

THE INTERNATIONAL ORGANIZATIONS  
RESEARCH GROUP

# RIGHTS BY STEALTH

The Role of UN Human  
Rights Treaty Bodies in the  
Campaign for an International  
Right to Abortion

Douglas Sylva, Ph.D.  
and Susan Yoshihara, Ph.D.

*Catholic Family & Human Rights Institute*

WHITE PAPER SERIES

NUMBER EIGHT



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The National Catholic Bioethics Center,  
6399 Drexel Road, Pennsylvania, PA 19151  
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## PREFACE

Not a single UN human rights treaty mentions abortion. When UN member states went to the negotiating table to meticulously craft the language of the eight international human rights treaties, some of those nations had legalized abortion and many more had not. That is why these treaties are silent on the subject. That is why it is so surprising when last year Colombia's high court decided to legalize abortion, basing their decision largely on the reasoning that UN human rights treaty bodies said that the treaties guaranteed a woman's right to abort her unborn child.

Even for those who follow the abortion issue closely, it is puzzling that a high legal body in any nation could so profoundly misunderstand international treaties. More confounding still is how laws so central to a nation's culture and religious heritage could be changed by misunderstanding. What explains this?

In this white paper, Douglas Sylva and Susan Yoshihara help us understand. The authors show that rather than an episodic miscalculation by one nation's high court, the Colombia decision is the result of more than a decade of careful planning and operations by "a tenacious network of actors" who believe in abortion rights. The self-proclaimed "stealth strategy" was formally begun at a round table meeting in Glen Cove, New York in 1996. There, participants from the UN Population Fund (UNFPA), the office of the High Commissioner on Human Rights and select NGOs met to articulate a comprehensive strategy they said would "determine how the right to abortion-on-demand could be found in universally accepted norms such as the right to life."

At the heart of the strategy are the UN human rights treaty monitoring bodies, especially those monitoring the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child (CEDAW), and the International Covenant on Civil and Political Rights.

Sylva and Yoshihara show that in order to make the strategy work, UN officials and NGOs have had to convince member states, treaty body experts and other participants in the system, that these "treaties are not fixed as negotiated, but rather are living, mutable documents." In essence, they must convince participants that existing human rights can be re-interpreted to include a right to abortion. "Rather than seeking to sway voters directly," the authors note, abortion proponents "seek mastery of the complex and little-known inner working of the international human rights system," arguing that "reproductive and sexual health rights" are necessary components of a host of already existing human rights."

And this is a point that several prominent UN experts have made recently. The UN is often portrayed as having increased credibility and legitimacy in international law precisely because of the perception that it is a democratic body – one imbued with the will of member states. As this white paper shows, the treaty bodies are emblematic of a system that is opaque, complex, and largely unaccountable to any member state.

According to Sylva and Yoshihara, the current situation seems untenable since it undermines the very human rights system that abortion proponents need to promote their agenda. Like the critical legal studies movement and radical feminist movement from which the campaign for an international right to abortion emerged, the “stealth” strategy is elitist. It is well-funded by large American foundations and NGOs inside the network, but it enjoys very little grass roots support. Not surprisingly, the movement to focus the UN women’s agenda on abortion rights has utterly failed to help poor women, or raise the GDP of a single developing nation. And even as it has succeeded in promoting a feminist agenda in rich countries, the demographic winter in Europe and Japan is causing many to reassess its long term effects on developed economies and societies.

So what will happen? There has been some good news recently. Some member states have stood up to the committees during their annual reviews. The Pakistani delegate told the CEDAW committee in their 2007 review that “abortion is murder once the fetus is conceived,” and defended its pro-life laws. The delegate from Sierra Leone told the same committee, “Children are a gift from God,” when that country was pressed to liberalize abortion. If more nations insist on the proper understanding of these international human rights laws and reject the persistent misinterpretations of the laws by the committees, the “stealth” strategy may fail after all. Only time will tell how many nations will follow this brave and controversial course.

For any policy maker, scholar or citizen seeking clear and readable insight into the “complex inner workings” of this system and the high stakes of that outcome, this white paper is sure to provide a valuable guide.

Austin Ruse

President

Catholic Family and Human Rights Institute

*Abstract: In the mid-1990s, a group of UN officials and nongovernmental organizations gathered to formulate a strategy to promote a controversial international social policy agenda by reinterpreting existing human rights treaties to give them new meanings. At the heart of this strategy was a four-step process to use the six UN human rights treaty monitoring bodies and an interlocking network of UN agencies, UN officials, and NGOs to create an international right to abortion. In the decade that has followed, UN member nations have allowed the strategy to develop to an extensive degree, despite the fact that it undermines their own laws. This study examines the reasons why the process has been able to advance, and analyzes the way the strategy has undermined the treaty monitoring system and challenged the credibility of the international human rights regime.*

Binding international law is a hard thing to make. It is difficult enough for nations to agree on truly international issues, such as the law of the sea, but it is even more difficult to gain consensus on domestic issues, such as social policies. There have been good reasons to want to extend the scope of international law, and nations have often agreed that some social values are universal.<sup>1</sup> But starting in the early 1990s, certain forces saw an opportunity to push this domestic standard-setting type of international law beyond the level of consensus that resulted in binding international treaties. They conceived of a way to compel nations to adopt domestic social policies based on a version of feminism that emerged from radical and critical theories of 1960s and 1970s academia, especially the Critical Legal Studies Movement.<sup>2</sup> While the movement is now often at odds with the General Assembly, it was initially able to ride the coattails of what Paul Kennedy has called

the radicalization of the General Assembly's political agendas, with the pressures for a new international economic order, with the heightened awareness about the environment, and with the general assault upon the traditional loci of power. White, uncaring capitalist men in the North were now to concede influence and affluence to nonwhite/Southern, environmentalist, pro-government and feminist movements.<sup>3</sup>

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<sup>1</sup>For an examination of the way diverse national, cultural, and religious leaders forged the Universal Declaration of Human Rights, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

<sup>2</sup>Rachel Lorna Johnstone, "Feminist Influences on the United Nations Human Rights Treaty Bodies," *Human Rights Quarterly* 28.1 (February 2006): 148–185.

<sup>3</sup>Paul Kennedy, *The Parliament of Man: The Past, Present, and Future of the United Nations* (New York: Random House, 2006), 167.

There are three major elements to this feminist ideology as it has related to multilateral dialogue: the sexual autonomy of minor children, especially girls; the redefinition of family and marital life; and abortion rights. Of these three, the most highly sought-after component of the feminist ideology has been abortion, with the ultimate goal of establishing an international right to abortion-on-demand for women and girls. The ideas are truly revolutionary.

What the revolutionaries had to work with were existing human rights treaties that explicitly left out their agenda, and nonbinding international conferences that tried but failed to push through negotiated language that might be used to support it. When they failed to get a binding or nonbinding international consensus document, they turned to other avenues in the international human rights system, a system that has experienced massive growth in the previous thirty years, including a rapid rise of participation by nongovernmental organizations (NGOs).<sup>4</sup> Their goal was and is to convince participants in the system that the treaties are not fixed as negotiated, but rather are living, mutable documents. While the heart of the system is the human rights treaties, there is also an unwieldy apparatus of monitoring bodies and extra-conventional mechanisms—Special Rapporteurs, working groups, and special representatives of the Secretary General—as well as regional human rights systems, national and international NGOs, and other advocates with crosscutting associations, allegiances, and influences. All of these parties provide the material to transform international social policy.

At a fateful meeting in 1996, devotees of the new human rights agenda presented a detailed strategy on how to use the international human rights system to claim, as legally binding on states, rights that those states had refused to accept during negotiations. Essentially, their plan was to create a body of international “law” that could be imposed on nations and peoples that otherwise disagree with it. Central to that strategy was the use of UN treaty compliance mechanisms.

Part I of this article shows the four-part strategy that was initiated in 1996 and explains the logic behind the approach. Part II examines the relationship among the major actors who formulated the strategy and focuses on the way NGOs integrated it into their own operating plans. Part III takes each of the four parts of the strategy in turn, analyzing how effective the various members of the network have been in working together toward the goal of creating new rights. Using the case of Latin America, it shows how the treaty bodies are the center of a mutually reinforcing pattern of misinterpreting

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<sup>4</sup>Felice D. Gaer, “Implementing International Human Rights Norms: UN Human Rights Treaty Bodies and NGOs,” *Journal of Human Rights* 2.3 (September 2003): 339–357. See also Anne F. Bayefsky, ed., *The UN Human Rights Treaty System in the 21st Century* (The Hague: Kluwer Law International, 2000).

existing understandings of rights. Part IV discusses the implications of this phenomenon, and then offers policy recommendations. This analysis finds that the strategy to import radical interpretations into existing international law has been carefully followed and expanded on during the last decade, with deleterious effects. Execution of the strategy itself is transforming the way in which multilateral negotiations are carried out.

Had nations agreed to the radical agenda through international law, there would have been no need for this strategy. Likewise, if today nations accepted and adopted these ideas, there would be no need to codify them. Thus, the story is one of a tenacious network of actors who continue to fight to transform international social policies over the objections of sovereign states and the souls who populate them. Unfortunately, the dynamic has contributed to an age of heightened distrust of the UN and the very human rights system these devotees claim to cherish and defend. It has also contributed to the growing cynicism about the very nature of international obligation.

## I

In December 1996, UN experts gathered at a conference that would have immense implications for the development of international law. At the conference, they adopted a common strategy in order to transform existing international law—codified in the Universal Declaration of Human Rights and in human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women (Women’s Convention)—into a vehicle to further a radical feminist ideology, to in fact import this ideology into international law.

Called the “Roundtable of Human Rights Treaty Bodies on Human Rights Approaches to Women’s Health, with a Focus on Sexual and Reproductive Health and Rights,” this meeting was sponsored by three powerful members of the UN system of organizations: the UN Population Fund (UNFPA), the office of the UN High Commissioner for Human Rights (UNHCHR), and the UN Division for the Advancement of Women (DAW). UNFPA, founded as the United Nation’s chief agency for population control programs in the developing world, had recently adopted new language to justify programming for controversial “population control” policies, which had begun to fall out of favor. One of these new terms was “reproductive health.” At this point population control became linked to international health. UNHCHR operated, and still operates, as the chief custodian of the expanding framework of internationally recognized human rights. DAW sought to alter the vast panoply of UN programs so that all of them would

further a feminist agenda, under the banner of “gender mainstreaming.” Thus, the human rights, population control, and feminist agendas were allied in a common strategy to transform international law.

## WHAT HAPPENED AT GLEN COVE

These agencies chose a secluded mansion in Glen Cove, New York, for the location of the conference. They invited a host of other allies—the parties that would be responsible for promoting, and ultimately instituting, the new strategy. The ultimate goal of the participants was as unambiguous as it was revolutionary: “to establish the legal accountability of Governments for neglecting or violating rights to reproductive and sexual health.”<sup>5</sup> Why was this revolutionary? To begin with, the “legal accountability” of nations (along necessary enforcement mechanisms) was at the time, and remains to this day, an ill-defined concept. This is especially true regarding enforcement mechanisms, as well as the most widely respected, longstanding, and non-controversial international human rights. Second, the rights to be discussed at the Roundtable in Glen Cove were not yet internationally recognized rights, in any sense of the term. No such rights—“reproductive and sexual health rights”—had ever been enumerated in UN human rights treaties. In other words, the Roundtable participants sought to establish their own conceptions of “rights” as rights, and to impose these on the world community. In this way they would circumvent the purposefully lengthy and laborious international process involved in recognizing new rights.

