

Claiming Comprehensive Sex Education is a Right Does Not Make it So: A Close Reading of International Law

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The international community is currently debating whether international law requires States to educate adolescents about their sexuality. Various non-governmental organizations, United Nations Special Rapporteurs, and treaty-monitoring bodies assert a right to comprehensive sex education, a controversial approach to sex education that arguably encourages adolescents to experiment with their sexuality. This assertion of a right to comprehensive sex education is erroneous and misleading. International human rights are created in two ways: by treaty and by custom. Treaties do not mention comprehensive sex education, or any other form of sex education or training. Custom, found in international consensus documents and other declarations of political will, and confirmed by State practice, holds no universal agreement on sex education. Because neither treaty nor custom creates a right to comprehensive sex education, no such right exists.

KEYWORDS sex education, human rights

I. Introduction

In the international law and policy realm in recent years the debate surrounding sex education has focused on the question of whether States must provide ‘comprehensive sex education.’¹ This debate is troubling because the term ‘comprehensive’ is a misnomer – comprehensive programmes do not give a complete picture of human sexuality. Rather, comprehensive sex education is a pedagogy whereby institutions like the International Planned Parenthood Federation (IPPF)² and the Sexuality

¹ There are a variety of terms used to describe comprehensive sex education, such as ‘comprehensive sexual education,’ ‘comprehensive sexuality education,’ and ‘abstinence-plus sex education.’ For the sake of consistency, this article will use the term ‘comprehensive sex education’ to refer to sex education curricula that advocate contraceptive use and exploration of sexuality and gender identity and do not emphasize abstinence or a holistic understanding of the human person in relation to sexuality.

² The International Planned Parenthood Federation advocates for sexual and reproductive rights for people around the world and provides family planning, contraception, and abortion services. See Int’l Planned Parenthood Fed’n [IPPF], *About IPPF*, <http://ippf.org/en/About>.

Information and Education Council of the United States (SIECUS)³ emphasize sexual fulfilment and pleasure.⁴ Because they are grounded in the premise that teens will not wait to have sex, comprehensive programmes spend substantial time and material describing various types of contraceptives, helping students to ‘explore their attitudes towards condoms’ and ‘discussing methods of overcoming ... barriers’⁵ to contraceptive use. Although the United Nations Educational, Scientific, and Cultural Organization (UNESCO) views comprehensive sex education as age-appropriate and culturally sensitive,⁶ in reality these programmes are neither – SIECUS’s programmes begin in pre-kindergarten,⁷ WHO Europe advocates for sexuality education beginning before the age of four,⁸ and IPPF urges all governments to recognize the sexual rights of young people.⁹

Despite the urgings of IPPF, SIECUS, and UNESCO, comprehensive sex education programmes are not mandated by international law. States may provide sex education programmes of their choice, taking into account the culture, religion, and norms of their people.¹⁰ What is universally acknowledged is that sex education must provide medically accurate information to children and adolescents.¹¹ There is

³ The Sexuality Information and Education Council of the United States posits that sexuality education is a lifelong process that begins at birth, and advocates for comprehensive sexuality education for students starting in pre-kindergarten. See Sexuality Info. & Educ. Council of the U.S. [SIECUS], *Position Statements: Sexuality Education*, <http://siecus.org/index.cfm?fuseaction=Page.viewPage&pageId=494&parentID=472> (last visited Feb. 7, 2014).

⁴ See, e.g., IPPF, IPPF FRAMEWORK FOR COMPREHENSIVE SEXUALITY EDUCATION 4 (2d ed. 2010) (‘Our approach includes an emphasis on sexual expression, sexual fulfilment and pleasure. This represents a shift away from methodologies that focus exclusively on the reproductive aspects of adolescent sexuality.’) [hereinafter IPPF FRAMEWORK], available at <http://www.ippf.org/resource/IPPF-Framework-Comprehensive-Sexuality-Education>; WORLD HEALTH ORG. REG’L OFFICE FOR EUR (WHO), STANDARDS FOR SEXUALITY EDUCATION IN EUROPE: A FRAMEWORK FOR POLICY MAKERS, EDUCATIONAL AND HEALTH AUTHORITIES AND SPECIALISTS 5 (2010) (‘Traditionally, sexuality education has focused on the potential risks of sexuality, such as unintended pregnancy and STI. This negative focus is often frightening for children and young people: moreover, it does not respond to their need for information and skills and, in all too many cases, it simply has no relevance to their lives.’) [hereinafter WHO FRAMEWORK], available at <http://www.bzga-whooc.de/?uid=072bde22237db64297daf76b7cb998fo&cid=Seite4486>.

⁵ U.N. EDUC., SCIENTIFIC & CULTURAL ORG. [UNESCO], INTERNATIONAL GUIDELINES ON SEXUALITY EDUCATION: AN EVIDENCE INFORMED APPROACH TO EFFECTIVE SEX, RELATIONSHIPS AND HIV/STI EDUCATION 2 n.1 (2009) [hereinafter UNESCO GUIDELINES]. See also Karen Jordan, *Recovering Subsidiarity in Family Life Education*, 18 WM. & MARY J. WOMEN & L. 235, 242 (2012); IPPF, *Comprehensive Sexuality Education* (‘Comprehensive sexuality education (CSE) refers to rights-based and gender-equitable education about sexuality, gender, sexual and reproductive health and rights and sexual behaviour. CSE equips young people with life skills and empowers them to make autonomous, informed decisions.’), www.ippf.org/our-work/what-we-do/adolescents/education (last visited Feb. 7, 2014).

⁶ UNESCO GUIDELINES, *supra* note 5, at 4, 19.

⁷ SIECUS, *Position Statements: Sexuality Education*, *supra* note 3.

⁸ WHO FRAMEWORK, *supra* note 4, at 34-40.

⁹ IPPF, *Exclaim! 9* (2011) (‘Young people’s sexual rights are different and more complex than adults’ sexual rights. One reason for this is the widespread denial of young people’s sexuality. There is a common misconception that young people are not, or should not be sexual beings with the exception of certain groups, such as married young people above a certain age. Sexuality is a central aspect of being human during all phases of each person’s life.’) available at http://www.ippf.org/sites/default/files/ippf_exclaim_lores.pdf. IPPF defines sexuality as referring to ‘each young person’s awareness, experience and expression of eroticism, sexual pleasure, intimacy, sexual orientation and gender identity.’ *Id.* at 13.

¹⁰ See *infra* Part II.

¹¹ See, e.g., CTR. FOR REPROD. RTS., IMPLEMENTING ADOLESCENT REPRODUCTIVE RIGHTS THROUGH THE CONVENTION ON THE RIGHTS OF THE CHILD 4 (1999) [hereinafter CRR, ADOLESCENT REPRODUCTIVE RIGHTS] (‘All adolescents need accurate and adequate information about sexual and reproductive health.’), available at www.reproductiverights.org/sites/default/files/documents/pub_bp_implementingadoles.pdf; Leah J. Tulin, *Can International Human Rights Law Cointenance Federal Funding of Abstinence-Only Education?*, 95 GEO. L.J. 1979, 1999 (2006-2007) (‘[A] sex education curriculum that provides incomplete information about the proper use of condoms, gives inaccurate information about their effectiveness in preventing pregnancy or STIs, or gives misinformation about the ways in which HIV can be transmitted likely interferes with a minor’s ability to protect his health in the event that he has sex.’); UNESCO GUIDELINES, *supra* note 5, at 21 (‘Information within a curriculum should be evidence-informed, scientifically accurate and balanced, neither exaggerating nor understating the risks or effectiveness of condoms or other forms of contraception.’); IPPF, *Report of the IPPF YOUTH PARLIAMENT* (1998) [hereinafter IPPF YOUTH] (‘Sexual and reproductive health education must be accurate, reliable and responsive to the physical and emotional needs of young people of all ages and sexual lifestyles.’).

no international consensus on the type of programme that is best.¹² In fact, a study by the Guttmacher Institute found that sex education, regardless of type, is associated with healthier sexual behaviours.¹³ And a study on sex education in developing countries found a causal link between general education and health: literacy skills when acquired in school are strongly linked to fertility and child health outcomes.¹⁴ Therefore, governments that invest in school access and quality education can expect delayed sexual initiation and a reduced likelihood of pregnancy.¹⁵

No international human rights treaty mentions sex education, and, although international consensus documents do address it, they leave States the option to implement the programmes that best serve their populations. However, many international institutions and non-governmental organizations (NGOs) urge States to implement programmes that teach comprehensive sex education to children, adolescents, and adults, and claim that a lack of such programmes violates international law.

This article first presents the international rights created by legally binding treaties and evaluates their treatment of sex education and reproductive health education, finding that there is no international right to comprehensive sex education, or any particular form of sex education or training. The article next evaluates how international consensus documents from major world conferences present sex education, and finds no universal agreement on sex education. Finally, it discusses the problem of institutions and organizations that erroneously claim to uphold the international right to comprehensive sex education, and emphasizes the importance of the proper understanding and use of these terms.

II. International Human Rights

International human rights are created in two ways: by treaty and by custom.¹⁶ A treaty is a binding instrument of international law for the States that sign and ratify the treaty.¹⁷ States do not have to accept every provision of a treaty in order to agree to be bound by the treaty. Instead, a State may make reservations, understandings, and declarations (RUDs) to modify or exclude the legal effect of certain provisions of the treaty.¹⁸ After one State makes an RUD, other States Parties to a treaty have an opportunity to reject it; any State that objects to an

¹² See *infra* Part II.

¹³ See Laura Duberstein Lindberg & Isaac Maddow-Zimet, Guttmacher Institute, *Consequences of Sex Education on Teen and Young Adult Sexual Behaviors and Outcomes*, 51 J. ADOLESC. HEALTH 332, 337 (2012) ('It appears that talking with adolescents about sex—before they first have sex—seems to be what is important, regardless of specific subject matter.'), available at <http://www.guttmacher.org/pubs/journals/jadohealth.2011.12.028.pdf>.

¹⁴ CYNTHIA B. LLOYD, POVERTY, GENDER, AND YOUTH: THE ROLE OF SCHOOLS IN PROMOTING SEXUAL AND REPRODUCTIVE HEALTH AMONG ADOLESCENTS IN DEVELOPING COUNTRIES 10 (2007) (citing findings from Ghana, South Africa, Nepal and Guatemala).

¹⁵ *Id.* at 12-13.

¹⁶ DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 16 (2d ed. 2006); Statute of the International Court of Justice art. 38(1), June 26, 1945, 33 U.N.T.S. 993.

¹⁷ Vienna Convention on the Law of Treaties arts. 11-17, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 339 [hereinafter VCLT].

¹⁸ *Id.* arts. 2(1)(d), 21.

RUD is not bound by it.¹⁹ Any State that does not object to the RUD is deemed to have accepted it.²⁰ A State may make an RUD unless it is incompatible with the object and purpose of the treaty.²¹ RUDs are important in large multilateral treaties, like human rights treaties, where it is often very difficult to reach agreement on a text that is acceptable to all States.²²

Once a State has ratified a treaty it is obligated to implement the various policies and procedures to which it has not objected.²³ Treaty-monitoring bodies (TMBs) evaluate a State's progress towards achieving its obligations.²⁴ TMBs issue general recommendations to elaborate on a treaty's provisions and guide States' implementation of such provisions, and they comment on a State's actual implementation of the treaty.²⁵ Although a TMB can formulate general analyses of a treaty's provisions, its interpretations are not authoritative, and the TMB does not have judicial power to pronounce a State in violation of a treaty.²⁶ Therefore, TMB recommendations are not binding on States and do not create international law.

Custom is the second way that international law is created. There are two elements in the creation of customary international law: the rule must be followed as a general practice, and the rule must be accepted as law.²⁷ The general practice element requires an objective inquiry: evidence that the proponent of the practice might offer includes a showing that international actors have followed the rule, that the practice has been consistent, and that it has been followed for a sufficient period of time.²⁸ The accepted as law element demands a more subjective inquiry: it asks why an international actor has observed a particular practice.²⁹ To satisfy this element, a proponent may demonstrate reasonableness or utility of the rule or use analyses found in international tribunal decisions and the writings of international legal scholars.³⁰ Once established as part of customary international

¹⁹ *Id.* art. 20(4)(a).

²⁰ *Id.* art. 20(5).

²¹ *Id.* art. 18.

²² For a discussion of the validity of reservations, understandings, and declarations in international law, and a discussion of the historical and political reasons that the United States uses them, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000-2001).

²³ VCLT, *supra* note 17, art. 26.

