

SYMPOSIUM ON THE BIDEN ADMINISTRATION AND THE INTERNATIONAL LEGAL ORDER

A HUMAN RIGHTS AGENDA FOR THE BIDEN ADMINISTRATION

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The Biden administration has much to do to restore the United States' credibility as a human rights leader and to strengthen the human rights system in an era of rising right-wing nationalism, authoritarianism, and competition for global power. In doing so, it needs to lead by example by putting its own house in order, and act with both courage and humility in the face of deep global skepticism and distrust. Specifically, the administration should pursue five stages of engagement on human rights: *reverse and revoke* measures taken by the Trump administration, *reaffirm* the United States' traditional commitments to human rights at home and abroad, *rebuild* the State Department and diplomatic corps, *reengage* with international and regional mechanisms through bilateral and multilateral diplomacy, and *reconceptualize* the United States' twenty-first century relationship to human rights. All of the other topics addressed in this symposium—climate, health, elections, migration, structural racism, and trade—implicate human rights. None can be adequately addressed without a robust U.S. human rights agenda.

The Challenge

The outgoing administration badly stained America's human rights reputation and abdicated leadership in the international human rights realm. While some countries stepped into the vacuum to preserve the system, others worked to undermine it. Neither group will step aside because the United States says, "We're back." But the Biden administration cannot reenter this space timidly.

The administration should make the protection of human rights at home and abroad a central pillar of U.S. foreign policy. The United States unquestionably has a mixed record in respecting human rights. But promotion and protection of universal human rights is a founding ideal of the United States and has been a distinctive hallmark of our foreign policy. The United States' combination of values and power has led the world to expect U.S. human rights leadership. When the United States announces its position with moral clarity, sympathetic states listen.

Historically, there was a parallel strategic aspect to the United States' engagement on human rights in the Cold War era. Given the new rivalry with China, which is attempting to reframe normative issues into a "development frame" rather than a rights frame to shield its authoritarian model from criticism (external and internal), there is a new strategic rationale for reengagement on human rights.

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In pursuing that reengagement, the administration will be constrained by acutely divided U.S. domestic politics and a sharply divided Senate. Internationally, longstanding regional and international human rights mechanisms are severely underfunded, in need of structural reform, and under attack. This is not the time to develop shiny new human rights mechanisms. The Biden administration should focus on strengthening the effectiveness of the existing regime and securing it for twenty-first century challenges.

Reverse and Revoke

Restoring U.S. credibility and leadership on human rights starts at home. The Trump administration abandoned the goal of closing Guantánamo, revoked restrictions on targeted killings, reversed the ban on anti-personnel mines, and supported the Saudis' atrocity-riddled war in Yemen. The administration reinvigorated the federal death penalty, privileged religion over reproductive health,¹ and reversed litigation positions regarding protections for transgender and other LGBT persons, health insurance, reproductive rights, and corporate human rights responsibility.² The administration eased civil rights oversight of discriminatory police departments.³ Its zero-tolerance immigration policy, inter alia, banned entry from Muslim-majority countries,⁴ separated families, and slashed the annual refugee admission quota.

Overseas, the administration claimed power to sanction International Criminal Court (ICC) personnel⁵ and launched a broad-based assault on gender rights—expanding the “global gag rule” on organizations providing reproductive health services, opposing UN resolutions, and eliminating reproductive health from the annual State Department Human Rights Country Reports.

Quick reversal of these positions is an essential first step toward rehabilitating the United States' credibility as a nation that practices what it preaches.

Reaffirm

In the past four years, millions took to the streets to demand their human rights in the United States and abroad. Rather than support such movements, the outgoing administration attacked free speech, the free press, free elections, and judicial independence at home; coddled dictators; ignored assaults on the rule of law abroad; and failed to press for meaningful accountability, including for the Saudi murder of Jamal Khashoggi. Through the bravado of its “Unalienable Rights Commission,” the administration purported to redefine human rights narrowly and unilaterally for the international system, including by elevating religion over other rights.

