



DAY OF GENERAL DISCUSSION
ON THE FORMULATION OF A GENERAL COMMENT ON
“THE RIGHT TO SEXUAL AND REPRODUCTIVE HEALTH”

UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

UNITED NATIONS, GENEVA
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SUBMITTED BY

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The Committee on Economic, Social and Cultural Rights (CESCR) has called for written submissions on the themes proposed for the Day of General Discussion, to be held in Geneva on Monday, November 15, 2010. The themes proposed include definitions and elements of the right to sexual and reproductive health, and legal aspects and state obligations. The Committee has declared that the Day of General Discussion is part of the preparatory work leading to the formulation of a general comment on “the right to sexual and reproductive health.”

The Catholic Family & Human Rights Institute (C-FAM)’s Center for Legal Studies and the Alliance Defense Fund (ADF) make this submission in response to the CESCR’s call.

C-FAM was founded in the summer of 1997 in order to monitor and affect the social policy debate at the United Nations and other international institutions. C-FAM is a non-partisan, non-profit research institute dedicated to reestablishing a proper understanding of international law, protecting national sovereignty and the dignity of the human person.

ADF is a not-for-profit international legal alliance of more than 1700 lawyers dedicated to the protection of fundamental human rights. ADF has argued cases before the United States Supreme Court and the European Court of Human Rights. It has also provided expert testimony to the European Parliament and United States Congress. ADF has full accreditation with the United Nations' Economic and Social Council (ECOSOC), as well as the Organization for Security and Co-operation in Europe and the European Union (Fundamental Rights Agency and European Parliament). As a result, ADF is fully versed in rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the international law issues that bear upon this submission.

The following submission asserts that the CESCR has no authority under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to issue a general comment on the right to sexual and reproductive health. Furthermore, even if the CESCR did possess such authority pursuant to the ICESCR, a right to sexual and reproductive health does not encompass a right to abortion.

I. ICESCR BOTH EMPOWERS THE CESCR AND LIMITS THE SCOPE OF ITS REVIEW

The CESCR was created via Economic and Social Council (ECOSOC) resolution,¹ in order to facilitate the fulfillment of ECOSOC's duties under the ICESCR. Accordingly, the scope of CESCR's duties cannot exceed that set forth in ICESCR, which was negotiated, drafted, signed and ratified by sovereign states parties. Such ratifying states parties, as an exercise of sovereignty, have chosen to bind themselves to the terms contained in the convention.²

Such commitment is not open-ended, however, and is limited by what states parties have bound themselves.³ In other words, they have not undertaken commitments beyond what is contained in the treaty. Per the Vienna Convention on the Law of Treaties ("VCLT"), the authority of a treaty stems from obtaining the consent of the States Parties to be bound by the treaty.⁴

In order to ascertain the scope of the obligations to which States Parties have committed themselves, the VCLT sets forth interpretive norms: "A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in light of its object and purpose."⁵ In other words, attention must be paid to the actual text of the treaty and, as an aid to interpretation, to its surrounding context.

By applying these principles, one discerns that the role of the CESCR (per the grant of authority ICESCR gives ECOSOC) is limited to the following:

- 1) Acceptance of reports by States Parties on measures which they have adopted and progress made in achieving the observance of rights for consideration in accordance with the provisions of ICESCR.⁶
- 2) Coordination with specialized agencies, including "particulars of decisions and recommendations on such implementation adopted by competent organs."⁷
- 3) Submitting reports to the General Assembly with recommendations of a general nature and a summary of the information received from States Parties on the progress made in achieving general observance of ICESCR rights.⁸

¹ ECOSOC Resolution 1985/17 (May 28, 1985). For purposes of this submission, we assume that the powers enumerated in ICESCR part IV in conjunction with this resolution are sufficient to authorize CESCR to conduct the present inquiry.

² The United Nations "is based on the principle of the sovereign equality of all its members." U.N. Charter art. 2, para. 1. The principle of *pacta sunt servanda* holds that States Parties must, in good faith, adhere to the terms of a treaty to which they freely consented and agreed. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, available at

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, at art. 26: ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

³ Cf. UN Charter art. 2(7) ("Nothing contained in the present charter shall allow the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.").

⁴ As evidenced by the contractual language used to describe states in Article 2 of the VCLT. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁵ Ibid., at art. 31 (l) (emphasis added).

⁶ ICESCR art. 16.

⁷ ICESCR art. 18.

