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## **America First and the Human Rights Regime**

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## **Abstract**

Donald Trump's populist, nationalist "America First" agenda advocates a transactional, zero-sum, hypercompetitive, and sovereigntist view of U.S. foreign policy, which many scholars and policymakers conclude poses a considerable challenge to multilateralism. We explore the threat America First presents to the international human rights regime as reflected in important institutions and norms. We survey America First policies regarding immigration and refugee norms as well as norms prohibiting torture and war crimes. We examine its position on the UN Human Rights Commission and the International Criminal Court, consider President Trump's sympathies for autocratic governments, and explore the development of the Commission on Unalienable Rights. Finally, we explain why the America First norm transgressions pose a novel threat to the human rights regime, potentially more worrisome than prior U.S. norm violations. America First's performative element risks reconstituting U.S. identity as an outsider state, if not an outlaw, vis-à-vis the international community.

## **Biographical note**

Kurt Mills is Professor of International Relations and Human Rights at the University of Dundee. His research focuses on the development of international norms and institutions related to human rights, humanitarianism, international criminal justice, and the responsibility to protect, particularly in the context of sub-Saharan Africa. He is the author of numerous articles and books, including *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute, and Palliate*. He is Director of the Scottish Human Rights Defenders Fellowship, an Editor of the journal *Global Governance*, past Vice-Chair of the Academic Council on the United Nations System, past Vice President of the International Studies Association (ISA), and founder of the ISA Human Rights section.

Rodger A. Payne is Professor of Political Science at the University of Louisville. His research focuses on the significance of United States opposition to an array of international norms and institutions. He is the author of dozens of journal articles and book chapters and is the coauthor of *Democratizing Global Politics*. For 17 years, Payne directed the Grawemeyer Award for Ideas Improving World Order. In spring 2019, he was a Visiting Global Scholar at University of Dundee, and in fall 2018, he was a Fulbright Canada Research Chair at the Norman Paterson School of International Affairs, Carleton University in Ottawa, Canada.

## American First and the Human Rights Regime

### Introduction

United States President Donald Trump's "America First" agenda has triggered enormous concern about the status of the liberal international order. Trump's extensive use of tariffs against major trading partners are antithetical to the global free trade regime and his administration's refusal to approve appellate panel members undercuts the World Trade Organization's ability to resolve trade disputes. Likewise, Trump's broad denunciation of globalism has manifested in specific decisions to undermine multilateral cooperation on centrally important issues of world politics. Perhaps most notably, Trump announced in June 2017 that the U.S. would exit from the Paris Climate Agreement, in May 2018 he withdrew the U.S. from the Iran nuclear deal, and in May 2020 Trump announced he was terminating the US relationship with the World Health Organization. A wide array of academics, policy analysts, and leaders of important countries point to these policies and various others to warn that the liberal international order is in great jeopardy.

This paper examines the implications of America First for the international human rights regime, which has received much less scrutiny in the global debate even though it is an important element in the liberal order. Specifically, we demonstrate that the Trump administration is often indifferent to, and even hostile towards, the international human rights regime. Moreover, we note the President's open expressions of admiration for an array of dubious autocrats and his frequent bombastic attacks on democratic norms of governance. Altogether these acts rightly spawn concern that his administration and its America First agenda depart starkly from business-as-usual, imperil fundamental tenets of American democracy, and could greatly damage the international human rights regime.

We ultimately find that the Trump administration has altered U.S. policies and diminished American standing in a manner uniquely threatening to the human rights regime. The America First agenda provides what Trump's administration describes as a "principled realist approach" towards human rights, emphasizing state sovereignty rather than a shared concern for human dignity: "We do not expect diverse countries to share the same cultures, traditions, or even systems of government. But we do expect all nations to uphold these two core sovereign duties: to respect the interests of their own people and the rights of every other sovereign nation" (Trump, 2017). The Trump White House (2018) describes a human rights agenda that includes some practices that are consistent with prior America policy, such as criticism of specific regimes (Burma, Cuba, Iran, North Korea), sanctions against individuals alleged to violate the Global Magnitsky Human Rights Accountability Act, and designation of 11 states as countries of concern under the International Religious

Freedom Act. However, the Trump National Security Strategy (NSS 2017) mentions human rights only once,<sup>1</sup> and the White House (2018) interpretation of the importance of human rights is instrumental and strategic: “a commitment to fundamental human rights is essential to advancing American influence abroad. Respect for human rights and democracy also produces peace, stability, and prosperity—making it an integral component of U.S. national security.” President Trump made his perspective crystal clear in the fallout after the October 2018 murder of *Washington Post* columnist Jamal Kashoggi in the Saudi consulate in Istanbul – ordered by Saudi Crown Prince Mohammed bin Salman according to the U.S. Central Intelligence Agency (Barnes, 2018). Asked why he was “siding with the Saudis over your own intelligence community,” President Trump replied: “Because it’s ‘America First’ for me. It’s all about ‘America First.’ We’re not going to give up hundreds of billions of dollars in orders, and let Russia, China, and everybody else have them.” He went on to explain that “if we broke with them,” then Saudi Arabia would send oil prices “through the roof” (Trump, 2018).

Of course, the U.S. record vis-à-vis the human rights regime has long been viewed as problematic by many observers. Critics emphasize U.S. unwillingness to agree to important norms widely shared in the international community, failure to maintain membership in the primary United Nations human rights institutions, and even notable violations of norms that it has long embraced. For examples of prior U.S. indifference – if not quite hostility – towards the regime, consider that the U.S. is not a state party to the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, or the International Covenant on Economic, Social, and Cultural Rights. U.S. disinterest in primary human rights institutions was made apparent when the George W. Bush administration declined to become a member of the UN Human Rights Council (UNHRC). Finally, it is commonly argued that U.S. policies during the Bush administration’s prosecution of the global war on terror abrogated longstanding international human rights norms by utilizing “extraordinary rendition” and “enhanced interrogation” techniques widely viewed as torture (Koh, 2007; Mertus, 2004; Apodaca, 2006; Foot, 2008).

While this post-Cold War historical record provided strong reasons for human rights lawyers, practitioners, and legal and international relations (IR) scholars to raise serious objections, other governments, especially like-minded regimes with strong human rights records, did not seriously challenge the idea that America maintained its position as a

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<sup>1</sup> In a paragraph entitled “Support the Dignity of Individuals,” the NSS (2017: 42) says:

We support, with our words and actions, those who live under oppressive regimes and who seek freedom, individual dignity, and the rule of law. We are under no obligation to offer the benefits of our free and prosperous community to repressive regimes and human rights abusers. We may use diplomacy, sanctions, and other tools to isolate states and leaders who threaten our interests and whose actions run contrary to our values. We will not remain silent in the face of evil. We will hold perpetrators of genocide and mass atrocities accountable.

member in good standing of the community of “civilized” states, committed to upholding individual liberties and human dignity. Support for human rights norms helps “define identities of liberal states” and “human rights performance” serves as a “crucial signal to others to identify a member of the community of liberal states” (Risse and Sikink, 1999: 8). To the extent the international community tolerated prior American transgressions, this was because U.S. identity was bolstered by strong rhetorical support for democracy and human rights, as well as by U.S. attempts to acknowledge egregious wrongdoing – as it did during the Abu Ghraib scandal – or to deny misconduct or otherwise minimize its opposition to underlying normative principles. The Bush administration claimed, for example, that the US does not torture and that terrorist captives were unlawful combatants not protected by the laws of war. In contrast, Donald Trump’s government has essentially abdicated any claim to leadership in this domain and his America First approach openly dismisses key human rights norms and attempts unilaterally to redefine and narrow the international agenda. While all behavior in contravention of the human rights regime is worrisome, we argue that open American indifference and/or antipathy sends an especially distressing signal about U.S. identity. The magnitude of this stress may prove fatal to the regime (Gearty, 2017).

