



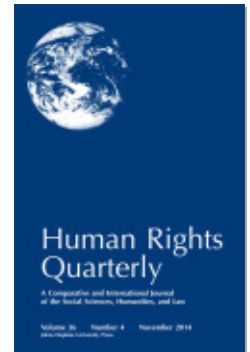
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The “Myth” and Mystery of US History on Economic, Social, and Cultural Rights: The 1947 “United States Suggestions for Articles to be Incorporated in an International Bill of Rights”

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The “Myth” and Mystery of US History on Economic, Social, and Cultural Rights: The 1947 “United States Suggestions for Articles to be Incorporated in an International Bill of Rights”

*Sally-Anne Way**

ABSTRACT

This article examines the official position of the United States on economic, social, and cultural rights during the drafting of the Universal Declaration of Human Rights, the detail of which is mysteriously absent from contemporary histories of human rights. An overlooked June 1947 US draft for an international bill of rights proves beyond doubt early official US support for economic, social, and cultural rights, if only in an aspirational Declaration rather than a legally-binding Covenant. The official US position shifted significantly over 1947 and 1948, but this US draft remained surprisingly significant for the eventual phrasing of the 1966 International Covenant on these rights.

I. INTRODUCTION

Many scholars writing on international human rights law have long contended, for very different reasons, that economic, social, and cultural rights

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(ESC rights) were only included in the 1948 Universal Declaration of Human Rights (UDHR) because “Third World countries . . . insisted on, and achieved in collaboration with socialist countries at the time, recognition of individual economic and social rights.”¹ Antonio Cassese, too, suggested that “it was only in a second stage, given the hostility of the Socialist countries and under strong pressure from the Latin-Americans . . . that the West agreed to incorporate . . . a number of economic and social rights.”² This dominant narrative posits that the “West” supported “first generation” civil and political rights, but always resisted the inclusion of “second generation” economic, social, and cultural rights, including during the drafting of the UDHR. A further persistent narrative also insists that ideas of economic, social, and cultural rights are, and always have been, alien to the liberal individualist, civil and political rights-based tradition of the United States, in ways that continue to draw force from the recent history of the United States administration’s position on ESC rights.³

In an article in the *Human Rights Quarterly*, however, Daniel Whelan and Jack Donnelly challenged this narrative, questioning what they call the “myth of Western opposition” to economic, social, and cultural rights, and arguing that this was an erroneous reading of the history of human rights; indeed, that it was “ludicrous” and “revisionist history of the worst kind.”⁴ Countering this myth, Whelan and Donnelly argued that economic and social rights had, in fact, become central to the thinking of Western welfare states and to the Western vision of the post-war economic order by 1945—including that of the United States. They point to evidence including Franklin Roosevelt’s Four Freedoms and the Atlantic Charter, his 1944 “Economic Bill of Rights,” and the positive support of the United States and other Western states for the inclusion of ESC rights in the Universal Declaration, as well as the instantiation of these ideals in the development of welfare states in the UK and, less comprehensively, in the US.⁵

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1. HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 428–29 (Abdullahi A. An-Na’Im ed., 1992).
 2. ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 35 (1994).
 3. The United States has never ratified the ICESCR and has frequently opposed ideas of economic, social, and cultural rights in its official position at the international level. Alston has chronicled in detail more recent official US opposition over the period between 1980 and 2009 to the International Covenant on Economic, Social and Cultural Rights, which, he quips, has been understood by the US as the “Covenant on Un-economic, Socialist and Collective Rights.” See Philip Alston, *Putting Economic, Social, and Cultural Rights Back on the Agenda of the United States*, Center for Human Rights and Global Justice Working Paper (2009); Philip Alston, *US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 366 (1990).
 4. Daniel J. Whelan & Jack Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight*, 29 HUM. RTS. Q. 908, 910 (2007).
 5. *Id.*

In response to this article, Alex Kirkup and Tony Evans criticized Whelan and Donnelly's methodology as being too empirical and positivist, suggesting that they take official US support for these rights at face value, without looking at the underlying rationale of the US for promoting human rights (which Kirkup and Evans suggest was to legitimize the expansion of laissez-faire global markets, despite then going on to detail how conservative groups opposed these rights for their threat to laissez-faire).⁶ Kirkup and Evans also challenge Whelan and Donnelly for their assumptions of widespread domestic US support for economic and social rights, highlighting the powerful conservative reaction against these rights, as evidenced by the influential opposition of the American Bar Association (ABA) and the Bricker amendment controversy of the early 1950s.⁷ They also point to earlier US opposition to ESC rights (especially the right to work) during the 1944 Dumbarton Oaks and 1945 San Francisco conferences and the ambivalent position of the US in the drafting of the human rights instruments⁸ (although, as Whelan and Donnelly later correctly pointed out, there are a number of inaccuracies in Kirkup and Evans' use of archival sources⁹). In another critique of Whelan and Donnelly, Susan Kang similarly suggests that, despite rhetorical western support for economic and social rights in the drafting of the human rights instruments, this was not a settled political question in 1945 and that commitments to these rights and to welfare states merely reflected a historic compromise that coopted labor and other social movements into the capitalist system.¹⁰

While these critiques provide important reflections that serve as a corrective to taking rhetorical elite support for these rights at face value, it is interesting nonetheless to note that, despite focusing on the role of the United States in the drafting of the international human rights instruments, none of these scholars look in detail at the US official position during the drafting period of the UDHR over the period 1947 to 1948. Even Whelan's more recent 2010 book on the history of the International Covenant on Economic,

6. Alex Kirkup & Tony Evans, *The Myth of Western Opposition to Economic, Social, and Cultural Rights?: A Reply to Whelan and Donnelly*, 31 HUM. RTS. Q. 221, 222 (2009); Daniel J. Whelan & Jack Donnelly, *Yes, a Myth: A Reply to Kirkup and Evans*, 31 HUM. RTS. Q. 239 (2009).

7. The 1952 Bricker Amendment aimed to limit any possibility that international treaties would supersede the US Constitution by 1) specifying that any treaty that conflicted with the Constitution would not be of any force or effect; 2) that could become effective as internal law only through domestic legislation; and 3) that Congress could limit the executive's treaty-making power. See Kirkup & Evans, *The Myth of Western Opposition*, *supra* note 6, at 227–30.

8. *Id.*

9. Whelan & Donnelly, *Yes, a Myth*, *supra* note 6, at 246–48.

10. Susan L. Kang, *The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly*, 31 HUM. RTS. Q. 1006, 1007 (2009); Daniel J. Whelan & Jack Donnelly, *The Reality of Western Support for Economic and Social Rights: A Reply to Susan L. Kang*, 31 HUM. RTS. Q. 1030 (2009).

Social and Cultural Rights (ICESCR)¹¹ and its division from the International Covenant on Civil and Political Rights (ICCPR) (which also contains some of the material on which Whelan and Donnelly's article is based), looks at important US sources of inspiration for the UDHR but does not look in depth at the US official position during the drafting of the UDHR.¹² While Whelan delves in depth into the *travaux préparatoires* [drafting history] of the Covenants,¹³ he avoids a detailed investigation of the *travaux préparatoires* of the UDHR—largely because he sees Johannes Morsink's seminal exploration of the UDHR as definitive.¹⁴ Yet while Morsink's history of the UDHR locates much of the inspiration for economic, social, and cultural rights with the existing constitutions of Latin American states (among others) and various Latin American proposals to the drafting of the UDHR, Morsink also does not explore the official United States written submissions to the UN at that time.¹⁵

Delving into the detail of the official position of the United States during the drafting of the 1948 UDHR sheds new light on this debate and has revealed an important part of the history of economic, social, and cultural rights that appears to have been missed by these scholars. My own research in the United Nations archives of the *travaux préparatoires* of the UDHR has yielded a July 1947 text entitled "United States Suggestions for Articles to be Incorporated in an International Bill of Rights" (US Suggestions)¹⁶ and an earlier June 1947 submission on which this is based entitled "United States Suggestions for Redrafts of Certain Articles in the Draft Outline" (US Suggestions for Redrafts).¹⁷ These texts (among other US position papers) were submitted as official US contributions to the UN for the work of the Drafting Committee on an International Bill of Human Rights set up by the UN Commission on Human Rights.¹⁸ These US Suggestions set out the of-

