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Abbreviations

ACHR	American Convention on Human Rights
CEDAW	Committee on the Convention on the Elimination of All Forms of Discrimination against Women
ICESCR	International Covenant on Economic, Social and Cultural Rights
IACHR	Inter-American Commission on Human Rights
ECHR	Convention for the Protection of Human Rights and Fundamental Freedom (European Convention on Human Rights)
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
FGM	Female Genital Mutilation
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICPD	International Conference on Population and Development (Cairo, 1994)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNFPA	United Nations Fund for Population Activity
WHO	World Health Organization

1 Introduction

In 2002, the Center for Reproductive Rights, the Latin American and Caribbean Committee for the Defense of Women's Rights and the Counseling Center for the Defense of Women's Rights filed a complaint with the Human Rights Committee (HRC) on behalf of a young Peruvian woman, who was compelled by state officials to carry an anencephalic foetus to term. The petitioner was 17 years old and fourteen weeks pregnant when doctors at a public hospital in Lima diagnosed the foetus with anencephaly, a fatal anomaly where the foetus lacks most or all of a forebrain. The woman decided to have an abortion but was denied access to the procedure by the public hospital's director. After an anencephalic infant was born, she was forced to breast feed the newborn for four days before its inevitable death. The Center for Reproductive Rights and its partners said that the pregnancy severely compromised the woman's life, physical and psychological health. They asked the HRC to find that Peru violated the petitioner's rights, which related to reproductive health and choice guaranteed under the International Covenant on Civil and Political Rights (ICCPR), particularly violated right to be free from cruel, inhuman and degrading treatment, and recommend that the government compensate her for her severe suffering.¹

As Cook notes, "women's ability to obtain abortion services is affected by the prevailing law in a particular country and how it is interpreted and applied."² The legality and availability of abortion, sterilization or some other reproductive health and choice matters still much depend upon state's domestic law, which may imposes various restrictions upon them regardless of women's will. Even in the states where abortion is permitted in some circumstances, the relevant law is often oversimplified, "unwritten"

¹ See *UN Human Rights Committee Petitioned with Reproductive Rights Case*, available at http://www.reproductiverights.org/pr_02_1126peru.html (last visited on 21 November 2004).

² Rebecca J. Cook, Bernard M. Dickens, and Mahmoud F. Fathalla, *Reproductive Health and Human Rights*, (Clarendon Press, Oxford, 2003) p.345.

“ambiguously worded”.³ As a result, “health care providers are reluctant to provide those services, even though women might be legally entitled to them”, which sometimes leads to tragedy just like what happened in the above case, even leads to death of the woman.⁴

It seems that the situation of women with respect to their reproductive health and choice in Peru, is much worse than the above story has reflected. The Concluding Observations issued by the HRC in 2000 reveals that in Peru, abortion continues to be subject to criminal penalties, even when pregnancy is the result of rape; clandestine abortion continues to be the main cause of maternal mortality; and the forced sterilizations has still been practiced.⁵

Unfortunately, the tragedy of Peruvian women is not unique to Peru. The publications of United Nations (UN)’ human rights treaty bodies disclose that women’s dignity, freedom of choice, reproductive health, even life, have still been undermined or threatened in the twenty-first century, by unsafe abortion, lack of family planning information and services, lack of medical services, governments’ coercive measures of population control, traditional harmful practices and so forth, in many other countries. ⁶

Motherhood is constituted as an essential identity for women. Does a woman have a fundamental right to choose to be a mother or not to be, and whatever she chooses, she has the right to access to adequate knowledge and services to do so? If she does, does the international human rights law, particularly the ICCPR, safeguard such a right? In the above case, the petitioner filed a complaint to the HRC, which was established pursuant to article 28 of the ICCPR. It appears the first case with regard to women’s reproductive health to be brought to the attention of the HRC.⁷ Can the

³ Cook, *supra* note 2, p. 345.

⁴ *Ibid.*

⁵ See UN, the HRC, Concluding observations on Peru, (15 November 2000), para. 20, UN Doc. CCPR/CO/70/PER.

⁶ See UN, the HRC, Concluding Observations on the states parties reports.

⁷ See Dina Bogecho, ‘Putting It to Good Use: The International Covenant on Civil and

ICCPR be used to advance women's right to reproductive health and choice? Focusing on women's prospective role as a mother, this thesis is going to address these questions.

The thesis is organized into two parts. The first part briefly provides an outline on the development of women's reproductive rights under the international human rights law and the scope and content of those rights. The second part examines how the ICCPR can be used to safeguard women's reproductive rights. In the latter part, several specific rights guaranteed under the ICCPR are discussed to find to what extent those rights can be used to advance those rights and for protecting them what obligations the states parties should undertake.

2 International Protection of Women's Reproductive Rights

2.1 *The Development of Women's Reproductive Rights*

Women's reproductive rights were not spelled out in the international human rights documents until 1990s. The development of those human rights, by and large, fell into two relatively successive phases: (1) development brought by the international human rights instruments from 1940s to 1980s; and (2) development brought by the international conferences in 1990s. In the first phase, several international human rights treaties lay a foundation of the international protection for women's reproductive rights as a whole. In the second phase, the women's reproductive rights have been unprecedentedly developed and obtained a worldwide recognition.

2.1.1 Development Brought by the International Human Rights Instruments

In response to World War II and the Nazi regime, the international community devoted to the international protection of human rights and enacted various human rights instruments. The signing of the Charter of the United Nations was a significant step in bringing human rights more firmly with the sphere of international law. ⁸ It sets forth the basic obligations of its member states, one of which is to promote universal "respect for, and observance of, human rights and fundamental freedoms for all".⁹ After the establishment of the UN, from 1940s to 1990s, The Universal Declaration of

⁸ See A M Bolin Pennegard, 'Overview over Human Rights-the Regime of the UN', Gudmundur Alfredsson, Jonas Grimheden, Bertram G. Ramcharan and Alfred de Aayas (eds), *International Human Rights Monitoring Mechanisms*, (Martinus Nijhoff Publishers, 2001) p. 23.

⁹ The Charter of the United Nations, signed on 26 June 1945, San Francisco, entered into force on 24 October 1945. The words were quoted from article 62 (2) of the Charter of the United Nations.

Human Rights (UDHR)¹⁰ and other three international human rights treaties protecting women's reproductive rights have been adopted under the auspices of the UN. These are, the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹¹, and the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention).¹²

The UDHR

The impact of the UDHR in the history of international human rights law, needless to say, is significant. As the leading document in the international human rights law, although not legally binding, its influence on subsequent standard-setting activities is tremendous. Some of the provisions within the UDHR were or have become norms under customary international law.¹³ Presently, few deny that the UDHR is a normative instrument that creates legal obligations for the UN member states.¹⁴

The UDHR establishes the foundation for the international protection of reproductive rights through the enumeration of specific rights, which include: (1) the right to a standard of living adequate for the health and well-being, including the right to special protection for a woman in her role as a mother;¹⁵ (2) the right to privacy;¹⁶ (3) the right to seek, receive and impart information; (4) the right to marry and found a family on the basis of equality;¹⁷ and (5) the right to freedom from discrimination on the basis of

¹⁰ The UDHR was adopted by the General Assembly of the UN, resolution 217 (III) of 10 December 1948.

¹¹ The ICESCR, adopted and opened for signature, ratification and accession by the General Assembly of the UN, resolution 2200(XXI) of 16 December 1966, entered into force on 3 January 1976.

¹² The Women's Convention, adopted by the General Assembly of the UN, resolution 34/80 of 18 December 1979, entered into force on 3 September 1981.

¹³ See Louis Henkin, et al., Human rights 305 cmt. D (1999) p. 322.

¹⁴ See Thomas Busrgental, *International Human Rights in a Nutshell*, West Publishing Co, 1995) p. 33.

¹⁵ Article 25 of the UDHR, *see supra* note 10.

¹⁶ Article 12 of the UDHR, *ibid*.

¹⁷ Article 16 of the UDHR, *ibid*.

sex and gender.¹⁸ The scope and meaning of these fundamental human rights listed in the UDHR were further elaborated upon in the subsequent human rights treaties.

The ICCPR

Just as its name implied, the ICCPR deals in particular with what are typically referred to as civil and political rights, such as the right to a fair trial, the right to security and liberty and so on. It also deals with women's rights with respect to family and reproductive self-determination. The article 23 (1) and (2) of the ICCPR states that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State" and that the "right of men and women of marriageable age to marry and to found a family shall be recognized." The ICCPR also protects the right to life, the right of privacy, the right to liberty, and the right to information, which the rights to reproductive health and choice directly relate to. Those rights and the relationship between them and women's reproductive rights will be discussed in detail in the next part.

The ICESCR

In contrast to the ICCPR, the ICESCR has been expected to safeguard economic, social and cultural rights. The ICESCR, in its article 10, demands states that "special protection should be accorded to mothers during a reasonable period before and after childbirth...". It also recognizes that every person has the right to the "enjoyment of the highest attainable standard of physical and mental health."¹⁹ In order to achieve the full realization of this right, the ICESCR states that steps to reduce the "stillbirth-rate and infant mortality and for the healthy development of the child" should be taken by the State. These provisions implicitly encompass the right of a woman to health services and information to prevent unwanted

¹⁸ Article 2 of the UDHR, *ibid.*

¹⁹ Article 12 of the ICESCR, *see supra* note 11.

pregnancies that may endanger the woman's physical and mental health. 20

The Women's Convention

In those early human rights treaties, women's reproductive role, resulting in "a host of discriminatory practices which originate from the treatment of women as instruments for childbearing and childrearing", "it was as childbearers and childrearsers through the protection of motherhood."²¹ It is the Women's Convention that has firmly established that the human rights of women included all rights--civil, political, economic, social and cultural, undoubtedly including reproductive rights.²² Article 16 (1)(e) of the Women's Convention reinforces women's right to reproductive choice, which has been first put forward in the First International Conference on Human Rights, by the language that "[s]tates parties...ensure, on the basis of equality of men and women . . . [t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights." With regard to the right to reproductive health care, the article 12(1) of the Women's Convention requires States to eliminate discrimination against women in access to health care services, including those related to family planning. Clearly, the Women's Convention is one of the strongest articulations of the international guarantee of women's reproductive rights.²³

2.1.2 Development Brought by the UN Conferences in the 1990s

The worldwide recognition of the legal foundations for reproductive rights

20 CRLP Worldwide, *International Family Planning and Reproductive Health: When Will the US Government Fulfill its Commitments?* (2001), available at http://www.crlp.org/pub_bp_intfamplan.html, (last visited on 21 November 2004)

21 Katarina Tomasevski, 'Men and Women, Sex and Gender', Gudmundur Alfredsson, Jonas Grimheden, Bertram G. Ramcharan and Alfred de Aayas (eds), *International Human Rights Monitoring Mechanisms*, (Martinus Nijhoff Publishers, 2001) p. 433.

22 *Ibid*, p. 432.

23 Hannah A Saona, 'The Protection of Reproductive Rights Under International Law: The Bush Administration's Policy Shift And China's Family Planning Practices', 13 *Pacific Rim Law and Policy Journal* (2004) p. 244.

is a pivotal step toward achieving human rights for all women. ²⁴The 1990s is a key decade in articulating the links between the provisions set out in existing human rights treaties and women's reproductive rights by the international community.²⁵ A series of the UN conferences relating to human rights, population, and women's equality were held in the 1990s, which promoted the development of women's reproductive rights. Some the UN conferences ended with the adoption of a document adopted by General Assembly resolutions. Although these documents are not treaties and do not create specific obligations for the states, they reflect the international community's common goals and policies regarding reproductive rights contemporaneous with those binding treaties mentioned above.²⁶ Since "the dynamic principle is particularly relevant to protection of women's reproductive self-determination", the texts of those documents, I may argue, will be very helpful in interpreting the norms concerning women's reproductive rights, which have already existed in the international human rights treaties.²⁷

The International Conference on Population and Development (ICPD) and Cairo+5

The ICPD was held in Cairo, Egypt in 1994 with the participation of 179 states.²⁸ It is a major turning point in the development of women's reproductive rights. It notes for the first time in Programme of Action of the

²⁴ The Center for Reproductive Right, *Reproductive Rights Are Human rights*, the fourth edition, http://www.reproductiverights.org/pdf/pdf_RRHR_0604.pdf. (last visited on 7 November 2004).