The paper is organized into three main sections. The first section briefly outlines the America First agenda and summarizes the Trump administration’s record on human rights. We find that the current U.S. assault on human rights norms, practices, and understandings is quite extensive. The second section discusses a typology for evaluating norm transgressions and attempts to explain why certain kinds of transgression are especially threatening and disquieting. Particular types of norm transgressions, for example, can send alarming messages and negatively transform the international community’s understanding of a state’s identity. The third section applies the typology to the Trump administration’s record and argues that its behaviour is potentially far more dangerous to the international regime than prior U.S. transgressions. While the US was a founding member of the post-war international community and remains an important member, extensive normative transgressions of a certain type may well cause other members to identify it as an outsider, if not a scofflaw, or rogue. A brief concluding section offers some closing thoughts about the status of the international human rights regime in the age of America First.

## **America First and the Human Rights Regime**

### ***America First***

United States sovereign interests are viewed as supreme under Donald Trump’s America First agenda. The President openly embraces selfish and insular views of world politics that are rarely expressed so openly in international affairs. Speaking to the United Nations General Assembly in 2017, Trump (2017) declared: “In foreign affairs, we are renewing this

founding principle of sovereignty....As President of the United States, I will always put America first...As long as I hold this office, I will defend America's interests above all else". The speech mentioned sovereignty on 21 occasions and interests 10 times. In contrast, President George W. Bush's well-known 2002 speech to the UNGA, roughly one year into the so-called "war on terrorism," never used the word sovereignty and only mentioned interests once, when discussing how Palestinians deserved a government that reflected their interests.

Trump's America First agenda applies a hyper-competitive perspective to evaluate virtually every relationship or issue area, explaining almost all interactions in material and transactional terms. Indeed, President Trump boasts that he wants to win every transaction or deal and describes practically all bargaining as zero-sum. To "make America great again," Trump has sought to renegotiate the terms of various treaties and agreements including trade deals, military basing agreements, and alliance commitments. Additionally, Trump positions himself as a populist and nationalist opposed to globalism. Communications scholar Robert C. Rowland (2019) documents that Trump's America First rhetoric is dominated by traditional populist nationalist appeals.

Given these worldviews, Trump has staked out numerous controversial positions on foreign policy issues that would have been anathema to prior American presidents from either major political party. For instance, Trump commonly employs a form of grievance politics that blames other nation-states and/or international agreements for America's victimhood. He repeatedly scapegoats a diverse set of states, including major trading partners and allies, such as China, Germany, Canada, and Mexico. Trump's attempts to blame China (and the WHO) for the worrisome number of U.S. pandemic fatalities from COVID-19 are perhaps the most dramatic example of this phenomenon.

As a political slogan, America First is widely employed to justify U.S. retrenchment from multilateral cooperation. As noted in the introduction, IR scholars, policy analysts, and political leaders have been debating the damage the liberal international order has suffered by Trump's attacks on multilateralism, alliances, and free trade agreements. After all, the administration has simply pulled the US out of various organizations and agreements, including the previously mentioned Paris Climate Agreement, Iran nuclear deal, and WHO, as well as the UN Human Rights Council (UNHRC). Such moves, by themselves, are not atypical for Republican presidents. The recent Bush administration never sought a seat on the UNHRC, and it showed little interest in, if not hostility to, other multilateral institutions, including the climate regime and the International Criminal Court (ICC). The war on Iraq was not supported by the UN Security Council and clearly posed a significant challenge to multilateralism. However, the Bush administration ultimately turned to the UN for assistance in Iraq soon after taking Baghdad, relied upon NATO allies for extensive security operations in Afghanistan, and never seriously challenged the logic or legitimacy of the free trade regime. Moreover, as will be explored below, the Bush administration's apparent

transgressions of the human rights regime were of a type that indicated its desire to deny or hide its actions and thereby remain a member in good standing of the international community of states. America First is dangerous, in part, because of its brazen open indifference and hostility to the norms.

### ***Human Rights Under Trump***

This paper argues that Trump's America First agenda is antithetical to the kind of cosmopolitan understanding of world politics that undergirds the human rights regime. There are many areas where the implementation of Trump's America First Policy poses direct injury to the implementation of human rights and potentially to the international regime. Moreover, even domestic political decisions have direct connections to the international sphere, influencing how other states view the status of American democracy. Further, Trump has attempted to justify many policies by engaging in unilateral redefinition of what constitutes human rights. Consistent with the renewed focus on sovereignty, for example, America First clearly attempts to recast human rights in terms of citizen's rights.

#### ***Immigration***

Domestically, Trump has tapped into broad populist and xenophobic nationalist discourses that are anti-immigrant. Almost from day one, his administration has been demonizing *The Other* and targeting specific groups of people as scapegoats for America's problems. Perhaps most prominently, at least in the security realm, he attempted to institute a Muslim travel ban. Specifically, he declared a ban on people entering the country from seven Muslim-majority countries – Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. He also ordered that Christian asylum seekers and others from minority religious groups be given priority over Muslim asylum seekers, arguing that “it was almost impossible” for Syrian Christian asylum seekers to gain entry to the US. All Syrian refugees were blocked indefinitely (Shearer and Cooper, 2017). These orders, including a narrower ban, were temporarily set aside by U.S. courts (Burns, 2017), although a version of the ban was ultimately upheld by the Supreme Court (Litman, 2018). Under international law, the Refugee Convention bans discrimination based on “race, religion or country of origin” and the International Covenant on Civil and Political Rights likewise prohibits discrimination and states that “all persons are equal before the law and are entitled...to the equal protection of the law” (quoted in Koh, 2017: 423).

The Trump administration has additionally slashed the flow of refugees into the US to all-time lows, in an era when the number of refugees internationally is at its highest level since World War II (Hesson, 2019). In its planning, Barack Obama's administration established a goal of accepting 110,000 refugees for fiscal year 2017. In contrast, the Trump administration slashed the cap to 50,000 and reportedly considered setting the number for 2020 at zero. It eventually proposed a cap of 18,000 for 2020 after setting a cap of 30,000



for 2019. This is “the lowest ceiling since Congress created the refugee program in 1980” (Hesson, 2019). During the COVID-19 pandemic, the U.S. closed its borders to asylum-seekers (Rosenberg and Hesson, 2020). To enforce these caps, the US has criminalized asylum-seeking, which the NGO Human Rights Watch (2018) notes is a violation of international law.

A related Trump policy has been to stop immigration from Latin America across the U.S. southern border and to build a wall to help accomplish this goal. In fact, building this wall was Trump’s signature campaign promise and was tied directly to his dystopian vision of America threatened by foreign “invaders.” Trump points to the flow of illegal drugs across the border and asserts that immigrants are murderers, rapists, and dangerous gang members. Trump refers to some undocumented immigrants as “animals” (J.H. Davis, 2018). Although only small portions of the wall have been built, Trump’s policy has created a humanitarian catastrophe at the border. The President has tried to argue that this is a crisis of the Democrats’ making because thousands of undocumented (he uses the term “illegal”) children have been brought across the border with their parents (Trump’s Speech on Immigration, 2019). Yet, there is nothing new here – undocumented individuals and families have been crossing the borders ever since the US was founded – and, in fact, the rate of undocumented border crossings has been falling for two decades (Ward and Singhvi, 2019). Families have been held in overcrowded, highly unsanitary conditions (Office of the Inspector General, 2019) and children have infamously been separated from their families (Jordan and Dickerson, 2019) and locked in cages (Dickerson, 2019). The UN High Commissioner for Human Rights (2019), Michele Bachelet, openly criticizes the US for the conditions under which people, and in particular children, are detained. UNHCR has declared that US family separation “is a serious violation of the rights of the child” in violation of multiple human rights conventions (Cumming-Bruce 2018). Human Rights Watch (2018, 2019) has likewise emphasized the violations of US law as well as the ongoing harm caused by the separations and detentions. These facilities holding undocumented migrant family members have been dubbed “concentration camps” by some commentators (Pitzer, 2019).

