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Human Rights Reporting as Human Rights Governance

MARGARET E. MCGUINNESS*

Contrary to the view that the rejection of human rights treaty membership has left the United States outside the formal international human rights system, the United States has played a key role in international human rights governance through congressionally mandated human rights monitoring and reporting. Since the mid-1970s, congressional oversight of human rights diplomacy, which requires reporting on global human rights practices, has integrated international human rights law and norms into the execution of U.S. foreign policy. While the congressional human rights mandates have drifted from their original purpose to condition allocation of foreign aid, they have effectively embedded international human rights norms and law into congressional decision-making and the operations of executive branch agencies. Over the years, the reports issued pursuant to the mandates have also become an important international source of human rights fact-

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finding, influencing the ways in which courts, non-governmental organizations (NGOs), and international human rights institutions themselves interpret and apply human rights law. In this respect, congressional human rights reporting mandates—not congressional human rights treaty policy—have evolved as a driver of U.S. engagement with and interpretation of the protections of international human rights law. This Article draws on a variety of sources, including diplomatic correspondence, interviews with government officials, caselaw in domestic courts, and reporting by international human rights NGOs, to explore the effects of the congressional human rights reporting mandates. It demonstrates that what was designed as unilateral policy to enforce human rights has affected the construction of the U.S. human rights identity within the international system and the international human rights system itself. Operating separately and in parallel to targeted human rights sanctions legislation, the human rights reporting mandates demonstrate the active and effective participation of the United States in international human rights governance.

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I. INTRODUCTION

Despite its general rejection of full membership in human rights treaties, the United States has played a leading role in international human rights governance through congressionally mandated human rights diplomacy. Since the adoption of the first congressional human rights mandates (“CHRMs”) in the mid-1970s, congressional requirements to monitor and report on global human rights practices have served to integrate international human rights law and norms into U.S. foreign policy. While these CHRMs have drifted from their original purpose to constrain executive branch discretion over the allocation of foreign aid, the mandates have effectively embedded international human rights norms and law into congressional decision-making and the operations of the State Department and other executive branch agencies. The annual Country Reports on Human Rights (“Country Reports”) required by the mandates have grown to become a leading international source of human rights fact-finding, influencing the ways in which domestic and international courts, NGOs, and human rights institutions interpret and apply human rights law. In this respect, congressional human rights *reporting* mandates—not congressional human rights *treaty* policy—have evolved as a central driver of U.S. engagement with and interpretation of the protections of international human rights law. What was designed as unilateral policy to regulate the human rights practices of aid-recipient states has constructed the U.S. human rights identity within the international system and influenced the operation of the international human rights system itself. Together with congressional and executive sanctions practices, the human rights reporting mandates form the legal basis for the active and influential participation of the United States in international human rights governance.¹

1. Human rights sanctions practice, separate from human rights reporting practice, remains a significant tool of U.S. human rights diplomacy and governance. This Article does not address either the normative desirability of sanctions or the empirical effects of human rights sanctions practice on state behavior.

Congress has been viewed by many scholars as the central obstacle to full U.S. participation in the post-World War II international human rights treaty system.² And indeed, it is true that Congress has been reluctant to subject U.S. domestic human rights behavior to international oversight through treaty membership; Congress even threatened a constitutional amendment to keep the United States out of human rights treaties.³ Yet, since the 1970s, Congress has been keenly interested in the human rights behavior of foreign states, particularly those which receive financial and military aid from the United States. This interest in external human rights behavior, coupled with a desire to constrain presidential foreign policy prerogatives in the wake of the Vietnam War, led Congress to condition foreign military and humanitarian appropriations on respect for human rights. In the language of the original statute, assistance would be prohibited to countries that engaged “in a consistent pattern of gross violations of *internationally* recognized human rights,” unless the President requested a waiver.⁴ Congress sought to extend robust oversight of this provision, which would claim for Congress a more direct role in presidential human rights policy, by requiring the State Department to report annually on human rights conditions in aid-recipient states. Preparation of the report required U.S. diplomats around the world to gather information on whether and how foreign state behavior meets international human rights standards.

The CHRMs have endured. Through them, the United States continues to play an important role in international human rights governance in ways that tends to smooth differences between presidential administrations.⁵ Since the 1970s, Congress has expanded the breadth

2. Critiques of Congress have largely focused on the Senate’s role in blocking treaty participation and congressional concerns that domestic human rights practices would be subject to international law. See, e.g., Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 421–22 (1979) (laying out the central objections posited in the 1970s for U.S. membership in treaties, including attitudes in Congress, while making the case for the joining); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 68 (1990); Richard B. Bilder, *Human Rights and U.S. Foreign Policy: Short-Term Prospects*, 14 VA. J. INT’L L. 597, 605–06 (1974); DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* 208, 221 (2016).

3. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 347–49 (1995).

4. See *infra* Part II.

5. The influence of the CHRMs has endured throughout the Trump administration, notwithstanding the recent withdrawal of the United States from the United Nations Human Rights Council and the Trump administration’s hostility toward the International Criminal Court (“ICC”). See Susan Hannah Allen & Martin S. Edwards, *The U.S. Withdrew from the U.N. Human Rights Council. That’s Not How the Council Was Supposed to Work*, WASH. POST (June 26, 2018, 5:00 AM),

of the annual reporting requirements to include reports on human rights conditions in all foreign states, not just those receiving U.S. aid.⁶ And it has expanded the depth and scope of human rights practices covered by the reports to include a long list of rights that reflect the growth of international human rights law over the past decades.⁷ In addition to the annual Country Reports, the State Department is also now required to prepare separate annual reports on religious freedom, sex trafficking, and democracy promotion programs.⁸ Congress has steadily added reporting requirements; it has never eliminated or reduced them.⁹ Over a time period that witnessed the broadening and deepening of the international human rights system, CHRMs have enmeshed the United States within international human rights governance—even as the United States remains formally outside the jurisdiction of the central human rights treaties.

Congressional human rights policy, therefore, embodies a paradox of the American human rights tradition: the United States sees itself as the champion of basic human rights around the world, while simultaneously believing its own constitutional traditions make it special, both exempt from and outside the reach of international human rights standards and enforcement.¹⁰ Louis Henkin famously described

age/wp/2018/06/26/the-u-s-withdrew-from-the-u-n-human-rights-council-thats-not-how-the-council-was-supposed-to-work/ [https://perma.cc/2QJQ-UN27]; Max Boot, *Trump Joins the World's Worst Human Rights Violators in Waging War on the ICC*, WASH. POST (Sept. 14, 2020, 12:36 PM), <https://www.washingtonpost.com/opinions/2020/09/14/trump-joins-worlds-worst-human-rights-violators-waging-war-icc/> [https://perma.cc/UZ5W-DJQH]. The full scope of the effects of the Trump administration's additional rhetorical weakening of U.S. human rights policy is worth future examination.

6. *See infra* Section II.B.

7. *See id.*

8. *See infra* Appendix.

9. Congress also created a congressional-executive agency, the U.S. Commission on International Religious Freedom, which is intended to serve as a check on State Department reporting by its preparation of a competing annual report on religious freedom. *See discussion infra* Part II.

10. Andrew Moravcsik has called the ways in which the United States promotes human rights for others but resists international evaluation of its behavior at home (framed as exceptional constitutional values) “the paradox of American Exceptionalism.” He argues that it is rooted in peculiar American notions about the source of legitimacy of rights but is also a result of deep ambivalence and unilateralism on the question of human rights in foreign policy. Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 167–76 (Michael Ignatieff ed., 2005). Michael Ignatieff argues that “exceptionalism” has two types: (1) “exemptionalism,” the process through which the United States exempts itself from international human rights treaty oversight; and (2) “double standards,” whereby the United States judges foreign states’ behavior by different standards than those it applies to itself. Michael Ignatieff, *Introduction:*

this through the metaphor of the cathedral of human rights: the United States provides the external “flying buttresses” in support of the structure, but acts as an outside critic of other states; it does not enter and engage in the activities within the cathedral or subject itself to its rituals.¹¹ As a result, some scholars simply assume that by remaining outside of the binding force of treaties, the United States has effectively closed itself off from the formal influences of international human rights law in foreign policy, just as it has closed off human rights treaty law from domestic rights jurisprudence.¹²

This picture of American human rights exceptionalism, which captures only formal treaty commitments at the federal level, becomes less sharply defined when viewed through a more expansive lens. Domestically, for example, external human rights developments have affected attitudes and lawmaking at the local and state level, which in some cases steps in to fill the gap created by the absence of national commitments to human rights treaties.¹³ Internationally, formal commitments to international governance in areas outside of human rights treaties have been transformed through international human rights norms, which are diffused throughout those legal and political processes.¹⁴

American Exceptionalism and Human Rights, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 10, at 1, 4, 7.

11. See Henkin, *supra* note 3, at 421. Henkin summarized the dilemma: “But the United States has not been a pillar of human rights, only a ‘flying buttress’—supporting them from the outside. Human rights have been a kind of ‘white man’s burden’; international human rights have been ‘for export only.’ Congress has invoked international human rights standards only as a basis for sanctions against other countries. President Carter has invoked human rights agreements in criticism of others.” *Id.*

12. For an example of the view that the decision of the United States to remain outside human rights treaties leaves it unaffected by external international human rights norms, see generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). For a view that the closing off of constitutional jurisprudence from international human rights is detrimental to U.S. interests, see MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS* 250–51 (2019).

13. See, e.g., Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PENN. L. REV. 245, 245–46 (2001); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1641–42 (2006); Risa E. Kaufman, *State and Local Commissions as Sites for Domestic Human Rights Implementation*, in HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 89, 89 (Shareen Hertel & Kathryn Libal eds., 2011).

14. See Kathryn Sikkink, *A Typology of Relations Between Social Movements and International Institutions*, 97 AM. SOC’Y INT’L L. PROC. 301, 302 (2003). See also RUTI G. TEITEL, *HUMANITY’S LAW* 165–92 (2011). See generally KATHRYN SIKKINK, *EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY* (2017).

The seeming hypocrisy of American human rights policy—pressing other states to live up to international human rights standards while rejecting those standards as a measure for its own behavior—is, in fact, a central feature of that policy. Congressional legislative mandates over executive branch human rights reporting operate to manage and channel that hypocrisy. The four-decade legacy of the mandates provides a counterexample to Harold Koh’s famous formulation that “the president almost always seems to win in foreign affairs.”¹⁵ Congress, it seems, has actually “won” the battle for control of U.S. international human rights policy.¹⁶ The deeply entrenched regime of congressional human rights oversight has forced human rights considerations onto the foreign policy agenda.¹⁷ Even in cases where national security ultimately trumps human rights in a decision to allocate military or humanitarian assistance, presidents are no longer free to ignore the human rights dimension of bilateral and multilateral relationships.¹⁸ This fact was evident in bipartisan congressional pushback against retreats from human rights policy during the Trump administration.¹⁹

Perhaps more important than their effect on congressional-presidential debates over the direction of foreign policy, the congressional human rights mandates have entrenched the norms and institutions of international human rights law and governance within the

15. See generally Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988). See also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 123 (1990) (describing congressional acquiescence and bad drafting as explanations for weak congressional oversight in foreign affairs). This formulation may seem particularly ironic, since Koh would go on to serve as the Assistant Secretary of State for Human Rights and Humanitarian Affairs, a position created by congressional legislation. See U.S. Dep’t State, *Assistant Secretaries of State for Democracy, Human Rights, and Labor*, <https://2001-2009.state.gov/r/pa/ho/po/12258.htm> [<https://perma.cc/975F-VBEH>].

16. This is the case notwithstanding the ability of the President to waive human rights conditionality under the general legislation. See Margaret E. McGuinness, *Congressional Enforcement of International Human Rights*, 44 FORDHAM INT’L L.J. 9, 10–11 (2020) (discussing congressional moves to limit presidential discretion through sanctions and individualized reporting).

17. Rebecca Ingber refers to these kinds of congressional mandates as “process controls” through which Congress mandates institutional design as an indirect mechanism of foreign policy. Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395, 400, 415–19 (2020).

18. Indeed, as the universal default sanctions regime failed to prevent aid to rights-abusing governments, Congress placed more targeted conditions linked to human rights performance and the rule of law. Today, targeted, country-specific conditions are the norm in almost every large bilateral aid and military assistance relationship. See *infra* Section II.B.

19. See McGuinness, *supra* note 16, at 11–12.

executive branch. International human rights governance is a series of decentralized processes of norm creation, elaboration, and enforcement. It is made up of interconnected political and legal institutions, treaty bodies, courts, and commissions, which interact with states, NGOs, corporations, and individuals in polycentric processes.²⁰ The polycentric nature of human rights governance allows multiple entry points for official U.S. federal government participation—through the executive branch, the courts, and Congress—in the full range of international human rights governance. The process of compliance with CHRMs has fundamentally altered the methods through which the executive branch carries out diplomacy, expanding the work of diplomats to include coordination and cooperation with human rights NGOs and other members of civil society, and with courts and other consumers of human rights reporting. The CHRM process has, therefore, created a dynamic policy feedback cycle among the State Department, Congress, and civil society, which has informed the continual expansion of the breadth and depth of human rights reporting requirements.²¹ This process serves as an alternative mechanism to treaty membership.²² Through the CHRM process, the U.S. influences, and is influenced by, the development of international human rights law in regional and international human rights systems.

In more recent years, international human rights institutions—particularly the UN Human Rights Council—have expanded self-reporting requirements for member states, including by those, like the United States, that are not party to international human rights treaty

20. See John Gerard Ruggie, *Global Governance and “New Governance Theory”*: *Lessons from Business and Human Rights*, 20 *GLOB. GOVERNANCE: REV. MULTILATERALISM & INT’L ORGS.* 5, 11–12 (2014).

21. See *infra* Section IV.E.

22. The U.S. is a party to only three of the major international human rights treaties: the Convention Against Torture (“CAT”), the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), and the International Covenant on Civil and Political Rights (“ICCPR”). U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Feb. 4, 1985, 85 U.N.T.S. 1465; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1866, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, Dec. 16, 1966, 171 U.N.T.S. 999. While membership in the CAT, CERD, and ICCPR requires self-reporting about compliance with those treaties, the effect of the U.S. reservations, understandings, and declarations is to render the treaties international obligations of the United States, but with no domestic legal effect. For a discussion of self-reporting under human rights treaties, see Cosette D. Creamer & Beth A. Simmons, *The Proof Is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 *AM. J. INT’L L.* 1, 7 (2020) (finding self-reporting has been expanded in recent years and noting four mechanisms for explaining why self-reporting may improve domestic rights practices: elite socialization, learning and capacity building, domestic mobilization, and law development).

adjudicatory mechanisms.²³ In these “self-reports” on domestic human rights practices prepared by the executive branch, we can see the influence of these embedded human rights norms, as the U.S. government mediates between the language of American constitutional human rights exceptionalism and international human rights.²⁴ The internalization of human rights norms was evident even in the Trump administration, whose policy was to de-emphasize human rights in its foreign policy rhetoric and behavior.²⁵

Significantly, the content of the human rights reports has affected the ways in which agencies, courts, other human rights institutions, and members of civil society have assessed and adjudicated human rights claims and elaborated the scope and subject matter of international human rights law.²⁶ Taken together, these trends demonstrate how the embedding of international human rights norms in the federal government, through dynamic congressional control of executive branch human rights reporting, has brought the United States inside the cathedral of human rights as a major driver of international human rights governance.

This Article provides a positive theory of U.S. participation in international human rights governance through human rights diplomacy. It focuses on the monitoring and reporting requirements of the CHRMs and the dissemination of the annual Country Reports as the central processes through which that diplomacy is carried out. The Article draws on primary sources, including: diplomatic cables and discussions with senior State Department officials; reported caselaw in

23. The UN Human Rights Council UPR requirement was passed as a General Assembly Resolution creating the new Council. See G.A. Res. 60/251 (Mar. 16, 2006). See also PHILIP ALSTON & SARAH KNUCKEY, *THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING* 3–4 (2016).

24. See, e.g., United States, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, U.N. Doc. A/HRC/WG.6/36/USA/1 (Aug. 13, 2020); United States, *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/USA/4 (May 22, 2012); United States, *Periodic Report of the United States of America to the United Nations Committee Against Torture (Third, Fourth, and Fifth Reports)*, U.N. Doc. CAT/C/USA/3-5 (Dec. 4, 2013); United States, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, U.N. Doc. A/HRC/WG.6/22/USA/1 (Feb. 13, 2015).

25. However, as I have argued elsewhere, the Trump administration’s absence of rhetoric in support of human rights in foreign policy had corrosive effects. See Margaret E. McGuinness, *Presidential Human Rights Talk*, 56 WASHBURN L.J. 471, 473–74 (2017). See also discussion *infra* Section IV.B.

