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International Law and the Legalization of Abortion in Northern Ireland

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INTERNATIONAL LAW AND THE LEGALIZATION OF ABORTION IN NORTHERN IRELAND

EMILY UTERHARK*, CLEVELAND-MARSHALL COLLEGE OF LAW, J.D. 2021

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* J.D., May 2021, Cleveland-Marshall College of Law. I would like to thank my mom and dad, Gary and Shari, and my sister, Amanda, for always encouraging me to be myself, to question everything, and to follow my own path in life. I would not be who I am today if they didn't put up with hours of rants, lectures, and hearing the words "did you know?" for the past 25 years. To my Grandad who first told me about Ireland when I was little: thank you, those stories have brought so much into my life.

I. INTRODUCTION

Imagine being 19 weeks pregnant. Looking forward to your first baby. Only to find out that the fetus was not viable. Even if you gave birth, the baby wouldn't live. However, your only option was to live with that reality for the next four months.¹ This was the reality that Sarah Ewart faced in Northern Ireland. In an article for "The Irish Times" Sarah wrote:

After a number of scans it was confirmed that the baby girl I was carrying had anencephaly – which means the skull and brain hadn't properly developed. We had never heard of anencephaly and so thought at that point we would be able to have operations and bring our daughter Ella home... As we listened to the consultant and the midwife it quickly became clear that this was not going to be an option for us and that the birth would be extremely difficult. I asked what my options were and was given only one – to continue with the pregnancy. I couldn't face continuing with a pregnancy I knew wouldn't survive so I enquired about a termination. Immediately we were told they couldn't discuss that or advise us on anything to do with an abortion. Legally, they were not allowed to offer that as an option, never mind talk about it. We left, numb and devastated.²

While the rest of the United Kingdom has allowed abortion in certain circumstances since 1967, Northern Ireland does not.³ Having an abortion or performing the procedure has been a criminal offense since 1861, except when the mother's life is in immediate danger or the pregnancy will cause permanent mental distress.⁴ While that seems like it would allow abortion in some cases, the reality of the situation is very different. Abortion is illegal even in instances of rape, incest, and non-viable fetuses.⁵ Northern Ireland is a part of the United Kingdom, however, when the Abortion Bill of 1967 was passed it was not applied to Northern Ireland.⁶ This resulted in one the strictest abortion regulations in the world to continue into the twenty-first century.

It left people like Sarah Ewart, pregnant, scared, and unable to make a complete medical decision on their own, feeling that their only option was to

¹ Sarah Ewart, *Heartbreaking Decision to Travel to England for an Abortion*, THE IRISH TIMES (Dec. 14, 2015), <https://www.irishtimes.com/news/health/heartbreaking-decision-to-travel-to-england-for-an-abortion-1.2465344>.

² *Id.*

³ Abortion Bill 1967, HL Bill.

⁴ Offences Against the Person (Northern Ireland) Act 1861, cls. 58-59.

⁵ *Id.*

⁶ Abortion Bill 1967, HL Bill.

spend money out of pocket and fly to another country to have the abortion. Sarah flew to England and spent a total of £ 2,100 on flights, accommodation, and the procedure.⁷ Sarah wrote:

A change in the law here is needed to help women like me. The experience is distressing enough without having to go to England for treatment. Support is needed for women like me who have taken this heartbreaking decision. If a woman wants to go through a birth that's okay, but if a woman doesn't want to there has to be another option. Neither one is easy. We need compassion, respect and dignity.⁸

The law needs to change, and in a sense it has. For now.

On July 24, 2019, the Parliament of the United Kingdom passed an act that included an amendment requiring Northern Ireland to implement recommendations from the Committee on the Elimination on Discrimination Against Women.⁹ The amendment required Northern Ireland to repeal the 1861 abortion act and requires the decriminalization of abortion.¹⁰ The law went into effect on October 22, 2019, since the Northern Ireland power-sharing government (Stormont) did not reconvene before October 21, 2019.¹¹ Since the law did go into effect, it will give women the right to obtain abortions under the CEDAW recommendations; however, when the Northern Irish government (Stormont) reconvenes, it can recriminalize abortion.¹² They made this attempt when Stormont under DUP leadership reconvened briefly on January 11, 2020 before the official Brexit the next day. This Note argues that abortion should be legal in Northern Ireland regardless of whether the new legislation from British Parliament ever went into effect or gets overturned by the Stormont legislature, because of several treaties and domestic decisions from the Supreme Court in Belfast and that the new regulations made in accordance with the amendment need to meet the standards of the CEDAW recommendations.

Part II will explain the development of abortion regulation in the United Kingdom and Ireland over the course of the past three centuries. In II.A-C, this Note will explore how the changing relationship between the United Kingdom and the Republic of Ireland has affected the abortion regulations in Northern Ireland and how treaty law has had a major impact on that relationship. Part II.D will discuss the various human rights treaties that the United Kingdom has signed, which also binds Northern Ireland. Part II.E-G will also discuss the recent

⁷ Ewart, *supra* note 1.

⁸ *Id.*

⁹ Northern Ireland Formation (Northern Ireland) Act 2019 c. 22, § 9.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

developments on abortion law in the Republic of Ireland, the changing public perception, and the Parliamentary amendment that led to the legalization of abortion in Northern Ireland for now. Part II.H-I will discuss the interim guidelines and the new official legal framework for abortion services in Northern Ireland in detail.

Part III will analyze the various treaties that the United Kingdom of Great Britain and Northern Ireland is bound to and how they apply to this issue. In III.A, this Note will analyze the Good Friday Agreement, in particular the human rights section of the treaty that includes a section on women's rights and how the classification of Northern Irish women as citizens of the United Kingdom affects their rights. Part III.B will examine European Convention on Human Rights, a treaty that the United Kingdom is a party of and is bound to the requirements. It will also explore Belfast's own High Supreme Courts recent decisions. Part III.C will examine the Convention on the Elimination of Discrimination Against Women, how it applies to abortion, what the recommendations are that Northern Ireland has to implement and what it means for a woman's right to an abortion, how the recommendations are binding even without the UK legislation, and therefore abortion should be legal in Northern Ireland even without the UK legislation. Part III. D examines the interim guidelines that came into effect on October 22, 2019, and if they meet CEDAW recommendations. Part III.E examines if the legal framework and regulations for abortion services that came into effect on March 31, 2020 meet CEDAW recommendations and whether they breach international treaty obligations. Part IV concludes that abortion should be legal in Northern Ireland, together they make the argument even more conclusive. Abortion should be legal in Northern Ireland even if the new legislation from British Parliament never goes into effect or gets over turned by the Stormont legislature.

II. BACKGROUND

A. *The Original Abortion Ban*

Abortion has been a controversial issue for the last 200 years. Moral argument entered into the political arena, and often religious views dictated policy and legislation on abortion. In the nineteenth century, the British Empire, as it existed at the time, banned abortion throughout its territory.¹³ The original abortion bans of 1861 stated:

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken

¹³ *Id.*

by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable [...] to be kept in penal servitude for life [...]¹⁴

Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable [...] to be kept in penal servitude [...]¹⁵

A woman faced criminal charges if she tried to procure an abortion, including cases of rape, incest, and fetal abnormalities that made it non-viable. The same criminal charges applied to anyone who tried to aid the woman, which included doctors.

Eventually, the United Kingdom reversed this ban in 1967 as part of the greater movement of second wave feminism that occurred in Europe and the United States in the 1960s and 1970s.¹⁶ However, this reversal did not apply to Northern Ireland, since Northern Ireland had Home Rule powers for domestic decisions.¹⁷ Abortion regulation became more complex in Northern Ireland because of the original colonial relationship between the island Ireland and Great Britain, and the present relationship between the Republic of Ireland and the United Kingdom of Great Britain and Northern Ireland.

