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# Universality Restored

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## INTRODUCTION

In its first year in power, the Biden administration has pointedly affirmed its support for the principle of the universality of human rights. This is particularly significant given the severity of the Trump administration's departure from that principle. Previous commentary on the Trump administration's signature initiative in this area—the “Commission on Unalienable Rights”—has not devoted appropriate attention to the significance of the Commission's distortion of this foundational human rights principle and its consequences for the longstanding global debate about its enduring validity. The Biden administration has firmly renounced the Commission's approach and returned to the traditional U.S. position on universality, a critical first step toward repairing the damage it threatened to inflict on the normative framework of international human rights law.

One of the early harbingers of policy change in the Biden administration was its affirmation in January that human rights belongs at the center of U.S. foreign policy.<sup>1</sup> In announcing this, U.S. Secretary of State Antony J. Blinken drew a distinction with the policies of the prior administration, which was known both for its admiration for authoritarian leaders and its disdain for human rights in foreign policy unless directed against a strategic adversary.<sup>2</sup> Secretary Blinken also sought to restore equal consideration for upholding the rights of women and LGBTQI+ persons alongside the right to religious freedom. He was heralding a marked change

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of direction—a rejection of the Trump administration’s “pick and choose” approach to human rights.

On February 8, 2021, Secretary Blinken announced that President Biden had directed the Department of State “to engage immediately and robustly with the United Nations Human Rights Council,” while continuing to work toward its reform. Secretary Blinken explained that to advance human rights, the U.S. must be present at the table in multilateral bodies to counter those who would undermine and distort the meaning of human rights. This would reverse the Trump administration’s decision to walk out of the Council in 2018, in the middle of the U.S. membership term.

The Council, according to Blinken, is “an important forum for those fighting injustice and tyranny... [it] can help to promote fundamental freedoms around the globe, including freedoms of expression, association and assembly, and religion or belief as well as the fundamental rights of women, girls, LGBTQI+ persons, and other marginalized communities.”<sup>3</sup> His references in this statement to the last several rights—marked off by the reference to “the fundamental rights”—were meant to signal that the human rights concerns that the Trump administration had belittled, ignored, and diminished, would now be acknowledged, promoted, and defended during the Biden presidency.

In the weeks that followed, Blinken returned to address the issue of human rights three times: on February 24, to the UN Human Rights Council, on March 30 when he released the State Department’s Annual Country Reports on Human Rights, and on May 7, as he addressed the UN Security Council’s debate on multilateralism.<sup>4</sup> In all three speeches, Blinken reaffirmed the universality of human rights, stating this means it applies to all persons and to all nations.<sup>5</sup> In so doing, he repeatedly drew particular attention to the applicability of human rights to marginalized groups (women, LGBTQI+ persons, minorities, and persons with disabilities). Blinken specifically affirmed in his March 30 speech that “women’s rights, including sexual and reproductive rights, are human rights.” He also pledged that the State Department would prepare an addendum to each chapter of the Annual Country Reports on Human Rights for 2020 to address reproductive rights, a subject that had been deleted altogether from these reports during the Trump administration.<sup>6</sup>

Significantly, in his March 30 speech, Secretary Blinken also directly repudiated the hierarchy that the Trump administration tried to establish through the Commission on Unalienable Rights,<sup>7</sup> a body which his predecessor, Secretary Pompeo, set up in July 2019 to determine “which rights are entitled to gain respect” when tensions between human rights emerge.

Secretary Blinken was making good on promises made in his confirmation hearing and early appearances before Congress. To the diplomatic audience in Geneva, Blinken repeated a particularly familiar phrase: that “all human rights are universal, indivisible, interdependent, and interrelated.” This statement was affirmed by all 171 states present at the Vienna World Conference on Human Rights in 1993 in the Vienna Declaration Programme of Action (VDPA).<sup>8</sup> With this, he hoped to reassure Human Rights Council members of his sincerity and humility as the U.S. re-engaged with the intergovernmental human rights body.

President Biden carried forward the human rights theme at the opening of the 76<sup>th</sup> UN General Assembly General Debate in September 2021. He referred to the Universal Declaration of Human Rights and asked member states, rhetorically, whether they would now allow “those universal principles [of the Universal Declaration of Human Rights (UDHR) and the UN Charter] to be trampled and twisted in the pursuit of naked political power.”<sup>9</sup> The U.S. effort to regain membership in the Human Rights Council was justified to the public not only as living up to lofty American ideals, but also to counterbalance actors who had taken advantage of the U.S. departure from the Human Rights Council by distorting and diminishing the values and principles of human rights law. China, Russia, North Korea, and Iran were among those at whom this was directed, but far from the only ones.

Clearly, the Biden administration was giving an unprecedented amount of attention to the issue of the universality of human rights. To understand the administration’s emphasis on the issue, it is important to know about the historical foundation for U.S. engagement on the matter.

#### **WHAT HAPPENED AT VIENNA:**

#### **THE CHALLENGE TO UNIVERSALITY OF HUMAN RIGHTS**

The 1948 Universal Declaration of Human Rights was the parent document of the human rights movement, setting forth in terse but inspiring language the human rights of each person. In the years that followed its adoption, binding treaties establishing obligations of states to enforce these human rights were negotiated and came into force and controversies arose. On many occasions, the Soviet Union and its allies rejected many human rights, such as freedom of expression and association, while they embraced economic and social rights, such as the right to food. The United States and many Western countries affirmed civil and political rights but were often ambivalent or even hostile about economic

and social rights. In the early 1990s, as the Cold War ended along with apartheid in South Africa, greater recognition was paid to the wisdom of the Universal Declaration, which set out all these rights and affirmed that “everyone” could claim all of them. Article 30 of the Universal Declaration even recalled that no State, group, or person had “any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth” in the UDHR.

