



Comment to Commission on Unalienable Rights Human Rights Watch July 2020

On June 16, 2020, the United States State Department released the draft Report of the Commission on Unalienable Rights. Since the formal announcement of the commission's creation, Human Rights Watch has expressed concern about its mandate and the dangerous precedent that it sets by purporting to unilaterally assess the validity and importance of internationally recognized human rights. We conveyed our position in oral and written testimony before the commission,¹ a letter with partner organizations from civil society,² and a formal submission outlining our concerns.³

With other organizations, we also remain concerned that the commission itself was not representative of the human rights community, did not take testimony from the full scope of the human rights community, and did not consider in its scope the range of issues the human rights framework aims to address.⁴ Agreed-upon mechanisms for interpreting human rights obligations of states already exist at international and regional levels. The supposed gap the commission was created to fill is one that does not exist; therefore, the premise is dubious and its work duplicative.⁵

Nevertheless, Human Rights Watch has reviewed the commission's draft report and wishes to share further concerns about the scope of its work and the stances it has taken toward internationally recognized human rights.

¹ Kenneth Roth (Human Rights Watch), "Prepared Testimony to Commission on 'Unalienable' Rights," January 10, 2010 <https://www.hrw.org/news/2020/01/10/prepared-testimony-commission-unalienable-rights>.

² Letter from Human Rights Watch and 166 other groups and individuals to the Commission on Unalienable Rights, "Groups Express Grave Concern about the Commission on Unalienable Rights," May 1st, 2020, <https://www.hrw.org/news/2020/05/01/groups-express-grave-concern-about-commission-unalienable-rights>.

³ Human Rights Watch Submission to the Commission on Unalienable Rights, May 5, 2020 https://www.hrw.org/sites/default/files/media_2020/05/HRW%20Submission%20to%20Commission%20on%20Unalienable%20Rights_May%202020.pdf.

⁴ Robert F. Kennedy Center for Justice and Human Rights, Center for Health and Gender Equity, Community Initiatives, and Global Justice Center vs. Michael Pompeo, Peter Berkowitz, and United States Department of State, case no. 1:20-cv-02002, Brief of Amici Curiae of Human Rights Watch et al, filed June 9, 2020, <https://ajws-americaniewishwo.netdna-ssl.com/wp-content/uploads/2020/06/06.09.20-51-Amicus-Brief.pdf> (accessed July 29, 2020).

⁵ Moreover, we remain concerned that the creation of the Commission itself was in violation of the Federal Advisory Committee Act. See footnote 4.

I. Misplaced Focus of the Commission

When the commission was announced, Human Rights Watch expressed concerns that it was a misguided enterprise with the potential to undermine human rights protections that governments found disagreeable. As the commission concludes its work, we continue to question its value and have increasing concerns about the repercussions that its work may have on the universality and efficacy of human rights protections and on the institutions designed to oversee compliance and implementation.

As human rights advocates have pointed out, the commission was an unnecessary enterprise. The world has no shortage of actors who aim to weaken existing protections or call internationally recognized rights into question. Too often, that has included the United States. In recent years, the United States has moved sharply away from its longstanding if inconsistent role of seeking to advance human rights worldwide. Its decisions to withdraw from the United Nations Human Rights Council,⁶ stonewall UN human rights experts,⁷ make an extraordinary threat of vetoing a UN Security Council resolution on women, peace, and security because it mentioned survivors' sexual and reproductive health and rights,⁸ and terminate funding for multilateral bodies like the United Nations Population Fund,⁹ UNESCO,¹⁰ and the World Health Organization¹¹ that help advance rights to education and health worldwide have removed the United States as a key player on global human rights issues. The United States State Department's creation of the Commission on Unalienable Rights purports to scrutinize well-grounded rights and obligations and reinterpret them in a way that deprives certain human rights but poses a risk to all rights. The United States should prioritize fulfilling its commitments, not redefining them to fulfill the wishes of a few.

The commission is not only a question of misplaced priorities, but threatens to do real harm. It sets dangerous precedent that countries should decide which internationally recognized rights are or are not valid. The commission's report focuses on unique features of the United States' own

⁶ "UN: US Retreat from Rights Body Self-Defeating," Human Rights Watch news release, June 19, 2019, <https://www.hrw.org/news/2018/06/19/un-us-retreat-rights-body-self-defeating>.

⁷ Ed Pilkington, US halts cooperation with UN on potential human rights violations, *Guardian*, January 4, 2019, <https://www.theguardian.com/law/2019/jan/04/trump-administration-un-human-rights-violations> (accessed July 29, 2020).

⁸ "US Stance at UN a Backward Step on Women's Rights," Human Rights Watch news release, April 25, 2019, <https://www.hrw.org/news/2019/04/25/us-stance-un-backward-step-womens-rights>.

⁹ Amanda Klasing, Elisa Epstein, "US Congress Should Pass Law to Protect Women's and Girls' Rights Around the World," commentary, Human Rights Dispatch, October 21, 2019, <https://www.hrw.org/news/2019/10/21/us-congress-should-pass-law-protect-womens-and-girls-rights-around-world>.

¹⁰ "US loses Unesco voting rights after stopping funds over Palestine decision," *Associated Press*, November 8, 2013, <https://www.theguardian.com/world/2013/nov/08/us-unesco-voting-funds-palestine-decision> (accessed July 29, 2020).

