

MONITORING WOMEN'S RIGHT TO HEALTH UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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INTRODUCTION

Several major international human rights instruments recognize the right to health care and a more comprehensive right to health. The United Nations Universal Declaration of Human Rights, the principal standard by which human rights are identified today, states that "everyone has a right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . ." ¹ Article 12 of the International Covenant on Economic, Social and Cultural Rights (Economic Covenant), intended to make more specific and binding the obligations of governments to protect the economic, social, and cultural rights enumerated in the Universal Declaration, "recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health," and to that end mandates that States Parties, the countries which have ratified or acceded to the Covenant, undertake the following steps to achieve its full realization:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;

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1. Universal Declaration of Human Rights, *infra doc. biblio.*, art. 25(1).

- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.²

As of 30 June 1994, 129 countries had ratified or acceded to this Covenant.³

While the International Covenant on Economic, Social and Cultural Rights has the most comprehensive definition of the right to health, other international human rights instruments also recognize this right. The International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child also have provisions related to the right to health.

As important as these international human rights instruments are in establishing normative standards for human rights, the promotion and protection of the enumerated rights require mechanisms to monitor the performance of governments and evaluate their compliance. Within the U.N. system, the major international human rights covenants require States Parties to report regularly on their implementation efforts. In ratifying or acceding to the Economic Covenant, for example, States Parties assume an international obligation to submit reports to the United Nations on the measures that they have adopted and the progress they have made in achieving observance of the Covenant. Currently, States are requested both to submit an initial report dealing with the entire Economic Covenant within two years of the Covenant's entry into force and to submit a periodic report every five years thereafter. These reports are reviewed by a body of experts, the Committee on Economic, Social and Cultural Rights.

Nevertheless, little systematic assessment of the performance of countries that have ratified or acceded to these conventions is currently taking place. Monitoring specific economic, social, and cultural rights, for example, requires the following: (1) a clear conception of the specific components of the right and the concomitant obligations of States Parties; (2) the delineation of performance standards related to each of these components, including the

2. Economic Covenant, *infra doc. biblio.*, art. 12.

3. Preparatory Document for the Fifth Meeting of Chairpersons of Treaty Bodies, Geneva, September 19-23, 1994, HRI/MC/3 (Aug. 15, 1994); see also *Status of the International Human Rights Instruments and the General Situation of Overdue Reports*, U.N. HRI, Item 6, at 4, U.N. Doc. HRI/MC/3 (1994).

identification of potential major violations; (3) collection of relevant data, appropriately disaggregated by sex and a variety of other variables; (4) development of an information management system for these data that would facilitate analysis of trends over time and comparisons of the status of groups within a country; and (5) analysis of these data. None of these five requirements are currently being met with regard to the right to health.

As discussed in this Paper, there are several factors accounting for this situation. Despite a rhetorical commitment to human rights, the international community, including the international human rights movement, has consistently neglected economic, social, and cultural rights, focusing instead on seeking redress for violations of civil and political rights. Monitoring of economic, social, and cultural rights has been hampered by conceptual and methodological problems, and evaluation of compliance with undertakings related to the right to health is particularly complex and difficult. Although the Covenant on Economic, Social and Cultural Rights has been ratified by over 100 States Parties, few States Parties have taken their responsibilities seriously, and a majority do not even comply with the reporting requirements. U.N. Member States have continuously underfunded human rights activities and discouraged the development of strong international human rights institutions with monitoring and enforcement capabilities. In addition, the U.N. Committee on Economic, Social and Cultural Rights operates under especially severe handicaps.

Given these problems, this paper suggests a new approach to monitoring women's right to health based on the identification of three types of potential and actual violations of this right. Such an approach is a first step toward developing resources for nongovernmental organizations to use to assess the performance of their governments.

