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One Hundred and Sixteenth Congress

Tom Lantos Human Rights Commission

July 30, 2020

Professor Mary Ann Glendon
Commission on Unalienable Rights
c/o Duncan H. Walker, Designated Federal Officer
U.S. Department of State
Washington, D.C. 20520

Via electronic mail.

Dear Professor Glendon,

I write to you in your capacity as Chair of the Commission on Unalienable Rights (CUR). As a Member of the United States Congress and Co-Chair of the Tom Lantos Human Rights Commission, an official bipartisan congressional body, I write to express my deep concern regarding the draft report issued on July 16 by the CUR. My objections to the draft report are both substantive and procedural. Given the very short two-week timeframe provided for public comment, in this submission I will limit myself to highlighting some of my most serious concerns.

I appreciate that the draft report recognizes that the United States has been a global leader in promoting and defending human rights, beginning with the key role played in the drafting of the Universal Declaration of Human Rights (UDHR) under the inspired leadership of Eleanor Roosevelt. I also appreciate that the report recognizes the integrated and indivisible nature of the human rights enumerated in the UDHR and endorses a continued American recognition of the full range of rights outlined in that document.[1] And I welcome the report's acknowledgement of

[1]For example, "The UDHR is not a mere list of severable, free-standing provisions, each understood in isolation and on its own terms. This means that it does violence to the Universal Declaration to wrench out of context any one of its rights at the expense of others, or to ignore one part of the document by focusing exclusively on another." *Report of the Commission on Unalienable Rights*, p.31.

U.S. imperfections and certainly agree with the position that American credibility to promote human rights depends to a great extent on its own behavior.[2]

However, the draft report leaves aside entirely the human rights law-building that has occurred since the approval of the UDHR, resulting in a document that is radically incomplete and thoroughly inadequate as a guide to human rights policymaking in the 21st century. Whereas the commissioners go out of their way to describe how the rights promises of the U.S. Constitution are made concrete through law, they simply dismiss that same law-building process when it comes to internationally recognized human rights. In so doing they assert that international human rights norms are not serious or not the result of considered deliberation.[3] They appear disdainful of the decades of negotiations that led to the nine core human rights treaties. They disparage the work of the international human rights commissions, courts and special procedures charged with interpreting the treaties and reconciling competing rights claims. Yet the process of interpreting the U.S. Constitution, lauded by the commissioners, is subject to the same kind of back and forth, the same law-building over time, the same dynamic of competing interpretations eventually resolved by courts, as characterizes the international human rights arena.

The draft report asserts that the human rights movement is in crisis because of a proliferation of rights claims. It reiterates that opinion several times but offers no specific examples and no evidence to substantiate the claim. I agree that too many regimes, and too many authoritarian leaders in nominally democratic regimes, feel empowered to ignore international human rights law and norms and to oppress their citizens in whatever way they find politically expedient. However, this tendency in state behavior has nothing to do with the existence of "too many" human rights claims but with decisions made by unaccountable governments. It is absurd to attribute the poor compliance of states with their human rights obligations to those who make use of human rights arguments in their advocacy. That people around the world seek to advance their demands within a human rights framework is a mark of the universal appeal of human rights and should be celebrated.

This particular argument is especially grating given the decision of the Trump administration – the same administration that created the CUR – to embrace many of the world's worst authoritarian leaders while withdrawing and disengaging from multilateral human rights bodies because of the presence of states accused of human rights abuses. This disengagement, combined with a one-size-fits-all strategy of trying to bully adversary governments into submission to the president's will, has mostly worsened human rights situations on the ground and put political reforms desired by local populations even further out of reach. The administration's failure to sincerely engage diplomatically and coordinate with like-minded allies, its withdrawal from key policy arenas, and its refusal to make the best possible use of every existing multilateral human rights mechanism have all been a boon for authoritarians always ready to expand their power given any opportunity.

[2] "[W]e are keenly aware that America can only be an effective advocate for human rights abroad if she demonstrates her commitment to those same rights at home," *Report of the Commission on Unalienable Rights,* p.7.

[3] See, for example, p.41 of the draft *Report.*

The draft report fundamentally misunderstands how human rights advocacy works. The commissioners seem to believe that it is enough for the U.S. to offer a moral example. Our country has undoubtedly served as a beacon of hope for oppressed people around the world, and I am proud of that legacy. But it is the norms, standards and mechanisms of the multilateral rights system that arise from and undergird legal obligations that advocates use to advance human rights claims all over the world. It is the complementarity between international human rights and domestic law that offers local human rights lawyers the rationale to push for changes to their countries' legal frameworks. It is regional bodies like the Inter-American human rights system that offer protective measures to threatened human rights activists. It is the jurisprudence of the European and Inter-American courts that has contributed to unify human rights standards across borders. It is the special procedures of the UN human rights system, with their in-country visits, reporting and analysis, that offer conceptual tools to human rights advocates around the world and can be counted on to help protect victims of human rights abuses, as we have seen time and again with prisoners of conscience, victims of torture, survivors of extrajudicial killings and sexual violence, and so many others. Human rights advocates use all the multilateral mechanisms the commissioners dismiss out of hand, and they use them to protect and defend the very civil and political rights that the draft report most celebrates. The reality is that those mechanisms have been far more important for the day-to-day struggles of victims of human rights abuses than the symbolism of the U.S. example.

