

SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS FROM THE PERSPECTIVE OF
INTERNATIONAL LAW

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I would like to thank Dr. Walley and MaterCare International for convening this important conference, and for inviting me to be a speaker. I hope that you will find my remarks to be useful.

It is by now a commonplace assertion that sexual and reproductive health and rights have become universally recognized components of international law. The United Nations Population Fund, for instance, states emphatically that, “the international community has agreed that reproductive choice is a basic human right.”

But if one were to search for the source of this supposed international law, this “basic human right,” in the actual texts of the major international covenants and treaties, one would find no such language – and certainly no mention of the most contentious aspect of reproductive rights, abortion. And if one were to search for the source of this supposed international law in customary legal practice, one would find nothing resembling this uniformity among states.

So what is going on? The UN Population Fund and its many allies hope that the very assertion of rights will serve as the legal foundation for their own particular policy preferences; in fact, with such statements, these actors hope to circumvent the ordinary and laborious process of creating international law. Advocates for the recognition of reproductive and sexual rights have decided to make these claims for a fundamental reason: binding (or hard) international law – be it treaty law or customary law – is almost entirely silent on these issues, and this silence reflects the lack of necessary international consensus, even after prolonged and extensive efforts to expand binding international law in this direction. And so advocates employ this alternative strategy, a strategy centered upon what has become known as “soft law.”

Soft laws, as the name implies, are international standards, statements, and other instruments, such as resolutions of the UN General Assembly, that do not impose legally binding obligations on nations. Why is soft law used? In this strategy, soft law is meant to create the impression that the corresponding hard law already exists. In essence, this strategy amounts to a claim of settled international law in the face of unsettled international debate. But such logic places the genesis of international legal obligations exactly backwards: binding international law is meant to reflect international consensus among nation states – to codify such consensus – not to guide or create it, and certainly not to substitute for it.

Treaties and the Status of Reproductive and Sexual Rights and Health

Treaties recognize formal, explicit state consent through the drafting and ratification of texts. Even the most cursory analysis of these documents shows the lack of sexual and reproductive rights language. In fact, the term “reproductive rights” entered the lexicon in the

1980s, the term “sexual rights” in the 1990s, years, even decades, after most of the treaties themselves had been negotiated. Only in the most recent treaty, the Convention on the Rights of Persons with Disabilities, does the text mention sexual and reproductive health in any context. But this language was only accepted by the member states after the Chairman of the drafting committee repeatedly reassured concerned delegations that no new international rights would be created by such language. The purpose of the text is solely to extend national-level rights equally to people with disabilities.

The only other language that appears relevant at all is found in the Convention on the Elimination of all forms of Discrimination Against Women and the Convention on the Rights of the Child; both mention family planning. And that is it. Tellingly, the word abortion is not even mentioned once, in any context. Over the many decades of drafting the major international human rights treaties, the world community has never seen fit to address the issue of abortion in any manner whatsoever.

In fact, not only is explicit language to support these claims virtually nonexistent, other language, language that could be interpreted as antithetical to the reproductive and sexual rights agenda, is present in relative abundance. So, for instance, many of the treaty documents recognize that the family is the fundamental group unit of society, and that there is an inherent right to life. The Convention on the Rights of the Child even goes so far as to state that the child deserves special protection, *before* as well as after birth.

Interestingly, advocates of sexual and reproductive rights agree with this assessment of the treaty documents. The Center for Reproductive Rights (CRR), perhaps the most important legal institution working to expand international law in this way, acknowledges that there are profound “gaps” in the law relating to reproductive rights, stating flatly that “there is no binding hard norm that recognizes women’s right to terminate a pregnancy.” However, CRR asserts that, despite the gaps, advocates must nonetheless “argue that such a right exists.” Here again, is the soft law strategy.

Treaties and Soft Law

The soft law strategy was first devised at a 1996 meeting, called “the Roundtable,” hosted by three United Nations agencies: the UN Population Fund, the office of the UN High Commissioner for Human Rights, and the UN Division for the Advancement of Women. These three groups: the international community’s chief agencies for population control, human rights, and the promotion of radical feminism, respectively, joined forces at this meeting and devised a common strategy.

The goal of the meeting was as simple as it was audacious: claim that sexual and reproductive rights were necessary (although unmentioned) elements of the host of already existing human rights. As the official summary of the conference puts it, “A human rights approach is premised on the view that reproductive and sexual health rights are integral to recognized human rights—in particular, to life, liberty and personal security, and the highest attainable standards of health.”

