

April 3, 2020

U.S. Department of State
Department of Policy Planning
Commission on Unalienable Rights
2201 C Street, NW
Washington, D.C. 20201

Submitted via state.gov

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

We are grateful for the opportunity to provide comments to the Commission on Unalienable Rights (“CUR” or “the Commission”) regarding its work and forthcoming report and recommendations. The CUR was established by Secretary of State Pompeo under the Federal Advisory Committee Act (“FACA”) with the aim to distinguish international human rights that are “unalienable” from those that are “ad hoc.”¹ The CUR will also provide guidance to the Secretary on where human rights discourse has purportedly departed from natural law and natural rights enshrined in the nation’s founding principles.²

The undersigned are scholars of law, political science, public policy, public health, psychology, and economics, among other fields, with substantial expertise related to human rights and discrimination generally, and the rights and well-being of lesbian, gay, bisexual, and transgender (“LGBT”) people in particular. Many of the undersigned are affiliated with the Williams Institute or the Promise Institute for Human Rights at the University of California at Los Angeles School of Law. The Williams Institute is a research center dedicated to conducting rigorous and independent academic research on sexual orientation and gender identity, including on the lived experience and well-being of LGBT people both inside the United States and globally, as well as rights and legal protections related to sexual orientation and gender identity. The Promise Institute is the center of human rights education, research, and advocacy at UCLA and around the region. The CUR’s mandate and opaque process, along with the publicly stated views of several CUR members, raise grave concerns about the underlying aims of the Commission and the potentially harmful impact its final recommendations could have for marginalized communities such as LGBT people.

Based on reporting from human rights advocates, as well as public statements by Secretary Pompeo and several Commission members, it appears that the objective of the CUR is to produce recommendations that would substantiate a ranking of rights that prioritize some rights – namely, freedom of religion – over others. Such determinations run counter to longstanding international legal obligations and foreign policies of the United States. Moreover, they risk endangering the lives of historically marginalized communities, such as women and people with

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> (accessed March 30, 2020).

² <https://www.federalregister.gov/documents/2019/05/30/2019-11300/departments-of-state-commission-on-unalienable-rights>

disabilities. This letter highlights the particular impact on LGBT people, especially in communities where U.S. support has helped advance the rights and improve the well-being of sexual and gender minorities.

I. There is no hierarchy of rights that privileges freedom of religion over enjoyment of other human rights.

Several CUR members have made comments during the public hearings that suggest the Commission's final recommendations will delineate a hierarchy of rights whereby some, such as freedom of religion, are fundamental and inviolable, while others are subsidiary and can be infringed upon for the protection of religious freedom.³ Through this lens, certain rights violations must be tolerated for the enjoyment of otherwise universal rights such as freedom of religion.⁴ At least one Commission member, Peter Berkowitz, has even argued that human rights themselves are derived from Christianity, effectively casting all rights as religious rights and elevating freedom of religion as primary and certain other rights as secondary.⁵

Adopting this hierarchical view of human rights would represent an abrogation of universally accepted international norms and a violation of the United States' obligations under international law. The Universal Declaration on Human Rights expressly states that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁶ Likewise, Article 5 of the Vienna Declaration and Programme of Action asserts that "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner."⁷ Even recognizing the diversity of historical, cultural, and religious contexts in which rights are claimed and applied, the Vienna Declaration maintains that states have a duty "regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."⁸ The United States, as a signatory, has a duty to promote and enforce all rights as equally important.

³ The Commission 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/>.

⁴ 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/> (accessed March 30, 2020); 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> (accessed March 30, 2020).

⁵ Peter Berkowitz, "Recovering the Christian Foundations of Human Rights," *Real Clear Politics*, April 20, 2019, https://www.realclearpolitics.com/articles/2019/04/20/recovering_the_christian_foundations_of_human_rights_140109.html (accessed March 30, 2020)

⁶ *Universal Declaration on Human Rights*, Paris, 10 December 1948, available from <https://www.un.org/en/universal-declaration-human-rights/> at Article 2.

