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Reflections on the Ratification of the
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Senate

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REFLECTIONS ON THE RATIFICATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS BY THE UNITED STATES SENATE

*M. Cherif Bassiouni**

Since the inception of the United Nations, the United States has been a world leader in the development of human rights norms. Its influence in this field has been unparalleled by any other country.¹ The Universal Declaration of Human Rights,² the International Covenant on Civil and Political Rights (ICCPR),³ and the International Covenant on Economic, Social and Cultural Rights,⁴ now ratified by the United States, incorporate U.S. constitutional approaches and terminology. These three major instruments have come to be known as the "International Bill of Rights," a term reminiscent of the U.S. Bill of Rights.⁵ However, notwithstanding the

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1. HAROLD BLAUSTEIN, *THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (1986); *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 383-403 (Louis Henkin & Albert J. Rosenthal eds., 1990); Richard B. Lillich & Hurst Hannum, *Linkages Between International Human Rights and U.S. Constitutional Law*, 79 AM. J. INT'L L. 158 (1985); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 59-61 (1990) (noting the importance of exposing law students to international human rights law).

2. G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 1, at 135, U.N. Doc. A/810 (1948).

3. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992).

4. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

5. RICHARD B. LILLICH, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE* 175-76 (1991). "International Bill of Rights" is also the commonly used general title in specialized United Nations publications for these three instruments. See Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415 (1979) ("Most of the Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world."); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 539 (1988) (discussing the influence the American Bill of Rights had on the Universal Declaration of Human Rights.). It should also be noted that American constitutionalism, as Professor Henkin describes it, has influenced other multilateral conventions, particularly the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, and the American Conven-

leadership role of this country in the elaboration and the 1966 adoption of the ICCPR, the U.S. Senate did not give the requisite "advice and consent" to it until 1992.⁶ President Bush finally ratified the treaty and deposited the instrument of ratification on June 8, 1992, with the United Nations Secretary-General as required by the ICCPR.⁷

Between 1966, the year the ICCPR was opened for signature, and 1992, the year the United States acceded to the treaty, support for ratification of the Covenant ebbed and flowed in the U.S. Senate and succeeding administrations, mostly drifting downwards.⁸ Argu-

tion on Human Rights (Pact of San Jose, Costa Rica), Nov. 22, 1969, 36 O.A.S.T.S. 1, 1144 U.N.T.S. 123.

6. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992).

7. White House Statement on Signing the International Covenant on Civil and Political Rights, 28 WEEKLY COMP. PRES. DOC. 1008 (June 5, 1992).

8. After an initial surge of support in the Carter Administration, the Reagan Administration backed off seeking Senate ratification. See SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 102d Cong., 2d Sess. 2 (1992), reprinted in 31 I.L.M. 645, 649 (1992) ("The Reagan Administration did not indicate any interest in ratifying the Covenant."). But despite the inaction of the Reagan Administration, the ICCPR remained before the Senate for the entire Reagan Administration term. See UNITED STATES RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS (Hurst Hannum & Dana D. Fischer eds., 1993); Craig H. Baab, *The Process for United States Ratification of Human Rights Instruments*, 20 GA. J. INT'L & COMP. L. 265, 269 (1990) ("At the conclusion of a Congress, legislation which unfortunately has not been passed and been sent to the President dies; a treaty does not."). Then, in 1991, President Bush resubmitted the Covenant for consideration. See SENATE COMM. ON FOREIGN RELATIONS, *supra*, at 25, reprinted in 31 I.L.M. at 660 (reprinting and referencing an Aug. 8, 1991 letter from President George Bush to Senator Pell, Chairman, Committee on Foreign Relations, proposing a qualifier package to the ICCPR). The qualifier package contained five reservations, stated as follows by Professor Quigley:

- (1) that the Covenant's requirement to prohibit war propaganda and the advocacy of national, racial, or religious hatred must be read consistent with the U.S. Constitution;
- (2) that, contrary to the Covenant, the United States reserves the right to impose capital punishment on persons who were under eighteen at the time of their crimes;
- (3) that the Covenant language on cruel and degrading treatment or punishment is no broader than that concept as it appears in the U.S. Constitution;
- (4) that the United States will not comply with the Covenant provision that states that when new legislation reduces the penalty for crime, anyone currently under sentence for the crime shall benefit from the new legislation; and
- (5) that the United States reserves the right to treat juvenile offenders as adults, despite language in the Covenant that calls for separate procedures and separate incarceration for juveniles.