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11. International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 Jan. 1976).
 12. Whelan points *inter alia* to Franklin Roosevelt's 1944 "Economic Bill of Rights" and the American Law Institute's 1946 Statement of Essential Human Rights as important sources of inspiration for the Universal Declaration. DANIEL WHELAN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY* 11–31 (2010).
 13. *Id.* at 87–111.
 14. *Id.* at 11–12.
 15. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT*, at xiv, 89, 130–238 (1999). Morsink examines the sources of inspiration for ESC rights in the UDHR, but he does not examine closely the US written submissions discussed here.
 16. *Report of the Drafting Committee on an International Bill of Human Rights to the Commission on Human Rights*, U.N. ESCOR, Comm'n on Hum. Rts., 1st Sess., Annex C, at 41–47, U.N. Doc. E/CN.4/21 (1947) [hereinafter Drafting Committee, US Suggestions].
 17. *United States Suggestions for Redrafts of Certain Articles in the Draft Outline*, U.N. ESCOR, Comm'n on Hum. Rts., U.N. Doc E/CN.4/AC.1/8 (1947) [hereinafter US Suggestions for Redrafts].
 18. The June 1947 US text was submitted by the US to the UN Drafting Committee (US Suggestions for Redrafts, *supra* note 17), and a slightly revised July 1947 US text was

ficial US position as of mid-1947, providing comments on the rights in the preliminary UN Secretariat draft and proposing wording for new provisions which the US believed should be included in the draft international bill of rights. Surprisingly, the US Suggestions set out in substantial detail not only a full catalogue of civil and political rights but also a full set of economic, social, and cultural rights with curiously detailed text on the correlative duties of the state, going significantly beyond the UN Secretariat draft in specifying the duties of states in relation to these rights.

This June 1947 text (and the slightly revised July 1947 version) of United States Suggestions thus provides a key piece of strangely overlooked historical evidence which provides proof—at least at the level of a positivist and rhetorical approach to human rights¹⁹—of official, albeit fleeting, US support for the inclusion of economic, social, and cultural rights in an aspirational declaration, if not in a legally-binding covenant.

Internal US government files available in the US archives also provide further insights into the US position during the drafting, particularly the records of the Interdepartmental Committee on International Social Policy and its Subcommittee on Human Rights and Status of Women, which developed the negotiating position of the United States during the whole period of the drafting of the UDHR between 1947 and 1948.²⁰ The Interdepartmental Committee on International Social Policy (ISP) was established in January 1947 to provide a coordinating mechanism between governmental departments for US postwar international social policy, and responsibility for formulating human rights policy was delegated to its Subcommittee on Human Rights and the Status of Women, chaired by the Department of State, with representatives from the Departments of Justice and Labor and the Federal Security Agency, as well as ad-hoc representatives from other government agencies.²¹ The files of these committees help to reveal in more detail the

published as Annex C to the report by the Drafting Committee to the Commission on Human Rights in July 1947 (Drafting Committee, US Suggestions, *supra* note 16, Annex C).

19. As discussed above, Kirkup and Evans roundly criticized Whelan and Donnelly for their positivistic approach in relying on human rights rhetoric and documents to prove western support for ESCR, while ignoring actual politics and practice. See Kirkup & Evans, *The Myth of Western Opposition*, *supra* note 6. The present article also focuses narrowly on the elite rhetoric of the official US position, but this is in the belief that this forgotten history is interesting given the significance of the US draft not only for the UDHR but also for the later drafting of the International Covenant on Economic, Social and Cultural Rights.
20. The records of the United States Inter-departmental Committee on International Social Policy (ISP) and its Subcommittee on Human Rights and Status of Women (S/HRW) for the period 1947–1949 are found in the US National Archives and Records Administration (NARA), Record Group (RG) 353, Boxes 98–113 (hereinafter identified with box number, RG353, NARA). The ISP and S/HRW files include many one to two page position papers on each of the rights and detailed US negotiating positions, which were provided to Eleanor Roosevelt as instructions on the US position for her role as US representative in the UN Commission and Drafting Committee.
21. See US Committee on ISP, *Draft Terms of Reference for the Committee on Human Rights and the Status of Women*, ISP-D8/47, Box 98, RG353, NARA (3 Jan. 1947).

nuances of the US position and how it shifted quite significantly over the short period of the drafting of the UDHR between 1947 and 1948.

Yet there is a certain mystery to this US history, in that this June 1947 United States suggestions for articles to be incorporated International Bill of Rights has been forgotten and features neither in the debate reviewed above nor in contemporary histories of human rights, including in histories of the UDHR.²² It is also absent from detailed histories of US policy on human rights in the 1940s,²³ even recent histories of the ICESCR, such as that by Whelan cited above.

The 1947 US Suggestions are significant not only because they belie standard assumptions about the US position on ESC rights but also because substantial parts of the US wording and provisions on economic, social, and cultural rights are closer to the text of the 1966 ICESCR than to the 1948 UDHR. A number of concepts and phrases that were later to become part of the ICESCR, including the concepts of “progressive realization,” “maximum use of resources,” and the specific formulation of rights such as the “right to the highest attainable standard of health,” appear to have clear roots in this 1947 US text, which anticipates the phrasing of the ICESCR. This begs a number of questions: why is it that this US text has not appeared or been analyzed in existing histories? And how did this 1947 US text have such an impact on the text of the 1966 ICESCR, a text which was only finalized nineteen years later after endless negotiations between states? What is clear from the archives is that this 1947 US text demonstrates US commitment to a particular conception of economic, social, and cultural rights early in the drafting process of the UDHR—one that is very similar to the rights eventually incorporated into the ICESCR. It is also clear, however, that this mid-1947 text marked a high watermark of official support for ideas of economic, social, and cultural rights within the US administration, a position which quickly shifted under the pressure of constitutional concerns, deepening conservative opposition as Franklin Roosevelt’s New Deal era drew to a close, and an increasingly fraught ideological environment at both the domestic and international levels.

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22. There has been a recent explosion of the literature on the history of human rights. See for example, PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* (2003); LYNN AVERY HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2008); MORSINK, *supra* note 15; A. W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2004); SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2012).
23. The main works on US human rights policy in the 1940s include MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); ELIZABETH BORWARDT, *A NEW DEAL FOR THE WORLD: AMERICA’S VISION FOR HUMAN RIGHTS* (2005); CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955* (2003); ROWLAND BRUCKEN, *A MOST UNCERTAIN CRUSADE: THE UNITED STATES, THE UNITED NATIONS, AND HUMAN RIGHTS, 1941–1953* (2013); SIMPSON, *supra* note 22; Hanne Hagtvedt Vik, *How Constitutional Concerns Framed the US Contribution to the International Human Rights Regime From Its Inception, 1947–53*, 34 *INT’L HIST. REV.* 887 (2012).

II. THE DRAFTING OF THE INTERNATIONAL BILL OF HUMAN RIGHTS

The drafting of the UDHR began when, in June 1946, the UN Economic and Social Council (ECOSOC) set out terms of reference for the new Commission on Human Rights²⁴ and assigned it the task of drawing up an international bill of rights with the assistance of the UN Secretariat's Division of Human Rights.²⁵ The Secretariat, headed by the Canadian John P. Humphrey, then initiated a comprehensive survey of existing state constitutions and of proposals for an international bill of rights that had been submitted by states, nongovernmental organizations, and intergovernmental bodies. From this review, Humphrey prepared a preliminary "Draft Outline of an International Bill of Rights," which contained a set of forty-eight articles on different human rights.²⁶ This first Secretariat draft included civil and political rights and economic, social, and cultural rights collected and collated from existing state constitutions around the world, as well as from the various proposals for draft declarations that had been sent in to the Secretariat. For its provisions on economic, social, and cultural rights, Humphrey's first draft drew on many sources, but most prominently from the many existing Latin American constitutional provisions on these rights as well as proposals for an international bill of rights submitted by various different organizations and some states—including proposals submitted by Panama, Chile, and Cuba.²⁷

However, although Humphrey's draft of the international bill of rights was very important as the first preliminary draft of what eventually became the UDHR, it was produced by the UN Secretariat and was not considered necessarily representative of the wishes of the member states of the UN Commission on Human Rights. Thus the Commission itself, in its first meeting at the beginning of 1947, set up a "Drafting Committee on an International

24. The UN Commission on Human Rights was established in 1946 with eighteen commissioners: representatives of the five Great Powers (United States, Soviet Union, United Kingdom, France, and China) and representatives from another thirteen member states of the Commission with revolving three-year terms, with the first consisting of Australia, Belgium, Byelorussia, Chile, Egypt, India, Iran, Lebanon, Panama, Philippines, Ukraine, Uruguay, and Yugoslavia.

