



**Submission to Commission on Unalienable Rights**  
**Human Rights Watch**  
**May 2020**

The international community has long recognized the fundamental principles that “[a]ll human beings are born free and equal in dignity and rights”<sup>1</sup> and that “[a]ll human rights are universal, indivisible and interdependent and interrelated.”<sup>2</sup> The Commission on Unalienable Rights has taken up the task of revisiting the United States’ human rights commitments with reference to domestic law and the Universal Declaration of Human Rights (UDHR) in 1948. In its notice published in the Federal Register,<sup>3</sup> the commission is described as an advisory body that will make recommendations on international human rights matters “where such discourse has departed from our nation’s founding principles of natural law and natural rights.”

Human Rights Watch is concerned that such unilateral efforts to revisit the scope of the international human rights framework will ignore the growth and maturation of the human rights framework over the past seventy years. Kenneth Roth, executive director of Human Rights Watch, delivered remarks to the commission on January 10, 2020, detailing the specific and myriad concerns that Human Rights Watch has with the work and intent of the commission. This submission includes a written record of his prepared remarks to the commission.

As Roth highlighted in his remarks, Human Rights Watch is particularly concerned that such efforts will jeopardize the rights of lesbian, gay, bisexual and transgender (LGBT) people, who are too often deprived of their human rights in the name of culture and tradition, and the rights of women and girls to access comprehensive health, including abortion care.

This submission describes how LGBT people are at risk of being deprived of widely recognized human rights, how LGBT people are at risk of discrimination based on sexual orientation and gender identity, and how the rights of LGBT people are equally as fundamental and inviolable as the rights of others. It also reviews international standards on reproductive rights and provides an overview of the often-dire consequences that result from states’ failure to uphold these rights.

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<sup>1</sup> Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948).

<sup>2</sup> Office of the High Commissioner on Human Rights, “Vienna Declaration and Programme of Action,” June 25, 1993, <https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf> (accessed March 16, 2020), para. 5

<sup>3</sup> Federal Register, “Department of State Commission on Unalienable Rights,” May 30, 2019, <https://www.federalregister.gov/documents/2019/05/30/2019-11300/departments-of-state-commission-on-unalienable-rights> (accessed April 14, 2020).

The commission's report should recognize that all human rights are necessary and interrelated and should be protected by the United States. The US State Department should recognize and affirm the rights of women—including the right to health care and reproductive rights—and the human rights of LGBT people both domestically and abroad as reflected in treaties and authoritative interpretations of international law. As the examples in this submission demonstrate, those rights are a matter of life and death, physical safety, and personal sanctuary for billions of vulnerable people. Religious rights and freedoms are among the rights that must be protected, but do not have primacy among rights and should not be allowed to infringe on other rights or deny them in their entirety. The report prepared by the Commission on Unalienable Rights should reflect these imperatives.

The concept of human dignity, the core value of the UDHR—which the US played a key role in drafting and promoting—embraces the concepts of privacy and autonomy. And while these words may not appear in the US Constitution, they are foundational principles that, along with equality, bind together all rights—including those that appear in the US Bill of Rights and are part of longstanding US legal traditions.

Just as US constitutional law has evolved over the years through jurisprudence, so has international human rights law. But human rights remain tethered to the underlying values inherent in the concepts of dignity, privacy, autonomy, and equal rights, and have been found to protect people's abilities to make choices about the most personal of matters, including when to have children and whom to love.

When the US criticizes the international human rights framework or undermines protections for women's reproductive rights or equal rights for LGBT people, it loses international credibility and leadership. But more than that, it turns its back on some of the key foundational principles underpinning much of its own constitutional history. And it risks doing untold harm to people the world over.

The first section offers an overview of LGBT rights. The second section reviews women's human rights, with a focus on reproductive rights. Kenneth Roth's January 10 testimony to the commission is included as an annex.

## I. Human Rights Include Rights for LGBT People

The human rights of LGBT people are not a separate, special, or new set of rights. LGBT people, like everyone else, are entitled to the human rights enshrined in the UDHR, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and other regional and international human rights treaties. LGBT people continue to be deprived of human rights that others enjoy, in the US and abroad, making it important that the US and other countries clearly and unequivocally affirm their rights.

LGBT advocates have highlighted how existing human rights protections apply to LGBT individuals. The Yogyakarta Principles, drafted by a gathering of experts and released in 2007, articulate how human rights guarantees can and do apply regardless of sexual orientation or gender identity.<sup>4</sup> As the authors of those principles note:

[H]uman rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern. They include extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights.<sup>5</sup>

Advancing “LGBT rights” merely means ensuring that LGBT people are able to enjoy the same human rights that everyone is guaranteed under existing regional and international law.

### A. LGBT People Experience Rights Violations

Human Rights Watch has documented many examples of the violations that LGBT people often experience. At least 68 countries prohibit same-sex activity, leading to violations of the right to privacy and freedom from arbitrary arrest and detention.<sup>6</sup> In countries where the penalty for same-

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<sup>4</sup> International Commission of Jurists, “The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity,” March 2007, [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) (accessed March 17, 2020). ; see also International Commission of Jurists, “The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles,” November 2017, [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf) (accessed March 17, 2020).

<sup>5</sup> International Commission of Jurists, “The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity.”

<sup>6</sup> Human Rights Watch, “#Outlawed: ‘The Love that Dare Not Speak Its Name,’” [http://internap.hrw.org/features/features/lgbt\\_laws/](http://internap.hrw.org/features/features/lgbt_laws/) (accessed March 16, 2020). Supranational bodies have found that laws restricting same-sex activity in private violate the right to

sex activity can be a death sentence, such a punishment violates the right to life.<sup>7</sup> In many places, individuals charged with same-sex activity are denied the right to a fair trial or subjected to cruel, inhuman, or degrading treatment or punishment, including the use of forced anal examinations to “prove” same-sex activity.<sup>8</sup> Globally, LGBT people and human rights defenders who work to uphold LGBT rights face state restrictions on publications, organizations, and protests that jeopardize their freedoms of expression, association, and assembly.<sup>9</sup> In these and many other instances, LGBT people are denied the substantive rights guaranteed by regional and international human rights law.

When we speak about protecting LGBT rights, we are thinking of people like Zhang Zhikun, who was forcibly detained for conversion therapy in China and subjected to electroshock therapy and forced medication to attempt to change his sexual orientation;<sup>10</sup> Sophia, a woman who tried to report a theft to police in Barbados and was mocked by authorities about being a lesbian;<sup>11</sup> or Salma, a transgender woman in Lebanon who has moved eight times because of evictions and sexual harassment.<sup>12</sup> We are also thinking of human rights defenders facing restrictions, including organizations like Community Health Education and Advocacy Services, deregistered by the government of Tanzania for working to advance the health and rights of LGBT people as part of a wider crackdown,<sup>13</sup> and psychologists volunteering for the youth group Deti-404, who face significant restrictions on the counseling they can provide to LGBT youth under Russia’s laws

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privacy under the ICCPR and the European Convention on Human Rights (ECHR). See UN Human Rights Committee, *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992, March 31, 1994, <http://hrlibrary.umn.edu/undocs/html/vws488.htm> (accessed December 17, 2019), para. 8.6,) (finding that such a restriction violates article 17 of the ICCPR); European Court of Human Rights, *Dudgeon v. United Kingdom*, judgement of September 23, 1981, Series A no. 45, available at [www.echr.coe.int](http://www.echr.coe.int), para. 63 (finding that such a restriction violates article 8 of the ECHR); see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding that such a restriction violates the right to privacy under the US Constitution). The Office of the High Commissioner for Human Rights has also observed that these laws can violate the freedom from arbitrary arrest and detention. See Office of the High Commissioner for Human Rights, “Criminalization,” [https://www.unfe.org/system/unfe-43-UN\\_Fact\\_Sheets\\_-\\_FINAL\\_-\\_Criminalization\\_\(1\).pdf](https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf) (accessed March 16, 2020).

<sup>7</sup> Office of the High Commissioner for Human Rights, “Criminalization,” [https://www.unfe.org/system/unfe-43-UN\\_Fact\\_Sheets\\_-\\_FINAL\\_-\\_Criminalization\\_\(1\).pdf](https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf) (accessed March 16, 2020).

<sup>8</sup> Human Rights Watch, *Dignity Debased: Forced Anal Examinations in Homosexuality Prosecutions*, July 12, 2016, <https://www.hrw.org/report/2016/07/12/dignity-debased/forced-anal-examinations-homosexuality-prosecutions>.

<sup>9</sup> See *Bayev v. Russia*, App. Nos. 67667/09, 44092/12 & 56717/12, Eur. Ct. H.R. (2017); *Kaos G.L. v. Turkey*, App. No. 4982/07, Eur. Ct. H.R. (2016); *Alekseyev v. Russia*, Apps. Nos. 4916/07, 25924/08 & 14599/09, Eur. Ct. H.R. (2010); UN Human Rights Committee (HRC), *Fedotova v. Russian Federation*, Communication No. 1932/2010: Views Adopted by the Committee at its 106th Session, U.N. Doc. CCPR/C/106/D/1932/2010 (2012).

<sup>10</sup> Human Rights Watch, *“Have You Considered Your Parents’ Happiness?”: Conversion Therapy Against LGBT People in China*, November 15, 2017, <https://www.hrw.org/report/2017/11/15/have-you-considered-your-parents-happiness/conversion-therapy-against-lgbt-people>.

<sup>11</sup> Human Rights Watch, *“I Have to Leave to Be Me”: Discriminatory Laws against LGBT People in the Eastern Caribbean*, March 21, 2018, <https://www.hrw.org/report/2018/03/21/i-have-leave-be-me/discriminatory-laws-against-lgbt-people-eastern-caribbean>.

<sup>12</sup> Human Rights Watch, *“Don’t Punish Me for Who I Am”: Systemic Discrimination Against Transgender Women in Lebanon*, September 3, 2019, <https://www.hrw.org/report/2019/09/03/dont-punish-me-who-i-am/systemic-discrimination-against-transgender-women-lebanon>.

<sup>13</sup> Human Rights Watch, *“If We Don’t Get Services, We Will Die”: Tanzania’s Anti-LGBT Crackdown and the Right to Health*, February 3, 2020, <https://www.hrw.org/report/2020/02/03/if-we-dont-get-services-we-will-die/tanzanias-anti-lgbt-crackdown-and-right-health>.

against “gay propaganda.”<sup>14</sup> Around the globe, LGBT people and their defenders face a range of human rights violations related to sexual orientation and gender identity that merit attention.

Historically, the United States and other countries assembled at the UN have affirmed that LGBT people may be at particular risk of substantive violations of their human rights. Beginning in 2003, the UN General Assembly included language in a standing resolution on extrajudicial, summary, or arbitrary executions noting that people were particularly vulnerable because of sexual orientation.<sup>15</sup> In 2010, the US successfully fought to preserve that language after some countries attempted to strip it from the resolution.<sup>16</sup> In 2012, the General Assembly added gender identity to the resolution as an additional ground for concern.<sup>17</sup> The UN Human Rights Council has adopted multiple resolutions expressing concern about human rights violations based on sexual orientation and gender identity.<sup>18</sup> In these and other instances, the US has recognized the particular vulnerability of LGBT people in the context of substantive rights that all people enjoy by virtue of their shared humanity.

## **B. Sexual Orientation and Gender Identification Discrimination**

The violations that LGBT people experience globally are not only violations of particular freedoms. Often, they also violate nondiscrimination and equality guarantees.<sup>19</sup> LGBT people are not only deprived of substantive rights, but are deprived of those rights because of their sexual orientation or gender identity. Many regional and international human rights bodies have therefore recognized that sexual orientation and gender identity are impermissible grounds for discrimination.

In *Toonen v. Australia* in 1994, the UN Human Rights Committee (HRC), which provides authoritative interpretation of the ICCPR, found that discrimination on the basis of sexual

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<sup>14</sup> Human Rights Watch, *No Support: Russia's "Gay Propaganda" Law Imperils LGBT Youth*, December 11, 2018, <https://www.hrw.org/report/2018/12/11/no-support/russias-gay-propaganda-law-imperils-lgbt-youth>.

<sup>15</sup> UN General Assembly, “Extrajudicial, Summary or Arbitrary Executions,” U.N. Doc. A/RES/57/214, para. 6.

<sup>16</sup> Louis Charbonneau, “U.N. Restores Gay Reference to Violence Measure,” *Reuters*, December 21, 2010, <https://www.reuters.com/article/us-un-gays/u-n-restores-gay-reference-to-violence-measure-idUSTRE6BK6UW20101221> (accessed March 17, 2020).

<sup>17</sup> UN General Assembly, “Extrajudicial, Summary or Arbitrary Executions,” para. 6(b); see also “UN: Seminal Vote on Gender Identity,” Human Rights Watch news release, November 21, 2012, <https://www.hrw.org/news/2012/11/21/un-seminal-vote-gender-identity>.

<sup>18</sup> UN Human Rights Council, “Human Rights, Sexual Orientation and Gender Identity,” Resolution 17/19, U.N. Doc. A/HRC/RES/17/19 (2011); UN Human Rights Council, “Human Rights, Sexual Orientation and Gender Identity,” Resolution 27/32, U.N. Doc. A/HRC/RES/27/32 (2014); UN Human Rights Council, “Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity,” Resolution 32/3, U.N. Doc. A/HRC/RES/32/3 (2016). Various treaty bodies have also emphasized the unique vulnerability of LGBT people to substantive human rights violations. See, e.g., Committee on the Rights of the Child, General Comment No. 13, *The Rights of the Child to Freedom from All Forms of Violence*, U.N. Doc. CRC/GC/2011/13 (2011), para. 72.7.