²⁵ *Ibid.*

²⁶ Hannah A Saona, 'The Protection of Reproductive Rights Under International Law: The Bush Administration's Policy Shift And China's Family Planning Practices', 13 *Pacific Rim Law and Policy Journal*, (2004) p. 245.

²⁷ Rebecca J. Cook, 'International Protection of Women's Reproductive Rights', 24 *New York University Journal of International Law and Politics*, (1992) p. 665. Cook noted that "[p]articularly relevant to protection of women's reproductive self-determination is the dynamic principle. This provides that a treaty be interpreted in a way that advances its goals in contemporaneous circumstances even if they were not imaginable when the drafters prepared the text for adoption."

²⁸ The ICPD was held from 5-13 September 1994 in Cairo, Egypt. During this two week period world leaders, high ranking officials, representatives of non-governmental organizations and United Nations agencies gathered to agree on a Programme of Action.

ICPD (Cairo Programme of Action), which was adopted by acclamation that:²⁹

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

The experts, in the Conference entitled ‘The International Protection of Reproductive Rights’, held on November 1994, the goal of which was to evaluate how international law could be used more effectively to advance women's reproductive rights in light of the ICPD, appraised the contribution of the ICPD:³⁰

The ICPD had underscored how women's rights to health and reproductive choice are critical to their full participation in society. The ICPD Programme of Action adopted at Cairo by Member States aims to assure women access to a wide range of health services and contraceptive choices. Recognizing that universally recognized human rights norms should be applied to all aspects of population programs, it employs the concept of reproductive rights, which includes the right to attain the highest standard of sexual and reproductive health, as well as the right to make decisions concerning reproduction free of discrimination, coercion, and violence.

In 1999, the General Assembly adopted a plan of action, ‘Key Actions for the Further Implementation of the Programme of Action of the International Conference on Population and Development’, known as the Cairo+5 Key Actions Document and renewed its commitment to the advancement of health and reproductive rights of women and girls.³¹ The Cairo+5 Key

²⁹ Report of the International Conference on Population and Development, U.N. Doc. A/Conf.171/13 (1994), para. 7.3.

³⁰ Copyright (c) 1995 44 *The American University Law Review* (The American University, 1995), p. 963

³¹ UN, Report of the Ad Hoc Committee of the Whole of the Twenty-first Special Session of

Actions Document directed states to enhance their efforts in protecting the human rights of women and girls as expressed in the Cairo Programme of Action.

The Fourth World Conference on Women and Beijing+5

In 1995, the United Nations Fourth World Conference on Women was held in Beijing (Beijing Conference). In Beijing Conference, 189 participating states reaffirmed what had been recognized one year earlier in Cairo. The Beijing Conference incorporated much of the ICPD language on reproductive rights directly into the Platform for Action (Beijing Platform).³² The Beijing Platform provides that “[t]he explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment.”³³ And it goes on to state that “[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”³⁴

Five years later, the representatives from over 180 countries met in New York at a Special Session of the UN General Assembly to review implementation and progress under the Beijing Platform, a meeting known as Beijing+5. At Beijing+5, states again reaffirmed their commitments to women's rights, including reproductive rights, and pledged to take further action to implement the Beijing Platform in an official Review Document.³⁵ The Beijing+5 Review Document focused on various reproductive rights issues including maternal mortality rates, provisions for safe and effective

the General Assembly, UN Doc. A/S-21/5/Add.1, 1 July 1999, available at <http://www.un.org/popin/unpopcom/32ndsess/gass/215a1e.pdf>. (last visited on 21 November 2004).

³²Beijing Declaration and Platform for Action, UN Doc. A/CONF. 177/20 (1995) and A/CONF. 177/20/Add. 1 (1995).

³³ *Ibid*, para. 17.

³⁴ *Ibid*, para. 97.

³⁵ Further Actions and Initiatives to Implement the Beijing Declaration and the Platform for Action, UN Doc. A/S-23/10/Rev.1 (2000).

contraception, and access to reproductive health services for women and adolescents.³⁶ To achieve these goals, states were directed to “review and revise national policies, programmes and legislation to implement” the provisions of the Beijing+5 Review Document.³⁷

The impact of the above UN Conferences on the development of women’s reproductive rights is of significance. However, bearing their nature of political pronouncement in mind, the challenge ahead is still great. The political commitments made by governments in those conferences should be turned into legally enforceable duties to respect reproductive rights.³⁸ Considering that, Cook states:³⁹

There is a growing awareness that national and international interactions to develop favourable practices and norms need to continue over time, and not end with court decisions or the approval of international documents. That is, the Cairo and Beijing commitments need to be seen as a dynamic, ongoing law-making and implementation process through which non-binding commitments become politically, socially, and legally binding.

2.2 The Scope and Content of Women’s Reproductive Rights

As mentioned above, the ICPD set out the context and content of the reproductive rights. According to the language of the ICPD document, the reproductive rights are composed of a clustering of specific human rights around individual’s reproductive interests, which have already recognized in the national law and the international human rights instruments and other relevant UN consensus documents. Moreover, it goes on to enumerate these specific human rights are:⁴⁰

³⁶ *Supra* note 35, para. 79 (f)

³⁷ *Supra* note 35, para. 79 (c).

³⁸ Cook, *supra* note 2, p. 155

³⁹ *Ibid.*

⁴⁰ *See supra* note 29.

- (1) the right to decide freely and responsibly the number, spacing and timing of their children and the right to have the information and means to do so;
- (2) the right to sexual and reproductive health; and
- (3) the right to make decision concerning reproduction free of discrimination, coercion and violence.

Reproductive rights have also known as the rights to reproductive health and choice. It implies that women's reproductive rights are composed of two interdependent and interrelated parts with different emphasis: the rights to reproductive health and the rights to reproductive choice. The above element (1) and (3) are considered as core elements of the rights to reproductive choice, while element (2) is directly referred to the rights to reproductive health.⁴¹

The rights to reproductive choice have also been abbreviated as the right to family planning⁴². Some commentator formulates the core elements of the composite rights to reproductive choice are: (a) the right to found a family; (b) the right to decide the number and spacing of one's children; (c) the right to access to family planning information and education; and (d) the right to access to family planning methods and services.⁴³

The right to sexual and reproductive health includes considerably comprehensive content. In order to understand it, as the ICPD articulates, the definition of reproductive health should be borne in mind:⁴⁴

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

41 See Corinne A. A. Packer, *The Right to Reproductive Choice, a Study in International law*, (Åbo Akademi University, Institute for Human Rights Turku/Åbo, 1996).

42 See Diana D. M. Babor, 'Population Growth And Reproductive Rights in International Human Rights Law', *14 Connecticut Journal of International Law*, (1999) pp.83-121.

43 See *supra* note 41, pp. 43-75.

44 See *supra* note 29, para. 7.2.

implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being through preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.

Cook, stressing the importance of women's reproductive health, considers that the movement of defining and protecting women's reproductive rights is still going on.⁴⁵

Nevertheless, the rights enumerated in the Cairo Programme of Action indicate the basic elements of women's reproductive interests and constitute the core content of reproductive rights. The open definition of reproductive rights implicated in the ICPD reveals the convictions that the rights to reproductive choice, the rights to reproductive health, and the rights to reproductive freedom are essential to control of women's life and to achieve their well-being.⁴⁶

In order to connect traditional human rights norms, which have already been recognized in national laws or international human rights instruments, scholars and organizations attempt to point several human rights norms that can be used to advance national or international protection of women's reproductive rights. The Center for Reproductive Rights, in its *Reproductive Rights Are Human rights* (the fourth edition) lists ten human rights key to

⁴⁵ Cook, *supra* note 2, p. 156.

⁴⁶ See *supra* note 7, p. 235.

reproductive rights.⁴⁷ They are:

- (1) *the right to life, liberty and security;*
- (2) *the right to health, reproductive health and family planning;*
- (3) *the right to decide the number and spacing of children;*
- (4) *the right to consent to marriage and to equality in marriage;*
- (5) *the right to privacy;*
- (6) *the right to be free from discrimination on specified grounds;*
- (7) *the right to be free from practices that harm women and girls;*
- (8) *the right to not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment;*
- (9) *the right to be free from sexual violence;*
- (10) *the right to enjoy scientific progress and to consent*

It seems that the content of some of those ten human rights overlaps to some extent. For example, the right to be free from practices that harm women and girls can be seen as part of the right not to be subjected to torture or other cruel, inhumane, or degrading treatment or punishment. Nevertheless these human rights, which have been recognized in the national constitutions and laws or regional or international human rights treaties, are a tool through which the respect for and protection of women's reproductive self-determination can be enhanced.

Interests that women's reproductive rights are attached to can "be categorized differently", "depending on the issues at stake and people's perceptions of those issues", so that the clustering of specific human rights around those interests subsequently can be arranged in different ways.⁴⁸ Since in the next part, the thesis is going to address the international protection of women's reproductive rights under the ICCPR, for descriptive and analytical convenience, I will particularly analyze five principal human rights embraced in women's reproductive rights below. These rights might not be exhaustive, but indicative of the 'key' rights that can be used to

⁴⁷ The Center for Reproductive Rights, *Reproductive Rights are Human Rights*, (the 4th edition), p.1, available at http://www.reproductiverights.org/pdf/pdf_RRHR_0604.pdf. (last visited on 21 November 2004).

⁴⁸ See Cook, *supra* note 2, pp.158-159.

safeguard women's reproductive health and freedom of reproductive choice.

These human rights include:

- (1) the right to life, including the right to reproductive health;
- (2) the right to be free from cruel, inhumane and degrading treatment;
- (3) the right to privacy;
- (4) the right to marry and to found a family; and
- (5) the right to information on reproductive health and choice.

It should be mentioned here that the right to non-discrimination is manifestly an important human right to women to achieve the full realization of all human rights, distinctly including women's reproductive rights. For this right is always invoked with other human rights, it will be touched upon in the discussion of the specific rights.

In this thesis, the discussion will be focused particularly on the women's role as a mother-to-be in the reproductive process. Therefore, there are some areas, which may relate to women's reproductive rights, that will not be specifically addressed, for instance, women's right to sexual health, since its purpose is the enhancement of life and personal relations, and the sexual relationship, similar to marriage, is sometimes, but not inevitable, a precursor to reproduction. ⁴⁹ Issues relating to HIV/AIDS are also beyond the research scope of this thesis.

⁴⁹ According to the definition of 'reproductive health', provided by the Cairo Programme of Action, sexual health is one component of reproductive health. *See supra* note 29, para.7.2.

