



SUBMISSION BY THE SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN FOR THE NOVEMBER 2010 DAY OF GENERAL DISCUSSION ON THE FORMULATION OF A GENERAL COMMENT ON THE RIGHT TO SEXUAL AND REPRODUCTIVE HEALTH

SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN

Submission by the Society for the Protection of Unborn Children

For the day of general discussion on the
formulation of a General Comment on the Right to
Sexual and Reproductive Health

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United Nations Committee for the International
Covenant on Economic, Social and Cultural Rights

The Society for the Protection of Unborn Children
is an ECOSOC-accredited NGO



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Preliminary

This submission to the Committee for the International Covenant on Economic, Social and Cultural Rights (ICESCR) while considering the issues arising from Article 10.2 and 12 of the Covenant as set out in the brief firstly considers the overall context in which this initiative has been drawn up .

The Society for the Protection of Unborn Children (SPUC) asserts that the Committee on Economic Social and Cultural Rights (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.

1. The scope of CESCR's duties

The scope of CESCR's duties derive from the UN Economic and Social Council (ECOSOC) in fulfilment of their duties under the ICESCR and cannot exceed that set forth in the Convention, which was negotiated, drafted, signed and ratified by sovereign states parties.

The commitment entered into by the states parties is not open-ended, however, and is limited to what they (the states parties) have bound themselves.¹ They have not undertaken commitments beyond what is contained in the treaty².

¹ 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.").

² ICESCR Preamble: The States Parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person, Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights, Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant, Agree upon the following articles:

In this way we can see that the ICESCR is subordinate to the Charter of the Un and therefore it would be impossible for the CESCR to recognise a new right since it would be effectively amending the Universal Declaration of Human Rights and the ICCPR



2. The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties (“VCLT”) is clear that the authority of a treaty stems from obtaining the consent of the states, or the States Parties³ over which it will be binding

The VCLT which sets out interpretive norms for all treaties in Article 31 says: "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."⁴ In other words, attention must be paid to the actual text of the treaty and, as an aid to interpretation, to its surrounding context.

The application of these principles delineates the role of the CESCER and 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.⁵
- 2) Coordination with specialized agencies, including “particulars of decisions and recommendations on such implementation adopted by competent organs.”⁶

3. Treaty body mandates

Treaty body mandates create a narrow role for treaty bodies such as CESCER, 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 CESCER do not have the authority to interpret or reinterpret treaties. Authoritative interpretations of treaties are reserved to States Parties *collectively*.⁷

³ 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.

⁴ *Id.* at art. 31 (1) (emphasis added).

⁵ ICESCR art. 16.

⁶ ICESCR art. 18.

⁷ *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 . . .”).



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

Article 10.2

The States Parties to the present Covenant recognize that:

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

Article 12

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

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.

5. UN Convention on the Rights of Persons with Disabilities

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.



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

Assuming for the sake of argument 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 so called “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.⁸ A false impression is being promoted that an international consensus exists which recognises access to abortion as a human right. No such right has been recognised in any human rights treaty. The right to life of all members of the human family, regardless of birth or any other status is a founding principle of the UN. The rights of the child before as well as after birth are protected by numerous treaties⁹ including the Convention on the Rights of the Child, which commits States to ensure appropriate pre-natal and post-natal health care for mothers.¹⁰ This commitment is to protect the interests of children and recognizes the pre-natal child as an independent right-holder, separate from his or her mother.

Not only was abortion 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 CRPD, [as evidenced by the 15 interpretive statements that underscored this point], but it is also excluded from the definition of the term contained in the ICPD Plan of Action of 1994¹¹ or the Beijing Platform of Action of the following year.¹² (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.)

⁸ 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>. With respect to attempts to insert a “right to abortion” into treaties using the treaty monitoring body system, see Sylva and Yoshihara, RBS, 7 Nat. Cath. Bioethics Q. 97 (2007).

⁹ The *Universal Declaration of Human Rights 1948* (UDHR) recognises the primacy of the right to life. The Preamble together with Article 3 makes it clear that the right to life is equal and inalienable and extends to “all members of the human family”. This plainly includes the child *in utero*. The *International Covenant on Civil and Political Rights 1966* (ICCPR) reiterates the recognition of the “inherent dignity of the human person”, and that “every human being has the inherent right to life.” Article 6(5) states that: “the sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.” The rationale for this provision relating to expectant mothers is clearly respect for human life *in utero*, such that the unborn child shall not be deprived of his or her life in the event that the state was to execute a mother.

The Preamble of the *Convention on the Rights of the Child* (CRC) recognises that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” Article 24(1) of the CRC obliges States Parties to “recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health” and to “strive to ensure that no child is deprived of his or her right of access to such health care services”.

¹⁰ CRC Article 24 (2) d.

¹¹ International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994.

¹² Fourth World Conference on Women, Beijing, P.R.C., Sept. 4-15, 1995.



7. Cairo and Beijing Conferences

The Cairo conference outcome document states that no new rights are created.¹³ 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.”¹⁴ It also disavows abortion as a tool for sex selection.¹⁵

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.¹⁶

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.”¹⁷ Presumably, if abortion were a “right” akin to freedom of expression, the drafters of the outcome documents would not be calling upon governments to “reduce” and “eliminate” it.¹⁸

CONCLUSION

Accordingly it is the considered view of SPUC that the CESCR has no authority to arbitrarily expand the scope of the convention agreed by states parties, which makes no reference in either article 10.2 or article 12 to a so called right to sexual or reproductive health, we therefore strongly object to the expansion of the mandate of the Committee beyond the terms of the Convention and assert that the committee has no authority to create a general comment for a concept not explicitly set out in the treaty.

Even if the CESCR did possess such a right to issue a General Comment on the issue, the right to sexual and reproductive health does not encompass a right to abortion.

¹³ ICPD 1.15.

¹⁴ ICPD 7.24; [see also 8.25]

¹⁵ 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, § 4.15. Cf. Beijing at § 277(c).

¹⁶ 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).

¹⁷ Mary Ann Glendon, “What happened at Beijing,” *First Things* (Jan. 1996); ICPD 8.25

¹⁸ 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.”).