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Recommended Citation
David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DePaul L. Rev. 1183 (1993)
Available at: https://via.library.depaul.edu/law-review/vol42/iss4/4

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UNITED STATES RATIFICATION OF THE COVENANT ON CIVIL AND POLITICAL RIGHTS: THE SIGNIFICANCE OF THE RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS

David P. Stewart*

I. INTRODUCTION

The recent ratification by the United States of the International Covenant on Civil and Political Rights (Covenant) was a very significant development in the field of international human rights law. Considered by many to be the single most important human rights treaty, the Covenant guarantees those basic rights and freedoms which form the cornerstones of a democratic society. Not only does U.S. adherence reflect and reinforce a long-standing national com-

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mitment to those values, it will also enhance the U.S. role in protecting and promoting the rule of law and democratic ideals internationally. As President Bush stated in August 1991, in urging renewed Senate consideration of the Covenant, ratification strengthens the ability of the United States to influence the development of appropriate human rights principles in the international community and provides an additional and effective tool for efforts to improve respect for fundamental freedoms in many problem countries.\(^2\)

The unanimous approval of the Covenant by the U.S. Senate also signaled an important victory in overcoming — or at least neutralizing — a persistent thread of hostility in that body and in the American legal community to ratification of human rights treaties.\(^3\) While the United States has for years been a party to a number of such treaties, including those relating to the political rights of women, slavery and the slave trade, slave labor, and refugees,\(^4\) there is a long and contentious history to Senate consideration of the Covenant itself, including the narrow defeat of the so-called Bricker Amendment to the U.S. Constitution in early 1954.\(^5\) As a result of

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2. See *Hearing*, supra note 1, at 4-5 (statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs).

3. At the hearing before the Senate Foreign Relations Committee, for example, Senator Helms opened the proceedings by noting that the Covenant is “a seriously flawed convention” and stating, “I cannot comprehend why the sudden rush to approve a convention that has been lying around this place for a quarter of a century.” *Hearing*, supra note 1, at 1. The Committee vote, however, was 19-0 in favor of the Covenant, see SENATE COMMITTEE ON FOREIGN RELATIONS, supra note 1, at 3, reprinted in 31 I.L.M. at 649, and the full Senate gave its approval in executive session without objection, see APPROVAL, supra note 1, at S4783.


5. Contemporary opposition to the Covenant and to other human rights treaties is essentially a legacy of the 1950s, rooted in two related domestic political phenomena — Cold War anticommunism and hostility to the emergent civil rights movement. The principal argument arrayed against the Covenant (and the Genocide Convention) at that time was that ratification posed a threat to the federal system of government. More particularly, the argument was that use of the treaty-making power to establish and protect individual rights would violate, or at least unacceptably limit, the rights of the individual states and deprive U.S. citizens of their right to self-government. Underlying this concern, of course, was fear that the federal government would rely on the treaty-making power in assuming an activist role in the elimination of legalized racial discrimination, then still prevalent in a number of southern states. Moreover, the debate over human rights
that debate, the United States was for decades effectively foreclosed from becoming party to major multilateral conventions promoting human rights, even those which it actively supported in international fora. Indeed, the United States did not become a party to the first post-war treaty of this type, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), until 1988, forty years after it was written. Four other major human rights treaties submitted to the Senate along with the Covenant during the Carter Administration received no endorsement during the Reagan and Bush Administrations. With approval of the Genocide Convention, however, and the Senate’s subsequent advice and consent to ratification of the United Nations Torture Convention, the groundwork had been prepared for resolving the various issues which had stood for many years in the way of ratification of the Covenant.

treaties initially took place amid a genuine fear of communist subversion and ideological assault aimed at taking over the United States and the remainder of the free world. Thus, it was not just that the treaties were seen as improperly opening to international review and regulation matters thought to be exclusively domestic, but that the ensuing loss of U.S. sovereignty to an illegitimate world government (the United Nations) was part of the general effort to eliminate democracy. The debate culminated in the defeat in January 1954 of the so-called Bricker Amendment to the U.S. Constitution, which was actually a series of proposals offered from July 1951 to early 1954. In its most developed form, the Bricker Amendment would have provided, inter alia, that any treaty denying or abridging any right enumerated in the Constitution would have no force or effect, that the rights of the states under the Tenth Amendment would be preserved from federal encroachment, and that a treaty would become effective as internal U.S. law only through enactment of appropriate legislation by the Congress. See generally Natalie H. Kaufman, Human Rights Treaties and the Senate: A History of Opposition (1990).


The elements of this accommodation are contained in the various reservations, understandings, and declarations upon which U.S. ratification was conditioned. Based largely on proposals initially set forth in the Carter transmittal, this "package" of provisos was proposed by the Administration after extensive inter-agency review and consultations with various nongovernmental human rights organizations and other interested academics, practitioners, and specialists. It also responded to the concerns of those who felt the Covenant was a "seriously flawed" instrument, including provisions inimical to established constitutional protections. Although during the hearings a number of witnesses criticized the package as unnecessary, unhelpful, and proof of U.S. refusal to accept the full measure of its international obligations, it was accepted without change, or even significant debate, by the Senate.

This Article briefly reviews the most important provisions of the Covenant and examines the specific reservations, understandings, and declarations upon which the Senate's advice and consent to ratification was based. An articulation of the rationale behind, as well as the criticisms of, the conditions the United States imposed on its acceptance of the Covenant will illustrate the problems which must be resolved when consideration turns to other pending human rights treaties.