3 International Protection of Women's Reproductive Rights under the ICCPR

3.1 the ICCPR and the HRC

The ICCPR was opened for signature by the UN General Assembly on 19th December 1966 and came into force upon receiving the requisite number of ratifications on 23rd March 1976.⁵⁰ It is supplemented by two Optional Protocols. The First Optional Protocol grants important procedural rights for individuals to make complaints about breaches of their rights by the states parties that have already ratified it. The second Optional Protocol aims at prohibition of death penalty. Given that it has universal coverage,⁵¹ “it is probably the most important human rights treaty in the world” and “has also been incorporated into the domestic law of many states parties”.⁵²

Originally, the ICCPR was contrived to protect and promote so-called ‘civil and political rights’, such as the right to life, the right to be free from arbitrary detention and torture, the right to free expression, the right to free association, and so on. It also covers a wide range of rights and offers broad protection to fundamental rights and freedoms.⁵³ Although the classification of human rights either as civil and political rights, or as economic, social and cultural rights, may rest upon analytic purpose, the labels sometime reflect the nature of the rights, and particularly, the nature of the obligations those rights impose on the states. Obligations may be negative or positive,

⁵⁰ <http://www.unhchr.ch/pdf/report.pdf>. (last visited 3rd November 2004)

⁵¹ As of November 2004, there are 154 states that become parties of the ICCPR and 146 state parties has ratified it by accession or succession.
<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp#N4>. (last visited on 21st November 2004).

⁵² Sarah Joseph, Jenny Schultz, And Melissa Castan, *The International Covenant on Civil and Political Right, case, materials and commentary*, 2 edition, (Oxford University Press, 2004) p 4 and 28.

⁵³ *Ibid*, p.4.

or some combination of both.⁵⁴ The ICCPR imposes not only negative obligations to respect rights but also positive obligations to ensure the respect for rights by adopting legislative or other necessary measures. Obligations may also be categorized as requiring either immediate action or progressive implementation. Traditionally, economic, social, and cultural rights have been viewed as imposing progressive obligations while only civil and political rights have been views as requiring immediate action.⁵⁵ This point is of significance to protect women's reproductive rights. It means that the provisions under the ICCPR to safeguard women's reproductive rights require the states to take an immediate action to fulfil their obligations to respect, protect and promote women's reproductive rights.

Over nearly 30 years, the dimension of these human rights norms in the ICCPR has been largely broadened in order to achieve its goals as proclaimed in its Preamble. It is largely contributed to the HRC, the monitoring body of the ICCPR, through its observations, comments and jurisprudence.

The HRC was established pursuant to article 28 of the ICCPR. The HRC is the most important part of its implementing machinery, and possess the functions (1) to conducts dialogues and draws conclusions from states parties' reports; (2) to issue General Comments which explain the meaning of ICCPR provisions; (3) to hear inter-State complains, and (4) to hear individual complains. Those functions generate its essential sources authorities to interpret the ICCPR, namely, the decisions under the First Optional Protocol, the General Comments, and the Concluding Observations/Comments.

According to article 40, the states parties to the ICCPR undertake to submit

⁵⁴ See Sandra Coliver, 'The Right to Information Necessary for Reproductive Health and Choice Under the International Law', 44 *American University Law Review*, (Washington College of Law of the American University,1995) p.1282.

⁵⁵ *Ibid.*

reports on the measures they have adopted which give effect to the rights recognized in the ICCPR and on the progress made in the enjoyment of those rights, within a year of entry into force of the ICCPR for a specific state, and thereafter when the HRC requests. Since 1982, the HRC has requested that states parties submit their reports every five years.⁵⁶ After examining the states parties' reports, the HRC formulates the Concluding Observations/Comments, which are always adopted by consensus. They normally contain both positive and negative aspects of the implementation of the treaty provisions by the state party concerned. They provide valuable evidence of the content of the rights in the ICCPR.⁵⁷ They even may be viewed as indicative of the way in which dynamic interpretation of the ICCPR norms is developing. They also reveal what specific measures the HRC wants the states parties to take in order to fulfil their obligations under the ICCPR in the specific circumstances. These aspects of the Concluding Observations are significant in estimating the HRC's role and contribution in protecting women's reproductive rights since the international protection of those rights is a relatively new area with substantive controversies in the international human rights law.

Another important function of the HRC is to issue 'General Comments', which address matters of relevance to all the states parties. Several General Comments have expanded the meaning of rights in the ICCPR to comprise obligations for the states parties to respect and protect women's reproductive rights, such as General Comment 6⁵⁸, which deals with article 6, the right to life. Several General Comments provide detailed directions for the states parties in implementing provisions with respect to women's reproductive rights from a particular point, such as General Comment 28, which proclaims equality of rights between men and women.⁵⁹ Hence, the

⁵⁶ See UN, the HRC, Decision on Periodicity, 26 August 1982, UN Doc. CCPR/C/19/Rev.1. para. 2.

⁵⁷ See A M Bolin Pennegård, 'Overview over Human Rights-the Regime of the UN', *supra* note 21, p.37.

⁵⁸ UN, the HRC, General Comment 6, *The right to life (Article 6)*, UN Doc. HRI/GEN/1/Rev.1 (1994).

⁵⁹ UN, the HRC, General Comment 28, *Equality of rights between men and women (article*

HRC's General Comments have proven to be a valuable jurisprudential resource to interpret rights in the ICCPR, including some specific rights embraced in women's reproductive rights.⁶⁰

Under article 41 of ICCPR, the HRC possesses the function to hear complaints submitted by the states parties about violation of the ICCPR by another state parties, if both of them have made declarations to recognize the HRC's competence to do so. So far, regrettably, this interstate complaints mechanism has never been utilized for political reasons.⁶¹

Pursuant to the First Optional Protocol of the ICCPR, individuals may submit complaints about alleged violations of the ICCPR rights by a state, which has ratified that Protocol. Although the decisions made by the HRC after considering those complaints are not legal binding since the HRC is not a judicial body, they are strong indicators of legal obligations undertaken by the states concerned. It is the conviction of some scholars that the future of the HRC does not lie in the examination of state party reports, but primarily on individual communications procedures, which further develop the international human rights law, "create precedent", "draw attention to the specific, concrete human rights violation", and provide victims visible and implementable remedies.⁶² So far, the HRC has not delivered its decisions on complaints directly alleged violation of women's reproductive rights. The case presented at the beginning of this thesis appears to be the first one before the HRC.

The function of dealing with individual complaints has already been replicated by the other treaty bodies within the UN, including the Women's Convention by its Optional Protocol.⁶³ As I mentioned above, the Women's

3), UN Doc. CCPR/C/21/Rev.1/Add.10 (2000).

⁶⁰ See *supra* note 52, p.12.

⁶¹ *Ibid*, p 13.

⁶² See Alfred de Zayas, 'The Examination of Individual Complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights', *supra* note 21, p. 73.

⁶³ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination

Convention is the strongest treaty to safeguard women's reproductive rights. Some scholars believe that women's reproductive rights advocates will prefer to turn to the HRC, instead of the Committee on the Women's Convention (CEDAW), to claim violations of women's reproductive rights by governments and ask for remedies and enumerate several reasons.⁶⁴ There are two that might be the most important. Firstly, one hundred and four states parties have ratified the First Optional Protocol to the ICCPR. By contrast, only sixty-eight have ratified the Optional Protocol to the Women's Convention. Secondly, the Women's Convention remains a controversial treaty, which may be reflected in the reservations and declarations made by the states parties when they ratified it. Out of 179 countries that have ratified the Women's Convention, 27 have made reservations with regard to articles 11,12,14 or 16, which specifically express women's rights to health and reproductive freedom.⁶⁵ In contrast to the Women's Convention, no state party has made a reservation to article 6(1) and very few states parties made a reservation to article 7, 17, 19 and 23(2).⁶⁶

3.2 The Right to Life (Including the Right to Reproductive Health)

It has been universally recognized that the right to life is the most fundamental human right, which is inalienable. It is an essential right and all the other rights derive from it. If a person is deprived of his right to life, all other human rights will be meaningless.⁶⁷ It is the supreme right and no derogation from it is permitted, even in time of public emergency, which threatens the life of the nation. Every human rights instrument proclaims the

against Women, *New York*, 6 October 1999, entered into force on 22 December 2000, in accordance with article 16 (1), Resolution A/RES/54/4, para. 16. status available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty12.asp>, (last visited on 21 November 2004).

⁶⁴ See Bogecho, *supra* note 7, p.238-240.

⁶⁵ Available at

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp>, (last visited on 21 November 2004).

⁶⁶ <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp>, (last visited on 21 November 2004).

⁶⁷ F. Menghistu, *The Satisfaction of Survival Requirements*, B. G. Ramcharan, (ed.) *The Right to Life in International Law*, (Martinus Nijhoff Publishers, Dordrecht, 1985) p. 63

right to life as a fundamental right. Undoubtedly, in the global level, the ICCPR is the most basic and far-reaching human rights treaty, which safeguards the right to life of “every human being”.

Article 6 of the ICCPR articulates that:

(1) 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.

(2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

(3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

(4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

(5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

(6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

The most obvious human rights violation in women’s pregnancy or childbirth is a violation of women’s right to life.⁶⁸ However, considerations on the death from pregnancy, labor or abortion were far beyond the traditional understanding of the right to life, which was evidenced by the

⁶⁸ Cook, *supra* note 27, pp. 688-689.

concrete wording of article 6 of the ICCPR.⁶⁹ The jurisprudence of the HRC before the 1990s early reveals that the right to life was primarily applied in a traditional sense, for example, the right to be free from arbitrary killings. That situation changed since 1994, the General Comment 6 was adopted by the HRC. The paragraph 5 of the General Comment 6 states:⁷⁰

...the Committee has noted that the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires considers that it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

In General Comment 6, the HRC addresses the positive nature of the right to life and particularly implicates that the right to life may be applied to “matters relating to health”.⁷¹ By providing a context of health and human dignity to the right to life, the HRC believes that the health of a population is a factor to be considered in evaluating states parties’ implementation of article 6.⁷² Mass avoidable practices and negligence threatening health of a population, even causing a high rate of death can be constituted a violation of the right to life. The HRC also indicates that the states, in order to fulfill their obligations under the ICCPR, should take positive measures to protect and promote the right to life.

In explaining the aim of the positive measures that should be taken by the states parties, namely, to reduce infant mortality and to increase life expectancy, another compatible goal of article 6 has been implicated by the HRC--to reduce the maternal mortality. Such a goal guides the considerations that the HRC has taken in examining the states parties’

⁶⁹ See Cook, *supra* note 27, pp.688-689. Cook notes that the right to life is traditionally referred to in the immediate context of the obligation of states to ensure that courts observe due process of law before capital punishment is imposed and this understanding is essentially male-oriented.

⁷⁰ *Supra* note 59, para.5.

⁷¹ Cook, *supra* note 2, p 160.

⁷² See Dina, *supra* note 7, p. 242.

reports with regard to women's reproductive health. For example, in its Concluding Observations on Mali, the HRC states: ⁷³

While noting the considerable efforts made by the State party, the Committee remains concerned by the high maternal and infant mortality rate in Mali, due in particular to the relative inaccessibility of health and family planning services, the poor quality of health care provided, the low educational level and the practice of clandestine abortions. (Article 6 of the Covenant).

What exactly is the position of the HRC on the high rate of maternal mortality? What the practices, which contribute to high rate of maternal mortality, should be eliminated by the states parties, and what appropriate measures, which can be used to reduce such a high rate, should be taken by the states parties? In the Concluding Observations on the states parties' reports, the HRC identifies at least five factors that have been considered as causes to the high rate of maternal mortality: unsafe abortion, lack of essential obstetric care, Female Genital Mutilation, early marriage and lack of family planning services. ⁷⁴

Unsafe Abortion

The right to life, foetus's right or mother's right?

The right to life has often been invoked to support opposing claims, some on behalf of foetuses and others on behalf of its pregnant mother: the adherents of anti-abortion claim that foetuses have an inherent right to life while reproductive rights advocates protest it.⁷⁵ It also happens when the abortion threatens the mother's life: the adherents of anti-abortion deny the mother's right to make an abortion by the reason of protecting foetus's life while the reproductive rights advocates insist that the mother's right to life

⁷³ UN, the HRC, Concluding observations on Mali(16 April 2003), para.14, UN Doc. CCPR/CO/77/MLI.