John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1289 n.15 (1993); see also SENATE COMM. ON FOREIGN RELATIONS, *supra*, at 10-14, reprinted in 31 I.L.M. at 645, 652-53. For the historical background and political and legal considerations relevant to the ICCPR, see NATALIE H. KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE (1990); Louis Henkin, *The Covenant on Civil and Political Rights in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES* (Richard B. Lillich ed., 1981); Louis B. Sohn, *United States Attitudes Toward Ratification of Human Rights Instruments*, 20 GA. J. INT'L & COMP. L. 255 (1990); David Weissbrodt, *United States Ratification of the Human*

ments for and against ratification have been the object of political debate within and outside the government, as well as within academic circles.⁹ This drawn-out, sometimes contentious debate has confused the governments and peoples of many countries who found it difficult to reconcile the United States' reluctance to ratify the treaty with its leadership role in the elaboration of the ICCPR and its otherwise strongly voiced expressions of support for international human rights. Was this another manifestation of the dichotomy between U.S. policy and practice: support for human rights when it suits, and when it applies to others, but looking the other way when attention to human rights is contrary to national or domestic political interests? In other words, was this another inconsistency between the avowed policies of the United States and its contradictory practices?

There is substance to claims that a double standard exists between U.S. policies and U.S. practices concerning human rights. Regrettably, values can only drive a nation's policies and practices so far. Self-interest and domestic political considerations are ultimately a greater, if not decisive, driving force in state policy and action.¹⁰ It is true that if American foreign policy and practice is notoriously fraught with contradictions and inconsistencies, so are the policies and practices of most other States Parties. Nevertheless, there is a belief that the policies and practices of the United States must not be significantly affected by self-interest and domestic political concerns. This belief is derived from the feeling that a higher responsibility attaches to a country whose influence and power drastically affects international relations and conditions international law.

In the case of the ICCPR ratification, questions of national security and national self-interest (in the foreign policy sense) are not apparent. Indeed, they are almost nonexistent.¹¹ The Senate's delay

Rights Covenants, 63 MINN. L. REV. 35 (1978).

9. See Egon Schwelb, Note, *Entry into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, 70 AM. J. INT'L L. 511, 511-19 (1976) (discussing various types of action which could have resulted after entry into force of the ICCPR and the Optional Protocol).

10. Among the great proponents of contemporary *Realpolitik* in the United States are former President Richard Nixon and former Secretary of State Henry Kissinger. See HENRY KISSINGER, *WHITE HOUSE YEARS* (1979); RICHARD M. NIXON, *THE MEMOIRS OF RICHARD NIXON* (1978). For an opposing view, see JIMMY CARTER, *KEEPING FAITH: MEMOIRS OF A PRESIDENT* (1989).

11. This is obvious from a reading of Senate debates on the question. See *Hearings on the International Covenant on Civil and Political Rights, Before the Senate Comm. on Foreign Rela-*

in giving its "advice and consent," as well as the reasons for the reservations attached to it, exhibit political and policy concerns which are inconsistent with the United States' world leadership role. These concerns are essentially xenophobic, though clothed in important constitutional garments.

Some of the reservations, however, exhibit concerns deeply rooted in the American character. At the very heart of this issue lies the original constitutional compromise achieved between Federalists and anti-Federalists.¹² At the time of the Constitution's drafting, the treaty-making power was vested in the president and the equivalent of legislative ratification power in the Senate's "advice and consent."¹³ Article II, Section 2 of the U.S. Constitution provides: "He [the president] shall have the power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur"¹⁴ The compromise, which left the House of Representatives outside the treaty process, assumed that a healthy form of "checks and balances" between the president and the Senate would be the best approach to this enormously significant prerogative of making and adopting treaties. The reasoning behind the compromise quite obviously can be found in Article VI, Section 2 of the Constitution, which makes treaties the "supreme law of the land."¹⁵ The power to make the "supreme law of the land" could not be left to the political whims of every president or those of a constantly changing Senate. Thus, the Framers of the Constitution apportioned this power between the agenda of the president in office and the national and political considerations of "two-thirds of the Senators present" at the time a given treaty is submitted for "advice and consent." Alexander Hamilton wrote the following about this apportioned prerogative:

tions, 100th Cong., 1st Sess. (1991) [hereinafter *Hearings*]; Richard B. Lillich, *United States Ratification of the United Nations Covenants*, 20 GA. J. INT'L & COMP. L. 279 (1990).

