

False Choices: Sacrificing Equality to Get CEDAW

DRAFT VERSION

November 9th 2007

The U.S. Version of CEDAW is a Dangerous Perversion of Women’s Rights

The United States signed CEDAW in 1980, but it has not yet ratified the Convention. Proponents of ratification argue that the U.S.’ failure to ratify CEDAW hurts American efforts, by both the government and private organizations, to promote human rights. Although the Global Justice Center agrees, we urge organizations committed to promoting true gender equality not to support ratification accompanied by the sort of “understanding” added by Senator Helms in 1994.¹ The compromises made by the addition of the Helms “understanding” sacrificed the core concepts of CEDAW. This dangerous “understanding” resurrects the discriminatory fallacy of biology as destiny and promotes the agenda of those who would find laws severely restricting or even criminalizing abortion to be perfectly compatible with “women’s rights” and “equality.”

The Helms “understanding” states, “nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning.”² To this day, the U.S. State Department “understands” that “there is international consensus that the term ‘sexual and reproductive health’ does not include abortion or constitute support, endorsement, or promotion of abortion or the use of abortifacients.”³ These “understandings” are not only legally inaccurate but undermine the global struggle for women’s equality.

CEDAW is not “Abortion-Neutral”

Although the treaty does not explicitly mention abortion – thus the assertion that CEDAW is “abortion-neutral” – it does recognize that women have the right “to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them

¹ I put the word “understandings” in quotation marks because CEDAW does not recognize interpretation of the Convention by understanding; the Committee says it will categorize statements by ratifying party according to their effect, rather than their given title. Report of the Committee on the Elimination of Discrimination against Women, Supplement No. 38 A/53/38/Rev.1, p 47 (1998). *available at:* <http://www.un.org/womenwatch/daw/cedaw/reports/18report.pdf> (“While it is not always easy to distinguish a declaration from a reservation, any statement, irrespective of its title, which seeks to modify the legal effect of the Convention in respect of a State party, will be considered by the Committee to be a reservation. The Committee has noted, in this regard, that a number of States parties have entered general declarations which constitute, in fact, general reservations.”)

² S. Rep. No. 103-38, at 52 (1994)

³ U.S. Dept. of State, *Commission on the Status of Women: U.S. Explanation of Position for Resolution on Forced Marriage of the Girl Child*, March 9, 2007. *available at:* <http://www.state.gov/p/io/81897.htm>

to exercise these rights.”⁴ Although in a perfect world, these rights might be protected fully by comprehensive sexual education and widely-available birth control, in the real world abortion is sometimes the necessary means through which these rights are exercised.

It is with this reality in mind that the Committee on the Elimination of All Forms of Discrimination Against Women has made clear that abortion rights are implicated by CEDAW. The Committee’s comments on abortion focus on women’s equal right to adequate comprehensive health care⁵ and the negative consequences to women when such care is not available.⁶ While the Committee has criticized the use of abortion as a substitute for sexual education and accessible birth control,⁷ it has consistently recognized that abortion must be a safe, legal and accessible option if women are to fully exercise their rights to health care, autonomy, and equality.

International Law as a Legal Source to Promote Access to Safe Abortion

On May 10, 2006 the Constitutional Court in Colombia struck down Colombia's total criminalization of abortion on the grounds that it violated women's rights under a "bundle" of laws, particularly CEDAW. The Court recognized that “CEDAW has established that a woman’s right to reproductive autonomy is infringed upon by obstacles to her access to the means of controlling her fertility.”⁸ The Court went on to declare, again based on CEDAW, that “laws criminalizing medical interventions that specially affect women constitute a barrier to women’s access to needed medical care, compromising women’s right to gender equality in the area of health, and amounting to a violation of states’ international obligations to respect those internationally recognized rights.” The Court also linked access to abortion to the right to life, recognizing that restrictive abortion laws lead to increased maternal mortality rates. Lawyers in other

⁴ Convention on the Elimination of all forms of Discrimination Against Women, G.A. Res. 180, U.N. Doc. A/34/180 (1980), 19 I.L.M. 33, Art. 16(e) (entered into force Sept. 3, 1981). [hereinafter CEDAW]

⁵ Committee on the Elimination of All Forms of Discrimination Against Women, General recommendation No. 24 -- twentieth session, 1999, article 12 - women and health, para 14. (Discrimination against women includes “laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”)

⁶ Committee on the Elimination of All Forms of Discrimination Against Women, General recommendation No. 24 -- thirteenth session, 1994, article 21 – equality in marriage and family relations, para 21. “The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women's lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children.” *See also*: Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Namibia. 12/08/97. A/52/38/Rev.1, para 111. “The Committee was also concerned about the high number of illegal abortions in Namibia and the high rate of maternal mortality, and the fact that the inadequacy of the existing law on abortion contributed to the problem.”