⁷⁴ Unsafe abortion and FGM may also violate the right to liberty and security of the person. However, it seems that the HRC has considered them in the right to life context.

⁷⁵ See Rebecca J. Cook and Bernard M. Dickens, 'Human Rights Dynamics of Abortion Law Reform', *25 Human Rights Quarterly*. (2003) pp.1-59.

and the right to reproductive health should be given the priority.

The legality of abortion is quite a controversial topic in the international human rights law and it is closely related with the question of whether an unborn has the right to life. However, it is not generally accepted that international human right treaties are applicable before the birth of a human being.⁷⁶

In Latin America, Article 4 of the American Convention on Human Rights (ACHR) made an explicit reference to a pre-natal right to life by articulating “[e]very person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” Clearly, by adding the words ‘in general’, the drafters of the ACHR intended to make a compromise between two opposite forces towards abortion present at its states parties. ⁷⁷

With regard to the article 2 of the European Convention on Human Rights (ECHR), which also safeguards the right to life, it seems that the Strasbourg organs had been reluctant to pronounce substantively on whether the protection in article 2 for everyone extends to an unborn child before. However, in recent *Vo v. France* case, the ECtHR seemingly leaves the question on foetus’s legal status to the free choice of the states by applying the doctrine of margin of appreciation.⁷⁸

As far as the ICCPR is concerned, the debate can be traced to the drafting history of article 6. An amendment aiming to protect right to life from the moment of conception was proposed by the representative of Lebanon firstly in the 6th Session of 1950 of Commission on Human Rights. It was not voted upon in that session. ⁷⁹ In 1957, another motion identical to that of

⁷⁶ See Cook, *supra* note 27, p.690.

⁷⁷ See Dinah Shelton, ‘International Law on Protection of the Fetus’, S.J. Frankowski and G.E. Cole (eds.), *Abortion and Protection of the Human Fetus*, (Martinus Nijhoff Publishers, 1987) p.4.

⁷⁸ *Vo v. France*, App no 53924/00, ECtHR, [2004]. Para. 82.

⁷⁹ See Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International*

Lebanon, proposed by Belgium, Brazil, El Salvador, Mexico and Morocco was submitted but was rejected by the 3rd Committee of the General Assembly.⁸⁰ Nowak has commented that it is "...clear from the travaux preparatoires that life in the making was not to be protected".⁸¹ So far, the HRC has never addressed that question directly.

Laying apart the question of foetus's legal status, even supposing that the interest of foetuses should be protected by article 6, or, a general prohibition on abortion by the State is not incompatible with article 6, the states can not employ the excuse of protecting foetus's right to life to justify their abortion laws or practices which may deny or ignore women's right to life. This principle has been indicated in the *Paton* case. When concerning whether an unborn is a human being under the ECHR, the EcommHR noted:⁸²

...If Art.2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant women. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman...such an interpretation would be contrary to the object and purpose of the Convention.

That principle has also been recognized by the HRC in its Concluding Observations. In its Concluding Observations on Gambia, the HRC stated "[t]he Committee is concerned that the criminalization of abortion, even when pregnancy threatens the life of the mother...leads to unsafe abortions, which contributes to a high rate of maternal mortality. The State party recommends that the law be amended so as to introduce exceptions to the general prohibition of abortions."⁸³ In its Conclusion Observations on

Covenant on Civil and Political Rights, (Martinus Nijhoff Publishers, 1987) p.120.

⁸⁰ *Ibid*, p.121.

⁸¹ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (N.P. Engel, Publisher, Kehl, Strasbourg, Arlington, 1993) p.123.

⁸² *Paton v. UK*, (1980) 19 D & R 244, para. 19, quoted from S. Farran, *The UK Before the European Court of Human Rights case law and commentary*, (Blackstone Press Limited, 1996), p.29.

⁸³ UN, the HRC, Concluding observations on Gambia (12 August 2004), para.17, UN Doc.

Guatemala, the HRC explicitly indicates “the State party has the duty to adopt the necessary measures to guarantee the right to life of pregnant women who decide to interrupt their pregnancy by...amending the legislation to provide for exceptions to the general prohibition of all abortions except where the mother's life is in danger”.⁸⁴ It also has been implicated in its Concluding Obligations on Trinidad and Tobago⁸⁵, Equatorial Guinea⁸⁶, the abortion laws of which do not provide a necessary exception to safeguard women’s rights, even including the right to life.

Unsafe abortion

The World Health Organization (WHO) defines ‘unsafe abortion’ as “a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking the minimal medical standards, or both.”⁸⁷ It estimates that worldwide, approximately 20 million unsafe abortions occur every year, resulting in 78,000 deaths.⁸⁸ The HRC, in its General Comment 28, require states parties, when reporting on the right of life protected by article 6, “should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.” It implies that where unsafe abortion is a major cause of maternal death, it may be possible to apply the right to life to require the States to improve services for treatment of unsafe abortion and to change restrictive laws, which may leads to unsafe abortion, to legalize or decriminalize abortion.

CCPR/CO/75/GMB.
⁸⁴ UN, the HRC, Concluding observations on Guatemala (27 August 2001), para.19, UN Doc.CCPR/CO/72/GTM.
⁸⁵ UN, the HRC, Concluding observations on Trinidad and Tobago (3 November 2000), para.18, UN Doc.CCPR/CO/70/TTO.
⁸⁶ UN, the HRC, Concluding observations on Equatorial Guinea (30 July 2004), para.9, UN Doc.CCPR/CO/79/GNQ.
⁸⁷ WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems*, available at http://www.who.int/reproductive-health/publications/safe_abortion/Safe_Abortion.pdf. (last visited on 21 November 2004) p.12.
⁸⁸ WHO, *Unsafe Abortion: Global and Regional Estimates of Incidence of and Mortality Due to Unsafe Abortion with a Listing of Available Country Data 8* (1998), quoted from Cook, *supra* note 73, p.2.

Many states adopt anti-abortion laws to prohibit abortion by imposing severe penalty upon women. However, experience consistently shows that stronger enforcement of restrictive laws is ineffective. It even forces women, who want to terminate an unintended pregnancy, into clandestine and less safe abortion practices. Cook notes that “[i]t is widely recognized that restrictive abortion laws do not reduce the number of abortions but only their safety, and may actually increase the number by denying women access to counseling that may present acceptable alternatives to abortion and reduce repeat abortions.”⁸⁹

The HRC in its concluding Observations showed much concern about the restrictive laws on abortion of the states parties. For example in its recent Concluding Observations on Colombia, the HRC states:⁹⁰

The Committee notes with concern that the existence of legislation criminalizing all abortions under the law can lead to situations in which women are obliged to undergo high-risk clandestine abortions.

The questions arise here. Should all the restrictions on the abortion be eliminated due to the risk of unsafe abortion or just permit some exceptions to general prohibition under some specific circumstances? And by what criteria should those restrictive laws be amended? The HRC has yet addressed the first question directly. It seems that the HRC merely indicates the linkage between the restrictive abortion laws and unsafe abortion, but was reluctant to recommend the states parties to legalize all the abortion. As to the second question, the HRC provides its position on that in its Concluding Observations on Trinidad and Tobago. Concerning the situation in the state party concerned, The HRC recommends that legal limitations on abortion be reappraised and that restrictions, which may risk violation of

⁸⁹ Cook, *supra* note 2, p. 165.

⁹⁰ UN, the HRC, Concluding observations on Colombia (26 May 2004), para.13, UN Doc.CCPR/CO/80/COL.

women's rights, be removed from the law.⁹¹ At the end of its recommendation, it also indicated the provisions contained in the ICCPR, which may be violated by the state, namely article 3, article 6 (1) and article 7. That position was reiterated in its Concluding Observations on Sri Lanka.⁹²

It is likely that the HRC prepares to establish a principle that the restrictions on abortion, which might contribute to high rate of maternal mortality due to unsafe abortion, and which may risk violation of women's rights and which are incompatible with obligations arising under the ICCPR, should be eliminated. These restrictions include (1) the restrictions on abortion when pregnancy threatens the life of the mother, which may violate article 6 (1);⁹³ (2) the restrictions on abortion when pregnancy results from rape or incest, which may violate article 7;⁹⁴ (3) other restrictions might result in high rate of maternal mortality and are incompatible with the obligations the ICCPR imposed on the states parties.

However, recently in the its Concluding Observations on Colombia, when concerning the legislation criminalizing all abortions, including abortion as a result of rape or incest, the HRC did not apply the above principle, but merely required the states party to decriminalize such abortions. The HRC stated:⁹⁵

13. The Committee notes with concern that the existence of legislation criminalizing all abortions under the law can lead to situations in which women are obliged to undergo high-risk clandestine abortions. It is especially concerned that women who have been victims of rape or incest or whose lives are in danger as a result of their pregnancy may be prosecuted for resorting to such measures.

⁹¹ See *supra* note 85.

⁹² UN, the HRC, the Concluding Observations on Sri Lanka (1 December 2003), para.12, UN Doc.CCPR/CO/79/LKA.

⁹³ See *supra* note 83.

⁹⁴ *Ibid*, see also the Concluding Observations on Morocco (1 November 1999), para.13, UN Doc. CCPR/C/79/Add.113.

⁹⁵ See *supra* note 90, para.13.

The State party should ensure that the legislation applicable to abortion is revised so that no criminal offences are involved in the cases described above.

Does it mean that the HRC applies different principles on the restrictive laws on abortion or other reproductive issues in different countries where such restrictions share the identical content? Or does it mean that, from the HRC's point of view, 'removal' from the law only means removal from the criminal law, but not leaving it to women's free choice? Clearly, as emphasized in the Concluding Observations on Trinidad and Tobago and Sri Lanka, those restrictions have already violated women's rights guaranteed by the specific provisions of the ICCPR. Bearing article 2 (2) of the ICCPR in mind, which articulates "[w]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary step...to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant", the states parties should take obligations to eliminate all the obstacles which may prevent women from exercising their rights recognized in the ICCPR. Merely decriminalizing acts, which women should have right to do, is far from being satisfied.

Recent Concluding Observations reveal that the HRC seemingly supports the trend of liberalizing not only legislation but also practice on abortion. In its Concluding Observations on Poland issued in 5 November 2004, the HRC states:⁹⁶

8. The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health...The State Party should liberalize its legislation and practice on abortion.

Cairo Programme of Action states that "[i]n circumstances where abortion is not against the law, such abortion should be safe. In all cases women should

⁹⁶ UN, the HRC, the Concluding Observations on Poland (5 November 2004), para.8, UN Doc.CCPR/CO/82/POL/Rev. 1.

have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family-planning services should be offered promptly, which will also help to avoid repeat abortions.”⁹⁷ That proposition has been accepted by the HRC, and reaffirmed in its General Comments and Concluding Observations. General Comment 28 requires the states parties take measures to ensure that women do not have to undergo life-threatening clandestine abortion. It implies that the state parties should take positive measures to ensure women’s access to adequate abortion services, at least in the circumstance where such an abortion is permitted by the law. In its Concluding Observations on Argentina, the HRC states “in cases where abortion procedures may lawfully be performed, all obstacles to obtaining them should be removed”.⁹⁸ Further, in its Concluding Observations on Ecuador, the HRC recommends that “the State party adopt all necessary legislative and other measures to assist women, and particularly adolescent girls, faced with the problem of unwanted pregnancies to obtain access to adequate health and education facilities.”⁹⁹

Female Genital Mutilation

Female Genital Mutilation (FGM) can also be described as Female Genital Cutting or circumcision. It brings very severe harm to women’s reproductive health:¹⁰⁰

In addition to loss of sexual feeling, circumcised women often suffer chronic urinary tract infections, pelvic infections that can lead to sterility, painful intercourse, and sever scarring that can cause tearing of tissue and hemorrhage during childbirth...