But at the same time, human rights horrors were unfolding in Bosnia, Algeria, Myanmar, Sri Lanka, and China. States were being reminded daily that human rights abuses continued to plague the contemporary world. Some leaders tried to justify their actions by propounding theories of different cultural values and the argument that history, culture, and even religion could justify the sacrifice of human rights in favor of social order or economic development. Human rights, they claimed, were not universal but depended on local conditions.

UN Under-Secretary General for Human Rights Jan Martenson led the effort to organize a World Conference on Human Rights, the first since 1968 and only the second ever convened. Conflicts over international action on human rights would be played out through the venue of the World Conference in Vienna, Austria, scheduled for June 1993.

In the months before the World Conference, a number of states, especially Asian countries, declared that human rights had to be viewed not as universal, but rather as a group of policies that could be fine-tuned and changed depending upon the history, culture, geographic location, and background and values of each country and society. These states considered that governments could pick and choose which rights to respect—and which to disregard. This *de facto* attack on the universality of human rights expanded as the World Conference approached. Under Presidents Ronald Reagan and George H.W. Bush, the United States had questioned whether economic and social rights set out in the Universal Declaration of Human Rights were rights at all. However, beginning in 1991, at the first preparatory conference for the World Conference and at relevant discussions prior to Vienna that followed, U.S. Ambassador to the Commission on Human Rights J. Kenneth Blackwell made a series of statements on behalf of the Bush administration regarding the World Conference, each affirming the universality of human rights. He called on the nations of the world to reflect the American position that the World Conference should “celebrate the great human rights achievement of this century: the acknowledgement of the universality of human rights.”<sup>10</sup> He also described universality as “the most lasting achievement of rights in this century.”

I attended the April 1993 Geneva preparatory conference for the World Conference on Human Rights, as well as the June 1993 World Conference itself in Vienna. I saw firsthand how sensitive and toxic the atmosphere had become over the issue of universality.<sup>11</sup> Always a struggle on a range of politicized issues—not least the naming and shaming of gross violator countries—the World Conference framework seemed to bring out the worst in the objecting states.

Earlier, States had decided to convene regional preparatory meetings for the World Conference, divided into the usual five UN regions—Africa, Asia, Latin America, West Europe & Others, and the Eastern European Group. This ended up dividing rather than uniting states around rights protections. The African regional meeting was convened first, in Tunis, Tunisia in early November 1992, followed by the Latin American regional conference in San José, Costa Rica, in January 1993. Then came the Asian regional preparatory meeting in Bangkok, Thailand from March 29 to April 2.<sup>12</sup>

In Tunis, the African states declared that “the universality of human rights is unquestionable; their protection and promotion constitute a duty for all states without regard to their political, economic, or cultural system.”<sup>13</sup> They went on to claim that “the principle of indivisibility of human rights is sacrosanct.”<sup>14</sup> At the Latin American session, states repeated their “commitment to promoting and guaranteeing the full observance of the human rights established in the Universal Declaration and in universal and regional human rights instruments” and emphasized that “the exercise of some [rights] cannot and must not be disallowed on the pretext that full enjoyment of the others has not yet been achieved.”<sup>15</sup>

At the regional session in Bangkok, however, several states, led by Indonesia, China, Malaysia, and Singapore, took another approach. They emphasized “Asian values,” and the historical, cultural, and political “particularities” affecting how the states in the region implemented international human rights norms.<sup>16</sup> Malaysia called for a “balance” between the rights of the individual and those of the community. Singapore put it more starkly: it demanded a balance between the “ideal” of universality and the “reality” of diversity.

Arguments about rights as opposed to duties factored into the conversation as well. Other states complained about unfair censure of their human rights performance and demanded a new and different, culturally relativistic and flexible standard by which their actions could be assessed. The outcome document for the Asian region, the Bangkok Declaration, was relatively short and adopted by consensus. Its key paragraphs both affirmed universality and then questioned it.<sup>17</sup> First, the Ministers and representa-

tives of these Asian states reaffirmed “their commitment to the principles contained in the Charter of the UN and the Universal Declaration,”<sup>18</sup> and the “full realization of all human rights throughout the world.”<sup>19</sup> But after that, the same diplomats added two paragraphs expressing a more relativistic approach. They declared that their states,

“Stress the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization, and that no violation of human rights can be justified.”

In the very next paragraph, the Asian region’s diplomats affirmed that they

“Recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm setting, bearing in mind the significance of national and regional particularities, and various historical, cultural and religious backgrounds.”<sup>20</sup>

The challenge posed by the Bangkok Declaration was clear: Asian countries would offer lip service to “universality” but argue that these same “universal” human rights had to be examined according to flexible standards and in context, with exceptions allowed due to history, culture, religion, and geographical location.

At the Asian preparatory conference, forty governments participating from all parts of Asia also demanded that the indivisibility of human rights be affirmed, also in resolutions in the Commission on Human Rights.<sup>21</sup>

*Asian countries would offer lip service to “universality” but argue that these same “universal” human rights had to be examined according to flexible standards and in context, with exceptions allowed.*

The Bangkok Declaration insisted that human rights matters should be addressed through cooperation, not confrontation.<sup>22</sup> Still, there was an expectation that the Eastern European Group and the Western European and Others Group might now jointly recognize human rights as universal and agree on human rights priorities for the future. At the same time, there was an ominous concern that countries of the South would join Asia’s demand for cultural relativism in the application of human rights.