⁸ ICESCR art. 21

- 4) Authorization to bring any matters arising out of the States Parties reports to the attention of UN bodies in order to contemplate the advisability of international measures likely to contribute to implementation of the ICESCR.⁹
- 5) Actions including the “conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.”¹⁰

Notably, General Assembly Resolution 1985/17, which created the CESCR, only specifically enumerates the powers listed in (3) and (4) above as belonging to the CESCR.¹¹

In summarizing the above, it is important to note that treaty body mandates create a narrow role for treaty bodies such as CESCR, and those bodies cannot exceed the scope of the authority set forth in the treaty itself. Specifically, committee recommendations and general comments issued by treaty bodies are not binding on States Parties because such recommendations and comments are not part of the actual negotiated language of the treaty.

Moreover, treaty bodies such as CESCR do not have the authority to interpret or reinterpret treaties. Authoritative interpretations of treaties are reserved to States Parties *collectively*.¹² Above all, the CESCR cannot create new terms that were not agreed to by the States Parties at the time the text of the treaty was finalized nor call upon States Parties to abide by such fabricated terms.

II. The Plain Text of the International Covenant on Economic, Social and Cultural Rights (ICESCR) Does Not Contain a “Right to Sexual and Reproductive Health”

The portion of the ICESCR germane to the present inquiry states:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - a. The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - b. The improvement of all aspects of environmental and industrial hygiene;

⁹ ICESCR art. 22

¹⁰ ICESCR art. 23

¹¹ Resolution 1985/17(f) only specifically mentions the delegation of duties under articles 21 and 22: “The Committee ... shall make suggestions and recommendations of a general nature ... in order to assist the Council to fulfill, in particular, its responsibilities under articles 21 and 22 of the Covenant.”

¹² *Cf.* Christopher C. Joyner, *International Law in the 21st Century*, Rowman & Littlefield, 114 (2005) (“In interpreting a treaty text, the task becomes to ascertain what the text means to the parties collectively . . .”).

- c. The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- d. The creation of condition which would assure to all medical service and medical attention in the event of sickness.¹³

There is no “right to sexual and reproductive health” found in the plain text of the relevant portions of the ICESCR. Such a “right” is therefore not part of the negotiated language of the treaty. CESCR has no authority to issue a general comment on language that is not part of the negotiated language of the treaty. Accordingly, any general comment regarding the “right to sexual and reproductive health” would be *ultra vires* and lacking in legitimacy.

The only international human rights treaty that contains the words “sexual and reproductive health” is the UN Convention on the Rights of Persons with Disabilities (CRPD), which was adopted by the UN General Assembly in December 2006. The term “sexual and reproductive health” is not defined in the text of the CRPD. During the negotiating of the CRPD, the Chairman of the drafting committee and numerous UN Member States made public statements that no new rights were being contemplated in the creation of that treaty.

As the CRPD is the only international human rights treaty that contains the words “sexual and reproductive health,” the committee that oversees the CRPD is the only treaty body that has the authority to draft a general comment on this term. However, no treaty body can make an authoritative interpretation of this term or any treaty provision, as that is reserved exclusively to the States Parties collectively.¹⁴

III. The Glen Cove Roundtable Empowered Treaty Bodies to Assume New Powers That Are Illegitimate

The genesis of the current effort to create a new “right to sexual and reproductive health” via the treaty body monitoring system can be traced directly to the “Roundtable of Human Rights Treaty Bodies on Human Rights Approaches to Women’s Health, with a Focus on Sexual and Reproductive Health Rights”, held in Glen Cove, New York, in 1996.¹⁵ As stated in an official report by the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), this Roundtable emphasized “the importance of integrating the conclusions of the United Nations world conferences into the human rights monitoring process.”¹⁶

¹³ International Covenant on Economic, Social and Cultural Rights, art. 12, Dec. 16, 1966, G.A. res 2200A (XXI). December 16, 1966, 21 U.N. GAOR Supp. (No. 16), U.N. Doc A/6316 (1966), 993 U.N.T.S. 3, [hereinafter ICESCR].

¹⁴ See Joyner, *supra*, at 114 (“In interpreting a treaty text, the task becomes to ascertain what the text means to the parties collectively . . .”)

¹⁵ “Summary of proceedings and recommendations,” Roundtable of Human Rights Treaty Bodies on Human Rights Approaches to Women’s Health, with a Focus on Sexual and Reproductive Health Rights, Glen Cove Report (December 9-11, 1996), hereafter “Roundtable Report”, available at http://www.centerforundocs.org/downloads/glencove/glencove_roundtable_SRHR.pdf

¹⁶ UN Population Fund, UN High Commissioner for Human Rights, and UN Division for the Advancement of Women, “Summary of proceedings and recommendations,” Roundtable of Human Rights Treaty Bodies on Human Rights Approaches to Women’s Health, with a Focus on Sexual and Reproductive Health Rights, Glen Cove Report (December 9-11, 1996), 40. In its eighteenth and nineteenth sessions, the CEDAW committee officially “welcomed” findings in the Roundtable Report. See General Assembly, Fifty-third