12. HERBERT J. STORING, *WHAT ANTI-FEDERALISTS WERE FOR* (1981). A compilation of the debates between the factions is contained in *RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1911). For a contemporary debate on the subject, see the various positions presented in *CONGRESS, THE PRESIDENT AND FOREIGN POLICY* (ABA Standing Comm. on Law & Nat'l Security ed., 1984).

13. It should be noted that the actual ratification of treaties is done by the president, after the Senate's "advice and consent." See *infra* text accompanying note 14. The "advice and consent" practice of the United States is equivalent to the legislative ratification process under other national constitutions. This is why the "advice and consent" procedure is sometimes called ratification, which is an easier, though incorrect, short-hand statement.

14. U.S. CONST. art. II, § 2, cl. 2.

15. U.S. CONST. art. VI, cl. 2.

However proper or safe it may be in Governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that forever to an elective magistrate of four years duration To have intrusted the power of making treaties to the Senate alone would have been to relinquish the benefits of the constitutional agency of the president in the conduct of foreign negotiations Besides this, the ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representative of the nation, and, of course, would not be able to act with an equal degree of weight of efficacy. . . . *It must indeed be clear to a demonstration that the joint possession of power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them.*¹⁶

The “joint possession of power” is at times weighted more in favor of a strong presidency, at other times in favor of a strong Senate. When the latter occurs, the Senate occasionally attempts to rewrite some provisions of the treaty through these various labelled devices. The international and national legal significance of these devices must be sorted out after the fact of ratification, usually by means of costly and prolonged litigation. Thus, this “joint possession of power” determines the process through which occasional vagaries produce the type of negative balance evidenced in the case of the ICCPR.

The Senate’s practice of *de facto* rewriting treaties, through reservations, declarations, understandings, and provisos, leaves the international credibility of the United States shaken and its reliability as a treaty-negotiating partner with foreign countries in doubt.¹⁷

16. THE FEDERALIST NO. 5, at 451-52 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). *Geofroy v. Riggs*, 133 U.S. 258 (1890), echoed the sentiments expressed by Hamilton, holding:

The treaty power, as expressed in the constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from that nature of the government itself, and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

Id. at 267 (citations omitted).

17. E.g., EDWARD S. YAMBRUSIC, WORLD ORDER THROUGH LEGAL CERTITUDE: THE NORM OF TREATY INTERPRETATION 21-32 (1984) (discussing the practice of treaty interpretation in the United States); c.f. W. Michael Reisman, Comment, *Necessary and Proper Executive Competence to Interpret Treaties*, 15 YALE J. INT’L L. 316 (1990) (discussing the uncertainty that post-agreement unilateral statements create).

United States treaty partners find themselves confronted with what amounts to new treaty provisions or limitations which were not part of their original perception of the treaty.¹⁸ The treaty partners have no alternative but to accept an individual treaty as amended by the U.S. Senate or to invoke international law to declare the "reservation," "proviso," or however the Senate may wish to label its amendment, as incompatible with the treaty's substantive legal obligations.¹⁹

The "advice and consent" process is not only a legal one, but essentially a political one as well.²⁰ The process frequently results in what Professor Louis Henkin referred to as the "cluttering" of treaties with reservations²¹ and similar addenda, alternatively referred to as "understandings," "declarations," and "provisos." This "cluttering" serves to confuse the precise nature, content, and international and domestic legal significance of treaties ratified by the United States. If the Senate intended all of these labels to be deemed equivalent to "reservations," why did it use other terms? Could it be that the Senate's intent has been to create purposeful confusion between international legal obligations and national implementation? How will judges acting pursuant to Article VI of the Constitution be bound by such language, if at all? The ICCPR will surely be the subject of litigation in U.S. courts. In that event, how will courts interpret these different labels and their contents? The "cluttering" of treaties promotes neither legislative clarity nor judicial economy.

The Vienna Convention on the Law of Treaties defines a "reservation" as follows: "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approv-

18. See, e.g., MYRES S. MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 213-16 (1962) (discussing how differing viewpoints on treaty interpretation and application contribute to instability in international relations).

19. E.g., Jean Kyongun Koh, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71, 71 (1982) ("The [reservation] doctrine pits an individual state's desire to depart from the terms of the treaty against the general agreement of all parties to be bound equally by the terms of a common document.").