26. See discussion *infra* Section II.B.

U.S., foreign, and international courts; opinions of international human rights treaty bodies and institutions; and reporting of human rights NGOs. It draws on these empirical data to illustrate the ways in which the mechanisms of U.S. human rights diplomacy influence legal processes and determinations of human rights claims in a variety of adjudicatory and non-adjudicatory settings. In this way, this Article seeks to contribute to the empirical turn in international law scholarship, which is concerned with “the conditions under which international law is formed and has effects”²⁷ and examines how international law is created by “specific forces and factors”²⁸ and “accomplishes its ends under particular conditions.”²⁹

This examination of U.S. human rights reporting contributes to our understandings of sources of international human rights law, both treaties and customary international law. It illustrates the dynamic process through which human rights monitoring and reporting applies and interprets the foundational non-binding declarations and treaties that construct international human rights law. It further illustrates that monitoring and reporting serve as a form of state practice and expression of *opinio juris* for purposes of determining customary international human rights law. The Article demonstrates that, under certain institutional conditions, what is frequently dismissed as a state’s unilateral human rights policy operates as a form of international human rights governance. Therefore, this Article also contributes to the burgeoning cross-disciplinary literature in political science and law that seeks to understand how and under what circumstances states engage or reject engagement with the international human rights system.³⁰

This Article proceeds as follows: Part II describes the legislative architecture of the human rights reporting mandates and explains the ways in which Congress exercised its appropriations power to create U.S. human rights diplomacy and incorporate emerging international human rights standards into U.S. law. Part III draws on primary sources to assess the effects of human rights reporting on human rights law and governance. It argues that widespread citation to the Country Reports in adjudication before domestic agencies and courts, before foreign courts, and in UN and NGO reporting, demonstrates the transformation of internal foreign policy oversight statutes into global human rights monitoring and reporting with influence on the interpretation and elaboration of human rights law. Part IV examines why the

27. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1, 1 (2012).

28. *Id.*

29. *Id.*

30. See EMILIE M. HAFNER-BURTON, MAKING HUMAN RIGHTS A REALITY 67–85 (2013).

CHRM have endured, draws some preliminary conclusions about the future of the congressional reporting mandates, and suggests avenues of future research at the intersection of human rights law and diplomacy that might enrich our understanding of how human rights governance works.

The viability of the international human rights system is threatened when states retreat from the rhetorical, normative, and legal commitments to human rights. While this Article focuses on the congressional mandates and the Country Reports, U.S. participation in human rights governance is influenced by other factors, including U.S. membership in international human rights institutions (including, yes, human rights treaties), unilateral and multilateral sanctions practices, and engagement with international human rights norms integrated into other areas of international law.

The Trump administration's retreat from human rights diplomacy, together with the rise of other nationalist challenges to international human rights governance, has prompted fundamental reassessment of the future of the human rights project and the United States' role in it. This Article suggests that any discussions of reform or reconception of the international human rights system—and the future of the United States in that system—must take into account the role of human rights monitoring and diplomacy in human rights governance.

II. CONGRESSIONAL HUMAN RIGHTS MANDATES

In U.S. constitutional law, the President, more by historical practice than by explicit design, “almost invariably wins in foreign affairs.”³¹ But Congress wields influence over the foreign policy agenda in two ways: the treaty power and coercive use of the power of the purse. In the first half of the twentieth century, the Senate effectively wielded the treaty power to thwart presidential efforts to commit the United States to the emerging international governance system. Despite President Wilson's strong support for the creation of the League of Nations and for U.S. membership therein, Congress blocked U.S. participation in the League of Nations.³² Following World War II,

31. See KOH, *supra* note 15, at 117. See also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 35–45 (2d ed. 1996) (describing the ways in which the paucity of textual conferrals of presidential foreign affairs power in the Constitution itself has been expanded on as American global power has grown).

32. See OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 309–51 (2019); Leroy G. Dorsey,

congressional leadership consolidated opposition to joining the nascent UN human rights system, arguing that the UN was an illegitimate outside arbiter of U.S. human rights behavior.³³ Congress even threatened a constitutional amendment to prevent the federal government from imposing international human rights standards on the states.³⁴ When the two central international human rights covenants—the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)—were completed in 1966, congressional opposition to treaty membership was entrenched.³⁵ When the United States did later join the ICCPR, the Convention Against Torture (“CAT”), and the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), it was with reservations rendering those treaties non-self-executing as domestic law, a condition that was required to achieve Senate approval for ratification.³⁶ In 2012, the U.S. Senate voted against adopting the Convention of Rights for Persons with

Woodrow Wilson’s Fight for the League of Nations: A Reexamination, 2 RHETORIC & PUB. AFF. 107, 110–16 (1999).

33. Thomas Buergenthal, *International Human Rights U.S. Policy and Priorities Symposium: Human Rights and United States Foreign Policy*, 14 VA. J. INT’L L. 611, 612–14, 618–19 (1974). As historian Carol Anderson has chronicled, this opposition was at least in part driven by anti-communist fervor and institutional racism. See generally CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955* (2003).

34. ANDERSON, *supra* note 33, at 220; SLOSS, *supra* note 2, at 201–08, 248–53 (explaining conservative reaction within Congress and the American Bar Association to the UN Human Rights Commission and its role in drafting the human rights covenants, including the proposed Bricker amendments, which were designed to block U.S. membership in any human rights treaties).

35. For a full discussion, see BARBARA J. KEYS, *RECLAIMING AMERICAN VIRTUE: THE HUMAN RIGHTS REVOLUTION OF THE 1970S*, at 27 (2014); Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in *REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT* 3, 15, 19 (Samantha Power & Graham Allison, eds., 2000).

36. For the Senate ratification of the CAT, see S. TREATY DOC. NO. 100-20 (1990), <https://www.congress.gov/treaty-document/100th-congress/20/resolution-text> [<https://perma.cc/4BJU-2CMK>]. For the Senate ratification of the ICCPR, see S. TREATY DOC. NO. 95-20 (1992), <https://www.congress.gov/treaty-document/95th-congress/20/resolution-text> [<https://perma.cc/577S-YPJP>]. For the Senate ratification of the CERD, see S. TREATY DOC. NO. 95-18 (1994), <https://www.congress.gov/treaty-document/95th-congress/18/resolution-text?r=14&s=1> [<https://perma.cc/YCJ3-97QS>]. See also Henkin, *supra* note 35, at 19 n.32 (discussing the adoption of the ICCPR with reservations, understandings, and declarations).

Disabilities (“CRPD”).³⁷ It joins several other human rights instruments the United States has signed but not ratified that remain stalled because of congressional opposition.³⁸ Congress has been effective in preventing presidents who seek full, formal membership in the international human rights treaty system from achieving it.

But Congress has not been hostile to international human rights law when it comes to judging other states. At the beginning of the 1970s, President Nixon and his national security team followed a foreign policy that was openly and explicitly hostile to both the idea of human rights treaty membership for the United States and of conditioning relationships with other states on the protection of human rights.³⁹ Congress pushed back to place human rights at the center of foreign policy.⁴⁰ While Congress continued to be uninterested in having the world judge U.S. practices by international standards, it was concerned that U.S. funds were being used aggressively to support egregious human rights abusers around the world. The revelations of the secret bombings of Cambodia, the heavy-handed involvement of the United States in South America (in particular the 1973 military coup in Chile), and the general U.S. support (financial and in the form of military sales and training) of regimes engaging in widespread human rights violations prompted Congress to tighten its controls over how the executive branch spent foreign aid and military assistance.⁴¹ The shift toward aggressive congressional oversight has been characterized as “spurred by the American civil rights movement, the

37. See Jennifer Steinhauer, *Dole Appears, but G.O.P. Rejects a Disabilities Treaty*, N.Y. TIMES (Dec. 4, 2012), <https://www.nytimes.com/2012/12/05/us/despite-doles-wish-gop-rejects-disabilities-treaty.html> [<https://perma.cc/JL54-WCYF>].

38. The Convention on the Elimination of Discrimination Against Women (“CEDAW”) was signed by Carter, but is not yet ratified; likewise, the Convention on the Rights of the Child (“CRC”) was signed in 1995, but has not yet been ratified. For a summary of congressional resistance to presidential efforts to adopt human rights treaties, see Moravcsik, *supra* note 10, at 185.

39. KEYS, *supra* note 35, at 132–33; SARAH B. SNYDER, FROM SELMA TO MOSCOW: HOW HUMAN RIGHTS ACTIVISTS TRANSFORMED U.S. FOREIGN POLICY 30–33 (2018); Daniel Sargent, *Oasis in the Desert?: America’s Human Rights Rediscovery*, in THE BREAKTHROUGH: HUMAN RIGHTS IN THE 1970S, at 134 (Jan Eckel & Samuel Moyn eds., 2014).

40. This was part of a broader congressional effort to curtail presidential power in the wake of Watergate and the Vietnam War. The War Powers Act was adopted around the same time. See HENKIN, *supra* note 31, at 85–86. For excellent histories on the origins of congressional human rights activism, see KEYS, *supra* note 35, at 132–33; SNYDER, *supra* note 39, at 30–33. See generally HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP, H.R. REP. NO. 29-692 (1974) [hereinafter FRASER REPORT].

41. SNYDER, *supra* note 39, at 6. See Judith Innes de Neufville, *Human Rights Reporting as a Policy Tool: An Examination of the State Department Country Reports*, 8 HUM. RTS. Q. 681, 683 (1986).

backlash against American involvement in Vietnam, and disenchantment with the amoral character of the Nixon-Kissinger-Ford foreign policy.”⁴² The result of Congress’s renewed interest in human rights was the passage of legislation linking the human rights practices of foreign nations to U.S. foreign policy.⁴³ Those statutes included requirements to restructure the processes of American diplomacy in an effort to affect the methods and means, if not the ends, of U.S. foreign policy.⁴⁴ As described below, the statutory architecture broadened and deepened over time, adding specificity to the content and nature of the rights to be monitored and expanding the covered states to include those not receiving aid.⁴⁵ This was the result of an iterative process—a policy feedback loop through which Congress and the executive acted and reacted to one another’s initiatives or retrenchment on human rights.⁴⁶ Over forty years, a process that began with a non-binding “sense of Congress” has grown into an edifice of international human rights governance within the U.S. government. It includes executive branch offices tasked with ongoing monitoring and reporting of human rights in conversation with NGOs, domestic and international courts, and treaty bodies. And it is more deeply entrenched into U.S. foreign policy than the original statutory architects could have imagined.⁴⁷

A. From “Sense of Congress” to Binding Reporting Obligations

In 1961, Congress passed the Foreign Assistance Act (“FAA”)⁴⁸ with the stated purpose “to help strengthen the forces of

42. David Carleton & Michael Stohl, *The Foreign Policy of Human Rights: Rhetoric and Reality from Jimmy Carter to Ronald Reagan*, 7 HUM. RTS. Q. 205, 206 n.2 (1985).

43. David Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT’L & COMP. L. 231, 246–51 (1977) (discussing the human rights legislation passed between 1973 and 1976). See also David L. Cingranelli & Thomas E. Pasquarello, *Human Rights Practices and the Distribution of U.S. Foreign Aid to Latin American Countries*, 29 AM. J. POL. SCI. 539, 539 (1985) (citing RICHARD B. LILICH, U.S. LEGISLATION RELATING HUMAN RIGHTS TO U.S. FOREIGN POLICY (1979)). See also *infra* Section II.B.

44. See DAVID P. FORSYTHE, HUMAN RIGHTS AND U.S. FOREIGN POLICY: CONGRESS RECONSIDERED 119 (1987) (describing how Congress tried to get at human rights “substance of the matter through procedure”). See also Ingber, *supra* note 17, at 415–419.

45. See *infra* Section II.C.

46. See *infra* Section II.A–B.

47. SNYDER, *supra* note 39, at 123. One of those architects was Congressman Donald Fraser, who led the committee that in 1974 set out an ambitious plan for incorporating international human rights into U.S. foreign policy. See generally FRASER REPORT, *supra* note 40.

48. Pub. L. No. 87-195.

freedom by aiding peoples of less developed friendly countries of the world to develop their resources and improve their living standards, to realize their aspirations for justice, education, dignity, and respect as individual human beings, and to establish responsible governments.”⁴⁹ As originally drafted, the FAA did not contain any specific restraints on assistance; it did not link the provision of aid to foreign states to human rights, nor did it require reports on the human rights practices of aid recipients.⁵⁰

In December 1974, Congress amended the FAA with the following “sense of Congress”:

It is the sense of Congress that, except in extraordinary circumstances, the President shall substantially reduce or terminate security assistance to any government which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman or degrading treatment or punishment; prolonged detention without charges; or other flagrant denials of the right to life, liberty, and the security of the person.⁵¹

Although not binding as a matter of law, the provision did stipulate that the President “shall advise the Congress of the extraordinary circumstances necessitating the assistance.”⁵² That same year, another “sense of Congress” resolution expanded the policy suggestion to terminate civilian humanitarian assistance to countries which engage in a “consistent pattern of gross violations of *internationally recognized human rights*.”⁵³

These congressional policy suggestions were met with hostility from the Ford administration. A November 1975 report from the administration to Congress stated that neither U.S. interests nor human rights would be served by “public obloquy” which “impaired relations with . . . recipient countries.”⁵⁴ The report also stressed the difficulty

49. 22 U.S.C. § 2151 (1961).

50. Pub. L. No. 93-559 (1974).

51. 22 U.S.C. § 2304(a) (1974) (enacted as Foreign Assistance Act of 1974, Pub. L. No. 93-559 § 46) (emphasis added).

52. 22 U.S.C. § 2304(b) (1974).

53. 1974 Foreign Assistance Act, Pub. L. No. 93-559 § 502B, 88 Stat. 1815 (1974) (emphasis added).

54. U.S. DEP’T STATE, REPORT TO THE CONGRESS ON THE HUMAN RIGHTS SITUATION IN COUNTRIES RECEIVING U.S. SECURITY ASSISTANCE (1975), reprinted in *Foreign Assistance Authorization Arms Sales Issues: Hearings Before the Subcomm. on Foreign Assistance of the S. Comm. on Foreign Rels.*, 94th Cong. 378 (1976).

in making distinctions among nations because human rights violations are widespread and often unrecorded.⁵⁵ The President and State Department argued forcefully—consistent with Secretary of State Henry Kissinger’s view that morality and moralizing should play no role in foreign policy—that U.S. concerns about human rights behavior in foreign states should be left to diplomatic discretion, and that Congress should not tie the hands of diplomats who are required to balance a range of U.S. interests in a particular country.⁵⁶

Congress responded to this executive branch resistance by making the human rights conditions on foreign and military assistance legally binding. In December 1975, Congress passed the International Development and Food Assistance Act (“IDFA”), which contained the following explicit condition: “No assistance may be provided under this subchapter [International Development] to the government of any country which engages in a consistent pattern of *gross violations of internationally recognized human rights* . . . unless such assistance will directly benefit the needy people in such country.”⁵⁷ This provision also stated that the Senate Committee on Foreign Relations or the House Committee on International Relations could require the submission of “information demonstrating that such assistance will directly benefit the needy people in such country, together with a detailed explanation of the assistance to be provided.”⁵⁸ If either the House or Senate disagreed with the President’s justification, “it may initiate action to terminate assistance.”⁵⁹ The statute also required the executive branch to submit annually a “full and complete report regarding the steps [the President] has taken to” carry out the provisions of this section.⁶⁰

Restrictions on security assistance were also codified through the new International Security Assistance and Arms Export Control Act (“ISA”), in June 1976. The Senate amendment to the House ISA bill contained four principal provisions, which were adopted at the committee of conference and passed as law.⁶¹ The first was a

55. *Id.*

56. See Bilder, *supra* note 2, at 598. See also SNYDER, *supra* note 39, at 30; KEYS, *supra* note 35, at 132; John Shattuck, *Diplomacy with a Cause: Human Rights in U.S. Foreign Policy*, in REALIZING HUMAN RIGHTS, *supra* note 35, at 272–73.

57. 22 U.S.C. § 2151n(a) (1975) (enacted by Pub. L. No. 94-161, Title III § 310) (emphasis added).

58. 22 U.S.C. § 2151n(b) (1975).

59. *Id.*

60. 22 U.S.C. § 2151n(d)(6) (1975).

61. H.R. REP. NO. 94-1272 (1976) (Conf. Rep.) (enacted as Pub. L. No. 94-329 § 310).

statement that “a principal goal of U.S. foreign policy shall be to promote the increased observance of internationally recognized human rights,” and accordingly that “no security assistance [shall] be provided to any country the government of which engages in a consistent pattern of gross violations of human rights.”⁶² Second, the Act established a new position of Coordinator of Human Rights and Humanitarian Affairs at the Department of State.⁶³ Third, it allowed termination, restriction, or continuation of assistance by joint resolution of Congress.⁶⁴ Fourth, it required that “the Secretary of State shall transmit to the Congress . . . a full and complete report, prepared with the assistance of the Coordinator for Human Rights and Humanitarian Affairs, with respect to practices regarding the observation of and respect for internationally recognized human rights in each country proposed as a recipient of security assistance.”⁶⁵ Congress received the first report from the State Department, as required by the ISA, in early 1977, reflecting information that was current through the end of 1976.⁶⁶

In August 1977, Congress amended the IDFA to require that human rights reports be prepared on all countries receiving development assistance.⁶⁷ The reports under the IDFA were to contain not only “the status of internationally recognized human rights” in each country but also “the steps the Administrator [of the U.S. Agency for International Development (“USAID”)] has taken to alter United States programs under subchapter 1 [International Development] of this chapter in any country because of human rights considerations.”⁶⁸ By the end of 1977, Congress had thus placed restraints on both security and development assistance based on human rights practice and had created the annual Country Reports as a means of overseeing the policy. Jimmy Carter had been sworn in as President earlier in the year, having run a campaign that promised, among other things, to put human rights at the center of American foreign policy.⁶⁹ His

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*; 22 U.S.C. § 2304(b) (1976).

