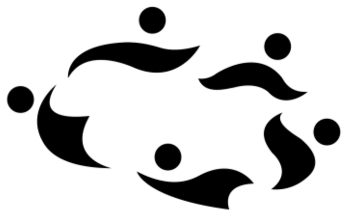

Reproductive Health | *White Paper*

World **Youth** Alliance

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I. Introduction

Reproductive health is an important theme throughout international human rights advocacy. Many international institutions, such as the United Nations, and non-governmental organizations, in particular women's rights groups, focus on developing and implementing reproductive health policies and programs. There is no consistency, however, in how the term is interpreted, allowing for ambiguity in the understanding of human rights and endangering the implementation of policies and programs that focus on reproductive health. For example, some organizations and government officials have asserted that reproductive health includes abortion.[1] Yet no international legal agreement or consensus document names abortion as a component of reproductive health.

This paper first presents the definitions of reproductive health and its associated concepts, including reproductive health services, reproductive health care and reproductive rights. In doing so, it evaluates international consensus documents from major world conferences and international human rights treaties. It next discusses the implications of a faulty understanding of the meaning of reproductive health, then demonstrates that no international right to reproductive health exists. Finally, it emphasizes the importance of the proper understanding and use of the term in international negotiations.

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[1] *See, e.g.*, Ctr. for Reprod. Rights, *Clinton to Canada: Abortion Access Must be Included in G8 Initiative*, http://reproductiverights.org/en/feature/clinton-to-canada-abortion-access-must-be-included-in-g8-initiative (last visited Jan. 9, 2012) (According to United States Secretary of State Hillary Clinton, "[R]eproductive health includes contraception and family planning and access to legal, safe abortion.").

II. Definitions

A. Reproductive health

"[R]eproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes."

-Paragraph 7.2, ICPD Programme of Action

The term "reproductive health" was introduced in the late 1980s as an alternative to the population control approach to reproduction and women's health that developed in the 1960s and 1970s.[2] In 1994, delegates from 179 Member States of the United Nations gathered in Cairo, Egypt for the International Conference on Population and Development.[3] In addressing the relationship between population and development and in keeping with this new focus on reproductive health, the conference focused on the needs of people as opposed to setting demographic targets. At the end of the conference, the Member States produced a consensus document called the Programme of Action, which sets forth goals to be achieved over a period of twenty years (1994–2014). Although the Programme of Action is an expression of political will and does not constitute international law, it outlines the priorities of the States Parties and indicates commitment on their part to work toward achieving them.

The Programme of Action was the first international consensus document to define the term "reproductive health."[4] According to paragraph 7.2,

> [r]eproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of birth control which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.[5]

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[2] Sandra Lane, *From Population Control to Reproductive Health: An Emerging Policy Agenda*, 39 SOC. SCI. & MED. 993 (1994).
[3] LARA KNUDSEN, REPRODUCTIVE RIGHTS IN A GLOBAL CONTEXT 6 (2006).
[4] *Id.*
[5] International Conference on Population and Development, Sept. 5–13, 1994, *Report of the International Conference on Population and Development*, Ch. I, Res. 1, Annex, ¶ 7.2, U.N. Doc. A/CONF.171/13/Rev.1 (Oct. 18, 1994) [hereinafter *ICPD Report*]. The ICPD Report contains both the resolutions adopted at the ICPD, including the Programme of Action, and the reservations made by Member States to the resolutions. Chapter I includes the Programme of Action and Chapter V the reservations.

B. Reproductive health care

The Programme of Action also defines terms related to reproductive health. Paragraph 7.2 defines reproductive health care

> as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.[6]

C. Reproductive health services

The term "reproductive health services," although not explicitly defined, is repeatedly mentioned throughout the Programme of Action. The chapter that calls for national action describes the major components that "should be integrated into basic national programmes for population and reproductive health"[7]:

> In the basic reproductive health services component - information and routine services for prenatal, normal and safe delivery and post-natal care; abortion (as specified in paragraph 8.25); information, education and communication about reproductive health, including sexually transmitted diseases, human sexuality and responsible parenthood, and against harmful practices; adequate counselling; diagnosis and treatment for sexually transmitted diseases and other reproductive tract infections, as feasible; prevention of infertility and appropriate treatment, where feasible; and referrals, education and counselling services for sexually transmitted diseases, including HIV/AIDS, and for pregnancy and delivery complications [. . .].[8]

Although abortion is listed as a component of reproductive health services, the Programme of Action explicitly limits the inclusion of abortion "as specified in paragraph 8.25."[9] Paragraph 8.25 specifies the inclusion of abortion where legal, and thus does not require abortion where it is not already legal.[10]

D. Reproductive rights

The ICPD Programme of Action also attempts to define reproductive rights. It enumerates some of the rights, stating,

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[6] *Id.*
[7] *Id.* Ch. I, Res. 1, Annex, ¶ 13.14.
[8] *Id.* Ch. I, Res. 1, Annex, ¶ 13.14(b).
[9] *Id.*
[10] *See* section II.E *infra*.

