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The Commission on “Unalienable Rights”: A Critique

Douglass Cassel

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The Commission on “Unalienable Rights”: A Critique

Cover Page Footnote

Emeritus Professor of Law, Notre Dame Law School

THE COMMISSION ON “UNALIENABLE RIGHTS”: A CRITIQUE

DOUGLASS CASSEL *

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* Emeritus Professor of Law, Notre Dame Law School

I. INTRODUCTION

A. INAUGURATION

Consciously invoking the language of the U.S. Declaration of Independence,¹ Secretary of State Mike Pompeo in July 2019 announced the creation of a Commission on Unalienable Rights to advise him on principles of human rights to guide our foreign policy.²

Even if the Commission had been blessed with an open-ended mandate, the task of advising on “unalienable” rights would have been daunting. Conceptually, “unalienable” and “human” rights are the same.³ They are rights inherent in all human beings. Governments can neither grant human rights nor take them away (“alienate” them). Governments can only “recognize” human rights.⁴

The vexing challenge is to determine which rights meet this exalted standard. This is especially so because, over time, “the idea of human rights . . . is capable of encompassing new understandings of what freedom and equality require.”⁵

But Secretary Pompeo’s Commission did not have an open-ended mandate. Its task was made even more difficult by its actual assignment: to ground its review in “our nation’s founding principles and [the principles of] the 1948 Universal Declaration of Human Rights” (UDHR).⁶

Our founding principles and the UDHR should be part of any review of the role of human rights in our foreign policy. But the whole? What about the expansive body of international human rights law and institutions developed and accepted by most of the world since 1948?

In announcing the Commission, Secretary Pompeo had nothing positive to say about these post-1948 developments. He decried the proliferation of claims of rights. He lamented clashes between some rights. He posited confusion among states and international institutions about their responsibilities concerning rights. And he objected that international institutions for protection of human rights “have drifted from their original mission.”⁷

1 “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2 U.S. DEP’T OF STATE, SEC’Y OF STATE MICHAEL R. POMPEO REMARKS TO THE PRESS (2019), <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/> [hereinafter Pompeo Remarks].

3 The Commission rightly recognizes that “unalienable rights” were “sometimes referred to as natural rights in the founding era” and “today are commonly called human rights.” U.S. DEP’T OF STATE, REPORT OF THE COMM’N ON UNALIENABLE RTS. (2020) at 11, <https://www.state.gov/wp-content/uploads/2020/08/Report-of-the-Commission-on-Unalienable-Rights.pdf> [hereinafter Report].

4 “The very notion of a human right is that of a right inherent in human beings and not dependent for its existence on the enactment of any state or international institution. Positive law can establish and clarify a state’s enforceable obligation to individuals and to other states. But positive law—whether that of a nation-state or of the international legal order—does not *create* a human right, nor can its silence or conduct nullify a human right.” *Id.* at 40-41.

5 *Id.* at 38.

6 *Id.* at 6; United Nations Universal Declaration of Human Rights, Dec. 10, 1948 [hereinafter UDHR]; See also U.S. DEP’T OF STATE, CHARTER FOR THE COMM’N ON UNALIENABLE RTS. (2019), <https://www.state.gov/charter-for-the-commission-on-unalienable-rights/>.

7 Pompeo Remarks, *supra* note 2.

Granted, there is some truth—but hardly an indictment—in these points. Claims of rights do proliferate; since 1948, many have been accepted by the overwhelming majority of the world’s nations and have become part of international law.⁸ Rights do sometimes clash and courts must resolve tensions between them; consider, for example, the clash between fair trial and free press embedded in the U.S. Constitution.⁹ Like any body of law, international human rights law does not give clear answers to all questions; they must be interpreted. And international human rights institutions at times stretch and arguably exceed their mandates.¹⁰

But these partial truisms are not reasons to downplay all of modern international human rights law since 1948 and to treat our domestic law and a non-binding declaration of seven decades ago, as the overriding guides to human rights in foreign policy. As a broad coalition of human rights groups and advocates later commented, “[T]he validity of the human rights project is in no way imperiled by the increasing number of rights claims made by those whose rights have historically been denied them.”¹¹

B. MEMBERS

Thus constrained by the restricted vision of its patron, the Commission was chaired by Harvard Law Professor Mary Ann Glendon. I am privileged to call Professor Glendon a friend and have long admired and learned from her scholarship on the Universal Declaration of Human Rights.¹² She is perhaps better known for declining to accept the University of Notre Dame’s Laetare Medal in 2009 after learning that President Obama would be the main commencement speaker and receive an honorary degree.¹³

Another Commission member was my former colleague, Notre Dame Law Professor Paolo Carozza, Director of the Kellogg Institute for International Studies. Professor Carozza was a stalwart defender of human rights as a member of the Inter-American Commission on Human Rights from 2006 to 2010 and as its President from 2008 to 2009. More recently, he was appointed by the State Department (under Pompeo) to serve on the Venice Commission of the Council of Europe.¹⁴

⁸ See Part II below.

⁹ *E.g.*, *Nebraska Press Ass’n. v. Stuart*, 427 U.S. 539 (1976).

¹⁰ Among other examples, see Judge Humberto Sierra Porto’s dissent from the majority’s holding that economic, social and cultural rights are justiciable under Article 26 of the American Convention on Human Rights. *Lagos del Campo v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 12.795 (Aug. 31, 2017).

¹¹ Letter to Mary Ann Glendon, Chairperson of the Comm’n on Unalienable Rts. (July 30, 2020), <https://www.humanrightsfirst.org/sites/default/files/CUR%20Report%20Comment%20NGO%20Letter%20Final%2020.07.30.pdf> [hereinafter Letter].

¹² *E.g.*, Mary Ann Glendon, *Knowing the Universal Declaration of Human Rts.*, 73 NOTRE DAME L. REV. 1153 (1998); MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (Random House, 1st ed. 2001).

¹³ *Mary Ann Glendon Refuses to Accept Laetare Medal from Notre Dame*, CATHOLIC NEWS AGENCY (Apr. 27, 2009), https://www.catholicnewsagency.com/news/mary_ann_glendon_refuses_to_accept_laetare_medal_from_notre_dame.

¹⁴ Amanda Gray, *Professor Paolo Carozza Appointed to Venice Commission*, UNIV. OF NOTRE DAME (Mar. 13, 2019), <https://law.nd.edu/news-events/news/professor-paolo-carozza-appointed-to-venice-commission>.

Other members of Secretary Pompeo's Commission consisted almost exclusively of his staff and religious advocates. The Executive Secretary, Rapporteur, and two of the ten original members were from his Policy Planning Staff.¹⁵ Of the remaining eight members, six had backgrounds in religious or religion-related institutions, and a seventh has published extensively on Roman Catholic bioethics.¹⁶

C. REPORT AND REACTION

After a year of study and public consultations, the Commission released a draft report in July 2020.¹⁷ Not unfairly characterizing the draft, Secretary Pompeo exulted that it “emphasizes foremost among these rights are property rights and religious liberty.”¹⁸ In his view, “[t]he vital 20th century human rights project has come unmoored, and it needs a re-grounding.”¹⁹

A scant two weeks were allowed for public comment on the draft. The main response was a letter to Glendon from more than 100 human rights, social justice, and faith-based organizations, including groups such as Amnesty International and Human Rights Watch, and more than 100 individuals, including twenty-five former senior government officials, mostly from posts in the field of human rights. They charged that the Commission had been used to advance Pompeo's “personal political and religious beliefs” and his “political agenda.”²⁰ Criticizing the draft report on multiple grounds, they concluded that it “undermines decades of human rights progress.”²¹

In August, following what the Commission characterized as “only small changes,” the Commission published its final Report.²² In some respects, the Report is praiseworthy.²³ Among other points noted below, the Commission recommends that “it is urgent to champion human rights in foreign policy.”²⁴

15 *Commission on Unalienable Rights: Member Bios*, U.S. DEP'T OF STATE, <https://www.state.gov/commission-on-unalienable-rights-member-bio>. The original Executive Secretary, Kiron Skinner, was later replaced by Peter Berkowitz. Professor Kenneth Anderson of American University, not on the original list, joined the Commission later.

16 *Id.* Chairperson Glendon (U.S. Commission on International Religious Freedom); Paolo Carroza (Notre Dame); Hamza Yusuf Hanson (President of Zaytuna College, a Muslim liberal arts college); Dr. Jacqueline Rivers (Director of Seymour Institute for Black Church and Policy Studies); Rabbi Dr. Meir Soloveichik (Congregation Shearith Israel); and Katrina Lantos Swett (U.S. Commission on International Religious Freedom). Professor Christopher Tollefson's books include, for example, *JOHN PAUL II'S CONTRIBUTION TO CATHOLIC BIOETHICS* (Springer 2004).

17 U.S. DEP'T OF STATE, REPORT OF THE COMM'N ON UNALIENABLE RTS. (2020), <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf>. The July 16 version of the Report was nowhere marked as a “draft.” In formally presenting it to Secretary Pompeo, Chairperson Glendon referred to it four times as “our Report,” never mentioning the word “draft.” See *infra* note 18.

18 Michael Pompeo, U.S. Sec'y of State, Speech on Unalienable Rights and the Securing of Freedom (July 16, 2020), <https://www.state.gov/unalienable-rights-and-the-securing-of-freedom/>. The views of the Report on these rights are discussed in part VII below.

19 *Id.*

20 Letter, *supra* note 11.

21 *Id.* The criticisms are discussed in Part VII below.

22 Commission U.S. DEP'T OF STATE, *Commission Note on Releasing its Final Report*, <https://www.state.gov/report-of-the-commission-on-unalienable-rights>.

23 See Part VI below.

24 Report, *supra* note 3, at 54.

However—true to the Commission’s constricted mandate—this recommendation explicitly refers only to human rights in the 1948 UDHR.²⁵ The entire Report refers only in passing to the two main UN human rights treaties—even though the U.S. is a party to one and has signed the other.²⁶ The Report does not even mention seven other core UN human rights treaties, except to note that the U.S. is a party to two of them.²⁷ Downplaying the post-1948 treaties as mere “positive law,”²⁸ the Report asserts—incorrectly, in my view—that positive international human rights law cannot be an “authoritative and final arbiter of legal disputes.”²⁹

The Report does recognize, but only in very general terms, that post-1948 international human rights treaties have “achieved tangible results.”³⁰ They can reflect a “broadening consensus” among nations about human rights.³¹ Their creation of “hard legal requirements, often monitored and promoted by supervisory institutions, enhances the protection of human rights.”³²

Yet the Report quickly adds that states and scholars question whether the “multiplication of human rights in treaties is an unalloyed good.”³³ Even leading human rights advocates question whether the multiplication of treaties is an “unalloyed” good.³⁴ But if, as the Commission recognizes, the treaties have been “goods” and have achieved “tangible results,” what is the good, what are the results, and why not discuss the provisions of the treaties? The Report does not elaborate on these questions.