II. ESSENTIAL PROVISIONS

The rights guaranteed by the International Covenant on Civil and Political Rights are essentially those civil and political rights reflected in the democratic tradition which limit the power of the State to impose its will on the people under its jurisdiction. The principal undertaking assumed by States Party, set forth in Article 2 of the Covenant, is to provide those rights to all individuals within their territories and subject to their jurisdiction without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, and birth or other status. The equal right of men and women to the enjoyment of these rights is

9. See Approval, supra note 1, at 4783-84.
10. Senator Helms, for example, expressed this view at the very outset of the Senate Foreign Relations Committee Hearing. Hearing, supra note 1, at 1-2.
11. Approval, supra note 1, at 4781-84.
12. ICCPR, supra note 1, art. 2(1), 999 U.N.T.S at 173.
specifically protected.\textsuperscript{13} States Party must adopt legislation or other measures necessary to give effect to rights under the Covenant and provide effective legal remedies for their violation.\textsuperscript{14}

Among the specific rights enumerated in the Covenant are the following: freedom of thought, conscience, and religion;\textsuperscript{18} freedom of opinion and expression;\textsuperscript{16} freedom of association;\textsuperscript{17} the right of peaceful assembly;\textsuperscript{18} the right to vote;\textsuperscript{18} equal protection of the law;\textsuperscript{20} the right to liberty and security of person, including protection against arbitrary arrest or detention;\textsuperscript{21} the right to a fair trial, including the presumption of innocence;\textsuperscript{22} the right of privacy;\textsuperscript{23} freedom of movement, residence, and emigration;\textsuperscript{24} freedom from slavery and forced labor;\textsuperscript{28} protection from torture or cruel, inhuman, or degrading treatment or punishment;\textsuperscript{26} and the general right to protection of life, including protection against the arbitrary deprivation of life.\textsuperscript{27}

Other provisions concern freedom from imprisonment for debt;\textsuperscript{28} the right of all persons deprived of their liberty to be treated with humanity and respect for the dignity of the human person;\textsuperscript{29} the right to compensation for unlawful arrest or detention;\textsuperscript{30} the right of every child to acquire a nationality;\textsuperscript{31} the right to marry and general protection of the family;\textsuperscript{32} and the right of persons belonging to ethnic, religious, or linguistic minorities to enjoy their own culture, pro-

\begin{footnotes}
\footnote{13. Id. art. 3, 999 U.N.T.S. at 174.}
\footnote{14. Id. art. 2(2), 999 U.N.T.S. at 173-74. Since the rights and freedoms protected by the Covenant are already recognized under state and federal law, the United States did not consider any additional measures to be necessary.}
\footnote{15. Id. art. 18(1), 999 U.N.T.S. at 178.}
\footnote{16. Id. art. 19(1)-(2), 999 U.N.T.S. at 178.}
\footnote{17. Id. art. 22, 999 U.N.T.S. at 178.}
\footnote{18. Id. art. 21, 999 U.N.T.S at 178.}
\footnote{19. Id. art. 25(b), 999 U.N.T.S. at 179.}
\footnote{20. Id. art. 14(1), 999 U.N.T.S. at 176.}
\footnote{21. Id. art. 9(1), 999 U.N.T.S. at 175.}
\footnote{22. Id. art. 14(1)-(2), 999 U.N.T.S at 176-77.}
\footnote{23. Id. art. 17(1), 999 U.N.T.S. at 177.}
\footnote{24. Id. art. 12(1)-(2), 999 U.N.T.S at 176.}
\footnote{25. Id. art. 8, 999 U.N.T.S. at 175.}
\footnote{26. Id. art. 7, 999 U.N.T.S. at 175.}
\footnote{27. Id. art. 6(1), 999 U.N.T.S. at 174.}
\footnote{28. Id. art. 11, 999 U.N.T.S. at 176.}
\footnote{29. Id. art. 10(1), 999 U.N.T.S. at 176.}
\footnote{30. Id. art. 9(5), 999 U.N.T.S. at 176.}
\footnote{31. Id. art. 24(3), 999 U.N.T.S. at 179.}
\footnote{32. Id. art. 23(2), 999 U.N.T.S. at 179.}
\end{footnotes}
fess and practice their own religion, and use their own language. 33

The Covenant contains provisions regarding the general right of peoples to self-determination and to dispose of natural wealth and resources, subject to the principles of mutual benefit and international law. 34

The Covenant permits States Party to condition or restrict the exercise of these rights to varying degrees and contains a derogation clause which allows the temporary and limited suspension of some but not all of the rights "[i]n time of public emergency which threatens the life of the nation," provided those rights are not abridged on a discriminatory basis. 35 Among the "non-derogable rights" are the right to life, protection against torture and cruel, inhuman, or degrading treatment or punishment, and freedom of thought, conscience, and religion. 36

Importantly, the Covenant established a Human Rights Committee, consisting of eighteen individuals elected by States Party to serve in their individual capacities, to examine reports from States Party and otherwise oversee compliance with the provisions of the Covenant. 37 The Committee has no enforcement authority, but under Article 41, a State may accept the Committee's competence to receive and consider communications by another State Party alleging nonfulfillment of its obligations under the Covenant, provided that the other State has made a similar declaration. Under the First Optional Protocol to the Covenant, which the United States has not signed, States Party may recognize the competence of the Committee to consider complaints from individuals as well. 38

III. RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS

Most commentators agree that existing U.S. law generally complies with the Covenant. In fact, as indicated above, almost all of the individual rights and freedoms embodied in the Covenant have

33. Id. art. 27, 999 U.N.T.S. at 179.
34. Id. art. 1(1)-(2), 999 U.N.T.S. at 173.
35. Id. art. 4(1), 999 U.N.T.S. at 174.
36. Id. art. 4(2), 999 U.N.T.S. at 174. The other rights from which no derogation may be made under this article are freedom from slavery and servitude, imprisonment for debt, protection against retroactive criminal prosecutions, and the right to recognition as a person under the law.
37. See generally id. arts. 28-45, 999 U.N.T.S. at 179-84 (relating to the Committee).
38. Id. Optional Protocol. The First Optional Protocol entered into force on March 23, 1976. The Second Optional Protocol, which came into force in July 1991, prohibits the death penalty. The United States has signed neither. A Third Optional Protocol has recently been proposed regarding the right to a fair trial.
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long been enjoyed by Americans by virtue of the U.S. Constitution and the constitutions and laws of the states.