In April 1993, all states met in Geneva to try to resolve the many differences that remained. The UN Secretariat’s Human Rights offices

prepared a working paper, “in a spirit of consensus building,” that compiled the positions set forth in the preparatory conferences.

This Secretariat document contained twenty-six principles followed by a draft program of action.<sup>23</sup> Principle III tried to incorporate concerns about “particularities” together with an affirmation of universality.<sup>24</sup> It stated, “all human rights are universal, indivisible, and interdependent.” Whatever the differing levels of development, it demanded that “regional and national specificities must contribute to the strengthening of the universality of human rights.” Significantly, the document restated that “it is the duty of States, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms.”

At the April meeting in Geneva, positions among countries and the regional groups became divided further. The Tunis Declaration was diluted by a new proposal from Kenya, on behalf of the African group,<sup>25</sup> warning that no single “ready-made” model could be

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imposed from the universal level. Indonesia and Malaysia then proposed language emphasizing regional “specificities.”<sup>26</sup> As a result, the proposed language on universality remained unresolved going into the World Conference and was essentially up for grabs.

Tensions grew. Some countries insisted on parts of the Bangkok Declaration, while others were trying to identify one set of rights as preeminent over the other. Additionally, a number of states emphasized that no outside body, organization, or group of states could decide on whether a state was complying with human rights norms or not. Instead, they wanted to affirm cooperation as the way forward, and warned that rights would be misused or manipulated by powerful states to subjugate other states. As Vienna approached, references to the importance of regional and cultural and other differences increased; so too did statements about applying human rights in an impartial and “non-selective” manner. All these terms seemed to be coded phrases, with those using them seeking to avoid new standards for compliance with human rights norms.

At the World Conference, U.S. Secretary of State Warren Christopher delivered an important speech in which he made clear that while the United States understood the many differences among states, it strongly supported the universality of human rights.<sup>27</sup> A “Fact Sheet” on the World

Conference issued by the U.S. State Department listed the “Major U.S. Goals,” beginning with “U.S. objectives to reaffirm the universality of human rights as defined in the Universal Declaration of Human Rights and help to strengthen the UN’s ability to promote human rights.” It warned that major challenges included attempts by vocal rights violators to “dilute recognition of human rights standards” by justifying exceptions to universal rights.

Universality was contested at the World Conference in Vienna, and for a while seemed likely to derail the whole conference, but, with the strong support of the United States, it was ultimately reaffirmed. A lengthy document, known as the Vienna Declaration and Programme of Action (VDPA), was approved by all governments at the conclusion of the World Conference. After some small group meetings, the text of the VDPA had been agreed to by all those present. It affirmed the universality of human rights in Paragraph five which stated:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems to promote and protect all human rights and fundamental freedoms.”

The U.S. found the language of Paragraph 5 troubling to the point where it had proposed and successfully obtained inclusion in paragraph 1 of the VDPA the clear-cut statement that States reaffirm that “the universal nature of these rights and freedoms is beyond question.” Afterwards, the United States insisted that the sentence citing other factors at the end of Paragraph 5 should not be referenced alone, but rather must be read together with the earlier sentence which proclaims, “all human rights are universal, indivisible, and interdependent and interrelated.”

As Vienna ended and following adoption of the VDPA, U.S. Assistant Secretary of State John Shattuck welcomed the VDPA as “a strong forward-looking document, one that reaffirms the basic universality of human rights and the basic principles my country has long stood for.”<sup>28</sup> He also praised the VDPA for marking “acknowledgement by the international community that these values are shared by all peoples,” and that it included protections for women, minorities, and the indigenous, demanded that gross violations of human rights must be stopped, and called for future creation of the post, UN High Commissioner for Human Rights.



In the years that followed the Vienna World Conference, there was a great deal of activity to advance implementation of international human rights. Dozens of independent special procedures in human rights were created, and new treaties were negotiated and entered into force. In 2004, the Commission on Human Rights was itself replaced by a smaller Human Rights Council, which also featured a new procedure called “Universal Periodic Review” for addressing human rights conditions in every country. Challenges to the content of universal human rights and ways to measure compliance continued as well. Among the controversial initiatives during these years challenging universality of rights were UN resolutions focused on affirming the primacy of “traditional values,” advanced by the Russians and considered “divisive” and “dangerous” by the European Union.”<sup>29</sup> There was also China’s proposal calling for “mutually-beneficial” cooperation only;<sup>30</sup> that is, for human rights norms to be discussed with states only when and where they deigned to accept it.<sup>31</sup>

Thereafter, the main challengers to the universality of human rights have come from authoritarian and non-democratic states, who have tried to re-formulate the VPDA resolution by demanding to decide whether rights applied in their own countries at all. Beginning in 2017, however, the Trump administration made clear that it, too, wanted to pick and choose its human rights. It had ended references to women’s health and reproductive rights in the Annual Country Reports and tried—sometimes with success—to eliminate such language from UN resolutions.<sup>32</sup> The Trump administration was also criticized for refusing to extend rights protections to defend LGBTQI+ persons.<sup>33</sup> Similarly, policies aimed at asylum seekers were raising questions about meeting longstanding U.S. human rights obligations.<sup>34</sup>

## THE COMMISSION ON UNALIENABLE RIGHTS

During his tenure as President Trump’s first Secretary of State in 2017, Rex Tillerson had drawn a sharp line between human rights as American values and any role they might play in policy. “Guiding all our foreign policy actions are our fundamental values—our values around freedom, human dignity, the way people are treated... Those are our values. Those are not our policies.” After all, Tillerson explained, policies can change.<sup>35</sup> And change, they did.