D. FUTURE U.S. FOREIGN POLICY

Beyond the few core treaties already ratified by the U.S., what part of contemporary international human rights law should help guide U.S. foreign policy? For example, and especially given our particular history of mistreating Native Americans,³⁵ should our foreign policy respect the rights of Indigenous Peoples recognized in a 2007 U.N. Declaration,³⁶ but not in the U.S. Declaration

²⁵ *Id.*

²⁶ *Id.* at 34, 46–47.

²⁷ *Id.* at 47.

²⁸ *Id.* at 40–41.

²⁹ *Id.* at 40. *See infra* notes 84 and 85.

³⁰ *Id.* at 40.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *See, e.g.*, Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L LAW 607 (1984).

³⁵ *See, e.g.*, the history recited in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020); *See also* Report, *supra* note 3, at 43: “In the 19th century, under the flag of Manifest Destiny, the United States cruelly expelled Native Americans from their ancestral lands with tremendous cost in human life and compelled them to enter into treaties that it failed to honor.”

³⁶ G.A. Res. 61/295 (Sept. 13, 2007). Although the U.S. did not vote for it initially, President Obama declared U.S. support for it in 2016. U.S. DEP’T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE U.N. DECLARATION ON THE RTS. OF INDIGENOUS PEOPLE (2016), <https://2009-2017.state.gov/documents/organization/184099.pdf>. The Commission Report mentions neither the Declaration nor the U.S. support.

of 1776, the U.S. Constitution of 1789,³⁷ or the UDHR of 1948? Or should our diplomats ignore indigenous rights because they are recognized in a Declaration rather than a binding treaty?

Apparently, the Commission—not without reason—viewed such questions as beyond its mandate. But future U.S. foreign policymakers should not be so limited. The time when international human rights law was circumscribed by the principles of the 1948 UDHR is long past. Yet the only specific reference in the Commission's proposed criteria for recognizing new claims of rights is to the 1948 UDHR. There is no express mention of any of the widely supported treaties and declarations reflecting the broad consensus on human rights in subsequent decades.³⁸

In responding to the Secretary's constricted questions, the Commission's Report thus addresses only a portion of the human rights norms that should guide our foreign policy. That is what Secretary Pompeo asked for and what the Commission delivered. Neither the American people nor U.S. diplomats should follow so narrow an approach.

II. INTERNATIONAL HUMAN RIGHTS NORMS

Until 1945, with few exceptions,³⁹ human rights were deemed to be the exclusive province of domestic laws and constitutions. At the conclusion of World War II in 1945, the horrors of the Holocaust, the brutality of fascism, mounting protests against colonialism, racial segregation in the U.S., and other affronts against human rights led citizen groups and some states to lobby for, and states generally to accept, a radical change: human rights were now to be a concern of international law and institutions.⁴⁰ The Charter of the United Nations lists as one of its purposes to “achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁴¹ All U.N. members pledge to take joint and separate action in cooperation with the U.N. to achieve these purposes.⁴²

Thus began modern international human rights law. In 1948, the U.N. adopted the UDHR,⁴³ which includes a broad spectrum of civil and political as

37 *See McGirt*, 140 S. Ct. at 2,462, citing *Lone Wolf v. Hitchcock*, 187 U. S. 553, 566–68 (1903), (“To determine whether a tribe continues to hold a reservation, there is only one place we may look: The Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties.”).

38 Report, *supra* note 3, at 39–40.

39 *See generally* Paul Gordon Lauren, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* (Univ. Pennsylvania Press 2011).

40 *Id.* at 165–94. The Commission apparently places the dividing line at 1948: “But after the Universal Declaration, no state may reasonably claim that the treatment of its own citizens in matters of human rights is solely a question of its own domestic affairs.” Report at 30.

41 U.N. Charter art. 1, ¶ 3.

42 *Id.* arts. 55–56.

43 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

well as economic, social, and cultural rights.⁴⁴ Also in 1948, the U.N. adopted its first major human rights treaty: The Convention against Genocide.⁴⁵

Progress thereafter slowed during the height of the Cold War. However, as decolonization spread, the increasing numbers of newly independent states in the U.N. General Assembly pressed for, and in 1965 secured, the first of what are now nine core U.N. human rights treaties: the Convention against Racial Discrimination.⁴⁶ Each core treaty defines a set of rights, which are monitored by committees of experts who adopt general guides to interpretation, receive and evaluate periodic reports from states, hold public hearings with public comment on the reports, and render opinions on complaints against those states which accept individual complaint procedures.⁴⁷

In chronological order, the topics of the nine core treaties, with their year of adoption and current number of states parties,⁴⁸ are as follows:

- Racial Discrimination:⁴⁹ 1966, 182 states parties;
- Civil and Political Rights:⁵⁰ 1966, 173 states parties;
- Economic, Social and Cultural Rights:⁵¹ 1966, 171 states parties;
- Discrimination against Women:⁵² 1979, 189 states parties;
- Torture:⁵³ 1984, 171 states parties;
- Children:⁵⁴ 1990, 196 states parties;
- Migrant Workers:⁵⁵ 1990, 55 states parties;
- Persons with Disabilities (“CRPD”):⁵⁶ 2006, 182 states parties; and
- Enforced Disappearances (“CPED”):⁵⁷ 2006, 63 states parties.

44 See Report *supra* note 3, at 29–30. For broader analysis, see Glendon, *supra* note 12.

45 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. 152 states parties are parties to Convention as of August 30, 2020.

46 United Nations International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

47 See generally U.N. Office of the High Comm’r of Human Rights, *Monitoring the Core International Human Rights Treaties*, <https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx> (showing dates of adoption and the numbers of state parties as of December 8, 2020).

48 See, e.g., U.N. Secretary-General, *Multilateral Treaties Deposited with the Secretary General: Chapter IV: Human Rights*, https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en.

49 International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 46.

50 United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

51 United Nations International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

52 United Nations Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. [hereinafter CEDAW]

53 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

54 United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

55 United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3.

56 United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

57 United Nations International Convention for the Protection of All Persons from Enforced Disappearances, Dec. 20, 2006, 2716 U.N.T.S. 3.

As shown by the numbers of states parties, seven of the core treaties have been joined by 170 or more states, and four by more than 180 states (compared to the total U.N. membership of 193 states).⁵⁸ Plainly these seven treaties represent a broad international consensus on legally binding human rights which, in many respects, are broader or more specific than provided by the 1948 Declaration.⁵⁹ They thus satisfy one of the Commission's proposed criteria for recognizing "new rights," because they "represent a clear consensus across a broad plurality of different traditions and cultures in the human family, as the Universal Declaration did, and not merely a narrower partisan or ideological interest."⁶⁰

If one looks to "like-minded democracies"—another Commission criterion for recognizing new rights⁶¹—the consensus on these seven treaties is even more overwhelming. All seven have been joined by (among many other states) European democracies like Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, The Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom.⁶² Democracies elsewhere like Australia, Canada, Chile, Costa Rica, Ghana, Japan, New Zealand, South Africa, South Korea (Republic of Korea), and Uruguay have likewise joined all seven treaties.⁶³

Some states make reservations to some treaties.⁶⁴ But that is an argument for the U.S. to consider reservations to particular treaties—not to ignore them in our foreign policy.

Two core treaties, on migrant workers and enforced disappearances, are not widely ratified. The migrant workers treaty has been joined mainly by predominantly migrant exporting countries, and not by predominantly receiving countries like the U.S. On the other hand, and despite committing our own disappearances in counterterrorism activities,⁶⁵ U.S. foreign policy has long viewed enforced disappearances as a key human rights issue.⁶⁶

In addition to treaties, the U.N. has adopted numerous, non-binding instruments on human rights. Many are widely supported, including by U.S. Administrations. In addition to the 1948 UDHR, they include, for example, the

58 See United Nations, *Growth in U.N. Membership: 1945-Present*, <https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html>.

59 See Part IV below.

60 Report, *supra* note 3, at 40.

61 *Id.* at 39. One Commission criterion is: "Have the United States and other like-minded democracies formally given their sovereign consent to the development in question through the established political mechanisms for creating international law (in particular through the adoption of clear and explicit treaty provisions)?"

62 See U.N. Secretary General, *supra* note 48.

63 *Id.*

64 *Id.* Reservations are shown at the United Nations Treaty Collection, https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en.

65 See e.g., *The United States' "Disappeared": The CIA's Long-Term Ghost Detainees*, HUMAN RIGHTS WATCH at 1 (2004).

66 U.S. State Department Country Reports on Human Rights have long included a section on disappearances. See Dept. of State, 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, app. A: *Notes on Preparation of the Country Reports and Explanatory Materials* (2020).

1946 resolution on the Nuremberg Principles,⁶⁷ the 1998 declaration on human rights defenders,⁶⁸ the 2005 resolution on remedies for victims of human rights violations,⁶⁹ the 2007 declaration on the rights of Indigenous Peoples,⁷⁰ the 2010 resolution on the right to clean water and sanitation,⁷¹ the 2011 Guiding Principles on Business and Human Rights,⁷² and the 2015 Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).⁷³

While there are of course other, controversial U.N. resolutions, such widely supported instruments as the foregoing should inform U.S. foreign policy on human rights. Indeed, as the Commission recognizes, "some of the most significant human rights landmarks and achievements have had a primarily extra-legal and diplomatic-political character, such as the Helsinki Accords and the Inter-American Democratic Charter."⁷⁴

In addition to U.N. instruments, there are also human rights treaties and declarations (like the Helsinki Accords and the Inter-American Democratic Charter) adopted by regional and sub-regional organizations, as in Europe,⁷⁵ the Americas,⁷⁶ Africa,⁷⁷ Arab nations,⁷⁸ and Southeast Asia.⁷⁹ Most do not apply to the U.S. and a few of their provisions are inconsistent with universal norms,⁸⁰ but most of their provisions can be considered by U.S. foreign policy toward those countries which adopt them.

III. INTERNATIONAL HUMAN RIGHTS BODIES

Two kinds of bodies monitor and attempt to enforce international human rights treaties and declarations: professional and political. The professional bodies include the U.N. treaty committees for the core treaties mentioned above.

67 G.A. Res. 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, at 1 (Dec. 11, 1946).

68 *See generally* G.A. Res. 53/144, annex, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Dec. 9, 1998).

69 *See generally* G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Int'l Human Rights Law and Serious Violations of Int'l Humanitarian Law (Dec. 16, 2005).

70 G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). Although the U.S. did not vote for it initially, President Obama declared U.S. support for it in 2016. G.A. Res. (2007) *supra* note 36.

71 G.A. Res. 64/292, The Human Right to Water and Sanitation (July 28, 2010).

72 Human Rights Council Res. 17/4, (Mar. 21, 2011).

73 G.A. Res. 70/175, The Nelson Mandela Rules (Dec. 17, 2015).

74 Report, *supra* note 3, at 41.

75 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 2889 U.N.T.S. 213, and subsequent protocols [hereinafter European Convention on Human Rights]; 2000 O.J. (C 364) 1; Org. for Sec. and Cooperation in Europe, *Human Dimension Commitments*, Vols. 1 and 2, <https://www.osce.org/odihr/what-is-the-human-dimension>.

