



Department of State Commission on Unalienable Rights
C/O Mr. F. Cartwright Weiland, Office of Policy Planning
Prof. Mary Ann Glendon, Chair
US Department of State
2201 C Street NW
Washington, DC 20520

May 19, 2020

Dear Members of the US State Department Commission on Unalienable Rights,

As a human rights non-governmental organization, we write to express our deep concern with the Commission, its work to date, and 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 the international human rights framework.

In particular, based on comments made by members of the Commission during public hearings, we are concerned that the Commission's final report will aim to reinterpret the agreed-upon international human rights framework in a manner that regresses on clearly recognized and protected rights, including through the establishment of interpretations that are at odds with those from human rights bodies, experts, and courts, and may seek to establish a false and preferential hierarchy of rights. Any hierarchy that privileges some human rights - such as the freedom of religion - to the exclusion of others - such as sexual and reproductive rights, is fundamentally contrary to the framework of modern human rights, including as set out in the Universal Declaration of Human Rights ("UDHR"). Finally, we have strong concerns with regards to the Commission's approach to sexual and reproductive rights, which is the particular focus of this submission.

With this letter we wish to reiterate that the international human rights law framework already adequately defines human rights; in particular, within that framework access to safe abortion has become firmly entrenched as a protected right.

I. International human rights law framework already adequately defines human rights

Despite Secretary Pompeo's stated purpose for establishing the Commission, the international human rights law framework already adequately identifies the scope, content, and obligations that arise from the human rights contained within the framework. The UDHR and the nine core human rights treaties, particularly the International Covenant on Civil and Political Rights ("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. The product of decades of multilateral negotiations, these treaties represent an international consensus regarding the scope of human rights, and where the United States is a party, binding obligations.

In addition, it is a fundamental principle of the human rights framework that it is not up to any one country to determine what is or is not a human right. Universal human rights norms exist to hold

states accountable: they cannot be defined, redefined, or limited based on the demands or viewpoints of a single government.

Over the course of the Commission’s public hearings, some Commissioners have suggested that the 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 claims and those rights that are “unalienable.”¹ Yet, many of the various human rights experts and academics who have testified before the Commission have demonstrated that the rights of the human rights framework are both inalienable and clearly identified in the aforementioned core human rights treaties, and that the various treaty bodies have an important role in the interpretation and application of the human rights provided by these treaties.²

Rather than ignoring this already well-established international human rights framework, the United States should reaffirm its commitments to the framework, as defined by the UDHR and the subsequent human rights treaties. Additionally, the United States must take seriously and engage meaningfully with its own obligations under this framework - notably taking into account the rights recognized under the treaties to which it is a party, such as the ICCPR, and ratify without reservations, understandings or declarations, those core human rights treaties to which it is not a state party.

II. Abortion as a protected right under international human rights law

As an important part of this international human rights framework, access to safe abortion has become firmly entrenched as a protected right.³ At a minimum, under human rights standards, “[s]tates have an obligation to refrain from the use of criminal law to punish women for ending a pregnancy, as well as to repeal restrictive laws and policies which put women and girls’ health, safety and lives at risk.”⁴

International and regional treaties that are now considered to protect access to abortion include the ICCPR and the Convention against Torture and Others Forms of Cruel, Inhuman and Degrading Treatment or Punishment (“CAT”).⁵ Under these treaties, abortion is protected as a matter of a

¹ 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”

² 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>.

³ United Nations Working Group on the issue of discrimination against women in law and in practice, Policy Paper: Women’s Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends (Oct. 2017), <https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf> [hereinafter Women’s Autonomy].

⁴ United Nations Office of the High Commissioner for Human Rights, *All states must ensure access to safe and legal abortion as a matter of human rights, say UN experts* (Sept. 28, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25066&LangID=E>.

⁵ See e.g. U.N. Human Rights Committee, *Mellett v. Ireland: Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2324/2013*, U.N. Doc. CCPR/C.116/D/2324/2013 (Jun. 9, 2016). Other treaties that protect abortion access include: International Covenant on Economic Social and Cultural Rights

multitude of complementary and intersecting rights, including to health, life, non-discrimination, privacy, and to be free from torture or cruel, inhuman, or degrading treatment.⁶ Most recently, the Human Rights Committee, which monitors compliance with the ICCPR (by which the United States is bound), stated in its General Comment on the right to life that:

Restrictions on the ability of women or girls to seek abortion must not, *inter alia*, jeopardize their lives, subject them to physical or mental pain or suffering which violates article 7, discriminate against them or arbitrarily interfere with their privacy. 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 is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions, and they should revise their abortion laws accordingly.⁷

In addition, a number of human rights experts have begun to recognize that the denial of access to abortion and criminal abortion laws may violate additional state obligations beyond those discussed above. For example, the United Nations (“UN”) Special Rapporteur on extrajudicial, summary or arbitrary executions has found that absolute abortion bans can amount to a gender-based arbitrary killing by a state,⁸ and that conditional access to abortion may constitute an arbitrary deprivation of life.⁹ Similarly, the UN Working Group on discrimination against women in law and in practice has found that the right to safe abortion services is an “equality right.”¹⁰

The human rights treaties under which the United States is bound, including the ICCPR and CAT, have made clear that abortion is protected under their provisions. In addition, as a signatory to other treaties that protect abortion, including the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), and the Convention on the Rights of the Child, the United States may not take any actions that “defeat the object and purpose” of that treaty.¹¹ In a treaty like CEDAW, where access to sexual and reproductive rights, including abortion, has been found to be fundamental not only to its specific provisions, but also its central obligation

(“ICESCR”); Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”); Convention on the Rights of the Child (“CRC”); European Convention on Human Rights; Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and American Convention on Human Rights.

