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Misguided at Best, Malevolent at Worst: The International Impact of United States Policy on Reproductive Rights

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Misguided at Best, Malevolent at Worst: The International Impact of United States Policy on Reproductive Rights

Lindsay Marum*

This Note discusses the effect of U.S. foreign policies on the reproductive rights of women in developing countries. Many international human rights treaties and their progeny have consistently found that reproductive rights are intertwined with basic human rights, such as the right to privacy, the right to health, the right to education, and the right to start a family. Despite considering itself a superpower among all other countries, U.S. policies like the Helms Amendment and the Mexico City Policy fail to adhere to these basic international human rights standards. At the same time the United States recognized the constitutional right of its female citizens to have an abortion, it began restricting that right for women in countries that are dependent on the United States for health aid. U.S. foreign policies go far beyond abortion and affect almost all health services, even those tangentially related to reproductive health services. These policies reinforce the notion that women, especially non-American and impoverished women, should be delegated to a second-class version of citizenship because of their anatomy. In order to prevent this continuing and harmful discrimination against women in developing countries, the United States must immediately repeal these foreign policies, prevent any future iterations from being enacted, and ensure that all subsequent policies are consistent with international human rights standards.

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INTRODUCTION

Reproductive justice in the United States has been a contentious topic even after the decriminalization of abortion in *Roe v. Wade*.¹ The debate usually focuses on the effect U.S. policies have on U.S. citizens, particularly in light of additional restrictions states and the Trump administration have imposed on women seeking reproductive services. This discussion often fails to address the impact of U.S. policies on women in developing countries who have even less access to reproductive information and resources.² U.S. policies that prevent women in developing countries from seeking and obtaining reproductive services violate women’s international human rights, reinforce stereotypes that lead to gender-based violence, and represent the United States’ rejection of its responsibilities in the international human rights arena. The United States must modify its foreign policies in accordance with international human rights standards in order to protect women’s reproductive rights.

I. APPLICABLE HUMAN RIGHTS LAW

While there is no specific treaty that protects women’s reproductive rights, these protections can be derived from existing human rights treaties like the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All

1. *Roe v. Wade*, 410 U.S. 113 (1973).
 2. Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, 16 GUTTMACHER POL’Y REV. 9 (2013).

Forms of Discrimination Against Women (CEDAW). The American Convention on Human Rights (ACHR) is the regional counterpart of international human rights treaties for the regional inter-American system.³ All of the referenced treaties guarantee that their enumerated rights shall be exercised without any discrimination as to sex.⁴ The United States has signed all the aforementioned treaties, but has only ratified the ICCPR.⁵ This means that even though the United States has signed the ICESCR, CEDAW, CRC, and ACHR, it has not consented itself to be bound to any of the terms of those treaties.⁶ Furthermore, the United States ratified the ICCPR with the understanding that “distinctions based upon . . . sex . . . [are] to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.”⁷ Even though it has not ratified and/or added understandings to these treaties, the United States is still obligated to “refrain, in good faith, from acts that would defeat the object and the purpose of the treat[ies].”⁸

A. *International Covenant on Civil and Political Rights*

The ICCPR obligates state parties to ensure that men and women have an equal right to enjoy all civil and political rights set forth by the Covenant.⁹ Neither the right to life nor freedom from cruel, inhumane, or degrading treatment can be derogated from.¹⁰ The ICCPR also prohibits arbitrary or unlawful interference with an individual’s privacy, family, and home, and offers the “right to the protection of the law against such interference or attacks.”¹¹ The freedom to “seek, receive and impart information and ideas” can only be restricted in limited circumstances, like public health and morals.¹² Lastly, the ICCPR recognizes the

3. American Convention on Human Rights art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter “American Convention”].

4. *Id.* at 144; International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 2, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Rights of the Child art. 2, Sept. 2, 1990, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention on the Elimination of All Forms of Discrimination Against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

5. U.N. Hum. Rts. Off. High Comm’r, Ratification of 18 International Human Rights Treaties, <https://indicators.ohchr.org/> (last visited Dec. 21, 2020).

6. U.N. Treaty Collection, Glossary of Terms Relating to Treaty Action, https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml (last visited Dec. 21, 2020).

7. U.N. Treaty Collection, International Covenant on Civil and Political Rights (Dec. 16, 1966), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en.

8. See note 4 for a list of general treaties.

9. ICCPR, *supra* note 4, at art. 3.

10. ICCPR, *supra* note 4, at arts. 6, 7.

11. ICCPR, *supra* note 4, at art. 17.

12. ICCPR, *supra* note 4, at art. 19.

right of men and women of marriageable age to found a family.¹³ State parties have the right to occasionally derogate from their obligations relating to privacy and family life.¹⁴ However, such derogations are only permissible during a public emergency and cannot be inconsistent with other obligations under international human rights law, nor involve discrimination solely on the basis of sex.¹⁵

The Human Rights Committee (HRC) recognizes that interferences with the right to privacy, right to life, and freedom from cruel, inhumane, or degrading treatment can occur when states “fail to respect women’s privacy relates to their reproductive functions.”¹⁶ In *Miss K.L.N.H. vs. Peru*, the HRC found that Peru violated ICCPR Articles 6, 7, and 17 when the government of Peru would not allow a minor to receive an abortion, even though the pregnancy posed a life-threatening risk to her.¹⁷ While the HRC recognizes that state parties may adopt measures to regulate abortion, it forbids state parties from imposing measures that violate “the right to life of a pregnant woman or girl, or her other rights under the Covenant.”¹⁸ The HRC also obligates state parties to remove existing barriers to safe and legal abortion and refrain from enacting new barriers.¹⁹ Furthermore, state parties must ensure that girls and boys have access to information on reproductive health, including a “wide range of affordable contraceptive methods,” and also protect women and girls who seek an abortion from stigmatization.²⁰

