

CENTER *for* REPRODUCTIVE RIGHTS

NEW YORK

199 Water Street, Fl. 22
New York, NY 10038
TEL. (917) 637-3600

reproductiverights.org

Office of the Secretary
Policy Planning Staff
U.S. Department of State
Attention: Commission on Unalienable Rights
Harry S. Truman Building
2201 C St., NW
Washington, DC 20520
commission@state.gov

VIA ELECTRONIC SUBMISSION

July 29, 2020

RE: U.S. STATE DEPARTMENT COMMISSION ON UNALIENABLE RIGHTS

Introduction

The Center for Reproductive Rights respectfully submits this comment to the U.S. Department of State regarding the July 16, 2020 draft report of the Commission on Unalienable Rights. The Center is a global human rights organization that uses the power of the law to advance reproductive rights as fundamental human rights that governments around the world are obligated to protect, respect, and fulfill. Reproductive freedom lies at the heart of the promise of human dignity, self-determination, and equality embodied in both the U.S. Constitution and the Universal Declaration of Human Rights.

The Center reiterates the significant concerns raised by other human and civil rights organizations over the justifications underlying the creation of the Commission, the operation of the Commission, and the substance of the July 16, 2020 draft report. In this submission, the Center notes specific concerns regarding (1) the report's false characterization of the nature, limits, and foundations of human rights, which seeks to undermine the unequivocal consensus by U.N. human rights treaty bodies and independent experts that reproductive rights are human rights, and (2) the Commission's dangerous effort to establish a road map for prioritizing a certain subset of rights. The Center offers this submission as a supplement to its previous submission to the Commission, dated April 2, 2020.

The Center has a deep concern that the Commission is being used by the Administration as subterfuge for rolling back rights protections in the U.S. and globally for women, LGBTQI people, and other marginalized and vulnerable communities, and to further the Administration's ongoing effort to erase sexual and reproductive health and rights from the global human rights discourse. The State Department's efforts, through the Commission, to pick and choose which rights the United States will recognize and prioritize (through foreign and domestic policy)

compounds the Administration’s disengagement, de-prioritization, and rollback of human rights and marks a shameful and full retreat from any previous effort by the United States to champion the full spectrum of human rights protections, domestically and globally.

I. Reproductive Rights and Other Human Rights are Clearly Established and Articulated under International Law

- a. The Commission’s stated purpose and draft report advance a false narrative that there is “confusion” over the status of rights.

From its inception, the stated purpose of the Commission – to assess which human rights are “real” rights – has been deeply flawed. In justifying the creation of the Commission on Unalienable Rights, Secretary of State Pompeo pointed to both an alleged confusion over and a supposed proliferation of human rights and a need to clarify and confirm which claims of rights are “true.”¹ According to the Secretary, the Commission is necessary because “loose talk of ‘rights’” has resulted in human rights becoming unmoored from founding principles, “proliferating,” and being granted “ad hoc” in a way that detracts from “serious efforts” to protect fundamental freedoms,² suggesting that international human rights law has developed in a way that is unprincipled and improvised.³ The Commission’s report reiterates this justification.

Yet, this justification is built on falsity. Human rights have not proliferated in an ad hoc and confused fashion. Rather, historically marginalized social groups have increasingly sought to ensure that the core rights contained in the UDHR and international covenants are extended to all people equally. The Commission’s report dismisses well-established law to weaponize the effort to secure equal access to rights for all.

- b. International law clearly articulates fundamental human rights protections, including reproductive rights.

In addition to undermining efforts to ensure rights protection generally, the false claim of confusion over the status and proliferation of human rights has been used repeatedly by the State Department and other federal agencies to undermine reproductive rights, specifically.⁴

The Commission’s draft report doubles down on this dangerous narrative. Throughout the report, the Commission falsely claims that abortion lacks any

¹ Michael P. Pompeo, Opinion, *Unalienable Rights and U.S. Foreign Policy*, WALL STREET J. (July 7, 2019, 3:07 PM), <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448>.