> Bearing in mind the above definition [of reproductive health], reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.[11]

E. Abortion

References to abortion throughout the Programme of Action cast it as undesirable. For example, the Programme of Action strongly opposes the use of abortion as family planning. Paragraph 7.24 of the Platform for Action firmly states this opposition: "Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning [. . .]."[12] The Programme of Action in paragraph 8.25 further emphasizes this point:

> *In no case should abortion be promoted as a method of family planning.* All Governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern and *to reduce the recourse to abortion through expanded and improved family-planning services*. Prevention of unwanted pregnancies must always be given the highest priority and *every attempt should be made to eliminate the need for abortion*. Women who have unwanted pregnancies should have ready access to reliable information and compassionate counselling. *Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process.* In circumstances where abortion is not against the law, such abortion should be safe. In all cases, women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family-planning services should be offered promptly, which will also help to avoid repeat abortions.[13]

Because reproductive health is a state of being, it necessarily does not include abortion or any other services. However, the ICPD Programme of Action states that abortion may be included within reproductive health care. Paragraph 7.6 lists different components of reproductive health care, including

> family-planning counselling, information, education, communication and

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[11] *ICPD Report*, *supra* note 5, Ch. I, Res. 1, Annex, ¶ 7.3.
[12] *Id.* Ch. I, Res. 1, Annex, ¶ 7.24.
[13] *Id.* Ch. I, Res. 1, Annex, ¶ 8.25 (emphasis added).

> services; education and services for prenatal care, safe delivery and post-natal care, especially breast-feeding and infant and women's health care; prevention and appropriate treatment of infertility; *abortion as specified in paragraph 8.25, including prevention of abortion and the management of the consequences of abortion*; treatment of reproductive tract infections; sexually transmitted diseases and other reproductive health conditions; and information, education and counselling, as appropriate, on human sexuality, reproductive health and responsible parenthood.[14]

"Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning."

-Paragraph 7.24, ICPD Programme of Action

Both abortion and the prevention of abortion are included as components of reproductive health care, while abortion is included as a component of reproductive health services. However, abortion is limited to its specification in paragraph 8.25 of the Programme of Action, reiterating that abortion is only to be included in the components of reproductive health care "[i]n circumstances where abortion is not against the law."[15] The Programme of Action thus does not require the provision of abortion as a component of reproductive health care or reproductive health services.

The Programme of Action stresses that "[a]ny measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process."[16] This indicates that no country can be forced to change its abortion laws because of what the Programme of Action says. Furthermore, the Programme of Action explicitly recognizes the "sovereign right of each country, consistent with national laws and development priorities, with full respect for the various religious and ethical values and cultural backgrounds of its people, and in conformity with universally recognized international human rights" to implement the Programme of Action.[17] This means that no country can be forced to implement the ICPD recommendations in violation of its laws and religious, ethical and cultural values.

F. ICPD Programme of Action reservations

It is clear from the country reservations made on the ICPD Programme of Action that the definition of reproductive health does not include abortion.[18] The vast majority of reservations made on the Programme of Action were specifically on Chapter VII, which deals with

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[14] *Id.* Ch. I, Res. 1, Annex, ¶ 7.6 (emphasis added).
[15] *Id.* Ch. I, Res. 1, Annex, ¶ 8.25.
[16] *Id.*
[17] *Id.* Ch. I, Res. 1, Annex, Ch. 2, Principle 8.
[18] A reservation "means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties art. 2(1)(d), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

reproductive rights and reproductive health, and Chapter VIII, which deals with health, morbidity and mortality. Many Latin American countries referenced their own national constitutions and Article 4 of the American Convention on Human Rights, which states that the right to life must be protected from the moment of conception,[19] in expressing their understanding that abortion should never be included as a component of reproductive health or reproductive health services.[20] Several Islamic countries made reservations on Chapters VII and VIII because of, for example, "certain terminology that is in contradiction with Islamic Sharia."[21] The delegation of Yemen expressed that "[i]n Islamic Sharia there are certain clear-cut provisions on abortion and when it should be undertaken."[22] Other participants, like Malta[23] and the Holy See,[24] asserted strong opposition to the inclusion of abortion in any reproductive health policies. These reservations on reproductive health clearly indicate that there is no consensus from the ICPD on a definition of reproductive health that includes abortion.

It is clear from the country reservations made on the ICPD Programme of Action that the definition of reproductive health does not include abortion.

[19] Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.
[20] *See ICPD Report*, *supra* note 5, Ch. V. Latin American countries that expressed reservations on Chapter VII of the Programme of Action are El Salvador, Honduras, Nicaragua, Paraguay, Argentina, Dominica Republic, Ecuador, Guatemala and Peru.
[21] *Id.* Ch. V, ¶ 19.
[22] *Id.*
[23] *Id.* Ch. V, ¶ 29.
[24] *Id.* Ch. V, ¶ 27.