### *Torture and War Crimes*

Drawing on the same fears of external threats that are embedded within anti-immigrant rhetoric, Trump has indicated on numerous occasions that he supports torture of terrorist suspects, boasting that his administration “would do a lot more than waterboarding” (Haberma, 2016c). Along those lines, he has additionally advocated killing the relatives of terror suspects. Admittedly, Trump has at times contradicted himself, indicating that “the United States is bound by laws and treaties and I will not order our military or other officials to violate those laws” (Haberma, 2016b). However, he then reverses himself again (Haberma, 2016a). In any event, Trump’s position disavows the stance taken by the Bush administration, which claimed that CIA waterboarding of suspected terrorists constituted “enhanced interrogation” rather than torture and argued that the prisoners questioned in

this way were “unlawful combatants” who did not deserve protections under prevailing laws of war. President Barack Obama temporarily ended this debate by instituting an outright ban on the practice. However, the populist appeal of Trump’s position is reflected in a 2016 public opinion poll finding that only 30% of the U.S. public believes it is not acceptable to torture enemy combatants (Alston, 2017).

Some senior administration officials have directly contradicted Trump, stating or implying that they would not allow torture under their watch – albeit for instrumental reasons. Specifically, former Secretary of Defense James Mattis (Fink and Cooper, 2017) and current Director of the Central Intelligence Agency Gina Haspel (Riechman and Freking, 2018) both stated that torture does not work.<sup>2</sup> If torture did occur, the reservations expressed by senior officials might mean that the world would not initially learn about it. Torture could again occur in the shadowy backwaters of world politics. However, Trump’s open stance is in direct contravention of international law and that appears to be the point of his boasts – to indicate that the U.S. will not be bound by laws which undermine its sovereignty, and ostensibly its security.

President Trump has also acted domestically using his constitutional presidential power to pardon offenders to undermine international humanitarian legal norms, especially norms that protect against war crimes. Specifically, in May 2019 Trump pardoned a US soldier convicted in 2009 of “unpremeditated murder in a combat zone” (Govern and Hamilton, 2019) for executing a prisoner in Iraq, an unprecedented presidential intervention on behalf of a service member convicted of violating the laws of war (Zafar, 2019). In pardoning First Lt. Michael Behenna, Trump cited “broad support from the military, Oklahoma elected officials, and the public” for Lt. Behenna, as well as the fact that he was a “model prisoner” (Zaveri, 2019). These claims are an obvious reference to populism – drawing on popular sentiment rather than the rule of law – and thereby a threat to such rule. In November 2019, Trump pardoned three additional service members who had been convicted or accused of horrific war crimes, typically by members of their own units who testified against them in various proceedings. Indeed, despite Trump’s claims, former military leaders and veterans often expressed outrage at the President’s actions, and one observer has gone so far as to describe Trump as “The War-Crimes President” and “a war-crimes enthusiast” (Serwer, 2019). As Govern and Hamilton (2019) argue, “[i]ndiscriminate and ill-advised clemency can encourage criminal behaviour with anticipated impunity on the battlefield.” Furthermore, since American – and other countries’ – service personnel rely on reciprocal recognition of the laws of war by opponents, such actions can undermine US interests. Other states and fighting forces might come to believe that their foes will not abide by the laws of war. Such pardons therefore undermine the global rule of law more generally, as well as the anti-impunity norm specifically.

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<sup>2</sup> Haspel has been linked to CIA torture activities under Bush (Holpuch, 2018).

### *United Nations Human Rights Council*

Trump has very directly attacked and tried to undermine international human rights institutions, including the UN Human Rights Council and the International Criminal Court. When the United Nations replaced the much-criticized Human Rights Commission with the UN Human Rights Council in 2006, the US voted against its creation, joined by only three other states in voting no, plus three abstentions. John Bolton (2006), then the US ambassador to the UN, said that the Council was not a significant improvement on the Commission, noting that it would still be possible for human rights-abusing countries to join the Council. Another criticism from Bolton was the imposition of term limits, which would mean that the US could not hold a seat permanently, which, he said, “‘will be to the detriment’ of the Council” (HRW, 2006). This latter statement demonstrates clearly the exceptionalism inherent in the US self-image – its contribution to the world (especially in the area of human rights) is intrinsically positive, and any exclusion or criticism of the US will not be tolerated – and indeed is damaging to the normative order. The Bush administration followed up on these criticisms of the new institution by refusing to seek a seat on the Council. This decision was reversed by the Obama administration in 2009, which recognized that it was in the US interest to address its criticisms from within the Council (MacFarquhar, 2009). The US held a seat for two consecutive terms, and then began a third term in 2017.

In June 2018, however, the Trump administration withdrew from the Council halfway through the U.S. term – becoming the first state to leave voluntarily. Libya had previously been expelled. Then-US ambassador to the UN Nikki Haley said that the Council was a “‘protector of human-rights abusers, and a cesspool of political bias,’” arguing that “‘America should not provide it with any credibility’” (Wolfe, 2018). She cited perceived bias against Israel (Wolfe, 2018) – which has been a common complaint by the US across administrations – condemning a “relentless, pathological campaign against a country that actually has a strong human rights record” (U.S. Department of State, 2017). A year before the withdrawal, she had cited the Council’s lack of response to a number of situations and the membership of human rights abusing countries like Burundi, China, Cuba, Saudi Arabia, and Venezuela, calling it a forum for “politics, hypocrisy, and evasion” which has “tarnished the cause of human rights” (U.S. Department of State, 2017). This rhetoric reflects the longstanding image the US previously sought to project as the protector of human rights, standing up to human rights abusers and fighting against hypocrisy. Indeed, Haley (U.S. Department of State, 2017) explicitly cited American exceptionalism:

My country has a unique beginning, founded on human rights, holding self-evident the truth that all men are created equal with rights to life, liberty, and the pursuit of happiness...

The American idea is that government exists to serve the people, not the other way around. Government should secure our rights, not violate them.

Haley also claimed that the US should be evaluated by its deeds, not merely by its words:

The inherent dignity of the individual is not secured by words but by actions. This is the standard by which we judge ourselves as a nation – and by which we invite others to judge us as well.

It is this commitment to the equal worth of all human beings that leads the United States to support universal human rights.

Prior to the U.S. withdrawal, Haley had said in 2017 that the US did not want to leave the Council but rather wanted “to reestablish the Council’s legitimacy” (U.S. Department of State, 2017). When the U.S. did eventually depart, on 19 June 2018, it exhibited a level of hypocrisy that it also decried. The announcement came only a day after the then-UN High Commissioner for Human Rights, Prince Zeid Ra’ad al-Hussein, criticized the US for its immigrant detention policies, noting the description of child detention from the American Association of Pediatrics as “government-sanctioned child abuse” (Cumming-Bruce, 2018). The Council had condemned the child detention policy on 5 June (Long, 2018). In response to this criticism, Haley denounced what she characterized as UN “hypocrisy,” but she now argued that US behavior was beyond reproach:

the United States leads the world with its actions, like providing more humanitarian assistance to global conflicts than any other nation. We will remain a generous country, but we are also a sovereign country, with laws that decide how best to control our borders and protect our people. Neither the United Nations nor anyone else will dictate how the United States upholds its borders. (U.S. Mission to the United Nations, 2018).

Thus, while claiming the mantle of US leadership on human rights – by attempting to re-establish the legitimacy of the UNHRC and leading by example – America First means that no other state, and certainly not the UN, could criticize the US human rights record.

### *International Criminal Court*

If the US has had an erratic relationship with the UNHRC – and sees it and the rest of the UN human rights machinery as an affront to its sovereignty – the International Criminal Court (ICC) has elicited even more vehement negative reactions. The ICC is an independent, treaty-based body, whose purpose is to prosecute those who engage in atrocities and violate other elements of international humanitarian law – namely those who engage in genocide, crimes against humanity, and war crimes, as well as those who engage in the international crime of aggression. It was created in 1998 and officially came into being in 2002. For the most part, only those nationals of states that have ratified the Rome Statute of the International Criminal Court may fall under the jurisdiction of the Court. However, nationals of non-state parties can fall under the jurisdiction of the ICC in two ways – if they

engage in relevant crimes while on the territory of a state party or if the UN Security Council refers a situation to the ICC.