<sup>19</sup> See, e.g., UDHR, arts. 2 & 7; International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, arts. 2 and 26. While violations of the right to equality are often related to the violations of other rights, they are conceptually distinct.

orientation constitutes sex discrimination under Article 26 of the ICCPR.<sup>20</sup> In subsequent cases, it has reiterated that sexual orientation is a protected ground under the ICCPR.<sup>21</sup> It has echoed these findings as well in its general comments on the rights protected under the ICCPR.<sup>22</sup> The HRC has also determined that Article 26 prohibits discrimination based on gender identity,<sup>23</sup> and frequently expresses concern about discrimination based on gender identity in its concluding observations on state compliance with the ICCPR.<sup>24</sup> Similarly, the Committee against Torture (CAT) has noted that the right to freedom from discrimination is fundamental to the interpretation and application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), to which the United States also is a party, and covers discrimination based on sexual orientation and gender identity.<sup>25</sup>

The recognition of sexual orientation and gender identity is in keeping with the purpose of equality guarantees in international human rights treaties, which were designed to be non-exhaustive and responsive to social and political realities. For the past twenty years, treaty bodies interpreting treaties that the US has signed but not ratified have repeatedly concluded that sexual orientation and gender identity are impermissible grounds for discrimination under the equality guarantees of

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<sup>20</sup> HRC, *Toonen v Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (1994), para.

8.7, <http://hrlibrary.umn.edu/undocs/html/vws488.htm> (accessed December 17, 2019) (declining to address whether sexual orientation is considered an “other status” under article 26 but deciding “the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”).

<sup>21</sup> HRC, *Young v Australia*, U.N. Doc. CCPR/C/78/D/941/2000 (2003), para. 10.4 (“The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.”); HRC, *X v Colombia*, U.N. Doc. CCPR/C/89/D/1361/2005 (2007), para. 7.2 (“The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.”); HRC, *Fedotova v Russian Federation*, , para. 10.5 (“[T]he Committee recalls that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.”).

<sup>22</sup> See HRC, General Comment No. 35 on Liberty and Security of Person (Art. 9), U.N. Doc. CCPR/C/GC/35 (2014), paras. 3 and 9.

<sup>23</sup> HRC, *G v Australia*, UN Doc. CCPR/C/119/D/2172/2012 (2017), para. 7.12 .

<sup>24</sup> See HRC “Concluding observations on the fourth periodic report of Azerbaijan,” U.N. Doc. CCPR/C/AZE/CO/4, November 16, 2016, paras. 8-9; HRC, “Concluding observations on the initial report of Burkina Faso,” U.N. Doc CCPR/C/BFA/CO/1, October 17, 2016, paras. 13-14; HRC, “Concluding observations on the seventh periodic report of Colombia,” U.N. Doc CCPR/C/COL/CO/7, November 17, 2016, paras. 16-17; HRC, “Concluding observations on the sixth periodic report of Costa Rica,” U.N. Doc CCPR/C/CRI/CO/6, April 21, 2016, paras. 11-12; HRC, “Concluding observations on the sixth periodic report of Denmark,” U.N. Doc CCPR/C/DNK/CO/6, August 15, 2016, paras. 13-14; HRC, “Concluding observations on the sixth periodic report of Ecuador,” U.N. Doc CCPR/C/ECU/CO/6, August 11, 2016, paras. 11-12; HRC, “Concluding observations on the initial reports of Ghana,” U.N. Doc CCPR/C/GHA/CO/1, August 9, 2016, paras. 43-44; HRC, “Concluding observations on the fourth periodic report of Jamaica,” U.N. Doc CCPR/C/JAM/CO/4, November 22, 2016, paras. 15-16; HRC, “Concluding observations on the second periodic report of Kazakhstan,” U.N. Doc CCPR/C/KAZ/CO/2, August 9, 2016, paras. 9-10; HRC, “Concluding observations on the third periodic report of Kuwait,” U.N. Doc CCPR/C/KWT/CO/3, August 11, 2016, paras. 12-13; HRC, “Concluding observations on the sixth periodic report of Morocco,” U.N. Doc CCPR/C/MAR/CO/6, December 1, 2016, paras. 11-12; HRC, “Concluding observations on the fourth report of Slovakia,” U.N. Doc CCPR/C/SVK/CO/4, November 22, 2016, paras. 14-15; HRC, “Concluding observations on the initial report of South Africa,” U.N. Doc CCPR/C/ZAF/CO/1, April 27, 2016, paras. 20-21.

<sup>25</sup> CAT, General Comment No. 3, Implementation of Article 14 by States Parties, U.N. Doc. CAT/C/GC/3 (2012), paras. 8, 32, and 39; CAT, General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (2008), para. 21.

the treaties they monitor and apply.<sup>26</sup> A wide range of UN thematic experts have similarly condemned discrimination based on sexual orientation and gender identity as a violation of human rights guarantees,<sup>27</sup> as have 12 UN agencies in a joint statement released in 2015.<sup>28</sup> The recognition of sexual orientation and gender identity as impermissible grounds for discrimination merely reflects that these categories alone are not grounds for treating people differently or depriving them of their rights.

### C. LGBT Rights as Human Rights

It is a well-established principle of international law that human rights are indivisible, interdependent, and interrelated.<sup>29</sup> Recent attempts to depict some rights as more “fundamental” than others are misguided and dangerous, as they purport to elevate some elements of the human rights framework above others. They often ignore provisions within human rights instruments that aim to harmonize different human rights claims and maximize the enjoyment of rights for all.<sup>30</sup> One example is the supposed clash between the freedom of religion and nondiscrimination on the basis of sexual orientation and gender identity. Across the US, for example, laws have been

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<sup>26</sup> See, e.g., Committee on the Rights of the Child, General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence, U.N. Doc. CRC/C/GC/20 (2016), para. 34; Committee on the Elimination of Discrimination against Women, General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, U.N. Doc. CEDAW/C/GC/32 (2014), paras. 6, 16, 38; Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, U.N. Doc. CEDAW/C/GC/30 (2013), para. 57; Committee on the Rights of the Child, General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24), U.N. Doc. CRC/C/GC/15 (2013), para. 8; Committee on the Elimination of Discrimination against Women, General Recommendation No. 27 on Older Women and Protection of their Human Rights, U.N. Doc. CEDAW/C/GC/27 (2010), para. 13; Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GC/28 (2010), para. 18; CESCR, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2), U.N. Doc. E/C.12/GC/20 (2009), paras. 11, 27, 32; CESCR, General Comment No. 19, The Right to Social Security, U.N. Doc. E/C.12/GC/19 (2008), para. 29; CESCR, General Comment No. 18, The Right to Work (Art. 6), U.N. Doc. E/C.12/GC/18 (2006), para 12(b)(1); Committee on the Rights of the Child, General Comment No. 4, Adolescent Health and Development in the Context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4 (2003), para. 6; Committee on the Rights of the Child, General Comment No. 3, HIV/AIDS and the Rights of the Child, U.N. Doc. CRC/GC/2003/3 (2003), para. 8; CESCR, General Comment No. 15, The Right to Water (Arts. 11 and 12), U.N. Doc. E/C.12/2002/11, (2002), para. 13; CESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (2000), para. 18.

<sup>27</sup> These experts, known as special rapporteurs or other “Special Procedures,” have made dozens of references to rights violations based on sexual orientation and gender identity. For a searchable database of those references, see International Commission of Jurists, “SOGI UN Database,” <https://www.icj.org/sogi-un-database/> (accessed March 17, 2020).

<sup>28</sup> “Joint UN Statement on Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People,” Office of the High Commissioner on Human Rights statement, September 29, 2015, <https://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx> (accessed May 1, 2020).

<sup>29</sup> Vienna Declaration and Programme of Action, para. 5.

<sup>30</sup> The drafters of human rights instruments as well as human rights experts have articulated ways in which some human rights may be permissibly limited to protect state interests or the rights of others. See, e.g., American Association for the International Commission of Jurists, “Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,” July 1, 1984, <https://www.icj.org/siracusa-principles-on-the-limitation-and-derogation-provisions-in-the-international-covenant-on-civil-and-political-rights/>.

enacted that allow recipients of state funding to discriminate against prospective adoptive or foster parents or patients seeking healthcare based on a provider's religious beliefs.<sup>31</sup> These laws discriminate against parents like Chris and CJ, a couple in Tennessee who were rejected by three child welfare agencies because they were a same-sex couple before finding an agency that would not discriminate against them, and deprive children of the opportunity to be raised in loving families.<sup>32</sup> Here, international human rights law distinguishes between the freedom to have or adopt a religion of belief, which is absolute and unconditional, and the freedom to manifest religion or belief, which may be limited by states when necessary to protect the fundamental rights and freedoms of others, among other valid grounds.<sup>33</sup> The existing protections to harmonize and protect rights are often lost when some rights are deemed fundamental and others are demoted to a lower tier of protection.

As discussed above, recognizing that LGBT people have human rights is not the same as seeking new or special rights for LGBT people. In efforts to advance LGBT people's human rights, advocates have sought to ensure that universal human rights guarantees are attentive to the particular needs of LGBT people. Thus, UN experts have clarified that prohibitions on torture and other cruel, inhuman, and degrading treatment or punishment may encompass forced anal examinations,<sup>34</sup> medically unnecessary surgeries on intersex infants,<sup>35</sup> and conversion therapy under coercive circumstances.<sup>36</sup> Similarly, various human rights bodies have found that the right to family life may require states to recognize same-sex partnerships and parent-child relationships, though they have diverged on what kind of recognition is required.<sup>37</sup> They have found that comprehensive sexuality education that is inclusive of LGBT children is essential to the

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<sup>31</sup> Human Rights Watch, *"All We Want is Equality": Religious Exemptions and Discrimination Against LGBT People in the United States*, February 19, 2018, <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people>.

<sup>32</sup> *Ibid.*, p. 24.

<sup>33</sup> HRC, General Comment No. 22, Article 18 (Freedom of Thought, Conscience or Religion), U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993) paras. 3 and 8.

<sup>34</sup> See, e.g., UN Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum, U.N. Doc. A/HRC/4/33/Add.1, March 20, 2007, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/Go7/120/41/PDF/Go712041.pdf?OpenElement> (accessed May 1, 2020), para. 317; Committee against Torture, "Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, Egypt," U.N. Doc. CAT/C/CR/29/4, December 23, 2002, <http://www.refworld.org/docid/4f213bf92.html> (accessed May 22, 2016), para. 6(k).

<sup>35</sup> See, e.g., UN Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, U.N. Doc. A/HRC/22/53, February 1, 2013; Committee against Torture, "Concluding Observations on the Seventh Periodic Report of France," U.N. Doc. CAT/C/FRA/CO/7, June 10, 2016.

<sup>36</sup> UN Human Rights Council, Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, U.N. Doc. A/63/175, July 28, 2008, <https://undocs.org/A/63/175> (accessed May 1, 2020).

<sup>37</sup> The Inter-American Court of Human Rights (IACrTHR) has advised that states must provide LGBT people equal access to all forms of family without discrimination. See *Identidad de género, e igualdad y no discriminación a parejas del mismo sexo*, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017). The European Court of Human Rights has most recently said that states must provide same-sex couples with the same rights and benefits as heterosexual couples, but has stopped short of requiring access to marriage. See *Oliari & Others v. Italy*, App. Nos. 18766/11 & 36030/11, Eur. Ct. H.R. (2015), paras. 191-194.



full realization of children’s rights to education, health, and information.<sup>38</sup> In these and other instances, LGBT people are at particular risk of violations of universal human rights.

Opponents of LGBT rights misrepresent the human rights framework when they suggest that advocacy on behalf of LGBT people amounts to a claim of special rights or undermines the validity of LGBT people’s human rights. Contestation over the scope of rights is normal and natural, and occurs in constitutional jurisprudence as well as human rights law.<sup>39</sup> It does not detract from the understanding that LGBT people are entitled to the same human rights as others, and that discrimination based on sexual orientation and gender identity is and should be prohibited by law. While states have debated the scope and application of the human rights framework in particular instances, this does not negate the basic principle that LGBT people are entitled to human rights regardless of sexual orientation and gender identity—a principle that the US should continue to vocally defend at home and abroad.

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<sup>38</sup> UN Human Rights Council, Report of the United Nations Special Rapporteur on the Right to Education, Vernor Muñoz, U.N. Doc. A/65/162, July 23, 2010, paras. 19, 69.

<sup>39</sup> Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) with *Lawrence v. Texas*, 539 U.S. 558 (2003); compare *Baker v. Nelson*, 409 U.S. 810 (1972) with *Obergefell v. Hodges*, 576 U.S. 644 (2015).

## II. Human Rights Include Comprehensive Access to Women’s Health

Human rights include access to health services, including access to contraception and other forms of reproductive health care. Authoritative interpretations of international human rights law establish that denying access to abortion is a form of discrimination and jeopardizes a range of human rights. UN human rights treaty bodies regularly call for governments to decriminalize abortion in all cases and to ensure access to safe, legal abortion when the life or health of the pregnant woman or girl<sup>40</sup> is at risk or where carrying a pregnancy to term would cause substantial pain or suffering (including where pregnancy results from rape or incest or is not viable). Any interpretation of international human rights by the State Department should include a recognition of these obligations.

A state is obligated to respect, protect, and fulfil the rights guaranteed under the international and regional human rights treaties to which it is a party, including the ICCPR<sup>41</sup> and the Convention against Torture.<sup>42</sup> Even for those treaties which the US has signed but not ratified, including the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>43</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>44</sup> the Convention on the Rights of the Child (CRC),<sup>45</sup> and the American Convention on Human Rights,<sup>46</sup> the United States is obligated to refrain from actions that undermine the object and purpose of the treaty.<sup>47</sup> Fulfilment of a government’s obligations under these and other relevant treaties includes at a minimum ensuring that abortion is safe, legal, and accessible when the pregnancy threatens life or health or

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<sup>40</sup> Human Rights Watch uses the term “pregnant woman or girl,” when referring to specific United Nations or country jurisprudence, laws or statements. Human Rights Watch recognizes that people who do not identify as a women or girl can become pregnant, including gender non-conforming or non-binary individuals, people of trans experience, or trans men. Pregnant people who do not identify as women face even greater difficulties in accessing any rights-respecting health services, and may especially encounter reproductive health services that meet their unique needs.