25. C.H.R. Res. 1946/9, at 520–22, U.N. Doc. E/Res/9(II) (1946).

26. UN Drafting Committee of the International Bill of Rights, *Draft Outline of International Bill of Rights*, U.N. ESCOR, Comm'n on Hum. Rts., 1st Sess., U.N. Doc. E/CN.4/AC.1/3 (1947) [hereinafter *Draft Outline Int'l Bill of Rights*].

27. *International Bill of Rights Documented Outline, Part I—Texts*, U.N. ESCOR, Comm'n on Hum. Rts., 1st Sess., § 2, U.N. Doc. E/CN.4/AC.1/3/ADD.1 (1947). Submitted texts included proposals for draft declarations submitted by Chile, Cuba, and Panama, as well as detailed proposals made by the US, the UK, and India. Notably Panama submitted the 1946 model bill of rights drawn up by the American Law Institute, while Chile submitted the 1945 Draft Declaration of the International Rights and Duties of Man drawn up by the Inter-American Juridical Committee.

Bill of Rights" consisting of eight state representatives²⁸ and led by the Chair, Eleanor Roosevelt (who was also the US representative to the Commission). This Drafting Committee was charged with taking the lead in formulating a preliminary draft international bill of rights. Humphrey's very detailed first draft along with copies of other draft proposals and comments and suggestions from states²⁹ were then submitted to this Drafting Committee as the basis for them to begin their work. The Drafting Committee met for its first official session between 9 and 25 June 1947 in Lake Success, New York, and started to negotiate the text for an international bill of rights. By the end of the June 1947 session, the Drafting Committee had produced its own draft.³⁰

At the end of its June 1947 session, the Drafting Committee reported on its work back to the Commission on Human Rights, providing a preliminary draft international bill of rights that had emerged from its work, but also providing the Commission with copies of the materials on which it had based its work. Along with its own draft, the Drafting Committee's report to the Commission provided annexes of documents that had influenced its work, including Humphrey's Secretariat draft, a detailed proposal from the United Kingdom (proposing a legally binding Covenant limited to civil and political rights), and proposals from the United States for revisions of the draft (which offered redrafts of articles already set out in Humphrey's initial Secretariat draft, not only on civil and political rights, but also on ESC rights). Paragraph 11 of the Drafting Committee's July 1947 report reads:

In addition to the Draft Outline of an International Bill of Human Rights prepared by the Secretariat (. . . constituting Annex A), the Drafting Committee had before it the text of a letter from Lord Dukeston, the United Kingdom Representative on the Commission on Human Rights, transmitting (a) a draft International Bill of Rights and (b) a draft resolution which might be passed by the General Assembly . . . constituting Annex B. . . . These two documents were considered and compared, *together with certain United States proposals for the rewording of some items appearing in the Secretariat Draft Outline, constituting Annex C.*³¹

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28. Initially, the UN drafting committee was composed of only three members of the Commission: the appointed Chair, Eleanor Roosevelt of the United States; the Vice-Chairman, P.C Chang of China; and the Rapporteur, Charles Malik of Lebanon, but was soon enlarged to include another five members with representatives from Australia, Chile, France, the Soviet Union, and the United Kingdom. During the second meeting in June 1947, the representatives of these members who attended the meetings included Ralph L. Harry (Australia), H. Santa Cruz (Chile), Rene Cassin (France), Vladimir M. Koretsky (USSR), and Geoffrey Wilson (UK).
 29. *International Bill of Rights Documented Outline*, *supra* note 27. This included proposals for draft declarations submitted by Chile, Cuba, and Panama and specific detailed proposals made by the United States, the UK, and India.
 30. Morsink offers a very clear overview of the seven stages of the drafting process in MORSINK, *supra* note 15, at 4–12.
 31. UN DRAFTING COMMITTEE, *US Suggestions*, *supra* note 16, at 41–47 (emphasis added).

The Drafting Committee report's Annex C is entitled "United States Suggestions for articles to be incorporated in an International Bill of Rights,"³² which is a slightly revised version of the June 1947 US submission submitted entitled "United States Suggestions for Redrafts of Certain Articles in the Draft Outline."³³ These US Suggestions (both in the June and July versions) set out proposed revisions on text contained in the Secretariat draft and wording for new provisions on all rights, including ESC rights.

These documents provide a clear picture of the official US position and point to a significant difference between the UK and US positions at that time. While the UK was emphasizing the importance of a legally binding covenant that would include only civil and political rights (as set out in Lord Dukeston's letter in Annex B), the US was emphasizing the importance of a non-legally binding declaration that would nonetheless be a forceful statement of all human rights, including ESC rights.

It is important here to remember that the Drafting Committee and the Commission on Human Rights could not reach agreement on whether to pursue the UK proposal of a legally binding covenant restricted only to civil and political rights, or whether to pursue the US proposal of a more expansive and inspirational, but non-legally binding, declaration of rights encompassing civil and political rights as well as economic, social, and cultural rights. The failure to reach agreement led to a decision to pursue the drafting of both a declaration and a covenant simultaneously. By the end of 1948, both texts had been through several rounds of negotiation under UN auspices, but the UN General Assembly only adopted the Universal Declaration of Human Rights, leaving the potentially legally binding covenant on civil and political rights until later.

III. THE 1947 "UNITED STATES SUGGESTIONS FOR ARTICLES TO BE INCORPORATED IN AN INTERNATIONAL BILL OF RIGHTS"

The mid-1947 US Suggestions were thus conceived within the context of the US position to produce a non-binding declaration, but nonetheless included language on the full range of human rights. The US Suggestions, which amounted to a full draft of an international bill of rights, included sixteen provisions on civil and political rights,³⁴ but also five expansive provisions

32. *Id.* Annex C can be found at 41–47.

33. US Suggestions for Redrafts, *supra* note 17. Comparing the June and July version shows that the only difference is the headings of articles, plus one brief addition to July 1947 that introduces a provision on private education into the article on the right to education: "The State shall maintain adequate and free facilities for such education which, however, *shall not be exclusive of private educational facilities or institutions.*" (The changed text italicized.)

34. These included the right to life, the right not to be subjected to arbitrary arrest or detention, the right not to be subjected to torture or any "unusual punishment," the right to

on economic, social, and cultural rights including: the right to progress; the right to health; the right to education; the right to economic security (including a decent standard of living, social security, work-related rights, adequate food, housing, and community services necessary to wellbeing); and the right to participate in cultural life and share the benefits of scientific progress. The US draft not only enunciated ESC rights but also carefully spells out a correlative duty of the state in detail for each economic and social right.

In its provisions on ESCR rights, the text of the US Suggestions (taken here from the June 1947 proposal) proposes:

Article 35

Right to Progress

Everyone has the right to a fair and equal opportunity to advance his own physical, economic, and cultural well-being and to share in the benefits of civilization.

It is the duty of the State, in accordance with the maximum use of its resources and with due regard for the liberties of individuals, to promote this purpose by legislation or by other appropriate means. Among the social rights thus to be achieved progressively by joint effort of the individual and the State are those defined in the following articles.

Article 36

Right to Health

Everyone, without distinction of economic or social condition, has a right to the highest attainable standard of health.

The responsibility of the State for the health and safety of its people can be fulfilled only by provision of adequate health and social measures.

Article 37

Right to Education

Everyone has the right to education.

Each State has the duty to require that each child within territories under its jurisdiction receive a fundamental education. The State shall maintain adequate and free facilities for such education. It shall also assure development of facilities for further, including higher, education, which are adequate and effectively available to all the people within such territories.

a fair trial, the right not to be held in slavery or compulsory labor, the right to privacy, the right to freedom of movement, the right to a legal personality, the right to equal opportunity in employment, the right to property, the right to a nationality, the right to freedom of expression and association, and the right to vote.

Article 38

Right to Economic Security

Everyone has a right to a decent standard of living; to a fair and equal opportunity to earn a livelihood; to wages and hours and conditions of work calculated to insure a just share of the benefits of progress to all; and to protection against loss of income on account of disability, unemployment, or old age.