66. Congress, through the House Committee on Industrial Relations (which had competence over military sales), later published the first report as “Human Rights Practices in Countries Receiving United States Security Assistance (1976).” See U.S. DEP’T STATE, ANNUAL HUMAN RIGHTS REPORT SUBMITTED TO CONGRESS 1 (1977).

67. H.R. REP. NO. 95-501, at 29 (1977) (Conf. Rep.) (enacted by Pub. L. No. 95-88, § 111(a), codified at 22 U.S.C. § 2151n(d) (1977)).

68. 22 U.S.C. §§ 2151n(d)(1), (6) (1977).

69. Leslie H. Gelb, *Human-Rights and Morality Issue Runs Through Ford-Carter Debate*, N.Y. TIMES (Oct. 8, 1976), <https://www.nytimes.com/1976/10/08/archives/>

administration embraced the new congressional reporting requirements, and Carter announced the elevation of the Coordinator of Human Rights and Humanitarian Affairs to Assistant Secretary for Human Rights in August 1977.⁷⁰ Carter appeared to be in step with congressional concerns about U.S. support for repressive regimes and championed the elevation of human rights as a pillar of U.S. foreign policy. The first full Country Report on Human Rights, covering all states receiving military and humanitarian assistance, was submitted to Congress from the State Department in January 1978.⁷¹

B. Global Human Rights Monitoring and Reporting

In 1979, Congress expanded the scope of countries for which annual reports would be required beyond aid recipients to include “all other foreign countries which are members of the United Nations.”⁷² In 1980, Congress expanded the illustrative—though not exhaustive—list of “internationally recognized human rights,” from the prohibition against “torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty and the security of person” to include “causing the disappearance of persons by the abduction and clandestine detention of those persons.”⁷³ In 1984, a restriction on the extension of trade preferences to certain countries was added the U.S. Code, barring Generalized System of Preferences (“GSP”) trading status to countries that do not afford “internationally recognized worker rights” to workers.⁷⁴ Congress also added the category of “worker rights” and labor rights such as collective bargaining, occupation safety, and acceptable wages

humanrights-and-morality-issue-runs-through-fordcarter-debate.html
[<https://perma.cc/4UAT-NLT7>].

70. SNYDER, *supra* note 39, at 171.

71. U.S. DEP’T STATE, *supra* note 66, at 1. The report was transmitted in 1978 but covered activity for the year 1977.

72. 22 U.S.C. § 2151n(d)(1)(B) (1979). The statute also included a requirement that the State Department report to Congress on the “impact” of the human rights reporting on U.S. foreign policy. 22 U.S.C. § 2304 (1979). *See also* H.R. REP. NO. 96-397 at 43 (1979) (Conf. Rep.).

73. *Compare* 22 U.S.C. § 2151n(a) (1979), *with* 22 U.S.C. § 2151n(a) (1980) (expanding the list of internationally recognized human rights to include “causing the disappearance of persons by the abduction and clandestine detention of those persons”).

74. 19 U.S.C. §§ 2461, 2462(b)(2)(G).

and hours to the coverage required in the annual human rights reporting.⁷⁵

Congress added another requirement in 1987 that, “wherever applicable, practices regarding coercion in population control, including coerced abortion and involuntary sterilization” be included in the annual reports.⁷⁶ In 1990, it added the restriction that “[n]o assistance may be provided to any government failing to take appropriate and adequate measures within their means to protect children from exploitation, abuse, or forced conscription into military or paramilitary services.”⁷⁷ This was included without adding new content requirements to the Country Reports. In 1994, as part of the reorganization of the Department of State in the Foreign Relations Authorization Act,⁷⁸ the position of Assistant Secretary for Human Rights and Humanitarian Affairs was replaced by the Assistant Secretary of State for Democracy, Human Rights, and Labor.⁷⁹

In 1996, two additional content requirements were added to the Country Reports: (1) “the votes of each member of the United Nations Commission on Human Rights on all country specific and thematic resolutions voted on at the Commission’s annual session during the period covered during the preceding year;”⁸⁰ and (2) “the extent to which each country has extended protection to refugees, including the provision of first asylum and resettlement.”⁸¹

75. 19 U.S.C. § 2464; 19 U.S.C. § 2467(4). The new provision required that the President submit to Congress an annual report “on the status of internationally recognized worker rights” within GSP countries. 19 U.S.C. § 2464 (enacted by Pub. L. No. 98-573 on Oct. 30, 1984).

76. 22 U.S.C. § 2151n(d)(2) (1987).

77. 22 U.S.C. § 2151n(b) (1990) (enacted by Pub. L. No. 101-513 § 599D).

78. H.R. REP. NO. 103-482, at 22 (1994) (Conf. Rep.) (enacted by Pub. L. No. 103-236).

79. *Id.* at 23. The House Conference Report for the Foreign Relations Authorization Act states that the position of Assistant Secretary for DRL “shall maintain continuous observation and review all matters pertaining to human rights and humanitarian affairs (including matters related to prisoners of war and members of the United States Armed Forces missing in action) in the conduct of foreign policy including the following:” (summarized as) i) gathering the detailed information for each country to which the FAA requirements apply; ii) preparing the reports required by the FAA; iii) making recommendations to the Secretary of State and the Administrator of the Agency for International Development regarding compliance with the FAA; and iv) performing other responsibilities which serve to promote increased observance of internationally recognized human rights by all countries. *Id.*

80. 22 U.S.C. § 2151n(d)(4) (1996) (enacted by Pub. L. No. 104-319, title II, § 201(a)).

81. 22 U.S.C. § 2151n(d)(5) (1996) (also enacted by Pub. L. No. 104-319, title II, § 201(a)).

Congress added two more topics to the required reports in 1998: (1) “the status of child labor practices in each country;” and (2) “wherever applicable, violations of religious freedom, including particularly severe violations of religious freedom.”⁸² The second was included as part of the International Religious Freedom Act of 1998 (“IRFA”),⁸³ whose purpose was

to reduce and eliminate the widespread and ongoing religious persecution taking place throughout the world today. It seeks to achieve this objective *by increasing the priority attached in U.S. foreign policy to the problem of religious persecution; by threatening to impose sanctions on foreign governments that carry out or condone serious religious persecution; and by seeking to increase the protections available to victims of religious persecution.*⁸⁴

IRFA went even further to ensure that Congress was receiving complete information on religious persecution, requiring the creation of the State Department Office on International Religious Freedom,⁸⁵ along with a Director, later titled Ambassador at Large for International Religious Freedom.⁸⁶ The Ambassador has a general responsibility to “advance the right to freedom of religion abroad, to denounce the violation of that right, and to recommend appropriate responses by the United States Government when this right is violated [serving a direct advisory role to the President and Secretary of State].”⁸⁷ The position is also charged with preparing and transmitting to Congress “an Annual Report on International Religious Freedom supplementing the most recent Human Rights Reports by providing additional detailed information with respect to matters involving international religious freedom.”⁸⁸

Both the House Report for IRFA and the law as drafted stressed the requirement of input from religious and human rights nongovernmental organizations or other interested parties to supplement the findings of the Country Reports, codifying, in part, formal cooperation between the State Department and human rights NGOs that had begun to

82. 22 U.S.C. § 2151n(d)(7) (1998).

83. H.R. REP. NO. 105-480(I), at 9–10 (1998) (enacted by Pub. L. No. 105-292 § 102(d)(1)).

84. *Id.* at 15 (emphasis added).

85. *Id.* at 4.

86. *Id.*; 22 U.S.C. § 6411.

87. 22 U.S.C. § 6411(c)(1), (2).

88. 22 U.S.C. § 6412(b)(1).

develop as part of the process of preparing the Country Reports.⁸⁹ The report must also distinguish between violations “conducted with the involvement or support of government officials or agents, or pursuant to official government policy” and those not conducted under such “but which the government fails to undertake serious and sustained efforts to eliminate being able to do so.”⁹⁰ Apart from the violations of international standards, the report is to contain trends toward improvement or deterioration, U.S. actions and policy in support of religious freedom with respect to each country, a description of any binding agreement entered into between the foreign government and the United States, the training and guidelines on violations of religious freedom provided to judges and officers within the country, and an Executive Summary for each country.⁹¹ The State Department is asked to designate “persecuted communities.”⁹² The designation has two purposes: to trigger congressional sanctions against particular countries and to support asylum claims from individual members of those designated religious communities.⁹³ The inclusion of the latter purpose explicitly linked IRFA reporting to asylum claims, a recognition by Congress of the ways in which earlier human rights reports were being used by claimants.⁹⁴

IRFA also created the congressionally controlled U.S. Commission on International Religious Freedom (“USCIRF”), a step many viewed as an effort by Congress to add independent oversight of the State Department.⁹⁵ The redundancy was motivated in part by distrust of the State Department among some conservatives, who were skeptical State would report adequately on the plight of Christians in countries where they represented a minority or on behalf of Christian missionaries who faced problems in states that ban proselytizing.⁹⁶

89. H.R. REP. NO. 105-480(I), at 4; 22 U.S.C. § 6412(c)(2). See also discussion *infra* Section III.B.

90. H.R. REP. NO. 105-480(I), at 3.

91. 22 U.S.C. §§ 6412(b)(1)(A)–(F).

92. H.R. REP. NO. 105-480(III), at 16.

93. *Id.*

94. For a discussion of the use of human rights reports in asylum claims in U.S. courts, see *infra* Section III.D.

95. Pub. L. No. 105-292, Title II, §§ 201–06 (codified at 22 U.S.C. §§ 6431–36).

96. See Laurie Goodstein, *A Rising Movement Cites Persecution Facing Christians*, N.Y. TIMES (Nov. 9, 1998), <https://www.nytimes.com/1998/11/09/us/a-rising-movement-cites-persecution-facing-christians.html> [<https://perma.cc/CP9R-E5AJ>]. For a full discussion of the U.S. approach to international religious freedom, see ANNA SU, EXPORTING FREEDOM: RELIGIOUS LIBERTY AND AMERICAN POWER 4–5 (2016) (describing the promotion and protection of religious liberty in U.S. foreign policy during the twentieth century, including

USCIRF's central responsibilities are: (1) the annual and ongoing review of the facts and circumstances of violations of religious freedom presented in the Country Reports on Human Rights Practices, the Annual Report, and the Executive Summary, as well as information from other sources as appropriate; and (2) the making of policy recommendations to the President, the Secretary of State, and Congress with respect to matters involving international religious freedom.⁹⁷ USCIRF conducts independent reporting on religious freedom, issues an annual report, and oversees a "watch list" of countries that are not meeting the internationally-defined standard for respect of religion or belief.⁹⁸

In 1999, two more requirements were added to the Country Reports: (1) "wherever applicable, consolidated information regarding the commission of war crimes, crimes against humanity, and evidence of acts that may constitute genocide;"⁹⁹ and (2) reporting on human trafficking.¹⁰⁰ The trafficking information provision was codified prior to the passage of the Victims of Trafficking and Violence Protection Act ("TVPA"), passed in October 2000.¹⁰¹ The TVPA also requires that the President establish an Interagency Task Force to Monitor and Combat Trafficking, and "authorizes" the Secretary of State to establish an Office to Monitor and Combat Trafficking within the

the shift from the Cold War anti-communism logic to the post-Cold War use of religious liberty as justification for the use of American power), and see generally PASQUALE ANNICCHINO, *LAW AND INTERNATIONAL RELIGIOUS FREEDOM: THE RISE AND DECLINE OF THE AMERICAN MODEL* (2017).

97. See *About Us*, COMM'N ON INT'L RELIGIOUS FREEDOM, <https://www.uscirf.gov/about-uscirf/about-us> [<https://perma.cc/H9FC-ZYY8>].

98. See *USCIRF Watch List*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, <https://www.uscirf.gov/uscirf-watch-list> [<https://perma.cc/P7XH-GBAJ>].

99. Pub. L. No. 106-113, § 806 (1999) (codified at 22 U.S.C. § 2151n(d)(8)).

100. Pub. L. No. 106-113 § 597 (1999) (codified at 22 U.S.C. § 2151n(f)(1)(A)).

101. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (codified at 22 U.S.C. § 7101-14). The TVPA was based on congressional findings that "[a]s the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 500,000 women and children are trafficked into the United States each year Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide." *Id.* § 102(b)(1), (3) (codified at 22 U.S.C. §§ 7101(b)(1), (3)). The TVPA revises some of the language in § 2151n(f) introduced the year before, but the scope is essentially the same: a description of the nature and extent of trafficking, and a detailed assessment of the government and specific authorities regarding their participation in or facilitation of trafficking, measures taken to combat trafficking, assistance to and treatment of victims, and degree of international cooperation. *Id.* § 104.

State Department.¹⁰² This Office was created in October 2001, and although the requirements reporting on trafficking were established under the same statutory provisions as the Country Reports on Human Rights, the State Department has produced a separate Trafficking in Persons Report since 2001.¹⁰³

In 2002, the Country Reports Act was again expanded to include: (1) forced recruitment and conscription of individuals under the age of eighteen—which Congress states is “related to each country’s compliance with standards set forth in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;”¹⁰⁴ and (2) “for each country with respect to which the report indicates that extrajudicial kills, torture, or other serious violations of human rights have occurred in the country, the extent to which the United States has taken or will take action to encourage an end to such practices in the country.”¹⁰⁵ This second requirement was part of the establishment of the Human Rights and Democracy Fund, created to:

- (1) support defenders of human rights; (2) assist the victims of human rights violations; (3) respond to human rights emergencies; (4) promote and encourage the growth of democracy, including the support for non-governmental organizations in foreign countries; and (5) carry out such other related activities as are consistent with paragraphs (1) through (4)¹⁰⁶

The Human Rights and Democracy Fund is administered by the Assistant Secretary of State for Democracy, Human Rights, and Labor, setting it outside the usual administration of development assistance through the U.S. Agency for International Development.¹⁰⁷

The annual reporting requirements were further amended in 2004, with the requirement that the State Department report separately on the problem of anti-Semitism,¹⁰⁸ in 2009, with the requirement to

102. *Id.* § 105(a), (e).

103. *Id.* § 104(a).

104. H.R. REP. NO. 107-671, at 143 (2002) (Conf. Rep.).

105. Pub. L. No. 107-228, § 665(a) (2002) (codified at 22 U.S.C. § 2151n(d)(10) (2002)).

106. 22 U.S.C. § 2151n-2(b) (2002).

107. 22 U.S.C. § 2151n-2(a) (2002).

108. The report must include “wherever applicable, a description of the nature and extent of acts of anti-Semitism and anti-Semitic incitement that occur during the preceding year, including descriptions of (A) acts of physical violence against, or harassment of Jewish people, and acts of violence against, or vandalism of Jewish community institutions, including schools, synagogues, and cemeteries; (B) instances of propaganda in government and

report on press freedoms, and in 2013, to report on the status of child marriages.¹⁰⁹ Congress has imposed on the State Department a rather heavy human rights reporting workload, requiring the production of four global human rights reports per year—all with different deadlines.¹¹⁰ In addition, over the years, Congress has enacted dozens of country-specific laws that establish human rights certification and reporting requirements for targeted bilateral assistance programs.¹¹¹ Congress has also adopted reporting and sanctions legislation targeting individuals and non-state actors responsible for attacks on human

nongovernment media that attempt to justify or promote radical hatred or incite acts of violence against Jewish people; (C) the actions, if any, taken by the government of the country to respond to such violence and attacks or to eliminate such propaganda or incitement; (D) the actions taken by such government to enact and enforce laws relating to the protection of the right to religious freedom of Jewish people; and (E) the efforts of such government to promote anti-bias and tolerance education.” Global Anti-Semitism Review Act of 2004 § 6(a), 22 U.S.C. § 2151n(d)(8).

109. See Daniel Pearl Freedom of the Press Act of 2009 § 2, 22 U.S.C. § 2151n(d)(12); see also Violence Against Women Reauthorization Act of 2013 § 1207, 22 U.S.C. § 2151n(g) (requiring that the Country Reports include a “description of the status of the practice of child marriage” in countries where “child marriage is prevalent”).

110. See *infra* Appendix for the four global reports and their deadlines. This list does not include country-specific reporting, or ad hoc requests by Congress that may be triggered under particular statutory provisions. The list also does not include “self-reporting” of the U.S. submission to the Universal Periodic Review and the United Nations Human Rights Council, or the periodic reports required by U.S. membership in the ICCPR, CERD, and CAT, which are generally coordinated by the Department of State. See Interview with Senior Officials, Bureau of Democracy, Hum. Rts., & Lab., U.S. Dep’t State (Sept. 19, 2012) (on file with author); see also United States, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, U.N. Doc. A/HRC/WG.6/22/USA/1, annex IV (Feb. 13, 2015) (explaining the process of compiling the report).

