

**Written contribution to the Committee on Economic, Social and Cultural Rights
On the occasion of the Day of General Discussion on
"The right to sexual and reproductive health" (15 November 2010)**

Submitted: 18 October 2010

This submission is made on behalf of the **Sexual Rights Initiative** (a coalition of organizations¹ working to advance sexual rights at the UN Human Rights Council) and the **Youth Coalition for Sexual and Reproductive Rights**. We would like to thank the Committee on Economic, Social and Cultural Rights for inviting civil society to make contributions to the Day of General Discussion on the right to sexual and reproductive health.

Additionally, we would like to encourage the Committee to hold further consultations outside of the actual Committee sessions over the course of the development of the general comment. For such consultations, we urge the Committee to ensure strong participation by reproductive and sexual rights and health advocates from the Global South and Central and Eastern Europe as well as representatives of certain marginalized populations or groups who experience violations of their reproductive and sexual rights and health in particular ways and tend to be overlooked in such processes. Sex workers and transgender persons are, for instance, two groups that should be included. Direct participation of representatives of these groups is necessary to ensure that the issues these groups face with respect to reproductive and sexual rights and health will be fully laid out for the benefit of the Committee in developing the general comment. Their specific experiences are sometimes misunderstood or not well understood by both the general human rights and sexual and reproductive health and rights communities.

Within a single contribution, it is difficult to comprehensively cover all issues or even all the topics within the area of sexual and reproductive health. In this submission, we have selected issues that we wish to assist the Committee in formulating its general comment. We have grouped these topics into three sections reflecting the themes of the Day of General Discussion:

- Section I – Definitions and elements of the right to sexual and reproductive health
- Section II – Groups in Focus
- Section III – Legal aspects and State obligations

Section I – Definitions and elements of the right to sexual and reproductive health

- **Scope of the General Comment: Addressing sexual and reproductive rights issues –**
It must be recognized that the human rights relating to “sexual and reproductive health” are found within numerous international human rights instruments; specific rights and obligations are found within the *ICESCR*, as well as the *ICCPR*, *CRC*, *CEDAW*, *ICERD*, *ICRPD*, and so on. Furthermore, sexual and reproductive health is part of a larger set of sexual and reproductive rights, which encompasses human rights applied to issues of sexuality and reproduction. Realizing sexual and reproductive health is intimately linked to and dependent on the realization of other sexual and reproductive rights, including those that may not typically be thought of as health issues, and hence we believe that the General Comment should address these broader rights. It can often be difficult to distinguish sexual and reproductive health issues from broader sexual and reproductive rights issues and such distinctions can be artificial and potentially unhelpful.

¹ Including: Action Canada for Population and Development (ACPD), Creating Resources for Empowerment in Action (CREA, India), Federation for Women and Family Planning (Poland), Mulabi – Latin American Space for Sexualities and Rights (Argentina), and others.

The strong inter-relationship and indivisibility between sexual and reproductive health and broader sexual and reproductive rights is further demonstrated in definitions of “sexual and reproductive health” that embrace holistic concepts, such as the definition found within the ICPD Programme of Action, and go beyond concepts such as the absence of sexual and reproductive ill-health, disease and infirmity. For example, paragraph 7.2 of the Programme of Action speaks of reproductive health and sexual health as encompassing “a complete state of physical, psychological and social-well being”, “a satisfying and safe sex life” and “the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases”. A holistic definition would recognize that a vast array of sexuality and reproductive rights issues are among the core issues of the right to sexual and reproductive health, and even the core obligations entailed by this right.

As we believe it is necessary for the Committee to address broader sexual and reproductive rights issues within this general comment, we would recommend that this be accomplished by the Committee’s ensuring that the title and scope of the general comment are formulated around sexual and reproductive rights, with sexual and reproductive health being a core component of this. Possible titles include “Sexual and reproductive health and rights”, “Human rights in relation to sexuality and reproduction”, and so on.

It is also critically important for the Committee to bear in mind, when defining the scope, elements and obligations of the right to sexual and reproductive health, that standards with respect to this issue have been developing progressively over the last 20 years or so. Even looking at the Committee’s own jurisprudence (especially its concluding observations) indicates that the Committee’s understanding of sexual and reproductive health issues has developed over the last 2 decades and the recommendations that the Committee has made to State Parties (reflecting States’ obligations under the *Covenant*) have also become increasingly rigorous, far-reaching and precise. We would strongly recommend that when formulating the general comment, this is explicitly recognized and that the general comment is formulated from the perspective that the understanding of States Parties’ obligations under the *Covenant* will develop as the understanding of the needs and situations of rights-holders also develops. We are of the strong belief that this general comment should not in any way freeze in place what States Parties are obliged to do in order to meet their duties under the *Covenant* and the Committee must guard against possible restrictive interpretations of this general comment.

