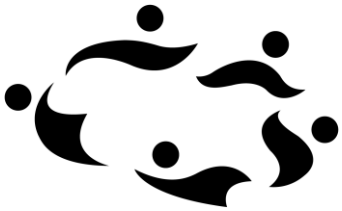

Family Planning | *White Paper*
World **Youth** Alliance

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I. Introduction

Family planning is an important topic in international human rights advocacy. As a component of reproductive health, it is tied to empowering men and women to determine the number and spacing of their children and to improving women's health. International human rights treaties call on States to provide people with access to family planning information and services, but non-governmental organizations and United Nations agencies suggest that this in turn means that States must provide contraceptives. The term "contraception" is often used synonymously with "family planning," although contraception is actually only one component of family planning. This focus on contraceptives is also seen in the interpretation of the concept of "unmet need for family planning," an argument that suggests that to provide women around the world with the access they need to family planning, only increased access to contraceptives will suffice. However, many women choose not to use contraceptives because of health, ethical, and other reasons, and so the call for more access to contraception does not aid in fully meeting the unmet need for family planning.

This paper first discusses the concept of unmet need for family planning and identifies its shortcomings. In discussing unmet need, it addresses informed consent and explains the difference between the terms "family planning" and "contraception." Next, it examines international human rights treaties for language on family planning, determining that no treaty mentions contraception or guarantees access to a particular family planning method or supply. It then evaluates non-treaty assertions of a right to contraception and explains why these assertions are not binding on States. Finally, it emphasizes the importance of a proper understanding of family planning rights in the global health policy arena.

II. Global unmet need for family planning and contraception

A. Background

UN agencies and non-governmental organizations have identified a global unmet need for family planning and conflate this with a need for contraception in particular. RAND Corporation defines unmet need as "a disconnection between a woman's fertility preferences and what she does about them: She wants to avoid conceiving but fails to do what is needed to prevent pregnancy."[1] RAND claims that unmet need is for women who want to delay or avoid pregnancy but are not using contraceptives.[2] RAND lists the reasons for this avoidance of contraceptives as lack of knowledge, health concerns, limited supplies and high costs, and cultural/personal objections.[3] UNFPA and the Guttmacher Institute further narrow the definition: women who are not using modern contraceptives, given that traditional methods are more prone to failure.[4] They define modern contraceptives as including "all hormonal methods (i.e., the pill,

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[1] RAND CORP., THE UNMET NEED FOR CONTRACEPTION IN DEVELOPING COUNTRIES, http://www.rand.org/pubs/research_briefs/RB5024/index1.html.
[2] *Id.*
[3] *Id.*
[4] UNFPA & GUTTMACHER INSTITUTE, ADDING IT UP: THE COSTS AND BENEFITS OF INVESTING IN FAMILY

injectables and implants), IUDs, male and female sterilization, condoms and modern vaginal methods (e.g., the diaphragm and spermicides)."[5] Under WHO's definition of unmet need for family planning, it estimates that there are "215 million women wanting to avoid a pregnancy [who] did not have access to or are not using an effective method of contraception."[6]

The number of unintended pregnancies in the world is high,[7] but the idea of a global unmet need for contraception is misguided. Although there may be 215 million women who want to delay or avoid pregnancy and are not using contraception, that does not mean that all of these women want to use contraception.[8] Social scientists and public policy experts identify women as having an unmet need for contraception even when those women have not expressed a desire to use contraception.[9] The idea of unmet need for contraception ignores the reasons for unmet need that women express, such as concern about health and other side effects of artificial contraception, incompatibility with religious and ethical beliefs, and the financial cost of contraception.[10] Unmet need for family planning should not be equated with an unmet need for contraception.

The idea of unmet need for contraception ignores the reasons for unmet need that women express, such as concern about health and other side effects of artificial contraception, incompatibility with religious and ethical beliefs, and the financial cost of contraception.

B. Informed consent

Those women who find that contraception violates their religious and ethical beliefs have an internationally recognized right to conscience that must be respected.[11] Furthermore, women must give their informed consent to any medical procedures or services, which means they must know about the possibility of any side effects.[12] Informed consent includes informing potential

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PLANNING AND MATERNAL AND NEWBORN HEALTH 7 (2009) [hereinafter ADDING IT UP], http://www.guttmacher.org/pubs/AddingItUp2009.pdf.

[5] *Id.*

[6] WHO, *Unmet need for family planning*, http://www.who.int/gho/maternal_health/reproductive_health/family_planning/en/index.html (last visited Feb. 29, 2012).