20. Winston P. Nagan, *The Politics of Ratification: The Potential for United States Adoption and Enforcement of the Convention Against Torture, the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights*, 20 GA. J. INT'L & COMP. L. 311, 314 (1990).

21. LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* 50 (1990); see also LOUIS HENKIN ET AL., *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (1990) (providing a symposium dedicated to foreign affairs in the third century of the U.S. Constitution); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 129-71 (1972) (discussing treaties and the treaty power found in the U.S. Constitution).

ing or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”²² The Convention’s definition presupposes that the additional language appended by the Senate to a treaty is deemed to be in the nature of a “reservation.” Thus, if the additional language is judicially held to be other than a “reservation,” such language does not affect the treaty with respect to the treaty’s international dimensions, but only the treaty’s domestic legal scope.

However, in the case of treaties whose import is to create national legal rights, the dichotomy between the international and domestic legal significance of a “reservation” or the like becomes more troublesome. In Article 2, the ICCPR establishes certain legal and administrative obligations on States Parties by conferring on individuals certain legal and administrative rights. How can these rights be internationally binding yet nationally unenforceable? Unfortunately, the Senate’s reservations, understandings, and provisos attached to the ICCPR create this precise result.

The International Court of Justice (I.C.J.) addressed the question of reservations only once, in the Advisory Opinion on Reservations to the Genocide Convention, where it adopted a test of whether the reservation is “compatible with the object and purpose” of the treaty.²³ But the I.C.J. left it to the other treaty partners to decide whether or not a given reservation is compatible or incompatible with the treaty’s “object and purpose.”²⁴ Such a situation leaves no choice for U.S. treaty-partners but to await the U.S. Senate’s “advice and consent” to assess the extent to which the United States

22. Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Convention]; see SHABTAI ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* (1970); G. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES 51-82* (1984) (defining and discussing reservations); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 495 (1970) (discussing two basic provisions on reservations).

23. 1951 I.C.J. 15. The I.C.J. held that

a state which has made and maintained a reservation which has been objected to by one or more of the Parties to the Convention but not to others, can be regarded as being a party to the Convention *if the reservation is compatible with the object and purpose of the Convention*; otherwise that State cannot be regarded as being a party to the Convention.

Id. at 29-30 (emphasis added); see also M. Cherif Bassiouni, *Introduction to the Genocide Convention*, in 1 M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: CRIMES 281, 283-84* (1986) (discussing the advisory opinion by the International Court of Justice on reservations to the Convention on Genocide).

24. 1951 I.C.J. at 29-30.

may be bound by treaties it signs.

The Vienna Convention on the Law of Treaties and the I.C.J. Advisory Opinion on Reservations do not, of course, resolve the peculiarities of U.S. constitutional issues of treaty-approval. In fact, they tend to reinforce the "take it or leave it" option which the Senate seems to have adopted as part of contemporary treaty approval practice.²⁵ The Senators must surely be comforted by the knowledge that they can "take it or leave it" without suffering any negative consequences. At worst, the president risks international embarrassment if he disagrees with the Senate. At best, the Senators can claim whatever political gains they seek to advance for the outcome of their vote. It is an all win and no lose situation from a domestic political point of view. Only a sense of the national interest and concern for the credibility and reliability of the United States' treaty-signing commitments can induce individual Senators to restrain themselves or to act in a manner that sustains these national interests.

Surprising as it may seem for a country that has been a leading advocate of human rights and whose constitution and other laws mirror, with a few exceptions, international human rights treaties, the United States has placed the highest number of reservations on the three major human rights treaties it has recently ratified. The recently adopted treaties are the Convention on the Prevention and Punishment of the Crime of Genocide,²⁶ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²⁷ and the International Covenant on Civil and Political

25. One such example is the U.S.-U.K. Supplementary Treaty on Extradition, wherein the Senate rewrote several of the treaty's provisions through the device of "reservations," "declarations," "provisos," and "understandings," leaving the U.K. with no other choice but to take it or leave it. See *Hearings, supra* note 11; M. Cherif Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K. — A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DENV. J. INT'L L. & POL'Y 255 (1987).