²⁴ OFFICE OF THE HIGH COMM'R FOR HUM. RTS., THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: AN INTRODUCTION TO THE CORE HUMAN RIGHTS TREATIES AND THE TREATY BODIES 7 [hereinafter OHCHR, HUMAN RIGHTS TREATY SYSTEM], www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf (last visited Feb. 7, 2014).

²⁵ CTR. FOR REPROD. RTS., 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.

²⁶ Treaties that create TMBs give them only limited authority, which does not include the authority to create rights. See, e.g., International Covenant on Civil and Political Rights art. 40-42, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on the Elimination of All Forms of Racial Discrimination part II, art. 8-9, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]; Convention on the Elimination of All Forms of Discrimination against Women arts. 17-22, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention on the Rights of the Child arts. 42-45, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention on the Rights of Persons with Disabilities art. 34, *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

²⁷ BEDERMAN, *supra* note 16, at 16 (2d ed. 2006). 'Accepted as law' is also called *opinio juris*. *Id.*

²⁸ *Id.* at 17.

²⁹ *Id.*

³⁰ *Id.*

law, a practice becomes binding on States.³¹ For example, when State Parties accept the guidance of TMBs, even if it conflicts with the ordinary meaning of a treaty's provisions,³² the TMB interpretation gains strength and becomes evidence of an emerging custom.³³ Therefore it is important for States to follow their treaty obligations to the letter and not be swayed by the erroneous or misleading statements of TMBs so that these statements do not gain traction and become binding.

A. Treaties

International human rights treaties establish a right to the enjoyment of the highest attainable standard of physical and mental health. Treaty rights typically contemplate governmental obligations: the UN General Assembly has said that human rights treaties require States to respect, protect, and fulfil each enumerated right.³⁴ The obligation to respect requires States to avoid measures that infringe upon or prevent the enjoyment of a particular right; the obligation to protect requires States to prevent third parties from infringing upon or preventing the enjoyment of a particular right; and the obligation to fulfil requires States to take positive measures to enable and assist individuals and communities to enjoy a particular right.³⁵ Therefore, human rights treaties are said to provide both negative obligations (refrain from interfering with enumerated rights)³⁶ and positive obligations (nurture and protect enumerated rights).³⁷

The enumerated rights to health and education provide examples of both positive and negative rights. They both require States Parties to recognize and respect the rights of all citizens to seek health care and education and they require States Parties to create mechanisms to help citizens enjoy these rights, such as the creation of health clinics and schools.³⁸ The positive obligation to fulfil the rights to health and education means States must guarantee access to health care services

³¹ *Id.* at 16. The 'consistent objector' principle indicates that States who consistently object to an emerging custom will not be bound by the custom. Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 418 (1988-1989). However, if the custom is *jus cogens*, then it is binding on all States, even those who have consistently objected. *Id.*

³² VCLT, *supra* note 17, art. 31(1) ('A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.')

³³ *Id.*; John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretations*, 23 HARV. HUM. RTS. J. 1, 20 (2010).

³⁴ Pronouncements of the General Assembly are not binding, but they are an indication of what the majority of States believes. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, Annex, art 2-1, U.N. Doc. A/RES/53/144/Annex (Mar. 8, 1999) ('Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields ...'). See also SCOTT LECKIE & ANNE GALLAGHER, *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A LEGAL RESOURCE GUIDE* xvi (2006). States must complete all three obligations with respect to each right. See *id.* at xx.

³⁵ See LECKIE & GALLAGHER, *supra* note 34, at xx-xxii. For a description of the obligation to respect, protect, and fulfil with regard to the CRPD, see U.N. Enable, *Obligations of States Parties Under the Convention*, www.un.org/disabilities/default.asp?id=225 (last visited Feb. 7, 2014).

³⁶ See Seth Korman, *The Welfarist Approach to Human Rights Treaties: A Critique*, 58 UCLA L. REV. (DISCOURSE) 95, 96 n. 5 (2010), <http://www.uclalawreview.org/pdf/discourse/58-5.pdf> (last visited Feb. 12, 2014); Ellen Wiles, *Aspirational Principles of Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 45 (2006).

³⁷ See Korman, *supra* note 36, at 98-101; Wiles, *supra* note 36, at 45. The distinction between positive and negative rights is not precise, and therefore not always helpful. See Ida Elisabeth Koch, *Social Rights as Components in the Civil Right to Personal Liberty: Another Step Forward in the Integrated Human Rights Approach?* 20 NETH. Q. HUM. RTS. 29, 32 (2002).

³⁸ See *infra* Parts II.A.1-6.

and to education services; it does not mean States have to provide these services.³⁹ Additionally, treaty rights are written in broad, vague language. States are free to fulfil their treaty obligations in a number of ways, and are free to take into account the customs, religions, and needs of their people. Finally, treaties do not mention comprehensive sex education, let alone require States to provide it to school children.

1. International Covenant on Economic, Social, and Cultural Rights

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) elaborates and codifies the economic, social, and cultural rights originally outlined in the Universal Declaration of Human Rights in 1948.⁴⁰ Two of the rights contained in the ICESCR are the right to health⁴¹ and the right to education.⁴²

The ICESCR is widely considered the central instrument of protection for the right to health because it is the first multilateral treaty⁴³ to recognize ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’⁴⁴ However, after establishing this broad right, the treaty does not explain the parameters of the right to health or prescribe specific actions States Parties must take to facilitate the access to health care.⁴⁵ Furthermore, it does not include a right to reproductive health or sexual health.⁴⁶

The ICESCR also recognizes ‘the right of everyone to education,’⁴⁷ saying that ‘primary education shall be compulsory and available free to all’⁴⁸ and that States Parties shall make equally accessible secondary⁴⁹ and higher education.⁵⁰ In

³⁹ University of Minnesota, Circle of Rights: Economic, Social & Cultural Rights Activism: A Training Resource, Sec. 4 Mod. 9 ‘Obligations of States and Nonstate Actors,’ www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module9.htm (last visited Feb. 7, 2014).

⁴⁰ OHCHR, HUMAN RIGHTS TREATY SYSTEM, *supra* note 22, at 8.

⁴¹ International Covenant on Economic, Social, and Cultural Rights art. 12, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁴² *Id.* art. 13.

⁴³ OFFICE OF THE HIGH COMM’R FOR HUM. RTS. & WHO, THE RIGHT TO HEALTH: FACT SHEET 31 (2008) [hereinafter OHCHR, RIGHT TO HEALTH], *available at* http://www.who.int/hhr/activities/Right_to_Health_factsheet31.pdf. The International Convention on the Elimination of All Forms of Racial Discrimination, which was opened for signature one year before the ICESCR, grants ‘the right to public health, medical care, social security and social services’ but does not recognize the right to the highest attainable standard of physical and mental health. CERD, *supra* note 26, art. 5(e)(iv).

⁴⁴ ICESCR, *supra* note 41, art. 12.

⁴⁵ The treaty does require the State Party to ‘undertake steps ... to the maximum of its available resources,’ but the rights are to be achieved ‘progressively.’ *Id.* art. 2(1). *See also* LECKIE & GALLAGHER, *supra* note 34, at xvii-xviii.

⁴⁶ The Covenant does require States Parties to provide for ‘the reduction of the stillbirth-rate and of infant mortality and the healthy development of the child’ as well as the ‘prevention, treatment and control of epidemic, endemic, occupational and other diseases.’ ICESCR, *supra* note 41, art. 12. None of these provisions contemplate reproductive or sexual health in the way understood and advocated by international organizations like SIECUS and IPPF. *See supra* notes 1-9 and accompanying text.

⁴⁷ ICESCR, *supra* note 41, art. 13. The right to education was recognized in an earlier treaty, the Convention against Discrimination in Education (CADE). *See* Convention against Discrimination in Education sec. (a), *opened for signature* Dec. 14, 1960, 429 U.N.T.S. 93. The scope of the right to education in both CADE and ICESCR is comparable; both require compulsory primary education available free to all, secondary education that is generally available and accessible to all, and higher education accessible to all on the basis of individual capacity. *Compare id.* art. 4(a) *with* ICESCR, *supra* note 41, art. 13(2). Since the guarantees are very similar, and since 98 States have ratified CADE, compared with 152 States that have ratified ICESCR, this article focuses on the ICESCR. *See generally*, UNESCO, UNESCO CONVENTION AGAINST DISCRIMINATION IN EDUCATION (1960) AND ARTICLES 13 AND 14 (RIGHT TO EDUCATION) OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMPARATIVE ANALYSIS

⁴⁸ ICESCR, *supra* note 41, art. 13(2)(a).

⁴⁹ *Id.* art. 13(2)(b).

⁵⁰ *Id.* art. 13(2)(c).

addition to providing these guarantees, the Covenant requires States Parties to ‘have respect for the liberty of parents ... to choose for their children schools ... and to ensure the religious and moral education of their children in conformity with their own convictions.’⁵¹

The provisions regarding education outline general principles for effective education,⁵² but do not outline specific obligations of States, do not suggest curricula, and do not mention sex education as a component of primary, secondary, or higher education.⁵³ Importantly, the ICESCR does not require that States provide sex education in schools, and several States Parties made reservations that underline the importance of parental involvement in education.⁵⁴ Nevertheless, the Committee on Economic, Social and Cultural Rights, the TMB for the ICESCR, urges States to provide comprehensive sex education in schools.⁵⁵

2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) elaborates and codifies the civil and political rights set out in the Universal Declaration of Human Rights.⁵⁶ Like the ICESCR, the ICCPR affirms the liberty of parents to ‘ensure the religious and moral education of their children in conformity with their own convictions.’⁵⁷ The Covenant does not provide any further guidance on education

⁵¹ *Id.* art. 13(3).

⁵² For example, Article 13(1) says, ‘[States] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups’ *Id.* art. 13(1).

⁵³ The Committee on Economic, Social and Cultural Rights created an interpretation of Article 13 that outlines the ‘form and substance of education’ contemplated by the ICESCR, saying curricula must meet minimum standards promulgated by the Committee. Comm. Econ., Soc. & Cultural Rts, Implementation of ICESCR, General Comment 13, ¶ 6, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999). However, because the Committee has no authority to create binding international law, its interpretations do not impact State obligations.

⁵⁴ See, for example, the reservations of Ireland (‘Ireland recognizes the inalienable right and duty of parents to provide for the education of children.’); Algeria (‘[A]rticle 13, paragraphs 3 and 4 ... can in no case impair its right freely to organize its educational system.’); and Turkey (reserving the right to interpret Article 13 in accordance with Turkey’s Constitution). ICESCR, *supra* note 41, Reservations.

⁵⁵ See Comm. Econ., Soc. & Cultural Rts., *Concluding Observations: Bosnia and Herzegovina*, ¶ 32, U.N. Doc. E/C.12/BIH/CO/2 (2013) (‘The Committee also recommends that the State party raise awareness of contraceptive methods, with age appropriate education on sexual and reproductive health and rights, in the school curricula, with the aim of preventing early pregnancies.’); *Pre-Sessional Working Group: Peru*, ¶ 23, U.N. Doc. E/C.12/PER/Q/2-4 (2012) (‘[P]romote sexual and reproductive health education in the regular education curriculum targeted at adolescent girls and boys.’); *Concluding Observations: Argentina*, ¶ 22, U.N. Doc. E/C.12/ARG/CO/3 (2011) (‘The Committee urges the State party to ensure the implementation of the law on sexual and reproductive health in all provinces and guarantee affordable access for everyone, especially adolescents, to comprehensive sexual and reproductive health education and services’); *Moldova*, ¶ 27, U.N. Doc. E/C.12/MDA/CO/2 (2011) (‘The Committee is concerned that a special course on sexual and reproductive health rights . . . has been withdrawn from the curriculum at public schools The Committee recommends that the implementation of the National Reproductive Health Strategy 2005-2015 include education in the school curriculum on sexual and reproductive rights.’); *Colombia*, ¶ 26, U.N. Doc. E/C.12/COL/CO/5 (2010) (‘The Committee recommends that the State party ensure sexual and reproductive education in schools.’); *Mauritius*, ¶ 25, U.N. Doc. E/C.12/MUS/CO/4 (2010) (‘The Committee recommends that the State party ... mainstream sexual and reproductive health education in schools.’); *Kazakhstan*, ¶ 33, U.N. Doc. E/C.12/KAZ/CO/1 (2010) (‘The Committee further notes with concern the lack of comprehensive sexual and reproductive health education programmes for girls and boys in the national school curricula that provide them with objective information in accordance with medical and education standards. The Committee recommends that the State party include sexual and reproductive health education programmes in schools’).

⁵⁶ OHCHR, HUMAN RIGHTS TREATY SYSTEM, *supra* note 24, at 7.

⁵⁷ ICCPR, *supra* note 26, art. 18.

and does not provide a right to reproductive or sex education. Further, it makes no mention of reproductive health or reproductive rights.