In sum, we urge the Committee to adopt a robust general comment that incorporates broader sexual and reproductive rights elements. At the same time, the Committee must guard against freezing in place any static understanding of States Parties’ obligations under the *Covenant*, through the elements and obligations identified in the general comment. The issues raised below fall within the broad ambit of sexual and reproductive rights that we would like to see addressed within the general comment.

- **Gender-Based Violence** – Gender-based violence has significant consequences for sexual and reproductive health. It is known that women and girls face such violence; at the same time, it must be recognized that men, boys and transgender people also face extreme and gendered violence. In fact, gender-based violence is a part of the daily lives of transgender people and individuals perceived to be gay or lesbian or other persons who do not conform to societal norms relating to gender. The forms of such violence include physical and emotional violence while walking down a street; bullying, punishment and coercion in schools and other educational institutions; ridicule and humiliation in health care centres; physical and sexual violence perpetrated by their families and the police; discrimination at the workplace, *etc.* The exacting demands of notions of masculinity, which form barriers to men seeking sexual and reproductive health information and services, can also be considered a form of gender based violence against men. It follows from this that the general comment should

view the concept of gender not just as pertaining to women but in its entirety as a social construct that affects all persons.

- **Informed Consent** – The concept of informed consent should be addressed in great length within the general comment. It is absolutely necessary that individuals receive full, accurate, non-biased, evidence-based information regarding their health and sexual and reproductive health services as to enable them to provide informed consent to health-related services. This issue is particularly important for women and girls seeking access to family planning and abortion services, as well as gender non-confirming persons who are often subjected to surgical requirements or sterilization without their informed consent. Further, the evolving capacities of children and young people should be respected when assessing consent. The issue of informed consent touches upon many human rights related to sexual and reproductive health, such as the rights to health, to information, equality and non-discrimination and bodily integrity. The general comment would add value in this area by setting forth specific requirements to obtain informed consent.
- **Conscientious Objection** – The concept of conscientious objection is one issue to which the Committee must pay close attention when formulating its general comment, partly because of the misuse of this concept that many States Parties have permitted. There are severe sexual and reproductive health violations that women and girls face due to the purported conscientious objection by physicians and hospitals, and so it is essential that the general comment specifically address the issue in detail. For example, the general comment should confirm that ONLY individuals, not institutions, may exercise conscientious objection and that governments have an obligation to create and implement policies to ensure that an individual’s exercise of conscientious objection does not lead to the denial of another individual’s right to access sexual and reproductive health services. The Committee should rely upon the work of the International Federation of Gynaecology and Obstetrics (FIGO) with respect to this issue. In particular, the 2006 resolution on “Conscientious Objection” adopted by the FIGO General Assembly states:

“FIGO affirms that to behave ethically, practitioners shall:

1. Provide public notice of professional services they decline to undertake on grounds of conscience;
2. Refer patients who request such services or for whose cares such services are medical options to other practitioners who do not object to the provision of such services;
3. Provide timely care to their patients when referral to other practitioners is not possible and delay would jeopardize patients’ health and well-being; and
4. In emergency situations, provide care regardless of practitioners’ personal objections.”

While this resolution is directed particularly at health care providers over what is ethical behaviour, States must take steps to ensure that health care providers discharge these ethical standards so that violations of the right to health can be prevented and redressed. Under the *Covenant*, States Parties have a duty to provide a full range of sexual and reproductive health services, and individual conscientious objection to the provision of particular services cannot form a barrier to accessing these services.

Indeed, CEDAW has repeatedly expressed concerns over the lack of access to abortion services due to laws permitting conscientious objection by hospital personnel.² The Committee has made it clear that, in

² See, e.g., **Croatia**, U.N. Doc. A/53/38 (1998) at para. 109; **Italy**, U.N. Doc. A/52/38 Rev.1, Part II (1997) at para. 353; **Poland**, U.N. Doc. CEDAW/C/POL/CO/6 (2007) at para. 25.

these circumstances, it considers that women's reproductive rights are infringed by a government's failure to ensure access to another provider willing to perform the procedure.³

- **Cultural Diversity** – While cultural diversity impacts the realisation of reproductive and sexual rights and health in different contexts and has implications for programme planning, we believe that it cannot be a factor in defining the normative content of a right itself. In particular, the principle of “universality” must entail that the definition of a right or rights is independent of any socio-cultural factors and should be an ideal for all persons irrespective of the contexts they live in. Rather, considerations of culture would be more appropriately applied to the means through which rights are realized or programmes implemented. It is also important to note, that while there are evolving conceptions of culture, it should be reaffirmed within the general comment that culture cannot be imposed upon individuals nor can arguments of tradition or culture be used to justify the infringement of their human rights, including their reproductive and sexual rights and health.

