

## **Borders and Human Rights – A Paradox**

**William Saunders**

*Catholic University of America*

### *Abstract*

The author considers various ways in which the concept of borders is relevant to an adequate understanding of human rights. He examines the role of nation states in human rights. He takes note of how contemporary claims of human rights could endanger the human rights project by violating the borders implicit in the concept of human rights. He examines the modern human rights foundational documents (such as the Universal Declaration of Human Rights) and the recent report on unalienable rights from the United States.

*Keywords: human rights, borders, Universal Declaration of Human Rights, report of the U.S. Commission on Unalienablgh.*

G. K. Chesterton is widely recognized as the modern master of paradox. He would surely chuckle over what is perhaps today's most interesting paradox – that of the meaning of “human rights.” Is it a chimera, an illusion that changes its content to reflect the political/social preferences of the day? Or, is it an expression of objective truths? Can it be both at the same time? We will return to that question at the end of this essay. However, let us begin by an historical consideration of human rights. While the question of “rights” has a long history – tracing back to the Enlightenment as well as the ancient religious and philosophical traditions that preceded it, the various strands – Eastern as well as Western – were intentionally and carefully brought together in 1948 by philosophers, historians, and political leaders in an international declaration issued by the United Nations (itself created in 1945).<sup>1</sup> The declaration is the Universal Declaration of Human Rights. It marks the beginning of the modern human rights movement. The

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<sup>1</sup> For the landmark history of this process, see, Mary Ann Glendon, *A World Made New* (New York: Penguin-Random House, 2002).

Declaration was issued by the UN unanimously...with eight abstentions. Those eight abstentions included the Republic of South Africa (which practiced apartheid), the Soviet Union and its satellites (all rich in political prisoners), and Saudi Arabia (where religious freedom did not exist). Given their political systems, it is no surprise that those nations did not vote *for* the Declaration, but what is surprising is that they did not vote *against* it. In other words, the “momentum” to issue the Declaration was too strong to oppose.

To understand why that was the case, one must understand that, though the Declaration made summoning statements about “inviolable rights” that were seemingly *deduced* from lofty principles, the document was, essentially, *inductive*. It was a “bottom up” compilation. The human rights it declared were identified from bitter, lived, and very recent *experience*, that is, the Second World War.

One must recall the utter devastation caused by that war to, literally, the entire world. It was fought on land and sea and in the air, across the globe. It completely devastated the economies of the primary theaters of the war - Europe and Asia. And it cost an unimaginable number of lives, sometimes estimated at around 80 million. What must never be forgotten is that such a number includes 50 million *noncombatants*, i.e., civilians, innocent people, by-standers. Approximately 2/3's of those who died were not soldiers, sailors, pilots, or combat support staff. It was total war, aimed at food supplies and the farmers/workers who supported the warriors. Finally, the war witnessed the unleashing of the ultimate weapon – the atom bomb – whose deadly radiation could kill people for decades. The one thing that any sane person could see was this: there must never be a Third World War because that would likely bring the end of humanity.

Further, the manner in which those noncombatants were killed was particularly heinous - in concentration camps, in targeted bombing, through mass shootings, through torture and brutal experiments, through industrial-scale genocide. It might sound hyperbolic, but it is not to state the following – the leaders of the world were entirely sobered by this war like no other and determined that it would not happen again.

Thus, they formed the United Nations in 1945, the year the Second World War ended. It was formed – with memories of its failed predecessor, the League of Nations, in mind – to preserve peace and resolve conflict. And here is the essential point: the founders did it – they hoped to *do* it - through an *emphasis* on *human rights*. This was new in human history.