<sup>41</sup> ICCPR, ratified by the US on June 8, 1992.

<sup>42</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the US on October 21, 1994.

<sup>43</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, signed by the US on October 5, 1977.

<sup>44</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981, signed by the US on July 17, 1980.

<sup>45</sup> Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, signed by the US on February 16, 1995.

<sup>46</sup> American Convention on Human Rights (“Pact of San José, Costa Rica”), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), signed by the US on June 1, 1977.

<sup>47</sup> See Vienna Convention on the Law of Treaties adopted May 22, 1969, G.A. Res. 2166 (XXI), 2287 (XXII), 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/11/Add.2. The US has not ratified the Vienna Convention on the Law of Treaties but considers many of its provisions reflective of customary international law. US Department of State, “Vienna Convention on the Law of Treaties,” archived page, <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm> (accessed April 22, 2020).

would cause substantial pain or suffering. In recent years, UN bodies have expressed specific concerns with the harms of unsafe abortion and barriers that deny effective access to safe and legal abortion in many countries.

Drawing on recent jurisprudence of UN human rights treaty bodies, this section provides an overview of key international human rights that are at risk when abortion is illegal or inaccessible. It focuses on the rights to life, freedom from torture and other cruel, inhuman and degrading treatment or punishment, and health.

Other affected rights include the rights to nondiscrimination and equality, bodily integrity, privacy, information, and to decide the number and spacing of children.

## A. Right to Life

Denial of access to safe, legal abortion puts the lives of women and girls at risk. A 2017 global report on abortion found that 25 million unsafe abortions were performed every year between 2010–2014, and that many women and girls die of complications. It found that between 8 to 11 percent of maternal deaths around the world relate to abortion, resulting in 22,800 to 31,000 preventable deaths each year.<sup>48</sup> The World Health Organization (WHO) has noted that the removal of restrictions on abortion results in reduction of maternal mortality.<sup>49</sup> By contrast, restrictions on abortion increase maternal mortality and harm. For example, Human Rights Watch research in Ecuador has shown that criminal penalties for abortion drive some women and girls to have illegal and unsafe abortions, undermining Ecuador’s efforts to reduce its stubbornly high rate of preventable maternal death.<sup>50</sup>

The right to life is guaranteed by international human rights treaties and customary international law. For example, article 6(1) of the ICCPR provides that: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>51</sup>

International human rights bodies and experts have repeatedly stated that restrictive abortion laws contribute to maternal deaths from unsafe abortions and jeopardize the right to life. For instance, the HRC, which monitors states’ compliance with the ICCPR, has explained that the right

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<sup>48</sup> Guttmacher Institute, “Abortion Worldwide 2017: Uneven Progress and Unequal Access,” 2018, [https://www.guttmacher.org/sites/default/files/report\\_pdf/abortion-worldwide-2017.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf) (accessed May 1, 2020), pp. 10 and 33.

<sup>49</sup> World Health Organization (WHO), *Safe Abortion: Technical and Policy Guidance for Health Systems*, (Geneva: WHO, 2012), noting, “The accumulated evidence shows that the removal of restrictions on abortion results in reduction of maternal mortality due to unsafe abortion and, thus, a reduction in the overall level of maternal mortality.”

<sup>50</sup> Human Rights Watch, *Rape Victims as Criminals: Illegal Abortion after Rape in Ecuador*, August 23, 2013, <https://www.hrw.org/report/2013/08/23/rape-victims-criminals/illegal-abortion-after-rape-ecuador>.

<sup>51</sup> ICCPR, art. 6(1).

to life should not be understood in a restrictive manner.<sup>52</sup> It has instructed states that when they report to the committee, they should provide information on measures to ensure that women do not have to undergo life-threatening, clandestine abortions.<sup>53</sup> In its most recent analysis of the right to life, the HRC has concluded that state regulation of abortion should not put the lives of women or girls at risk, subject them to ill-treatment, discriminate against them, arbitrarily interfere with their privacy, or lead them to resort to unsafe abortion. The committee has also observed that “States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.”<sup>54</sup>

The death of 16-year-old Rosaura Almonte Hernández in 2012 illustrates the impact of the Dominican Republic’s criminal laws that block access to abortion to protect the health of the pregnant person.<sup>55</sup> Rosaura, known as “Esperancita,” was diagnosed with leukemia, but she was initially denied access to chemotherapy because she was seven weeks pregnant. Her mother requested access to therapeutic abortion, and her request was denied. Weeks later, under mounting international pressure, doctors provided Esperancita with chemotherapy, but she died in August 2012 because the cancer had progressed without earlier treatment. In 2017, her mother, Rosa Hernández, with support from the organizations, Women’s Link Worldwide and Colectiva Mujer y Salud, filed a petition with the Inter-American Commission on Human Rights (IACHR) seeking justice for her daughter’s death.<sup>56</sup>

In country-specific concluding observations related to states’ compliance with the ICCPR, the HRC has noted the relationship between restrictive abortion laws and threats to women’s and girls’ lives. It has frequently expressed concern about criminalization of abortion, and has called for expanded exceptions in line with the guidance given in its updated general comment on the right to life.<sup>57</sup>

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<sup>52</sup> HRC, General Comment No. 6 on the right to life, U.N. Doc. HRI/GEN/1/Rev.9 (2008), para. 5.

<sup>53</sup> HRC, General Comment No. 28 on equality of rights between men and women, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 10.

<sup>54</sup> HRC, General Comment No. 36 on the Right to Life, U.N. Doc. CCPR/C/GC/36 (2019).

<sup>55</sup> Human Rights Watch, “*It’s Your Decision, It’s Your Life*: The Total Criminalization of Abortion in the Dominican Republic,” November 18, 2018, <https://www.hrw.org/report/2018/11/19/its-your-decision-its-your-life/total-criminalization-abortion-dominican-republic>.

<sup>56</sup> Women’s Link Worldwide, “Madre de “Esperancita” exige justicia ante Comisión Interamericana de Derechos Humanos,” August 17, 2017, <https://www.womenslinkworldwide.org/informate/sala-de-prensa/madre-de-esperancita-exige-justicia-ante-comision-interamericana-de-derechos-humanos> (accessed July 16, 2018).

<sup>57</sup> See, for example, HRC, “Concluding observations on Nigeria in the absence of its second periodic report,” U.N. Doc. CCPR/C/NGA/CO/2, August 29, 2019; HRC, “Concluding observations on the second periodic report of Mauritania,” UN Doc. CCPR/C/MRT/CO/2, August 23, 2019; HRC, “Concluding observations on the fifth periodic report of the Netherlands,” U.N. Doc. CCPR/C/NLD/CO/5, August 23, 2019; HRC, “Concluding observations on the fourth periodic report of Paraguay,” U.N. Doc. CCPR/C/PRY/CO/4, August 20, 2019; HRC, “Concluding observations on the initial report of Belize,” U.N. Doc. CCPR/C/BLZ/CO/1/Add.1, December 11, 2018; HRC, “Concluding observations on the fifth periodic report of the Sudan,” U.N. Doc.

The situation in El Salvador—where abortion has been illegal under all circumstances since 1998—demonstrates the catastrophic harm done by criminalizing abortion. Providers and those who assist face prison sentences of six months to twelve years. Dozens of girls and women, mostly from high-poverty areas, were prosecuted in the past two decades for what lawyers and activists say were obstetric emergencies. In some cases, the courts accepted as evidence a questionable autopsy procedure known as the “floating lung” test to forensically support the claim that a fetus was delivered alive. As of September 2019, at least 16 women suspected of having abortions remained imprisoned on charges of manslaughter, homicide, or aggravated homicide.<sup>58</sup>

In August, Evelyn Hernandez was tried for the second time for an abortion following her rape at age 17. The court found insufficient evidence to convict. In September, the government announced it would appeal the ruling.<sup>59</sup> In the last decade, 40 other women have been freed after having sentences commuted or being found non-guilty in abortion prosecutions.<sup>60</sup>

When abortion is authorized under domestic law, the HRC has called on states to guarantee unimpeded and timely access to those services, saying that states should “ensure the availability of medical facilities and guaranteed access to those facilities for legal abortion.”<sup>61</sup> It has called on states to amend their legislation to ensure effective access to safe and legal abortion at a minimum in the circumstances identified in its general comment on the right to life.<sup>62</sup>

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CCPR/C/SDN/CO/5, November 19, 2018; HRC, “Concluding observations on the seventh periodic report of El Salvador,” U.N. Doc. CCPR/C/SLV/CO/7, May 9, 2019; HRC, “Concluding observations on the fourth periodic report of Guatemala,” U.N. Doc. CCPR/C/GTM/CO/4, May 7, 2018; HRC, “Concluding observations on the third periodic report of Lebanon,” U.N. Doc. CCPR/C/LBN/CO/3, May 9, 2018; HRC, “Concluding observations on the fifth periodic report of Cameroon,” U.N. Doc. CCPR/C/CMR/CO/5, November 30, 2017; HRC, “Concluding observations on the fourth periodic report of the Democratic Republic of the Congo,” U.N. Doc. CCPR/C/COD/CO/4, November 30, 2017; HRC, “Concluding observations on the sixth periodic report of the Dominican Republic,” U.N. Doc. CCPR/C/DOM/CO/6, November 27, 2017; HRC, “Concluding observations on the fifth periodic report of Jordan,” U.N. Doc. CCPR/C/JOR/CO/5, December 4, 2017; HRC, “Concluding observations on the fifth periodic report of Mauritius,” U.N. Doc. CCPR/C/MUS/CO/5, December 11, 2017; HRC, “Concluding observations on the second periodic report of Honduras,” U.N. Doc. CCPR/C/HND/CO/2, August 22, 2017; HRC, “Concluding observations on the fourth periodic report of Madagascar,” U.N. Doc. CCPR/C/MDG/CO/4, August 22, 2017; HRC, “Concluding observations on the initial report of Pakistan,” U.N. Doc. CCPR/C/PAK/CO/1, August 23, 2017; HRC, “Concluding observations on the initial report of Bangladesh,” U.N. Doc. CCPR/C/BGD/CO/1, April 27, 2017; HRC, “Concluding observations on the sixth periodic report of Morocco,” U.N. Doc. CCPR/C/MAR/CO/6, December 1, 2016; and HRC, “Concluding observations on the sixth periodic report of Ecuador,” U.N. Doc. CCPR/C/ECU/CO/6, August 11, 2016. The committee’s standard language in many of these concluding observations is as follows: “The State party should amend its legislation with a view to ensuring effective access to safe, legal abortion when the life or health of a pregnant woman or girl is endangered and when carrying a pregnancy to term would cause the woman or girl substantial pain or suffering, most notably when the pregnancy is the result of rape or incest or when it is not viable.”

<sup>58</sup> Human Rights Watch, *World Report 2020* (New York: Human Rights Watch, 2020), El Salvador Chapter, <https://www.hrw.org/world-report/2020/country-chapters/el-salvador>.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> See, for example, HRC, “Concluding observations on the fifth periodic report of Jordan.”

<sup>62</sup> Many of the concluding observations listed in footnote 57 include this language.

The CEDAW Committee, which monitors state compliance with CEDAW, has also repeatedly expressed concern about the links between maternal mortality and unsafe abortion, and has called for decriminalization of abortion in all cases and legalization of abortion, at a minimum in specific circumstances. In a 2014 statement, the CEDAW Committee said:

Unsafe abortion is a leading cause of maternal mortality and morbidity. As such, States parties should legalize abortion at least in cases of rape, incest, threats to the life and/or health of the mother, or severe fetal impairment, as well as provide women with access to quality post-abortion care, especially in cases of complications resulting from unsafe abortions. States parties should also remove punitive measures for women who undergo abortion.<sup>63</sup>

Echoing this statement, many of the CEDAW Committee's concluding observations call for states to:

legalize abortion not only in cases in which the life of the pregnant woman is threatened, but also in cases of threats to her health, pregnancies resulting from rape or incest, and cases of severe fetal impairment, and to decriminalize abortion in all cases.<sup>64</sup>

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<sup>63</sup> CEDAW Committee, "Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review," 57th Session, 2014, <http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf>.