I. LIMITATIONS OF MONITORING COMPLIANCE WITHIN THE U.N. SYSTEM

While affirming the principle of the indivisibility and interdependence of human rights, most recently at the 1993 World Conference on Human Rights,⁴ the international community has invested little attention and few resources to the realization of economic, social, and

4. Paragraph 5 of the *Vienna Declaration and Programme of Action* adopted by the World Conference on Human Rights on June 25, 1993, states that "[a]ll human rights are universal, indivisible, interdependent and interrelated." *Vienna Declaration and Programme of Action, infra doc. biblio.*, ¶ 5. But the rest of the text once more virtually ignores issues related to the realization of economic, social, and cultural rights. *See id.*

cultural rights. With the exception of the Committee on Economic, Social and Cultural Rights, U.N. human rights bodies like the Commission on Human Rights rarely deal with issues related to economic, social, and cultural rights. Moreover, the Committee operates under considerable limitations. Like other U.N. treaty monitoring bodies, the Committee lacks adequate financial resources, staff, and meeting time. Although a subcommittee has a pre-session preparatory meeting, the full Committee meets only once a year for a three-week session. At this session, they generally review the reports of six countries. Members, who are elected by the Economic and Social Council, do not receive remuneration for their time. Nor are they assigned staff to undertake research or analysis.⁵ Reflecting on this situation, the Seminar on Appropriate Indicators to Promote Progressive Realization of Economic, Social and Cultural Rights, convened in 1993 by the U.N. Human Rights Centre,

expressed its concern about the continued neglect of economic, social and cultural rights within the United Nations system and by states parties to the International Covenant on Economic, Social and Cultural Rights. Failure to invest sufficient attention and resources in economic, social and cultural rights has resulted in their conceptual underdevelopment and a lack of progressive realization of specific rights in many countries.⁶

Most States Parties either fail to submit reports regularly or prepare very superficial and inadequate reports that do not provide the data requested. Although States Parties are asked to report not only on the progress that they have made, but also on any "factors and difficulties" that have affected the realization of the rights in the Covenant, in most cases reports appear to be designed to camouflage, rather than reveal, problems and inadequacies. In addition, virtually all the reports ignore the request in the guidelines for specific disaggregations by groups in reporting data. Thus, the Committee rarely receives data that differentiate between the human rights status of women and men.

Governments rarely voluntarily admit to violations of human rights. Therefore, the integrity and vitality of any human rights review process depends on alternative sources of information. The international human rights movement has played a major role during the

5. For a discussion of the inadequacies of the treaty monitoring bodies see Audrey R. Chapman, *Improving the Effectiveness of Human Rights Treaty Monitoring Bodies*, in *FRESH THOUGHTS ON HUMAN RIGHTS* 38-44 (Katherine Cosby & Bernard Hamilton eds., 1994).

6. *Report of the Seminar on Appropriate Indicators to Measure Achievements in the Progressive Realization of Economic, Social and Cultural Rights*, U.N. GAOR, 48th Sess., at 34, ¶ 157, U.N. Doc. A/CONF.157/PC/73 (1993) [hereinafter *Report of the Seminar on Appropriate Indicators*].

past thirty years in monitoring human rights and promoting compliance with international human rights standards.

Despite the Committee's openness to receiving information from nongovernmental organizations and to having such groups attend and contribute to its proceedings, very few human rights groups have taken advantage of these opportunities for participation. There is a major discrepancy between the number of groups that participate in the work of the United Nations Human Rights Commission and some of the other treaty monitoring bodies, particularly the Human Rights Committee that monitors the Civil and Political Covenant, and the Committee on Economic, Social and Cultural Rights. One reason for this discrepancy is that violations of civil and political rights attract far greater attention within the U.N. system than compliance with economic, social, and cultural rights. Another is that international human rights organizations with standing or "full consultative status" in the U.N. system and access to human rights bodies have focused primarily on civil and political rights. National and local groups are not eligible for "full consultative status," so that few of the organizations interested in economic, social, and cultural rights receive notification about meetings and reports from the Committee, or are encouraged to participate in the work of treaty bodies. Specialized nongovernmental organizations, like those interested in health, are generally even less connected to this review process. Also, until recently, there have been relatively few grassroots organizations focused on women's human rights. Moreover, there are few manuals, resources, or methodological tools available to assist these groups to identify and document violations of economic, social, and cultural rights.

In addition, implementation and monitoring of the rights articulated in the Economic Covenant have been hampered by the lack of intellectual clarity as to the definition and scope of these rights and the related obligations of States Parties to the various conventions. Understanding of the full implications of these rights is far less advanced than is the case with respect to civil and political rights. In contrast with civil and political rights, the rights contained in the Economic Covenant are not grounded on significant bodies of domestic or international jurisprudence. The different nature of economic, social, and cultural rights, the vagueness of many of the norms, the absence of national institutions specifically committed to the promotion of economic, social, and cultural rights *qua* rights, and

the range of information required in order to monitor compliance all present challenges.⁷

Complicating matters further, evaluation of performance to date within the U.N. system has focused on assessments of "progressive realization" rather than the identification of violations. Article 2(1) of the Economic Covenant commits States Parties "to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized."⁸ This provision differs considerably from the standard enumerated in Article 2 of the International Covenant on Civil and Political Rights, which specifies an immediate obligation to respect and ensure all enumerated rights.