² *Id.*

³ *Id.*

⁴ See Submission by Center for Reproductive Rights to U.S. State Department, April 2, 2020 (pp. 3-4).

protection under human rights law and ominously warns of the dangers of extending such recognition. Specifically, the report states that abortion is an area in which there are “conflicting interpretations of human rights claims” (p 7) and characterizes abortion as a “divisive social and political controversy in the United States,” suggesting that it is a “contestable political preference” and not a basic right (p 25). The report warns that efforts to “cloak” such contestable political preferences as human rights and protect them in court threatens the protection of unalienable rights. And it asserts that “prodigious expansion of human rights has weakened rather than strengthened the claims of human rights and left the most disadvantaged more vulnerable” (p 39).

The report does this through a brazen and dangerous discrediting of binding human rights treaties and the well-established authority of UN human rights treaty bodies. The report dismisses and ignores the mandate of the core human rights treaties negotiated among states, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, to codify human rights under widely recognized rules of international law. Yet these treaties are the product of decades of multilateral negotiations and represent an international consensus regarding the scope of human rights.

Despite its best efforts, the report cannot wish away the clear and unequivocal consensus that reproductive rights are human rights. The human rights treaty bodies have consistently recognized and protected reproductive rights grounded in the Universal Declaration of Human Rights as a component of and essential to the realization of fundamental human rights, including the rights to health, life, equality, information, education, privacy, freedom from discrimination and violence, and freedom from torture and cruel, inhuman and degrading treatment.⁵

For example, the Human Rights Committee has repeatedly recognized that the state obligation to ensure reproductive autonomy arises from the right to privacy enshrined in Article 17 of the International Covenant on Civil and Political Rights (ICCPR),⁶ a treaty ratified by the United States. The Committee has also made clear that the right to life, contained in Article 6 of the ICCPR, includes the right to access comprehensive reproductive health care, including safe and legal abortion without the imposition of restrictions which subject women and girls to physical or mental pain or suffering, discriminate against them or arbitrarily interfere with their

⁵ See *Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights 2020*, CTR. FOR REPROD. RTS. (2019), <https://reproductiverights.org/sites/default/files/documents/Breaking-Ground-2020.pdf>.

⁶ See e.g., *Siobhán Whelan v. Ireland*, Human Rights Committee, Commc’n No. 2425/2014, para. 7.8-7.9, U.N. Doc. CCPR/C/119/D/2425/2014 (2017); *Amanda Jane Mellet v. Ireland*, Human Rights Committee, Commc’n No. 2324/2013, para. 7.7-7.8, U.N. Doc. CCPR/C/116/D/2324/2013 (2016); *K.L. v. Peru*, Human Rights Committee, Commc’n No. 1153/2003, para. 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); *L.M.R. v. Argentina*, Human Rights Committee, Commc’n No. 1608/2007, para. 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).

privacy, or place them at risk of undertaking unsafe abortions.⁷ Indeed, the Human Rights Committee has developed significant jurisprudence regarding the right to access safe and legal abortion.⁸

Other treaty bodies have likewise made clear that reproductive rights are human rights. The Committee on Economic, Social and Cultural Rights (CESCR Committee) has clearly articulated that the right to the highest attainable standard of health, enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, includes the right to sexual and reproductive health.⁹ The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has stated that the right to autonomy “requires measures to guarantee the right to decide freely and responsibly on the number and spacing of their children,”¹⁰ as reflected in Article 16 of CEDAW.¹¹ The CEDAW Committee has moreover stated that “it is discriminatory for a State party to refuse to provide legally for the performance of certain

⁷ Human Rights Committee, *General Comment No. 36 on the Right to Life*, para. 8, U.N. Doc. CCPR/C/GC/36 (2018) [hereinafter Human Rights Committee, *Gen. Comment No. 36*].

