



The Council for Global Equality

Advancing an American Foreign Policy
Inclusive of Sexual Orientation and Gender Identity

April 2020

The Council for Global Equality (“the Council”) offers this submission in response to requests for input from the Commission on Unalienable Rights (“the Commission”), an advisory body organized and chartered by the Secretary of State under the Federal Advisory Committee Act (“FACA”). The Council is deeply concerned by substantive and procedural irregularities associated with the Commission’s work and its mandate. We offer this submission to challenge what we consider to be a set of misconceptions that lie at the core of the Commission’s mandate, and that the appointed Commissioners appear to have accepted without critical consideration or debate. The Council ultimately believes that the Commission is a dangerous and unnecessary entity that should not have been established and that now stands poised to undermine the work of the State Department’s Bureau of Democracy, Human Rights and Labor (“DRL”) and the credibility of the United States as a voice for human rights on the world stage.

First and foremost, the Council challenges the idea that there has been a proliferation of new human rights norms that have undermined or cheapened the concept of human rights, leaving the modern human rights system unworkable. The Council also is acutely concerned that the Commission’s work is part of a broader effort to push back against human rights for lesbian, gay, bisexual, transgender and intersex (“LGBTI”) individuals and other marginalized populations by creating a hierarchy of rights, with religious freedom at the pinnacle and the fundamental rights of LGBTI and other individuals – rights to life, liberty and non-discrimination – in the “alienable” category. This is dangerous, as it strips away the universality of human rights, elevates limited political and religious rights above all others and favors certain groups over others. Our concerns are described here in greater detail and we hope the Commission will consider these foundational principles before debating or issuing any final recommendations.

There Is Not a Proliferation of Rights, Although There is a Welcome Proliferation of Rights Claimants

Writing in the *Wall Street Journal* to introduce the Commission, Secretary Pompeo charged it with identifying which internationally recognized human rights are “unalienable” and which represent an “ad hoc” proliferation of rights.¹ This effort appears to be at the core of the Commission’s mandate. Speaking publicly about his concern over the supposed proliferation of rights, Secretary Pompeo explained that “there are those who want to confuse rights from good things. We all have

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>.

preferences.”² Various Commissioners have repeated this proliferation argument during the Commission’s public hearings. Chairwomen Glendon noted, for example, 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.”³

In the same *Wall Street Journal* piece, Secretary Pompeo also complains that today “[r]ights claims are often aimed more at rewarding interest groups and dividing humanity into subgroups.”⁴ This suggests that in addition to any concern that “preferences” are being substituted for human rights, Secretary Pompeo also is concerned with a proliferation of new “subgroups” claiming rights. The Commission, following Pompeo’s charge, seems equally fixated on the proliferation of “subgroups” claiming rights, in addition to any concerns over an expansion of the character or content of existing human rights norms that are recognized in the Universal Declaration of Human Rights⁵ and codified in the International Covenant on Civil and Political Rights (as ratified by the United States)⁶ and the International Covenant on Economic, Social and Cultural Rights (as signed but not yet ratified by the United States).⁷

The Council disputes this premise that there has been a sudden proliferation of human rights norms. In his public testimony before the Commission, Ken Roth, Executive Director of Human Rights Watch, also challenged this underlying misconception: “promoting the idea that there has been a ‘proliferation’ of human rights is dangerous and wrong. In fact, there are only nine core human rights treaties, with the most recent, for people with disabilities, adopted in 2006.”⁸ He went on to argue that “those who wish to deny rights to certain segments of the population have sometimes claimed that human rights advocates are inventing ‘new rights’ or ‘special rights.’ That accusation is often leveled against those who seek to prevent discrimination against populations that are especially vulnerable to abuse, such as lesbian, gay, bisexual, and transgender people. But there’s nothing ‘new’ or ‘special’ about the core rights that they seek recognition of; they simply want those rights applied to them.”⁹

What the Commission seems most focused on is just that, not necessarily the idea that there has been a sudden proliferation in what constitutes a fundamental human right, but that there has been a proliferation of “subgroups” that are claiming those rights. The Council believes that the proliferation of human rights claims by new groups, and most especially by groups that traditionally have been ignored or persecuted, is a cause for celebration, not concern. In contrast, Secretary Pompeo’s fear that human

² Secretary Michael Pompeo, speaking to Concerned Women for America, Sep. 13, 2019, available at: <https://www.state.gov/secretary-michael-r-pompeo-at-the-concerned-women-for-america-40th-anniversary-luncheon/>.

³ Second meeting of the Commission on Unalienable Rights, Nov. 1, 2019, held at the U.S. Department of State in Washington, DC.

⁴ See *supra*, note 1.

⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

⁶ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; ratified by United States Senate on Apr. 2, 1992), hereinafter “ICCPR.”