The Human Rights Committee, the enforcement body of the ICCPR, has directed States Parties to provide comprehensive sex education in schools,⁵⁸ including education ‘on the importance of contraceptive use.’⁵⁹ This is misleading because these forms of education are not required by the ICCPR.

3. International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination condemns all manifestations and practices of racial, religious, and national hatred and calls on States to take all necessary measures to prevent the manifestations of such hatred.⁶⁰ It establishes the right to ‘public health, medical care’⁶¹ and ‘education and training’⁶² to all people. It does not require that States provide education about health and makes no mention of sex education.

4. Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was a culmination of more than thirty years of work by the UN Commission on the Status of Women, which was established in 1946 to promote women’s rights.⁶³ It applies the range of economic, social, and cultural rights of the ICESCR and ICCPR to women.⁶⁴ Article 10 describes a woman’s right to sex education by saying that States Parties shall take measures to ensure equal access ‘to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.’⁶⁵ Further, Article 5 requires States to ‘ensure that family education includes a proper understanding of maternity as a social function.’⁶⁶ The provisions of CEDAW do not explain what is meant by ‘family education.’

CEDAW affirms a woman’s right ‘to decide freely and responsibly on the number and spacing of children’ and ‘to have access to the information, education and means’ to do so.⁶⁷ To promote this right, Article 12 requires States Parties to ensure ‘access to health care services, including those related to family planning’⁶⁸ and ‘appropriate services in

⁵⁸ See Hum. Rts. Comm., *Concluding Observations: Poland*, ¶ 9, U.N. Doc. CCPR/CO/82/POL (2004) (‘[I]nclude accurate and objective sexual education in your curricula.’).

⁵⁹ Hum. Rts. Comm., *Concluding Observations: Dominican Republic*, ¶ 15, U.N. Doc. CCPR/C/DM/CO/5 (2012) (‘[T]he State party should increase education and awareness-raising programs, both formal (at schools and colleges) and informal (in the mass media), on the importance of using contraceptives and the right to reproductive health.’); *Guatemala*, U.N.Doc. CCPR/C/GTM/CO/3 (2012) (‘[T]he State party should increase education and awareness-raising programs, both formal (at schools and colleges) and informal (in the mass media), on the importance of using contraceptives and the right to reproductive health.’); *Djibouti*, ¶ 9, U.N. Doc. CCPR/C/DJI/CO/1 (2013) (‘The State party should amend its legislation on abortion and make provision for additional exceptions, including access to abortion services in cases of pregnancy resulting from rape or incest. The State party should also strengthen its awareness-raising and education programmes on contraceptive methods, family planning and reproductive health ...’).

⁶⁰ CERD, *supra* note 26, preamble.

⁶¹ *Id.* art. 5(d)(iv).

⁶² *Id.* art. 5(d)(v).

⁶³ U.N. Inter-Agency Network on Women and Gender Equality, Division for the Advancement of Women, *Short History of CEDAW Convention*, <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Feb. 7, 2014).

⁶⁴ See LECKIE & GALLAGHER, *supra* note 34, at xv.

⁶⁵ CEDAW, *supra* note 26, art. 10(h).

⁶⁶ *Id.* art. 5(b).

⁶⁷ *Id.* art. 16(1)(e).

⁶⁸ *Id.* art. 12(1).

connection with pregnancy.⁶⁹ Further, Article 14 requires States Parties to provide ‘access to adequate health care facilities, including information, counseling and services in family planning’ to women in rural areas.⁷⁰

Although CEDAW requires States Parties to provide citizens with access to information, counselling, and services related to family planning and pregnancy, it does not require any particular type of family planning information.⁷¹ An individual State may decide what kinds of information it wishes to provide, as long as it does not discriminate against women.⁷² Indicative of this, numerous States made reservations before signing on to CEDAW’s health care provisions. Some States considered themselves not bound to the extent Article 16 conflicts with Islam.⁷³ Others made reservations to the extent the provisions might be interpreted as legalizing abortion or sterilization.⁷⁴ Further, ensuring access to services and information is typically thought to impart a negative obligation: States need not provide family planning information.⁷⁵ A State has satisfied its treaty obligation by merely providing access to information created by non-governmental actors. Similarly, a State that provides medically accurate information and education, but does not provide comprehensive sex education, does not violate CEDAW.

It is therefore important that States Parties are not swayed by the misleading statements of TMBs and NGOs with regard to their obligations under CEDAW. The Committee on the Elimination of Discrimination against Women, which is only authorized to make suggestions and general recommendations but not to interpret the provisions of CEDAW authoritatively,⁷⁶ has said that States must include comprehensive sex education to comply with the Convention.⁷⁷ This is not true, yet

⁶⁹ *Id.* art. 12(2).

⁷⁰ *Id.* art. 14.

⁷¹ MEGHAN GRIZZLE, WORLD YOUTH ALLIANCE, FAMILY PLANNING WHITE PAPER 6 (2012) [hereinafter GRIZZLE, FAMILY PLANNING], available at <http://www.wya.net/advocacy/research/familyplanning.html>.

⁷² CEDAW, *supra* note 26, art. 1. CEDAW defines discrimination against women as ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women ... of human rights and fundamental freedoms.’ *Id.*

⁷³ See the reservations of Oman, Malaysia, Libya, Syria, and Kuwait. *Id.* Reservations.

⁷⁴ See the reservations of Malta and Monaco. *Id.*

⁷⁵ See University of Minnesota, *supra* note 39.

⁷⁶ CEDAW, *supra* note 26, art. 21.

⁷⁷ See, e.g., Comm. Elim. Discrim. against Women, *Concluding Observations: Benin*, ¶ 27, U.N. Doc. CEDAW/C/BEN/CO/4 (2013) (‘Integrate age-appropriate education on sexual and reproductive health rights into school curricula, including comprehensive sex education for adolescent girls and boys covering responsible sexual behaviour and the prevention of early pregnancies and sexually transmitted diseases, including HIV/AIDS ...’); *Andorra*, ¶ 27, U.N. Doc. CEDAW/C/AND/CO/2-3 (2013) (‘Introduce age-appropriate education on sexual and reproductive health and rights in school curricula, including on responsible sexual behavior ...’); *Cambodia*, ¶ 33, CEDAW/C/KHM/CO/4-5 (2013) (‘Intensify age-appropriate education in schools on sexual and reproductive rights, gender relations and responsible sexual behaviour, in order to combat teenage pregnancies ...’); *Algeria*, ¶ 41, U.N. Doc. CEDAW/C/DZA/CO/3-4 (2012) (‘The Committee urges that the State party ... include more comprehensive education on sexual and reproductive health and rights in public school curricula.’); *Congo*, ¶ 36(e), U.N. Doc. CEDAW/C/COG/CO/6 (2012) (‘Widely promote education on sexual and reproductive health and rights by: (i) Undertaking large-scale awareness-raising campaigns for the population in general with special attention to early pregnancy and the importance of using contraceptives for family planning and the prevention of sexually transmitted diseases, including HIV/AIDS; (ii) Integrating effective and age-appropriate education on sexual and reproductive health and rights at all school levels and incorporating it into school curricula ...’); *Zimbabwe*, ¶ 34(d), U.N. Doc. CEDAW/C/ZWE/CO/2-5 (2012) (‘Widely promote education on sexual and reproductive health targeting adolescent girls and boys, with special attention to early pregnancy and the control of STIs, including HIV/AIDS ...’); *Lithuania* ¶ 81, U.N. Doc. CEDAW/C/LTU/CO/4 (2008) (‘The Committee calls upon the State party to ... provide mandatory sexual education in schools ...’); *Republic of Moldova*, ¶ 31, U.N. Doc. CEDAW/C/MDA/CO/3 (2006) (‘The Committee ... encourages the State party to provide sex education systematically in schools, including vocational and training schools.’).

the Committee has reprimanded States for not providing comprehensive sex education.⁷⁸ The Committee's reprimands are a misstatement of States' international obligations under CEDAW. Also, the Center for Reproductive Rights, an NGO that advocates for reproductive rights as fundamental human rights,⁷⁹ cites CEDAW as requiring States to provide comprehensive sex education.⁸⁰ This is misleading because CEDAW does not identify a right to any particular type of sex education.

5. Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) establishes civil, political, economic, social, and cultural rights of children.⁸¹ It ensures the application of existing rights to children;⁸² therefore, the CRC's provisions should be read in light of the original documents that granted these rights. For example, rights to education and health should be read in light of the ICESCR, which was the original international treaty to recognize the rights to education and health.

For health, the CRC requires States Parties to recognize 'the right of the child to the enjoyment of the highest attainable standard of health.'⁸³ To that end, States must take appropriate measures to ensure that parents and children 'are informed, have access to education and are supported in the use of basic knowledge of child health.'⁸⁴ The requirement that States ensure access to information and education regarding health is a negative obligation: the State must guarantee that parents and children can obtain this information and education, but the State does not have to be the provider.⁸⁵ For example, States might mandate that local school districts create a system for providing this information to students, or that health clinics and practitioners dispense information to patients. States do not have to create and provide a sex education curriculum.

⁷⁸ See, e.g., Comm. Elim. Discrim. against Women, *Concluding Observations: Brazil*, ¶ 127, U.N. Doc. A/58/38, Supp. No. 38 (2003) ('The Committee recommends that further measures be taken to guarantee effective access of women to health-care information and services, particularly regarding sexual and reproductive health, including young women ... that programmes and policies be adopted to increase the knowledge of and access to contraceptive methods ... [and] that sex education be widely promoted, particularly targeting adolescents ...').

⁷⁹ See Ctr. for Reprod. Rts., *Our Mission*, reproductiverights.org/en/about-us/mission (last visited Feb. 12, 2014).

⁸⁰ See CTR. FOR REPROD. RTS., AN INTERNATIONAL HUMAN RIGHT: SEXUALITY EDUCATION FOR ADOLESCENTS IN SCHOOLS 1 (2010), [hereinafter CRR, SEXUALITY EDUCATION], available at www.reproductiverights.org/sites/crr.civicactions.net/files/documents/WEB_pub_fac_sexed_10-10.pdf.

⁸¹ The Convention defines a child as any person under the age of 18. CRC, *supra* note 26, art. 1. It does not establish when childhood begins. This omission, coupled with the statement in the preamble that 'the child needs special safeguards and care ... before as well as after birth' allows States who ratify the CRC to interpret its provisions as applying from the moment of conception. *Id.* preamble; Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 186 (2006). As evidence of this, Argentina, the Holy See, and Guatemala stated that the Convention shall apply to all children from the moment of conception. CRC, *supra* note 26, Reservations.

⁸² CRC, *supra* note 26, preamble ('Bearing in mind the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in Articles 23 and 24), [and] in the International Covenant on Economic, Social, and Cultural Rights (in particular in Article 10).'). See also LECKIE & GALLAGHER, *supra* note 34, at xiv.

⁸³ CRC, *supra* note 26, art. 24.

⁸⁴ *Id.* art. 24(e).

⁸⁵ See University of Minnesota, *supra* note 39.

In addition to creating negative obligations, the CRC creates a positive obligation on States to ‘take appropriate measures ... to develop preventive health care, guidance for parents and family planning education and services.’⁸⁶ Although this requires the State to provide information and education on family planning, the CRC does not require States to provide this education to children, nor does it require family planning education to be disseminated in a school context. And the requirement that States take ‘appropriate measures’ means that States are free to implement the sex education services that are appropriate in the context of their national policies and local cultures, values, and traditions.⁸⁷ States may allow non-governmental actors, such as non-profit organizations, religious institutions, and community groups, to create and disseminate information about reproductive health. Indicative of States’ prerogative to interpret Article 24 according to national policies, several States objected to the CRC’s addition of family planning services to the ICESCR’s original health language. For example, Argentina, Ecuador, the Holy See, and Poland reserved the right to interpret family planning to mean only those types of family planning that they consider morally acceptable.⁸⁸ Furthermore, these States asserted that the requirement to provide children with access to family planning education does not include information about contraceptives or abortion.⁸⁹

Contrary to the assertions of the Committee on the Rights of the Child⁹⁰ and NGOs,⁹¹ which urge States to adopt comprehensive sex education to be in line with the health provisions of the CRC, the CRC does not require any particular form of education on the topic of reproductive health.⁹² Therefore, States only

⁸⁶ CRC, *supra* note 26, art. 24(f).

⁸⁷ LUISA BLANCHFIELD, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND AND POLICY ISSUES 15 (2011), available at fas.org/sgp/crs/misc/R40484.pdf. Also important, States must take into account the rights and responsibilities of parents to decide what family planning education their children receive. *Id.* at 3. See also CRC, *supra* note 26, art. 5.

