

**COMMENT ON THE REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS**

Center for Family and Human Rights (C-Fam) and Civil Society for the Family

*This comment is provided by the Center for Family and Human Rights (C-Fam) on behalf of the coalition Civil Society for the Family, representing over two-hundred organizations dedicated to the protection of the family and the promotion of human dignity internationally. The organizing committee of Civil Society for the Family includes the following organizations: Center for Family and Human Rights (C-Fam), the European Center for Law and Justice, Family Research Council, HazteOir, Human Life International, the Institute for Family Policy, the National Organization for Marriage, Novae Terrae, and Ordo Iuris for Legal Culture. The official platform of the coalition may be found at the website www.civilsocietyforthefamily.org.*

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*General Observations*

Civil Society for the Family congratulates the Commission on the production of the initial version of its inaugural report. The report provides a deeply insightful account of the history of the U.S. tradition of unalienable rights and the mature reflection on the challenges facing the legitimacy of the international human rights system. It also adopts a balanced posture for U.S. foreign policy in light of the discrepancies that have emerged between the international system and the U.S. constitutional tradition.

As the commission has rightly noted, promoting human rights has historically been and must remain a central element of U.S. foreign policy. Human rights are not mere positive legal tools, as the Commission also observed, but an essential element of humankind’s attempt to establish justice and uphold human dignity. That is why the seriousness the Commission affords the legality of U.S. human rights obligations, and the criticism of much the output of international human rights bodies as the result of poor-quality work, is seen when the commission dismisses this outpur as incapable of generating new legal obligations. All this is a welcome departure from the legal realism that generally dominates international human rights discourse.

As the Commission develops the final report, we urge the Commission not just to look to the past in order to ground the human rights discourse of the U.S. government consistently with the U.S. Constitution and the legal obligations democratically undertaken by the American people through their elected representatives, as the commission has so helpfully done. For the commission to more effectively assist the U.S. Secretary of State in upholding unalienable human rights for all people throughout the world the Commission should also look prospectively.

Global political and social trends are rapidly changing the international human rights landscape. It is not enough for the U.S. State Department to simply defend the processes of the international human rights system. It must aggressively defend and uphold the substantive human rights principles that undergird the human rights project since it was founded.

Above all, the Commission should attempt to articulate what relation, if any, should exist between U.S. Supreme Court precedent and the U.S. State Department’s approach to international human rights.

Many of the topics on which there are new and conflicting human rights claims are addressed in U.S. Supreme Court precedent, such as the right to life and other legal protections for children before they are born, homosexual relations, transgender status, etc. Often the decisions of the U.S. Supreme Court suffer from the same flaws as international human rights mechanisms, including lack of democratic legitimacy and capture by interest groups.

As the commission explains in its report, the executive branch should adopt a textual reading of international treaties that affords the positive legal expression of human rights the highest respect. This implies that the executive branch must exercise its own independent prerogative to interpret both the U.S. Constitution and international human rights obligations according to the highest standards of legality, independently of the U.S. Supreme Court, much as President Abraham Lincoln did to undermine slavery. What deference, if any, the Supreme Court should be afforded by the executive branch in its approach to binding international human rights obligations, and especially those applicable to the U.S. government, is an open question that the Commission should explore in order to help the Secretary of State determine what are “universally recognized human rights” for purpose of U.S. law.

The question is especially relevant when the U.S. Supreme Court has not directly ruled or made a finding of law on the obligations of the United States under international law. But even where the U.S. Supreme Court were to make a finding directly applicable to a certain legal question, it should not be dispositive. On many of the controversial subjects, international law enshrines a substantive version of human rights that is at odds with the novel readings of the U.S. Constitution that emerge with more and more frequency from the U.S. Supreme Court. It would be helpful if the commission were to attempt to reconcile or begin to explain how such discrepancies can be reconciled.

For this reason, it is disappointing and troubling to the organizations making this comment that the commission merely agreed to disagree on the most hotly debated human rights issues of our time, such as abortion, the legal status of homosexual relations, and transgender issues. It is a lost opportunity to help ground the human rights discourse of the U.S. State Department in an approach to international human rights that is both respectful of the U.S. Constitution and international human rights law.