III. Other conferences

A. Fourth World Conference on Women (Beijing)

The United Nations Fourth World Conference on Women, held in Beijing in 1995, dealt with many of the same issues as the ICPD in Cairo the previous year, in particular reproductive health. In the final outcome document, the Beijing Platform for Action, the delegates adopted the exact language of the ICPD Programme of Action on reproductive health,[25] reproductive health care[26] and reproductive rights.[27] The Platform for Action does not deviate from the Programme of Action's presentation of abortion.[28]

B. Beijing reservations

States Parties to the Platform for Action expressed reservations on key provisions of the Platform for Action, as did many on the ICPD Programme of Action. Once again, many States Parties indicated that their understanding of reproductive health does not include abortion, echoing their reservations on the ICPD Programme of Action.[29] For example, Venezuela's reservation stated, "The concepts of family planning, sexual health, reproductive health, maternity without risk, regulation of fertility, reproductive rights and sexual rights are acceptable provided that they do not include abortion or voluntary interruption of pregnancy."[30]

"The concepts of family planning, sexual health, reproductive health, maternity without risk, regulation of fertility, reproductive rights and sexual rights are acceptable provided that they do not include abortion or voluntary interruption of pregnancy."

-Reservation by Venezuela, Fourth World Conference on Women

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[25] Fourth World Conference on Women, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, Ch. I, Res. 1, Annex II, ¶ 94, U.N. Doc. A/CONF.177/20/Rev.1 (1996) [hereinafter *FWCW Report*]. The FWCW Report contains both the resolutions adopted at the Conference, including the Beijing Platform for Action, and the reservations made by Member States to the resolutions. Chapter I includes the Platform for Action and Chapter V the reservations.

[26] *Id.*

[27] *Id.* Ch. I, Res. 1, Annex II, ¶¶ 95 & 223. The term "reproductive health services" was only mentioned once in the Platform for Action. *Id.* Ch. I, Res. 1, Annex II, ¶ 206(i).

[28] It does recommend that Member States "consider reviewing laws containing punitive measures against women who have undergone illegal abortions." *Id.* Ch. I, Res. 1, Annex II, ¶ 106(k). However, this does not mean that States must decriminalize abortion; removing punishment for women who have undergone illegal abortions is not the equivalent of removing all legal restrictions on abortion. This still allows for the criminalization of abortion. Argentina expressed a reservation explicitly stating this understanding of paragraph 106(k). *See id.* Ch. V, ¶ 5.

[29] Reservations related to reproductive health, including reservations based on Islamic Sharia and various national constitutions and laws that affirmed a right to life from conception, were made by Argentina, Dominican Republic, Guatemala, Honduras, Nicaragua, Peru, Venezuela, Brunei Darussalam, Iran, Kuwait, Libya, Malaysia, Mauritania, Morocco, the Holy See and Malta. *See id.* Ch. V.

[30] *See id.* Ch. V, ¶ 34.

C. Review conferences

1. ICPD

The ICPD Programme of Action has a twenty-year implementation plan. As such, the implementation is reviewed every five years. The outcome document for the five-year review of the ICPD does not expand the definitions of reproductive health, reproductive health care, reproductive health services and reproductive rights.[31] In fact, during the review process States continued to express their understanding that abortion is not a component of reproductive health.[32] At the ten-year review of the ICPD, held at the annual Commission on Population and Development (CPD), which is tasked with evaluating the implementation of the Programme of Action, States reiterated this view.[33] The fifteen-year review did not expand on the definition of reproductive health.[34] The CPD has never elaborated on the definition of reproductive health as provided in the Programme of Action in its resolutions.[35]

2. Fourth World Conference on Women

The implementation of the Beijing Platform for Action is also reviewed every five years. Beijing review conferences have maintained or affirmed the same definitions of the key terms of reproductive health, reproductive health care and reproductive rights. The United Nations General Assembly held a special session in 2000 for the five-year review. The resolution adopted by the General Assembly uses definitions of these terms as they appear in the ICPD Programme of Action.[36] Some States included explanatory statements clarifying that States do not interpret the outcome documents of the Fourth World Conference on Women and the five-year review to constitute support for abortion.[37] The declaration adopted by the Commission on the Status of Women at its 49th session in 2005, which was a ten-year review of the Fourth World

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[31] *See Report of the Ad Hoc Committee of the Whole of the Twenty-first Special Session of the General Assembly, Key actions for the further implementation of the Programme of Action of the International Conference on Population and Development*, Addendum, U.N. Doc. A/S-21/5/Add.1 (July 1, 1999).

[32] *See Report of the Ad Hoc Committee of the Whole of the Twenty-first Special Session of the General Assembly*, ¶ 20, U.N. Doc. A/S-21/5 (July 1, 1999). Nicaragua referred to its ICPD reservation, which stated that abortion is not a component of reproductive health.

[33] *See* Commission on Population and Development, Mar. 22–26, 2004, & May 6, 2004, *Report on the thirty-seventh session*, U.N. Doc. E/2004/25, E/CN.9/2004/9 (2004). For example, the United States stated that it did not reaffirm "any language [. . .] that could be interpreted as promoting abortion or the use of abortifacients." *Id.* Annex II, ¶ 1.