The strategy discussed and adopted at the Roundtable was simple and audacious: claim that “reproductive and sexual health rights” are necessary (if unmentioned) components of a host of already existing human rights. As the official summary of the conference puts it, “A human rights approach is premised on the view that reproductive and sexual health rights are integral to recognized human rights—in particular, to life, liberty and personal security, and the highest attainable standards of health.”<sup>6</sup> In short, the meeting set out to determine how the right to abortion-on-demand could be found in universally accepted norms such as the right to life.

<sup>5</sup>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), 6, hereafter referred to as the Roundtable Report. In its eighteenth and nineteenth sessions, the CEDAW committee officially “welcomed” findings in the Roundtable Report. See General Assembly, Fifty-third 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, <http://www.un.org/womenwatch/daw/cedaw/reports/18report.pdf>.

<sup>6</sup>Ibid.

How would those involved accomplish this? Provisions for “treaty monitoring bodies”—also called “compliance committees,” or “expert committees”—are built into the major human rights treaties (Figure 1, following page). The function of the committees is to monitor the progress of states parties to the particular conventions in meeting the requirements of those treaties. States parties must produce periodic reports on compliance and submit them to the committees; they must also go before, answer questions, and accept “recommendations” on improvements from the committees.<sup>7</sup> The 1996 strategy called for using all six of the existing treaty bodies. A seventh treaty body, the Committee on Migrant Workers (CMW), has only recently been formed and therefore will not be addressed further in this study.

In addition to the regular country reviews, four of the six treaty bodies have quasi-judicial powers to receive and consider complaints from individuals within states: the Human Rights Committee (HRC), the Committee on the Elimination of All Forms of Racial Discrimination (CERD), the Committee against Torture (CAT), and the Committee on the Elimination of Discrimination against Women (CEDAW). States gave this power to the committees by ratifying optional protocols or accepting articles in the treaty allowing committees to investigate complaints. The Human Rights Committee, which oversees compliance with the ICCPR, had the most cases, with more than twelve hundred communications from seventy-five countries registered and nearly one thousand concluded.<sup>8</sup>

While each committee has slightly different procedures, generally complaints are brought against states that have ratified the optional protocol. After receiving and investigating a communication from an individual, the committee arrives at a finding by majority vote and delivers its “views” to the state party and the author of the communication. While these are non-binding, the committee also calls on the state to provide effective remedy according to the provisions of the treaty, and the HRC appoints a Special Rapporteur for Follow-up of Views to give more effect to decisions. The Rapporteur can freely make on-site investigations, and contact any officials deemed necessary to promote and enforce committee views. States are required to report on the remedial steps pursuant to a negative finding against them. Both CEDAW and CAT have the authority to initiate their own investigations if they receive “reliable” information about incidents.

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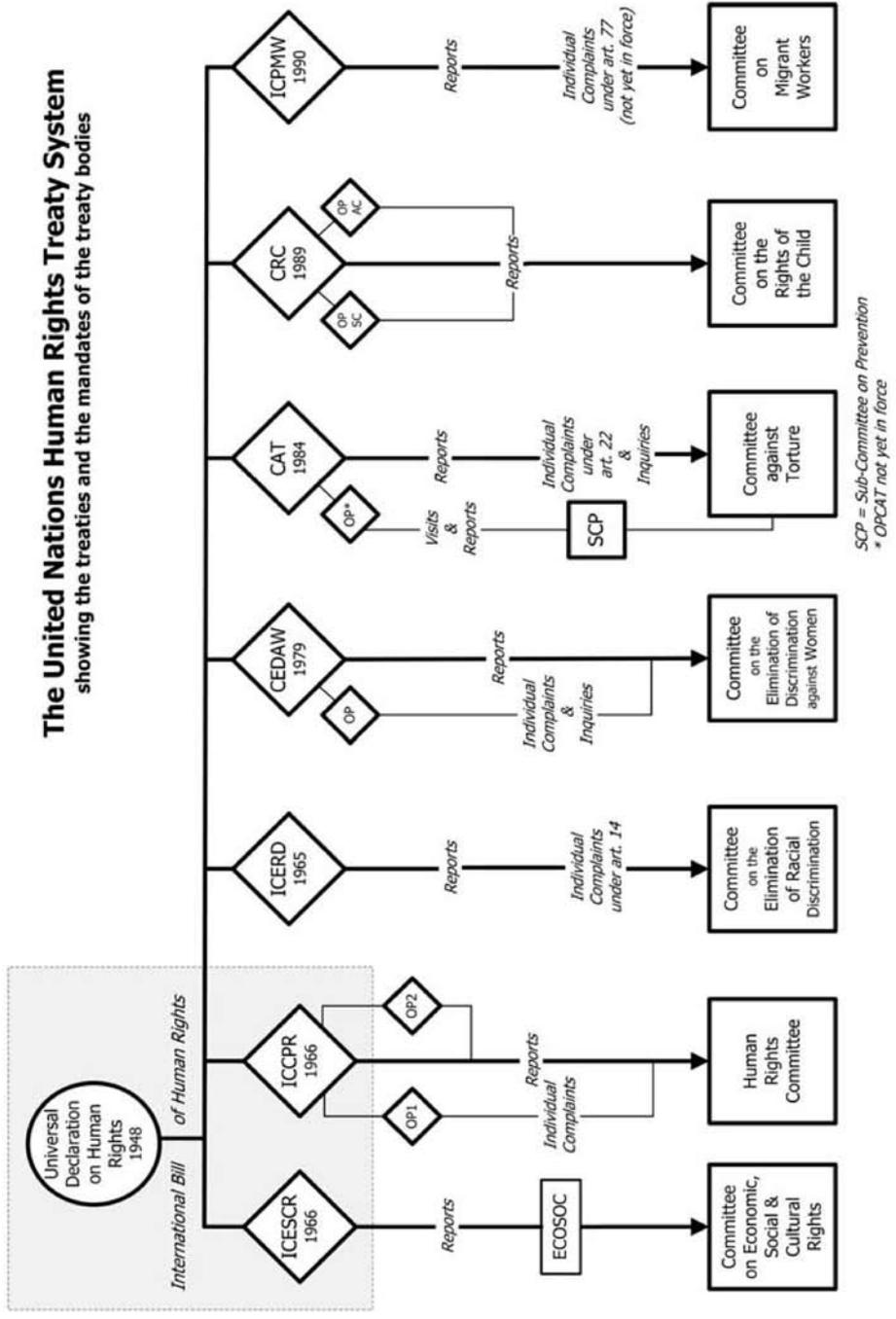
<sup>7</sup>The legal status of the committee recommendations is somewhat uncertain.

<sup>8</sup>Sian Lewis-Anthony and Martin Scheinin, “Treaty-Based Procedures for Making Human Rights Complaints within the UN System,” in *Guide to International Human Rights Practice*, 4th ed., ed. Hurst Hannum (New York: Transnational Publishers, 2004), 44.



# The United Nations Human Rights Treaty System

showing the treaties and the mandates of the treaty bodies



SCP = Sub-Committee on Prevention  
\* OPCAT not yet in force

Instruments  
Optional Protocols

Treaty Bodies

Here the Roundtable found its mechanism for finding “rights”: convince the compliance committees to reinterpret their respective documents to find such rights. According to the official summary,

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.<sup>9</sup>

The Roundtable would help the treaty bodies find such rights, thereby transforming the committees’ understanding of their own mandates. This would be a breathtaking change to the very understanding of the treaties themselves: from documents carefully crafted and weighted by the diplomatic representatives of sovereign governments who negotiated the language—that their governments would have to accept as new international obligations—to progressive or evolving documents, with progressive or evolving obligations, which would be guided not by representatives of governments, but by members of treaty bodies who are not answerable to governments. The Roundtable would initiate a new age for the major UN treaties, an age where the reinterpretation by the treaty body members could warrant the expansion of the respective treaties to cover issues and name rights never discussed by the framers of the treaties. They would even, if necessary, be able to contradict the specific language of the very treaties they were meant to help implement.

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<sup>9</sup>Roundtable Report, 1.

**Figure 1** (*facing page*). The United Nations human rights treaty system, showing the treaties and the mandates of the treaty bodies. The Universal Declaration of Human Rights (UDHR), along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), are sometimes referred to as an “international bill of human rights.” ABBREVIATIONS: ECOSOC, Economic and Social Council; ICERD, International Convention on the Elimination of All Forms of Racial Discrimination; OP, Optional Protocol; CEDAW, Convention on the Elimination of All Forms of Discrimination against Women; CAT, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; SCP, Subcommittee on Prevention; CRC, Convention on the Rights of the Child; OP SC, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; OP AC, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts; and ICPMW, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. © UN Office of the High Commissioner for Human Rights.

## THE FOUR-STEP STRATEGY

The Roundtable participants sought to accomplish this goal through four separate steps. First, they sought to elevate the status of the famous, and famously contentious, human rights conferences where sexual and reproductive health and rights were part of the agenda. These human rights conferences had concluded only a year before the meeting in Glen Cove: the 1994 International Conference on Population and Development, also known as the Cairo Conference, and the 1995 Fourth World Conference on Women, also known as the Beijing Conference.

Nafis Sadik, executive director of the UN Population Fund (UNFPA) at the time and chair of the Cairo Conference, explained in her foreword to the Glen Cove report, “The work of the Round Table was intended to help integrate the understandings reached at the Cairo and Beijing conferences into the treaty monitoring process.” The Roundtable’s summary report emphasizes the fact that the conferences were central to moving the main strategy forward: “To establish the legal accountability of Governments for neglecting or violating rights to reproductive and sexual health, it is necessary to integrate the consensus developed at the recent conferences into the treaty implementation and monitoring process.”<sup>10</sup>

But what justified using the treaty monitoring process for treaties that had little if anything to do with women’s rights, health, and population control? According to the participants, the reason was that “the United Nations conference documents had identified new dimensions for the interpretation and implementation of the human rights treaties, particularly by clarifying the interrelationship between human rights and women’s rights and their pertinence to reproductive and sexual health.” Furthermore,

The Beijing PFA [Platform for Action] specifically calls for the Platform commitments to be taken into account by the treaty bodies within their respective mandates, and by States parties in their reports to the treaty bodies. While these commitments are technically not binding on States, the documents reflect the official consensus of the world community. As such, they can be seen as contributing to the evolution of customary international law norms and obligations by clarifying the evolving meaning, or progressive development, of human rights norms as well as by indicating widely approved steps or means to further their implementation.<sup>11</sup>

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<sup>10</sup>Ibid., 6.

<sup>11</sup>Ibid., 4.