[7] ADDING IT UP, *supra* note 4, at 17 ("In 2008, two-fifths of the 186 million pregnancies that occurred among women aged 15–49 in the developing world were unintended; that is, they were the result of contraceptive nonuse, incorrect or inconsistent method use, or method failure.").

[8] *See* Lant Pritchett, No Need for Unmet Need, Presentation at the Johns Hopkins School of Hygiene and Public Health Population Center Seminar Series (Feb. 12, 1996).

[9] *Id.*

[10] Gilda Sedgh, Rubina Hussain, Akinrinola Bankole, & Susheela Singh, *Women with an Unmet Need for Contraception in Developing Countries and Their Reasons for Not Using a Method* 37–38, 40–43 (June 2007), http://www.guttmacher.org/pubs/2007/07/09/or37.pdf; Rand Corp., *The Unmet Need for Contraception in Developing Countries* (1998), http://www.rand.org/pubs/research_briefs/RB5024/index1.html.

[11] *See* Convention on the Rights of the Child art. 14, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; International Covenant on Civil and Political Rights art. 18, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(vii), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195. *See also* Universal Declaration of Human Rights, G.A. Res. 217A, art. 18, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

[12] *See* Convention on the Rights of Persons with Disabilities art. 25(d), *opened for signature* Mar. 30, 2007, 46 I.L.M. 433 [hereinafter CRPD]. Furthermore, treaty-monitoring bodies, the bodies charged with monitoring

contraceptive users that, for example, the World Health Organization's International Agency for Cancer Research lists combined estrogen-progestogen oral contraceptives as Group 1 carcinogens,[13] a category that is used "when there is *sufficient evidence* of carcinogenicity in humans."[14] Since side effects are a common reason why women discontinue use of contraceptives,[15] informing them about these side effects before use is critical. This discontinuation of use, which often occurs after a few months to a year and is due to a variety of reasons, combined with a lack of compliance with the regimen,[16] suggests that the need many women have to regulate fertility is not met by contraceptives.

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implementation of the human rights treaties, have written on informed consent, although their interpretations are non-binding. *See, .e.g.*, Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24: Article 12 of the Convention (women and health)*, ¶¶ 20, 22, 31(e), *compiled in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 358, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (May 27, 2008).

[13] *See* WHO, INT'L AGENCY FOR CANCER RES., IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS, VOL. 91: COMBINED ESTROGEN-PROGESTOGEN CONTRACEPTIVES AND COMBINED ESTROGEN-PROGESTOGEN MENOPAUSAL THERAPY (2007), *available at* http://monographs.iarc.fr/ENG/Monographs/vol91/mono91.pdf. *See also* WHO, INT'L AGENCY FOR CANCER RES., AGENTS CLASSIFIED BY THE IARC MONOGRAPHS, *Volumes 1-103* (2012), *available at* http://monographs.iarc.fr/ENG/Classification/ClassificationsGroupOrder.pdf.

[14] WHO, INT'L AGENCY FOR CANCER RES., IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISKS TO HUMANS, Preamble (2006), *available at* http://monographs.iarc.fr/ENG/Preamble/CurrentPreamble.pdf.

[15] *See, e.g.*, Tina R. Raine, Anne Foster-Rosales, Ushma Upadhyay, Cherrie B. Boyer, Beth A. Brown, Abby Sokoloff, Cynthia C. Harper, *One-Year Contraceptive Continuation and Pregnancy in Adolescent Girls and Women Initiating Hormonal Contraceptives*, 117 OBSTET. & GYNECOL. 363, 367 (2011) [hereinafter *One-Year Contraceptive Continuation*] ("The most common reason for discontinuation [of contraceptive use] was side effects."); Janine Barden-O'Fallon, Sadith Cáceres Zelaya, Javier Cálix Borjas, Francisco Rodríguez Valenzuela, & Ilene Speizer, *Contraceptive Discontinuation: A One-Year Follow-Up Study of Female Reversible Method Users in Urban Honduras* (Oct. 2008), http://www.cpc.unc.edu/measure/publications/sr-08-46 ("Women were asked to give the main reason for stopping the use of their baseline method. The single most commonly reported reason given was because of side effects[.]").

[16] *See, e.g.*, *One-Year Contraceptive Continuation*, *supra* note 15, at 363–71 (assessing contraceptive discontinuation, switching, factors associated with method discontinuation, and pregnancy among women initiating hormonal contraceptives); B. Pinter, *Continuation and compliance of contraceptive use*, 7 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 178 (2002) (discussing issues related to continuation of and compliance with contraceptive use); A. Zibners, Barbara A. Cromer, & John Hayes, *Comparison of Continuation Rates for Hormonal Contraception Among Adolescents*, 12 J. PEDIATR. ADOLESC. GYNECOL. 90 (1999) (identifying continuation rates of adolescents' use of contraception); James Trussell &Barbara Vaughan, *Contraceptive Failure, Method-Related Discontinuation And Resumption of Use: Results from the 1995 National Survey of Family Growth*, 31 FAM. PLAN. PERSP. 64 (1999) (identifying continuation rates of use of contraception).