⁷ International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976; signed by United States on Oct. 5, 1977), hereinafter “ICESCR”.

⁸ Testimony of Ken Roth before the Commission on Unalienable Rights, Jan. 10, 2020, available at: <https://www.hrw.org/news/2020/01/10/prepared-testimony-commission-unalienable-rights>.

⁹ *Id.*

rights claims are being misused by “rewarding interest groups and dividing humanity into subgroups”¹⁰ suggests that he opposes the groups making the claims as much as the content of the claims they are making. In another speech, he has belittled these claims as “pet causes.”¹¹

When it comes to disfavored subgroups, Secretary Pompeo and most of the Commissioners seem most concerned with the ability of LGBTI individuals, along with women and girls, to assert their sexual and reproductive rights. Secretary Pompeo has long opposed civil rights for LGBTI Americans and their families¹² and he refused to disavow those views during his Senate confirmation to be Secretary of State.¹³ Many Commissioners hold similar views and have written extensively in opposition to abortion, contraception and human rights for LGBTI individuals.¹⁴ This bias will undoubtedly cloud the Commission’s work and its recommendations – indeed, it seems purposefully intended to do so.

The rights claims of LGBTI individuals provide a particularly instructive example of the misguided premise behind the Commission’s mandate. One of the most important efforts to catalogue the human rights of LGBTI individuals is found in the Yogyakarta Principles. The Principles, adopted by leading human rights scholars at a meeting in Yogyakarta Indonesia in 2006 and reaffirmed in 2017, do not claim new rights for LGBT or intersex individuals; they seek instead to understand the unique barriers that LGBTI individuals face in claiming their most basic and fundamental rights.¹⁵ The Principles recognize that there are no “gay rights” or “LGBTI rights,” but that LGBTI individuals are forced to assert their fundamental rights as equal citizens in the face of discriminatory laws and beliefs around the world.

The Yogyakarta Principles open by asserting: “All human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated. Sexual orientation and gender identity are integral to every person’s dignity and humanity and must not be the basis for discrimination or abuse.”¹⁶ In their application, the Yogyakarta Principles recognize that “there is significant value in articulating in a systematic manner international human rights law as applicable to the lives and experiences of persons of diverse sexual orientations and gender identities.”¹⁷ They also acknowledge that “this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries.”¹⁸ These are not new rights; they are claims to

¹⁰ See *supra*, note 1.

¹¹ See: <https://www.k-state.edu/landon/speakers/mike-pompeo/transcript.html>.

¹² See “Mike Pompeo’s 6 most anti-LGBT moments,” available at: <https://www.lgbtqnation.com/2018/03/heres-mike-pompeos-6-anti-lgbt-moments/>.

¹³ See “Mike Pompeo still opposes gay marriage. Now he's about to be secretary of state,” available at: <https://www.nbcnews.com/feature/nbc-out/mike-pompeo-still-opposes-gay-marriage-now-he-s-about-n865556>.

¹⁴ See “Mr. Pompeo’s Fraud,” available at: <https://globalequality.wordpress.com/2020/03/09/mr-pompeos-fraud/>.

¹⁵ The Yogyakarta Principles address a broad range of international human rights standards and their application to sexual orientation and gender identity issues. On 10 Nov. 2017 a panel of experts published additional principles expanding on the original document reflecting developments in international human rights law and practice since the 2006 Principles, *The Yogyakarta Principles plus 10*. The new document also contains 111 ‘additional state obligations’, related to areas such as torture, asylum, privacy, health and the protection of human rights defenders. The full text of the Yogyakarta Principles and the Yogyakarta Principles plus 10 are available at: www.yogyakartaprinciples.org.

¹⁶ *Id.* at “Introduction,” available at: <https://yogyakartaprinciples.org/introduction/>.

¹⁷ *Id.* at “Preamble,” available at: <https://yogyakartaprinciples.org/preamble/>.

¹⁸ *Id.*

fundamental human rights by a subgroup that has been persecuted and denied access to those rights for far too long.

Just as subgroups of LGBTI individuals are seeking to claim their rights, and international experts are coming to understand the common impediments LGBTI groups face in claiming those rights, so too are other subgroups of marginalized communities coming together to claim their rights within the international system. This should be a cause for celebration. Through its work, the Commission should seek to elevate examples of such traditionally marginalized groups – LGBTI individuals, indigenous peoples, minority religious communities, survivors of sexual abuse and trafficking, among others – that have come forward in recent years to claim their rights using the treaties and the human rights system that the United States created after the end of the Second World War. Unfortunately, to our knowledge, the Commission has not invited such stakeholders to share their insights or provide testimony.

