cannot be ascertained that said opportunity would have materialized.[139] To justify punitive awards of this nature, childbearing applicants may wish to underscore how the trajectory of their lives have changed as a result of being made to give birth and take care of a child. They could point to lost job or educational opportunities. A child applicant could also claim that being born to a mother unprepared to take care of them has impeded their educational and professional prospects. If

136. "The purpose of the Court's award under Article 41 of the Convention in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. . . The Court has therefore considered it inappropriate to accept claims for damages with labels such as 'punitive', 'aggravated' or 'exemplary' . . ." RULES OF THE COURT, *supra* note 127, at 66.

137. Paulo Pinto de Albuquerque & Anne van Aaken, *Punitive Damage in Strasbourg*, *in* THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW 230, 230 (Anna van Aaken & Iulia Motoc eds., 2018).

138. *Id.* at 234.

139. *Id.* at 235.

the traditionally *ex post* stance that the ECtHR takes to damages awards would otherwise foreclose applicants' rightful recovery, punitive damages may ultimately make the difference for victims of state-compelled pregnancy.

To conclude, in the face of uncertainty governing prospective damages, victims of state-compelled pregnancies should avoid foreclosing any legitimate avenues of discovery. It is advisable that both child-bearers and children request damages in the form of foreseeable future expenditures and injuries, in addition to damages related to any harm they have *already* suffered as a result of state-compelled pregnancy, to allow themselves the maximum recovery possible. If *ex ante* recovery requests fail, punitive damages may serve as a discrete secondary avenue of recovery for applicants.

C. *The Causal Link*

The relevant causal link standard depends on the nature of harm for which an applicant seeks to recover. For pecuniary damage, a "direct causal link must be established between the damage and the violation found;" speculative or tenuous connections are insufficient.[140] The standard for non-pecuniary damage is weaker: a link between the violation and harm is reasonably assumed, and the applicant is typically not required to provide additional evidence attesting to her suffering.[141]

The stringent causation standard for pecuniary damages may pose a significant obstacle for victims of state-compelled pregnancy, particularly child-bearers seeking to recover for childcare costs. At first glance, the direct causal link seems obvious: but for the state's actual or effective refusal to grant the applicant an abortion, she would never have given birth and had occasion to raise the child in question. However, as time passes from childbirth, the extent to which the state is responsible for subsequent expenditures may appear to lessen, even if those expenses are paid in the name of childcare. For instance, an applicant may include in her request for pecuniary damages the medical fees that she paid to treat her child's broken arm. This raises a complicated issue, for even though it is true that the applicant would never have had to pay those fees had her

140. Rules of the Court, *supra* note 127, at 79.
141. *Id.* at 79.

child never been born, and the child's birth would never have occurred had the state allowed the applicant to abort her pregnancy, the state is not directly responsible for the playground incident that caused the child's injury. The Court may therefore adopt the stance that such an expansive view of pecuniary damages would explode the scope of state responsibility and, thus, undermine states' willingness to comply with ECtHR judgments.[142]

For that reason, applicants would likely have the greatest chances of receiving pecuniary damages for losses suffered more proximately to the pregnancy. From the child-bearer's perspective, these pecuniary harms could include the costs of giving birth and the loss of income due to maternity leave. As for the child, more proximate injuries to the pregnancy could include medical expenditures for conditions that originated at birth. This does not mean that litigants should avoiding requesting damages for less proximate injuries, such as long-term childcare costs; the strong "but for" causal link between the violation and the damages, in spite of the occurrence of intervening factors, could still justify the Court's accession to such a request.

Because of the presumption in favor of a causal link between the violation and damages, applicants may be able to substantiate demands for non-pecuniary damages more easily. Employing the litigation strategies proposed in Part II, children could claim damages attributed to the harm that state-compelled pregnancy has had on their sense of self and family life. Alternatively, the child-bearer could recover on the basis of the inhuman physical or mental treatment she suffered from being pregnant against her will, as well as for the negative consequences that having an unwanted child has had on her family life. These examples illustrate the two major benefits

142. A study of the damages awarded by the ECtHR has revealed the Court's tendency to award lowered damages to ensure compliance. The Court's commitment to this practice is so strong that it is willing to disregard inconsistencies, such as the possibility that victims of multiple violations could be granted lower rates of compensation than they would have had they alleged their violations separately and achieved the same degree of success. Whether this practice is actually successful in ensuring compliance is unclear; behavioral economists opine that it has no deterrent effect and that paying mind to these considerations could even contribute to the collapse of the system as a whole. Veronika Fikfak, *Changing State Behaviour: Damages Before the European Court of Human Rights*, 29 EUR. J. INT. LAW 1091, 1111–12 (2018).

of framing abortion denial claims from the perspective of state-compelled pregnancy. The child is able to recover for the otherwise ignored harm he may suffer from state-compelled pregnancy, and the child-bearer is able to receive compensation for a much broader spectrum of harm than previously noted in the Court's case law on abortion.