C. Contraception as one component of family planning

Finally, those who promote the concept of an unmet need for contraception often disregard that there are modern family planning methods that do not include contraception, such as fertility awareness, which is based on modern science and has been proven effective.[17] Family planning is not synonymous with contraception, and calls for family planning methods and services should not be construed as calls for contraceptives alone. This understanding excludes the needs of those women who are unable to use contraception for a variety of reasons. Methods involving fertility awareness can meet the need of women who are not using family planning to avoid pregnancy while also respecting their health concerns and rights of conscience and allowing for them to give informed consent.

Family planning is not synonymous with contraception, and calls for family planning methods and services should not be construed as calls for contraceptives alone.

III. International human rights

A. How international law is created

Given the prominence of the idea of an unmet need for family planning and the corresponding call for increased access to contraception, an investigation of international law relating to family planning and contraception is necessary. To fully understand whether there is an international human right to contraception or family planning, one must first understand from where international human rights come. International human rights are created by international treaties that are then ratified by those countries that agree to adhere to the treaties.[18] Examples of international treaties that have the force of law include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. International human rights can also be created by customary international law, which is discussed below.

B. International human rights treaties on family planning

No international human right to any particular form of family planning supply or method is enumerated in international human rights treaties. The only international human rights treaties that explicitly mention family planning are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on Persons with Disabilities (CRPD). Despite claims from UNFPA and the

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[17] K. Dorairaj, *The modified mucus method in India*, 165 AM. J. OBSTET. & GYNECOL. 1991 (2006–07); Margaret P. Howard & Joseph B. Stanford, *Pregnancy Probabilities During Use of the Creighton Model Fertility Care System*, 8 ARCH. FAM. MED. 391 (1999); T.W. Hilgers & J.B. Stanford, *Creighton Model NaProEducation Technology for avoiding pregnancy: Use effectiveness*, 43 J. REPROD. MED. 495 (1998); A.K. Gosh, S. Saha, G. Chattergee, Symptothermia vis-a-vis fertility control, 32 J. OBSTET. & GYNAECOL. INDIA 443 (1982).

[18] WHO, 25 QUESTIONS & ANSWERS ON HEALTH AND HUMAN RIGHTS 9, July 9, 2002 [hereinafter WHO, 25 QUESTIONS], http://www.who.int/hhr/activities/en/25_questions_hhr.pdf.

Center for Reproductive Rights that there is a right to contraceptive information and services,[19] no international human rights treaty even mentions contraception.

1. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

In Article 14(b), CEDAW identifies a right "[t]o have access to adequate health care facilities, including information, counselling and services in family planning."[20] Article 10(h) mandates that States ensure "[a]ccess to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."[21] Article 12(1) also mandates States Parties "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."[22] Article 16 further recognizes the right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."[23]

CEDAW then does not create a right to any particular family planning method or service. Instead, States Parties to CEDAW must provide citizens with access to family planning information, counseling, and services. This does not mean that States Parties must provide citizens with all types of family planning supplies or with any particular family planning supply, such as a form of contraception. Furthermore, this does not equal a right to contraception, as contraception is not even mentioned in CEDAW.

2. Convention on the Rights of the Child (CRC)

Article 24 of the Convention on the Rights of the Child recognizes "the right of the child to the enjoyment of the highest attainable standard of health."[24] In implementing this right, States Parties "shall take appropriate measures [to] develop preventive health care, guidance for parents and family planning education and services."[25] States Parties must develop family planning education and services in accordance with the CRC, but this does not require that States Parties provide children with contraceptive education and services.

3. Convention on the Rights of Persons with Disabilities (CRPD)

Article 23 of the Convention on the Rights of Persons with Disabilities requires that States

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[19] UNFPA & CTR. FOR REPROD. RTS., BRIEFING PAPER: THE RIGHT TO CONTRACEPTIVE INFORMATION AND SERVICES FOR WOMEN AND ADOLESCENTS (2011), http://www.unfpa.org/webdav/site/global/shared/documents/publications/2011/Contraception.pdf.
[20] Convention on the Elimination of All Forms of Discrimination against Women art. 14(b), *opened for signature* Dec. 18. 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].
[21] *Id.* at art. 10(h).
[22] *Id.* at art. 12(1).
[23] *Id.* at art. 16(1)(e).
[24] CRC, *supra* note 11, art. 24(1).
[25] *Id.* at art. 24(2)(f).