<sup>64</sup> See, for example, CEDAW Committee, "Concluding observations on the seventh periodic report of Chile," U.N. Doc. CEDAW/C/CHL/CO/7, March 14, 2018; CEDAW Committee, "Concluding observations on the fifth periodic report of Fiji," U.N. Doc. CEDAW/C/FJI/CO/5, March 14, 2018; CEDAW Committee, "Concluding observations on the combined initial to third periodic reports of the Marshall Islands," U.N. Doc. CEDAW/C/MHL/CO/1-3, March 14, 2018; CEDAW Committee, "Concluding observations on the eighth periodic report of the Republic of Korea," U.N. Doc. CEDAW/C/KOR/CO/8, March 14, 2018; CEDAW Committee, "Concluding observations on the combined third and fourth periodic reports of Saudi Arabia," U.N. Doc. CEDAW/C/SAU/CO/3-4, March 14, 2018; CEDAW Committee, "Concluding observations on the combined fourth to sixth periodic reports of Suriname," U.N. Doc. CEDAW/C/SUR/CO/4-6, March 14, 2018; CEDAW Committee, "Concluding observations on the seventh periodic report of Burkina Faso," U.N. Doc. CEDAW/C/BFA/CO/7, (November 22, 2017); CEDAW Committee, "Concluding observations on the combined eighth and ninth periodic reports of Guatemala," U.N. Doc. CEDAW/C/GTM/CO/8-9, November 22, 2017; CEDAW Committee, "Concluding observations on the eighth periodic report of Kenya," U.N. Doc. CEDAW/C/KEN/CO/8, November 22, 2017; CEDAW Committee, "Concluding observations on the fifth periodic report of Kuwait," U.N. Doc. CEDAW/C/KWT/CO/5, November 22, 2017; CEDAW Committee, "Concluding observations on the combined initial to third periodic reports of Monaco," U.N. Doc. CEDAW/C/MCO/CO/1-3, November 22, 2017; CEDAW Committee, "Concluding observations on the combined initial and second periodic reports of Nauru," U.N. Doc. CEDAW/C/NRU/CO/1-2, November 22, 2017; CEDAW Committee, "Concluding observations on the combined second and third periodic reports of Oman," U.N. Doc. CEDAW/C/OMN/CO/2-3, November 22, 2017; CEDAW Committee, "Concluding observations on the seventh periodic report of Paraguay," U.N. Doc. CEDAW/C/PRY/CO/7, November 22, 2017; CEDAW Committee, "Concluding observations on the seventh periodic report of Costa Rica," U.N. Doc. CEDAW/C/CRI/CO/7, July 24, 2017; CEDAW Committee, "Concluding observations on the combined third and fourth periodic reports of the Niger," U.N. Doc. CEDAW/C/NER/CO/3-4, July 24, 2017; CEDAW Committee, "Concluding observations on the combined seventh and eighth periodic reports of Nigeria," U.N. Doc. CEDAW/C/NGA/CO/7-8, July 24, 2017; CEDAW Committee, "Concluding observations on the combined eighth and ninth periodic reports of El Salvador," U.N. Doc. CEDAW/C/SLV/CO/8-9, March 9, 2017; CEDAW Committee, "Concluding observations on the combined sixth and seventh periodic reports of Ireland," U.N. Doc. CEDAW/C/IRL/CO/6-7, March 9, 2017; CEDAW

The CEDAW Committee also regularly calls for measures to ensure access to safe abortion. For example, it calls for training of medical personnel; ensuring that conscientious objection by health care personnel does not pose an obstacle for terminating a pregnancy; eliminating procedural obstacles that hinder access to legal abortion, including requirements for committee approval or judicial recognition of criminal acts in rape cases; adopting protocols on provision of legal abortion; raising awareness among women and providers about access to legal abortion; protecting medical confidentiality; and conducting campaigns to prevent abortion stigma.<sup>65</sup>

Similarly, the UN Committee on the Rights of the Child, which monitors the implementation of the CRC, has noted that “the risk of death and disease during the adolescent years is real, including from preventable causes such as ... unsafe abortions” and urged states to “decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislation with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions.”<sup>66</sup> The committee has expressed

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Committee, “Concluding observations on the sixth periodic report of Jordan,” U.N. Doc. CEDAW/C/JOR/CO/6, March 9, 2017; CEDAW Committee, “Concluding observations on the combined initial to third periodic reports of the Federated States of Micronesia,” U.N. Doc. CEDAW/C/FSM/CO/1-3, March 9, 2017; CEDAW Committee, “Concluding observations on the combined seventh to ninth periodic reports of Rwanda,” U.N. Doc. CEDAW/C/RWA/CO/7-9, March 9, 2017; CEDAW Committee, “Concluding observations on the eighth periodic report of Sri Lanka,” U.N. Doc. CEDAW/C/LKA/CO/8, March 9, 2017; CEDAW Committee, “Concluding observations on the seventh periodic report of Argentina,” U.N. Doc. CEDAW/C/ARG/CO/7, November 25, 2016; CEDAW Committee, “Concluding observations on the eighth periodic report of Bangladesh,” U.N. Doc. CEDAW/C/BGD/CO/8, November 25, 2016; CEDAW Committee, “Concluding observations on the combined eighth and ninth periodic reports of Bhutan,” U.N. Doc. CEDAW/C/BTN/CO/8-9, November 25, 2016; CEDAW Committee, “Concluding observations on the combined fifth and sixth periodic reports of Burundi,” U.N. Doc. CEDAW/C/BDI/CO/5-6, November 25, 2016; CEDAW Committee, “Concluding observations on the combined eighth and ninth periodic reports of Haiti,” U.N. Doc. CEDAW/C/HTI/CO/8-9, March 9, 2016; CEDAW Committee, “Concluding observations on the combined seventh and eighth periodic reports of the United Republic of Tanzania,” U.N. Doc. CEDAW/C/TZA/CO/7-8, March 9, 2016; and CEDAW Committee, “Concluding observations on the combined seventh and eighth periodic reports of Honduras,” \* U.N. Doc. CEDAW/C/HND/CO/7-8, November 25, 2016.

<sup>65</sup> See, for example, CEDAW Committee, “Concluding observations on the seventh periodic report of Chile,” March 14, 2018; CEDAW Committee, “Concluding observations on the seventh periodic report of Burkina Faso,” November 22, 2017; CEDAW Committee, “Concluding observations on the sixth periodic report of Israel,” U.N. Doc. CEDAW/C/ISR/CO/6, November 17, 2017; CEDAW Committee, “Concluding observations on the eighth periodic report of Kenya,” November 22, 2017; CEDAW Committee, “Concluding observations on the combined initial to third periodic reports of Monaco,” November 22, 2017; CEDAW Committee, “Concluding observations on the combined initial and second periodic reports of Nauru,” November 22, 2017; CEDAW Committee, “Concluding observations on the seventh periodic report of Paraguay,” November 22, 2017; CEDAW Committee, “Concluding observations on the seventh periodic report of Costa Rica,” July 24, 2017; CEDAW Committee, “Concluding observations on the seventh periodic report of Italy,” U.N. Doc. CEDAW/C/ITA/CO/7, July 24, 2017; CEDAW Committee, “Concluding observations on the combined eighth and ninth periodic reports of El Salvador,” March 9, 2017; CEDAW Committee, “Concluding observations on the combined sixth and seventh periodic reports of Ireland,” March 9, 2017; CEDAW Committee, “Concluding observations on the eighth periodic report of Sri Lanka,” March 9, 2017; and CEDAW Committee, “Concluding observations on the seventh periodic report of Argentina,” November 25, 2016.

<sup>66</sup> Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence, U.N. Doc. CRC/C/GC/20 (2016), paras. 13 and 60.

concern about the elevated risks of maternal mortality among adolescent mothers,<sup>67</sup> and has explicitly called for decriminalization of abortion “in all circumstances” in many concluding observations.<sup>68</sup> In many African states, adolescent girls struggle to access health services, but they also are often banned from school if they become pregnant.<sup>69</sup> Most African Union countries criminalize abortion in most circumstances,<sup>70</sup> meaning girls with unplanned pregnancies must either carry those pregnancies to term against their wishes, or obtain clandestine—and often unsafe—abortions. Of all the regions in the world, Africa has the highest number of deaths from unsafe abortion.<sup>71</sup>

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<sup>67</sup> See, for example, Committee on the Rights of the Child, “Concluding observations on the combined fifth and sixth periodic reports of Guatemala,” U.N. Doc. CRC/C/GTM/CO/5-6, February 28, 2018; Committee on the Rights of the Child, “Concluding observations on the combined third and fourth periodic reports of the Marshall Islands,” U.N. Doc. CRC/C/MHL/CO/3-4, February 27, 2018; and Committee on the Rights of the Child, “Concluding observations on the second periodic report of Palau,” U.N. Doc. CRC/C/PLW/CO/2, February 28, 2018.

<sup>68</sup> See, for example, Committee on the Rights of the Child, “Concluding observations on the combined fifth and sixth periodic reports of Portugal,” U.N. Doc. CRC/C/PRT/CO/5-6, December 9, 2019; Committee on the Rights of the Child, “Concluding observations on the combined third and fourth periodic reports of Mozambique,” U.N. Doc. CRC/C/MOZ/CO/3-4, November 27, 2019; Committee on the Rights of the Child, “Combined fifth and sixth periodic reports submitted by the Republic of Korea under article 44 of the Convention, due in 2017,” U.N. Doc. CRC/C/KOR/CO/5-6, November 19, 2018; Committee on the Rights of the Child, “Concluding observations on the second periodic report of Côte d’Ivoire,” U.N. Doc. CRC/C/CIV/CO/2, July 12, 2019; Committee on the Rights of the Child, “Concluding observations on the initial report of Tonga,” U.N. Doc. CRC/C/TON/CO/1, July 2, 2019; Committee on the Rights of the Child, “Concluding observations on the combined fifth and sixth periodic reports of Guatemala,” February 28, 2018; Committee on the Rights of the Child, “Concluding observations on the combined third and fourth periodic reports of the Marshall Islands,” February 27, 2018; Committee on the Rights of the Child, “Concluding observations on the second periodic report of Palau,” February 28, 2018; Committee on the Rights of the Child, “Concluding observations on the combined fifth and sixth periodic reports of Panama,” U.N. Doc. CRC/C/PAN/CO/5-6, February 28, 2018; Committee on the Rights of the Child, “Concluding observations on the second and third periodic reports of the Solomon Islands,” U.N. Doc. CRC/C/SLB/CO/2-3, February 28, 2018; Committee on the Rights of the Child, “Concluding observations on the combined fifth and sixth periodic reports of Sri Lanka,” U.N. Doc. CRC/C/LKA/CO/5-6, March 2, 2018; Committee on the Rights of the Child, “Concluding observations on the combined third to fifth periodic reports of Malawi,” U.N. Doc. CRC/C/MWI/CO/3-5, March 6, 2017; Committee on the Rights of the Child, “Concluding observations on the combined third and fourth periodic reports of Saudi Arabia,” U.N. Doc. CRC/C/SAU/CO/3-4, October 25, 2016; Committee on the Rights of the Child, “Concluding observations on the combined third to fifth periodic reports of Sierra Leone,” U.N. Doc. CRC/C/SLE/CO/3-5, November 1, 2016; Committee on the Rights of the Child, “Concluding observations on the combined second and third periodic reports of Haiti,” U.N. Doc. CRC/C/HTI/CO/2-3, February 24, 2016; Committee on the Rights of the Child, “Concluding observations on the combined fourth and fifth periodic reports of Peru,” U.N. Doc. CRC/C/PER/CO/4-5, March 2, 2016; Committee on the Rights of the Child, “Concluding observations on the combined third to fifth periodic reports of Kenya,” U.N. Doc. CRC/C/KEN/CO/3-5, March 21, 2016; and Committee on the Rights of the Child, “Concluding observations on the combined third and fourth periodic reports of Ireland,” U.N. Doc. CRC/C/IRL/CO/3-4, March 1, 2016.

<sup>69</sup> Human Rights Watch, *Leave No Girl Behind in Africa: Discrimination in Education against Pregnant Girls and Adolescent Mothers*, June 14, 2018, <https://www.hrw.org/report/2018/06/14/leave-no-girl-behind-africa/discrimination-education-against-pregnant-girls-and>.

<sup>70</sup> United Nations Population Fund, “Harmonizing the Legal Environment for Adolescent Sexual and Reproductive Health and Rights – A review in 23 Countries in East and Southern Africa,” 2017, [https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital\\_0.pdf](https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital_0.pdf) (accessed May 1, 2020); Guttmacher Institute, “Abortion Worldwide 2017: Uneven Progress and Unequal Access,” March 2018, <https://www.guttmacher.org/report/abortion-worldwide-2017> (accessed May 9, 2018); Human Rights Watch research conducted in Senegal in October 2017.

<sup>71</sup> Guttmacher Institute, “Factsheet – Abortion in Africa,” March 2018, <https://www.guttmacher.org/fact-sheet/abortion-africa> (accessed May 9, 2018).



Moreover, the UN Committee on Economic, Social and Cultural Rights (CESCR), which monitors compliance with the ICESCR, has called on states to amend restrictive abortion laws and to increase access to legal abortion in order to decrease maternal deaths.<sup>72</sup> The committee has observed that denial of abortion often leads to maternal mortality or morbidity, which in turn constitutes a violation of the right to life or security.<sup>73</sup> It has urged states to remove penalties for women who seek abortion, and to make it legal in certain circumstances.<sup>74</sup> It has expressed deep concern about prohibitions on abortion with no exceptions.<sup>75</sup>

The committee has also said that states should ensure that abortion services can be accessed in practice, for example by adopting protocols on legal abortion, guaranteeing that conscientious objection laws are not an obstacle to abortion, and ensuring that health insurance covers abortion.<sup>76</sup>

Regional human rights authorities have also raised concerns about restrictive abortion laws. The IACHR in a 2018 statement urged states “to adopt legislation designed to ensure that women can effectively exercise their sexual and reproductive rights, with the understanding that denying the voluntary interruption of pregnancy in certain circumstances constitutes a violation of the fundamental rights of women, girls, and female adolescents.”<sup>77</sup> In 2017, the IACHR stated, “Denying access by women and girls to legal and safe abortion services or post-abortion care can

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<sup>72</sup> See, for example, CESCR, “Concluding observations on the fourth periodic report of the Republic of Korea,” U.N. Doc. E/C.12/KOR/CO/4, October 19, 2017; CESCR, “Concluding observations on the combined fifth and sixth periodic reports of the Philippines,” U.N. Doc. E/C.12/PHL/CO/5-6, October 26, 2016; CESCR, “Concluding observations on the combined second to fifth periodic reports of Kenya,” U.N. Doc. E/C.12/KEN/CO/2-5, April 6, 2016; and CESCR, “Concluding observations on the initial report of Pakistan,” U.N. Doc. E/C.12/PAK/CO/1, July 20, 2017.

