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**If These Walls Could Talk, They Would Be Censored:  
U.S. Restrictions on Pro-Choice Speech**

**By  
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If United States foreign assistance funded the writing of this paper, which addresses free speech and women's rights issues of the utmost international concern, the authors, two United States citizens,<sup>1</sup> would be censored—by U.S. law—from making any statements that advocated for abortion in any context.

Because the writing of this paper is not conditioned on the revocation of the authors' First Amendment rights, this paper can and will examine the legality and impact of U.S. abortion speech restrictions on foreign assistance recipients. The restrictions violate U.S. constitutional protections of free speech and contravene international law regarding democratic reform of criminal abortion laws abroad and human rights guarantees, including the right to health. Although the U.S. places myriad abortion-related restrictions on foreign assistance,<sup>2</sup> this paper

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<sup>1</sup> The authors would like to exercise their First Amendment rights to free speech to thank Janet Benshoof for introducing us to the Helms Amendment and each other, all of our editors, and Jon Bellinger, who listened to a lot of uncensored abortion speech.

<sup>2</sup> The Leahy Amendment states that the term "motivate" in Helms "...shall not be construed to prohibit the provision, consistent with local law, of information or counseling about all pregnancy options." Department of State, Foreign Operations, and Related Programs Act ("FY2010 Foreign Appropriations") (Division F of P.L. 111-117), FY2010, 123 Stat. 3325. The DeConcini Amendment requires that "[f]unds shall be available only to voluntary family planning projects which offer, either directly or through referral to, or information about access to, a broad range of family planning methods and services." Section 541 of the Foreign Assistance and Related Programs Appropriations Act, 1986 (Section 101(i) of H.J. Res. 465; P.L. 99-190; 99 Stat. 1295), approved December 19, 1985. The "Biden Amendment" provides, "None of the funds made available to carry out this part may be used to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning." Section 104(f)(3) of the Foreign Assistance Act of 1961 (P.L. 87-195; 22 U.S.C. 2151b(f)(3)), as amended by Section 302(b) of the International Security and Development Act of 1981 (P.L. 97-113; 95 Stat. 1532), approved December 29, 1981. The Kemp-Kasten Amendment states, "No foreign assistance funds can be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization." Section 104(f)(2) of the FAA, 22 U.S.C. §2151b(f)(2). The Livingston Amendment states, "In awarding grants for natural family planning, no applicant shall be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning. All such applicants must comply with the requirements of the DeConcini Amendment." Title II of Section 101(f) of H.J. Res. 738, P.L. 99-500 (100 Stat. 1783-217), approved October 18, 1986.

focuses on the speech concerns of the Helms Amendment<sup>3</sup> in the context of domestic constitutional law and the Helms and Siljander Amendments<sup>4</sup> in the context of international law.

The Helms Amendment to the Foreign Assistance Act of 1961 (“FAA”) prohibits the use of U.S. foreign assistance funding to “motivate” abortion. The Siljander Amendment prohibits the use of foreign assistance funding to lobby for or against abortion. The censorship of free speech pursuant to the Helms Amendment violates funding recipients’ freedom of speech domestically, while both the Helms Amendment and the Siljander Amendment (herein “the abortion restrictions”) contravene efforts to bring countries into compliance with international obligations regarding abortion provision and law.

## **I. Abortion-related restrictions on foreign assistance**

The Helms Amendment states, “[n]one of the funds made available to carry out subchapter I of this chapter may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.”<sup>5</sup> The Helms Amendment not only prohibits the use of federal funds for the performance of abortions, but it also censors speech related to the provision of abortion.

The Helms Amendment is the statute from which the Mexico City Policy (also known as the “Global Gag Rule”) was derived. The Mexico City Policy prohibited foreign non-governmental organizations (“FNGOs”) that received foreign assistance for family planning from engaging in or promoting abortion, even with their own private funds,<sup>6</sup> and prohibited even domestic non-governmental organizations (“DNGOs”) from providing financial support to any other FNGO that conducted such activities.<sup>7</sup> President Clinton lifted the Mexico City Policy by executive order in 1993,<sup>8</sup> President George W. Bush reinstated it in 2001,<sup>9</sup> and President Obama lifted it again in 2009.<sup>10</sup> Although the Mexico City Policy is currently not in effect, the Helms Amendment remains in force and continues to prohibit individuals, NGOs, and foreign governments from using foreign aid for abortion and motivating abortion speech.<sup>11</sup> The Helms Amendment is even more restrictive than the Mexico City Policy in that it censors foreign governments and domestic entities, and has been in place, without reprieve, since 1973.

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<sup>3</sup> Helms Amendment to the Foreign Assistance Act, Section 104(f)(1) of the Foreign Assistance Act of 1961 (P.L. 87-195; 22 U.S.C. 2151b(f)(1)), as amended by the Foreign Assistance Act of 1973 (P.L. 93-189), approved December 17, 1973.

<sup>4</sup> Siljander Amendment, FY 2006 Appropriations Act, Title II, “Child Survival and Health Programs Fund.

<sup>5</sup> Helms Amendment to the Foreign Assistance Act, *supra* note 3.

<sup>6</sup> U.S. Congressional Research Service, International Family Planning: The “Mexico City” Policy, 2 (RL30830; Apr. 2, 2001), by Larry Nowels.

<sup>7</sup> DKT Memorial Fund Ltd. v. Agency for International Development, 887 F.2d 275, 278 (D.C. Cir. 1989) (“DKT”), (quoting AID Handbook 13 at 4D-54).

<sup>8</sup> International Family Planning: The “Mexico City Policy” at 1, *supra* note 6.

<sup>9</sup> *Id.*

<sup>10</sup> Press Release, USAID, President Obama Rescinds Mexico City Policy (Jan. 26, 2009).

<sup>11</sup> “Mexico City Policy and Assistance for Voluntary Population Planning (Memorandum for the Secretary of State and the Administrator of the United States Agency for International Development),” Jan. 23, 2009, 74 Federal Register 4903 (Jan. 28, 2009).

The Mexico City Policy contained an exception to its censorship in the event of rape or if the life of the mother was in danger.<sup>12</sup> The text of the Helms Amendment facially prohibits the *provision* of abortion funding in the context of family planning, which could be interpreted as allowing abortion in the event of rape or to save the life of the mother (although USAID funding has never provided abortion under any circumstances since the implementation of the Helms Amendment in 1973).<sup>13</sup> However, the *speech* provision of the Helms Amendment is not limited to the context of family planning, meaning that funding recipients are prohibited from “motivating” abortion even in the event of rape or to save the life of the mother. This statutory construction is consistent with its interpretation by grantees and USAID; no foreign aid recipients speak to any instances in which they “motivate” abortion.

The Siljander Amendment prohibits the use of foreign aid to lobby for or against abortion.<sup>14</sup> Although the Helms Amendment only censors pro-choice speech,<sup>15</sup> the Siljander Amendment censors both sides of the debate. Together, the Helms Amendment and the Siljander Amendment silence all pro-choice speech of U.S. foreign aid recipients.

### **A. The expansion of the Helms Amendment**

Since its enactment in 1973, the U.S. government has expanded the application of the Helms Amendment legislatively and administratively, furthering pro-choice speech censorship. Originally, the Helms Amendment censored pro-choice abortion speech under “subchapter I of this chapter” of the FAA, which primarily concerned development assistance.<sup>16</sup> However, since 1985, the government has replicated the terms of the Helms Amendment in all State-Foreign Appropriations.<sup>17</sup> The language of the Helms Amendment is included in policy directives for U.S. and non-U.S. nongovernmental organizations (“NGOs”).<sup>18</sup> In June 2008, USAID issued a

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<sup>12</sup> International Family Planning: The “Mexico City Policy” at 2, *supra* note 6.

<sup>13</sup> The principle of “*expressio unius est exclusio alterius*,” which translates to “the inclusion of one is the exclusion of others,” in the context of statutory construction, means that “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.” U.S. Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends*, 16-17 (RL97589; Aug. 31, 2008), by Yule Kim (citing *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) (citing *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942)). Accordingly, the “as a method of family planning” modified is only next to the language pertaining to the provision of abortion services, but not the “motivate” provision of the Helms Amendment, under this rule of statutory construction, it is construed to only apply to the language pertaining to the provision of abortion.

<sup>14</sup> Siljander Amendment, *supra* note 4.

<sup>15</sup> The term “pro –choice,” as employed in this paper, encompasses all speech censored by the “motivate” provision of the Helms Amendment.

<sup>16</sup> Foreign Assistance Act of 1961, 22 U.S.C. §2151(b)(f)(1) (1973). Subchapter I included, and therefore censored, the “motivating” abortion speech of the following: Development Assistance Authorizations; Multilateral and Regional Development Programs; American Schools and Hospitals Abroad, Prototype; Housing and Other Credit Guaranty Programs; Disadvantaged Children in Asia; Utilization of Democratic Institutions in Development; Famine Prevention and Freedom From Hunger; International Organizations and Programs; Contingencies; Central America Democracy, Peace, and Development Initiative; Debt-For-Nature Exchange; International Narcotics Control; International Disaster Assistance; Development Fund for Africa; and Support for the Economic and Democratic Development of the Independent States of the Former Soviet Union; Support for the Economic and Political Independence of the Countries of the South Caucasus and Central Asia.

<sup>17</sup> FY2002 State-Foreign Operations Appropriations Act (P.L. 107–115, §518).

<sup>18</sup> USAID, *Mandatory Standard Provisions for U.S. Nongovernmental Recipients* (Feb. 6, 2012).

policy statement ensuring that abortion censorship is explicitly included in all contracts presently and retroactively, including those with foreign governments.<sup>19</sup> The addition of the language of the Helms Amendment to specific areas of foreign assistance that are already censored illustrates the government's aggressive reiteration of its pro-choice abortion censorship policy.

USAID now explicitly states that the Helms Amendment applies to all foreign assistance funds.<sup>20</sup> Because it is difficult, if not impossible, for funding recipients to separate speech from other activity to comply with the conditions of U.S. aid, the abortion restrictions have the effect of censoring all programming of recipients. While foreign assistance is estimated to total approximately \$53.3 billion in 2012,<sup>21</sup> when U.S. aid is comingled with funding from private organizations, the United Nations, and foreign governments, the censorship affects significantly more funding. For instance, the U.S. censors pro-choice speech for the entire \$780 million budget for UNFPA, even though the U.S. only provides \$50 million to the organization.<sup>22</sup>

Notably, organizations, individuals, and governments advocating against abortion are not censored by the Helms Amendment. Furthermore, even though the Siljander Amendment's censorship is abortion neutral, USAID and Congressmen such as Rep. Chris Smith have only investigated alleged violations of abortion speech restrictions that implicate pro-choice speech.<sup>23</sup>

## **II. The Helms Amendment violates First Amendment rights**

The Helms Amendment violates the First Amendment's freedom of speech provision, which states, "Congress shall make no law . . . abridging the freedom of speech."<sup>24</sup> The censorship of the pro-choice speech of U.S. foreign aid recipients is unconstitutional for two reasons. First, the parameters of the "motivate" provision of the Helms Amendment are unclear—the Amendment does not clarify what speech constitutes "motivation." The Helms Amendment chills all neutral or pro-choice abortion speech because the statute fails to clarify what speech is permissible. Second, through the Helms Amendment, the government impermissibly conditions the benefit of foreign assistance on the abridgement of a constitutional right: the freedom of speech. While

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<sup>19</sup> USAID, Acquisition & Assistance Policy Directive 08-01 (Jun. 12, 2008). *See also* USAID, Mandatory Standard Provisions for Non-U.S. Non-governmental Recipients (Feb. 06, 2012); and Mandatory Standard Provisions for U.S., Non-governmental Recipients, *supra* note 17.