B. *International Covenant on Economic, Social, and Cultural Rights*

Similarly to the ICCPR, the ICESCR requires that state parties ensure that men and women have the equal right to enjoy their economic, social, and cultural rights.²¹ The Committee on Economic, Social, and Cultural Rights (CESCR) recognizes that discrimination against women who belong to an ethnic or religious minority has a “unique and specific impact” on those populations.²² It also recognizes that the family should be accorded the “widest possible protection and

13. ICCPR, *supra* note 4, at art. 23.

14. ICCPR, *supra* note 4, at art. 4.

15. *Id.*

16. U.N. Hum. Rts. Comm., General Comment No. 28, The Equality of Rights Between Men and Women, ¶ 20, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

17. U.N. Hum. Rts. Office High Comm’r, Reproductive Rights Are Human Rights at 99, U.N. Doc. HR/PUB/14/6 (2014).

18. U.N. Hum. Rts. Comm., General Comment No. 36 to the International Covenant on Civil and Political Rights, The Right to Life, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

19. *Id.*

20. *Id.*

21. ICESCR, *supra* note 4, at art. 3.

22. Comm. on Econ., Soc., & Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights, ¶ 17, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

assistance,” particularly in regard to its establishment.²³ Under Article 12 of the ICESCR, everyone has the right to enjoy the “highest attainable standard of physical and mental health,” and state parties must take steps to achieve this right.²⁴ State parties are also obligated to recognize everyone’s right to education.²⁵

The CESCR places special emphasis on the right to health in relation to reproductive rights.²⁶ The CESCR recognizes that the realization of the right to health is dependent on other rights, including the right to education, non-discrimination, privacy, and human dignity.²⁷ Accordingly, the CESCR asks states to develop national strategies to eliminate discrimination against women in the health sector.²⁸ Its interpretation of Article 12.2(a), which obligates states to take measures to reduce their stillbirth rates and infant mortality, also asks states to adopt measures that improve sexual and reproductive health services.²⁹ These services include child and maternal health, pre- and post-natal care, access to family planning, emergency obstetric services, and access to information and resources on these topics.³⁰ In order to ensure men and women have equal access to the highest attainable standard of health, state parties may be obligated to remove legal restrictions on reproductive health provisions.³¹ Respecting and promoting women’s right to make “autonomous decisions concerning their sexual and reproductive health” through these measures is required to fully realize women’s rights and gender equality.³²

C. *Convention on the Elimination of Discrimination Against Women*

CEDAW was enacted in light of continued and “extensive” discrimination against women, despite the existence of non-discrimination obligations under international human rights treaties.³³ Recognizing the roles that “poverty, colonialism, and traditional notions of women’s place in society” play in perpetuating discrimination against women, CEDAW prohibits discriminating

23. ICESCR, *supra* note 4, at art. 10.

24. *Id.* at art. 12.

25. *Id.* at art. 13.

26. *See infra* notes 27, 31, 32.

27. Comm. on Econ., Soc., & Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health, ¶ 3, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

28. *Id.* ¶¶ 12, 21.

29. *Id.* ¶ 14.

30. *Id.*

31. Comm. on Econ., Soc., & Cultural Rights, General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, ¶ 29, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005).

32. Comm. on Econ., Soc., & Cultural Rights, General Comment No. 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 28, U.N. Doc. E/C.12/GC/22 (May 2, 2016).

33. CEDAW, *supra* note 4, at Preamble.

against women based on their role in procreation.³⁴ It also condemns making “any distinction, exclusion or restriction . . . on the basis of sex which has the effect or purpose of impairing or nullifying” women’s human rights and fundamental freedoms.³⁵ CEDAW obligates states to “pursue . . . all appropriate means [of] eliminating discrimination against women,” which include enacting anti-discrimination laws, establishing legal protections for women’s equal rights, refraining from discriminatory practices, and modifying or repealing discriminatory domestic laws.³⁶

State parties have a number of obligations concerning family planning, which include taking appropriate measures to “modify social and cultural practices” that are based on stereotypical roles of men and women in society.³⁷ To eliminate discrimination against women in the education sector, state parties must provide access to “specific educational information” on health, familial well-being, and family planning.³⁸ Discrimination in the healthcare sector is also a concern for CEDAW. It requires states to take all appropriate measures to ensure men and women, especially those in rural areas, have equal access to healthcare services, including family planning and pregnancy services.³⁹ Women and men must have the same rights and responsibilities as parents, including the same right to decide “freely and responsibly” on when to have children, as well as access to relevant information and education.⁴⁰

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has issued a number of general recommendations on the provisions of CEDAW. The CEDAW Committee acknowledges that special attention is necessary to ensure women have access to information on sexual and reproductive health, adequate and confidential services, and that girls receive age-appropriate information on these rights.⁴¹ It also recognizes that some violations of women’s sexual and reproductive rights may violate the right to freedom from torture and cruel, inhumane, or degrading treatment.⁴² The CEDAW Committee recommends that state parties amend legislation that criminalizes abortion, remove barriers to reproductive services, and require all healthcare services to respect women’s rights to autonomy, privacy, confidentiality, informed consent,

34. *Id.*

35. *Id.* at arts. 1, 2.

