July 30, 2020

Via Email: commission@state.gov; walkerdh3@state.gov

Department of State Commission on Unalienable Rights

and

Duncan H. Walker
Policy Planning Staff, Department of State
2201 C Street, NW
Washington, DC 20520

RE: Comments on Draft Report of the Department of State Commission on Unalienable Rights

Dear Madam/Sir:

On behalf of the International Law Section (“Section”) of the American Bar Association (“ABA”), we are pleased to submit comments on the Draft Report of the Department of State Commission on Unalienable Rights.

Please note that these views are being presented only on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the American Bar Association.

If you have any comments or questions after reviewing these comments, we would be happy to respond and/or provide further comments.

Sincerely,

Lisa Ryan
Chair, International Law Section
The views stated in these Comments are presented on behalf of the American Bar Association International Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

Introduction

The International Law Section of the American Bar Association would initially like to express its appreciation for the opportunity to submit these comments on the Report of the Commission on Unalienable Rights (Report).

We appreciate the Report providing the opportunity to address international human rights.

These comments reflect the international human rights expertise and experience of the Section’s members with the United States government sector, foreign governments, international organizations, including United Nations bodies, nongovernmental organizations, and United States and foreign law firms and businesses. Based on this expertise and experience, the Section wishes to provide general comments on the overall approach of the Report and specific comments on the content of the Report.

These comments are intended to contribute to the Commission’s reflections on the structure, approach and substance of the Report and its role in furthering international human rights. Please note that the comments refer to the numbered pages of the Report.

General Comments

i. Characterization of the need for the Report

The need for a Report by the Commission on Unalienable Rights is founded on the idea that the “ambitious human rights project of the past century is in crisis.” (p.5) However, this statement and the reference to the “erosion of the human rights project” (p.6) frame the Report in terms that encourage the United States to consider a unilateral approach rather than a multi-lateral one based on international cooperation with other States.

The Section notes that the initial nomenclature of an “ambitious human rights project” (p.5) mischaracterizes the development of human rights protection. In doing so, the Report fails to
acknowledge that respect for human rights is an ongoing process, which is continually furthered by the recognition of human rights violations and the need to protect against such violations.

We are concerned that the Report’s statement about the fragility of “[t]he broad consensus that once supported the UDHR’s principles” (p.5) could be misconstrued. The Report seems to suggest that the fragility it references is the result of greater diversity in the nations represented in the United Nations. At the time of the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, the United Nations constituted a mere 58 Member States. At present, the 193 United Nations Member States represent a broad range of political, economic, and social systems and cultural values. Yet, diversity does not logically lead to a fragility in the consensus to human rights, but instead, to a richness in approaches.

While the Report notes that “gross violations of human rights and dignity continue apace” (p.5), it fails to acknowledge the role that the human rights principles of the UDHR have played over the past 70 plus years in not only addressing those violations, but also in assuring democracy, rule of law, justice and accountability. The contributions made by international organizations and institutions, through their persistent and tireless efforts, to the protection, respect and fulfilment of human rights throughout the world are similarly not acknowledged.

**ii. Focus on “Unalienable Rights”**

The focus in the Report on “unalienable rights,” the term used in the American Declaration of Independence, rather than “inalienable rights,” as used in the UDHR, further emphasizes a United States specific approach rather than one of international cooperation, as provided in the United Nations Charter. Rather than employing the founding fathers’ vision as a justification for the approach of the United States to human rights, the Report could usefully have considered the evolution of rights in the United States resulting from the struggles of African Americans and other minorities, women, and more recently, the LGBTQ community.

Additionally, the Report would benefit from supplementing the explanation of the role of the United States in drafting the UDHR with information on the significant contributions of the United States to international treaties codifying rights in the UDHR, including its input on the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. The Report also could usefully highlight the role of the United States in the creation of United Nations human rights bodies, such as the International Criminal Court, and the contributions made by the United States to the United Nations Human Rights Commission and the United Nations Human Rights Council through its work and diplomacy, as well as the various Americans who have served as United Nations Special Rapporteurs and in other Special Procedures of the United Nations Human Rights Council.

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2 **Universal Declaration of Human Rights**, first preambular para.
3 **United Nations Charter**, Article 1(3) provides that “The Purposes of the United Nations are: … [t]o achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all with without distinction as to race, sex, language, or religion.”
iii. Authority for statements in the Report

The lack of support and citations for statements that lead to significant conclusions in the Report weakens the Report; these statements could benefit from further substantiation. We provide just a few examples below for illustrative purposes:

- “the drafters of the UDHR fully expected the diverse nations of the world to look within their own distinctive traditions to find support for the fundamental principles it outlined.” (p.7) – used as a basis to support the Report’s use of the distinctive American rights tradition
- “The framers also knew that keeping the list [of rights in the Universal Declaration of Human Rights] more tightly circumscribed would accord higher political importance to each of the rights and would reduce the conflicts among rights claims” (p.39) – used as a basis to limit the number of rights
- “At the same time, both states and scholars have questioned whether the multiplication of human rights in treaties is an unalloyed good.” (p.40) – used as a basis to object to the “proliferation” of rights
- “enthusiasm for promoting human rights has waned” (p.49)

In particular, the failure to provide support for the statement that “[f]oremost among the unalienable rights that government is established to secure, from the founders’ point of view, are property rights and religious liberty” (p.13) is troubling. This statement abandons a balanced approach to all “unalienable rights” and shifts instead to an overemphasis on religious liberty throughout the Report, which does not mention, with respect to the choice of religion, the choice of no religion.