[34] *See* Commission on Population and Development, *Report on the forty-second session*, U.N. Doc. E/2009/25, E/CN.9/2009/10 (2009).

[35] *See, e.g.*, Commission on Population and Development, *Report on the forty-fourth session*, U.N. Doc. E/2011/25, E/CN.9/2011/8 (2011); Commission on Population and Development, Apr. 3, 2009, & Apr. 12–16, 2010, *Report on the forty-third session,* U.N. Doc. E/2010/25, E/CN.9/2010/9 (2010). Commission on Population and Development, Apr. 1–5, 2002, *Report on the thirty-fifth session,* U.N. Doc. E/2002/25, E/CN.9/2002/6 (2002).

[36] Further actions and initiatives to implement the Beijing Declaration and Platform for Action, G.A. Res. S-23/3, ¶ 72, U.N. Doc. A/RES/S-23/3 (Nov. 16, 2000).

[37] For example, the representative of the United States stated, "Based on consultations with States, we further understand that States do not understand the outcome documents of the Beijing Conference and the five-year review of the Beijing Conference to constitute support, endorsement or promotion of abortion." Commission on the Status of Women, Feb. 28–Mar. 11, 2005, & Mar. 22, 2005), *Report on the forty-ninth session*, Economic and Social Council, Annex IX, ¶ 2, E/2005/27, E/CN.6/2005/11 (2005).

Conference on Women, reaffirmed the Beijing Declaration and Platform for Action, adding nothing to the definitions of reproductive health terms.[38] The fifteen-year review of the Fourth World Conference on Women, held at the 54th session of the Commission on the Status of Women, produced a similar declaration.[39]

Additionally, the United Nations General Assembly produces a resolution every year that follows up on the Fourth World Conference on Women. These resolutions have never expanded on the definition of reproductive health; in fact, they generally do not even include that term.[40]

It is clear that conferences reviewing the ICPD and the Fourth World Conference on Women have never amended or expanded the definitions of reproductive health, reproductive health care, reproductive health services and reproductive rights as agreed to at Cairo and Beijing.

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[38] Commission on the Status of Women, Feb. 28 – Mar. 11, 2005, *Declaration issued by the Commission on the Status of Women at its forty-ninth session,* ¶ 1, E/CN.6/2005/L.1 (Mar. 3, 2005).
[39] Commission on the Status of Women, Mar. 1–12, 2010, *Declaration on the occasion of the fifteenth anniversary of the Fourth World Conference on Women*, U.N. Doc. E/CN.6/2010/L.1 (Feb. 24, 2010).
[40] *See, e.g.*, Follow-up to the Fourth World Conference on Women and Full Implementation of the Beijing Declaration and Platform for Action and the Outcome of the Twenty-Third Special Session of the General Assembly, G.A. Res. 65/191, U.N. Doc. A/RES/65/191 (Mar. 3, 2011); Follow-up to the Fourth World Conference on Women and Full Implementation of the Beijing Declaration and Platform for Action and the Outcome of the Twenty-Third Special Session of the General Assembly, 59/168, U.N. Doc. A/RES/59/168 22 (Feb. 22, 2005).

IV. International treaties

No international treaty contains language that affirms abortion as included in reproductive health or reproductive health care. In fact, the Convention on the Rights of Persons with Disabilities (CRPD) is the only international human rights treaty that even mentions reproductive health.[41] It does not, however, define reproductive health and it does not mention abortion. Other international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), do not mention reproductive health and thus do not define the term.

> **Treaty-monitoring bodies have recommended that countries reformulate their national laws that prohibit abortion, even though the Programme of Action both affirms that abortion policy is a national and local prerogative and sets forth a definition of reproductive health services that only includes abortion where it is already legal.**

Provisions on the right to health in several international human rights treaties[42] also do not guarantee a right to reproductive health that includes abortion, despite the attempts of treaty-monitoring bodies to establish otherwise. Treaty-monitoring bodies (TMBs), which are composed of appointed officials and which have no authority, issue non-binding recommendations to States Parties.[43] Many States Parties, however, erroneously accord more authority to TMBs than they are due. TMBs have identified reproductive health as a component of health.[44] TMBs have recommended that countries reformulate their national laws that prohibit abortion,[45] even though the Programme of Action both affirms that abortion policy is a national

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[41] Convention on the Rights of Persons with Disabilities art. 25, *opened for signature* Mar. 30, 2007, 46 I.L.M. 433 [hereinafter CRPD].