Nonetheless, when the Covenant was transmitted to the Senate in February 1978, along with three other human rights treaties, it was accompanied by a number of proposed reservations, understandings, and declarations, considered necessary at the time to meet anticipated constitutional and legal objections and to make certain other adjustments in light of U.S. law. Some have criticized this as a costly tactical error on the part of the Carter Administration. The Senate Foreign Relations Committee held extensive hearings on the treaties in November 1979, including considerable debate over the necessity of the various provisos, but the Soviet invasion of Afghanistan and the hostage crisis in Iran (among other events) prevented final consideration before the change of administrations in 1981.

For its part, the Reagan Administration chose to focus its attention first on winning approval for the 1948 Genocide Convention, which had been pending before the U.S. Senate since President Truman transmitted it in 1949. When that effort proved successful in 1988, the Administration turned to the task of gaining the Senate's advice and consent to ratification of the Torture Convention, which occurred in August 1990. In each of these exercises, it proved necessary to accept a series of reservations, understandings, and declarations, generally dealing with issues of federalism, perceived conflicts with the U.S. Constitution, and differences with U.S. law.

Thus, when attention turned to consideration of the Covenant in August 1991, account had to be taken both of the proposals which the Carter Administration had made when first transmitting the Covenant to the Senate, as well as of the provisos which had been agreed to with respect to the Genocide and Torture Conventions. In substance, although it contained some modifications and new elements, the package of reservations, understandings, and declarations formally proposed by the Bush Administration in November 1991, and ultimately adopted by the U.S. Senate, was not significantly dif-

39. The other treaties were the International Covenant on Economic, Social and Cultural Rights, supra note 7, the International Convention on the Elimination of All Forms of Racial Discrimination, supra note 7, and the American Convention on Human Rights, supra note 7. The Convention on the Elimination of All Forms of Discrimination Against Women, supra note 7, was transmitted separately in 1980.

40. See, e.g., Weissbrodt, supra note 1, at 78.
different from the one put forward some thirteen years earlier.41

Some have criticized these provisos as excessive (there are five reservations, five understandings, and four declarations), unnecessary, and evidence of U.S. unwillingness to accept the international human rights regime. In fact, the United States has accepted the obligations of the Covenant with very few exceptions and limitations. While the “package” seems large, a careful reading demonstrates that each proviso addresses a legitimate issue and none is contrary to the object and purpose of the treaty. Importantly, there is no “general” reservation of the type previously attached to the Genocide Convention.

A. Reservations

1. Freedom of Speech and Expression

It is not legally possible for the United States to agree to treaty undertakings which would require action prohibited by the U.S. Constitution; even if such an international obligation were accepted, it could not be effective as a matter of domestic law.42 In this regard, Article 20 of the Covenant (restricting various forms of speech) was of particular concern — sufficient to lead some representatives of the press community to speak against ratification.43 By requiring the prohibition of propaganda for war and advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence, it would clearly contravene the free speech protections of the First Amendment to the Constitution.44

Accordingly, a clear and strong reservation was considered neces-

41. The principal changes concerned replacement of the reservation on federalism with an understanding, a revision to the reservation on the First Amendment, acceptance of the prohibition against imposing the death penalty on pregnant women, and deletion of the understanding interpreting certain rights enumerated in Article 10 as “goals for progressive achievement.” Among the new elements were an additional reservation regarding Article 7 (cruel, inhuman, or degrading treatment or punishment), an understanding concerning equal protection and nondiscrimination, and a declaration concerning restrictions and limitations on rights.

42. See Reid v. Covert, 354 U.S. 1, 16-17 (1957).

43. See Hearing, supra note 1, at 43-46 (statement of Harold W. Andersen, Chairman, World Press Freedom Committee).

44. While it has long been recognized that the guarantee of free speech is not absolute and that certain forms of incitement of violence or “hate speech” may be properly restricted or regulated, see, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993), there was general agreement that Article 20 would intrude into constitutionally protected areas.
This provision was generally supported by the various legal and human rights interest groups and specialists who testified at the Senate Foreign Relations Committee hearing or submitted written comments for the record.46

2. Capital Punishment

Article 6, paragraph 5 of the Covenant prohibits imposition of the death sentence on pregnant women or for crimes committed by persons below eighteen years of age.

For many opponents of the death penalty, even this restriction is inadequate. Some find in the general guarantee of the inherent right to life, and in the protection against arbitrary deprivation of life, both of which are protected in Article 6(1), a prohibition against capital punishment. If that were true, there would have been no need for either the second paragraph of Article 6 (which provides that in countries which have not abolished the death penalty, it may only be imposed for the most serious crimes in accordance with the law in force at the time the crime was committed) or for the Second Optional Protocol to the Covenant (which prohibits the death penalty in all circumstances, and which came into force in July 1991 for those states which have adhered to it).