111. See Jeffrey A. Meyer, Note, *Congressional Control of Foreign Assistance*, 13 YALE J. INT’L L. 69, 80–82 (1988) (“Country-specific prohibitions . . . became increasingly common as an alternative to the general human right-based prohibition because the legislation could employ more specific language when applied to particular countries.”); Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT’L L. 246, 254–56 (1982) (noting country-specific legislation attached to aid for Argentina, Brazil, Chile, El Salvador, Guatemala, Paraguay, the Philippines, South Korea, Uruguay, and Zaire between 1975 and 1982). One example is the 2007 Mérida Initiative for Mexico and Central America (amended in 2010 to separate Central America by creating a separate Central American Regional Security Initiative (“CARSI”). See PETER J. MEYER & CLARE RIBANDO SEELKE, CONG. RSCH. SERV., R41731, CENTRAL AMERICA REGIONAL SECURITY INITIATIVE: BACKGROUND AND POLICY ISSUES FOR CONGRESS 24 (2015). Another example is security assistance to Ukraine, military assistance part of which the United States has conditioned on reaching particular certifications. National Defense Authorization Act for Fiscal Year 2020 § 1235, 22 U.S.C. § 2593a note (amending reporting requirements under the Ukraine Freedom Support Act of 2014, 22 U.S.C. § 8929 10(c)). See also CORY WELT, CONG. RSCH. SERV., R45008, UKRAINE: BACKGROUND, CONFLICT WITH RUSSIA, AND U.S. POLICY 42 (2020).

rights defenders. For example, the Leahy Law was adopted as two amendments to the Foreign Assistance Act (“FAA”), which applies to the State Department, and the Arms Export Control Act (“AECA”), which applies to the Department of Defense.¹¹² The Leahy Act intends to prohibit U.S. assistance to any foreign security forces *unit* where the United States has “credible information that the *unit* has committed a gross violation of human rights.”¹¹³ The 2012 Magnitsky Act was adopted to identify and impose sanctions on individuals involved in the murder of Russian journalist Sergei Magnitsky as well as other gross human rights violations committed against individuals exposing illegal activity of the Russian government.¹¹⁴ The 2016 Global Magnitsky Act expanded the availability of sanctions imposed upon any “foreign person” who engages in “gross violations of internationally recognized human rights” against human rights advocates and activists.¹¹⁵ Together, the general and targeted monitoring and reporting requirements demand significant resources at embassies abroad and within the State Department. The next section addresses how Congress has molded the structure of the foreign affairs bureaucracy to meet the demands of human rights reporting and monitoring.

C. Embedding Human Rights Diplomacy in the Bureaucracy

Congressional oversight has extended beyond the substance of diplomatic reporting to include restructuring of the processes and institutions of diplomacy. Congress mandated the creation of the Office of Human Rights and Humanitarian Affairs, and codified its later incarnation as the Bureau of Human Rights and Humanitarian Affairs and its current structure as the Bureau of Democracy, Human Rights,

112. See Consolidated Appropriations Act, 2008 § 651, 22 U.S.C. § 2378d(a) (FAA amendment); Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 § 1204, 10 U.S.C. § 362(a)(1) (AECA amendment).

113. See 22 U.S.C. § 2378d(a); 10 U.S.C. § 362(a)(1).

114. The full name of the statute is the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012. Pub. L. No. 112-2018, 126 Stat. 1496 (codified in scattered sections of 19 U.S.C. and 22 U.S.C.) [hereinafter Magnitsky Act]. For a section of the statute addressing individual sanctions for abuses, see Magnitsky Act, § 404, 22 U.S.C. § 5811 note (Identification of Persons Responsible for the Detention, Abuse, and Death of Sergei Magnitsky and Other Gross Violations of Human Rights).

115. Global Magnitsky Act, Pub. L. No. 114-328, 130 Stat. 2533 (codified at 22 U.S.C. § 2656 note (Human Rights Sanctions)). A similarly individually targeted statute addressing a specific human rights problem is the Uyghur Act, Pub. L. No. 116-145, 134 Stat. 648 (codified at 22 U.S.C. § 9601 note (Imposition of Sanctions)).

and Labor (“DRL”).¹¹⁶ Congress later created ambassadorial positions overseeing reporting on human trafficking, international religious freedom (concurrent with the creation of USCIRF), and war crimes.¹¹⁷ The combination of a yearly reporting requirement with mandates to create new offices focused explicitly on particular human rights has embedded the content of human rights norms within the institutions of American bilateral and multilateral diplomacy.¹¹⁸

Moreover, the language of United States diplomacy over the past four decades has kept pace with the growth of international human rights.¹¹⁹ The weaving of “human rights talk” into the diplomatic narrative has altered and shaped expectations within bilateral and multilateral relationships in ways that reflect original congressional purposes. At times, however, the monitoring and reporting mandates work at cross-purposes in particular bilateral relationships, where security or economic policy might be prioritized over human rights. Indeed, the “nuisance” of congressional human rights mandates to particular bilateral relationships underscores the ways in which monitoring and reporting norms affect day-to-day behavior. Even where diplomatic and strategic relationships have not been determined by human rights, those relationships have been affected by the monitoring and public reporting under the general congressional mandates.¹²⁰

Diplomacy is both a legal and political practice. Diplomacy is created and protected by international law and is carried out as

116. Bureau status at the State Department places human rights on equal footing with regional bureaus and other subject-matter bureaus such as Economic and Business Affairs and International Organizations. A Bureau is headed by an Assistant Secretary who sits two levels below the Secretary of State on the reporting chain. See 22 U.S.C. § 2651a (codifying organizational mandates for the State Department). The State Department Office of Human Rights and Humanitarian Affairs was created during the Ford Administration and upgraded to the Bureau of Human Rights and Humanitarian Affairs in 1977 under President Carter. SNYDER, *supra* note 39, at 166, 171. It was renamed the Bureau of Democracy, Human Rights and Labor in 1994. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 § 162, 22 U.S.C. § 2304 (1994). Congress created its own human rights commission, the Lantos Human Rights Commission, as a formal follow-on to the Congressional Human Rights Caucus, created in 1983. See H.R. Res 1451, 110th Cong. (2008) (passed by unanimous consent).

117. See *supra* text accompanying notes 86–88.

118. See Interview with Senior Officials, *supra* note 110.

119. See McGuinness, *supra* note 25, at 473–74; Interview with Senior Officials, *supra* note 110.

120. This effect is present even where waivers of sanctions are granted and/or where Congress adopts country-specific conditions to get around the general legislation’s aid conditionality. For a discussion of decoupling of reporting from sanctions, see *infra* Part IV.

representation and governance. Representation refers to the ways in which diplomats formally represent the interests of one state to another, which includes building economic, political and cultural relationships between states and also the making of international law through treaty and customary practice. State interests also include promoting and enforcing international law and international governance institutions, and representation of those interests often overlaps with governance functions. Diplomats also serve to carry out domestic legal mandates, sometimes in complementary function with consular representation, which focuses on protection of co-nationals and the facilitation of particular cross-border legal processes, such as visa and passport issuance. Increasingly in the past forty years, specialized agencies, including the Commerce, Treasury, Agriculture and Justice Departments have posted officials in overseas embassies as well as in divisions within agency headquarters devoted to international regulatory matters, both cross-border and within international institutions.¹²¹ The administration of congressionally delegated powers in coordination with and through diplomatic representatives has become commonplace.

In much the same way, U.S. human rights diplomacy—as mandated by Congress—is practiced as both human rights representation and human rights governance.¹²² Human rights diplomacy includes aspects of enforcing compliance with international human rights law, as well as promoting membership in and supporting the work of international human rights law and institutions. Human rights diplomacy also includes monitoring, interpreting, and reporting the human rights practices of foreign states, communicating with those states the importance of protecting human rights, and leveraging financial and other benefits with the goal of improving human rights behavior. The formal diplomatic and investigatory processes that are necessary to the

121. See Ingber, *supra* note 17, at 416–19 (discussing Congress’s role in designing executive branch foreign policy agencies and processes within agencies); see also *Overseas Offices*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/contact-us/legal-attache-offices> [<https://perma.cc/XSV9-R9UD>] (listing U.S. embassies that host FBI attachés). For a discussion of the general approach to congressional funding of international operations—including those of the Departments of Agriculture, Commerce, Justice and Treasury—see CORY R. GILL ET AL., CONG. RSCH. SERV., R46367, DEPARTMENT OF STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS: FY2021 BUDGET AND APPROPRIATIONS 23–29 (2020).

122. Ole Jacob Sending et al., *The Future of Diplomacy: Changing Practices, Evolving Relationships*, 66 INT’L J. 527, 529, 538–40 (2011) (distinguishing between representation and governance functions of diplomacy).

monitoring and reporting of human rights, as well as the subsequent uses of human rights reports, operate as human rights governance.¹²³

D. The Internalization of International Human Rights Law

Congress has embraced international human rights law and norms more deeply than is appreciated when we speak in generalities of human rights “policy.”¹²⁴ Indeed, one consistent feature of congressional human rights mandates is the way in which they have moved in parallel with international human rights law itself: from the aspirational and hortatory nature of rights laid out in the Universal Declaration of Human Rights (“UDHR”),¹²⁵ to the more specified obligations of the ICCPR and later to narrower subject-matter protocols such as the anti-trafficking protocol of the UN Convention against Transnational Crime.¹²⁶ Rather than viewing the rest of the world through the lens of a particularized American constitutional view of rights, Congress has been comfortable and consistent with its use of international conventions as the legal and normative standard against which foreign state human rights behavior is judged.¹²⁷ Given the strong form of American exceptionalism that animated congressional opposition in the late 1940s and early 1950s to any plans for the United States to join international human rights treaties, this explicit and consistent adoption of the language of international human rights into the U.S. Code

123. ALSTON & KNUCKEY, *supra* note 23, at 5–7 (discussing the proliferation of fact-finding bodies within international human rights governance structures).

124. This goes beyond mere agenda setting. Ingber, *supra* note 17, at 413.

125. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (declaring that, *e.g.*, “Everyone has the right to life, liberty, and the security of person”).

126. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; G.A. Res. 55/25, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000).

127. American constitutional values are invoked by Congress in the mandates. 22 U.S.C. § 2304 (“The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. And accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.”) (emphasis added). But the standard of assessment is international human rights law. U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1986 INSTRUCTIONS CABLE (1986) (on file with author); U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994 INSTRUCTIONS CABLE (1994) (on file with author); U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001 INSTRUCTIONS CABLE (2001) (on file with author).

is somewhat surprising. But it reflects the burgeoning of international human rights law and institutions in the 1970s and 1980s, and the availability of text—viewed by the United States as generally consistent with U.S. constitutional rights protections—that could be said to be universal, and therefore able to bridge the gap between U.S. domestic rights *practice* and its international human rights *policy*.¹²⁸

In its initial oversight legislation, Congress was concerned with those states that engaged in “consistent patterns of gross violations of internationally recognized human rights,” which required some examination of what “internationally recognized” rights were, as opposed to the kinds of rights enshrined in the U.S. Constitution.¹²⁹ In the years prior to the ICCPR, which came into force in 1976, the UDHR stood as the sole universally adopted statement of the parameters of human rights. It was thus the UDHR that Congress used as its standards in the early years of its human rights policy oversight, mimicking directly text from the UDHR aiming to prohibit “torture or cruel, inhuman and degrading treatment or punishment,” “prolonged detention without charges,” and other “flagrant denials of the right to life, liberty and the security of the person.”¹³⁰ Because the UDHR was adopted as a non-binding General Assembly resolution, adoption of its text did not, perhaps, represent the kind of dissonance with the U.S. domestic approach to rights as later human rights treaties did. Rather, it was championed as reflecting the same core values as the U.S. Constitution. Congress could thus plausibly claim that the behavior it sought in other countries paralleled that required of the government at home.¹³¹

Notwithstanding the textual reference to international human rights standards in the CHRMs, U.S. constitutional rights developments also influenced how Congress defined the scope of rights. For example, the domestic women’s and civil rights movements and, later, particularized American views on religious liberty, influenced the

128. For general histories of the rise of human rights in U.S. foreign policy in the 1970s, see SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 46–47 (2010); SNYDER, *supra* note 39, at 1–6; KEYS, *supra* note 35, at 127–28; Samuel Moyn, *The Return of the Prodigal: The 1970s as a Turning Point in Human Rights History*, in *THE BREAKTHROUGH*, *supra* note 39, at 8–10; Sargent, *supra* note 39, at 125–45; Carl J. Bon Tempo, *Human Rights and the U.S. Republican Party in the Late 1970s*, in *THE BREAKTHROUGH*, *supra* note 39, at 146–65.

129. See *supra* Sections II.A., II.B.

130. For discussion of 22 U.S.C. § 2304, see *supra* Section II.A.

131. See, e.g., *Fiscal Year 1975 Foreign Assistance Request: Hearing on H.R. Doc 93-293 Before the H. Comm. on Foreign Aff.*, 93rd Cong. 4 (1974) (statement of Hon. Henry A. Kissinger, Secretary of State) (“A nation’s foreign policy must be rooted in its most basic beliefs. The economic assistance program of the United States is an expression of our moral values.”).

breadth and specificity of rights behavior that was of interest to Congress.¹³² Yet even when Congress acted to place an American stamp on a particular area of rights it added to the reporting requirements, it largely did so through the language of international human rights instruments. One prominent example of this is the amendment to the human rights mandates created by the 1998 International Religious Freedom Act (“IRFA”). IRFA required the State Department to pay particular attention to religious persecution, and also created the U.S. Commission on International Religious Freedom (“USCIRF”) whose mandate is to report and maintain a watch list according to the standards of the UDHR.¹³³ USCIRF describes the legal standards that it applies to its reporting as follows:

Article 18 of the Universal Declaration of Human Rights provides that “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest this religion or belief in teaching, practice, worship and observance.”¹³⁴

USCIRF goes on to say that “[b]y relying on *international human rights standards* as specified in IRFA, USCIRF is not attempting to impose American values on other nations, but rather examines the actions of foreign governments *against these universal standards and by their freely undertaken international commitments*.”¹³⁵ This language attempts to preempt the criticism of double standards by claiming that the United States is not imposing its particularized view of religious liberty (under the Free Exercise and Establishment Clauses of the First Amendment) on other states.¹³⁶ At the same time, the statute makes clear that, for the United States, religious freedom ranks as fundamental and a high-priority right among all international human rights commitments.¹³⁷ An explicit adoption of the international standard was arguably necessary to blunt criticism of double standards or hypocrisy by assessing foreign states in accordance with the legal instruments

132. SNYDER, *supra* note 39 at 9, 12–13; KEYS, *supra* note 35, at 133, 135–38; SU, *supra* note 96, at 3.

133. International Religious Freedom Act, Pub. L. No. 105-292, §§ 2, 202, 112 Stat. 2787, 2788, 2798–99 (1998).

134. *Frequently Asked Questions*, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, <https://www.uscirtf.gov/about-uscirtf/frequently-asked-questions> [<https://perma.cc/XUP5-ASLC>].

135. *Id.* (emphasis added).

136. For the history on the earlier versions of IRFA considered by Congress, see SU, *supra* note 96, at 142–44.

137. See International Religious Freedom Act § 2, *supra* note 133.

those states have undertaken to obey as a part of their international commitments. IRFA thus had two purposes. First, it sought to apply a particular American view of religious liberty on states that have historically refused to join human rights treaties that guarantee religious liberties, or that, like the United States itself, have attached reservations to treaty commitments which avoid international oversight on questions of religious liberties.¹³⁸ Second, it tried to establish “religious liberty” (as understood in American jurisprudence under the Free Exercise Clause of the U.S. Constitution) as synonymous with “international religious freedom.”¹³⁹ By applying an interpretive gloss on the texts of the UDHR and ICCPR, IRFA attempts to accomplish this delicate balance between an American “exceptionalist” or particular understanding of religious freedom on the one hand, and the international human rights understanding of religious freedom on the other.¹⁴⁰

This blending of constitutional commitment to religious liberty and the international human rights protections of religious freedom is further reflected in IRFA’s creation of two parallel institutions to monitor the practice of religious liberty. The USCIRF, which operates as a congressional agency, reflects the interest of its commissioners (jointly nominated by Congress and the President) who represent the interests of religious organizations and legal practitioners devoted to advancing religious freedom for particular groups.¹⁴¹ The Office of

138. See SU, *supra* note 96, at 142–47; S. TREATY DOC. NO. 95-20 (1992) (containing numerous Reservations, Understandings, and Declarations to the U.S. Senate Resolution of Ratification for the ICCPR).

139. The argument for special treatment of “international religious freedom” came from Republicans (Senator Sam Brownback) and Democrats (Representative Tom Lantos) during the drafting process of the IRFA. SU, *supra* note 96, at 145. However, IRFA has been criticized for: (1) creating an “irrational hierarchy” of human rights; and (2) taking a unilateral approach to international religious freedom that would “weaken existing multilateral regimes.” *Id.* at 145–46.