Consider the words of the Preamble of the UN Charter – “...to save succeeding generations from the scourge of war...and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...[the nations of the world] do hereby establish...the United Nations.”<sup>2</sup> In chapter 1, the Charter states, “[t]he [p]urposes of the United Nations[, in addition to maintaining international peace and security, is] “to achieve international co-operation...in promoting and encouraging respect for *human rights and for fundamental freedoms* for all without distinction...”<sup>3</sup>

However, upon reflection, the founding nations concluded that they had not given enough emphasis to articulating what those human rights were. Hence, three years later, after lengthy consideration by an eminent committee of philosophers, politicians, and historians of the various traditions of mankind, the UN announced the Universal Declaration of Human Rights.

### *Borders and the concept of human rights*

The Preamble of the Declaration sets the stage for the enumeration of rights recognized in the articles. In it, the UN left no doubt as to the importance of human rights. In the first paragraph, it states, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” During the Second World War, “barbarous acts” based on “contempt for human rights” have “outraged the conscience of mankind.”<sup>4</sup> Thus, “the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women...”<sup>5</sup> The UN – and its member States – undertake to make “this Universal Declaration of Human Rights as a common standard of achievement for all.” The Declaration contains not an arbitrary list of right, but of a painstakingly compiled list of the essential human rights.

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<sup>2</sup> Universal Declaration of Human Rights, G.A. res. 217 A(III), December 10, 1948, U.N. Doc. A/810 (1948), Charter Preamble 1 & 2.

<sup>3</sup> Ibid., Article 1-3. Emphasis mine.

<sup>4</sup> Ibid., Preamble 2. It also mentions the “four freedoms” made famous by Franklin Roosevelt. Though the point will not be developed further in this essay, the “four freedoms” are used by the UN as interchangeable with “human rights.” The four freedoms are – freedom of speech and of belief, and freedom from want and fear.

<sup>5</sup> Ibid., Preamble 4.

What, then, are those rights? They are enumerated in thirty articles. They range from “life, liberty and the security of [the] person”<sup>6</sup> to “equality” before the law<sup>7</sup>, from the right “to marry”<sup>8</sup> to “freedom of peaceful assembly and association”<sup>9</sup> to the rights “to work”<sup>10</sup> and to “education.”<sup>11</sup> Some of these (such as the right to work) do not seem to be “rights” in the Anglo-American sense of enforceable legal obligations but seem to reflect a Continental European approach to rights. There have long been disputes whether certain “rights” in the Declaration should have been deemed “aspirations” since, to some extent, they depend on contingent matters, such as the existence of sufficient resources within the host State.<sup>12</sup> While these disputes would ensnarl the ensuing treaties, as far as the Declaration itself goes, it may be sufficient to note that Eleanor Roosevelt, a primary driving behind its production and adoption, referred to them as “principles,” not “rights.”

As one would expect, in a world awash in refugees and “stateless persons”<sup>13</sup> in the wake of World War II, the Declaration addresses the concept of “borders” in a number of ways. Article 13 states that “everyone has the right to freedom of movement and residence within the borders of each state”<sup>14</sup> (i.e., rights *within* borders wherever one is), and then goes on to proclaim, “everyone has the right to leave any country, including his own”<sup>15</sup> (i.e., rights to *cross* borders). A separate article, article 14, says, “everyone has the right to seek...in other countries asylum from persecution” (i.e., rights within borders if you can get there). Let us call these herein, collectively, “the right to movement.”

The Declaration is not a treaty. Only treaties legally bind (and they bind only the nations who ratify them). Thus, it was

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<sup>6</sup> Ibid., Article 3.

<sup>7</sup> Ibid., Article 7.

<sup>8</sup> Ibid., Article 16.

<sup>9</sup> Ibid., Article 20.

<sup>10</sup> Ibid., Article 23.

<sup>11</sup> Ibid., Article 26.

<sup>12</sup> See, e.g., *On Human Rights: On the 50<sup>th</sup> Anniversary of the Universal Declaration on Human Rights*, Ramsey Colloquium, First Things, April 4, 1998. Moreover, it must be noted that article 22, ensuring “social security,” is expressly subject to “the organization and resources of each State...”