When discussion began in the early 1990s, the US – under the Bill Clinton administration – supported the institution, believing American interest and identity as a champion of human rights aligned with a permanent war crimes court. Yet, when it came time to finalize and vote on the Rome Statute, the US pulled back. Other states were not willing to give the Security Council the kind of control the US felt was needed to assure its own interests would be upheld. This was particularly important because the US role in the post-Cold War global power hierarchy and its prominence in humanitarian (and other military) interventions meant that U.S. citizens would face unique scrutiny. The U.S. also worried about the possibility of politically motivated prosecutions. It became one of only seven states to vote against the Rome Statute. Clinton signed the Rome Statute so that the U.S. might influence its further development, but there were no plans for US ratification (Mills and Lott, 2007: 504-508).

In the runup to the US invasion of Iraq, the Bush administration ‘unsigned’ the Rome Statute, signifying its interpretation of American interests. It also reflected the common domestic understanding, as David Forsythe (2002: 976) puts it, that “real human rights come from US experience and are then exported to the rest of the world.” This view means that there is no need for the U.S. to be a member of the ICC – it had already perfected and practiced human rights. This idea draws on the broader perspective of US exceptionalism which U.S. Secretary of State Mike Pompeo (2019c) calls “Americanism,” whereby the US perceives itself as the fount of human rights with a messianic duty to export democracy and individual freedoms. From this perspective, the ICC potentially impinges on this U.S. autonomy. Critics refer sometimes to American “exemptionalism” – U.S. decisions to excuse itself from norms and institutions that it expects others to obey (Mills and Lott, 2007: 515-517). This form of exceptionalism permeated post-World War II foreign policy and continued in the post-Cold War era and “war on terrorism.” During the Bush years, the US Congress passed the American Service-Member’s Protection Act (ASPA), which went further and mandated that states signing the Rome Statute could not receive US military assistance. The law attempted further to undermine ICC jurisdiction over the US by pressuring states to sign so-called Article 98 agreements whereby they agreed not to turn over American citizens for potential prosecution (Mills and Lott, 2007: 509). This law was dubbed the “Hague Invasion Act” because it authorized the US to use force to “liberate” US citizens or citizens of allied countries being held by the Court (HRW, 2003).

Yet, within three years, the Bush administration began to rethink its approach to the new institution. First, it acknowledged that the ICC could be useful for US strategic interests, and it thus supported – by abstaining rather than vetoing – a Security Council resolution to refer the situation in Darfur to the ICC. Second, the US realized that its attempts to strongarm allies were hurting its interests – including global anti-terror efforts – and so backed away

from making threats (Mills and Lott, 2007: 511-512). When Barack Obama came into office in 2009, the US began to reengage more directly with the ICC.

In 2018, the US approach changed yet again – from cautious engagement to even more extreme hostility. On 10 September, Trump’s National Security Adviser Bolton, the Bush administration veteran and long-time foe of the ICC, announced an even more implacable stance against the ICC. He described the Court as “ineffective, unaccountable, and indeed, outright dangerous” (Bolton, 2018), a product of supporters of “global governance” who wanted to constrain the US by targeting the senior political leadership of the US and which “constituted an assault on the constitutional rights of the American People and the sovereignty of the United States.” Bolton noted that the ICC Prosecutor had requested authorization to open a formal investigation in Afghanistan, which would potentially include war crimes committed by US citizens – or as Bolton described them, “American patriots, who voluntarily went into harm’s way to protect our nation, our homes, and our families in the wake of the 9/11 attacks.” Bolton labelled this “an utterly unfounded, unjustifiable investigation” and pledged that the US would protect its citizens “from unjust prosecution by the illegitimate court.” He asserted:

We will not cooperate with the ICC. We will provide no assistance to the ICC. We will not join the ICC.

We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us.

Bolton argued parochially that the ICC is “antithetical to our Nation’s ideals.” And, getting to the crux of US exceptionalism, he asserted that the ICC “is superfluous, given that U.S. judicial standards already hold American citizens to the highest legal and ethical standards.” The US system of justice, in other words, could not be challenged by an international institution – indeed, it “is more vigorous, more fair, and more effective than the ICC.” The very fact that the Prosecutor requested an investigation allegedly demonstrated its political nature.

Bolton then repeated Trump’s pledge from 2016 that he would “always put the interests of the American people and American security above all else.” To this end, in accordance with the ASPA, he said the US would negotiate more Article 98 agreements, prevent ICC judges and prosecutors from entering the US by targeting their financial assets and prosecuting them in US courts, as well as the assets of states or companies that assisted the ICC in investigating US citizens, “take note” of countries cooperating with ICC investigations of US citizens and retaliate when deciding upon foreign or military assistance, and take action in the Security Council to constrain the ICC.

Moreover, foreshadowing Nikki Haley’s stance in reaction to UN criticism of US immigration detention policies, and summing up the philosophy behind America First, Bolton declared:

“No committee of foreign nations will tell us how to govern ourselves and defend our freedom.... we will put the interests of the American People FIRST.”

Some of this was not new – many aspects reiterated US policy under Bush. But it was a more forceful and uncompromising reiteration. Threatening individuals working for the ICC was new and the comments reflected a significant ratcheting up of the hostile rhetoric against the ICC in violation of diplomatic norms. The Pre-Trial chamber declined to authorize the requested investigation, although this decision was overturned by an appeals chamber in March 2020 (Peltier and Faizi, 2020). While the request to overturn was still open, the US allowed the Prosecutor to come to the US to brief the Security Council – although it did reject her entry visa for other purposes (US revokes ICC prosecutor’s entry visa, 2019). Thus, the Trump administration has recognized at least some, if not all, diplomatic niceties. Yet, after the appeals chamber ruling, Pompeo, who had previously boasted that the US had stopped the investigation (Pompeo, 2019c), explicitly named and threatened two ICC officials and their families (Pompeo, 2020). In June 2020 Trump carried through on the threats by signing an executive order imposing economic sanctions on Court personnel and visa restrictions on them and their families (Borger, 2020). But the wider takeaway is a stance wherein the US sees itself as the bastion of human rights and is unwilling to allow any other entity to comment on its internal policies, much less hold the government or its citizen to account for any actions. In other words, the US is exceptional and thus exempt from the international norms and institutions that most states believe are appropriate for the smooth running of the international community and to protect human rights globally.

### *Embrace of Autocrats*

Throughout his presidency, Donald Trump has demonstrated uncomfortable admiration for an array of autocrats and tyrannical regimes around the world. As noted in the introduction, the administration’s willingness to overlook even extreme examples of human rights abuses, such as the brutal murder and apparent dismemberment of a *Washington Post* columnist in a Saudi consulate, reflects the President’s America First calculus of U.S. interests. Freedom House (2020) ranks Saudi Arabia as “not free” and among the “least free” countries for protecting political and civil liberties. It is also on a list of “countries of concern” with regard to violations of religious freedom, ostensibly a high human rights priority for the administration (Promoting Human Rights is Essential, 2018). However, instead of condemning Saudi Arabia for the extra-judicial killing of Jamal Khashoggi, Trump gave his full support to the regime and the Crown Prince, citing US arms sales to Riyadh and the global price of oil (Borger and Chulov, 2018). “They give us a lot of jobs. They give us a lot of business,” Trump declared by way of explanation (DeYoung, 2019). While the current President is hardly the first US leader to put trade above human rights – witness, for example, Bill Clinton’s explicit determination to privilege trade and other relationships with China over criticism of its human rights record – his particularly brazen statements and support for Saudi Arabia implicitly condone such killings and potentially undermine the rule of law.

However, this kind of zero-sum calculation of U.S. interest is not the most disquieting element of Trump's version of America First. Given the President's governing style, recourse to populism, and claims to executive power, it is perhaps not surprising that Trump would embrace and even emulate autocrats who undermine the rule of law and violate human rights on a regular basis. He has expressed admiration for Russian President Vladimir Putin (Porter, 2017), who exercises power with an iron fist and whose regime has committed numerous human rights abuses, including the apparent assassination of regime critics and journalists. Trump's own Secretary of State Michael Pompeo (2018) has observed that Russia "has suppressed opposition voices." Trump has likewise praised authoritarian Hungarian prime minister Victor Orbán for doing a "tremendous job" and said he was respected for his anti-immigration policies (Borger and Walker, 2019), which primarily attempt to limit the flow of Muslims from the Middle East, Africa, and Asia. The U.S. President also mentioned Orbán's support for Christian communities. Again, alleged persecution of Christians has been a theme of Trump's administration, in line with the popular support he gains from the Christian Right. Trump also praised Philippines President Rodrigo Duterte for doing an "unbelievable job on the drug problem" despite wide international condemnation for extrajudicial killings (Sanger and Haberman 2017).

