Written submission from Dr Claire Lougarre (ANI0024)

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This submission focuses on the following questions:

**Q3 (1) What are the responsibilities of the UK Government under its international obligations for taking action to reform abortion law in Northern Ireland?**

And

**Q3 (2) How should these be reconciled to the UK’s devolution settlement?**

In this submission, I will first outline the obligations of the UK under international human rights law with regard to women’s access to abortion, as set in the United Nations and in the Council of Europe. I will then highlight how the UK should act with regard to its abortion law in Northern Ireland, in order to reconcile its current legislation, including its devolution settlement, with its international obligations.

This submission concludes that the UK is bound to various human rights treaties, all of which are progressively interpreted as obliging states to provide access to abortion services – especially when a pregnancy jeopardises the woman’s life and health, when it results from rape, and in instances of serious foetal abnormality. As a result, the UK should reform Northern Ireland abortion law in order to fulfil its international obligations.
I. Obligations of the UK in international human rights law to provide access to abortion services

A. Obligations of the UK as per United Nations standards

The United Kingdom has ratified various United Nations (UN) human rights treaties that embody rights crucial to women’s access to abortion:

- The International Covenant on Civil and Political Rights
  This treaty protects everyone’s freedom from cruel, inhuman and degrading treatment, as well as their right to life and right to privacy. It also prohibits gender discrimination (articles 3, 6, 7, 17)

- The International Covenant on Economic, Social and Cultural Rights
  This treaty protects everyone’s right to health, and it prohibits gender discrimination (articles 3 and 12).

- The Convention on the Elimination of All Forms of Discrimination against Women
  This treaty protects women’s right to health as well as their right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights. It also prohibits gender discrimination (articles 1, 2, 3, 5, 12 16)

All the UN human rights bodies mandated to interpret those treaties have interpreted the rights listed above, as obliging states to provide women with access to abortion services (particularly when the pregnancy jeopardises the woman’s life and health, when it results from rape, and in instances of serious foetal abnormality).

- The Human Rights Committee, when interpreting the International Covenant on Civil and Political Rights in its General Comment No. 28 on Article 3, The equality of rights between men and women (2000); and in its case law (Karen Noelia Llantoy Huamán v Peru, 2005; and Amanda Jane Mellet v Ireland, 2016).

- The UN Committee on Economic, Social and Cultural Rights, when interpreting the International Covenant on Economic, Social and Cultural Rights in its General Comment No. 22 on Article 12, The right to sexual and reproductive health.

- The UN Committee on the Elimination of Discrimination against Women, when interpreting the Convention on the Elimination of All Forms of Discrimination against Women in its General Recommendation No. 24 on Women and health; in General Recommendation No. 35 on Gender-based violence against women; and in its case law (T.P.F. v. Peru, 2011).

All of these UN human rights bodies agree that denial of abortion often results in maternal mortality and morbidity, due to the rise in numbers of unsafe abortions and the need to travel abroad to terminate a pregnancy. As a result, they all recognise that denials of abortion constitute a breach of women’s right to life and may also be a breach of their freedom from cruel, inhuman and degrading treatment, right to health, and/or right to privacy. All of these human rights bodies declare that states must, therefore
take measures to prevent unsafe abortions, including by decriminalising and liberalising restrictive abortion laws, and provide post-abortion care and counselling when needed. This is particularly emphasised in circumstances where pregnancies jeopardise women's lives and health, when they result from rape, and in instances of serious foetal abnormality.

**B. Obligations of the UK as per Council of Europe**

The United Kingdom has ratified various Council of Europe human rights treaties that embody rights crucial to women's access to abortion:

- The European Convention of Human Rights
  This treaty protects women's freedom from cruel or inhuman treatment, as well as their right to life and right to privacy. It also prohibits gender discrimination (articles 2, 3, 8, 14)

- The European Social Charter
  This treaty protects women's right to health, and it prohibits gender discrimination (articles 11, E).

The Council of Europe is quickly aligning with United Nations human rights standards regarding sexual and reproductive health, except with regard to abortion where progress is slower, but nonetheless bound to change.

**The European Court of Human Rights**

The European Court of Human Rights is mandated to monitor the implementation of the European Convention of Human Rights (ECHR), including two provisions that are often discussed in abortion cases: Article 3 on the freedom from ill-treatment and Article 8 on the right to private life.