140. See Thomas F. Farr & William L. Saunders, Jr., *The Bush Administration and America’s International Religious Freedom Policy*, 32 HARV. J.L. & PUB. POL’Y 949, 952 (2009) (discussing the history of IRFA and the Clinton administration’s opposition to the IRFA’s intent to create a “hierarchy” of human rights). For a discussion of the work of USCIRF in promoting these purposes, see Elizabeth K. Cassidy & Catherine Cosman, *A View from the United States: US Bilateral and Multilateral Promotion of Freedom of Religion or Belief*, in CHANGING NATURE OF RELIGIOUS RIGHTS UNDER INTERNATIONAL LAW 105–06 (Malcolm Evans et al. eds., 2015). See, e.g., U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 2018 ANNUAL REPORT: KEY FINDINGS AND RECOMMENDATIONS 23, 25; U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 2019 ANNUAL REPORT: KEY FINDINGS AND RECOMMENDATIONS 72–79, 90–97 (discussing Saudi Arabia and Pakistan).

141. *About Us*, COMM’N ON INT’L RELIGIOUS FREEDOM, <https://www.uscirf.gov/about-uscirf/about-us> [<https://perma.cc/H9FC-ZYY8>]; Cassidy & Cosman, *supra* note 140, at 101, 105.

International Religious Freedom with the State Department, on the other hand, operates within the executive branch to demonstrate the centrality of religious freedom to the broader project of human rights diplomacy. Both institutions operate to promote the international human rights norm of religious freedom, while seeking to influence and refine the content of that norm through the lens of the U.S. constitutional experience of religious freedom.¹⁴²

The international human rights movement matured throughout the 1970s and 1980s, with the growth of the jurisprudence of the Inter-American and European Courts of Human Rights, and the formal adoption of the ICCPR, ICESCR, CAT, and the Convention on the Elimination of Discrimination Against Women (“CEDAW”). The statutory language of congressional mandates followed suit, adopting more explicit standards emerging in subject matter treaties and expanding the scope of areas of concern.¹⁴³ The State Department, as the agency responsible for carrying out the monitoring demanded by the statutes, was increasingly required to interpret the meaning of “international standards” and other text in preparing its reports.¹⁴⁴ Each year, the State Department, through the DRL Bureau, publishes instructions for the embassy and regional bureau staff tasked with preparing the reports.¹⁴⁵ The instructions evolved over time from general descriptions of the kind of practices that would constitute “gross violations of internationally recognized human rights,” to precise language that frequently matched verbatim the standards in human rights instruments.¹⁴⁶

The U.S. State Department gleaned these standards from multiple sources: (1) human rights institutions at the UN, where the United States remained engaged in multilateral human rights policy through its almost-uninterrupted membership in the UN Human Rights

142. *SU*, *supra* note 96, at 6; ANNICCHINO, *supra* note 96, at 19–21.

143. Interpretive issues over the meaning of “internationally recognized” arose early on, when the “Sense of Congress” prompted the State Department to examine particular human rights practices in aid recipient states. *See* FRASER REPORT, *supra* note 40, at 1–2. *See also* H.R. REP. NO. 95-501, at 1, 10–11, 31 (1977). These include references in congressional discussions of human rights oversight to the work of UN human rights organs. H.R. REP. NO. 95-501, at 49.

144. Interview with Senior Officials, *supra* note 110.

145. These instructions were sent via cable to posts preparing the reports beginning in 1977. Since 2006, they have been posted via the State Department Intranet. *Id.*

146. *See* H.R. REP. NO. 95-501, at 49. The inclusion of “torture” in the human rights reports is a good example of the emerging standards defined in a treaty. *See, e.g.*, U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994 INSTRUCTIONS CABLE (1994) (on file with author); U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2002 INSTRUCTIONS CABLE (2002) (on file with author).

Commission (later the Human Rights Council); (2) regional institutions with strong human rights agendas, such as the Organization for American States and the Helsinki Commission; and (3) members of civil society in foreign states and in Washington, D.C.¹⁴⁷ Through the reporting and monitoring mandates, the executive branch has been required to learn international human rights law and keep current on treaty adoption, interpretation, and application. International human rights law has thus been incorporated into the day-to-day work of the executive branch in its external policy, much as full treaty adoption by the United States would have worked to incorporate it in domestic policy. The next Part turns to how that process of monitoring and reporting operates, and how it forms a part of international human rights governance.

III. MONITORING AND REPORTING AS HUMAN RIGHTS GOVERNANCE

John Ruggie has explained governance as “the systems of authoritative norms, rules, institutions, and practices by means of which any collectivity, from the local to the global, manages its common affairs,” and global governance as “an instance of *governance* in the absence of *government*.”¹⁴⁸ Human rights governance, under this view, is the decentralized processes through which states, along with NGOs, corporations and individuals, create, elucidate, and enforce the international human rights norms. In this conception, norms are created and complied with as part of a transnational process. Harold Koh identified this general process of governance as transnational legal process.¹⁴⁹ This framework is helpful to understanding the decentralized nature of international lawmaking and the ways in which actors

147. U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2002 INSTRUCTIONS CABLE (2002) (on file with author). See generally, SARAH B. SNYDER, HUMAN RIGHTS ACTIVISM AND THE END OF THE COLD WAR: A TRANSNATIONAL HISTORY OF THE HELSINKI NETWORK (2013).

148. Ruggie, *supra* note 20, at 5 (discussing the new governance theory as exemplified in Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT’L L. 501, 501–78 (2009)).

149. “Transnational legal process describes the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.” Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1994).

interact with norms within institutions, and through processes of interactions with other actors, to manage international human rights.

Two decades following the adoption of the first congressional human rights mandates, Sarah Cleveland explored unilateral economic sanctions against rights-abusing regimes as a mechanism of transnational legal process and norm internalization.¹⁵⁰ Professor Cleveland's study examined the unilateral sanctions regimes that Congress adopted in tandem with, and in response to the waivers built into, the general human rights mandates.¹⁵¹ She argued that the sanctions, along with the processes developed to support them, served an important role in protecting human rights in a world lacking a central adjudicative authority.¹⁵² If the United States responded to particular state action as outside the bounds of acceptable behavior, and conditioned particular policies on that assessment of non-compliance, that sanctioning (or in the case of good behavior, non-sanctioning) would play a role in the development of the content of norms. Sanctions thus contribute to "domestic internalization by incorporating attention to human rights concerns in the political process of the sanctioning state," and to "transnational internalization" by "attracting foreign attention to human rights concerns."¹⁵³

The unilateral congressional human rights monitoring and reporting mandates operate in support of sanctions, but also create a parallel and separate process that operates regardless of whether the foreign state being monitored is subject to sanctions. The processes and the monitoring and reporting mandates imposed by Congress on the executive branch contribute to domestic internalization of human rights norms, regardless of sanctions behavior. The product of those processes—the reports themselves—constitute a body of work created by U.S. diplomats, guided by reporting requirements established by Congress, that has legal value independent of sanctions.

This Part addresses the ways in which monitoring and reporting serve to internalize international human rights law domestically and thus contribute to human rights governance internationally. It draws on a broad range of sources—domestic and foreign asylum

150. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, YALE J. INT'L L. 1, 5 (2001). For an earlier examination of the effectiveness of congressional sanctions legislation, see David Carleton & Michael Stohl, *The Role of Human Rights in U.S. Foreign Assistance Policy: A Critique and Reappraisal*, 31 AM. J. POL. SCI. 1002, 1002 (1987).

151. Cleveland, *supra* note 150, at 8–21 (examining the case of sanctions against Burma by the federal government, as a complement to efforts at the local and state level, as well as within multilateral organizations).

152. *Id.*

153. *Id.* at 7.

cases, caselaw and reports of international courts, commissions, and committees, and the reporting of NGOs—to illustrate the influence of the reports in a variety of adjudicatory and non-adjudicatory settings. The use of the reports in foreign and international legal institutions, as well as by NGOs, reveals how unilateral U.S. human rights diplomacy has helped shape the development of human rights law separate and apart from the processes of unilateral sanctions. The research findings here prompt questions about how other forms of human rights fact-finding and monitoring have been deployed or may be deployed in support of human rights governance and suggest some avenues for future research.

A. Monitoring and Reporting as Human Rights Fact-Finding

The preparation of the human rights reports requires State Department officials—both those in the field serving as embassy “human rights officers” and those in the DRL Bureau—to engage in year-long data collection of rights practices. The data collection takes place in many different forms, and is coordinated by DRL through instructions to overseas U.S. missions that include categories of human rights, definitions, and advice on sources.¹⁵⁴ The process includes: close scrutiny of news and social media reporting on political, civil and social rights; direct conversations with members of the government engaged in law enforcement and judicial administration; meetings with political parties, dissidents, and members of the opposition to government; conversations with members of civil society groups (e.g. academics, rights activists, lawyers, and journalists); review of official and unofficial reporting of international and regional human rights institutions and of international and local human rights NGOs; meeting with investigators associated with international and local human rights NGOs; and, in countries that restrict access to the forgoing channels, review of information available from NGOs and other sources outside the state.¹⁵⁵

In gathering facts to prepare the reports, executive branch officials thus communicate and cooperate with particular groups and institutions, many of which are wholly outside the formal channels of traditional bilateral diplomacy between foreign ministries and offices of the heads of state. This process of engagement places the State

154. Interview with Senior Officials, *supra* note 110.

155. See, e.g., Telegram from the Dep't of State to All Diplomatic & Consular Posts & the Embassies in Cape Verde, the Republic of Congo, & Uganda (Aug. 4, 1979), <https://history.state.gov/historicaldocuments/frus1977-80v02/d190> [<https://perma.cc/3MEB-RMXZ>]. See also Margaret E. McGuinness, Instructions Cables for Country Reports (Dec. 3, 2020) (dataset on file with author).

Department *within* the human rights movement, reporting on conditions side-by-side with civil society and international and regional human rights institutions, which are also monitoring and reporting on human rights conditions. One consequence of the State Department working from inside the human rights movement is its reliance on human rights journalists, activists, and NGOs to provide the information needed for the annual reports, and a reciprocal reliance by those same journalists, activists, and NGOs on the State Department reports for their own work. It represents a normative feedback loop between these actors and also serves as an important coordinating mechanism and focal point for U.S. engagement in international human rights governance outside the formal treaty bodies.

Over the years, the institutionalization of human rights fact-finding within the State Department has also proved quite useful to Congress. While the general default statutory provisions of the FAA and ISA were never invoked to cut off aid automatically, the content of the reports proved useful in pushing for the targeted legislation that conditioned aid on specific benchmarks. The reports highlight problems in particular countries, which Congress can then point to as justification for further restrictions on the executive's prerogatives to award aid packages in targeted countries and to crafting individual sanctions legislation.¹⁵⁶ The State Department may present the reports as the considered and "objective" view of the U.S. government of a particular state's rights practices for strategic purposes in diplomatic negotiations.

In addition to this particular use in diplomacy, the reports are relied upon by many official and unofficial actors outside of Congress and have come to serve as a valuable reference guide in many other policy making contexts.¹⁵⁷ For example, human rights NGOs, which in the early days of the Country Reports used them as a foil for critiquing how U.S. reporting and policy fell short of universal human rights ideals, use the reporting to corroborate their own work. The process and institutionalization of human rights within the State Department has provided an institutional focal point for lobbying in the executive

156. A recent example regarding Russia can be seen in the Minority Staff Report of the Senate Foreign Relations Committee, "Putin's Asymmetric Assault on Democracy in Russia and Europe: Implications for U.S. National Security." MINORITY STAFF S. COMM. ON FOREIGN RELS., S. REP. 115-21 (2018). The Senate staff report cites to the State Department Country Report on Human Rights for the years ranging from 2001 through 2018 in more than a dozen places in the report. *See, e.g., id.* at 15 n.53. They also provide a focal point for targeted, multilateral sanctions. *See id.* at 153–62.

157. The work of the Department of Homeland Security on issues of asylum and deportation is one example. The Department of Defense and its work in institution building overseas is another.

branch, evidenced, perhaps, by the fact that several assistant secretaries for Human Rights came from careers in human rights advocacy.¹⁵⁸ The multiplicity of ways in which the U.S. government takes part in norm elaboration and interpretation as it engages in the processes of monitoring and reporting form a kind of state practice.

B. Human Rights Monitoring and Reporting as Opinio Juris

To understand how the reporting process affects U.S. actors and institutions, we need to examine not just the costs of the reports as shaming “talk,” but their value as “legal talk” as well. As Chimène Keitner has explained in the context of the jurisprudence of the U.S. Supreme Court, any practice in which states describe behavioral expectations about the content of human rights law might, in fact, represent *opinio juris* for the purpose of customary international law.¹⁵⁹ Similarly, Kate Shaw has explored how presidential foreign policy statements may represent *opinio juris*.¹⁶⁰ Here, the statements about the content of international human rights norms are being made by the executive branch, in a process overseen by Congress, which supports a conclusion that these reports may constitute U.S. *opinio juris* regarding the content of customary international human rights law.¹⁶¹

The reports themselves describe facts on the ground in particular countries. They require framing these facts within a sub-heading

158. Prime examples include Richard Schifter (who became the Assistant Secretary of State for Human Rights and Humanitarian Affairs in 1985, after spending years representing indigenous peoples in their suits against the U.S. government), Harold Koh (who was a leading international law and human rights scholar who led human rights litigation prior to becoming the Assistant Secretary of State for Democracy, Human Rights, and Labor in 1998), Michael Posner (who headed Human Rights First from 1978 until he became the Assistant Secretary of State for Democracy, Human Rights, and Labor in 2009), and Tomasz Malinowski (who was a lobbyist for Human Rights Watch before becoming Assistant Secretary of State for Democracy, Human Rights, and Labor in 2014). See U.S. Dep’t State, *Assistant Secretaries of State for Democracy, Human Rights, and Labor*, <https://2001-2009.state.gov/r/pa/ho/po/12258.htm> [<https://perma.cc/975F-VBEH>].

159. Chimène I. Keitner, ‘Cheap Talk’ About Customary International Law, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 494, 494 (David L. Sloss et al. eds., 2011).

160. Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 134–37 (2017). See also McGuinness, *supra* note 25, at 471 (describing U.S. human rights policy as “a means of projecting U.S. values and reinforcing internationally created human rights norms”).

161. As discussed *infra* in Section III.D., the federal courts may also take judicial notice of human rights practices from these reports.

or category. Some categories reflect direct statutory mandates.¹⁶² For example, in the early years of the mandates, Congress was concerned with acts of “torture or other cruel, inhuman and degrading treatment.”¹⁶³ Under the category of “torture, or other cruel, inhuman and degrading treatment,” the State Department would then be required to place sections of its report dealing with the practices engaged in by the state being examined.¹⁶⁴ By engaging in the factual identification of what constitutes “torture,” the State Department makes a categorical assessment of what kinds of behavior fall within the international definition of torture in the ICCPR and CAT. This “talk” of torture becomes a statement of what the United States believes the standard to be—even in areas where it has, as a matter of treaty law, not consented to having its own actions be bound by international standards. This statement of what the State Department believes international law to require is analogous to the kinds of statements made by courts and other government actors that have been recognized as constituting *opinio juris*.¹⁶⁵

C. Accuracy and Politicization

Early on, the Country Reports were subject to criticism that, because they reflect the policy goals and preferences of particular administrations, they are politicized and inaccurate.¹⁶⁶ As a result, the

162. See *supra* Part II for discussion of statutory mandates. See also U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1986 INSTRUCTIONS CABLE (1986) (on file with author); U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994 INSTRUCTIONS CABLE (1994) (on file with author); U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001 INSTRUCTIONS CABLE (2001) (on file with author).

163. See H.R. REP. NO. 105-480 (1998).

164. *Id.*

165. See KENNETH ANDERSON & BENJAMIN WITTES, SPEAKING THE LAW: THE OBAMA ADMINISTRATION’S ADDRESSES ON NATIONAL SECURITY LAW 6–8 (2015). As an official government document, that is governed by a statute requiring a report based on “international standards,” it is reasonable to view the report as the best and most deliberative statement of what the U.S. government believes the content of particular international human rights standards to be. See also Ashley Deeks, *Statutory International Law*, 57 VA. J. INT’L L. 263, 274–75 (2018) (discussing statutory references that instruct the executive branch to consider whether actions are taken in accordance with international human rights standards).