Parties

> take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that [t]he rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided.[26]

While States Parties must provide persons with disabilities the means necessary to recognize their rights, once again, no right to any particular form of family planning is enumerated.

C. Non-treaty assertions of an international right to contraception

1. Treaty-monitoring bodies

Human rights treaty-monitoring bodies (TMBs) are charged with monitoring the implementation of international human rights treaties. These bodies do not have the authority to create international human rights. Treaties that create TMBs clearly give them only limited authority, which does not include any authority to create rights.[27] Each TMB is comprised of experts who give comments and recommendations to States Parties on implementation of the treaty. These experts are not accountable to anyone in particular. Although States Parties are obligated to submit reports to TMBs, the TMB's recommendations and interpretations of treaties have no binding or authoritative status with respect to the States who are party to the treaty.[28] However, many States Parties erroneously accord more authority to TMBs than they are due.

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Despite the fact that there is no international right to contraception, treaty-monitoring bodies (TMBs) have recommended again and again that States provide contraceptives to their citizens. The Committee on the Elimination of Discrimination against Women has repeatedly told States Parties that they must make contraceptives, including emergency contraception, more widely

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[26] CRPD, *supra* note 12, art. 23(b).
[27] *See, e.g.*, CRC, *supra* note 11, arts. 42–45; CEDAW, *supra* note 20, arts. 17–22.
[28] CTR. FOR REPROD. RTS., GAINING GROUND: A TOOL FOR ADVANCING REPRODUCTIVE RIGHTS LAW REFORM 17 (2007) [hereinafter CRR, GAINING GROUND], http://reproductiverights.org/sites/default/files/documents/pub_bo_GG_advocacy.pdf; OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: AN INTRODUCTION TO THE CORE HUMAN RIGHTS TREATIES AND THE TREATY BODIES, http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf.

available to comply with CEDAW.[29] The Committee on the Rights of the Child has stated that States Parties to the Convention on the Rights of the Child should provide adolescents with access to contraception.[30] It also has told States directly in its concluding observations that they

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[29] *See, e.g.*, CEDAW Committee, *Concluding Observations: Ghana*, ¶ 32, U.N. Doc. CEDAW/C/GHA/CO/5 (Aug. 25, 2006) ("[The Committee] urges the State party to raise community awareness with regard to negative cultural beliefs and [. . .] recommends the adoption of measures to increase knowledge of and access to affordable contraceptive methods, so that women and men can make informed choices about the number and spacing of children, as well as access to safe abortion in accordance with domestic legislation."); CEDAW Committee, *Concluding Observations: Mauritius*, ¶ 31, U.N. Doc. CEDAW/C/MAR/CO/5, (Aug. 25, 2006) ("The Committee urges the State party to step up the provision of family planning information and services to women and girls, in particular regarding reproductive health and affordable contraceptive methods [. . .]."); CEDAW Committee, *Concluding Observations: Mexico*, ¶ 33, U.N. Doc. CEDAW/C/MEX/CO/6 (Aug. 25, 2006) ("The Committee urges the State party to expand the coverage of health services, including reproductive health care and family planning services[.] The Committee urges the State party to implement a comprehensive strategy which should include the provision of [. . .] a wide range of contraceptive measures, including emergency contraception."); CEDAW Committee, *Concluding Observations: Philippines*, ¶ 28, U.N. Doc. CEDAW/C/PHI/CO/6 (Aug. 25, 2006) ("[The Committee] requests the State party to strengthen measures aimed at the prevention of unwanted pregnancies, including by making a comprehensive range of contraceptives more widely available and without any restriction and by increasing knowledge and awareness about family planning."); CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women, Concluding Observations: Uruguay*, ¶ 203, U.N. Doc. A/57/38 (2002) ("The Committee recommends that the State party examine the situation of adolescents as a matter of priority, and urges it to take action to ensure [. . .] that due attention is paid to the information requirements of adolescents, including through programmes and policies to provide information on the different kinds of contraceptives available and how they are to be obtained[.]"); CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women, Concluding Observations: Kazakhstan*, ¶ 106, U.N. Doc. A/56/38 (2001) ("The Committee urges the Government to maintain free access to adequate health care and to improve its family planning and reproductive health policy, including availability of and accessibility to modern contraceptive means."); CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women, Concluding Observations: Mongolia*, ¶ 274, U.N. Doc. A/56/38 (2001) ("[The Committee] urges the Government to increase access, particularly in the rural areas, to affordable contraceptives for women and men [. . .]."); CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women, Concluding Observations: Nicaragua*, ¶ 303, U.N. Doc. A/56/38 (2001) ("The Committee calls upon the Government to improve its family planning and reproductive health policy and programmes, including the availability and accessibility of affordable modern contraceptive means to both women and men."); CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women, Concluding Observations: Viet Nam*, ¶ 267, U.N. Doc. A/56/38 (2001) ("The Committee urges the Government to maintain free access to basic health care and to continue to improve its family planning and reproductive health policy, inter alia, through making modern contraceptive methods widely available, affordable and accessible."); CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women, Concluding Observations: Democratic Republic of the Congo*, ¶ 228, U.N. Doc. A/55/38 (2000) ("The Committee calls upon the Government to make efforts to improve the use of contraceptive methods, to repeal article 178 of the Penal Code, which prohibits the dissemination of contraceptive methods, and to provide sex education for young people."); CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women, Concluding Observations: Chile*, ¶ 229, U.N. Doc. A/54/38 (1999) ("[The Committee] requests the Government to strengthen its actions and efforts aimed at the prevention of unwanted pregnancies, including by making all kinds of contraceptives more widely available and without any restriction. The Committee recommends granting women the right to undergo sterilization without requiring their husband's — or anyone else's — prior consent."); CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women, Concluding Observations: Antigua and Barbuda*, ¶ 258, U.N. Doc. A/52/38/Rev.1, Part II (1997) ("The Committee was also concerned about the continuing illegality of abortion, which would lead to unsafe abortions. It also noted with concern the lack of family planning education programmes and the fact that contraceptives were not covered by medical benefits schemes.").