26. G.A. Res. 260A, U.N. GAOR, 3d Sess., Supp. No. 1, U.N. Doc. A/810 (1948); see *Hearings Before the Sub-Committee on the Constitution of the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. (1985) (providing testimony related to the Convention); LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 245-49 (1990) (providing the text of the Convention); David Stewart, *The Potential for United States Adoption of the Genocide Convention and the Convention Against Torture*, 20 GA. J. INT'L & COMP. L. 343 (1990) (presenting part of a panel discussion on the U.S. Constitution and the adoption of international human rights instruments); see also Note, *Genocide: A Commentary on the Convention*, 58 YALE L.J. 1142 (1949) (describing the historical impetus behind the Convention).

27. G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985), reprinted in 23 I.L.M. 535 (1985) (entered into force June 26, 1987); *Hearings on Convention Against Torture and Other Cruel, Inhuman and Degrading Treating or Punishment*,

Rights.²⁸ The United States has cumulatively encumbered these treaties with nine reservations, fifteen understandings, seven declarations, and two provisos. No other country in the world holds such a record. The overriding concern of Senators like Jesse Helms, Orrin Hatch, and Richard Lugar, who have effectively prevented ratification of these treaties without the plethora of what are really amendments, was that no treaty be supreme to the Constitution or the domestic laws of the United States.²⁹

The express terms of Article VI, Section 2 of the Constitution provide, and the early understanding of its meaning was, that treaties are the "supreme law of the land." The specific issue, however, is whether a treaty rises above the Constitution. The Senate has implicitly answered in the negative. By its use of reservations and other means of treaty amendment, the Senate has adopted the position that other aspects of the domestic law of the United States supersede treaties.

The U.S. Supreme Court, in *Reid v. Covert*,³⁰ held that the Constitution prevails over treaties.³¹ The Supreme Court reasoned that

[t]here is nothing in this language [Article VI, Section 2] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . . There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.³²

Before the Senate Comm. on Foreign Relations of the United States Senate, 100th Cong. 2d Sess. (1990); see also Stewart, *supra* note 26, at 343-52 (discussing the potential for U.S. absorption of the Convention Against Torture).

28. ICCPR, *supra* note 3; see *Hearings*, *supra* note 11.

29. See Lugar-Helms-Hatch Sovereignty Package, S. TREATY DOC. NO. 2, 99th Cong., 1st Sess. 26-27 (1985). For earlier, similar attempts, see Michael D. Craig, Comment, *The International Covenant on Civil and Political Rights and United States Law: Department of State Proposals for Preserving the Status Quo*, 19 HARV. INT'L L.J. 845 (1978).

30. 354 U.S. 1 (1957).

31. *Id.* at 16.

32. *Id.* at 16-17. There is no doubt, however, that treaties supersede prior inconsistent legislation. This has been an unchanged practice since 1795. See *Clark v. Allen*, 331 U.S. 503, 507-08 (1947) (holding that a treaty with Germany prevailed over California law); *Bacardi Corp. v. Domenech*, 311 U.S. 150, 161-62 (1940) (holding that the Puerto Rico legislature could not override a treaty which bound Puerto Rico); *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181 (1825) (involving the Treaty of 1778, between the United States and France); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 103 (1801) ("The court is as much bound as the executive to take notice of a treaty . . ."); *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 85-93 (1795) (holding that treaties can supersede inconsistent admiralty law); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 408-12 (1985) (advocating the use of human rights law to infuse U.S. constitutional and statutory standards); Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 570-611 (1989)

The facts of this case involved a treaty which reduced individual human rights protected by the Constitution. The holding of the Court does not imply, however, that greater rights provided by a treaty are necessarily limited by the Constitution.

The rationale for constitutional supremacy in favor of protected rights is unquestionable. But precisely because of the concern for a minimum threshold protection of individual rights in the United States, it must be concluded that the greater or more detailed protections which may be provided by a treaty are not limited by the Constitution. To be sure, if a State within the Union abolishes the death penalty because it deems it to violate its constitutional provision on "cruel and unusual punishment," one could hardly argue that such greater protection in state law violates the supremacy of the U.S. Constitution. Surely if the Fifth Amendment is interpreted differently by the U.S. Supreme Court than by a given state, it does not mean that greater state rights are banned by the supremacy of the U.S. Constitution.

