

International Justice Clinic
University of California, Irvine School of Law
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April 12, 2020

Dear U.S. State Department Commission on Unalienable Rights,

As students and faculty of the International Justice Clinic at UC Irvine School of Law, we write to express our deep concern with the activities of the Commission on Unalienable Rights. We are alarmed by the Commission's work to date, as well as the potential harm that a final report produced by the Commission, in line with its mandate and the views expressed by several of its members, may have on well-established human rights and the international human rights movement.

As you know, the Commission is an advisory body that was organized and chartered by the Secretary of State under the Federal Advisory Committee Act. The purpose of the Commission, according to Secretary of State Mike Pompeo, is to identify which internationally recognized human rights are "unalienable" and which are "ad hoc," in apparent opposition to U.S. treaty and legal obligations and longstanding foreign policy positions.¹ From its inception, the Commission's mandate, the opaque process by which it came into being, the duplicative nature of the body vis-à-vis the State Department's legally authorized human rights bureau, the publicly stated views of several of its members, and the lack of diversity of expertise of its membership have deeply troubled hundreds of human rights organizations, international law scholars, and other concerned citizens, who previously asked that the Commission be disbanded.²

Over the past several months, the work of the Commission has only reinforced these concerns. To date, the Commission has held five meetings, during which it has heard from several invited witnesses. These meetings have been made accessible only to a small number of individuals who have been able to register in advance and dedicate up to six hours to observing the proceedings in person at the State Department in Washington, D.C. The Commission has largely ignored Federal Advisory Committee Act provisions requiring that all Commission records available to the general public. Indeed, it is only through the reporting of human rights advocates that the public has been made aware of the deeply troubling views expressed by several commissioners.

These views, as articulated, support one of our initial concerns; namely, that the Commission's objective is to produce recommendations that would narrow the scope of U.S. obligations under international human rights law and justify a ranking of rights that prioritize some, such as the right to freedom of religion, to the detriment of others. Given the past statements of several commissioners, including the body's chairperson, we remain concerned that the Commission's report may seek to justify the rolling back of hard-won advances in areas such as the rights of women, girls, and LGBTQ individuals.

¹ See Michael Pompeo, *Unalienable Rights and U.S. Foreign Policy*, Wall Street Journal, (July 7, 2019), <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448>.

² <https://www.humanrightsfirst.org/sites/default/files/Unalienable-Rights-Commission-NGO-Ltr.pdf>

The following discussion details a selection of our myriad concerns with the Commission. Such concerns are only amplified in the current moment: the COVID-19 pandemic implicates and necessitates the full spectrum of human rights for all people.³ This is a time for safeguarding rights — not unilaterally rewriting them to exclude protections for marginalized populations.

I. Subscription to a Hierarchy of Rights is Antithetical to Established International Law.

Based on comments made by members of the Commission during its meetings, we remain concerned that the Commission’s report will seek to distort the agreed-upon international human rights framework in a manner that may seek to establish a false and preferential hierarchy of rights. Some members of the Commission have openly discussed the “prioritization” of some rights over others.⁴ When raised, this discussion has mainly focused on prioritizing freedom of religion over other rights, such as the right to health or the right to be free from discrimination. The argument made by some individual commissioners, as well as by some of the testifying witnesses, is that freedom of religion sits atop “lesser” or subsidiary rights, and that the violation or infringement of these lesser rights must be tolerated in order to ensure the full protection of religious freedom.⁵ Another concern is that the Commission, and some witnesses, do not recognize social, economic, and cultural rights — or would relegate such rights to little if any real protection).

A prioritization of freedom of religion over the enjoyment of other human rights would constitute a violation of the United States’ binding obligations under human rights law. Although the international human rights framework does recognize a distinction between derogable and non-derogable rights (the former being rights that can be suspended in times of national emergency) it rejects any notion of a hierarchy of rights. As the Universal Declaration of Human Rights (UDHR) and subsequent human rights instruments make clear, human rights are interdependent, interrelated, and equal in importance.⁶ Indeed, it is axiomatic that “[t]he

³ See, e.g., *No exceptions with COVID-19: “Everyone has the right to life-saving interventions” – UN experts say*, OHCHR, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E>; *Covid-19 and Special Procedures*, OHCHR, <https://www.ohchr.org/EN/HRBodies/SP/Pages/COVID-19-and-Special-Procedures.aspx>.

⁴ During the Commission’s third meeting (held on 12/11/19), Commissioner David Pan responded to remarks by Michael Abramowitz of Freedom House regarding concerns over the Commission’s apparent desire to create a “hierarchy of rights,” asking Mr. Abramowitz if he would “support that same prioritization that we want to do.” The Commission also reproduced a discussion regarding the “prioritization” of rights in the published “minutes” of the third meeting. See <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-3/>.