By December 2017, it was reported that Brian Hook, then the Director of Policy Planning, had prepared a memorandum to the Secretary of State advising him about the rare occasions of when and how human rights standards had been properly used in foreign policy, and advocating

that compliance with human rights standards could effectively be employed only against a strategic adversary “to impose costs, apply counter-pressure, and regain the initiative from them strategically.” Hook explained that human rights standards could be invoked against China, Russia, North Korea, and Iran, because “pressing those regimes on human rights is one way to impose costs, apply counter-pressure, and regain the initiative from them strategically.”<sup>36</sup>

Michael Pompeo was sworn in as Secretary of State at the end of April 2018. By the middle of June, as the 38<sup>th</sup> session of the UN Human Rights Council opened, the United States announced that it would withdraw from the body, in the middle of its three-year term of membership. The United States had been changing its positions on language affirming women’s health and reproductive rights at the UN Commission on the Status of Women and elsewhere. It had been subjected to withering criticism by international human rights experts over its separation of children from their parents after they had crossed the border into the United States.<sup>37</sup>

On July 8, 2019, Secretary of State Mike Pompeo announced the formation of the U.S. Commission on Unalienable Rights.<sup>38</sup> He explained that this Commission would probe some fundamental questions: “As human rights claims have proliferated, some claims have come into tension with one another, provoking questions and clashes about which rights are entitled to gain respect. Nation-states and international institutions remain confused about their respective responsibilities concerning human rights.” Because of these and other controversies about human rights, a new U.S. State Department Commission was formed to study the subject and provide him with “advice on human rights grounded on our nation’s founding principles and the principles of the 1948 Universal Declaration of Human Rights.” When rights clashed, Pompeo explained, this Commission could “guide our foreign policy toward a more perfect fidelity to our founding principles...”<sup>39</sup>

The Commission was assigned the job of carrying out “an informed review of the role of human rights in a foreign policy that serves American interests, reflects American ideas, and meets the international obligations that the U.S. has assumed.” After several public sessions of the eleven-person Commission, a draft Report was issued on July 16, 2020. Pompeo greeted it, in person, in Philadelphia, by declaring it would be used as “a framework” for U.S. policy regarding human rights.

The draft Report was briefly made available for comment before being finalized in August, largely unchanged. The Secretary of State reportedly instructed its translation and distribution to U.S. State Department posts overseas and urged all personnel to study it carefully. It was posted

online in English and in eight other languages with the intention that it would be used widely.<sup>40</sup>

### POMPEO'S COMMISSION REVERSES VIENNA'S UNIVERSALITY GUARANTEE

Readers of the Commission's Report will find it filled with platitudes about America, its founding principles, and the role of human rights in future foreign policy. But while many organizations and individuals have fixated on the Commission's role in affirming a "hierarchy" of human rights, few have recognized the sleight of hand used by the Commission in its Report to distort the understanding of the core concept of the universality of human rights.<sup>41</sup>

The Report of the Commission on Unalienable Rights subtly, but clearly, encourages the United States to reverse its longstanding position on the universality of human rights, as it was agreed upon in the VDPA. The Commission's Report presents an argument for U.S. policymakers to exercise caution concerning many rights claims by historically marginalized groups including women, LGBTQI+ people, and racial minorities. This argument is based on claims that human rights law permits a certain degree of discrimination on "moral and political" grounds.

On its face, the Commission's Report affirms that human rights are "universal, indivisible and interdependent and interrelated," and rejects the concept of "cultural relativism." However, the Report simultaneously concludes that "*nation-states have some leeway* to base their human rights policy on their own distinctive national traditions." The report also recommends that the U.S. "should respect the independence and sovereignty of nation states to make their own moral and political decisions that affirm universal human rights within the limits set forth in the [UDHR]," and should tolerate what it now calls a "degree of pluralism" in how states implement their human rights obligations, reflecting the principle of "subsidiarity."<sup>42</sup>

The Commission bases its recommendation for the United States to respect the principle of "subsidiarity" in promoting human rights abroad on an interpretation of the concept of universality that is rooted in the 1993 VDPA. As described previously, the key paragraph on universality in VDPA was Paragraph 5. Within that paragraph, after a firm affirmation of universality, this controversial sentence can be found in the last sentence:

"While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in

mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”<sup>43</sup>

The Commission’s analysis emphasizes the first part of the last sentence from Paragraph 5 of the VDPA, emphasizing that “particularities” and “backgrounds” of countries allow them some “leeway” in implementing their human rights commitments. However, this completely reverses the approach that the United States traditionally has taken in its international negotiations and interpretation of Paragraph 5 of the VDPA with respect to upholding the principle of universality.<sup>44</sup> The Commission’s report makes this reversal without explicitly citing or even recognizing the important history of that language in the VDPA.