⁸⁸ See CRC, *supra* note 26, Reservations.

⁸⁹ See *id.*

⁹⁰ See, e.g., Comm. Rts. Child, *Concluding Observations: China*, ¶ 70, U.N. Doc. CRC/C/CHN/CO/3-4 (2013) (‘... ensure the widespread provision of comprehensive adolescent health services and psychological support; improve awareness and knowledge, including by providing sexual- and reproductive-health education in schools’); *Tuvalu*, ¶ 52 (2013) (‘Strengthen and widen access to sexual and reproductive health education in schools for both girls and boys’); *Cuba*, ¶ 46, U.N. Doc. CRC/C/CUB/CO/2 (2011) (‘The Committee recommends that the State party strengthen its awareness raising programmes, including campaigns on sexual and reproductive health education for adolescents, in school and out of school, with a view to providing them with access to safe contraception methods.’); *Hungary*, ¶ 44, U.N. Doc. CRC/C/HUN/CO/2 (2006) (‘The Committee recommends that the State party ... strengthen its efforts to promote adolescent health, including sexual and reproductive health education in schools, and to introduce school health services, including youth-sensitive and confidential counseling and care.’); *Portugal*, ¶ 39, U.N. Doc. CRC/C/15/Add.162 (2001) (‘The Committee recommends that the State party: (a) Take steps to address adolescent health concerns, including teenage pregnancy and sexually transmitted diseases, through, *inter alia*, sex education, including about birth control measures such as the use of condoms’).

⁹¹ See, e.g., CRR, SEXUALITY EDUCATION, *supra* note 80, at 1 (stating the CRC supports and establishes obligations in international law for States to provide sexuality education in primary and secondary schools.); UNFPA, COMPREHENSIVE SEXUALITY EDUCATION: ADVANCING HUMAN RIGHTS, GENDER EQUALITY AND IMPROVED SEXUAL AND REPRODUCTIVE HEALTH 11-12 (2010) [hereinafter UNFPA, CSE] (stating that the right to comprehensive sexuality education is based on the rights protected by the CRC); IPPF, STRATEGIC FRAMEWORK 2005-2015 3 (3d ed., 2007) (stating that sexual and reproductive rights are internationally recognized basic human rights).

⁹² The CRC maintains no explicit provision on the issues of contraception, abortion, or other family planning services. GRIZZLE, FAMILY PLANNING, *supra* note 71. In fact, ‘a credible effort was made during the drafting process to ensure that the Convention is “abortion neutral.”’ David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 GEO. J. ON POVERTY L. & POLY 161, 178 (1998). The CRC’s authors deliberately left the CRC’s provisions on family planning open to interpretation by each of the ratifying States Parties. Rutkow & Lozman, *supra* note 81, at 186.

need to make changes to the extent that they have created sex education programmes that provide medically inaccurate information. If a State's programme is medically accurate, but is not a 'comprehensive sex education' programme, the State has not violated the health provisions of the CRC. Similarly, if a State does not provide a sex education programme in schools, or if it relies on sex education created by non-governmental actors, such as non-profit organizations, religious organizations, and community groups, the State has not violated the CRC.⁹³

In the field of education, the Convention reiterates 'the right of the child to education.'⁹⁴ The CRC goes further than previous treaties, however, and requires States to encourage international cooperation in education by facilitating access to scientific knowledge and modern teaching methods.⁹⁵ Again, the requirement to ensure access to information and education does not mean States must provide the education, merely that they ensure children have access to it. The CRC further says the purpose of education is to prepare children 'for responsible life in a free society.'⁹⁶ The Committee on the Rights of the Child⁹⁷ and NGOs⁹⁸ assert that States must provide comprehensive sex education to fulfil this mandate to prepare children to be responsible. However, other types of sex education can teach children to be responsible.

The CRC also requires States Parties to respect the rights and duties of parents to provide appropriate direction and guidance in the child's exercise of his or her rights.⁹⁹ It describes the family as 'the fundamental group of society and the natural environment for children's growth and well-being.'¹⁰⁰ Parental rights do not extend only to the role of enforcing the rights granted by the CRC; parents may use discretion to limit their child's autonomy in the short-run until the child is

⁹³ See University of Minnesota, *supra* note 39.

⁹⁴ CRC, *supra* note 26, art. 28.

⁹⁵ *Id.* art. 28(3).

⁹⁶ *Id.* art. 29(d).

⁹⁷ See, e.g., Comm. Rts. Child, *Concluding Observations: Sao Tome and Principe*, ¶ 49, U.N. Doc. CRC/C/STP/CO/2-4 (2013) ('Adopt a comprehensive sexual and reproductive health policy for adolescents and ensure that sexual and reproductive health education is part of the mandatory school curriculum and targeted at adolescent girls and boys, with special attention on preventing early pregnancy and sexually transmitted infections.'). *Azerbaijan*, ¶ 63(a), U.N. Doc. CRC/C/AZE/CO/3-4 (2012) ('Intensify efforts to provide adolescents with education on sex and reproductive health, particularly with regard to HIV, and improve the accessibility of contraception'); *Panama*, ¶ 57, U.N. Doc. CRC/C/PAN/CO/3-4 (2011) ('The Committee recommends that the State party ensure that children have access to sex and reproductive health education at school'); *Philippines*, ¶ 62(c), U.N. Doc. CRC/C/PHL/CO/3-4 (2009) ('Strengthen formal and informal sex education for girls and boys, focusing on the prevention of early pregnancies, STIs and family planning').

⁹⁸ See CRR, ADOLESCENT REPRODUCTIVE RIGHTS, *supra* note 11 ('The Children's Convention's comprehensive approach to the right to health imposes upon governments the obligation to ensure adolescent girls' access to comprehensive reproductive health services.'). Leah J. Tulin, *supra* note 11, at 1999-2000 (stating that preparing children for life in a free society requires governments to prepare children for all of the activities protected in a free society, including the right to use contraception, and therefore withholding information about sex and imposing value judgments about sexuality through state-sponsored education is incompatible with the right to health information embodied in the CRC).

⁹⁹ See CRC, *supra* note 26, art. 5.

¹⁰⁰ *Id.* preamble.

mature enough to exercise it responsibly.¹⁰¹ For guidance, States can look to earlier international human rights instruments, which link children's rights and parents' rights.¹⁰²

6. Convention on the Rights of Persons with Disabilities

The purpose of the Convention on the Rights of Persons with Disabilities (CRPD) is to promote, protect, and ensure the full enjoyment of human rights by persons with disabilities.¹⁰³ Like the CRC, the CRPD ensures the application of existing rights to persons with disabilities.¹⁰⁴ Therefore, the CRPD's provisions should be read in light of the original documents that recognized these rights.

The Convention's opening statement recognizes the importance of accessibility 'to health and education and to information and communication in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms.'¹⁰⁵ For education, it ensures that children with disabilities are not excluded from the free and compulsory primary education established by the ICESCR.¹⁰⁶ The Convention also requires States Parties to enable persons with disabilities to 'learn life and social development skills to facilitate their full and equal participation in education and as members of the community.'¹⁰⁷ Notably, it does not require sex education.

For health, the Convention requires States Parties to recognize that 'persons with disabilities have the right to the enjoyment of the highest attainable standard of health'¹⁰⁸ and affirms 'the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children.'¹⁰⁹ While States Parties must provide persons with disabilities the means necessary to recognize their rights, including 'access to age-appropriate information [and] reproductive and

¹⁰¹ Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 466 (1996). Jonathan Todres, a children's rights scholar, argues, '[T]he CRC assumes that the family environment is best for the child, and that parents play a significant role in the care of the child, a role which States Parties must respect.' Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 190 (1998-1999). See also, David M. Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 81, 91 (2006) ('The parental roles of providing for the needs of the child and protecting the child from harm often require parents to act contrary to the immediate desires and will of the child and are not effectuated primarily through offering the child choices. Protecting the child often requires the parent to remove options and choices from the child.').

¹⁰² For example, the Universal Declaration of Human Rights states, 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Universal Declaration of Human Rights, G.A. Res. 217A, art. 16-3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). ICCPR quotes UDHR in Article 23-1, and adds that States must 'have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions.' ICCPR, *supra* note 26, art. 18-4. ICESCR quotes the ICCPR's provision requiring the State to respect the liberty of parents to ensure the religious and moral education of children in Article 13-3, and provides further that '[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.' ICESCR, *supra* note 41, art. 10-1.

¹⁰³ CRPD, *supra* note 26, art. 1.

¹⁰⁴ See *id.* preamble (b) ('Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind.').

¹⁰⁵ *Id.* preamble (v).

¹⁰⁶ See *id.* art. 24.

¹⁰⁷ *Id.* art. 24.

¹⁰⁸ *Id.* art. 25.

¹⁰⁹ *Id.* art. 23(b).

family planning education,¹¹⁰ which includes ‘sexual and reproductive health and population-based public health programs,’¹¹¹ the CRPD does not identify a right to any particular form of information, and does not require the State to be the provider.

Although the CRPD grants health rights to persons with disabilities, it does not specifically grant these same health rights to children with disabilities. Early drafts of the Convention did not grant reproductive health rights to children with disabilities,¹¹² and throughout the negotiating process, delegates stressed the importance of closely following the language of the CRC,¹¹³ which does not include the right to comprehensive sex education.¹¹⁴ Fundamentally, the CRPD must be read in light of its stated purpose of ‘promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.’¹¹⁵ To the extent that the CRPD’s health provisions are read to create rights not established in earlier treaties, States lodged objections. Lithuania, Malta, and Poland, for example, stated that ‘the concept of sexual and reproductive health shall not be interpreted to establish new human rights and create relevant international commitments’ and that these concepts do not include ‘support, encouragement or promotion of pregnancy termination.’¹¹⁶

B. Custom

There are two ways that comprehensive sex education may become customary international law. The first is that international conferences will issue declarations that become binding custom. Multilateral declarations by international conferences can potentially create new customs because they are declarations of political will. Statements of political will have become an increasingly significant source of human rights law, especially when ‘phrased in declaratory terms, supported by a widespread and representative body of states, and confirmed by state practice.’¹¹⁷

¹¹⁰ *Id.* art. 23(b).

¹¹¹ *Id.* art. 25(a).

¹¹² See Ad Hoc Comm’n on an Int’l Convention, Chair’s Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities part II, art. 18 (Dec. 2003), <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm#18> (last visited Feb. 7, 2014).

¹¹³ See, e.g., Third Ad Hoc Comm. Daily Summary, *Japan* (‘States Parties shall recognise and take appropriate measures to respect the rights of children with disabilities in accordance with Article 23 of the Convention on the Rights of the Child ...’); *Ireland* (‘Some of the proposals submitted today could in fact undermine existing rights in the CRC and other human rights instruments. Referencing certain parts of this Convention in this Article implies that other parts of the Convention are not equally applicable to children with disabilities.’); *Norway* (‘[C]aution[s] against using language that is similar but not identical to what already appears in the CRC.’), <http://www.un.org/esa/socdev/enable/rights/ahc3summary.htm> (last visited Feb. 7, 2014); Fifth Ad Hoc Comm. Daily Summary, *Holy See* (‘The draft Convention may neither create new additional rights nor diminish or interfere with existing human rights recognized for PWD. Language from existing juridical instruments should not be modified. This could well interfere with agreed upon meaning, intent and obligations presently in existence and impose non-agreed upon duties upon states.’); *Australia* (‘Article 14 should not extend beyond Article 17 of the International Covenant on Civil and Political Rights. Privacy protection for PWD should be on an equal basis as that provided to others.’); *Russia* (‘The wording of [Article 14] should be as close as possible to the Article 23 of the ICCPR.’), <http://www.un.org/esa/socdev/enable/rights/ahc5summary.htm> (last visited Feb. 7, 2014).

¹¹⁴ See *supra* Part II.A.5.

¹¹⁵ CRPD, *supra* note 26, art. 4. See also, JEAN ALLAIN, DISABILITY ACTION, TREATY INTERPRETATION AND THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 7 (2009).

¹¹⁶ See the reservations of Lithuania, Malta, and Poland. CRPD, *supra* note 26, Reservations.

¹¹⁷ Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 757 (2001).

The second is that States will follow the pronouncements of TMBs. Although TMBs have no binding or authoritative status and may not create rights, many States give their recommendations significant weight.¹¹⁸ If States follow the misleading and erroneous recommendations of TMBs out of a sense that the law obliges them to do so, then these recommendations could become customary international law.