<sup>73</sup> CESCR, General Comment No. 22 on the right to sexual and reproductive health, U.N. Doc. E/C.12/GC/22 (2016), para. 10.

<sup>74</sup> See, for example, CESCR, “Concluding observations on the second periodic report of Honduras,” U.N. Doc. E/C.12/HND/CO/2, July 11, 2016; CESCR, “Concluding observations on the sixth periodic report of Poland,” U.N. Doc. E/C.12/POL/CO/6, October 26, 2016; CESCR, “Concluding observations on the combined fifth and sixth periodic reports of the Philippines,” October 26, 2016; CESCR, “Concluding observations on the fifth periodic report of Costa Rica,” U.N. Doc. E/C.12/CRI/CO/5, October 21, 2016; CESCR, “Concluding observations on the combined second to fourth periodic reports of the former Yugoslav Republic of Macedonia,” U.N. Doc. E/C.12/MKD/CO/2-4, July 15, 2016; CESCR, “Concluding observations on the combined second to fifth periodic reports of Kenya,” April 6, 2016; and CESCR, “Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories,” U.N. Doc. E/C.12/GBR/CO/5, June 12, 2009.

<sup>75</sup> See, for example, CESCR, “Concluding observations on the combined fifth and sixth periodic reports of the Philippines,” October 26, 2016; CESCR, “Concluding observations on the second periodic report of Honduras,” July 11, 2016; and CESCR, “Concluding observations on the combined third, fourth and fifth periodic reports of El Salvador,” U.N. Doc. E/C.12/SLV/CO/3-5, June 19, 2014.

<sup>76</sup> See, for example, CESCR, “Concluding observations on the sixth periodic report of Spain,” U.N. Doc. E/C.12/ESP/CO/6, April 26, 2018; CESCR, “Concluding observations on the combined fifth and sixth periodic reports of Mexico,” U.N. Doc. E/C.12/MEX/CO/5-6, April 17, 2018; CESCR, “Concluding observations on the third periodic report of the Republic of Moldova,” U.N. Doc. E/C.12/MDA/CO/3, October 19, 2017; CESCR, “Concluding observations on the fifth periodic report of Uruguay,” U.N. Doc. E/C.12/URY/CO/5, July 20, 2017; CESCR, “Concluding observations on the sixth periodic report of Poland,” October 26, 2016; and CESCR, “Concluding observations on the fifth periodic report of Costa Rica,” October 21, 2016.

<sup>77</sup> “IACHR Urges El Salvador to End the Total Criminalization of Abortion,” IACHR press release, March 7, 2018, [http://www.oas.org/en/iachr/media\\_center/PReleases/2018/042.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/042.asp) (accessed May 23, 2018).

cause prolonged and excessive physical and psychological suffering to many women, especially in cases involving risks to their health, unviability of the fetus, or pregnancies resulting from incest or rape. Without being able to effectively exercise their sexual and reproductive rights, women cannot realize their right to live free from violence and discrimination.”<sup>78</sup> Similarly, in its 2019 report on “Violence and Discrimination against women, girls and adolescents”, the IACHR noted that the “the denial of legal abortions would constitute a violation of the fundamental rights for women, girls, and adolescents.”<sup>79</sup>

In a 2015 statement on sexual and reproductive rights, the IACHR’s rapporteur on the rights of women criticized the fact that women in the region face “very significant obstacles in exercising their sexual and reproductive rights” and are forced to “continue pregnancies that put their lives at risk” due to restrictive abortion legislation.<sup>80</sup> She and other regional and UN rapporteurs reiterated this concern in a joint statement that called on states to “remove punitive measures for women who undergo abortion, and at the very minimum, legalize abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the woman or the life of the woman.”<sup>81</sup>

## **B. Rights Begin at Birth**

Plain reading of human rights declarations and treaties suggest that human rights protections attach at birth. The UDHR clearly states:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.<sup>82</sup>

This language of the first article of the declaration is unequivocal that rights begin at birth. The drafting history of the declaration provides clarity that the question of whether to include “born” in the first Article was specifically debated, and an amendment to remove the language rejected

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<sup>78</sup> “IACHR Urges All States to Adopt Comprehensive, Immediate Measures to Respect and Protect Women’s Sexual and Reproductive Rights,” IACHR press release, October 23, 2017, <https://mailchi.mp/dist/iachr-urges-all-states-to-adopt-comprehensive-immediate-measures-to-respect-and-protect-womens-sexual-and-reproductive-rights?e=07a43d57e2> (accessed May 23, 2018).

<sup>79</sup> IACHR, “Violence and Discrimination against women, girls and adolescents” (Violencia y discriminación contra mujeres, niñas y adolescentes), November 14, 2019, <http://www.oas.org/es/cidh/informes/pdfs/ViolenciaMujeresNNA.pdf> (accessed January 29, 2020), para. 210.

<sup>80</sup> “On International Women’s Day, IACHR Urges States to Guarantee Women’s Sexual and Reproductive Rights,” IACHR press release, March 6, 2015, [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/024.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/024.asp) (accessed October 25, 2015).

<sup>81</sup> “Joint Statement by UN human rights experts, the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights (IACHR) and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples’ Rights,” September 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16490&LangID=E> (accessed April 28, 2015).

<sup>82</sup> UDHR.

after debate.<sup>83</sup> Other international human rights treaties ratified or signed by the United States are either silent or ambiguous regarding the starting point for the right of life, whereas the negotiating history of the treaties, jurisprudence, and most legal analysis suggest that the right to life, as contemplated in those documents, does not apply before the birth of a human being.<sup>84</sup> The American Convention on Human Rights, a regional treaty, is the only human rights instrument that contemplates the right to life from the moment of conception. Under article 4, “[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”<sup>85</sup> No other international human rights document refers to rights attaching any time prior to birth.

In 1981, the IACHR was asked to establish whether or not the right-to-life provisions provided by the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man were compatible with a woman’s right to access safe and legal abortions. The commission concluded that they are.

In the case of the declaration, the commission noted that the conferees in Bogotá in 1948 rejected language that would have extended the right to the unborn and “thus it would appear incorrect to read the Declaration as incorporating the notion that the right of life exists from the moment of conception.”<sup>86</sup>

With regard to the convention, the commission found that the wording of the right to life in article 4 was very deliberate and that the convention’s founders intended the “in general” clause to allow for non-restrictive domestic abortion legislation. As the commission phrased it: “it was recognized in the drafting session in San José that this phrase left open the possibility that states parties to a future Convention could include in their domestic legislation ‘the most diverse cases of abortion,’” allowing for legal abortion under this article.<sup>87</sup>

Furthermore, the Inter-American Court of Human Rights (IACrHR), which issues binding decisions on state parties to the American Convention, has concluded that in regulating abortion, the protection of prenatal life does not prevail over other rights.<sup>88</sup> The court noted that “it can be

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<sup>83</sup> UN General Assembly Official Records, 3rd Comm., 99th mtg. at 110-124, UN Doc. A/PV/99, 1948, <https://undocs.org/A/C.3/SR.99>.

<sup>84</sup> For an analysis of the international consensus regarding the right to life in the ICCPR, see Cook and Dickens, “Human Rights Dynamics of Abortion Law Reform,” *Human Rights Quarterly*, Vol. 25 (2003), p. 24; and Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Kehl am Rhein: N.P. Engel, 1993), p. 123 (describing how several states proposed protecting a right to life of the fetus during treaty negotiations, and that these proposals were voted down by the majority of the delegates).

<sup>85</sup> American Convention on Human Rights, art. 4(1).

<sup>86</sup> IACHR, White and Potter (“Baby Boy Case”), Resolution No. 23/81, Case No. 2141, U.S., March 6, 1981, OAS/Ser.L/V/II.54, Doc. 9 Rev. 1, October 16, 1981, para. 14(a).

<sup>87</sup> *Ibid.*, para 14(6).

<sup>88</sup> *Artavia Murillo et al. v Costa Rica*, Judgment of November 28, 2012, Inter-Am Ct.H.R., Series C. No. 257, paras. 259, 264.

concluded from the words ‘in general’ that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible.”<sup>89</sup>

### **C. Right to be Free from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

The right to be free from torture and other cruel, inhuman or degrading treatment or punishment is protected by human rights treaties, including the ICCPR, Convention against Torture, and the American Convention on Human Rights.<sup>90</sup> Torture and other ill-treatment are also prohibited under customary international law.<sup>91</sup>

Criminalization and inaccessibility of abortion is incompatible with the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment. The CAT has said that criminalization of abortion with few exceptions may result in women experiencing severe pain and suffering if they are compelled to continue pregnancy. It has expressed concern at the severe physical and mental anguish and distress experienced by women and girls due to abortion restrictions.

The committee has called on governments to “allow for legal exception to the prohibition of abortion in specific circumstances in which the continuation of pregnancy is likely to result in severe pain and suffering, such as when the pregnancy is the result of rape or incest or in cases of fatal fetal impairment.”<sup>92</sup> It has also criticized restrictions on access to legal abortions in cases in which laws are unclear, abortions require third party authorizations, or physicians or clinics refuse to perform abortions on the basis of conscientious objection.<sup>93</sup>

Similarly, the HRC has ruled in individual cases against Ireland, Peru, and Argentina that the governments violated the right to freedom from torture or other cruel, inhuman or degrading

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<sup>89</sup> Ibid., para. 264.

<sup>90</sup> For example, ICCPR, art. 7; American Convention on Human Rights, art. 5.

<sup>91</sup> See, e.g., Restatement (Third) of Foreign Relations Law of the United States § 702.

<sup>92</sup> See, for example, concluding observations of the Committee against Torture on Timor-Leste, U.N. Doc. CAT/C/TLS/CO/1 (2017); Ireland, UN Doc. CAT/C/IRL/CO/2 (2017); and Ecuador, UN Doc. CAT/C/ECU/CO/7 (2016).

<sup>93</sup> See, for example, concluding observations of the Committee against Torture on Macedonia, UN Doc. CAT/C/MKD/CO/3 (2015); Peru, UN Doc. CAT/C/PER/CO/5-6 (2013); Bolivia, UN Doc. CAT/C/BOL/CO/2 (2013); Poland, UN Doc. CAT/C/POL/CO/5-6 (2013); and Kenya, UN Doc. CAT/C/KEN/CO/2 (2013).

treatment by failing to ensure access to abortion services in these cases.<sup>94</sup> It pointed out that this right relates not only to physical pain, but also to mental suffering.<sup>95</sup>

A painful example of this is the case of Beatriz, a 22-year-old woman from El Salvador who in 2013 sought medical treatment from a hospital for a life-threatening pregnancy.<sup>96</sup> Doctors worried that if she continued her pregnancy she could suffer hemorrhaging or severe preeclampsia, a condition that is a leading cause of maternal death. The fetus also had anencephaly – a neural tube defect in which a major portion of the brain, skull, and scalp fail to develop. If an anencephalic infant is not stillborn, the baby will often die within hours or days.

In light of information provided to her by medical staff, Beatriz asked for an abortion. Her doctors sought permission from the government to terminate the pregnancy without risking prosecution. They never received it. After months of waiting, Beatriz delivered the baby prematurely via cesarean section. The baby died five hours later. The procedure was much riskier than an early abortion. After the surgery, Beatriz was admitted to the intensive care unit because of heightened concerns of complications from lupus. She was released from the hospital a week after the delivery, and nearly 12 weeks from the time doctors first determined the abortion was a medical necessity.

The CEDAW Committee has also described criminalization of abortion and denial or delay of access to legal abortion as “forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”<sup>97</sup> Similarly, the CESCR has also said that denial of abortion “in certain circumstances can amount to torture or cruel, inhuman or degrading treatment.”<sup>98</sup>

The UN special rapporteur on torture has said that “[h]ighly restrictive abortion laws that prohibit abortions even in cases of incest, rape or fetal impairment or to safeguard the life or health of the woman violate women’s right to be free from torture and ill-treatment.”<sup>99</sup> He continued:

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<sup>94</sup> *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017); *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016); *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (2005); and *L.M.R. v. Argentina*, CCPR/C/101/D/1608/2007 (2011).

<sup>95</sup> *Ibid.* See also HRC, General Comment No. 20 on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, U.N. Doc. HRI/GEN/1/Rev.1 (1994), para. 5.

<sup>96</sup> Amanda Klasing, “Dispatches: 17 Women in El Salvador Need Help This Holiday Season,” commentary, Human Rights Watch dispatch, December 11, 2014, <https://www.hrw.org/news/2014/12/11/dispatches-17-women-el-salvador-need-help-holiday-season>.

<sup>97</sup> CEDAW Committee, General Recommendation no. 35 on gender-based violence against women, U.N. Doc. CEDAW/C/GC/35 (2017), para. 18.

<sup>98</sup> CESCR, General Comment No. 22, para. 10.

<sup>99</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, U.N. Doc. A/HRC/31/57, January 5, 2016, para. 43.

The denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill-treatment. States have an affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care....<sup>100</sup>

Furthermore, the Committee of Experts of the Follow-up Mechanism to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women noted that laws that establish an absolute prohibition of abortion “perpetuate the exercise of violence against women, girls and adolescents...and violate the prohibition of torture and mistreatment.”<sup>101</sup> The committee concluded that states should establish “laws and policies that enable the termination of pregnancy at the very least in the following cases: i) risk to the life or health of the woman; ii) inability of the fetus to survive; and iii) sexual violence, incest and forced insemination.”<sup>102</sup>

#### D. Right to Health

The right to health—including both physical and mental—is protected in numerous human rights treaties. For example, the ICESCR guarantees everyone the right to the highest attainable standard of physical and mental health, and the CRC guarantees this right for children.<sup>103</sup> CEDAW provides, “[S]tates Parties shall 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.”<sup>104</sup>

Unsafe abortions are a grave threat to the health of women and girls. According to the 2017 report by the WHO and the Guttmacher Institute, 25 million unsafe abortions occurred every year between 2010 and 2014.<sup>105</sup> Complications from unsafe abortions can include incomplete abortion, hemorrhage, vaginal, cervical and uterine injury, and infections. Unavailability of safe abortion also poses risks to mental health, including severe anguish and risk of suicide.<sup>106</sup>

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<sup>100</sup> Ibid., para. 44.

