

**What in the World?**  
**U.S. Elections Seen Through the Lens of International Human Rights Law**  
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It is an honor and a pleasure to be invited to speak to you today, as part of the Caucasus University's Human Rights Week. I have to begin by thanking our host, Ambassador Ioseb Nanobashvili, Dean of the Law School, for the invitation as well as his kind introduction. And my participation would not have been possible without the help of our moderator, Konstantine Kopaliani, a Georgian lawyer and newly-minted Master of Laws from the Duke University School of Law. Konstantine has been my guide and invaluable mentor in all things Georgian: I am especially grateful to him for his friendship.

Earlier this year, I led a group of students from the School of Advanced International Studies at the Johns Hopkins University in a project studying the implementation of human rights norms in the domestic legal regime of Georgia. The students produced a major report analyzing the incorporation of those norms in the areas of police accountability, discrimination, and media freedom. Our investigation included a visit to Tbilisi in January, during which we were offered extraordinary assistance and cooperation from government ministries, Members of Parliament, civil society, and the private sector. So I am especially pleased to take part in a Georgian university's celebration of human rights.

I have to express at the outset my regret that we cannot be meeting each other in person today! However efficient may be this electronic platform for communication, it necessarily is a poor medium for the transmission of the Georgian hospitality that my class and I enjoyed during a cold winter in Tbilisi and that I am enjoying right now, and for the gratitude that I offer for that welcome.

My class discovered a very high level of familiarity, among Georgians in many walks of life, with the standards expected, indeed demanded, of democratic states in the 21<sup>st</sup> century. The last 75 years have of course been marked by enormous changes reaching every corner of the globe, but among the most significant of those changes is the shared awareness that how a state treats its own citizens is a matter of legitimate international concern. As you all know, it was not always

thus, and obviously even now, the aspirational goals of human rights law leave enormous gaps that remain to be filled.

But what is established beyond doubt is that international human rights law is law. It recognizes entitlements that we all have simply by virtue of our humanity. Those rights are not conferred by governments in their benign and magnanimous discretion, and they cannot be revoked by governments, not even under the pretext of security, or expediency, or tradition.

One of the rights vouchsafed by the instruments codifying the contents of human rights law is the right to participate in the selection of the women and men who will govern us. Art. 21(3) of the Universal Declaration of Human Rights declares that: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." As you all know, the Declaration is a statement of principles and not a treaty. But the International Covenant on Civil and Political Rights is a treaty, to which Georgia and the United States, along with over 170 other nations, have agreed to be bound as a matter of law.

The ICCPR provides additional content, as well as binding force, to the words of the Declaration. At Art. 25, the Covenant declares that: "Every citizen shall have the right and the opportunity, without ... unreasonable restrictions: ... To vote ... at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the Electors." Implementation of these precepts is an international obligation. States must provide for elections of public officials that are genuine and free, and everyone must be permitted to take part under conditions of equality.

Equal suffrage means nothing more or less than one person, one vote. If we are fellow citizens, you and I, then your vote counts as much as mine, and mine as much as yours. No attention is paid to what differences there might be in our wealth, our education, our location, or our status in life. It does not matter that you are well-versed in the issues at stake in the election, and I have no clue at all. The bricklayer casts one vote, and so does the Prime Minister; the illiterate farmworker has one vote, and so does the university professor. That is the essence of democratic accountability, which is enshrined, incidentally, not only in the instruments I have cited, but also in the first Protocol to the European Convention on Human Rights, to which Georgia is a party. All members of the Council of Europe "undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people."

The question I propose to discuss, during the balance of my time at this virtual lectern, is this: looking at the recent election of our next president, how does the United States measure up

according to these international human rights standards? To do this, however, I need to provide some background about how Americans select their president, and why we do it that way.

The U.S. President is elected by an Electoral College, not by popular vote. Although Electors' names do not appear on the ballot, the slate of Electors for whom people cast their ballots have pledged to vote for the candidate whose name does appear. Electors may, and occasionally do, deviate from their pledges: States may punish them for doing so, but as the Supreme Court has recently reiterated, Electors do have that right. They are the ones who choose our President. Our founders did not prefer direct popular elections for the national leader to be vested with such immense powers, envisaging a process by which wise Electors would dispassionately identify and inaugurate the best person for the job. And that basic structure still persists.