<sup>20</sup> USAID, Family Planning Guiding Principles and U.S. Legislative and Policy Requirements, [http://www.usaid.gov/our\\_work/global\\_health/pop/restrictions.html](http://www.usaid.gov/our_work/global_health/pop/restrictions.html) (last visited Feb. 7, 2012). *See also*, Kaiser Family Foundation, The U.S. Government and International Family Planning and Reproductive Health (May 2010) ("Since 1973, U.S. law, though the Helms Amendment, has prohibited the use of foreign assistance for abortion as a method of family planning or to motivate or coerce any person to practice abortion."), available at: [http://pdf.usaid.gov/pdf\\_docs/PCAAC151.pdf](http://pdf.usaid.gov/pdf_docs/PCAAC151.pdf), (last visited Feb. 7, 2012). *See e.g.*, Strategic Objective Grant Agreement Between the United States of America and the Islamic Republic of Afghanistan for the Strategic Objective of a Democratic Government with Broad Citizenship Participation. September 19, 2005 USAID Grant Agreement No. SOAG-06-00.

<sup>21</sup> Press release, U.S. Senate Committee on Appropriations, Summary of FY12 State and Foreign Operations Conference Report, (Dec. 16, 2011).

<sup>22</sup> United Nations Population Fund ("UNFPA"), Resources and Management, <http://www.unfpa.org/public/home/about/pid/4634> (last visited Feb. 7, 2012); Press Release, UNFPA, U.S. Resumption of UNFPA Funding to Boost Women's Health and Rights, Mar. 12, 2009, <http://www.unfpa.org/public/News/pid/2180> (last visited Feb. 7, 2012).

<sup>23</sup> *See* "Kenya," *infra* Section III (D) (1).

<sup>24</sup> U.S. Const. amend. I.

the Supreme Court has permitted certain First Amendment censorship in funding decisions such as the government’s “refusal to fund” speech, the constitutional significance of private abortion speech is nonetheless protected from the refusal to fund argument in many instances.

### A. Global censorship and domestic rights

The Helms Amendment infringes on the First Amendment rights of both foreign and domestic foreign aid recipients. The Supreme Court has applied parts of the Bill of Rights extraterritorially, extending specific constitutional protections outside the borders of the United States.<sup>25</sup> In some instances, the Court has even found constitutional guarantees for aliens abroad.<sup>26</sup> While the Supreme Court has not definitively determined if and when the First Amendment applies to extraterritorial speech, courts have drawn an unclear line between the free speech rights of U.S. citizens and aliens.<sup>27</sup>

#### 1. First Amendment censorship of aliens outside U.S. territory

The Supreme Court has recognized certain constitutional rights for aliens abroad. In *Boumediene v. Bush*, the Court found an extraterritorial constitutional right to habeas corpus for enemy combatants detained at Guantanamo Bay.<sup>28</sup> In *DKT Memorial Fund Ltd. v. Agency for International Development* (“DKT”), the court stated, “[w]e will not, however, hold . . . that an alien beyond the bounds of the United States never has standing to assert a constitutional claim.”<sup>29</sup> On the other hand, in *United States v. Verdugo-Urquidez* (“Verdugo”), the Court held that the Fourth Amendment does not apply “to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country.”<sup>30</sup> In its determination, the *Verdugo* Court considered the Fourth Amendment’s text, with the plurality stating that the Amendment applied to citizens only, as it referred to “the people.”<sup>31</sup>

The First Amendment’s extraterritorial reach to aliens is even less established. The Second Circuit has declined to recognize the First Amendment rights of a FNGO. In *DKT Memorial Fund*, both DNGOs and FNGOs brought suit against USAID, alleging that the Mexico City Policy violated plaintiffs’ “First Amendment rights by rendering plaintiffs ineligible to receive population assistance funds because they engage[d] in certain activities relating to voluntary abortion, including the dissemination of information, that r[a]n afoul of AID’s policy. . . .”<sup>32</sup> The plaintiffs did not distinguish the First Amendment injuries to the DNGOs from those of the

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<sup>25</sup> See e.g. *Reid v. Covert*, 354 U.S. 1 (1957) (holding that the Fifth and Sixth Amendments applied to American civilian court-martialed abroad for murder).

<sup>26</sup> See *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that an alien held abroad by the United States had right to constitutional right of habeas corpus).

<sup>27</sup> See *Reid v. Covert*, *supra* note 25, (rejecting the argument that citizens’ constitutional rights were confined to U.S. territory); and *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (“we believe that the operation of the Establishment Clause strongly indicates that its restrictions should apply extraterritorially.”).

<sup>28</sup> *Boumediene v. Bush*, *supra* note 26.

<sup>29</sup> *DKT Memorial Fund* at 285, *supra* note 7.

<sup>30</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) (“Verdugo”).

<sup>31</sup> *Id.* at 265–266. *But see* *Id.* at 276 (Kennedy J. concurring) (finding that “the people” did not affect the Fourth Amendment’s extraterritorial reach).

<sup>32</sup> *DKT Memorial Fund* at 285 (quoting Amended Complaint at 10), *supra* note 7.

FNGOs.<sup>33</sup> The Court of Appeals ruled against the DNGOs (*see* “Unconstitutional Conditions Doctrine,” *infra*) and found that the FNGO plaintiffs lacked “prudential standing” to bring a case, because their cause of action was not “within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>34</sup> The court stated that aliens abroad had no First Amendment protection if they were “not within the custody or control of the United States . . . .”<sup>35</sup>

Even under a more rigorous “custody or control” standard of extraterritorial application, the Helms Amendment may interfere with the free speech of aliens under the “effective control” of the United States. The dominating presence of U.S. government-funded aid and military presence in armed conflicts implicitly extends the country’s territory in economic terms, because U.S. aid plays an amplified role in grantee countries through USAID and various UN organs. As Justice Ginsburg pointed out in *DKT*, “The prominence of AID in population control assistance abroad is apparent.”<sup>36</sup> In 2010, the United States contributed \$30,353,000 to development assistance abroad. The United Kingdom contributed the second highest amount with \$13,053,000.<sup>37</sup> Justice Ginsburg noted in regards to the Mexico City Policy, the censorship “encompasses relations with NGOs in countries where abortion is legal, where abortion-related services are regarded as a necessary last resort given current conditions of poverty, ignorance, physical insecurity, and fear in which many women live.”<sup>38</sup> To the extent that U.S. aid eclipses other programs in resource poor countries, and U.S. policy rules in areas lacking any other aid, the U.S. should be held to its own constitution and afford constitutional rights to those under its control.

In her partial dissent in *DKT*, Justice Ginsburg dismissed the distinction of “prudential standing” altogether, finding that the FNGO plaintiffs had a viable claim for relief on the merits.<sup>39</sup> While acknowledging that the extraterritoriality of First Amendment rights “ha[ve] not been authoritatively adjudicated,” she cautioned, “I would hesitate long before holding that in a United States-foreign citizen encounter, the amendment we prize as ‘first’ has no force in court.”<sup>40</sup> Citing the Restatement (Third) of Foreign Relations Law, Justice Ginsberg found “support for the ideal that ‘wherever the United States acts, it can only act in accordance with the limitations imposed by the Constitution.’”<sup>41</sup>

Case law from other areas of First Amendment jurisprudence supports Justice Ginsburg’s openness to extending First Amendment rights to aliens abroad. In *Lamont v. Woods*, a case addressing the First Amendment’s Establishment Clause,<sup>42</sup> the Second Circuit held that the

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<sup>33</sup> Id. at 282.

<sup>34</sup> Id. at 283.

<sup>35</sup> Id. at 285.

<sup>36</sup> Id. at 303 (Ginsburg, J., dissenting).

<sup>37</sup> Organisation for Economic Co-operation and Development, Development aid: Net official development assistance (ODA) Net disbursements at current prices and exchange rates (Dec. 22, 2011), [http://www.oecd-ilibrary.org/development/development-aid-net-official-development-assistance-oda\\_20743866-table1](http://www.oecd-ilibrary.org/development/development-aid-net-official-development-assistance-oda_20743866-table1) (last visited Feb. 6, 2012).

<sup>38</sup> *DKT* Memorial Fund at 306 (Ginsburg, J., dissenting), *supra* note 7.

<sup>39</sup> Id. at 307, n.10.

<sup>40</sup> Id. at 308.

<sup>41</sup> Id. at 303 (quoting *Reid v. Covert*, 354 U.S. 1, 6 (1957) (Black, J., plurality opinion)).

<sup>42</sup> *Lamont v. Woods*, *supra* note 27.

clause applied extraterritorially to FAA funding for religious schools abroad, because the constitutional violations occurred in the United States, “at the time that appellants granted money to United States entities. . . .” The court stated that “general principles of Establishment Clause jurisprudence provide[d] no basis for distinguishing between foreign and domestic establishments of religion,” but nonetheless found “that aliens would not be entitled to challenge either a grant or denial of aid.”<sup>43</sup> While *Lamont* did not firmly establish aliens’ First Amendment rights abroad, it opened the possibility that because the Helms Amendment violates free speech rights at the time of funding domestically, its censorship of aliens abroad could be deemed unconstitutional.

## 2. United States citizens’ First Amendment rights

Courts have been more willing to extend constitutional rights to U.S. citizens extraterritorially. In *Reid v. Covert*, the Supreme Court rejected “the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”<sup>44</sup> *Reid* established that the constitutional rights of citizens could be applied extraterritorially; finding Fifth and Sixth Amendment rights applied to two military wives abroad who murdered their husbands. The Court held that it was a constitutional violation to try the women by military authorities rather than a civilian court, even though their crimes were committed abroad.<sup>45</sup> Similarly, U.S. citizens abroad providing aid cannot give up their constitutional rights as a condition of the receipt of funding.

Although the FAA fundamentally addresses initiatives abroad, the Helms Amendment also censors free speech at home. For example, USAID refused to renew funding under Foreign Appropriations for a publication by the Alan Guttmacher Institute, a domestic nonprofit corporation with a mission “to ensure the highest standard of sexual and reproductive health for all people worldwide.”<sup>46</sup> The publication, *International Family Planning Perspectives*, had domestic and international distribution.<sup>47</sup> The publication was defunded, in part, for reporting the mortality rate of unsafe abortions in Bangladesh and stating that abortion had been legalized in Tunisia.<sup>48</sup> During an ensuing lawsuit, USAID conceded that the information was abortion-neutral and would merit reconsideration for funding.<sup>49</sup> The *Guttmacher* case illustrates how the Helms Amendment purports to regulate foreign funding, but nonetheless censored the First Amendment free speech of citizens at home.

## **B. Application of the First Amendment**

Does this speech “motivate” abortion?

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<sup>43</sup> Id. at 840.

<sup>44</sup> *Reid v. Covert* at 5-6, *supra* note 25.

<sup>45</sup> Id. at 5.

<sup>46</sup> Guttmacher Institute, About the Guttmacher Institute, <http://www.guttmacher.org/about/index.html>, (last visited Feb. 6, 2012).

<sup>47</sup> *Alan Guttmacher Institute v. McPherson*, 805 F.2d 1088, 1089 (2d Cir. 1986) (“AGI II”).

<sup>48</sup> Id. at 1091.

<sup>49</sup> Id.



## 1. The vagueness doctrine

The “motivate” provision of the Helms Amendment is unconstitutionally vague. The “vagueness doctrine” states that a statute violates due process if it “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”<sup>50</sup> The vagueness doctrine, “in addition to securing the due process value of fundamental fairness...serves a vital First Amendment function when speech is at issue. Vague statutes, like laws that are overbroad, create a constitutionally unacceptable risk of official censorship because they invite arbitrary and discriminatory enforcement.”<sup>51</sup> The Helms Amendment’s “motivate” provision is vague, thereby “chilling” or stifling legal speech due to the uncertainty of whether it is permissible under the statute.