While the Committee on Economic, Social and Cultural Rights acknowledges the constraints imposed by limited resources in a general comment on the nature of States Parties obligations, it interprets progressive realization as requiring States Parties to move as expeditiously and effectively as possible toward the full realization of the constituent rights. The Committee also specifies that it is incumbent upon every State Party to ensure, at the very least, the satisfaction of minimum essential levels of each right.⁹ However, the Committee has not yet defined what moving expeditiously and effectively entails. Nor has it set forth the minimum core content of relevant rights. The Committee, therefore, lacks concrete standards for evaluating governments' performance and compliance with the Covenant.

Furthermore, evaluating the progressive realization of economic, social, and cultural rights is very complicated. It requires the availability of comparable statistical data from several periods in time to assess trends, preferably disaggregated in relevant categories, including gender, race, region, and linguistic group. Many governments do not have appropriate, quality data for this type of analysis, and those that do have the data generally do not make them available to the United Nations or nongovernmental organizations. Nor does the Committee have regular access to relevant statistical data collected by other parts of the U.N. system and the World Health Organization.

7. See Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 490-91 (Philip Alston ed., 1992).

8. Economic Covenant, *infra doc. biblio.*, art. 2(1).

9. *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. HRI, Committee on Economic, Social and Cultural Rights, 5th Sess., general cmt. ¶ 1 (1990), HRI/Gen/1 (Sept. 4, 1992).

Moreover, analysis of these data to evaluate performance, were they to be available, involves statistical expertise that members of the U.N. Committee on Economic, Social and Cultural Rights, staff of the U.N. Centre on Human Rights, and nongovernmental organizations generally lack.

The volume of statistical data that would be generated if States Parties provided appropriately disaggregated data as requested in the guidelines would require a computerized information system, something that the U.N. Centre for Human Rights lacks. Despite repeated calls from the chairs of the various human rights treaty monitoring bodies for the establishment of a computerized information system, the Centre is only at the early stages of installing computers even for the simplest word processing.¹⁰ In addition, current plans of the coordinator for office automation do not include the creation of a comprehensive and integrated information and documentation system. Such a system should be based on country files that would facilitate the control and retrieval of information from treaty monitoring bodies, the Commission, and special rapporteurs, as well as enable treaty monitoring bodies to access relevant U.N. and specialized agency databases. Currently, the Committee operates on the basis of a League-of-Nations-style filing system where information from previous reports has to be recovered manually. This precludes developing the times series data needed to assess progressive realization. It means that the Committee generally confines its review to data provided in current reports under the Economic Covenant, without reference to past performance or to information in reports to other treaty monitoring bodies.

II. USE OF INDICATORS TO MEASURE PROGRESSIVE REALIZATION OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

Attempting to circumvent some of the problems outlined above, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Human Rights Commission appointed Danilo Turk as a Special Rapporteur in 1988 with a mandate to prepare a study of the problems, policies, and practical strategies relating to the more effective realization of economic, social, and cultural rights. In his reports, the Special Rapporteur discusses the potential use of

10. Preparatory Document for the Fifth Meeting of Chairpersons of Treaty Bodies, Geneva, Sept. 19-23, 1994, *Improving the Operation of the Human Rights Treaty Bodies*, at 5, HRI/MC/2 (Aug. 12, 1994); see also *Improving the Operation of Human Rights Treaty Bodies*, U.N. HRI, Item 6, at 5, U.N. Doc. HRI/MC/2 (1994).

economic and social indicators for assessing progress in the realization of these rights. The Special Rapporteur identifies four major roles that the indicators can play. First, indicators can provide a quantifiable measurement device of direct relevance to the array of economic, social, and cultural rights. Second, indicators provide a means of measuring the progressive realization of these rights over time. Third, indicators may establish a method for determining difficulties or problems encountered by States in fulfilling these rights. In addition, indicators can "[a]ssist with the development of the 'core contents' of this category of rights" and offer "yardsticks whereby countries can compare their progress with other countries."¹¹ The Special Rapporteur therefore recommended that the United Nations convene a seminar "for discussion of appropriate indicators to measure achievements in the progressive realization of economic, social, and cultural rights . . . [to] offer an opportunity for a broad exchange of views among experts."¹²