It is the duty of the State to undertake measures that will promote full employment and good working conditions; provide protection for wage-earners and dependents against lack of income for reasons beyond their control; and assure adequate food, housing, and community services necessary to the well-being of the people.

Article 39

Right to Participate in the Cultural, Scientific and Artistic Life

Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science.³⁵

The way in which the rights are set out, with an initial statement of the right, followed by a correlative duty, mirrors the form (though not the content) of the American Law Institute's 1946 Statement of Essential Human Rights.³⁶ The US proposals on correlative duties set out concrete measures necessary to implement the economic and social rights, including measures for health and education and policies for ensuring full employment and social protection for a decent standard of living. These proposals for text on correlative obligations were surprisingly also significantly stronger than the original Secretariat text (except in the case of the right to education, on which Humphrey's draft had already provided similarly worded text on the duty of the state).

Although setting out the ESC rights and their correlative obligations in such detail did not necessarily suggest that the US administration believed that these rights should be legally enforceable,³⁷ this text suggests that the

35. US Suggestions for Redrafts, *supra* note 17, at 6–7.

36. The 1946 ALI statement was submitted to the UN Secretariat via the delegation of Panama and was used by Humphrey in his first draft, and so had a significant effect on the drafting of the UDHR. The ALI statement also appears to have had a significant effect on the official US position, possibly via Eleanor Roosevelt's adviser, Durward Sandifer of the State Department, who had been involved in the drafting of the ALI statement since 1942. See Hanne Hagtvedt Vik, *Taming the States: The American Law Institute and the "Statement of Essential Human Rights,"* 7 J. GLOBAL HIST. 461, 467 (2012).

37. By pursuing a non-binding declaration on human rights, the US was able to postpone the question of whether these rights should be legally enforceable in the domestic US context. In relation to the ALI's approach, Vik details how the ALI drafting committee included economic and social rights drafted as rights with correlative duties, but members of the committee could not agree on the precise legal form of these rights and remained

US at least initially believed that a forceful statement of these rights should also include references to take particular policy measures that would be necessary for states to meet their responsibility towards these rights.³⁸ Yet despite this relatively strong language on duties in mid-1947—and despite succeeding in getting significant amounts of these mid-1947 text proposals into the draft Declaration (e.g. the US text on the right to health was taken verbatim into the draft of the Declaration that emerged at the end of the June 1947 Drafting Committee meeting)—the US position later shifted, and from late 1947 onwards, the US explicitly tried to downplay or eliminate all this text on correlative duties or state obligations in relation to ESC rights, as discussed below.

These US suggestions for provisions on ESC rights formed part of the first US draft for an international bill of rights during the drafting process.³⁹ US government files reveal that this draft was produced by the ISP's Subcommittee on Human Rights and Status of Women,⁴⁰ which had reviewed not only the UN Secretariat's draft but also at least twenty-three other draft bills of rights in existence at the time.⁴¹ The Subcommittee files contain the position papers of the US administration on each right, which were produced by the different department representatives on the Subcommittee, and which reveal some significant differences in the understanding of the character of economic and social rights between the different government departments. However, these position papers also show that the 1947 US Suggestions intended to strengthen some of the language of Humphrey's Secretariat

divided over whether these rights should be presented as legally enforceable rights or as policy goals. The final approach agreed upon was that these rights could be framed as a declaration of principles, with the aim to encourage states to enact social legislation and formalize constitutional principles, much as the formulation of international principles in the International Labour Organization had had some effect on states. This failure to agree on the legal form of these rights led to the ALI's proposal being presented as a "Statement of Essential Rights," rather than as a "draft bill of rights," and it was "circulated," rather than submitted for approval by the wider ALI membership. *Id.*

38. The files of the US Inter-Departmental Committee on International Social Policy and its Subcommittee on Human Rights and Status of Women suggest that there were some internal differences between representatives of different government agencies on the character of ESC rights, with some suggesting that the US proposals should take a declaratory rather than a mandatory form, focusing on the rights of individuals, rather than the duties of the state. See, e.g., US Committee on International Social Policy, *Supplement to Recommendations with Respect to Specific Articles, Declaration on Human Rights: Article 26 (Social Security)*, position paper submitted by the Federal Security Agency with Labor, ISP D-72/48, 7 May 1947, Box 107, RG353, NARA.
39. US Subcommittee on HRW, *Draft International Bill of Rights* ISP D-95/47, Box 110, RG353, NARA (20 June 1947) at 8 and at the Annex: *Section II (Social Rights)*.
40. See the earlier position paper US Subcommittee on HRW, *Section II: Social Rights*, ISP D-89/47, Box 110, RG353, NARA (3 June 1947).
41. The US S/HRW files collect together many of these drafts, which range from the bill drafted by Hersch Lauterpacht to that of H.G. Wells, from the American Bar Association to the statement of the American Law Institute and many others.

draft, particularly in relation to the articles on the rights to health, education, and social security, although it also sought to avoid a direct reference to the right to work (preferring the promotion of full employment, rather than the direct responsibility of the state to provide jobs) and introduced the notion of “progressive realization” and emphasized the need for efforts of the individual as well as the state.⁴²

Of the articles proposed by the US, the proposed article on the “Right to Progress” was new (in that this did not exist in the Secretariat draft) and is set out as a *chapeau* or “umbrella” article for the following economic and social rights. It is significant in that its wording is surprisingly close to the eventual wording of Article 2(1) of the ICESCR, and it appears to provide the first use of the concepts “maximum available resources” and “progressive realization” (or “achieving progressively”). The US position papers suggest that the US initially drafted this article as a provision to balance the duties of the state with the duties of the individual and to limit the immediacy of the obligation by emphasizing that these rights would be “progressively realized.”⁴³ The UN meeting records show that Eleanor Roosevelt (acting simultaneously in her role as Chair of the meeting but also a member of the drafting committee representing the United States) raised this proposal to the attention of the Drafting Committee but did not press forcefully for this to be included explicitly as a right to progress during the June meeting in 1947.⁴⁴ This language was not immediately incorporated by the Drafting Committee into its draft, although the idea of an umbrella article for economic and social rights did come back into the drafting process at a later point as a French proposal and is partly captured in the final UDHR in Article 22.⁴⁵ This eventual UDHR Article 22 was, however, interpreted differently by different government representatives to the UN, with the French emphasizing

42. A range of position papers is accessible in Box 110 for this time period. Precise references are given below under the separate discussions of each right.

43. US Subcommittee on HRW, *Article 28A: Right to Progress*, Position Paper S/HRW D-122/47, Box 110 (12 Sept. 1947) explains that the text aimed to balance the duties of the individual and the need for self-reliance with the duties of the state. I could not find any earlier position paper to explain the concepts of “achieving progressively” and “maximum available resources,” although it appears that this combines some text from other position papers on social security and the right to work (referenced below) and “maximum available resources” may have been originally understood in the Keynesian sense of full employment of resources. Further research is thus still necessary on how the US originally conceived of “maximum use of available resources” and “progressive achievement.”

44. U.N. Doc. E/CN.4/AC.1/SR.14, 14th Mtg. 23 June 1947, at 6.

45. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess, art. 22, U.N. Doc. A/RES/3/217A (1948) states:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national efforts and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

the aspect of international cooperation for securing economic and social rights (Cassin, as the French representative, emphasized that international cooperation was essential for resolving the issue of mass unemployment),⁴⁶ and the US later stressing that this article was intended as a limitation on state duties, as Eleanor Roosevelt emphasized in her final speech to the General Assembly before the adoption of the Declaration.⁴⁷

The US proposed text on the “Right to Health” is also interesting, as it was significantly different and more detailed than Humphrey’s preliminary draft. Humphrey’s draft read, “Everyone has the right to medical care. The State shall promote public health and safety.”⁴⁸ However, the US Subcommittee position paper suggested that this article on the right to health “was entirely inadequate” and called for the use of stronger language, adapted from the Constitution of the World Health Organization on the right to “the highest attainable standard of health” and on the responsibilities of governments in the “provision of adequate health and social measures.”⁴⁹ In the June 1947 UN meeting, Eleanor Roosevelt explained that her government was in support of the substance of the article on health suggested in the Secretariat draft, but that the United States had proposed a new wording. She explained that the language proposed by the US (which read that, “Everyone, without distinction of economic and social condition, has the right to the highest attainable standard of health” along with language on the correlative duty of the state to ensure the “provision of health and social measures”) was an adaptation of text from the Constitution of the World Health Organization.⁵⁰

The US proposal on this right did make its way almost verbatim into the draft after her intervention. However, the text on the right to health was later merged and collapsed into a broader article covering a range of rights, and in the final UDHR, the right to health is subsumed into Article 25 as “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care.”⁵¹ Interestingly, however, this phrasing of “the highest attainable standard of health” was to later come back in the text of the ICESCR. It is intriguing, then, that it was the US that first proposed this language—a

46. See MORSINK, *supra* note 15, at 226–30.

47. *Id.* at 230, Eleanor Roosevelt, *On the Adoption of the Universal Declaration of Human Rights* (9 Dec. 1948), available at <http://www.americanrhetoric.com/speeches/eleanor-rooseveltdclarationhumanrights.htm>.