In the United States, the citizens in a majority of states have to date determined, through the democratic process, to retain the death penalty for the most serious crimes. Moreover, recent Supreme Court decisions have upheld state laws permitting imposition of the death penalty for especially serious crimes committed by juveniles aged sixteen and seventeen, having determined that capital punishment does not in and of itself violate the Eighth Amendment's protection against cruel and unusual punishment.47

Accordingly, the United States formally reserved the right, sub-

45. Senate Comm. on Foreign Relations, supra note 1, at 11, reprinted in 31 I.L.M. at 653.
46. See, e.g., Hearing, supra note 1, at 85 (statement of the American Bar Association); id. at 161 (statement of the Association of the Bar of the City of New York); id. at 107-09 (statement of the International Human Rights Law Group); id. at 168 (statement of the ACLU).
47. See, e.g., Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988). In Thompson, the Supreme Court held that the execution of people for crimes committed while they were under the age of 16 was unconstitutional. 487 U.S. at 838.
ject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age. This reservation leaves open the possibility that Congress might at some point adopt legislation prohibiting the imposition of the death penalty for crimes committed by those below age eighteen. Legislation giving effect to the Covenant's prohibition against executions of pregnant women, which was accepted by the United States, was not considered necessary since neither the federal government nor the state governments in fact carry out such executions.

Opponents of the death penalty, such as Amnesty International, the ACLU, and the American Bar Association, were understandably vociferous in their opposition to this reservation. The Association of the Bar of the City of New York contended that "[t]he fact that the U.S. Constitution contains no prohibition against such executions is no justification for a refusal to adhere to a more humane standard reflecting the views of the international community." The Minnesota Lawyers International Human Rights Committee said that in preserving the possibility of the death penalty for crimes committed by persons under the age of eighteen at the time of the crime, "the reservation is clearly out of step with international standards and consensus." The underlying question, however, is one of national policy, which appears to have the democratically expressed support of a majority of citizens in a majority of states.

3. Cruel, Inhuman, or Degrading Treatment or Punishment

Article 7 of the Covenant provides that no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment, or be subjected without his free consent to medical or scientific experimentation.

In its consideration of the Torture Convention, which contains

49. See Hearing, supra note 1, at 86 (statement of the American Bar Association); id. at 95 (statement of Amnesty International); id. at 170 (statement of the ACLU); see also id. at 109-11 (statement of the International Human Rights Law Group); id. at 137 (statement of the Lawyers Committee for Human Rights); id. at 145 (statement of the American Branch of the Human Rights Committee of the International Law Association).
50. Id. at 162 (statement of the Association of the Bar of the City of New York).
51. Id. at 152 (statement of the Minnesota Lawyers International Human Rights Committee).
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Substantively similar but more detailed provisions, the United States identified a possible dissonance between these provisions and the prohibitions of the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution against cruel and unusual punishment. More particularly, the Human Rights Committee, like the European Court of Human Rights in its Soering decision, has adopted the view that prolonged judicial proceedings in cases involving capital punishment could in certain circumstances constitute cruel, inhuman, or degrading treatment or punishment, even though such proceedings are entirely lawful under U.S. constitutional principles. Accordingly, the United States proposed to take a formal reservation to the Torture Convention to the effect that the United States considers itself bound by Article 7 to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

To insure uniformity of interpretation as to the obligations of the United States under the Covenant and the Torture Convention on this point, the United States took an identical reservation to the Covenant.

Reaction to this reservation has been mixed so far. Some, including the American Bar Association, expressed support, while others saw it as unnecessarily preventing extension of this fundamental protection beyond the confines of the Eighth Amendment. For example, it prevents extension of the right to schoolchildren, mental patients, and to those not convicted of a crime, such as pretrial detainees. The Lawyer’s Committee for Human Rights found the res-

55. Senate Comm. on Foreign Relations, supra note 1, at 12, reprinted in 31 I.L.M. at 654.
56. See Hearing, supra note 1, at 86 (statement of the American Bar Association).
57. See, e.g., id. at 95 (statement of Amnesty International); id. at 145 (statement of the American Branch of the Human Rights Committee of the International Law Association); id. at 170 (statement of the ACLU). The International Human Rights Law Group thought the reservation was unnecessary, noting that the Human Rights Committee had reached a different result in Pratt & Morgan v. Jamaica than the European Court of Human Rights had reached in its Soering decision. Id. at 112-13.
ervation objectionable, stating that the United States should bring its laws into conformity with international standards. It would appear, however, preferable to do so through the adoption of appropriate legislation rather than reliance on the treaty power.

4. Post-Offense Reductions in Penalty

Under U.S. law, federal as well as state, the penalty in force at the time the crime was committed generally applies to an offender. By contrast, Article 15(1) obliges States Party to give offenders the benefit of any post-offense reductions in penalty. In U.S. practice, such reductions in sentence (e.g., through legislative enactment) are in fact taken into account in sentencing decisions and are often granted in practice when there have been subsequent statutory changes.

Nonetheless, because current federal law, as well as the law of most states, does not require such relief and, in fact, contains a contrary presumption, and because upon consideration there was no disposition to effect a change in that law through adherence to the Covenant, it was considered necessary to take a reservation stating that the United States does not adhere to the third clause of paragraph 1 of Article 15.

The principal criticism of this reservation has been simply that the United States should bring its law into conformity with the agreed international standard. As stated by the Lawyer's Committee for Human Rights, the fact that the practice is not now required by U.S. law is not a proper reason for refusing to require it by treaty. Here again, the issue is one of the proper modality for effecting such a change.

5. Treatment of Juveniles

United States law, policy, and practice are generally in compliance with the Covenant's requirements regarding separate treatment...
of juveniles in the criminal justice system. Nonetheless, close consideration of these provisions indicated that it would be prudent to retain a measure of flexibility to address exceptional circumstances in which trial or incarceration of juveniles as adults may well be appropriate. Exceptional circumstances might include prosecution of juveniles as adults based on their criminal histories or the nature of their offenses, and incarceration of particularly dangerous juveniles as adults in order to protect other juveniles in custody.

