Observations by the United States of America
on "The Right to Health, Fact Sheet No. 31"

1. The United States Government takes this opportunity to convey its observations on certain opinions and legal conclusions expressed in "Fact Sheet No. 31" ("Fact Sheet") on the Right to Health, produced by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the World Health Organization (WHO).

2. The issues addressed in the "Fact Sheet" are important to the United States, given its commitment to the protection of human rights and fundamental freedoms and to improving the health of its citizens and people worldwide.

3. As a general matter, the United States observes that the "Fact Sheet" is, in spite of its name, replete with unwarranted legal conclusions and opinions. The United States considers it misleading to style such a document as a "fact sheet," which conveys an impression to readers that the document includes factual information not reasonably open to doubt. Instead, the document contains sweeping and far reaching conclusions related to the "right to health" and the associated obligations of States.

4. These observations address a select number of subjects about which the United States holds fundamentally different views from those apparently held by the OHCHR and WHO officials responsible for the "Fact Sheet." In this paper, the United States sets forth in summary fashion a number of observations concerning this "Fact Sheet" without addressing all of the substantial issues, statements and conclusions with which it may not agree.

I. Observations on the "Right to Health"

5. There is no international consensus on the nature and scope of health-related rights and obligations. The Universal Declaration of Human Rights established as one of its aspirations the "right [of everyone] to a standard of living adequate for the health and well-being of himself and of his family." States Parties to the International Covenant on Economic, Social and Cultural Rights obligated themselves to progressive realization of the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health." However phrased, the right is one to be realized progressively. In other words, it is the ultimate goal, not an immediate entitlement. Accordingly, this "right" does not lend itself to the expansive and detailed characterization of its legal content as set forth in the "Fact Sheet."

6. We further observe that not a single resolution of the World Health Assembly, the Commission on Human Rights, nor the Human Rights Council includes any reference to a principle or concept styled as the "Right to Health."

II. Obligations of "States" versus "States Parties"

7. Page 1 clarifies that the "full name" of what the "Fact Sheet" refers to as the "right to health" is the right to the "enjoyment of the highest attainable standard of physical and mental health." This phrasing originates from the International Covenant on Economic, Social and Cultural Rights ("ESC Covenant" or "Covenant"), which was adopted by the United Nations General Assembly in 1966 for ratification or accession by States. Although a number of States have ratified the Covenant, a number of States have decided not to join this instrument. For those non-Parties, which include the United States, the Covenant does not give rise to international legal obligations.

8. However, the "Fact Sheet" conveys the general impression that all States, regardless of whether they have ratified the ESC Covenant, have international obligations to respect, protect, and fulfill the "right to health" to individuals within their respective jurisdictions. Rather than focus on the legal obligations arising from the ESC Covenant in particular, the "Fact Sheet" invokes a wide range of treaties, declarations, non-binding recommendations, general comments by treaty implementation bodies, and other documents to convey the impression that this patchwork represents a coherent and uniform explanation of the "right to health" obligations applicable to all countries.

9. Section III -- entitled "Obligations on States and Responsibilities of Others Towards the Right to Health" -- sets forth a detailed and extensive set of opinions on the international legal obligations of States in relation to the right to health. This section begins by discussing the obligations of *States Parties* to the ESC Covenant. However, the discussion changes quickly into an analysis of the obligations of *States*, without distinguishing whether a particular State has ratified the ESC Covenant. This section and others contain dozens of legal assertions as to what States "must" do or are "required" or "obligated" to do. Little care is paid to the basic matter of whether a state is actually bound by any obligations related to the "right to health." Observations elsewhere in the "Fact Sheet" reinforce the general impression that all States are bound by the obligations described therein. For example, the Introduction asserts that "*every State* has ratified at least one international human rights treaty recognizing the right to health." (p. 5, emphasis added).