However, almost immediately the American political space was divided into two political parties, and candidates announced their desire to be chosen as president by Electors already resolved to support them. The Electoral College system was not designed with this in mind. So while voters in each state still choose Electors, not candidates, today the Electors are stand-ins: intermediaries, tasked with carrying out the will of their state's voters. In practice, all but two States have decided to allocate their votes by awarding all of their Electors to the winner of the popular vote in that State, no matter how close that vote may have been. The state winner takes all, even if a difference of only a few votes determines who will receive all of the Electoral votes of the State (as happened in *Bush v. Gore*, in 2000).

The number of Electoral votes allocated to each State is equal to the number of seats that State has in the two Houses of Congress, which is to say their Members of the House of Representatives, plus two (since each State has two Senators). And three votes are given to the District of Columbia, although it has no Members of Congress, by virtue of the Twenty-Third Amendment (adopted in 1961). Thus there are 538 Electoral College votes at stake: 435 Congresspersons + 100 Senators + 3 for DC. The absolute majority required to win is, therefore, 270.

This system is grounded in history. But it is unfair and undemocratic in practice, for several reasons.

First, it means that there is no real electoral contest in many states, because they are predictably Democratic or Republican, and the votes in those States are therefore of little consequence. For example, 3 of the 10 biggest States – California, New York, and Illinois – are solidly Blue (that is, Democratic). Together, those states represent over 20% of the population of the country, and contain three of our four largest cities. Other states are equally reliably Red (or Republican): in those States too, neither party's presidential candidate needs to compete, and this year, neither of them did. Indeed, a national campaign is typically concentrated exclusively on the so-called "swing" or "purple" States – that is, those that are neither Blue nor Red, but are up for grabs.

This produces extreme anomalies. Vermont is predictably a Democratic state: no Republican candidate for the presidency has carried Vermont since Ronald Reagan won it in 1984. Its neighbor, New Hampshire, however, is a swing state, and its voters are courted by both parties. Thus it is that citizens on the eastern (New Hampshire) side of the Connecticut River are very much in demand, while those who live just across the river on the Vermont side may safely be ignored: no one bothered to ask for their votes; no one came before them to debate the issues; no one treated them as if they mattered. And while this year there were a few surprises – Georgia’s and Arizona’s Electoral votes will be cast for the Democratic candidate for the first time since 1992 and 1996, respectively, and Democratic hopes to succeed in North Carolina as Barack Obama did in 2008 were dashed – the notion that well over half of the American public can be safely disregarded by both campaigns hardly suggests that all citizens’ votes are treated equally.

But to understand how far the Electoral College system deviates from an expression of the will of the people, consider this: in 2016, Donald Trump got 3 million fewer votes than Hillary Clinton, and yet he won 306 votes in the Electoral College and therefore the presidency. In 2020, Joe Biden received nearly 7 million more votes than Donald Trump, and Biden won the Electoral College by **precisely** the same margin: 306-232.

This is quite astonishing: two candidates, one who lost the popular vote by 3 million and one who won it by 7 million, received exactly the same number of votes in the Electoral College! But what is novel here is not that the loser of the popular vote became President, it is the sizes of the vote margins. Five times in our history, presidents have been elected without winning a plurality of the people’s votes: John Quincy Adams in 1824, Rutherford Hayes in 1876, Benjamin Harrison in 1888, George W. Bush in 2000, as well as Donald Trump in 2016.

These anomalies – more American voters want Candidate X, but Candidate Y is deemed elected – are a direct result of the Electoral College system.

But the Electoral College is undemocratic not just in practice but by design as well, and these problems would not be fixed even if all 50 States were potentially to be won by either side. This is because the allocation of Electoral votes is skewed, to grant far more influence to some States, and therefore to their citizens, than to others, for reasons other than the number of people who reside there. And that happens because Electoral College representation is based in part on the allocation of two seats to each state in the United States Senate. To understand how this works, a little history is required.

The drafters of our Constitution in 1787 needed to balance the interests of the 13 very different original States, which were far from united in their desire for a strong central government. To do so, they reached two compromises, which may have been completely sensible at the time, but the rationales for which are certainly not relevant to the modern day.

First, the so-called “Connecticut Compromise,” established the bicameral legislature, with representation in the House of Representatives allocated to the States in proportion to their population, but with each State given the same number of Senators. This was intended to provide the smaller States – whose economies were not agricultural, and which tended not to practice the American “original sin” of slavery – with assurances that their interests would not be overridden by the larger States. The “Big States” were Virginia, North Carolina, Pennsylvania, and Massachusetts (each with over 10% of total population). The “Small States” were Delaware, Rhode Island, Georgia, and New Hampshire (of which none had more than 3.5% of the total). The ratio of the populations of the smallest (Delaware) to the biggest (Virginia) was about 1:12.