⁸ For example, in 2016 and 2017, the Human Rights Committee issued decisions in cases challenging Ireland’s abortion restriction under the ICCPR, holding that Ireland’s abortion restrictions violated the rights to be free from cruel, inhuman, or degrading treatment, to privacy, and to equality before the law. The Committee affirmed that laws that prohibit abortion and thereby force women to choose between continuing a pregnancy and travelling to another country to access legal abortion services can cause anguish and suffering, noting the financial, social, and health related burdens and hardships that are placed on women in such situations. *Siobhán Whelan v. Ireland*, Human Rights Committee, Commc’n No. 2425/2014, para. 7.5-7.7, 8, U.N. Doc. CCPR/C/119/D/2425/2014 (2017); *Amanda Jane Mellet v. Ireland*, Human Rights Committee, Commc’n No. 2324/2013, para. 7.4-7.6, 8, U.N. Doc. CCPR/C/116/D/2324/2013 (2016); *see also e.g.*, Human Rights Committee, *Concluding Observations: Angola*, para. 21-22, U.N. Doc. CCPR/C/AGO/CO/2 (2019); *Poland*, para. 24(a), U.N. Doc. CCPR/C/POL/CO/7 (2016); *Colombia*, para. 21, U.N. Doc. CCPR/C/COL/CO/7 (2016); *L.M.R. v. Argentina*, Human Rights Committee, Commc’n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); *K.L. v. Peru*, Human Rights Committee, Commc’n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

⁹ CESCR Committee, *General Comment No. 22: (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 11–21, U.N. Doc. E/C.12/GC/22 (2016) [hereinafter CESCR Committee, *Gen. Comment No. 22*].

¹⁰ CEDAW Committee, *Decision 57/II Statement by the Committee on the Elimination of Discrimination against Women on sexual and reproductive health: Beyond the 2014 review of the International Conference on Population and Development*, at 85, U.N. Doc. A/69/38 (2014).

¹¹ Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, art. 16(e), G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980), U.N.T.S. 13 (*entered into force* Sept. 3, 1981).

reproductive health services for women.”¹² And the Committee Against Torture (CAT Committee) has found that denying or delaying safe abortion or post-abortion care, in particular, may amount the torture or cruel, inhuman or degrading treatment.¹³

This Administration has a clear ideological opposition to abortion. But it cannot unilaterally rewrite human rights law by choosing to ignore the clear consensus by the human rights treaty bodies that reproductive rights, including abortion, are protected human rights.

II. The Right to Access Sexual and Reproductive Health Services cannot be De-Prioritized

Secretary of State Pompeo also justified the Commission as necessary to resolve purported “tension” and alleged conflict between rights.¹⁴ Throughout the hearings, Commission members echoed these alleged concerns. Members of the Commission both questioned whether the U.S. should “prioritize all rights equally, or choose some over others,”¹⁵ and described rights in competitive, zero sum terms.

While paying lip service to concepts of universality, indivisibility, interrelatedness, and interdependence, the report nevertheless very clearly articulates justifications and possibilities for how governments can and should prioritize rights. In doing so, it sets forth a dangerous road map for creating a hierarchy of human rights that the U.S. seeks to protect, with religious freedom and property rights at the apex. By calling for the de-prioritization of certain rights, the report invites governments, including the United States, to undermine human rights obligations and violate individual liberties, including in the area of sexual and reproductive rights.

This, too, is exemplary of the Commission’s effort to unilaterally re-write human rights law. Human rights treaty bodies and experts consistently emphasize that the right to freedom of thought, conscience, and religion is not unfettered.¹⁶ It

¹² CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20th Sess., 1999), para. 11, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*].

¹³ CAT Committee, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, para. 46, U.N. Doc. CAT/C/GBR/CO/6 (2019).

¹⁴ “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.” Secretary of State Michael R. Pompeo Remarks to the Press (July 8, 2019), <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/>.

¹⁵ During the Commission’s fourth public hearing, Commissioner David Pan asked whether a U.S. foreign policy approach should prioritize all rights equally, or choose some over others. *See* Meeting Notes (not for public distribution).

¹⁶ *See, e.g.*, Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, para. 8, U.N.Doc.