76 American Declaration of the Rights and Duties of Man (May 2, 1948); American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

77 African Charter of Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217.

78 Arab Charter of Human Rights, September 15, 2004, League of Arab states [LAS].

79 Association ASEAN Human Rights Declaration, November 19, 2012, Ass'n of Se. Asian Nations [ASEAN].

80 *E.g.*, Mervat M. Rishmawi, *The Revised Arab Charter on Human Rights: A Step Forward?*, 5 HUMAN RTS. L. REV. 361, 364 (2005).

Their members are selected for expertise in human rights and are directed to vote in their individual capacities.⁸¹ Other professional bodies are discussed below.

The political bodies vary, but at their center is the much-criticized—for good reason—U.N. Human Rights Council. The Council's forty-seven members are not individuals but states whose representatives in the Council vote according to the foreign policies of their governments.⁸²

A. PROFESSIONAL BODIES

In addition to the nine U.N. treaty committees mentioned above, global and regional human rights bodies include courts, commissions, and rapporteurs, selected for their expertise in human rights, law, or related fields, and instructed to apply international norms, rather than to follow instructions from their governments. Because most are elected by governments, some professional positions become occupied by individuals who lack ability, human rights credentials, or independence.⁸³ In my experience as a scholar and practitioner over the last thirty years, however, a clear majority of the individuals elected are both qualified and independent.

The Commission observes that “standards emanating from international commissions and committees, individual experts, and advocacy groups—may be useful sources of reflection about the appropriate scope of human rights, but they lack the formal authority of law.”⁸⁴

That may be true of many experts and committees. However, it overlooks those who are judges on international human rights courts. Their judgments are indeed a source of law, both under general international law,⁸⁵ and, for states in the cases before them, under the treaties that establish their courts.⁸⁶

The U.N. has no court specifically for human rights. However, human rights claims are sometimes presented by states, or human rights questions presented

81 For example, members of the Human Rights Committee, which is the monitoring committee for the Civil and Political Covenant, “shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.” ICCPR *supra* note 50, at art. 28.2. They are to perform their functions “impartially.” *Id.* at art. 38.

82 G.A. Res. 60/251, ¶ 7 (Mar. 15, 2006).

83 See, e.g., Douglass W. Cassel, Jr., *D.Somoza's Revenge: A New Judge for the Inter-American Court of Human Rights*, 13 HUM. RTS. L.J. 137, 137–38 (1992).

84 Report, *supra* note 3, at 40.

85 Statute of the International Court of Justice, art. 38(1)(d) (ICJ to apply “judicial decisions . . . as subsidiary means for the determination of rules of law”) and art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”) – which of course means that the judgment does have “binding force” between the parties in that case. In *Medellin v. Texas*, 552 U.S. 491, (2008), the majority interpreted UN Charter art. 94, requiring that states “undertake to comply” with ICJ judgments, not to obligate the U.S. to comply. I believe this view was in error, for the reasons aptly stated by Justice Breyer for three justices in dissent.

86 E.g., *European Convention on Human Rights*, *supra* note 75, art. 46, art. 46.1 (“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”); *American Convention on Human Rights*, *supra* note 76, art. 68.1 (“The states parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.”); June 10, 1998, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 10, 1998, Org. of African Unity [OAU], art. 30 (“The states parties to the present Protocol undertake to comply with the judgment in any case to which they are parties . . .”). See note 85 *supra*.

by U.N. organs, and resolved by the International Court of Justice.⁸⁷ The International Criminal Court (which is related to but not part of the U.N.)⁸⁸ has jurisdiction over genocide, crimes against humanity, and war crimes, which often involve violations of human rights.⁸⁹

In contrast, specialized human rights courts have been created by regional organizations in Europe, the Americas, and Africa.⁹⁰ From 1959 through 2019, the European Court of Human Rights has rendered more than 22,000 judgments.⁹¹ Since 1987 the Inter-American Court of Human Rights has rendered over 400 judgments in contested cases,⁹² and twenty-five advisory opinions.⁹³ Since 2009, the African Court of Human and Peoples' Rights has made final decisions in 100 contested cases,⁹⁴ and decided twelve requests for advisory opinions.⁹⁵

The result is a rich body of international human rights jurisprudence. As in national legal systems, most judgments are not legally groundbreaking, but many are controversial.⁹⁶

Professionals are also selected as special rapporteurs or experts on human rights themes or on human rights in troubled countries, and report annually to the U.N. Human Rights Council.⁹⁷ Hundreds of professionals are on the staff of

87 *E.g.*, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20). The ICJ also renders advisory opinions, at the request of competent U.N. organs, some of which address human rights. *E.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136. (July 9).

88 Rome Statute of the International Criminal Court, art.2, July 17, 1998, 2187 U.N.T.S. 3.

89 *Id.*, arts. 5-8. Shamefully, the Trump Administration has authorized and imposed financial and visa sanctions on ICC lawyers investigating cases involving the U.S. See Ellen Nakashima and Carol Morello, *Lawyers Urge Trump to Rescind Sanctions and Travel Bans for International Criminal Court*, WASH. POST (June 29, 2020), https://www.washingtonpost.com/national-security/lawyers-urge-trump-to-rescind-sanctions-and-travel-bans-for-international-criminal-court/2020/06/29/0ef0c476-ba15-11ea-86d5-3b9b3863273b_story.html.

90 Some sub-regional courts also address human rights matters in some cases. *E.g.*, Koraou v. Niger, Judgment No. ECW/CCJ/JUD/06/08/ Judgment (Oct. 27, 2008) (Niger held liable for slavery).

91 Overview 1959-2019, at 3, Eur. Ct. H.Rts (Feb. 2020).

92 *Judgements*, Inter-Am. Ct. H.R., https://www.corteidh.or.cr/casos_sentencias.cfm?lang=en.

93 *Advisory Opinions*, Inter-Am. Ct. H.R., https://www.corteidh.or.cr/opiniones_consultivas.cfm?lang=en.

94 *Contentious Matters*, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], <https://en.african-court.org/index.php/cases>.

95 *Advisory Opinions*, Afr. Ct. H.P.R., <https://en.african-court.org/index.php/cases/2016-10-17-16-19-35>.

96 *See, e.g.*, Alvaro Paul, *Decision-Making Process of the Inter-American Court: An Analysis Prompted by the in Vitro Fertilization Case*, 21 ILSA J. INT'L & COM. L. 87 (2014); O. Bowcott, *Council of Europe Accepts UK Compromise on Prisoner Voting Rights*, THE GUARDIAN (Dec. 7, 2017), <https://www.theguardian.com/politics/2017/dec/07/council-of-europe-accepts-uk-compromise-on-prisoner-voting-rights>.

97 There are currently forty-two thematic mandates, listed at <https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM&lang=en>, and nine country mandates (for Belarus, Cambodia, Central African Republic, Iran, Mali, Myanmar, occupied Palestinian territories, Somalia and Sudan), listed at [net.ohchr.org/ViewAllCountryMandates.aspx?lang=en](https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?lang=en).

the U.N. High Commissioner for Human Rights.⁹⁸ Others are members or staff of regional human rights commissions.⁹⁹

B. POLITICAL BODIES

The main political body is the U.N. Human Rights Council.¹⁰⁰ Although the election of its forty-seven member states is supposed to “take into account” their human rights records,¹⁰¹ the reality is sometimes otherwise. Recent members include, for example, Eritrea, the Philippines, and Venezuela,¹⁰² none of whose recent records on human rights are admirable.¹⁰³

It is fair to say that both the election of some members to the Council, and some of its decisions,¹⁰⁴ have at times given human rights a bad name. When the U.S. withdrew in protest from the Council in 2018,¹⁰⁵ U.S. Ambassador Nikki Haley described the Council as a “hypocritical and self-serving organization that makes a mockery of human rights.”¹⁰⁶

However, no other nation followed the U.S. example. Then U.K. Foreign Secretary Boris Johnson, for example, termed the U.S. decision “regrettable,” arguing that while reforms are needed, the UNHRC is “crucial to holding states to account.”¹⁰⁷ In a broad-based organization on the international plane, there is probably no realistic way to avoid the political involvement of governments of varying stripes, whether in human rights or in other fields. And, as noted earlier, treaties negotiated by governments, and resolutions they adopt in political bodies—both by the Council and by the U.N. General Assembly, and

98 The High Commissioner had some 1,300 staff as of December 2017, counting administrative staff as well as human rights professionals. Multilateral Organisation Performance Assessment Network [MOPAN], OFFICE OF THE U.N. HIGH COMM’N FOR HUMAN RTS. (OHCHR): 2017-18 PERFORMANCE ASSESSMENT, 13 (Apr. 2019).

99 The oldest and largest is the Inter-American Commission of Human Rights, with seven elected commissioners and, as of 2019, 134 staff, including administrative and contract staff. *Annual Report 2019*, Ch. VI ¶ A.1, INT’L.-AM. COMM’N. H.R. Other regional commissions have small staffs: for example, the eleven-member African Commission of Human and Peoples’ Rights, and the ten-member ASEAN Intergovernmental Commission on Human Rights.

100 Political bodies in regional organizations have varying records on human rights. See, e.g., Douglass Cassel, *Regional Human Rights Systems and State Pushback: The Case of the Inter-American Human Rights System (2011–2013)*, 33 HUM. RTS. L.J. 1, (2013).

101 G.A. Res. 60/251, ¶ 8 (Mar. 15, 2006).

102 *Current Membership of the Human Rights Council for the 14th cycle, 1 January – 31 December 2020*, OFF. OF THE U.N. HIGH COMM’N FOR HUMAN RTS., <https://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx>.

103 Freedom House most recently rates Eritrea as “not free,” the Philippines as “partly free,” and Venezuela as “not free.” *Countries and Territories*, FREEDOM HOUSE, <https://freedomhouse.org/countries/freedom-world/scores>.

104 See, e.g., Lula Ahrens, *UN Human Rights Council Faces the Same Criticism as its Predecessor*, GLOBAL POLICY FORUM (May 21, 2010), <https://www.globalpolicy.org/un-reform/un-reform-topics/human-rights-council/49143-un-human-rights-council-faces-the-same-criticism-as-its-predecessor.html>.

105 Report, *supra* note 3, at 49.

106 Colin Dwyer, *U.S. Announces its Withdrawal from U.N. Human Rights Council*, NPR (June 19, 2018, 5:09 PM), <https://www.npr.org/2018/06/19/621435225/u-s-announces-its-withdrawal-from-u-n-s-human-rights-council>.

107 *U.S. Quits ‘Biased’ UN Human Rights Council* BBC NEWS (June 20, 2018), <https://www.bbc.com/news/44537372>.

even at times by the Security Council¹⁰⁸—have made important normative and operational advances in human rights.