*Article 3 of the ECHR on freedom from ill-treatment in abortion cases*

Since 2000, the European Court of Human Rights has held four Merits Judgments under Article 3 of the ECHR, concerning allegations of insufficient access to abortion services in Poland and in Ireland. No case on Northern Ireland abortion law has yet been brought to the attention of the Court.

In earlier cases involving Article 3 of the ECHR, the European Court of Human Rights has not been particularly protective of women who were denied access to abortion services. In the two cases *Tysiac v Poland* (2007) and *A., B. and C. v Ireland* (2010), the Court did not find that a denial of abortion services breached Article 3. However, in the cases *R.R. v Poland* (2011) and *P. and S. v Poland* (2012), it found that Article 3 had been breached. Here a violation of Article 3 was triggered by the obstruction by state authorities of the appellants' rights to a legal abortion – rather than the suffering caused by not accessing abortion services. The Court has not yet held that a lack of access to an abortion procedure where it is not legally available constitutes a breach of Article 3.
However, this position goes against a more recent decision of the UN Human Rights Committee, which held that women having to travel abroad from Ireland to terminate their pregnancies were subject to ‘conditions of intense physical and mental suffering’ likely to contribute to a breach of their freedom from inhuman treatment \( (Amanda Jane Mellet v Ireland, 2016, \text{para. 7.4}) \). This UN decision is likely to affect the rulings of the European Court of Human Rights in the future, since the Court frequently refers to UN human rights standards as ‘relevant international law’ in its judgments.

**Article 8 of the ECHR on the right to private life in abortion cases**

The four cases above were also considered under Article 8 of the ECHR. In the three Polish cases \( (\text{Tysiac v Poland, 2007; R.R. v Poland, 2011; and P. and S. v Poland, 2012}) \), the European Court of Human Rights found a violation of Article 8, and affirmed that the state was under a ‘positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion’.

In the Irish case \( (A., B. and C. v Ireland, 2010) \), where abortion was not legal at the time, the Court recognised that prohibiting abortion when women’s health or wellbeing is at stake represented an interference with women’s right to private life. Therefore, it considered that such interference could only be lawful if it was prescribed by law (here, the Irish Constitution), pursued legitimate aims (here, ‘the protection of morals’) and was necessary in a democratic society. The Court found that Ireland had not exceeded its margin of appreciation. The Court, nonetheless, contradicted itself in this case. It indicated that states’ margin of appreciation was normally restricted when a ‘particularly important facet of an individual’s existence’ was at stake [para. 23] but seemingly refused to apply this reasoning to women’s decisions to pursue a pregnancy.

These cases highlight that whilst the European Court of Human Rights is willing to protect women’s autonomy in cases where the implementation of abortion laws is problematic, it has not yet extended this protection to cases where the law itself was being challenged. However, the Court could rely on General Comment No. 22 on the right to sexual and reproductive health (2016), recently drafted by the UN Committee on Economic, Social and Cultural Rights, in order to further protect women’s autonomy. This is a strong possibility since the Court frequently refers to UN human rights standards as ‘relevant international law’ in its judgments.

**The European Committee of Social Rights**

The European Committee of Social Rights is mandated to monitor the implementation of the European Social Charter (ESC), including one provision that is often discussed in abortion cases: Article 11 on the right to health. The Committee is silent so far on the issue of abortion when commenting on periodic states’ reports on the implementation of the European Social Charter. However, it has discussed this issue on several occasions through its collective complaints procedure, a procedure allowing NGOs to bring cases before the Committee regarding allegations of violations of the European Social Charter. The UK has not ratified the Additional Protocol providing for a system of collective complaints, allowing NGOs to bring complaints against states for alleged violations of the ESC. Collective complaints cannot be brought against the UK as a result,
but the European Committee of Social Rights has made comments on other countries which are relevant. In the case *International Planned Parenthood Federation European Network v Italy* (2013), the European Committee of Social Rights accepted that access to abortion services be associated with the right to health, and even referred to key UN documents in this respect, when examining relevant international law. It also recognised that Article 11 of the ESC imposed positive obligations upon states, including the obligation to provide ‘appropriate and timely health care on a non-discriminatory basis, including services relating to sexual and reproductive health’, and the obligation to care for ‘the specific health needs of women’ [para. 66]. Such assertions were repeated in the case *Confederazione Generale Italiana del Lavoro v Italy* (2015) and could clearly also apply to Northern Ireland abortion law. However, in these cases the Committee relied heavily on the fact that the state had legalised access to abortion to avoid making a more assertive ruling regarding women’s right to access abortion services. It even justified the relevance of the right to health on the ground that ‘national legislation has classified [abortion] as a form of medical treatment that relates to the protection of health and individual well-being’ in *International Planned Parenthood Federation European Network v Italy* (2013) [para. 161]. It is, therefore, unclear whether the connection between access to abortion and the right to health reflects a definite human rights norm, or whether it is conditioned by states’ abortion laws. In the latter hypothesis, the Committee could potentially find states with restrictive abortion laws in compliance with Article 11 of the ESC, as long as women’s access to abortion remained guaranteed in the very few exceptions allowed by the national legislation, as is the case in Northern Ireland.