The draft report prioritizes the right to religious freedom above all others, based on a debatable approach to American history that gives "biblical faith" the same status in the philosophical thinking of the founders as civic republicanism. But the first amendment to the U.S. constitution protects freedom of religion alongside the freedoms of speech, press, assembly and the right to petition government. These protections are clearly interdependent: no one can practice a faith without the rights to speech or assembly. The persistent effort in the draft report to separate freedom of religion from these other rights and elevate its relative importance is incorrect and inappropriate. I share the concerns of the many faith leaders from diverse traditions who wrote on July 20 that "freedom of religion must never be used as a pretext to diminish other rights" and that the CUR's approach "will weaken religious freedom itself and undermine respect for and damage the protections of the universal values of human dignity."[4]

The draft report extends to 60 pages but says virtually nothing about non-discrimination or the rights of minorities. In fact, the word "minority" does not even appear in the report. This is stunning since very often violation of the right to freedom of conscience and religion goes hand-in-hand with the minority status of the affected community. We have seen this time and again in briefings and hearings before the Human Rights Commission: Tibetans and Uyghurs in China, Rohingya in Burma, Yazidis in Syria, Ahmadis in Pakistan, Muslims in India, Shi'a in Saudi Arabia – all are minorities in their countries of citizenship who face discrimination not only because of their religious faith, but also because of their cultural, linguistic and educational practices, and all are denied effective access to civil and political rights. Yet the report says nothing about the central importance of non-discrimination in international human rights law –

[4] "Statement by Faith Leaders on the U.S. State Department's Commission on Unalienable Rights," July 20, 2020.

and deprioritizes the economic, social and cultural rights of which these communities are also systematically deprived.

The lack of attention to the rights of minorities is made worse by the report's unqualified insistence on respect for "democratic majorities" as a criterion for evaluating human rights claims. Yes, democracy is important, as is social and political support for rights claims. But democratic majorities can be wrong, as Americans were about slavery, as South Africans were about apartheid, and as Indian Hindus today are about Indian Muslims. The draft report simply ignores the risk of tyranny of the majority, even though that was a real concern for America's founders. In fact, human rights claims very often are a defense against that form of tyranny – against the misunderstanding, fear and hated directed against those who are different and become the "other".

There are any number of other gaps in the draft report. The commissioners do not mention international law and standards embraced by the United States stretching back for decades, such as the four Geneva Conventions and our own Uniform Code of Military Justice, both of which served as key reference points in the development of the UDHR and the related international human rights conventions and treaties. In describing the origins of the international human rights system, they do not once mention the Holocaust. They refer to democratic accountability but say nothing about demands for justice for atrocities, whether of the past or those occurring today. They dismiss multilateral institutions like the International Criminal Court but are completely silent on any alternative, except economic sanctions. They do not acknowledge that the U.S. neither accepts universal jurisdiction nor has its own laws to pursue perpetrators of grave abuses. Once again, the "moral example" of the U.S., as important as it is to us as Americans, is simply not enough to satisfy the rights to truth, justice and reparations of victims all around the world who have been so grievously wronged.

The draft report is also full of "straw man" arguments. The non-problem of the proliferation of rights claims was mentioned above. Another is that somehow international human rights standards run roughshod over local conditions or preferences. But a fair reading of the rulings of the European and Inter-American human rights courts, for example, makes clear that the courts are very sensitive to national conditions and that national courts in turn retain the final word – as former Justice Stephen Breyer noted in his book *The Court and The World*.

On process, I share the concerns raised in the pending lawsuit brought by several human rights groups last March.[5] Reporting strongly suggests that the membership of the CUR was hand-picked to produce a report in line with a preexisting political agenda. There were few public meetings with limited participation. Although Members of Congress have been told repeatedly that the CUR is not a policy body, that claim is disingenuous at best. The Executive Secretary of the CUR, Peter Berkowitz, is the Director of Policy Planning at the Department of State, and Secretary of State Mike Pompeo sent a memo on July 20 to all State Department staff

[5]Case 1:20-cv-02002 filed before the United States District Court for the Southern District of New York, March 6, 2020.

urging them to "read the report thoroughly" as a means to "guide every State Department employee" in the work of carrying out U.S. foreign policy.

The principle value of CUR will not be this draft report, but the robust debate on international human rights in relation to the United States that the Commission's flawed process has already unleashed. That debate will surely extend to the reasons the U.S. has refused to ratify so many human rights treaties, including the Convention on the Rights of Persons with Disabilities negotiated by the administration of George W. Bush. It will surely revisit the question of why America exempts itself from the international scrutiny of its human rights practices that we demand of other countries and in fact depend on for the high quality of the resulting information. We know the historical reason the U.S. rejected international oversight at the time of the founding of the United Nations: our deeply rooted and institutionalized racism.[6] But what does the administration fear today if, as Secretary Pompeo declared when launching the draft report, "America is fundamentally good"?

Finally, the coming debate will surely serve to clarify the already existing legal and moral grounding of the "new rights claims" the CUR most hopes to discredit – particularly those of women and of LGBTQ+ people – in the constitutional rights of Americans to liberty and the pursuit of happiness; in the UDHR and the subsequent international law-making; and in basic human dignity. As a Member of Congress, I welcome that debate.

Sincerely,

James P. McGovern
Member of Congress

[6] Gay McDougall, "Shame in Our House," in *The American Prospect,* September 4, 2004.