[42] *See id.*; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families arts. 28, 43(1)(e) and 45(1)(c), *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 93 [hereinafter ICRMW]; Convention on the Rights of the Child art. 24, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention on the Elimination of All Forms of Discrimination against Women art. 12, *opened for signature* Dec. 18. 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Covenant on Economic, Social and Cultural Rights art. 12, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter *ICESCR*]; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(e)(iv), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

[43] Ctr. for Reprod. Rights, *Gaining Ground: A Tool for Advancing Reproductive Rights Law Reform* 17 (2007), *available at* http://reproductiverights.org/sites/default/files/documents/pub_bo_GG_advocacy.pdf [hereinafter *CRR Gaining Ground*]; Office of the United Nations High Commissioner for Human Rights, *The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, *available at* http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf.

[44] *See, e.g.*, Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24*, ¶ 1 (1999) [hereinafter *CEDAW General Recommendation No. 24*].

[45] *See, e.g.,* Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kenya*, ¶ 34, U.N. Doc. E/C.12/KEN/CO/1 (Nov. 19, 2008) ("The Committee recommends that the State party ensure affordable access for everyone, including adolescents, to comprehensive family planning services, contraceptives and safe abortion services, especially in rural and deprived urban areas, by [. . .] decriminalizing abortion in certain situations, including rape and incest."); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ireland*, ¶13, U.N. Doc. CCPR/C/IRL/CO/3 (July 30, 2008) ("The Committee reiterates its concern regarding the highly restrictive circumstances under which

and local prerogative[46] and sets forth a definition of reproductive health services that only includes abortion where it is already legal.[47] It is clear, however, that given the lack of actual international human rights treaty language on abortion and reproductive health and the lack of authority of TMBs that there is no legal understanding of abortion as a component of reproductive health.

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women can lawfully have an abortion in the State party. [. . .] The State party should bring its abortion laws into line with the Covenant [on Civil and Political Rights]. It should take measures to help women avoid unwanted pregnancies so that they do not have to resort to illegal or unsafe abortions that could put their lives at risk (article 6) or to abortions abroad (articles 26 and 6).”); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Poland*, ¶ 8, U.N. Doc. CCPR/CO/82/POL (Dec. 12, 2004) (“The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health. [. . .] The State party should liberalize its legislation and practice on abortion.”).

[46] *ICPD Report*, *supra* note 5, Ch. I, Res. 1, Annex, ¶ 8.25.

[47] *Id.* Ch. I, Res. 1, Annex, ¶ 13.14(b).

V. Implications

A. International treaties

Although the ICPD Programme of Action and the Beijing Platform for Action do not have the status of international law, they are crucial because they are the only international consensus documents to define and discuss reproductive health in detail. How the international community understands those documents and the terms within thus colors how international treaties discussing health and health care are interpreted. In fact, the Beijing Platform for Action calls on the Committee on the Elimination of Discrimination against Women, the treaty-monitoring body for the CEDAW, to "take into account the Platform for Action when considering the reports submitted by States parties."[48] Furthermore, in the forward to a report from a 1996 roundtable sponsored by the United Nations Population Fund (UNFPA), the United Nations High Commissioner for Human Rights and the United Nations Division for the Advancement of Women, the Executive Director of UNFPA stated that the roundtable's purpose was "to help integrate the understandings reached at the Cairo and Beijing conferences into the treaty monitoring process."[49] She further claimed, "The human rights treaties hold Governments accountable for neglecting or violating women's rights and ensure that States Parties to those Conventions honour the commitments they made at Cairo, Beijing and other international conferences of this decade."[50]

These statements indicate that States' agreements at Cairo and Beijing play a role in the interpretation of treaties. At Cairo and Beijing, States agreed on a definition of reproductive health that does not include abortion. In incorporating the Cairo and Beijing conferences into their interpretations of treaties, TMBs should use this agreed upon definition of reproductive health. A major implication of improperly changing the interpretation of reproductive health to include abortion is that TMBs can then pressure countries to change their reproductive health policies to include abortion. This pressure on States to comply with TMB recommendations is significant because States Parties to international human rights treaties are required to submit reports to TMBs for review, and TMBs directly comment on the reproductive health policies of States Parties. Indeed, this pressure has already occurred as a result of false understandings of reproductive health; as discussed above, TMBs have pressured countries to decriminalize abortion, often in the name of health.[51] Countries must remember the original and unchanged meaning of reproductive health from Cairo and Beijing in order to withstand such pressure from TMBs.

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[48] *FWCW Report*, *supra* note 25, Ch. I, Res. 1, Annex II, ¶ 332.
[49] United Nations Population Fund [UNFPA], United Nations High Commissioner for Human Rights & United Nations Division for the Advancement of Women, *Summary of Proceedings and Recommendations, Round Table of Human Rights Treaty Bodies on Human Rights Approaches to Women's Health, with a Focus on Sexual and Reproductive Health and Rights* 2 (1996).
[50] *Id.*
[51] *See* note 45 *supra*.