166. See Margaret E. McGuinness, *Lawyers’ Committee for Human Rights/Human Rights First Critiques of the Country Reports: States and Rights Covered (1978–1996; 2002)* (dataset on file with author). See also Matthew L. Fore, *Shall Weigh Your God and You: Assessing the Imperialistic Implications of the International Religious Freedom Act in Muslim Countries*, 52 DUKE L.J. 423, 451–52 (2002) (finding that the U.S. reports mandated by Congress are politicized by friendly regimes); Steven C. Poe et al., *How Are These Pictures*

Country Reports have been subjected to close scrutiny by foreign governments and non-state actors. This scrutiny has sometimes come in the form of contentious discussions between the State Department and civil society.¹⁶⁷ These interactions have embedded human rights norms and practices more deeply into the reporting functions of the State Department, and prompted efforts to improve the accuracy and fairness of the reporting.¹⁶⁸ Criticism waned over time, as the process of preparing the reports became a regular, carefully managed part of U.S. diplomacy with an internal bureaucratic infrastructure to support the processes of monitoring and reporting. By the mid-1990s, the so-called “shadow human rights report” critiquing the Country Reports and filling in gaps, prepared by the U.S.-based Lawyers’ Committee for Human Rights, was discontinued on the basis that the State Department had become more accurate and even-handed in its treatment of friends and foes.¹⁶⁹

The reports came to be relied on not because they were considered impartial and complete. Indeed, some of the early criticisms remain valid that, at least in tone and framing, the United States tends to filter bad acts by friendly states and to overstate claims of abuse by unfriendly states.¹⁷⁰ Nonetheless, they came to be relied on because of a lack of any alternative source. They were, for many years, the only game in town. The publication of the reports reflected the scope of U.S. diplomatic power and its capacity to monitor human rights practices everywhere—far outstripping, for many years, the capacity of the UN and regional human rights institutions.

Before the periodic self-reporting requirements of the ICCPR, ICESCR, and other UN treaties were in place, and well before the UN Human Rights Council adopted the Universal Periodic Review process in 2007, the United States was regularly and systematically preparing

Different? A Quantitative Comparison of the US State Department and Amnesty International Human Rights Reports, 1976–1995, 23 HUM. RTS. Q., 650, 650–51 (2001) (asserting that the United States Human Rights Reports are biased towards U.S.-friendly regimes and overly critical of unfriendly regimes).

167. Interview with Senior Officials, *supra* note 110.

168. *Id.*

169. The Lawyers’ Committee for Human Rights (later Human Rights First) published its first critique of the Country Reports in 1978 and its last in 1996. One exception was a special report issued by Human Rights First reviewing the 2002 Country Reports on particular countries in light of counter-terrorism measures undertaken by the United States after 9/11. The reason for the special shadow report was to “look for evidence that country reports either omitted or provided a positive gloss on abuses taken in the name of counter-terrorism.” LAWS’ COMM. FOR HUM. RTS., HOLDING THE LINE: A CRITIQUE OF THE DEPARTMENT OF STATE’S ANNUAL COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, at i–ii (2003).

170. McGuinness, *supra* note 166.

reports about human rights conditions in every UN member state. Consistent with the view of reporting as part of *foreign* policy, the United States did not prepare reports on itself—a fact which became a central motif of criticism of the reports from state and non-state actors alike.¹⁷¹ But the United States reported on all other states and measured their compliance with rights across a growing spectrum of rights.¹⁷² No other systematic, periodic, and global reports by an official entity—national government or international organization—were available prior to the adoption of the UPR process. Further, when human rights treaty bodies required reporting about the practices of member states, the only systematic reporting was self-reporting: the submission of reports by state parties describing their compliance with the obligations under the treaties.¹⁷³ Independent reporting on human rights situations in particular states remains largely ad hoc within international organizations.¹⁷⁴

The reports have been treated—by courts, by foreign governments, by NGOs—as generally accurate because of their systematic method of production and the lack of alternatives.¹⁷⁵ Competing

171. Interview with Senior Officials, *supra* note 110. The Lawyers Committee for Human Rights, later Human Rights First, was the leading NGO critic of the politicization of the Country Reports. *See, e.g.*, LAWS' COMM. FOR HUM. RTS., CRITIQUE: REVIEW OF THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1989, at 2–9 (1990). *See also* McGuinness, *supra* note 151.

172. The 1977 United States Country Report on Human Rights included 105 country reports, and in 2019, the report included 185. Notably, however, the U.S. reports did not include the core economic and social rights as enumerated in the ICESCR. Margaret E. McGuinness, State Department Country Reports: States and Rights Covered (1977–2019) (dataset on file with author). *See infra* Part III.

173. *See, e.g.*, International Covenant on Civil and Political Rights art. 40, Dec. 16, 1966, 999 U.N.T.S. 171 (reporting requirement). *See also* Creamer & Simmons, *supra* note 22, at 35. For a summary of the regional reporting (Council of Europe) and more limited UN reporting (thematic and selective) that was in the early 2000s, prior to the creation of the UN Human Rights Council and adoption of the Universal Periodic Reporting Requirement, see AUSTRIAN RED CROSS, RESEARCHING COUNTRY OF ORIGIN INFO: A TRAINING MANUAL (2004), https://www.coi-training.net/site/assets/files/1031/en-coi_manual_part_i_plus_annex_20060426.pdf [<https://perma.cc/RH6S-DLT3>].

174. This is changing with the expansion of the Special Procedures at the new UN Human Rights Council, but it is well short of a universal approach to “outside” reporting. The ability of NGOs and other states to comment on the UPRs filed by member states creates a record from which more independent and objective assessments of human rights behavior might be made. *See* OFF. U.N. HIGH COMM’R FOR HUM. RTS., SECRETARY-GENERAL’S REFORM AGENDA (2002), <https://www2.ohchr.org/english/bodies/chr/special/reform.htm> [<https://perma.cc/ZD3W-JTDB>].

175. *See* Creamer & Simmons, *supra* note 22, at 35 (claiming that reports are accurate despite nations like the U.S. filtering unfavorable actions by allies and overstating abuses by unfriendly nations). *See also* Interview with Senior Officials, *supra* note 110; Michael H.

reports prepared by global NGOs, in particular the annual report prepared by Human Rights Watch and Amnesty International, have emerged as important non-state sources and reporting.¹⁷⁶ But the U.S. Country Reports remain, for now, widely read and cited, including by NGOs and international and regional human rights institutions.¹⁷⁷

D. Monitoring and Reporting in International Lawmaking

The ways in which the United States—through the language of the congressional reporting mandates and the interpretation of that language by the State Department—reports on human rights problems in foreign states has informed other processes of international and domestic law, in ways not envisioned under the original congressional mandates.¹⁷⁸ A significant example is the role it has played in refugee and asylum claims. The United States is a party to the 1951 Refugee Convention (through the 1967 Protocol).¹⁷⁹ Under the implementing statute, the Refugee Act of 1980,¹⁸⁰ the Departments of Justice and, later, Homeland Security were required to apply the standard of a “well-founded fear of persecution on account of religion (or race, nationality, membership in a particular social group, or political opinion).”¹⁸¹ Litigants on both sides of asylum adjudications (asylum seekers and the U.S. government) have sought authoritative sources to prove or disprove membership in particular categories of persons

Posner, *Response to Harold Koh's Childress Lecture—A United States Human Rights Policy for the 21st Century Respondent*, 46 ST. LOUIS U. L.J. 411, 413 (2002) (“Over time . . . the State Department’s reporting improved dramatically.” But “challenges also remain in maintaining the high quality and reliability of the Country Reports . . .”).

176. Human Rights Watch began its annual global report in 1990. Amnesty International issued its first report on a group of political prisoners in 1962, but did not publish comprehensive annual reports on global human rights practices until the 1990s.

177. Margaret E. McGuinness, *Country Report Citations by NGO, IHR Courts, and Commissions* (dataset on file with author) (tracking citations to the Country Reports by Human Rights Watch, Amnesty International, UN Human Rights Council—and its earlier iteration, the UN Human Rights Commission—the European Court of Human Rights, and the Inter-American Court of Human Rights).

178. Later amendments to the human rights mandates explicitly understood the developing asylum jurisprudence that relied on State Department Reporting. *See supra* Section II.A. *See also* Interview with Senior Officials, *supra* note 110.

179. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol of 1967, Apr. 10, 1967, 606 U.N.T.S. 7. The United States became a party to the Protocol in 1968.

180. Refugee Act of 1980, 8 U.S.C. § 1101–07, 1157–59, 1521–24 (2018).

181. *See, e.g.*, H.R. REP. NO. 105-480, pt. 1, at 20 (1998); H.R. REP. NO. 104-478, pt. 2, at 136 (1996).

protected under the Refugee Act. The Country Reports have served as one important source. Even before reaching courts, administrative determinations made by the Department of Homeland Security (“DHS”) and Immigration and Customs Enforcement (“ICE”) may use Country Reports as admissible statements of facts about conditions in particular countries to assess credibility of asylum claims.¹⁸² DHS draws on the report to support the government’s position in asylum and other human rights-related claims.¹⁸³ Under the International Religious Freedom Act, immigration officers are specifically empowered to draw from the reports in assessing claims for religious persecution.¹⁸⁴

Under the Federal Rules of Evidence,¹⁸⁵ immigration judges may, and frequently do, take judicial notice of the Country Reports in determining treatment of particular social and other protected groups under the 1980 Refugee Act.¹⁸⁶ Between 1980 and 2017, over 4,000 reported federal asylum cases discussed the State Department Country Report as evidence of human rights conditions in the country of origin

182. 8 C.F.R. § 208.12 (2020). An asylum seeker’s initial interaction with the United States government is with Customs and Border Protection (“CBP”). Pursuant to U.S. Code, CBP officers and border patrol agent roles are governed by the U.S. Immigration and Nationality Act. *See* 8 U.S.C. § 1357(a)(3) (2018). Initial intake interviews are performed by immigration officers, who can be either Immigrations and Customs Enforcement (“ICE”) or CBP officers. *See* 8 C.F.R. § 235.3 (2020). While CBP’s legal authority focuses on border enforcement, and ICE enforces immigration laws in the interior of the country, those lines have become blurred. *See* Anna Giaritelli, *Trump Administration to Give Border Patrol Agents Authority to Decide Asylum Claims on the Spot*, WASH. EXAM’R (May 2, 2019, 2:30 PM), <https://www.washingtonexaminer.com/news/trump-administration-to-give-border-patrol-agents-authority-to-decide-asylum-claims-on-the-spot-sources> [https://perma.cc/A5FT-95KF].

183. *See, e.g., Humanitarian-Based Immigration Resources*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/humanitarian-based-immigration-resources> [https://perma.cc/J6AJ-DCW7] (listing the Country Reports as “additional government resources”).

184. *See* 8 C.F.R. § 235.3 (2020). “In deciding an asylum application, or in deciding whether the alien has a credible fear of persecution or torture pursuant to § 208.30 of this part, or a reasonable fear of persecution or torture pursuant to § 208.31, the asylum officer may rely on material provided by the Department of State, other USCIS offices or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions.” 8 C.F.R. § 208.12(a) (2020). “A country or geographic area may be suspended from the Guam-CNMI Visa Waiver Program if that country or geographic area is designated as a Country of Particular Concern under the International Religious Freedom Act of 1998 by the Department of State.” 8 C.F.R. § 212.1(q)(3)(ii) (2020).

185. FED. R. EVID. 201 (codifying rules for judicial notice). The Federal Rules of Evidence guide, rather than direct, the admission of evidence in administrative hearings. Administrative Law Judges may exercise discretion in excluding evidence that is immaterial, irrelevant, or repetitive. Article I judges require administrative notice, whereas Article III judges mandate the use of judicial notice. 29 C.F.R. § 503.44(b) (2020).

186. Refugee Act of 1980, 8 U.S.C. § 1100 (2018).

as part of assessing an asylum-seeker's well-founded fear of persecution.¹⁸⁷ Some federal judges have worried about the great deference to, and potential overreliance on, the Country Reports in asylum cases.¹⁸⁸ The Country Reports can be either a boon or bane to asylum seekers: reports often corroborate an asylum seeker's claims of persecution based on their group membership. For those contesting a government denial of asylum, they can serve as a form of unofficial "judicial estoppel," preventing the Department of Justice from arguing facts contrary to official findings by the State Department.¹⁸⁹ Where a Country Report contradicts claims of an asylee, it bolsters the DOJ position in the face of contrary evidence by the claimant.¹⁹⁰

The Country Reports have thus become a recognized institutional feature of asylum claims in the United States, directly influencing asylum jurisprudence in the federal courts. Perhaps more remarkable is the influence they have had on asylum jurisprudence outside the United States. In Canada, for example, between 1985 and 2017, 792 reported immigration cases assessing either asylum claims or stays of deportation explicitly cited the State Department Country Reports

187. Between 1980 and 1985, only six asylum cases (out of 134) referenced the Country Reports. Six cases (out of 172) discussed the reports between 1985 and 1990; 203 cases (out of 1,152) between 1990 and 2000; 2,445 (out of 16,719 cases) between 2000 and 2010; and 1,405 cases (out of 7,177) between 2010 and 2017. Margaret E. McGuinness, U.S. Federal Courts Asylum Cases Dataset of Citations to Country Reports (1980–2019) (dataset on file with author). A review of the case law demonstrates the increased use of the reports over time, as the reports expanded in depth and breadth of its coverage of country practices. A full analysis of the Trump administration era has not been completed.

188. Judge Richard Posner has been a particular critic of the "overreliance" on the reports, noting that they are "anonymous" and therefore restrict the ability of asylum seekers to cross-examine them, *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) (citing *Gailius v. INS*, 147 F.3d 34, 46 n.7 (1st Cir. 1998)), and expressing the "perennial concern that the Department softpedals human rights violations by countries that the United States wants to have good relations with." *Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997).

189. Thanks to Carlos Vasquez for this insight. Judicial estoppel generally refers to the doctrine that a party may be estopped from arguing contradictory positions in different proceedings. Here, the logic would be extended to prevent the Executive from arguing contradictory positions regarding the human rights conditions in a particular country in: (1) an inter-governmental report pursuant to statute, and (2) a later-in-time federal court immigration proceeding.

190. The near-total deference by federal courts to the findings of these reports is not always welcome by asylum advocates. See Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J.L. & SOC. POL'Y 1, 5 (2007) (lamenting that "country conditions reports, regardless of their comprehensiveness or veracity, may be fatal to an asylum application where those reports contradict the asylum seeker in virtually any way").

in assessing human rights conditions in the country of origin.¹⁹¹ During that same time period in Australia, 510 reported cases cited the State Department Country Reports in immigration claims.¹⁹² And at least ninety-eight reported U.K. cases between 1990 and 2017 cited to the reports.¹⁹³ The process of taking judicial notice of facts from the reports has the effect of transmogrifying an executive-congressional reporting function, intended to serve as a mechanism of shared foreign policymaking and oversight of foreign appropriations within the U.S. government, to a set of documents with legal valence, used in the adjudication of human rights claims across a number of jurisdictions.¹⁹⁴

E. Norm Integration Feedback Loop

From the beginning, the Country Reports have generally been welcomed by local and international NGOs and human rights activists working on the ground in states where government human rights abuses have been criticized by the State Department.¹⁹⁵ Likewise, they have generally been unwelcome by the governments subject to the criticism.¹⁹⁶ As part of the general critique that the United States filters

191. See Margaret E. McGuinness, Country Reports in Foreign Court Asylum Cases: Canada, Australia, United Kingdom (dataset on file with author).

192. *Id.*

193. *Id.*

194. Additionally, the application of judicial notice to the reports is considered by some an improper shift of judicial fact-finding from the courts to the State Department. Walker, *supra* note 190, at 7, 7 n.51 (citing *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) (stating that “it was improper for the [Board of Immigration Appeals] to rely on the State Department’s opinion in finding the petitioner not credible because it is the Attorney General, not the Secretary of State, whom Congress has entrusted with the authority to grant asylum”) (internal brackets and quotations omitted)).

195. For example, an April 19, 2006 cable from Embassy Freetown to the State Department summarizing the reaction to the 2005 Country Report on Human Rights for Sierra Leone noted that at a parliamentary forum on human rights, many individual and NGO participants were “supportive of the report’s criticisms (especially women)” *Sierra Leoneans React to Human Rights Report*, WIKILEAKS (Apr. 19, 2006), https://wikileaks.org/plusd/cables/06FREETOWN322_a.html [<https://perma.cc/4Z4K-7UE9>]. In contrast, “others, especially the Attorney General [of Sierra Leone], expressed frustration at what they viewed as unfair condemnation.” *Id.* Press coverage of the reports was generally supportive of the conclusions and criticisms of the Sierra Leone government. *Id.*

196. The pushback and formal objection to the reports generally takes place in those countries where there are serious human rights abuses and weak legal protections for claims in the domestic legal system. One prominent example is China, which for the past decade has issued an annual rebuttal to the U.S. Country Report, as well as a report on human rights conditions in the U.S. The China report is called “The Human Rights Record of the United States” and has been published as a rebuttal since 2003. See, e.g., *Full Text of Human Rights*

out the worst abuses of its allies, NGOs and others criticize the ways in which the reports fall short and fail to include practices that rise to the level of violations of international human rights norms.¹⁹⁷ Many of the activists, NGOs, and local government officials who respond to the reports are frequently also among the many first-person sources of the embassy officials who draft the report.¹⁹⁸ Thus, on the ground, the reports are influenced by both local and international civil society perspectives on the rights situation in the particular country being monitored.¹⁹⁹ The central reporting process, controlled at the State Department, is also subject to lobbying efforts by NGOs and broader civil society, and, through the regional bureaus, the views of the governments that are the subjects of the reports.