The incoming administration must signal that it stands with rights defenders, not dictators. It should publicly reaffirm the United States' commitment to human rights—particularly the values on which the United States traditionally has led. These include the freedoms of expression, press and assembly; judicial independence; democracy and the rule of law; equality and nondiscrimination (including for racial, ethnic, religious, and sexual minorities and persons with disabilities); and the rights of refugees and migrants. The administration should reject the hubris of the Unalienable Rights Commission and reaffirm the universality and indivisibility of all internationally recognized human rights.

¹ [Exec. Order No. 13798](#), 82 Fed. Reg. 21,675 (May 4, 2017).

² Brief for the United States as Amicus Curiae Supporting Neither Party at 11, [Jesner v. Arab Bank](#), PLC, 138 S. Ct. 1386 (June 2017) (No. 16–499).

³ Ed Pilkington, [Trump's Scrapping of Obama-era Reforms Hinders Police Reform](#), GUARDIAN (June 7, 2020).

⁴ [Proclamation No. 9645](#), 82 Fed. Reg. 45,161 (Sept. 27, 2017).

⁵ [Exec. Order No. 13928](#), 85 Fed. Reg. 36,139 (June 11, 2020).

Rebuild

Effective engagement in international diplomacy and institutions requires a knowledgeable and skilled diplomatic staff. President Trump's isolationist tack assaulted the State Department: hundreds of State Department personnel were either fired or quit on principle. The knowledge base of the U.S. diplomatic corps thus has been severely compromised.

The Biden administration must rebuild the U.S. diplomatic corps and modernize State Department methodologies. The administration needs to appoint highly qualified and diverse personnel for positions ranging from the UN Permanent Representatives in New York and Geneva, to the State Department's Legal Adviser and Assistant Secretary for Democracy, Human Rights and Labor, to the human rights officers in embassies and bureaus throughout the government. It should resurrect a revamped, high-level interagency working group on human rights under the direction of a Senior Director at the National Security Council of proven human rights reputation, to help ensure that human rights awareness is integrated through all domestic and foreign policy branches of the government.

The administration also must rebuild relations with civil society organizations, essential partners in promoting human rights compliance at home and abroad.⁶ Such openness will also help restore the United States' global leadership in promoting robust civil societies and transparency in governments.

Reengage

The last administration, *inter alia*, withdrew from the UN Human Rights Council and UNESCO, cut funding for the UN Population Fund and the UN Relief and Works Agency for Palestinian Refugees, and attacked the ICC. The United States should reengage in promoting human rights through these and other regional and international mechanisms, as well as through bilateral and multilateral diplomacy.

The United States should re-join the UN Human Rights Council. Although the Trump administration withdrew from the Council abruptly in 2018, it nevertheless appeared for the Council's third Universal Periodic Review of the United States in November 2020,⁷ reaffirming universal participation. The Biden administration will now have an important early human rights signaling opportunity when it reports back to the Council in March on whether the United States accepts the resulting recommendations.

Unquestionably, the Council is an imperfect institution. But as the political human rights arm of the United Nations, the Council is the UN's primary and most powerful human rights body. Often the Council, including its special rapporteurs and other special procedures, is the only forum to address human rights issues that particularly concern the United States—including in Syria, Iran, North Korea, Venezuela, and Myanmar. While the Council warrants reform, including on election procedures and the Israel agenda item, the United States can accomplish change only by engaging. Withdrawal from the Council, and removing the full-time U.S. ambassador dedicated to it, simply ceded that space to dictators and autocrats.⁸ The United States could also demonstrate leadership on transparency by adopting an open-door policy for special rapporteurs.

While party only to some mechanisms, the United States generally has been a strong supporter of the independence of the UN treaty bodies, which monitor state compliance with human rights treaty obligations, as well as of the overall inter-American human rights system. One notable measure of the collapse of the United States' human rights reputation has been its loss of an unprecedented number of elections to such bodies in the last four years.