[30] Committee on the Rights of the Child, *General Comment 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, ¶ 24, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) ("States parties should

need to provide adolescents with contraception.[31] The Committee on Economic, Social, and Cultural Rights, which monitors implementation of a treaty that does not contain any language on reproductive health, family planning, or contraception,[32] has recommended that "States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health."[33] The Human Rights Committee, which monitors the International Covenant on Civil and Political Rights, a treaty that does not mention reproductive health, family planning, or contraception,[34] has also pushed for increased access to contraceptives.[35]

States Parties must keep in mind that these recommendations are not binding, and that

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provide adolescents with access to sexual and reproductive information, including on family planning and contraceptives."); *Id.*, ¶ 30 ("States parties are urged (a) to develop effective prevention programmes, including measures aimed at changing cultural views about adolescents' need for contraception and STD prevention and addressing cultural and other taboos surrounding adolescent sexuality; [. . .] (c) to take measures to remove all barriers hindering the access of adolescents to information, preventive measures such as condoms, and care."); *Id.*, ¶ 31 ("The Committee urges States parties (a) to develop and implement programmes that provide access to sexual and reproductive health services, including family planning, contraception and safe abortion services where abortion is not against the law.").

[31] *See, e.g.*, Committee on the Rights of the Child (CRC Committee), *Concluding Observations: Nicaragua*, ¶ 65(a), U.N. Doc. CRC/C/NIC/CO/4 (Oct. 1, 2010) ("The Committee recommends that the State party [e]nsure that safe, legal and confidential sexual and reproductive health services are accessible to adolescents including for information, counseling and termination of pregnancy, and that contraception is widely available."); CRC Committee, *Concluding Observations: Ecuador*, ¶ 64, U.N. Doc. CRC/C/ECU/CO/4 (Jan. 29, 2010) ("The Committee recommends that the State party strengthen its measures to promote access to reproductive health services for all adolescents in all parts of the country, including sex and reproductive health education in schools as well as youth-sensitive and confidential counseling and health-care services, including information on and access to contraceptives. It further recommends that the State party make emergency contraception available to adolescents.").

[32] *See* International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

[33] Committee on Economic, Social, & Cultural Rights (ESCR Committee), *General Comment No. 14*, ¶ 34, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000). *See also* ESCR Committee, *Concluding Observations: Chile*, ¶ 54, U.N. Doc. E/C.12/1/Add.105 (Nov. 26, 2004) ("The Committee recommends that the State party strengthen measures to promote education programmes on sexual and reproductive health and to raise awareness about and access to safe contraception methods."); ESCR Committee, *Concluding Observations: Lithuania*, ¶ 50, U.N. Doc. E/C.12/1/Add.96 (June 7, 2004) ("The Committee calls upon the State party to strengthen its efforts to promote awareness of sexual and reproductive health, safe contraceptive methods and the health risk of using abortion as a method of birth control[.]"); ESCR Committee, *Concluding Observations: Cameroon*, ¶ 25, U.N. Doc. E/C.12/1/Add.40 (Dec. 8, 1999) ("In this respect, the Committee also urges the Government to review its family planning policies with a view to increasing access to information concerning contraceptives through educational programmes."); ESCR Committee, *Concluding Observations: Poland*, ¶ 12, U.N. Doc. E/C.12/1/Add.26 (1998) ("The Committee is also concerned that family planning services are not provided in the public health care system so that women have no access to affordable contraception.").