36. *Id.*

37. *Id.* at art. 5.

38. *Id.* at art. 10.

39. *Id.* at arts. 12, 14.

40. *Id.* at art. 16.

41. Comm. on Elimination of Discrimination Against Women, General Recommendation No. 31, ¶ 69, U.N. Doc. CEDAW/C/GC/31 (Nov. 14, 2014).

42. Comm. on Elimination of Discrimination Against Women, General Recommendation No. 35, ¶ 18, U.N. Doc. CEDAW/C/GC/35 (July 14, 2017).

and choice.⁴³ In the case *LC v. Peru*, the CEDAW Committee reinforced these recommendations by finding that the state's denial of a child's urgently-needed surgery due to fear of harming her pregnancy violated her rights to privacy, freedom from gender stereotyping, health, and to a remedy.⁴⁴

D. *Convention on the Rights of the Child*

The CRC obligates states to recognize, promote, and protect the reproductive rights of children including the right to life; the right to be free from torture or other cruel, inhuman or degrading treatment or punishment; the right to be free from arbitrary or unlawful interferences with privacy; the right to access information, especially information aimed at the promotion of physical or mental health; and the right to the highest attainable standard of health, particularly in regard to pre-natal and post-natal health care for mothers.⁴⁵ Notably, there is no restriction on the termination of a child's life during the course of pregnancy, nor does the CRC define life as beginning before conception. The CRC mandates appropriate legal protection before and after birth, but protecting a fetus's potential right to life violates the CRC if it conflicts with a pregnant child's right to life and health by threatening her physical or mental health.⁴⁶ While Article 6 obligates state parties to ensure "to the maximum extent possible the survival and development of the child," it does not explicitly forbid the practice of abortion.⁴⁷ The Committee on the Rights of the Child (CCRC) is generally concerned over high rates of abortion, but finds that the best way to reconcile this concern with protecting reproductive rights is to "increase policies and education" by providing family planning services.⁴⁸

The CCRC recognizes that the care women receive "before, during, and after pregnancy" has significant implications on the health and development of children.⁴⁹ Accordingly, it recommends that state parties not only provide comprehensive healthcare during those time periods, but also take measures to

43. Comm. on Elimination of Discrimination Against Women, General Recommendation No. 24, ¶ 15, U.N. Doc. A/54/38/Rev.1 (1999).

44. CTR. FOR REPROD. RIGHTS, REPRODUCTIVE RIGHTS UNDER THE CONVENTION ON THE RIGHTS OF THE CHILD 1 (2014), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Wright_Glo%20Adv_7.15.14.pdf.

45. CRC, *supra* note 4, at arts. 6, 16, 17, 24, 37.

46. Abby F. Janoff, Note, *Rights of the Pregnant Child vs. Rights of the Unborn Under the Convention on the Rights of the Child*, 22 B.U. INT'L L.J. 163, 165 (2004).

47. *Id.*

48. CTR. FOR REPROD. RIGHTS, ABORTION AND HUMAN RIGHTS: GOVERNMENT DUTIES TO EASE RESTRICTIONS AND ENSURE ACCESS TO SAFE SERVICES (2008), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF.

49. Comm. on Rights of Child, General Comment No. 15, On the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, ¶ 53, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013).

“reduce maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practices.”⁵⁰ The CCRC also asks state parties to provide adequate sexual and reproductive health services and education to women and girls, specifically mentioning the right of indigenous women to this information.⁵¹ It even recommends providing access to “safe abortion services” to ensure girls can make “autonomous and informed decisions” about their reproductive health, thus dispelling any notion that the rights of the child under the CRC are inconsistent with reproductive rights.⁵²

E. *American Convention on Human Rights*

The ACHR is the inter-American system’s regional counterpart to international human rights treaties. Like the ICCPR, ICESCR, CEDAW, and CRC, it protects the right to life, the right to freedom of expression, and the right to raise a family.⁵³ The right to be free from torture includes the right to have one’s physical, mental, and moral integrity respected, while the right to privacy encompasses the right to have one’s honor respected and dignity recognized.⁵⁴ Even though the American Convention seeks to protect the right to life “in general, from the moment of conception,” this “in-general” provision does not “confer an equivalent right to life on the fetus or require invalidation of permissive abortion laws.”⁵⁵ The Inter-American Commission on Human Rights (IACHR) embraced this interpretation when it rejected the claim of anti-abortion advocates that challenged a U.S. court’s refusal to convict a doctor for performing a late-term abortion.⁵⁶

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women not only enumerates the same protections specifically for women, but more broadly protects the right of women to be free from violence or “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women.”⁵⁷ States are obligated to condemn all violence against women by adopting appropriate legal measures, supporting research on violence against women, “modifying social and

50. Comm. on Rights of Child, General Comment No. 4, Adolescent Health and Development in the Context of the Convention on the Rights of the Child, ¶ 4, U.N. Doc. CRC/GC/2003/4 (July 1, 2003).

51. Comm. on Rights of Child, General Comment No. 11, Indigenous Children and Their Rights Under the Convention at para. 54, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009).

52. CRC General Comment 15, *supra* note 49, ¶¶ 54, 56.

53. American Convention, *supra* note 3, at art. 4, 13, 17.

54. *Id.* at arts. 5, 11.