Concerning its severe harm to women’s reproductive health, the

⁹⁷ See *supra* note 29, para. 8.25.

⁹⁸ UN, the HRC, the Concluding Observations on Argentina (03 November 2000), para.14, UN Doc.CCPR/CO/70/ARG.

⁹⁹ UN, the HRC, the Concluding Observations on Ecuador (18 August 1998), para.11, UN Doc. CCPR/C/79/Add.92.

¹⁰⁰ Lori Heise, *Reproductive Freedom and Violence Against Women: Where are the Intersections?*, 21 J. L. Med. & Ethics 206, 206 (1993).

governments in the ICPD agrees to take effective action to eliminate all forms of coercion and discrimination in politics and practices and to adopt and enforce measures to eliminate early child marriage and FGM.¹⁰¹ It has been reiterated in the Beijing Platform.¹⁰²

FGM affects many human rights, such as the right to life and the right to be free from inhumane, degrading treatment, and so forth. Laying emphasis upon the relationship between the effect of FGM practice on women's reproductive health and their right to life, the HRC is especially "adamant" that the states parties should outlaw the practice of FGM. ¹⁰³ In Concluding Observations on Senegal, being especially disturbed at the persistent custom of FGM and the high rate of maternal mortality which result from that practice, the HRC views that the practice of FGM violates articles 6 and recommends that "judges and lawyers make use of ordinary criminal law provisions to deal with instances of female genital mutilation until a specific law for this offence, the adoption of which the Committee strongly supports, is enacted". ¹⁰⁴

Lack of Essential Obstetric Care

Cook notes that "[t]he right to life is the most obvious right that could be applied to protect women at risk of dying in childbirth, due to lack of essential or emergency obstetric care."¹⁰⁵ International human rights tribunals have already showed their concerns on that in interpreting the right to life. In *Tavares v. France*, the ECommHR considered a complaint alleging a state's violation of the right to life of a woman who had died in childbirth.¹⁰⁶ Although the case was inadmissible on technical grounds, it gave the EcommHR an opportunity to emphasize that state should take

¹⁰¹ *Supra* note 29, para.5.5.

¹⁰² *Supra* note 32, para. 224.

¹⁰³ See Bogecho, *supra* note 7, p. 257.

¹⁰⁴ UN, the HRC, the Concluding Observations on Senegal (19 November 1997), para.12, UN Doc.CCPR/C/79/Add.82.

¹⁰⁵ Cook, *supra* note 2, p. 161.

¹⁰⁶ *Tavares v. France* (1991), App no. 16593/90, ECommHR, unpublished, quoted from Cook, *supra* note 2, p. 161.

necessary measure to protect life against unintentional loss. 107

The ICPD emphasizes that it is implicit in the reproductive health that “the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant”.¹⁰⁸

Taking the crucial linkage between essential obstetric care and the maternal and infant mortality into account, the HRC bears no hesitation to address in its Concluding Observations on Mali that the State should strengthen its efforts to ensure the accessibility of health services, including emergency obstetric care and its health workers receive adequate training.¹⁰⁹ It shows that the states parties are obliged to take positive measures to protect and promote pregnant women’s right to life.

Early Marriage

Early marriage is another factor that may lead to high maternal mortality rate. Epidemiological Data has been reviewed which demonstrate health risks arising from pregnancy that occur too early in a woman’s reproductive years.¹¹⁰ In Concluding Observations on Sudan, the HRC notes the linkage between early marriage and the high maternal mortality rate. The protection of girls from early marriage under the ICCPR may mainly rest upon article 23 (2), which deals with the right to marry of persons of ‘marriageable age’, and article 24, which guarantees the right of child. Therefore, this issue will be discussed in detail below.

Lack of Family Planning Services

In examining the states parties’ reports, the HRC finds that high rates of

¹⁰⁷ *Tavares v. France*, see *supra* note 106.

¹⁰⁸ *Supra* note 29, para.7.2.

¹⁰⁹ See *supra* note 73.

¹¹⁰ See Cook, *supra* note 27, p.695.

pregnancy and illegal abortion, which is the main cause of maternal mortality, result from lack of family planning services. For instance, in its Concluding Observations on Equatorial Guinea, the HRC states: ¹¹¹

*The Committee expresses concern that legal restrictions on the availability of family planning services give rise to high rates of pregnancy and illegal **abortion**, which are one of the principal causes of maternal mortality.*

The right to access to family planning services is a key component of the right to decide the number and the spacing of children, since that right would remain illusory unless men and women are aware of the knowledge and means to do so. The right to decide the number and the spacing of children, which directly relate to women's reproductive autonomy, is principally guaranteed by article 17 of the ICCPR dealing with individual's right to privacy. It safeguards women's freedom of reproductive choice from arbitrary and unlawful interference by the state.

Considering the linkage between legal restriction on availability of family planning services and maternal mortality, in Concluding Observations on Equatorial Guinea, the HRC further recommends that the state party should eliminate legal restrictions on family planning. ¹¹² In Concluding Observations on Morocco, concerning state party's restrict prohibition on abortion, the HRC also requires the State ensure that "women have full and equal access to family planning services and to contraception". ¹¹³

High cost of family planning services de facto deprives women of the right to access to family planning services. Taken that factor into consideration, the HRC in its recent Concluding Observations on Poland states that the high cost of contraception are also of concern to the HRC and requires the

¹¹¹ *Supra* note 86.

¹¹² *Ibid.*

¹¹³ *Supra* note 94. *See also* the Concluding Observations on Argentina, in which the HRC recommends that "the laws and policies with regard to family planning be reviewed on a regular basis. Women should be given access to family planning methods and **sterilization** procedures", *supra* note 98.

State party to assure the availability of contraceptives and free access to family planning services and methods.

It should be noted that abortion cannot be used as a method of family planning. The practice of using abortion as a means of family planning has been criticized by the HRC. In Concluding Observations on Albania, concerning the high rate of abortion and the apparent lack of family planning and social care in some parts of the state concerned, recommends the state take steps to ensure that abortion is not used as a method of family planning.¹¹⁴

3.3 The Right to be Free from Torture, or Cruel, Inhumane or Degrading Treatment

Article 7 of the ICCPR provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The right to be free from torture or cruel, inhumane or degrading treatment or punishment is one of the few absolute rights in the ICCPR, which no restriction is permitted to be imposed on. The traditional application of this right was only to ensure that persons in jails could be treated in humane ways.¹¹⁵ The HRC, in General Comment 20, amplified the traditional understanding of this right, by providing the aim of article 7:¹¹⁶

The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by

¹¹⁴ UN, the HRC, the Concluding Observations on Albania (5 November 2004), para.14, UN Doc.CCPR/CO/82/ALB/Rev. 1.

¹¹⁵ Cook, *supra* note 2, p. 170.

¹¹⁶ UN, the HRC, General Comment 20: *Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, para.2.

article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

This amplification is significant to women's reproductive rights protection. It provides possibilities for the HRC to interpret the right to be free from torture or cruel, inhuman or degrading treatment in a manner of embracing the respect, protection and fulfillment of the inherent dignity of women and their freedom of reproductive choice from disregard and coercion.

In General Comment 28, the HRC further set forth the states parties' obligations to prevent women from torture or inhumane or degrading treatment related to their reproductive health and choice:

To assess compliance with article 7 of the Covenant, as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape. It also needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape. The State parties should also provide the Committee with information on measures to prevent forced abortion or forced sterilization. In States parties where the practice of genital mutilation exists information on its extent and on measures to eliminate it should be provided. The information provided by States parties on all the issues should include measures of protection, including legal remedies, for women whose rights under article 7 have been violated.

In General Comment 28, the HRC enumerates 3 types of acts that may constitute torture or inhumane or degrading treatment with respect to women's reproductive health and choice, namely (1) denial of abortion service, including terminating pregnancy as a result of rape or incest; (2) forced abortion and sterilization; (3) FGM. These types will be addressed respectively below. Moreover, I will also discuss denial of adequate medical treatment as another type of torture or inhumane or degrading treatment, which has been indicated by the HRC in the Concluding Observations.

Denial of Abortion Service

The HRC does not classify all the denial of abortion service as inhumane or degrading treatment. However, it addressed “the inhumane and degrading nature of maternal death from unskilled abortion” in its Concluding Observations on states’ reports.¹¹⁷ In its Concluding Observations on Sri Lanka, the HRC stated: ¹¹⁸

The Committee is concerned that abortion remains a criminal offence under Sri Lankan law, except where it is performed to save the life of the mother. The Committee is also concerned by the high number of abortions in unsafe conditions, imperilling the life and health of the women concerned, in violation of articles 6 and 7 of the Covenant.

The State party should ensure that women are not compelled to continue with pregnancies, where this would be incompatible with obligations arising under the Covenant (art. 7 and General Comment 28), and repeal the provisions criminalizing abortion.

That two paragraphs indicate the view of the HRC that it is a violation of article 7 of the ICCPR by the states, to force women to continue with pregnancy, resulting in maternal death from unsafe abortion.

Forced pregnancy resulting from rape is an extremely severe violation of a woman’s right to reproductive choice. It forces a woman to be subjected to inhumane and degrading treatment. In its Concluding Observations on Peru, concerning the situation that “abortion gives rise to a criminal penalty even if a woman is pregnant as a result of rape and that clandestine abortions are the main cause of maternal mortality”, the HRC found that that law not only forces women subjected to inhumane treatment but are possibly incompatible with the article 3, 6 and 7 of the ICCPR. It further recommends Peru to revise its law in the light of the obligations laid down in the ICCPR and to ensure that “laws relating to rape, sexual abuse and violence against women provide women with effective protection”. It also

¹¹⁷ See Cook, *supra* note 2, p. 171.

¹¹⁸ *Supra* note 92.

recommended Peru to “take the necessary measures to ensure that women do not risk their life because of the existence of restrictive legal provisions on abortion”¹¹⁹.

Forced pregnancy of a prospective child with fatal anomaly, which may inevitably lead to the death of the child before or after its birth, may impose not only physical but mental pain or suffering on a woman. Does such a forced pregnancy qualify as an inhumane or degrading treatment to a woman? The HRC has so far yet address this question directly. Nowak notes that as far as the degrading treatment, which is the weakest level of a violation of article 7, is concerned, the pivotal point is the circumstances of the individual case and the principle of proportionality.¹²⁰ In the case I present at the beginning of this thesis, the Peruvian government may employ the abortion law aiming to provide protection to an unborn life, to justify its action of forcing that pregnant woman to carry an anencephalic foetus to term.¹²¹ However, suffice it to say that it is out of proportion to force a woman to continue her pregnancy, suffering mental and physical pain, only for the purpose of protecting an unviable foetus with fatal defect.

The Concluding Observations of the HRC disclose that many unreasonable restrictions on abortion still remain in many states’ abortion laws, which may expose women to the risk of being subjected to torture or inhumane or degrading treatments. The HRC always recommends the states concerned to amending national laws to ensure compliance with the obligations to respect and guarantee the rights recognized in the ICCPR. Unfortunately, the HRC has yet gone further to address concrete standards to recommend the states to comply with in their abortion law reform process. Cook suggests:

...where a national law that strictly penalizes abortion is shown to result in

¹¹⁹ UN, the HRC, the Concluding Observations on Peru (18 November 1996), para.15, UN Doc.CCPR/C/79/Add.72.

¹²⁰ Nowak, *supra* note 81, p.132.

¹²¹ Article 2 of the Constitution of Peru stipulates: "Every person has the right to life, an identity, moral, mental and physical integrity and free development and well-being. The unborn child is a subject of law in all matters favourable to it".

inhuman treatment of women and undue maternal mortality, the state should be obliged to consider legal reform on its abortion law so that such a law can comply with human rights standard for women's health and dignity. A new national policy could be expressed in law that more adequately balances limitations on abortion with women's several rights relating to safe and humane access to health services necessary to protect their lives and dignity, to their security in health and to be free from inhuman and degrading treatment.