Since 1973, the government has provided little guidance as to what constitutes speech that “motivates” abortion. In 1974, USAID interpreted the Helms Amendment’s “motivate” provision to encompass “information, education, training, or communication programs that seek to promote abortion as a method of family planning.”<sup>52</sup> USAID expanded and codified this position in 1978 to encompass “payments to persons to perform abortions or to solicit persons to undergo abortions.”<sup>53</sup> The Leahy Amendment, which may allow for information about “all pregnancy options,” has never been utilized by the government in interpreting the Helms Amendment, and therefore adds little to the analysis of the Helms Amendment’s censorship, as it has been effectively ignored.

Indeed, the government appears to deliberately provide little written direction concerning the Helms Amendment. A study by Ipas on the effects of the Helms Amendment on the speech of NGOs found that:

guidance requested [by NGOs] and received from USAID in DC, including from the general counsel, tends not to be put in writing and could thus be of little help in case an organization is accused of non-compliance. As one interviewee shared, “I never had anything in writing from USAID. When I send an email, I get a call back. People [at USAID] fear being on the record on that.”<sup>54</sup>

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<sup>50</sup> *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

<sup>51</sup> Keith Werhan, *FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 146 (2004) (citing *Smith v. Goguen*, 415 U.S. 566 (1974)).

<sup>52</sup> USAID, *Policies Relative to Abortion-Related Activities* (Jun. 10, 1974).

<sup>53</sup> 48 C.F.R. 752.7016(b)(iii)-(iv) (1978).

<sup>54</sup> Memorandum from Patty Skuster, Senior Policy Advisor on Behalf of Ipas, to Scott Radloff, Director, Office of Population and Reproductive Health, USAID, p. 4 (Nov. 2, 2011) (on file with authors) (quoting Elizabeth Westley, PAC Consortium Coordinator, 2009-2011) (“Ipas Helms Memo”).

USAID also declined to clarify in writing what speech was censored under the Siljander Amendment, when the Government Accountability Office (“GAO”) asked USAID to provide clarification. GAO stated that “neither State nor USAID has clear guidance for compliance with the Siljander Amendment, which makes it difficult for some agency officials and award recipients to determine what types of activities are prohibited. State has not developed any guidance at all on the prohibition.”<sup>55</sup> GAO reported that the State Department believes that “it should inform staff of the amendment but not that it should provide examples of potentially prohibited activities.”<sup>56</sup> The refusal to provide speech guidelines further chills abortion speech, because it raises alarms to grantees who are already inclined to be overly cautious with respect to abortion.<sup>57</sup>

USAID has given some reactive guidance as to how it interprets the censorship of the pro-choice speech censored by the Helms Amendment. As mentioned previously, USAID attempted to defund *International Family Planning Perspectives* for reporting neutral abortion information regarding the mortality rate of unsafe abortions and the legal status of abortion in other countries.<sup>58</sup> Moreover, POPLINE, a database that provides reproductive health articles and receives USAID funding, temporarily removed the word “abortion” from its search database when USAID officials discovered that the search term brought up pro-choice materials. “Abortion” was later reinstated as a search term but the abortion-related articles were permanently removed.<sup>59</sup>

The impact of the chilling effect of the Helms Amendment on the population that the U.S. government aids cannot be understated. Some NGOs will not admit, at least not “on the record,” that they do not address abortion in their work due to the conditions of their receipt of U.S. aid. However it is difficult to prove censorship by illustrating that a group withholds information regarding abortion that they would otherwise provide, censorship can be inferred amongst U.S. funded aid groups working on issues in which abortion normally would be addressed.

For instance, USAID funds, and therefore censors, the RIGHTS Consortium, a group of NGOs including Freedom House, the American Bar Association’s Rule of Law Initiative, and the National Democratic Institute for International Affairs. These groups in turn, partner with, among others, Global Rights (“for reaching vulnerable populations in conflict and post-conflict environments”), The Carter Center (for conflict mitigation and resolution in divided societies), The International Center for Not-for-Profit Law (“for promotion and defense of civil society through legal frameworks”); and The Center for Victims of Torture (“on issues of torture and

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<sup>55</sup> Government Accountability Office, Report to Congressional Requesters: Foreign Assistance, Clearer Guidance needed on Compliance Overseas with Legislation Prohibiting Abortion-Related Lobbying,” GAO-12-35, p. 15 (Oct. 2011) (“GAO Siljander Audit”).

<sup>56</sup> Id. at “Highlights,” *supra* note 55.

<sup>57</sup> Ipas Helms Memo at 3, *supra* note 54.

<sup>58</sup> AGI II at 1091, *supra* note 47.

<sup>59</sup> Michael Klagg, Johns Hopkins Bloomberg School of Public Health, Follow Up Statement Regarding Popline Database, Apr. 8, 2008, <http://www.jhsph.edu/publichealthnews/popline/poplinestatement.html> (last visited Feb. 6, 2012).

strategic and tactical planning for reform”).<sup>60</sup> These groups, under the Human Rights and Rule of Law cooperative agreement with USAID, are prohibited from expressing a pro-choice stance on abortion even when working with populations where rape is systemically used as a weapon of war. Strikingly, they do not mention abortion at all, which could be due to the chill effect of the “motivate” provision of the Helms Amendment.

The International Rescue Committee (“IRC”) is another possible example of the chill effect of the Helms Amendment. IRC works with women in conflict areas such as Sudan and the Democratic Republic of Congo (“DRC”), “the rape capital of the world,” where IRC is one of the few private NGOs to provide humanitarian aid.<sup>61</sup> IRC states that “[i]n areas affected by conflict where pregnancy-related deaths are exceptionally high, IRC provides basic and comprehensive emergency obstetric care to manage complications that arise during pregnancy and childbirth.”<sup>62</sup> Yet, IRC does not assist with medical abortion, nor does it mention abortion in any context. In fact, at a presentation on women raped in armed conflicts, IRC explained that it provides “birthing kits,” consisting of a plastic sheet and a clean knife, to women raped as a weapon of war, and described how women could take the kits into the brush to hide from soldiers and give birth<sup>63</sup> (birthing kits are available for purchase as donations on Mother’s Day on IRC’s website).<sup>64</sup>

While these NGOs may or may not admit on the record that they do not address abortion issues because of the Helms Amendment, it is incomprehensible that all NGOs receiving U.S. aid that address sex trafficking, women’s rights in countries in which abortion is criminalized, and conflicts in which rape is used as a weapon of war, do not address abortion.

Furthermore, foreign aid recipients have attested to Helms Amendment censorship. For instance, Ipas studied the effect of censorship on Nepalese citizens and was told by a Safe Mother coordinator in the government, “[w]hen the [Nepalese] government wanted to disseminate safe abortion policy and strategy in materials and manuals and that activity is supported by USAID, the abortion part cannot be put in those materials. [USAID] said we cannot use funds for safe abortion-related materials. So that was a little bit of a problem.”<sup>65</sup>

A high-level NGO USAID recipient described USAID’s censorship of her abortion speech:

In 2009, I co-authored a publication focused on family planning which was funded by USAID. At the 4th or 5th version of a back forth of review and edits

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<sup>60</sup> USAID, DCHA/DG User’s Guide to DG Programming (Nov. 2010), [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/DG\\_UserGuide\\_November10.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/DG_UserGuide_November10.pdf) (last visited Feb. 6, 2012).

<sup>61</sup> Nicholas D. Kristof, *The Weapon of Rape*, N.Y. TIMES, Jun. 15, 2008.

<sup>62</sup> International Rescue Committee, Reproductive Health, <http://www.rescue.org/our-work/reproductive-health>, (last visited Feb. 6, 2012).

<sup>63</sup> Screening and discussion of “Grace Under Fire,” Women’s Refugee Commission and the International Rescue Committee (Dec. 11, 2009).

<sup>64</sup> IRC, Honor a mother, rescue another, <https://www.rescue.org/donate/mothers-day-v3>, (last visited Feb. 6, 2012).

<sup>65</sup> Ipas, U.S. foreign policy and abortion in Nepal: Barriers to saving women’s lives, (2010) (quoting an Advisor for Safe Motherhood, formerly with the Family Health Division, interviewed by Ipas consultant in Kathmandu, Nov. 18, 2009).

with the USAID Population office, I suddenly received a reviewed version where all of the lines on unsafely performed abortions were taken out, deleted. This was factual information, data on the magnitude of unsafely performed abortion and consequences on women's morbidity and mortality. There were several places where this was mentioned, so someone actually scanned the document to take every mention of this out.<sup>66</sup>

USAID's censorship of neutral abortion information is outside the scope of the Helms Amendment and perpetuates the chilling of all abortion speech.

As noted by the United States Mission to the United Nations, "The United States is the largest bilateral donor for family planning in absolute dollars. In 2009, the United States has allocated \$545 million for family planning and reproductive health, and for the first time in seven years, includes a contribution to UNFPA of \$50 million as provided in the 2009 Omnibus Appropriations Act."<sup>67</sup> Even with such a large amount of funding at issue, USAID has yet to establish, in writing, accurate guidance regarding the meaning of the Helms Amendment's "motivate" provision.

## 2. Unconstitutional conditions doctrine versus the refusal to fund doctrine

Because the Helms Amendment conditions funding on the deprivation of a constitutional right, it violates the "unconstitutional conditions" doctrine, which states, "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."<sup>68</sup>

Nonetheless, the Supreme Court, in many instances, has found speech censorship as a condition of funding to be constitutional, because it is a "refusal to fund" otherwise legal speech. While not explicitly overruling the unconstitutional conditions doctrine, nor recognizing conflicting decisions as exceptions to the doctrine, the Court has ruled inconsistently concerning unconstitutional conditions, without a framework for applying its decisions. In *Rust v. Sullivan*, the Court considered whether federal regulations prohibited Title X grantees from providing or counseling abortion. In finding that such funding conditions did not violate the Constitution, the Court stated that:

[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest,

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<sup>66</sup> Ipas Helms Memo at 6, *supra* note 54.

<sup>67</sup> United States Mission on the United Nations, *Non-paper by the United States of America, on the Report of the Secretary General on the Flow of Financial Resources for Assisting in the Implementation of the Programme of Action of the International Conference on Population and Development in the United Nations Economic and Social Council Commission on Population and Development*, 42nd Sess. (Mar. 30, 2009), available at: <http://usun.state.gov/briefing/statements/2009/march/131657.htm> (last visited Feb. 6, 2012) ("USUN ICPD Non-paper").

<sup>68</sup> *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). See also *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) ("FAIR").

without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>69</sup>

Furthermore, the Court in *DKT* held that the Mexico City Policy did not constitute viewpoint suppression in violation of the First Amendment with respect to the DNGOs, stating, “In attempting to assert an infringement of free speech rights, plaintiffs constantly mischaracterize the policy of AID as a suppression of their viewpoint on abortion. What they actually complain of is not suppression, but rather a refusal to fund.”<sup>70</sup>

Following the “refusal to fund” logic, there is no reason that the U.S. government could not fund other controversial viewpoints and censor an opposing view. For instance, Congress can enact legislation conditioning the receipt of funding on the censorship of pro-Viagra speech, while allowing speech that advocates for male abstinence.

While the Supreme Court does not consistently adhere to the constitutional conditions doctrine, it does not completely adhere to the refusal to fund doctrine either. Rather, the Court has decided a series of cases that carve out an amorphous path along the line of unconstitutional conditions regarding free speech. Generally, the Supreme Court’s abortion speech jurisprudence has established three situations in which the government is allowed to condition a benefit on the infringement of free speech: (1) when the recipient acts as the voice of the government; (2) when the recipient is allowed to use private funds to speak; or (3) when the condition stipulates silence or neutrality rather than affirmative speech. None of these situations provides a constitutional basis for the censorship of all pro-choice speech under the Helms Amendment.

### 3. Voice of the government

Mexico City is about much more than a policy on abortion, which continues to be the most emotive of all topics in this country. It is also about such things as freedom of speech, ideological imperialism, reproductive choice and national sovereignty.