In January 1993, the U.N. Centre for Human Rights convened such an expert seminar for which this author served as the rapporteur. After an extensive review, however, the members of the Seminar concluded that far from being a short cut to defining and monitoring economic, social, and cultural rights, the development of indicators requires the conceptualization of the scope of each of the enumerated rights and the related obligations of States Parties. Thus, it is not yet possible to formulate indicators to assess progressive realization of these rights. After an extensive review of the problems in measuring implementation of economic, social, and cultural rights, the Seminar concluded that additional work is required in particular to:

- (a) Clarify the nature, scope, and contents of specific rights enumerated in the Covenant;
- (b) Define more precisely the content of the specific rights, including the immediate core obligations of States parties to ensure the satisfaction of, at the very least, minimum essential levels of each of these rights;
- (c) Identify the immediate steps to be taken by States parties to facilitate compliance with their legal obligations toward the full realization of these rights, including the duty to ensure respect for minimum subsistence rights for all.¹³

11. *The New Economic Order and the Promotion of Human Rights*, U.N. ESCOR, Comm'n Hum. Rts., Subcomm'n on Prevention of Discrimination and Protection of Minorities, 42d Sess., Item 7, at 31, U.N. Doc. E/CN.4/Sub.2/19 (1990) (Progress report prepared by Danilo Turk, Special Rapporteur).

12. *Id.* ¶ 219(a).

13. *Report of the Seminar on Appropriate Indicators*, *supra* note 6, ¶ 159.

Beyond these priorities, the Seminar highlighted the need to improve evaluation and monitoring of progressive realization, identify and address violations, institute improved cooperation within the U.N. system, facilitate the participation of nongovernmental organizations and affected communities in each of the tasks outlined above, and apply scientific statistical methodologies.¹⁴ The Seminar also put forward a variety of cautions about the use of indicators to assess progressive realization of economic, social, and cultural rights. It emphasized that human rights indicators are not necessarily synonymous with the statistical indicators utilized by specialized agencies to measure economic and social development. Therefore, monitoring States Parties' performance in the progressive realization of economic, social, and cultural rights requires new approaches in data collection, analysis, and interpretation, including particularly a focus on the status of the poor and other disadvantaged groups and disaggregation for a number of variables, including gender.¹⁵ Use of existing statistical indicators to evaluate human rights compliance at the least "require[s] a re-analysis from a human rights perspective."¹⁶ In addition, the Seminar concluded that "it may be premature or inappropriate" at times "to apply quantifiable indicators."¹⁷ Because not all indicators can be expressed in numerical terms, it is important to develop criteria, principles, and standards for evaluating performance.¹⁸

III. CURRENT EFFORTS TO MONITOR THE RIGHT TO HEALTH WITHIN THE U.N. SYSTEM

While there is considerable collection of data at local, national, and international levels concerning health status and access to health care, there is currently little, if any, monitoring of the right to health. Not only is little effective monitoring of the right to health taking place, virtually none of this effort focuses on women. Reflecting the period in which it was drafted, the very definition of the right to health in the Economic Covenant lacks sensitivity to women's health needs. Under the guise of being gender neutral, Article 12 has a male-oriented conception of the right to health. Reproductive health, for example, is conspicuously absent from the listing of the major components of the right. Article 12 mandates that States Parties to

14. *Report of the Seminar on Appropriate Indicators*, *supra* note 6, ¶ 181.

15. *Report of the Seminar on Appropriate Indicators*, *supra* note 6, ¶ 160.

16. *Report of the Seminar on Appropriate Indicators*, *supra* note 6, ¶ 171.

17. *Report of the Seminar on Appropriate Indicators*, *supra* note 6, ¶ 170.

18. *Report of the Seminar on Appropriate Indicators*, *supra* note 6, ¶ 170.

the Covenant undertake steps to provide for the reduction of the stillbirth rate and infant mortality, but remains silent about maternal morbidity and mortality. The reporting guidelines developed by the Committee for Article 12 mandate that States Parties provide some, but certainly not all, data disaggregated by sex, but the Committee has failed to stress or enforce this requirement.