The Glen Cove Roundtable was sponsored by the UN Population Fund, the UN Office of the High Commissioner for Human Rights (which has oversight of the treaty bodies), and the UN Division for the Advancement of Women. Participants included officials from most of the major UN agencies, members of all the human rights treaty bodies, and pro-abortion nongovernmental organizations, including International Planned Parenthood Federation.¹⁷

The official summary of the Glen Cove Roundtable stated the following purpose:

The Round Table was the first occasion on which members of the six human rights treaty bodies met to focus on the interpretation and application of human rights in relation to a specific thematic issue. The purpose of the Round Table was to contribute to the work of the treaty bodies in interpreting and applying human rights standards to issues relating to women's health and to encourage collaboration in the development of methodologies and indicators for use by both the treaty bodies and the United Nations agencies and other bodies to promote, implement and monitor women's human right to health, in particular, reproductive and sexual health.

One of the recommendations for treaty bodies in the Roundtable summary specifically called for chairpersons of the treaty bodies to allocate a day "for consideration of particular thematic issues, including the right to reproductive and sexual health," a recommendation that has been apparently followed by the CESCR in this case.¹⁸

The push to establish a sexual and reproductive health framework among human rights treaties was primarily motivated by a desire to try to create an international right to abortion, which would be included in the right to sexual and reproductive health. Several presenters at the Glen Cove Roundtable advised treaty body members how they could find a right to abortion within existing provisions of the human rights treaties they monitored.

The Glen Cove Roundtable focused extensively on the maternal mortality issue, and claimed that many maternal deaths worldwide were the direct result of illegal abortion.¹⁹ Treaty bodies were then urged to tie in the maternal mortality issue to existing rights in order to promote an internationally recognized right to abortion. Specifically, a member of the Human Rights Committee detailed the process to use the right to life (Article 6), the right to equality before the courts and before the law (Articles 14 and 26), the right to freedom of movement (Article 12), the right to protection of privacy and home (Article 17), and the right to freedom of expression (Article 19) of the ICCPR to advance the right to abortion.²⁰ A Member of the CEDAW Committee encouraged fellow committee members

Session, "Report of the Committee on the Elimination of Discrimination against Women, 18th and 19th Sessions," supplement 38, 1998 (A/53/38/Rev. 1), 37-38, *available at* <http://www.un.org/womenwatch/daw/cedaw/reports/18report.pdf>

¹⁷ Roundtable Report, 41-46

¹⁸ Roundtable Report, 8

¹⁹ Roundtable Report, 6

²⁰ Roundtable Report, 22-23

to apply the principal of non-discrimination based on gender from Articles 1 and 12 to the issue of abortion.²¹

The Vice-Chairperson of the CESCRC encouraged the treaty body to take a human rights approach to maternal mortality, and call for its reduction through access to safe abortion, under the right to health care (Article 12).²²

The approach adopted by the Glen Cove Roundtable does not accord with proper procedure by which international law is made, as there was no participation by or consensus among member states. Thus the legitimacy of the treaty monitoring process has been called into question.²³ As the summary from the Glen Cove Roundtable makes clear, organizers and most participants tried to create a previously unrecognized right to sexual and reproductive health. Treaty bodies, instead of looking at the plain text of the human rights treaties or what States Parties had consented to, were urged to rely on non-binding documents from various conferences to reinterpret the treaties that they were charged with monitoring.

The one dissenting voice listed in the Glen Cove Roundtable summary was the Chair of the Committee on the Elimination of All Forms of Racial Discrimination (CERD). Michael Danton rejected the pressure from fellow Roundtable participants to extend the mandate of the CERD to encompass discrimination based on the grounds of gender – “Treaty bodies should be wary of exceeding their mandates or of overlapping their functions.”²⁴

IV. A “Right to Sexual and Reproductive Health” Does Not Include the Right to Abortion

Assuming arguendo that CESCRC did have authority to issue a general comment on the “right to sexual and reproductive health” – authority that it pointedly does not have – any interpretation could not include a “right to abortion” within the term. While certain advocacy groups interpret the term to include abortion, such a reading is without support in any negotiated UN document.²⁵

Abortion was excluded from the meaning of the term “sexual and reproductive health” that appears in the text of the only global treaty that contains such language, the Convention on the Rights of Persons with Disabilities (CRPD), as evidenced by the interpretive statements of 15 Member States that negotiated the treaty.²⁶ Abortion was also excluded from the

²¹ Ibid., 26-28

²² Ibid., 24

²³ Douglas Sylva and Susan Yoshihara, *Rights By Stealth*, 7 Nat. Cath. Bioethics Q. 97 (2007).