- Duff G. Gillespie, former Senior Deputy Assistant Administrator for Global Health, USAID<sup>71</sup>

While instances exist in which the government provides foreign assistance for the purpose of furthering its own message, or “voice,” foreign assistance is not always used for that purpose. The censorship in the Helms Amendment is unconstitutional in circumstances in which the speech is not an extension of the voice of the government. Although the Supreme Court allowed

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<sup>69</sup> *Rust v. Sullivan*, 500 U.S. 17, 193 (1991). *See also* *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983) (holding that the government’s “decision not to subsidize the exercise of a fundamental right does not infringe the right. . .”).

<sup>70</sup> *DKT Memorial Fund* at 288, *supra* note 7.

<sup>71</sup> *The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health: Hearing Before the Comm. On Foreign Affairs*, 110th Cong. 18 (2007) (Prepared Statement Of Duff G. Gillespie, Ph.D., Professor And Senior Scholar, Gates Institute For Population And Reproductive Health, Johns Hopkins Bloomberg School Of Public Health) (“Mexico City Policy Congressional Briefing”).

viewpoint-based funding discrimination in *Rust*, in *Legal Services Corporation v. Velazquez* (“Valezquez”), it explained that the funding in *Rust* served to convey a government message and “it does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”<sup>72</sup> In *Velazquez*, the Supreme Court held that an annual Appropriations restriction prohibiting Legal Services Corporation (“LSC”) attorneys from challenging welfare law was unconstitutional. The Court distinguished the facts from *Rust* because “the LSC program was designed to facilitate private speech, not to promote a governmental message,” and LSC did not speak on behalf of the government.<sup>73</sup>

The Helms Amendment censorship does not constitute government speech for several reasons. First, the viewpoint-based restriction in the Helms Amendment censors all aid recipients, not a particular program. In *Rust*, the restriction was on Title X funding in particular. The government cannot assert that its funding furthers a government message in all programs funded by foreign assistance. While foreign appropriations used to fund the salaries of State Department employees logically fund such employees as “the voice of the government,” a project on human rights civic education or research that may yield results that are unfavorable to the government do not constitute the government’s message. The “voice of the government” argument fails with respect to the Helms Amendment, because not all foreign assistance furthers the government’s own speech. Some foreign aid recipients are no more an extension of the voice of the government than the LSC lawyers in the *Velazquez* case, as they also engage in private speech with government funding.<sup>74</sup>

Furthermore, “voice of the government” censorship applied to all foreign assistance deprives much of the world of independent assistance by “stifl[ing] other viewpoints and distort[ing] the marketplace of ideas.”<sup>75</sup> The First Amendment “aims to protect democratic self-government by ensuring that all viewpoints be heard.”<sup>76</sup> If all foreign assistance was censored, because it all funds a government message, only the U.S. government’s voice would be heard in many aid programs. Compromised speech hurts aid recipients who trust and rely on accurate information from an NGO or government, when in fact, the information is incomplete. The *Rust* Court inconsistently chose which listeners to protect; although the Court acknowledged the importance of protecting the First Amendment rights of universities as a marketplace for ideas, it failed to recognize the free speech rights of the doctor/patient relationship at issue under Title X funding.

The Court said that the patients were no worse off for the censorship because they had no money prior to funding anyway. The Court’s dismissal of the effect of the denial of abortion speech of doctors on “indigent women who relied on Title X services” was “constitutionally offensive,”

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<sup>72</sup> *Legal Services Corporation v. Velazquez*, 531 U.S. 535, 542 (2001) (quoting *Rosenberg v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)) (“*Velazquez*”).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Brief for Independent Sector, as Amici Curiae Supporting Plaintiffs-Appellees at 8, *Alliance for Open Society International, Inc. et al. v. United States Agency for International Development et al.*, 651 F.3d 218 (2d Cir. 2011) (No. 08-4917) (“*AOSI v. USAID*”).

<sup>76</sup> *Overbreadth and Listener's Rights*, 123 HARV. L. REV 1749, 1763 (citing Alexander Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948)).

because it robbed those women of all viewpoints.<sup>77</sup> Likewise, the Helms Amendment prohibits doctors funded under Foreign Appropriations from advising pregnant woman on potentially life-saving medical abortion. If a doctor believes that a woman needs an abortion, that woman is constitutionally entitled to that viewpoint.

Finally, the “voice of the government” argument fails generally because the government itself rarely finds private entities to constitute state actors, acting on behalf of the government. It is inconsistent for the government to maintain that it can control the speech of all funding recipients as an extension of the government, and yet, demand a “close nexus” between a private entity and the government to establish that the private entity is a state actor.<sup>78</sup>

#### 4. Alternative routes to speech

The Supreme Court has also upheld the constitutionality of the refusal to fund speech when the funding recipient was allowed to speak through the use of separate, private funds. In *Regan v. Taxation with Representation*, the Court upheld a statute that denied tax deductions to groups that conducted “substantial lobbying,” because such groups were permitted to create a separate, tax exempt 501(c)(3) nonprofit with private funds, thereby allowing speech through an alternative route.<sup>79</sup> In *Brooklyn Legal Services Corp.*, the Second Circuit synthesized the cases establishing the constitutionality of alternative, private funding as allowing the burdening of First Amendment rights “if the recipients are left with adequate alternative channels for protected speech.”<sup>80</sup>

Speech, however, is not always divertible to an alternative channel. Some ideas are only accurate in conjunction with others. Abortion information may be provided as an inseparable component of other objectives that address issues spanning rape in conflict, democracy training, reproductive health, or women’s rights. An NGO publishing a research report recommending abortion services would have to separately and privately fund and account for the paragraphs addressing the abortion component. A doctor treating women raped in armed conflict would have to show that the information she conveys to a dangerously ill patient was funded from the part of her salary that was not provided by and censored by the U.S. government. Separating funds is not just unduly burdensome, but often impossible.

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<sup>77</sup> David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. Rev. 675, 697 (1992).

<sup>78</sup> See e.g. *Brentwood Acad. v. Tenn. Secondary Sch. Ass’n*, 531 U.S. 288, 295 (2001) (stating that a “close nexus” between state and private entity is required to bring private entity within Fourteenth Amendment rights); and *Jackson v. Statler Found*, 496 F.2d 623, 625 (2d Cir. 1974) (listing factors to find a private entity as a state actor).

<sup>79</sup> *Regan v. Taxation with Representation* at 544-545, *supra* note 69. See also *Velazquez v. Legal Services Corp.*, 164 F.3d 757, 766 (2d Cir. 1999) (“in appropriate circumstances, Congress may burden the First Amendment rights of recipients of governmental benefits if the recipients are left with adequate alternative channels for protected expression”); *Planned Parenthood Federation of America, Inc. v. Agency for International Development*, 915 F.2d 59, 64 (“the Standard Clause does not prohibit plaintiffs-appellants from exercising their first amendment rights. Plaintiffs-appellants may use their own funds to pursue whatever abortion-related activities they wish in foreign countries.”); and *Federal Communications Commission v. League of Women Voters of California et al.*, 468 U.S. 364, 400 (1984) (invalidating the provision of the Public Broadcasting Act banning editorializing with funding, but noting that a separate, affiliate organization using “the stations facilities to editorialize with nonfederal funds” would be valid under *Regan v. Taxation with Representation*).

<sup>80</sup> *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 231 (2d. Cir 2006).

Furthermore, not every foreign assistance recipient has the financial ability to set up separate, private funding for “motivating” abortion speech, because many funding situations “involve the allocation of a scarce resource where choice is inevitable . . . .”<sup>81</sup> NGOs, some of which are understaffed or small, cannot always afford to designate one or more employees to pro-choice speech funded by a private account. In some instances, aid recipients have no alternative, private sources of funding, which is a significant impediment to free speech when an aid recipient may be one of the only sources of abortion information.

For instance, in *Rust*, the Court stated, “Petitioners contend . . . that most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services. But once again, even these Title X clients are in no worse position than if Congress had never enacted Title X.”<sup>82</sup> But the question is not whether they would be in a worse position—it is whether they have access to speech through an alternative route at all. A lack of alternative funding forces aid recipients to “abandon certain activities otherwise within their mission, or create affiliate organizations that in fact obscure their structure and activities.”<sup>83</sup> The “alternate funding” theory also failed under the Mexico City Policy:

In resource-poor countries, women often lack the means to access separate facilities or providers for various health services. Failure to integrate reproductive health and HIV/AIDS programming places many women in a position where they must choose between HIV/AIDS services and family planning services, ultimately choosing between knowledge of HIV status and treating that condition or preventing unwanted pregnancy and attaining other reproductive health services.<sup>84</sup>

U.S. aid is often so important that it is absolutely necessary for the purpose for which it is given, a fact that should be a source of pride for the U.S. rather than an impediment to aid recipients, who must choose between U.S. speech censorship and failure of their purpose.<sup>85</sup> In that situation, there is no alternative route in which to speak.

##### 5. Silence v. affirmative speech

“If you want to know who wanted an abortion, you have to go to the morgue.”

- Janet Benshoof, Founder and President of the Global Justice Center

The Helms Amendment’s silencing of pro-choice speech may infringe on the freedom of speech as much as compelling abortion speech. Nonetheless, the Second Circuit has distinguished

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<sup>81</sup> Erwin Chemerinsky, *First Amendment and Content-Based Choices*, 42 Clev. St. L. Rev. 199, 207 (1994).

<sup>82</sup> *Rust v. Sullivan* at 203, *supra* note 69.

<sup>83</sup> Brief for Independent Sector, as Amici Curiae Supporting Plaintiffs-Appellees, *supra* note 75.

<sup>84</sup> Mexico City Policy Congressional Briefing (written statement by Serra Sippel, Acting Executive Director For The Center For Health And Gender Equity (CHANGE)), *supra* note 69.

<sup>85</sup> Furthermore, In many instances, the purpose of foreign assistance is to solicit diverse viewpoints. In these instances, such speech cannot be censored by viewpoint based restrictions if the funds are “to encourage a diversity of views from private speakers.” *Velazquez* at 542, *supra* note 72.

ensorship of “affirmative” speech, which compels funding recipients to speak, from funding requirements that silence speech, such as the requirements in *Regan*, *League of Women Voters*, and *Rust*. In the *AOSI* case, the court struck down a provision of the United States Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, which mandated that funding recipients must have a policy opposing prostitution (aka “anti-prostitution pledge”). While the Supreme Court has allowed speech restrictions, the Second Circuit has found that “[c]ompelling speech as a condition of receiving a government benefit cannot be squared with the First Amendment.”<sup>86</sup>

The distinction between affirmative speech and silence, however, is sometimes illusory. The suppression of a pro-choice view may further an anti-choice view, because “[a]llowing only one side of the abortion debate to communicate its position, in countries where women’s low social and economic status already limits their reproductive choices, further restricts women’s access to safe abortion, family planning services, and the ability to make informed decisions regarding maternal health.”<sup>87</sup> This presents a different First Amendment problem: rather than a suppression of dangerous ideas, it becomes a dangerous suppression of ideas. With no information or with anti-choice information as the only information available, the only choice for women is childbirth.

The Second Circuit’s distinction between silence and affirmative speech also ignores that the freedom of speech includes both the freedom to *speak* and the freedom to choose what to say, particularly in the context of politically-charged speech. The Supreme Court has stated that “[g]overnment cannot, consistent with free speech, craft a policy of granting or withholding subsidies which is primarily ‘aimed at the suppression of dangerous ideas.’”<sup>88</sup> Regardless of whether the government compels speech or silence, “it is the fact that the targeted speech concerns a controversial public issue that is constitutionally significant.”<sup>89</sup>

In the *Guttmacher* case, the court recognized that the Helms Amendment addresses “the most sensitive area of First Amendment concern: governmental attempts to manipulate the public flow of information about controversial issues.”<sup>90</sup> The United States government’s censorship of this hugely important issue is exactly the invasive behavior that the First Amendment is designed to protect against, because:

[e]ven more obnoxious to first amendment values than government speech intended to influence constitutionally protected choices, however, is state action designed to disadvantage—or silence—private speakers with whom the

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<sup>86</sup> *AOSI v. USAID* at 234 (citing *Wooley v. Maynard*, 430 U.S. 705, 714-717 (1977) (emphasis added), *supra* note 75).