This elevation of the conferences, in turn, required a series of its own half-truths to be propagated and accepted as truths. For instance, the participants would need to claim that there was, in fact, “an official consensus of the world community” on these issues. But this is incorrect on two fronts: there was no consensus, and it was not “official” in any international legal sense of the term. While the issues of reproductive and sexual health were certainly placed on the agendas of the conferences, the radical feminist participants in the conferences failed in their primary mission of defining abortion-on-demand as a reproductive right, and inserting this abortion-as-reproductive-right into the constellation of internationally recognized human rights. So grand was their failure, in fact, that when several states boycotted or threatened to boycott the Cairo conference altogether, every official of note at the conference was compelled to state on record that the conference did not establish any new rights. The boycott came mostly from Islamic leaders who wanted to disassociate themselves from endorsing abortion and other controversial issues in the draft document:

Saudi Arabia, the Sudan, and Lebanon have announced that they will not attend the 170-nation conference in Cairo, where Egyptian Islamic fundamentalists threatened last week to attack participants in what they term the “conference of licentiousness.” The Turkish Prime Minister, Tansu Ciller, worried by strengthening Islamic sentiment in her own country, has also said that she will not attend.<sup>12</sup>

In his memoir about the making of the Cairo conference, Jyoti Shankar Singh, assistant to UNFPA chief Nafis Sadik, argues that Pope John Paul II was largely responsible for thwarting the plan to make abortion an international human right at Cairo. He explains the role the Pope’s public addresses and private meetings played, including a meeting with Sadik. Singh claims that the early years of conference preparation were heady days for reproductive rights advocates, but that by the time the conference was held in 1994, all had abandoned their hopes of making new rights at Cairo. Singh remembers that Catholic and Muslim criticism was so strong that “those of us who were in the Secretariat began to worry about the potential impact of this crescendo of criticism on the success of the Conference.”<sup>13</sup> And during the conference,

The Holy See maintained its vehement opposition to abortion, with Costa Rica, Argentina, Malta, Venezuela, Morocco and Ecuador continuing to insist that they would not agree to any definitions that could be construed as including access to abortion. It was clear to us

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<sup>12</sup>Alan Cowell, “Vatican Says Gore Is Misrepresenting Population Talks,” *New York Times*, September 1, 1994, A1.

<sup>13</sup>Jyoti Shankar Singh, *Creating a New Consensus on Population* (London: Earthscan, 1998), 58.

that given the diametrically opposite views on the subject held by different member states, the Conference would not be in a position to endorse, on a global basis, the concept of legal abortion, even in the case of rape or incest.<sup>14</sup>

The *New York Times* published several articles and editorials criticizing the Vatican and what they called the alliance between the Vatican and the Muslim world.<sup>15</sup> Backed by the newly elected President Bill Clinton—who made overturning the Mexico City policy<sup>16</sup> one of his first presidential acts—the U.S. representative to the conference, Timothy Wirth, was one of the most outspoken proponents of the new abortion right. But by the time the conference approached, the head of the U.S. delegation, Vice President Al Gore, had to state for the record, “Let us get a false issue off the table: the U.S. does not seek to establish a new international right to abortion, and we do not believe that abortion should be encouraged as a method of family planning.”<sup>17</sup>

Thus, not only is there no such unambiguous world “consensus” statement from Cairo and Beijing establishing abortion as a reproductive right, but the abortion language that did gain inclusion in the documents was so successfully debated by conservative forces, and therefore so circumspect, that arguably it categorically and explicitly stops abortion from being deemed a right. There was simply no clarion call for abortion rights emerging from the conferences.

Furthermore, the claim that the outcome documents of the conferences count as “official” international human rights documents is vastly

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<sup>14</sup>*Ibid.*, 55

<sup>15</sup>*New York Times* articles criticizing the Vatican-Muslim alliance leading up to the Cairo conference include John Tagliabue, “Vatican Seeks Islamic Allies in UN Population Dispute,” August 17, 1994, A1; Gustav Niebuhr, “Forming Earthly Alliances to Defend God’s Kingdom,” August 28, 1994, 5; Cowell, “Vatican Says Gore is Misrepresenting”; Anna Quindlen, “Public and Private: Beside the Point,” September 7, 1994, editorial.

<sup>16</sup>The Mexico City Policy, announced by President Ronald Reagan in 1984, required NGOs to agree as a condition of their receipt of federal funds that they would neither perform nor actively promote abortion as a method of family planning in other nations. It was reinstated by President George W. Bush in 2001. See “Restoration of the Mexico City Policy,” memorandum from George W. Bush for the Administrator of the U.S. Agency for International Development, January 20, 2001, <http://www.whitehouse.gov/news/releases/2001/01/23-5.html>.

<sup>17</sup>Singh, *Creating a New Consensus*, 60. Six days before the conference, Vatican spokesman Joaquin Navarro-Valls pointed out the inconsistency of Gore’s words with U.S. actions: “Mr. Al Gore, Vice President of the U.S.A. and member of the American delegation, recently stated that ‘the United States has not sought, does not seek and will not seek to establish an international right to abortion.’ The draft population document, which has the United States as its principal sponsor, contradicts, in reality, Mr. Gore’s statement.” Cowell, “Gore is Misrepresenting.”

overstated. What count as official are consensus documents that are ratified by states parties—treaties and conventions—who then explicitly accept the obligations enumerated in those documents as part of their own domestic law. Conferences fall far short of treaties in international legal standing, so it is uncertain why it would be acceptable to use nonbinding documents to define, and in this case to redefine and reinterpret, binding international law documents.

The second part of the international law strategy discussed at the Roundtable was to build a network of mutually reinforcing actors. Agencies invited to participate in the Roundtable were “members of the six human rights treaty bodies; persons working in women’s reproductive and sexual health drawn from the UN specialized agencies and other UN bodies; and persons representing NGOs and academia.”<sup>18</sup> This is the network—NGOs, UN agencies, and UN treaty monitoring bodies—that the Glen Cove team would come to rely on over the years to effect change, mutually reinforcing one another’s work and, they hoped, culminating in the treaty bodies’ reinterpreting their treaties to include reproductive rights, especially abortion: “Collaboration among treaty bodies, the UN agencies and programmes, NGOs and women’s human rights scholars is of critical importance to this endeavour.”<sup>19</sup>

NGOs would be responsible for building local support for the reproductive rights agenda, and for bringing cases in front of national, regional, and international legal bodies to make the case for a customary law understanding of international reproductive rights. This would then help to convince the treaty bodies to reinterpret their hard law norms in this direction. NGOs would also monitor nations, treating these new understandings as if they were already accepted hard law norms. UN agencies would be responsible for programming as if reproductive rights were already rights, for providing the treaty bodies with information about programmatic best practices in line with these reproductive rights, and for working as closely as possible with the treaty bodies. Treaty bodies, for their part, had the relatively simple task of accepting the concept that the treaties they were mandated to implement were “evolving,” not static, and were in fact evolving in the direction desired by the Roundtable participants.

The Roundtable participants sought to overcome any potential limitations to the development and successful functioning of this network. For instance, if an NGO needed money, they would provide it: “United Nations agencies might provide NGOs with resources, including financial support, for programmes on human rights education and legal literacy at grass-roots

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<sup>18</sup>Roundtable Report, 1.

<sup>19</sup>Ibid., 6.

levels.”<sup>20</sup> If agency mandates were not broad enough for this strategy, they would find a way to expand them:

Recognizing the obstacles to direct participation in the examination of reports by States parties, United Nations agencies could analyse each treaty and the work of each treaty monitoring body and, where possible assist the treaty bodies in identifying gaps between the contents of the reports of States parties and specific country situations.<sup>21</sup>

It is essential to note that this network includes not one diplomat who actually represents a sovereign government. This was deliberate. It would be impossible to achieve the right outcome if nations of the world—many of which recognize the right to life from the moment of conception in their very constitutions—were allowed to participate directly in this process.

The third component of the reproductive rights strategy was simply to get the treaty bodies to accept the strategy, writ large: to accept the notion that their treaties can in fact evolve, and to accept the notion that the treaty bodies should follow the recommendations of the reproductive rights NGOs and UN agencies. The summary report states that, “Treaty bodies are urged to review and consider the discussions held and recommendations made at this meeting . . . Treaty bodies are encouraged to take into account the Declarations made at the [conferences], to the extent that they are pertinent to their treaty norms and provide a useful source of indicators and questions for monitoring human rights, including the right to reproductive and sexual health.” Treaty bodies should listen to the conference outcomes (interpreted correctly), listen to NGOs, and listen to UN agencies, all leading up to this: “The chairpersons of the treaty bodies are urged to allocate a particular time . . . for consideration of particular thematic issues, including the right to reproductive and sexual health.”<sup>22</sup>

This aspect of the strategy is extremely revolutionary. Its exceptional nature is made clear in the strenuous objections of influential members of the treaty bodies who attended the Roundtable:

Mr. Michael Banton, Chairperson, CERD, the treaty body which monitors the Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), suggested that the Race Convention, unlike the Women’s Convention, does not extend protection against discrimination beyond “public life.” Further, the Committee’s mandate was limited to discrimination on grounds of race; it did

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<sup>20</sup>Ibid., 11.

<sup>21</sup>Ibid., 10.

<sup>22</sup>Ibid., 8.

not encompass discrimination on the grounds of gender. To ensure the effective functioning of the treaty system, treaty bodies should respect the limits of their competence. ... In relation to women's health, Mr. Banton suggested that it would be preferable to focus on social processes of disadvantage and their physical consequences and to identify points of intervention. Treaty bodies should be wary of exceeding their mandates or of overlapping their functions.<sup>23</sup>

As discussed below, in part II of this analysis, the advocates for this strategy simply worked around such resistance, picking the treaty bodies—most notably the treaty bodies for the ICCPR and CEDAW—that were staffed by like-minded advocates.

The fourth and final part of the strategy was to provide the treaty bodies with the specific interpretations. Most important, the committees were told where and how to find a right to abortion-on-demand in their various treaty documents. For instance, the right to life would become justification for abortion:

The right to life (article 6, ICCPR) has already been applied to infant mortality. The Committee has emphasized the obligation of States parties to take affirmative measures to ensure protection. It could be extended to the issue of life expectancy, including distinctions between women and men, particularly in respect of issues of women's reproductive and sexual health which adversely affect women's life expectancy, such as ... strict abortion laws which lead women to seek unsafe abortion.<sup>24</sup>

The committee further mapped out how the HRC would interpret the ICCPR:

The right to equality before the courts and before the law (articles 14 and 26, ICCPR) could encompass laws which imprison women for certain offenses while men go free, as in the case of abortion and prostitution, or which restrict women's access to health and family planning services by the operation of spousal consent requirements ... The right to freedom of movement (article 12, ICCPR) could extend to the consideration of laws which prohibit women from traveling abroad to seek an abortion ... The right to protection of privacy and home (article 17, ICCPR) could include consideration of women's right to make their own decisions about pregnancy and abortion ... The right to freedom of expression and to seek, receive, and impart information (article 19, ICCPR) protects the freedom of

<sup>23</sup>Ibid., 25–26.

<sup>24</sup>Ibid., 22–23.

women of all ages to receive and impart information about health services, including contraception and abortion.<sup>25</sup>

Roundtable participants planned to make maternal mortality a central part of the plan to claim an international right to abortion:

In adopting a human rights approach to women's health, the treaty bodies could consider the issue of maternal mortality, and the means to reduce the incidence of maternal mortality by the application of specific rights provided for in the respective treaties. Thus, for example, the Human Rights Committee could apply the right to life (article 6, ICCPR); the CESCR could apply the right to health care (article 12, ICESCR); CEDAW could apply the right to nondiscrimination on the ground of gender, in relation to the criminalization of medical procedures which are only needed by women, such as abortion (article 1 and article 12, Women's Convention).<sup>26</sup>

The sweeping nature of this strategy, in its implementation and interpretation stage, should be readily apparent from this list of bedrock and fundamental human rights that were used as vehicles for incorporating controversial beliefs into the corpus of human rights—used for the very reason that those beliefs could not achieve the status of human rights under their own names.