<sup>101</sup> Follow-up Mechanism to the Convention of Belém Do Pará (Mesecvi) Committee Of Experts (Cevi), “Declaration on Violence against Women, Girls and Adolescents and their Sexual and Reproductive Rights,” OEA/Ser.L/II.7.10, September 19, 2014, <http://www.oas.org/es/mesecvi/docs/CEVI11-Declaration-EN.pdf> (accessed May 23, 2018), pp. 3-4.

<sup>102</sup> Ibid., p. 7.

<sup>103</sup> ICESCR, art. 12(1) and CRC art. 24.

<sup>104</sup> CEDAW, art. 12.

<sup>105</sup> WHO and Guttmacher Institute, “Global, regional, and subregional classification of abortions by safety, 2010–14: estimates from a Bayesian hierarchical model,” *The Lancet* 390 (November 2017), pp. 2372–2381.

<sup>106</sup> UN General Assembly, Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. A/66/254, August 3, 2011, para. 36.

Statistics from the WHO reveal the grim toll taken on women from unsafe abortions:

- Around 25 million unsafe abortions were estimated to have taken place worldwide each year, almost all in developing countries.
- Among these, 8 million were carried out in the least- safe or dangerous conditions.
- Over half of all estimated unsafe abortions globally were in Asia.
- Three out of four abortions that occurred in Africa and Latin America were unsafe.
- The risk of dying from an unsafe abortion was the highest in Africa.
- Each year between 4.7 percent and 13.2 percent of maternal deaths can be attributed to unsafe abortion.
- Around 7 million women are admitted to hospitals every year in developing countries, as a result of unsafe abortion.
- The annual cost of treating major complications from unsafe abortion is estimated at US\$553 million.<sup>107</sup>

According to the WHO, providing access to safe, legal abortion has been shown to prevent these risks.

International bodies have repeatedly stated that criminalization of or unreasonable restrictions on access to abortion violate the right to health. The CESCR has stated that “States must reform laws that impede the exercise of the right to sexual and reproductive health. Examples include laws criminalizing abortion...”<sup>108</sup> In country-specific concluding observations, the committee has recommended that states advance women’s health by providing for exceptions to criminalization of abortion and removing barriers to access.<sup>109</sup>

The CEDAW Committee has affirmed states’ obligation to “take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care.”<sup>110</sup> It explained that “barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”<sup>111</sup> As noted above, the CEDAW Committee consistently recommends that states amend their laws to decriminalize

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<sup>107</sup> WHO, “Preventing unsafe abortion,” June 26, 2019, <https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion> (accessed 8 April 2020).

<sup>108</sup> CESCR, General Comment No. 22 on the right to sexual and reproductive health (2016), para. 40.

<sup>109</sup> See, for example, concluding observations of the CESCR on the Republic of Korea, UN Doc. E/C.12/KOR/CO/4 (2017); Pakistan, UN Doc. E/C.12/PAK/CO/1 (2017); Honduras, UN Doc. E/C.12/HND/CO/2 (2016); Poland, UN Doc. E/C.12/POL/CO/6 (2016); the Philippines, UN Doc. E/C.12/PHL/CO/5-6 (2016); Costa Rica, UN Doc. E/C.12/CRI/CO/5 (2016); Kenya, UN Doc. E/C.12/KEN/CO/2-5 (2016); and Macedonia, UN Doc. E/C.12/MKD/CO/2-4 (2016).

<sup>110</sup> CEDAW Committee, General Recommendation No. 24 on women and health, UN Doc. A/54/38/Rev.1 (1999), para. 17.

<sup>111</sup> *Ibid.*

abortion in all cases, and legalize abortion at least in cases of rape, incest, risk to the life or health of the women, and severe fetal impairment.<sup>112</sup>

The Committee on the Rights of the Child has warned of the danger of unsafe abortion to adolescent girls' health. It has often urged states to decriminalize abortion in all circumstances, and to ensure that adolescent girls have access to safe abortions.<sup>113</sup>

The UN special rapporteur on the right to health has also recommended that states decriminalize abortion.<sup>114</sup> He has stated that “criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women’s right to health and must be eliminated,” and that the criminalization of abortion has a “severe impact on mental health.”<sup>115</sup>

## E. Reproductive Rights Can Be Balanced with Other Human Rights

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<sup>112</sup> See, for example, CEDAW Committee, “Concluding observations on the seventh periodic report of Chile,” March 14, 2018; CEDAW Committee, “Concluding observations on the fifth periodic report of Fiji,” March 14, 2018; CEDAW Committee, “Concluding observations on the combined initial to third periodic reports of the Marshall Islands,” March 14, 2018; CEDAW Committee, “Concluding observations on the eighth periodic report of the Republic of Korea,” March 14, 2018; CEDAW Committee, “Concluding observations on the combined third and fourth periodic reports of Saudi Arabia,” March 14, 2018; CEDAW Committee, “Concluding observations on the combined fourth to sixth periodic reports of Suriname,” March 14, 2018; CEDAW Committee, “Concluding observations on the seventh periodic report of Burkina Faso,” U.N. Doc. CEDAW/C/BFA/CO/7, November 22, 2017; CEDAW Committee, “Concluding observations on the combined eighth and ninth periodic reports of Guatemala,” November 22, 2017; CEDAW Committee, “Concluding observations on the eighth periodic report of Kenya,” November 22, 2017; CEDAW Committee, “Concluding observations on the fifth periodic report of Kuwait,” November 22, 2017; CEDAW Committee, “Concluding observations on the combined initial to third periodic reports of Monaco,” November 22, 2017; CEDAW Committee, “Concluding observations on the combined initial and second periodic reports of Nauru,” November 22, 2017; CEDAW Committee, “Concluding observations on the combined second and third periodic reports of Oman,” November 22, 2017; CEDAW Committee, “Concluding observations on the seventh periodic report of Paraguay,” U.N. Doc. CEDAW/C/PRY/CO/7, November 22, 2017; CEDAW Committee, “Concluding observations on the seventh periodic report of Costa Rica,” July 24, 2017; CEDAW Committee, “Concluding observations on the combined third and fourth periodic reports of the Niger,” July 24, 2017; CEDAW Committee, “Concluding observations on the combined seventh and eighth periodic reports of Nigeria,” July 24, 2017; CEDAW Committee, “Concluding observations on the combined eighth and ninth periodic reports of El Salvador,” March 9, 2017; CEDAW Committee, “Concluding observations on the combined sixth and seventh periodic reports of Ireland,” March 9, 2017; CEDAW Committee, “Concluding observations on the sixth periodic report of Jordan,” March 9, 2017; CEDAW Committee, “Concluding observations on the combined initial to third periodic reports of the Federated States of Micronesia,” March 9, 2017; CEDAW Committee, “Concluding observations on the combined initial to third periodic reports of the Federated States of Micronesia,” March 9, 2017; CEDAW Committee, “Concluding observations on the combined seventh to ninth periodic reports of Rwanda,” March 9, 2017; CEDAW Committee, “Concluding observations on the eighth periodic report of Sri Lanka,” March 9, 2017; CEDAW Committee, “Concluding observations on the seventh periodic report of Argentina,” November 25, 2016; CEDAW Committee, “Concluding observations on the eighth periodic report of Bangladesh,” November 25, 2016; CEDAW Committee, “Concluding observations on the combined eighth and ninth periodic reports of Bhutan,” November 25, 2016; CEDAW Committee, “Concluding observations on the combined fifth and sixth periodic reports of Burundi,” November 25, 2016; and CEDAW Committee, “Concluding observations on the combined seventh and eighth periodic reports of Honduras,” November 25, 2016.

<sup>113</sup> See discussions above under “the right to life.”

<sup>114</sup> UN General Assembly, Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, para. 65(h).

<sup>115</sup> *Ibid.*, para. 36.



Governments have an obligation to ensure that everybody in their jurisdiction has accessible, affordable healthcare services on a nondiscriminatory basis. There are some healthcare providers who have a religious objection to the provision of some reproductive health services. The commissioners have raised concerns that the rights of a person seeking reproductive health care may conflict with the rights of the healthcare provider who objects to such care. The freedom of religion, as well as nondiscrimination, is protected under international law, and it is important that governments do not unnecessarily burden the exercise of religious conscience. This is especially important to minority religious groups, whose practices are all too easily trampled on by laws and policies enacted by majorities. But when accommodations for religious beliefs or practices in the workplace prevent people from accessing care to which they have a right, they are inconsistent with human rights obligations.

The ICCPR guarantees equal protection under the law as well as the freedom of thought, conscience, and religion.<sup>116</sup> Article 26 of the ICCPR states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Likewise, article 18(1) of the ICCPR recognizes the right to freedom of thought, conscience and religion, which includes both the “freedom to have or to adopt a religion or belief of [a person’s] choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”<sup>117</sup>

The HRC has emphasized that Article 18 “does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice,” but—recognizing that religious exercise may affect others—does permit limited restrictions on the freedom to manifest one’s religion or beliefs.<sup>118</sup>

Under Article 18(3), states may regulate the manifestation of religion or belief if, and only if, such regulations “are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>119</sup>

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<sup>116</sup> ICCPR, art. 26.

<sup>117</sup> ICCPR art. 18(1).

<sup>118</sup> HRC, General Comment 22, “Article 18: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” UN Doc. HRI/GEN/1/Rev.1 (1994), paras. 3-4.

<sup>119</sup> ICCPR art. 18(3); see also art. 5(1) (“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”).

The HRC has clarified that the freedom of thought, conscience, and religion does not protect religiously motivated discrimination against women, or racial and religious minorities.<sup>120</sup> It has urged states considering restrictions on the manifestation of religion or belief to “proceed from the need to protect all rights guaranteed under the Covenant, including the right to equality and non-discrimination.”<sup>121</sup>

This does not lead inherently to a tension between rights that requires one set of rights to be subverted by the other. Instead, it is a question of balancing competing rights—to health care and to nondiscriminatory access to lawfully available services, to a particular employment or choice of livelihood, to freedom of belief. While different governments may reach different outcomes on how to balance those rights, it is reasonable and rational for a government to decide that the balance falls in favor of protecting the rights of patients by making it a term of employment that a healthcare worker agrees to carry out lawful procedures. In a case before the European Social Rights Committee, the *Federation of Catholic Families in Europe (FAFCE) v Sweden*,<sup>122</sup> FAFCE argued that healthcare workers’ right to nondiscrimination was violated by their inability to refuse to provide abortion services on the basis of “conscientious objection.” The committee found that under the European Charter on Social and Economic Rights, neither the right to health nor the right to nondiscrimination entitles healthcare professionals to refuse to perform abortion services on grounds of personal conscience. The committee stated that the purpose of the right to health is to guarantee individuals’ access to adequate health care, not to protect the interests of healthcare providers. The committee also went on to underscore that the charter “does not impose on states a positive obligation to provide a right to ‘conscientious objection’ for health care workers.”

Unless states that allow conscientious objection take steps to ensure that it does not impede access to health care, rights are effectively denied, with consequences that can be dire. When conscientious objection is permitted without safeguarding access to services, abortion services that are permitted by law may be difficult or impossible to obtain, and access to other sexual and reproductive health services may be curtailed. Such was the case for a 14-year-old girl in Poland who was denied access to a legal abortion, for a pregnancy resulting from a rape, under claims of “conscience” by providers and health systems. She was compelled to undergo non-fact-based

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<sup>120</sup> See HRC, General Comment 28, “Article 3 (The Equality of Rights Between Men and Women),” Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 21 (“Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience, and religion.”); HRC, General Comment 22, “Article 18: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” para. 2 (“The committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.”); *Ibid.*, para. 7 (noting that “no manifestation of religion or belief may amount to ... advocacy of national, racial, or religious hatred that constitutes incitement to discrimination” and that “States parties are under the obligation to enact laws to prohibit such acts.”).

<sup>121</sup> HRC, General Comment 22, “Article 18: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” para. 8.

<sup>122</sup> *Federation of Catholic Families in Europe (FAFCE) v. Sweden*, Complaint No. 99/2013, Eur. Comm. Soc. R. (2015).

counseling, had her personal information disclosed to the press, and was for a time removed from her mother's care because her mother supported her decision to have an abortion.<sup>123</sup>

In fact, in parts of some countries that allow conscientious objection such as Italy, Poland and Uruguay, the levels of healthcare professionals refusing to provide abortion services and related care are estimated to be as high as 80 percent.<sup>124</sup> And the impact extends beyond abortion. LGBT persons and their families have also been refused a range of sexual and reproductive health services, such as contraception and infertility treatments, because of their sexual orientation or gender identity. Cases brought before the European Court of Human Rights that have sought recognition of a right to refuse services to LGBT persons on the grounds of personal belief have been unsuccessful.<sup>125</sup>

No international legal instrument explicitly provides for a right to conscientious objection in the provision of health or most other essential services. A right of conscientious objection to military service only—derived from the right to freedom of thought, conscience and religion - has been recognized.<sup>126</sup> There is no basis in international human rights law to suggest governments have any obligations to recognize a broader right to conscientious objection. Where states do provide for the exercise of conscientious objection in relation to provision of healthcare services, in particular reproductive health care including abortion, human rights bodies have noted that any possibility of conscientious objection would need to be subject to limits to protect the rights of others.<sup>127</sup> In summary, states are not required to but may allow for conscientious objection in health care, so long as it does not create a barrier or undue hardship for a patient being able to access health services to which they are entitled. For example, in its General Comment No. 36, the HRC stated, “parties should not introduce new barriers and should remove existing barriers that

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<sup>123</sup> *P. and S. v. Poland*, No. 57375/08, Eur. Ct. H.R. (2012).