48. UN Drafting Committee of the International Bill of Rights, *Draft Outline Int’l Bill of Rights*, *supra* note 26, at 12.

49. US Subcommittee on HRW, *Right to Health: Article XXXV*, Position Paper S/HRW D-66/47, Box 110 (20 May 1947).

50. MORSINK, *supra* note 15, at 194 (Morsink provides a discussion of the US spoken positions, as Eleanor Roosevelt’s interventions are recorded in the UN meeting records, but Morsink does not analyse the US written submissions).

51. *Id.* at 334.

phrase which, like the phrases of “progressive realization” and the “use of maximum available resources,” has since entered the lexicon of economic, social, and cultural rights.

On the proposal for the “Right to Education” the US suggestion cleaved more closely to Humphrey’s text (which already followed a similar format setting out the duty of the state),⁵² although the US Subcommittee position paper had even proposed stronger language than the language that ended up in the US draft, including phrasing on the need for the development of facilities to “the highest attainable level” for further education.⁵³

The article proposed by the United States on the “Right to Economic Security,” which includes the right to a decent standard of living, work-related rights, and social security, appears to have been a revision and extension of Humphrey’s draft article on social security. The US Subcommittee position paper on social security suggested that the Secretariat draft article on social security was “too narrow in concept” and should be broadened, incorporating the broader understanding adopted in the 1944 Philadelphia Conference of the International Labor Organization. This understanding went beyond the provision of social insurance to include other types of social measures including public assistance and the provision of medical care, as well as measures for encouraging employment (although they also suggest that measures to prevent unemployment would be too much to expect in a free economy).⁵⁴ Eleanor Roosevelt raised this proposal for an article on the “Right to Economic Security” in the June 1947 meeting, and although the United States text was not taken wholesale into the new draft, many elements of it were eventually incorporated in the UHDR as Article 25 on the right to an adequate standard of living.⁵⁵

Surprisingly, the US Subcommittee’s position papers therefore generally proposed strengthening the articles in the Secretariat draft, particularly in relation to the correlative duties of the state—even whilst introducing the idea that these should be duties to be progressively realized. It was only the article which proposed the “Right to Work” that appears to have raised significant problems for the Subcommittee.

The US Subcommittee’s position paper on the right to work takes a markedly different tone from the other position papers (and is presumably

52. Humphrey’s text appears to be closely influenced by the text of the right to education proposed in the 1946 ALI statement. Whelan draws a careful comparison between the ALI statement and Humphrey’s preliminary draft. See WHELAN, *supra* note 12, at 22.

53. US Subcommittee on HRW, *Right to Education: Article XXXVI*, position paper, S/HRW D-63, Box 110 (20 May 1947).

54. US Subcommittee on HRW, *Right to Social Security: Article XLI*, position paper, S/HRW D-66/47, Box 110 (20 May 1947).

55. UN Drafting Committee of the International Bill of Rights, *Summary Record of the Ninth Meeting of the Drafting Committee*, U.N. ESCOR, Comm’n on Hum. Rts., 1st Sess., 9th mtg., art. 37, U.N. Doc. E/CN.4/AC.1/SR.9 (1947).

written by a different agency than the other papers, although this is not clear from the records). It questions the legal enforceability of the right to work (and social rights more broadly) and pushes for the UN language of the right to work to be replaced by US language on the “promotion of full employment.”⁵⁶ The fear of an explicit reference to the right to work is clearly linked to the administration’s keen awareness that any guarantee of the right to work had already been rejected outright by Congress, and it would not therefore be possible for the official US position to accept a right to work in the declaration. Congress had rejected the ideas of the right to work and state guarantees of full employment during the fierce debates in 1945 and 1946 that followed the introduction of the Full Employment Bill of 1945 by Senator James Murray (Democrat, Montana). This proposed bill was eventually passed, but only as the watered-down 1946 Employment Act, with a commitment to pursue “maximum employment” but no guarantee of full employment or the right to work.⁵⁷ The position paper of the Subcommittee expresses these concerns explicitly:

In Congressional debates preceding the enactment of our own Employment Act of 1946, the concept of a “right to work” met with strong opposition. Neither this phrase nor “full employment” appears in the law as enacted, which instead declares it to be the policy and responsibility of the Federal Government, subject to certain provisos, to use all its resources to create and maintain conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production and purchasing power.⁵⁸

The same position paper also points out that, during the drafting of the UN Charter’s Article 55, the United States had also opposed text on the duty to guarantee full employment, although it eventually accepted language to “promote full employment.” For these reasons, the US Suggestions therefore subsumes the article on the right to work under the “Right to Economic Security,” replacing language on the “right to work” with text on the duty of the state to promote full employment and good working conditions in the context of a “right to a decent standard of living.” However, the US was not successful in eliminating a reference to the right to work in the final UDHR, which includes the right to work in its Article 23. Notably, however, during the drafting of the UDHR, the US position on the right to work was also significantly influenced by a lengthy dispute with the Soviet delegates on the meaning of the right to work, as the Cold War rhetoric on both sides

56. US Subcommittee on HRW, *Right to Work: Article XXXVII*, Position Paper, S/HRW D-71/47, Box 110 (23 May 1947).

57. See STEPHEN KEMP BAILEY, *CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946* (1950).

58. US Subcommittee on HRW, *Right to Work*, *supra* note 56, at 3.

escalated during the meetings of the Commission on Human Rights.⁵⁹ The US suggested that the USSR conception of the right to work meant that people were forced to work, without a choice in their occupation, which explains why the UDHR's article on the right to work in Article 23 is also balanced with US language on the "free choice of employment." And while the UDHR did not include language on "full employment," it is again interesting to note that this wording was recovered later in the ICESCR, which calls in its Article 6(2) for policies to promote, *inter alia*, "full and productive employment."

Although both the UDHR and the ICESCR were clearly the result of negotiations and the different voices and ideas of many different country representatives, the language and concepts raised in its 1947 US Suggestions do appear nonetheless to have had an important impact on the drafting of the UDHR but also a strangely significant impact on the later drafting of the ICESCR. Indeed, the wording of the provisions of US Suggestions is surprisingly close in form and content to the 1966 text of the ICESCR. The table below shows the similarity between the two texts by highlighting in italics the similar wording in relation to economic, social, and cultural rights, using the full text of the 1947 US Suggestions and comparing this with extracts of text of articles of the ICESCR (with references in italics where there are similarities in the text). Note, for example, the provisions on "maximum available resources" and "progressive realization," as well as the references to "full employment" and the "right to the highest attainable standard of health":

59. See, e.g., *Summary Record of the Sixty-Fourth Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 3rd Sess., 64th mtg., U.N. Doc. E/CN.4/SR.64 (1948).