1. International Conference on Primary Health Care

In 1978, delegates from 134 States met in Alma-Ata, USSR, to discuss the need to promote and protect health.¹¹⁹ The document that resulted from this meeting, called the Report of the International Conference on Primary Health Care, defines primary health care as care that ‘addresses the main health problems in the community.’¹²⁰ According to the Report, primary health care includes ‘education concerning prevailing health problems and the methods of preventing and controlling them ... maternal and child health care, including family planning’¹²¹ and ‘develops through appropriate education the ability of communities to participate’¹²² in ‘the planning and implementation of their health care.’¹²³ The

¹¹⁸ For example, in 2004, the Human Rights Committee recommended that Poland ‘include accurate and objective sexual education in [its] curricula’ even though the ICCPR does not require States Parties to provide sex education. See *supra* note 56 and accompanying text. In 2009, when Poland reported on its progress in this area, the Committee noted that Polish sex education, which begins in fifth grade, includes information about human sex life, methods and means of conscious procreation, and sexually transmitted diseases and their prevention. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Poland*, ¶ 60, U.N. Doc. CCPR/C/POL/6 (2009). In 2008, the Committee on the Elimination of Discrimination against Women recommended that Lithuania ‘provide mandatory sexual education in schools’ even though that is not a requirement of CEDAW. See *supra* note 75 and accompanying text. In 2001, when Lithuania reported on its progress in this area, the Committee noted that Lithuanian schools have mainstreamed sexual education topics, and that a new programme will be implemented to update health and sexual education goals for primary, basic, and secondary education. Comm. Elim. Discrim. against Women, *Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Lithuania*, ¶¶ 196, 219, U.N. Doc. CEDAW/C/LTU/5 (2011). In 2003, the CEDAW Committee recommended that Brazil ‘increase the knowledge of and access to contraceptive methods ... [and] that sex education be widely promoted, particularly targeting adolescents’ even though information and education about contraceptives is not a requirement of CEDAW. See *supra* note 78 and accompanying text. In 2007, when Brazil reported on its progress in this area, the Committee was encouraged with Brazil’s steps to increase sexual and reproductive health, but recommended that the State ‘continue its efforts to enhance women’s access to health care ... including by increasing knowledge and awareness about, as well as access to, a range of contraceptives and family planning services. The Committee recommends that the State party give priority attention to the situation of adolescents, and that it provide appropriate life skills education with special attention to the prevention of pregnancies and HIV/AIDS and other sexually transmitted diseases.’ Comm. Elim. Discrim. against Women, *Concluding Observations: Brazil*, ¶¶ 7, 30, U.N. Doc. CEDAW/C/BRA/CO/6 (2007). In 1997 the Committee on the Rights of the Child was concerned that Paraguay did not provide ‘large-scale public campaigns for the prevention of unwanted pregnancies, STDs and HIV/AIDS, especially for children and adolescents.’ See *infra* note 217. In 2001, it noted ‘the limited availability of programmes and services in the area of adolescent health, including mental health, and the lack of sufficient prevention and information programmes in schools, especially on reproductive health,’ and urged Paraguay to undertake further measures for sex education. Comm. Rts. Child, *Concluding Observations: Paraguay*, ¶¶ 41-42, U.N. Doc. CRC/C/15/Add.166 (2001). By 2010, Paraguay had implemented the National Plan on Health for Adolescents and the National Plan on Reproductive and Sexual Health, and, although the Committee was pleased with these changes, it continued to urge Paraguay to ‘promote and ensure access to reproductive health services for all adolescents, including sex and reproductive health education in schools ...’ Comm. Rts. Child, *Concluding Observations: Paraguay*, ¶¶ 52-53, U.N. Doc. CRC/C/PRY/CO/3 (2010).

¹¹⁹ See International Conference on Primary Health Care, 6-12 Sept. 1978, *Report of the International Conference on Primary Health Care, in WHO, HEALTH FOR ALL SERIES (6-12 Sept. 1978)* [hereinafter *PCH Report*], available at www.who.int/publications/almaata_declaration_en.pdf.

¹²⁰ *Id.* VII (2).

¹²¹ *Id.* VII (3).

¹²² *Id.* VII (5).

¹²³ *Id.* IV.

Report indicates that education about health and health care was important to the drafters because it helps people understand their health problems, possible solutions to them, and the cost of different alternatives.¹²⁴ The drafters emphasized the importance of educating young people about how to achieve good health.¹²⁵ But the drafters did not intend for education about health care to be implemented in top-down methods by States.¹²⁶ Rather, they stressed the need for ‘associations of parents and teachers [to] assume certain responsibilities for primary health care activities within schools and the community.’¹²⁷ Furthermore, the Report does not define family planning education as including information about contraceptives and abortion and does not cite a need for comprehensive sex education.

2. International Conference on Population and Development

In 1994, delegates from 179 States met in Cairo, Egypt, to discuss the relationship between population and development.¹²⁸ The document that resulted from this meeting, called the Programme of Action of the International Conference on Population and Development, in part outlines the priorities of States Parties with regard to education and information about reproductive health.¹²⁹ The Programme of Action is not binding international law.¹³⁰ Therefore, States Parties are not required to implement any of the policies or procedures outlined in the Programme of Action; they may implement the policies that are most appropriate to the situations of their people.

The Programme of Action defines reproductive health as including family planning and sexual health, and suggests that States ensure adequate ‘counseling, information, [and] education’ for family planning.¹³¹ All ‘individuals of appropriate ages’ should have access to ‘education and counseling, as appropriate, on human sexuality, reproductive health, and responsible parenthood.’¹³² This information should be ‘comprehensive and factual’¹³³ and help adolescents ‘understand their sexuality and protect them from unwanted pregnancies, sexually transmitted diseases and subsequent risk of infertility.’¹³⁴ After making these broad declarations, the Programme of Action does not further elaborate what type

¹²⁴ DIRECTOR-GENERAL WHO & EXECUTIVE DIRECTOR U.N. CHILDREN'S FUND (UNICEF), PRIMARY HEALTH CARE, ¶ 36, presented at the *International Conference on Primary Health Care* (1978) [hereinafter PRIMARY HEALTH CARE].

¹²⁵ See *id.* ¶ 85.

¹²⁶ See *id.* ¶ 36; *PCH Report*, *supra* note 117, IV (‘The people have the right and duty to participate individually and collectively in the planning and implementation of their health care.’).

¹²⁷ PRIMARY HEALTH CARE, *supra* note 122, ¶ 36.

¹²⁸ See International Conference on Population and Development, Sept. 5-13, 1994, *Report of the International Conference on Population and Development*, Ch. I, Res. 1, Annex, preamble, ¶ 1-9, U.N. Doc. A/CONF.171/13/Rev. 1 (Oct. 18, 1994) [hereinafter *ICPD Report*].

¹²⁹ See *id.* at Ch. I, Res. 1, Annex, ¶ 7-2.

¹³⁰ *Id.* preamble ¶ 1-15 (‘While the International Conference on Population and Development does not create any new international human rights, it affirms the application of universally recognized human rights standards to all aspects of population programs.’). The non-binding nature of the ICPD is widely acknowledged. See, e.g., UNFPA, REPRODUCTIVE HEALTH IN REFUGEE SITUATIONS: AN INTER-AGENCY FIELD MANUAL, available at <http://www.unfpa.org/emergencies/manual/a2.htm>; CTR. FOR REPROD. RTS, LEGAL STANDARDS, ROMA REPRODUCTIVE FREEDOM IN SLOVAKIA 97, available at http://reproductiverights.org/sites/default/files/documents/bo_slov_part4.pdf.

¹³¹ *ICPD Report*, *supra*, note 128, ¶ 7-6.

¹³² *Id.*

¹³³ *Id.* ¶ 7-5(a).

¹³⁴ *Id.* ¶ 7-41.

of information is acceptable, or who should provide the information. Importantly, it does not suggest that States should provide access to information about abortion or contraceptives.¹³⁵

Although the Programme of Action uses the term ‘comprehensive,’ this does not grant a right to comprehensive sex education. First, because the Programme of Action is a document of political will, and not a binding treaty, it cannot create international human rights.¹³⁶ Second, the Programme of Action cannot be used as evidence that a right to comprehensive sex education has become customary international law because numerous states objected to including abortion or contraceptives in the definition of reproductive health.¹³⁷ For example, Guatemala objected to the Programme of Action’s use of the terms ‘reproductive rights,’ ‘sexual education and services for minors,’ and ‘distribution of contraceptives.’¹³⁸ Similarly, Iran stated, ‘[W]e believe that sexual education for adolescents can only be productive if the material is appropriate and if such education is provided by the parents and aimed at preventing moral deviation and physiological diseases.’¹³⁹ The Conference discusses comprehensive information and education in terms of reproductive health care services, therefore any information and education provided by the State must comport with the State’s understanding of what is included in reproductive health care services. States do not understand reproductive health care services to include what TMBs and NGOs have termed ‘comprehensive sex education.’

The Programme of Action further discusses education, saying:

[E]ducation about population issues must begin in primary school and continue through all levels of formal and non-formal education, taking into account the rights and responsibilities of parents and the needs of children and adolescents. Where such programs already exist, curricula should be reviewed, updated and broadened with a view to ensuring adequate coverage of such important concerns as gender sensitivity, reproductive choices and responsibilities, and sexually transmitted diseases, including HIV/AIDS.¹⁴⁰

This provision does not state that comprehensive sex education is necessary. Other types of sex education are compatible with a curriculum that discusses reproductive choices and STDs. Further, the Programme of Action does not specify that States should be in charge of updating and broadening sex education curricula. Instead, there is room in the provisions for the State to mandate that non-governmental actors create new curricula. It is also important to note that the Programme of

¹³⁵ MEGHAN GRIZZLE, WORLD YOUTH ALLIANCE, REPRODUCTIVE HEALTH WHITE PAPER 5-6 [hereinafter GRIZZLE, REPRODUCTIVE HEALTH], available at <http://www.wya.net/advocacy/research/reproductivehealth.html>.

¹³⁶ WHO, 25 *Questions & Answers on Health and Human Rights* 9 (2002) (‘Declarations are non-binding, although many norms and standards enshrined therein reflect principles which are binding in customary international law; United Nations conferences generate non-binding consensual policy documents, such as declarations and programs of action.’), available at http://www.who.int/hht/activities/en/25_questions_hhr.pdf.

¹³⁷ Libya, Yemen, Egypt, Indonesia, Algeria, Afghanistan, Syria, El Salvador, Kuwait, Jordan, Malta, Iran, Malaysia, Djibouti, and Maldives all made reservations regarding the inclusion of abortion in the concept of reproductive health. *ICPD Report*, *supra*, note 128, reservations. And Colombia, Libya, El Salvador, Georgia, Indonesia, Yemen, and Malta all made reservations regarding the use of the terms ‘unsafe abortion’ and ‘responsible sexual behaviour.’ *Id.* See also GRIZZLE, REPRODUCTIVE HEALTH, *supra* note 135, at 7.

¹³⁸ *ICPD Report*, *supra* note 126, reservations: Guatemala.

¹³⁹ *Id.* reservations: Iran.

¹⁴⁰ *Id.* ¶ 11.9.

Action establishes international consensus that States will take into account the rights and responsibilities of parents.¹⁴¹ Like the CRC, the Programme of Action does not envision the child exercising these rights alone, but with the direction and guidance of his or her parents.¹⁴²

States' implementation of the ICPD Programme of Action is monitored by the Commission on Population and Development (CPD).¹⁴³ The CPD is a creation of the UN Economic and Social Council.¹⁴⁴ It is composed of 47 Member States elected to four-year terms by the Economic and Social Council.¹⁴⁵ Like a TMB, the CPD monitors, reviews, and assesses the implementation of the ICPD and provides recommendations.¹⁴⁶ Also like a TMB, the CPD has no binding authority and cannot create international law.¹⁴⁷ Since 2007 the CPD resolutions have urged States to provide young people with comprehensive education on human sexuality and sexual and reproductive health.¹⁴⁸ The ICPD Programme of Action, however,

¹⁴¹ See *id.* ¶ 7:37 ('Support should be given to integral sexual education and services for young people, with the support and guidance of their parents, and in line with the Convention on the Rights of the Child.');

id. ¶ 7:45 ('Recognizing the rights, duties and responsibilities of parents and other persons legally responsible for adolescents to provide, in a manner consistent with the evolving capacities of the adolescent, appropriate direction and guidance in sexual and reproductive matters.').

¹⁴² See *id.* ¶ 6:15 (saying children's access to sex education must be 'ensured with the support and guidance of their parents and in line with the Convention on the Rights of the Child.');

id. ¶ 7:8 (stating with regard to reproductive health information, 'boys and adolescents, with the support and guidance of their parents, and in line with the Convention on the Rights of the Child, should also be reached through schools, youth organizations and wherever they congregate.').