The reports are thus part of a continual feedback cycle of human rights policy and norm elaboration.²⁰⁰ The reports have become an entrenched part of international human rights law processes; at the same time, they invoke the law and norms developed by the international human rights system to determine whether states are meeting international human rights standards. Findings from U.S.-prepared

Record of the United States in 2010, XINHUA NEWS AGENCY (Apr. 10, 2011, 10:48 PM), https://web.archive.org/web/20131029151313/http://news.xinhuanet.com/english2010/china/2011-04/10/c_13822287.htm [<https://perma.cc/2CME-BA84>].

197. For the shadow reports process, see LAWS.' COMM. FOR HUM. RTS., *supra* note 169, at 2–9.

198. Reporting is generally protective of local activists and NGOs, referring to them under general descriptions, without naming them, while naming transnational NGOs that may be protected from retaliation from the national government. *See, e.g.*, U.S. DEP'T STATE, ALGERIA 2016 HUMAN RIGHTS REPORT 36 (2016). Under the title “*Press and Media Freedoms*,” the report states that “[a]ccording to the NGO Reporters without Borders, private advertising existed but frequently came from businesses with close links to the ruling political party.” *Id.* at 12. In the same section discussing others raising concerns about press freedoms, it refers to “nongovernmental sources,” “activists and journalists,” and “[s]ome observers.” *Id.* at 12–15.

199. The Foreign Affairs Manual contemplates the role of civil society in the work of the DRL Bureau. *See* U.S. DEP'T STATE, 1 FOREIGN AFFS. MANUAL 512.1: PRINCIPAL DEPUTY ASSISTANT SECRETARY (DRL/PDAS) (2020) (“The Principal Deputy Assistant Secretary meets with Congress, nongovernmental organizations (NGOs), and the private sector . . .”); U.S. DEP'T STATE, 1 FOREIGN AFFS. MANUAL 513: SPECIAL ENVOY FOR THE HUMAN RIGHTS OF LGBTI PERSONS (2020) (The Special Envoy for LGBTIQI rights “[e]ngages in discussions with foreign government officials and representatives of nongovernmental organizations (NGOs) regarding the human rights of LGBTI persons”). *See* U.S. DEP'T STATE, 1 FOREIGN AFFS. MANUAL 514: SENIOR ADVISOR TO THE ASSISTANT SECRETARY (2020) for additional references to requirements to work with NGOs and civil society. *See also* U.S. DEP'T STATE, 1 FOREIGN AFFS. MANUAL 516: BUREAU OFFICES (2020).

200. *See* Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POLS. 595, 597 (1993).

human rights reports are cited in the work of international human rights bodies, including courts, commissions, and treaty committees.²⁰¹ They are also used as sources in the reporting of the major international human rights NGOs.²⁰² The reports prepared by international human rights institutions and NGOs inform the monitoring and fact-finding done by embassies and the DRL Bureau that serve as source material for the Country Reports. In addition to gathering information from local sources, embassy reporting officers are instructed to review and cite to the work of international NGOs, regional and international human rights courts, and international human rights bodies.²⁰³ The U.S. reporting process thus both informs and is informed by the process of norm elaboration and application within international human rights institutions, domestic legal systems, and the networks of NGOs that make up the international human rights system.

This feedback cycle also includes Congress, as evidenced in subsequent statutory amendments that explicitly reference laws, norms, and standards emerging from the UN and other international human rights institutions.²⁰⁴ This entrenchment of the United States as an active participant in international norm elaboration is quite remarkable for being an unintended consequence of the original legislation. In the next Part, I address the divergence of the monitoring and reporting processes from the original purposes of the general

201. See Margaret E. McGuinness, International Human Rights Courts, Human Rights Treaty Committees and Human Rights Commissions Citation to State Department Country Reports (dataset on file with author).

202. See Margaret E. McGuinness, NGO Citation to State Department Country Reports (2014) (dataset on file with author). See also Amnesty Int'l, *Nigeria: Trapped in the Cycle of Violence* AI Index AFR 44/043/2012 (Nov. 1, 2012) (citing U.S. DEP'T STATE, 2011 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES – NIGERIA (2012)); Hum. Rts. Watch, *Ten Long Years: A Briefing on Eritrea's Missing Political Prisoners* (Sept. 22, 2011) (citing U.S. DEP'T STATE, 2002 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES – ERITREA (2003)), <https://www.hrw.org/report/2011/09/22/ten-long-years/briefing-eritreas-missing-political-prisoners> [<https://perma.cc/YM6G-675J>].

203. See Margaret E. McGuinness, State Department Country Reports Citation to NGO Reporting (dataset on file with author). See also Telegram from the Dep't of State, *supra* note 155. This early instruction cable instructed posts to: “consult” reports by “responsible [NGOs] such as Amnesty International, the International Commission of Jurists and the International League of Human Rights,” as well as international organizations such as the “Inter-American Commission on Human Rights, the UN Human Rights Commission, the European Human Rights Commission, the International Labor Organization, and UNESCO” which “should be quoted when that is a good way to make a point.” *Id.* The instructions went on to say that “[c]ountry reports will be compared with NGO and other reports, and we need to be sure our reports take adequate account of what has been said in the other reports.” *Id.* See also McGuinness, *supra* note 155.

204. See *supra* Part II for discussion of amendments to the statutory framework.

mandates. I also draw preliminary conclusions about the future of U.S. human rights reporting and its role in U.S. participation in international human rights legal regimes. I also note the ways in which the record of the congressional mandates suggests additional avenues for research into understanding the role of human rights diplomacy in human rights governance.

IV. THE STICKINESS OF HUMAN RIGHTS REPORTING

The original purpose of congressional human rights legislation was to apply the coercive power of the purse to halt U.S. government support of regimes that engaged in severe human rights abuses and to express support for human rights as a core element of U.S. foreign policy.²⁰⁵ As several scholars have noted, the general legislative framework set up by Congress was intended as a default sanctions mechanism—a “carrots and sticks” approach through which bad actors would be punished by denials of U.S. assistance and good actors would be rewarded.²⁰⁶ That original, general approach, which sought to impose automatic cut-off of aid to states that did not meet the statutory standard of rights compliance, had little direct or immediate effect on U.S. humanitarian or military aid practices.

First, the statutory waiver provisions, through which the President could override conditions on aid in cases of real economic need or national security, delegated considerable authority to the executive branch over ultimate funding decisions.²⁰⁷ During the Carter administration, for example, security assistance was cut off in only eight cases, all in Latin America.²⁰⁸ Some of the cases were actually the result of the foreign state rejecting human rights conditions attached to the aid (as with early cases of Uruguay and Argentina); in other cases, it was unclear whether the decision to cut off military assistance was based solely on rights concerns, or some combination of other national security interests, since neither Congress nor the President formally

205. *See id.*

206. *See* Cleveland, *supra* note 150, at 42–43; Carleton & Stohl, *supra* note 42, at 206–07; Weissbrodt, *supra* note 43, at 241.

207. McGuinness, *supra* note 16, at 24–27 (discussing waiver provision of the congressional mandates).

208. Carleton & Stohl, *supra* note 42, at 215–16.

invoked the statutory triggers under the Foreign Assistance Act.²⁰⁹ Later presidential practices followed a similar pattern.²¹⁰

Second, in response to the waiver exceptions in the general legislation, Congress has tended to adopt targeted legislation tailored to the policy considerations and conditions in the particular aid-recipient states whose behavior Congress has sought to punish, or, in the case of non-aid recipient states, impose other forms of unilateral sanctions.²¹¹ As a result, there appears to be no evidence that an assistance package requested has ever been denied *solely* on the basis of failing to meet the human rights conditions laid out in the general human rights provisions of the foreign or military assistance statutes. Presidents, at the end of the day, decided sanctions under the general provisions. Congress decoupled states of particular interest from the general monitoring and reporting provisions.

While human rights sanctions policy became decoupled from human rights monitoring and reporting, academic attention focused on the effectiveness of aid conditionality on improved human rights practices. Empirical studies completed in the 1980s and 1990s found that Congress's attempt to place human rights at the center of U.S. policy through the general condition on aid failed to achieve the articulated goal of limiting aid in cases of "gross violations" of rights.²¹² Following the adoption of the human rights conditionality and reporting requirements, aid generally continued to flow to friendly governments, regardless of human rights practices.²¹³ This was found to be the case in both the Ford and Carter administrations, contrary to public perception and the purported focus of the Carter administration on human rights behavior.²¹⁴ Further, the countries for which the reporting

209. *Id.* at 216.

210. Meyer, *supra* note 111, at 91–92 (discussing Reagan administration).

211. For examples of country-specific targeted legislation, see McGuinness, *supra* note 16, at 22–23. For a discussion of the turn to targeting individuals as a form of sanction or punishment within U.S. national security law, see Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1077–78 (2020).

212. See discussion *supra* Section II.A.

213. Defining and measuring human rights compliance for the purpose of quantitative analysis necessarily requires making a judgment on the content of international human rights obligations. One early study concluded that aid tended to go to governments that were more repressive, the opposite of what Congress intended. Lars Schoultz, *U.S. Foreign Policy and Human Rights Violations in Latin America: A Comparative Analysis of Foreign Aid Distributions*, 13 COMP. POL. 149, 167 (1981).

214. Michael Stohl et. al., *Human Rights and U.S. Foreign Assistance from Nixon to Carter*, 21 J. PEACE RES., 215, 223–24 (1984). For a summary of the empirical studies of the 1980s, see Steven C. Poe, *Human Rights and US Foreign Aid: A Review of Quantitative Studies and Suggestions for Future Research*, 12 HUM. RTS. Q. 499, 502 (1990). Poe

requirement was intended to support “constructive engagement” continued to be associated with bad human rights behavior.²¹⁵

These studies were not without their criticisms, including the subjective question of how to measure the dependent variable of “human rights compliance/noncompliance” as part of a quantitative empirical study.²¹⁶ Nonetheless, the conclusions of these early studies, that short-term policy and behavioral changes aimed at targeted states had little to no effect on improving human rights practices, seem to track general assessments, including of NGOs, regarding the human rights record of states receiving U.S. aid. These studies did not, however, seek to measure the effect of congressional reporting requirements on norm internalization in the U.S. government (within the executive branch, Congress, or the courts), the long-term effects of the mandates on the structures of diplomacy, or their effect on the growth and development of international human rights law and governance.²¹⁷ With reporting mandates decoupled from sanctions law and practices, it is worth considering why Congress continually added to the reporting functions and burdens.

A. Not-so-“Cheap Talk”

Given the real costs of human rights reporting on U.S. foreign policy resources, one might expect a Congress that is hostile to U.S. participation in international human rights treaty regimes to take the budget axe to human rights mandates. But the legislative history shows a consistent pattern—through Democratic- and Republican-controlled Congresses alike—of adding to reporting requirements and expanding the number of diplomats designated to specific human

concludes that only one study found a positive correlation between human rights concerns and actual policy effects. *Id.* at 500.

215. Cingranelli & Pasquarello, *supra* note 43, at 560–62.

216. See Poe, *supra* note 214, at 509–10. But see BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 11–12 (2009).

217. One exception is a qualitative empirical study completed by Ted Maynard and a group of attorneys from the law firm Paul, Weiss in early 1989, which tracked the developments within the human rights bureaucracy at the State Department through interviews with former State Department officials. Edwin S. Maynard, *The Bureaucracy and Implementation of US Human Rights Policy*, 11 HUM. RTS. Q. 175, 219–24 (1989). It described the institutionalization of a process of bureaucratic conformity with congressional mandates. *Id.* This was true even within the Reagan administration, which had demonstrated overt hostility to placing human rights on the foreign policy agenda. *Id.* at 224. This was despite the Reagan administration’s “tracking” of countries reported on by categorizing them as “friendly, neutral, or hostile.” *Id.*

rights reporting duties.²¹⁸ Even as the ideology of presidents has swung from skepticism about human rights considerations to a full embrace of the centrality of human rights to U.S. interests and back again, the State Department has consistently devoted resources to human rights reporting and has taken seriously the work of drafting accurate and comprehensive reports.²¹⁹ What makes monitoring and reporting “sticky”? Why have the mandates persisted?

The clearest answer to the persistence questions is that the mandates may reflect a genuine expressive and aspirational commitment to the ideals of human rights, viewed through the lens of U.S. politics.²²⁰ The persistence of the congressional mandates and their full integration into the work of the executive branch may also lie, paradoxically, in the decoupling of the mandates from their original, failed purpose to create general conditions on aid. The shift in purpose allowed members of Congress to add issues to human rights reporting coverage that helped them meet a domestic political constituency, while incurring no political cost that might be associated with efforts to actually constrain presidential foreign policy prerogatives. The State Department and Congress were cognizant of the shift in purpose, fully embracing the independent valence of the reports as a dimension of human rights governance.²²¹ The Country Reports stand apart and on their own; they have transformed from an internal report from one political branch to another for limited purposes of assessing compliance with statutory purposes, to a free-standing assessment by the United States of global human rights conditions. The “submission” of the annual Country Reports from the State Department to Congress has become the global “publication” of the annual Country Reports.

The independent valence of the reports is displayed each spring when the State Department, in anticipation of the impact of the reports, coordinates the publication with embassies around the world and delivers a message conveying the American commitment to human rights from the Secretary of State.²²² States receiving low marks from the

218. Meyer, *supra* note 111, at 72–73; Sargent, *supra* note 39, at 136 (“[H]uman rights made ideological claims to which both Republicans and Democrats could subscribe.”).

219. *See id.* *See also* Interview with Senior Officials, *supra* note 110; Posner, *supra* note 175, at 412–13 (noting the work of the Lawyers’ Committee and other NGOs to engage with the State Department in ways that improved accuracy and reliability of the Country Reports).

220. *See* discussion of the statutory origins *supra* Part II.

221. Interview with Senior Officials, *supra* note 110.

222. For an example of the pomp and circumstance of the rollout of reports, see Hillary Rodham Clinton, U.S. Sec’y of State, Remarks on the Release of the 2011 Human Rights Report (May 24, 2012), <https://2009-2017.state.gov/secretary/20092013clinton/rm/2012/05/190826.htm> [<https://perma.cc/N88Z-XAB3>]. The rhetorical shift in the Trump administration

United States prepare for the date of publication with rebuttals (and, in the case of China, with a counter-report, condemning the United States for its own human rights shortcomings) and rhetorical defenses.²²³ The act of contestation in the receiving states may itself be evidence of the power of the report to engage the rights abusers on questions about their own human rights practices. Moreover, there is some evidence to suggest that the reports lend legitimacy to and embolden political dissidents and human rights activists in reported-on states.²²⁴ The publication and reaction to the reports reveal that their impact is felt well beyond Congress.

Decoupled as they now are from conditions on development and military assistance, the Country Reports might, therefore, be dismissed as merely expressive “signaling,” permitting the United States to express a commitment to human rights behavior in particular states, while acting on other considerations when distributing assistance to those very states. Statements by governments condemning—in moral or legal terms—the conduct of others, without apparent policy consequences, have been dismissed by some scholars as precisely the kind of “signaling” or “cheap talk” that falls far short of normative commitments particular to international law.²²⁵ But as Abram and Antonia Chayes have argued, “jawboning” about other states’ behavior and non-compliance with norms itself constitutes a form of management within the international system, and should not be dismissed as mere

was to reframe the reporting within a particular lens of “unalienable rights,” but the reporting itself continued as required by the CHRMs. Michael R. Pompeo, U.S. Sec’y of State, Remarks to the Press on the Release of the 2019 Country Reports on Human Rights Practices (Mar. 11, 2020), <https://2017-2021.state.gov/secretary-michael-r-pompeo-on-the-release-of-the-2019-country-reports-on-human-rights-practices//index.html> [<https://perma.cc/529K-Q24Z>].

223. See, e.g., *Full Text of Human Rights Record of the United States in 2010*, *supra* note 196.

224. Examples can be seen more generally in the role of civil society and NGOs in the Universal Periodic Review Process at the UN Human Rights Council, which has created a more formal mechanism for local and transnational NGO engagement directly with states. See, e.g., *Summary of Stakeholder Submissions on the United States of America*, U.N. Doc. A/HRC/WG.6/36/USA/3 (Mar. 6, 2020), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/062/28/PDF/G2006228.pdf?OpenElement> [<https://perma.cc/8L7A-7YDY>].

225. For a comprehensive discussion of “signaling” and “cheap talk,” see Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. S115, S119 (2002). See also John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1741 (2009); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 12–13, 59–60 (2008); Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORG. 689, 689 (2008).