⁶ See, e.g., *Walking the Talk: 2021 Blueprints for a Human Rights-Centered U.S. Foreign Policy*, HUM. RTS. FIRST (2020).

⁷ Rupa Shenoy, *At the UN Review of US Human Rights, the Trump Administration Gets an Earful*, WORLD (Nov. 17, 2020).

⁸ Keith Harper & Stephen Pomper, *On the U.N. Human Rights Council, Quitters are Losers*, FOREIGN POL'Y (Jan. 29, 2018).

The United States now has no member on any UN treaty body (the Human Rights Committee, the Committee Against Torture, or the Committee on the Elimination of Racial Discrimination) or on the Inter-American Commission on Human Rights. The Trump administration also failed to submit reports to any treaty body.

The Biden administration should reengage constructively with international and regional human rights mechanisms by promoting the nomination and election of highly qualified independent experts; submitting overdue U.S. reports; ensuring institutions have the resources, infrastructure and independence to fulfill their mandates; respecting their decisions; and contributing to ongoing efforts to strengthen and modernize these systems.

The United States is not a party to the Rome Statute establishing the ICC. Nevertheless, the Bush and Obama administrations constructively supported the Court, consistent with U.S. interests in promoting international justice.⁹ Domestic politics and intra-governmental resistance will impede reengagement, given the Court's needed reforms and pending investigation of the United States. But a well-functioning ICC would solve problems the United States lacks the time or energy to address. The Biden administration should reaffirm the U.S. signature and its intent not to violate the object and purpose of the Rome Statute, and resume cooperation with the Court on matters of mutual concern.

Beyond human rights mechanisms, the United States should work to ensure that human rights are a primary concern of multilateral and regional fora, both to help fill the leadership vacuum on human rights and to prevent other states from diluting the human rights impact of those organs. Any position the United States takes has ripple effects. For example, the Trump administration's threat to veto an annual UN resolution on conflict-related sexual violence diluted the resolution and allowed Russia and China to secure even worse changes.¹⁰ Similarly, in its diplomatic and aid relationships, the United States should act in concert with other states and regional mechanisms to prevent backsliding and strengthen democracy and the rule of law in fragile democracies such as Tunisia and Guatemala, and in states that are trending authoritarian, such as Hungary, Poland, India, and Turkey.

Reconceptualize

Many of the steps above would largely restore the status quo ante. But the greatest challenge is to recalibrate and reconceptualize the nation's engagement with human rights in a world where the United States is no longer the hegemon. Gone are the days when the United States could muscle through its position. The international landscape is more fragmented, with less consensus on human rights. Reconceptualizing U.S. engagement on human rights will involve many steps. Here are four good places to begin:

Building Creative Alliances and Solutions: Coalition building, engaging new allies, and creative use of all available tools and fora should form a core part of U.S. reengagement on human rights. Only with the support of others will the United States be able to pose an effective bulwark against Russia and China's efforts to redefine international norms. Only through creative alliances will the United States be able effectively to shore up democracy, the rule of law, and human rights against creeping autocracy.

One way the Trump administration contributed positively to human rights accountability was through the use of targeted sanctions against human rights violators under the Global Magnitsky Act of 2016 and similar authorities. These have included sanctioning officials for China's Xinjiang policies and banning goods made with Uighur forced labor. While selectively imposing sanctions undermines their credibility, properly deployed, targeted sanctions can be an important means for ensuring that gross human rights violations are condemned and human rights norms affirmed. Strategic confrontation is an essential part of human rights leadership. Smart use of sanctions,

⁹ Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT'L L. 525, 533–37 (2013); John Bellinger, *The International Criminal Court and the Trump Administration*, LAWFARE (Mar. 27, 2018).