Forced Abortion or Sterilization

Anything less can be viewed as being as equally coercive as forced abortions or sterilizations.¹²² They deprived women of their dignity and not only risk of women's physical health but even more infringe on their mental integrity. They violate various international human rights, including the right to be free from torture or cruel, inhumane or degrading treatment.¹²³

Force abortion or sterilization may originate in population policies of governments. Abortion, or sterilization or both has been employed by government as a means of family planning to control birth rate in some countries. It brings serious problems. A report from the United Nations Fund for Population Activity (UNFPA) reveals that in some country, forced abortion will be carried out if the illegal pregnant woman rejected to make an abortion in accordance with laws or regulations.¹²⁴

Decisions of the regional human rights tribunal support the view that forced sterilization constitutes a violation of the right to humane treatment. In 1999, a case named as *María Mamérita Mestanza Chávez v. Peru* was brought to the Inter-American Commission on Human Rights. In that case, the

¹²² See *supra* note 43, p. 101.

¹²³ E.g., the right to found a family. Forced sterilization is also a violation of right to be free from crimes against humanity, if a state coercively sterilize a targeted ethnic or racial group. See The Center for Reproductive Rights, Body and Soul, Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia, (2003) p. 103, available at http://www.reproductiverights.org/pdf/bo_slov_part4.pdf. (last visited on 21 November 2004).

¹²⁴ See UNFPA and Force Abortion in China, http://www.iconservatives.org.uk/unfpa_and_forced_abortion_in_chi.htm (last visited on 16th November 2004)

petitioners alleged that Peru violated the human rights of Mrs. María Mamérita Mestanza Chávez, on forcefully subjecting her to surgical sterilization, which ultimately caused her death. The case has been settled by signing a friendly settlement agreement between the petitioners and Peru. Peru accepted that the government had committed violations of the right to humane treatment.¹²⁵

Female Genital Mutilation

FGM has been made reference to above in the part dealing with ‘the right to life’. The practice of FGM may not only threaten women’s life but also force women to be subjected to inhumane and degrading treatment.

The practice of FGM has been condemned by the HRC in its concluding observations on many countries, where FGM is widely practiced, such as on Sudan¹²⁶, on Gambia¹²⁷, on Egypt¹²⁸, on Cameroon¹²⁹ and on many other states, as being contrary to article 7. Recently, in its Concluding Observations on Uganda, considering the situation that the State party has not taken all the necessary measures to eradicate the practice of FGM, which violates article 7, the HRC required the State party take appropriate measures, as a matter of priority, to outlaw and penalize FGM and to effectively eradicate it in practice.¹³⁰

Denial of Adequate Medical Treatment

As Cook notes, international human rights courts and tribunals are

¹²⁵ *María Mamérita Mestanza Chávez v. Peru*, Case 12.191, Decision on Admissibility, 3 October 2000. A friendly settlement agreement was signed on 22 October 2003.

¹²⁶ UN, the HRC, the Concluding Observations on Sudan (19 November 1997), para.10, UN Doc.CCPR/C/79/Add.85.

¹²⁷ UN, the HRC, the Concluding Observations on Gambia (12 August 2004), para.10, UN Doc.CCPR/CO/75/GMB.

¹²⁸ UN, the HRC, the Concluding Observations on Egypt (28 November 2002), para.11, UN Doc.CCPR/CO/76/EGY

¹²⁹ UN, the HRC, the Concluding Observations on Cameroon (04 November 1999), para.12, UN Doc.CCPR/C/79/Add.116

¹³⁰ UN, the HRC, the Concluding Observations on Gambia (04 May 2004), para.10, UN Doc.CCPR/CO/80/UGA.

“beginning to import notions of health into the content and meaning of the right to be free from inhuman and degrading treatment”. In *D v. United Kingdom*, the ECtHR has held that it would constitute inhuman treatment that a government deports a person at an advanced stage of terminal AIDS back to his own country, where he would have no hope of receiving appropriate care, would constitute inhuman treatment.¹³¹ Delivered in the same year, a decision of the HRC bears a similar construction with that of the ECHR. In *Williams v. Jamaica*, the author, who was detained in death row, suffering severe mental disorder in Jamaica, alleged that he was not receiving proper medical treatment for his severe mental disorder, which constitutes a breach of article 7 of the ICCPR. The HRC held that:¹³²

All these factors justify the conclusion that the author did not receive any or received inadequate medical treatment for his mental condition while detained on death row. This situation constitutes a violation of articles 7 and 10, paragraph 1, of the Covenant, since the author was subjected to inhuman treatment and was not treated with respect for the inherent dignity of his person.

It is obvious that the decision above has paved the way for the HRC to treat denial of adequate medical treatments, for instance essential obstetric care, and treatment for obstetric fistulae or unsafe abortion, for women, as a inhumane treatment, and further, to demand the states parties to take positive measures to ensure that a woman is access to adequate medical treatment, which may include services to treat a high-risk pregnancy, and to make a safe abortion when her life or health is at risk due to continuance of the pregnancy.

3.4 The Right to Privacy

Article 7 of the ICCPR provides that

¹³¹ *D v. United Kingdom*(1997), App no. 30240/96, ECommHR.

¹³² *Williams v. Jamaica*, Comm. No. 609/1995, UN Doc. CCPR/C/61/D/609/1995, 17 November 1997, para.6.5.

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

Respect for private and family life is a basic right, which is recognized and protected in all international human rights instruments, of course including the ICCPR. For the purpose of the ICCPR, the meaning of privacy has not been thoroughly defined in the General Comment or the case law. In the General Comment 16, the HRC attempts to define all the other terms used in article 17 such as ‘family’, ‘home’, ‘unlawful’ and ‘arbitrary’, which provides some basic standards implicated in that article.¹³³ It is obvious that article 17 not only prohibits the states parties from invading a person’s privacy, but also requires the states parties to adopt legislative and other measures to give effect to the prohibition against such invasion.

Has the women’s reproductive rights, at least to some extent, been incorporated into the right to privacy? As far as the ICCPR is concerned, the HRC, through its General Comment 28, confirms that article 17 guarantees women’s rights of reproductive autonomy over their own body. In General Comment 28, the HRC specifically indicates an area relating to women’s reproductive functions, as a part of women’s privacy. It further enumerates several circumstances fallen into that area. The HRC states:¹³⁴

Another area where States may fail to respect women’s privacy relates to their reproductive functions, for example, where there is a requirement for the husband’s authorization to make a decision in regard to sterilization; where general requirements are imposed for the sterilization of women, such as having a certain number of children or being of a certain age, or where State impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion. In these instances, other rights in the Covenant, such as those

¹³³ UN, the HRC, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*.

¹³⁴ *Supra* note 59, para.20.

of article 6 and 7, might also be at stake. Women's privacy may also be interfered with by private actors, such as employers who request a pregnancy test before hiring a woman. States parties should report on any laws and public or private actions that interfere with the equal enjoyment by women of the rights under article 17, and on the measures taken to eliminate such interference and to afford women protection from any such interference.

Professional Duties of Confidentiality

Lack respect of confidentiality can deter women from seeking advice and treatment and thereby adversely affect their health and well-being.¹³⁵ Women's right to privacy requires states to ensure that clinic policies and laws can safeguard their confidentiality. The Cairo Programme of Action also states that reproductive and sexual health services must safeguard the rights of adolescents to privacy, confidentiality, respect and informed consent, respecting cultural values and religious beliefs.

The HRC recently has issued its comment on the issue of professional duties of confidence in its Concluding Observations on Portugal:¹³⁶

The Committee is concerned that lawyers and medical doctors may be required to give evidence despite their duty of confidentiality, in cases which are described in very broad terms by the Code of Criminal Procedure. The State party should amend its legislation so that it specifies the precise circumstances in which limitations on the professional privilege of lawyers and medical doctors are imposed.

In particular, with respect to the medical information on abortion, the HRC in its Concluding Observations on Chile recommends the state to protect confidentiality of medical information on abortion.¹³⁷

Accordingly, article 17 through the HRC's authoritative interpretation

¹³⁵ See UN, the CEDAW, General Recommendation 24, para. 12 (d).

¹³⁶ UN, the HRC, the Concluding Observations on Portugal (05 July 2003), para.18, UN Doc. CCPR/CO/78/PRT.

¹³⁷ UN, the HRC, the Concluding Observations on Chile (30 March 1999), para.15, UN Doc. CCPR/C/79/Add.104.

imposes an obligation on the states to ensure protection of confidentiality in delivery of reproductive health services to women, including abortion.

Invasion of Private Sector

Women's privacy on reproductive function has always been invaded by private sectors, particularly by private employers. In Concluding Comments on Mexico, concerning that Mexican women seeking employment in foreign enterprises in the frontier areas of Mexico are subjected to pregnancy tests and required to respond to intrusive personal questioning, and that some women employees have been administered anti-pregnancy drugs, and those allegations have not been seriously investigated, the HRC recommends that the State should take measures to investigate all such allegations with a view to ensuring that women whose rights to equality and privacy have been violated in this way have access to remedies and to preventing such violations from recurring.¹³⁸ It illustrates that, to safeguard women's right to privacy, the states should take measures to outlaw any act of private sectors, which may invade women's privacy related to reproductive function, through legislation if necessary, and provide appropriate legal remedies to victims.

Moreover, apart from the obligation of ensuring that national laws protect women's privacy on reproductive functions, the state should take positive measures to ensure that such laws can be implemented effectively. It has been evidenced in the Concluding Observations of the HRC. For example, in Concluding Observations on Brazil in 1996, the HRC recommends that the state party put in place effective enforcement mechanisms that will ensure the implementation of law, which prohibits the requirement of pregnancy and sterilization certificates and other discriminatory practices in employment. ¹³⁹

¹³⁸ See UN, the HRC, the Concluding Observations on Mexico (27 July 1999), para.17, UN Doc. CPR/C/79/Add.109.

¹³⁹ UN, the HRC, the Concluding Observations on Brazil (24 July, 1996), paras.335. UN Doc.CCPR/C/79/Add.66; A/51/40.

Voluntary Termination of Pregnancy

In General Comment 28, the HRC restricts itself on women's reproductive functions, yet goes on to address its opinion on the question whether other aspects of women's reproductive autonomy can be protected by article 17, especially on voluntary termination of pregnancy.

In 1973, the Supreme Court of the United States, in its decision on Roe case, recognized that a woman's right to decide whether to continue her pregnancy was protected under the constitutional provisions of individual autonomy and privacy. Cook considered that free choice of maternity is increasingly recognized as an attribute of private and family life.¹⁴⁰ I doubt whether it might be overoptimistic. It seems to me that not all the aspects of women's reproductive choice have been brought into the domain of privacy in the international human rights law.

At the European level, Article 8 of the ECHR also safeguards the right to privacy and family life, the paragraph (1) of which articulates that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." In the case of *Bruggemann v Federal Republic of Germany*, in which two West German women claimed that German regulations, which were too restrictive on the issue of termination of pregnancy, was contrary to article 8 (1) of the ECHR, the ECommHR notes that "[p]regnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus."¹⁴¹ Therefore, article 8 (1) cannot be interpreted as meaning that pregnancy and its termination fall exclusively within the ambit of the mother's private life.¹⁴²

¹⁴⁰ See Cook, *supra* note 2, p.176.

¹⁴¹ *Bruggemann v Federal Republic of Germany*(1978), App no.6959/75, ECommHR, quoted from R.St.J. Macdonald, F. Matscher and H.Petzold (edited by), *The European System For the Protection of Human Rights*, (Martinus Nijhoff Publishers, 1993), p. 408.