## II

The next logical question becomes a historical one: what happened after the meeting, after all of these people left the mansion in Glen Cove? The finest plans must be carried forth into praxis. Did this happen? Amazingly, the agencies, NGOs, and treaty bodies have followed the recommendations and decisions made at the Roundtable in a disciplined manner perhaps never seen before in modern international negotiations.

## CHANGING SOFT NORMS INTO HARD LAW: THE ROLE OF NGOS

The most well placed and well financed NGO has proved to be the Center for Reproductive Rights (CRR), originally known as the Center for Reproductive Law and Policy (CRLP), a New York-based group founded in 1992 by lawyers formerly associated with the American Civil Liberties Union (ACLU). In 2003, a series of reports from a major CRR strategy session were made public and are now part of the U.S. Congressional Re-

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<sup>25</sup>Ibid., 36–37.

<sup>26</sup>Ibid., 22.

cord.<sup>27</sup> We learn from these memos that the CRR strategy is revolutionary to the point of being a cabal. Following the recommendations of the Roundtable, CRR intends to reinterpret almost every major internationally recognized human right to include a right to abortion, and then fight for that reinterpretation to become the definitive one, thereby creating a legal obligation with which the “hard countries” (pro-life countries) must comply. According to CRR,

Reproductive rights advocates, including the Center, have found guarantees of women’s right to reproductive health and self-determination in long-standing and hard international norms, relying on such instruments as the Universal Declaration of Human Rights..., 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.<sup>28</sup>

In fact, CRR “finds” reproductive rights everywhere it looks:

We and others have grounded reproductive rights in a number of recognized human rights, including: the right to life, liberty, and security; the right to health, reproductive health, and family planning; the right to decide the number and spacing of children; the right to consent to marriage and to equality in marriage; the right to privacy; the right to be free from discrimination on specified grounds; the right to modify traditions or customs that violate women’s rights; the right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment; the right to be free from sexual violence; and the right to enjoy scientific progress and to consent to experimentation.<sup>29</sup>

The rulings of the treaty monitoring bodies, although “soft” in legal terms, are essential to CRR’s strategy for the very simple reason that these rulings often count as the authoritative interpretations of established hard norms. Establish the right soft norms and you can transform them into hard norms that really matter. Thus, for CRR, a principal option is to develop “soft norms” or precedents (decisions or interpretations) to guide states’ compliance with binding norms.<sup>30</sup> CRR knows that this strategy works,

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<sup>27</sup>The CRR documents were introduced in the House of Representatives by the Hon. Christopher H. Smith of New Jersey. “Documents Reveal Deceptive Practices by Abortion Lobby,” 108 Cong., 1st sess., *Congressional Record* 149, no. 175, extensions of remarks (December 8, 2003), E2534–E2547, [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=E2534&dbname=2003\\_record](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=E2534&dbname=2003_record).

<sup>28</sup>CRR, in *Congressional Record*, E2535.

<sup>29</sup>*Ibid.*, E2536.

<sup>30</sup>*Ibid.*

since it has already worked: “it is possible to secure favorable interpretations. Indeed, the Center has begun to do so.”<sup>31</sup>

Additionally, CRR believes that a soft norm, repeated often enough, may, of itself, become a hard norm. It may then, through its “customary” use, become a binding international law. The possible creation of pro-abortion “customary” law is especially attractive, since it implies that this norm is now the standard view of the international community. In fact, CRR even believes that new customary international law can therefore become binding on recalcitrant countries, those “hard countries” that have not adopted the reproductive rights agenda. In this regard, the gradual accumulation of soft norms may result in an international hard norm even tougher than treaty provisions, since only the states that ratify a specific treaty are bound to respect its provision. It is essential to note that this point would require its own substantial reinterpretation of the accepted view of customary international law.<sup>32</sup>

## A LEGAL PLAN FOR NEW RIGHTS BY STEALTH

We learn about other aspects of this strategy by studying the CRR memos. Most important, the memos indicate the parties must work through secrecy. The notes envision a multi-year “stealth” effort to create an international right to abortion that is binding on all nations. It must be secret, because the goal is to impose this right on pro-life nations, what CRR labels the “hard countries.” According to CRR,

The gradual nature of this approach ensures that we are never in an “all-or-nothing” situation, where we may risk a major setback. . . . There is a stealth quality to the work: we are achieving incremental recognition of values without a huge amount of scrutiny from the opposition. These lower profile victories will gradually put us in a strong position to assert a broad consensus around our assertions.<sup>33</sup>

In other words, CRR hopes to present the international right to abortion as a legal fait accompli. This strategy amounts to a sort of confidence game.

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<sup>31</sup>Ibid., E2535.

<sup>32</sup>The controversy over what constitutes customary international law and international obligation has reemerged with force in the debates about the rights of prisoners of the war on terror. In these debates it is clear that no consensus exists in the way CRR asserts. For a restrictive view, see papers by John C. Yoo, for example, “Globalism and the Constitution: Treaties, Non-Self-Execution and the Original Understanding,” *Columbia Law Review* 99.8 (December 1999): 2218–2258. For a permissive viewpoint, see Harold Hongju Koh, “Paying ‘Decent Respect’ to World Opinion on the Death Penalty,” Edward L. Barrett Jr. Lecture on Constitutional Law, *U.C. Davis Law Review* 35.5 (June 2002): 1085–1131.

<sup>33</sup>CRR, in *Congressional Record*, E2538.

CRR acknowledges that an explicit international agreement on abortion rights, resulting in a new international legal instrument, “offers the potential for strong, clear and permanent protections of women’s reproductive rights.”<sup>34</sup> But in the memos, CRR explicitly rejects calls for such a legal instrument. Why? CRR is most interested in creating the perception that international law already recognizes abortion rights, and worries that such an enterprise would undermine this perception:

Embarking on a campaign for a new legal instrument appears to concede that we do not have legal protections already, making failure potentially costly. . . . As a matter of public perception, does pursuing a new instrument—without any assurance of success—undermine current claims regarding the existence of reproductive rights?<sup>35</sup>

In the memos—intended only for its staff—CRR readily admits that there are profound “gaps” in international law relating to reproductive rights, stating flatly that “there is no binding hard norm that recognizes women’s right to terminate a pregnancy.” However, in the very next sentence, CRR begins to explore how “to argue that such a right exists.”<sup>36</sup>

The second part of the plan is to discredit national sovereignty. According to CRR, the goal of their international legal program “is to ensure governments worldwide guarantee women’s reproductive rights out of an understanding that they are bound to do so.”<sup>37</sup> CRR works to strengthen international governmental structures at the expense of national sovereignty, since the “international fora with a quasi-judicial character arguably offer the most promising venues for securing justice and interpretations that actually change governments’ behavior.”<sup>38</sup>

The third part is to undermine the United States. In its 2001 lawsuit against the Bush administration, it is clear that CRR holds a special animus toward the United States on account of its well-organized and influential opposition to CRR’s agenda: “Since the decision of the United States Supreme Court in *Roe v. Wade*, there has existed an ongoing political, legal, and social movement in the United States to overturn *Roe*, prohibit abortion, and protect fetal life from the moment of conception.”<sup>39</sup> This opposition is certainly reflected in the policies of President George W. Bush’s administra-

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, E2536.

<sup>37</sup> *Ibid.*, E2535.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Center for Reproductive Law & Policy v. George W. Bush*, complaint, U.S. District Court, Southern District of New York (2001), 21, <http://news.lp.findlaw.com/hdocs/docs/crlp/crlpbushcmplt60601.pdf>.

tion, causing CRR to lament in a memo, “What good is all our work if the Bush administration can simply take it all away with the stroke of a pen, by, for example, enacting the federal partial-birth abortion ban that we are currently fighting?”<sup>40</sup> As the actions of the Bush administration at the UN have made clear, the United States can use its immense international influence to pursue a worldwide counter-revolutionary agenda on reproductive rights.

The CRR has elaborate plans for the United States as well as for the Holy See. First, CRR seeks to isolate the United States from the rest of the international community: “In order to counter opposition to an expansion of recognized reproductive rights norms, we have questioned the credibility of such reactionary yet influential international actors as the United States and the Holy See.”<sup>41</sup> Even more importantly, CRR hopes that its customary law strategy will simply wrest power away from the United States to govern itself on issues relating to abortion. In the court papers filed against the Bush administration in 2001, CRR (then known as the Center for Reproductive Rights and Policy, CRLP) asserts that “generally recognized international legal norms may, if endorsed and accepted by the vast majority of nations, become part of customary international law and thus binding on the United States even if it does not ratify or endorse those norms.”<sup>42</sup> In fact, the suit admits that CRR and its allies “prepare for the eventuality that Roe may be overruled by the United States”<sup>43</sup> by advancing customary international law. This also explains why the ICCPR and its potential reinterpretation loom so large in the strategy of the Roundtable participants: the United States has ratified ICCPR, although not its optional protocols.<sup>44</sup>

The fourth aspect of the plan is to create enforcement mechanisms. CRR knows that there must be teeth to these laws: “Because we wish not only to set standards for government behavior, but also to ensure that governments understand that they are bound to those standards, our success depends on some focus on enforcement of international law.”<sup>45</sup> Here the NGO hopes to use national supreme courts to impose the new interpretations of the treaties on recalcitrant nations: “Jurists are aware of how legal questions have been resolved by their peers in other fora. Arguments based on the decisions of one body can be brought as persuasive authority to decision-makers in other bodies.”<sup>46</sup>

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<sup>40</sup> CRR, in *Congressional Record*, E2540.

<sup>41</sup> *Ibid.*, E2539.

<sup>42</sup> *CRLP v. Bush* complaint, 23.

<sup>43</sup> *Ibid.*, 21.

<sup>44</sup> The United States has also ratified the CERD and CAT, but has not ratified the CESCRC, CEDAW, CEDAW optional protocol, CRC, CRC optional protocols, or CMW.

<sup>45</sup> CRR, in *Congressional Record*, E2537.

<sup>46</sup> *Ibid.*, E2538.

How would this plan work? A related example concerns the U.S. Supreme Court decision to overturn Texas's sodomy law, *Lawrence v. Texas*. In the majority opinion, Justice Anthony Kennedy cited a "friend of the court" (amicus) brief submitted in the case by Mary Robinson, former UN High Commissioner for Human Rights. Robinson asserted that the United States must accede to certain international beliefs on this topic, beliefs that have now found voice in the recommendations of the treaty monitoring bodies. Robinson wrote, "five of the six major UN human rights treaties have been interpreted by their respective supervisory organs to cover sexual orientation discrimination."<sup>47</sup> In fact, none of the UN treaties cited by Robinson actually mentions sexual orientation. While the foreign law did not control authority in the *Lawrence* opinion, it may have a greater impact on future decisions, and that is what CRR and others are hoping.