¹⁴³ Dep't Econ. & Soc. Affairs: Population Division, *Commission on Population and Development*, <http://www.un.org/en/development/desa/population/commission/index.shtml> (last visited Feb. 7, 2014). CPD was originally created by the Economic and Social Council in 1946, but in 1994 the General Assembly tailored its function to be a follow-up and implementation mechanism for the ICPD Programme of Action. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ The United Nations General Assembly stated that the mission of the Commission would be to 'monitor, review and assess the implementation of the Programme of Action at the national, regional and international levels and advise the [Economic and Social] Council thereon' Report of the International Conference on Population and Development, G.A. res. 49/128, 49 U.N. GAOR Supp. No. 49, at 149, U.N. Doc. A/49/49 (1994). The General Assembly did not indicate that the advice or assessments of the Commission were meant to legally bind States. *Id.* Additionally, the Programme of Action itself does not indicate that the Commission's recommendations would have binding or authoritative weight. *ICPD Report*, *supra* note 128, art. 16:3. Regarding follow-up procedures, the Programme of Action says, 'The main functions related to Conference follow-up include ... coordination and mutual accountability of efforts to implement the Programme of Action; problem solving and sharing of experience within and between countries; and monitoring and reporting of progress in the implementation of the Programme of Action. ... Implementation, monitoring and evaluation of the Programme of Action at all levels should be conducted in a manner consistent with its principles and objectives.' *Id.*

¹⁴⁸ See, e.g., Commission on Population and Development, Resolution 2011/1: Fertility, Reproductive Health and Development, ¶ 6, U.N. Doc. E/CN.9/2011/8 (2011) ('Urges Governments, in order to ensure the contribution of the Programme of Action of the International Conference on Population and Development to the internationally agreed development goals ... [to] provid[e] young people with comprehensive education on human sexuality, on sexual and reproductive health, on gender equality and on how to deal positively and responsibly with their sexuality'); Resolution 2010: Health, Morbidity, Mortality and Development, ¶ 12, U.N. Doc. E/CN.9/2010/9 (2010) ('Urges Governments, in order to ensure the contribution of the Programme of Action of the International Conference on Population and Development to the internationally agreed development goals ... [to] provid[e] young people with comprehensive education on human sexuality'); Resolution 2009/1: The Contribution of the Programme of Action of the International Conference on Population and Development to the Internationally Agreed Development Goals, Including the Millennium Development Goals, ¶ 7, U.N. Doc. E/CN.9/2009/10 (2009) ('Urges Governments, in order to ensure the contribution of the Programme of Action of the International Conference on Population and Development to the internationally agreed development goals ... [to] provid[e] young people with comprehensive education on human sexuality'); Resolution 2007/1: Changing Age Structures of Populations and their Implications for Development, ¶ 20, U.N. Doc. E/CN.9/2007/9 (2007) ('[E]ncourages Governments to address the rising rates of HIV infection among young people to ensure HIV-free future generations through the implementation of comprehensive, evidence-based prevention strategies, responsible sexual behavior, including the use of condoms, evidence- and skill-based, youth-specific HIV education').

does not establish consensus on comprehensive sex education. Instead, it emphasizes the importance of the sovereign right of each State to implement its recommendations,¹⁴⁹ and the rights and responsibilities of parents to provide direction and guidance on sexual and reproductive health matters.¹⁵⁰ The 2011 CPD resolution on fertility, reproductive health, and development reaffirms State sovereignty and recognizes the role of parents in the education of children,¹⁵¹ but earlier CPD reports did not.¹⁵² The absence of parental and State sovereignty rights from pre-2011 CPDs is potentially misleading and a misstatement of international consensus.

3. Fourth World Conference on Women

In 1995, delegates from 190 States met in Beijing, China, to discuss issues of development that had specific relevance to women.¹⁵³ The document that resulted from the meeting, the Platform for Action of the Fourth World Conference on Women (Beijing), adopted the ICPD Programme of Action's language on reproductive health.¹⁵⁴ This means the Platform for Action does not specify any particular type of information and education related to reproductive health, and does not contemplate States making available information about contraceptives and abortion.¹⁵⁵

Additionally with regard to education of adolescents, the Platform for Action closely tracks the language of the ICPD Programme of Action. It notes that the Programme of Action recommends full attention be given 'to meeting the educational and service needs of adolescents to enable them to deal in a positive and responsible way with their sexuality'¹⁵⁶ and suggests that States provide 'appropriate direction and guidance in the exercise by the child of the rights recognized in the CRC and in conformity with CEDAW' in a way that is 'consistent with the evolving capacities of the child ... with parental support and guidance.'¹⁵⁷ The language on the evolving capacities of the child holds the same connotations as that same phrase in the CRC, meaning parents have the right to provide direction and guidance in the child's exercise of his or her rights.¹⁵⁸

The Platform for Action goes on to say that States should 'remove legal, regulatory and social barriers, where appropriate, to sexual and reproductive health education within formal education programs regarding women's health issues'¹⁵⁹ and 'ensure education and dissemination of information to girls, especially adolescent girls, regarding the physiology of reproduction, reproductive

¹⁴⁹ See *ICPD Report*, *supra* note 128, Ch. II, principles ('The implementation of the recommendations contained in the Programme of Action is 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.').

¹⁵⁰ See *supra* notes 138-40 and accompanying text.

¹⁵¹ Resolution 2011/1, *supra* note 146, ¶ 4, 18.

¹⁵² See, e.g., Resolution 2010, *supra* note 148, ¶ 12; Resolution 2009/1, *supra* note 148, ¶¶ 7-9.

¹⁵³ See Fourth World Conference on Women, Sept. 4-15, 1995, *Report of the Fourth World Conference on Women*, Ch. I, Res. 1, Annex I, ¶¶ 7-10, U.N. Doc. A/CONF.177/20/Rev.1 (1996) [hereinafter *FWCW Report*].

¹⁵⁴ See *id.* Ch. I, Res. 1, Annex II, ¶ 94.

¹⁵⁵ See GRIZZLE, REPRODUCTIVE HEALTH, *supra* note 135, at 8.

¹⁵⁶ *ICPD Report*, *supra* note 128, art. 7.3.

¹⁵⁷ *FWCW Report*, *supra* note 153, Annex II, ¶ 267.

¹⁵⁸ See *infra* Part III.

¹⁵⁹ *FWCW Report*, *supra* note 153, ¶ 83(k).

and sexual health, as agreed to in the ICPD Programme of Action, responsible family planning practice, family life, reproductive health, sexually transmitted diseases, HIV infection and AIDS prevention, recognizing the parental roles.¹⁶⁰ Again, the Platform for Action tracks the language of the ICPD and provides for parental discretion.

States' reservations to the Platform for Action indicate that parents have the primary responsibility for providing sex education.¹⁶¹ Therefore the Platform for Action cannot be used as evidence that a right to child autonomy with respect to sex education has become customary international law.

The Commission on the Status of Women monitors the Platform for Action and provides yearly reports on gender equality and women's empowerment worldwide.¹⁶² In its reports for 2009, 2011, and 2013, the Commission urged States to provide sex education based on 'full and accurate information.'¹⁶³ Like the Platform for Action, the CSW's broad phrasing does not suggest any particular type of sex education. The CSW also states that sex education should be provided 'in a manner consistent with the evolving capacities of girls and boys,'¹⁶⁴ but like the Platform for Action, this must be interpreted in the same way as that phrasing in the CRC. Cognizant of that, the CSW suggests that States allow parents to provide 'appropriate direction and guidance' for their children's sex education.¹⁶⁵

4. Special Rapporteurs

United Nations Special Rapporteurs are independent experts appointed by the Human Rights Council to examine, monitor, and give advice on human rights problems either within a specific country or globally on a specific theme.¹⁶⁶ Of

¹⁶⁰ *Id.* ¶ 281(e).

¹⁶¹ See, e.g., *id.* Reservations, *Argentina* ('No definition or recommendation contained in these documents weakens the parents' primary responsibility for bringing up their children, including providing education on sexual matters, a responsibility which should be respected by States pursuant to the Convention on the Rights of the Child.');

Brunei ('[W]e believe that parental guidance should not be abdicated and that sexual permissiveness and unhealthy sexual and reproductive practices by adolescents should not be condoned.');

Guatemala ('The government of Guatemala reserves the right to interpret the Platform for Action expressly in accordance with its unconditional respect for the right to life from the moment of conception and its unconditional respect for the right of parents to choose the upbringing of their children.');

Iran ('Concerning programs aimed at sexual and reproductive health, education and services, the Islamic Republic of Iran believes that such education and services should be guided by ethical and moral values and respect the responsibilities, rights and duties of parents, taking into account the evolving capacities of adolescents.').

¹⁶² UN Women, Comm'n on the Status of Women, *Mandate*, <http://www.un.org/womenwatch/daw/csw/index.html#about> (last visited Feb. 7, 2014).

¹⁶³ Comm'n on the Status of Women, 57th Session, *Report on the Fifty-Seventh Session*, ¶ kk, U.N. Doc. E/2013/27-E/CN.6/2013/11 (2013) ('Develop and implement educational programmes and teaching materials, including comprehensive evidence-based education for human sexuality, based on full and accurate information, for all adolescents and youth, in a manner consistent with their evolving capacities, with the appropriate direction and guidance from parents and legal guardians');

55th Session, *agreed conclusions*, ¶ x, U.N. Doc. E/2011/27-E/CN.6/2011/12 (2011) (States should 'Ensure women's and girls' right to education at all levels as well as access to life skills and sex education based on full and accurate information, and, with respect to girls and boys, in a manner consistent with their evolving capacities, and with appropriate direction and guidance from parents');

53d Session, *agreed conclusions*, ¶ nn, U.N. Doc. E/2009/27-E/CN.6/2009/15 (2009) (States should provide 'increased access to an appropriate and comprehensive package of prevention programs and support to prevent the transmission of HIV and other sexually transmitted infections, including through increased access to education, including in the areas of sexual and reproductive health, for young people.').

¹⁶⁴ Comm'n on the Status of Women, 53d Session, *agreed conclusions*, ¶ x, U.N. Doc. E/2009/27-E/CN.6/2009/15 (2009).

¹⁶⁵ *Id.*

¹⁶⁶ U.N. Office of the High Comm'r for Hum. Rts., *Special Procedures of the Human Rights Council*, www.ohchr.org/en/HRBodies/SP/Pages/Welcompage.aspx (last visited Feb. 11, 2014).

particular importance to the issue of sex education are the statements of the Special Rapporteur on the Right to Education. In 2004, the Special Rapporteur on the Right to Education said comprehensive sex education is ‘a crucial issue for the elimination of gender discrimination.’¹⁶⁷ In 2010, the Rapporteur released a report alleging a right to comprehensive sex education.¹⁶⁸ Reminding States of their obligation to provide the highest attainable standard of physical and mental health, the Special Rapporteur said that States must provide ‘comprehensive sex education from the outset of schooling and through the educational process.’¹⁶⁹ Similarly, he mischaracterized the right to education, stating that ‘the right to education includes the right to sex education, which is both a human right in itself and an indispensable means of realizing other human rights.’¹⁷⁰ While human rights treaties do recognize the right to primary education, this does not include sex education.¹⁷¹ However, the Rapporteur urged States to embrace his views, saying, ‘[T]here is no valid excuse for not providing people with the comprehensive sex education they need.’¹⁷² He failed to mention that international law does not require comprehensive sex education; human rights treaties require States Parties ensure access to information and education about family planning,¹⁷³ but do not require the State to provide this information itself,¹⁷⁴ and do not delineate what this information and education should communicate. Finally, the Rapporteur misstates the rights of parents, saying parental authority ‘may never run counter to the rights of children and adolescents, in accordance with the principle of the best interests of the child.’¹⁷⁵ However, international human rights treaties acknowledge the primary role of parents in the care and protection of children, and the obligation of the State to respect parents’ rights to direct the education of children.¹⁷⁶ Also, the CRC indicates that parents are best able to determine what is in the best interest of their children, and that States Parties must respect the decisions of parents.¹⁷⁷

The Rapporteur’s statements are not indicative of an emerging norm of customary international law. Numerous States objected to the Rapporteur’s 2010 statement, accusing him of inventing new human rights and introducing concepts

¹⁶⁷ Special Rapporteur on the Right to Education: Katarina Tomasevski, *Report of the Special Rapporteur on Economic, Social & Cultural Rights: The Right to Education*, ¶ 2, U.N. Doc. E/CN.4/2004/45 (Jan. 15, 2004).