<sup>87</sup> Leitner Center for International Law and Justice at Fordham University, *Exporting Confusion: U.S. Foreign Policy as an Obstacle to the Implementation of Ethiopia’s Liberalized Abortion Law* at 26 (May 2010) (citing Dina Bogecho & Melissa Upreti, *The Global Gag Rule: An Antithesis to the Rights-Based Approach to Health*, 9 *Health Hum. Rights* 23 (2006)).

<sup>88</sup> *Alan Guttmacher Institute v. McPherson*, 616 F. Supp. 195, 205 (S.D.N.Y. 1985), *aff’d*, 805 F.2d 1088 (2d Cir. 1986) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)) (“AGI I”).

<sup>89</sup> *AOSI v. USAID* at 236, fn. 4, *supra* note 75.

<sup>90</sup> *AGI I* at 205, *supra* note 88.

government disagrees. The concept of ‘equal liberty of expression’ that is central in first amendment theory recognizes the equal rights of all individual speakers.<sup>91</sup>

Attaching pro-choice censorship to all foreign assistance is “so attenuated from the benefit condition as to amount to a pretextual device for suppressing dangerous ideas or driving certain viewpoints from the marketplace. . . .”<sup>92</sup>

Although courts have never ruled explicitly on whether the Helms Amendment violates the First Amendment, the unconstitutionality argument has failed with regards to the Mexico City Policy on multiple occasions. Lawsuits focused on the Mexico City Policy, however, were limited to FNGOs and the DNGOs associated with them. While the Mexico City Policy also censored the *private* funds of FNGOs, few U.S. foreign aid recipients exist now, with the Mexico City Policy lifted, who are able to separate and speak with their private funds while receiving U.S. aid.

Under the chill of the Helms Amendment, U.S. foreign policy silences both neutral and pro-choice speech, leaving almost no entity addressing global women’s rights and receiving U.S. foreign aid free to speak about abortion.

### **III. The international impact of U.S. abortion censorship**

"USAID foreign assistance is subject to a number of abortion-related statutory restrictions that have been in place for decades. The Agency must make the same high level of commitment to comply with these restrictions as it makes to supporting critical family planning interventions in countries like Malawi."

- Susan K. Brems, USAID<sup>93</sup>

Both the Helms Amendment and the Siljander Amendment raise significant concerns under international law. U.S. abortion speech restrictions impede the realization of rights guaranteed by treaty obligations relating to the right to abortion, as well as the obligation to eliminate structural barriers to women’s rights, such as criminal abortion laws. Given that the U.S. is the largest bilateral donor to rule of law and governance programs,<sup>94</sup> family planning and reproductive health programs,<sup>95</sup> and humanitarian assistance, funding conditions on abortion speech widely limit access to unbiased training and implementation of equality rights under human rights laws. The imposition of abortion speech censorship on U.S. funding undermines human rights treaty obligations by exporting a truncated and biased view of human rights guarantees related to abortion. U.S. foreign assistance recipients—including foreign

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<sup>91</sup> Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 Harv. L. Rev. 1916, 1931-32 (1988).

<sup>92</sup> Brooklyn Legal Services Corp. v. Legal Services Corp at 230 (citing Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998), *supra* note 80).

<sup>93</sup> Letter from Susan K. Brems, Senior Deputy Assistant Administrator, USAID, to Elizabeth Maguire, President & CEO, Ipas (Oct. 4, 2010), available at: <http://www.thenation.com/sites/default/files/USAID%20LETTER%20HELMS%20RESPONSE%20REc'd%2010-12-10.pdf> (last visited Feb. 7, 2012) (“USAID Letter to Ipas”).

<sup>94</sup> DCHA/DG User’s Guide to DG Programming, *supra* note 60.

<sup>95</sup> USUN ICPD Non-paper, *supra* note 67.

governments—are prohibited from using the complete framework of international human rights treaty obligations in their democracy and development, and reproductive health and family planning programs, including in programs providing services to sexual violence survivors in conflict settings.

A variety of international instruments contain obligations to eliminate barriers to and ensure access to safe abortion services, including human rights treaties, jurisprudence and guidance from treaty bodies,<sup>96</sup> as well as recommendations from UN experts and State commitments at international conferences.<sup>97</sup> These obligations arise from international human rights guarantees of the rights to health, free expression, life and non-discrimination under various treaties. By silencing pro-choice speech as a condition of foreign aid, the U.S. forces countries to choose between U.S. foreign aid and compliance with their own international treaty obligations, including the International Covenant on Civil and Political Rights (“ICCPR”), Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”), and the Convention against Torture (“CAT”).<sup>98</sup>

This section explores: (1) the international framework of obligations that guarantee the right to abortion and that require states to reconsider restrictive and criminal abortion laws; and (2) how U.S. abortion restrictions impede the realization of those rights and obligations.

#### **A. International obligations to provide information about the option of abortion**

International human rights law recognizes that guarantees of the rights to health, non-discrimination and life, among others, implicate the right to abortion and information about abortion.

The International Conference on Population and Development (ICPD)’s Programme of Action, which reflects international commitments made by States with regard to access to reproductive and sexual health services as a central tenant of sustainable development, recognizes that unsafe abortions pose a significant public health problem. Accordingly, Article 8.25 of the ICPD

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<sup>96</sup> Treaty monitoring bodies have authority to monitor state compliance with treaty obligations, in the form of concluding observations to states under review, as well as provide authoritative guidance elaborating on the substance of the rights guaranteed by the treaty, in the form of general recommendations or general comments.

<sup>97</sup> Other incidents provide further evidence that USAID monitors abortion involvement in order to regulate international aid funds. An audit report from USAID’s Regional Inspector General/Manila to the USAID/Bangladesh Director in 1995 shows that USAID “identified 3,367 incidents of possible noncompliance with the [Mexico City Policy] or Helms at 7 of the 41 sub-grantees receiving USAID funds through Pathfinder,” mainly related to menstrual regulation, which USAID considers a form of abortion. Menstrual regulation is legal in Bangladesh. Nonetheless, Pathfinder restricted aid to the suspected violators until it could determine whether the sub-grantees violated the Mexico City Policy or the Helms Amendment. USAID Office of the Inspector General, Audit of USAID/Bangladesh’s Nongovernmental Organization (NGO) Service Delivery Program, Audit Report No. 5-388-05-004-9 (Mar. 31, 2005).

<sup>98</sup> For a more detailed analysis of the guarantees under international law to abortion *see* Global Justice Center, The right to an abortion for girls and women reaped in armed conflict: States’ positive obligations to provide non-discriminatory medical care under the Geneva Conventions (Jan. 2010), available at: <http://globaljusticecenter.net/publications/Reports/GJCbrieffinal.pdf> (last visited Feb. 6, 2012) (“GJC Rape & Abortion Brief”) and Center for Reproductive Rights, Bringing Rights to Bear: Abortion and Human Rights (Jan. 2009), available at: <http://reproductiverights.org/en/document/bringing-rights-to-bear-abortion-and-human-rights> (last visited Feb. 6, 2012).

programme provides that “Women who have unwanted pregnancies should have ready access to reliable information and compassionate counseling...[and i]n circumstances where abortion is not against the law, such abortion should be safe.”<sup>99</sup>

Building on the ICPD, many human rights treaties have found that access to information about the option of abortion implicates substantive guarantees under these documents. Human Rights Watch (“HRW”) has found that “The right to information, certainly as it relates to the right to health, includes both the negative obligation for a state to refrain from interference with the provision of information by private parties and a positive responsibility to provide complete and accurate information necessary for the protection and promotion of reproductive health and rights, including information about abortion.”<sup>100</sup>

While many human rights treaties and international bodies address the right to abortion under international law, human rights guarantees of the right to information about the option of abortion under the ICCPR, CEDAW and CAT are representative.

### 1. International Covenant on Civil and Political Rights

The ICCPR,<sup>101</sup> monitored by the Human Rights Committee (“HRC”), sets forth minimum standards for ensuring civil and political rights, including the right to abortion. The HRC has found that, at various times, the denial of the provision of legal abortion services,<sup>102</sup> as well as the failure to provide information about abortion as an option,<sup>103</sup> violates the ICCPR Article 3 guarantees of non-discrimination,<sup>104</sup> the Article 6(1) protection of the right to life,<sup>105</sup> the Article 7 prohibition on torture, or cruel, inhuman and degrading treatment,<sup>106</sup> and the Article 19(2) right to freedom of expression.<sup>107</sup> Accordingly, where permitted by law, the ICCPR requires that girls and women are provided information about their full range of pregnancy options, including abortions, in order to realize their right under the Covenant.

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<sup>99</sup> International Conference on Population and Development, Sept. 5-13 1994, *Cairo Programme of Action*, ¶ 8.25, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994).

<sup>100</sup> Human Rights Watch, *My Rights, and My Right to Know: Access to Therapeutic Abortion in Peru* at 38 (2008) (citing Article 19, *The Right to Know: Human Rights and Access to Reproductive Health Information* (Philadelphia: University of Pennsylvania Press, 1995), pp. 39 and 61-72), available at: <http://www.hrw.org/sites/default/files/reports/peru0708webwcover.pdf> (last visited Feb. 6, 2012).

<sup>101</sup> International Covenant on Civil and Political Rights (“ICCPR”), Dec. 16, 1966, 99 U.N.T.S. 171.

<sup>102</sup> See for example UN Human Rights Committee (“HRC”), *Concluding Observations: Poland*, ¶ 8, U.N. Doc. CCPR/CO/82/POL, (Dec. 2, 2004). See also HRC, *KL v. Peru*, ¶ 6.6, U.N. Doc. CCPR/C/85/1153/2003 (Nov. 22, 2005) (holding that the denial of therapeutic abortion constitutes torture under Article 7 of the Covenant); and HRC, *Concluding Observations: Ireland*, ¶ 445, U.N. Doc. A/55/40 (Jun. 24, 2000).

<sup>103</sup> See for example HRC, *Concluding Observations: Poland*, ¶ 8, *supra* note 102.

<sup>104</sup> ICCPR, art. 3, *supra* note 101 (article 3 reads: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”).

<sup>105</sup> ICCPR, art. 6(1), *supra* note 101 (article 6(1) reads: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

<sup>106</sup> ICCPR, art. 7, *supra* note 101 (article 7 reads, in relevant part: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

<sup>107</sup> ICCPR, art. 19(2), *supra* note 101 (article 19(2) reads: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”).

## 2. Convention on the Elimination of All Forms of Discrimination against Women

CEDAW, like the ICCPR, includes substantive guarantees of the access to safe abortion services as integral to the non-discriminatory application of its provisions, including the right to health,<sup>108</sup> and also requires positive steps toward the realization of those rights.<sup>109</sup> This understanding of non-discrimination in the provision of medical care is underscored by CEDAW General Recommendation 24 which states that “[i]t is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women,”<sup>110</sup> i.e. abortion.<sup>111</sup>

## 3. Convention against Torture

The jurisprudence of the Convention against Torture, monitored by the Committee against Torture (CAT),<sup>112</sup> as it relates to abortion, is less robust than that of other treaty monitoring bodies. Nonetheless, the Committee has increasingly found that access to abortion, at least in certain circumstances, implicates certain provisions of the convention, including the Article 2 guarantee to be free from torture, or cruel, inhuman or degrading treatment and the Article 14 guarantee of “the means for as full rehabilitation as possible,” which includes medical care for injuries resulting from violations.<sup>113</sup>

### **B. Censorship of the provision of information about abortion**

The question of access to safe abortion as an option for victims of rape is not openly discussed in any health facility receiving international humanitarian

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<sup>108</sup> Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”), art. 12, Sept. 3, 1981, 1249 U.N.T.S. 13 (“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”).