B. Partition of Ireland

The island of Ireland had been under British colonial rule from around 1200 until the twentieth century.¹⁸ Ireland was under complete governmental control of Westminster until 1922. The War of Independence began in 1919 on the streets of Dublin over the British promise of Home Rule after World War I.¹⁹ However, many in the North of Ireland, particularly in Belfast, did not wish Ireland to have Home Rule.²⁰ Those that did not want Home Rule were mainly descendants of Protestant transplants in Northern Ireland. They feared that the Home Rule government would follow the agenda of a Catholic Southern

¹⁴ Offences Against the Person (Northern Ireland) Act 1861 cl. 58.

¹⁵ Offences Against the Person (Northern Ireland) Act 1861 cl. 59.

¹⁶ See generally T.W. MOODY, THE COURSE OF IRISH HISTORY 299-317 (5th ed. 2012).

¹⁷ Offences Against the Person (Northern Ireland) Act 1861 cls. 58-59.

¹⁸ See generally MOODY, *supra* note 16.

¹⁹ See generally *id.* at 257-72.

²⁰ *Id.*

Ireland.²¹ Between 1919 and 1921 the Irish rebels in the south ran a guerrilla style warfare that eventually brought the British government to the negotiation table.²² The British offered eventual complete independence for 26 counties of Southern Ireland, but they would retain complete control of the six counties of Northern Ireland that were mainly Protestants.²³ This Anglo-Irish Treaty was signed, and Northern Ireland was partitioned from the rest of the island. The Irish Free State was established, now the Republic of Ireland, and Northern Ireland remained a part of the United Kingdom.²⁴ This partition and Home Rule given to Northern Ireland is what allowed for Northern Ireland to retain the 1861 abortion ban that the rest of the United Kingdom overturned with new legislation in 1967.

C. *Good Friday Agreement*

After partition, Northern Ireland had a semblance of Home Rule under the United Kingdom while the Irish Free State acted independently and eventually became the Republic of Ireland.²⁵ Because the majority of people in Northern Ireland were Protestant, they controlled the government at Stormont.²⁶ While in power they created policies that discriminated against Catholics and stripped them of many civil rights.²⁷ Protestantism in Northern Ireland is conservative and maintained the strict anti-abortion legislation at this time.²⁸ Tensions built, a civil rights movement gained speed, and violence erupted that led to the Troubles in Northern Ireland from 1968 to 1998.²⁹ During this time, a strong feminist movement failed to gain traction because of the violence.³⁰ Eventually, a cease fire was called in the middle 1990s and negotiations for peace began.³¹ This led to what is known as the Good Friday Agreement.

The agreement laid out the relationship between Republic of Ireland, United Kingdom, and Northern Ireland, which still remained part of the United

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *See generally id.* at 283-98.

²⁶ *See generally id.* at 273-82.

²⁷ *Id.*

²⁸ *See generally id.* at 299-332.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Kingdom. It provided a power-sharing government in Northern Ireland that has a dual executive representing the Protestants and the Catholics. The agreement also had a specific human rights section because of the discrimination against Catholics and the sectarian violence for 30 years. This human rights section can be applied to reproductive rights in Northern Ireland. The section stated:

The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular: the right of free political thought; the right to freedom and expression of religion; the right to pursue democratically national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to freely choose one's place of residence; the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; the right to freedom from sectarian harassment; and the right of women to full and equal political participation.³²

The United Kingdom was required to incorporate into Northern Irish law the European Convention on Human Rights (ECHR), which was first signed in 1953 in a post-World War II world.³³ This incorporation includes "direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency."³⁴ This made the ECHR binding on any legislation on Northern Ireland and the United Kingdom. The incorporation of the ECHR and the specific rights laid out in the Good Friday Agreement were meant to be a Bill of Rights in Northern Ireland.³⁵ Both of these documents ensure the social, economic, and political equality of women.

D. Human Rights Treaties

The rights of women in the ECHR include a woman's right to an abortion. Article 8 states:

Everyone has the right to respect for his private and family life, his home and his correspondence.³⁶ There shall be no interference by a public authority with the exercise of this right except such as is in

³² Good Friday Agreement, Ir.-U.K., Apr. 10, 1998, N.I. Office.

³³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, E.T.S. No. 005.

³⁴ Good Friday Agreement *supra* note 32.

³⁵ *Id.*

³⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 33.

accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³⁷

Under this treaty, the European Court on Human Rights was created to hear cases from private individuals against nations that have possibly violated human rights under the ECHR. This court has heard several cases on the rights of women under Article 8 in particular. In *A., B. and C. v. Ireland*, one of the three applicants to the Court won her case. The Court deemed that Ireland's abortion bans were in violation to the treaty.

Those in support of the criminalization of abortion can claim that another section of Article 8 can support state interference and ban of abortion:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³⁸

Some groups have made the argument that this caveat would allow a country to ban abortion for the protection of health and morals or to protect the rights of an unborn fetus. However, again, Northern Ireland's abortion ban does not allow for an abortion even in the cases of rape, incest, and fatal fetal abnormality.

In *A., B. and C. v. Ireland*, two out of the three applicants lost their case because of this section of Article 8.³⁹ One of the applicants was in remission from a rare form of cancer and her pregnancy caused a huge strain on her recovery and because of her cancer treatment, the fetus was not viable.⁴⁰ The fetus had a fatal fetal abnormality and the policy in Northern Ireland did not allow for abortion. The Court held that in her case, the ban is in direct violation of Article 8.⁴¹ However, the other two applicants' claims were denied by the court.⁴²

In addition, there is not a right to life to protect for that fetus, whereas there is a right to life for the mother. While not a direct abortion case, the Court did hear a case on whether a physician can be held criminally liable for puncturing the amniotic fluid of the wrong woman, making an abortion of the

³⁷ *Id.*

³⁸ *Id.*

³⁹ *A., B. and C. v. Ireland*, Eur. Ct. H.R. (2010).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

fetus medically necessary. They decided it was not manslaughter and did not state that France violated the ECHR. They held that the right to life was not violated and that they would not say that a fetus had right to life.⁴³

In another case of fatal fetal abnormality, *R.R. v. Poland*, the Court stated that Poland's strict policy on abortion and general reproductive health care violated this woman's rights under Article 8.⁴⁴ In the case of rape and incest, a state should not be able to ban abortion. The Court declared in another case dealing with Poland's restrictive abortion that a nation cannot have a ban on abortion that does not include a rape exception.⁴⁵

This is not the only human rights treaty that the United Kingdom has signed that has becoming binding on the laws of the United Kingdom and Northern Ireland. The British agreed to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979 and then UK government signed the Optional Protocol of CEDAW in 1999, which created a "complaint and inquiry mechanism" that enforces the treaty.⁴⁶ This created the Committee, which reviews and rules on complaints from individuals against the human rights policies of a nation.⁴⁷ These rulings are binding on countries that have signed the Optional programs, such as the United Kingdom and Northern Ireland.⁴⁸ In addition, the Committee issues statements on specific issues of human rights abuses such as reproductive health and abortion bans; often it demonstrates the way that the Committee interprets countries' obligations under the treaty.

For example, in Part III Article 12.1, CEDAW states, "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."⁴⁹ The Committee has interpreted what this right to health care and family planning means for a country's obligations:

Upholding the right to health for women and girls requires health services, including sexual and reproductive information, counselling and services that are available, accessible, affordable and of good quality. The Committee has observed that failure of a

⁴³ *Vo v. France*, Eur. Ct. H.R. (2004).

⁴⁴ *R.R. v. Poland*, Eur. Ct. H.R. (2011).

⁴⁵ *P. and S. v. Poland*, Eur. Ct. H.R. (2012).

⁴⁶ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 20378 [hereinafter CEDAW]; Optional Protocol to CEDAW, June 10, 1999, 2131 U.N.T.S. 20378.

⁴⁷ Optional Protocol to CEDAW, *supra* note 46.

⁴⁸ *Id.*

⁴⁹ CEDAW, *supra* note 46.