IV. U.S. PARTICIPATION IN INTERNATIONAL HUMAN RIGHTS TREATIES

Of the seven core human rights treaties joined by all the democracies listed in Part II above (and by the vast majority of states in the world), the U.S. has joined only three: the Civil and Political Covenant, and the treaties against torture and racial discrimination.¹⁰⁹ That hardly means, however, that our foreign policy should ignore the other widely ratified core treaties on the rights of women, children, and persons with disabilities and on economic, social, and cultural rights.

In addition to three core treaties, the U.S. has joined such other human rights treaties as: the 1948 Genocide Convention¹¹⁰ (152 states parties), the 1953 Convention on the Political Rights of Women¹¹¹ (123 states parties), the 1957 Convention on the Nationality of Married Women¹¹² (75 states parties), the 1957 International Labor Organization (“ILO”) convention on forced labor¹¹³ (176 states parties¹¹⁴), the 1999 ILO Convention on the Worst Forms of Child Labor¹¹⁵ (187 states parties¹¹⁶), the Optional Protocols of 2000 to the children’s rights convention on child soldiers¹¹⁷ (170 states parties) and on the sale of children, child prostitution and child pornography¹¹⁸ (176 states parties).¹¹⁹

The U.S. has also joined other treaties relating to human rights (although categorized differently under international law), including the 1949 Geneva Convention on protection of civilians in wartime¹²⁰ (196 states parties¹²¹), the

108 *E.g.*, U.N. Sec. Council Res. 2493, ¶ 5 (Oct. 29, 2019) (calling on member states “to promote all the rights of women, including civil, political and economic rights”).

109 See ratification tables at https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en. See also Report, *supra* note 3, at 47 and Part VII below.

110 United Nations Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

111 United Nations Convention on the Political Rights of Women, Mar. 31, 1953, 193 U.N.T.S. 135.

112 United Nations Convention on the Nationality of Married Women, Feb. 20, 1957, 309 U.N.T.S. 65.

113 Int’l Labor Org., Abolition of Forced Labour Convention, June 25, 1957, No. 105.

114 *Id.*

115 Int’l Labor Org., Worst Forms of Child Labor Convention, June 17, 1999, No. 182.

116 *Ratifications of C182 – Worst Forms of Child Labour Convention, 1999 (No. 182)*, INT’L LABOR ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327:NO.

117 United Nations, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222.

118 United Nations, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227.

119 See ratification tables at the United Nations Treaty Collection, https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en (last visited Dec 1, 2020).

120 Int’l Comm. of the Red Cross, Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949; see ratification table at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/states.xsp?xp_viewstates=XPages_NORMstatesParties&xp_treatySelected=380 (last visited Dec 1, 2020).

121 See list at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/states.xsp?xp_viewstates=XPages_NORMstatesParties&xp_treatySelected=380 (last visited Dec 1, 2020).

1977 Geneva Protocol I on protection of victims of armed conflict¹²² (174 states parties¹²³), and the 1967 protocol on refugees¹²⁴ (147 states parties).

V. THE NEED FOR OUR FOREIGN POLICY TO CONSIDER INTERNATIONAL HUMAN RIGHTS LAW BEYOND THE U.S. CONSTITUTION AND THE UDHR

At a general level, U.S. constitutional jurisprudence, the UDHR, and post-1948 international human rights law embody common, underlying values. These include especially life,¹²⁵ liberty,¹²⁶ equality,¹²⁷ dignity,¹²⁸

122 Int'l Comm. of the Red Cross, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument> (last visited Dec 1, 2020).

123 *Id.*

124 United Nations, Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

125 *E.g.*, U.S. Const. amend. V (no deprivation of life without due process of law); UDHR *supra* note 6, at art. 3, Dec. 10, 1948 (“right to life”); ICCPR *supra* note 50 art. 6.1, Dec. 19, 1966 (“inherent right to life”).

126 *E.g.*, U.S. Const. amend. V (no deprivation of liberty without due process of law); UDHR, *supra* note 6, at art. 3 (“right to . . . liberty”); ICCPR, *supra* note 50, at art. 9.1 (“right to liberty”).

127 *E.g.*, U.S. Const. amend. XIV (“Equal protection of the laws”); UDHR, *supra* note 6, at art. 1 (“All human beings are born free and equal in dignity and rights.”), art. 2 (UDHR rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”), art. 7 (equality before the law and equal protection of the law.), art. 16 (men and women “entitled to equal rights as to marriage . . .”); ICCPR, *supra* note 50, at Preamble (“inherent dignity of the human person”), art. 2.1 (states to ensure rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”), art. 3 (“equal right of men and women” to civil and political rights), art. 14.1 (equality before courts and tribunals), art. 24.1 (child’s right to protection “without any discrimination”), art. 26 (equality before the law and equal protection of the law. No discrimination on any ground “such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

128 *E.g.*, U.S. Const. amend. VIII (prohibiting “cruel and unusual punishments”); UDHR, *supra* note 6, at art. 1 (“All human beings are born free and equal in dignity and rights.”), art. 5 (no “torture or . . . cruel, inhuman or degrading treatment or punishment”); ICCPR, *supra* note 50, at art. 7 (no “torture or . . . cruel, inhuman or degrading treatment or punishment . . . [N]o one shall be subjected without his free consent to medical or scientific experimentation.”), art. 10.1 (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”).

community,¹²⁹ autonomy,¹³⁰ and security.¹³¹

But if the underlying values are the same, should not the U.S. Constitution and UDHR suffice (as the Commission Report implies) to guide U.S. foreign policy on human rights?

Despite its limited mandate, the Commission does not argue for simply ignoring post-1948 international human rights law. Its Report acknowledges that “[m]uch has been done in the decades since the approval of the UDHR to go beyond these aspirational and pedagogical goals by translating its principles into legally binding obligations, principally through treaties.”¹³² Indeed, “[t]he collective effort since 1948 to translate the UDHR’s broad principles of human rights into binding legal commitments through a network of treaties has achieved laudable results.”¹³³

Nonetheless, the Commission downplays post-1948 international human rights law. First, its Report barely mentions this body of law. Second, the Report implies that these laws depend, for effectiveness, on the moral and political commitments of the UDHR¹³⁴—as if embodying norms in law somehow weakens, rather than strengthens, their moral force.¹³⁵ And third, the Report downgrades treaty law as mere “positive law,” which does not “create” human rights¹³⁶—overlooking the fact that the UDHR likewise did not “create,” but merely recognized human rights.

There are at least five reasons why the U.S. Constitution and UDHR are not, by themselves, sufficient, and why post-UDHR international human rights law should not be virtually ignored, or downgraded as mere positive law.¹³⁷ They are (1) universality, (2) specificity, (3) newly protected groups, (4) newly proscribed wrongs, and (5) newly identified actors.

129 The U.S. Constitution does not directly authorize the judiciary to impose communitarian values. However, courts defer to legislative takings of private property for a “public purpose,” including the welfare of the community as a whole, *e.g.*, *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (Hawaii Land Reform Act designed to “attack certain perceived evils of concentrated property ownership” had “legitimate public purpose.”); International norms are more explicit, *e.g.*, UDHR, *supra* note 6, at art. 1 (All human beings “should act towards one another in a spirit of brotherhood.”), art. 22 (“right to social security”), art. 29 (“duties to the community”); ICCPR, *supra* note 50, at art. 23.1 (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

130 *E.g.*, U.S. Const. amend. I (freedom of speech and religion), amend. 4 (“right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”), *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy); UDHR, *supra* note 6, at art. 12 (no “arbitrary interference with . . . privacy, family, home or correspondence . . .”), art. 18 (“freedom of thought, conscience and religion”), art. 19 (“freedom of opinion and expression”); ICCPR, *supra* note 50, at arts. 17.1 (no “arbitrary or unlawful interference with . . . privacy, family, home or correspondence”), 18.1 (“freedom of thought, conscience and religion”), art. 19.1 (“right to hold opinions without interference”), 19.2 (“freedom of expression”).

131 *E.g.*, U.S. Const. amend. II (well-regulated militia “necessary to the security of a free state”); UDHR, *supra* note 6, at art. 3 (“security of person”), art. 5 (no “torture or . . . cruel, inhuman or degrading treatment or punishment.”), art. 9 (no “arbitrary arrest, detention or exile.”), art. 25 (“right to a standard of living adequate for the health and well-being of himself and of his family”); ICCPR, *supra* note 50, at art. 7 (no “torture or . . . cruel, inhuman or degrading treatment or punishment”), art. 9.1 (“right to . . . security of person”).

132 Report, *supra* note 3, at 31–32.

133 *Id.* at 58.

134 *Id.* at 32.

135 *See, e.g.*, LON FULLER, *THE MORALITY OF LAW* (Yale Univ. Press. rev. ed. 1969).

136 Report, *supra* note 3, at 41.

137 *Id.* at 40–41.

A. UNIVERSALITY

As the Commission recognizes, universal human rights cannot be photocopied in every aspect everywhere; within limits, they do and must allow for variations in the extent and manner of their recognition and implementation, in the context of diverse “political, economic, cultural, religious, and legal traditions.”¹³⁸ The U.S. Constitution cannot be the template for human rights everywhere.

Consider, for example, one of the rights which Secretary Pompeo regards as “foremost”: freedom of religion.¹³⁹ The U.S. Constitution,¹⁴⁰ the UDHR,¹⁴¹ and post-1948 international human rights law,¹⁴² all provide for the free exercise of religion and prohibit discrimination based on religion. But the U.S. Constitution’s First Amendment, reflecting our particular history as a haven for religious dissidents, goes a step further: it prohibits Congress from making any law respecting an “establishment of religion. . . .”¹⁴³

In contrast, many other nations, including democracies, have established religions in one form or another. Yet few Americans would suggest that we should denounce violations of human rights in England because the official religion is the Church of England,¹⁴⁴ or in Germany because it privileges Christian faiths,¹⁴⁵ or in Greece because the Orthodox Church is the State religion.¹⁴⁶ In these and other countries, it is enough that the State does not limit the free exercise of religion, and does not otherwise discriminate against those who believe in a particular faith or in no faith at all.

Another example is the right to fair trial. In the U.S., as in many common law countries, the right to trial by jury is deemed fundamental to a fair trial in significant cases.¹⁴⁷ Most nations of the world, however, do not use juries.¹⁴⁸ The UDHR accordingly does not refer to juries, and international human rights law does not require trial by jury. As with the ban on established religion, our constitutional right to jury does not guide other countries.

138 *Id.* at 32.

139 Pompeo, *supra* note 18.

140 U.S. Const. amend. I, XIV.

141 UDHR, *supra* note 6, at arts. 2 and 18.

142 *E.g.*, ICCPR *supra* note 50, at arts. 2.1 and 18.