¹⁶⁸ See Special Rapporteur on the Right to Education: Verner Muñoz, *Report of the United Nations Special Rapporteur on the Right to Education*, ¶ 75, Human Rights Council, U.N. Doc. A/65/162 (July 23, 2010) (‘International human rights standards clearly establish the human right to comprehensive sexual education, which is indivisible from the right to education and is key to the effective enjoyment of the right to life, health, information and non-discrimination.’).

¹⁶⁹ *Id.* ¶ 12.

¹⁷⁰ *Id.* ¶ 19.

¹⁷¹ See ICESCR, *supra* note 41, art. 13 (addressing the right to primary education); CEDAW, *supra* note 26, art. 10 (addressing the right of women and girls to access the same curricula, equipment, and teachers as men and boys); CRC, *supra* note 26, art. 28 (recognizing the right of children to education, but not sexual education).

¹⁷² Verner Muñoz, *supra* note 168, ¶ 15. The Rapporteur said one of the goals of comprehensive sexual education should be ‘pleasure and enjoyment of sexuality ... abolishing guilt feelings about eroticism that restrict sexuality to the mere reproductive function.’ *Id.* ¶ 16.

¹⁷³ See CEDAW, *supra* note 26, art. 10(h); CRC, *supra* note 26, art. 24(f); CRPD, *supra* note 26, art. 23(b).

¹⁷⁴ See *supra* notes 67-71 & 86-87 and accompanying text.

¹⁷⁵ Verner Muñoz, *supra* note 168, ¶ 73.

¹⁷⁶ See ICESCR, *supra* note 41, art. 13(3); ICCPR, *supra* note 26, art. 18; CRC, *supra* note 26, art. 5.

¹⁷⁷ Todres, *supra* note 101, at 190.

not recognized in international law.¹⁷⁸ The African Group¹⁷⁹ rejected the report, stating that it is common knowledge that there is no universal agreement on sex education.¹⁸⁰ The Caribbean Community¹⁸¹ also criticized the Rapporteur's attempt to create a new right within the universally established right to education.¹⁸² Delegates from Morocco, Mauritania, Russia, the United States, and South Africa echoed these criticisms.¹⁸³

III. Implications

International law establishes a right to the enjoyment of the highest attainable standard of physical and mental health.¹⁸⁴ Included in the right to health is the right to information and education necessary to safeguard health.¹⁸⁵ However, human rights treaties do not require that States provide this education to children and adolescents and do not require health education in primary or secondary schools. Not only do treaties not require States to provide comprehensive sex education, they do not even mention it.

The right to education is worded generally, and treaties provide little specific guidance to States.¹⁸⁶ Although States Parties may recognize that every person is entitled to receive primary education at the public expense, a narrow and proper reading of treaty provisions shows that States are free to determine the content of that education.¹⁸⁷ TMBs, NGOs, and Special Rapporteurs have attempted to fill in the areas of treaties that were intentionally left vague. For example, the Special Rapporteur on the Right to Education outlined a detailed scheme, saying States Parties are obliged to make education available, accessible, acceptable, and adaptable.¹⁸⁸ With regard to sex education, the Special Rapporteur would have States include sex education at every level and in every school.¹⁸⁹ So would TMBs like the Committee on the Rights of the Child¹⁹⁰ and the Committee on the Elimination of Discrimination against Women,¹⁹¹

¹⁷⁸ Mindy Jane Roseman & Alice M. Miller, Symposium, *Normalizing Sex and its Discontents: Establishing Sexual Rights in International Law*, 34 HARV. J.L. & GENDER 313, 363-66 (2011).

¹⁷⁹ The African Group is made up of all 54 UN Member States located in the continent of Africa. U.N. Dep't for General Assembly and Conference Mgmt, *United Nations Regional Groups of Member States*, <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last visited Feb. 11, 2014). It is the largest geopolitical group, comprising 28 percent of all UN member countries. *Id.* When the Group coordinates its substantive policy, its size affords its members greater negotiating power than they would each individually have.

¹⁸⁰ Press Release, General Assembly Holds Lengthy Exchange on Report on Sex Education, GA/SCH/3987 (Oct. 25, 2010), available at <http://www.un.org/News/Press/docs/2010/gashc3987.doc.htm>.

¹⁸¹ The Caribbean Community is an organization made up of 15 Caribbean nations with the purpose of promoting economic cooperation and coordinating foreign policy. Caribbean Comm. Secretariat, *History of the Caribbean Community (CARICOM)*, www.caricom.org/jsp/community/history.jsp?menu=community (last visited Feb. 12, 2014).

¹⁸² Press Release, GA/SCH/3987, *supra* note 180.

¹⁸³ *Id.*

¹⁸⁴ See ICESCR, *supra* note 41, art. 12; CEDAW, *supra* note 26, art. 12; CRC, *supra* note 26, art. 24.

¹⁸⁵ CEDAW, *supra* note 26, art. 16(1)(e); CRC, *supra* note 26, art. 24(e).

¹⁸⁶ See *supra* Part II. See also L. Elizabeth Chamblee, *Rhetoric or Rights?: When Culture and Religion Bar Girls' Right to Education*, 44 VA. J. INT'L L. 1073, 1092 (2003-2004).

¹⁸⁷ See Roger J. R. Levesque, *The Right to Education in the United States: Beyond the Limits of the Lore and Lure of Law*, 4 ANN. SURV. INT'L & COMP. L. 205, 216 (1997).

¹⁸⁸ SPECIAL RAPPORTEUR ON THE RIGHT TO EDUCATION KATARINA TOMASEVSKI, PRIMER NO. 3: HUMAN RIGHTS OBLIGATIONS: MAKING EDUCATION AVAILABLE, ACCESSIBLE, ACCEPTABLE, AND ADAPTABLE 11 (2011), available at <http://www.right-to-education.org/sites/r2e.gn.apc.org/files/B6g%20Primer.pdf>.

¹⁸⁹ See *supra* notes 166-74 and accompanying text.

¹⁹⁰ See *supra* notes 92, 99.

¹⁹¹ See *supra* notes 79-80.

and NGOs like IPPF¹⁹² and SIECUS.¹⁹³ Comprehensive sex education is not required by the plain language of the treaties. When given an ordinary reading,¹⁹⁴ treaties' requirement of ensuring access to information and education about health and family planning means that if sex education is provided by non-governmental actors, States do not need to create curricula in this area.¹⁹⁵ Even if treaties' general requirement of providing access to education meant that States had to expend resources to create schools, treaties do not require the same for sex education.¹⁹⁶

States are not the final arbiter of the content of education; parents are.¹⁹⁷ States must respect the right of parents to ensure that their children's education is in conformity with their own convictions.¹⁹⁸ States must not be pressured by TMBs, NGOs, and academics; contrary to what these bodies and people say, States do not have a duty to provide comprehensive sex education.¹⁹⁹ Because implementation of the right to health will vary from State to State, international treaties do not offer set prescriptions.²⁰⁰

The phrase 'evolving capacities of the child' has emerged in the more recent human rights treaties and is also seen in international consensus documents and TMB recommendations. This phrase was first introduced in the CRC, which requires States Parties to 'respect the responsibilities, rights and duties of parents ... to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance' in the child's exercise of his or her rights.²⁰¹ When originally introduced, this phrase was a new approach to the personal autonomy of children.²⁰² Principles previously adopted by the United Nations were concerned only with care and protection for children, not with the idea of children's rights of autonomy.²⁰³

¹⁹² See IPPF YOUTH, *supra* note 11.

¹⁹³ See SIECUS, Position Statements: Sexuality Education, *supra* note 3.

¹⁹⁴ VCLT, *supra* note 17, art. 31(1) ('A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.').

¹⁹⁵ See University of Minnesota, *supra* note 39.

¹⁹⁶ See *infra* Part II.A.

¹⁹⁷ Levesque, *supra* note 187, at 225.

¹⁹⁸ See *supra* notes 51, 57, 86, 88, & 101 and accompanying text.

¹⁹⁹ *Contra* Aliya Haider, *Adolescents Under International Law: Autonomy as the Key to Reproductive Health*, 14 WM. & MARY J. WOMEN & L. 605 (2008) (Erroneously citing CRC Articles 5 and 24 as support for the proposition that governments have a duty under international law to provide comprehensive sex education, and that when they restrict access to reproductive health information they violate international law.); UNFPA, CSE, *supra* note 91, at 11 (arguing that ICPD identifies sexuality education as a human right); CRR, SEXUALITY EDUCATION, *supra* note 80, at 1 (stating that individuals have a right to comprehensive information about sexual and reproductive health).

²⁰⁰ OHCHR, RIGHT TO HEALTH, *supra* note 43.

²⁰¹ CRC, *supra* note 26, art. 5.

²⁰² U.N. 1994/95 PUBLICATIONS CATALOGUE 64. See also Hafén & Hafén, *supra* note 101.

²⁰³ See generally Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1 (1993-1994) (describing the abrupt change from 'care and protection' rights to 'individual personality' rights in the drafting process). This change in language might not have been a conscious choice by many of the participating States. The drafting and development of the Convention was heavily impacted by the growing momentum toward the end of the Cold War and there is some evidence that the impending collapse of total state paternalism in the Soviet Union helped convince the drafters that granting autonomy rights to the child was the ideological victory of the US over the USSR. Akira Morita, *The Legal-Historical Background and Drafting Process of the Convention on the Rights of the Child—Protection vs. Autonomy*, SOCIO-LEGAL STUD. ON FAM. L., Sep. 1994, at 29, 31; Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185 (2006). The CRC was adopted unanimously by the U.N. General Assembly eleven days after the Berlin Wall fell; in the months surrounding the CRC vote, all of the European communist allies of the former Soviet Union collapsed. T. Jeremy Gunn, *The Religious Right and the Opposition to the U.S. Ratification of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 111, 111 (2006). Additionally, given the complexities of language translation in legal documents, it is likely that many members of the international community did not understand the CRC's language or its conceptual novelty. Hafén & Hafén, *supra* note 101, at 489 (drawing an analogy from the 1994 International Conference on Population and Development, where French translators had to resuscitate a nineteenth-century term in the effort to render 'reproductive health' in their language, and Arabs had difficulty translating 'sexually active unmarried individuals' without referencing the criminality of the act under Islamic law).

Although the ‘evolving capacities of the child’ language represented a novel approach to children’s rights, its inclusion in international human rights documents is helpful for States who do not want to provide comprehensive sex education. Properly understood, the phrase does not mean that a child’s autonomy is the ultimate goal.²⁰⁴ Instead, it reminds States to approach children developmentally, targeting and tailoring sex education curricula to ensure that it is appropriate for the age and maturity level of the child.²⁰⁵ The CRC did not envision the child exercising his or her rights alone, but with the direction and guidance of his or her parents.²⁰⁶

International consensus documents also include the phrase ‘age-appropriate’ to remind States to approach children developmentally.²⁰⁷ This phrase is seen in conjunction with language urging States to respect a parent’s right to direct his or her child’s education and development.²⁰⁸

The international human rights treaties acknowledge the primary role of parents in the care and protection of children and the obligation of the State to respect parents’ rights to direct the education of children.²⁰⁹ Even so, the tension between parental responsibility and child autonomy has created room for ambiguity, which TMBs and NGOs can exploit. Institutions like IPPF and SIECUS have been known to twist references to a child’s ‘evolving capacities’ and to ‘age-appropriate’ information to provide an unfettered right to comprehensive sex education.²¹⁰ In

²⁰⁴ See James Garbarino, *The Child’s Evolving Capacities*, in CYNTHIA P. COHEN & HOWARD A. DAVIDSON, CHILDREN’S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 19 (Cynthia P. Cohen & Howard A. Davidson eds., 1990).

²⁰⁵ *Id.* See also, Hafen & Hafen, *supra* note 101, at 476 (‘To develop the capacity for autonomous action, children must submit their freedom temporarily to the schoolmaster of education and training, the developmental processes that create the tools and skills that are essential for responsible and self-determined action.’).

²⁰⁶ See *supra* notes 101-04 and accompanying text.

²⁰⁷ For example, the CRPD requires States Parties provide disabled persons with ‘access to age-appropriate information, reproductive and family planning education’ CRPD, *supra* note 26, art. 23. The ICPD Programme of Action urges States to provide ‘age-appropriate education, especially for adolescents, about the issues considered in the Programme of Action’ ICPD Report, *supra* note 128, ¶ 11.24. Specifically in the context of sex education, the Programme of Action says that States should ‘address adolescent sexual and reproductive health issues through ... counselling specifically suitable for that age group’ *Id.* ¶ 7.44. The Commission on the Status of Women uses similar language, urging the availability of age-appropriate information and education on sexual and reproductive health. Comm’n on the Status of Women, *Report on the Fifty-First Session*, ¶ 14.4(b), U.N. Doc. E/CN.6/2007/9 (2007); *id.* ¶ 14.5(b) (‘Provide appropriate information to help young women, including adolescent girls, understand their sexuality, including their sexual and reproductive health’).