While noting that it remains supportive of the Covenant's provisions regarding separate treatment of juveniles and that current domestic practice is in fact in compliance, the United States nonetheless reserved the right in exceptional circumstances to treat juveniles as adults, notwithstanding the provisions of paragraphs 2(b) and 3 of Article 10 and paragraph 4 of Article 14. In addition, the reservation extended to those provisions with respect to individuals who volunteer for military service prior to the age of eighteen. The reference to "exceptional circumstances" is drawn from Article 10, paragraph 2(a), which permits the incarceration of accused adults with convicted adults under such conditions.

This reservation attracted little opposition, with the American Bar Association noting simply that it was not necessary because the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding these requirements.

B. Understandings

1. Equal Protection and Nondiscrimination

The Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. As in most if not all legal systems, however, U.S. law does permit certain lawful distinctions to be made among individuals when those distinctions are, at minimum, rationally re-

63. Hearing, supra note 1, at 87. Similarly, the ACLU said this reservation was "not particularly disturbing" because they expressed support for the Covenant's goals on this matter. Id. at 171. The American Branch of the Human Rights Committee of the International Law Association stated that the reservation "does not appear especially objectionable." Id. at 146. The International Human Rights Law Group was not opposed but considered it unnecessary. Id. at 116.
lated to a legitimate governmental objective. By contrast, Articles 2(1) and 26 of the Covenant prohibit discrimination not only on the bases of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth," but also on any "other status," a term which could be interpreted to prohibit even legitimate, nondiscriminatory distinctions.  

Current U.S. civil rights law is not so open-ended. Discrimination is only prohibited for specific statuses, and there are exceptions which allow for distinctions. For example, under the Age Discrimination Act of 1975, age may be taken into account in certain circumstances. In addition, U.S. law permits additional distinctions, as between citizens and noncitizens and between different categories of noncitizens, especially in the context of the immigration laws. The Human Rights Committee itself has observed that not all differentiation of treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. In its General Comment on nondiscrimination, for example, the Committee noted that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.

Because of the central importance of the nondiscrimination obligation under the Covenant, the United States felt it appropriate to clarify, through an understanding, its interpretation that the nondiscrimination provisions of the Covenant, in particular those set forth in Article 2(1) and Article 26, which it accepts, do not prevent such distinctions when they are, at minimum, rationally related to a legitimate governmental objective. In addition, the United States stated its understanding that the prohibition in Article 4(1) on discrimination in time of emergency solely on status of race, color, sex, language, religion, or social origin does not prohibit distinctions that may have a disproportionate effect upon persons of a particular status.

Most commentators appear to have agreed with the American

64. ICCPR, supra note 1, arts. 2(1), 26, 999 U.N.T.S. at 173, 179.
66. See the Committee's General Comment 18 [37] (nondiscrimination) of Nov. 21, 1989, U.N. Doc. CCPR/C/21/Rev. 1/Add. 1, at 3 (1989) ("The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance.").
68. Id.
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Bar Association (ABA) in considering this understanding unnecessary, both because U.S. law generally complies with the nondiscrimination requirements of the Covenant and because the Human Rights Committee has in fact stated that differentiation is permissible if the criteria are reasonable and objective and if the aim is to achieve a legitimate purpose under the Covenant. Moreover, the ABA pointed out, if those provisions were construed to prohibit any distinctions between citizens and noncitizens, no State Party would be able to satisfy this impossible standard. The ACLU, however, found the understanding "an imprecise and erroneous statement of current national law [which] confuses well-established equal protection standards for different groups, merging them all into one vague and misleading test. . . . This understanding is thus at best superfluous, at worst a misstatement of our jurisprudence." The ACLU comment misses the point, however, since the difficulty lies in the language of the Covenant, not the understanding.

2. Right to Compensation

Articles 9(5) and 14(6) of the Covenant can be read to give every individual an absolute right in all situations to recover compensation for unlawful arrest or detention or for miscarriage of justice. While it is questionable that these provisions were in fact intended to set an international standard requiring payment of compensation in all such cases, the negotiating history on this point was considered ambiguous at best. And while it is doubtful that every state party to the Covenant accords such rights to everyone within its jurisdiction, there appears to be no authoritative interpretation limiting Article 9(5), for example, to arbitrary arrests and detentions or defining the content of "miscarriage of justice" as set forth in Article 14(6).

Within the United States, federal law does provide individuals an enforceable right to seek compensation against the persons responsible for unlawful arrests and detentions and, in certain instances, against the government itself. It does not, however, generally ac-

69. Hearing, supra note 1, at 88 (statement of the American Bar Association); see also id. at 118 (statement of the International Human Rights Law Group) (stating that the negotiating record illustrates that states intended to preserve the right to make "reasonable differentiations"); id. at 163 (statement of the Association of the Bar of the City of New York); id. at 154 (statement of the Minnesota Lawyers International Human Rights Committee).

70. Id. at 171 (statement of the ACLU).

71. The Federal Tort Claims Act, for example, makes the United States liable for false arrest and imprisonment by federal law enforcement officers. 28 U.S.C. § 2680(h) (1988). The Supreme
cord a right to compensation for an arrest or detention made in good faith but ultimately determined to have been unlawful (for example, through a revised interpretation of constitutional principles by the Supreme Court). Moreover, the doctrine of sovereign immunity generally restricts opportunity for recovery of compensation against the government. For instance, military personnel may not sue the federal government for injuries incident to their military service, including alleged torts of the kind covered by Articles 9(5) and 14(6). Given the multiplicity of state and local jurisdictions in the United States, it is possible that in some other situations, a victim of unlawful arrest or detention might not in fact be able to recover compensation, notwithstanding the variety of compensatory schemes which exist in those jurisdictions.