What does this mean, that reproductive rights are “integral” to already existing human rights? It means that they would somehow “find” these new rights, to use the Center for Reproductive Rights’ own language, “embedded” or “grounded” in the old: How would they accomplish this feat, of finding new rights embedded in the old? They would do so through soft law, most importantly, through the work of the treaty monitoring bodies. Each of the major treaties has a monitoring body, or compliance committee, that is charged with monitoring the progress of the states that are parties to the treaties. It is here that the strategists at the Roundtable found their opening, their chance to use soft law, here in the form of the recommendations and interpretations of the compliance committees. It was really very simple, first, the Roundtable participants convinced the treaty bodies that the texts should be evolving, or open to reinterpretation, by the committee members, themselves. And, second, they provided the committee members with the specific reinterpretations they favored. Most importantly, the committees were taught how to find rights such as a universal right to abortion-on-demand in the various rights already enumerated in treaty documents, such as the right to life. And they found this right wherever they looked for it. According to the official report of the Roundtable: “The right to equality before the courts and before the law could encompass laws which imprison women for certain offenses while men go free, as in the case of abortion and prostitution, or which restrict women’s access to health and family planning services by the operation of spousal consent requirements... The right to freedom of movement could extend to the consideration of laws which prohibit women from traveling abroad to seek an abortion ... The right to protection of privacy and home could include consideration of women’s right to make their own decisions about pregnancy and abortion ... The right to freedom of expression and to seek, receive, and impart information protects the freedom of women of all ages to receive and impart information about health services, including contraception and abortion.” Breathtaking.

The majority of treaty bodies agreed to the strategy, and they have followed this agenda now for over a decade. In the last ten years, the six treaty bodies have pressured at least sixty nations to legalize or increase access to abortion. Six nations were pressured by two committees, and ten were pressured twice by the same committee; all of this, again, despite the fact that the very word abortion cannot be found in any treaty document. And the drumbeat continues. Just two weeks ago, Nicaragua was repeatedly questioned and criticized by the Human Rights Committee, the committee that monitors compliance to the International Covenant on Civil and Political Rights, because it had the temerity to reinforce its protection of the unborn in 2006. At the same time, the Committee to monitor compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was pressuring El Salvador, Myanmar, Uruguay and Portugal to either scrap pro-life laws or to expand access to abortion. Again, both committees acted in this way despite the fact that neither of their treaties mentions the word abortion.

Customary International Law and the Status of Reproductive and Sexual Rights and Health

Beyond treaty documents, the only other type of binding international law is customary international law. Customary law results from general, uniform and consistent state practice driven out of a sense of legal obligation. This sense of legal obligation is a necessary condition of such law’s creation.

Sexual and reproductive rights do not constitute customary international law because the reproductive health concept has not been reflected in uniform state conduct. Instead, states practice a wide variety of domestic policies, ranging from extensive governmental involvement and regulation of reproductive health, to minimal state involvement in reproductive health, to governmental prohibitions against certain types of reproductive health-related services. To name a few examples: adolescent access to reproductive services, state funding for maternal health, and the legal status of abortion services, all exhibit wide variation among nations. For example, on the contentious issue of abortion, there is simply nothing approaching uniform state practice. Over forty states proscribe the practice entirely or permit it only to save the life of the mother. Another twenty states are slightly more permissive towards abortion, also permitting abortions in the case of rape or incest. Some states are more permissive yet, also allowing women to have abortions based on socioeconomic considerations. Much of the rest of the world shares the United States' system and permits what is essentially "abortion on demand." Nearly all countries that permit abortion restrict its availability based on various gestational periods in which the abortion would occur. Meanwhile, the Peoples Republic of China enforces a one-child per couple policy, implemented through forced abortions and sterilizations. Thus, nothing approaching uniform state practice exists in the realm of sexual and reproductive rights.

Customary International Law and Soft Law

Just as in the case of treaties, however, advocates for international sexual and reproductive rights hope to overcome these deficiencies through the use of soft law. In this case, the soft law is to be drawn mainly from the outcome documents of recent international conferences; the language in these soft law documents is said to reflect the existence of customary law. Every time it is said that the Cairo Conference agreed to a particular expansion of rights, or the Beijing Conference called for states to change their laws, you are seeing the soft law strategy at work, this time by creating the impression that customary law exists favorable to reproductive rights.

But these efforts have proven to be more difficult than anticipated. Perhaps most importantly, almost all attempts to include sexual and reproductive rights language in soft law documents, themselves, have been met with intense resistance from significant numbers of countries. Sexual and reproductive rights language is routinely the most contentious issue at international meetings. In fact, many times, the effort to include such language in soft law documents fails, such as at the 2001-2002 World Summit for Children. Where the language has been included in soft law documents, such language has been carefully circumscribed, and many of the most controversial elements have been left out of the documents, altogether, or explicitly left to the discretion and competence of domestic laws and the national democratic process. Finally, there is no evidence that the term "reproductive health," even when referenced in various documents and reports produced by international bodies, is meant to describe a binding international norm, as distinct from a policy exhortation.

For instance, the "Programme of Action" of the International Conference on Population and Development, held in Cairo, Egypt, advises countries to take steps to protect the "reproductive health" of their female citizens. But the "Programme of Action" also states that the "International Conference on Population and Development does not create any new international

human rights.” And if the text, itself, acknowledges that it does not have a mandate to create new international rights, it simply cannot be used as a source for new international rights (customary or otherwise).