10. The United States has, of course, ratified the WHO Constitution, which was adopted in 1946. In its preamble, the WHO Constitution States that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." The United States fully accepts this and the other "principles" outlined in the Preamble. But it cannot reasonably be maintained that the preambular language of the instrument establishing the WHO binds States to the extensive set of obligations described in the "Fact Sheet." Furthermore, when the United States ratified the WHO Constitution it took the following understanding: "nothing in the

Constitution of the WHO in any manner commits the United States to enact any specific legislative program regarding any matters referred to in said Constitution."

11. The United States is also a party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the "Fact Sheet" identifies as one of the "[i]nternational human rights treaties recognizing the right to health" (p. 9). Article 5(e)(iv) of that Convention states that:

> "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of … [e]conomic, social and cultural rights, in particular … [t]he right to public health, medical care, social security and social services."

12. Although Article 5(e) recognizes the existence of what it terms "[t]he right to public health, medical care, social security and social services," it does not obligate States to respect, protect, or fulfill this right to individuals within its jurisdiction. In its Initial Report to the Committee on the Elimination of Racial Discrimination, the United States stated that:

> "Article 5 obliges States parties to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, without distinction as to race, colour, or national or ethnic origin. . . . Importantly, article 5 goes even further, requiring States Parties to guarantee equality and non-discrimination on this basis 'notably in the enjoyment' of a list of specifically enumerated rights. Some of these enumerated rights, which may be characterized as economic, social and cultural rights, are not explicitly recognized as legally enforceable 'rights' under U.S. law. However, *article 5 does not affirmatively require States Parties to provide or to ensure observance of each of the listed rights themselves, but rather to prohibit discrimination in the enjoyment of those rights to the extent they are provided by domestic law*."[1]

13. This view makes sense in light of the object and purpose of the ICERD. The ICERD is a treaty focusing on eliminating racial discrimination in all its forms; it does not set forth any substantive health-related obligations.

14. The United States Government is fully committed to improving the health of its citizens and people of all countries. However, for the reasons expressed above, the United States does not agree with the suggestion that *all States*, regardless of their

[1] *Initial Report of the United States of America to the Committee On the Elimination of Racial Discrimination*, Paras. 297-298, Oct. 10, 2000 (emphasis added). Available at: http://www.state.gov/g/drl/hr/treaties/.

status under the ESC Covenant, have international obligations to respect, protect, and fulfill the "right to health" to individuals within their respective jurisdictions.

III. Treaty Monitoring Bodies

15. The "Fact Sheet" mischaracterizes the roles and authorities of United Nations treaty monitoring bodies. According to the "Fact Sheet," the general comments adopted by treaty monitoring bodies "provide an authoritative and detailed interpretation of the provisions found in the treaties" (p. 10). The "Fact Sheet" also suggests in numerous places that treaty monitoring bodies are empowered to identify or "clarify" the specific legal obligations or requirements of States, even where those obligations or requirements are not expressly found in the relevant treaty.[2] Indeed, many of the conclusions and assertions in the "Fact Sheet" are based on General Comment No. 14 of the Committee on Economic, Social and Cultural Rights ("ESC Committee").

16. General comments and other documents issued by treaty monitoring bodies express the opinions of individuals acting in their expert capacities; such documents are not the result of deliberations among States. While the views of treaty monitoring bodies are entitled to respect and should be considered carefully by States Parties, they do not create legal obligations or "requirements." Although States Parties to a treaty can agree to establish a third party to render authoritative treaty interpretations or to definitively resolve legal disputes, in the case of UN human rights treaties, no such authorities have been given to the relevant Committees.