Accordingly, U.S. adherence was conditioned on the understanding that the proper reading of Articles 9(5) and 14(6) is that states are obliged to provide effective and enforceable mechanisms by which victims of unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain such compensation either from the responsible individual or from the appropriate governmental entity. Moreover, the actual entitlement to compensation may be subject to reasonable requirements of domestic law.

Here again, there does not seem to have been much controversy, because U.S. practice is in fact considered to be in compliance with the requirements of the Covenant. If anything, this understanding reflects an abundance of caution on the part of the government, justified by the negotiating record.

3. Separate Treatment of the Accused

Article 10, paragraph 2 requires that accused persons be segregated from the convicted “save in exceptional circumstances” and that juveniles who are accused of a crime be separated from adults.

Court in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), held that when there is a Fourth Amendment violation by a federal official, there may be a federal common law remedy for damages. Id. at 390-97. Similarly, the Supreme Court has held that § 1983 of title 42 provides a remedy for a victim of unlawful arrest and imprisonment at the federal or state level. Monroe v. Pape, 365 U.S. 167, 172 (1961).

73. SENATE COMM. ON FOREIGN RELATIONS, supra note 1, at 16, reprinted in 31 I.L.M. at 656.
74. See, e.g., Hearing, supra note 1, at 121 (statement of the International Human Rights Law Group); id. at 139 (statement of the Lawyer's Committee for Human Rights); id. at 171 (statement of the ACLU). The American Bar Association also supported the Administration's proposal. Id. at 88.
While, in general, federal law and prison policy conform to these requirements, some exceptions exist. For example, prison authorities are permitted to take into account such factors as a prisoner's overall dangerousness when determining treatment. Prisoners may also waive their right to segregation in order to participate in special programs. Within the military justice system, segregation of the accused from the convicted cannot always be guaranteed in light of military exigencies.

For these reasons, the United States conditioned its adherence on the understanding that the reference to "special circumstances" in Article 10(2)(a) permits the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness and allows accused persons to waive their rights to segregation from convicts.\(^7\)

Paragraph 3 of Article 10 states that the essential aim of treatment of prisoners in the penitentiary system is reformation and social rehabilitation. The United States also stated its understanding that this provision does not diminish the goals of punishment, deterrence, and incapacitation (i.e., restraint) as additional legitimate purposes for a penitentiary system.\(^7\)

The American Bar Association, among others, supported this provision, while the ACLU found it "superfluous and harmful, insofar as it expresses an objection to achieving the higher international standards embodied in the Covenant."\(^7\)

4. **Right to Counsel, Compelled Witness, Double Jeopardy**

Paragraphs 3(b) and 3(d) of Article 14 provide a defendant in a criminal proceeding the right to choose his or her own counsel. Even though the right to counsel is broadly recognized and enforced within the United States, U.S. law does recognize some circumstances, such as indigence, in which a defendant may not in fact choose his own counsel but is instead furnished legal representation through the public defender's office or by court appointment. Nor does federal law recognize a right to counsel with respect to offenses

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76. *Id.*

77. *Hearing*, supra note 1, at 171 (statement of the ACLU). *But see id.* at 88-89 (statement of the American Bar Association); *id.* at 121-22 (statement of the International Human Rights Law Group).
for which imprisonment may not be imposed. The United States accordingly stated its understanding that these subparagraphs do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on ground of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed.78

Paragraph 3(e) of Article 14 entitles a defendant to obtain witnesses on his behalf under the same conditions as witnesses against him have been obtained. United States law permits a defendant to obtain witnesses on his own behalf to the extent necessary for his defense; absent such a showing of necessity, the defendant is not entitled to compel the attendance and examination of witnesses.79 Thus, the United States conditioned its acceptance of this provision on an understanding that it does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense.80

Finally, paragraph 7 of Article 14 prohibits an individual from being tried or punished again for an offense for which he or she has already been finally convicted or acquitted. The prohibition against double jeopardy is well-recognized in American jurisprudence. However, under the Constitution, the prohibition attaches only to multiple prosecutions by the same sovereign and does not prohibit trial of the same defendant for the same crime in, for example, state and federal courts or in the courts of two states.81 The United States, therefore, stated its understanding that the Covenant's prohibition upon double jeopardy applies only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the federal government or a constituent unit, that is seeking a new trial for the same offense.82

Criticism of these proposed understandings was distinctly muted. The principal objections focused on the double jeopardy issue, with one view (represented by the Lawyer's Committee for Human

78. Senate Comm. on Foreign Relations, supra note 1, at 17, reprinted in 31 I.L.M. at 656.
79. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (holding that the Sixth Amendment does not grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses and that it merely guarantees the defendant compulsory process in his or her favor).
80. Senate Comm. on Foreign Relations, supra note 1, at 17, reprinted in 31 I.L.M. at 656.
82. Senate Comm. on Foreign Relations, supra note 1, at 17, reprinted in 31 I.L.M. at 17.
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Rights) favoring a prohibition against successive state and federal prosecutions, and another (represented by the International Human Rights Law Group) calling instead for a narrowing of the provision so that it would permit only a second prosecution at the federal level to remedy an unsatisfactory prosecution or investigation of a civil rights violation at the local level.

5. Federalism

One of the most difficult problems for nonunitary states to resolve in considering human rights treaties, especially when the central government is one of limited or delegated powers, is to determine when and to what extent adherence to such a treaty may properly bind the constituent units. This is not a new problem by any means, but it remains a significant one.

By expressly extending the provisions of the Covenant to all parts of federal states, Article 50 exacerbates the problem. In light of the intent behind the article (it was included precisely to prevent federal states from limiting their obligations to areas within the federal government's authority), a reservation exempting constituent units might readily be characterized as contrary to the object and purpose of the Article, if not the Covenant as a whole.