55. Baby Boy, Case 2141, Inter-Am. Comm’n H.R., Res. 23/81, 25/OEA/ser. L./V./II.54, Doc.9 Rev.1 (1981).

56. *Id.*

57. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women art. 1, Mar. 5, 1995, 33 ILM 1534.

cultural patterns” based on gender stereotypes that “legitimize or exacerbate violence against women,” and promoting education and awareness.⁵⁸ This Convention has been ratified by every country in the inter-American system except for the United States and Canada.⁵⁹

Entities like the IACHR investigate, report, and make recommendations on human rights abuse cases. In 2017, the IACHR asked all state parties to “adopt immediate measures to ensure that women can fully exercise all sexual and reproductive rights.”⁶⁰ State parties’ obligation to respect and protect fundamental rights is hindered by sexual violence that negatively affects women’s reproductive health, denial of access to female services, and clandestine reproductive health services.⁶¹ These challenges are often exacerbated by various factors such as race, ethnicity, age, and economic position.⁶² The work of these entities cannot have a substantial impact on human rights unless states accept and implement their recommendations into their own laws and policies. While the United States has a “strategic interest” in the IACHR’s efforts to address human rights violations in countries like Venezuela, it rarely takes serious steps to comply with the IACHR’s decisions on U.S. matters.⁶³ By engaging in this “selective” enforcement of international human rights, the United States delegitimizes prominent international human rights standards.

In short, numerous international human rights instruments and entities have consistently held that reproductive rights are not only essential to the full enjoyment of many other human rights but should be recognized as independent human rights. However, the United States consistently avoids ratifying these treaties to the fullest extent and incorporating them into their own policies.⁶⁴ The United States’ failure to ratify the ACHR is even more notable considering the fact that the IACHR’s headquarters are in Washington, D.C. This failure to fully adhere to international human rights standards and integrate these standards into U.S. laws and policies prevents women from fully realizing and exercising their reproductive rights.

58. *Id.* at arts. 7, 8.

59. *Id.*

60. Press Release, Inter-Am. Comm’n on Hum. Rts., IACHR Urges All States to Adopt Comprehensive, Immediate Measures to Respect and Protect Women’s Sexual and Reproductive Rights (Oct. 23, 2017).

61. *Id.*

62. *Id.*

63. Michael Camilleri & Danielle Edmonds, The Inter-American Human Rights System in the Trump Era (The Dialogue, Working Paper, 2017) <https://www.thedialogue.org/analysis/the-inter-american-human-rights-system-in-the-trump-era/>.

64. Ratification of 18 International Human Rights Treaties, *supra* note 5.

II. U.S. LAWS AND POLICIES ON REPRODUCTIVE JUSTICE

U.S. laws and policies fall drastically short of international standards concerning reproductive justice. Despite the fact that treaties are supposed to be the “supreme law of the land” under the Constitution, the United States consistently fails to ratify international human rights treaties.⁶⁵ The few times the United States does ratify such treaties, it adds reservations, understandings, and declarations that either significantly alter the effect of the treaty on domestic law or prevent the treaty from self-executing until it is formally enacted through domestic legislation.⁶⁶ Instead, the United States formulates its own laws and policies that significantly harm the reproductive rights of not only its own citizens but also of women in countries that depend on U.S. foreign aid.

In the landmark decision of *Roe v. Wade*, the U.S. Supreme Court held that a woman has a constitutionally-protected right to end her pregnancy through abortion.⁶⁷ Subsequent Supreme Court jurisprudence chipped away at *Roe* by replacing the trimester framework with a more subjective, “undue burden” standard.⁶⁸ The Court’s decision to uphold the Partial Birth Abortion Ban in *Gonzales v. Carhart* emboldened other states to enact restrictive abortion laws; in 2019 alone, nine states passed “heartbeat” bills that banned abortion after a heartbeat has been detected.⁶⁹ Planned Parenthood, which provides a wide array of reproductive services, withdrew from the Title X program in August 2019 after the U.S. Department of Health and Human Services prohibited grantees from providing abortion except in limited circumstances.⁷⁰

While anti-choice lawmakers and advocates have not yet succeeded in outlawing abortion in the United States, they have succeeded in defunding abortion and excluding it from federal health programs in other countries.⁷¹ The Trump administration “gutted” the Office of Global Women’s Issues, withdrew from the United Nations Human Rights Council, refused to recognize language in U.N. resolutions that protects sexual and reproductive health, and made

65. Janet Benshoof, *U.S. Ratification of CEDAW: An Opportunity to Radically Reframe the Right to Equality Accorded Women Under the U.S. Constitution*, 35 N.Y.U. REV. L. & SOC. CHANGE 103, 124 (2011).

66. *Id.* at 125.

67. *Roe*, 410 U.S.

68. *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992).

69. K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html>.

70. Sarah McCammon, *Planned Parenthood Withdraws from Title X Program Over Trump Abortion Rule*, NPR (Aug. 19, 2019, 2:55 PM), <https://www.npr.org/2019/08/19/752438119/planned-parenthood-out-of-title-x-over-trump-rule>.

71. Barot, *supra* note 2, at 9.

substantial cuts to its reproductive health foreign aid budget.⁷² These measures are drastic, but they are not entirely without precedent. Rather, they are rooted in the efforts of anti-choice advocates to restrict and diminish the protections guaranteed to women under *Roe*.