¹⁴² See Macdonald, *supra* note 141, p.408.

Someone may suggest that General Comment 28 and the Concluding Comments on Mexico may imply that anti-abortion laws breach a woman's article 17 rights of privacy and autonomy.¹⁴³ However, it seems that the HRC only condemns anti-abortion laws as dangers to women's right to life and the right to be free from torture, inhumane or degrading treatment, the right to non-discrimination, rather than as breaches of right to private and family life.¹⁴⁴ Actually, from the concrete wording of the Concluding Observations of the HRC, it may be found that the general prohibition of abortion with appropriate exceptions has been viewed as being not incompatible with the ICCPR and has all through been tolerated by the HRC.

Right to Decide the Number and Spacing of Children

Although to decide the number and spacing of children has not been pronounced as an element of women's privacy in General Comment 28, it has been viewed essentially as a private matter.¹⁴⁵ Any choice and decision with regard to the size of the family must irrevocably rest with the family itself, and cannot be decided by anyone else.

The right to decide the number and spacing of their children is also known as the right to family planning, as opposed to governments' family planning policies. It has been identified for the first time in the First International Conference on Human Rights, held in Tehran in 1968 as the "right to decide freely and responsibly on the number and spacing of their children". What does the term "responsibly" mean? Does it intend to impose a duty or restriction on individuals when they make such a decision? At the 1974 World Population Conference in Bucharest, the World Population Plan of Action provided a definition of 'responsibly' as requiring that couples and individuals take into account the needs of their living and future children and their responsibility towards the community. It seems that the Cairo Programme of Action agrees with this definition since Paragraph 7.12 states

¹⁴³ See Joseph, *supra* note 52, p. 352.

¹⁴⁴ *Ibid.*

¹⁴⁵ See Packer, *supra* note 41, p 55.

that “[t]he success of population education and family-planning programmes in a variety of settings demonstrates that informed individuals everywhere can and will act responsibly in the light of their own needs and those of their families and communities.” Each state may interpret the term ‘responsibly’ in different way, it however cannot be used to justify government intervention in a manner of discrimination, coercion and violence, as indicated in General Comment 19 of the HRC, “[w]hen States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory”.¹⁴⁶ Thus, coercive measures of population control are incompatible with the ICCPR and accordingly, laws that authorize to do so, can not be used to justify such a interference of women’s reproductive autonomy as ‘lawful’ or ‘non-arbitrary’. Moreover, some scholar even considers that the right to decide the spacing of one’s children seems to be an absolute freedom and interference with this decision by specify a specific interval would thus be manifestly and always arbitrary.¹⁴⁷

3.5 The Right to Marry and Found a Family

Article 23 (2) provides that “[r]ight of men and women of marriageable age to marry and to found a family shall be recognized”.

The Right to Marry

Although, the right to marry in article 23 (2) is expressed as an absolute right, it is not always absolute. Some common restrictions are permissible, such as restrictions on incestuous marriage or on persons who are already married, and a legal minimum age is prerequisite. In General Comment 19, the HRC states that “[a]rticle 23, paragraph 2, of the Covenant reaffirms the right of men and women of marriageable age to marry and to found a family.” It implies that a female adolescent, who is under a marriageable age,

¹⁴⁶ UN, the HRC, General Comment 19 *Protection of the family, the right to marriage and equality of the spouses (Art. 23)*.

¹⁴⁷ See Packer, *supra* note 41, p. 56.

has the right not to marry.

World Bank report reveals that women who give birth before age 18 are three times more likely to die in childbirth than women aged over 18 years.¹⁴⁸ Early marriage often leads to early childbearing. The HRC expresses its concern on early marriage in Concluding Observations on Sudan and states that “the high maternal mortality rate” may be the “consequence of early marriage”. A requirement of a minimum age for women to marry, set by laws, can help to ensure that women to avoid the physical health risks of premature childbearing and the mental health consequences of early marriage. National family laws have traditionally set a minimum age at which persons are able to marry. However, those laws are not implemented effectively in some countries. In its Concluding Observations on India, the HRC explained that:¹⁴⁹

While acknowledging measures taken to outlaw child marriages (Child Marriages Restraint Act), the practice of dowry and dowry related violence (Dowry Prohibition Act and the Penal Code) and sati - self-immolation of widows - (Commission of Sati (Prevention) Act), the Committee remains gravely concerned that legislative measures are not sufficient and that measures designed to change the attitudes which allow such practices should be taken...The Committee therefore recommends: that the Government take further measures to overcome these problems and to protect women from all discriminatory practices...

It may accordingly be formulated that article 23 (2) imposes an obligation for the states parties to take legislative measures to enforce an appropriate minimum age requirement for women to marry and ensure that relevant laws can be implemented effectively, in order to reduce high rate of early marriage and early childbearing.

The Right to Found A Family

¹⁴⁸ World Bank, *World Development Report 1993: Investing in Health* (Oxford University Press, New York, 1993), pp.84-117.

¹⁴⁹ UN, the HRC, the Concluding Observations on India (04 August 1997), para.16, UN Doc. CCPR/C/79/Add.81.

In examining the drafting history of the ICCPR, it seems that the right to found a family was not of much concern and article 23(2) was adopted unanimously without much deeply consideration.¹⁵⁰ General Comment 19 states “[t]he right to found a family implies, in principle, the possibility to procreate and live together.” Cook argues that an act of foundation goes beyond a passive submission to biology, to involve the right of a woman positively to plan, time and space the births of children to maximize their health and her own.¹⁵¹ This understanding of article 23 (2) has been rejected in his subsequent literature on reproductive rights. It has been recognized by commentators that the right to decide the number and the spacing of their children is protected by article 17, which safeguards the right to privacy. The right to found a family is distinguishable from the right to private and family life, although for some purposes the former right may be considered to be part of the latter. ¹⁵² As stressed in General Comment 19, protection of family and its members is also guaranteed directly or indirectly by other provision of the ICCPR, such as article 17, which deals with the right to private and family life. Article 17 guarantee of privacy prohibits ‘arbitrary interferences’ with one’s family, while article 23 (2) appears to emphasize states’ positive obligation to protect family life. As far as women’s right to reproductive choice is concerned, I consider that the right to private and family life in article 17 focuses on protection of women’s right to decide the number and spacing of their children from arbitrary or unlawful interference, and the right to found a family in article 23 mainly focuses on women’s right to possible procreation.

General Comment 19 states “[w]hen States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminator or compulsory”. As article 23 (1) articulates, family is the natural and fundamental group unit of society. States may adopt laws and policies to encourage a certain family size to

¹⁵⁰ See Packer, *supra* note 41, p. 43.

¹⁵¹ Cook, *supra* note 27, p. 700.

¹⁵² Cook, *supra* note 27, p. 703.

control population positive or negative growth. Therefore, the right to found a family is not absolutely free from any interference from the states. Article 23 (2) permits the states parties to take incentive or disincentive measures to guide persons' free choice. However, they may not "interfere with the freedom of persons ultimately to disregard" these incentives or disincentives and to choose as they wish.¹⁵³

In response to remarkable technological innovations over the last three decades in the areas of contraception, sterilization, surrogate motherhood, etc, which have greatly increased the possibilities of choice in relation to reproduction, some scholars put forward an argument that the right to found a family embraces the right to have access to the medical technology which would enable procreation and the states must serve this positive right through positive actions. Packer believes that that understanding of the provision of article 23 (2) is "far too broad and lacks real foundation".¹⁵⁴ He further notes that the HRC's subsequent authoritative interpretation of that article in paragraph 5 of General Comment 19 "refers only to the implied 'possibility to procreate' and in no way refers to a State's duty to assist in creating such a possibility."¹⁵⁵

The issue of disability with regard both to the prospective mother raises a question. Does a disabled woman, particularly a woman with transmissible disease, have a right to found a family? The ICCPR and the HRC have so far kept silent on this question. Article 3 prohibits discrimination not only on specified grounds such as sex, race, and age, but also on open-ended grounds of 'other status', such as health status and disability. In light of article 3 it seems that physically or mentally disabled women have equal right to found a family. General Comment 5 of the Committee on the ICESCR has pronounced its interpretation of article 10 of the ICESCR with respect to persons with disabilities, stating that it implies the right of persons with disabilities to marry and to have their own family. However, in some

¹⁵³ Packer, *supra* note 41, p.44.

¹⁵⁴ *Ibid*, p. 47.

¹⁵⁵ *Ibid*.

circumstances, for example where a woman has a severe transmissible disease, which may be transmitted to her offspring, women's reproductive freedom comes into conflict with other values such as the prevention of harm to others.¹⁵⁶ It may depend upon the circumstance of an individual case to judge which value or interest should prevail in the conflict. I consider that suffice it to say here that in some extreme cases, where the disease will inevitably be transmitted to her offspring and may impose physical or mental suffering not only on the prospective child in his lifetime, but also on the prospective mother in the rest of her life, limitations on the woman's right to found a family, in order to prevent harm to others and the woman herself should be permitted. Thus, most disabled persons retain the right to found a family while in some extreme circumstances limitations on that should be allowed.

3.6 The Right to Information

The right to information is a key component of the right to freedom of expression, which has been widely recognized as fundamental to a democratic society and to the inherent dignity of the person. The right to information is particularly important for women to exercise their reproductive rights. The Cairo Programme of Action indicates that inadequate level of knowledge about human sexuality and inappropriate or poor-quality reproductive health information and services is one of the factors, because of which, reproductive health eludes many of the world's people.¹⁵⁷ Women need information in order to be able to exercise the reproductive rights effectively. They need information to improve their reproductive health, to access to family planning services, to make a decision on abortion and so on. The significance of the information necessary to reproductive health and choice is reinforced by article 10(h) of the Women's Convention, which requires states to ensure women to have access to "specific educational information to help to ensure the health and

¹⁵⁶ See Allen Buchanan, Dan W. Brock, Daniel Wikler, *From Chance to Choice-Genetics and Justice*, (Cambridge University Press, 2001) p. 206.

¹⁵⁷ *Supra* note 29, para.7.3.

well-being of families, including information and advice on family planning”. The right to information necessary to reproductive health and choice has also been reiterated and reinforced by other human rights instrument and supported by decisions of international human rights tribunals.¹⁵⁸

The right to information as a whole has been guaranteed under the article 19 of the ICCPR. Article 19 (2) and (3) of the ICCPR says:

(2) 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, whether orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary;

(a) For respect of the right or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Clearly, that article at least means that the individual is protected against interference by states organs with respect to generally accessible information. It does, accordingly, imply an obligation for the states not to interfere with information on women’s reproductive matters, such as abortion and family planning services. It has been evidenced in the Concluding Observations of the HRC on Ireland:

Concerning the 15. With respect to freedom of expression and the right of access to information, the Committee notes with concern that the exercise of those rights is unduly restricted under present laws concerning censorship, blasphemy and information on abortion. The prohibition of interviews with certain groups outside the borders by the broadcast media infringes upon the freedom to receive and impart information under article 19, paragraph 2, of the Covenant. The Constitutional

¹⁵⁸ E.g., *Open Door Counselling and Dublin Well Women v. Ireland*.

requirement that the President and judges must take a religious oath excludes some people from holding those offices.

However, the HRC simply indicates that those rights is ‘unduly’ restricted by the Irish laws. It has not gone further to explain what kind of restriction can be viewed as ‘undue’.

The right to information is not an absolute right in the international human rights law. Restrictions are permitted on some conditions, when those restrictions may relate either to the interests of other persons or to those of the community as a whole.¹⁵⁹ General Comment 10 explains those conditions as:

...when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 [of Article 19] lays down conditions that it is only subject to these conditions that restrictions may be imposed: the restrictions must be ‘provided by law’; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being ‘necessary’ for that State party for one of those purposes.