In adhering to the Covenant, the United States followed the precedent it had earlier established with respect to the Torture Convention by indicating, in an admittedly somewhat convoluted understanding, that it will carry out its obligations under the Covenant in a manner consistent with the federal nature of its form of government. More precisely, the understanding states that the Covenant "shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the State and local governments." As to matters within the jurisdiction of state and local governments, "the Federal Government shall take measures appropriate to the Federal system" to ensure that the state and local governments fulfill their obligations.

83. See Hearing, supra note 1, at 140 (statement of the Lawyers Committee for Human Rights).
84. Id. at 124-25 (statement of the International Human Rights Law Group).
85. See THE INTERNATIONAL BILL OF RIGHTS, supra note 1, at 50-51.
86. SENATE COMM. ON FOREIGN RELATIONS, supra note 1, at 18, reprinted in 31 I.L.M. at 657.
87. Id.
It is important to note that this provision is not a reservation and was not intended to modify or limit U.S. obligations under the Covenant, but rather concerns the steps to be taken domestically by the respective federal and state authorities. The understanding serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the state and local governments or to use the provisions of the Covenant to "federalize" matters now within the competence of the states. It also serves to notify other States Party that the United States will implement its obligations under the Covenant by appropriate legislative, executive, and judicial means, federal or state, and that the federal government will remove any federal inhibition to the states' abilities to meet their obligations in this regard.

Reaction to this important statement ran from the support of the American Bar Association and Amnesty International to the view of the Lawyer's Committee for Human Rights that it is "ambiguous and confusing" and not constitutionally necessary because "[f]ederal authority in this area is clear."

C. Declarations

1. Not Self-Executing

As a matter of domestic law, the United States declared Articles 1 through 27 of the Covenant to be "not self-executing." As in the case of the understanding concerning federalism, this declaration does not affect the international obligations of the United States under the Covenant. Rather, it means that the Covenant does not, by itself, create private rights enforceable in U.S. courts. That can be done only by means of legislation enacted by the Congress and the president in the ordinary course. This approach reflected the view that U.S. compliance with the Covenant should be overseen

88. Hearing, supra note 1, at 89-90 (statement of the American Bar Association); id. at 98 (statement of Amnesty International). The International Human Rights Law Group, however, suggested different wording clarifying the responsibility of the federal government to ensure compliance of its constituents with the international obligations they assume under the Covenant. Id. at 127.

89. Id. at 140 (statement of the Lawyers Committee on Human Rights, citing Missouri v. Holland, 252 U.S. 416 (1920)). The Association of the Bar of the City of New York objected to this understanding because it feared that other countries would interpret it as limiting the responsibility of the federal government to matters of federal law, leaving implementation by the states in serious doubt. Id. at 77, 162-64.

90. Senate Comm. on Foreign Relations, supra note 1, at 19, reprinted in 31 I.L.M. at 657.
through the mechanisms established by the Covenant, rather than through litigation by private parties in U.S. courts. The specific language of the Covenant is in some respects imprecise and could invite substantial litigation over issues at the periphery of the Covenant’s essential object and purpose. The fundamental rights and freedoms protected by the Covenant are also guaranteed as a matter of U.S. law, constitutional and statutory, and can be effectively asserted by individuals in the judicial system.

Understandably, this proviso was most criticized by those organizations with an interest in using the Covenant as a tool to compel or prevent governmental action, either through litigation or other direct means.\textsuperscript{91} The comments of the International Human Rights Law Group were especially sharp, noting that no other country has made such a reservation or declaration and contending that rendering all the substantive provisions of the Covenant non-self-executing may be so inconsistent with the language of the Covenant as to violate the principles of Article 19 of the Vienna Convention on Treaties.\textsuperscript{92}

2. Limitations on Rights

More generally, the Covenant recognizes the possibility that States Party may in exceptional circumstances limit or circumscribe certain rights otherwise protected. For example, Article 12(3) permits States Party to impose restrictions on the right to liberty of movement and freedom to choose residence when “necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others,” when consistent with the other rights recognized in the Covenant.\textsuperscript{93} Similar restrictions are permissible with regard to the right of peaceful assembly (Article 21) and freedom of association (Article 22(2)); somewhat narrower restrictions are authorized with respect to the right to a fair

\textsuperscript{91} See, e.g., Hearing, supra note 1, at 98 (statement of Amnesty International); id. at 140 (statement of the Lawyers Committee for Human Rights); id. at 171 (statement of the ACLU). The American Branch of the International Law Association advocated leaving the issue for resolution by the courts, noting that a blanket attempt to prevent U.S. citizens and others from invoking the Covenant is unnecessary and unwise, especially since the United States has not accepted the Optional Protocol to the Covenant. Id. at 148. Others, including the ABA, thought that the overriding consideration was prompt ratification and hoped for the early adoption of implementing legislation conforming U.S. law to the Covenant to the extent permitted by the Constitution. Id. at 90.

\textsuperscript{92} Id. at 90-91 (statement of the International Human Rights Law Group).

\textsuperscript{93} ICCPR, supra note 1, art. 12(3), 999 U.N.T.S. at 176.
and public hearing (Article 14(1)), freedom of religion (Article 18(3)), and the right to freedom of expression (Article 19(3)). Certain limited derogations from recognized rights are also permitted during times of public emergency threatening the life of the nation under Article 4.

In a number of instances, such restrictions would encounter constitutional obstacles within the United States. An example would be limiting freedom of expression under Article 19(3). More generally there was some concern that once ratified the Covenant might be relied upon to justify limitations that are not now recognized in U.S. law. However, since under the Covenant these restrictions are permissible rather than required, it was not considered necessary to condition U.S. ratification upon a reservation. Nonetheless, the United States believes as a general matter that other States Party should only resort to such restrictions in the most unusual and extenuating circumstances.