In March 2018, Trump noted to Republican donors that he admired Chinese authoritarian leader Xi Jinping's move to extend his power: "He's now president for life. President for life. And he's great...And look, he was able to do that. I think it's great. Maybe we'll give that a shot some day" (Philips, 2018). Additionally, Trump has frequently praised North Korean dictator Kim Jong Un and regularly jokes about serving more than two terms as President, in contravention of the U.S. constitution.

In reviewing this record, Douglas Brinkley, a presidential historian, asserts that Trump has "dictator envy" (Rucker, 2018). Mark Danner (2020) describes Trump's governing style as "Big Man autocracy," while Robert Reich (2020) accuses him of "lawless thuggery." Indeed, many academic analysts (Levitsky and Ziblatt, 2018) charge that the President's rhetoric is often authoritarian – he frequently fails to recognize legitimate democratic checks on power and often calls for the use of nondemocratic means to achieve his goals. Again and again, Trump refers to the media as "the enemy of the American people" (W.P. Davis, 2018). He argues that the late 2019 impeachment proceedings in the US House of Representatives reflected an attempted coup in process, despite their origins in constitutional procedures. Trump has called Democratic politicians un-American and treasonous for their opposition to some of his policies and referred to other domestic foes as "human scum" (Quealy 2017). The President even urges partisan audiences to chant their desire to "lock up" (Hadley 2016) political opponents like Hillary Clinton and former Federal Bureau of Investigations director James Comey. He condoned violence against protesters at his campaign-style rallies (Hadley 2016), which except for a few months during the viral pandemic he atypically continued to hold throughout his presidency. Trump even retweeted a conservative pastor who wrote that Trump's removal from office via impeachment would "cause a Civil War like fracture" in



the US (Harte, 2019). During Black Lives Matter (BLM) protests in early June 2020, federal law enforcement officials dispersed a peaceful protest near the White House with chemical gas and rubber bullets. President Trump urged US governors to “dominate the streets,” cheered the use of “overwhelming force” on Twitter, and repeatedly promised to send in the military to quell domestic “insurrection” and assure law and order (Hennigan and Walcott 2020). In July, the administration dispatched unidentified federal law enforcement personnel to Portland, Oregon, and President Trump threatened to send them to various other cities. Officers were shown in videos shooting non-lethal munitions at protesters, snatching some off the streets, and speeding away in unmarked vehicles. The Customs and Border Patrol agency confirmed the actions, which were condemned by local political officials and constitutional scholars (Shepherd and Berman 2020).

Some of the apparent dictatorial fantasies seem cartoonishly evil. Trump reportedly suggested shooting migrants in the legs as they cross into the US and allegedly inquired about the possible uses of snakes or alligators in water-filled trenches around the border (Shear and Davis, 2019). In July 2020, during the pandemic and BLM protests, Trump tweeted “Delay the Election until people can properly, securely and safely vote???” This idea was roundly criticized and dismissed by numerous Republican Senators. Conservative Federalist Society co-founder Steven G. Calabresi (2020) said it “is fascistic and is itself grounds for the president’s immediate impeachment again by the House of Representatives and his removal from office by the Senate.”

#### *Commission on Unalienable Rights*

In May 2019, the State Department announced that it was creating the Commission on Unalienable Rights to advise the Secretary of State on international human rights issues. Specifically, it “will provide fresh thinking about human rights discourse where such discourse has departed from our nation’s founding principles of natural law and natural rights” (Department of State, 2019). It would, Secretary of State Pompeo said, undertake “one of the most profound re-examinations of the unalienable rights in the world since the 1948 Universal Declaration,” as well as “an informed review of the role of human rights in American foreign policy” (Pompeo, 2019a). He argued that

America’s Founders defined unalienable rights as including ‘life, liberty, and the pursuit of happiness.’ They designed the Constitution to protect individual dignity and freedom. A moral foreign policy should be grounded in this conception of human rights. (Pompeo 2019b)

Yet, Pompeo (2019b) cautioned against creating new categories of rights, which he argued human rights advocates had pursued: “when politicians and bureaucrats create new rights, they blur the distinction between unalienable rights and ad hoc rights”.

While Pompeo’s creation of the category of “ad hoc rights” itself raises questions, critics raised concerns from the outset that the commission would provide an intellectual argument for a narrow understanding of rights and for undermining rights – indeed, one of the first invited speakers called for protecting an “irreducible minimum” of human rights (U.S. Department of State, 2019a). In particular, many feared that the commission would be used to undermine a wide swathe of gender related rights including women’s rights, LGBT rights, and abortion rights, as well as undermine any claims to economic, social, and cultural rights by focusing on what have long been the mainstay in US understanding of rights – namely civil and political liberties. Indeed, more than 400 NGOs and individuals signed a letter to Secretary Pompeo highlighting many of these concerns (Letter to Michael Pompeo, 2019).

Given the composition of the commission, these fears were well-founded. The Chair of the commission, Mary Ann Glendon, a former US ambassador to the Vatican, won an award for her anti-abortion activities and has argued that same-sex marriage is a “social experiment” that impairs the rights of children (Huckerby, et al, 2019). Other members of the commission share this anti-abortion, anti-LGBT agenda. Jacqueline Rivers (2014) identifies marriage as a “gift from God” and argues that “the divinely established order of marriage between one man and one woman is challenged.” Another commission member, neoconservative scholar Peter Berkowitz (2019), denouncing the linking of “human rights to a secular and enlightened left-liberalism,” explicitly tied human rights to Christianity. Other commission members, including Rabbi Meir Soloveichik (Wuerl, et al, 2012) and conservative legal scholar Paolo Carozza (2014), argue that some rights can be violated in the name of religious freedom – such as allowing religious institutions and businesses to opt out of including contraception as part of their health insurance offering. Carozza has also identified third generation rights, such as the right to development or a healthy environment, as a target for the commission (Shenoy, 2020).

These appointments are consistent with previous Trump administration actions in the area of women’s/LGBT rights. Just three days after he took office – and one day after the anniversary of the Supreme Court *Roe v. Wade* decision which affirmed women’s rights to an abortion – Trump reinstated the so-called “global gag rule” that forbids US financial support for any international organization that provides – or provides information about – abortion. The administration has reduced sections on reproductive rights in the annual State Department report on human rights around the world. At the 63<sup>rd</sup> session of the UN Commission on the Status Women in March 2019, the Trump administration opposed substituting “gender” for “women and girls” in Commission decisions and took ardent anti-abortion positions. The leader of the delegation was a graduate of Bob Jones University, a leading ultra-conservative evangelical university. It rejected embassy requests to fly the rainbow flag during LGBTQ Pride Month in June 2019 – although some embassies defied the administration and flew the flag anyway. This was a radical shift from the Obama

administration, which directed US foreign policy agencies to promote LGBT rights (Morello, 2019).

The focus on “natural” rights and unalienable rights ties directly to understandings of human rights as God-given. Glendon argued that the US should narrowly focus on what she identified as “basic” rights:

protections against genocide; slavery; torture; cruel, inhuman, or degrading treatment or punishment; retroactive penal measures; deportation or forcible transfer of population; discrimination based on race, color, sex, language, religion, nationality, or social origin; and protection for freedom of conscience and religion. (Glendon and Kaplan, 2019)

These are the core so-called “first generation” rights that have long formed the bedrock of US understandings of rights. Glendon and her colleague Seth Kaplan (2019) argue that the international community has strayed far from what should be the bedrock of human rights because of

a pick-and-choose attitude toward rights initiated by the two superpowers in the Cold War era; an over-extension of the concept once the human rights idea showed its moral force; and a forgetfulness of the hard-won wisdom of the men and women who had lived through two world wars.