- Art 29
*US July 1947 Suggestions*⁶⁰
 "Everyone has the right to a fair and equal opportunity to advance his own physical, economic, spiritual and cultural well-being and to share in the benefits of civilization."
 It is the duty of the State, in accordance with the *maximum use of its resources* and with due regard for the liberties of individuals, to promote this purpose by legislation or by other appropriate means. Among the social rights thus to be *achieved progressively* by joint effort of the individual and the State are those defined in the following Articles."
- 30
 "Everyone, without distinction as to economic or social condition, has a *right to the highest attainable standard of health*.
 "The responsibility of the State for the health and safety of its people can be fulfilled only by provision of adequate health and social measures."
- 31
 "Everyone has the *right to education*. Each State has the duty to require that each child within territories under its jurisdiction receive a fundamental education. The State shall maintain *adequate and free facilities for such education* which, however, shall not be exclusive of private educational facilities or institutions. It shall also assure development of facilities for further, including higher education, which are *adequate and effectively available to all the people* within such territories."
- Art 2.1
ICESCR 1966
 "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the *maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."
- 12.1
 The States Parties to the present Covenant "recognize the *right of everyone to the enjoyment of the highest attainable standard of physical and mental health*."
- 13.1
 "The States Parties to the present Covenant recognize the *right of everyone to education*. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for humanrights and fundamental freedoms.
- 13.2
 "The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 "(a) Primary education shall be compulsory and *available free to all*"

32	<p>"Everyone has a right to a decent standard of living, to a fair and equal opportunity to earn a livelihood; to wages and hours and conditions of work calculated to insure a just share of the benefits of progress to all; and to protection against loss of income on account of disability, unemployment or old age.</p>	11.1	<p>"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.</p>
35	<p>"It is the duty of the State to undertake measures that will promote full employment and good working conditions; provide protection for wage-earners and dependents against lack of income for reasons beyond their control; and assure adequate food, housing, and community services necessary to the well-being of the people."</p>	7	<p>The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work.</p>
60.	<p>"Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science."⁶⁰</p>	6.1	<p>The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.</p>
61.	<p>"The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include . . . to achieve . . . full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."</p>	6.2	<p>"The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications"</p>

60. This US July 1947 text was a revised version of the June 1947 text above, but the only revision is a brief added extra phrase aimed at permitting private education. See *supra* notes 16, 17.

61. Note that this provision was similar to the provision in Humphrey's first draft, so the similarity in wording is less surprising here.

The provisions proposed in the mid-1947 US Suggestions are, in fact, closer in wording to the 1966 ICESCR than to the wording of the 1948 UDHR, which is significant to the extent that the US suggestions appear to have remained influential even after 1948 and after the US position had shifted substantially against commitments to ESC rights. The archives show that, despite the evidence of official US support for the inclusion of ESC rights in the declaration in June and July 1947, there was a significant shift in the US position by the end of 1947 to eliminate references to the correlative obligations of states and to emphasize the non-legally binding nature of the declaration. The US did, however, support the inclusion of ESC rights in the UDHR right up until its adoption in 1948 (albeit in a non-binding form), and it was only after 1948 that the US administration turned more decisively against these rights.

IV. THE EVOLUTION OF THE US POSITION ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS DURING THE DRAFTING OF THE UDHR

The US administration's decision to pursue a non-binding declaration of human rights had been part of its international human rights policy since 1942.⁶² It was stressed at the beginning of the drafting period of the UDHR when, in February 1947, the US called for the drafting of a nonbinding declaration to be followed by (a) legally binding convention(s) at a second stage:

With regard to the legal form of an international bill of rights, the United States suggests that the Commission should first prepare it in the form of a Declaration on Human Rights and Fundamental Freedoms to be adopted as a General Assembly resolution. This Declaration should be . . . framed with a view to speedy adoption by the General Assembly. The resolution containing this Declaration should make provision for the subsequent preparation by the Commission on Human Rights of one or more conventions on human rights and fundamental freedoms. This course, it is thought, would permit prompt adoption of a broad statement of human rights and allow time for the working out of detailed treaty provisions on specific matters.⁶³

For Eleanor Roosevelt, who led the US delegation to the Commission on

62. In 1942, a US State Department Special Subcommittee on Legal Problems had argued that international recognition and guarantee of the protection of basic human rights among all countries would be essential for the maintenance of international peace. In advance of the 1944 Dumbarton Oaks conference, a draft bill of rights was prepared with the aim "to formulate the basic rights of individuals that should be universally respected, even if not formally subscribed to by all states, in a brief and forceful statement of general principles." WHELAN, *supra* note 12, at 40–42.

63. 277 DEPT. OF STATE BULLETIN, available at <http://archive.org/stream/departmentofstat1647unit#page/276/mode/2up/search/277>.

Human Rights and chaired the Drafting Committee, the language of rights was powerful, even if the rights were not to be initially inscribed in legally binding provisions. Eleanor Roosevelt wanted to push first for a declaration, which she saw as more immediately important than a legally binding instrument. She was keen that the declaration should not be full of legalese but should rather be phrased in short, rousing text in ordinary language “readily understood by all peoples.”⁶⁴ Majorie Whiteman, Eleanor Roosevelt’s legal adviser from the State Department at the time, wrote:

In her view, the world was waiting, as she said, “for the Commission on Human Rights to do something” and that to start by the drafting of a treaty with its technical language and then to await its being brought into force by ratification, would halt progress in the field of human rights.⁶⁵

While it is easy to take a cynical reading of the US decision to pursue a non-binding instrument on human rights, it is also interesting to examine whether for Eleanor Roosevelt and her advisers pushing first for a morally binding declaration (and only later for a legally binding convention) was also a strategic choice from the perspective of the US domestic context. Pursuing a declaration first would mean that difficult constitutional questions over the implications of a binding international treaty could be postponed and, importantly, a non-legally binding statement of principles would not require congressional approval. Avoiding the need for congressional approval was particularly important for Eleanor Roosevelt and her advisers in the historical context of isolationists in Congress becoming increasingly hostile to the United Nations and the drafting of international treaties that might have an impact on national sovereignty.⁶⁶ It was also important if economic and social rights were to be included in a declaration—as the Subcommittee on Human Rights was deeply aware of the Congressional rejection of the right to work in the wake of the controversy over the 1945 proposal for a “Full Employment Bill” (as reflected in their position discussed above). However, it was also crucial for civil and political rights, particularly in relation to provisions on non-discrimination and the right to vote in the context of tensions over racial desegregation and southern opposition to change.⁶⁷ On 3 July 1947, Eleanor Roosevelt requested advice from the head of the US delegation to the UN, Senator Warren Austin, on his views regarding the likelihood of securing approval for a legally binding convention from the Senate (even one only referring to civil and political rights as the UK had

64. JOSEPH P. LASH, *ELEANOR: THE YEARS ALONE* 71 (1972). Other members of the original Drafting Committee had also urged this, particularly the delegate from the USSR. In December 1947, the Commission on Human Rights issued a Resolution that the Drafting Committee should prepare a short such text.

65. *Id.* at 65.

66. GLENDON, *supra* note 23, at 71.

67. *See generally* ANDERSON, *supra* note 23.

proposed). Senator Austin “agreed with Mrs. Roosevelt that there would be certain elements among the Southern contingent and the reactionaries from other parts of the country where very strong opposition to a convention would be met.”⁶⁸ Eleanor Roosevelt concurred:

We should be perfectly willing to enter into a convention as well as a declaration, but we must be reasonably certain that the country will back us up. We should not try for too much. It would be most unfortunate if we were to take the lead in forcing a convention through the General Assembly and then be turned down by the Senate.⁶⁹

By the end of that meeting in July 1947, Austin had agreed with Eleanor Roosevelt that priority should be given to drafting the declaration, followed by the preparation of one or more legally binding conventions. She also asked Austin if he could put some pressure for support of this position on Robert Lovett, who had just become Under-Secretary of State and was responsible for UN affairs, but who was opposed to both the declaration and the covenant. Lovett opposed any legally binding covenant, as he was convinced that the Senate, dominated by powerful southern Democrats, would oppose any agreement on human rights that might outlaw segregation and other forms of racial discrimination.⁷⁰ He was also opposed to a declaration because he did not see how it would serve the interests of the United States. He further believed that economic and social rights had no place in the draft, but focused his efforts firstly on preventing the drafting of the covenant and secondly on insisting that the declaration would not impose any contractual duties on the state.⁷¹ A.W. Brian Simpson details how Eleanor Roosevelt “locked horns” with Lovett in November 1947 but went over his head to the White House and Dean Acheson to insist on US involvement in the drafting of the declaration and also to have the freedom to participate in the drafting of a convention, if this became the priority at the UN.⁷² Lovett’s instructions to the US delegation of 26 November 1947 were self-contradictory and revealed these tensions in the US position:

The United States position . . . is that priority should be given to the declaration. The draft declaration should not be so phrased as to give the impression to individual citizens or governments that there is a contractual obligation on the part of government or on the part of the USA to guarantee the rights set

68. THE ELEANOR ROOSEVELT PAPERS, VOL. 1: THE HUMAN RIGHTS YEARS, 1945–1948 at 587 (Allida M. Black ed., 2007) (James Hendrick, *Memorandum of Conversation with Eleanor Roosevelt*, 3 July 1947).