In a subsequent judgement (*Federation of Catholic Families in Europe (FAFCE) v Sweden*, 2015), the Committee specified that Article 11 of the ESC on the right to health prioritised women’s access to abortion services over the right of conscientious objectors in Sweden’s healthcare system. However, it is still unsure whether the European Committee of Social Rights would protect women’s rights over states’ legislation in cases where the law itself restricts access to abortion services.

That being said, the Committee is more likely to follow the overall direction taken by international human rights law by further protecting women’s access to abortion services. It frequently examines UN standards and European Court of Human Rights’ judgments as ‘relevant law’ in its decisions, and tends to be influenced by their findings.

## II. The necessity for the UK to reform abortion law in Northern Ireland

### A. Calls from the United Nations

The UK sends periodic reports to UN human rights bodies on the implementation of UN human rights treaties it has ratified, following which UN human rights bodies express comments in documents called ‘Concluding Observations’. When examining the ‘Concluding Observations’ of the three UN human rights bodies discussed above over the past decade, it is notable that they all regularly express concern regarding Northern Ireland abortion law. All three UN human rights bodies highlight that by maintaining this legislation, the UK violates women’s rights and that as a result, it must reform Northern Ireland abortion law.
No case involving the Northern Ireland abortion law has yet come to the attention of the Committee on the Elimination of Discrimination Against Women. However, previous case law from this Committee highlights that states denying access to abortion can breach women’s right to health, a rationale which could apply to the UK’s situation. It is worth noting that no case can be brought against the UK before the Human Rights Committee or the Committee on Economic, Social and Cultural Rights given the UK has not ratified the relevant Optional Protocols. Were the UK to ratify those instruments, individuals would be able to bring complaints before UN human rights bodies once they have exhausted all local remedies. In such cases, any challenge to the Northern Ireland abortion law is likely to be successful.

B. Calls from the Council of Europe

No case involving the Northern Ireland abortion law has yet come to the attention of the European Court of Human Rights. However, its case law on abortion demonstrates a progressive recognition that denying women access to abortion can constitute a breach of their freedom from torture and cruel, inhuman and degrading treatment, and a breach of their right to privacy. At present NGOs cannot bring collective complaints against the UK before the European Committee of Social Rights because the UK has not ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. However, previous case law from this Committee highlights that states denying access to abortion can breach women’s right to health. This rationale could apply to the UK in the comments formulated by the European Committee of Social Rights following UK periodic reports on the implementation of the European Social Charter. This could also provide a challenge to the abortion law in Northern Ireland in collective complaints, should the UK chose to ratify the Additional Protocol.

Conclusion

UN human rights bodies urge states to reform restrictive abortion laws in order to protect women’s freedom from ill-treatment, right to life, right to privacy, right to health, and freedom from gender discrimination. More precisely, they regularly express concerns regarding the decision of the UK to maintain Northern Ireland abortion law and its impact on women’s rights. These comments point towards a failure of the UK to comply with: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention on the Elimination of All Forms of Discrimination against Women.

Both the European Court of Human Rights and the European Committee of Social Rights clearly integrate UN human rights standards in their abortion case law, by examining these standards as ‘relevant international norms’. This has resulted in a slow and steady alignment with UN standards and further protection of women’s access to abortion services in their case law on Ireland, Poland, Italy and Sweden. As a result, the UK is
potentially in violation of the European Convention on Human Rights and the European Social Charter if it fails to reform Northern Ireland abortion law following this enquiry.

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