The basic dishonesty involved in this strategy is apparent in the works of other pro-abortion NGOs, such as the International Women's Health Coalition (IWHC). According to IWHC,

The international conference and human rights documents ... do not explicitly assert a woman's right to abortion, nor do they legally require safe abortion services as an element of reproductive health care. Moreover, the ICPD [UN International Conference on Population and Development, 1994] and FWCW [Fourth World Conference on Women, 1995] agreements recognize the wide diversity of national laws and the sovereignty of governments in determining national laws and policies. Despite these qualifications, however, the conference documents and human rights instruments—if broadly interpreted and skillfully argued—can be very useful tools in efforts to expand access to safe abortion.<sup>48</sup>

## TARGETING CHILDREN

IWHC, a pro-abortion lobby recently praised for its work by UN Secretary General Kofi Annan, confidently pushes aside the facts to assert that,

Certain provisions of international human rights instruments can also be used to argue for access to safe abortion services, [including] women's right to life and security of person. ... The right to life would imply that abortion services must be provided for women

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<sup>47</sup>*Lawrence v. Texas*, amicus brief by Mary Robinson, 539 U. S. 558 (2003), 24, <http://hrw.org/press/2003/07/amicusbrief.pdf>.

<sup>48</sup>A. Germain and T. Kim, "Expanding Access to Safe Abortion: Strategies for Action" (New York: International Women's Health Coalition, 1998), 6, [http://www.iwhc.org/docUploads/Expanding\\_Access\\_English.pdf](http://www.iwhc.org/docUploads/Expanding_Access_English.pdf) (original emphasis).

whose lives are endangered by pregnancy. A country could be in violation of this right if it refuses to protect women from risk of death or disability resulting from unsafe abortion.<sup>49</sup>

The International Planned Parenthood Federation (IPPF), like CRR and IWHC, was present at the Roundtable. IPPF has been distributing a brochure to children worldwide informing them that the Convention on the Rights of the Child (CRC) has established for them an international right to abortion as well as complete sexual autonomy from their parents.<sup>50</sup> According to this document, both the CRC's recognition of a child's right to life as well as a child's right to health can be interpreted to mean that children should have access to abortion. For example, the CRC's broad right to health includes the right to "visit a doctor or nurse to receive the full range of sexual and reproductive health services that are available and legal in your country, including contraceptives [and] abortion services." Also, because children have a right to life, they must be protected from reproductive problems that could threaten their lives, "such as ... unsafe [illegal] abortion."

The IPPF brochure tells children that the CRC frees them from any parental interference in their sexual education or in the provision of reproductive services. Because children have a right to health, the brochure states, "No one should turn you away or stop you from receiving services, or demand that you get someone else's permission first (e.g. the permission of a parent)." The right to privacy means that "if you tell a medical person or a teacher something that you don't want anyone else to know, then he or she should respect your privacy." According to IPPF, the CRC firmly establishes a child's right to complete sexual freedom and autonomy. As the brochure tells children,

You should be given wide-ranging and easy to understand information on sexual and reproductive issues that will let you feel comfortable with yourself, your body and your sexuality. This information should enable you to make your own decisions about your sexual and reproductive health.<sup>51</sup>

Thus, the Glen Cove Roundtable and individual NGO strategies were carefully established to misinterpret existing and universally accepted rights into new, controversial, and unaccepted sexual and reproductive rights, including the so-called right to abortion. Even though the underpinnings

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<sup>49</sup> Germain and Kim, *Expanding Access*, 5.

<sup>50</sup> International Planned Parenthood Federation, "Young Person's Guide to the UN Convention on the Rights of the Child and Sexual and Reproductive Health and Rights" (London: IPPF, 2002), <http://content.ippf.org/output/ORG/files/7541.pdf>.

<sup>51</sup> IPPF, "Young Person's Guide."

of this strategy—official international consensus at the Cairo and Beijing conferences—are hollow, by the end of the 1990s, implementation of the strategy was well under way. In 2006, the work of the treaty bodies indicates that the strategy is working.

### III

In less than a decade, the treaty bodies have been able to redefine terms and change the treaties' original meanings with impunity. Treaty bodies continue to ask nations to provide information on policies not covered by the treaties, and nations have largely complied. This would be merely another puzzling aspect of international diplomatic theater if it were not for the fact that, in this brief period of time, states have also felt pressured to change their national laws on these same matters, and some have done so.

## ELEVATING THE CONFERENCES—CEDAW AS PROXY FOR CAIRO AND BEIJING

The CEDAW treaty, commonly called the Women's Convention, was adopted in New York on December 18, 1979, and entered into force on September 3, 1981. According to a UN handbook for new diplomats, "the Convention is the only human rights treaty to affirm the reproductive rights of women."<sup>52</sup> Yet the treaty does not mention reproductive rights, reproductive health, or any other formulation of the term at all. That even a non-legal UN document can make this claim unchallenged is an indicator of how pervasively the Cairo and Beijing language has permeated the interpretation of the CEDAW treaty, and human right treaties in general. At the negotiations on the newest human rights treaty in August 2006, the Disabilities Convention, delegates were surprised that the CEDAW treaty was silent on reproductive health, and one went so far as to insist that there must be some error in the text shown to him.<sup>53</sup> This common misunderstanding about the Convention results from a deliberate misinterpretation of the treaty, in particular the liberty taken with Article 12 of the Convention in the CEDAW committee's General Recommendation 24.<sup>54</sup>

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<sup>52</sup>United Nations, "Focus 2006: Crossing Borders—Multilateral Treaty Framework: An Invitation to Universal Participation," 2006, 38, [http://untreaty.un.org/English/TreatyEvent2006/Focus2006\\_eng.pdf](http://untreaty.un.org/English/TreatyEvent2006/Focus2006_eng.pdf).

<sup>53</sup>Author interviews with various country delegates to the Ad Hoc Committee on the Convention on the Rights of Persons with Disabilities, August 14–25, 2006, New York.

<sup>54</sup>The other human rights treaty bodies have adopted similar General Comments, Recommendations, and reporting procedures that indicate acceptance of the agenda. These include Human Rights Committee General Comment 11, requiring states to report on access to abortion in cases of rape; CESCR General Comment 14, asserting broad rights on reproduction; HRC changing of their reporting guidelines in 1995 to include details of progress on

General Recommendations are the treaty body members' own interpretations of the articles of the conventions. Once created, they serve as the committees' official interpretations, which then steer their findings regarding a nation's compliance. The recommendations allow committees to expand on the articles in cases where an issue has become urgent or perennial among many nations, to provide guidelines about applying an article where the language of the convention might seem underdeveloped, or to adapt the article to a perceived change in circumstances since the time the convention was adopted. This practice gives committees the power to expand the treaty beyond the boundaries set by those who carefully negotiated its language. Treaty language is often the most vague where there was the least agreement about application of the articles and where a compromise had to be struck. Thus, there is a danger that the General Recommendations are becoming an attempt to reverse consensus where none existed or was intended by those who ratified the treaties.

CEDAW General Recommendation 24 asserts that, "when possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion."<sup>55</sup> The Comment further warns that states, "must also put in place a system that ensures effective judicial action. Failure to do so will constitute a violation of article 12." However, Article 12 is silent on the subject of abortion, its full text stating only:

1. 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.
2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the postnatal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.<sup>56</sup>

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women's rights; CRC General Comment 1, requiring states to report on the gender sensitivity of school curricula, and General Comment 3, regarding cultural attitudes about girls' sexuality; CERD changing of reporting guidelines in 1999 and its General Recommendation 25 on gender-related dimensions of racial discrimination. See general comments and recommendations for the treaties at <http://www.unhchr.ch/tbs/doc.nsf>.

<sup>55</sup>CEDAW, Twentieth Session, General recommendation 24, (1999), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

<sup>56</sup>General Assembly, Thirty-fourth Session, "Convention on the Elimination of All Forms of Discrimination against Women," December 18, 1979 (A/RES/34/180), article 12.

How, then, does the CEDAW committee justify its extreme interpretation? General Comment 24 explains that the Committee used nonbinding UN conventions, the work of various UN agencies, and the opinions of NGOs to interpret Article 12:

In preparing this general recommendation, the Committee has taken into account relevant programmes of action adopted at United Nations world conferences and, in particular, those of the 1993 World Conference on Human Rights, the 1994 International Conference on Population and Development, and the 1995 Fourth World Conference on Women. The Committee has also noted the work of the World Health Organization (WHO), the United Nations Population Fund (UNFPA), and other United Nations bodies. It has collaborated with a large number of nongovernmental organizations with a special expertise in women's health in preparing this general recommendation.<sup>57</sup>

It is puzzling that this interpretation of Article 12 has been allowed to remain, given that at the time the Convention was adopted in 1979, the states that negotiated the treaty could not possibly have meant for it to include a right to legal abortion. First, there was no consensus on the issue in 1979. Even though some states had legal abortion at the time, most continued to criminalize it, and virtually all had restrictions on its practice. Second, it is telling that while the reservations to the CEDAW treaty far exceed those to similar treaties, not a single nation made a reservation to Article 12. The fact that 182 nations ratified the treaty and none of them made a reservation on this article, including those with restrictive abortion laws, makes it clear that states did not interpret the article to include reproductive rights.

Third, the most recent negotiations on the Disabilities Convention in August 2006 demonstrate definitively that there is still no international consensus on the matter. The abortion issue was so contentious that states negotiated until four o'clock in the morning on the last day of the proceedings because states, even those that had legalized the practice, wanted to be sure that the language in the treaty could in no way be construed as promoting or granting a right to abortion.<sup>58</sup>

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<sup>57</sup> CEDAW, General recommendation 24.

<sup>58</sup> The United States made the following statement upon the adoption of the Disabilities Convention by the General Assembly Ad Hoc Committee on August 25, 2006: "The U.S. understands that the phrase reproductive health does not include abortion, and its use in paragraph 25(a) does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion." See Lifesite report on UN Disabilities Conference, August 31, 2006, <http://www.lifesite.net/ldn/2006/aug/06083102.html>.

So why has the directive been allowed to stand? One reason is that the treaty bodies have no oversight, either from the nations they monitor, or from the UN system in general. Committee members act in their personal capacity and not as representatives of a particular country. In essence, they are unaccountable. A second reason is that they find like-minded support for their positions within the NGOs, UN agencies, other treaty bodies, and the UN system. Third, the CEDAW committee, like the other treaty bodies, is made of up many like-minded individuals who actively pursue or at least accept the Glen Cove agenda. While the country delegations may change every few years, some of the experts on the committees retain virtually permanent appointments. For example, Christine Chanet from France has been on the HRC for more than eighteen years, and led efforts to pressure several nations to legalize abortion, including Colombia, El Salvador, Kenya, Mali, Mauritius, Peru, Poland, and Sri Lanka. Chanet also pushed through the HRC finding against Peru in 2005 that would begin what advocates hope is a domino effect on Latin American prohibitions against abortion. Rosario Manalo from the Philippines has served on the CEDAW committee for seventeen years, and between 1997 and 2006 led the committee's pressuring of Australia, Chile, Colombia, the Dominican Republic, Ecuador, Ethiopia, Ireland, Italy, Jordan, Lebanon, Luxembourg, Mexico, Nepal, Northern Ireland (UK), Paraguay, Portugal, Togo, and Zimbabwe to liberalize their abortion laws or policies.