69. *Id.* at 588.

70. *Letter of Eleanor Roosevelt to Robert Lovett*, in THE ELEANOR ROOSEVELT PAPERS, *supra* note 68, at 711; ANDERSON, *supra* note 23; IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013).

71. *Letter of Eleanor Roosevelt to Robert Lovett*, *supra* note 70, at 711.

72. SIMPSON, *supra* note 22, at 429.

forth in the declaration . . . the proposal for a convention at this time should not be pressed. It may be that the original US position, that conventions should be worked out carefully over a period of years, may be the best approach. The US does not wish to see members of the U.N. enter into a convention unless they intend to observe it in good faith. . . . *You are, however, authorized at your discretion to participate in the drafting of a convention and to accept it for submission to your government.*⁷³

While Lovett's views were not reflected in the June and July US Suggestions, with their emphasis on correlative obligations, by the December 1947 second session of the Commission on Human Rights, Eleanor Roosevelt's interventions, as recorded in the UN meeting records, reflect Lovett's view and a shift in the US position:

[T]here had been a slight evolution in the United States' position with regard to the form which a Declaration on Human Rights should take. Her delegation thought that priority should be given to the draft Declaration, and that the latter should not be drawn up in such a way as to give the impression that Governments would have a contractual obligation to guarantee human rights. As regards the draft Convention or Conventions, the United States considered that the Commission should not proceed to draw them up until it was sure that such Conventions could be accepted and applied in all good faith by the participating States.⁷⁴

The US position had evolved to the extent that it now wished to avoid any suggestion of concrete duties or contractual obligations of states and would avoid any legally binding instrument. At this point the US also argued that the declaration should be shorter and less detailed. On 26 November 1947, the United States submitted a new draft text for a short form Declaration with only ten articles, with an emphasis on the brief declaration of rights and with no reference to mandatory language or correlative obligations.⁷⁵ Only one of the articles in the new draft (Article 9) referred to economic and social rights—which collapsed the earlier proposed rights together, cutting much text and eliminating any reference to correlative duties. The text of Article 9 on ESC rights thus now read, “Everyone has the right to a decent living; to work and advance his well-being; to health, education and

73. *Id.* at 429–30 (emphasis added). See also US Committee on ISP, *Commission on Human Rights, Changes Made by the Under Secretary of State in the US Draft Declaration of Human Rights and in the US Draft Convention on Human Rights*, ISP D-182/47 (21 Nov. 1947) and US Committee on International Social Policy, *Instructions to US Representative*, ISP D-188/47, (11 Dec. 1947) in Box 111.

74. *Summary Record of Twenty-Fifth Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 2nd Sess., 25th mtg., U.N. Doc E/CN.4/SR.25 (1947).

75. *Proposal for a Declaration Of Human Rights, Submitted By The Representative of the United States on the Commission on Human Rights*, U.N. ESCOR, Comm'n on Hum. Rts., 2nd Sess., U.N. Doc. E/CN.4/36 (1947).

social security. There shall be equal opportunity for all to participate in the economic and cultural life of the community."⁷⁶ (To the dismay of Lovett, the US delegation did, however, also put forward a more legalistic text for a convention, although this did not include ESC rights.)⁷⁷

Despite the clash with Lovett, at the time of the third session of the Commission between May and June 1948, Eleanor Roosevelt was still emphasizing the importance of economic and social rights and echoing the words of Franklin Roosevelt's "Economic Bill of Rights," but she also again emphasized that the US position was now against setting out the correlative duties of states or how states should implement those rights, as that would have to be accomplished in different ways by different countries. Referring explicitly to the right to work and the commitment to full employment, she stated that:

The United States delegation favoured the inclusion of economic and social rights in the Declaration, for no personal liberty could exist without economic security and independence. Men in need were not free men. The United States delegation considered that the Declaration should enunciate rights, not try to define the methods by which Governments were to ensure the realization of those rights. Those methods would necessarily vary from one country to another and such variations should be considered not only inevitable but salutary.⁷⁸

By the end of its third session in mid-1948, the Commission on Human Rights had a final draft of the Declaration. This was sent to the UN General Assembly's Third Committee, which again debated every article of the draft Declaration against the increasingly tense backdrop of growing rivalry and tensions between the US and the Soviet Union and rising Cold War rhetoric. But on 23 September 1948, Secretary of State George Marshall gave a resounding call to the General Assembly: "Let this third regular session of the General Assembly approve by an overwhelming majority the Declaration of Human Rights as a standard of conduct for all."⁷⁹ He also emphasized also that "[o]ur aspirations must take into account men's practical needs—improved living and working conditions, better health, economic and social advancement for all, and the social responsibilities which these entail."⁸⁰

76. *Id.* at 2–3.

77. *Proposal for a Human Rights Convention, Submitted by the Representative of the United States on the Commission on Human Rights*, U.N. ESCOR, Comm'n on Hum. Rts., 2nd Sess., U.N. Doc E/CN.4/37 (1947).

78. *Summary Record of the Sixty-Fourth Meeting*, *supra* note 59, at 5.

79. Human Rights Questions at the Third Regular Session of the General Assembly: The United States Position, Minutes of the Fourth Meeting of the United States Delegation to the Third Regular Session of the General Assembly, Paris, Hotel d'Iena, 24 Sept. 1948, *in* FOREIGN RELATIONS OF THE UNITED STATES, 1948 VOL. I, PT. 1, at 289 [hereinafter Minutes of Fourth Meeting].

80. GLENDON, *supra* note 23, at 135.

However, minutes of a meeting of the US delegation to the third session of the General Assembly dated 24 September 1948 record the continuing sense of growing domestic pressures in relation to the nature of the Declaration and the anti-communist pressures at home. The minutes record how John Foster Dulles, who had joined the US delegation (and who later became Secretary of State), asked for assurances that the Declaration would not impose any new legal obligations on the United States and State Department advisers reassured him that the Declaration would not be legally binding.⁸¹ But Dulles was concerned by one particular provision in the Declaration:

Mr. Dulles read the provision of the Declaration which states "everyone has the right of access to public employment" and recalled that he had had to sign a declaration that he was not a Communist at the time of his appointment to the Delegation. . . . He pointed out that unexplained United States support of the Declaration, however, might lead to misunderstanding, if it were not made clear that the Declaration is a general statement of principle and aspiration and not a legal document. . . . He emphasized that it was important to make this very clear to avoid any unfortunate inferences. He referred again to the statement regarding the right of any person to public employment. . . . He referred to the possibility of the Republican Party picking up an isolated clause such as that on public employment and interpreting it as a commitment by the United States Delegation agreeing to employment of Communists in such agencies as the Atomic Energy Commission.⁸²

This provision on the right of access to public employment was about nondiscrimination in access to public employment. It had been in the original Humphrey draft and had also been supported by the US and included in the 1947 US Suggestions. But Dulles was referring to the 1947 Federal Employee Loyalty Program introduced to address fears of communist spies in the federal government, especially in agencies such as the Atomic Energy Commission.⁸³ Dulles' concern, and other domestic objections to ideas of economic and social rights, explains Eleanor Roosevelt's statement when she presented the UDHR to the Third Committee of the General Assembly that: "The United States Government did not feel that it was infringing any basic human right by excluding individuals with subversive ideas from its civil service."⁸⁴

Eleanor Roosevelt also emphasized again the weaker position on economic, social, and cultural rights, stressing that these would not imply any

81. Minutes of Fourth Meeting, *supra* note 79, at 291–92.

82. *Id.*

83. Dulles' role is interesting, as he was an earlier supporter of human rights, but by 1953 as US Secretary of State, Dulles announced a no-treaty policy in the human rights field, sacrificing human rights to defuse the growing controversy over the Bricker and other amendments. Vik, *How Constitutional Concerns Framed*, *supra* note 23, at 901.

84. *Summary Record of the Eighty-Ninth Meeting*, U.N. GAOR, 3rd Sess., 89th mtg., at 33, U.N. Doc. A/C.3/SR.89 (1948).

direct governmental action, but that they would be circumscribed by the limits in the “umbrella” article on available resources and progressive realization. Even in her final speech to the General Assembly on 9 December 1948, before the adoption of the UDHR on 10 December 1948, Eleanor Roosevelt again reiterated that the Declaration was not legally binding and that the commitments to economic, social, and cultural rights did not imply any legal obligations for the state to take direct action.