So it was understood, and accepted, that Senators representing Delaware had the same power as Senators from Virginia, although the Virginia Senators represented 12 times as many people. But there was another problem here. Large numbers of the people who resided in Virginia and North Carolina, among the most populous States, were considered not as humans but as property, “owned” by wealthy planters. Enslaved persons made up nearly 40% of the population of Virginia, and over 25% in North Carolina. What to do about them?

The southern States insisted that enslaved individuals should count fully for the purposes of allocating House seats, and therefore Electoral votes. Northern States pointed out the hypocrisy and inconsistency of this. People in slavery were treated as objects, and by law that is exactly what they were: so why should they be counted in allocating seats? This dispute resulted in the second of the fundamental compromises without which the Constitution would never have been adopted. For purposes of the census, 3/5 of the enslaved population would count. The value of each enslaved person, in other words, would be treated as equivalent to 60% of a free person.

This compromise, actually enshrined in the Constitution itself and not altered for almost eight decades, is frequently misunderstood. It was not their “owners” who argued that enslaved people should not be taken into account in determining congressional representation, but those who opposed the institution of slavery. And the idea that people of African descent – brought to these shores under horrific conditions and forced to live out their lives under a regime designed to deny them the most basic elements of human dignity – should be counted at all resulted in benefits to those who supported the continuation of slavery, until a bloody and fratricidal war brought it to an end.

In the first Congress, the allocation of House seats was 10 for Virginia, 8 for Massachusetts and Pennsylvania, and 5 for North Carolina. Georgia and New Hampshire had 3 each, with Delaware and Rhode Island each entitled to one. Thus, when the Electoral College met in 1792 to re-elect George Washington, it had 95 members: 67 reflecting the House membership, and 28 the Senate (Vermont had by then been admitted as the 14<sup>th</sup> State). Virginia had 12 Electors, with

Massachusetts and Pennsylvania each having 10. Yet the “free” populations of those States were about the same.

The effect of this was to solidify the disproportionate influence of the slave States. And as a result, five of our first seven presidents (the ten winners of the first 12 presidential elections) were themselves slaveholders.

Now let us compare the impact of this allocation of Electoral votes to the situation today. The population distributions among the States now are entirely different from what they were in 1792. The ratio of smallest State (Wyoming) to the biggest (California) is no longer 1:12, but 1:68.

Because of the way Electoral College seats are assigned, the 39,500,000 citizens of California have 55 Electoral Votes, while the 580,000 people of Wyoming have 3. The ratio of their Electoral College seats is 18.3:1, compared with a population ratio of 68:1. That means that in the Electoral College, Wyoming is over-represented by a factor of 3.7. To put it another way, each California Elector represents 718,000 people, while each Wyoming Elector represents 193,000. If the Electoral College is to represent the States in proportion to their populations, and if we start from Wyoming’s representation as the standard, California should have not 55 Electoral votes, but 252. Or if we take California as the benchmark, any State that has 3 Electoral votes should have a minimum of  $3.7 \times 718,000 = 2.66$  million residents.

But 15 U.S. States and the District of Columbia have populations of less than 2.6 million. All of them, therefore, are overrepresented in the Electoral College. And the thing that they have in common, with just a few exceptions, is no longer the driver of their economies, but the fact that most of their citizens do not live in cities. Today, the Electoral College locks in a very strong bias in favor of rural States, although 80% of the US population lives in urban, suburban, or exurban communities. The 28 States with no city of over 500,000 inhabitants have more power than they should have in a one-person-one vote environment; the 23 jurisdictions with one or more large cities have less. And the fact is that rural States are more reliably Republican, and urban ones more likely to vote Democratic. Sixteen jurisdictions are homes to the 25 largest cities in America. Of those, in 2020, 10 were carried by Biden and 6 by Trump. But of the 35 States with no big cities, Trump carried 24, and Biden 11.

So the Electoral College defies the international human rights requirement of universal and equal suffrage in two ways: it entirely discounts the votes of American citizens in the States whose outcomes are predictable and who therefore may be ignored. And it builds in a structural bias in favor of rural States, by overcounting their votes while undervaluing those of citizens who live in cities.

There are, of course, defenders of the Electoral College, even today. But their arguments tend to address not the inequities that I have outlined, but the practical considerations that influence

political campaigns in the modern era. They point out, correctly, that if California's voters had an equal say in deciding who would be the next president as those in, for example, a "swing State" like Ohio, then disproportionate resources would have to be invested by candidates to harvest a comparatively small number of votes.