<sup>13</sup> This is addressed in articles 16 (“everyone has the right recognition everywhere as a person before the law”) and 15 (“No one shall be arbitrarily deprived of his nationality nor denied the right to change [it]”).

<sup>14</sup> *Universal Declaration of Human Rights*, Article 13-IIN.

<sup>15</sup> Ibid., Article 13-2.

always intended that the rights enunciated in the Declaration would be protected in, and implemented by, two treaties, one concerning political/judicial rights and one concerning social/economic rights.<sup>16</sup> As we can see from the brief listing above of some of the rights in the Declaration, certain rights fall easily in one category, and some in another. For example, equality before the law (article 7) is a political/judicial right. The right to work (article 23), on the other hand, falls more easily into the category of social/economic. One treaty developed to implement the Declaration is the International Covenant on Civil and Political Rights (the “ICCPR”), and the other is the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”).<sup>17</sup> But these categories in the two treaties should not be taken as ironclad. There is plenty of overlap when it comes to some rights such as those affecting the family or education.<sup>18</sup> Further, the UN understood that the rights in the Declaration – civil/political and economic/social – constituted a whole, a unity; they were indivisible.

In any case, it is the ICCPR, not the ICESCR, that deals with the “right to movement” (as we designated it above). The ICCPR - ratified by nearly every nation on earth – guarantees these rights in article 12. However, article 12 limits the right to move *within* a state to those who are “lawfully within the territory of a State,” but anyone may leave “any country” at any time. Though the ICCPR and ICESCR do not exhaust by a long shot the number of international agreements dealing with crossing borders, they do give us the basic idea, to wit, borders are essential to understanding the extent of rights for it is within borders that rights are realized. While borders are not absolute (i.e., they may be appropriately crossed in certain circumstances), they are crucial in most cases. In a world of sovereign states (and in the absence of an international

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<sup>16</sup> These three documents – the Declaration and the two treaties – are sometimes referred to as the International Bill of Rights. Thus, though there are many “second generation” treaties on particular subjects (such as torture or racial discrimination) and many more bi-lateral or multi-lateral agreements among nations, the International Bill of Rights is the foundation of modern human rights.

<sup>17</sup> The Declaration, the ICCPR and the ICESCR are often referred to, collectively, as the International Bill of Rights

<sup>18</sup> Compare, e.g., ICESCR, articles 13 and 14 on education with ICCPR, article 18-4, which concerns parental rights in education; or ICCPR, article 22, on freedom of association with ICESCR, article 8 on the right to associate in trade unions. Likewise, the right of the family to protection and support by the state is recognized in ICCPR, article 23 and in ICESCR, article 10.

police force), the concrete implementation of human rights is the responsibility of states, that is, *within* the borders of each state. There is irony here. “International” human rights are not, by definition, merely the positive law of a particular nation; human rights is a concept without borders; yet, in our “real world,” the whole concept is meaningless unless particular nations, within each’s border, creates positive law recognizing them.<sup>19</sup>

Summing up our consideration of the basic human rights documents, we may conclude that (1) identifying and (2) protecting basic human rights was the (3) fundamental task of the post-World War II international political leadership; (4) these rights were enumerated in the Universal Declaration, including (5) a right to movement (as we designated it above). (6) Human rights is a borderless concept<sup>20</sup> that can only be recognized within borders.

### *The report<sup>21</sup> of the Commission*

In 2019, U.S. Secretary of State, Michael Pompeo, announced the creation of a commission, the Commission on Unalienable Rights. Its charge was to make recommendations about the role human rights should play in the conduct of U.S. foreign policy. It was to examine two “strands” of human rights - that stemming from the Universal Declaration and that embodied in the U.S. Declaration of Independence.<sup>22</sup>

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<sup>19</sup> One might claim that human rights is not a “borderless” concept – it is a trans-border concept. In other words, human rights transcend borders, rendering borders irrelevant. The answer, however, is that only by observing borders (of and by sovereign states) can human rights be recognized in reality.