State party to provide services and the criminalization of some services that only women require is a violation of women's reproductive rights and constitutes discrimination against them.⁵⁰ This concept applies directly to Northern Ireland's policy against abortion. When a complaint was filed against Northern Ireland, the Committee stated that Northern Ireland's abortion policies breached the treaty.⁵¹

E. Republic of Ireland Referendum

In May 2018, the Republic of Ireland held a referendum to repeal the 8th Amendment of its constitution, which denied the right to an abortion and gave constitutional standing to the right to life as a fetus. The referendum passed an amendment to the Irish constitution that allowed for legislation that regulated abortion. Following this referendum, the Irish government passed the Health (Regulation of Termination of Pregnancy) Act of 2018, which allowed abortion in the first twelve weeks of pregnancy and allowed for it even later into the pregnancy if the woman's life is in danger or there is a fatal fetal abnormality. This policy is now much different from the abortion policy in Northern Ireland, whereas before the two jurisdictions of Ireland had very similar legislation and were seen by the international community as violating human rights.

F. Collapse of N.I. Power-Sharing

In 2017, a corruption scandal hit Northern Ireland in the power-sharing government that led to its collapse, and it had not been reestablished until the 11th of January 2020. Under the Good Friday Agreement, Northern Ireland is required to have a power-sharing government that has a First Minister and a Deputy First Minister, each represent the two sides of the sectarian conflict. In addition, Northern Ireland is supposed to have a legislature (Stormont) that makes the major decisions for Northern Ireland, such as abortion regulations. Since the collapse of the two First Ministers and Stormont, parliament members have continued to occupy their seats in the British parliament, such as the Democratic Unionist Party ("DUP"), and Stormont has not been in session. Legislation for Northern Ireland has been handled in Westminster since the collapse of the Northern Irish government. Now policies are not just driven by internal politics within Northern Ireland between the DUP and Sinn Féin, but rather are being dictated by various interests between British political parties. Changing Members of Parliament (MP) opinions on abortion in Great Britain is what led to the

⁵⁰ *Id.*

⁵¹ See generally CEDAW Committee Report, *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW Doc. C/OP.8/GBR/1 (23 Feb. 2018).

abortion amendment being added to the Northern Ireland (Executive Formation) Act of 2019.

G. Amendment in Parliament

Public opinion about abortions had been changing since mid-twentieth century throughout the United Kingdom, and this includes public opinion in Northern Ireland. However, the legislation had never been changed. In 1967 throughout the rest of the UK, abortions were decriminalized and were allowed in a broader range of circumstances.⁵² There was a general mental health reason that many doctors used in order to legally perform an abortion.⁵³ In Northern Ireland that was not the case. The abortion ban as it was written in 1861 was still in effect. The DUP and Sinn Fein have never tackled the issue of abortion because of many conservative views from both parties, especially in regard to women's rights. However, this is not the case throughout the rest of the UK, including a significant portion of the Northern Irish population, across sectarian lines. As stated before, the Northern Ireland legislature and executive has not been governing Northern Ireland since 2017. Because the Northern Irish government has not been re-established, British Parliament has been passing "Northern Ireland (Executive Formation) Acts" every so often in order to allow the DUP and Sinn Fein more time to come to an agreement and call for an election and appointment of new First Ministers. In July, the British Parliament passed such an act. On July 24, 2019, an amendment was added to the Northern Ireland (Executive Formation etc) Act 2019 that repealed the 1861 act.⁵⁴ The amendment stated:

(1) The Secretary of State must ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland. (2) Sections 58 and 59 of the Offences Against the Person Act 1861 (attempts to procure abortion) are repealed under the law of Northern Ireland. (3) No investigation may be carried out, and no criminal proceedings may be brought or continued, in respect of an offence under those sections under the law of Northern Ireland (whenever committed). (4) The Secretary of State must by regulations make whatever other changes to the law of Northern Ireland appear to the Secretary of State to be necessary or appropriate for the purpose of complying with subsection (1). (5) Regulations under subsection (4) must, in particular, make provision for the purposes of regulating abortions in Northern Ireland, including provision as to the circumstances in which an abortion may take place. (6) Regulations under subsection (4) must be made so as to come into force by 31 March 2020 (but this does not in any

⁵² Abortion Bill 1967, HL Bill.

⁵³ *Id.*

⁵⁴ Northern Ireland (Executive Formation) Act 2019 c. 22, § 9.

way limit the re-exercise of the power). (7) The Secretary of State must carry out the duties imposed by this section expeditiously, recognising the importance of doing so for protecting the human rights of women in Northern Ireland. (8) The Secretary of State may by regulations make any provision that appears to the Secretary of State to be appropriate in view of subsection (2) or (3). (9) Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly.⁵⁵

This went into effect on October 22, 2019 since the power-sharing government had not been reestablished in time.⁵⁶ However, if the government of Northern Ireland reestablishes after the law takes effect, they can still repeal the legislation.⁵⁷ In the days leading up to the amendment taking effect, the DUP attempted to call Stormont into session in order to block the legalization of abortion and same sex marriage.⁵⁸ They stated that their first order of business once they are back in session is to repeal the legislation.⁵⁹ However, under international law it is clear that they should not be allowed to commence such action since it would violate several treaty obligations.

On January 11, 2020, as a last ditch effort to stop abortion and same-sex marriage from being officially implemented in Northern Ireland, Stormont was reconvened for a short period of time through a deal struck by the DUP and Sinn Fein to attempt to reestablish a power sharing government.⁶⁰ This reconvening also came the day before the official exit of the United Kingdom from the European Union, without an Irish backstop.⁶¹ The effort to squash the decriminalization in Northern Ireland ultimately failed and there were not enough votes and support to overturn abortion or same-sex marriage.⁶² It should be noted that there were rumors in December of deals surrounding Brexit and abortion in Northern Ireland being struck between DUP Members of Parliament and Boris Johnson, Prime Minister.⁶³ Due to Stormont's failure, the interim guidelines

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Abortion: NI politicians' bid to halt law changes fails*, BBC (Oct. 21, 2019), <https://www.bbc.com/news/uk-northern-ireland-50115449>.

⁵⁹ *Id.*

⁶⁰ Peter Taggart, Angela Dewan & Rob Picheta, *Arlene Foster becomes First Minister after Northern Ireland power-sharing deal reached*, CNN (Jan. 9, 2020), <https://www.cnn.com/2020/01/09/uk/northern-ireland-uk-agreement-gbr-intl/index.html>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

continued to be in effect until March 31, 2020, and the new permanent guidelines went into effect on March 31.⁶⁴

H. Interim Guidelines

From October 22, 2019, when the amendment went into effect, the British government, not the Northern Irish government at Stormont, issued interim guidelines to doctors, which were in effect until March 31, 2020 when the official permanent regulations were issued and came into effect⁶⁵. The interim regulations were more closely related to the regulations under the original abortion ban under the Offenses Against the Person Act of 1961. Abortion was decriminalized on October 22, and therefore people could not be prosecuted for accessing services or ordering abortion pills online.⁶⁶ All pending prosecutions were also cancelled for anyone who had an abortion prior to October 22.⁶⁷ However, the Criminal Justice Act of Northern Ireland of 1995 was still in effect, which meant any abortion where the fetus could be born alive was still unlawful and abortions were generally not being provided⁶⁸, especially as the threat of coronavirus increased around the world and in particular in Northern Ireland.⁶⁹

No additional NHS abortion services were implemented during the interim period, but in the cases of fatal fetal abnormalities, a medical professional could provide treatment if they chose to.⁷⁰ These medical professionals are not under a duty to provide abortion care unless the woman's life is at risk.⁷¹ General practitioners can prescribe abortion pills, but again are under no obligation to do so, however, they are also no longer obligated to report anyone using abortion pills.⁷²

The trend has always been that Northern Irish and Irish women travelled to England to obtain an abortion, this continued under the interim guidelines as

⁶⁴ AMNESTY INTERNATIONAL UK, *Abortion decriminalised in Northern Ireland*, <https://www.amnesty.org.uk/abortion-rights-northern-ireland-timeline> (last visited Apr. 3, 2020).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

well.⁷³ This caused a huge economic and logical burden on women.⁷⁴ Under the interim regulations, however, the British government will cover all expenses related to the abortion, including the procedure, airfare, and lodging.⁷⁵ Generally speaking, the interim guidelines were not very different from the reality of the situation under the guidelines issued in accordance with the Offenses Against the Person Act of 1961, except for the ease of mind knowing you will not be prosecuted for having an abortion.