143 U.S. Const. amend. I.

144 *E.g.*, Bérengère Massignon, *Confrontations Europe: The Countries of Europe: All Secular, All Different!*, Jan. 25, 2015, <http://confrontations.org/admin/the-countries-of-europe-all-secular-all-different/>.

145 *Id.*

146 *Id.* See Constitution of Greece (2008), §2, art. 3.1.

147 U.S. Const. amends. VI (criminal cases) and VII (civil cases). As the Commission notes, James Madison in 1789 conceded that trial by jury was not a “natural right,” but he nonetheless thought it “essential.” Report, *supra* note 3, at 18. Most legal cultures of the world, then and now, do not agree that it is essential.

148 However, many countries utilize other forms of lay participation in judicial decision-making. See generally Valerie P. Hans, *Jury Systems Around the World*, CORNELL L. FACULTY PUBL’NS, 305 (2008) <http://scholarship.law.cornell.edu/facpub/305>.

B. SPECIFICITY

Although “universal” by definition, the UDHR is also quite general. Widely supported human rights treaties and declarations are not only less culturally specific than the U.S. Constitution, they are also not as generally worded as the UDHR. They are both universal (or nearly so) and relatively specific in defining rights.

Consider, again, the right to fair trial. The UDHR provides for a “fair and public hearing by an independent and impartial tribunal. . . .”¹⁴⁹ and for “the right to be presumed innocent until proved guilty according to law in a public trial at which [the accused] has had all the guarantees necessary for his defence.”¹⁵⁰

But what are those “guarantees” necessary for defense?¹⁵¹ The International Covenant on Civil and Political Rights, adopted in 1966 and now joined by 173 states (including the U.S.), supplies a more specific answer. In criminal cases, they include the “following minimum guarantees”¹⁵²:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.”

Even in civil cases, what is a “public” trial? The U.S. Constitution does not define “public,” U.S. Supreme Court interpretations do not govern other nations, and the UDHR likewise does not define a “public” trial. In contrast, the Civil and Political Covenant clarifies:

The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest

149 UDHR, *supra* note 6, at art. 10.

150 UDHR, *supra* note 6, at art. 11(1).

151 As the Commission notes, the “‘right to a fair and public hearing before an independent and impartial tribunal’ leaves undefined the details of what specifically constitutes independence, impartiality, and even a tribunal.” Report, *supra* note 3, at 32.

152 ICCPR, *supra* note 50, at art. 14.3.

of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.¹⁵³

Thus, if U.S. foreign policy on human rights were to be guided only or primarily by our nation's founding documents and the UDHR, with little or no reliance on post-1948 international human rights law, U.S. diplomats would be hampered, both in assessing whether other nations conduct fair trials and in persuading the world at large to credit our assessments. U.S. Constitutional provisions on fair trial are too country-specific, while the UDHR is too general. To be grounded in criteria that are both universal and specific, our foreign policy needs to embrace international human rights law and policy, embodied in widely supported treaties and declarations,¹⁵⁴ except where contrary to our values.

C. NEWLY PROTECTED GROUPS

Groups whose rights were not expressly recognized in 1948, or were hardly recognized, are now widely accepted as needing specific recognition in order to ensure their human rights. For example, the UDHR does not mention persons with disabilities, who are now protected by a treaty joined by 182 states,¹⁵⁵ or Indigenous Peoples, whose rights are now recognized by a declaration that enjoys broad support.¹⁵⁶

The UDHR barely mentioned children. They were merely “entitled to special care and assistance,” and implicitly entitled to free primary education.¹⁵⁷ Yet their rights are now specified extensively by the Convention on the Rights of the Child—a treaty joined by every U.N. member State (except the U.S.).¹⁵⁸

D. NEWLY PROSCRIBED WRONGS

Even previously protected groups—such as women—are now protected from additional wrongs. For example, the UDHR expressly recognized the right of women to equal rights,¹⁵⁹ but did not expressly protect them from sexual violence and sexual harassment. In contrast, the 1981 Convention against

153 ICCPR, *supra* note 50, at art. 14.1.

154 *E.g.*, G.A. Res. 40/146, Basic Principles on the Independence of the Judiciary (Dec. 13, 1985).

155 U.N. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 45; U.N. Convention on the Rights of the Child, *supra* note 54.

156 G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). The Resolution was adopted by a vote of 144 to 4 (with 11 abstentions). Since then, all four opposing states have reversed their positions and now support the Declaration. *See* G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). Although the U.S. initially voted against, President Obama declared U.S. support for the Declaration in 2016. *See* U.S. DEP'T OF STATE, *supra* note 36.

157 UDHR, *supra* note 6, at arts. 25(2) and 26(1).

158 U.N. Secretary-General, *supra* note 48; CEDAW *supra* note 52.

159 UDHR, *supra* note 6, at arts. 2 and 16.

Discrimination against Women (CEDAW),¹⁶⁰ now joined by 189 states, has been consistently interpreted by the expert CEDAW committee to prohibit violence against women.¹⁶¹ Regional treaties expressly prohibiting violence against women have been joined by every OAS nation in Latin America and the Caribbean,¹⁶² and by 42 states in Africa.¹⁶³

E. NEWLY IDENTIFIED ACTORS

International human rights law and policy now protect against non-State actors who were not addressed by the 1948 UDHR.¹⁶⁴ For example, in 2011 the U.N. Human Rights Council adopted, without dissent, the U.N. *Guiding Principles on Business and Human Rights*, which impose on business a “responsibility to respect” human rights.¹⁶⁵ While not legally binding on business, those principles have been widely embraced by states, international organizations, industry associations, individual companies, and by some human rights organizations.¹⁶⁶ Nowadays the potential impacts of business on human rights—both positive and negative¹⁶⁷—are too important for U.S. foreign policy to ignore, simply because they were not recognized by our nation’s founding documents or by the UDHR. Yet the Commission’s Report mentions only “violations” by non-State actors,¹⁶⁸ without mentioning the post-1948 norms that address them.

160 U.N. Secretary-General, *supra* notes 48; CEDAW, *supra* note 52.

161 U.N. Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 8th Sess., CEDAW General Recommendation No. 12: Violence Against Women, 1989; U.N. CEDAW, 11th Sess., CEDAW General Recommendation No. 19: Violence Against Women, 1992; U.N. CEDAW, 67th Sess., General Recommendation No. 35, 2017.

162 Organization of American states, Inter-American Convention, on the Prevention, Punishment and Eradication of Violence against Women, Aug. 9, 1994, OAS treaty A-61 (joined by 32 states). See ratification table at *General Information of the Treaty: A-61*, DEP’T OF INT’L LAW, <http://www.oas.org/juridico/english/signs/a-61.html> (last visited Dec. 1, 2020). Cuba, which refuses to participate in the OAS, is the only independent Latin American or Caribbean State not party to this OAS treaty. See *General Information of the Treaty: A-61*, DEP’T OF INT’L LAW, <http://www.oas.org/juridico/english/signs/a-61.html>. (last visited Dec. 1, 2020).

163 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art. IV.2 (a)–(f), July 11, 2003 (See list of states parties at *List of Countries which have Signed, Ratified/Acceded to the African Charter on Human and People’s Rights on the Rights of Women in Africa*, AFRICAN UNION, <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf>). (last visited Dec. 1, 2020)).

164 Universal Declaration of Human Rights, Preamble, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (calling on “every individual and every organ of society” to strive by “teaching and education” to promote and secure human rights).

165 G.A. Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises (June 16, 2011) (endorsing the Guiding Principles, annexed to the Report of the Special Representative of the Secretary-General, at 13-16, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011)).

166 See, e.g., World Business Council for Sustainable Development, <https://www.wbcsd.org/Programs/People/Social-Impact/Human-Rights> (last visited Dec. 1, 2020) (advocating that companies embed the Guiding Principles into their operations).

167 John Ruggie (Special Representative of the Secretary-General), *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶¶ 2-3, U.N. Doc. A/HRC/8/5, (Apr. 7, 2008).

168 Report, *supra* note 3, at 52.

F. *LIMITS*

Not every right in international human rights law is consistent with American law and values. For example, Article 20 of the Civil and Political Covenant requires state parties to prohibit “propaganda for war” and “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁶⁹

In contrast, U.S. constitutional jurisprudence reflects the higher value we place on free speech. Our First Amendment safeguards hate speech unless it is “[1] directed to inciting or producing [2] imminent lawless action and is [3] likely to incite or produce such action.”¹⁷⁰ Accordingly, when the U.S. joined the ICCPR in 1992, we made a reservation to Article 20, to preserve our broader scope of free speech.¹⁷¹

Our foreign policy should not seek to impose our broader view of free speech on others.¹⁷² However, neither should we accept the ICCPR’s narrower conception, which is contrary to our fundamental values and law. On this issue we should, in effect, respectfully agree to differ.

In general, however, U.S. constitutional jurisprudence is compatible with international treaty law. Although the U.S. made other reservations to the ICCPR (and to the race and torture conventions), none reflects an inconsistency with basic American values.¹⁷³

G. *SUMMARY*

In short, for at least five sets of reasons, in addition to the human rights groups’ objections, grounding U.S. foreign policy on human rights only in our nation’s founding documents and the 1948 UDHR risks undermining “decades of human rights progress.”¹⁷⁴ Except where international human rights law conflicts with basic American values, as in the case of the limits on free speech, our foreign policy should take account of widely supported international human rights treaties and declarations.

VI. MERITS OF THE REPORT

The Commission’s Report is commendable for a number of important points. It would be regrettable if they were to become lost amid the protest over

¹⁶⁹ ICCPR, *supra* note 145, at art. 20, §2.

¹⁷⁰ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁷¹ "(1) That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." Reservations of the United States of America to the International Covenant on Civil and Political Rights (Dec. 16, 1966), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec (last visited Dec. 1, 2020).

¹⁷² The Commission agrees. *See* Report, note 3 at 25, 36-37, 39.

¹⁷³ When the U.S. ratified the ICCPR in 1992, it made a Reservation preserving the right to impose capital punishment “for crimes committed by persons below eighteen years of age.” ICCPR, *supra* note 145, at art. 6, §5. However, since then, the U.S. Supreme Court has ruled that the Constitution prohibits the juvenile death penalty. *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁷⁴ Letter, *supra* note 11.

the Report’s politicized context, constrained mandate, and certain of its conclusions. The Report’s positive aspects include at least the following:

- its condemnation of racial injustice in the U.S.,
- its appropriately modest assessment of the U.S. human rights record,
- its holistic reading of the UDHR,
- its abstention from any claim that human rights demand acceptance of conservative religious or political positions on social issues,
- its bipartisan history of the U.S. stance on human rights,
- its prioritization of the role of human rights in government,
- its timely criticisms of Russia and China on human rights, and
- its call for human rights to be an important component of our foreign policy.