<sup>20</sup> Every human being no matter where located has human rights by virtue of being a living member of the human species.

<sup>21</sup> “Draft Report of the Commission on Unalienable Rights,” State Government, accessed April 5, 2022, <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf>

<sup>22</sup> *Ibid.*, 8.

Regarding the *American* understanding of rights, the Commission noted that “the 17<sup>th</sup> century British subjects who settled...the eastern seaboard...brought with them a variety of traditions.... Eventually their intertwining gave rise to the core conviction that government’s primary responsibility was to secure unalienable rights – that is, rights inherent in all persons.” The three traditions that “stand out” are (1) Protestant Christianity “infused with the beautiful Biblical teachings that every human being is imbued with dignity...”; (2) “the civic republican ideal,

Some objected that the very idea of the report – that one nation should be considering the effect it would give in its foreign policy - seemed inconsistent with the idea of international human rights. However, this is merely another aspect of the paradox of human rights and borders. Human rights, though trans-border in concept, can only be achieved within borders, though there is the irony that what is being considered in the Report is how America (acting as a sovereign nation within its own borders) can and should emphasize these principles *outside* its borders (i.e., in its foreign policy with other nations).

In any case, the Commission did issue its report in the summer of 2020. The report noted seven “challenges” – (1) the decline of enthusiasm for human rights; (2) the failings of international organizations such as the UN’s Human Rights Council;<sup>23</sup> (3) the autocracy challenge (“the most influential are Russia and China”); (4) new technologies (“these technologies run the gamut from artificial intelligence and cyber/internet technologies to emerging biotechnologies”); (5) the migration of peoples; (6) the global health pandemic; (7) human rights violations by non-state actors (“for example, terrorist groups, transnational organized crime networks, purveyors of child pornography, and organizations engaged in human trafficking”).

The Report concluded with twelve “observations” (rather than “recommendations”).<sup>24</sup> All of them merit attention by anyone concerned with human rights, but five seem to be particularly relevant to our review of human rights and borders.

First, “the universality and indivisibility of human rights do not mean uniformity in bringing them to life.” “The [Declaration] does contemplate...some variation in emphasis, interpretation, and mode of implementation...The universality of human rights and the pluralism necessary to their practical realization are held together by the principle of subsidiarity inherent in the system of international human rights law.” Second, “a degree of pluralism in respecting human rights does not imply cultural relativism.” Third, “nation-states have some leeway to base their human rights policy

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rooted in classical Rome...that freedom and equality...depend on an ethical citizenry”; (3) classical liberalism with its “moral premise that human beings are by nature free and equal”.

<sup>23</sup> Ibid., 49.

“Given the mandate to include [UN] members from all regions..., it is inevitable that nations that are themselves flagrant human rights abusers – such as China, Cuba, Libya, Russia, Saudi Arabia and Venezuela - ...dominate the Council.”

<sup>24</sup> Ibid., 56-58.

on their own distinctive national traditions.” “Though it is sometimes difficult to define the bounds of legitimate pluralism..., the process must begin with the understanding that the basic principles in the [Declaration] were meant to work together rather than to be pitted against each other...[T]ensions...therefore must be occasions to discern how to give each right as much protection as possible....”

Fourth, “national sovereignty is vital to securing human rights.” “Like other international legal obligations, the international human rights obligations of the United States [and of every other nation] must be grounded in those norms to which [that nation] has formally and explicitly consented.” These four “observations” recall to mind the paradox that is the subject of this essay – that of human rights and borders, of the essential role borders play in the protection of human rights, of the role nation states (which are, by definition, defined by borders) play in protecting (trans-border) human rights within their borders (and outside their borders with reference to their foreign policy), rights due to every person no matter within which state he or she happens to be. But the fourth observation (the tethering of states to the precise obligations they have assumed) further points us to the paradoxical “challenge” that is unraveling the entire human rights project.