⁷ Concluding comments of the Committee on the Elimination of Discrimination Against Women: Greece. CEDAW/C/GRC/CO/6, para. 26 (February 2, 2007). “The Committee recommends that the State party implement programmes and policies aimed at providing effective access for women, including minority women and adolescent girls, to health-care information and contraceptives, and to family-planning services, thus avoiding the need for women to resort to abortion as a method of birth control.”; General recommendation No. 24, *supra* note 5, para 31 (c). (“State Parties should also prioritize the prevention of unwanted pregnancy through family planning and sex education.”)

⁸ Decision C-344/2006, *available at*: http://www.womenslinkworldwide.org/pdf/pub_c355.pdf.

countries are following Colombia's lead and using the decision along with CEDAW to challenge restrictive abortion laws.⁹

The recent Colombian decision is part of a global legal trend to recognize control of one's reproductive life as critical to women's human rights. The Beijing Platform for Action adopted in 1995 at the United Nations Fourth World Conference on Women called on all governments "to deal with the health impact of unsafe abortions as a major public health concern".¹⁰ Regional human rights organs with founding documents drafted around the same time as CEDAW, such as the European Court of Human Rights, have located the right to abortion in articles similar to those found in CEDAW.¹¹ More recent regional human rights documents explicitly recognize that the right to control one's fertility requires at least the legalization of emergency and therapeutic abortion. For example, the Protocol to the African Charter on the Rights of Women in Africa requires State Parties provides for, in addition to education on sexual health, access to birth control and adequate pre- and post-natal care, the right to abortion "in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."¹²

The Helms "Understanding" Undermines Women's Equality

Supporters of women's rights who promote an "abortion neutral" interpretation of CEDAW do so because they believe that the most important goal is for the U.S. to ratify CEDAW, since our failure to do so decreases the U.S.'s ability to advocate for greater respect for human rights and because our ratification will increase respect for CEDAW – and woman's rights – worldwide. While the Global Justice Center appreciates those concerns, we fundamentally disagree with this strategy. Ratification of CEDAW with the "understanding" that it is abortion-neutral will have the opposite effect – instead of promoting gender equality it will undermine it.

The U.S. is criticized for failing to ratify CEDAW – one of only eight U.N. member countries who have not done so – but ratification with the proposed "understandings" would not improve the situation. While there are many state parties that have ratified the convention with troubling, and often much broader, reservations, those ratifications are rightly seen as problematic. Rather than increase respect for women's

⁹ A suit has been filed challenging Nicaragua's Law 603 (2006), criminalizing abortion in all circumstances.

¹⁰ Platform for Action, Forth World Conference for Women, Beijing, China (1995).

¹¹ See, e.g., *Tysiac v. Poland*, decided March 20, 2007 (E.C.H.R., app. 5410/03) [Vagueness of criminal code on when an exception was authorized had a chilling effect on doctors' willingness to perform even legal and medically indicated abortions and resulted in a denial of plaintiff's right to respect for her private life and her physical integrity guaranteed by Art. 8 of the European Convention on Human Rights.]

¹² Protocol to the African Charter on the Rights of Women in Africa, Art. 14(c), July 11, 2003. *available at*: <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>

rights, the Senate’s “understanding” would encourage those countries that want to ratify human rights treaties without actually modifying any of their laws. All of us working to promote human rights are aware of how other countries point to actions by the U.S. when avoiding obligations under international law. Ratifying CEDAW with the Helms “understanding” would be a gift to those who oppose access to safe, legal abortion and undermine the efforts of women around the globe who are using CEDAW to advocate for their reproductive rights.

