



Center for Family and Human Rights (C-Fam)
OBSERVATIONS ON DRAFT GENERAL RECOMMENDATION N°37
ON RACIAL DISCRIMINATION IN THE ENJOYMENT OF THE RIGHT TO HEALTH
Submitted to the Committee on the Elimination of Racial Discrimination on August 4, 2023

INTRODUCTION

Below are seven observations of C-Fam on the contents of paragraphs 12 and 22 of draft General Recommendation n°37, submitted to the Committee on the Elimination of Racial Discrimination (CERD), pursuant to its call for inputs.

The Center for Family and Human Rights (C-Fam) is a nongovernmental organization that was founded in 1997 and has held Special Consultative Status with the UN Economic and Social Council since 2014. We are headquartered in New York and Washington, D.C., and are a nonprofit, nonpartisan research and advocacy organization that is dedicated to reestablishing a proper understanding of international law, protecting national sovereignty and the dignity of the human person.

OBSERVATIONS

1. The Committee on the Elimination of Racial Discrimination does not have the authority to create new obligations that were never agreed upon by sovereign states or even modify existing obligations.

The independence of treaty bodies and other UN experts is at the service of authentic and judicious stewardship of the obligations that State Parties agreed upon in UN treaties. It is not a license to rewrite treaties that took decades to negotiate. Treaty bodies must not usurp the role of State Parties, who alone are the final interpreters of their obligations. This is borne out by how the views and recommendations of UN treaty bodies must be germane to the reporting under the treaties that establish them and, by the design of the negotiating states, are neither binding nor authoritative on State Parties.¹

2. Paragraphs 9 and 10 of General Recommendation n°37 threaten the sovereignty and democratic legislative prerogatives of nations and their peoples.

¹ Pedone, Joanne; Kloster, Andrew R., New Proposals for Human Rights Treaty Body Reform, *Journal of Transnational Law & Policy* 22: (2012-2013) 29, available at: <http://research.un.org/en/treatybodies>.

Abortion is not an international human right; none of the UN core human rights treaties mentions abortion, or could reasonably be interpreted as including it as a right. Moreover, the international consensus at the International Conference on Population and Development asserted that laws regulating abortion are solely for national governments to determine, not multilateral institutions. An international coalition of 36 nations has signed the Geneva Consensus Declaration, which reiterates the outcomes of numerous negotiations over decades: abortion is not a right, and the highest attainable standard of health, including maternal health, can be achieved for women of all races without induced abortion.² The issue of abortion remains highly contested in international negotiations, and many countries have laws that contradict the contents of the relevant paragraphs of General Recommendation n°37.

3. The fact that other treaty bodies have exceeded their mandates by interpreting a right to abortion into their respective treaties does not compel or justify similar actions by CERD.

In asserting that “abortion is part of the right to control one’s health and body and the right to life of persons protected under the Convention,” Paragraph 22 includes a citation to an annex of the World Health Organization’s recent guideline on “safe abortion.” This annex, in turn, traces the origin of this “right” to observations of other treaty bodies. As previously stated, none of the core UN human rights treaties mention abortion, much less as a right, and such language would never have been agreed upon when their texts were being meticulously negotiated.

Moreover, the decision of certain treaty monitoring bodies to insinuate a putative right to abortion into their respective treaties began as a coordinated strategy in the 1990s following several failed attempts to obtain such a right through negotiated consensus. For decades, efforts to establish a right to abortion by consensus have been rejected, even as experts and expert committees within the UN human rights system have continued to exceed their mandates in this regard.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is the oldest of the nine core UN human rights treaties, has been ratified by the vast majority of UN member States, and, with few exceptions, has showed unique restraint concerning pressuring countries on the abortion issue. It is therefore dismaying that paragraphs 12 and 22 of the General Recommendation signal CERD’s intention to adopt an activist posture on this controversial issue, at the expense of the many decades of goodwill and respect the committee has earned.

4. Experts in international law and policy declare that abortion is not a right and that international law “may, and indeed should be used” to protect the life of the unborn.

“As a matter of scientific fact, a new human life begins at conception,” the San Jose Articles declare. The 2011 document signed by over 30 experts in health and law states that “No matter how an individual member of the species begins his or her life, he or she is, at every stage of development, entitled to recognition of his or her inherent dignity and to protection of his or her inalienable human rights.” The articles further state, “There exists no right to abortion under

² Geneva Consensus Declaration. 2020. <https://undocs.org/en/A/75/626>

international law, either by way of treaty obligation or under customary international law. No United Nations treaty can accurately be cited as establishing or recognizing a right to abortion.” When treaty bodies say otherwise, they act *ultra vires* and cannot create new obligations on state parties.³

5. Abortion is not analogous to the provision of medical care, either in law or in practice.

An induced abortion intends to end a pregnancy in a way that requires the death of the fetus, or unborn child. This is ethically distinct from medical interventions performed to save the life of the mother which may indirectly result in fetal death, but where the ultimate goal is to save the lives of both patients.⁴ Induced abortion is therefore not therapeutic, as it intends to end the life of the fetus while failing to treat any disease or injury on the part of the woman, as pregnancy itself is not a disease, and most complications of pregnancy and birth can be treated without requiring the death of either mother or child.

In addition to not being a human right, abortion has always been accompanied in negotiated documents by caveats, including that it must not be used as a method of family planning (thus reducing its frequency), that it is regarded as potentially unsafe, and that women must be provided with alternatives.⁵ These caveats indicate that international consensus places more emphasis on abortion being limited than on its being universally accessible. While it is true that, in many settings, people with greater wealth and privilege have been able to evade legal limits on abortion, this is not an argument in favor of the removal of restrictions; rather, it points to the need to end such impunity through the equal application of the law.