Glendon and Kaplan (2019) also decry developments in various European states, where there is “a growing divide between the secular state (backed by a secularized majority population) that pursues animal rights, children’s rights, and nondiscrimination, and minority religious groups defending their right to practice their faith.” In April 2020, Pompeo promised that the Commission would “return America’s understanding of human rights... back to the fundamental moorings of the Judeo-Christian tradition on which this country was founded” (Montgomery, 2020).

The draft report of the Commission confirmed the fears of critics of the commission (Commission on Unalienable Rights, 2020). It focused on the natural law origins of human rights, while critiquing the positive law underpinning of rights. In particular, it focused on the American Revolution as foundation for American understandings of rights. It asserted two core “unalienable” rights – property and religious liberty. It derided much of the international legal human rights framework, essentially asserting that even though the US has not signed up to many human rights treaties, the American practice of human rights is superior to those who have ratified many international treaties. Although the report did not specifically mention LGBT rights and other “ad hoc” rights, it clearly lays the foundation for undermining them in US policy. In the end, “it asserts an American Exceptionalism that serves to exempt the US from international human rights standards since it has already supposedly perfected human rights. It justifies Trump’s American First policy.” (Mills, 2020).

This prioritization of natural rights excludes claims to economic justice, gender rights, and any limits that might undermine the sacrosanct sovereignty of the state and the principle of non-interference. Indeed, this provides the direct connection to America First, which at its core embraces a radical view of sovereignty. This perspective decries any imposition or criticism from outside. Any such criticism is viewed as especially offensive when it goes against American exceptionalism, which sees the US as the fount of human rights and which has been, in one way or another, at the core of a broad-based consensus in the foreign policy establishment since World War II (Forsythe, 2018: 223-235). The focus on sovereignty is apparent in both the report and in the constant focus in the committee meetings on the founding of the US as the source of human rights, along with the UDHR, which is aspirational and non-binding, rather than binding international human rights instruments which provide more detail on what the rights found in the UDHR actually mean and could hold the U.S. to account. The commission is thus an attempt to provide the intellectual justification for redefining what counts as human rights by rolling back some rights, refocusing on the civil and political rights that the US has supposedly perfected, and connecting human rights to their purported religious – Christian – roots.

### **Norm Transgressions**

As a framework for analysing the Trump administration's approach to human rights, we draw on a useful typology for distinguishing different types of norm transgressions developed by Evers (2017), who argues that not all acts of normative non-compliance, resistance, or deviance are equivalent. Transgression requires that states intentionally and publicly violate international norms. Unintended violations, perhaps caused by errors, lack of state capacity, or bureaucratic failings, are not true cases of transgression. The idea that norm violations must be public to count as a transgression is particularly interesting because such overt acts send an especially strong message about identity to other members of the international community. Moreover, attempts to hide a violation signal an understanding that the deviance is not defensible or is too embarrassing.

As ordinarily defined in the literature (Katzenstein, 1996: 5; Finnemore and Sikkink, 1998: 891), norms reflect "collective expectations for the proper behaviour of actors with a given identity." As Evers explains, "performative" transgressions denote a "public process for conveying and defining an actor's identity" (Evers, 2017: 788). Thus, norm violations kept secret reflect an intentional effort to hide inappropriate behaviour, arguably indicating a determination to maintain good standing as a norm-abiding member of the international community. In such cases, a state does not typically want to change a norm or even contest its own status. In contrast, public violations of, or resistance to, a norm indicate an overt performance reflecting an identity and status outside the normative community. States that

stand well outside the international community on a large set of important norms are thus viewed by other states as outlaw, rogue, or pariah states (Henriksen, 2001).

Evers specifically develops four typologies and explains them in terms of the identity of the transgressor and the type of norm violation. Norms are broadly categorized as either constitutive or regulative, which is consistent with a large body of constructivist international relations scholarship. Constitutive norms “specify what actions will cause relevant others to recognize a particular identity” (Katzenstein, 1996: 5). Members in good standing of a particular international normative community are identified as insider states, while states not in good standing are outsiders. *Inclusionary* transgressions involve outsiders undermining the boundaries between insiders and outsiders by taking actions reserved for members of a community. *Exclusionary* transgressions are performed when states attempt to draw new distinctions between insiders and outsiders, believing that their behaviour should grant them insider status.

The inclusionary example Evers offers is India’s five nuclear tests in 1998. India was not a member of the Comprehensive Nuclear Test Ban Treaty or the Non-Proliferation Treaty but has long argued that it is willing to join the NPT as a nuclear-armed state, a status under the accord granted to the United States, Russia, China, the United Kingdom, and France. India’s transgressions effectively challenged the meaning of membership in the select community. The exclusionary example Evers offers is restoration of the Islamic caliphate in Syria and Iraq in 2014. The Islamic State attempted to redefine world politics into two groups – an Islamic faith grouping and a collection of disbelieving hypocrites.

Regulative “norms operate as standards that specify the proper enactment of an already defined identity” (Katzenstein, 1996: 5). In turn, *rejective* transgressions are performed by outsider states that abrogate regulative standards. By contrast, *adaptive* transgressions are performed when insider states challenge the notion of how a regulative norm should limit state behaviour. The example of rejection Evers offers is the Russian taking of Crimea, which involved an obvious open challenge to norms related to state sovereignty and the use of force. Most pragmatic IR scholars would view Russia as an insider state in the Westphalian system, its seat on the UN Security Council merely one marker of its continuing membership. In this instance, however, Russia’s performative rejection of key regulative norms, casts it as an outsider – subject to wide international condemnation and sanction. At the same time, Russia has never had insider status in the somewhat smaller community of states that uphold and promote both democratic governance and human rights. For adaptive transgression, Evers offers the example of NATO bombardment of Yugoslavia in 1999, which participating states argued would help uphold human rights at a worthwhile cost to state sovereignty and norms limiting the use of force in international politics.

Evers notes that his typology, which treats norm violations as a variable, allows for scholars to “study the effects of a norm violation on the meaning of norms and the boundaries of

international society” (Evers, 2017: 792). Essentially, this is our aspiration in this article – to understand the potential wider impact of the Trump administration’s human rights norm violations and other performative signals on US identity and the international human rights regime. Because of US prominence in global politics and in the founding of the human rights regime, its failures would be particularly salient – both to the likeminded members of that community of states and to the entire world. Evers argues that transgressions performed by insiders invite wide international criticism, by states both inside and outside the international community. Insiders fear the breakdown of normative structures and outsiders are apt to diminish the importance of a community that tolerates duplicitous behavior. In contrast, Evans says that transgressions performed by outsiders are typically not criticized by other outsiders.

Our approach obviously focuses on insider violations. Though we are interested in all U.S. transgressive acts against the human rights regime, especially during the Trump administration, we are somewhat less interested in transgressions that are adaptive. Adaptive challenges merely test the stability of regulative norms. While the performative element does suggest that such transgressions could signal something important about identity, the regulative component of the norm ordinarily limits the scope of possible change to the meaning of the norm itself. Contestation and other forms of norm challenge are fairly common actions and the U.S. has often engaged in such actions. For example, the U.S. war in Iraq in 2003 was arguably a major example of this type of transgression as its justification reflected the U.S. attempting to alter international normative understandings regarding the use of force. The U.S. was nearly alone among western democracies in making arguments about the definition of pre-emptive versus preventive war. While the Iraq war was viewed by most states as a violation of norms limiting the use of force (Dombrowski and Payne, 2003), members of the international community did increasingly come to accept the U.S. interpretation over the next few years – in the specific case of threats from weapons of mass destruction (Dombrowski and Payne, 2006). Adaptive challenges to regulative norms could have very significant consequences for the protections provided by the international human rights regime if accepted by other states, but it is this element of acceptance that potentially limits the impact of regulative transgressions and makes them subject to global debate.