Treaty bodies continue to ask nations for information about abortion laws during their proceedings, knowing full well that the actual convention that they are to monitor is silent on the subject. Why is it that even though the treaty bodies have no capacity to enforce their creative interpretations, nations continue to play along with this routine and regularly report on their abortion laws and other extraneous laws and policies? While the answer remains illusive, understanding the multiple sources of pressure put on states, especially developing nations, to conform to UN edicts, requires an understanding of the intricate network of committee members, NGOs, national delegates, and UN agencies that work together to mutually reinforce the process.

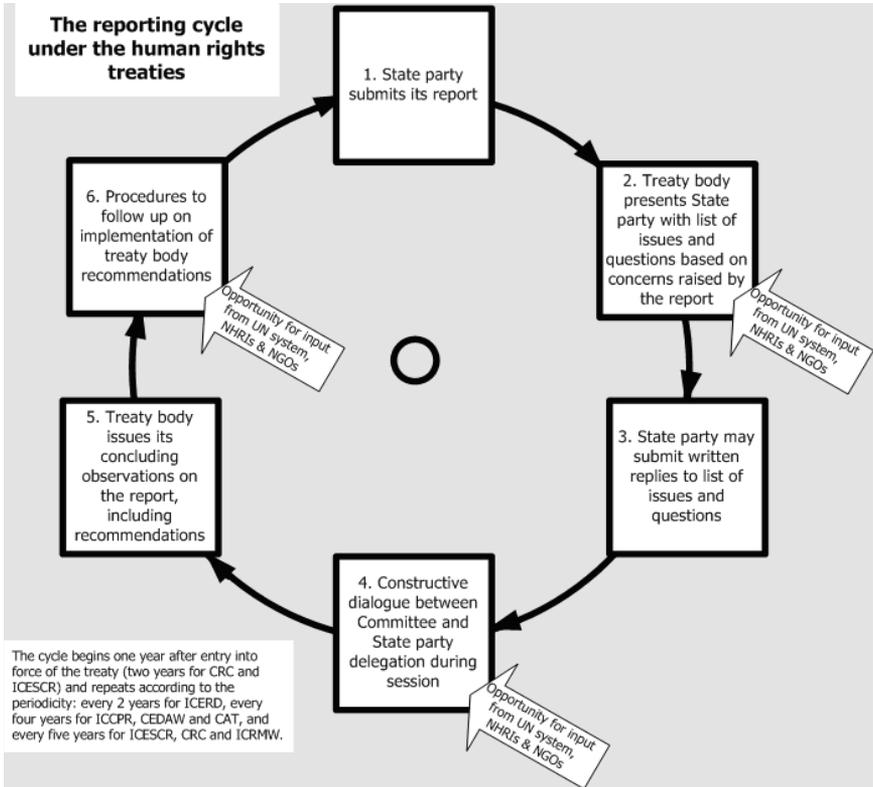
## BUILDING MUTUALLY REINFORCING NETWORKS—EXPERTS, NGOS, UN AGENCIES, AND DONORS

Committee members increasingly acknowledge the unprecedented and extensive influence NGOs are having on the treaty reporting process (Figure 2, following page).<sup>59</sup> Cecilia Medina, former chair of the HRC, acknowledged that the HRC had come to rely on NGO input so much that, “the

<sup>59</sup>Gaer, “Implementing International Human Rights Norms,” 339–357.

**Figure 2: Reporting Cycle for UN Human Rights Treaties**

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Committee could not function without information from nongovernmental organizations.”<sup>60</sup> This was not always the case. Until the 1990s, the committees often eyed NGOs with suspicion. But between 1990 and 1999, the situation rapidly reversed.<sup>61</sup> Not only have the committees come to rely on NGOs for input on state practice, they use them as watchdogs and enforcers of committee recommendations. Treaty bodies even ask states parties about the extent of NGO participation in the reporting process, set aside time during the proceedings to hear from NGOs, and often refer to them in their concluding comments.<sup>62</sup>

The NGOs’ shadow reports are highly influential on the country’s under-going review. Treaty bodies have come to rely on them. In fact, this was part of the original plan at Glen Cove:

<sup>60</sup>Ibid., 340.

<sup>61</sup>Ibid., 345.

<sup>62</sup>Ibid., 343.

Another mechanism for securing acceptance of reproductive rights, including abortion, as international human rights is to ensure compliance by foreign governments and the United States with international law that protects such rights. One way of doing so is to prepare and publish “shadow reports” in the status, both in the United States and foreign countries, of reproductive rights and access to reproductive health care, including abortion. Such reports “shadow” government reports to United Nations treaty monitoring bodies. The monitoring bodies then issue recommendations to governments concerning actions they should take to comply with their treaty obligation.<sup>63</sup>

The NGOs themselves report how well this plan is working. The CRR asserts that its lobbying efforts, and shadow reports in particular, are having significant influence on CEDAW members, and that their interaction with the treaty bodies is in part responsible for the fact that the six human rights committees, regardless of their mandates, have pressed nations on the subject of abortion; the nations include Poland (HRC, 1999), Cambodia (CRC, 2000), Slovakia (CERD, 2001), Nepal (CESCR, 2001), Moldova (CEDAW, 2000), and China (CAT, 2001).<sup>64</sup>

A CRR partner NGO, EnGendeRights, also claims to influence outcome documents, including CEDAW’s last review of the Philippines. Clara Rita A. Padilla, attorney and executive director of EnGendeRights, likened NGO work with CEDAW experts to that of a legal team at a trial:

It’s like arguing in court and winning the case. Although I would have wanted for them to also issue their recommendations on the right to sexual orientation, I’m quite pleased with the Committee’s Concluding Comments.

A lot of our hard work paid off. We gave the CEDAW experts all kinds of materials from the Shadow Report, highlights/talking points, oral presentation, to our recommendations and even slips of paper with our comments.<sup>65</sup>

During the proceedings, the Philippine delegation confronted the committee, arguing that their government “upheld the constitutional provision safeguarding the life of the unborn child, as well as the mother.”<sup>66</sup> When

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<sup>63</sup>Roundtable Report, 90.

<sup>64</sup>Center for Reproductive Rights, “Bringing Rights to Bear: An Advocate’s Guide to the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights,” [http://www.reproductive-rights.org/pdf/pub\\_bp\\_brb.pdf](http://www.reproductive-rights.org/pdf/pub_bp_brb.pdf).

<sup>65</sup>Rina Jimenez-David, “Still a Lot to Do,” *Philippine Daily Inquirer*, September 5, 2006.

<sup>66</sup>General Assembly press release, “Women’s anti-discrimination committee urges Philippines to speed up legislation aimed at erasing stereotypes, combating violence against females,”

the delegate explained that her country fulfilled the requirements of the convention by offering all types of family planning, an expert asked “how the Government could expect women to use only natural family planning methods in a patriarchal society where most women had difficulty negotiating their right to refuse sex?”<sup>67</sup> The committee did not give evidence for this assertion, and the exchange is indicative of the way the proceedings can become ideologically charged.

The influence of the NGOs appears to go beyond what is expected given their size. The CRR has only forty-five permanent staff members, but a look at the organization reveals that its real influence is in its associations with donors and affiliates, and the way that it gives cover to UN and government officials to promote the controversial agenda. The CRR Expert Litigation Team includes UN Special Rapporteur for Health Paul Hunt, and its board of directors includes UN Special Envoy for HIV/AIDS Nafis Sadik, both of whom also work directly for the UN Secretary General. Additionally, one of CRR’s largest donors is UNFPA. The CRR also receives much of its ten-million-dollar annual budget from powerful foundations such as the Hewlett, Packard, Buffett, Ford, and MacArthur foundations, as well as from the Open Society Institute.<sup>68</sup> This is a mutually reinforcing network of UN officials, UN agencies, NGOs, and treaty bodies that work together to bolster and legitimate their common agenda. At the heart of this network is the reporting process of the committees.

## REMOVING TREATY BODY AUTONOMY AND REINTERPRETING EXISTING RIGHTS

In the last ten years, the six treaty bodies, individually or simultaneously, pressured forty-four nations to legalize or increase access to abortion. Six nations were pressured by two committees, and ten were pressured twice by the same committee.<sup>69</sup> It is increasingly clear that the committee members

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August 15, 2006. General Assembly press releases are available online at <http://www.un.org/News/Press/archives.htm>.

<sup>67</sup> *Ibid.*

<sup>68</sup> See reports on CRR at the Better Business Bureau of New York, <http://www.newyork.bbb.org>; and the CRR 2005 Annual Report, [http://www.crlp.org/pdf/pub\\_bo\\_AnnualReport2005.pdf](http://www.crlp.org/pdf/pub_bo_AnnualReport2005.pdf).

<sup>69</sup> The forty-four states pressured by committees to liberalize abortion laws comprise ten African nations, fifteen Latin American and Caribbean countries, four Asian countries, ten European countries, four Middle Eastern countries, and one Pacific Island country. The ten African countries are Burkina Faso (CEDAW, 2000), Eritrea (CEDAW, 2006), Ethiopia (CEDAW, 2004), Kenya (HRC, 2005), Mali (CEDAW, 2000, HRC, 2003), Mauritius, (HRC, 2005; CEDAW 1995), Morocco (CEDAW, 1997), Namibia (CEDAW, 1997, 2007 prep), Togo (CEDAW, 2006), and Zimbabwe (CEDAW, 1998). The fifteen Latin American and Caribbean states are Antigua and

do not independently interpret the treaties for which they were selected as experts, but instead use the misinterpretations of other committees to support their own. The experts are chosen from the states parties who nominate them, but once serving their term, they act in their personal capacity and are not accountable as country representatives. Committee members meet at least twice annually to confer on methods and substantive matters,<sup>70</sup> and have collaborated on formulating their General Comments.<sup>71</sup> There is now a move to consolidate all of the bodies into one super-compliance committee, which would further undercut committee autonomy and consolidate power in the hands of a few experts.

A recent example from Latin America illustrates the way the optional protocols, country reviews, and NGO activism work together to put consistent pressure on a country and region to change their laws. In November 2000, the HRC found that Peru was in violation of articles 3, 6, and 7 of the ICCPR because it did not legalize abortion.<sup>72</sup> These articles set forth the rights to effective remedy, to life, and to freedom from cruel, inhuman, or degrading treatment or punishment. In November 2002, the HRC received a communication from a woman in Peru who had tried and failed to get an abortion from public health professionals when she found out that the child had anencephaly, a fatal brain disease in which the child often dies within hours or days of delivery. Represented by CRR<sup>73</sup> and two Latin American

Barbuda (CEDAW, 1997), Argentina (CEDAW, 1997), Belize (CEDAW, 1999), Chile (CESCR, 2004; CEDAW 1999, 1995), Colombia (HRC, 2004, CEDAW 1999, 2007 prep), Dominican Republic (CEDAW, 2004, 1998), Ecuador (CEDAW, 2003), El Salvador (HRC, 2003), Mexico, (CEDAW, 1998, 2006), Panama (CEDAW 2005, 1996), Paraguay (CEDAW 2005, 1996), Peru (HRC, 2005; CEDAW, 1998), St. Vincent and Grenadines (CEDAW, 1997), Trinidad and Tobago (CESCR, 2002), and Venezuela (CEDAW, 1997). The four Asian states are Indonesia (CEDAW, 1998), Myanmar (CEDAW, 2000), Nepal (CEDAW, 1999), and Sri Lanka (HRC, 2003). The ten European states are Andorra (CEDAW, 2001), Cyprus (CEDAW, 1996), Ireland (CEDAW, 2005, 1999), Italy (CEDAW, 1997), Liechtenstein (CEDAW, 1999), Luxembourg (CEDAW, 2000, 1997), Malta (CESCR, 2004), Poland (HRC, 2004, CESCR, 2002, 1998), Portugal (CEDAW, 2002), and UK-Northern Ireland (CEDAW, 1999). The four Middle Eastern states are Jordan (CEDAW, 2000), Kuwait (CESCR, 2004), Lebanon (CEDAW, 2005), and Turkey (CEDAW, 1997). The Pacific Island state is Australia (CEDAW, 2006). Thomas Jacobson, "Forty-four Nations Arbitrarily Pressured by UN Treaty Committees to Legalize or Increase Access to Abortion," unpublished paper, June 5, 2006.