[34] *See* ICCPR, *supra* note 11.

[35] *See, e.g.*, Human Rights Committee, *Concluding Observations: Paraguay*, U.N. Doc. CCPR/C/PRY/CO/2, ¶ 10 (Apr. 24, 2006) ("The State party should take effective action to reduce infant and maternal mortality by [. . .] ensuring that contraceptives are available to the general public, especially in rural areas."); Human Rights Committee, *Concluding Observations: Poland*, U.N. Doc. CCPR/CO/82/POL, ¶ 9 (Dec. 2, 2004) ("The State party should assure the availability of contraceptives and free access to family planning services and methods."); Human Rights Committee, *Concluding Observations: Hungary*, U.N. Doc. CCPR/CO/74/HUN, ¶ 11 (Apr. 19, 2002) ("The State party should take steps to protect women's life and health, through more effective family planning and contraception (art. 6)."); Human Rights Committee, *Concluding Observations: Colombia*, U.N. Doc. CCPR/C/79/Add.75, ¶ 37 (May 5, 1997) ("In this regard, priority should be given to protecting women's right to life by effective measures against violence and by access to safe contraception.").

consequently they are not required to provide people with contraceptives as a component of their family planning and reproductive health programs.

2. Conferences

a. International Conference on Population and Development

The provision of family planning is a prominent component of reproductive health programs. In 1994, delegates from 179 Member States of the United Nations gathered in Cairo, Egypt for the International Conference on Population and Development, where family planning took center stage.[36] In addressing the relationship between population and development, the conference focused on a new concept, reproductive health, and its components, in particular family planning. At the end of the conference, the Member States produced a consensus document called the Programme of Action, which sets forth goals to be achieved over a period of twenty years (1994–2014). Although the Programme of Action is an expression of political will and does not constitute international law, it outlines the priorities of the States Parties and indicates commitment on their part to work toward achieving them.

States Parties committed to the provision of family planning services, methods, and information. The foundation of this commitment is captured by Principle 8 of the Programme of Action, which states, "All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so."[37] States Parties also determined that one component of reproductive health is the "right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law."[38] The Programme of Action elaborates:

> The aim of family-planning programmes must be to enable couples and individuals to decide freely and responsibly the number and spacing of their children and to have the information and means to do so and to ensure informed choices and make available a full range of safe and effective methods. The success of population education and family-planning programmes in a variety of settings demonstrates that informed individuals everywhere can and will act responsibly in the light of their own needs and those of their families and communities. The principle of informed free choice is essential to the long-term success of family-planning programmes.[39]

Furthermore, the Programme of Action emphasizes that "Governments should take appropriate

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[36] LARA KNUDSEN, REPRODUCTIVE RIGHTS IN A GLOBAL CONTEXT 6 (2006).
[37] International Conference on Population and Development, Sept. 5–13, 1994, *Report of the International Conference on Population and Development*, Ch. I, Res. 1, Annex, Principle 8, U.N. Doc. A/CONF.171/13/Rev.1 (Oct. 18, 1994) [hereinafter *ICPD Report*]. This right is mentioned throughout the Programme of Action. *See id.* at ¶¶ 7.14(a), 7.16.
[38] *Id.* Ch. I, Res. 1, Annex, ¶ 7.2.
[39] *Id.* Ch. I, Res. 1, Annex, ¶ 7.12.

steps to help women avoid abortion, which in no case should be promoted as a method of family planning [. . .]."[40]

The Programme of Action encourages States Parties to develop family planning programmes that follow certain criteria. One criterion is the "recogni[tion] that appropriate methods for couples and individuals vary according to their age, parity, family-size preference and other factors,"[41] in addition to the "ensur[ing] that women and men have information and access to the widest possible range of safe and effective family-planning methods in order to enable them to exercise free and informed choice[.]"[42] Another component is the provision of "accessible, complete and accurate information about various family-planning methods, including their health risks and benefits, possible side effects and their effectiveness in the prevention of the spread of HIV/AIDS and other sexually transmitted diseases[.]"[43] Governments must also "[m]ake services safer, affordable, more convenient and accessible for clients and ensure, through strengthened logistical systems, a sufficient and continuous supply of essential high-quality contraceptives. Privacy and confidentiality should be ensured[.]"[44] Finally, programs must "[e]nsure appropriate follow-up care, including treatment for side effects of contraceptive use[.]"[45]