In addition, the Report states, as a conclusory observation without clarification of any basis, that “[s]ocial and economic rights are most compatible with American founding principles when they serve as minimums that enable citizens to exercise their unalienable rights, discharge their responsibilities, and engage in self-government.” (p.21) Consequently, the Report reduces social and economic rights to subsidiary rights that support civil and political rights and contradicts the indivisible and interdependent nature of human rights. At a time of the Covid-19 pandemic, with rising unemployment in the United States and an increasing number of people joining the already estimated 27.5 million persons, or 8.5% of the population, without health insurance, the Report could more emphatically acknowledge the importance of social and economic rights. The increasing recognition of the importance of these rights does not necessarily entail “subordination” of political and civil rights “in the name of development or other social and economic objectives” (p.55) as the Report claims.

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Specific Comments

i) References to use of human rights for certain causes

We suggest that framing grievances in terms of the historical recognition and defense of human rights by the United States is a far more constructive and effective approach than referring to this important concept as a "temptation to cloak a contestable political preference in the mantle of human rights." (p.25) Particularly this year with the 100th anniversary of the passage of the 19th Amendment in the United States, the suffragette movement, as well as the civil rights movement, attests to the value, strengths and dynamic quality of human rights today. Instead of discouraging the use of human rights, we believe the Report should be promoting their use, recognition and development even in cases viewed by some as unpopular causes at the time.

Whether intentionally or unintentionally, the Report seems to diminish the importance of human rights activists through its statement that “activists determined to bypass ordinary politics and domestic democratic processes employ the language and structures of international human rights.” (p.40) The Report would be improved by recognizing and lauding the courage of human rights defenders and the role they play in assisting to embrace, support and protect those in our society who are marginalized and disadvantaged.

ii) Creation of a hierarchy of rights

While the Report notes the “interdependence of basic human rights” (p.37), it then uses distinctions, including the exceptions to certain human rights in times of national emergency and that some rights are “contingent on available resources and on regulatory arrangements” (p.37), to justify a hierarchical approach to human rights that explicitly supports “religious freedom” (p.38) over other rights. We also note that in using the term “basic human rights,” the Report implies a hierarchy among all human rights. Also, the Report’s justification of the hierarchy, based on the statement that the implementation of certain rights is dependent upon “available resources and on regulatory arrangements,” is misplaced and mischaracterizes the need to take “steps, individually and through international assistance and co-operation… to the maximum of its available resources with a view to achieving progressively the full realisation of the rights,” as provided in the International Covenant on Economic, Social and Cultural Rights.5

iii) References to United Nations human rights instruments and institutions

The International Law Section finds that the Report improperly characterizes the UDHR as being “crafted as a moral and political document but not as a legal instrument creating formal law.” (p.31) In doing so, the Report fails to acknowledge that the rights recognised in the UDHR have been codified in international human rights law treaties and that many of them now have the status of customary international law. Consequently, the subsequent reference to the UDHR, as having “aspirational and pedagogical goals” (p.31), overlooks the legal status today of the rights contained in the UDHR. This characterization also fails to acknowledge that international human rights law

5 International Covenant on Economic, Social and Cultural Rights, Article 2(1).
develops through the formulation of “soft law” instruments that become binding through customary international law or their formulation in legally binding instruments. For example, the latter occurred with the Declaration of the Rights of the Child (1959) that evolved into the Convention on the Rights of the Child (1989), which has become the most widely ratified human rights treaty.

As noted above, by failing to recognize the importance of other rights as extensively as it does “religious liberty,” the Report provides an unbalanced view of human rights. The Report also improperly, in our view, diminishes the importance and contribution made by the recognition of more recently formulated rights by inappropriately claiming that:

- “There is good reason to worry that the 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 surfeit of new treaty obligations in human rights does not seem to have increased the effectiveness of human rights law nor stemmed the pervasive violations of very basic human rights around the world, even in many countries that have ratified all of the major treaties.” (p.40)

In addition, the Report fails to acknowledge the importance of the “right to development,” in stating that “China tries to diminish the traditional political and civil dimension of human rights by emphasizing what it calls the ‘right to development’.” (p.49) We would note that the “right to development” is recognized in the Declaration on the Right to Development and in “Transforming our world: the 2030 Agenda for Sustainable Development,” which was unanimously endorsed by all 193 United Nations Member States, including the United States.

Further, the Report fails to properly credit the important role and contributions of United Nations human rights institutions through explicit wording in some cases and implicit suggestions in others. A few examples are provided below for illustrative purposes:

- “the widespread proliferation of non-legal standards - drawn up commissions and committees, bodies of independent experts, NGOs, special rapporteurs, etc., with scant democratic oversight - gives rise to serious concerns.” (p.41)
- “The United States cooperates with and supports [international human rights] institutions when they serve the larger purposes of advancing human rights” (p.48)
- “The U.S. withdrawal from the UN [Human Rights Committee reflects] … a determination to find better means of effectively securing [human rights and fundamental freedoms].” (p.49)
- “One of the major dilemmas facing friends of human rights involves decisions about when to persist in reforming, or at least mitigating the damage done by flawed institutions….” (p.49)

The Report provides an opportune moment for an examination of the obstacles that remain for the United States’ ratification of four key treaties it has signed (the International Covenant on

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Economic, Social and Cultural Rights, 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) as well as the two other core international human rights treaties (the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention for the Protection of All Persons from Enforced Disappearance) not yet signed or ratified by the United States. The International Law Section notes that in the case of the Convention on the Rights of the Child, the United States is the only country that has not ratified the treaty.

The Report also would benefit from an examination of the obstacles that remain to United States ratification of the Rome Statute of the International Criminal Court and what conditions would be required for the United States to rejoin the United Nations Human Rights Council. We note that engagement in reform of an institution is much more easily done as a member of the institution than as an outsider.

Thank you once again for the opportunity to provide comments on this important document.