<sup>109</sup> Id. at art. 2 (“State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of discrimination against women and, to this end, undertake...[t]o adopt appropriate legislative and other measures...prohibiting all discrimination against women...[and] [t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”).

<sup>110</sup> U.N. Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, ¶ 11, U.N. Doc. A/54/38/Rev.1 (1999).

<sup>111</sup> For example, the Constitutional Court of Colombia cited to the need to comply with the substantive provisions of CEDAW, including the right to health provision, to liberalize Colombia’s restrictive abortion law. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, C-355/06 (Colom.), *translated in* Women’s Link Worldwide, Excerpts of the Constitutional Court’s Ruling that Liberalized Abortion in Colombia (2007), [http://www.womenslinkworldwide.org/pdf\\_pubs/pub\\_c3552006.pdf](http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf) (last visited Feb. 7, 2012).

<sup>112</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), art. 2(1), Dec. 10, 1984, 1465 U.N.T.S. 85 (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”).

<sup>113</sup> Id. at art. 14. *See also* Amnesty International, *The Impact of the Complete of Abortion in Nicaragua: Briefing to the United Nations Committee Against Torture* (2009), available at: <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/NICARAGUA%20THE%20IMPACT%20OF%20THE%20COMPLETE%20BAN%20OF%20ABORTION%20IN%20NICARAGUA:%20BRIEFING%20TO%20THE%20UNITED%20NATIONS%20COMMITTEE%20AGAINST%20TORTURE?CMD=VEROBJ&MLKOB=27451372258> (last visited Feb. 7, 2012). For further discussion see section III (C) (3) *infra*.

assistance in Darfur, Chad or elsewhere...Humanitarian agencies seem to assume it is not essential to provide abortion services or accurate information for victims of rape in camp or IDP settings. It is likely that US government anti-abortion policies have contributed to reluctance to provide safe abortion services.

- Tamara Fetters, Ipas<sup>114</sup>

The Helms Amendment contravenes the rights guaranteed under international human rights law, including the ICCPR, CEDAW, and CAT as discussed above, by denying information, where legal, regarding the option of abortion to women. Girls and women present for treatment at medical facilities funded by U.S. foreign assistance are not provided their full range of options as guaranteed by the substantive protections of these treaties.

The failure to include the option of abortion in U.S.-funded programs is particularly injurious in conflict settings where systematic rape is employed as a weapon of war and where access to medical services is limited.<sup>115</sup> Girls and women, raped and impregnated in situations of armed conflict, suffer from serious and life-threatening injuries, which may be exacerbated by the denial of abortion. A safe abortion is ten times safer than carrying a pregnancy to term,<sup>116</sup> and maternal mortality rates are abysmal in conflict situations.<sup>117</sup> For example, a study on the use of rape as a part of the conflict in Sudan found that:

Pregnancy is itself a health risk for women in less-developed countries. In the Sudan, recent best estimates suggest that 590 women die for every 100,000 births, and the infant mortality rate is 77 infant deaths for every 1,000 live births. Unwanted pregnancy through rape (and gang rape increases the risk of pregnancy) and the conditions imposed by war (malnutrition, anemia, malaria, exposure, stress, infection, disease), increase the risks defined by this baseline maternal mortality rate.<sup>118</sup>

As noted above, the ICCPR guarantees of the right to life and to be free from torture, or cruel, inhuman and degrading treatment, among others all touch on the right to an abortion. U.S. censorship directly contravenes the ICCPR's right to life guarantee, because it denies information about safe abortion, which could lead women to undergo life-threatening abortions

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<sup>114</sup> Tamara Fetters, *Abortion care needs in Darfur and Chad*, Forced Migration Review 25, 48-49 (2006), available at: [www.fmreview.org/textOnlyContent/FMR/25/29.doc](http://www.fmreview.org/textOnlyContent/FMR/25/29.doc) (last visited Feb. 7, 2012).

<sup>115</sup> GJC Rape & Abortion Brief, *supra* note 98.

<sup>116</sup> National Abortion Federation, *Safety of Abortion*, available at: [http://www.prochoice.org/about\\_abortion/facts/safety\\_of\\_abortion.html](http://www.prochoice.org/about_abortion/facts/safety_of_abortion.html) (last visited Feb. 7, 2012).

<sup>117</sup> "Management of pregnancy resulting from rape is always challenging even in western countries with advanced health care systems. However, in DRC pregnancy, labor and delivery can be most detrimental to a women's health. Some experts estimate the maternal mortality ratio (MMR) in Eastern DRC to be 3,000 deaths per 100,000 live births, more than three times the MMR for Sub-Saharan Africa overall (920 deaths per 100,000 live births). Although the risks of childbirth are real for any Congolese woman, they are significantly higher for young girls whose bodies are not mature enough for labor and delivery and for women who have serious pelvic injuries and scarring from the physical damage often caused by gang rape." Harvard Humanitarian Initiative & Oxfam International, "Now, The World is Without Me:" An investigation of sexual violence in Eastern Democratic Republic of Congo at 41 (April 2010).

<sup>118</sup> Physicians for Human Rights and Harvard Health and Human Rights, *The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan* at 20 (Oct. 2004).

under unsafe conditions. Furthermore, the denial of information regarding abortion could also constitute torture, or cruel, inhuman or degrading treatment under both the ICCPR and the Convention against Torture. For example, denying a fourteen-year-old rape victim access to abortion information could result in the death of the girl or the fetus. Withholding such life-saving medical information could constitute torture, or cruel, inhuman and degrading treatment under these treaties.

Furthermore, the denial of information regarding abortion to such a girl contravenes CEDAW's requirements that the provision of medical care be non-discriminatory. The U.S. abortion restrictions do not censor information about life-saving medical services to boys raped in armed conflict who present at a U.S.-funded medical center, but do censor the information provided girls raped in armed conflict.

As the largest provider of humanitarian assistance globally, the U.S. plays a central role in obstructing women's access to information about abortion, and preventing access to abortion services in conflict situations. The prevention of information about safe abortion leads to unsafe abortion, which can have serious, life-threatening consequences. Médecins Sans Frontières ("MSF," also known as "Doctors Without Borders") is one of the few organizations to recognize the impact of the unavailability of safe abortion services on rape survivors. It is also one of the only organizations working in conflict zones that does not receive any U.S. funding<sup>119</sup> and does in fact provide abortion services.<sup>120</sup> According to MSF, "Rape may result in unwanted pregnancies. Where abortion services do not exist or are unaffordable, women who feel unable to give birth to a child conceived during rape are exposed to the risks of unsafe abortion."<sup>121</sup> However, the U.S. censors many other NGOs whose funding is conditioned on silence regarding abortion, in contravention of human rights guarantees.

U.S. abortion restrictions also limit the inclusion of abortion in publications and manuals that pertain to the treatment of victims of gender-based violence. A study by Ipas found that "USAID policy on abortion has been applied to prevent the sharing of information on abortion in print and meetings."<sup>122</sup> The study further found that "government publications, including key training manuals supported by USAID, exclude information about abortion, even where the local government is committed to providing the information."<sup>123</sup> Such exclusion shows how U.S. censorship of abortion speech effectively limits the information available about abortion, whether for the provision of services or for use in legal reform efforts, in contravention of international human rights treaty obligations. Furthermore, Ipas also found that programs designed to address gender-based violence ("GBV") with U.S. aid generally do not include information about abortion. A U.S. aid recipient stated that:

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<sup>119</sup> Médecins Sans Frontières, About Us, <http://www.doctorswithoutborders.org/aboutus/> (last visited Feb. 7, 2012).

<sup>120</sup> "Abortion is an issue that remains completely unresolved in a country like the DRC. Abortion – carried out as a matter of course in our projects – is nonetheless forbidden in this country, as is the importing and usage of the abortion pill." Médecins Sans Frontières, Democratic Republic of Congo: Rape as a Weapon in North Kivu (Jul. 19, 2006), <http://www.doctorswithoutborders.org/news/article.cfm?id=1836> (last visited Feb. 7, 2012).

<sup>121</sup> Médecins Sans Frontières, Shattered Lives: Immediate medical care vital for sexual violence victims (Mar. 5, 2009), <http://www.doctorswithoutborders.org/publications/article.cfm?id=3422> (last visited Feb. 7, 2012).

<sup>122</sup> Ipas Helms Memo at 5, *supra* note 54.

<sup>123</sup> *Id.*

while abortion comes up in their work on GBV they ‘cannot go there’ because of the U.S. funding restrictions: ‘I think that concerning rape and GBV in countries that allow for abortion in cases of rape, we are resigned not to raise [if we get USG funding]... We work with the U.S. mission in country and they don't want us to touch it.’<sup>124</sup>

In this way, U.S. abortion restrictions, by impeding information about abortion in U.S. supported programs, contravene the rights of girls and women under international law, including the right to health and life, and impede states from complying with their obligations to ensure the provision of such services, including by changing restrictive abortion laws.

### C. Obligations to reform restrictive abortion laws

Criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women’s right to health and must be eliminated. These laws infringe women’s dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health... Creation or maintenance of criminal laws with respect to abortion may amount to violations of the obligations of States to respect, protect and fulfill the right to health.

- Anand Grover, *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health*<sup>125</sup>

Unsafe abortion accounts for the 13 percent maternal mortality rate worldwide (approximately 47,000 deaths in 2008)<sup>126</sup> and abortion law reform is closely tied to efforts to reduce maternal mortality and the rate of unsafe abortions.<sup>127</sup> The World Health Organization has found that, “Women all over the world are highly likely to have an induced abortion when faced with an unplanned pregnancy – irrespective of legal conditions. However, where abortion laws are the least restrictive there is no or very little evidence of unsafe abortion, while legal restrictions increase the percentage of unlawful and unsafe procedures.”<sup>128</sup> Recognizing the link between maternal mortality, unsafe abortions and the legality of the procedure, the reform of criminal abortion laws has specifically been recommended by various international actors and bodies.

#### 1. International Covenant on Civil and Political Rights (ICCPR)

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<sup>124</sup> Id. at 7.

<sup>125</sup> The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (“SR Health”), *Report of the Special Rapporteur of the Human Rights Council, Summary, delivered to the General Assembly*, ¶ 21, U.N. Doc. A/66/25 (Aug. 3, 2011).

<sup>126</sup> World Health Organization (“WHO”), *Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008* at 27 (2011).

<sup>127</sup> WHO defines unsafe abortion as “a procedure for terminating an unintended pregnancy carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both.” Id. at 2.

<sup>128</sup> Id. at 6 (2011).

In order to ensure the substantive rights guaranteed under the ICCPR, State parties are obligated under Article 2(1) to “undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”<sup>129</sup> and under Article (2)(2) where “not already provided for by existing legislation or other measures,” to “take the necessary steps...to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”<sup>130</sup>

In this vein, the HRC has on numerous occasions recommended that state parties amend their criminal abortion laws to comport with the substantive guarantees of the ICCPR.<sup>131</sup> For example, the Committee recommended to Nicaragua that “[t]he Nicaraguan State must amend its laws on abortion so that they comply with the Covenant. The state must take measures to help women avoid unwanted pregnancies, so that they are not forced to seek illegal and unsafe abortions which put their lives at risk.”<sup>132</sup>

## 2. Convention on the Elimination of All Forms of Discrimination against Women

Like the HRC, the CEDAW Committee has found that “[t]he obligation to respect rights [under CEDAW] requires States parties to refrain from obstructing action taken by women in pursuit of their health goals...other barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”<sup>133</sup> The Center for Reproductive Rights notes that the CEDAW committee “has consistently criticized restrictive abortion laws, particularly those that prohibit and criminalize abortion in all circumstances, and confirmed that such legislation leads women to obtain illegal and unsafe abortions. The Committee has often framed restrictive abortion laws as a violation of the rights to life and health.”<sup>134</sup>

For example, the CEDAW committee has twice recommended to Kenya that it act concerning with restrictive measures on abortion.<sup>135</sup> Most recently, the Committee noted that “illegal abortion remains one of the leading causes of the high maternal mortality rate and that the State party’s restrictive abortion law further leads women to seek unsafe and illegal abortions,”<sup>136</sup> and

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<sup>129</sup> ICCPR, art. 2(1), *supra* note 101.