The Report addresses these issues as follows:

A. RACE

The Report does not sugarcoat American violations of human rights. Particularly in the area of racial injustice, the Report gives special recognition to “the sin of slavery,” calling it “our nation’s deepest violation of unalienable rights.”¹⁷⁵ While rightly praising structural safeguards (*e.g.*, limited powers, separation of powers) in our Constitution of 1789, the Report laments that the Founders’ basic charter “betrayed the promise of unalienable rights by giving legal protection to slavery.”¹⁷⁶

The Report traces this betrayal through U.S. history. Lauding federalism, it nonetheless recalls that “under the banner of states’ rights, states exploited federalism to shield slavery and prolong discrimination.”¹⁷⁷ In the 1930s, “Even the New Deal’s sweeping reform of labor law excluded agricultural and domestic workers, a large proportion of whom were members of racial and ethnic minorities.”¹⁷⁸

In the present day, “[t]he brutal killing of an African-American man by a police officer in the late spring of 2020 and the subsequent civic unrest that swept the country underscore that much still must be accomplished.”¹⁷⁹ The Report stresses “the nation’s unfinished work in overcoming the evil effects of its long history of racial injustice.”¹⁸⁰

B. MODESTY

175 Report, *supra* note 3, at 9.

176 *Id.* at 18.

177 *Id.* at 15.

178 *Id.* at 22.

179 *Id.* at 24.

180 *Id.* at 4.

Although the Report does not pretend to undertake a comprehensive historical survey, it is also appropriately modest about the U.S. record in other areas of human rights. “Americans rightly take pride in their constitutional tradition.”¹⁸¹ However, we must “show the same honest self-examination and efforts at improvement” that we expect of others.¹⁸² The U.S. is “burdened with a history of grave departures from the principles of freedom and equality both at home and abroad.”¹⁸³

At home, “under the flag of Manifest Destiny, the United States cruelly expelled Native Americans from their ancestral lands with tremendous cost in human life and compelled them to enter into treaties that it failed to honor.”¹⁸⁴ There has been “much in America with which to struggle,” including “discrimination against immigrants and other vulnerable minorities; and the imposition of legal liabilities on, and the withholding of opportunities from, women.”¹⁸⁵ Yet “[p]rogress toward the securing of rights for all has often been excruciatingly slow and has been interrupted by periods of lamentable backsliding.”¹⁸⁶

Abroad, the U.S. “has sided at times with dictators and undermined expressions of democratic will. And the United States has undertaken military actions that, many have concluded, were ill-conceived and damaging to the cause of freedom.”¹⁸⁷ Given this record, “the nation must be humble in light of the work that remains to be done.”¹⁸⁸

Such assessments might be unremarkable coming from, say, Human Rights Watch. But from a commission appointed by possibly the most jingoistic, least internationalist Administration in modern U.S. history, the candor is noteworthy and commendable.

C. UDHR

Reflecting the scholarship of Professor Glendon,¹⁸⁹ the Report offers a holistic view of the UDHR.¹⁹⁰ The UDHR has both civil and political, as well as economic, social and cultural rights.¹⁹¹ However, the UDHR “is not a mere list of severable, free-standing provisions, each understood in isolation and on its own terms.”¹⁹² It embodies a “holistic understanding of individual rights in community.”¹⁹³ It was “written and understood as an integrated set of interlocking principles. Each principle was like an instrument that made an essential contribution to the harmony of the whole ensemble.”¹⁹⁴

181 Report, *supra* note 3, at 54–55.

182 *Id.* at 44.

183 *Id.* at 43.

184 *Id.* at 43.

185 *Id.* at 8–9.

186 Report, *supra* note 3, at 9.

187 *Id.* at 43.

188 *Id.* at 9.

189 See authorities cited in Glendon, *supra* note 12.

190 Report, *supra* note 3, at 29–33.

191 *Id.* at 30.

192 *Id.* at 31.

193 *Id.*

194 *Id.*

The Report does not take this understanding to what seems to me to be its logical conclusion —that economic, social, and cultural rights are “interlocked” with, and no less human rights, than are civil and political rights.¹⁹⁵ Still, the Commission’s holistic reading lays the foundation for what should be an unsurprising conclusion: that all rights in the UDHR, including economic, social, and cultural rights, are universal human rights.

D. SOCIAL ISSUES

When the Commission was announced, opponents expressed fears that its “deeply conservative” patronage, mission, and Chair would “threaten sexual equality, LGBTQ rights and reproductive health globally.”¹⁹⁶

To the Commission’s credit, however, it resisted any temptation to equate human rights with conservative religious or political positions on hot-button social issues. Perhaps this was because, as they openly state, the Commissioners were “not of one mind on many issues where there are conflicting interpretations of human rights claims—abortion, affirmative action, and capital punishment, to name a few.”¹⁹⁷

Whatever the reason, their Report admits that no “single answer” to metaphysical questions of “natural rights” (a term for “human rights” at the time¹⁹⁸) was “decisive in 1776. Still less today. . . .”¹⁹⁹ The Report acknowledges the reality that “[i]n divisive social and political controversies in the United States—abortion, affirmative action, same-sex marriage—it is common for both sides to couch their claims in terms of basic rights.”²⁰⁰ This is simply an empirical fact, one on which all sides to these social controversies might agree.²⁰¹

E. BIPARTISAN HISTORY

Appointed by a Republican Administration, the Commission nonetheless repeatedly cites Democrats in its summary history of U.S. commitments to human rights. They include Woodrow Wilson,²⁰² Eleanor Roosevelt,²⁰³ Franklin

¹⁹⁵ See *infra* Part VII.C.

¹⁹⁶ Katherine M. Marino, *How Mike Pompeo’s New Commission on ‘Unalienable Rights’ Butchers History*, WASHINGTON POST (Aug. 15, 2019), <https://www.washingtonpost.com/outlook/2019/08/15/how-mike-pompeos-new-commission-unalienable-rights-butchers-history/>.

¹⁹⁷ Report at 7.

¹⁹⁸ *Id.* at 12 (Unalienable rights were “sometimes referred to as natural rights in the founding era and today commonly called human rights. . . .”)

¹⁹⁹ *Id.* at 11.

²⁰⁰ *Id.* at 24.

²⁰¹ See, for example, the conflicting arguments in *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (rights of gay persons to be free from discrimination versus freedom of speech and free exercise of religion by a baker who refused to bake a special cake for same sex marriage). Although the baker won a 7-2 decision by the Court, the point here is simply that claims of basic rights, as often occurs, were made on both sides.

²⁰² Report, *supra* note 3, at 43.

²⁰³ *Id.* at 7-8, 58.

Roosevelt,²⁰⁴ Harry Truman,²⁰⁵ and Jimmy Carter,²⁰⁶ among others,²⁰⁷ along with Ronald Reagan.²⁰⁸

Despite this gesture, the historical record is not evenly bipartisan. Diplomatically left unsaid is the reality that Democratic administrations and Senates have generally been somewhat more open to international human rights treaties than Republican ones.²⁰⁹ For example, would any recent Republican president have advocated ratification of all five human rights treaties, and acceptance of three international complaint procedures, presented by Jimmy Carter to the Senate?²¹⁰

Even so, the Report is not inaccurate in stating that a cautious approach has been “the consistent orientation of the U.S. State Department to international human rights law and institutions for at least the past half-century, under both Democratic and Republican administrations.”²¹¹

F. GOVERNMENT PRIORITY

The Report is clear that human rights should be a top priority for all governments: “The [U.S.] Declaration [of Independence] also holds it to be a self-evident truth that the first task of political society is to ensure that unalienable rights are respected: ‘to secure these rights, Governments are instituted among Men.’”²¹² Similarly, the UDHR “affirms that all nations’ political institutions and laws should be judged by their ability to secure the rights that individuals everywhere share.”²¹³

That includes our government: “The most important obligation of the United States government under the Constitution is to protect its citizens’ unalienable rights, which it accomplishes by giving expression to those rights in the positive law of the land.”²¹⁴

G. RUSSIA AND CHINA

Naming “flagrant human rights abusers—such as China, Cuba, Libya, Russia, Saudi Arabia, and Venezuela,” the Report accurately observes that “a large portion of the globe now lives in countries with scant human rights

204 *Id.* at 21, 43.

205 *Id.* at 22.

206 *Id.* at 43, 44, 46.

207 *Id.* at 44 (Senator Henry Jackson and Rep. Charles Vanik), 45 (Rep. Donald Fraser).

208 *Id.* at 44, 46.

209 *See, e.g., infra* Part VII.E.

210 *See generally* Jimmy Carter, U.S. President, Human Rights Treaties Message to the Senate, (Feb. 23, 1978), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JAMES E. CARTER, JR. 1978 at 395 (1979), (Race Convention; Civil and Political Covenant; Economic, Social and Cultural Rights Covenant; American Convention on Human Rights; individual complaints under Race Convention, and State-to-State complaints under the Civil and Political Covenant, and the American Convention); Jimmy Carter, U.S. President, Convention on the Elimination of All Forms of Discrimination Against Women, Message to the Senate Transmitting the Convention, (Nov. 12, 1980), in 3 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JAMES E. CARTER, JR. 1980-81 at 2715 (1982).

211 Report, *supra* note 3, at 41.

212 *Id.* at 11–12.

213 *Id.* at 12.

214 *Id.* at 36.

protection. Among these countries, the most influential are Russia and China.”²¹⁵

In deploring the current attitudes and practices on human rights by the governments of Russia and China, the Commission is in the good company of major human rights groups otherwise critical of its Report, such as Amnesty International²¹⁶ and Human Rights Watch.²¹⁷

Today’s world has no shortage of gross violators of human rights. The Commission’s Report rightly singles out the most influential violators, Russia and China, for extended discussion.²¹⁸ If anything, the Commission understates the threat to human rights posed by the rising economic, military, and diplomatic power of China.²¹⁹ Unless Beijing’s orientation changes dramatically, human rights will likely be under mounting and greater threat in the coming decades than at any time since 1948.

215 *Id.* at 49.

216 **Russia:** Amnesty’s most recent summary states, “Russia’s human rights record continued to deteriorate, with the rights to freedom of expression, association and peaceful assembly consistently restricted Those attempting to exercise these rights faced reprisals, ranging from harassment to police ill-treatment, arbitrary arrest, heavy fines and in some cases criminal prosecution and imprisonment. Human rights defenders and NGOs were targeted Hundreds of Jehovah’s Witnesses were persecuted for their faith. Other vulnerable minorities also faced discrimination and persecution. Counter-terrorism provisions were widely used to target dissent Torture remained pervasive, as did impunity for its perpetrators. Violence against women remained widespread and inadequately addressed Refugees were forcibly returned to destinations where they were at risk of torture.” Amnesty INT’L, HUMAN RIGHTS IN EASTERN EUROPE AND CENTRAL ASIA: REVIEW OF 2019 24 (2020) (Index: EUR 01/1355/2020).