⁵ Some members of the Commission have expressed this view repeatedly throughout their careers. For a sample of previous statements made by various commissioners, see the following articles: Jayne Huckerby, Sara Knuckey & Meg Satterthwaite, *Trump’s “Unalienable Rights” Commission Likely to Promote Anti-Rights Agenda*, Just Security, (July 9, 2019), <https://www.justsecurity.org/64859/trumps-unalienable-rights-commission-likely-to-promote-anti-rights-agenda/>; Masha Gessen, *Mike Pompeo’s Faith-Based Attempt to Narrowly Redefine Human Rights*, The New Yorker (July 10, 2019) <https://www.newyorker.com/news/our-columnists/mike-pompeos-faith-based-attempt-to-narrowly-redefine-human-rights>.

⁶ Article 5 of the 1993 Vienna Declaration specifically notes that “[a]ll human rights are universal, indivisible and interdependent and interrelated.” UN OHCHR, *Vienna Declaration and Programme of Action* (1993), available at <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>. See also Human Rights Committee, General Comment No. 12: Art. 1 (Right to Self-determination), U.N. Doc. HRI/GEN/1/Rev.6 (March 13, 1984); Committee

international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”⁷

Notably, expert testimony solicited and received by the Commission undermines the argument that the exercise of certain rights, such as freedom of religion, can be prioritized over enjoyment of others. For example, Ken Roth, Executive Director of Human Rights Watch, testified that the UN Human Rights Committee (the body that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) by its State parties) “has explained that freedom of thought, conscience, and religion does not protect religiously motivated discrimination against women or racial minorities.”⁸ In response, the commissioners indicated an unwillingness to accept such testimony, notwithstanding its recitation of established international law.⁹

II. International Law Makes Clear That All Human Rights Are Inalienable.

As invited witnesses have informed the Commission, the concept of “unalienable rights” has neither a clear legal nor Constitutional meaning. Indeed, the preamble of the UDHR refers to all human rights as “inalienable,” a concept also reflected in the working papers of the drafters of the UDHR. Refuting Secretary Pompeo’s purported rationale for the Commission’s creation, international law already identifies the scope, content, and obligations of human rights. The UDHR and the nine core human rights treaties, particularly the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), codify a set of human rights under widely recognized rules of international law. These instruments are the product of decades of multilateral negotiations and represent an international consensus regarding the nature and scope of human rights that bind the states that have ratified them. No state has the authority to unilaterally pick and choose between these rights and redefine the terms of the treaties.

Over the course of the Commission’s meetings, some commissioners have suggested that the international human rights framework is poorly defined or has been stretched to cover “new” rights. Some have also suggested that it is up to the Commission to differentiate between “alleged” rights and those rights that are “unalienable.”¹⁰ Yet, many of the human rights experts

on Economic, Social and Cultural Rights, General Comment No. 22 (right to sexual and reproductive health (Art. 12)), UN Doc. E/C.12/GC/22 (March 4, 2016).

⁷ *Vienna Declaration and Programme of Action* (1993), art. 5.

⁸ Ken Roth, *Prepared Testimony to Commission on ‘Unalienable’ Rights*, Human Rights Watch (Jan. 10, 2020), <https://www.hrw.org/news/2020/01/10/prepared-testimony-commission-unalienable-rights>. See also 2020 Report of the Special Rapporteur on freedom of religion or belief (Freedom of religion or belief and Gender Equality), A/HRC/43/48, available at <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx>.

⁹ Commissioners Berkowitz, Carozza, Tollefsen, Tse-Chien Pan, and Lantos Swett criticized Roth’s assertion that the rights of women and girls to receive sexual and reproductive healthcare, including access to abortion, should not be absolutely subjugated to the rights of those who would deny such care on the basis of their religious beliefs. In contrast, none of the Commissioners suggested that Mr. Roth’s position had merit, though it is understood to be an accurate representation of international human rights law by human rights advocates and experts. Complaint, *Robert F. Kennedy Human Rights et al. v. Pompeo*, No. 1:20-cv-02002, ¶¶ 84-85 (S.D.N.Y. filed March 6, 2020) available at <https://democracyforward.org/wp-content/uploads/2020/03/Complaint-As-Filed.pdf>.

¹⁰ During the Commission’s second meeting (held 11/1/2019), the Chair of the Commission, Mary Ann Glendon, stated that it was the responsibility of the Commission “to help the U.S. to think more clearly about alleged human rights”

who have testified before the Commission have demonstrated that the rights set forth by the international human rights framework are both inalienable and clearly identified.¹¹

Some commissioners have also indicated a reluctance to recognize economic, social, and cultural rights as “inalienable,”¹² or as having equal status to civil and political rights. Those commissioners’ stated positions are the product of a false dichotomy that views civil and political rights as independent and severable from economic, social, and cultural rights. International law has long rejected this narrative, recognizing that all rights of every classification — political, civil, economic, social, and cultural — are indivisible, interdependent, and on equal footing.¹³

III. Claims of Rights Proliferation Seek to Undermine Progress Made for Marginalized Populations.

Secretary Pompeo and several of the commissioners have purported to justify the Commission’s work by arguing that a “proliferation” of human rights claims has undermined “fundamental” individual rights, namely freedom of religion and freedom of speech.¹⁴ This argument is deeply misguided and supports widespread concerns within the social justice community that the Commission’s work will be cited as support for policies that would limit rights, including those of women, girls, and LGBTQ individuals.