²⁴ Ibid., 25-26

²⁵ See, e.g., CENTER FOR REPRODUCTIVE RIGHTS, STEP-BY-STEP GUIDE: USING THE UN TREATY MONITORING BODIES TO PROMOTE REPRODUCTIVE RIGHTS, available at <http://reproductiverights.org/en/document/step-by-step-guide-using-the-un-treaty-monitoring-bodies-to-promote-reproductive-rights>.

²⁶ The 15 statements were delivered by: the Canada, Costa Rica, Egypt, Marshall Islands, Peru, Uganda, Iran, Nicaragua, Libya, the Philippines, Syria, Honduras, El Salvador, Poland and Malta. See, e.g. U.N. GAOR, 61st Sess., 76th plen. mtg. at 5-7, 11, 14, 22, U.N. Doc. A/61/PV.76 (Dec. 13, 2006), available at

definition of the term contained in the International Conference on Population and Development (ICPD) Plan of Action of 1994²⁷, as well as the Beijing Platform of Action of the following year.²⁸ (Neither the outcome document from Cairo nor from Beijing are binding, unlike CRPD which, as a treaty, is binding upon parties that have ratified it.)

The ICPD document states that no new rights are created.²⁹ It contains a definition of “reproductive health/rights” which excludes reference to abortion.

Elsewhere, the document references the term, and states as follows: “Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning.”³⁰ It also disavows abortion as a tool for sex selection.³¹ While ICPD does state that “where abortion is not against the law, such abortion should be safe,” it nevertheless affirms the sovereign right of states to legislate in this regard, explicitly acknowledging that “Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process.”³² The Beijing document repeats and affirms these statements.³³

Moreover, multiple countries in attendance at these conferences insisted that the conference did not create an international right to abortion, and affirmatively stated that life begins at conception.³⁴

As one of the delegates at the Beijing Conference and an important commentator on the conference, Mary Ann Glendon has pointed out, rather than treating abortion as a “right” that should be cherished and protected, akin to freedom of expression or religion, the Cairo and Beijing outcome documents state that governments should seek “to reduce the recourse to abortion,” “eliminate the need for abortion,” and strive to help women “avoid repeat abortions.”³⁵ Presumably, if abortion were a “right” akin to freedom of expression, the

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/657/07/PDF/N0665707.pdf?OpenElement> (containing statements from Egypt, Peru, Iran, Honduras, Nicaragua, Libya, Costa Rica, Uganda, El Salvador, and the Holy See). See also Press Release, General Assembly, General Assembly Adopts Groundbreaking Convention, Optional Protocol on Rights of Persons with Disabilities, GA/10554 (Dec. 13, 2006), available at <http://www.un.org/News/Press/docs/2006/ga10554.doc.htm>, which quotes the Marshall Islands as stating that it understood the CRPD to guarantee “the right to life of disabled persons from the moment of conception, throughout their natural lives . . . until their natural deaths,” and that references within the CRPD to “sexual and reproductive health services” did not include abortion, or abortion rights, or create any new rights or obligations that contravened national laws.”

²⁷ International Conference on Population and Development, *Programme of Action of the United Nations International Conference on Population & Development*, Cairo, Egypt, Sept. 5-13, 1994, A/CONF.171/13.

²⁸ Fourth World Conference on Women, *Declaration and Platform for Action*, Beijing, P.R.C., Sept. 4-15, 1995, A/CONF.177/20

²⁹ ICPD 1.15.

³⁰ ICPD 7.24, 8.25

³¹ ICPD 4.15. Cf. Beijing at 277(c).

³² ICPD 8.25.

³³ Beijing 106(k).

³⁴ El Salvador, Honduras, Nicaragua, Paraguay, Ecuador, Guatemala, and Peru affirmed that life begins at conception. JYOTI SHANKAR SINGH, *CREATING A NEW CONSENSUS ON POPULATION* 69 (Earthscan, 1998).

³⁵ Mary Ann Glendon, “What happened at Beijing,” *First Things* (Jan. 1996); ICPD 8.25

drafters of the outcome documents would not be calling upon governments to “reduce” and “eliminate” it.³⁶

V. Conclusion

In summary, the CESCR does not have authority to promulgate a general comment regarding the “right” to sexual and reproductive health, as such a “right” does not appear in the plain text of the ICESCR. Even if the CESCR did possess such a right to issue a General Comment, the right to abortion is not encompassed by a “right” to sexual and reproductive health.

³⁶ Glendon, *supra*. (“One would hardly say of an important right like free speech, for example, that governments should reduce it, eliminate the need for it, and help avoid its repetition.”)

Respectfully Submitted,

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