But I think that argument is both empirically wrong and analytically vacuous. Perhaps, if Donald Trump had had a reason to campaign in California, he would have been able to persuade many more voters there to support his re-election (rather than to stay home) because their votes would matter, and he might even have used them to forge a popular majority. Perhaps if Joe Biden had visited Tennessee, although he had no hope of carrying the State (and therefore his supporters had little incentive to turn out), the overwhelming majority he won in Nashville and Memphis, by providing a substantial contribution to his national popular vote, would have enhanced his prospects of election.

The other argument sometimes heard in the United States is that it would in some way be unfair to allow more densely-populated cities to have greater weight as compared with less populous rural areas. But the response to this is that in a democracy, more people are **supposed** to have more influence in electoral outcomes. The eight million people of New York City have, and should have, greater weight in the election of the governor of New York State than the residents of a small town near Niagara Falls. But if we think of ourselves simply as equal citizens – which is what the one-person-one-vote mandate would seem to require – then it should not matter where we live. If the voters of a largely urban State elect officials who campaign on their understanding of urban issues, well, that is because they are appealing to the interests of the majority of the people. I cannot imagine how any other conclusion is compatible with democratic governance.

However, changing the Electoral College system would require a constitutional amendment, as would addressing the underlying cause of the anomalies, which is the allocation of Senate seats to all States in the same measure. The Constitution, however, is maddeningly difficult to alter: there have been only 27 amendments appended to it in 233 years. Not only does an amendment require two-thirds approval from both Houses of Congress, but it must also be ratified by three-quarters of the States. Given that over-represented States would certainly never agree to a reduction in their influence over presidential elections, it is impossible to foresee that such a change will ever come. And the Constitution provides that the equal representation of the States in the Senate is the sole provision of the document that cannot ever be altered by amendment, so that option is forever off the table.

For all of these reasons, if we are to grade the compliance of the Electoral College method of electing our presidents against the ICCPR standard of "universal and equal suffrage" meant to "guarantee the free expression of the will" of the voting public, it must be concluded that the United States does not come off very well.

Nor is this the only way in which the U.S. fails to implement the requirements of international human rights law in our selection of a head of state. The lack of a uniform system of registering voters, conducting elections, and counting ballots, also serves to dilute and even to distort the expression of voters' wills. The complications and the uncertainties resulting from the hodgepodge of governing regimes have been especially apparent in 2020. And this year in particular, one of the consequences of this mélange has been to make the electoral system virtually impenetrable and incomprehensible to those trying to make sense of it. Let me try to shed some light that could be helpful.

On the third of November of this year, Americans voted not just for candidates for the presidency, but also for prospective State governors, Senators, city mayors, county executives, State and local legislators, judges, court clerks, sheriffs, recorders, aldermen, councilors, and countless other positions created under the interlocking sets of laws by which the political space is organized. Because only one office – the presidency – is chosen by the nation at large (albeit through the convoluted Electoral College process), and that happens only once every four years, it has always been the case that States and localities control the mechanics of voting.

Aside from the basic guarantees – no one may be denied the right to vote on the basis of race, sex, age (if over 18), or inability to pay a tax – the federal government has little by way of oversight responsibility for elections. The only area in which the government in Washington actually does set, or approve, rules for their conduct in parts of the country in which there is evidence that electoral rules are racially-motivated and discriminatory. This exception was put in place during the administration of President Lyndon Johnson through the adoption of the Voting Rights Act of 1965. But in 2018, the Supreme Court gutted that statute, holding that even this limited degree of federal oversight was too much. Rather, as the conservative majority of the Court held in a vehemently contested 5-4 decision, the principles of federalism dictate that the national government cannot interfere with local control over elections except in very narrowly defined exceptional circumstances.

Federalism is deeply embedded in our Constitution. Among other things, it dictates that the national government has only those powers expressly conferred upon it, and as to everything else, States remain the masters of their fate. Again, there are deep historical roots for this conception, bearing in mind that the 13 original States were by no means certain in 1776 that they wanted to form a single country, rather than a loose confederation of separate ones. But this structural element of the architecture of our government is fundamental to the United States today, just as it has been since the time of the country's founding.

And so it is that the States decide who may vote, by controlling the process of registration. They get to select the means, places, procedures, and technologies for casting, and for counting, votes. Many States devolve these powers further, down to the level of counties and cities. In 2000, for example, one of the reasons the Supreme Court gave for installing George W. Bush in the White

House was that votes cast in different areas of Florida were being counted under different sets of rules. The Court concluded in that instance that Florida voters were therefore not receiving the equal protection of the laws, in violation of the Constitution. But what the Court did not say – yet what is perfectly obvious – is that such inequality will always obtain when there is no central control over the conduct of elections.