“cheap talk.”²²⁶ Rather, the talk itself can affect the behavior of the state being shamed, as well as the state doing the shaming. The reports, separated from the underlying policy, have independent valence as a device for shifting state behavior.²²⁷

B. Path Dependency and Reform

The international system of governance within which these unilateral human rights reports operate has changed considerably since the 1970s. In the intervening decades, the international human rights regime has grown from infancy into adolescence. But it is not yet a fully mature system. The human rights governance system is unwieldy and sprawling but also incomplete. The system may be more effective where there are regional arrangements—as in Europe and the Americas—than in those places with a weak or no regional system left to rely on UN treaties or institutional mechanisms for oversight and enforcement. Nonetheless, despite recent declarations of the “end times,” the international human rights project has progressed.²²⁸ This progress has created multiple sources of outside scrutiny of particular states’ human rights practices—including opportunities for binding adjudication and enforcement of rights. Furthermore, since the end of the Cold War, there has been an expansion of states that incorporate the central human rights norms into their national constitutions and laws, opening up additional avenues for applying international human rights law to address claims at the domestic level.²²⁹ The jurisprudence of international human rights has grown apace.

Against this backdrop, unilateralism not only seems out of place, but may, in fact, carry affirmative costs for the United States. By aggressively pursuing unilateral judgment of foreign practices—while rejecting the same judgments on U.S. practices by remaining outside of treaties—the United States risks complete rejection, disengagement, and, in light of current human rights crises at

226. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 25–26 (1997).

227. For a full empirical examination of the effect of “naming and shaming” on state human rights practices, see Emilie M. Hafner-Burton, *supra* note 225, at 689.

228. SIKKINK, *supra* note 14, at 26 (responding, comprehensively, to critics of the human rights movement and noting that “human rights law, institutions, and movements have been far more effective than they are often given credit for”).

229. Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 207–09.

home, more resonant accusations of hypocrisy.²³⁰ The answer to these critiques is not to remove human rights practices from the foreign policy agenda. Nor is the answer for a President to engage in ideological or partisan projects to redefine the scope of rights to be considered.²³¹ Indeed, the efforts by the Trump administration to redefine international human rights through the creation of the State Department Advisory Commission on Unalienable Rights, whose purpose was to assert a particular hierarchy of international human rights purportedly rooted, like the congressional mandates, in the UHDR, is evidence that the mandates have been successful in making the role of human rights in U.S. foreign policy more durable. A more effective approach may be to coordinate external human rights reporting more closely with the

230. Following the killing of George Floyd and the subsequent special session of the United Nations Human Rights Council to consider police violence and race discrimination in the United States in the summer of 2020, the charge of hypocrisy has grown louder. See Press Release, Office of the High Commissioner, Statement on the Protests Against Systemic Racism in the United States (June 5, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25927&LangID=E> [<https://perma.cc/9SNR-MN6A>]; see also Coalition Letter to Members of the United Nations Human Rights Council, Request for the Convening of a Special Session on the Escalating Situation of Police Violence and Repression of Protests in the United States (June 8, 2020), <https://www.aclu.org/letter/coalition-letter-request-un-independent-inquiry-escalating-situation-police-violence-and?redirect=letter%2Fcoalition-letter-request-un-investigation-escalating-situation-police-violence-and-repression> [<https://perma.cc/9ZU9-7LHD>] (requesting an independent inquiry into the escalating situation of police violence and repression of protests in the United States) [hereinafter June 8, 2020 Coalition Letter].

231. Caitlin Oprysko, *Mike Pompeo Unveils Panel to Examine 'Unalienable Rights.'* POLITICO, <https://politi.co/2NGeCXA> [<https://perma.cc/5K6H-T6GC>]. See U.S. DEP'T STATE, REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS (2020), <https://www.state.gov/wp-content/uploads/2020/08/Report-of-the-Commission-on-Unalienable-Rights.pdf> [<https://perma.cc/K5ZS-UM2T>]. For critiques and opposition to this report, see Rob Berschinski & Reece Pelley, *Why We Oppose the Pompeo Commission on Unalienable Rights' Draft Report*, JUST SEC. (July 30, 2020), <https://www.justsecurity.org/71750/why-we-oppose-the-pompeo-commission-on-unalienable-rights-draft-report/> [<https://perma.cc/UDQ6-BR95>]. In October 2020, the Trump administration signed the Geneva Consensus Declaration, a declaration against women's right to abortion, which operates as a parallel effort to the Unalienable Rights Commission. It explicitly seeks to contest the content of international law within the U.N. and its human rights institutions to reflect the interpretive view of a particular administration. See *Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family* (Oct. 22, 2020), <https://www.hhs.gov/sites/default/files/geneva-consensus-declaration-english.pdf> [<https://perma.cc/Y9K5-6AYD>]; see also Alex M. Azar II, U.S. Sec'y of Health & Hum. Servs., Michael Pompeo, U.S. Sec'y of State, Remarks at the Signing Ceremony of the Geneva Consensus Declaration (Oct. 22, 2020), <https://www.state.gov/secretary-michael-r-pompeo-with-secretary-alex-m-azar-ii-at-the-signing-ceremony-of-the-geneva-consensus-declaration/> [<https://perma.cc/GV62-RSS4>].

reporting and oversight requirements of the international and regional human rights treaty regimes and institutions.

The reporting demands on the State Department have become quite onerous, with some reporting overlapping that of other agencies. The State Department spends resources reporting on states that offer robust legal human rights protection and who are parties to binding supranational regional human rights regimes.²³² It may be challenging, under current bureaucratic conditions, to create alternate means to provide the information presented in the reports to other executive branch agencies and courts that rely on them for decision-making. For courts, the non-official alternatives to the State Department reports (e.g., NGO, academic, and civil society reporting) lack the official imprimatur that enables courts to take formal judicial notice. Nonetheless, there are multilateral sources of human rights fact-finding that could effectively substitute for at least some of the U.S. government human rights reporting for courts and the executive branch.

As a result of joining the ICCPR, CERD, and CAT, albeit with conditions, the United States monitors and reports on its own compliance with international human rights under those treaties' periodic reporting requirements.²³³ When carried out on time and in good faith, treaty self-reporting has the effect of further normalizing international human rights discourse and language in the Department of Justice, in the courts, and other parts of government previously unexposed to international human rights law. As a complement to the congressionally mandated human rights reports, this process effectively internalizes human rights as a necessary dimension of both U.S. internal and external behavior and the behavior of other states.

Gaps between the domestic and international, of course, persist. Despite the move toward human rights adoption at the state and local level, and debates over the use of international human rights norms in American constitutional jurisprudence notwithstanding, international human rights norms are not internalized as formal law governing domestic rights practices. Indeed, recent Supreme Court jurisprudence seems to suggest it is moving in the opposite direction.²³⁴

232. U.S. DEP'T STATE, 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2020), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/> [<https://perma.cc/39GU-5BY4>].

233. See S. TREATY DOC. NO. 100-20 (1990), <https://www.congress.gov/treaty-document/100th-congress/20/resolution-text> [<https://perma.cc/4BJU-2CMK>].

234. Recent Court decisions that effectively "shut the courthouse door" to extraterritorial international human rights claims include cases in which the Court has: (1) limited the extraterritorial application of the Alien Tort Statute, *see* *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124 (2013); and (2) narrowed the scope of personal jurisdiction over foreign

But to the extent that policymakers can be made aware of the deep influence that U.S. congressional mandates and executive branch practice have had on the development of international human rights law, and the role they continue to play in human rights governance, adoption of the language of international human rights law into other aspects of domestic rights practice (including potential adoption of binding human rights treaty obligations) may not be such a large leap from our “exceptional” rights traditions.

What once looked like unilateral human rights “exceptionalism”—under which the United States rationalized judging the human rights behavior of foreign states but not itself—may be slowly eroding as the United States subjects itself to international scrutiny of its rights behavior at the UN and elsewhere. It may also be eroding because U.S. behavior is increasingly scrutinized by the very human rights governance structures whose growth the United States has supported.²³⁵ As the domestic political rationales for and foreign acceptance of human rights exceptionalism wanes, the United States gains more from active multilateral engagement in human rights than from continuing to play a weakened role as unilateral global scold.

The governance story of the congressional human mandates may suggest a path forward. First, they demonstrate that the executive branch is well-integrated into the international human rights system and continues to be well-placed to influence its direction. Second, the effects of the mandates on international human rights governance also suggest that there may be less daylight between how the U.S. reports about the world’s human rights practices, and how, in the era of treaty self-reporting and the Universal Periodic Review under the UN Human Rights Council, it can (or should) report on itself.²³⁶ At least in terms

corporations liable for human rights abuses abroad, *see* *Daimler AG v. Bauman*, 571 U.S. 117, 119 (2014). Similar patterns can be seen in other efforts to apply international law to conduct in the United States, where the Court has: (1) limited the application of international law in interpretation of treaty implementing statutes, *see* *Bond v. United States*, 572 U.S. 844, 846 (2014); and (2) rejected as non-self-executing, international judgments that seek review of capital sentences, *see* *Medellin v. Texas*, 552 U.S. 491, 522 (2008).

235. This trend had begun before the Trump administration but has accelerated during it. For example, the 2020 UN Human Rights Council special session convened to address police violence and anti-Black discrimination in the United States. U.N. Hum. Rts. Council, *Human Rights Council Begins Interactive Dialogue with the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, OHCHR, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26102&LangID=E> [<https://perma.cc/42HC-L5ZW>]. *See also* Statement on the Protests Against Systemic Racism in the United States, *supra* note 230.

236. *See, e.g.*, United States, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, U.N. Doc. A/HRC/WG.6/22/USA/1 (Feb. 13, 2015) (incorporating the language of international human rights into the U.S.

of practice of the two political branches, there is an opportunity for convergence between the U.S. reporting on its own and others' rights practices using the universal language of international human rights law.

C. Human Rights Diplomacy: An Agenda for Research

This Article is intended to provide both a positive account of the operation of the congressional human rights mandates as a mechanism for norm integration in the U.S. government, and of their operation as a form of international human rights governance. As such, it makes no claim about the effect of those norms on human rights conditions, but rather serves to illustrate the influence of human rights diplomacy in defining and elaborating on those norms. The processes of contestation over the content of the norms at the center of U.S. human rights diplomacy—internally with U.S. domestic politics and externally with bilateral and multilateral governance—is the subject of some attention from historians, political scientists, and legal scholars. By making more visible the role of diplomacy in the construction and interpretation of human rights norms and institutional governance, I hope to suggest additional avenues of research for understanding how international human rights law works. These include a more fine-grained understanding of the content of the human rights norms at the center of U.S. human rights diplomacy, how those norms have evolved over time, and the degree of influence of those normative frameworks on the development of international human rights law. Understanding how human rights monitoring and reporting contributes to customary international law raises additional questions regarding the social practice of international human rights diplomacy in law creation.

Identification of the use of the U.S. human rights reports in a myriad of adjudicatory and non-adjudicatory settings raises important questions about their reliability and admissibility for purposes of determining factual and legal claims. These questions apply to other human rights reporting processes and their uses in a particular legal fora.

report: “As a nation founded on the human rights principles of equality under the law and respect for the dignity of the individual, the United States is firmly dedicated to the promotion of human rights.”). *But see* United States, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, 3, U.N. Doc. A/HRC/WG.6/36/USA/1 (Aug. 13, 2020) (framing U.S. human rights practices within a particular interpretation of the U.S. Constitution: “The United States of America is a compound federal republic, in which the power entrusted to government by our people is first divided between two distinct governments [federal and state], and then the portion allotted to each subdivided among distinct and separate departments”) (internal quotations omitted).

Closer examination of the processes and methods of U.S. human rights reporting will be an important contribution to the growing scholarship around human rights fact-finding, including critiques of the use of data and “human rights indicators.”²³⁷ Providing greater transparency about standards applied to fact-finding and legal determinations is important for purposes of determining due process and separation of powers questions within U.S. constitutional law.²³⁸ Such transparency is also important for determining international due process and accuracy questions within international human rights governance. Most important, it can inform debates over measuring the effectiveness of human rights governance over state human rights practices.

Finally, the influence of unilateral human rights mandates as a form of governance raises a persistent legitimacy challenge to international human rights governance, which is worth examining: the question of “clean hands.” The United States has been steadily criticized for judging others, when its own record of human rights protection is less than perfect.²³⁹ The problem of judging rights with unclean hands has led to calls for the United States to focus on problems at home and abandon the project of human rights diplomacy.²⁴⁰ Similar questions haunt human rights governance at the United Nations, where states with records of gross human rights violations are viewed as illegitimate arbiters of human rights compliance.²⁴¹ The international human

237. For a summary of the move toward human rights indicators within the international human rights system, see David McGrogan, *Human Rights Indicators and the Sovereignty of Technique*, 27 EUR. J. INT’L L. 385, 387–91 (2016). See also United Nations, *Human Rights Indicators: A Guide to Measurement and Implementation* (2012), https://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf [<https://perma.cc/3UBH-MEZA>].

238. Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 872–99 (2019) (examining how internal executive branch structures, congressional regulation, and judicial review may be deployed to ensure that presidential fact-finding ensures that the constitutional duties of “honesty” and “reasonable inquiry” are met).

239. Ignatieff, *supra* note 10, at 1, 4–7. See also the discussion of accuracy and politicization *supra* Section III.C.

240. See, e.g., Kelebogile Zvobgo, *Foreign Policy Begins at Home*, FOREIGN POL’Y (Jan. 15, 2021, 10:19 AM), <https://foreignpolicy.com/2021/01/15/human-rights-foreign-policy-domestic/> [<https://perma.cc/HGN9-K4QA>] (calling on the creation of transitional justice mechanisms to address the human rights problems of the Trump era); David Kaye, *America the Unexceptional*, FOREIGN POL’Y (June 10, 2020, 4:57 PM), <https://foreignpolicy.com/2020/06/10/american-exceptionalism-human-rights-democracy-unexceptional/> [<https://perma.cc/6F7V-9F2X>] (arguing for full U.S. membership in and implementation of human rights treaties to address human rights problems at home as a predicate for human rights leadership).

241. Philip Alston, *Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council Feature*, 7 MELB. J. INT’L L. 185, 185 (2006) (proposing criteria for membership of the then-new UNHCR that is “genuinely supportive of its human rights objectives”); UN: *Deny Rights Council Seats to Major Violators*, HUM. RTS. WATCH

rights system has been premised on states' commitment to improvement of behavior, against the norms articulated and elaborated through interstate processes. Participation in human rights governance does not require perfection, but rather perfectibility. Yet, in order for international human rights institutions to live up to the highest ideals of universal state protections of individual human rights, some standards about who monitors and reports human rights, and how they do so, is warranted. Unilateral assertions of U.S. exceptionalism and the exercise of the prerogatives of global power may not be sufficient to warrant unchallenged claims of legitimacy.

APPENDIX: ANNUAL CONGRESSIONAL REPORTING REQUIREMENTS
FOR HUMAN RIGHTS AND DEMOCRACY

Title of Report	Content	Statutory Requirement	Transmit by:
<p>Country Reports on Human Rights Practices</p>	<p>The Secretary of State shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate “a full and complete report regarding the status of internationally recognized human rights, within the meaning of subsection (A) in countries that receive assistance under this part, and (B) in all other foreign countries which are members of the United Nations. The reports cover internationally recognized individual, civil, political, and worker rights, as set forth in the Universal Declaration of Human Rights.</p>	<p>Sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (“FAA”), as amended, and section 504 of the Trade Act of 1974, as amended. Codified in 22 U.S.C. § 2304 and §2151(n).</p>	<p>Feb. 25</p>

International Religious Freedom	Status of religious freedom in each foreign country, government policies violating religious belief, and practices of groups, religious denominations, and individuals, and U.S. policies to promote religious freedom around the world.	Section 102(b) of the International Religious Freedom Act (“IRFA”) of 1998. Codified in 22 U.S.C. § 6412.	Sept. 1
Victims of Trafficking and Violence Protection Act of 2000	Secretary of State submits the annual report to Congress on “severe forms of trafficking in persons.”	Originated in TVPA 2000, codified at 22 U.S.C. § 7107.	June 1
Annual Report on Advancing Freedom and Democracy ²⁴²	State Dept. submits report on U.S. efforts to promote democracy and human rights in nondemocratic	Pursuant to Section 2121 of the ADVANCE Democracy Act of 2007 (P. L. 110-53). ²⁴³	No later than ninety days after submission of the Country Reports on Human Rights

242. “The Annual Report on Advancing Freedom and Democracy shall include, as appropriate –

(1) United States priorities for the promotion of democracy and the protection of human rights for each nondemocratic country and democratic transition country, developed in consultation with relevant parties in such countries; and

(2) specific actions and activities of chiefs of missions and other United States officials to promote democracy and protect human rights in each country.

22 U.S.C. § 8221.

“The Department chose the 106 countries represented after taking into consideration the Act’s definition of a ‘non-democratic country or democratic transition country’ and the requirement that the Department take into account the views of nongovernmental organizations.” U.S. DEP’T STATE, ADVANCING FREEDOM AND DEMOCRACY REPORT 2009 – WESTERN HEMISPHERE, <https://2009-2017.state.gov/j/drl/rls/afdr/2008/wha/index.htm> [<https://perma.cc/934X-YDQH>].

243. Title as enacted, “Implementing Recommendations of the 9/11 Commission Act of 2007,” incorporates provisions from the earlier ADVANCE Democracy Act of 2007, H.R. 982, that was wiped off calendar at end of session.

	countries and countries undergoing democratic transitions worldwide.		
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