A. Helms Amendment

In the same year the Supreme Court guaranteed U.S. citizens the right to an abortion in *Roe*, the Senate adopted the Helms Amendment to the Foreign Assistance Act.⁷³ The amendment prohibits the use of foreign federal assistance funds for abortions or any biomedical research that relates to abortion as a method of family planning.⁷⁴ At the time it was passed, no women and only two minority men were in the Senate.⁷⁵ Its creator, Republican Senator Jesse Helms, vehemently opposed CEDAW, defining it as “negotiated by radical feminists [to] enshrine[] their radical anti-family agenda into international law.”⁷⁶ He believed CEDAW would promote abortion and force the United States to implement pro-abortion legislation, even though the term “abortion” is never mentioned in the text of the treaty.⁷⁷ Senator Helms openly acknowledged the coercive nature of the amendment, proclaiming that countries dependent on foreign aid know they will only receive aid if they adhere to “. . . ‘reasonable conditions’ [of] ‘social reform’ mandated by ‘the host country.’”⁷⁸

The Nixon administration’s United States Agency for International Development (USAID) criticized the “imperialistic and hypocritical overtones” of the Helms Amendment.⁷⁹ USAID implied that restricting safe abortions for women in other countries, a right that was just recognized for women in the United States, was a form of coercion.⁸⁰ The Helms Amendment perpetuates a sharp divide between women in the United States, for whom abortion is currently a constitutional right, and poor women in developing nations who struggle with “repugnant vestiges of colonialism, slavery, and imperialism.”⁸¹ Despite these

72. Stephanie Schmid, *The Trump Administration Is Erasing Reproductive Rights at Home and Abroad*, FOREIGN POL’Y (Oct. 23, 2018, 7:00 AM), <https://foreignpolicy.com/2018/10/23/trump-administration-erasing-reproductive-rights/>.

73. Michele Goodwin, *Challenging the Rhetorical Gag and Trap: Reproductive Capacities, Rights, and the Helms Amendment*, 112 NW. U. L. REV. 1417, 1431–32 (2018).

74. 22 U.S.C.A. § 2151b(f) (West).

75. Goodwin, *supra* note 73, at 1432.

76. *Id.*

77. Eileen P. Ward, *I’m a Convention, Hear Me Roar: A Call for the United States to Ratify the Convention on the Elimination of All Forms of Discrimination Against Women*, 27 J.C.R. & ECON. DEV. 415, 426 (2014).

78. Goodwin, *supra* note 73, at 1433.

79. Barot, *supra* note 2, at 9.

80. *Id.*

81. Goodwin, *supra* note 73, at 1433.

concerns, the Helms Amendment passed by a 52-42 vote in the Senate without any hearings.⁸² It also paved the way for legislation that further restricted the use of U.S. funds for research and “lobbying” related in any way to abortion.⁸³ The Helms Amendment and its progeny have wide-reaching implications for reproductive rights that go far beyond prohibiting federal funds for abortion. Rather, they deny women in developing countries immediate reproductive healthcare, hinder scientific research, and reinforce imperialistic notions that women in developing countries are not entitled to the same rights as Western women.

B. *Mexico City Policy*

The Mexico City Policy (MCP), also known as the Global Gag Rule, goes beyond the Helms Amendment’s limitations on the direct use of U.S. funds for abortion by disqualifying foreign NGOs that support “abortion-related activities” from U.S. family planning aid altogether.⁸⁴ First enacted in 1984, the MCP requires foreign NGOs that receive U.S. global health assistance to certify that they do not use their own funds to “provide abortion services, counsel patients about the option of abortion or refer them for abortion, or advocate for the liberalization of abortion laws.”⁸⁵ This essentially “gags” NGOs from mentioning the word “abortion” when offering advocacy services, which often include medical care and other types of family planning services. The United States is the largest donor of global health aid, and the MCP affects not only this significant portion of funding but even NGO funds that are “wholly detached” from U.S. funds.⁸⁶ The enforcement of the MCP depends on the presiding administration;⁸⁷ since its inception, every Democratic president has repealed the policy and every Republican president has reenacted it.⁸⁸

In January 2017, the Trump administration not only followed this pattern by reimplementing the policy, but by expanding its application to “global health assistance furnished by all departments or agencies.”⁸⁹ This latest iteration of the MCP no longer just affects U.S. family planning funds, valued at around \$575

82. *Id.* at 1431.

83. *Id.* at 1436.

84. Barot, *supra* note 2, at 10.

85. *Trump’s ‘Mexico City Policy’ or ‘Global Gag Rule,’* HUM. RTS. WATCH (Feb. 14, 2018, 12:55 AM), <https://www.hrw.org/news/2018/02/14/trumps-mexico-city-policy-or-global-gag-rule#>.

86. Casey Quackenbush, *The Impact of President Trump’s ‘Global Gag Rule’ on Women’s Health is Becoming Clear*, TIME (Feb. 4, 2018), <https://time.com/5115887/donald-trump-global-gag-rule-women.html>.