"[T]he General Assembly's mandate to the Conference does not extend to the creation or formulation of rights; this reservation therefore applies to all references in the document to [. . .] 'distribution of contraceptives.' "

-Reservation by Guatemala, International Conference on Population and Development

The Programme of Action identifies the immense importance that States and the global health policy community place on the provision of family planning methods and services. States have committed to the provision of services aimed at improving reproductive health. However, an important distinction between declarations of political will, such as the Programme of Action, and international human rights treaties is that international human rights cannot be created by declarations of political will.[46] Because it does not have the status of international law,[47] the Programme of Action does not obligate States to provide or allow for the provision of any particular family planning methods, services, or information. Guatemala expressed a reservation to the Programme of Action on this point, indicating its understanding that "the General

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[40] *Id.* Ch. I, Res. 1, Annex, ¶ 7.24.
[41] *Id.* Ch. I, Res. 1, Annex, ¶ 7.23(a).
[42] *Id.*
[43] *Id.* Ch. I, Res. 1, Annex, ¶ 7.23(b).
[44] *Id.* Ch. I, Res. 1, Annex, ¶ 7.23(c).
[45] *Id.* Ch. I, Res. 1, Annex, ¶ 7.23(e).
[46] WHO, 25 QUESTIONS, *supra* note 18, at 9.
[47] This lack of binding force is widely acknowledged. *See* UNFPA, REPRODUCTIVE HEALTH IN REFUGEE SITUATIONS: AN INTER-AGENCY FIELD MANUAL, *available at* http://www.unfpa.org/emergencies/manual/a2.htm; CTR. FOR REPROD. RTS., LEGAL STANDARDS, ROMA REPRODUCTIVE FREEDOM IN SLOVAKIA 97, *available at* http://reproductiverights.org/sites/default/files/documents/bo_slov_part4.pdf .

Assembly's mandate to the Conference does not extend to the creation or formulation of rights; this reservation therefore applies to all references in the document to [. . .] 'distribution of contraceptives.'"[48] Thus, States' commitment to implementation of the Programme of Action is their own prerogative, and they are able to implement policies and programs that are most appropriate to the situations of their own people.

b. Fourth World Conference on Women

The United Nations Fourth World Conference on Women, held in Beijing in 1995, dealt with many of the same issues as the ICPD in Cairo the previous year, in particular reproductive health and its family planning component. In the final outcome document, the Beijing Platform for Action, the language echoes that of the ICPD Programme of Action.[49] In addition to the ICPD language, the Platform for Action encourages Governments to "[p]rovide more accessible, available and affordable primary health-care services of high quality, including sexual and reproductive health care, which includes family planning information and services."[50] It also encourages Governments to

> [r]ationalize drug procurement and ensure a reliable, continuous supply of high-quality pharmaceutical, contraceptive and other supplies and equipment, using the WHO Model List of Essential Drugs as a guide, and ensure the safety of drugs and devices through national regulatory drug approval processes.[51]

However, like the ICPD Programme of Action, the Beijing Platform for Action is only a declaration of political will. Thus, States Parties to the Platform for Action are not required to provide the contraceptives and family planning services outlined in the document. Rather, they must only adhere to their international legal obligations, which do not call on them to provide contraception.

3. Other assertions

Several women's health and human rights organizations vigorously assert that there is a right to contraception or contraceptive information and services.[52] This assertion is unfounded, but they both directly and indirectly pressure countries to comply with their erroneous understanding of

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[48] *ICPD Report*, *supra* note 37, Ch. V, ¶ 26.
[49] *See, e.g.*, Fourth World Conference on Women, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, Ch. I, Res. 1, Annex II, ¶¶ 94, 95, 97, U.N. Doc. A/CONF.177/20/Rev.1 (1996) [hereinafter *FWCW Report*].
[50] *Id.*, Ch. I, Res. 1, Annex II, ¶ 106(e).
[51] *Id.*, Ch. I, Res. 1, Annex II, ¶ 106(u).
[52] HUM. RTS. WATCH, ILLUSIONS OF CARE: LACK OF ACCOUNTABILITY FOR REPRODUCTIVE RIGHTS IN ARGENTINA (2010), http://www.hrw.org/sites/default/files/reports/argentina0810webwcover.pdf; CTR. FOR REPROD. RTS. & UNFPA, THE RIGHT TO CONTRACEPTIVE INFORMATION AND SERVICES FOR WOMEN AND ADOLESCENTS (2010), http://www.unfpa.org/webdav/site/global/shared/documents/publications/2011/Contraception.pdf; ADDING IT UP, *supra* note 4; CTR. FOR REPROD. RTS., BRINGING RIGHTS TO BEAR: FAMILY PLANNING IS A HUMAN RIGHT (2008), http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_Contra.pdf; CRR, GAINING GROUND, *supra* note 28, at 34–43.

international law by providing access to contraception, including emergency contraception.[53] These NGOs clearly have no authority to determine what constitutes an international right or to expand on existing international rights.