<sup>130</sup> ICCPR, art. 2(2), *supra* note 101.

<sup>131</sup> For example, the HRC found that in order for Peru to comply with the Article 6 obligation to ensure the right to life, Peru should amend its abortion law (“The State party is under a duty to take measures to ensure the right to life of all persons, including pregnant women whose pregnancies are terminated. In this regard: The Committee recommends that the law be amended so as to introduce exceptions to the general prohibition of all abortions...”). HRC, *Concluding Observations: Peru*, ¶ 20 U.N.Doc. CCPR/CO/70/PER (Nov. 15, 2000); HRC, *Concluding Observations: Chile*, ¶ 15, U.N. Doc CCPR/C/79/Add.104 (Mar. 30, 1999). *See also* HRC, *Concluding Observations: Poland*, ¶ 8, *supra* note 102; HRC, *Concluding Observations: Guatemala*, ¶ 19, U.N. Doc. CCPR/CO/72/GTM, ¶ 19 (Aug. 27, 2001); HRC, *Concluding Observations: Ecuador*, ¶ 11, U.N. Doc CCPR/C/79/Add.92 (Aug. 18, 1998); and HRC, *Concluding Observations: Argentina*, ¶ 14, U.N. Doc. CCPR/CO/70/ARG (Nov. 3, 2000).

<sup>132</sup> HRC, *Concluding Observations: Nicaragua*, ¶ 13, U.N. Doc. CCPR/C/NIC/CO/3 (Dec. 12, 2008).

<sup>133</sup> CEDAW General Recommendation No. 24: *Article 12 of the Convention (Women and Health)*, ¶ 14, *supra* note 110 (emphasis added).

<sup>134</sup> *Bringing Rights to Bear: Abortion and Human Rights* at 4 (internal cites omitted), *supra* note 98.

<sup>135</sup> CEDAW Committee, *Concluding Observations: Kenya*, ¶ 38, U.N. Doc. CEDAW/C/KEN/CO/6 (Aug. 10, 2007).

<sup>136</sup> CEDAW Committee, *Concluding Observations: Kenya*, ¶ 37, U.N. Doc. CEDAW/C/KEN/CO/7 (Apr. 5, 2011).

as a corrective measure, recommended that Kenya review “the law relating to abortion with a view to removing punitive provisions imposed on women who undergo abortion.”<sup>137</sup>

### 3. Convention against Torture

The Committee against Torture, in examining situations where reproductive rights touch upon rights guaranteed in the Convention, has increasingly found that restrictive abortion laws do not comport with the Convention. For example, in 2006, the Committee reviewed Peru’s restrictive abortion law, which contained no rape or life exception, and recommended that Peru “take whatever legal and other measures are necessary to effectively prevent acts that put women’s health at grave risk.”<sup>138</sup> Additionally, in 2009, CAT urged Nicaragua “to review its legislation on abortion,”<sup>139</sup> and in 2011, recommended that Ireland “clarify the scope of legal abortion through statutory law and provide for adequate procedures to challenge differing medical opinions as well as adequate services for carrying out abortions in the State party, so that its law and practice is in conformity with the Convention.”<sup>140</sup>

### 4. International Policy Commitments and Recommendations

UN experts and special mandate holders and commitments made by States in international conferences and global initiatives, also acknowledge the importance of abortion law reform and the negative effect that punitive measures on abortion can have on the realization of international human rights guarantees.

The Beijing Platform for Action, which adds to the commitments of the ICPD, provides that in order to fulfill the ICPD pledge, states should review “laws containing punitive measures against women who have undergone illegal abortions.”<sup>141</sup> Furthermore, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (“SR Health”) has stated that “[c]riminal laws and other legal restrictions affecting sexual and reproductive health may amount to violations of the right to health.”<sup>142</sup>

The Special Rapporteur also notes that “[o]ther legal restrictions also contribute to making legal abortions inaccessible...[including] laws prohibiting public funding of abortion care... [T]hese laws make safe abortions and post-abortion care unavailable, especially to poor, displaced and young women.” U.S. abortion restrictions on foreign assistance (as well as domestic constraints on federal funding for abortion such as the Hyde Amendment) fall into the SR Health’s “other legal restrictions category,” as laws prohibiting public funding for abortion.

#### **D. Censorship of processes aimed at abortion law reform**

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<sup>137</sup> Id. at ¶ 38(c).

<sup>138</sup> Committee against Torture (“CAT Committee”), *Concluding Observations: Peru*, ¶ 26, U.N. Doc. CAT/C/PER/CO/4 (Jul. 26, 2006).

<sup>139</sup> CAT Committee, *Concluding Observations: Nicaragua*, ¶ 16, U.N. Doc. CAT/C/NIC/CO/1 (Jun. 10, 2009).

<sup>140</sup> CAT Committee, *Concluding Observations: Ireland*, ¶ 26, U.N. Doc. CAT/C/IRL/CO/1 (Jun. 17, 2011) (emphasis added).

<sup>141</sup> Fourth World Conference on Women, Sept. 4-15 1995, *Beijing Platform for Action* ¶ 106(k), A/CONF.177/20/Rev.1 (Sept. 15, 1995).

<sup>142</sup> *Report of the Special Rapporteur of the Human Rights Council*, ¶16, *supra* note 125.

Legal grounds largely shape the course for women with an unplanned pregnancy towards a safe or an unsafe abortion.

- World Health Organization<sup>143</sup>

As noted above, international treaties, treaty bodies, state commitments at international conferences, and UN experts have all recognized the devastating impact that unsafe abortion and criminal abortion laws have on women's lives worldwide. This impact has given rise to specific recommendations that states change their criminal abortion laws so as to comport with their treaty obligations. However, U.S. abortion speech censorship impedes efforts to change criminal abortion laws, because foreign governments and other U.S. foreign aid recipients cannot work to reform abortion laws if they cannot speak freely about abortion.

The U.S. government provides significant support<sup>144</sup> to democracy and governance programs designed to reinforce the rule of law and human rights, which means that a significant number of such programs do not discuss abortion reform in countries where abortion is criminalized, in contravention of international law. For example, the "Human Rights and Rule of Law Cooperative Agreement," awarded to the RIGHTS Consortium, states as a potential area of work, "Legitimate Constitutions, Laws and Legal Institutions," including activities such as "[d]eveloping constitutions, laws and institutions derived from democratic processes and consistent with international human rights,"<sup>145</sup> but any activities undertaken under this contract cannot include any abortion-related speech. Furthermore, USAID has clearly asserted that it is working to ensure that these restrictions are in fact enforced in contracts for democracy and governance, as well as in health-related contracts: "In the past year, the Agency has also taken steps to increase awareness of these restrictions among non-health staff, particularly those working in the area of democracy and governance."<sup>146</sup> Ironically, while the U.S. supports programs to further the democratic process in other countries, it undemocratically silences one half of a woman's rights and global health debate.

Two recent instances of U.S. censorship of pro-choice speech, in Kenya and Malawi, demonstrate both how the U.S. ensures that U.S. abortion restrictions censor and impede the fulfillment of state obligations to bring domestic abortion laws in line with human rights treaties.

### 1. Kenya

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<sup>143</sup> Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008 at 3, *supra* note 60.

<sup>144</sup> USAID states that they "spend over \$1 billion a year in a broad range of programs covering justice, human rights, peace and security." DCHA/DG User's Guide to DG Programming at 16, *supra* note 60.

<sup>145</sup> *Id.* at 46.

<sup>146</sup> Letter from Sean C. Carroll, Chief Operating Officer, United States Agency for International Development, to Jacquie Williams-Bridgers, Managing Director, US Government Accountability Office, on the formal response of USAID to the GAO draft report "Foreign Assistance: Clearer Guidance Needed on Overseas Compliance with Legislation Prohibiting Abortion-Related Lobbying" (Oct. 11, 2011), *reprinted in* GAO Siljander Audit, *supra* note 55.

In Kenya, approximately 2,600 women die a year from unsafe abortions, and another 21,000 require medical treatment for the consequences of unsafe abortions.<sup>147</sup> Studies have found that Kenya's restrictive abortion laws account for unsafe abortion and that unsafe abortion contributes to approximately 30 to 40 percent of Kenya's maternal mortality rate, a significantly higher percentage than the global average of 13 percent.<sup>148</sup>

Prior to 2008, abortion was generally illegal under the Kenyan penal code, with a limited life exception,<sup>149</sup> and its Constitution was silent on the issue.<sup>150</sup> In May 2008, Kenya began a process of democratic reform, including constitutional reform.<sup>151</sup> The U.S. government supported (and censored) funding for civic education and technical assistance.<sup>152</sup> One of the approximately three hundred proposed new constitutional provisions touched on a very limited right to abortion, providing that "[a]bortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."<sup>153</sup>

Over the years, treaty-monitoring bodies have repeatedly recommended that Kenya reconsider its restrictive criminal abortion laws in order to comply with its treaty obligations. As noted above, the CEDAW Committee has twice recommended action along such lines, as has the HRC. In 2005, the HRC specifically recommended to Kenya that "[i]t should review its abortion laws, with a view to bringing it into conformity with the covenant."<sup>154</sup> Consequently, the inclusion of a limited right to abortion in the new draft constitution was comports with international law.

American politics and U.S. abortion censorship, however, attempted to intervene in the constitutional reform process. Representative Chris Smith (Republican, New Jersey), an ardent anti-abortion activist,<sup>155</sup> along with Representative Darrell Issa (Republican, California), and Ileana Ros-Lehtinen (Republican, Florida), initiated a tax-payer funded investigation into the United States' role in aiding the drafting of the new Kenyan constitution, because of the inclusion of the sub-clause related to abortion in the proposed constitution. In a letter to the Acting Comptroller General of the U.S. Government Accountability Office ("GAO"), Acting Inspector General, U.S. Department of State, Office of Inspector General, and Inspector General of USAID, the representatives stated, "We believe any expression of support for or opposition to the proposed new constitution (including by drafting, offering technical advice or providing

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<sup>147</sup> Center for Reproductive Rights, *In Harm's Way: The Impact of Kenya's Restrictive Abortion Law* at 9 (2010).

<sup>148</sup> *Id.*

<sup>149</sup> Kenyan Penal Code, §§ 158-160, 240 (rev. 2009), available at:

<http://www.kenyalaw.org/Downloads/GreyBook/8.%20The%20Penal%20Code.pdf>. Oddly, the life exception in the penal code seems to only explicitly immunize doctors from criminal culpability for the performance of a life saving abortion, but not the woman undergoing the procedure. *See Id.* at §240.

<sup>150</sup> GAO Siljander Audit at 4, *supra* note 55.

<sup>151</sup> GAO Siljander Audit at 3, *supra* note 55.

<sup>152</sup> Per GAO, USAID funded "12 awards to 9 award recipients...[who] have, in turn, given 182 smaller awards to 124 Kenyan partner organizations, or subrecipients." GAO Siljander Audit at 4, *supra* note 55. .

<sup>153</sup> CONSTITUTION, Art. 26(4) (rev. 2010) (Kenya), available at:

<http://kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> (last visited Feb. 7, 2012).

<sup>154</sup> HRC, *Concluding Observations: Kenya*, ¶ 14, U.N. Doc. CCPR/CO/83/KEN (Apr. 29, 2005).