I. Governing Guidelines

The new official guidelines that were issued and went into effect on March 31, 2020 are drastically different from the old regulations. They still maintain a component of ideals from Northern Ireland due to the inclusion of a conscientious objection clause and a notification system⁷⁶, and an aspect of criminalization on medical professionals that do not comply in good faith with the new regulations.⁷⁷

The most glaring changes are the regulations of when abortions are allowed. As previously stated, before most abortions were only allowed in drastic life-saving situations.⁷⁸ Northern Ireland did not even allow for instances of rape, incest, or fatal fetal abnormalities.⁷⁹ In addition, anyone who obtained or performed an abortion was subject to criminal prosecution.⁸⁰ Now, the regulations allow for many more abortions, sometimes without conditions. The new regulation states:

The Regulations, coming into force by 31 March 2020, will make provisions for⁸¹:

1. Early termination of pregnancy - access without conditionality to abortion services up to 12 weeks gestation (11 weeks + 6 days).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ HM Government, “A new legal framework for abortion services in Northern Ireland Implementation of the legal duty under section 9 of the Northern Ireland (Executive Formation etc) Act 2019,” (March 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875380/FINAL_Government_response_-_Northern_Ireland_abortion_framework.pdf.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Author’s note: these Regulation provisions are discussed in non-numerical order to maintain the numbering from the original form. They are discussed by topic.

2. Termination of pregnancy up 24 weeks - access to abortion services up to 24 weeks gestation (23 + 6 days) in cases where the continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman or girl, greater than the risk of terminating the pregnancy.
3. Fetal abnormality - access to abortion services in cases of severe fetal impairment (SFI) and fatal fetal abnormalities (FFA) with no gestational time limit. This is where there is a substantial risk that the condition of the fetus is such that the death of the fetus is likely before, during or shortly after birth; or if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.
4. Risk to the woman or girl's life or risk of grave permanent injury – access to abortion services with no gestational time limit where there is a risk to the life of the woman or girl, greater than if the pregnancy were terminated, or where necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman or girl, including in cases of immediate necessity.⁸²

The clearest distinction is the fact that women can now have an abortion without conditions for up to 12 weeks into the pregnancy.⁸³ Abortions due to fatal fetal abnormalities can take place at any time during the pregnancy, which were not allowed at all before.⁸⁴ In addition, abortions are allowed up to 24 weeks if continuing the pregnancy would be more harmful than ending the pregnancy.⁸⁵ These provisions are vastly different than what was available to women even through the interim period starting on October 22.

In addition, to the provisions of when abortions being allowed, the government also outlined various provisions that apply to medical professions and their obligations. The new regulation states:

7. Certification of opinion - a certification process for all terminations in Northern Ireland. In relation to terminations carried out with no conditionality before 12 weeks gestation (or in a case of immediate necessity where there is a risk to the life of the woman or girl) the certificate will be signed by one medical professional certifying in good faith that the pregnancy has not exceeded 12 weeks gestation or that the termination is immediately necessary. For terminations on other grounds under the Regulations the certificate will be signed by two medical professionals certifying in good faith that one of the grounds has been met.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

8. Notification requirements - a duty on the medical professional to give notice of the termination and submit this with relevant data, specified in the Regulations, to the Chief Medical Officer at the Northern Ireland Department of Health. The Department of Health in Northern Ireland will then be responsible for annual publication of relevant data.
9. Conscientious objection - This framework for Northern Ireland will mirror the same statutory protection as under the Abortion Act 1967, meaning no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorized by the Regulations to which the person has a conscientious objection. The only exception will be where the participation in treatment is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman or girl.
10. Sanctions - The Regulations impose sanctions for terminating a pregnancy other than in accordance with the Regulations, with a failure to comply with the requirements will be a criminal offence punishable with a level five fine (up to £5000 in Northern Ireland). An intentional failure to comply with certification and notification requirements will be a criminal offence punishable with a level four fine (up to £2500 in Northern Ireland).⁸⁶

The certification of opinion, the notification requirement, conscientious objection, and the criminal sanctions apply to the action of medical professions that will be performing the abortion services. While the timeframes of the abortions have been liberalized, these provisions seem to hold onto the old regulations. While decriminalization has occurred in general, if a medical professional does not follow these guidelines, they still face criminal prosecution.⁸⁷

Other provisions in the regulation relate to where an abortion can be obtained and who can give an abortion:

5. Who can perform a termination - a registered medical practitioner licensed by the General Medical Council (a doctor), a registered nurse or a registered midwife will be able to perform a termination – referred to collectively as ‘medical professionals’.
6. Where procedures can take place - terminations to be carried out in General Practitioners premises, clinics provided by a Health and Social Care (HSC) trust, and HSC hospitals, operating under the overall Northern Ireland HSC framework and women’s homes where the second stage of early medical terminations may be carried out. The Regulations also provide a power for the Northern Ireland Health Minister to be able to approve further places where medical

⁸⁶ *Id.*

⁸⁷ *Id.*

abortion can be performed, with the power being able to be exercised at any point in time.

These provisions seem to increase the level of access women will have to procuring abortion services directly in Northern Ireland. These are liberal standards compared to the regulations in the United States and the TRAP laws that have been put forth in various states across the nation. In Northern Ireland, the regulations allow not only doctor to perform the services, but nurses and midwives as well,⁸⁸ and the regulations allow various medical settings to be used for such procedures and include women's own homes for early abortion pill use.⁸⁹ These new regulations that claim to be following CEDAW recommendations are vastly different from the abortion law in Northern Ireland prior to the implementation of these regulations, which clearly breached the United Kingdom's obligations under several treaties.

III. ANALYSIS

The international law that is binding upon the United Kingdom, and more specifically Northern Ireland, is clear. The regulation of abortion as it was before the implementation of the amendment to the Northern Ireland Formation Act was in violation of several treaties, including two major human rights treaties. Under the Good Friday Agreement, the abortion regulation violates the human rights section of the treaty. More specifically it violates a woman's right to equal opportunity, and it violates a person's right to religious freedom. Because of the Good Friday Agreement, the European Convention on Human Rights was entered into the domestic law of the United Kingdom and is binding on Northern Ireland. Under the ECHR, Northern Ireland has violated Article 8 of the treaty, which is supported by earlier ECHR decisions on very similar cases. In addition, Northern Ireland's abortion ban violated the Convention on the Elimination of All Forms of Discrimination Against Women. Specifically, Northern Ireland has violated the CEDAW's Part III Article 12.1. This has been confirmed by the CEDAW's own judiciary body. It is clear that binding international law holds that Northern Ireland has violated international human rights law through its conservative and burdensome abortion ban.

A. *Good Friday Agreement*

The Good Friday Agreement is a multi-party treaty between the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland. It was signed on Good Friday in 1998. A treaty, according to the Vienna Convention of 1969, is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single

⁸⁸ *Id.*

⁸⁹ *Id.*

instrument or in two or more related instruments and whatever in particular designation.”⁹⁰ A treaty can be referred to as a convention, agreement, treaty, accord, etc., carrying the same binding authority on all parties that have signed onto and ratified the treaty. The Good Friday Agreement was signed, ratified, and entered into the law of the United Kingdom in 1998. Each provision of the agreement is therefore binding.

The Good Friday Agreement lays out the relationship of Northern Ireland to Great Britain and Ireland. This includes the fact that Northern Ireland remained a part of the United Kingdom with Great Britain. Every provision that is binding on the United Kingdom also applies to Northern Ireland, such as the section on human rights. The laws of Northern Ireland need to be compatible with the human rights section of the Good Friday Agreement. In this case, Northern Ireland’s abortion laws cannot violate the Good Friday Agreement. Again, the Good Friday Agreement states:

The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular: the right of free political thought; the right to freedom and expression of religion; the right to pursue democratically national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to freely choose one’s place of residence; the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; the right to freedom from sectarian harassment; and the right of women to full and equal political participation.⁹¹

The main clauses that have barring on a woman’s right to choose to have an abortion are “the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity” and “the right to freedom and expression of religion.”