We focus most attention on exclusionary constitutive transgressions and regulative rejective transgressions, primarily because such transgressions send an especially strong signal about American identity. Regarding constitutive norms, we primarily focus on exclusionary transgressions as the U.S. historically has uncontested insider status vis-à-vis the normative community, especially in the post-Cold War era focus of this study. The US highlights its transgressions when it openly rejects existing constitutive norms and institutions undergirding the current regime and/or attempts to redefine fundamental notions of human rights. These exclusionary violations aspire to reorder the regime completely, in a manner comparable to the Islamic caliphate.

The U.S. cannot readily be viewed as an outsider vis-à-vis the human rights regime, though it has admittedly not ratified some specific treaties nor embraced all norms – especially in the area of economic and social rights. For this reason, the US only rarely commits inclusionary transgressions comparable to the Indian attempts to become a nuclear-armed member of the NPT. Such transgressions also seem harmless to the regime. In regard to the ICC, for instance, the US helped negotiate the Rome Statute, though it did not ratify the final document and the Bush administration withdrew Clinton’s signature. Nonetheless, the hostile Bush administration eventually allowed the Darfur referral at the Security Council and thereby helped the ICC fulfil its intended purpose.

The performative element of regulative rejective transgressions also potentially sends an especially strong signal about identity, as the Russian invasion of Crimea suggests. By definition, rejective transgressions are performed by outsiders, meaning that the US can only commit this type of violation when its words or deeds directly and unambiguously contravene a well-established regulative norm. Such transgressions are more dangerous to the human rights regime than adaptive violations because they reflect the lack of interest in sustaining the norms – or in convincing the international community to change the norms.

In the following section, we categorize the Trump administration’s transgressions against the human rights regime according to the Evers typology. Norm violations that the administration concealed, such as the child separation policy prior to the public announcement of that policy, would not by definition be considered transgressions according to this framework, although they are norm violations and do raise questions about the US commitment to upholding human rights. Again, the most worrisome transgressions would be performative transgressions of norms that transmit signals about changes in US identity or reflect American attempts to redefine the fundamental human rights agenda.

## **Human Rights Transgressions and America First**

Having reviewed the record of human rights transgressions of the Trump administration, and having explained a framework for analysing these transgressions, what can we say about the character and impact of these transgressions? Table 1 briefly summarizes the Evers typology, provides his examples, and includes human rights transgressions from this section.

### *Immigration*

The separation and detention of children, when first enacted, would not be considered a transgression as such since norm violations initially occurred in secret and did not include the performative element. In other words, these acts were neither an attempt to signal U.S. displeasure at the norm, nor an effort to alter international understandings of the proper

way to deal with child migrants. Once the actions came to light, the Trump administration backpedalled in an overt attempt to undo the significant reputational damage of this violation. This could be compared to the Bush-era *mea culpa* in response to the Abu Ghraib scandal.

However, the “Muslim ban” and limits on admission of refugees may properly be considered transgressive behaviours given that they continue to be performed openly with a very public intent – to telegraph to the world that the US has a particular understanding of itself – essentially a white, Christian country that is now unaccommodating to outsiders, especially dangerous Muslims, immigrants from Latin America, and refugees. This message was reinforced in July 2019 when President Trump publicly admonished four Democratic Congresswomen of color (two are Muslim), telling them to go back to their home countries (Pengelly, 2019) – this despite the fact that three of them were born in the US. The primary audience for this attack was likely domestic as researchers have found that almost three-fourths of Republicans express anger or anxiety about the changing ethnic make-up of the US population (Myers and Levy, 2018). Trump’s policies and rhetoric reify a particular notion of America’s national identity, stoking fears of a “majority-minority” nation. However, these notions of identity are also broadcast to the world and are therefore a clear case of constitutive transgression – publicly violating various human rights norms to reaffirm a closed, narrow national identity. The explicit and publicly racial nature of the Trump policy takes it even beyond rejection of a regulative norm. The administration’s words and deeds reflect an attempt to push a particular interpretation of the normative boundaries of sovereignty towards a more exclusionary understanding of which humans deserve rights.

#### *Torture and War Crimes*

President Trump has very openly and flamboyantly stated his support for torture, in contrast to his predecessor George W. Bush, who tried to deny that what was going on was torture. Trump’s statements are very clearly performative. Whereas the Bush administration tried to hide its support for torture in the shadows, and the Obama administration unambiguously repudiated any attempts to justify torture, Trump’s position is a direct affront to the unequivocal international ban on torture and a blatant, public challenge to the applicability of international norms to the US. Unlike the Bush government’s attempts to redefine pre-emptive war, the Trump administration is not trying to alter the scope of the regulative norm for specific situations. By effectively stating that US personnel could derogate these norms with impunity, Trump is rejecting regulative norms of such signal importance that the transgression arguably reflects an exclusionary redefining of state identity. Indeed the torture prohibition is one of the very few norms considered to be *jus cogens* – a principle from which there can be no derogation.

The signal emanating from Trump’s repeated pardons of war criminals is likewise quite worrisome. Despite many warnings from retired military leaders and veterans, the US President is informing the world that American military personnel are free to commit war



crimes because he will overturn their convictions and commute their sentences. Trump's words and deeds may well have highly negative international consequences, giving the green light to autocratic regimes around the world to engage in torture, war crimes, and other human rights violations. Even worse, these statements and actions create an ugly image of America outside the community of law-abiding nations. Once again, the rejective regulative transgressions serve as examples of how the US is pursuing exclusive constitutive reordering of global understandings of human rights.

#### *UN Human Rights Council*

The US withdrawal from the UN Human Rights Council is also an unmistakable constitutive transgression. Initially, it might appear consistent with Bush administration policy. Although the rhetoric surrounding the withdrawal partly focused on making the Council more effective, Ambassador Haley made clear the connections to US identity – and American exceptionalism – in the withdrawal: the UNHRC dared to criticize US human rights policies. Given Haley's claim that the US "has a unique beginning, founded on human rights," the US cannot allow itself to be associated with – and criticized by – a body that "tarnished the cause of human rights." In the end, the sovereigntist streak running through the US foreign policy establishment, significantly exaggerated thanks to America First, "trumps" all other considerations. Rejecting a key (if flawed) multilateral institution devoted to the protection of human rights reflects an insider – which supposedly adheres to the core norms of the institution – asserting a singular identity. This move pushes the US beyond the limits of ordinary insider status, recasting the institution and larger regime in an exclusionary manner.

#### *International Criminal Court*

If the Trump administration's actions toward the UNHRC raise questions about America's status as a member of the like-minded community of states, even more vociferous attempts to undermine an international human rights institution are evident in policy toward the ICC. As with the UNHCR, the US has had a difficult and fluid relationship with ICC, again reflecting internal understandings of US identity and an extreme sovereigntist American exceptionalism. Yet, the Trump critique extends well beyond Bush administration policy to threaten ICC personnel who dare to investigate US citizens for war crimes. Again, this is not an ordinary type of action that insider states typically take. They may disagree with a norm or an institution and then try to alter the meaning or operation of the norm or institution. However, such threats – characteristic of Trump's bombastic rhetoric – again call into question the US identity as a member of the civilized club of nations even as the administration tries to situate itself morally above that club. This is thus yet another constitutive exclusionary transgression performed quite publicly.

#### *Embrace of Autocrats*

The Trump administration again pushes the boundaries of what it means to be an insider in the contemporary international community by praising and cozying up to leaders who are

considered to be outsiders by other insiders. Indeed, such actions could ultimately align him squarely with the outsider club of autocrats, even as his administration makes exclusionary claims about the superior US human rights position. Trump's rejective threats to a wide array of regulative democratic norms of domestic governance potentially place the US outside the smaller community of western-style democracies. That too sends an alarming signal about US identity.