*If all is politics, all is lost*

“Human rights” is the lingua franca of our age. Nearly everyone believes in, and supports, “human rights.” But what are human rights? They can be defined by philosophy or by theology, by political theory or by history. But human rights in the only sense that matters to real human beings – that is as enforceable protection from the depredations of others or as enforceable entitlements that others must grant – is a legal concept. As with the Declaration of Independence, so with the Universal Declaration – each sets the vision. But in each case, it takes a legal document – the Constitution (with its Bill of Rights) in the first case, the ICCPR and the ICESCR in the other – to guarantee those rights in reality, in practice, backed up by the legal apparatus of the State.

As noted in the fourth observation above, such “norms” require (and logically entail) formal and explicit adoption by the State. That way, the State knows precisely what it is undertaking – and the person within its borders knows precisely what is guaranteed.



The fifth observation from the report<sup>25</sup> notes, “new human rights claims must be carefully considered.” “It must be kept in mind...that it was largely owing to the relative modesty of its reach that the [Declaration] succeeded in launching the universal human rights project on a global scale. The [Declaration] was deliberately limited to a small set of rights on which there was perceived to be near-universal consensus.” The report provides some sensible things to consider when faced with new rights claims<sup>26</sup> – “How closely rooted is the claim in the explicit language of the Universal Declaration of Human Rights as it was written and understood by the framers of that document...in 1948...? “Does the new claim represent a clear consensus across a broad plurality of different traditions and cultures...?”<sup>27</sup> “Can the new right to be integrated consistently into the existing body of human rights?”

Yet, we frequently hear of claims for new “human rights” (such as “transgender rights) that no one alive in 1948 would have imagined. Such claims, far from representing a cross-cultural consensus, represent something entirely new, created by a “human rights organization,” and, hence, with quite limited support. Finally, such claimed new rights usually cannot be integrated in the existing body of human rights. For instance, if transgenderism is a human right, must it be taught in schools? If so, what happens to the rights of parents to choose the education for their children, which is one of most well-established human rights, one, further, that the drafters of the Declaration saw as essential to prevent the growth of totalitarians that preserve power by indoctrinating those students?

As the report notes, “the power of the universal human rights idea...is weakest when it is employed in disputes among competing groups in society over political priorities. Such political disputes are usually best left to resolution of ordinary democratic processes of bargaining, education, persuasion, compromise, and voting. The tendency to fight political battles with the vocabulary of human rights risks stifling the kind of robust discussion on which a vibrant democracy depends. The effort to shut down legitimate debate by recasting contestable policy preferences as fixed and unquestionable human rights imperatives promotes intolerance,

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<sup>25</sup> Number five of the five particular observations I am discussing, but number ten within the document itself.

<sup>26</sup> “Draft Report of the Commission on Unalienable Rights,” 39-40.

<sup>27</sup> *Ibid.*, 40.

“These sorts of claims frequently privilege the participation of self-appointed elites, lack widespread democratic support, and fail to benefit from the give-and-take of negotiated provisions among the nation-states...”

impedes reconciliation, devalues core rights, and denies rights in the name of rights.”<sup>28</sup>

“Human rights,” at least in the international legal and policy world, is a “bordered term.” It is not an endlessly malleable. Its borders consist of the International Bill of Rights, i.e., the Universal Declaration, the ICCPR, and the ICESCR. If that border is destroyed, it puts in peril the entire human rights project.<sup>29</sup>

### *Conclusion*

In a four-day span in May 2022, a remarkable thing happened: two major *American* institutions thought it important to publicly address human rights by focusing on the activities of two *Chinese men*.

On May 14, the Catholic University of America held graduation exercises. As part of those ceremonies, it awarded six honorary degrees. While most went to the “usual suspects” - theologians, the head of a religious order, etc. – one went to an individual who was recognized for resisting political oppression and tyranny. His name was Jimmy Lai.