China: Even before recent deteriorations, Amnesty’s most recent world report summarized human rights in China as follows: “The government continued to draft and enact new laws under the guise of ‘national security’ that presented serious threats to human rights. Nobel Peace Prize laureate Liu Xiaobo died in custody. Activists and human rights defenders were detained, prosecuted and sentenced on the basis of vague and overbroad charges. . . . Police detained human rights defenders outside formal detention facilities, sometimes incommunicado, for long periods, which posed additional risk of torture and other ill-treatment Controls on the internet were strengthened. Repression of religious activities outside state-sanctioned churches increased. Repression conducted under “anti-separatism” or “counterterrorism” campaigns remained particularly severe in the Xinjiang Uighur Autonomous Region and Tibetan-populated areas. Freedom of expression in Hong Kong came under attack” AMNESTY INT’L, REPORT 2017/18: THE STATE OF THE WORLD’S HUMAN RIGHTS 125 (2018) (Index: POL 10/6700/2018).

217 *E.g.*, Yaqiu Wang, *In China, the “Great Firewall” is Changing a Generation*, HUMAN RIGHTS WATCH (Sept. 1, 2020, 11:57 AM), <https://www.hrw.org/news/2020/09/01/china-great-firewall-changing-generation> (originally published in *Politico*); Rachel Denber, *Russia Needs an Investigation into Navalny’s Illness: Kremlin Critic is Fighting for his Life*, HUMAN RIGHTS WATCH (Aug. 21, 2020, 12:02 PM), <https://www.hrw.org/news/2020/08/21/russia-needs-investigation-navalnys-illness>.

218 Report, *supra* note 3, at 49–52.

219 According to the World Bank, China’s total real income, measured in PPP (purchasing power parity) terms, surpassed that of the U.S. in 2017. Jeffrey Frankel, *Is China Overtaking the US as a Financial and Economic Power?*, THE GUARDIAN (May 29, 2020), <https://www.theguardian.com/business/2020/may/29/is-china-overtaking-the-us-as-a-financial-and-economic-power>. Entrepreneur Elon Musk predicts that China’s economy will double or triple that of the U.S. Amanda Macias & Jessica Bursztynsky, *Elon Musk says Chinese Economy Will Surpass US by 2 or 3 Times: ‘The Foundation of War is Economics,’* CNBC (Feb. 28, 2020), <https://www.cnbc.com/2020/02/28/musk-says-chinese-economy-will-surpass-the-us-by-two-or-three-times.html>. For military power, *see, e.g.*, John Grady, *Pentagon Report: China Now Has World’s Largest Navy as Beijing Expands Military Influence*, USNI NEWS (Sept. 1, 2020), <https://news.usni.org/2020/09/01/pentagon-report-china-now-has-worlds-largest-navy-as-beijing-expands-military-influence>. For diplomatic influence, *see, e.g.*, Ben Westcott, *China has overtaken US as world’s largest diplomatic power, think tank says*, CNN (Nov. 26, 2019), <https://www.cnn.com/2019/11/26/asia/us-china-diplomacy-lowy-intl-hnk/index.html>.

H. FOREIGN POLICY

The Report recognizes the threat, not only from Russia and China, but from other authoritarian governments: “[W]ith hundreds of millions of men and women around the world suffering extreme forms of deprivation under harsh authoritarian regimes, we are of one mind on the urgent need for the United States to vigorously champion human rights in its foreign policy.”²²⁰

This is no minor matter: “America must rise to today’s challenges with the same energy and spirit that she brought to the building of a new international order in the wake of two world wars.”²²¹ In such an endeavor, the U.S. cannot succeed unilaterally: “With freedom, human equality, and democracy facing strong ideological opposition from powerful states, this is not the moment for the liberal democracies of the world to falter in defending the principles that have enabled them to achieve ‘better standards of life in larger freedom.’”²²² Yet “even some liberal democracies appear to be losing sight of the urgency of human rights in a comprehensive foreign policy.”²²³

Although the Commission apparently shrinks from using the word “multilateralism,” the resulting implications are clear, even if understated. The Report “notes the likelihood that U.S. measures to promote human rights abroad will be more effective when carried out in cooperation with other nations. No nation alone can achieve all that is necessary to bring human rights to life, and one nation acting by itself will always be suspected, fairly or unfairly, of ulterior motives.”²²⁴

In spite of its clarion call, the Commission is not naïve about the potential role of human rights in U.S. foreign policy. Its Report recognizes that the implications of human rights for foreign affairs are “more diffuse and indirect than they are for domestic affairs,”²²⁵ because of the “multiple factors that must be considered in the formation of foreign policy.”²²⁶

Still, the “self-evident truths concerning individual freedom and human equality on which the United States was founded nevertheless should inform and elevate America’s conduct in the world.”²²⁷ The Commission might have added that the global consensus reflected in widely supported international human rights instruments should likewise inform and elevate U.S. foreign policy.

VII. CRITICISMS OF THE REPORT

As noted above, the Commission’s draft Report, later adopted as its final Report with only minor changes, was roundly criticized on multiple grounds by more than 200 organizational and individual human rights advocates in a letter

220 Report, *supra* note 3, at 7.

221 *Id.*

222 *Id.*

223 *Id.* at 6.

224 *Id.* at 54.

225 Report, *supra* note 3, at 25.

226 *Id.* at 53.

227 *Id.* at 25.

to Chairperson Glendon.²²⁸ They object to Secretary Pompeo’s “political agenda” underlying the Commission’s work, adding that “the failure of the Secretary and the Commission to acknowledge the many Trump administration policies that have significantly undermined America’s leadership on human rights undercuts both the Commission’s standing and the report itself.”²²⁹

Even though the Commission might respond that its mandate was to focus on “principle, not policy formulation,”²³⁰ the perception that it gives a free pass to its patron is not easily dispelled. However, my present assessment attempts to meet the Commission on its own ground, and to consider only its analysis of human rights principles.²³¹

At the level of principles, the letter from the human rights advocates (hereafter “HR advocates”) identifies five “most concerning aspects” of the Report. Recall that the HR advocates were given only a token two weeks to respond to the Commission’s Report.²³² With more time, some who signed might have chosen differing words, nuances, or priorities.

The following are my attempts to paraphrase the concerns of the HR advocates together with brief observations on each concern:²³³

A. PROLIFERATION OF HUMAN RIGHTS CLAIMS:

HR Advocates: The proliferation of new claims does not undermine the legitimacy and credibility of human rights. On the contrary, this “growing understanding of rights should be celebrated as an accomplishment worth protecting—one that fulfills the promise of human rights”²³⁴

Observations: The response of the HR advocates is generally on the mark. New human rights treaties and declarations are not easily achieved; they generally require an enormous amount of work over an extended period of time in order to gain widespread acceptance. Wary of being held to account for expanding obligations, many states do not lightly accept new claims of human rights.

That does not necessarily mean that political claims never succeed in winning broad acceptance as human rights. But if undeserving claims have been broadly accepted as human rights, it seems to me that the Commission has the burden of identifying at least what it considers to be leading examples and explaining why they do not qualify. Its Report does neither.

B. MEANING AND SCOPE OF HUMAN RIGHTS:

HR Advocates: There is no “untenable uncertainty” about the meaning of human rights. Human rights have been clarified by the UDHR and the nine core UN treaties. “That the current administration might not agree with these

228 Glendon, *supra* note 12.

229 *Id.*

230 Report, *supra* note 3, at 7.

231 This by no means suggests that I approve of Trump Administration policies on human rights. I oppose most of them, but those are issues for another day.

232 *Supra* Part I.C.

233 Glendon, *supra* note 12, at 2–4.

234 *Id.* at 2–3.

instruments and their obligations in full or in part does not mean that there is confusion about human rights.”²³⁵

Observations: Initial uncertainty about meaning and scope is inherent in broad legal phrases, including human rights like “freedom of speech” and “freedom of religion,” until interpreted. As illustrated in Part V above, phrases such as “fair” and “public” trial in the UDHR have subsequently been specified in greater detail by broadly supported human rights treaties and declarations. There is far more definitional uncertainty in the UDHR than in subsequent international human rights law. Focusing on the UDHR, and downplaying subsequent international law, as Secretary Pompeo requested and as the Commission’s Report does, makes any problem of uncertainty worse, not better.

Human rights are also interpreted by the jurisprudence of international courts and experts, applying the norms in the instruments that create them. As with U.S. Supreme Court decisions, there are inevitably disputes over particular interpretations, often evidenced in dissenting opinions by judges. However, the solution is not simply to retreat to the broad wording of the U.S. Constitution or UDHR and eschew any interpretation at all. Again, simply ignoring international human rights case law, as the Commission’s Report does, makes problems of uncertainty worse, not better.

However, not all instruments denominated as human rights are broadly accepted. Simply referring, as do the HR advocates, to the nine core UN human rights treaties, is not dispositive. As noted in Part II above, two of those nine treaties (on migrant workers and enforced disappearances) are not widely ratified. There is a case to be made that they are nonetheless human rights. However, making that case would require more extended analysis than presented in the HR advocates’ necessarily swift and brief letter responding to the Commission’s draft Report.

C. RIGHTS HIERARCHIES:

HR Advocates: Even though the Report acknowledges that rights are “universal, indivisible and interdependent and interrelated,” it then “prioritizes property rights and religious liberty over other civil and political rights, and advocates for the de-prioritization of socioeconomic rights, including by putting increased emphasis on rights interpreted from specific American documents, rather than those guaranteed in international treaties that bind the United States and other governments.”²³⁶

Observations: As often happens in reports drafted by committee, the Report is both internally inconsistent and ambiguous on the hierarchy of rights. On the one hand, the Report argues persuasively that “it defies the intent and structure of the UDHR to pick and choose among its rights according to preferences and ideological presuppositions while ignoring other fundamental rights.”²³⁷ The Report cites with approval the statement in the 1993 Vienna Declaration that “all human rights are universal, indivisible and interdependent and interrelated.”²³⁸

²³⁵ Glendon, *supra* note 12.

²³⁶ *Id.*

²³⁷ Report, *supra* note 3, at 37.

²³⁸ *Id.*

On the other hand, elsewhere in the Report, there are suggestions that Secretary Pompeo’s “foremost” rights—property rights and religious liberty²³⁹—have a higher status in the hierarchy of rights. Property rights are “central to the effective exercise of positive rights and to the pursuit of happiness in family, community, and worship.”²⁴⁰ Religious liberty enjoys “similar primacy in the American political tradition.”²⁴¹

But are these philosophical affirmations, or merely historical observations? For example, the Report states, “Prominent among the unalienable rights that government is established to secure, from the founders’ point of view, are property rights and religious liberty. A political society that destroys the possibility of either loses its legitimacy.”²⁴² Is this the Commission’s view of legitimacy, or merely a description of the “founders’ point of view”?

In light of the Commission’s mandate, one might argue that this ambiguity does not matter. A Report commissioned to reaffirm “unalienable rights,” as understood by America’s founders and in the UDHR, by definition embraces the “founders’ point of view.” However, as noted in Part VI above, the Report expressly condemns the founders’ embrace of slavery. So, the Commission and the founders do not agree on everything. Do they agree on the centrality of property rights and the primacy of religious liberty?