In fact, none of the various conferences held in the 1990s was authorized to foster the creation of international law. In general, “reproductive health” has not been precisely defined, its very content continues to be debated (with the question of whether it includes abortion being particularly disputed), and the role of states in providing or ensuring access to reproductive health services remains very much in contention. There is simply no evolving customary international law concerning sexual and reproductive rights.

In general, soft law is useful to advocates because it is so much easier to “make” than hard law. The burgeoning world of multilateral meetings provides immense opportunities for statements, policies, recommendations, resolutions, etc. And since soft laws are by definition nonbinding, nations are more likely to compromise, to accede to statements that they would not consent to in treaty documents. Also, soft laws are often declaratory in nature, symbolic statements, broad enough to create a foundation for policies that would not be accepted by name, such as a right to abortion. Finally, the multiple avenues for soft law creation provide an advantage to the persistent, the well-funded, and those well-versed in the intricacies of both international law and multilateral procedures, in this case, the advocates for sexual and reproductive rights.

But the temptation to shorten or even circumvent the process of international law creation out of a certainty of one’s rectitude should be resisted at all costs. The propagation and protection of the regime of international law depends upon the level of trust of member states. If member states believe that the specific commitments they have ratified (and therefore accepted into domestic law) can expand, and expand in a manner without national oversight, they may grow distrustful of the entire regime of international law. It is therefore in the best interests of the UN system, and all proponents of a vibrant system of international law, to acknowledge that international law should only reflect explicit consensus between and among national actors.

As we have seen, there is presently no international right to sexual and reproductive health. The strategies outlined above, strategies to make states think there is, share some characteristics, starting with a fundamental level of dishonesty. For instance, one important reproductive rights group, the International Women’s Health Coalition, admits that, “The international conference and human rights documents...do not explicitly assert a woman’s right to abortion, nor do they legally require safe abortion services as an element of reproductive health care. Moreover, the ICPD [Cairo] and FWCW [Beijing] agreements recognize the wide diversity of national laws and the sovereignty of governments in determining national laws and policies.” But this reality should not stop the effort to convince the world of the opposite conclusion: “Despite these qualifications, however, the conference documents and human rights instruments—if broadly interpreted and skillfully argued—can be very useful tools in efforts to expand access to safe abortion.” The Center for Reproductive Rights even praises “the stealth quality” of this strategy; “we are achieving incremental recognition of our values without a huge amount of scrutiny from the opposition.”

Also, there is a concerted effort to separate children from their parents. The International Planned Parenthood Federation (IPPF), like CRR and IWHC, was present at the Roundtable. IPPF has been distributing a brochure to children worldwide informing them that the Convention on the Rights of the Child (CRC) has established for them an international right to abortion, as well as complete sexual autonomy from their parents. Because children have a right to health, the brochure states, “No one should turn you away or stop you from receiving services, or demand that you get someone else’s permission first (e.g. the permission of a parent).”

And it must be said that these forces are gradually succeeding. One by one, nations in the developing world learn what they have to say and what they have to do in order to stay in the good graces of the United Nations. In a little over ten years, the treaty bodies have been able to redefine terms and change the treaties’ original meanings with impunity. Treaty bodies continue to ask nations to provide information on policies not covered by the treaties, and countries have largely complied. In this brief period of time, states have felt pressured to change their laws, and some have done so.

Admittedly, this is a bleak picture. Back to hope. How much hope should we have that we can turn back the soft law efforts? Well, I had more hope before the outcome of this week’s election in the United States. There are three separate forces, sometimes allied, sometimes not, that have resisted the rising tide: Muslim countries, the United States, and the Holy See. Muslim countries are strong because they are usually united, but they are ultimately unreliable, since they seek to defend unborn life less out of recognition of the inherent dignity of all human beings, and more out of an effort to defend their patriarchal social systems. For the past eight years, the United States has been strong, because it cannot be bullied, it cannot be held hostage for international development funds, and it hasn’t even ratified most of the conventions, so it is not party to them. But the United States just turned 180 degrees; President-elect Obama has already pledged to undo all of the pro-life work accomplished by the Bush administration on the international stage. Not only will that mean the loss of pro-life leadership, it will also mean that the United States may very well place itself at the very mercy of these same compliance committees, by ratifying the treaties and by appointing domestic judges who will accept the interpretations of these committees into US domestic law.

So is there any hope, at all? Of course. The pro-life non governmental organizations in New York and Geneva will not give up, and we will of course alert the world to what is happening. But more than that, the Holy See still stands. It may at times stand alone, but it still stands. How fitting is it, in a way, that modernist philosophies come and go, but still the Holy See remains, proclaiming the inherent dignity of all human life, in and out of season? After all, the very Roundtable strategy I have discussed here today was developed in the wake of and in response to the pro-life victories orchestrated by Pope John Paul the Second at Cairo and Beijing. The Holy See will seek the restoration of true international law, as Pope Benedict announced in his address to the United Nations, as an international law grounded upon a universal respect for the dignity of the person. And how fitting does it happen to be that I can proclaim this truth today, with confidence, in the very shadow of St. Peter’s, itself?