This lack of uniformity is a procedural nightmare, of course. We saw this on election night, when television hosts reported the different methodologies for counting ballots, and for submitting the counts for tabulation. And this year, of course, because of the pandemic, voters cast an unprecedented number of absentee or paper ballots, filed in some cases months before Election Day and yet, under State laws, which in many instances could not be counted until the polls had closed. Those State statutes were adopted precisely because some partisan legislatures wanted to have in-person ballots counted first, to create the impression that President Trump was ahead in the result on election night. They knew that Democratic voters would be the ones more reluctant to risk COVID infection by voting in person, and the tabulation of those paper ballots would be delayed, thereby generating suspicion of fraud or conspiracy when the apparent majorities in favor of the President began to erode as election night, and the days following, wore on.

Of course, all available empirical evidence demonstrates that these rumors are nonsense. And lately we have been treated to a constant drumbeat of such nonsense, some of it coming directly from the White House itself. Now, the rest of the world watches astonished, and wonders what disability has befallen the country that was once the beacon of democracy that all sought to emulate. Now, although one legal challenge to the electoral outcome after another has been rejected by the State and federal judiciary, conspiracy theories continue to abound. Inconsistent enforcement of highly detailed rules – such as the requirement in some States that voters sign the envelopes containing their mail-in ballots, with those signatures be matched up with signatures on file – are presented as proof of a grand scheme, even a loopy theory that electoral fraud in 2020 was put in motion by a Venezuelan dictator who has been dead for 7 years.

Thankfully, the courts – as always the last bastion in the defense of democracy – have yet to accept a single one of these theories, repeatedly confirming that in this election there was no fraud, there was no theft, and there is no basis to disallow significant number of ballots, much less to set aside or to reverse the outcome of the vote in any State.

States may permit, or even require, recounts in close races. They may allow party-affiliated observers to witness the counting process, and they may set the rules for such monitoring. They may permit special rules to apply in situations like the present one, in which close in-person interactions are discouraged because of the pandemic. Again, challenges to the application of these rules have in all cases been rejected by courts, but more are being filed, undeterred by the complete lack of evidence offered, or success achieved.

That there is no uniformity in States' procedures has been a nuisance in the past: it has made tabulation complicated, protracted, and sometimes unreliable. But this year, the really pernicious effect of this haphazard system is being seen more dramatically than ever, and it poses a very serious threat to the people's confidence in the outcome of this election. The refusal by President Trump to accept the verified and confirmed results is unprecedented, and his followers' espousal of his wild conspiracy theories introduces a level of uncertainty that the country has never before had to confront.

The members of the Electoral College, assembled in their respective State capitals, will cast their votes for the next president on 14 December: 10 days from today. But only on 6 January 2021, when the newly-elected Congress meets in joint session, will those ballots be opened, and an official count reported. Only then – 14 days before he is inaugurated – will it be clear as a matter of law that Joseph R. Biden, Jr., has been elected the 46<sup>th</sup> President of the United States.

In the variations, the inconsistencies, and the loopholes resulting from the lack of a single regime for the conduct of national elections, there may well be cracks and fissures that permit the erosion of democratic governance. And most assuredly, the differences that cause voters in some States to be disenfranchised, or votes in others to be discounted because voters followed local rules later held invalid, undermine the international human rights principle of one-person-one-vote.

Let me conclude where I began. The Universal Declaration of Human Rights provides that "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage." Yes, this language is aspirational and not binding. But it appears in a document whose creation was overseen by an American well-versed in electoral law: Eleanor Roosevelt, the widow of the only man ever elected to the presidency four times. And the principle has been reiterated and strengthened in international conventions that nearly all states have pledged to honor.

It must be reported, in a spirit of candor and as the only possible conclusion from the evidence, that America's system for electing its president does not conform to international norms. We really need to do something about this: our star is losing its luster, and this year's election has shown – within our country as well as in the view of the rest of the world – that we can no longer instruct others, we can no longer claim to be a paragon, and we can no longer inspire confidence in our democracy until we put our own electoral house in order. I hope I live to see the day when the United States resumes its honored place as the exceptional country, in which democratic governance and human rights are the order of this, and every, day.

Let me, finally, reiterate my thanks to Dean Nanobashvili for the invitation to speak with you today. I now confidently turn over the floor to Konstantine Kopaliani, to curate and to present

your questions, which I hope I will be able to address. I am grateful to you all who are watching and listening, in Georgia, the United States, and elsewhere, for allowing me to share these thoughts with you.

Thank you!