To emphasize this view to other current and potential States Party, the United States adopted a declaration stating its view that States Party “should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant.”

For the United States, the undertaking in Article 5(2) — that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognized them to a lesser extent — has particular relevance to the restrictions permitted by Article 19(3). The declaration also states that the United States will continue to adhere to the constraints of its Constitution in respect of all such restrictions and limitations.

This provision was generally regarded favorably.

3. Human Rights Committee

The United States has made a declaration under Article 41 accepting the competence of the Human Rights Committee (Committee) to receive and consider state-to-state complaints by and against the United States on a reciprocal basis, so long as the state making

94. Senate Comm. on Foreign Relations, supra note 1, at 18, reprinted in 31 I.L.M. at 657.
95. Hearing, supra note 1, at 90-91 (statement of the American Bar Association); id. at 99 (statement of Amnesty International); id. at 168-69 (statement of the ACLU). But see id. at 141 (statement of the Lawyers Committee on Human Rights, finding the declaration unnecessary).
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or receiving the complaint has done likewise. The United States intends to participate actively in the work of the Committee, in part because of the hope that the Committee can contribute even more to the development of a generally accepted international law of human rights.

Here again, general support was expressed.

4. International Law

The final declaration recorded the long-standing view of the United States that the inherent right of all peoples to enjoy and utilize their natural wealth and resources fully and freely, as recognized in Article 47, may only be exercised in accordance with international law. Nothing in the Covenant permits States Party to avoid their obligations under international law or justifies arbitrary deprivation of property.

Although the American Bar Association supported this provision, others expressed relatively tepid concern that it was unnecessary.

CONCLUSION

The debate over ratification of the Covenant, and more importantly the forthcoming debate over whether the United States should proceed to ratify other pending human rights treaties and on what terms, turns in large part on whether, taken individually and collectively, these reservations, understandings, and declarations were necessary and, even if warranted, whether they represented too high a price to pay to obtain Senate approval.

The above analysis indicates that the most common criticisms of the specific elements of the package have been that they were not legally necessary and that the United States should have conformed

96. Senate Comm. on Foreign Relations, supra note 1, at 20, reprinted in 31 I.L.M. at 658.

97. See, e.g., Hearing, supra note 1, at 91 (statement of the American Bar Association); id. at 133-34 (statement of the International Human Rights Law Group); id. at 141 (statement of the Lawyers Committee on Human Rights); id. at 149 (statement of the American Branch of the Human Rights Committee of the International Law Association).

98. Senate Comm. on Foreign Relations, supra note 1, at 21, reprinted in 31 I.L.M. at 658.

99. Hearing, supra note 1, at 91 (statement of the American Bar Association).

100. See id. at 134-35 (statement of the International Human Rights Law Group); id. at 141 (statement of the Lawyer's Committee on Human Rights).
its laws and practices to the international standards reflected in the Covenant. There seems to be general agreement that only one reservation, interposing the First Amendment as a bar to Article 20, is constitutionally required. As the Lawyers Committee on Human Rights has contended, the others appear to reflect three operative principles: (1) that the United States would not commit itself to do anything that would require a change in present U.S. law or practice; (2) that the treaty should not be self-executing but should require implementation by legislation; and (3) that subjects within the jurisdiction of the states might be excluded from the obligation of the treaty or left exclusively to implementation by legislation by the states.\textsuperscript{101}

The response to these objections is straightforward. The premise underlying most of the reservations, understandings, and declarations was the conclusion that existing U.S. law, even if not strictly in conformity with the precise language of the Covenant, was acceptable and indeed preferable. A subsidiary concern was a desire not to effectuate changes to domestic law by means of the treaty-making power. There is little question that under Article VI of the Constitution, the federal government could in fact have made necessary changes to federal law and required parallel changes in state and local law to give effect to the Covenant's provisions. For many reasons, including those rooted in respect for our federal system of government, there was substantial resistance in both the Executive branch and the Senate to exercising that authority. But the principal conclusion was, as a policy matter, not to seek changes to U.S. law at those relatively minor points at which it diverged from the Covenant.

The experience gained in obtaining advice and consent to ratification of the Covenant suggests strongly that, in pursuing ratification of additional human rights treaties, serious consideration should be given to the simultaneous submission of proposed implementing legislation wherever U.S. law differs from the treaty requirements and it is determined that conforming changes to that U.S. law are desirable. As a general matter, conformity with widely accepted international human rights standards is a worthy and achievable goal, and it should be U.S. policy to adopt as few reservations, understandings, and declarations as possible. Modification of U.S. law through

\textsuperscript{101} Id. at 136 (statement of the Lawyers Committee on Human Rights).
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the legislative process would eliminate the need for provisos in many instances.

In their details, however, not all internationally recognized human rights treaties are in fact superior to established U.S. principles and practices. By definition, the negotiation of multilateral treaties between states with widely differing legal systems produces compromises and ambiguities. Where the treaty provision is inferior, there is no reason for the United States to adhere to it, even if that could be done constitutionally.

The task, therefore, is, first, to identify any provisions of the treaty which conflict with or raise significant questions about U.S. law, and, second, to determine whether a change to the relevant U.S. law is possible and desirable or whether an appropriate reservation, understanding, or declaration must be taken to condition U.S. obligations under the instrument. Proposed changes to U.S. law should be presented in the form of draft legislation at the time the Senate considers the question of advice and consent to ratification. Where changes are not desirable, ratification should be conditioned upon an appropriate caveat. Ideally, both the Executive Branch and the Congress would work in open partnership with each other in this process, together with interested nongovernmental organizations and knowledgeable individuals.