The first half of the last sentence of Paragraph 5 of the VDPA is a legacy of the “Bangkok Declaration,” from the Asian regional meeting that preceded Vienna.<sup>45</sup> As mentioned earlier, the Bangkok Declaration is widely interpreted as repudiating the universality of human rights.<sup>46</sup> Readers will recall that the United States opposed the position in the Bangkok Declaration, as reflected in remarks at Vienna by then-Secretary of State Warren Christopher.<sup>47</sup>

But in the Report of the Commission on Unalienable Rights (hereafter, the “Report”), the authors use a flawed interpolation of this sentence from Vienna. States seeking to justify departures from universal rights standards routinely tried to do the same in negotiations at the UN human rights bodies, in many of which I participated personally as a “public member” of U.S. delegations to UN human rights negotiations. The United States always objected. It cannot be accidental that the Commission’s report itself follows up using the same technique as those government negotiators who routinely challenged universality.

The Report affirms that “it is urgent to vigorously champion human rights in foreign policy,”<sup>48</sup> but at the same time suggests that the United States should generally refrain from endorsing or supporting “new” human rights claims made by “competing groups in society over political priorities,” and should leave such issues to be resolved through “ordinary democratic processes.”<sup>49</sup> Earlier in the Report, a reference to “abortion, affirmative action, [and] same-sex marriage” is presented as an example of “divisive social and political controversies” in the United States in which “both sides couch their claims in terms of basic rights.”<sup>50</sup> This reference suggests that the Report is intended to be read as recommending that the United States should not engage in these or similar human rights issues—particularly claims about laws and policies that discriminate against

women, racial minorities, and LGBTQI+ people—in its foreign policy. Instead, the Report, while noting that the UDHR does not “explicitly” establish a hierarchy of rights, recommends that U.S. foreign policy should be selectively deployed in support of the rights that “most accord with U.S. national principles, priorities, and interests.”<sup>51</sup>

Since 1993, the United States has often invoked the VDPA to reject attempts by governments to cite religious or cultural traditions of a majority of their citizens as a justification for denying equal treatment to individuals belonging to marginalized groups.<sup>52</sup> The approach adopted in the Commission report is not only inconsistent with past U.S. practices on Paragraph 5 but also with Paragraph 1 of the VDPA, which affirms universality.<sup>53</sup>

Despite encouraging the Commission to reaffirm the longstanding U.S. position that governments must promote human rights for all people and not allow historical, cultural, or religious beliefs to be used to justify discrimination, violence, or the denial of human rights, the Commission did not do so when this reversal was brought to its attention in the official “comment” from the Jacob Blaustein Institute. Instead, it continued its “pick and choose” approach.<sup>54</sup>

#### **FORMAL “COMMENTS” CRITICIZING THE COMMISSION’S REPORT**

After the draft Report was released, it was widely criticized in formal “comments” submitted by a large number of organizations and individuals engaged in the promotion and protection of human rights.<sup>55</sup> The concerns raised were several—ranging from the Commission Report diminishing the rights of LGBTQI+ people, women, and minority groups to the claims that the Report itself established a hierarchy of human rights,<sup>56</sup> with religious liberty and property rights at the top. Some critics remarked that the Report was rewinding human rights by hundreds of years to America’s founding, rather than to the contemporary struggles of American minorities and the current understanding of human rights and non-discrimination. It was particularly troubling that many issues of human rights appeared to be dismissed by the draft Report, which classified them instead as “divisive” social and political concerns, and not as human rights.

#### **UNIVERSAL HUMAN RIGHTS AND THE REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS**

Observers may ask why Secretary Blinken spent so much of his early tenure talking about “universal” human rights. Clearly, the Biden adminis-

tration wanted to draw a distinction between itself and the previous administration. The prominence attached by Trump administration Secretary of State Mike Pompeo to the Commission on Unalienable Rights and its Report no doubt made it the focus of extra attention early in the new administration.

The Report of the Commission on Unalienable Rights seemed purposefully aimed at justifying the restrictive approach to human rights by the Trump administration, one that carved out exceptions to rights protections rather strongly. From the very beginning, the Trump administration declined to recognize and promote, in human rights bodies of the United Nations, all rights of women's health and reproductive rights and of non-discrimination against LGBTQI+ persons and asylum seekers.<sup>57</sup>

The Commission was established and staffed by the Policy Planning Bureau, reportedly bypassing the Bureau of Democracy, Human Rights, and Labor which handles most policy matters and programs in human rights within the State Department. This organizational detail is in its own way emblematic of the Commission's approach to human rights—it was indeed “outside the box,” organizationally and substantively. Its search for principles to guide U.S. foreign policy led it not only to reverse the long-standing U.S. approach to “universality” as defined in the VDPA, but also saw the entry of other approaches to justify departure from universal norms such as non-discrimination. For instance, at one point, the Report refers to the concept of a “margin of appreciation” in interpreting applicability of rights. This is a doctrine of the European regional human rights system to which the United States does not belong, and which is applied by a European court to interpret the European Convention on Human Rights, a treaty that the United States has not ratified. It allows the European Court of Human Rights to consider differences in a country's interpretation of the binding provisions of the treaty.<sup>58</sup> Even in the European system, the margin of appreciation is very narrow; it reflects the European system's support for the principle of universality of human rights, but it is used by the Commission Report to suggest that the “bounds of legitimate pluralism” can be ambiguous and expanded by individual countries. All of this appears to be part of the broader effort of the Commission on Unalienable Rights to find excuses that offer extra “leeway” to States when it comes to respecting universal human rights on selected issues. The approach of the Commission Report seems to offer *de facto* encouragement to some governments to discriminate against historically marginalized populations, including women, LGBTQI+ communities, and racial minorities.<sup>59</sup>