⁷ United Nations Office of the High Commissioner for Human Rights, *Vienna Declaration and Programme of Action*, Vienna, 25 June 1993, available at <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>, at [Article 5](#).

⁸ *Ibid.*

II. The international human rights framework does not reflect a proliferation of rights but rather the equitable recognition of existing rights and duties.

Secretary Pompeo and several commissioners have argued that a supposed “proliferation” of human rights claims has undermined “fundamental” individual rights, such as freedom of religion and freedom of speech.⁹ Such claims could form the basis of policies that would limit the rights of marginalized communities, including LGBT individuals, who have increasingly made rights claims within the international human rights framework. That phenomenon does not reflect a proliferation of new rights but rather the belated application to individuals and communities of fundamental rights to which they have always been entitled.

The development of the international human rights architecture over time has not resulted in the recognition of new rights. Rather, the implementation of foundational treaties, such as the International Covenant on Civil and Political Rights (ICCPR) through the Human Rights Committee,¹⁰ and the advent of subsequent agreements like the Convention Against Torture (CAT) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), have broadened the scope of rights recognized and resulted in the more equal application of existing duties to states and the more equal extension of rights to more groups and individuals who, for historical, political, or other reasons, had previously been excluded.

Reflecting this universality, global human rights bodies have recognized the right to be free from discrimination on the basis of sexual orientation and gender identity. In March 2007, an eminent group of human rights experts, under the auspices of the International Commission of Jurists, released the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (“the Yogyakarta Principles”).¹¹ The group of 29 experts, representing 25 countries and all geographic regions, conducted a comprehensive mapping of international human rights law to identify how LGBT communities were already protected within existing human rights obligations and to affirm the duty of states to prevent discrimination and violence on the basis of sexual orientation and gender identity.¹² Similarly, in 2011, the United

⁹ 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>.

¹⁰ See, e.g. UNHRC, *Communication No. 1361/2005 (X v. Colombia)*, adopted 14 May 2007, CCPR/C/89/D/1361/2005, available at

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstcNDCvDan1pXU7dsZDBaDU7jDqMHGrMzXmdIB6IL%2bD6DQFkVHN36ckVamM%2b8U5W6OOvfHLesxqdgClrdKi0Ysr0th%2fzndtO%2fopsY6tp025SkXI m%2fjm4vKNTIn519dAHI6ffQxCqmby0F%2btUIXfFeQ%3d>.

¹¹ *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*, Geneva, 26 March 2007, available at <https://yogyakartaprinciples.org/>. In 2017, the Yogyakarta Principles were supplemented with 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, available at <http://yogyakartaprinciples.org/principles-en/yp10/>.

¹² Michael O’Flaherty and John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles,” *Human Rights Law Review* 8, no. 2 (2008): 207–248

Nations Human Rights Council adopted a resolution offered by South Africa, Brazil, and 39 co-sponsors that specifically recalled the universality of human rights enshrined in the UDHR, ICCPR, and ICESCR to express "grave concern at acts of violence and discrimination, in all regions of the world committed against individuals because of their sexual orientation and gender identity."¹³ And in 2016, the United Nations General Assembly expressly recalled the universality and interdependence of human rights law in adopting a resolution appointing an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, with a mandate to, among other things, "assess the implementation of *existing* international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps."¹⁴

Regional bodies have also recognized the universality of human rights protections for LGBT people. The Inter-American Commission on Human Rights has recognized that violence, prejudice, and discrimination violate the human rights of LGBT persons and have "specific and negative repercussions on the enjoyment and exercise of all their human rights, including their civil, political, economic, social and cultural rights."¹⁵ Likewise, the Inter-American Court of Human Rights has held that the American Convention on Human Rights and international human rights law prohibit discrimination on the basis of sexual orientation and gender identity when applied to family rights and the right to one's identity, including legal name change.¹⁶ Within Europe, multiple institutions, including the Council of Europe and the European Court of Human Rights, have linked European support for LGBT rights to universal values and a respect for fundamental rights, including freedom from discrimination.¹⁷ And for its part, the African Commission on Human and People's Rights grounded its 2014 resolution on "Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity" in the African Charter's broad prohibition against discrimination of any kind.¹⁸