The idea of pregnancy affecting your “right to equal opportunity in all social and economic activity, regardless of...gender” is not a new one.⁹² A pregnancy can drastically affect a woman’s life. To carry a child is a medical decision, an economic decision, and a social decision. To carry a child for nine months affects a woman’s ability to participate equally with others, especially men, in all social and economic activity. If a man gets a woman pregnant, his life is not changed in the same way a woman’s life is changed.⁹³ He can still go to work full time and does not have to request time off for medical appointments. He does not have to pay for those medical appointments. His job is not endangered

⁹⁰ Vienna Convention on the Law of Treaties, May 23, 1968, 1155 U.N.T.S. 18232.

⁹¹ Good Friday Agreement, *supra* note 32.

⁹² *Id.*

⁹³ *Id.*

because he is expecting a child. He does not have to change his social behaviors. The abortion ban affects women in a discriminatory proportion compared to men, therefore her right to equal opportunity in all social and economic activity is violated based on gender under the Good Friday Agreement.

The Good Friday Agreement also required the European Convention on Human Rights (ECHR) to become domestic law throughout the United Kingdom. This was done through the Human Rights Act of 1998.

B. European Convention on Human Rights

Since the ECHR was added to domestic law in the United Kingdom in 1998, there is no question of its binding authority on the whole United Kingdom, especially Northern Ireland since the ECHR was adopted into law as a direct result of The Troubles in Northern Ireland. There is no question that the ECHR applies to Northern Ireland.

The Human Rights Act of 1998 adopted the major “Convention Rights” of the ECHR, which includes Article 8. Article 8 states, “Everyone has the right to respect for his private and family life, his home and his correspondence.”⁹⁴ The right to terminate a pregnancy falls under the article. The decision to have or not have children is a private decision and a decision that directly affects family life. In various cases the European Court of Human Rights, the main judicial body of the European Convention of Human Rights, has held that the right to terminate abortion falls under Article 8 of the ECHR. In various cases the Court held that nations with similar abortion laws to Northern Ireland have violated Article 8.

However, those in support of the criminalization of abortion can claim that another section of Article 8 can support state interference and ban of abortion:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁹⁵

Some groups have made the argument that this caveat would allow a country to ban abortion for the protection of health and morals or to protect the rights of an unborn fetus. This include groups that support the abortion ban in Northern Ireland remaining the same. Again, Northern Ireland’s abortion ban does not allow for an abortion even in the cases of rape, incest, and fatal fetal abnormality. However, the Court of the ECHR does not follow that line of reasoning and instead hold nations in violation of Article 8, especially in cases where abortion is

⁹⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 33.

⁹⁵ *Id.*

not allowed in cases of rape, incest, and fatal fetal abnormality, such as the case in Northern Ireland.

For example, *A., B. and C. v. Ireland*, one of the three applicants won their case because of this section of Article 8.⁹⁶ This case is key in the application of the ECHR to domestic law in Ireland. In *A., B. and C. v. Ireland*, the Court of the ECHR ruled that Northern Ireland's policy was in direct violation of the treaty because of its lack of fatal fetal abnormality expectation:

Three women living in Ireland, who became pregnant unintentionally, complained that, because of the impossibility of obtaining a legal abortion in Ireland, they had to go to the United Kingdom for an abortion and that the procedure was humiliating, stigmatizing and risked damaging their health. One of the applicants in particular, in remission from a rare form of cancer and unaware that she was pregnant, underwent checkups contraindicated in pregnancy. She understood that her pregnancy could provoke or lapse and believed that it put her life at risk. The Court found that Ireland had failed to implement the constitutional right to a legal abortion. There had therefore been a violation of Article 8...of the Convention concerning the applicant in remission from cancer...The Court noted in particular the uncertainty surrounding the process of establishing whether a woman's pregnancy posed a risk to her life and that the threat of criminal prosecution had a 'significant chilling' effect both on doctors and the women concerned.⁹⁷

The fetus will never be completely viable. If carried to full term, the fetus will either be still-born or will not last passed a few hours or days. The fetus is not being protected by enforcing this strict and unnecessary policy. Instead the policy only puts undue emotional and economic burdens on the woman who is pregnant. The Court in this case has directly ruled on Ireland's ban on abortion and has deemed it to be invalid under Article 8 in the case of fatal fetal abnormality, which was extremely similar to Northern Ireland's abortion ban.

In addition, there is not a right to life to protect for that fetus under the ECHR. In *Vo v. France*, the court will not say there is a right to life for a fetus, but the ECHR is clear that there is right to life for the woman carrying the fetus:

Owing to a mix-up with another patient with the same surname, the applicant's amniotic sack was punctured, making a therapeutic abortion necessary. She maintained that the unintentional killing of her child should have been classified as manslaughter. The Court held that there had been no violation of Article 2 (right to life) of the Convention. It found that it was not currently desirable or possible to rule on whether an unborn child was a person under Article 2 of the Convention. And, there was no need for a criminal law remedy;

⁹⁶ *A., B. and C. v. Ireland*, *supra* note 39.

⁹⁷ *Id.*

remedies already existed allowing the applicant to prove medical negligence and to seek compensation.

They held that the right to life was not violated and that they would not say that a fetus had a right to life.⁹⁸ This further dismantles the possibility that section 2 of Article 8 could be used as a means to maintain the abortion ban in Northern Ireland.

In another ECHR case, the Court ruled on a similar abortion ban in Poland and fatal fetal abnormality again. In *R.R. v. Poland*:

A pregnant mother-of-two – carrying a child thought to be suffering from a severe genetic abnormality – was deliberately denied timely access to the genetic tests to which she was entitled by doctors opposed to abortion. Six weeks elapsed between the first ultrasound scan indicating the possibility that the fetus might be deformed and the results of the amniocentesis, too late for her to make an informed decision on whether to continue the pregnancy or to ask for a legal abortion, as the legal time limit had by then expired.⁹⁹

This case further supports the ECHR's position on the types of abortion bans it deems to be in violation of Article 8, which would include Northern Ireland's ban.

In the case of rape and incest, a state, such as Northern Ireland, should not be able to ban abortion. The ECHR has also ruled on this issue on the same Poland policy discussed above. In *P. and S. v. Poland*,

This case concerned the difficulties encountered by a teenage girl, who had become pregnant as a result of rape, in obtaining access to an abortion, in particular due to the lack of a clear legal framework, procrastination of medical staff and also as a result of harassment. The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention. It found in particular that the applicants had been given misleading and contradictory information and had not received objective medical counselling; and, the fact that access to abortion was a subject of heated debate in Poland did not absolve the medical staff from their professional obligations regarding medical secrecy.¹⁰⁰

Under the ECHR, an abortion ban has to include an exception for rape, which the Northern Ireland law does not provide for. This further shows that the abortion ban in Northern Ireland violates Article 8 of the ECHR.

It is not only the European Court on Human Rights that adjudicates on the ECHR. Under the Good Friday Agreement Northern Ireland's High Court can also hear cases from private individuals against the state concerning abortion. For example, Sarah Ewart's case was finally decided by the High Court in Belfast on

⁹⁸ *Vo v. France*, *supra* note 43.

⁹⁹ *R.R. v. Poland* *supra* note 44.

¹⁰⁰ *P. and S. v. Poland* *supra* note 45.

October 3, 2019. The Court decided that Northern Ireland's abortion ban was incompatible with the human rights outlined in Article 8 of the ECHR.