The position taken in connection with the ICCPR harkens back to the battle that the anti-Federalists lost over two-hundred years ago. Apparently, the battle is still being waged by the conservative wing of the U.S. Senate, and it appears to be winning ground previously lost by the anti-Federalists.³³

An ideological corollary to the doctrine that the Constitution is supreme over treaties is the Senate's reservation to the ICCPR's limiting the compulsory jurisdiction of the I.C.J. over human rights challenges involving the United States. The Senate's conservative proponents have long fought against compulsory jurisdiction of the I.C.J., particularly when it has not suited United States' interests. The case of *Nicaragua v. United States*³⁴ exemplifies this attitude. But there are times when it suits the interests of the United States to submit to I.C.J. jurisdiction. For instance, in the Iran hostage-taking situation in 1979, the United States brought an action before

(discussing the judiciary's use of human right precepts as constitutional rights and standards); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) (discussing the judicial invention of self-executing treaties) [hereinafter *Self-Executing Treaties*].

33. Compare STORING, *supra* note 12, with Hamilton, *supra* note 16 (asserting it is "utterly unsafe and improper to intrust (the treaty making powers) to an elective magistrate of four years duration," but noting also that the executive commands respect from foreign powers that the legislative body would lack).

34. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4 (June 27).

the I.C.J. against the Islamic Republic of Iran,³⁵ claiming compulsory jurisdiction under the terms of the Vienna Convention on Diplomatic Immunity.³⁶ This duality of legal standards places the commitment of the United States to the international rule of law in serious question.

This type of reservation is, however, straightforward and qualifies for the popular legal maxim of "questions about which reasonable persons can disagree." Indeed, limitations on the compulsory jurisdiction of the I.C.J. are not unreasonable, though in the opinion of this author, they are unwise. Similarly, subjecting the ICCPR (and the other human rights treaties referred to above) to the U.S. Constitution is also not unreasonable, though also in the opinion of this writer, it is unwise and unwarranted. Nonetheless, to hold that the United States cannot agree to submit to greater individual human rights protections than those afforded in the U.S. Constitution is both unreasonable and unwarranted.

The limitations placed on the ICCPR, particularly with the avowed intentions of former President Bush and the Senate not to enact enabling legislation, are inconsistent with the good faith obligation of this country as party to the ICCPR. "Good faith" is a basic requirement in the law of treaties,³⁷ and a "reservation" or the like which expressly holds that the treaty at issue does not impose any duty on the United States to enact implementing legislation that may be contrary to the Constitution as interpreted by domestic law and judicial interpretations violates that basic principle.³⁸ For all practical purposes, this "reservation" leaves the United States free from any legal obligation under the ICCPR whenever, in its

35. United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1980 I.C.J. 3 (final order).

36. Vienna Convention on Diplomatic Relations, Dec. 13, 1972, 34 U.S.T. 3227; 500 U.N.T.S. 95.

37. See Convention, *supra* note 22, art. 31 (1), 1155 U.N.T.S. at 340 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in light of its object and purpose."); see also J.F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW 107-16 (1991) (discussing good faith in the law of treaties).

As to the meaning of a treaty's context, the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 301-339 (1987) follows the same approach as that of the Vienna Convention, as do decisions of the courts. See Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281 (1988) (discussing U.S. courts and the law of treaties). The development of customary international law has confirmed this proposition since the Vienna Convention. MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 183-96 (1985).

38. Lugar-Helms-Hatch Sovereignty Package, *supra* note 29, at 26-27.

sole discretion, it decides not to implement it legislatively.³⁹ In fact, this "reservation" allows Congress, at any time, to pass a law contrary to an ICCPR provision and have it supersede the treaty. Also, it allows any federal judge to hold that a given statute or court decision supersedes the ICCPR.⁴⁰

This open-ended approach to treaties is incompatible with international law, much as it is incompatible with common sense and good judgment. No treaty, contract, or legal obligation can be binding on all parties if one party can opt out of any provision at will and also change positions in time, alternatively considering itself bound and then not bound by a given provision. The Senators who drafted the language of these "reservations" knew full well that such limitations on the ICCPR would render its legislative implementation and judicial enforcement very difficult and subject any invocation of its provisions to protracted litigation.⁴¹ Of particular