The development of human rights law since 1948 has enhanced protections for more people across the globe. Through the painstaking work of social movements, scholars, civil society, and diplomats, the international community has adopted nine core human rights treaties — progeny of the UDHR. These treaties address the rights challenges faced by women, children, LGBTQ individuals, racial and ethnic minorities, persons with disabilities, migrants, and other marginalized groups, and represent a global consensus that certain groups face unique barriers to the full realization of the rights enshrined in the UDHR.

¹¹ See Sunstein, Cass R. “Rights and Citizenship.” U.S. Department of State’s Commission on Unalienable Rights Meeting, November 1, 2019. See also Ken Roth, *Prepared Testimony to Commission on ‘Unalienable’ Rights*, Human Rights Watch (Jan. 10, 2020), <https://www.hrw.org/news/2020/01/10/prepared-testimony-commission-unalienable-rights>; Michael Abramowitz, *Prepared Testimony, US Leadership in the Reinforcement of Human Rights*, Freedom House (Dec. 11, 2019), <https://freedomhouse.org/article/us-leadership-reinforcement-human-rights>.

¹² During the Commission’s second meeting (held 11/1/2019), commissioner Soloveichik pushed back against Professor Cass Sunstein’s assertion that the founding generation recognized certain economic rights as “unalienable,” noting that economic rights, such as the right to healthcare, can “clash with individual liberty” such as freedom of religion. Additionally, in a February 2019 article, Chairwoman Glendon advocated for the prioritization of “basic” set of rights that are “universal” in nature and articulated a list that did not include a single economic, social or cultural right. See Mary Ann Glendon, Seth Kaplan, *Renewing Human Rights*, First Things, (2019), <https://www.firstthings.com/article/2019/02/renewing-human-rights>.

¹³ See *Vienna Declaration and Programme of Action* (1993), art. 5.

¹⁴ Also during the Commission’s second meeting (held on 11/1/2019), chairwomen Glendon noted that the Commission was created to address the “proliferation” of rights and stated that “[t]his is one of the reasons to go back to basics, what rights are fundamental, it is right to say that proliferation of rights can lead to a situation where you’re either in paralysis or the currency is devalued where truly fundamental rights become meaningless. In his Wall Street Journal op-ed, Secretary Pompeo argued that a “proliferation of rights claims” has “unmoor[ed] us from the principles of liberal democracy.” See Michael Pompeo, *Unalienable Rights and U.S. Foreign Policy*, Wall Street Journal, (July 7, 2019), <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448>.

Contrary to the assertions of the members of the Commission, the adoption and application of human rights instruments have not resulted in new rights claims; the only “proliferation” that has occurred as a result of these conventions is that of greater equity for marginalized populations. Any efforts to scale back rights deemed excessive, superfluous, or “ad hoc” by the Commission would be to the detriment of such populations.¹⁵

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Unlike the work of the Commission thus far, a good faith review of the role of human rights in U.S. policy would necessarily focus on how the government could both improve its human rights record at home and promote greater protections abroad.¹⁶ Such an effort would *inter alia* reaffirm the U.S. government’s commitment to the international human rights framework; make clear that human rights are indivisible, interdependent, and enjoyed by all people; and make the promotion and protection of human rights a cornerstone of foreign policy. We urge the Commission to change course and work to bolster human rights, rather than unilaterally diminish them.

Sincerely
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Mary Hansel, Esq.
On behalf of the
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¹⁵ Further, any efforts to undermine the rights of marginalized populations based on a supposed “tension” between freedom of religion and such rights would contravene international law. During the Commission’s fourth meeting (held 1/10/20), Commissioners Peter Berkowitz, Christopher Tellefsen, and Katrina Lantos Swett, each suggested that a “tension” exists between women’s reproductive health rights and the free exercise of religion. However, U.N. human rights bodies have provided amply guidance on how to avoid such tensions. *See, e.g.*, Human Rights Committee, General Comment No. 36: Art. 6 (Right to Life), U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) (“States parties should not introduce new barriers and should remove existing barriers that 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.”)

¹⁶ As has been widely documented, the Trump administration has produced an abysmal policy record concerning internationally recognized human rights. Under the leadership of President Trump, Secretary Pompeo, and other cabinet members, the administration that chartered the Commission on Unalienable Rights has detained migrant children and separated them from their parents; denied individuals their legal right to seek asylum; facilitated widespread Saudi and Emirati war crimes in Yemen; downplayed human rights abuses in countries from North Korea to Central Asia to the Persian Gulf; actively rolled back reproductive health rights at home and abroad; verbally attacked the concept of a free press and individual reporters; and undermined America’s independent judiciary, among other actions.