B. Customary international law

There is a risk that abortion or a right to abortion may become a component of reproductive health due to customary international law. Customary international law "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way."[52] It thus consists of two components: State practice, or "general and consistent practice by states," and *opinio juris*, or when "the practice is followed out of a belief of legal obligation."[53] Customary international law may allow for the inclusion of abortion in reproductive health in two ways. First, multilateral treaties and declarations by international conferences, such as the ICPD, can potentially create new customs, "depend[ing] on factors such as whether they are phrased in declaratory terms, supported by a widespread and representative body of states, and confirmed by state practice."[54] A proper understanding of the definitions of the terms outlined in the Programme of Action, the Platform for Action and other international consensus documents is thus critical. None of these consensus documents has ever defined reproductive health as including abortion.

Second, assertions of abortion or a right to abortion as an aspect of reproductive health could become authoritative in the future if validated by State practice that accepts and gives effect to those assertions. If a TMB interprets health or reproductive health to include abortion, even though it has no formal authority to bind States with its interpretations, it may nevertheless influence State practice in that direction. This can effectively contribute to the emergence of a new development in the understanding of what the treaty norms require. However, as long as States are unwilling to bow to pressure from TMBs to legalize abortion or provide for abortion in their reproductive health programs, there can be no international custom.

C. Foreign aid

Small and developing countries are threatened with the loss of foreign aid if they do not amend their reproductive health laws and programs to include provision of abortion

Foreign aid is sometimes conditioned on legal reform or the implementation of certain programs, such that one country will give another country aid only if it changes its policies and practices.[55] When major foreign aid donors and the world's most developed countries insist again and again that reproductive health includes the provision of abortion services, it becomes increasingly difficult for small and developing countries that rely on foreign aid to resist the pressure to liberalize their abortion laws. Small and developing countries are threatened with the loss of foreign aid if they do not amend their reproductive health laws and programs to include

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[52] SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984).
[53] Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L. L. 757, 757 (2001).
[54] *Id.* at 758.
[55] *See, e.g.*, Steven Woehrel, *Conditions on U.S. Aid to Serbia, CRS Report for Congress*, Jan. 7, 2008, *available at* http://www.fas.org/sgp/crs/row/RS21686.pdf.

provision of abortion services.[56] In some cases, countries or organizations finance efforts to change the laws or constitution in another country.[57] This pressure disproportionately affects the small and developing countries that rely on foreign aid. However, this pressure does not conform to readings of the original documents produced at Cairo and Beijing, which show that abortion is not a component of reproductive health and that only individual countries have the prerogative to change their own abortion laws.

D. UNFPA and reproductive health policy

The ICPD Programme of Action provides a framework of action for UNFPA.[58] UNFPA provides governments with assistance in the realm of sexual and reproductive health. Its programming and aid should reflect the priorities highlighted in the Programme of Action. Reproductive health as defined in the Programme of Action should inform the policy that then becomes the basis for the implementation of UNFPA programs.

However, UNFPA often ignores the Programme of Action and promotes abortion and various understandings of reproductive health and reproductive health care that are not contained in the Programme of Action.[59] UNFPA promotes reproductive rights,[60] which is defined by the ICPD Programme of Action and does not include abortion, but its extensive partnership on projects and reports with International Planned Parenthood Federation and its funding of the Center for Reproductive Rights[61] call into question UNFPA's dedication to the limited meaning of reproductive rights within the Programme of Action. The former Executive Director of UNFPA even strongly implied during her tenure at UNFPA that abortion is a human right.[62] She also

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[56] For example, in the wake of Hurricane Mitch, a group of foreign aid donors pressured Nicaragua to change its laws restricting the provision of abortion services. *See Disastrous Aid Targeted at Nicaragua: Western Powers Linked Abortion Mandates to Post-Hurricane Aid*, ZENIT, Sept. 20, 2000.

[57] For example, according to U.S. Congressman Chris Smith, U.S. Agency for International Development funds went to promoting a referendum on a new Kenyan constitution that would create a constitutional right to abortion in certain circumstances, while the then-existing Kenyan constitution made no mention of abortion. The new Kenyan constitution passed. *See* Congressman Chris Smith, *House Members Speak Out Against Obama Push for Pro-Abortion Kenyan Constitution*, July 30, 2010, http://chrissmith.house.gov/News/DocumentSingle.aspx?DocumentID=201859; Congressman Chris Smith, *Probe Sought into Alleged Misuse of U.S. Funds by Obama Administration's Push for New Pro-Abortion Constitution in Kenya*, May 10, 2010, http://chrissmith.house.gov/News/DocumentSingle.aspx?DocumentID=184721.

[58] UNFPA, *About UNFPA*, http://www.unfpa.org/public/home/about (last visited Jan. 9, 2012).

[59] *See, e.g.*, MARA HVISTENDAHL, UNNATURAL SELECTION 150 (2011) (explaining that UNFPA did not want to label prenatal sex selection in China as a type of abortion because it did not want to detract from abortion); Ileana Ros-Lehtinen, *Remarks: Markup of H.R. 2830 and H.R. 2059*, Oct. 5, 2011, *available at* http://foreignaffairs.house.gov/112/irl2059.pdf (explaining UNFPA's involvement in China's coercive one-child policy).

[60] UNFPA, *Human Rights: Supporting the Constellation of Reproductive Rights*, http://www.unfpa.org/rights/rights.htm (last visited Jan. 24, 2012).