[M]y government has made it clear in the course of the development of the Declaration that it does not consider that the economic and social and cultural rights stated in the Declaration imply an obligation on governments to assure the enjoyment of these rights by direct governmental action. This was made quite clear in the Human Rights Commission text of article 23 which served as a so-called “umbrella” article to the articles on economic and social rights. We consider that the principle has not been affected by the fact that this article no longer contains a reference to the articles which follow it. This in no way affects our whole-hearted support for the basic principles of economic, social, and cultural rights set forth in these articles.⁸⁵

The Chilean representative, Hernán Santa Cruz, who had accompanied her on the journey to produce the UDHR since their roles together in the Drafting Committee, wrote that her

intervention disappointed me a little. I did not hear the spontaneous expression of her personal fight for human rights that was present on previous occasions. On the other hand, one sensed the caution of someone who was speaking on behalf of a State that does not forget the political implications of the practical application of human rights instruments.⁸⁶

However, Eleanor Roosevelt, too, was troubled: she recorded that night, “I wondered whether a mere statement of rights, without legal obligation, would inspire governments to see that these rights were observed.”⁸⁷

The focus of this article has been on a close analysis of the UN and US archives over 1947 to 1948, to show a more nuanced US position on ESC rights—and, indeed, to illustrate this shift in the US position over this period from comparatively strong support for ESC rights and their correlative duties in the mid-1947 US Suggestions to a much weaker position by the end of 1948. Although space here does not permit it, this history needs to be understood within a broader historical arc of the domestic and international context between 1945 and 1953.

85. Roosevelt, *On the Adoption of the Universal Declaration*, *supra* note 47. The Article 23 that she refers to became Article 22 in the Declaration, and in turn this appears to have provided the background to Article 2(1) of the ICESCR as a limitation according to resources on the implementation of these rights.

86. *Cited in* GLENDON, *supra* note 23, at 167.

87. *Id.* at 170.

The international context of the Cold War is a familiar story, as the drafting of the UDHR took place against the dramatic backdrop of the end of the wartime alliance with the USSR, the announcement of the Truman Doctrine and the Marshall Plan for Europe in June 1947, and the Berlin blockade that began in June 1948. But the domestic US context is also important. The drafting also took place against the background of a domestic crusade against “Communists in government” or the “Second Red Scare” in the US, as well as the formalization of the Federal Employee Loyalty Program in the US in March 1947⁸⁸ and its chilling effect on government staff.⁸⁹ It also took place in the face of rising conservative fears of an overextension of federal and executive power in racial desegregation and progressive New Deal reforms and growing isolationist opposition to US involvement in international treaty making.

The shifting US position should thus be understood within the arc of the shift in power from internationalists and overwhelming US congressional approval of the UN Charter in 1945 towards the isolationists, which culminated with the Bricker amendment controversy and the eventual announcement in 1953 under Republican President Dwight Eisenhower that the US administration would not become party to any human rights treaty. It should also be understood within the context of conservative opposition to New Deal policies, the rise of opposition such as that of the American Bar Association to any international human rights convention (particularly one that included economic and social rights), and the McCarthyism that aimed to purge progressives from the US administration. While Vik provides a detailed analysis of the concerns over legal and constitutional issues that the Subcommittee on Human Rights and the Status of Women addressed (including the implications of international human rights agreements for federalism and states’ rights),⁹⁰ many of the legalistic arguments around constitutional concerns and the balance of responsibilities between the federal and state governments were also related to conservative fears of federal and executive overreach. And this, in turn, was related to fears that human rights agreements would strengthen federal power to outlaw racially discriminatory practices (such as segregation and lynching) in southern states and to interfere in the economy by imposing labor laws and social rights. Carol Anderson has shown in detail how the US debate on race substantially shaped the US position,⁹¹ while Natalie Kaufman has also detailed conservative opposition

88. As noted above, this program aimed to purge presumed communists from the US administration. For a contemporaneous view, see Seth W. Richardson & Harry S. Truman, *The Federal Employee Loyalty Program*, 51 COL. L. REV. 546 (1951).

89. See generally LONDON R. Y. STORRS, *THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT* (2013); ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1996).

90. Vik, *How Constitutional Concerns Framed*, *supra* note 23, at 891.

91. ANDERSON, *supra* note 23.

to ESC rights for their impacts on economic policy and private enterprise, particularly through the forceful lobbying of the ABA which, significantly, began around the beginning of 1948 during the drafting of the UDHR and escalated during the drafting of the Covenants.⁹² Along with the end of the New Deal era (and its support to economic and social rights as expressed in Franklin Roosevelt's "Second Bill of Rights" speech one year before his sudden death in 1945), it was this growing opposition that led to the shift in the US official position from the comparatively strong language in the mid-1947 document to a much weaker position by the end of 1948.

However, it was only after 1948 that the tide turned decisively against these rights. It was during the drafting of the legally binding Covenants (the ICCPR and the ICESCR) in 1953 that Eleanor Roosevelt was summarily sacked by the Eisenhower administration from her role on the Commission on Human Rights, as the new administration announced to the world that it would not accept "foreign interference" in its domestic affairs and would not become a party to any human rights treaty approved by the United Nations.⁹³ Eleanor Roosevelt was outraged when John Foster Dulles (then Secretary of State) announced this US no-treaty policy in 1953 (a position that sacrificed human rights in order to defuse congressional support for the Bricker amendment) and was blistering in her very public attack on the new US position:

We have sold out to the Brickers and McCarthys. It is a sorry day for the honor and good faith of the present Administration in relation to our interest in the human rights and freedoms of people throughout the world.⁹⁴

Other nations may bind themselves if they wish, but we feel that it is impossible "to codify standards of human rights as binding legal obligations," and the Eisenhower Administration does not want to fight a section of the American Bar Association, or the isolationists or those who might vote for the Bricker amendment. . . . The Administration . . . should feel . . . embarrassed.⁹⁵

V. CONCLUSION

This article chronicles the official US position on economic, social, and cultural rights during the drafting of the UDHR over the period between

92. NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* (2011).

93. BRENDA GAYLE PLUMMER, *WINDOW ON FREEDOM: RACE, CIVIL RIGHTS, AND FOREIGN AFFAIRS, 1945–1988*, at 31 (2003).

94. Eleanor Roosevelt, *My Day* (9 Apr. 1953).

95. Eleanor Roosevelt, *My Day* (10 Apr. 1953). "My Day" was a six-day-a-week newspaper column written by Eleanor Roosevelt from 30 December 1935 until 26 September 1962 that was nationally syndicated and appeared at its height in 90 newspapers across the United States.

1947 and 1948. It sheds new light on the debate over “the myth of Western opposition” through a detailed analysis of the US position, as revealed in the United Nations archives of the *travaux préparatoires* of the UDHR, as well as United States archives of the time. In particular, it examines a July 1947 US proposal entitled “United States Suggestions for Articles to be Incorporated in an International Bill of Rights” and an earlier June 1947 submission on which this is based entitled “United States Suggestions for Redrafts of Certain Articles in the Draft Outline,” which was submitted as the official US contribution to the UN for the work of the Drafting Committee on an International Bill of Human Rights of the Commission on Human Rights. These mid-1947 US Suggestions are significant because they provide evidence of official support of the US administration for the inclusion of ESC rights in the Universal Declaration—even if these rights were only to be included as part of a morally binding declaration of principles, rather than as part of a legally binding convention. An analysis of the UN archives, alongside the US archives, also shows that the US position was far more nuanced than standard narratives suggest, that there were differences among the US delegation and its advisers, and that the US position in fact shifted quite significantly over the short period of the drafting of the UDHR between 1947 and 1948 in response to domestic and international pressures. The standard narratives of the history of human rights and the history of economic, social, and cultural rights need to be revised to recognize the distinctly different picture of the US position that emerges here.

The text of the 1947 US Suggestions is also significant, not only because it belies standard assumptions about the US position on ESC rights, but because substantial parts of the US wording and provisions on economic, social, and cultural rights reappear in the text of the 1966 ICESCR. A number of key concepts and phrases that were later to become part of the lexicon of ESC rights, including the concepts of “progressive realization,” “maximum use of resources,” and the specific formulation of certain rights such as the “right to the highest attainable standard of health,” clearly have their roots in this 1947 US proposal. Any history of the ICESCR must, therefore, take this earlier history into account.