¹⁰ Jamille Bigio, *Controversy over Sexual Violence in Conflict at the UN Security Council*, COUNCIL ON FOREIGN REL. (May 3, 2019).

especially in coordination with other states, helps respond to atrocities, avoid impunity, and isolate perpetrators across a wide range of human rights concerns.¹¹

Creative twenty-first century engagement needs to recognize the essential role of non-state actors and soft law norms. America best leads with ideas, and the best often come from outside the government. Creative engagement through public-private alliances with civil society organizations, religious and youth groups, corporations, and other stakeholders will maximize both credibility and impact, on issues ranging from internet freedom to redressing civilian harms in armed conflict.

Rethinking U.S. positions on human rights: Some U.S. positions on human rights may warrant reconsideration if the United States is to be an effective leader in alliance with others, including the extraterritorial application of human rights treaties,¹² and economic, social, and cultural rights.¹³ In the face of Senate opposition to treaty ratification, rethinking human rights engagement also means using executive branch tools to comply with important unratified treaty norms. Senator Biden's support for the Americans with Disabilities Act and the Violence Against Women Act helped inform global norms on these issues, now reflected in the Disabilities Convention and the Convention on Elimination of Discrimination Against Women. The Biden administration can use these and other treaties as models for executive branch standards, as Obama did with the Landmines Convention, and support their adoption by state and local governments.¹⁴

Institutional Reform: The Biden administration should join efforts to address existing weaknesses in international human rights institutions. Reform conversations are underway from the UN treaty bodies to the regional human rights systems but have lacked strong leadership by states seeking constructive reform. Common concerns include methods for electing participants, backlogs in processing human rights complaints, antiquated and cumbersome working methods, and insufficient "connectivity" among the various mechanisms.¹⁵ Reform is no simple matter: concerted engagement is needed to build consensus among states and within institutions. Nevertheless, severe financial challenges, reform threats by hostile states, and the COVID pandemic's disruption of established working methods may present a unique opportunity to achieve meaningful reform. To participate credibly in those conversations, the Biden administration must earn its seat at the table, matching constructive ideas with meaningful resources and demonstrated staying power, in partnership with like-minded states, civil society groups, and other stakeholders.

Expressive Freedoms: To meaningfully address any of the substantive areas discussed in this symposium, the administration should make freedom of expression, press, and association an anchor of its international diplomacy. Shrinking civil society space, attacks on media freedom, and restrictions on online speech accelerated globally in the past few years, inflamed by the White House's "war on truth." Repression of these expressive rights is the first indicator in a move from democracy to autocracy, and thus an early warning for growing illiberalism,¹⁶ from which other human rights violations also flow. By engaging on these issues, the Biden administration can both counter illiberalism abroad and advance America's interests at home. Freedom of association and assembly are

¹¹ High Level Panel of Legal Experts on Media Freedom, [Report on the Use of Targeted Sanctions to Protect Journalists](#) (2020).

¹² This position is not monolithic. See Sarah H. Cleveland, [The United States and the Torture Convention, Part I: Extraterritoriality](#), JUST SECURITY (Nov. 14, 2014).

¹³ Gillian MacNaughton & Mariah McGill, [Economic and Social Rights in the United States: Implementation Without Ratification](#), 4 NORTHEASTERN UNIV. L.J. 365 (2012).

¹⁴ JoAnn Kamuf Ward & Sarah Alshawish, [If the US Wants to Lead on Human Rights, We Must Shift to the State and Local Level](#), JUST SECURITY (Dec. 10, 2020).

¹⁵ Sarah H. Cleveland, [Human Rights Connectivity: The Future of the Treaty Body System](#), in THE FUTURE OF HUMAN RIGHTS (N. Bhutal ed., forthcoming 2020).

¹⁶ V-Dem Inst., [Democracy Report 2020](#), at 18.

core U.S. constitutional rights that resonate in the Black Lives Matter protests at home and pro-democracy protests abroad. Likewise, the United States' voice is sorely needed in global conversations regarding online speech, including censorship, surveillance, and misinformation, which implicate core U.S. values and interests.

Conclusion

The past four years have badly damaged America's reputation for commitment and competence. But for this same reason, the Biden administration must not under-correct. In order to right the ship of state and persuade the world that a values-based America is back, the administration should turn the page boldly.