87. *See id.*

88. Goodwin, *supra* note 73, at 1440.

89. Memorandum from President Donald Trump on Mexico City Policy to Sec’y of State, Sec’y of Health & Hum. Servs., & Adm’r of U.S. Agency for Int’l Dev. (Jan. 25, 2017).

million, but rather restricts approximately \$8.8 billion in federal funding.⁹⁰ This drastic expansion encompasses programs that offer services beyond family planning and reproductive and sexual health services, including “maternal and child health, nutrition, HIV/AIDS . . . infectious diseases, . . . and even . . . sanitation, and hygiene programs.”⁹¹ Trump’s version of the MCP also goes beyond the USAID funding agency and includes agencies such as the State Department, the Department of Health and Human Services, the Centers for Disease Control and Prevention, and the National Institutes of Health.⁹² The MCP gives NGOs dependent on foreign aid two options: either lose their U.S. funding or cut their reproductive health programs, a lose-lose situation for women in developing countries.⁹³

III. EFFECTS OF U.S. POLICIES ON REPRODUCTIVE RIGHTS IN DEVELOPING COUNTRIES

U.S. policies concerning reproductive rights have far-reaching implications. While the right to an abortion in the United States may be tenuous, the Helms Amendment and the MCP have already severely undermined the availability of this procedure and human rights in general for women in poor and developing countries. These policies are in direct contradiction with many rights related to reproductive justice that are protected by international human rights standards.⁹⁴ The United States violates the rights to life, health, and privacy; to make decisions about one’s family; to be free from torture or other cruel, degrading, or inhumane treatment; and other rights related to reproductive justice through the enforcement of its federal aid policies.⁹⁵

Limiting abortion and contraceptive services violates women’s rights to start their families.⁹⁶ Approximately 214–225 million women in developing countries would like to prevent or delay pregnancy, but cannot use contraception due to limited access and poor quality of services.⁹⁷ Giving these women access to contraception would cause the number of unintended pregnancies, unplanned births, and abortions to decrease by three-quarters, and in turn would reduce the

90. *Trump’s ‘Mexico City Policy’ or ‘Global Gag Rule,’ supra* note 85.

91. *Id.*

92. Goodwin, *supra* note 73, at 1429.

93. *Trump’s ‘Mexico City Policy’ or ‘Global Gag Rule,’ supra* note 85.

94. Hannah A. Saona, *The Protection of Reproductive Rights Under International Law: The Bush Administration’s Policy Shift and China’s Family Planning Practices*, 13 PAC. RIM L. & POL’Y J. 229, 250 (2004).

95. *See Trump’s ‘Mexico City Policy’ or ‘Global Gag Rule,’ supra* note 85.

96. *See* ICCPR, *supra* note 4, at art. 23; ICESCR, *supra* note 4, at art. 10; CEDAW, *supra* note 4, at art. 16.

97. *Trump’s ‘Mexico City Policy’ or ‘Global Gag Rule,’ supra* note 85; CTR. FOR REPROD. RTS., FACTSHEET: THE GLOBAL GAG RULE AND HUMAN RIGHTS 2 (2018), <https://reproductiverights.org/document/fact-sheet-the-global-gag-rule-and-human-rights>.

number of maternal deaths associated with unsafe abortions.⁹⁸ However, the latest iteration of the MCP goes in the opposite direction. In 2010, the unmet need of contraceptive services in certain developing countries was close to twenty-five percent, and over 120 million women had unmet needs for family planning services.⁹⁹ Given that Trump implemented arguably the most restrictive version of the MCP of any Republican president, it is fair to assume these numbers have increased since his iteration of the MCP went into effect.¹⁰⁰ Preventing women from seeking these services violates their right to start a family and blatantly contradicts the findings and recommendations of human rights treaty bodies.

Defunding or threatening to defund NGOs that provide reproductive and sexual health services violates women's right to health and right to life. The risk of dying during pregnancy or child birth for women in developing countries is fifteen times higher than in developed countries.¹⁰¹ Over 200 million women per year are estimated to experience life-threatening complications in connection with pregnancy, and three million babies die within the first week of life.¹⁰² Additionally, over 800 women and girls die globally "from preventable causes related to pregnancy and childbirth every day, including unsafe abortions."¹⁰³ While abortion in developed countries is usually safe when performed legally, about fifty-five percent of abortions in developing nations are unsafe, and this proportion of unsafe abortions is on the rise.¹⁰⁴

UN bodies and public health agencies like the World Health Organization have found that denying women access to abortion services does not stop women from seeking these services; it just forces women to undergo unsafe abortions and increases maternal mortality rates.¹⁰⁵ From 2001 to 2008, the MCP went back into effect under President Bush's administration and had a substantial effect on women in countries that are highly dependent on global health aid.¹⁰⁶ From 2001 to 2008, abortion rates rose among women in sub-Saharan African countries by four to eight abortions per 10,000 women, while the use of contraception declined.¹⁰⁷ The Helms Amendment and MCP not only ignore well-documented evidence that limiting access to reproductive and sexual health services violates

98. *Id.*

99. U.N. Off. of High Comm'r for Hum. Rts., *supra* note 17, at 4.

100. *See Trump's 'Mexico City Policy' or 'Global Gag Rule,' supra* note 85.

101. *Id.*

102. *Id.*

103. *Id.*

104. Goodwin, *supra* note 73, at 1437.

105. CTR. FOR REPROD. RTS., *supra* note 97.

106. Nina Brooks, Eran BenDavid & Grant Miller, *USA Aid Policy and Induced Abortion in Sub-Saharan Africa: An Analysis of the Mexico City Policy*, 7 LANCET GLOB. HEALTH at e1046, e1047, e1049 (2019), <https://www.thelancet.com/action/showPdf?pii=S2214-109X%2819%2930267-0>.

107. *Id.* at e1051–52.

the rights to health, life, and freedom from torture, but also exacerbate the problem they purport to address.