V. Conclusion

State-compelled pregnancies are underexamined in human rights law. While abortion has been the subject of considerable jurisprudence, consideration of what ensues following a state's refusal to grant a person an abortion—namely, being forced to continue the pregnancy to term, give birth, and subsequently raise a child—has yet to be analyzed from a human rights perspective. Furthermore, the harm that a child born to a compulsory pregnancy may face with respect to his identity and his sense of family ties has also gone unexamined. In this Note, I have raised four novel strategies for victims of state-compelled pregnancies to assert human rights violations before the European Court of Human Rights. I have also discussed considerations that these victims ought to keep in mind when seeking damages from the Court for those violations.

Of course, the strategies that I have contemplated in this Note are not the only human rights arguments that victims of state-compelled pregnancies could raise. For instance, despite the ECHR's primary preoccupation with civil and political rights, the Court has recognized how civil and political rights may "have implications of a social or economic nature."[143] An intriguing, unorthodox argument could be made by invoking the Article 8 right to private life, but reading socioeconomic obligations into the concepts of "dignity" and "development"—both of which, as mentioned before, fall within the purview of private life. Namely, applicants could emphasize how these concepts have been interpreted by human rights tribunals and treaty bodies as compelling a minimum living standard for all peoples.[144] Because both children and child-bearers tend to

143. Airey v. Ireland, App. No. 6289/73, ¶ 26 (Oct. 10, 1979), https://hudoc.echr.coe.int/eng?i=001-57420.

144. Sebastian Heselhaus and Ralph Hemsley note that, "human dignity serves as an appreciation of particular social rights, specifically by postulating

suffer impaired socioeconomic circumstances following a state-compelled pregnancy, they may be able to tie these harms to the concepts of dignity and development and, consequently, allege a violation of the right to private life. This is just one of multiple examples of litigation strategies that, although left unexplored in this Note, could also be employed by victims seeking to push the Court outside of its comfort zone and increase their chances of attaining remedies.

The benefits of taking new approaches to formulating abortion questions before the ECtHR are twofold. First, raising these new claims paves ground for applicants to receive greater, or any, compensation from the Court. As it stands, a child has never received damages from the ECtHR from the negative impacts that being born to a state-compelled pregnancy has had on them. Meanwhile, child-bearers often receive appallingly small rewards that fail to account for the undeniable fact that, were it not for the state's refusal to grant them an abortion, they would not have to bear the costs of raising an additional life. The expanded focus on state-compelled pregnancy would grant victims the compensation they merit from the Court, better-equip child-bearing applicants to handle the challenges of compulsory childcare, and create a financial incentive for states to legalize abortion.

The second and more abstract benefit is momentum for change. By forcing the ECtHR to reexamine its approach to abortion and, more generally, sexual and reproductive health, these new strategies could help paint a clearer picture of the harms associated with abortion denials. As past case law reveals, the ECtHR "continues to cast doubt upon the existence of a

---

that '[e]veryone who works has the right to *just and favourable remuneration* ensuring for himself and his family an existence worthy of human dignity.'" *Human Dignity and the European Convention on Human Rights*, *in* HANDBOOK OF HUMAN DIGNITY IN EUROPE 969, 973 (Paolo Becchi & Klaus Mathis eds., 2018). Meanwhile, the economic and social undercurrents of development are evident from the identical first articles of the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), which both read, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, art. 1(1), Dec. 16, 1966, 9999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

right to choose for a pregnant woman."[145] Forcing the Court to consider issues such as whether state-compelled pregnancy can constitute ill-treatment for the pregnant person, or how it can hamper the personal development and family ties of children, such claims and ensuing judgments could help garner a greater awareness of the gravity of pregnancy and abortion denial. In turn, this could generate the momentum necessary to legalize and guarantee elective abortion. At a time of regression in Europe, creative ways of reframing the issue of compelled pregnancies in human rights terms may be what is needed to finally safeguard the right to abortion.

145. Elizabeth Wicks, *A, B, C v Ireland: Abortion Law Under the European Convention on Human Rights*, 11 Hum. Rts. L. Rev. 556, 565 (2011).