### *Commission on Unalienable Rights*

The Commission on Unalienable Rights gets to the core of US identity claims – and its public operations thus far portend extraordinary exclusionary transgressions. Although it is uncertain exactly what effect it will have, the draft report demonstrates an intent is to impose a uniquely American stamp on what ideas constitute human rights. Indeed, beyond the Secretary of State's announced goals for the entity, the draft document focuses on the founding principles of the US, with little recognition on the part of the Commissioners of the major role played by the US in establishing the cosmopolitan international norms and institutions they now appear to reject. One Commissioner did recognize "continuity" from the Founding of the US to the UDHR (U.S. Department of State, 2019b), and Secretary Pompeo recognized Eleanor Roosevelt's role in drafting the UDHR which, he noted, drew on the US Bill of Rights (Pompeo, 2019d), but these and other instances seem to indicate a sense that the rest of the world has perverted the perfect idea of rights that the US has long-ago given to the world. Indeed, Pompeo (2019b) said that the human rights community had "lost its bearings" and was no longer "a moral compass." The commission could thus "help reorient international institutions specifically tasked to protect human rights, like the United Nations, back to their original missions" – in an Americanist vision.

Enacting the Commissioners' priorities is likely to have extremely negative consequences for human rights protections domestically, especially for LGBT peoples, pregnant women, and others. But the external component could also be substantial if the US limits its view of human rights to a revised, narrow conception. It is not certain exactly how many takers there will be for this redefined and constrained understanding of human rights, but as a performative transgression against more expansive understandings, it would say something fundamental about the US and its relationship to human rights – as well as what human rights should mean internationally. Although Ambassador Haley was careful to say that the US did not invent human rights, attributing human rights to a deity reinforces a Christian-centric understanding of human rights, which is intimately tied into US identity as a Christian nation. In this case, the US is defining itself as a sovereign nation with a special responsibility to safeguard, uphold, and spread a select set of rights, while protecting itself from external criticisms involving an alternate, progressive, cosmopolitan, and expansive understanding of human rights. The potential consequences of wide acceptance of the Trump administration's exclusionary vision would be to redefine the boundary between human rights-protecting insiders and various other human rights-violating outsiders. Recall that the Evers example of an exclusionary transgression similarly involved the Islamic state

redefining global politics around its caliphate. We do not expect significant international acceptance of what might be termed, following Pompeo, an “Americanist” version of human rights. Instead, this parochial vision could signal a clear attempt to reject the broad cosmopolitan international human rights regime (which it played a significant role in constructing), in favor of something much narrower than the U.S. itself implemented both domestically and internationally. The outcome could be disastrous for the fate of the international regime and the protection of human rights.

**Table 1 Norm Transgressions Typology**

	Identity/behavior	Evers example	US foreign policy example
Constitutive Inclusionary	Outsiders undermine boundaries by taking actions reserved for members.	India nuclear explosions	US tacit support for ICC referrals at UN Security Council
Constitutive Exclusionary	States attempt to draw new boundaries between insiders & outsiders, believing their behavior should grant them insider status.	Islamic state creation of caliphate	<p>US Commission on Unalienable Rights creates “Americanist” understanding of human rights</p> <p>Muslim ban attempts to narrow the boundaries of who is allowed to be part of the US and entitled to human rights protections</p> <p>Rejection of <i>jus cogens</i> torture ban takes US beyond the bounds of civilized society</p> <p>Pardoning war criminals signals</p>

			<p>support for war crimes</p> <p>Withdrawing from the UNHRC takes US outside human rights institutional framework</p> <p>Existential threats against ICC indicate opposition beyond normal bounds</p> <p>Embrace of autocrats undermines basic democratic identity</p>
Regulative Rejective	Outsider states abrogate regulative norms	Russian invasion of Crimea	<p>US criminalization of asylum-seeking</p> <p>Advocacy of torture *</p> <p>Pardoning war criminals rejects norms banning war crimes *</p> <p>Embrace of autocratic style rejects democratic norms (demonizes media, denies legitimacy of political opponents, rejects domestic checks on power, and threatens use of violence) *</p>
Regulative Adaptive	Insider state challenges how regulative norm should limit state behavior	NATO bombing of Yugoslavia for "humanitarian" cause	Bush administration efforts to alter norms about preemptive versus preventive war

\* Because of their signal importance, some rejective violations exemplify the exclusive reconstitution of US identity vis-à-vis the international community.

## Conclusions

The clandestine nature of some Trump administration human rights norm violations, particularly involving immigrant family separation and the confinement of children in cages, indicates some recognition that the US has acted inappropriately and outside international norms. While such violations raise questions about US compliance with regulative norms, they do not indicate a clear attempt to redefine America's status or identity. More importantly, the US has acted to extricate itself from key multilateral institutions created to protect human rights globally that may constrain the US in some way, even while putting forth alternate and narrow visions of what should constitute human rights norms. Though such US transgressions literally serve to reject an array of established international human rights norms and institutions, Trump administration officials nonetheless frequently argue that the US is the fount of human rights. Indeed, the US framing of its own identity is an attempt to put itself above the international community, positioning itself as exceptional and morally superior to the states and institutions which attempt to encroach upon its sovereignty and restrict its freedom to decide for itself how it will treat its citizens and (especially) non-citizens. When it makes such points, the US sends a mixed signal about identity. Conceivably, the array of US exclusionary transgressions serve as a call for a redefinition of various human rights norms – just as the administration claims.

However, the US has clearly also rejected and transgressed some regulative human rights norms that it previously accepted without question – or President Trump openly declared an intention to transgress these norms as in the case of torture. The public, performative transgressions serve a broad purpose. These transgressions also make public statements to the international community about US identity and the widely shared ideals rejected by that identity. If the US remains a member in good standing of the international community despite such repeated public transgressions, then the US perspective has won the day and the transgressions will effectively alter the boundaries of what is considered acceptable behaviour *vis-a-vis* the regulative norms. In the Evers typology, advocates of change pursue adaptive transgressions. Then again, if the community successfully preserves its norms, it will have no choice other than to view the US as an outsider rejecting important constitutive and regulative standards. In such a scenario, American transgressions would be viewed as so egregious and public that the US position as an insider, human rights-protecting country, and member of the club of civilized nations would necessarily be called into question. Praising authoritarian leaders and declaring an intent to torture terror suspects and kill their families conceivably pushes the US – or at least the Trump administration – into outsider status. By refusing to participate in key institutions and taking very public stances against key human rights norms, the US is in danger of placing itself substantially at odds with upstanding members of the international community. The risk is that the United States of

America becomes identified as an outsider state, joining an array of norm-rejecting regimes that are often viewed as outlaws or worse.<sup>3</sup>

The U.S. has also had a significant sovereigntist streak in its foreign policy. Yet, even as it previously sought to uphold American exceptionalism – and all the hypocrisy that goes with it – the U.S. has also typically agreed to engage with international institutions, including those related to human rights. The behaviour of the Trump administration thus appears particularly aberrant – or transgressive. The question then becomes whether this is a temporary anomalous situation, or whether it is reflective of a longer-term understanding about American identity and US foreign policy.

Perhaps even more important, however, is the question of what effect this aberrant, transgressive behaviour has on the wider international community and the international human rights regime. Conceivably, public US transgressions serve to embolden autocrats and those who wish to violate human rights. Putin, Orbán, and Duterte will likely feel reassured when they hear President Trump speak and when they see the US openly violating widely accepted human rights norms. Likewise, Trump's actions may serve to justify similar policies in other countries, including policies in the European Union aimed at keeping asylum-seekers and other migrants out. Those who attempt to challenge autocrats and protect human rights will likely see their efforts weakened as they will be backed neither by American moral authority nor its political power.

At the same time, even though the US is a very powerful country, it is not a hegemonic state that gets to decide the exclusionary contours of international human rights norms and practices. Indeed, while there are pressures on such norms from many quarters, such norms are still *normative* – that is they delineate how states are expected to act. In an age of US commitment to America First, like-minded members of the international community will probably continue to support the international human rights regime, though their task will be greatly complicated by the additional need to convince the US to realign its membership status and reject its narrow Americanist recasting.

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<sup>3</sup> Freedom House (2020) points to many of the same policies discussed in this article and documents an 8-point reduction in the US aggregate score over the past decade, which is on a 100-point scale.

international law deal with systemic change?’ Centre for Global Constitutionalism, University of St. Andrews, 8 November 2019. The authors would like to thank the various meeting participants as well as the anonymous reviewers for their helpful comments.

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