17. For instance, Article 40, paragraph 4 of the ICCPR simply states that "The [Human Rights] Committee shall study the reports submitted by the States Parties to the present Covenant" and also "transmit its reports, and such general comments as it may consider appropriate, to the States Parties." There is no suggestion that the Committee is empowered to render authoritative interpretations of the treaty or identify new non-treaty obligations of States, as claimed by the OHCHR and the WHO.[3] As the authors of the "Fact Sheet" are likely aware, the ESC Committee was not even created by the ESC Covenant; rather, it is a creation of the UN's Economic and Social Council.[4]

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[2] *See e.g.*, Fact Sheet at 3 ("…characteristics of the right to health are *clarified* …by Committee on Economic, Social and Cultural Rights."); 8 ("…the Committee on Economic, Social and Cultural Rights has *made it clear*…); 13 ("The Committee on the Elimination of Discrimination against Women further *requires States parties* to…").

[3] It is also notable that the Human Rights Committee itself has not claimed that their observations have a particular legal weight. In its response to the Observations of the United States to General Comment 24, the Chairman of the Committee stated that it "would like to assure the delegation of the United States that General Comments do not suggest that the Committee's interpretations are strictly binding." The Chairman also expressed the "hope" that General Comments "carry a certain weight and authority" with States Parties. "Chairman's Statement on the Issue of Reservations," Human Rights Committee, Mar. 31, 1995.

[4] ECOSOC, res. 1985/17, May 28, 1985.

18. Furthermore, the pronouncements of a treaty monitoring body are directed only to the *States Parties* of the relevant treaty. The authors of the "Fact Sheet", perhaps inadvertently, repeatedly characterize the statements of the treaty bodies as applying to "States," regardless of whether a particular state has ratified the relevant treaty.[5]

19. As noted above, a significant portion of the substantive content of the "Fact Sheet" appears to be based on General Comment No. 14, produced in 2000 by the ESC Committee. Although the United States is not a Party to the ESC Covenant, it nevertheless considers it apparent that a number of statements and assertions in General Comment No. 14 go beyond the Covenant and purport to create a panoply of health-related rights that are not found in the treaty itself. The U.S. does not accept such conclusions -- many of which pervade the "Fact Sheet" -- as they are not found in international human-rights instruments.

20. Some of the assertions of legal rights and obligations made by the Committee (and OHCHR and WHO by extension) also raise profound questions about how those rights and obligations would be implemented and how compliance could be meaningfully assessed. For instance, States cannot be held meaningfully accountable to an obligation "to respect the enjoyment of the right to health in *other countries*".[6] Overall, the United States does not consider General Comment No. 14 to be a viable foundation upon which to elaborate a "fact sheet" dealing with human rights and health.

IV. Reproductive Health-Related Wording

21. The United States is concerned about the document's frequent use of terms regarding reproductive health care that have been misinterpreted by others to support rights and obligations that have not been agreed to in international fora. It is the understanding of the United States that the Programme of Action of the International Conference on Population and Development and the Beijing Declaration and Platform for Action did not create any rights and did not purport to create or recognize a right to abortion. References to these documents and use of the phrases "reproductive health," "sexual and reproductive health," and "reproductive health care" cannot be interpreted to constitute support, endorsement, or promotion of abortion. The United States objects to the use of the term "reproductive health services" in UN documents because there is ambiguity surrounding the term. In multilateral fora, some Member States misinterpret the term as including abortion. As these terms have been so frequently misconstrued in international fora, the U.S. proposes using the term "reproductive health care" exclusively to avoid confusion.

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[5] *See e.g.*, Fact Sheet at 13 ("The Committee on the Elimination of Discrimination against Women *requires States* to…); 25 ("With respect to the right to health, the Committee has underlined that States *must ensure*…" and "The Committee on Economic, Social and Cultural Rights has also stressed that *States have a core minimum obligation* to…); 30 (The Committee on Economic, Social and Cultural Rights has underlined that *States must*…).

[6] Fact Sheet at 30; Committee on Economic, Social and Cultural Rights, general comment N° 14 on the right to the highest attainable standard of health, para. 39 (2000).