Section II – Groups in Focus

- **Young people** – The largest-ever generation of youth is approaching adulthood and it is essential that the general comment fully elaborate on the rights, needs and interests of children and young people, with regard to their sexual and reproductive health. It is particularly important that the general comment acknowledge and incorporate the concept of children and young people's “evolving capacities” and emphasize that the “best interest of the child” must be incorporated into health policies and practices. This should include an investigation of what sexual and reproductive health services must be tailored for young people and how, and recommendations for ensuring young people's access to these services. As a part of their right to education, children and young people must have access to accurate, non-biased, evidence-based comprehensive sexuality education so as to: promote their confidence and self-worth, equip them with the knowledge and skills to make healthy sexual and reproductive choices, prevent HIV infection and other sexually transmitted infections, and avoid unwanted pregnancies. Therefore, childhood and youth are particularly important life stages to protect and promote individuals' sexual and reproductive rights.
- **Women and girls** – Women and girls' oppression, disempowerment and marginalization are inextricably linked with the regulation of their bodies and sexuality, and the denial of their sexual and reproductive health and rights. This is evident from the continually high unmet need for contraception among women and girls, incidence of pregnancy and childbirth related mortality and morbidities, and spread of HIV and sexually transmitted infections. It is extremely important that the general comment adopt a gender-specific approach to women and girls' sexual and reproductive health and rights, recognizing the links between the empowerment of women and girls, the improvement of their status in societies and the achievement of these rights.
- **Transgender, third gender and intersex persons** – Transgender, third gender and intersex persons experience specific violations of their reproductive and sexual rights and health, including forced or mandatory sterilization, body modification including genital disfigurement during infancy and hence lacking informed consent, lack of access to desired body modification for gender reassignment, and ridicule, humiliation and denial of sexual health services in healthcare centres. It is important that this general comment elaborate on the sexual and reproductive health-needs and rights of transgender, third gender and intersex people, and include consideration of specific ways in which they experience violations of their reproductive and sexual health and rights.

³ See **Croatia**, U.N. Doc. A/53/38 (1998) at para. 109.

- **Gender expression and identity** – Further to the above paragraph, we urge the Committee to explore fully the concept of “gender expression”. We view this as an inclusive concept with respect to how individuals express or manifest their own sense of their gender. This term is inclusive of the concept of “gender identity” (referring to the gender that an individual identifies as, whether or not it is consistent with the individual’s assigned sex at birth). However, it also goes beyond this to recognize that individuals sometimes face violence or discrimination based on how they express their sense of their own gender (e.g. in dress, mannerisms, appearance, speech, *etc.*). Violations of human rights, including reproductive and sexual rights and health, on this basis are often rooted in traditional and societal-based notions of what gender roles for men and women are. Such societal beliefs about gender underlie many violations relating to the reproductive and sexual rights and health of transgender and third gender persons, as well as persons who do not conform to societal-based gender norms. At this stage, the Committee has already recognized that “gender identity” is a prohibited ground of discrimination in the *Covenant* (within *General Comment no. 20*). We urge the Committee to include within its next general comment some consideration of specific ways in which people experience violations of their reproductive and sexual rights and health, based on their gender expression and identity.
- **Sex workers**
In paragraph 96 of the Beijing Platform for Action, Governments recognized “the right to have control over and decide freely and responsibly on all matters related to one’s own sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence.” Much as any form of forced or coerced prostitution violates this right, laws prohibiting the buying and selling of sexual services among adults and involving no victimization also violate this right. The *International Guidelines on HIV/AIDS and Human Rights* (published by OHCHR and UNAIDS) make it clear that States must distinguish in law between sex work involving no victimization and forced or other coerced forms of prostitution:
“With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients. Criminal law should ensure that children and adult sex workers who have been trafficked or otherwise coerced into sex work are protected from participation in the sex industry and are not prosecuted for such participation but rather are removed from sex work and provided with medical and psycho-social support services, including those related to HIV.” (para. 21c)

Furthermore, in a recent report by the UN Special Rapporteur on the right to health, laws criminalizing sex work were identified as being in violation of the right to health. Specifically, the Special Rapporteur stated:

“The criminalization of sex work infringes on the enjoyment of the right to health, by creating barriers to access by sex workers to health services and legal remedies. When sex workers are not recognized as engaging in legitimate work, they are not recognized by standard labour laws in many countries... The decriminalization or legalization of sex work with appropriate regulation forms a necessary part of a right-to-health approach to sex work, and can lead to improved health outcomes for sex workers. Any regulation of the sex sector should be implemented in accordance with a right-to-health framework, and should satisfy the requirement of safe working conditions as incorporated into the right to health. Decriminalization, along with the institution of appropriate occupational health and safety regulations, safeguards the rights of sex workers.”⁴

⁴ Report of the Special Rapporteur on the right of everyone to enjoyment of the highest attainable standard of physical and mental health (2010), UN Doc. A/HRC/14/20 at paras. 43 and 46.

It should be noted that while there is wide agreement among sex workers' organizations as to the necessity of decriminalizing adult sex work in order to safeguard the rights of sex workers, including their right to health, the issue of "regulation", or "legalisation", is a complex one and many elements of "regulation", in particular those infringing the rights of sex workers, are highly contested by many sex workers' organizations. Without going into lengthy details on this issue, it is clear that policies formulated that affect sex workers either explicitly or in effect, need to be formulated and evaluated with the effective participation of sex workers and sex workers' organizations. Such participation is a procedural obligation on States Parties and is fundamental to a human rights approach, as further explored below. It is also clear that any policy or other legislative measure, including occupational health and safety measures, must respect the full range of sex workers' human rights, including principles of informed consent and freedom of movement. Thus regulations seeking to impose ghettoisation of sex workers, mandatory health tests, and so on, should be seen as inconsistent with the *Covenant* and infringing the rights of sex workers, including their right to sexual and reproductive health.

Within his report, the Special Rapporteur identifies that criminalization of sex work often takes two major forms:

"First, through the criminalization of the selling of sexual services, with the imposition of penalties upon sex workers themselves. Second, through the criminalization of various practices around sex work: these include, but are not limited to, keeping a brothel; recruiting for or arranging the prostitution of others; living off the proceeds of sex work; solicitation; and facilitating sex work through the provision of information or assistance. Although the former is not directly criminalized in many States worldwide, sex workers are nonetheless treated as criminals where activities around sex work are criminalized, or through the use of other pre-existing laws (not specific to sex work) to harass, intimidate or justify the use of force against sex workers."⁵

At the same time, in much the same way that the International Guidelines on HIV/AIDS and Human Rights do, the Special Rapporteur recognizes the need for criminal laws to prohibit forced or coerced prostitution:

"The trafficking and enforced sexual slavery of any person is abhorrent, and undoubtedly merits criminal prohibition. However, the conflation of consensual sex work and sex trafficking in such legislation leads to, at best, the implementation of inappropriate responses that fail to assist either of these groups in realizing their rights, and, at worst, to violence and oppression."⁶

As part of their obligations to adopt measures to realize the right of everyone to health, the Special Rapporteur calls upon States:

"To repeal all laws criminalizing sex work and practices around it, and to establish appropriate regulatory frameworks within which sex workers can enjoy the safe working conditions to which they are entitled. He recommends that States implement programmes and educational initiatives to allow sex workers access to appropriate, quality health services."⁷

With respect to sex work, we believe that the Committee should be guided by the analysis of the content of the right to health provided by the UN Special Rapporteur on the right to health as well as the analysis provided by the International Guidelines on HIV/AIDS and Human Rights.

⁵ *Ibid.* at para. 29.

⁶ *Ibid.* at para. 33.

⁷ *Ibid.* at para. 76(b).