The “gag” the MCP places on NGOs violates both their right to impart information and women’s rights to seek and receive information.¹⁰⁸ Healthcare providers in Kenya, a country particularly dependent on foreign aid with high rates of self-induced abortions, call the MCP a “death sentence” that holds “life-saving aid hostage to [U.S.] ideology.”¹⁰⁹ Family Health Options Kenya reported that it could lose sixty percent of its budget and have to cut half of its services if it failed to comply with the MCP.¹¹⁰ By July 2017, six months after Trump’s version of the MCP went into force, Family Health Options Kenya closed one clinic and cancelled 100 planned outreach events that would have provided cervical cancer screening, HIV testing, and family planning counseling for thousands of people.¹¹¹ While states are allowed to limit the freedom of expression to protect public morals, these restrictions must be necessary and proportionate, legitimate, and rooted in law.¹¹² Using U.S. funds to put a blanket ban on almost all reproductive services does not fit this narrow category. Rather, it is a thinly veiled attempt to promote anti-choice ideology that violates the right to impart, seek, and receive information.

U.S. policies on reproductive rights in developing countries exacerbate the already serious and prevalent problem of gender discrimination. Adolescent girls in disaster or conflict zones face heightened risks of sexual violence due to increased exposure to coerced sex, early marriage, and forced childbearing.¹¹³ This increased exposure leads to higher rates of abortion.¹¹⁴ El Salvador is one of several countries that criminalizes women for miscarriages and stillborn births, even in cases of rape or incest.¹¹⁵ Between 2000 and 2011, 129 women were prosecuted in El Salvador for “abortion” crimes and twenty-six were convicted, while their rapists faced little to no jail time.¹¹⁶ Women face unique consequences of sexual violence like unwanted pregnancies, unsafe abortions, sexually transmitted infections, and other health complications.¹¹⁷ A lack of comprehensive sexual education programs also exposes women to these risks; a study in Kenya revealed that less than fifty percent of students received minimum

108. See ICCPR, *supra* note 4, at art. 19.

109. Quackenbush, *supra* note 86.

110. *Trump’s Mexico City Policy’ or ‘Global Gag Rule,’ supra* note 85.

111. *Id.*

112. ICCPR, *supra* note 4, at art. 19.

113. Goodwin, *supra* note 73, at 1437.

114. *Id.* at 1436.

115. Tracy Wilkinson, *El Salvador Jails Women for Miscarriages and Stillbirths*, L.A. TIMES (Apr. 15, 2015, 3:00 AM), <https://www.latimes.com/world/great-reads/la-fg-c1-el-salvador-women-20150415-story.html>.

116. *Id.*

117. Press Release, Inter-Am. Comm’n on Hum. Rts., *supra* note 60.

reproductive education, often taught by teachers with negative attitudes toward premarital sex and abortion.¹¹⁸

The Helms Amendment and MCP give a stamp of approval to these practices in developing countries by perpetuating a “culture of punishment, fear, and shame” around reproductive rights.¹¹⁹ Policies penned by white American men like Senator Helms, who had no qualms with using state power to wield “unflinching, harmful, and even lethal control over women’s reproduction and lives,” discriminate between Western women and poor women in developing countries.¹²⁰ Despite the well-documented role poverty, colonialism, and traditional notions of women’s place in society plays in gender violence and discrimination, the United States continues to enact reproductive policies that implicate and even further these dangerous practices.¹²¹ The restrictions these policies impose not only affect abortion, but rather all forms of reproductive and sexual health services and force women in countries dependent on foreign aid into a “second-class version[] of citizenship.”¹²²

IV. RECOMMENDATIONS FOR THE UNITED STATES TO RESPECT, PROMOTE, AND PROTECT REPRODUCTIVE RIGHTS

The United States’ treatment of reproductive rights is troubling at best and hypocritical at worst. It hosts the IACHR in Washington D.C., yet is one of only two states that has not ratified the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.¹²³ President Reagan cited the UN Declaration of the Rights of the Child as the foundation for the MCP, yet the United States is the only nation that has not ratified the CRC.¹²⁴ The United States is the largest donor of global health assistance, yet it continues to implement policies that severely restrict women’s access to reproductive and sexual health services, even in spite of the well-documented harms these policies cause.¹²⁵ Whether these policies were created simply to limit the availability of abortion or purposefully designed to have these far-reaching consequences, they violate reproductive rights protected by international human rights treaties.¹²⁶

118. See GUTTMACHER INST. & AFR. POPULATION & HEALTH RSCH. CTR., FACT SHEET: SEXUALITY EDUCATION IN KENYA: NEW EVIDENCE FROM THREE COUNTIES 1–2 (2017), <https://www.guttmacher.org/sites/default/files/factsheet/sexuality-education-kenya-fs.pdf>.

119. Goodwin, *supra* note 73, at 1445.

120. *Id.* at 1453.

121. See CEDAW, *supra* note 4.

122. Goodwin, *supra* note 73, at 1428.

123. See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 57; Press Release, Inter-Am. Comm’n on Hum. Rts., *supra* note 60.

124. Goodwin, *supra* note 73, at 1439.

125. Quackenbush, *supra* note 86.

126. Saona, *supra* note 94, at 249.

Unless the United States changes these policies in recognition of the dangers they pose to reproductive rights around the world, these violations will continue.