And, even if they do, does this mean that these rights have higher status than other vitally important human rights, such as freedom of speech, racial equality, and freedom from torture? Or is the Commission merely arguing that property rights and religious liberty should not be viewed as any less important?

Less ambiguity attends the HR advocates’ further objection that the Report de-prioritizes socioeconomic rights. Quoting article 22 of the UDHR, the Report does cite the “social and economic rights indispensable for [a person’s] dignity and the free development of his personality.”²⁴³ However, the Report also equates these rights with mere “positive rights” left primarily to the legislature,²⁴⁴ describes them as “aspirational principles,”²⁴⁵ and characterizes them as “controversial because they frequently involve a clash of rights claims.”²⁴⁶ They 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.”²⁴⁷ However, they are “least compatible” when they “induce dependence on the state, and when, by expanding state power, they curtail freedom”—including “the rights of property and religious liberty.”²⁴⁸

In U.S. foreign policy, the Report concludes, socioeconomic rights must be “taken seriously,” but treated differently, “through programs of economic

239 Michael R. Pompeo, U.S. Sec’y of State, Unalienable Rights and the Securing of Freedom (July 16, 2020), <https://www.state.gov/unalienable-rights-and-the-securing-of-freedom/>.

240 Report, *supra* note 3, at 13.

241 *Id.*

242 *Id.*

243 *Id.* at 30.

244 *Id.* at 21.

245 *Id.*

246 Report, *supra* note 3, at 24.

247 *Id.* at 21.

248 *Id.*

assistance and development.”²⁴⁹ Such a foreign policy would retain only the language, but no real commitment, to socioeconomic rights. When other governments fail to provide basic education or health care to their citizens,²⁵⁰ especially while privileging the wealthy or incurring bloated military expenditures, the U.S. should take note and speak up, no less than when governments repress demonstrators. Foreign aid is not an adequate substitute. As a percentage of our economy, U.S. foreign aid is minuscule and well below that of other developed nations.²⁵¹ Even if it were more generous, aid is any event treated by Washington as a matter of grace, not right.

International human rights law is not blind to the fact that implementation of socioeconomic rights depends on resources. Honduras (GDP per person of \$2,500),²⁵² is not Switzerland (GDP per person over \$80,000).²⁵³ Under the Covenant on Economic, Social and Cultural Rights,²⁵⁴ joined by 171 countries,²⁵⁵ each state party undertakes, only “to the maximum of its available resources,” to take steps to achieve “progressively the full realization” of Covenant rights.²⁵⁶ Available resources include both a country’s own resources and economic and technical assistance received through international cooperation.²⁵⁷ Such a realistic commitment, and not a mere dependence on the vagaries and selectivity of foreign aid budgets, is faithful to the integral recognition of socioeconomic rights in the UDHR.

D. SOCIAL ISSUES:

HR Advocates: The “weight of both domestic and international human rights law . . . clearly establishes and recognizes the protection of LGBTQI+ rights and sexual and reproductive rights, including abortion, as human rights imperatives.”²⁵⁸ For the Report to suggest otherwise is to “substitute the ideology of the Administration and opinion of 11 individuals”²⁵⁹ for these laws.

249 *Id.* at 35.

250 For example, in Latin America and the Caribbean, according to UNICEF, “14 million children and adolescents ranging between ages 7 to 18 are out of the educational system,” including 1.6 million excluded from preprimary education, 3.6 million children from primary school, 2.8 million children from lower secondary school and 7.6 million from upper secondary. “The percentage of children and adolescents out of school in the early years of secondary education in Latin America and the Caribbean is 7.7% which is almost 4 times higher than in developed countries (2.1%).” UNICEF, *Investing in Education*, <https://www.unicef.org/lac/en/investing-education-0>.

251 “There is a broad international commitment that wealthy countries should provide annually 0.7 percent of GNP to assist poor countries. Five countries (Norway, Sweden, Luxembourg, Denmark, and the U.K.) exceed that benchmark. The average for all wealthy nations is around 0.4 percent. The U.S. ranks near the bottom at below 0.2 percent.” G. Ingram, *What every American should know about US foreign aid*, BROOKINGS (October 2, 2019) <https://www.brookings.edu/opinions/what-every-american-should-know-about-u-s-foreign-aid/> (originally published by The Ripon Forum).

252 The World Bank, GDP per capita (current US\$) - Honduras (2019), <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=HN> (last visited Dec. 1, 2020).

253 The World Bank, GDP per capita (current US\$) - Switzerland, <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=CH> (last visited Dec. 1, 2020).

254 ICCPR, *supra* note 145.

255 *Id.*

256 *Id.*, art. 2.1.

257 *Id.*

258 Glendon, *supra* note 12.

259 *Id.*

Observations: The Commission Report does not deny the existence of these social rights, observing only that claims of rights are made by both sides on these contentious issues.²⁶⁰ Even if the “weight” of international human rights law recognizes reproductive rights, including abortion in some circumstances, there remain important exceptions.²⁶¹ While equality based on gender identity and sexual preference is rapidly gaining ground in international law, it is by no means yet universally recognized in regard to all rights. For example, a constitutional right to same sex marriage was recognized only in 2015 by the U.S. Supreme Court.²⁶² A human right to same sex marriage was recognized only in 2017 by the Inter-American Court of Human Rights,²⁶³ but was rejected in 2016 by the European Court of Human Rights.²⁶⁴ In any event, both domestically²⁶⁵ and internationally, these rights –important as they are–may sometimes be limited by the rights of religious objectors “in a democratic society.”²⁶⁶

E. NEW RIGHTS:

HR Advocates: The Report’s restrictive criteria for recognizing new rights would “sideline the post-1948 treaties and processes by which human rights have properly been interpreted to cover marginalized groups and circumstances not explicitly addressed in the treaties in a manner consistent with their principles.”²⁶⁷

Observations: As argued in Part V above, this objection is well-taken.

The Report argues that the development of new rights in positive law “must be informed by thoughtfulness and due deliberation,” and that this “reflects the

²⁶⁰ Report, *supra* note 3, at 24.

²⁶¹ *E.g.*, *American Convention on Human Rights*, *supra* note 76, art. 4.1 (The right to life “shall be protected by law and, in general, from the moment of conception.”) *White and Potter v. U.S.* (“Baby Boy Case”), Case 2141, Inter-Am. Comm’n H.R., Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 (1981); Press Release, IACHR, IACHR Urges All states to Adopt Comprehensive, Immediate Measures to Respect and Protect Women’s Sexual and Reproductive Rights, (Oct. 23, 2017) https://www.oas.org/en/iachr/media_center/PReleases/2017/165.asp (“The absolute criminalization of abortion, including in cases where the woman’s life is at risk and when the pregnancy results from a rape or incest, imposes a disproportionate burden . . .”); *Matter of B*, Provisional Measures with Regard to El Salvador, Order of the Court, (Inter-Am. Ct. H.R. May 29, 2013), https://www.corteidh.or.cr/docs/medidas/b_se_01_ing.pdf (ordering State to allow medical measures to be decided by physicians in case where life of pregnant mother was in danger and chances of survival of the child were nil).

²⁶² *Obergefell v. Hodges*, 576 U.S. 644 (2015).

²⁶³ State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017), http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf.

²⁶⁴ *Chapin and Charpentier v. France*, App. No. 40183/07, Judgment of June 9, 2016.

²⁶⁵ *Masterpiece Cakeshop*, 138 S. Ct at 1723.

²⁶⁶ *European Convention on Human Rights*, art. 8.2 (interference with rights to private and family life permitted when “necessary in a democratic society,” *inter alia*, “for the protection of health or morals, or for the protection of the rights and freedoms of others.” See *Dudgeon v. U.K.*, 45 Eur. Ct. H.R. (ser. A) 52 (1981); Alice Tidey, *Activist take UK to the European Court of Human Rights over ‘Support Gay Marriage’ Cake*, EURONEWS (Aug.15, 2019) <https://www.euronews.com/2019/08/15/activist-take-uk-to-the-european-court-of-human-rights-over-support-gay-marriage-cake>.

²⁶⁷ Glendon, *supra* note 12.

consistent orientation of the U.S. State Department to international human rights law and institutions for at least the past half century.”²⁶⁸

No responsible person would argue for acceptance of new rights thoughtlessly and without due deliberation. However, the U.S. record toward international human rights law owes at least as much to a high constitutional barrier and to domestic politics. Unlike many democracies,²⁶⁹ the U.S. Constitution requires a two-thirds supermajority of the Senate to consent to ratification of treaties.²⁷⁰ A minority of only thirty-four Senators can block consent to a human rights treaty.

Combined with domestic political divisions, this barrier can become insuperable. For example—after due deliberation—President Carter referred the Convention on the Elimination of All Forms of Discrimination against Women (adopted in 1979) to the Senate for ratification in November 1980. But the Senate did not act on the treaty in Carter’s few remaining weeks in office. The Convention was then opposed by the Administrations of Ronald Reagan and George H.W. Bush.

In 1994 President Clinton sent a treaty package to the Senate for ratification of the Convention, but it “never came to vote in the full Senate because of opposition from several Senators.”²⁷¹ In 2002 the Senate Foreign Relations Committee voted twelve to seven to report the Convention favorably, but Congress adjourned before the Senate could vote on the treaty. In 2007, the Bush Administration informed the Senate that it did not support action on the Convention at that time.

In 2009, the Obama Administration informed the Senate that it supported action on the Convention “at this time,” and in 2010 reiterated its support for the treaty.²⁷² However, by 2014, despite the support of the Administration and the Chair of the Senate Committee, supporters still had not managed to win the support of the sixty-seven Senators.²⁷³ Today the U.S. remains one of only a handful of U.N. member states not to have joined the Convention.

VIII. CONCLUSION

There are legitimate criticisms, as well as points to admire, both in the Report’s idiosyncratic conception of human rights and in the U.S. record on international human rights. However, there can be little dispute that authoritarian regimes are now on the march around the world, and that the government of the rising superpower in China rejects many of the basic concepts of freedom, democracy, and human rights that have animated international human rights law since 1945.

268 Report *supra* note 3, at 41.

269 See generally BETH A Simmons, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (Cambridge Univ. Press 2010).

270 U.S. Const. art. II, § 2.

271 LUISA Blanchfield, CONG. RESEARCH SERV., *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): ISSUES IN THE U.S. RATIFICATION DEBATE* 5 (2011).

272 *Id.*, summarizing the history up to this point.

273 J. Kucinich, *She The Peoples’ Guide to the International Women’s Right Treaty You Have Never Heard Of*, WASHINGTON POST, June 25, 2014.

The Commission is then right to recommend that, "in this moment of crisis for the human rights idea, America must pursue that cause with renewed vigor, with pride in what has been accomplished, with humility born of the awareness of her own 'shortcomings and imperfections' and of the complexities of world politics" ²⁷⁴

²⁷⁴ Report, *supra* note 3, at 45.