The decision of the Pompeo State Department to finalize the Report

quickly, translate and distribute it widely, and convene high-level meetings at the United Nations in September 2020 was followed by an effort to convince more than thirty countries to join it, just two weeks before the U.S. elections, in signing the Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family.<sup>60</sup> The Declaration states that each signatory State commits to work together to "reaffirm that there is no international right to abortion." The Declaration affirms women's equal human rights in general but, by citing this phrase from the 1994 Cairo World Conference on Population and Development, excludes women's reproductive rights and freedoms. Additionally, the U.S. government had been active both before and after the Report of the Commission on Unalienable Rights in stripping language from a variety of UN resolutions on sexual and reproductive health rights. It was surely efforts of this sort that prompted Secretary Blinken to speak so often and so vigorously about universal human rights in his early months in office.

The Commission Report, now removed from the State Department website, and repudiated by the new Secretary of State personally, cannot easily cover for those who want to narrow human rights protections. That is a positive development. Following the experience of the Commission on Unalienable Rights, and the Biden administration's repudiation of it, those who want to use the founding fathers' vision to justify excluding groups of people from universal human rights protections or to claim that such rights are mere "policy choices" will have a much harder time. But the matter may not be settled just yet. The United States will need to be vigilant on these issues and guard against efforts to undercut U.S. commitments to the universality of human rights and the specific obligations it has accepted by ratifying a number of core human rights treaties. Blinken has referenced "universal" human rights quite a bit in his early months, and President Biden has affirmed them at the United Nations, too. We can only hope that a commitment to uphold universality continues to guide U.S. policy in the years ahead.*f*

#### ENDNOTES

- 1 Anthony J. Blinken, Statement for the Record before the United States Senate Committee on Foreign Relations, January 19, 2021.
- 2 Brian Hook to Rex Tillerson, memorandum, May 17, 2017 published by Politico; see <https://www.politico.com/f/?id=00000160-6c37-da3c-a371-ec3f13380001> and Nahal Toosi, "Leaked Memo Schooled Tillerson on Human Rights," *Politico*, December 19, 2017, <https://www.politico.com/story/2017/12/19/tillerson-state-human-rights-304118>.
- 3 Anthony J. Blinken, "U.S. Decision to Reengage with the UN Human Rights Council," press statement, February 8, 2021.

- 4 See Anthony J. Blinken, “Remarks to the 46th Session of the Human Rights Council,” Video Remarks, February 22, 2021; Anthony J. Blinken, “Remarks on the Release of the 2020 Country Reports on Human Rights Practices,” remarks to the press, March 30, 2021; and Anthony J. Blinken, “Virtual Remarks at the UN Security Council Open Debate on Multilateralism,” Remarks to the Press, May 7, 2021.
- 5 Ibid. On March 30, Blinken said: “All people are entitled to these rights, no matter where they’re born, what they believe, whom they love or any other characteristic” and he told the Security Council on May 7: “The Universal Declaration of Human Rights begins with the word ‘universal’ because our nations agreed there are certain rights to which every person, everywhere, is entitled.”
- 6 Ibid.
- 7 Blinken statement on March 30, 2021: “Human rights are also co-equal; there is no hierarchy that makes some rights more important than others. Past unbalanced statements that suggest such a hierarchy, including those offered by a recently disbanded State Department advisory committee, do not represent a guiding document for the administration.” Blinken was referring to the Final Report of the Commission: *Report of the Commission on Unalienable Rights*, U.S. Department of State, July 16, 2020.
- 8 Vienna Declaration Programme of Action, World Conference on Human Rights, June 25, 1993, <https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>.
- 9 Joe Biden, “Remarks by President Biden Before the 76<sup>th</sup> Session of the United Nations General Assembly,” September 21, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/21/remarks-by-president-biden-before-the-76th-session-of-the-united-nations-general-assembly/>.
- 10 Blackwell made this statement before the Third Committee at the 47<sup>th</sup> Session of the UN General Assembly, November 25, 1992. A few weeks earlier on September 14, 1992, Blackwell told the 3<sup>rd</sup> Session of the Preparatory Committee for the 1993 Conference on Human Rights, meeting in Geneva, that the drafters of the UDHR “produced a document which describes itself as ‘a common standard of achievement for all peoples and all nations.’ It is that notion of universality which connects us all as human beings and which represents the most lasting achievement in the field of human rights in this century. The World Conference on Human Rights will be a celebration of this universality, as people from widely different traditions and cultures gather together next June to reiterate a shared belief.” At that meeting he also stated, “The agenda we adopt here must enable the World Conference to accomplish its important mission: to achieve universal respect for and observance of human rights and fundamental freedoms.”
- 11 In June 1993, I was appointed a “public member” of the U.S. delegation to the World Conference. Earlier, I had represented a non-governmental organization at the preparatory conference.
- 12 United Nations, Dag Hammarskjöld Library, Index to Proceedings of the General Assembly, A/C.3/47/7 (November 18, 1992), [https://www.un.org/sites/un2.un.org/files/a47-parti\\_1.pdf](https://www.un.org/sites/un2.un.org/files/a47-parti_1.pdf), containing the text of the Tunis Declaration adopted at the African Regional Meeting (Tunis Declaration) and Report of the Drafting Committee: World Conference on Human Rights, Regional Meeting for Latin America and the Caribbean, San Jose Costa Rica A/CONF.157/LACRM/12/Add.1 (January 22, 1993), <https://digitallibrary.un.org/record/175317?ln=en>, containing the San Jose Declaration (San Jose Declaration).
- 13 Tunis Declaration, paragraph 2.
- 14 Tunis Declaration, paragraph 1 and 6.
- 15 San Jose Declaration, paragraph 3.