It should be noted that the right to health as defined in the Covenant is broad and inclusive. Aspects of public health, industrial and environmental hygiene, as well as access to medical services and medical attention in the event of sickness, are included in the Covenant. As such, the right to health is interrelated with several other rights enumerated in the Covenant—for example, the right to safe working conditions. Because health status depends on a wide range of socio-economic conditions, such as nutritional status, the right to health is also linked to the right to food and the right to education. Moreover, women's health status is affected by implementation of Article's 10 protections for the family and mothers before and after childbirth.

The Committee has not yet defined the scope and limits of the right to health or established the minimum core obligations of governments in relationship to this right. One of the ways in which the Committee pursues this task is to hold a day of discussion on a particular subject and then to draft a general comment setting forth its interpretation. In December 1993, the Committee devoted a day of general discussion to the right to health. Although the invitations to participate requested contributions focusing on the minimum core content of the right and discrimination issues, most of the papers were very general and virtually none of them addressed women's issues.¹⁹ The Committee has not yet issued its general comment on the right to health.

It is clear that effective monitoring of this Covenant requires the formulation of appropriate standards and indicators through which to assess implementation and reporting guidelines that request appropriate data to evaluate performance, something which the Committee, again, has not yet done. The current reporting guidelines relative to Article 12 are very general, and the Committee does not assess the performance of States Parties relative to specific standards. Nor does the Committee review States Parties' reports in

19. See generally *Report on the Eighth and Ninth Sessions*, U.N. ESCOR, Supp. 3, U.N. Doc. E/1994/23; E/C.12/19 (1994).

terms of their completeness or their compliance with the Committee's own reporting guidelines.

Further, as noted below, the Committee requests very little data relevant to addressing women's right to health. Other than specifying that reports disaggregate some data by sex, the only indicator that deals with women's particular needs is the proportion of pregnant women having access to trained personnel during pregnancy and delivery. The failure to specify more indicators relevant to women's health status means that even if countries complied with the reporting guidelines, the Committee would have an inadequate data on which to evaluate the performance of States Parties with regard to fulfilling women's right to health.

The Committee's reporting guidelines on Article 12, as they are now formulated, request that States Parties provide background information on: "the physical and mental health of the population, both in the aggregate and with respect to different groups within [the] society"; the existence of a national health policy; and the percentages of the GNP as well as national and regional budgets that are spent on health care.²⁰ Where available, States Parties are asked to provide indicators defined by the World Health Organization (WHO) relating to the following issues:

- (a) Infant mortality (. . . by sex, urban/rural division, and . . . if possible, by socio-economic or ethnic group);
- (b) Population access to safe water (. . . disaggregate[d by] urban/rural);
- (c) Population access to adequate excrete disposal facilities (. . . disaggregate[d by] urban/rural);
- (d) Infants immunized against [major diseases] (disaggregated by sex and urban/rural);
- (e) Life expectancy (. . . disaggregate[d by] urban/rural, by socio-economic group and by sex);
- (f) Proportion of the population having access to trained personnel for the treatment of common diseases and injuries, with regular supply of 20 essential drugs, within one hour's walk or travel;
- (g) Proportion of pregnant women having access to trained personnel during pregnancy and proportion attended by such personnel for delivery, . . . including maternity mortality rate, both before and after childbirth;

20. Philip Alston, *The International Covenant on Economic, Social and Cultural Rights*, in UNITED NATIONS CENTRE FOR HUMAN RIGHTS, *MANUAL ON HUMAN RIGHTS REPORTING* 63 (1991) [hereinafter *MANUAL ON HUMAN RIGHTS REPORTING*].

(h) Proportion of infants having access to trained personnel for care.²¹

The reporting guidelines also seek to elicit information on groups within the country whose health situation is "significantly worse than that of the majority of the population" and the measures the government has taken to improve their health.²² In addition, the guidelines ask about measures "to maximize community participation in the planning, organization, operation, and control of health care [and] . . . to provide education concerning prevailing health problems" with regard to prevention and control.²³ Few States, however, comply with the specific requests to provide data on a disaggregated basis, and the Committee rarely criticizes States for failing to do so. Virtually all of the statistics on health coverage and health status in the States Parties' reports, therefore, indicate only a national average without disaggregation by sex, region, income level, or ethnic/racial group. Although it can be assumed that most national governments are able to disaggregate much of their health data to determine women's health status and problems, those that do so in reports to U.N. treaty monitoring bodies are still very much the exception.