⁶ Center for Reproductive Rights, *Safe and legal abortion is a woman's human right*, (Oct. 2011), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Safe%20and%20Legal%20Abortion%20is%20a%20Womans%20Human%20Right.pdf>.

⁷ Human Rights Comm., General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

⁸ Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, ¶ 94, U.N. Doc. A/HRC/35/23 (Jun. 6, 2017).

⁹ *Id.* at ¶ 95.

¹⁰ Women's Autonomy, *supra* note 6.

¹¹ Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, U.N.T.S. 1155.

to eliminate discrimination and ensure equality,¹² a strong argument exists that barriers to safe abortion would violate the object and purpose of the treaty.

By contrast to the clear understanding of abortion as a fundamental right by the established international human rights system, Commissioners - both in Commission meetings and in their own writings - have consistently taken a contrary view, including as it relates to other rights. For example, during one of the Commission's recent meetings speaker Kenneth Roth, Executive Director of Human Rights Watch, asserted 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. Concerningly, Commissioners Berkowitz, Carozza, Tollefsen, Tse-Chien Pan, and Lantos Swett sharply criticized Mr. Roth's assertion;¹³ however, such a critique is in stark contrast to the established position of the human rights field.¹⁴ Significantly, as international human rights law confirms, "no human right may be invoked to destroy another human right."¹⁵

Despite these clear and consistent calls from human rights treaty bodies and experts, rather than work to improve its human rights record, the US government continues to violate its human rights obligations related to abortion, assert that there is no "international consensus" on abortion,¹⁶ and take increasingly regressive steps to undermine this fundamental aspect of the international human rights regime. Most recently, in the midst of the COVID-19 pandemic, the USAID acting Administrator wrote to UN Secretary-General Antonio Guterres to urge that the United Nations remove references to "sexual and reproductive health" from the UN's Global Humanitarian Response Plan.¹⁷

The definition and scope of what constitutes a human right is not purely an academic matter, but rather one that has implications for the lived realities of individuals around the world. For example, US policies on abortion have had and continue to have dire, often lethal, consequences for women and girls in the United States and around the world. The World Health Organization has estimated

¹² Committee on the Elimination of All Forms 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, ¶ 21, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

¹³ Complaint at 84, Robert F. Kennedy Center for Justice and Human Rights et al. v. Pompeo, No. 1:20-cv-02002, (S.D.N.Y. March 6, 2020), available at <https://democracyforward.org/wp-content/uploads/2020/03/Complaint-As-Filed.pdf>.

¹⁴ See Human Rights Council, Report of the Special Rapporteur on freedom of religion or belief, U.N. Doc. A/HRC/43/48 (Feb. 27, 2020) ("[Former Special Rapporteur on freedom of religion or belief] Heiner Bielefeldt similarly concurred that "freedom of religion or belief can never serve as a justification for violations of the human rights of women and girls". (A/68/290 para 30)).

¹⁵ *Id.* at ¶ 61 (citing Article 30 of the Universal Declaration of Human Rights ("UDHR") and Article 5 of the International Covenant on Civil and Political Rights ("ICCPR")).

¹⁶ See Alexander M. Azar, U.S. Sec'y of Health & Human Services, *Remarks on Universal Health Coverage*, U.N. General Assembly Press (Sept. 23, 2019), <https://www.hhs.gov/about/leadership/secretary/speeches/2019-speeches/remarks-on-universal-health-coverage.html>.

¹⁷ USAID, *Acting Administrator John Barsa Letter to UN Secretary General Guterres* (May 18, 2020), <https://www.usaid.gov/news-information/press-releases/may-18-2020-acting-administrator-john-barsa-un-secretary-general-antonio-guterres>.

that approximately 45%, or 25 million, of annual abortions are “unsafe,” and unsafe abortion remains a leading cause of maternal mortality around the world.¹⁸

The work of the Commission to date does nothing to reassure that this regressive trajectory that puts the United States out of compliance with its human rights record will be meaningfully addressed, nor that it will include recommendations focused on how US foreign policy can be consistent with, not antithetical to, its fundamental human rights obligations.

On behalf of the Global Justice Center, I am grateful for the opportunity to provide this written submission to the Commission on Unalienable Rights. I welcome an opportunity to discuss any of the concerns raised in this letter in additional depth.

Sincerely,



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President
Global Justice Center

¹⁸ World Health Organization, *Worldwide, an estimated 25 million unsafe abortions occur each year* (Sept. 28, 2017), <https://www.who.int/news-room/detail/28-09-2017-worldwide-an-estimated-25-million-unsafe-abortions-occur-each-year>.