¹³ (Human Rights Council, Res. 17/19 Human Rights, Sexual Orientation and Gender Identity, 2011, U.N. Doc. No. A/HRC/RES/17/19 (2011). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement>

¹⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/154/15/PDF/G1615415.pdf?OpenElement> (emphasis added).

¹⁵ <http://www.oas.org/en/iachr/reports/pdfs/LGBTI-RecognitionRights2019.pdf> at 18.

¹⁶ State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017), available at http://www.corteidh.or.cr/docs/opiniones/seria_24_eng.pdf. See also Atala and Duque.

¹⁷ Phillip Ayoub and David Paternotte, *LGBT Activism and the Making of Europe: A Rainbow Europe?* (Palgrave Macmillan, 2014).

¹⁸ African Commission on Human and People's Rights, ACHPR/Res.275(LV)2014: *Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*, 12 May 2014, available at <https://www.achpr.org/sessions/resolutions?id=322>.

III. The Commission’s work may benefit authoritarian regimes and further endanger the safety, well-being, and dignity of LGBT communities outside the United States.

By questioning the universality of human rights and prioritizing some rights over others, the Commission risks signaling to the international community that the U.S. government views the international human rights framework as open to reinterpretation as individual governments or public officials see fit. The Commission’s willingness to question the basic foundations of the human rights framework risks emboldening populist and authoritarian regimes that actively promote revanchist policies and apply culturally relativist interpretations of this framework to justify repression, further endangering already marginalized communities such as LGBT people.

Despite advances in recent years, consensual same-sex activity remains criminalized in 69 countries, and sexual and gender minorities remain at risk throughout the world.¹⁹ Political leaders increasingly denounce LGBT people and impose restrictions on organizations that advocate for—or are perceived as supporting—LGBT rights. LGBT human rights defenders are subject to arrest, and some states have even sought to expand criminal penalties for same-sex conduct.²⁰

Scholars have found that homophobic rhetoric is employed in diverse global contexts to a variety of ends. It provides a “ready rhetoric” of oppression that political actors can leverage in times of both crisis and calm.²¹ State actors can use homophobia for strategic ends such as deflecting attention from undemocratic activities or economic downturn,²² or promoting national identity when political regimes or physical borders are under threat.²³ Leaders may feel emboldened to use such rhetoric—or even act on these impulses—if they perceive that they will incur few if any costs for violating the rights of LGBT people.

LGBT people are harmed by what leaders say and do, for it has widespread implications and can shape public attitudes that negatively impact their health and well-being. Anti-LGBT rhetoric contributes to an environment of stigma and discrimination, which are associated with bullying and violence, physical and mental health problems, employment discrimination, and decreased rates of civic participation.²⁴ For example, after Russian President Vladimir Putin signed the 2013 “gay propaganda” law, the level of violence against LGBT people in the country

¹⁹ ILGA World: Lucas Ramon Mendos, *State-Sponsored Homophobia 2019: Global Legislation Overview Update* (Geneva: ILGA, December 2019). <https://ilga.org/ilga-launches-state-sponsored-homophobia-2019>

²⁰ See e.g., Adam Nossiter, “Nigeria Tries to ‘Sanitize’ Itself of Gays,” *The New York Times*, February 8, 2014, sec. World, <https://www.nytimes.com/2014/02/09/world/africa/nigeria-uses-law-and-whip-to-sanitize-gays.html>.