<sup>70</sup> See Office of the High Commissioner on Human Rights, "Annual meeting of chairpersons of human rights treaty bodies and inter-committee meeting, Geneva, June 19–23, 2006," <http://www.ohchr.org/english/bodies/icm-mc/index.htm>.

<sup>71</sup> Johnstone, "Feminist Influences," 164.

<sup>72</sup> Human Rights Committee, Seventieth Session, "Concluding observations: Peru," November 15, 2000 (CCPR/CO/70/PER).

<sup>73</sup> CRR was then called CRLP, the Center for Reproductive Law and Policy.

affiliates, DEMUS and CLADEM, the woman claimed that having to carry to term and breastfeed her fatally ill child caused her to become depressed.

After a delay of three years, the Committee delivered its views in October 2005, and found that Peru had violated the claimant's right to life and caused her cruel, inhuman, or degrading treatment (Articles 6 and 7).<sup>74</sup> Because the woman was a minor at the time of giving birth to her child, the HRC also found Peru in violation of child protection (Article 24).

The Peru case also highlights the way the committees reinforce one another, referring to each others' misinterpretations to support their claims. In the Peru report, the HRC noted

that the Committee has viewed lack of access for women to reproductive health services, including abortion, as a violation of women's right to life, and that this has been reiterated by other committees such as the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights.<sup>75</sup>

The HRC finding, in turn, reinforced NGO strategies to liberalize abortion laws in the region. CRR, which prepared the Peru claim, then used the finding to help support a domestic case brought to the high court in Colombia later the same year. A CRR-trained Colombian attorney, Monica Roa, brought suit against Colombia, claiming that Colombia's law violated its international agreements to protect a woman's right to life and health. In a five-to-three decision handed down in May 2006, the Constitutional Court overturned Colombia's law prohibiting abortion.<sup>76</sup> In its opinion, the court concluded that it was bound by "the recommendations made by the international authorities in charge of overseeing compliance by" Colombia with the "Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)."<sup>77</sup>

Reinforcing the interlocking nature of this cycle, the CEDAW committee has included the court ruling in its list of questions that Colombia is to address in its report for the January–February 2007 session:

Please indicate what measures have been taken or are planned to ensure that judges in lower courts take into account the ruling of the Constitutional Court in their decision. Also, please indicate

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<sup>74</sup>Human Rights Committee, Eighty-fifth Session, "Views," November 22, 2005 (CCPR/C/85/D/1153/2003).

<sup>75</sup>Ibid., 6.

<sup>76</sup>Juan Forero, "Colombian Court Legalizes Some Abortions," *New York Times*, May 12, 2006, A14.

<sup>77</sup>Colombia high court ruling legalizing abortion. English translation of excerpts of the opinion may be found at [http://www.womenslinkworldwide.org/pub\\_c355.html](http://www.womenslinkworldwide.org/pub_c355.html)

whether the Constitutional Court's ruling could have an impact on the possible reform of abortion laws.<sup>78</sup>

The international NGOs support a network of local NGOs in member states and territories. The local advocates for legalized abortion in Latin America claim that the favorable interpretation of international law by the treaty bodies, and the Peru decision in particular, has emboldened them in their domestic efforts to overturn abortion laws.<sup>79</sup> They, in turn, help the international NGOs like CRR by alerting them to local cases that may advance the agenda.

The strategy is to use hard cases, what CRR's international litigation strategy calls "high impact cases," to win court challenges to national laws. These cases capture the public's attention and gain the sympathy of judges—particularly cases that involve a minor and frame the argument in terms of maternal mortality, such as the 2006 case of a Mexican woman who was raped at age thirteen. In that case, *Paulina Ramírez v. Mexico*, CRR was able to win damages in the Inter-American Commission on Human Rights by arguing that Mexico failed to abide by its international obligations to make sure that abortion was provided legally in the case of rape. CRR then presented that finding in its shadow letter to CEDAW for the most recent committee meeting on Mexico, in August 2006, and by its own estimation was very influential in getting the CEDAW committee to include language regarding the connection of illegal abortions to maternal mortality, the need for safe (legal) abortion, and emergency contraception in the concluding comments of their report on the review of Mexico.<sup>80</sup>

## MATERNAL MORTALITY— HARD CASES AND DOUBLE SPEAK

One of the most common arguments committee experts use to pressure states to legalize abortion is that legalization will lower their country's maternal mortality rates. The committees, supported by NGOs and UN agencies like the World Health Organization (WHO), consistently link maternal mortality to the criminalization of abortion. This is problematic. The lowering of maternal mortality rates is due to improvements in nutrition, basic health care, prenatal care, and good basic and emergency obstetrical

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<sup>78</sup> CEDAW, "List of issues and questions for the consideration of periodic reports: Colombia," August 14, 2006 (CEDAW/C/COL/Q/6).

<sup>79</sup> Juan Forero, "Push to Loosen Abortion Laws in Latin America," *New York Times*, December 3, 2005, A1.

<sup>80</sup> CEDAW, "Concluding comments: Mexico," August 26, 2006, (CEDAW/C/MEX/CO/6), <http://www.crlp.org/pdf/CEDAW.CO.Mexico.pdf>; CRR, "Supplementary information about Mexico scheduled for review during the CEDAW committee's 36th session," letter to CEDAW, August 7, 2006, [http://www.crlp.org/pdf/sl\\_Mexico\\_eng2006.pdf](http://www.crlp.org/pdf/sl_Mexico_eng2006.pdf).

care during and after delivery. The WHO's own research has shown that decreased maternal mortality rates in the developed world "coincided with the development of obstetric techniques and improvement in the general health status of women,"<sup>81</sup> and not with the legalization of abortion. Subsequent WHO reports corroborate its earlier findings, and identify low social and economic status, unskilled birthing attendants, and poor nutrition as underlying causes of maternal mortality. Anemia and malaria have been identified as primary indirect causes of maternal deaths in African countries. Yet the experts continue to focus on illegal abortion with the delegations appearing before the committees. In August 2006, the CEDAW committee report on Mexico stated,

The Committee notes with concern that abortion remains one of the leading causes of maternal deaths and that, in spite of the legalization of abortion in specific cases, women do not have access to safe abortion services and to a wide range of contraceptive measures, including emergency contraception.<sup>82</sup>

It is telling that committees and NGOs which make this argument do not offer causal analysis, but are sufficiently confident that vague correlative arguments suffice. Given that nations continue to provide the committees the information they seek in this regard, it seems as though UN delegations have bought into this false line of reasoning.

This is confounding, since the committees themselves frequently contradict their own arguments. The same experts who argue that illegal abortion is the cause of high maternal mortality also find that legal abortion is one of the primary causes of death among women worldwide. For example, at the August 2006 session, the CEDAW committee pointed out to Ghana that abortion causes 30 percent of maternal deaths in that country.<sup>83</sup> Abortion was legalized in Ghana in 1960. In Jamaica, where abortion was legalized in 1938, unsafe abortions were the fifth contributing cause of female deaths.<sup>84</sup> In Moldova, where abortion is not only legal but free of charge, the committee said that abortion causes 10 percent of female deaths, and that maternal mortality and HIV/AIDS and other phenomena were on the

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<sup>81</sup> Carla Abou Zahr and Erica Royston, *Maternal Mortality, A Global Factbook* (Geneva: WHO, 1991).

<sup>82</sup> CEDAW, "Concluding comments: Mexico," 8.

<sup>83</sup> General Assembly press release, "Women's anti-discrimination committee commends Ghana for taking convention obligations seriously," August 9, 2006.

<sup>84</sup> General Assembly press release, "Significant progress made, but gender stereotyping still major obstacle to equality in Jamaica, women's anti-discrimination committee told," August 11, 2006.

rise.<sup>85</sup> In its last session, the CEDAW committee complained to Cuba that so many women were having abortions in that country that they wanted to know what the government was doing about the “culture of abortion” in Cuba. Cuba, which legalized abortion in 1965,<sup>86</sup> responded that the rate may be alarming, but at least legal abortion was not causing as many deaths as it did in other countries.<sup>87</sup>

The contradiction in their argument extends to family planning in general. Like the WHO and other UN agencies, the CEDAW committee sometimes admits that the evidence does not back up its assertions about contraception.<sup>88</sup> In the case of France, CEDAW noted that,

French statistics on contraception are paradoxical: despite the massive dissemination of information regarding contraceptive methods in the past thirty years, the number of undesired pregnancies is still high. According to the most recent data, almost one-third of all pregnancies are unexpected; of them, half end in voluntary termination.<sup>89</sup>

Despite the fact that the experts have found that pervasive use of contraception in the developed world contributes to high abortion rates, and that legal abortion is linked to maternal mortality, they continue to press countries with lower contraceptive rates to increase distribution and education, especially among minors.

What is the reason why committees, NGOs, and UN agencies continue to use this disproved line of argument? Essentially, they use it because it works. Press reports pursuant to the recent HRC finding against Peru, the Colombian high court ruling, and the Inter-American Human Rights findings against Mexico indicate that the maternal mortality argument is especially effective in swaying Latin American public opinion.<sup>90</sup> Without

<sup>85</sup> General Assembly press release, “Women’s anti-discrimination committee commends Moldova’s legislative efforts to promote gender equality, combat trafficking in persons,” August 16, 2006.

<sup>86</sup> Abortion was first legalized in Cuba in 1936.

<sup>87</sup> General Assembly press release, “Cuba striving hard to eliminate persistent stereotypes, women’s inequality, deputy foreign minister says, as women’s committee considers latest country report,” August 8, 2006.

<sup>88</sup> See World Health Organization, Department of Reproductive Health and Research, “Sexual and Reproductive Health—Laying the Foundation for a More Just World through Research and Action: Biennial Report 2004–2005,” [http://www.who.int/reproductive-health/publications/biennial\\_reports/2004\\_05/report.pdf](http://www.who.int/reproductive-health/publications/biennial_reports/2004_05/report.pdf).

<sup>89</sup> CEDAW, “Sixth periodic report of states parties: France,” April 6, 2006 (CEDAW/C/FRA/6), 49.