- 16 United Nations, Press Release HR/3774, March 31, 1993.
- 17 United Nations Document A/CONF.157/PC/59, April 2, 1993.
- 18 United Nations Document A/CONF.157/ASRM/7, April 1, 1993, paragraph 1.
- 19 Ibid.
- 20 Ibid., paragraphs 7-8.
- 21 They also used the opportunity of the Asian regional meeting in Bangkok—without the Western or other powers present—to denounce “foreign occupation,” affirm “the right to development” and the “right to a clean environment.”
- 22 Bangkok Declaration, United Nations Document A/CONF.158/PC/5, March 1993.
- 23 Bangkok Declaration, United Nations Document A/CONF.158/PC/5, March 1993.
- 24 Ibid. The proposed paragraph read: “All human rights are universal, indivisible, and interdependent. The universality of civil, cultural, economic, political, and social rights require that every State throughout the world recognize, protect, respect, and promote internationally recognized human rights standards, whatever the State’s level of economic or political development. Regional and national specificities must contribute to the strengthening of the universality of human rights. The exercise of any human right must not be denied because the full enjoyment of other rights has not been achieved. It is the duty of States, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms.”
- 25 United Nations Document A/CONF.157/PC/L.3. Kenya presented the Declaration on behalf of the African group.
- 26 Jan Bauer, *Report on United Nations World Conference on Human Rights*, June 14-25, 1993, Article 19 (UK) and Canadian Network on International Human Rights, October 31, 1993 (unpublished manuscript), 32-33.
- 27 Ibid., 60-69; Elaine Sciolino, “U.S. Rejects Notion That Human Rights Vary With Culture,” *The New York Times*, June 15, 1993, <https://www.nytimes.com/1993/06/15/world/us-rejects-notion-that-human-rights-vary-with-culture.html>.; Warren Christopher, U.S. Department of State Dispatch, 4, 441, 442, June 21, 1993, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015077200189&view=1up&seq=175>. Note particularly: “We respect the religious, social and cultural characteristics that make each country unique. But we cannot let cultural relativism become the last refuge of repression... We reject any attempt by any State to relegate its citizens to a lesser standard of human dignity.”
- 28 John Shattuck, statement on the adoption of the VDPA, June 25, 1993, [https://searchlibrary.ohchr.org/search?ln=en&cc=Speeches&p=john+shattuck&f=&action\\_search=Search&rm=&ln=en&sf=author&so=a&rg=100&c=Speeches&c=&of=hb&fct\\_\\_7=Meeting+22&fct\\_\\_7=Meeting+22](https://searchlibrary.ohchr.org/search?ln=en&cc=Speeches&p=john+shattuck&f=&action_search=Search&rm=&ln=en&sf=author&so=a&rg=100&c=Speeches&c=&of=hb&fct__7=Meeting+22&fct__7=Meeting+22), in OHCHR Library Category, World Conference on Human Rights 1993 Speeches.
- 29 United Nations Human Rights Council Resolution A/HRC/21/3, November 5, 2012; European Union, Permanent Delegation to the United Nations Office and other international organizations in Geneva, “Contribution of the European Union: Traditional Values,” February 15, 2013.
- 30 Kate Sosin, “Trump has gutted LGBTQ+ rights. Could a Biden presidency undo the damage?” *USA Today*, October 10, 2020, <https://www.usatoday.com/story/news/politics/2020/10/10/trump-has-gutted-lgbtq-rights-biden-presidency-might-undo-damage/3608929001/>.
- 31 In this statement, the United States explains how this concept aims at weakening human rights and turns the concept of “respect” for human rights on its head. Jason Mack, “EOV on Mutually Beneficial Cooperation – Hrc37 Resolution L.36,” Human