¹¹ Yanzhong Huang, "Trump's decision to pull U.S. out of WHO will boost China's influence," *The Washington Post*, June 23, 2020, <https://www.washingtonpost.com/politics/2020/06/23/trumps-decision-pull-us-out-who-will-boost-chinas-influence/> (accessed July 29, 2020).

rights tradition, indicating that this should be a guidepost for divining which rights are unalienable and which are not. As human rights advocates are painfully aware, however, appeals to history and tradition are frequently abused by governments to justify their rejection of internationally recognized human rights norms. The commission's report not only is a template for the United States to shy away from its international commitments but also provides a blueprint for other countries to do the same. Such an approach is likely to fragment and weaken the international human rights system, not strengthen or revitalize it. The report does all of this while ignoring the role the United States has played in what it terms the "decline" of human rights culture.

II. Misplaced Guideposts of the Report

From the outset, the Commission on Unalienable Rights was tasked with rethinking human rights policy in line with the Declaration of Independence and the Universal Declaration of Human Rights.¹² While both of these documents are foundational, particularly in the rights tradition of the United States, they are statements of principle, not obligation. Using these documents without also considering relevant human rights treaties and other sources of international law to guide human rights policy leads to a distorted understanding of the United States' binding international obligations and commitments.

The commission's report offers a lengthy history of concepts of rights throughout United States history, devoting a substantial portion of the report to the Declaration of Independence and the values of the Founders. The report spends far less time on other rights that have been recognized and affirmed throughout United States history. Relative to the Declaration of Independence, it spends little time on the adoption of the Constitution, the Bill of Rights, the Reconstruction Amendments, the enfranchisement of women, the strengthening of due process under the Warren Court, the passage of the Civil Rights Act, Fair Housing Act, and Americans With Disabilities Act, and jurisprudence recognizing the right to reproductive autonomy and the rights of lesbian, gay, bisexual, and transgender people. Similarly, it does little to acknowledge increased recognition over the years of economic and social rights as central to human rights discourse. These achievements are products of strong social movements that are also part of the story of human rights in the United States and elsewhere.

A narrow focus on the aspirations of the Universal Declaration of Human Rights threatens to overshadow the binding human rights commitments that the United States has adopted. The

¹² Transcript of News Conference, United States Secretary of State Michael Pompeo, July 16, 2020, <https://www.state.gov/unalienable-rights-and-the-securing-of-freedom/> (accessed July 29, 2020).

United States has ratified and is bound by core human rights treaties.¹³ It has also signed but not ratified the International Covenant on Economic, Social and Cultural Rights and other agreements,¹⁴ obligating the United States to refrain from acts that would defeat the object and purpose of those treaties. United States obligations under core human rights treaties coexist with other commitments the United States has made to respect, protect, and fulfill human rights, which are largely absent from the commission's report. The commission's focus on the Universal Declaration of Human Rights neglects these many binding and nonbinding commitments that the United States has made in the 70 years that followed, as well as customary international law binding on all countries, to the detriment of the full range of human rights that people enjoy.

III. Misplaced Concern of the Recommendations

In recent years, human rights advocates have warned – and the report of the commission acknowledges – that the human rights project is facing significant challenges. The challenges it faces, however, are not a matter of too many people seeking or claiming their rights. Instead, they are challenges that arise from autocratic or authoritarian governments that have denied fundamental rights, silenced vulnerable populations, and diminished the institutions and civil society groups that protect human rights from erosion.

For human rights to be meaningful, governments need to be held accountable to international standards – and should have the humility to acknowledge and remedy instances where they fall short. The commission's report often fails that approach. In many places, it seems to suggest that the United States sets the bar for human rights and that human rights that are inconsistent with domestic traditions are less meaningful or real than those the United States deems to favor. Elsewhere, it seems to suggest that the United States does enough if it meets its obligations more than other states – erroneously looking outward, not inward, to evaluate its compliance with its human rights obligations. The report stresses the strength of the United States' rights tradition, but does not sufficiently acknowledge the maintenance, scrutiny, and accountability that upholding human rights requires.

The report's emphasis on a purported proliferation of rights is similarly misplaced. The commission suggests that some issues are not properly understood as matters of human rights but instead as mere policy preferences. It further suggests that invoking human rights in these

¹³ These include the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. ¹³ The United States is also party to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography.

¹⁴ The United States has also signed the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.

contexts weakens or dilutes the power of the universal human rights framework. These arguments are not only misguided but also lend themselves to abuse by governments that would dismiss efforts to expand human rights to everyone, everywhere. The history of the United States, like that of other countries, is filled with human rights violations that were understood at the time as policy preferences, from segregation to coverture to internment.

The power of the human rights framework derives in large part from its articulation of core principles that can then be invoked and applied by advocates and social movements around the world to better fulfill the promise of universal human rights. Efforts to secure access to abortion are not merely about a policy preference, but about rights to life, to health, and to bodily autonomy. Similarly, efforts to secure the freedom to marry are not merely about a policy preference, but about the right to form a family and equal access to existing rights and protections without discrimination based on sexual orientation or gender identity. States may not recognize every demand that is phrased in the language of human rights. And some rights may be limited in some circumstances, including when necessary to protect the rights of others. But it misunderstands human rights to say they should not guide lawmakers in crafting law and policy.

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Human Rights Watch regrets the limited opportunities for feedback on the work of the commission and its report. The report is nominally labeled a draft, but was accompanied with a public launch, a media rollout, and instructions from United States Secretary of State Michael Pompeo to diplomatic personnel to use it as guidance. A project of this scope – like the protection and promotion of human rights more generally – would benefit from a more inclusive, deliberative, and participatory process. The commission’s failure to seek input from much of the human rights community and its flawed focus are evident in its report.