[61] UNFPA was one of the top donors to the Center for Reproductive Rights in 2010–11. *See* Ctr. for Reprod. Rights, *Annual Report 2010–2011* 43, *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/AR_2010-11_SPREADS.pdf.

[62] Thoraya Ahmed Obaid said in a statement, "During the past 15 years, the ICPD Programme of Action has paved the way for needed reform to advance human rights in countries around the world." She then listed reforms, one of which was that "[i]n 2008, the Colombian Constitutional Court struck down the country's total abortion ban, citing the ICPD Programme of Action. [. . .] It is essential that we keep human rights front and centre as we celebrate the

praised the Maputo Protocol for "providing broad protection for African women's rights, including reproductive rights."[63] The Maputo Protocol authorizes abortion in a number of instances, thus pressuring African countries to liberalize their laws regarding abortion.[64]

E. Millennium Development Goals

The Millennium Development Goals provide another framework for UNFPA and other UN agencies and are central to global efforts to improve reproductive health. The Millennium Development Goals are eight international development goals created and agreed to by the UN Member States in 2000, which expire in 2015.[65] Because they have been agreed to by UN Member States, States are encouraged to work to achieve those goals and must report on progress or decline in each area. Millennium Development Goal 5 (MDG 5) focuses on improvements in maternal health[66]; target 5B is to "achieve, by 2015, universal access to reproductive health."[67] The current focus of this target is improvement in the areas of maternal health and access to family planning.[68] Statements issued by NGOs like the International Planned Parenthood Federation[69] and Ipas[70] incorrectly assert that universal access to reproductive health includes access to abortion. Instead, the Programme of Action's understanding of reproductive health, which does not include abortion, should inform the understanding of the MDG 5's requirement of universal access to reproductive health.

15th anniversary of the International Conference on Population and Development." Statement by Thoraya Ahmed Obaid, Executive Director, United Nations Population Fund at IPCI, *Five Key Areas for Moving Forward: Reflections with Parliamentarians on ICPD/15*, Oct. 27, 2009, *available at* http://www.unfpa.org/public/op/edit/News/pid/4119 [hereinafter *Obaid Statement*]. The Maputo Protocol calls for States to "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 14(c), *adopted* July 11, 2003 [hereinafter Maputo Protocol].

[63] *See Obaid Statement*, *supra* note 62.

[64] Maputo Protocol, *supra* note 62, at art. 14(c).

[65] *See* United Nations, *The Millennium Development Goals Report 2010* (2010).

[66] *Id.* at 32.

[67] *Id.*

[68] *Id.* at 30–38.

[69] IPPF claims in a factsheet on MDG 5B that "universal access to reproductive health refers to a full package of services including [. . .] safe abortion services." Int'l Planned Parenthood Fed'n, *A Promise is a Promise: Universal Access to Reproductive Health*, http://www.ippf.org/NR/rdonlyres/64B0DBC5-F292-4887-8793-8AD44BC6545C/0/MDG5b_Factsheet.pdf.

[70] Ipas claims in an MDG strategy document that "[e]xpanding access to safe, legal, voluntary and affordable abortion care" is a "required" component of achieving MDG 5. Ipas, *Ensuring Women's Access to Safe Abortion: A Key Strategy for Achieving Millennium Development Goals* (2009), *available at* http://www.ipas.org/Publications/asset_upload_file557_2458.pdf.

VI. International human rights

A. The right to health and the absence of a right to reproductive health

The right of everyone to the enjoyment of the highest attainable standard of physical and mental health is established in international law.[71] However, no international human rights treaty asserts a right to reproductive health. Although some international human rights treaties have discussed health as related to women's special needs and as related to nondiscrimination on the basis of sex, no treaty actually establishes a right to reproductive health. The argument that these encompass a right to reproductive health is very tenuous. For example, proponents of a right to reproductive health argue that Article 12 of CEDAW, which requires that States Parties "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,"[72] establishes a right to reproductive health. However, a requirement that States Parties give access to family planning-related health care services clearly does not mean a right to reproductive health. Furthermore, the obligation on the part of States Parties in the CRPD to "[p]rovide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes"[73] does not constitute a right to reproductive health or reproductive health care. The right to health is explicitly enumerated in international treaties; here there is no explicit enumeration of a right to reproductive health.

No international human rights treaty asserts a right to reproductive health.