- Rights Council, 37<sup>th</sup> Session, Geneva, March 23, 2018..
- 32 Eliot Engel, Lois Frankel, Barbara Lee, Nita M. Lowey, and Jan Schakowsky, Letter to Michael R. Pompeo, November 14, 2018, [https://foreignaffairs.house.gov/\\_cache/files/2/8/288d3941-1ba4-43ae-b637-4cf475a1fe86/54D25311B96E68E7B1E75E08464ACC03.111418-ele-nml-bl-js-jf-to-secy-pompeo.pdf](https://foreignaffairs.house.gov/_cache/files/2/8/288d3941-1ba4-43ae-b637-4cf475a1fe86/54D25311B96E68E7B1E75E08464ACC03.111418-ele-nml-bl-js-jf-to-secy-pompeo.pdf).
- Colum Lynch and Robbie Gramer, “At the U.N., America Turns Back the Clock on Women’s Rights,” *Foreign Policy*, March 14, 2019, <https://foreignpolicy.com/2019/03/14/at-united-nations-women-rights-gender-health-trump-diplomacy/>.
- 33 Julian Borger, “Trump Administration Wants to Remove ‘Gender’ From UN Human Rights Documents,” *The Guardian*, October 25, 2018, <https://www.theguardian.com/world/2018/oct/24/trump-administration-gender-transgender-united-nations>.
- 34 “AJC Comment on Proposed Asylum Regulations,” Jacob Blaustein Institute for the Advancement of Human Rights, July 13, 2020, <https://www.jbi-humanrights.org/AJC%20Comment%20on%20Proposed%20Asylum%20Regulations%20.pdf>.
- 35 Conor Finnegan, “Tillerson: Pushing Human Rights Abroad ‘Creates Obstacles’ to US Interests,” *ABC News*, May 3, 2017, <https://abcnews.go.com/Politics/tillerson-pushing-human-rights-abroad-creates-obstacles/story?id=47190743>.
- 36 Brian Hook to Rex Tillerson, memorandum, May 17, 2017, published at <https://www.politico.com/f/?id=00000160-6c37-da3c-a371-ec3f13380001>.
- 37 Felice Gaer, “Children in Immigration Detention – What are the international norms?” Jacob Blaustein Institute, <https://www.jbi-humanrights.org/Children%20in%20Immigration%20Detention%20-%20What%20Are%20the%20International%20Norms.pdf>.
- 38 Secretary of State Michael R. Pompeo Remarks to the Press, July 8, 2019, <https://2017-2021.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/index.html>.
- 39 Ibid.
- 40 U.S. Department of State, *Report of the Commission on Unalienable Rights*, July 16, 2020, <https://2017-2021.state.gov/report-of-the-commission-on-unalienable-rights/index.html>.
- 41 This section is based on the submission by Felice Gaer, Christen Broecker, and Alyssa Oravec of the Jacob Blaustein Institute for the Advancement of Human Rights to the U.S. Department of State, “Comment on the Draft Report of the Commission on Unalienable Rights” July 24, 2020, available at <https://www.jbihumanrights.org/JBI%20Comment%20on%20Commission%20on%20Unalienable%20Rights%207-24.pdf>. The author wishes to thank Christen Broecker and Alyssa Oravec for their assistance on this section.
- 42 U.S. Department of State, *Report of the Commission on Unalienable Rights*, July 16, 2020, <https://2017-2021.state.gov/report-of-the-commission-on-unalienable-rights/index.html>.
- 43 Vienna Declaration and Programme of Action, World Conference on Human Rights, June 25, 1993, Paragraph 5, <https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>.
- 44 *Report of the Commission on Unalienable Rights*, 55.
- 45 Bangkok Declaration, United Nations Document A/CONF.158/PC/5, March 1993, [https://www.hurights.or.jp/archives/other\\_documents/section1/1993/04/finaldeclaration-of-the-regional-meeting-for-asia-of-the-world-conference-on-human-rights.html](https://www.hurights.or.jp/archives/other_documents/section1/1993/04/finaldeclaration-of-the-regional-meeting-for-asia-of-the-world-conference-on-human-rights.html). See esp. Paragraph 8: “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and

- various historical, cultural and religious backgrounds.”
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  - 47 Warren Christopher’s criticism of cultural relativism is cited in part in the Commission’s draft report. See note 30 above: Warren Christopher, U.S. Department of State Dispatch, 4, 441, 442, June 21, 1993, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015077200189&view=1up&seq=175>.
  - 48 Report of the Commission on Unalienable Rights, 54.
  - 49 *Ibid.*, 57.
  - 50 *Ibid.*, 24.
  - 51 *Ibid.*, 9.
  - 52 See “United States Joins Over 50 Nations to Support Human Rights Council Statement on Iran,” U.S. Mission on International Organizations in Geneva, June 15, 2010, <https://geneva.usmission.gov/2010/06/15/u-s-joins-over50-nations-to-support-hrc-statement-on-iran/>.
  - 53 Vienna Declaration and Programme of Action, June 25, 1993, Paragraph 1, which reads: “The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.”
  - 54 “Report of the Commission on Unalienable Rights,” U.S. Department of State, July 16, 2020, <https://2017-2021.state.gov/report-of-the-commission-on-unalienable-rights/index.html>.
  - 55 “Comment on Draft Report of the Commission on Unalienable Rights,” Jacob Blaustein Institute for the Advancement of Human Rights, July 24, 2020, [https://www.jbi-humanrights.org/JBI Comment on Commission on Unalienable Rights 7-24.pdf](https://www.jbi-humanrights.org/JBI%20Comment%20on%20Commission%20on%20Unalienable%20Rights%207-24.pdf).
  - 56 “Comments on the Commission on Unalienable Rights’ Draft Report,” Freedom House, July 22, 2020, <https://freedomhouse.org/article/comments-commission-unalienable-rights-draft-report>.
  - 57 UN General Assembly Human Rights Council, U.S. National Report to the United Nations Universal Periodic Review, A/HRC/WG.6/36/USA/1, 14 (August 13, 2020), <https://www.state.gov/wp-content/uploads/2020/11/US-report-on-UPR-13-Aug-2020.pdf>.
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  - 59 “Comment on Draft Report of the Commission on Unalienable Rights,” Jacob Blaustein Institute for the Advancement of Human Rights, July 24, 2020, [https://www.jbi-humanrights.org/JBI Comment on Commission on Unalienable Rights 7-24.pdf](https://www.jbi-humanrights.org/JBI%20Comment%20on%20Commission%20on%20Unalienable%20Rights%207-24.pdf).
  - 60 “Geneva Consensus Declaration on Promoting Women’s Health and Strengthening the Family,” U.S. Mission to the United Nations, December 2, 2020, <https://usun.usmission.gov/geneva-consensus-declaration-on-promoting-womens-health-and-strengthening-the-family/>.