<sup>124</sup> See, for example, Francisco Coppola, Leonel Briozzo, Fernanda Nozar, Verónica Fiol, and Diego Greif, “Conscientious objection as a barrier for implementing voluntary termination of pregnancy in Uruguay: Gynecologists’ attitudes and behavior,” *International Journal of Gynecology & Obstetrics* 134, supp. 1 (August 2016), pp. S16-S19, doi:10.1016/j.ijgo.2016.06.005; Council of Europe Committee of Ministers, *Resolution—International Planned Parenthood Federation – European Network (IPPFEN) v. Italy, Complaint No. 87/2012*, April 30, 2014, CM/ResChS (2014), 6.

<sup>125</sup> See, for example, *Eweida and others v United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10), Judgement of January 15, 2013.

<sup>126</sup> For example, in General Comment No. 22, the HRC has said it believes that a right to conscientious objection to military service “can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service.”

<sup>127</sup> See for example CEDAW Committee, General Comment No. 22, UN Doc. A/50/38 (1995); Committee on the Rights of Child, General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health, UN Doc. CRC/C/GC/15 (2013), art. 24; CEDAW Committee, “Concluding observations on the combined 7<sup>th</sup> and 8<sup>th</sup> periodic report of Hungary,” U.N. Doc. CEDAW/C/HUN/CO/7-8/Add.1, June 17, 2013, p. 8; CEDAW Committee “Concluding observations on the combined 7<sup>th</sup> and 8<sup>th</sup> periodic report of Romania,” U.N. Doc. CEDAW/C/ROU/CO/7-8, 24 July 2017, p. 12; and CEDAW Committee, “Concluding observations on the combined 4<sup>th</sup> and 5<sup>th</sup> periodic reports of Croatia,” U.N. Doc. CEDAW/C/HRV/CO/4-5, July 28, 2015, pp. 9-10.

deny effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers.”<sup>128</sup>

In its concluding observations, the committee has repeatedly urged states, including Colombia, Lebanon, Poland, and Romania, to enhance the effectiveness of referral mechanisms in cases of conscientious objection by medical practitioners, in order to ensure access to abortion services and to ensure that women are not obliged, as a consequence of conscientious objection on the part of medical staff, to resort to unsafe abortions. The CEDAW Committee in its General Recommendation 24 on women and health, said that it is discriminatory “to refuse to provide legally for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.”<sup>129</sup>

The CESCR, in its General Comment No. 22 on the right to sexual and reproductive health, says:

Where health-care providers are allowed to invoke conscientious objection, States must appropriately regulate this practice to ensure that it does not inhibit anyone’s access to sexual and reproductive health care, including by requiring referrals to an accessible provider capable of and willing to provide the services being sought, and that it does not inhibit the performance of services in urgent or emergency situations.<sup>130</sup>

The jurisprudence of the European Court of Human Rights recognizes that a right to conscientious objection can exist, in limited form, in the provision of reproductive rights services. But conscientious objection cannot, for example, be used by pharmacies to refuse to provide contraception. Also, once a state decides to allow abortion, it has an obligation to structure its legal framework so that it does not limit women’s ability to effectively access the service, including by way of conscientious objection. In cases against Poland, the court has indicated that at a minimum, there must be referral mechanisms in place and the conscientious objection must be made in writing.

Likewise, recent jurisprudence from the IACrHR is instructive in understanding the state’s role in regulating health services to ensure women can access care, without impediment. In *Artavia Murillo v. Costa Rica*, when the court ruled that Costa Rica’s prohibition on IVF treatment was a violation of the Convention, it indicated that the state has the responsibility to regulate and

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<sup>128</sup> HRC, General Comment No. 36 on the Right to Life.

<sup>129</sup> CEDAW Committee, General Recommendation No. 24 on women and health, para. 11.

<sup>130</sup> CESCR, General Comment No. 22 on the right to sexual and reproductive health, para. 43.

oversee the provision of health services “to ensure effective protection of the rights to life and personal integrity.”<sup>131</sup> It also found that a “lack of legal safeguards that take reproductive health into consideration can result in a serious impairment of the right to reproductive autonomy and freedom.”<sup>132</sup>

In a report on Access to Information on Reproductive Health the IACHR has indicated that conscientious objection:

- is a right that can be held only by natural persons and not by legal entities (such as hospitals or other health centers) or the state;
- is an individual decision that must be based on a duly grounded conviction and should be presented in writing;
- applies only to direct providers and not to administrative personnel;
- is to be exercised together with an obligation to immediately refer the patient to a doctor who can provide the requested medical service.<sup>133</sup>

## **F. Women’s Rights May Not Be Infringed Under Guise of Religion Freedom**

Rights to religious practice, liberty, and expression are vital and should be complementary to and reinforce women’s rights. As recognized in a recent report from the UN special rapporteur on freedom of religion and belief, many faith groups promote women’s rights and gender equity within their faiths.<sup>134</sup> For example, in Burundi, the ‘ImamsForShe’ program runs educational workshops for religious leaders, sports camps for girls and a weekly radio show to discuss how the Qur’an supports women’s human rights including the rights to education, healthcare, and equal work opportunities.<sup>135</sup>

However, the UN report demonstrates that elevation of religious freedom to a place of preemptive primacy in an abstract hierarchy of rights has undermined and destroyed rights for millions of women and girls globally. The report concluded:

[I]n all regions of the world, actors citing religious justifications for their actions have advocated to governments and to the broader public for the

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<sup>131</sup> Artavia Murillo and others Case, Judgment of November 28, 2012, Inter-Am Ct.H.R., Series C. No. 257, para. 148.

<sup>132</sup> Ibid., para. 147.

<sup>133</sup> IACHR, “Access to Information on Reproductive Health from a Human Rights Perspective,” OEA/Ser.L/V/II., doc. 61, November 22, 2011, <http://www.cidh.oas.org/pdf%20files/womenaccessinformationreproductivehealth.pdf> (accessed May 1, 2020).

<sup>134</sup> UN Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, draft unedited version, U.N. Doc. A/HRC/43/48 February 27, 2020, p. 9).

<sup>135</sup> Ibid., p. 13.

preservation or imposition of laws and policies that directly or indirectly discriminate against women [and] girls . . . . In every region of the world, the Special Rapporteur has identified laws enacted with the aim of mandating standards of conduct purportedly demanded by a particular religion that effectively deny women and other individuals the right to equality and non-discrimination on the basis of their sex, sexual orientation or gender identity . . . Governments in all regions of the world have also failed to uphold their obligation to protect people from gender-based violence and discrimination perpetrated against them by private individuals or entities claiming a religious justification for their actions and to sanction the perpetrators of such acts. Gender-based violence and discrimination is being perpetuated both in the public sphere and by and within religious communities and entities.<sup>136</sup>

As the UN report correctly observes, an essential part of the right to freedom of religion or belief is that freedom of religion or belief must not be used for ends that are inconsistent with the UN charter or relevant human rights instruments.<sup>137</sup> Both Article 30 of the UDHR and Article 5 of the ICCPR further clarify that no human right may be invoked to destroy another human right.<sup>138</sup>

The human suffering resulting from this is cataclysmic. Over the last decade over 200 million women were subjected to forced genital mutilation and three quarters of married young women were married before the age of 18,<sup>139</sup> attributable in part to imposition of religion-based sensibilities. The UN summarized the reports of religion-based human rights violations against women and girls:

The Special Rapporteur is alarmed at the persistence of harmful practices and that those who engage in them ‘justify’ such acts on the grounds that they are permitted or required by religious beliefs, including female genital mutilation, dowry killings, rape, polygyny, early and enforced marriage, beatings, coercive gender re-assignment surgery, and so called ‘honour’ crimes. Governments have an obligation to prohibit such practices in law and to ensure that perpetrators of gender-based violence, including violence perpetrated by individuals claiming a religious

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<sup>136</sup> Ibid., p. 3.

<sup>137</sup> Ibid., p. 14.

<sup>138</sup> UDHR, art. 30; ICCPR, art. 5.

<sup>139</sup> United Nations, “Report of the Secretary-General on SDG Progress 2019: Special Edition,” 2019, [https://sustainabledevelopment.un.org/content/documents/24978Report\\_of\\_the\\_SG\\_on\\_SDG\\_Progress\\_2019.pdf](https://sustainabledevelopment.un.org/content/documents/24978Report_of_the_SG_on_SDG_Progress_2019.pdf) (accessed May 1, 2020), p. 13.

‘justification’ for their actions, are held accountable and their victims provided with redress.<sup>140</sup>

Specific examples of human rights violations against women under the auspices of religion include:

- Discrimination in personal status and family laws can prevent women from leaving violent relationships and have a significant bearing on their safety and well-being;<sup>141</sup>
- Enforcement of religious principles that promote gender-based violence and/or discrimination against women and girls through personal status or family law, or delegation of authority in administering personal status rights and affairs regulated by family law to religious communities;<sup>142</sup>
- Denominational law in some countries permits divorce only with the consent of the husband;<sup>143</sup>
- Many women and girls are left at risk of sexual and gender-based violence within their religious communities without any legal remedy;<sup>144</sup>
- Throughout South and Southeast Asian, women and girls from religious minority communities are often at particular risk of violence, including violence associated with forced conversions and forced marriage, and “counter-extremism” measures adopted by States have targeted women from Muslim minority communities with rape, forced sterilization, and forced abortion;<sup>145</sup>
- In Iran, the government has compulsory veil laws and there are reported arrests, enforced disappearances, and arbitrary detention of women’s human rights defenders who protested against them.<sup>146</sup>

These examples demonstrate the enormous, life-threatening and all too often deadly consequences of establishing a hierarchy of rights that places religion in a pre-emptive role.

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<sup>140</sup> UN Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, draft unedited version, February 27, 2020, p. 9.

<sup>141</sup> Ibid., p. 5, citing UN Secretary General; see UN Economic and Social Council, Commission on the Status of Women, Review and appraisal of the implementation of the Beijing Declaration and Platform for Action and the outcomes of the twenty-third special session of the General Assembly: Report of the Secretary General,” U.N. Doc. E/CN.6/2020/3, December 13, 2019, para 37, Box III.1.

<sup>142</sup> Ibid., p. 5.

<sup>143</sup> Ibid., p. 5, citing United Nations Office of the High Commissioner on Human Rights; see “CEDAW discusses situation of women in Israel, Kuwait, Kenya, and Oman with civil society representatives,” Office of the High Commissioner on Human Rights news release, October 20, 2017, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22336&LangID=E>. (accessed April 9, 2020).

<sup>144</sup> Ibid.

<sup>145</sup> Ibid., pp. 6-7, citing “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),” International Court of Justice news release, January 23, 2020, <https://www.icj-cij.org/files/case-related/178/178-20200123-PRE-01-00-EN.pdf> (accessed May 1, 2020).

<sup>146</sup> Ibid., p. 7.

## **Conclusion**

The concepts of human dignity, privacy, autonomy, and equal rights are foundational principles that bind together all rights—those that appear in the US Bill of Rights and are part of US legal traditions, as well as universal human rights.

The US should be trying to strengthen the systems that protect and promote these rights, not undermine them.



## Annex I

### Prepared Testimony of Kenneth Roth to the United States' Commission on Unalienable Rights, January 10, 2020

Good afternoon. My name is Kenneth Roth. I am the executive director of Human Rights Watch, a position I have held for the past 26 years. I thank the members of the commission for inviting me to testify today.

Human Rights Watch was founded in 1978 as “Helsinki Watch” to investigate human rights violations in countries that signed the Helsinki Accords. Since then, our work has expanded to more than 100 countries on five continents. We investigate and document human rights abuses across the spectrum of rights, including extrajudicial killings and deprivation of liberty, government takeovers of media, arbitrary arrest of peaceful activists and political opposition figures, and such economic and social rights as discrimination in access to education, barriers to adequate health care, and restrictions on the rights to food and water. We are sensitive to the rights of people who are most likely to face discrimination, including women, children, LGBT people, and people with disabilities. When families victimized by war crimes find no justice at home, we champion international justice. When communities experience devastation at the hands of seemingly unaccountable companies, we ensure that governments, development banks, and businesses live up to their rights-related obligations. Human Rights Watch promotes and defends all human rights and is consistent with the international human rights framework, making no distinction among civil and political rights and economic, social and cultural rights.

When Secretary of State Mike Pompeo announced the formation of this commission in July, I was—and remain—concerned. Its announcement and subsequent open hearings have been fraught with threats to the very human rights that the commission purports to strengthen. This is because, as Secretary Pompeo suggested, the purpose of this commission is not to uphold all rights but to pick and choose among them. In his remarks he said, “What does it mean to say or claim that something is, in fact, a human right? How do we know or how do we determine whether that claim that this or that is a human right, is it true, and therefore, ought it to be honored?” The secretary justified this exercise by citing an alleged conflict among rights. He said, “as human rights claims have proliferated, some claims have come into tension with one another, provoking questions and clashes about which rights are entitled to gain respect.”

In my remarks today, I will answer the secretary’s questions directly, using examples from Human Rights Watch’s extensive global research. As I will show, international law is clear on what human rights are and how they work in tandem with one another. It also provides guidance when there is tension among rights-holders.