39. The doctrine of non-self-executing treaties arose in *Foster v. Nielson*, 27 U.S. (2 Pet.) 253 (1829), where Chief Justice John Marshall developed the early distinction between self-executing and non-self-executing treaties. In *United States v. Percheman*, Chief Justice Marshall found the treaty self-executing. 32 U.S. (7 Pet.) 51 (1833). Professor Paust contends that Chief Justice Marshall erred in developing the non-self-executing treaty doctrine in that he departed from the Framers' original intent. Paust, *Self-Executing Treaties*, *supra* note 32, at 767. Chief Justice Marshall developed this doctrine even prior to his appointment to the Supreme Court. See *United States v. Robbins*, 27 F. Cas. 825, 826 (D.S.C. 1799) (No. 16,175) (holding that extradition treaties were self-executing). For a discussion of extradition treaties as self-executing, see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE* 39-94 (2d ed. 1987); see also CHARLES H. BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 268 (1902) (quoting Secretary of State John Jay's Oct. 13, 1786, Report to Congress, where he stated that treaties, upon the Senate's "advice and consent," are immediately enforceable). For a discussion of self-executing treaties, see Paust, *supra* note 32, at 760-83; Charles H. Dearborn III, Note, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233 (1979); Charles W. Stolter, Note, *Self-Executing Treaties and the Human Rights Provisions of the United Nations Charter: A Separation of Powers Problem*, 25 BUFF. L. REV. 773 (1976). The most significant cases relating to human rights are probably those involving the non-self-executing nature of the Universal Declaration of Human Rights, particularly *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952) (interpreting the self-executing nature of the United Nations Charter); see also Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 633-49 (1986) (discussing the concept of self-executing treaties); Note, *The Declaration of Human Rights, The United Nations Charter and Their Effect on the Domestic Law of Human Rights*, 36 VA. L. REV. 1059, 1081 (1950) (discussing the *Sei Fujii* case).

40. The situation may prove embarrassing to the United States, which filed a Declaration pursuant to Article 41 of the ICCPR that it consents to complaints filed against it for noncompliance with the treaty. The United States did not, however, ratify the Optional Protocol to the ICCPR, which provides that individuals may file complaints with the Human Rights Committee (established pursuant to the Optional Protocol).

41. For the effects of the human rights treaty obligations in United States courts, see Lillich, *supra* note 32, at 385-93. It should also be noted that customary international law can be raised in U.S. courts with respect to human rights issues. See *Siderman de Blake v. Republic of Argentina*,

significance is Article 2.3 of the ICCPR, which states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent *judicial, administrative or legislative authorities, or by any other competent authority* provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.⁴²

Could this provision apply notwithstanding the absence of implementing legislation?⁴³ The answer to this question is found in the Bush Administration's representation to the Senate with respect to the package of proposed reservations, understandings, and declarations. Through this package, the Administration clearly stated that no private cause of action should be permitted without implementing legislation. Moreover, the representation stated that no implementing legislation was contemplated.⁴⁴

ICCPR supporters include those who because of the reservations attached to it, would have preferred that the United States not ratify it. Other ICCPR supporters feel that in time, the predominantly xenophobic motives which brought about the reservations to it are likely to abate, and that it was therefore better that the United States ratify the treaty even with such reservations. But supporters ideologically committed to an American supremacist position in all matters see these reservations as the effective death-knell of the ICCPR. The political compromise that brought about the reservation-laden ratification, leaves all sides unsatisfied. It appears to this writer that the anti-Covenant advocates have enmeshed the ICCPR in cumbersome and weighty reservations involving complex constitutional questions, ensuring that the ICCPR will not have, for some time to come, the capacity of impacting the domestic scene.

965 F.2d 699 (9th Cir. 1992) (applying international law to expropriation); *Filartega v. Penarala*, 630 F.2d 876 (2d Cir. 1980) (applying international law to allegations of torture); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 311-314 (1987). For a landmark foundation case, see *The Paquete Habana*, 175 U.S. 677 (1900) (involving international maritime law).

42. ICCPR, *supra* note 3, art. 2, 999 U.N.T.S. at 174 (emphasis added).

43. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 703, 711 (1987) (stating that failure to provide a remedy constitutes a violation of an agreement). Furthermore, customary international law requires providing "access to courts."

44. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 8, at 25, reprinted in 31 I.L.M. at 660.

What national supremacists overlook is that the difference between a great power and a mighty one is its adherence to the rule of law.⁴⁵ To hold to the higher legal and moral grounds in international matters is not always compatible with national interests and certainly cannot be subject to domestic political considerations. It is, however, the cost of achieving and maintaining greatness in the community of nations and peoples of the world.

45. Kaufman sees what she calls "The Reservations Game" as the "Legacy of Fear." See KAUFMAN, *supra* note 8, at 148-94. This "fear" includes fear of internationalism and world government. Like all similar fears, these are subjective and irrational. The strong may always justifiably fear loss of strength, but the principled can accept a loss of influence because, in the final analysis, real strength inherently co-exists with occasional losses.