To date, the Committee has not attempted to analyze independently health data available in the U.N. system. As noted above, the Committee lacks extensive staff services to collect and assess such data, and the Centre for Human Rights does not have access to statistical databases within the United Nations and its specialized agencies. While WHO has a few staff members personally concerned with human rights, as an organization, it has done little to promote the linkage between health and human rights. Currently WHO sends a staff member to attend some of the Committee's sessions, but it does not provide staff services or assistance to the Committee nor does WHO seek to collect or evaluate health data on a human rights basis.

IV. RECOMMENDATIONS FOR MONITORING WOMEN'S RIGHT TO HEALTH

Given all of the limitations outlined above, there is a need for a new approach to monitoring women's right to health. I would like to suggest that the most fruitful strategy at the current time is to focus on violations rather than "progressive realization," which is currently the primary standard used by the United Nations. While requiring

21. *Id.* at 64.

22. *Id.*

23. *Id.* at 64-65.

further specification, violations are easier to define and identify, particularly for nongovernmental organizations, and perhaps for governments and international bodies as well. It is theoretically possible, for example, to develop a consensus on specific types of violations without first conceptualizing the full scope of a right and States Parties' obligations in relationship to it. Because a "violations approach" does not necessarily require access to extensive statistical data (although this approach may take advantage of the data when available), it is more consistent with the skills of grassroots human rights organizations. A "violations approach" also is comparable to the evaluation of performance under other international human rights instruments. Moreover, the Committee's recent decision to permit nongovernmental organizations to address the Committee in the initial stage of its review of a State Party report is likely to redirect its own analysis more toward an emphasis on violations.

In monitoring violations of women's right to health, it is important to distinguish between three types of violations: (1) violations resulting from government actions and policies; (2) violations related to patterns of discrimination; and (3) violations related to a State's failure to fulfill the minimum core obligations of enumerated rights. These violations may affect women's enjoyment of their rights as members of the society or more specifically as women.

Violations resulting from state actions are those most comparable to violations of civil and political rights. Many are acts of commission—activities of States or governments that contravene standards set in the Economic Covenant. Others are policies or laws that create conditions inimical to the realization of recognized rights.

Violations related to patterns of discrimination also represent a fundamental breach of the Covenant. As defined by the Economic Covenant, States Parties have the immediate obligation to ensure nondiscrimination. Article 2(2) calls on States Parties "to guarantee that the rights enunciated in the . . . Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²⁴ Article 3 further amplifies that States Parties are required to "undertake to ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights set forth in the present Covenant."²⁵ Obligations under Articles 2(2) and (3) ensure that nondiscrimination is not subject to progressive

24. Economic Covenant, *infra doc. biblio.*, art. 2(2).

25. Economic Covenant, *infra doc. biblio.*, art. 3.

realization. These provisions have been interpreted as requiring both negative measures to prevent discrimination and positive affirmative-action initiatives to compensate for past discrimination.²⁶ Moreover, the Committee has indicated that the positive measures needed to give effect to these articles go beyond merely the enactment of legislation.²⁷

While "discrimination" is not defined in the Covenant, its meaning may be ascertained by reference to the usage developed in the references and interpretation of other international human rights instruments. The definition of discrimination against women in the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) encompasses a broad range of issues. Article 1 provides:

[T]he term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁸

The Women's Convention obligates states "to pursue by all appropriate means and without delay a policy of eliminating discrimination against women."²⁹ The Women's Convention also reconceptualizes and extends the scope of the right to health to cover women's reproductive needs, thereby eliminating a fundamental source of discrimination in the definition and scope of the right. Article 12(11) mandates States Parties "to eliminate discrimination against women in the field of health care in order to ensure . . . access to health care services, including those related to family planning."³⁰

The third category of violations results from the failure to fulfill minimum core obligations. In its third general comment the Committee "is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party."³¹ Similarly, the Committee underscores that "even in times of severe resources constraints . . . the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted pro-

26. MANUAL ON HUMAN RIGHTS REPORTING, *supra* note 20, at 47.

27. MANUAL ON HUMAN RIGHTS REPORTING, *supra* note 20, at 48.

28. Women's Convention, *infra doc. biblio.*, at 19.

29. Women's Convention, *infra doc. biblio.*, art. 2.

30. Women's Convention, *infra doc. biblio.*, art. 12(1).

31. *Report on the Eighth and Ninth Sessions*, *supra* note 19, ¶ 10.

grammes."³² In most societies, women constitute one such vulnerable and neglected community. As noted above, the Committee, however, has yet to define the core minimum obligations related to the right to health care. Because the Committee has yet to do so, this is likely to be the most complex of the three types of violations to define.