As a preliminary step, the United States needs to accept its role as a major player in the international human rights field by ratifying international human rights treaties without reservations. As the largest donor of global health assistance, the United States needs to recognize the responsibility this role entails and set an outstanding example for how women's healthcare needs should be addressed.¹²⁷ The United States' refusal to ratify treaties like CEDAW signals an unwillingness to accept women's rights even in our own country, which "casts a shadow of doubt to other nations" that struggle to eliminate discriminatory practices against women.¹²⁸ Accepting the responsibility that comes with the United States' role as a major player in the international arena also requires the United States to refrain from "mandating" discriminatory policies on recipient countries by using foreign aid as an ideological vehicle.¹²⁹ Rooting foreign policies in U.S. ideology hurts foreign women who have no say in the United States' ideological shifts; rather, these policies must be grounded in well-founded international human rights standards.

The United States also needs to fully recognize and participate in international human rights institutions like the Human Rights Council and the IACHR. This would signal to other countries that the United States is prepared to take responsibility for its actions and allow itself to be held to international standards of human rights. If the United States is going to show a "strategic interest" in the IACHR's denouncing of human rights violations in Venezuela, it should also realize that the MCP affects the women fleeing Venezuela to escape war and persecution.¹³⁰ The United States cannot expect human rights law to be applied selectively and in accordance with its own interests. Human rights law must be applied in a way that protects all people, especially vulnerable populations like women in developing countries.

The United States must permanently repeal policies like the Helms Amendment and the MCP that place a significant burden on women seeking reproductive services. The recent passing of Justice Ruth Bader Ginsburg serves as a solemn reminder that women's reproductive rights are constantly under siege.¹³¹ The draft Global HER Act that was recently reintroduced in Congress

127. *See id.*

128. Ward, *supra* note 77, at 433.

129. *See* Goodwin, *supra* note 73, at 1433.

130. *See* Camilleri & Edmonds, *supra* note 63, at 2; *Video: US Global Gag Rule Cuts Access to Care for Venezuelan Women*, DRS. WITHOUT BORDERS (Sept. 26, 2019), <https://www.doctorswithoutborder.org/what-we-do/news-stories/story/video-us-global-gag-rule-cuts-access-care-venezuelan-women>.

131. *See* Sarah McCammon, *Ginsburg's Death A 'Pivot Point' For Abortion Rights, Advocates Say*, NPR (Sept. 19, 2020, 8:56 PM), <https://www.npr.org/sections/death-of-ruth-bader-ginsburg/2020/09/19/914864867/ginsburgs-death-a-pivot-point-for-abortion-rights-advocates-say>.

would reverse the MCP and permanently prevent it from being reenacted.¹³² This could prevent individuals like Senator Helms from politicizing women's health care and wielding their discriminatory influence over reproductive policies. It could also allow non-American women to breathe a sigh of relief and not worry that their health and sexual services may be taken away by an administration they do not even get to vote for. Since these goals may take a long time to get through Congress, the United States should mitigate the harmful effects of these policies by immediately removing restrictions on education services and creating an exception for abortions to be eligible for federal funding in cases of rape, incest, or a life-threatening emergency.¹³³

Once these policies are repealed, the United States must ensure that all of its foreign aid policies respect, promote, and protect reproductive rights. The involvement of human rights experts, academics, and NGOs in the drafting process would ensure that reproductive policies are grounded in research rather than politics. Representative Lois Frankel recently introduced a resolution that would commit the United States to promoting reproductive rights and sustainable development.¹³⁴ This resolution will call on the United States to recognize reproductive rights as human rights and commemorate the twenty-five years that have passed since the International Conference on Population and Development (ICPD).¹³⁵ The resolution recognizes that while major progress has been made toward universal access to reproductive healthcare, major challenges such as the Trump administration's expansion of the Global Gag Rule prevent fulfillment of the ultimate goals of the ICPD. All of these tasks require the United States to recognize the harm its policies inflict on women in developing countries and commit to protecting the reproductive rights of women everywhere.

American history is fraught with the mistreatment of women, non-American citizens, and the impoverished; the Helms Amendment and MCP represent the ultimate culmination of this mistreatment. Despite research consistently showing that restricting access to reproductive healthcare services actually increases the number of abortions, these restrictive policies continue to thrive.¹³⁶ The Trump administration ramped up these policies by expanding the MCP well beyond reproductive services, suspending funding for organizations that provide

132. Mariah A. Lindsay & Roxy Szal, *Achieving Reproductive Freedom: Ending Global Gag Rule and Helms Amendment Once and for All*, MS. MAGAZINE (Mar. 9, 2021), <https://msmagazine.com/2021/03/09/achieving-reproductive-freedom-ending-global-gag-rule-and-helms-amendment-once-and-for-all/>.

133. Barot, *supra* note 2, at 12.

134. Rep. Lois Frankel, *US Must Lead the Charge on Global Reproductive Rights — Not Stand in the Way*, HILL (Nov. 18, 2019, 8:30 AM), <https://thehill.com/blogs/congress-blog/foreign-policy/470869-us-must-lead-the-charge-on-global-reproductive-rights-not>.

135. *Id.*

136. See Sneha Barot, *The Benefits of Investing in International Family Planning — and the Price of Slashing Funding*, 20 GUTTMACHER POL'Y REV. 82, 84 (2017).

reproductive healthcare, and even removing the reproductive rights section from the State Department's annual human rights report.¹³⁷ President Biden, who ironically preceded Senator Helms as the Chair of the Senate Foreign Relations Committee, has the opportunity to diminish Senator Helms' racist and sexist legacy by protecting and promoting the reproductive rights of women everywhere. International human rights law provides the answer to achieving reproductive justice, all the United States has to do is listen.

137. Frankel, *supra* note 134.