Section III – Legal aspects and State obligations

- **Decriminalization of Consensual Sexual Activity** – The Committee must give serious consideration to including the decriminalization of consensual sexual activity such as commercial sex activity, sexual activity of people living with HIV, consensual sexual activity between minors close in age, and individuals of the same gender(s) within the core obligations of States Parties in realizing the right to sexual and reproductive health. Again, there is evidence that criminalization merely leads to increased stigma, increasing risk to sexually-transmitted infections or other sexual ill-health, reduces individuals' access to sexual and reproductive health services, denies autonomy and dignity, and violates a host of other human rights. The simple threat of criminal sanction is enough to subject individuals to violence, discrimination and harassment, and serves to maintain societal norms stigmatizing all non-heterosexual, non-marital sexual activity. The Special Rapporteur on the right to health, in his latest report to the Human Rights Council, identifies criminal laws prohibiting consensual sexual activity as violating the right to health and calls upon all States to decriminalize consensual sexual activity, including same-sex sexual conduct and sex work, as well as HIV transmission.⁸ Additionally, a broad definition of sexual and reproductive health that, for example, incorporates elements from para. 7.2 of the ICPD Programme of Action, such as “a satisfying and safe sex life” and “the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases” also suggests that the decriminalization of many forms of consensual sexual activity would constitute a core obligation of the right to sexual and reproductive health.
- **Decriminalization of Sexual and Reproductive Health Services** – The decriminalization of sexual and reproductive health services, such as contraceptive and safe abortion services, should be among the core obligations of the right to sexual and reproductive health identified in the general comment. It is essential that the general comment note that decriminalization of sexual and reproductive health services is not only integral to removing stigma and penalization in order to facilitate access to services but also to protect and promote individuals' dignity. We therefore recommend that the Committee call for decriminalization of abortion services. There is a wealth of statistical public health evidence that confirms that penalization of abortion services directly correlates with an increased prevalence of unsafe abortions. Although the issue of abortion is sensitive, it is important that the Committee interpret the *Covenant* and draft its general comment in-line with science and its own evolving jurisprudence, as opposed to political sensitivities, so as to ensure a full realization of individuals' reproductive and sexual rights and health. In this respect, the Human Rights Committee has characterized restrictive abortion laws as violating the right to life as they force women to put their lives and health at risk in seeking illegal and unsafe abortions.⁹ The Committee on Economic, Social and Cultural Rights, within its own jurisprudence, has recognized that restrictive abortion laws contribute to the problems of unsafe abortion and maternal mortality and has requested States Parties to legalize and decriminalize abortion in numerous instances.¹⁰
- **Accountability** – We believe that accountability is a major component of protecting and fulfilling individuals' reproductive and sexual rights and health, that is, in particular, to ensure that governments are held accountable for rights violations by state actors and, in some circumstances, non-state actors. Without such accountability, rights violations may continue with impunity and the realization of rights will remain illusory. While the new Optional Protocol represents an important addition to the

⁸ Ibid at para 76.

⁹ See **Poland**, U.N. Doc. CCPR/CO/82/POL (2004) at para. 8.

¹⁰ See, e.g., **Nepal**, U.N. Doc. E/C.12/1/Add.66 (2001) at paras. 32–33, 55; **Poland**, U.N. Doc. E/C.12/1/Add.26 (1998) at para. 12; **Poland**, U.N. Doc. E/C.12/1/Add.82 (2002) at para. 29; **Bolivia**, U.N. Doc. E/C.12/1/Add.60 (2001) at para. 43; **Chile**, U.N. Doc. E/C.12/1/Add.105 (2004) at para. 26; **Mauritius**, U.N. Doc. E/C.12/1994/8 (1994) at para. 15.

accountability landscape with respect to ESC rights, individuals need to first be able to seek reparation and redress for the infringement of their rights at the national level. The requirements for national-level accountability as a core component of the right to health can be found within the Committee's *General Comment no. 14*. We hope that the Committee will take a similar approach with respect to its general comment on sexual and reproductive health. We urge the Committee to underscore non-discrimination, transparency and participation as important hallmarks of national-level accountability systems.

We also hope that the Committee will include "participation" or "voice accountability" as part of the general comment's content related to accountability. In this respect, the Committee can draw from its own work in *General Comment 14*:

"The formulation and implementation of national health strategies and plans of action should respect, *inter alia*, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States."¹¹

The Committee in looking at participation can also draw upon the recent study by UN High Commissioner for Human Rights on "preventable maternal mortality and morbidity and human rights":

"Participation is an operational principle of a rights-based approach that has come to be recognized as a right in itself... Participation in the context of maternal mortality and morbidity means granting women access to relevant information and including them in the decision-making processes which affect their pregnancy and childbirth."¹²

The General Comment should emphasize that formulation of sexual and reproductive rights and health policies and the planning, implementation and evaluation of sexual and reproductive health programmes must include the participation of groups or persons who either face particular barriers to access, are particularly affected by lack of access or have particular services that they need access to. Similarly, the participation of those who are significantly affected, either directly or through disproportionate effects, by a specific policy or programme is essential. For example, when formulating occupational health and safety policies or designing programmes in the context of sex work, sex workers' participation is critical; transgender, third gender and intersex persons must be involved in the formulation of guidelines around gender identity and sex reassignment; and young people's participation is central to the formulation of policies and programmes pertaining to sexuality education, sexual and reproductive health services tailored for young people; and so on.

¹¹ UN Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health (art. 12)*, UN Doc. E/C.12/2000/4 at para. 54.

¹² UN Doc. A/HRC/14/39 at para 39.