B. Non-treaty assertions of an international right to reproductive health

To fully understand that there is no international human right to reproductive health, one must first understand from where international human rights come. International human rights are created by international treaties that are then ratified by those countries that agree to adhere to the treaties.[74] Examples of international treaties that have the force of law include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

International human rights are not created by declarations of political will, such as documents produced at international conferences, or declarations by international or regional institutions,

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[71] *See* CRPD, *supra* note 41, at art. 25; ICRMW, *supra* note 42, at arts. 28, 43(1)(e) & 45(1)(c); CRC, *supra* note 42, at art. 24; CEDAW, *supra* note 42, at art. 12; ICESCR, *supra* note 42, at art. 12; CERD, *supra* note 42, at art. 5(e)(iv).
[72] CEDAW, *supra* note 42, at art. 12.
[73] CRPD, *supra* note 41, at art. 25.
[74] WHO, *25 Questions & Answers on Health and Human Rights* 9, July 9, 2002, *available at* http://www.who.int/hhr/activities/en/25_questions_hhr.pdf.

such as the United Nations.[75] The most-cited document for the false assertion that there is an international human right to reproductive health is actually the ICPD Programme of Action—a declaration of political will.[76] The Programme of Action is not a legally binding international treaty. This lack of binding force is widely acknowledged.[77] The Programme of Action does not create any international human rights because it is not a legal instrument; only international legal instruments and customary international law can create international human rights.

Furthermore, although human rights treaty monitoring bodies have claimed that there is an international right to reproductive health,[78] these bodies do not have the authority to create international human rights. Treaties that create TMBs clearly give them only limited authority, which does not include any authority to create rights.[79] Each TMB is comprised of experts who give comments and recommendations to States Parties on implementation of the treaty. These experts are not accountable to anyone in particular. Although States Parties are obligated to submit reports to TMBs, the TMB's recommendations and interpretations of treaties have no binding or authoritative status with respect to the States who are party to the treaty.[80]

Finally, special rapporteurs and United Nations agencies cannot create international law. Special rapporteurs are unelected and do not have the authority to create new international rights.[81] Thus, the claim asserted by the special rapporteur on the right to health that there is an international right to reproductive health[82] is not authoritative. The World Health Organization also cannot create international law, so it cannot be cited as an authority on the right to reproductive health.

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[75] *Id.*

[76] Paragraph 7.3 of the ICPD Programme of Action asserts that there is, among other reproductive-related rights, a "right to attain the highest standard of sexual and reproductive health." *ICPD Report*, *supra* note 5, Ch. I, Res. 1, Annex, ¶ 7.3. The Beijing Platform for Action, the consensus document of the 1995 Fourth World Conference of Women, which affirms the ICPD Programme of Action's definition of reproductive health and assertion of reproductive rights, is also not legally binding.

[77] One of Guatemala's reservations on the ICPD Programme of Action was that "because the General Assembly's mandate to the Conference does not extend to the creation or formulation of rights; this reservation therefore applies to all references in the document to 'reproductive rights', 'sexual rights', 'reproductive health', 'fertility regulation', 'sexual health', 'individuals', 'sexual education and services for minors', 'abortion in all its forms', 'distribution of contraceptives' and 'safe motherhood' [. . .]." *ICPD Report*, *supra* note 5, Ch. V, ¶ 26. *See also* UNFPA, *Reproductive Health in Refugee Situations: An Inter-Agency Field Manual*, *available at* http://www.unfpa.org/emergencies/manual/a2.htm; Ctr. for Reprod. Rights, *Legal Standards*, *Roma Reproductive Freedom in Slovakia* 97, *available at* http://reproductiverights.org/sites/default/files/documents/bo_slov_part4.pdf .

[78] *See, e.g.*, *CEDAW General Recommendation No. 24*, *supra* note 44.

[79] *See, e.g.*, CRC, *supra* note 42, at arts. 42–45, CEDAW, *supra* note 42, at arts. 17–22.

[80] *CRR Gaining Ground*, *supra* note 43; Office of the United Nations High Commissioner for Human Rights, *The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, *available at* http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf.

[81] Additionally, the mandate of each special rapporteur is limited. *See, e.g.*, Human Rights Council, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/HRC/RES/15/22 (Oct. 6, 2010).

[82] The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, *delivered to the Third Committee and the General Assembly*, U.N. Doc. A/66/254 (Aug. 3, 2011).

VII. Use of the term "reproductive health" in international negotiations

A proper definition of reproductive health, one that has remained unchanged since first presented at the International Conference on Population and Development in 1994, must be affirmed and used.

The term "reproductive health" is firmly rooted in international advocacy efforts, and international negotiations therefore must not reject this term. Instead, a proper definition of the term, one that has remained unchanged since first presented at the International Conference on Population and Development in 1994, must be affirmed and used. Since the introduction of the term in 1994, no international human rights treaty or international consensus document has amended the definition. NGOs and States that present an unfounded interpretation of reproductive health should not be allowed to introduce this definition into agreed upon international declarations and texts. States can and should work with the proper definition of reproductive health, the definition from the ICPD Programme of Action, to develop international law and policy that protect the health of women and men.

VIII. Conclusion

An investigation of international consensus documents and international human rights treaties reveals that abortion is not a component of reproductive health, despite the repeated claims of various NGOs and treaty-monitoring bodies. This investigation also shows that there is no international human right to reproductive health. This means that United Nations Member States must not be pressured by organizations and institutions to provide for abortion services in their reproductive health policies and programs. It is each State's individual prerogative to develop its own reproductive health policies and programs.