²¹ Meredith L. Weiss and Michael J. Bosia, *Global Homophobia: States, Movements, and the Politics of Oppression* (University of Illinois Press, 2013); Tara McKay and Nicole Angotti, “Ready Rhetorics: Political Homophobia and Activist Discourses in Malawi, Nigeria, and Uganda,” *Qualitative Sociology* 39, no. 4 (December 2016): 397–420, <https://doi.org/10.1007/s11133-016-9342-7>.

²² Weiss and Bosia 2013

²³ Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times*, Second edition, Next Wave (Durham: Duke University Press, 2017).

²⁴ Gregory M. Herek, “Confronting Sexual Stigma and Prejudice: Theory and Practice: Confronting Sexual Stigma and Prejudice,” *Journal of Social Issues* 63, no. 4 (November 28, 2007): 905–25, <https://doi.org/10.1111/j.1540-4560.2007.00544.x>.

substantially increased.²⁵ The CUR’s work, if ultimately relegating LGBT rights to a subsidiary status, would further stigmatize sexual and gender minorities and provide ample fodder for authoritarian leaders to target this already marginalized population.

IV. Failing to promote LGBT rights through U.S. foreign policy would reflect a departure from longstanding priorities and an abdication of global leadership.

Since 2011, LGBT rights have been an official component of U.S. foreign policy, ushered in with a presidential memorandum that mandated all government agencies “ensure that U.S. diplomacy and foreign assistance programs promote and protect the human rights of LGBT people.”²⁶ Then-Secretary of State Hillary Clinton declared that “gay rights are human rights, and human rights are gay rights,” presaging a slew of initiatives to promote LGBT rights abroad including the creation of the Global Equality Fund to finance activism and instructing U.S. ambassadors abroad to pursue LGBT equality in their engagement with local public officials. To be sure, such engagement by the United States was not without controversy, and some activists and commentators have lamented that U.S. policies sparked a backlash against progress on LGBT rights.²⁷ Yet, the Commission’s work could lead to a significant shift in U.S. foreign policy that would reflect a deeper retrenchment on global LGBT rights and an abdication of the United States’s role as a leader on these issues.²⁸ Such a decision would be misguided. As previously noted, LGBT people around the world continue to face violence and discrimination. While a change in approach may be warranted—to one privileging the leadership, priorities, and expertise of in-country stakeholders outside the United States—the diminution of political and financial support could imperil the health and well-being of LGBT people abroad.

V. Conclusion

For the foregoing reasons, the Commission on Unalienable Rights should refrain from prioritizing some rights as primary over other rights or relying strictly on a conception of natural rights to derive fundamental human rights. At a minimum, the CUR should continue public hearings in a more transparent, accessible manner and ensure a greater diversity of viewpoints are included in guiding the Commission’s final recommendations.

Respectfully submitted,

²⁵ Alexander Kondakov, “The Influence of the ‘Gay-Propaganda’ Law on Violence against LGBTIQ People in Russia: Evidence from Criminal Court Rulings,” *European Journal of Criminology*, November 11, 2019, <https://doi.org/10.1177/1477370819887511>. See also Alec Luhn, “Russian Anti-Gay Law Prompts Rise in Homophobic Violence,” *The Guardian*, September 1, 2013, sec. World news, <https://www.theguardian.com/world/2013/sep/01/russia-rise-homophobic-violence>.

²⁶ Presidential Memorandum – International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons, 6 December 2011, available at: <https://obamawhitehouse.archives.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-l>.

²⁷ Omar G. Encarnación, “The Global Backlash Against Gay Rights,” *Foreign Affairs*, May 2, 2017, <https://www.foreignaffairs.com/articles/2017-05-02/global-backlash-against-gay-rights>.

²⁸ Omar G. Encarnación, “Trump and Gay Rights,” *Foreign Affairs*, March 31, 2017, <https://www.foreignaffairs.com/articles/2017-02-13/trump-and-gay-rights>.

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