An Abortion-Neutral CEDAW Would Promote the Anti-Choice Global Agenda

The Helms “understanding would not only encourage discriminatory interpretations generally, it would actually *promote* a false and dangerous view of the relationship between abortion and family planning. The “understanding” is an attempt to divorce abortion from all other reproductive health services by asserting that countries can provide adequately for women’s sexual and reproductive health without providing any access to abortion under any circumstances. The very phrasing of the Helms “understanding” - “abortion as a method of family planning” - is a well-known euphemism that has a legal definition under case law and under USAID regulations interpreting the Mexico City Policy and the Helms amendment.¹³ Under the Mexico City Policy, better known as the Global Gag Rule, the U.S. government has held itself out as a generous funder of women’s health services worldwide while the actual effect of the policy has been to drastically reduce the availability of all types of reproductive services around the world.

Already, the push for ratification has created a paper trail of human rights and women’s rights advocates declaring CEDAW to be “abortion-neutral.” Given that CEDAW explicitly guarantees the right to make decisions about number and spacing of children and “to have access to the information, education and means to enable them to exercise these rights,” Article 16 (e) would only “not reflect any right to abortion” if it were possible to guarantee that women would always have the means to exercise their right to control the number and spacing of their children without recourse to abortion. This sort of semantic three-card monty is reminiscent of the present administrations efforts to redefine “torture” – efforts that have been frighteningly effective in undermining condemnation of torture and encouraging its practice.

¹³ *Ctr. for Reprod. Law v. Bush*, 304 F.3d 183, 188 (2nd Cir. 2002) (The court found that the clause in USAID’s family planning assistance agreements and contracts which prohibited the performance or promotion of “abortion as a method of family planning” meant that “in order to receive U.S. government funds, a foreign NGO may not engage in *any* activities that promote abortion.” In other words, *any* abortion for *any* reason is *always* “as a method of family planning.”)

In countries where women’s reproductive rights are not protected by domestic law, CEDAW may be their best hope to secure recognition of their right to control over their reproductive lives. Throwing the weight of the United States government behind an abortion-neutral reading of CEDAW undermines its usefulness in an area that is literally of life-or-death importance to women around the world. While we strongly advocate for recognition of the rights explicitly mentioned in CEDAW – suffrage, freedom from gender-based violence, the right to own and inherit property, equal rights within marriage and with regards to one’s children – they should not blind us to the necessity of guaranteeing to women the full range of family planning options needed to ensure not only their autonomy but also their survival.

The United States Needs CEDAW – *Without Reservations*

The Helms “understanding” is a relic of earlier debates on CEDAW; we should use the recent shift in the political climate to push for ratification of CEDAW without it. Rather than distancing ourselves from what the CEDAW Committee has had to say about abortion, women’s rights groups should be acknowledging and owning those statements, framing the discussion of abortion, as the Committee does, in terms of women’s health, safety and access to the means of personal development. In this way we can work to alter the legal and popular debate surrounding reproductive rights in this country and build an equality-based analysis of abortion access. The United States Supreme Court says that the government can choose to exclude medically indicated abortions from the health services it would subsidize without violating the Equal Protection Clause.¹⁴ The CEDAW Committee calls on State Parties to “eliminate discrimination against women in their access to health care services, throughout the life cycle.”¹⁵ Which definition of equality is better for women?

Reproductive freedom is central to women’s ability to exercise their rights as human beings, yet access to safe and legal abortion is denied or endangered in too much of the world – including here in the US. CEDAW has a major role to play in the fight for women’s equality; we cannot afford to reinterpret it into a tool for the anti-choice agenda. Rather than rallying around the Trojan horse that is the current US version of CEDAW, women’s rights advocates need to fight for the integrated and complete vision of gender equality that the actual Convention presents. If that means that the US does not ratify CEDAW in 2007, it will be unfortunate, but preferable to ratifying a perverted version of the treaty that actually undermines women’s equality and safety.

¹⁴ *Harris v. McRae*, 448 U.S. 297, 322 (1980). (“For the reasons stated above, we have already concluded that the Hyde Amendment violates no constitutionally protected substantive rights. We now conclude as well that it is not predicated on a constitutionally suspect classification.”)

¹⁵ General recommendation No. 24, *supra* note 5, para 2.