<sup>155</sup> Nick Wing, *Chris Smith: Obama Is 'The Enemy Of Life,' Appoints Pro-abortion 'Death Peddlers' To Cabinet*, HUFFINGTON POST, Jan. 24, 2012, [http://www.huffingtonpost.com/2012/01/24/chris-smith-obama-enemy-of-life\\_n\\_1229476.html](http://www.huffingtonpost.com/2012/01/24/chris-smith-obama-enemy-of-life_n_1229476.html) (last visited Feb. 7, 2012).

foreign assistance of any kind that is designed to influence public approval in the upcoming plebiscite) unavoidably involves lobbying for or against abortion.”<sup>156</sup> The representatives cited the Siljander Amendment, which prohibits lobbying for or against abortion, as the impetus behind their concern.<sup>157</sup>

In response, the State Department,<sup>158</sup> USAID,<sup>159</sup> and GAO conducted extensive investigations into U.S.-funded award recipients’ involvement with the Kenyan constitutional reform process, including recipients engaged in the provision of technical assistance to the constitutional Committee of Experts and civic education on the proposed constitution. The State Department and GAO found that some sub-recipients “addressed the abortion-related provisions of the constitution” but did not lobby for or against them, and one award recipient made suggestions regarding abortion and fetal rights. U.S. abortion restrictions were included in the contract to International Development Law Organization (“IDLO”), who at the request of the Committee of Experts provided technical assistance and civic education trainings, which censored the information available to both the Committee of Experts and those performing civic education on the constitution.<sup>160</sup> It is particularly troubling that the funding provided to IDLO is censored, because it is an intergovernmental organization<sup>161</sup> relied upon internationally, including by state governments, to provide apolitical rule of law assistance. Censoring IDLO inherently inhibits its ability to “wield no political agenda”<sup>162</sup> by substituting the U.S. political agenda on abortion instead of neutrality.

Despite U.S. censorship of groups associated with the reform process, the Kenyan constitution containing the limited abortion provision was approved and promulgated on August 27, 2010. On March 21, 2011, during a tax-payer funded trip, Representative Smith gave a speech at an event in Kenya on the new constitution, reportedly calling for "a world free of abortion" and accusing “pro-abortion NGOs’ of having ‘hijacked’ the maternal mortality issue in order to

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<sup>156</sup>Letter from Chris Smith, Darrell Issa, and Ileana Ros-Lehtinen, House of Representatives, to Inspectors General of the U.S. Department of State and USAID, and the GAO (May 10, 2010), available at: <http://chrissmith.house.gov/News/DocumentSingle.aspx?DocumentID=184721> (last visited Feb. 7, 2012).

<sup>157</sup> For example, in 1996, USAID testified before Congress that the Helms Amendment prohibits U.S.-funded overseas radio groups from any speech regarding abortion laws: “No USAID funded programs are aimed at changing local laws regarding abortion. The Helms Amendment of 1973 prohibits such support . . . USAID does not support activities to address laws regarding abortion in any country; consequently we do not monitor the status of abortion laws.” *Role of Radio in Africa: Hearing before the Subcomm. on African Affairs of the S. Comm. on Foreign Relations*, 14th Cong. 2 (March 28, 1996) (Statement of Carol A. Peasley, Deputy Assistant Administrator for Africa, USAID).

<sup>158</sup> U.S. Department of State Office of the Inspector General, Review of Department of State Activities Concerning the Draft Kenya Constitution, ISP-I-10-77 (Aug. 2010), available at: <http://oig.state.gov/documents/organization/146146.pdf> (last visited Feb. 7, 2012).

<sup>159</sup> USAID conducted an investigation, but did not publically release the results of the investigation. GAO Siljander Audit at 2, fn. 3, *supra* note 55.

<sup>160</sup> *Id.* at 11-14.

<sup>161</sup> International Development Law Organization, Who we are, <http://www.idlo.int/english/WhoWeAre/Pages/Home.aspx> (last visited 2.9.2012).

<sup>162</sup> *Id.*

legalize the killing of the unborn.”<sup>163</sup> His advocacy was legal because the taxpayer funding came from Congressional funds, rather than foreign appropriations.<sup>164</sup>

## 2. Malawi

The U.S. also contravenes abortion reform in Malawi that would bring that country’s law in line with international law. Like Kenya, Malawi’s statistics linking unsafe abortion to maternal mortality are dire. One study shows that unsafe abortion is the second highest cause of maternal mortality in the country at 18 percent. The study concluded that urgent action was needed to reform Malawi’s abortion law, which contains only a life exception.<sup>165</sup> Like Kenya, Malawi has also been recommended to act to bring its abortion laws in line with its human rights obligations. In 2010, the CEDAW Committee recommended that Malawi review its laws relating to abortion.<sup>166</sup> During its Universal Periodic Review by the Human Rights Council, Austria recommended that it “[i]ntensify measures to address the problems of maternal mortality and unsafe abortion, reviewing punitive provisions regarding the latter.”<sup>167</sup>

However, key participants in following such recommendations are censored by the abortion restrictions placed on them as a condition to accepting assistance from the U.S. government. For example, the U.S. funded the Director of the Reproductive Health for the Malawian Ministry of Health, Dr. Chisale Mhango. Dr. Mhango was a principal investigator on two epidemiological studies on unsafe abortions in Malawi, one funded primarily by the UK Department for International Development (DFID) and the United Nations Population Fund (UNFPA), and the other by the World Health Organization (WHO).<sup>168</sup> Dr. Mhango was supposed to speak at a Malawi government-sponsored public health workshop on August 18-19, 2010, reviewing the two studies.<sup>169</sup> USAID prevented Dr. Mhango from speaking at the workshop because of the censorship placed on abortion speech as a condition of his funding. The Senior Deputy Assistant Administrator of USAID explained that “it was anticipated that this workshop would include discussion of study findings, as well as possible changes to the legal status of abortion in Malawi, [it] raised concerns in light of the statutory restrictions on the funding for Dr. Mhango’s position.”<sup>170</sup> She further stated:

the statutory restrictions relating to abortion have been in place for many years. The Agency has worked hard to consider the application of these restrictions to particular situations and to inform USAID staff, implementing partners, and host

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<sup>163</sup> Kate Sheppard, *Chris Smith’s African Abortion Adventure*, MOTHER JONES, Mar. 29, 2011, available at: <http://motherjones.com/politics/2011/03/chris-smith-kenya-abortion-constitution> (last visited Feb. 7, 2012).

<sup>164</sup> Id.

<sup>165</sup> Emily Jackson et. al., *A strategic assessment of unsafe abortion in Malawi*, 19: 37 REPROD. HEALTH MATTERS, p. 133 (2011).

<sup>166</sup> CEDAW Committee, *Concluding Observations: Malawi*, ¶ 36, U.N. Doc. CEDAW/C/MWI/CO/6 (Feb. 5, 2010).

<sup>167</sup> U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Malawi*, ¶ 105.32, U.N. Doc. A/HRC/16/4 (Jan. 4, 2010).

<sup>168</sup> Letter from Elizabeth S. Maguire, President & CEO, Ipas, to Dr. Rajiv Shah, Administrator, USAID (Aug. 23, 2010), available at:

<http://www.thenation.com/sites/default/files/Ipas%20Letter%20to%20USAID%20regarding%20Malawi--Aug%2023%202010.pdf> (last visited Feb. 7, 2012) (“Ipas letter to USAID”).

<sup>169</sup> Id.

<sup>170</sup> USAID letter to Ipas, *supra* note 93.

government counterparts about them. We believe that the Agency is implementing the statutory restrictions in a manner that is consistent with the Obama Administration's commitment to family planning and reproductive health while ensuring compliance with the restrictions.<sup>171</sup>

Under the terms of Dr. Mhango's contract funded by USAID, he was a "technical advisor to the Ministry of Health,"<sup>172</sup> rather than a government official of Malawi. However, public documents show that from 2008 onwards and possibly even during USAID's investigation in 2010, Dr. Mhango was presented as the Director of Reproductive Health in the Ministry of Health.<sup>173</sup> By censoring Dr. Mhango, who as the "Director of Reproductive Health" presumably holds some official responsibility in Malawi related to reproductive rights, from participating in such discussions, U.S. abortion restrictions directly impede and inhibit Malawi's ability to change its abortion laws to comply with its international obligations, including under CEDAW.

#### **IV. Going Forward**

The U.S.'s enormous contributions to foreign assistance have funded commendable and essential initiatives around the world. However, concern that U.S. abortion speech censorship contravenes both the freedom of speech and international law undercuts the important work funded by the U.S.

Foreign governments are becoming aware that where their funds are commingled with U.S. funds, U.S. abortion restrictions also censor their funds: in 2011, Norway became the first country to challenge the legality of the Helms Amendment, in a question posed at the Universal Periodic Review of the United States before the Human Rights Council in Geneva.<sup>174</sup>

On March 4, 2011, the President of the Association of the Bar of New York City, on behalf of approximately 22,000 members, wrote to President Obama and urged the Administration to lift the abortion prohibitions put on all U.S. humanitarian aid for women and girl who survive rape in conflict.<sup>175</sup>

In August 2011, the Global Justice Center, a DNGO that does not receive funding from USAID, coordinated an international "August 12th Campaign" in honor of the anniversary of the Geneva Conventions, which focused on the Helms Amendment. The campaign encouraged key organizations and individuals around the world to send letters to President Obama that ask for

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<sup>171</sup> Id.

<sup>172</sup> Id.

<sup>173</sup> See for example Countdown to 2015: Development and retention of the Health Workforce in Malawi (Apr. 2008), [http://www.countdown2015mnch.org/documents/presentations/20080418\\_chisalemhango-malawi.pdf](http://www.countdown2015mnch.org/documents/presentations/20080418_chisalemhango-malawi.pdf) (last visited Feb. 7, 2012); The UN Secretary General's Global Strategy for Women and Children's Health (Jan. 2011), [http://www.sph.unc.edu/images/stories/academic\\_programs/mch/documents/appendix2\\_lop\\_atlanta.pdf](http://www.sph.unc.edu/images/stories/academic_programs/mch/documents/appendix2_lop_atlanta.pdf) (last visited Feb. 7, 2012); or Carrie Auer, Speech at the Launch of the State of the World's Mothers Report (May 2010), [http://www.unicef.org/malawi/MLW\\_officialstatement\\_launchsowm10.pdf](http://www.unicef.org/malawi/MLW_officialstatement_launchsowm10.pdf) (last visited Feb. 7, 2012).

<sup>174</sup> U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: United States of America*, ¶ 228, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011).

<sup>175</sup> Letter from Samuel W. Seymour, President, Association of the Bar of the City of New York, to President Barack Obama (Mar. 4, 2011), available at: <http://www.nycbar.org/pdf/report/uploads/20072069-LettertoObamaReNon-DiscriminatoryMedicalCaretoWomen.pdf> (last visited Feb. 9, 2012).

him to lift the abortion restrictions on humanitarian aid for girls and women raped in armed conflict via an Executive Order. Over fifty organizations, including Amnesty International USA, Physicians for Human Rights, the Center for Reproductive Rights, and V-Day, as well as numerous individuals, signed letters to President Obama. President Obama, by issuing an executive order removing the application of abortion speech restrictions to humanitarian aid, can unilaterally reduce the scope of the Helms Amendment so that, at the very least, it allows pro-choice speech to reach women and girls who have been raped or who suffer dangerous pregnancies in situations of armed conflict.

Many more voices against the Helms Amendment may not be speaking out, however, wary that speaking out might constitute “motivating” abortion under the Helms Amendment.

Although an Executive Order by President Obama would be an immediate relief, the “motivate” provision of the Helms Amendment must be repealed altogether in order to comply with domestic law and international treaty obligations. Without an uninhibited conversation about abortion rights, there is no uninhibited democracy, democracy development, or safe medical care for women. As George Washington once said to the officers of his army, “freedom of Speech may be taken away, and dumb and silent we may be led, like sheep, to the Slaughter.”<sup>176</sup>

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<sup>176</sup> George Washington, Speech to Officers at Newburgh (Mar. 15, 1783) available at: <http://www.pbs.org/georgewashington/multimedia/arrr/newburgh.html>.