When the High Court in Northern Ireland or the Supreme Court of the United Kingdom decides to hear a case to decide a statute's compatibility with human rights, they must give leniency to the government as much as possible, however, eventually the Court will decide on the case. If the statute is found to be incompatible, as a last resort the court will make a formal declaration of incompatibility. However, there is a problem with the enforcement of this declaration. "A declaration by a court (High Court or above) that a statute (or part of a statute) is incompatible with the European Convention on Human Rights. Before making such a declaration, the court must try to interpret or give effect to the legislation 'so far as it is possible to do so...in a way which is compatible with the Convention rights. A declaration of incompatibility does not in itself invalidate the legislation but a fast-track procedure can be used by the government to ensure that Parliament amends it.'"¹⁰¹ The court's declaration does not force Parliament or Stormont to change the statute.

This has been a particular problem in the past. There have been two cases heard by the High Court on abortion prior to their recent ruling on Sarah Ewart's complaint.¹⁰² In the past the High Court has either refused to decide on a declaration of incompatibility or in the earlier case, stated there was not an incompatibility.¹⁰³ The changing attitudes and the changing make-up of the High Court has aided in changing the decisions handed down by the Court. The Court went from denying the claim, to not ruling on the claim but recognizing the merits, to now ruling in Sarah Ewart's favor. However, the decision on Sarah Ewart's case cannot force the Stormont legislature to decriminalize abortion. Nevertheless, it is still clear from the ECHR and its case law that abortion cannot be criminalized in Northern Ireland and the lack of access for women is problematic under human rights law. The ECHR is not the only human rights treaty that supports that abortion must be decriminalized in Northern Ireland.

C. *Convention on the Elimination of Discrimination Against Women*

The Convention on the Elimination of Discrimination Against Women (CEDAW) is a human rights treaty similar to the ECHR, however, it has been signed by more than European countries and it focuses on the gender equality because that has been a gap in human rights law. Under the CEDAW, Northern Ireland is required to decriminalize of abortion. The Convention on the Elimination of Discrimination Against Women was signed in 1971 as a means to

¹⁰¹ *The Declaration of Incompatibility*, OXFORD DICTIONARY OF LAW (8th ed. 2015).

¹⁰² Elizabeth Nelson, *Northern Ireland's abortion ban is finally crumbling. Even if some won't accept it*, THE GUARDIAN (Oct. 3, 2019), <https://www.theguardian.com/commentisfree/2019/oct/03/northern-ireland-abortion-ban-sarah-ewart-high-court>.

¹⁰³ *Id.*

stop the inequality between genders throughout the world. The United Kingdom ratified the treaty in 1986, which makes the treaty binding on Northern Ireland. The treaty included a specific provision on women's health care, including a specific section on reproductive care. Part III Article 12.1 of the CEDAW states, "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."¹⁰⁴ A similar analysis that was applied to the ECHR's section on private family life can apply here, but the CEDAW statement is actually even more specific than the ECHR. This section of the CEDAW is comparable with ECHR's Article 8. It is clear that both sections of these treaties mean that the decision to have or not have children is a private decision and a decision that directly affects family life.

However, unlike the ECHR, the CEDAW puts a focus on reproductive health and family planning not just the right to make private decisions in regard to having a family. In addition, the CEDAW does not have the same caveat that the ECHR has that states countries can regulate the right to privacy, and other rights, if it impedes national security, morals, etc. Therefore, the CEDAW is even more straightforward on its stance that the Northern Irish ban on abortion violates the United Kingdom's and Northern Ireland's treaty obligations.

The CEDAW directly references family planning and health services, not just the broad concept of the right to privacy and private decision that is found in the Good Friday Agreement. The right to family planning includes abortion under the CEDAW.¹⁰⁵ The right to family planning means the right to have children and the right to not have children.¹⁰⁶ The Committee, the main judiciary body of the Convention, has interpreted clearly what this right to health care and family planning means for a country's obligations:

Upholding the right to health for women and girls requires health services, including sexual and reproductive information, counselling and services that are available, accessible, affordable and of good quality. The Committee has observed that failure of a State party to provide services and the criminalization of some services that only women require is a violation of women's reproductive rights and constitutes discrimination against them.¹⁰⁷

The treaty is clear. Women have the right to safe and effective reproductive health care, which includes abortion. The Committee expressly states that criminalization of services dealing with women's health care is strictly prohibited—the exact thing which has occurred to abortion in Northern Ireland. While the

¹⁰⁴ CEDAW, *supra* note 46.

¹⁰⁵ CEDAW, *Statements of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health rights: Beyond 2014 ICPD review* (Feb. 10-28, 2014).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Committee has released these interpretations of the CEDAW, they also give judiciary opinions under the Optional Protocol.

The Optional Protocol to the CEDAW was signed by 80 countries in 1999. The United Kingdom signed on to the Optional Protocol in 2004.¹⁰⁸ The Optional Protocol established a complaint and inquiry system that is directly binding on signatories.¹⁰⁹ Individuals can bring human rights complaints against countries, and then the Committee investigates and determines if there has been a problem and whether human rights have been violated.¹¹⁰ The reports completed by the Committee are then binding on the states that were under investigation. The expectation is that the state cooperates with the investigation throughout the whole process and then implements any changes CEDAW requires in the report they issue.

In 2010, such a complaint was filed against the United Kingdom in regard to the lack of safe and accessible abortion and birth control in Northern Ireland.¹¹¹ The organizations that submitted the complaint, The Family Planning Association, Northern Ireland Women's European Platform, and the Alliance for Choice¹¹², had very specific complaints in regard to the status of abortion in Northern Ireland. The committee's report states:

The sources submit that in NI, assisting with or procuring an abortion is criminalized, punishable by a maximum sentence of life imprisonment and the availability of abortion is highly restricted. They allege failure of the UK, *inter alia*, to: (a) establish a comprehensive legal framework to protect and guarantee NI women's right to abortion; (b) ensure that NI women are not exposed to the health risks of unsafe abortion; and, (c) address social, practical and financial obstacles in accessing abortion, which disproportionately affect rural women. The sources allege that the legal framework on abortion discriminates against NI women. Further, accessing abortion is impeded by the prevailing "anti-choice" rhetoric in churches, schools and local politics.¹¹³

The organizations felt that the legal framework was illegal not only under CEDAW, but also that cultural and social policies impeded abortion.¹¹⁴ In essence, they claimed it was not enough to decriminalize abortion, but rather make it an accessible choice for women. It is a well-documented fact that the

¹⁰⁸ Optional Protocol to CEDAW, *supra* note 46.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ CEDAW Committee Report, *supra* note 51, at 1.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 12.

policy in Northern Ireland has not stopped women from having abortions, but it has thwarted their ability to have safe and economically reasonable abortions.¹¹⁵

Critics charge that because there is no enforcement mechanism, these reports do not do much to change the status of women in various signatory states. However, this is the case of all international law. In addition, it is the only mechanism that people have to hold their governments accountable for violating human rights treaties when domestic routes fail them. States do respond to the judgements of international bodies like the Committee for several reasons, such as maintaining their international reputation and to not face backlash from other countries. Ultimately, the Parliament in the UK eventually responded to the CEDAW Committee by placing their recommendation into the amendment to the Northern Ireland Formation Act of 2019.

These recommendations came from a report that the Committee released after completing their investigation that began in 2016. The Committee released their “Report of the Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women” in 2018.¹¹⁶ The Committee declared that Northern Ireland’s abortion laws were in direct violation of the CEDAW.¹¹⁷ They first addressed Northern Ireland’s assertion that the fact that they allow abortion in some rare circumstances.¹¹⁸ The Committee said it was not enough:

[D]espite legal provision for abortion in very limited circumstances, de facto limitations render access to abortion virtually impossible. This includes: (a) geographical and institutional limitation of services; (b) ambiguity regarding the circumstances for performing a legal abortion; (c) clinicians’ unwillingness to perform abortions due to intimidating and hostile working environments resulting from threats of prosecution; and, (d) impunity of anti-abortion protestors for assaults perpetrated against women seeking abortion.¹¹⁹

The Committee is clear that the rare circumstances do not actually provide women with proper access to abortion care.¹²⁰ The Committee also declares that Northern Ireland women travelling to other parts of the UK or other countries is not an acceptable alternative to actual abortion access because of the “heavy financial, emotional, and logical burden.”¹²¹

¹¹⁵ *Id.* at 15-16.