22. The use of the term "right to sexual and reproductive health" in this document is also problematic. The United States is not aware that this term has ever been used in any UN documents - much less in any global multilateral treaty - nor has it any standing in the international community. In general, the United States opposes terms implying that undefined "rights" exist, and can accept the term "reproductive rights" only in the context of explicit references to coercive population control policies. In that context, the phrase refers to a couple's freedom to determine the number and spacing of their children. In all other contexts, we oppose its use because it is ambiguous. There is no international definition of what it does or does not include, and some may misconstrue the term to signify an international right to abortion

23. The use of the term "reproductive health services" is even more problematic when juxtaposed with the phrases "unwanted pregnancies" and "unsafe abortion." This can be read to imply the existence of a right to terminate "unwanted pregnancies," and that abortion is acceptable so long as the procedure is safe. Such assertions are contrary to the policies of the United States and of many other UN Member States, and they have no place in a UN document purporting to discuss internationally recognized human rights.

V. Non-State Actors

24. The discussion in the "Fact Sheet" of non-state actors begins by stating that "[a] State's obligation to protect human rights includes ensuring that non-State parties do not infringe upon human rights."[7] This statement sweeps too broadly and categorically. The responsibility of a government in relation to non-state actors depends on the nature of legal obligations that a particular country has assumed.

25. As a general matter, with notable exceptions such as slavery, a human rights violation entails state action.[8] In addition, human rights treaties may contain provisions that clearly and specifically impose obligations upon States Parties to prevent, in certain limited circumstances, particular kinds of misconduct by private parties or non-state actors. For instance, the ICERD and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) contain specific provisions that do impose limited obligations upon States Parties, in the specific context of preventing discrimination, to prevent discrimination, respectively, "by any persons, group or organization" and "by any person, organization or enterprise" (ICERD, Article 2(1)(d); CEDAW, Art. 2(e)). Importantly, even in the case of CEDAW and ICERD, where an obligation is spelled out regarding prevention of discrimination by non-state

[7] Fact Sheet at 28. While the phrase "non-State parties" typically refers to States that have not joined a particular treaty, it seems apparent from the context of this discussion that the OHCHR and WHO are intending to refer to non-state actors, such as private individuals, corporations, NGOs, and the like.

[8] A notable example of the state-action requirement is found in the definition of torture in Article 1 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (referring to pain or suffering inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.")

actors or private parties, the obligation is carefully circumscribed (e.g., "all appropriate means" or "all appropriate measures") to reflect the limitations on even well-intentioned States Parties to control the actions of non-governmental actors.

26. As the above examples illustrate, the drafters of the international treaties clearly know how to draft provisions that address the actions of non-state actors. The fact that some human rights obligations do explicitly extend to private actors whereas others do not undermines the sweeping assertion of the OHCHR and the WHO that there is a general obligation in international human rights law -- including with respect to the "right to health" -- that obligates States to "ensure" the non-infringement on human rights by non-state actors. A much more careful analysis on this question would be needed to determine the factual situation in question, the actual treaty obligations of the country in question, and the extent to which a private entity might be exercising governmental authority before a useful analysis of this complex issue could be undertaken.

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In conclusion, the observations contained in this document, while potentially sounding somewhat legalistic, are animated by the United States longstanding legal views that international obligations are not optional. Where treaty obligations exist, Parties have a solemn duty under international law to fulfill such obligations. The doctrine of *pacta sunt servanda* is one of the oldest principles of international treaty law and certainly the most important. Where customary international law obligations exist, they must be clear and specific, demonstrated by the requisite state practice and *opinio juris.* An attempt to fashion policy objectives into assertions of international legal obligation -- especially where such rules are not being implemented, and to some extent cannot be implemented or enforced at the national level -- does not foster respect for international law. For this reason, the United States believes it essential that international legal discourse hew closely to long accepted principles of international law. Fact Sheet No. 31 falls short of this standard.

The United States Government greatly appreciates the work of the OHCHR and the WHO. Although the United States does not agree with all of the authors' recommendations with respect to the "right to health," it fully supports the continuing efforts of these organizations to improve the health and well being of people in all countries. The United States looks forward to its continuing dialogue on these issues.