²⁰⁸ ICPD Report, *supra* note 128, principle 10 (‘The best interests of the child shall be the guiding principle of those responsible for his or her education and guidance; that responsibility lies in the first place with the parents.’); *id.* ¶ 11.24 (‘Age-appropriate education, especially for adolescents ... should begin in the home and community ... taking into account the rights and responsibilities of parents and the needs of adolescents.’).

²⁰⁹ See ICESCR, *supra* note 41, art. 13(3); ICCPR, *supra* note 26, art. 18; CRC, *supra* note 26, art. 5.

²¹⁰ See, e.g., IPPF FRAMEWORK, *supra* note 4, at 5 (‘IPPFs Youth Policy states that IPPF is committed to promoting, protecting and upholding the sexual and reproductive health rights of all young people. This includes the right to information and education on sexuality, and a right to pleasure and confidence in relationships and all aspects of their sexuality.... Information should be accessible to children and young people of all ages in accordance with their evolving capacities.’); SIECUS, *supra* note 3 (‘From the moment of birth, children learn about love, touch, and relationships. Infants and toddlers learn about sexuality when their parents talk to them, dress them, show affection, and teach them the names and parts of their bodies. As children grow into adolescence, they continue to receive messages about sexual behaviors, attitudes, and values from their families.’); IPPF, EXCLAIM! *supra* note 9, at 9 (2011) (‘Since each young person develops at their own pace, there is no universal age at which certain sexual rights and protections gain or lose importance. Therefore, striking the balance between protection and autonomy should be based on the evolving capacities of each individual young person.’) available at http://www.ippf.org/sites/default/files/ippf_exclaim_lores.pdf.

the eyes of these NGOs, information about sex and sexuality is appropriate for children of all ages.²¹¹ For example, although SIECUS stresses the importance of providing young people with age-appropriate education,²¹² its guidelines for comprehensive sexuality education advocate teaching children ages 5–8 that ‘both boys and girls have body parts that feel good when touched’²¹³ and ‘touching and rubbing one’s own genitals to feel good is called masturbation.’²¹⁴ Similarly, WHO Europe advocates teaching children ages 0–4 about masturbation and ‘discovery of own body and own genitals,’ about pregnancy, birth, and the basics of human reproduction, ‘the right to ask questions about sexuality,’ and ‘the feeling that they can make their own decisions’ with respect to sexuality.²¹⁵

Also, the Committee on the Rights of the Child, a TMB with no binding legal authority,²¹⁶ has frequently criticized States for ‘lack of sufficient reproductive health information and services for adolescents’ and ‘failing to promote education about family planning for adolescents.’²¹⁷ It has also interpreted Article 16 of the CRC to expand even further this new notion of privacy and autonomy for children, stating, ‘healthcare providers have an obligation to keep confidential medical information concerning adolescents’²¹⁸ and advocating that adolescent

²¹¹ See, e.g., IPPF YOUTH, *supra* note 11 (‘We are strengthening our commitment to young people; they are sexual beings with the right to access services and contraceptives ... We are faced with societies that prefer to deny that young people have sex at all ...’).

²¹² SIECUS, GUIDELINES FOR COMPREHENSIVE SEXUALITY EDUCATION: KINDERGARTEN THROUGH 12TH GRADE 15 (3d ed., 2004).

²¹³ *Id.* at 25.

²¹⁴ *Id.* at 51. It also advocates telling children ages 9–12 that ‘masturbation is often the first way a person experiences sexual pleasure’ and that ‘most boys and girls begin to masturbate for sexual pleasure during puberty.’ *Id.* at 52.

²¹⁵ WHO FRAMEWORK, *supra* note 4, at 38–39.

²¹⁶ Smolin, *supra* note 101, at 100.

²¹⁷ See, e.g., Comm. Rts. Child, *Concluding Observations: Madagascar*, ¶ 52, U.N. Doc. CRC/MDG/CO/3-4 (2012) (‘[I]mprove sexual and reproductive health education in all schools.’); *Syria*, ¶ 66, U.N. Doc. CRC/SYR/CO/3-4 (2011) (‘The Committee ... urges it to increase the availability of confidential and youth-friendly health services throughout the country, enhance the availability of reproductive health services, and promote sexual and reproductive health education targeted at adolescent girls and boys.’); *Czech Republic*, ¶ 58(a), U.N. Doc. CRC/CZE/CO/3-4 (2011) (‘Step up efforts in adolescent sex and reproductive health education as well as improve the accessibility of contraception to reduce the number of teenage pregnancies ...’); *Nigeria*, ¶ 62(c)-(d), U.N. Doc. CRC/NGA/CO/3-4 (2010) (‘Ensure free and easily accessible contraceptives for adolescents, including condoms, in health facilities and in schools, and develop and implement child-friendly awareness-raising programmes on the use of contraceptives; Introduce sex education for boys and girls in the school curricula and undertake sensitization programs at the community level on reproductive health and rights ...’); *Tunisia*, ¶ 53, U.N. Doc. CRC/TUN/CO/3 (2010) (‘The Committee recommends to the State party to ensure that adolescents be provided information on sexual and reproductive health, including on family planning and contraceptives.’); *Iran*, ¶ 58, U.N. Doc. CRC/IR/CO/3/Add.254 (2005) (‘[T]he Committee recommends that the State party take measures to address adolescent health issues and develop a comprehensive policy to provide adolescents in both urban and rural areas with reproductive health and counseling services, including family life education, especially on the effects of early marriage and on family planning, as well as to prevent and combat HIV/AIDS ...’); *Hungary*, ¶ 36, U.N. Doc. CRC/H/CO/3/Add.87 (June 24, 1998) (‘[T]he Committee recommends that in order to reduce the number of teenage pregnancies, reproductive health education programmes be strengthened and that information campaigns be launched concerning family planning and prevention of HIV/AIDS.’); *Paraguay*, ¶¶ 23, 45, U.N. Doc. CRC/PR/CO/3/Add.75 (June 18, 1997) (‘The Committee is concerned by the absence of large-scale public campaigns for the prevention of unwanted pregnancies, STDs and HIV/AIDS, especially for children and adolescents. It is also concerned about the lack of sufficient reproductive health information and services for adolescents.’); *Cuba*, ¶ 37, U.N. Doc. CRC/CU/CO/3/Add.72 (June 18, 1997) (‘The Committee recommends that further resources and assistance be devoted to activities in the area of family planning and health education programmes, with a view to addressing the problem of teenage or unwanted pregnancies and changing male sexual behavior.’).

²¹⁸ Comm. Rts. Child, *General Comment No. 4: Adolescent Health & Development in the Context of the Convention of the Rights of the Child*, ¶ 11, U.N. Doc. CRC/GC/2003/4 (July 1, 2003).

reproductive health services be available without parental consent.²¹⁹ However, legal scholars have consistently stated that the ‘evolving capacities’ language in the CRC was not established to circumvent the role of parents, but to protect children against government intrusion and abuse.²²⁰ The only explicit mention of privacy in the CRC appears in Article 16, which provides that no child shall be ‘subject to arbitrary or unlawful interference with his or her privacy.’²²¹ Parental involvement in sex education would not be arbitrary or unlawful due to the fact that a parent’s right to guide his or her child’s education is included in the ICESCR,²²² the ICCPR,²²³ and the CRC.²²⁴

However, if States bow to the pressure of TMBs and NGOs, there is a significant chance that their erroneous and misleading interpretations of treaties will become customary international law. If States consistently follow the recommendations of TMBs, this might be evidence that the TMB interpretation has become general practice.²²⁵ And if TMBs or NGOs can show that States are following TMB recommendations and interpretations because the States believe that the law requires it, then this is evidence of *opinio juris*.²²⁶ General practice plus *opinio juris* turns a custom into law that is binding on everyone.²²⁷ For this reason, it is important for States to follow their treaty obligations to the letter, and not be swayed by the erroneous or misleading statements made by TMBs.

States must understand what they are legally obligated to provide to their citizens. International law does not create a right to any particular form of sex education. If a State consistently objects to a customary rule as it is emerging it may prevent the rule from becoming binding on that State, although other non-objecting States would still be bound.²²⁸ If enough States consistently object to the rule, then it will fail to qualify as custom. Each State must be equipped to withstand pressure from NGOs, TMBs, UN agencies, and other States to implement policies and programmes that do not fit with their cultural, religious, or ethical values.

²¹⁹ Comm. Rts. Child, *Concluding Observations: Austria*, ¶ 15, U.N. Doc. CRC/C/SR.507-509 (Apr. 15, 1999) (‘Austrian law and regulations do not provide a legal minimum age for medical counseling and treatment without parental consent. The Committee is concerned that the requirement of a referral to the courts will dissuade children from seeking medical attention and be prejudicial to the best interests of the child. The Committee recommends that, in accordance with the provisions of articles 3 and 12 of the Convention, an appropriate age and structures for medical counseling and treatment without parental consent be set by law.’); *Barbados*, ¶ 25, U.N. Doc. CRC/15/Add.103 (Aug. 24, 1999) (‘The Committee recommends that the State party ... make it possible for adolescents to have access to medical advice and treatment without parental consent in accordance with their age and maturity.’); *Benin*, ¶ 25, U.N. Doc. CRC/15/Add.103 (1999) (‘[I]t is recommended that the State party undertake further measures, including the allocation of adequate human and financial resources, to develop youth-friendly counselling, care and rehabilitation facilities for adolescents that would be accessible, without parental consent, where in the best interests of the child.’).

²²⁰ See, e.g., Barbara Bennett Woodhouse, *The Family Supporting Nature of the U.N. Convention on the Rights of the Child*, in JONATHAN TODRES, THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD 37 (2006); CAMPAIGN FOR U.S. RATIFICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD, MYTHS AND FACTS ON THE CONVENTION ON THE RIGHTS OF THE CHILD, available at www.childrightscampaign.org/images/documents/Myths%20and%20Facts.pdf (last visited Feb. 7, 2014).

²²¹ CRC, *supra* note 26, art. 16.

²²² ICESCR, *supra* note 41, art. 13(3).

²²³ ICCPR, *supra* note 26, art. 18.

²²⁴ CRC, *supra* note 26, art. 5.

²²⁵ See *supra* note 28 and accompanying text.

²²⁶ See *supra* notes 29-30 and accompanying text.

²²⁷ See *supra* note 31 and accompanying text.

²²⁸ Ted L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457 (1985).

IV. Conclusion

Comprehensive sex education is a controversial approach to sex education that is being implemented in countries around the world. An investigation of international human rights treaties and consensus documents reveals that although there is a right to receive education about human sexuality, States are *not* required to provide any particular type or method of sex education.

Treaties merely require States to make accessible information and education about reproductive health and family planning. Requiring accessibility is typically thought to impart a negative obligation: States must eliminate legal and administrative barriers and financial obstacles, but do not have to provide such information and services. A State has satisfied its treaty obligation by merely ensuring access to information created in the private sector. If, however, such education is not being provided by private sector actors, a State might be criticized by the relevant TMB for ‘failing’ to ensure access to education and information about reproductive health. Regardless of the criticisms of TMBs, which do not have authority to create international law or make binding interpretations, States are not required to provide sex education. The requirement to provide access to information and education about reproductive health might include States’ mandating that local school districts create a system for providing information to students, or mandating that health clinics and practitioners dispense information to patients, but it does not require the State to create and provide a sex education curriculum.

International law does not mention sex education as a component of primary, secondary, or higher education. Sex education may be taught by community groups, religious organizations, or health clinics. Treaties do not require sex education to be available for any specific age groups. Instead, States must approach children developmentally, ensuring that any sex education, whether it is provided by the state or a private institution, is tailored to the age and maturity level of the child. States also must take into account the rights and responsibilities of parents to direct the education of their children. Because of these two requirements, respecting parental rights and targeting education to the evolving capacities of children, international law gives States room to decide for themselves the type of information and education children receive. States are free under international law to implement the sex education that is most appropriate for their people.²²⁹

Notes on contributor

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²²⁹ *The New Bioethics* seeks to provide a diverse and multidisciplinary dialogue on bioethics, the body, and society. With that goal in mind, the journal is pleased to include this legal article, which discusses international law relating to sex education. Rather than our standard Harvard System of Referencing it uses the Bluebook System of Citation, which is the preferred legal citation system in the United States. Some key differences include the use of footnotes instead of in-text citations, a citation for every assertion, citations that pinpoint the exact page in the source material where the assertion can be found, and the use of explanatory parentheticals when an assertion is not directly stated in the source material.