¹¹⁶ *Id.* at 1.

¹¹⁷ *Id.* at 16.

¹¹⁸ *Id.* at 4.

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.* at 3.

¹²¹ *Id.* at 7.

The Committee then attacked the fact that Northern Ireland's abortion laws do not even allow an abortion to be performed in cases that involve rape, incest and fatal fetal abnormality¹²². They concluded:

the NI legal and policy framework criminalizing abortion deprives women of any real choice in influencing circumstances affecting their mental and physical health. Being forced to either continue a pregnancy, particularly in grievous situations of FFA, rape and incest, as well as for children and poor women, or to travel to receive intimate care in unfamiliar surroundings in the absence of support networks, do not represent reasonable or acceptable options. Both avenues entail significant physical and psychological suffering.¹²³

Next, the Committee stated that the law as it stands now does not allow women and girls a chance to have a say in their own family planning, a right that has been declared by many human rights treaties throughout the twentieth century.¹²⁴

The United Kingdom is bound by the treaty to make sure that Northern Ireland is in compliance with the CEDAW recommendations.¹²⁵ According to the Committee "The Vienna Convention on the Law of Treaties provides in article 27 that a party to a treaty may not invoke the provisions of its internal law as a justification for its failure to perform it."¹²⁶ It is clear that this international treaty, the ECHR, and the Good Friday Agreement requires the legalization of abortion in Northern Ireland.

D. Interim Guidelines

While they were meant as interim provisions, the UK and Northern Ireland were still bound to meet treaty obligations, in particular the CEDAW Recommendations, when issuing guidelines. The interim guidelines, while an improvement on the old regulations in regard to decriminalization and access for women, still do not meet all the requirements from the CEDAW itself or the Committee's recommendations.

First, the interim guidelines did not provide for abortion in circumstances of rape and/or incest.¹²⁷ This goes against the CEDAW, which stated "[u]pholding the right to health for women and girls requires health services, including sexual and reproductive information, counselling and services that are available, accessible, affordable and of good quality"¹²⁸ and the Committee who stated:

¹²² *Id.* at 2.

¹²³ *Id.* at 10.

¹²⁴ *Id.* at 12.

¹²⁵ *Id.* at 19.

¹²⁶ *Id.* at 12.

¹²⁷ AMNESTY INTERNATIONAL UK, *supra* note 65.

Being forced to either continue a pregnancy, particularly in grievous situations of FFA, rape and incest, as well as for children and poor women, or to travel to receive intimate care in unfamiliar surroundings in the absence of support networks, do not represent reasonable or acceptable options. Both avenues entail significant physical and psychological suffering.¹²⁹

The CEDAW itself and the Committee each declare that women need access to proper health services, and anything short of that, especially in the case of rape and incest, causes harm to the woman both physically and mentally.¹³⁰ By leaving out a provision for rape and incest, the UK and Northern Ireland in their interim guidelines continued to breach their treaty obligations.

In the case of fatal fetal abnormalities, the interim guidelines did provide the ability for medical professionals to perform an abortion in that instance, however, there is no duty for the medical profession to perform the abortion.¹³¹ This could lead women to going from doctor to doctor in Northern Ireland trying to find someone who will terminate her pregnancy with a child that will not survive. This leads to longer suffering at least on the part of the pregnant woman if not other people within her family and friends, which does not seemingly go along with the goal and message of the CEDAW completely. Especially when the committee claimed the harm caused by the lack of abortion access for women in the cases of rape and incest is the same harm caused by the lack of abortion access for the women in the cases of fatal fetal abnormalities.¹³²

The interim guidelines did meet some of the CEDAW recommendations through the cancellation of prosecutions¹³³ and through the United Kingdom government providing monetary support to women who still needed to travel to England for their abortion.¹³⁴ That did alleviate the burden of costs, however, there is still the emotional burden that the Committee wished for the UK and Northern Ireland to address in new regulations.¹³⁵ There is also a problem with access to traveling for an abortion, especially in the cases of minors, women with disabilities, ailments that prevent them from traveling, and therefore need abortion care in Northern Ireland, which was still not provided under the interim guidelines despite the requirements from the CEDAW Recommendations.¹³⁶ This was

¹²⁸ CEDAW, *supra* note 46.

¹²⁹ CEDAW Committee Report, *supra* note 51, at 10.

¹³⁰ CEDAW, *supra* note 46; CEDAW Committee Report, *supra* note 51, at 10.

¹³¹ AMNESTY INTERNATIONAL UK, *supra* note 65.

¹³² CEDAW Committee Report, *supra* note 51, at 17-18.

¹³³ AMNESTY INTERNATIONAL UK, *supra* note 65.

¹³⁴ *Id.*

¹³⁵ CEDAW Committee Report, *supra* note 51, at 18-19.

particularly made clear as the number of cases of coronavirus increased throughout the world, making travel impossible since at least since mid-March 2020.¹³⁷ Access was a major point of contention for the Committee and had called out the old regulations in Northern Ireland for claiming to be accessible, but were, in reality, causing many women to not be able to obtain an abortion even if they met the qualifications.¹³⁸ While these interim guidelines were improvement on the previous regulations, they still breached international treaty obligations several times. The official guidelines that went into effect on March 31, 2020 are an extreme improvement on these interim guidelines, however, there are still some instances that can be considered a breach of the CEDAW and the Committee's recommendations.

E. Governing Guidelines

While the DUP tried to stop the implementation of abortion in Northern Ireland, their attempt when they reconvened Stormont failed in January 2020¹³⁹ and the UK government through the Minister of State, Northern Ireland Office, drafted new legal framework for abortion that went into effect on March 31, 2020.¹⁴⁰ The new legal framework addressed the recommendations of the Committee and did meet the minimum requirements of the more pressing recommendations such as the new timeframe for obtaining abortion care, however, one of the regulations still criminalizes the actions of medical professional and does not completely meet the Committee's recommendations. In addition, there are other issues in the Committee's recommendations that the new legal framework failed to address as of yet and delegated to local authorities in Northern Ireland who devised the old regulations under the Offense Against the Persons Act of 1861. This raises concerns that these particular recommendations from the Committee will go unaddressed and continue to breach the CEDAW and the UK and Northern Ireland's treaty obligations. The reality of access under these new guidelines has also been called into question due to the COVID-19 pandemic, especially in regard to early abortion pills and the requirement of taking the pills at an approved location under the new regulations.

The new 12-week framework that allows women and girls to obtain an abortion without conditionality¹⁴¹ is a large stride forward for abortion access in Northern Ireland and at face value seems to meet the minimum standards set by the CEDAW recommendations. However, in their legal framework the

¹³⁶ AMNESTY INTERNATIONAL UK, *supra* note 65.

¹³⁷ *Id.*

¹³⁸ CEDAW Committee Report, *supra* note 51, at 11.

¹³⁹ Taggart, Dewan & Picheta, *supra* note 61.

¹⁴⁰ HM Government, *supra* note 76.