6. Abortion has historically been used to further marginalize and eliminate oppressed racial groups, not to empower and uplift them.

Prior to the circulation of General Recommendation n°37, one of the relatively few countries criticized by CERD for its abortion laws and policies is the United States of America. The Committee particularly expressed concern that women of racial and ethnic minorities, particularly those of African descent, face disproportionate barriers to accessing abortion. However, the racial group with the highest abortion rate in the United States is non-Hispanic Black women (23.8 abortions per 1,000 women), and the lowest rate was among non-Hispanic

³ The San Jose Articles and explanatory notes on the article are a document relevant to the general discussion of Article 6 of the International Covenant on Civil and Political Rights by the Human Rights Committee. Forty-four human rights lawyers and advocates, scholars, elected officials, diplomats, and medical and international policy experts signed the articles in 2011. The articles have been presented at UN headquarters in New York, and in parliaments across the world. The articles and footnotes are available at: www.sanjosearticles.com.

⁴ “As experienced practitioners and researchers in obstetrics and gynecology, we affirm that direct abortion – the purposeful destruction of the unborn child – is not medically necessary to save the life of a woman. We uphold that there is a fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child. We confirm that the prohibition of abortion does not affect, in any way, the availability of optimal care to pregnant women.” For more information on the Dublin Declaration on Maternal Health Care visit the website www.dublindeclaration.com.

⁵ UN Population Fund (UNFPA), Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, 1995, A/CONF.171/13/Rev.1.

White women (6.6 abortions per 1,000 women).⁶ Black women also suffered a 2-3 times higher abortion-related mortality rate than their White counterparts, in cases where abortions were legal.^{7,8} Further increasing the already-high abortion rate among Black women is not the way to reduce the disproportionately high rate of maternal mortality in that racial group. The solution requires addressing the underlying causes of poverty and ill health, including past and present forms of racial discrimination.

Abortion has not healed the wounds from the past, and it only serves to create new wounds. The high rate of abortion among Black Americans has impacted the relatively slow growth of that group's population compared with other racial groups. The early leaders of the birth control movement in the United States were advocates for eugenics, and specifically targeted Black persons and other racial minorities, as well as people who had disabilities, were poor, or were otherwise considered to be less "fit."⁹ In recent years, two organizations whose affiliates are among the leading providers of abortion worldwide have taken steps to distance themselves from the racist and eugenicist views of their founders.^{10,11} Yet even as they claim their motives have shifted from racist to anti-racist, they continue to offer abortion as the solution to the problems faced by women who may face discrimination on account of their race.

7. Racial equality is not zero-sum, and neither is pregnancy and motherhood.

The preamble to ICERD states that racial discrimination is "an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State." It follows that the elimination of such discrimination is both possible to achieve and beneficial to all, regardless of their race or other characteristics. All too often, racial unrest results from the false notion that the ability to thrive is zero-sum—that the good of one requires deprivation from another. Similarly, advocates for abortion as a right have framed pregnancy as a zero-sum situation, where the woman's ability to survive, thrive, and live a productive life can only be achieved at the expense of her child's life. In particular, women who are poor or part of marginalized groups, including racial minorities, have been told that their unborn children, especially when the pregnancies were unintended at the time of conception, will be doomed to lives of hardship, marginalization, or even criminality, if they are allowed to be born. The international

⁶ Kortsmit K, Mandel MG, Reeves JA, et al. Abortion Surveillance — United States, 2019. *MMWR Surveill Summ* 2021;70(No. SS-9):1–29. DOI: <http://dx.doi.org/10.15585/mmwr.ss7009a1>

⁷ Bartlett LA, Berg CJ, Shulman HB, Zane SB, Green CA, Whitehead S, Atrash HK. Risk factors for legal induced abortion-related mortality in the United States. *Obstet Gynecol.* 2004 Apr;103(4):729-37. doi: 10.1097/01.AOG.0000116260.81570.60. PMID: 15051566.

⁸ Zane S, Creanga AA, Berg CJ, Pazol K, Suchdev DB, Jamieson DJ, Callaghan WM. Abortion-Related Mortality in the United States: 1998-2010. *Obstet Gynecol.* 2015 Aug;126(2):258-265. doi: 10.1097/AOG.0000000000000945. PMID: 26241413; PMCID: PMC4554338.

⁹ Parker S, Dannenfels M, Williams R. The Impact of Abortion on the Black Community. Center for Urban Renewal and Education. January 2023. <https://curepolicy.org/report/the-impact-of-abortion-on-the-black-community-2/>

¹⁰ Stewart, Nikita. "Planned Parenthood in N.Y. Disavows Margaret Sanger Over Eugenics." *The New York Times*, July 21, 2020. <https://www.nytimes.com/2020/07/21/nyregion/planned-parenthood-margaret-sanger-eugenics.html>.

¹¹ Ford, Liz. "Marie Stopes charity changes name in break with campaigner's view on eugenics." *The Guardian*, November 17, 2020. <https://www.theguardian.com/global-development/2020/nov/17/marie-stopes-charity-changes-name-in-break-with-founders-view-on-eugenics>.

community, which has pledged to “leave no one behind” must rise above this form of fatalism and recognize that, if our ambitious global goals are to be achieved and human rights truly respected, no human life, born or unborn, and of any race, can be regarded as “unwanted.”