While the other recipients of the honorary degrees were American born, Jimmy Lai was not. He was born in Guangzhou, China. As a child, he was a stowaway on a boat to Hong Kong, where he remained as he rose, remarkably, from child laborer to the head of a media empire. One of his publications, *Apple Daily*, was eventually published in English. In 2020, he was arrested for his role in supporting the democracy movement in Hong Kong, which sought to resist the erosion of political and civil rights under the pressure of the Chinese Communist Party (the “CCP”). In 2021, he was sentenced to prison, and *Apple Daily* was closed.

Several copies of the last issue of *Apple Daily* made their way to the Catholic University, specifically to Chen Guangcheng, a Distinguished Visiting Fellow there. Three days after Jimmy Lai received his honorary degree, on May 17, Guangcheng was honored by the Bradley Foundation with its annual Prize. Guangcheng was recognized because he is a fearless, ceaseless opponent of the CCP, insisting on human rights in the face of a ruthless tyranny that

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<sup>28</sup> *Ibid.*, 57.

<sup>29</sup> Many thoughtful commentators have concluded that is precisely what has happened and urge the U.S. to disengage from the international human rights project. See, e.g., Kenneth Anderson, *Living with the UN – American Responsibilities and International Order* (Hoover Institute Press Publication, 2012).

denies the Chinese people the right to live under their own system of constitutional democracy and the rule of law.

In the report of the Commission on Unalienable Rights, the CCP was identified as one of the greatest threats to human rights. China rejects the integrated nature of human rights by claiming that “an optimal pursuit of development requires restrictions on individual rights and political liberty that far exceed the scope” of anything allowed by the Universal Declaration.<sup>30</sup> Further, “nowhere has the ambition to establish a ‘wholly-surveilled’ society progressed as far as in China. The [CCP] has built an aggressive internet censorship system known as the Great Firewall of China...Beijing’s ‘social credit system’, moreover, is based in large part on emerging AI and cyber software that permit the aggregation and integration of many different data streams about an individual...An authoritarian regime can not only use these tools to track and punish individuals but also exploit them to monitor and control entire groups, such as disfavored religions or ethnicities.”<sup>31</sup> Yet, despite the formidable power of the CCP, Jimmy Lai and Chen Guangcheng stood up to it, insisting on political and civil rights.

The recognition of these two *Chinese* men, Jimmy Lai and Guangcheng, by *American* institutions testifies to the relevance of the human rights project begun by the UN in the Universal Declaration in 1948. It demonstrates that human rights concerns are not narrowly nationalistic, but concern what Guangcheng calls “universal values,” which transcend national borders. This is evidence of the “universal” aspect of, of the trans-border reach of, human rights. But human rights must not ignore its own borders; it must resist the ceaseless claims of novel “human rights;” otherwise, if human rights become a synonym for merely partisan political demands, the entire project will be at risk.

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<sup>30</sup> *Ibid.*, 49.

<sup>31</sup> *Ibid.*, 50.

## REFERENCES

Anderson, Kenneth. *Living with the UN – American Responsibilities and International Order*. Hoover Institute Press Publication, April 2012.

Glendon, Mary Ann. *A World Made New*. New York: Penguin-Random House, 2002.

State Government. “Draft Report of the Commission on Unalienable Rights.” Accessed April 5, 2022. <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf>

Universal Declaration of Human Rights. G.A. res. 217 A(III). December 10, 1948, U.N. Doc. A/810 (1948).

William Saunders, a graduate of the Harvard Law School, is a professor of human rights at the Catholic University of America, where he directs the Center for Human Rights as well as the Master of Arts in Human Rights. He is also the co-director of the Center for Religious Liberty at the Columbus School of Law.

*William Saunders*  
*Catholic University of America*  
*620 Michigan Ave NE*  
*324 Caldwell Hall*  
*Washington, DC 20064*  
*<saunderswl@cua.edu>*