CCPR/C/21/Rev.1/Add.4 (1993) (“Article 18.3 permits restrictions on the freedom to

does not provide for the manifestation of conscience or religion in a manner that gives rise to gender discrimination or jeopardizes or nullifies the rights of others to timely access quality sexual and reproductive health care, and it cannot serve as a justification for stigmatizing or discriminating against people seeking access to these services.¹⁷ The UN Special Rapporteur on freedom of religion or belief has noted concern with the particular ways in which institutions, including within the U.S., seek exemptions to laws and policies that protect gender equality and non-discrimination, on the ground that compliance conflicts with their faith. Examples of this phenomenon include refusals to perform abortions, fill prescriptions for contraceptives, or perform gender affirming care, as well as refusals to provide services consistent with antidiscrimination laws.¹⁸ Indeed, human rights treaty monitoring bodies have made clear that human rights require States to ensure that individuals are able to access lawful reproductive health services without hindrance, delay, or stigma, including those caused by refusals of care based on conscience or religion.¹⁹

Here, too, the Commission cannot wish away this analysis or authoritative interpretation simply because it does not match the Administration's ideological or political agenda.

Conclusion

The Commission on Unalienable Rights has always been a solution in search of a problem. With its asserted purpose of examining human rights in light of

manifest religion or belief if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26.”)

¹⁷ See *id.*; Human Rights Committee, *Gen. Comment No. 36 (2018)*, *supra* note 7, para. 8; CESCR Committee, *Gen. Comment No. 22*, *supra* note 9, para. 14, 43; CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 12, para. 11; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Interim rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, para. 24, 65(m), U.N. Doc. A/66/254 (2011) [hereinafter SR Health, 2011 *Interim Report*].

¹⁸ Human Rights Council, *Freedom of religion or belief- Report of the Special Rapporteur on freedom of religion or belief*, paras. 44-45, U.N. Doc. A/HRC/43/48 (2020).

¹⁹ CESCR Committee, *Gen. Comment No. 22*, *supra* note 9, para. 11- 21, 43; Human Rights Committee, *Gen. Comment No. 36*, *supra* note 7, para. 8; CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 12, para. 11, 13; SR Health, 2011 *Interim Report*, *supra* note 17, para. 22, 24.

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“foundational documents” to clarify which rights it considers to be “real,”²⁰ the Commission undermines the international human rights system and furthers the false narrative that certain rights, including reproductive rights, have no basis in international human rights as a way of undermining rights protections for all. Yet, international human rights law makes clear that reproductive rights are human rights. The prioritization of the right to religious freedom over other human rights, including reproductive rights, violates international law and undermines or nullifies the rights of others, including the right reproductive health care services free from barriers, discrimination, stigma, or coercion.

Any effort to pick-and-choose which rights the United States protects undermines the core tenets of universality and interrelatedness and erodes rights protections for marginalized and vulnerable communities around the world. Human rights are not specific to a particular country, and they do not exist in the eye of the beholder. The report’s effort to develop such a pick-and-choose approach compounds the Administration’s disengagement, de-prioritization, and rollback of human rights and sets a dangerous precedent for other countries seeking to undermine rights protections.

As detailed in the Center’s April 2, 2020 submission, the Commission itself also undermines principles of transparency and accountability, as required under United States federal law. The Commission runs afoul of federal law and regulations by unnecessarily duplicating an existing government bureau, by failing to follow required process, and by failing to have a balanced membership.

Given the inherent illegitimacy of the Commission, the draft report should be disregarded. And, for the reasons set forth above, the report should also be understood as a threat to decades of progress globally in ensuring rights protections for women, LGBTQI people, and other marginalized communities.

²⁰ Secretary of State Michael R. Pompeo Remarks to the Press (July 8, 2019), <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/>. The Federal Register notice of intent to establish the Commission states that the Commission “will provide fresh thinking about human rights discourse where such discourse has departed from our nation’s founding principles or natural law and natural rights.” Department of State Commission on Unalienable Rights, 84 Fed. Reg. 25,109 (May 30, 2019), <https://www.federalregister.gov/documents/2019/05/30/2019-11300/departments-of-state-commission-on-unalienable-rights>.