¹⁴¹ *Id.*

government admits that “[t]he CEDAW Report does not recommend gestational time limits in relation to these requirements”¹⁴² but claims that they meant to leave it up to the state’s discretion, however, the CEDAW recommendations do not explicitly state that. Some doctors worry about imposing this cut off for young girls who might not even know they are pregnant until after the 12-week mark due to the lack of sexual/reproductive health education in Northern Ireland,¹⁴³ which could breach the section of the CEDAW recommendations that state: “[m]ake age-appropriate, comprehensive and scientifically accurate education on sexual and reproductive health and rights a compulsory component of curriculum for adolescents, covering prevention of early pregnancy and access to abortion, and monitor its implementation”¹⁴⁴ and the general recommendation that Northern Ireland improve access to abortion in an actual sense.¹⁴⁵

In addition, the government did not outline a specific provision for instances of rape and incest, instead they feel that the 12-week period covers it:

The decision has been made to provide access to abortion services without any conditions up to 12 weeks to allow access for victims of sexual crime (i.e. rape and incest). We judge that this provision is proportionate and appropriate in order to avoid building a system that could lead to further trauma for victims of rape or incest or act as a barrier to access for victims of sexual crime. A barrier to access would, in the Government’s view, be a breach of the CEDAW requirements.¹⁴⁶

However, there is the question, again, of young girls who do not even realize they are pregnant after being raped until after 12 weeks or are too traumatized to see medical help during that time period. This might not completely fulfil the CEDAW recommendations for a provision for instances of rape and incest due to the physical and emotional trauma brought on by those pregnancies.¹⁴⁷

The new legal framework includes a sanctions section for the medical professionals performing abortion services. The new regulation states:

10.Sanctions - The Regulations impose sanctions for terminating a pregnancy other than in accordance with the Regulations, with a failure to comply with the requirements will be a criminal offence punishable with a level five fine (up to £5000 in Northern Ireland). An intentional failure to comply with certification and notification requirements will be a criminal offence punishable with a level four fine (up to £2500 in Northern Ireland).¹⁴⁸

¹⁴² *Id.*

¹⁴³ CEDAW Committee Report, *supra* note 51, at 10-11.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ HM Government, *supra* note 76.

¹⁴⁷ CEDAW Committee Report, *supra* note 51, at 18.

The charges are criminal charges, which directly goes against the CEDAW recommendation that states: “repeal sections 58 and 59 of the Offences against the Person Act, 1861, so that no criminal charges can be brought against women and girls who undergo abortion or against qualified health-care professionals and all others who provide and assist in the abortion.”¹⁴⁹ While the government did repeal those sections of the Offences against the Person Act of 1861, they added this section that does criminalize a medical professional. The government claims it does not breach the CEDAW recommendations when it states:

The CEDAW recommendations do not require unlimited access to abortion services. It is for the UK Government to set appropriate safeguards on the circumstances for provision of abortion services and determine how these will be enforced. We therefore considered what type of sanction would be most proportionate and appropriate.¹⁵⁰

However, that is not the reality of the situation. First, there is the conscientious objection standard¹⁵¹, which limits the number of medical professionals willing to perform abortion services, including prescribing pills, then add in criminal repercussions of not following the regulations exactly, this can discourage even more medical professionals, thus limiting access to abortion for women all over Northern Ireland. In addition, the language of the CEDAW recommendations are clear, no criminalization of any kind for patients or medical professionals.¹⁵² This regulation does criminalize some of those actions.

The CEDAW also recommended a general greater amount of access to abortion across Northern Ireland. In the past there had been a lack of access due to societal pressures¹⁵³, protests outside clinics¹⁵⁴, lack of logistical access in the rural communities¹⁵⁵, lack of sexual education¹⁵⁶, and lack of access to contraception.¹⁵⁷ All of these recommendations were not included in the regulations but rather left to local authorities such as the Department of Health and Department of Education in Northern Ireland.¹⁵⁸ The Northern Ireland

¹⁴⁸ HM Government, *supra* note 76.

¹⁴⁹ CEDAW Committee Report, *supra* note 51, at 18.

¹⁵⁰ HM Government, *supra* note 76.

¹⁵¹ *Id.*

¹⁵² CEDAW Committee Report, *supra* note 51, at 18.

¹⁵³ *Id.* at 16.

¹⁵⁴ *Id.* at 5.

¹⁵⁵ *Id.* at 14-17.

¹⁵⁶ *Id.* at 17.

¹⁵⁷ *Id.* at 14.

¹⁵⁸ HM Government, *supra* note 76.

Department of Health had overseen abortion services for decades and did not change regulations to meet obligations under international treaty law. The Department of Education, who has been in charge of sexual education policies for decades, did not change policies to meet international obligations either. These local departments kept the policies in check with the Offenses Against the Person Act of 1861 and the typical social and cultural attitudes of Northern Ireland. These areas listed above that were delegated to the local authorities still need to meet the CEDAW recommendations, and if they remain as they still are, then Northern Ireland and the UK will continue to be in breach of their treaty obligations.

The COVID-19 pandemic has also called into question the amount of abortion access that is actually readily available to women in Northern Ireland. It has shown flaws in the new legal framework in an emergency setting where no one readily accesses medical facilities due to health concerns and stay at home orders¹⁵⁹, and has shown flaws in the new system during an ordinary time where there are still people who have trouble accessing medical facilities for a variety of reasons such as health concerns,¹⁶⁰ economic burden,¹⁶¹ logistics,¹⁶² living in a rural area,¹⁶³ being a minor,¹⁶⁴ and societal pressures.¹⁶⁵ All of which have also been addressed above. This COVID-19 pandemic has especially shown problems with the administration of early abortion pills¹⁶⁶ and the requirement that women must take one of the pills in a medical facility and can take the second at home.¹⁶⁷ During stay at home orders, women cannot go to their medical professional for abortion pills due to the dangers of being in contact with COVID-19, and spreading the disease further. Therefore, a woman does not have access to abortion for the 12-week timeframe of no conditionality. It is stated by “the Royal College of Obstetricians and Gynecologists (RCOG) that, for early medical abortions, there is ‘no medical justification for drugs to be taken in a hospital or clinic setting’. ‘It is safer, more effective and better tolerated for women to

¹⁵⁹ Dr. Antony Lempert, *Northern Ireland’s new abortion guidelines are welcome but should have gone further*, NAT’L SECULAR SOCIETY, (Mar. 27, 2020), <https://www.secularism.org.uk/opinion/2020/03/northern-irelands-new-abortion-guidelines-are-welcome-but-should-have-gone-further>.

¹⁶⁰ See generally CEDAW Committee Report, *supra* note 51.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Lempert, *supra* note 159.

¹⁶⁷ HM Government, *supra* note 76.

administer the drugs in the privacy of their own residence.”¹⁶⁸ If it is not medically necessary for women to have to go into a medical facility for the first abortion pill normally, then this regulation is not increasing abortion access in a proper manner during a normal time or during a time of a medical emergency. Therefore, it does not meet the recommendation from the Committee for a general greater access for abortion care that is based on medical fact.

IV. CONCLUSION

Abortion as of October 22, 2019 is legal in Northern Ireland because of the amendment attached to the Northern Ireland Formation Act of 2019. When the amendment was first passed Sarah Ewart sat watching the vote on her T.V: ““I feel massively relieved, I feel like a weight has been lifted off my shoulders, this has been six years we have been trying to get some change and finally Westminster is going to act and give women here the healthcare we deserve.””¹⁶⁹

Months later she received the news from the High Court of Northern Ireland that she had won her case and they had deemed the law in Northern Ireland as incompatible with the ECHR. Ewart and other activists can take a breath for the first time in many years and begin to focus on how regulations will be implemented in the near future. However, the abortion issue is still far from fully settled in Northern Ireland.

In the few days before the amendment went into effect, the DUP attempted to quickly reorganize the legislature at Stormont in order to stop the legalization of abortion.¹⁷⁰ If they had been able to call the legislature into order, their first order of business was to repeal the Northern Ireland Formation Act of 2019.¹⁷¹ In the future, this action is still possible.

In their first act, the DUP and Stormont legislature could criminalize abortion again in Northern Ireland. They attempted to do just that in January 2020 when Stormont reconvened briefly before Brexit, however, the motion to criminalize abortion and same sex marriage failed.¹⁷² If they had succeeded, this would breach the Good Friday Agreement, the ECHR, and the CEDAW.

While the domestic law of Northern Ireland might be on the side of activists today, that might not always be the case. Especially under the new regulations, there have been great strides in increasing access to abortion services, however, some of the regulations do not completely meet the CEDAW recommendations. Activist and medical professionals that see the problems with

¹⁶⁸ Lempert, *supra* note 159.

¹⁶⁹ Nelson, *supra* note 102 .

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Taggart, Dewan & Picheta, *supra* note 61.

the new legal framework must look to international law. The international human rights treaties discussed throughout this Note would support the activists in their mission to maintain the legalization of abortion and to increase the amount of access to a basic human right.