Finally, special rapporteurs and United Nations agencies cannot create international law. Special rapporteurs are unelected and do not have the authority to create new international rights.[54] Thus, the claim asserted by the special rapporteur on the right to health that "[c]riminal laws and other legal restrictions that reduce or deny access to family planning goods and services, or certain modern contraceptive methods, such as emergency contraception, constitute a violation of the right to health" is not authoritative.[55] The World Health Organization also cannot create international law, so its listing of contraceptives as essential medicines[56] cannot obligate States to provide any of those contraceptives to their citizens.

D. Customary international law

There is a risk that a right to particular family planning supplies or contraception may develop due to customary international law. Customary international law "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way."[57] It thus consists of two components: State practice, or "general and consistent practice by states," and *opinio juris*, or when "the practice is followed out of a belief of legal obligation."[58] Customary international law may allow for a right to family planning or contraception in two ways. First, multilateral treaties and declarations by international conferences, such as the ICPD, can potentially create new customs, "depend[ing] on factors such as whether they are phrased in declaratory terms, supported by a widespread and representative body of states, and confirmed by state practice."[59] A proper understanding of the non-binding

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[53] *See, e.g.*, Ctr. for Reprod. Rights, Shadow Letter to CEDAW on the state of reproductive and sexual health and rights in Costa Rica, May 25, 2011, *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/English_CR_CEDAW%20%28May%2025,%202011%29%20AS%20SENT.pdf ("address[ing] the right to comprehensive healthcare and information, and particularly Costa Rica's failure to guarantee access to comprehensive reproductive health services that only women need, such as legal abortion, emergency contraception and in vitro fertilization for women with infertility"); Ctr. for Reprod. Rights, Shadow Letter on Nicaragua to the Committee on the Rights of the Child, Sept. 1, 2010, *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/CRC_Nicaragua_Shadow_Letter.pdf ("[I]t is necessary that Nicaragua institute a comprehensive sexual education program and increase access to contraceptives, particularly for adolescents living in rural areas.").

[54] Additionally, the mandate of each special rapporteur is limited. *See, e.g.*, Human Rights Council, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/HRC/RES/15/22 (Oct. 6, 2010).

[55] The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, delivered to the Third Committee and the General Assembly*, ¶ 48, U.N. Doc. A/66/254 (Aug. 3, 2011).

[56] WHO, *Model List of Essential Medicines, 17th list* (Mar. 2011), http://whqlibdoc.who.int/hq/2011/a95053_eng.pdf.

[57] SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984).

[58] Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L. L. 757, 757 (2001).

[59] *Id.* at 758.

status of the Programme of Action, the Platform for Action, and other international consensus documents is thus critical for those countries who do not want to be pressured into providing family planning services that violate national ethics and health laws.

Second, assertions of a right to family planning or contraception in particular could become authoritative in the future if validated by State practice that accepts and gives effect to those assertions. If a TMB interprets a provision of a treaty to guarantee a right to contraception, even though it has no formal authority to bind States with its interpretations, it may nevertheless influence State practice in that direction. This can effectively contribute to the emergence of a new development in the understanding of what the treaty norms require. However, as long as States are unwilling to bow to pressure from TMBs to grant their citizens a right to contraception, there can be no international custom.

IV. Family planning in international negotiations

Throughout their participation in international negotiations on global health policy and interaction with treaty-monitoring bodies, States must understand what they are legally obligated to provide their citizens. International law clearly does not create a right to contraception; States are thus not required to provide contraception. Each State must be equipped to withstand pressure from NGOs, TMBs, UN agencies, and other States to implement policies and programs that may not fit best within that particular State's cultural, religious, or ethical values and that may be less likely to succeed in improving reproductive health than other methods and practices that are more attuned to the needs of the women, men, and adolescents of that State.

International law clearly does not create a right to contraception; States are thus not required to provide contraception.

V. Conclusion

An investigation of international human rights treaties reveals that people have the right to access to family planning information and services, yet because there is no mention of contraception in these treaties, there is no corresponding right to contraceptives. States have committed through consensus documents like the Programme of Action and the Platform for Action to improving the reproductive health of their people, and they should be able to implement policies and programs that fit within the framework provided by international law. In addressing the reproductive health of their people, they must assess the true desires and needs of their people in order to meet any unmet need for family planning.