The remainder of this Paper begins the process by identifying potential violations related to the first two categories, state actions and discrimination, drawn primarily from existing literature. It is meant as an invitation to other human rights advocates, international lawyers, researchers, and nongovernmental organizations to contribute to the development of a fuller cataloguing of actual and potential violations to women's right to health. The inventory is but a first step toward formulating resources for nongovernmental organizations to use in assessing the performance of governments. Through understanding better the most significant violations, it will also be possible to develop standards and indicators to evaluate compliance with the Covenant. Improving the capabilities of nongovernmental organizations to monitor violations and better linking them to relevant U. N. and regional monitoring bodies will also help to make the Committee more effective.

A. *Violations Based on Governmental Actions, Laws, and Policies*

The right to health is closely related with the right to life enumerated in Article 6 of the International Covenant on Civil and Political Rights. According to the Human Rights Committee, the right to life is "the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation."³³ Although the right to life is often equated with protection against arbitrary deprivation of life, the general comment notes that "[i]t is a right which should not be interpreted narrowly."³⁴ The Human Rights Committee interprets the right to life to require States to undertake positive measures, such as major initiatives "to reduce infant mortality and to increase life expectancy."³⁵

By extension, a State or government's policies, actions, and laws which endanger the health and life of women can be labeled a

32. *Report on the Eighth and Ninth Sessions, supra* note 19, ¶ 12.

33. *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. HRI, Human Rights Committee, 16th Sess., General Comment, art. 6, ¶ 1, HRI/GEN/1 (Sept. 4, 1992).

34. *Id.*

35. *Id.* ¶ 5.

violation of the right to health. Many women die or are chronically disabled by their lack of access to reproductive health services. WHO estimates that 500,000 women die each year from pregnancy-related causes, twenty-five to fifty percent of which result from the absence of family planning services or access to safe procedures or humane treatment for the complications of abortion.³⁶ Under international human rights law, "when continuation of pregnancy would imminently endanger women's lives, a right exists to take advantage of available means of contraception, sterilization and abortion."³⁷ Therefore, a State Party to the Economic Covenant which has laws or policies that make contraception, sterilization, or abortion illegal has violated its obligations to promote the right to health.

Coercive birth control practices, including abortions and large-scale sterilization, also constitute a violation of women's right to health.³⁸ These violations are apparently being carried out by several Asian countries, most notably China, as a matter of state policy to accomplish fertility control. Laws and policies that obstruct women's access to reproductive health services or attempt to control women's sexual and reproductive behavior also constitute a fundamental violation of women's right to health. For example, laws and regulations that require that a married woman have the authorization of her spouse before obtaining reproductive services obstruct a woman's access to such services. In addition, laws and regulations that condition eligibility for voluntary sterilization on such factors as the number of living children, the age of the woman, or the number of cesarian sections the woman has undergone violate a woman's right to health.³⁹

Legalization or policy support for medical or cultural practices that endanger girls' or women's health also constitutes a human rights violation. Female circumcision is one such practice that detrimentally affects girls' and women's health. Usually undertaken before menarche and often in unsanitary conditions, the physical health consequences may include infection, tetanus, shock, hemorrhage, septicemia, and urine retention. It may also produce longer-term physical complications, particularly urinary and reproductive tract infections that then result in infertility, menstrual disorders, and

36. Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645, 646 (1992).

37. *Id.* at 660.

38. *Report on the Eighth and Ninth Sessions*, *supra* note 19, ¶ 292(12).

39. Cook, *supra* note 36, at 648-49.

difficulties in childbirth.⁴⁰ Efforts to regulate female circumcision—including for example a recent decree of the Egyptian Ministry of Health specifying that circumcision be performed by medical professionals in hospitals—serve more as sanctions for the practice. The failure of Ministries of Health to take issue with either religious or medical claims that circumcision is mandatory for health, religious, and moral reasons can also be considered to be a violation of women's right to health.⁴¹

B. Violations Based on Discrimination

The first and most pervasive violation based on discrimination relates to the basic conception of the right to health in the Economic Covenant. Although the right to health as defined in the Covenant is theoretically gender-neutral, in fact it is male-oriented. Thus, a major consideration when assessing violations based on discrimination is whether a government has adopted a sufficiently inclusive approach to the right to health that goes beyond the Economic Covenant to incorporate reproductive health and allocates sufficient emphasis and resources to the protection and promotion of women's health. Few governments have done so.