Human rights do not exist in the eye of the beholder. Pretending that they do would create a dangerous opening that rights abusers the world over would be happy to exploit. Rather, the Universal Declaration of Human Rights and subsequent international treaties, particularly the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, codify what they term “inalienable” human rights. These treaties have been widely ratified, although, as you are aware, the United States signed but has not ratified the latter covenant. The Declaration and treaties provide indisputable answers to what is a human right. They are based not on the whims of any particular government but upon inclusive negotiations in which the US government played a significant role.

Further, promoting the idea that there has been a “proliferation” of human rights is dangerous and wrong. In fact, there are only nine core human rights treaties, with the most recent, for people with disabilities, adopted in 2006. However, social movements that have advanced equality, including the civil rights movement, the women’s rights movement, the LGBT rights movement, and the disability rights movement, among others, have rightfully demanded that existing rights be extended to all people. If this commission does anything, it should affirm that human rights do and should extend to all people, everywhere, and are a source of protection and inclusion rather than exclusion.

Those who wish to deny rights to certain segments of the population have sometimes claimed that human rights advocates are inventing “new rights” or “special rights.” That accusation is often leveled against those who seek to prevent discrimination against populations that are especially vulnerable to abuse, such as lesbian, gay, bisexual, and transgender people. But there’s nothing “new” or “special” about the core rights that they seek recognition of; they simply want those rights applied to them. Human Rights Watch’s large body of work on the rights of LGBT people includes, most recently, advocating for the rights of transgender women in Lebanon, who are discriminated against on the basis of their gender identity when they try to access education, housing, health care, and employment. It also includes calling for an end to arbitrary arrests and forced anal examinations of LGBT people in Uganda, and challenging Russia’s discriminatory law that prohibits presenting LGBT issues to children in a positive light. Such work is firmly rooted in rights protected under existing treaties.

My many colleagues who are on the ground every day, documenting human rights violations around the world, can attest that the challenges they are documenting have nothing to do with a mythical proliferation of rights, but rather, with governments’ failure to respect the body of established rights enshrined in international law. If there is anything new, it is that the victims are often segments of the population who have long suffered in the shadows of state neglect but are now demanding to be included in the protection that established rights provide to most others.

Whether we are documenting the denial of education to Rohingya refugee children in Bangladesh; the violation of the right to health through the use of dangerous pesticides and dumping of industrial waste in development projects in the Democratic Republic of Congo, funded by European banks; the denial of medical care to people in abusive detention in Egypt; or the deaths of women and girls in the Dominican Republic as a result of its total ban on abortion, we rely on a set of globally recognized, well-established international human rights standards.

These internationally recognized standards are not new, yet some critics claim they represent an expansion or so-called “proliferation of rights.” I would like to address this issue head on, as the State Department itself has decided in recent years to distance itself from support of reproductive rights, and this administration has explicitly stated that a right of access to abortion does not exist under international law. While the term “abortion” may not be found mentioned explicitly in treaties, international human rights bodies and experts have repeatedly found that the realization of women’s human rights requires access to health care, including reproductive health care. Authoritative interpretations of international human rights law have recognized the link that exists between accessing reproductive health care, including abortion, and the rights to health, bodily integrity, nondiscrimination and equality, privacy, information, and the right to decide on the number and spacing of children. A state’s obligation to protect women’s right to life requires access to reproductive health care, as data show that restrictive abortion laws contribute to preventable maternal deaths. So clear is the tie between restrictions in access to reproductive health and women’s human rights that the UN Committee against Torture has expressed concern at the severe physical and mental anguish and distress experienced by women and girls due to abortion restrictions, and concluded that criminalization and inaccessibility of abortion can be incompatible with a government’s duty to uphold the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment.

The secretary has also raised a purported tension among rights. In fact, when documenting rights violations, we often find that, rather than human rights working against each other, abuses are intertwined and supportive of each other: the deprivation of rights in one area tends to create conditions for the deprivation of rights in others. For example, in Venezuela, beyond our long-time documentation of violations of political rights, Human Rights Watch researchers exposed the extensive violations of the rights to health and food that are killing Venezuelans and causing millions to flee. We found a health system in utter collapse with increased levels of maternal and infant mortality; the spread of vaccine-preventable diseases, such as measles and diphtheria; and increases in the prevalence of infectious diseases such as malaria and tuberculosis. Data we analyzed show high hospital admissions of malnourished children. The Venezuelan government’s failure to report public health information and its suppression of those speaking out about health conditions within the country, all while the country’s health facilities continue to deteriorate, represent a violation of Venezuela’s obligations to respect, protect, and fulfill the right to the

highest attainable standard of health. Those deprivations are often a direct consequences of the Maduro government's actions, but they are also a major reason why the Venezuelan people are speaking out, often at great risk, calling for a more accountable government, and why so many people are fleeing the country, creating one of the most dire refugee situations the region has faced. In other words, violation of their rights to health and food are undermining their political rights.

We find this interconnectedness frequently: when one set of rights is upheld, it tends to create the conditions for greater respect for other sets of rights, while when one set of rights is compromised, respect for others is often debilitated as well. For example, without access to education, a girl may be forced into child marriage, be more susceptible to trafficking, experience higher levels of abuse and violence, be shut out from the formal labor market, and never be able to take part in the political life of her community. Likewise, for persons with disabilities, including children, such as in Nigeria, where Human Rights Watch researchers have found that thousands of people with mental health conditions lack access to health care, but are instead detained, chained, and subject to physical abuse and violence, depriving them not only of their rights to health and dignity, but also to freedom of movement, freedom from torture, and any ability to access other civil and political rights.

Similarly, corruption is a major impediment to a government's ability to respect its people's economic and social rights—to provide such essentials as housing, food, water, jobs, and education. Deprivation of those rights may lead to political protest and, in turn, repression. One such example comes from Iraq's Basra province. In 2018, over 100,000 Basrawis were sent to the hospital with symptoms from contaminated water due to mismanagement and corruption. For three decades, Iraq has failed to uphold its obligations under several international treaties to respect the right to water, sanitation, and health. The consequences of the water crisis are far reaching: not only has it led to tens of thousands being hospitalized, degradation of agriculture lands, and jeopardized livelihoods, but it also led to protests in mid-2018 that Iraqi security forces responded to with excessive force, killing and wounding demonstrators. In Equatorial Guinea, for example, an oil-rich country has many people mired in poverty because President Obiang's highly repressive rule precludes people from challenging his blatant and shocking corruption. The best antidote to corruption is a free press, a vigorous civil society, and a responsive, democratic government.

Just in recent weeks, a political campaign to promote the rights of a particular religious group, Hindus, at the expense of another, Muslims, has led to serious instability in India. Indians have taken to the streets in protest of a discriminatory law that grants automatic citizenship only to non-Muslim irregular immigrants who are minorities in neighboring Muslim-majority countries. Security forces in Indian states ruled by the ruling Hindu nationalist Bharatiya Janata Party have

responded with excessive and at times lethal force against the protesters—arresting hundreds and killing more than two dozen—and shutting down the internet and limiting public transportation. The Indian government’s apparent intent to maintain this discrimination against Muslims, in violation of the right to freedom of religion and to be free from discrimination, has led it to violate rights of expression and peaceful assembly. This cascading impact shows that human rights should not be viewed in isolation from one another.

A similar link can be found in China’s northwestern Xinjiang region, where repression of Uighurs and other Turkic Muslims, grounded in violations of their religious freedom, has taken the form of mass arbitrary detention for forced indoctrination, the separation of children from their families, and the creation of a highly intrusive surveillance state.

A supposed tension between rights is often cited with respect to women’s rights, but that “tension” is typically a pretext to deprive women and girls of their human rights. For example, in the case of child marriage, proponents say that customary or religious beliefs dictate protecting the honor of girls or family through early marriage, with the result that girls who marry young are often denied a range of human rights: many must discontinue their education, face serious health risks from early and multiple pregnancies, and suffer sexual and domestic violence. Human Rights Watch research in Malawi, South Sudan, Tanzania, Zimbabwe, Afghanistan, Bangladesh, Nepal, and Yemen has found that customary practices and religious beliefs, intersecting with gender discrimination and poverty, poor access to education and health services, and weak justice mechanisms, fuel the practice.

Perhaps this tension is best understood in the context of abortion, where some call for a balance of the “rights” of healthcare providers to cite their religious beliefs in refusing to provide reproductive health care against the right of women and girls to access that care. A resolution of those tensions has already been elaborated by the UN Human Rights Committee, the official interpretive body of the International Covenant on Civil and Political Rights, which the US ratified in 1992. That committee has emphasized that article 18 of the Covenant, on freedom of religion, “does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice,” but—recognizing that religious exercise may affect others—does permit limited restrictions on the freedom to manifest one’s religion or beliefs in actions toward others.

For example, the committee has explained that freedom of thought, conscience, and religion does not protect religiously motivated discrimination against women or racial and religious minorities. Freedom from discrimination is an important human right, and while states can craft accommodations for religious objectors, they should ensure that these are carefully constructed so that they do not come at the expense of the equality or dignity of others. So, in the case of

abortion, a government may allow some scope for individual healthcare providers who hold a religious conviction to decline to perform an abortion. Yet, the space for such refusals should be closely and appropriately regulated to protect the rights of women and girls by ensuring that reasonable access to an abortion is available in the vicinity. A right to religious belief shouldn't be used as a tactic to deny access to fundamental health care. The priority should be ensuring seamless and dignified treatment and care without unreasonable barriers. Women and girls should not be forced to travel long distances to access alternative providers, be shamed for seeking care, or experience diminishment in the quality of care.

What the US government does and doesn't do matters. The actions and rhetoric of Washington is felt the world over, with potentially constructive or destructive results for human rights. In Tanzania, when the US and other governments raised concerns regarding a regional official's threat to arrest all the gay men in the capital, Dar es Salaam, the Tanzanian government publicly distanced itself from the official's comments and pledged to uphold international law. The application of human rights sanctions, under an executive order modeled after the US Global Magnitsky law, has also been a welcome step for the promotion of human rights—sending a strong message of disapproval and deterrence to perpetrators of abuse. Conversely, when the US government politicizes those same human rights sanctions, by targeting only lower-level Saudi officials, for example, instead of the senior officials almost certainly responsible for the murder of journalist Jamal Khashoggi, the impunity threatens to outweigh the otherwise positive message of accountability.

In announcing the creation of this commission, the secretary said it would advise on the promotion of human rights in US foreign policy. But it doesn't require months of meetings and testimony to know that as long as the president continues to embrace autocrats and dictators, while expressing envy of their ability to silence or to compromise the democratically essential checks and balances on their authority, such as an independent judiciary, probing journalists, and vigorous activists, the US government will have little credibility. The US government's credibility as a promoter of human rights abroad is further eroded by its human rights abuses at home. This includes the separation of immigrant children from their families and the needless detention of migrants in horrendous conditions; the mass incarceration of millions of people in a US criminal legal system rife with discrimination, arbitrariness, disproportionate and excessive sentencing, often with a lack of due process; the continued indefinite detention of individuals without charge or trial at the Guantanamo Bay detention facility; the failure to hold any US government officials accountable for post-September 11, 2001 torture by the Central Intelligence Agency; and the denial of health care to individuals because of their lack of insurance, because doctors are gagged by prohibitions related to Title X funding, or because the government has rolled back nondiscrimination protections for LGBT patients, giving providers free rein to discriminate.

Since the inception of the international human rights system, a major problem confronting it has been certain governments' attempts to prioritize some rights over others—something we see rampant today in China, Iran, Russia, and Saudi Arabia, among others. The creation of this commission poses the same threat. The Democracy, Human Rights, and Labor Bureau within this building is already tasked with upholding human rights in US foreign policy. There's no need to duplicate its efforts or to contribute to the selective definition and adherence to rights that is already the preference of governments such as China and Saudi Arabia. Rights become meaningless if governments are free to pick and choose the ones they will respect.

I conclude by noting that one aim of this commission may be found in the secretary's claim that "international institutions remain confused about their respective responsibilities concerning human rights." The reference was left vague, but I fear that, given this administration's withdrawal from the UN Human Rights Council for supposedly criticizing Israel too much, the asserted confusion may be a failure by other governments to fall lockstep into the administration's selective idea of what the enforcement of universal human rights should mean.

It is worth noting that while the administration's withdrawal from the Human Rights Council has contributed to a diminution of the US government's global influence and status as a defender of human rights, the council has remained strong in many areas even without the US presence. For example, for the first time, it condemned Venezuela, in large part because the effort was led by Latin American democracies rather than what Venezuela could have tried to pass off as a US imperialist endeavor. Iceland, which assumed the US seat, led a successful effort to condemn the mass summary executions spawned by the "drug war" of Philippine President Rodrigo Duterte, one of the autocrats whom President Trump has embraced. There have also been important steps taken on Myanmar, Syria, Iran, Burundi, Nicaragua, Yemen, Eritrea, and Belarus, and increasing scrutiny of China's mass abuses in Xinjiang. The reality is that any confusion about human rights rests not so much with international institutions as in this administration's commitment to defend them.

International political institutions are of necessity imperfect because they depend on the ability to secure the agreement of a majority of their members. The US pullout from the Human Rights Council means it is no longer there to stand up to those, like China, Russia, Venezuela, and Cuba, who seek to undermine most efforts to uphold human rights.

International human rights law may not perfectly align with the preferences of any particular government or political party, and it shouldn't. We all would be much worse off if we were to abandon legal instruments that bind all member states in favor of a selective approach that would reduce human rights from a limitation on governmental action to a take-it-or-leave-it option. The "inalienable rights" of all people would be dangerously compromised.

The US government's voice is needed on human rights—but it should be a voice that upholds the principled defense of all rights, not a pick-and-choose approach that reinforces the excuses offered by the world's most abusive governments.