<sup>90</sup> “Abortion Rights in Latin America,” editorial, *New York Times*, January 6, 2006.

taking direct aim at the Roman Catholic Church in these countries, the carefully selected cases undermine Catholic teaching on the sanctity of the unborn child's life by casting the problem as one of the lesser evil: saving the life of the mother, often a child herself, at the expense of the unborn child. This skewed perception is reinforced by the selection of high-profile court cases.

## CIRCUMVENTING DEMOCRACY

The committees continue to press nations that have repeatedly shown that their citizens are opposed to legalizing abortion. In Europe, Poland and Ireland have been especially goaded by the committees to liberalize abortion laws, with Ireland coming under fire twice by CEDAW and Poland by HRC and twice by CESCRC. Evident in the pattern of this division of labor is a deliberate burden sharing among the committees as they coordinate their efforts to advance a single agenda.<sup>91</sup> The repetitious probing by multiple committees continues over national objections and consistent state practice upholding the rights of the unborn. In their list of questions for Namibia's 2007 appearance, the CEDAW committee continues to try to break down that country's resistance:

The report indicates on page twenty-nine that the Ministry of Health proposed a draft law on abortion in 1996 but it was withdrawn in 1999 because a majority of Namibians were not in favour of the law. Are there any new efforts being undertaken to change the Abortion and Sterilization Act (Act 2 of 1975), which makes it a crime for a woman to seek an abortion, or terminate her own pregnancy, except in very narrow circumstances?<sup>92</sup>

In October 2006, CEDAW vice president Silvia Pimentel of Brazil intervened in a vote on abortion in Nicaragua's national assembly. Using her position as CEDAW vice chairman, she wrote a letter to the national assembly criticizing the influence in Nicaragua of "the hierarchies of the Catholic Church and some Evangelical Churches." Pimentel asserted that the national assembly should engage her and others in dialogue before voting to change Nicaragua's penal code and criminalize therapeutic abortion. In her letter, she maintains that by changing its laws, Nicaragua would be violating the right to a therapeutic abortion "protected by treaties and international conventions signed by Nicaragua."<sup>93</sup> Nicaragua has

<sup>91</sup> See footnote 69 above, listing the forty-four nations pressured by the treaty bodies.

<sup>92</sup> CEDAW, "List of issues and questions: Namibia," August 4, 2006 (CEDAW/C/NAM/Q/3), 4.

<sup>93</sup> Silvia Pimentel, letter to Nicaraguan National Assembly dated October 16, 2006. The assembly voted fifty-nine to zero to change the law.

made explicit reservations to international instruments stating that it does not interpret them as including abortion. For example, its reservation to the Cairo document states,

The Government of Nicaragua, pursuant to its Constitution and its laws, and as a signatory of the American Convention on Human Rights, confirms that every person has a right to life, this being a fundamental and inalienable right, and that this right begins from the very moment of conception.<sup>94</sup>

The committees' disregard for the democratic process and sovereignty is not limited to the abortion issue, but includes a variety of controversial issues, from gender quotas for elected officials to mainstreaming homosexuality. In January 2006, Hanna Beate Schopp-Schilling, from Germany, one of the vice-chairmen of CEDAW, pressed the Venezuelan delegation to make the fifty/fifty target of UN gender balancing the law of the land in that country. She did so by arguing that it was required by the CEDAW convention, even though the convention does not require such quotas. Schopp-Schilling pressed the Venezuelan delegation: "Since the [CEDAW] Convention actually overrides the Constitution [of Venezuela], have there been any efforts to incorporate the Convention provisions [into law]?" Her colleague, Meriem Belmihoub-Zerdani, from Algeria, also misrepresented the convention in a similar way, saying, "National legislature has 28.7 percent women; Executive has two women ministers. Continue fighting for 50/50; we hope Venezuela will be the first country to fully implement the convention by reaching 50/50."<sup>95</sup>

The boldness with which the committees misinterpret the conventions, overreach their mandates, and assert the binding nature of their office is remarkable. If states do not reclaim their authority from the committees, the proponents of the Glen Cove agenda will no doubt claim that they have won their battle to make abortion an international human right.

## IMPLICATIONS AND POLICY RECOMMENDATIONS

What is the effect of this agenda? Recently, the committees have come under fire from the inside. One CEDAW committee member, Krisztina

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<sup>94</sup>Nicaragua, oral statement of reservation to International Conference on Population and Development, in *ICPD Programme of Action, Part 2: Statements and Reservations*, chapter 1, [http://www.unfpa.org/icpd/icpd\\_poa.htm#pt2ch1](http://www.unfpa.org/icpd/icpd_poa.htm#pt2ch1).

<sup>95</sup>Thomas Jacobson, "CEDAW Committee Meeting Country Report Review: Venezuela," unpublished paper, January 26, 2006.

Morvai from Hungary, has criticized publicly the way the treaty bodies regularly overstep their mandates in order to promote a litany of controversial social policies, such as the right to abortion, the legalization of prostitution, the promotion of sex education for young teenagers, the promotion of contraceptives for young girls, and the promotion of free condoms in the developing world to deal with the scourge of HIV/AIDS, to the exclusion of all other remedies.<sup>96</sup>

*Policies Out of Step with the Rule of Law.* Morvai further believes that contrary to the rhetoric, the policies prove harmful to women and girls and therefore are not part of a genuinely “feminist” outlook. She points out that because these policies are not found in the treaties themselves, they are therefore not supported by elected governments and their citizens. The way the committees apply “creative interpretation” to their comments and recommendations regardless of the written text make it impossible for states to know their legal obligations. Since “one of the basic principles of the Rule of Law is that interpretations of the law must be coherent and consistent, and decisions based on the law must be predictable and foreseeable,” she argues, the treaty bodies are “largely incompatible” with the rule of law and cannot therefore be accepted as legally binding.<sup>97</sup> Hence, the strategy of redefining or misinterpreting existing human rights norms essentially undermines the perception that these proceedings are binding. This is highly ironic, since the purpose of using the strategy is to make binding the nonbinding norms that emerged from Cairo and Beijing.

*Treaty-Body Power Creep.* The optional protocols have contributed to a creeping increase of compliance-committee power. Aided by the substantial shadow reports, the groundwork of NGOs, the committees do not just publish reports on national compliance, but they are able to use the interlocking network to have virtual enforcement capabilities.

Additionally, while the committees have increasingly relied on NGO shadow reports and other investigations, this increased participation has done nothing to help the overwhelmed states who labor to make each report. The entire treaty monitoring system is coming under attack for overburdening states, especially small and developing nations. Making simultaneous investigative reports to the various committees is more than the administrative and technical infrastructures of many countries can handle. For example, Bolivia submitted its second, third, and fourth reports in March 2006, eleven years

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<sup>96</sup>Krisztina Morvai, “Respecting national sovereignty and restoring international law: the need to reform UN treaty monitoring committees,” briefing at UN headquarters, New York, September 6, 2006.

<sup>97</sup>Ibid.

after its first appearance before CEDAW.<sup>98</sup> On receiving Cape Verde's most recent report, the committee chided the delegation for taking more than two decades to make its initial report.<sup>99</sup>

*Poor Women Lose.* Another criticism of the strategy is that it is, at heart, elitist. While the international feminist–human rights movement has addressed the concerns of feminists throughout the developed world, it has not comparably helped women in general, especially poor and disadvantaged women in the global south. UNFPA, UNIFEM, and other UN agencies, by their own admission, have failed to improve the plight of women. In the UN report on violence against women, released in July 2006, Secretary General Kofi Annan states that there is “compelling evidence that violence against women is a severe and pervasive human rights violation throughout the world.”<sup>100</sup> Paul Kennedy notes that:

The women's agenda has certainly advanced since 1945, but it has done so in a very disproportionate manner. It has been most visible in places that hardly need UN assistance, like Stockholm and San Francisco, but is scarcely noticeable in Somalia and Senegal.... For the past decade, the number of people living on less than \$1 or \$2 a day has barely moved, and in sub-Saharan Africa the numbers are increasing absolutely. And poor women suffer the most. No matter how many UN agencies and commissions are created for women's issues, and no matter how many other international bodies from the World Bank to ECOSOC show concern, this remains a signal failure in our human condition.<sup>101</sup>

*Human Rights Regime Undermined.* Elitism has been a common criticism of the human rights movement in general. Human rights activists have long struggled with the fact that they have not been able to gain and maintain grassroots support, even while they enjoy the political and financial support of political parties and private foundations. This explains why the movement prefers to work by “stealth.” Rather than seeking to sway voters directly, they seek mastery of the complex and little-known inner workings of the international human rights system. Yet this approach undermines the very human rights system they need to advance the agenda. It is uncertain how

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<sup>98</sup> CEDAW, “Combined second, third, and fourth periodic reports: Bolivia,” March 29, 2006 (CEDAW/C/BOL/2-4).

<sup>99</sup> General Assembly press release, “Women's anti-discrimination committee chides delegation of Cape Verde over lateness in submitting first report,” August 18, 2006.

<sup>100</sup> General Assembly, Sixty-first Session, “In-depth study on all forms of violence against women: report of the Secretary General,” July 6, 2006 (A/61/122/Add.1), 95.

<sup>101</sup> Kennedy, *Parliament of Man*, 172.

sustainable such an approach would be if sovereign states decided to hold the treaty bodies accountable.

*Prospects for Change.* What would it take to restore credibility to the committees? At the forefront of reform should be a strategy, or counter-strategy, to roll back the methodical misinterpretation of language by the committees. The strategy must also address the rising power asymmetry in which states report to a growing number of increasingly empowered and unaccountable committees which change their interpretations of the laws at will. Current treaty body reform efforts, like the call for one super-compliance committee, focus on more consolidation of power and procedures and would only exacerbate the problems.

Initial steps should ensure committee experts respect their responsibility to uphold the values and practices embodied in the laws they are charged with stewarding. First, a mechanism should be put in place to allow recorded votes and to more broadly disseminate dissenting opinions. Second, General Recommendations that are incompatible with the meaning of the treaties should be eliminated. Third, nations can use their prerogative power to appoint or challenge the appointments of committee members who are known offenders, holding them accountable. They can insist on an oversight system and a way of removing those who are no longer deemed persons of “high moral character.” Fourth, nations who are the object of coercive compliance tactics can continue to confront, ignore, and remain skeptical of experts and NGOs that misinterpret the treaties. Finally, nations whose laws protect the unborn must reclaim language of the treaties. One place to start is the right to life article in ICCPR, which is different from other formulations on the right to life. It states that every “human being” has the right to life and not every “person” or “every one” or “every child” or “every citizen.” Even proponents of legalized abortion admit that this creates an opportunity to assert a right to life for the unborn. It certainly supports national laws that do so.

In general, nations must remain vigilant and continue to insist that negotiated language is not misinterpreted while they perform the hard work of negotiating future documents. There is tremendous opportunity to bring back a renewed sense of honesty and integrity to the international treaty system. We certainly believe that abortion should not be accepted as an internationally recognized human right. But even if such an outcome were desired, the current process is not the way to achieve it. For it is becoming increasingly apparent that the strategy established in Glen Cove, promoted by NGOs such as CRR, and accepted by the treaty monitoring bodies, does appreciable harm to the legitimacy of the very international institutions that these forces profess to so greatly respect. More importantly, it continues to chip away at the hope of achieving real progress for the women who are in most need of it.



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