Even if just by way of illustration, it is highly appropriate for the Commission to identify select controversies on which the principles it developed for assessing human rights claims can be applied. This is all the more so in light of how frequently the topic of abortion has been brought to the attention of the Commission. Remaining silent in the face of the political controversy these topics elicit creates the impression that there is nothing cogent that can be said about these topics in light of international human rights law. Nothing could be further from the truth.

1. ABORTION

In light of the text and history of the right to life in the Covenant on Civil and Political Rights, to which the United States is a party, something substantive may be said on the topic of protections for children before birth without upsetting the political debates that are legitimately carried out through democratic institutions.

For instance, even though the U.S. Supreme Court has read a right to abortion in the U.S. Constitution since 1973, unborn children cannot be said to be excluded from the right to life in the International Covenant on Civil and Political Rights. To say or imply otherwise is not consistent with the text and history of the treaty. Article 6 of the covenant prohibits the application of the death penalty to pregnant mothers, precisely out of concern for the innocent unborn child, as the General Assembly 3rd committee records and the reports of the Secretary General at the time bear out.

Moreover, at no point during the negotiations of the covenant were children in the womb ever said to be excluded from the right to life. Moreover, at the same time as the covenant was negotiated, the 1959 Declaration on the Rights of the Child was adopted by the General Assembly, committing States to protect children “before as well as after birth.” This very declaration was made binding in 1989 in the prologue of the convention on the Rights of the Child, which has achieved near universal ratification. At the very least, Member States *may* interpret this passage as protecting the unborn child from abortion.

Early in the drafting stages of the covenant, in 1947, the framers explicitly rejected an obligation to allow abortion in cases where a child is conceived by rape, incest, or when carrying a pregnancy to term might endanger the life of a mother. Even if in 1957 the framers of the covenant decided to exclude a positive obligation to protect the unborn from abortion, it does not remove the presumption that the unborn are included in the protections of the covenant. Rather, it must be seen as a compromise that allowed states with vastly different understandings of when and how the right to life applies in the prenatal phase to ratify the treaty. In other words, it does not exclude children from the right to life. It merely gives State Parties a wide margin of appreciation in protecting the right to life before birth.

[These conclusions are based in the thorough analysis of the text and history of the ICCPD in Finegan, Thomas, *International Human Rights Law and the "Unborn": Texts and Travaux Préparatories*, Tulane Journal of International & Comparative Law, Winter 2016, Vol. 25 Issue 1, at p. 14-23]

It should also be noted that UN political agreements based on consensus continue to reject abortion as a right and recognize abortion laws as an exclusively national prerogative. In 2015, when the General Assembly adopted the Sustainable Development Goals it reaffirmed that any policies related to sexual and reproductive health must be in accordance with the Programme of Action of the International Conference on Population and Development (ICPD), which explicitly rejected a right to abortion. [2030 Agenda for Sustainable Development, UN Document A/RES/70/1, target 5.6; Programme of Action of the International Conference on Population and Development, UN Document A/CONF.171/13, paragraph 8.25]

Many experts in international law and policy agree that abortion is not a right and that international law “may, and indeed should be used” to protect the life of the unborn. “As a matter of scientific fact a new human life begins at conception,” the San Jose Articles declare. The 2011 document signed by over 30 experts in health and law states that “No matter how an individual member of the species begins his or her life, he or she is, at every stage of development, entitled to recognition of his or her inherent dignity and to protection of his or her inalienable human rights.” The articles further state, “There exists no right to abortion under international law, either by way of treaty obligation or under customary international law. No United Nations treaty can accurately be cited as establishing or recognizing a right to abortion.”

[Forty-four human rights lawyers and advocates, scholars, elected officials, diplomats, and medical and international policy experts signed the San Jose Articles in 2011. The articles have been presented at UN headquarters in New York, and in parliaments across the world. The articles and footnotes are available at: www.sanjosearticles.com]

1. THE FAMILY

Even though the U.S. Supreme Court has read a right to homosexual marriage into the U.S Constitution, the binding obligations enshrined in international treaties do not prescribe homosexual marriage as a human right. Nevertheless, the U.S. government is part of a group of states that routinely promotes homosexual marriage as a human rights issue at the United Nations.

The Universal Declaration of Human Rights and binding international instruments reserve singular protections for the nuclear family in recognition of the family’s irreplaceable role as “natural environment for the growth and well-being of all its members and particularly children.”