Following that explanation, it may be concluded that an ‘undue’ restriction can be interpreted as a restriction which may not be imposed for, or may not be necessary for, any of purposes set out in article 19 (3).

Someone may argue that the right to information on abortion (or sterilization or other reproductive matters) can be restricted by the state in light of the provision of article 19 (3) on the ground of public moral particularly in the countries where abortion is generally prohibited, or on the ground of public order, including crime prevention, particularly in countries where abortion or other methods of contraception are restrictively prohibited, in order, e.g., to protect an unborn life. In fact, both of the situations coexisted or still have coexisted in some countries, for instance in Ireland. The international human rights tribunals have already addressed on this

¹⁵⁹ UN, the HRC, General Comment 10 *Freedom of expression (Art. 19)*, para 14.

matter and provided us some principles, which may be used for reference.

In *Handyside v. UK*, the ECtHR notes, with regard to the restriction on ground of protection of public moral, that “it is not possible to find in the domestic law of the various contracting States a uniform European Conception of morals...Consequently, article 10 (2) leaves to the Contracting States a margin of appreciation.”¹⁶⁰ The ECtHR continued to say that “[n]evertheless, article 10 (2) does not give the Contracting States an unlimited power of appreciation...the domestic margin of appreciation thus goes hand in hand with a European supervision”.¹⁶¹ It considers that the states should have a narrower margin of appreciation in matters affecting their intimate and private lives.¹⁶²

The application of margin of appreciation by the ECtHR to the article 10 (2) illuminates that no universal public moral standard exists. The identical view has been adopted by the HRC in *Hertzberg et al. v. Finland*.¹⁶³ In that case, the HRC notes, “public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.”¹⁶⁴ It is the only case in which the HRC applies the doctrine of margin of discretion in individual communications. Some commentators criticized that that doctrine dilutes human rights protection and “[i]t is unwise to apply such a doctrine under the ICCPR, where a common practice would rarely be discerned among the very different States Parties to this universal treaty.”¹⁶⁵

As Mr Opsahl has noted in his separate concurring opinion in *Hertzberg et al. v. Finland*, the conception and contents of ‘public moral’ referred to in

¹⁶⁰ *Handyside v. UK* (1976), A24, 5493/72, ECtHR, para. 22.

¹⁶¹ *Ibid*, para. 23.

¹⁶² See *Dudgeon v. UK*(1981), A45, ECtHR.7525/76

¹⁶³ *Hertzberg et al. v. Finland*. The HRC, Communication No. 61/1979 : Finland. 02/04/82. UN Doc. CCPR/C/15/D/61/1979.

¹⁶⁴ *Ibid*. para. 10.3.

¹⁶⁵ Joseph, *supra* note 52, p. 394.

article 19 (3) are relative and changing.¹⁶⁶ It is beyond doubt that the traditional values and moral standard on abortion or reproductive choice have been challenged, although have not been completely changed, by the notion of women's reproductive health and choice. This challenge cannot be neglected by the HRC in dealing with women's right to information necessary for reproductive health and choice. Moreover, it also should be noted that, could the important role, which the information to women reproductive health and choice has played in reduction of maternal and infant mortality and morbidity, be understood sufficiently by the HRC, it might be more reluctant to uphold the restriction on right to information on abortion or other reproductive choice matters on the ground of 'public moral'.

In another case before the ECtHR, we may see the view of the ECtHR to the impact of information about abortion on an unborn life, and more important to women themselves. In *Open Door Counselling and Dublin Well Women v. Ireland*, two family planning agencies, Open Door Counselling and Dublin Well Women, two counselors and two women lodged an suit against Ireland challenging a ruling of the Irish Supreme Court that Prohibited the imparting information about where to obtain legal abortions outside of Ireland.¹⁶⁷ The ECtHR in the decision held that the Irish court's order violated the right to freedom of information for several reasons. Some of them, I consider, are crucial. First, the order was too sweeping and made no exceptions for women who might have special need for the information, for example, for sake of health.¹⁶⁸ Second, the link between the provision of information and the destruction of unborn life is not as definite as contended.¹⁶⁹ Thirdly, the injunction appeared to have been largely ineffective, either for protecting unborn life, or reducing number of women who obtained abortions in Great Britain, and have "created a risk to the

¹⁶⁶ See *Hertzberg et al. v. Finland*, supra note 151, separate concurring opinion.

¹⁶⁷ *Open Door Counselling and Dublin Well Women v. Ireland* (1992), A246-A, case no. 64/1991/316/387-388, ECtHR.

¹⁶⁸ *Ibid*, para. 73.

¹⁶⁹ *Ibid*, para. 75.

health of women who are now seeking abortions at a later stage...and who are not availing of customary medical supervision after the abortion has taken place”. 170

A principle that may arguably “reflect the way in which international law is developing”, can be extrapolated from the decision of *Open Door Counselling and Dublin Women v. Ireland* that governments may not prevent a woman from receiving information about abortion in the circumstances, at the least, when continuance of pregnancy or childbearing may be harmful to her, even in a country where abortion is illegal, when the provision of information did not inevitably lead to the destruction of unborn life, and when such a prevention is proved to be ineffective to reduce number of women who obtained abortions.¹⁷¹ This principle, I consider, will be very instructive to the HRC in deal with women’s right to information on abortion and other reproductive matters.

In the ICPD, governments pledge to “ensure that comprehensive and factual information and a full range of reproductive health-care services, including family planning, are accessible, affordable, acceptable and convenient to all users.” Does the article 19 of the ICCPR impose a positive obligation for the states parties to provide information that people need? Nowak cautions that it might be difficult to answer whether the right to seek information obligates the states in certain cases to guarantee with positive measures to make information available themselves.¹⁷² Coliver argues that the right to information has evolved to oblige the states to provide information that is necessary for the protection and promotion of reproductive choice, especially to women at high risk.¹⁷³ That argument is increasingly supported by the HRC in its Concluding Observations on the states parties’ reports, when it observes that the lack of information on women’s abortion and family planning has a serious impact on maternal mortality. For instance, in

170 *Supra* note 167, para.76.

171 *See* Coliver, *supra* note 54, p.1294-1297.

172 *See* Nowak, *supra* note 81, pp.343-344.

173 *See* Coliver, *supra* note 54, p. 1298.

its Concluding Observations on Guatemala, the HRC emphasizes that the state party has the duty to adopt the necessary measures to guarantee the right to life of pregnant women who decide to interrupt their pregnancy by providing the necessary information and resources to guarantee their rights.¹⁷⁴

¹⁷⁴ See *supra* note 84.

4 Conclusion

Women's reproductive rights, at least to some extent, have been recognized in many international human rights treaties, including the ICCPR. By way of dynamic interpretation through its General Comments, concluding observations on states parties' reports and its jurisprudence, the HRC has broadened many specific rights under the ICCPR, which have been used, or can be used, to advance women's reproductive rights. In evaluating the states parties' compliance with those rights, the HRC generally recognizes that attributing a purely negative or passive role to the states parties appears inadequate. The provisions that safeguard those rights may require the states parties to play an active role to take, not only negative, but also positive, and immediate obligations to respect, protect and promote those rights. Those rights are interactive so that each depends to a greater or lesser degree on the observance of others, and may not be exhaustive, for protecting women's interests on reproductive health and choice, though, they hit, at least part of the vital components of women's reproductive rights.

Due to the broadening of the nature of the right to life, women can invoke article 6, not only to protect them from death penalty when they are pregnant, but also to protect and promote their reproductive health and freedom of reproductive choice. The states parties are obliged to take positive measures to outlaw traditional harmful practices, such as FGM, to liberalize abortion, and to ensure women's access to abortion services, essential obstetric cares, family planning services and so forth, in order to reduce high maternal mortality rate.

Apart from protecting prisoners from being treated inhumanely, the right to be free from inhuman and degrading treatment, also ensure the inherent dignity of women in the reproductive health and choice context. Denial of abortion services even when pregnancy is a result of rape or the prospective child is unviable, denial of adequate medical treatment to a pregnant woman

whose health is threatened, forced abortion or sterilization, FGM and other practices, which may inflict physical or mental pain or suffering upon women, are incompatible with article 7. The states parties should take positive measures to eliminate such practices and provide adequate remedies to victims.

Women's reproductive autonomy over their own body, particularly including freedom to decide the number and spacing and timing of their children, is guaranteed by article 17, which protects the right to privacy. Article 17 safeguards women's privacy, which relates to reproductive functions, from unlawful or arbitrary interference of governments, and from invasion of private sectors. Positive obligations should be taken by the states parties to prohibit interference of women's privacy in matters relating to reproductive health and choice and to ensure confidentiality of women's reproductive health status.

In order to reduce the amount of early marriages, which may be a cause of high maternal mortality rate, the HRC recommends the states parties to effectively implement national family laws, which set a minimum age for women to marry, for fulfilling their obligations under article 23 (2). And it also provides protection for women's possibility to procreate. Discriminatory or compulsory family planning measures taken by the states parties have been viewed by the HRC as being incompatible with that article.

The right to information necessary for women's reproductive health and choice is guaranteed by article 19. Women's access to information on abortion should not be unduly restricted even in the countries where abortion is generally prohibited. Moreover, article 19 imposes positive obligations on the states parties to provide adequate information on reproductive health and choice, especially to women at high risk.

Although the right to equality and non-discrimination is not particularly addressed in this thesis, it does not mean that this right is not important.

Contrarily, it should be borne in mind in considering the scope and function of those specific rights analyzed above. Article 3 requires states to undertake to ensure the rights of women equal to those of men, to enjoyment of all civil and political rights set forth in the ICCPR, including those rights relating to women's reproductive health and choice. Article 26 further requires states to eliminate laws, policies and practices in reproductive area, which discriminate on specified or unspecified grounds, including sex and gender, marital status, age, health status and so forth. Moreover, following the principle laid down by *Broeks and Zwaan de Vries* Case that the article 26 is an autonomous right and thus also applicable in matters not within the ICCPR, article 26 also can be invoked to prohibit discrimination against women on reproductive issues outside the ICCPR.

It should be noted that in some areas, which may directly relate to women's reproductive health and choice, the HRC has shown reluctance, to provide a detailed guidance for the states parties to comply with. The most important and manifest example is the issue of abortion. Concerning the linkage between national anti-abortion laws and unsafe abortion, which is one of the principal causes of high maternal mortality rate in many countries, the HRC obviously supports the liberalization trend. That position has been revealed in its concluding observations on many states parties. However, the HRC has so far not set a specific standard for the states parties to conform to in amending their national anti-abortion laws. In some concluding observations, its recommendations to different states parties, which are confronted with the same problem, even appear inconsistent and ambiguous. It is unwise to slide over issues, which may affect substantially the implementation of the provisions under the ICCPR by the states parties. As to the areas where the HRC has already made general recommendations for the states parties to take positive measures to promote women's reproductive health and choice, it is hoped that the HRC will be able to clarify more precisely the concrete obligations that the states parties may take.

Although there is not much experience of the application of human rights in

women's reproductive health and choice context at the international level, the amount of such experience is growing. Other international human rights treaty bodies and tribunals, for example, in the global level, the Committee on ICESCR, the CEDAW, and in the regional level the ECtHR and the IACHR, have provided many useful suggestions for the HRC when it applies the provisions to formulate concluding observations or comments concerning reproductive issues and make decisions on individual complaints about their violation of women's reproductive rights.

In sum, given its universal coverage, and the significant functions of the HRC in monitoring the implementation of the ICCPR by the states parties, the role of the ICCPR in protecting women's reproductive rights cannot be neglected. Women and reproductive rights advocates can make a good use of the ICCPR and its treaty monitoring mechanism to safeguard women's reproductive rights.

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