Some of the specifics to consider are the following: (1) are meaningful reproductive health services incorporated as part of primary care and therefore widely available; (2) does the allocation of health expenditures in national and regional budgets represent a fair balance between women's health needs and other concerns; and (3) are illnesses and other health problems that solely or disproportionately affect women, like breast cancer, receiving adequate attention.

A related issue is whether the conception of women's health grants true personhood and autonomy to women, or instead frames women's health status solely in terms of their maternal and reproductive roles. Society's interest in the delivery of healthy newborns has often resulted in women's health status being considered solely or primarily in relationship to reproduction. As a result, a woman's health needs and status have been subordinated to the well-being of her fetus. There are lingering traces of this tendency to frame women's health

40. REBECCA J. COOK, *WOMEN'S HEALTH AND HUMAN RIGHTS* 8-9 (1994); see also INSTITUTE OF MEDICINE, *WOMEN AND HEALTH RESEARCH: ETHICAL AND LEGAL ISSUES OF INCLUDING WOMEN IN CLINICAL STUDIES* (Anna C. Mastroianni et al. eds., 1994), cited in Vanessa Merton, *Review Essay: Women and Health Research*, 22 J.L. MED. & ETHICS 272, 277 (1994).

41. Merton, *supra* note 40, at 274-77.

status in terms of their reproductive and maternal roles in the Economic Covenant.

In some societies this disposition has given rise to efforts to bar fertile women from hazardous jobs. In others, it has been used to justify forced medical interventions (e.g., cesarean sections and blood transfusions) on unwilling or unconsenting women. Assumptions of tension between maternal and fetal/infant interests also fuels the debate in some developed countries, for example the United States, over abrogating informed consent procedures for HIV testing of pregnant or newly delivered women.⁴²

To date, health research has tended to be discriminatory on two levels. First, many health problems specifically or particularly affecting women have not received sufficient attention. This bias, whether by commission or omission, doubtlessly reflects women's relative exclusion from significant health public policy decisionmaking positions. Thus, setting a just research agenda may require substantial changes in the way priorities are established, as well as a reordering of the priorities themselves.⁴³

Second, women are rarely included in research trials. Existing research guidelines from the U.S. Department of Health and Human Services and the Food and Drug Administration, for example, presume that pregnant women and women of childbearing potential should be excluded from clinical studies. Exclusion from clinical research harms women in a variety of ways. Male-female differences in average body weight, body surface, and ratio of lean to adipose tissue affect optimal drug-dose levels. Men's consistently higher metabolism rates and differences in the concentration of steroids and hormones in the body modify the pharmacokinetics and pharmacodynamics of some drugs. Further, although the timing of menstrual cycles has been shown to affect drug and surgical interventions, there is little systematic data collected. Finally, psychosocial gender differences, such as the incidence and pattern of depression, may also produce distinct patterns of drug consumption and efficacy.⁴⁴

The training of female health care workers is another area of likely discrimination. In many cultures, women can only be treated by female doctors and nurses. A dearth of trained women therefore leaves much of the female population without access to medical care. Even in countries where sex segregation in medical facilities is not an

42. Wendy Chavjkin et al., *Finding Common Ground: The Necessity of an Integrated Agenda for Women's and Children's Health*, 22 J.L. MED. & ETHICS 262, 262-69 (1994).

43. Merton, *supra* note 40, at 277 (citing Institute of Medicine study).

44. Merton, *supra* note 40, at 274-77.

issue, the lack of female professionals deprives women of a voice in shaping professional practices and priorities. If women are significantly underrepresented, as is in the case in many countries, it is essential to evaluate the types of impediments to women's training and advancement.

The delineation of the potential and actual violations of women's right to health enumerated in this Paper is very preliminary. It needs to be elaborated from "the bottom up," that is, from the experience of individual women and grassroots groups. Hopefully, the increasing attention of women's nongovernmental organizations to health issues will provide a vehicle for beginning this process. Cataloguing the types of violations taking place is a first step toward developing resources that will enable grassroots groups to monitor women's right to health. The Science and Human Rights Program of the American Association for the Advancement of Science, for one, is committed to working in partnership with such groups.