It is not accurate to say that international law does not define the family. Article 16 Universal Declaration of Human Rights defines the family as “the natural and fundamental group unit of society” and declares that it is “entitled to protection by society and the State.” These words are repeated across several widely ratified human rights treaties as well as the laws and constitutions of a majority of member states. International law further predicates the complementarity and equal rights of women and men in the context of marriage and family formation. Even if these provisions were not intended as a formal definition of the family, they at least must be understood as a functional definition.

International law establishes that the family is formed when a man and a woman exercise their right to freely “marry and found a family.” States may extend social protections to other types of bonds between individuals, such as friendships or even sentimental attachments between persons of the same sex or other relations. But only the family is “entitled” by international law to protection by society and the state. In this sense, the family is unique, no doubt because of its role and status as “natural and fundamental group unit of society.”

[For a more detailed discussion of this topic in light of other UN treaties and political agreements see the official platform of the coalition Civil Society for the Family may be found at the website www.civilsocietyforthefamily.org.]

1. SEXUAL ORIENTATION AND GENDER IDENTITY

In a recent Supreme Court case (*Bostock*), a narrow majority decided that “sexual orientation and gender identity” are protected categories in U.S. civil right law. Whether the U.S. government should promote these categories as international human rights categories is a matter altogether different. It is appropriate for the commission to comment on this topic.

All human beings possess the same fundamental human rights by virtue of their inherent dignity and worth according to the Universal Declaration of Human Rights (Preamble and Article 1), but sexual preferences and behaviors are not protected by international human rights law except in the context of the right of men and women to freely marry and found a family. Debates on the use of the terms “sexual orientation” and “gender identity” within the United Nations in reference to individuals who identify as lesbian, gay, bisexual, and transgender (LGBT) are often conducted with the assumption that these notions are clearly defined in science and law. But that is not the case.

No UN human rights treaty includes the words “sexual orientation and gender identity” in any form nor does the context and drafting histories of respective treaties allow a good faith interpretation that includes special protections for sexual preferences or behavior. Unlike freedom of conscience and religion sexual preferences are not protected under international human rights law.

Quite aside from any moral considerations, there is no legal basis for asserting any special protections for sexual preference and behavior outside of the context of the right to marry and found a family, according to the definition of the family outlined above (footnote 4 and 5). International human rights law does not protect unfettered sexual autonomy. The only autonomous sexual choices protected in international law are in the context of the right to freely marry and found a family (UDHR 16, ICCPR 23 and 24, CESCR 10) and the equal right of men and women to decide freely and responsibly on the number and spacing of children (CEDAW 16).

The right to privacy and family life similarly does not protect unfettered sexual autonomy. The UDHR and ICCPR indeed recognize a right to be free of interference in one’s privacy and family 12 (UDHR 17; ICCPR 17). But this cannot be understood to protect unfettered sexual autonomy or any kind of sexual activity between consenting adults At the time that these human rights instruments were negotiated and adopted by UN member states many countries outlawed sodomy, and roughly 70 still do so to this day. Many countries also restricted or penalized other forms of sexual conduct between consenting adults, including incest, adultery, and fornication, and some countries still do today.

It is highly tendentious to argue that either the right to privacy or the prohibition against unjust discrimination in international law presume the protection of sexual preferences and behaviors outside of the context of the right to marry and found a family, as defined in international law. UN political consensus similarly does not recognize these categories. The UN General Assembly has repeatedly turned down possibilities to include this notion in UN resolutions.

Moreover, international law has a clear articulation of the equal dignity and rights of men and women throughout. It is difficult to even situate the notion of “gender identity” in the framework of international human rights law.

[For a more detailed discussion of this topic in light of other UN treaties and political agreements see the official platform of the coalition Civil Society for the Family may be found at the website www.civilsocietyforthefamily.org.]

*Conclusion*

We urge the commission to consider expressing a cogent legal opinion on these matters to assist the U.S. Secretary of State in crafting U.S. foreign policy that upholds binding international human rights norms. A failure to defend these binding norms will leave a normative vacuum that will be exploited by partisan actors who politicize human rights to obtain their preferred substantive results. It may even tarnish the legacy of the Commission to avoid hotly debated topics. How can the U.S. State Department craft a coherent approach to these hot-button issues when the most respected human rights experts in the United States can’t agree that there is an approach to these topics consistent with both international law and U.S. law?