In short, this is not a crisis of proliferation; it is a testament to the success of the modern human rights system and the energy behind a growing grassroots human rights movement. And while there are still many flaws in the UN's human rights mechanisms, the overall trend toward open engagement by an increasing number of persecuted groups is a testament to efforts by the United Nations and others to "mainstream" human rights and to make traditionally stodgy human rights institutions more accessible and responsive to persecuted communities that never would have had access to them in Geneva or New York when the United Nations was first created.

Religious Exercise Must Be Limited to Protect the Rights of Others

Having participated in the hearings of the Commission, the Council also is increasingly concerned that this is an academic exercise designed to marginalize disfavored groups and elevate religious freedom to a position of dominance in our country's human rights diplomacy. Indeed, Secretary Pompeo regularly refers to religious freedom as the "first" and "the most important freedom."¹⁹ This policy shift was already foreshadowed by Secretary Pompeo's announcement last June, marking the release of the State Department's 2018 Annual Report on International Religious Freedom, that he would strip the State Department's office of religious freedom out of the Department's human rights bureau, where it long has served to integrate religious liberty concerns with other human rights priorities, to a position of independence and priority in the Department's organizational hierarchy.²⁰

It is dangerous and ultimately self-defeating to undermine the existing human rights system to create an artificial human rights hierarchy with religious liberty as a priority above all else. The International Covenant on Civil and Political Rights, which the United States has ratified and which imposes binding obligations on U.S. practice, expressly recognizes that while the freedom of religious belief or non-belief is absolute, the freedom to manifest one's religion or beliefs is not absolute and must be limited by law "to protect . . . the fundamental rights and freedoms of others."²¹ The bedrock principle of religious liberty is that it should not be invoked to deny rights to others, including individual rights to dignity and non-discrimination.

¹⁹ See *supra*, note 2.

²⁰ Available at: <https://www.state.gov/secretary-of-state-michael-r-pompeo-at-the-release-of-the-2018-annual-report-on-international-religious-freedom/>.

²¹ ICCPR, *supra* note 6, art. 18.

This certainly means that religious liberty must not be invoked to discriminate against LGBTI individuals by criminalizing their relationships or prohibiting their equal participation in the social, legal and economic institutions of a country. We acknowledge, of course, that there is ongoing debate in the United States about whether religious beliefs may be used to exempt individuals from adhering to non-discrimination laws and policies that protect their fellow citizens from discrimination on the basis of sexual orientation and gender identity. But we believe the debate is flawed and shortsighted and we strongly discourage this Commission from recommending any policies that would explicitly or implicitly allow governments or non-state actors to discriminate on the basis of sexual orientation, gender identity, sex characteristics, or health needs in the guise of religious exercise.

Any attempt to elevate religious freedom or to invoke religious freedom to deny rights to others stands to harm the very concept of religious liberty. It also lends powerful philosophical justification to theocratic governments and religious majority populations that are, by far, the leading persecutors of religious minorities around the world. Those same oppressors also happen to be some of the leading persecutors of LGBTI individuals and other marginalized groups.

There is a Crisis in Leadership, Not Rights

Many of the errors we cite above appear irresolvable in light of a fundamental flaw in the Commission's composition. Its members are drawn exclusively from academia and include few actual human rights practitioners; apart from their bias toward the unfettered primacy of religious freedom, those chosen to participate in analyzing and drafting its conclusions have written dismissively of LGBTI rights, women's reproductive freedoms, and gender. These flaws cast serious questions as to the viability of any recommendations or report to be issued and suggest that the best course, at this point, would be the Commission's dismantlement.

In the larger political context, the Commission's efforts also seem designed to justify America's loss of moral authority by blaming it on a "crisis" in the modern human rights system. We and many other human rights practitioner organizations trace the loss of this authority to President Trump's extreme reluctance to criticize statements and policies of some of the world's worst human rights abusers; chaotic policies that ignore and even green-light human rights atrocities in Russia, Syria, Saudi Arabia and beyond; and maltreatment of asylum-seekers at our border -- all of which have cast doubt on the integrity of U.S. human rights policy. This Commission's work is dedicated instead to the proposition that our country's lack of moral authority is a matter of human rights confusion and a proliferation of rights, not a failure of leadership. That is simply not the case.

For these and other reasons related to the Commission's disregard of FACA legal requirements, the Council has joined with four other nonpartisan organizations focused on human rights and democracy advocacy to bring a legal challenge in federal court to the Commission's creation and operation.²² The Commission's mandate is dangerously misguided. It lends credibility to the Trump Administration's conscious decision to embrace human rights dictators, and it stands to jeopardize decades of State Department leadership in support of human rights around the world. The American people deserve better than to politicize the cause of human rights and thereby strip away our country's ability to lead credibly on an issue fundamental to U.S. foreign policy.

²² Complaint available at: <https://democracyforward.org/wp-content/uploads/2020/03/Complaint-As-Filed.pdf>.