

University of St. Thomas Law Journal

Volume 3
Issue 2 Fall 2005

Article 8

2005

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Bluebook Citation

Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDs*, 3 U. St. Thomas L.J. 311 (2005).

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ARTICLE

THE UNEXCEPTIONAL U.S. HUMAN RIGHTS RUDS

JACK GOLDSMITH*

The United States helped create international human rights law, much of which reflects principles developed under the U.S. Constitution. It has been an enthusiastic supporter of the international human rights law movement for decades. And it has ratified four of the most important international human rights treaties: the Genocide Convention, the Torture Convention (CAT), the International Covenant on Civil and Political Rights (ICCPR), and the Convention to Eliminate All Forms of Racial Discrimination (CERD).

But the United States has also consistently attached conditions to these treaty ratifications, in the form of reservations, understandings, and declarations (RUDs). These RUDs have “evoked criticism abroad and dismayed supporters of ratification in the United States,”¹ and have provoked the charge that U.S. ratifications of human rights treaties with RUDs are “specious, meretricious, hypocritical.”² Critics complain that the reservations that are “designed to reject any obligation to rise above existing law and practice are of dubious propriety,”³ and lead “[e]ven friends of the United States [to object] that its reservations are incompatible”⁴ with the treaties’ object and purpose to promote human rights through the assumption of universal human rights norms. In addition, the “U.S. practice of declaring human rights conventions non-self-executing is commonly seen as of a piece with the other RUDs,”⁵ and “confirms that United States adherence

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1. Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 Am. J. Intl. L. 341, 341 (1995).

2. *Id.*

3. *Id.* at 343.

4. *Id.*

5. *Id.* at 346.

remains essentially empty”⁶ and that “the United States does not take [human rights treaties] seriously as international obligations.”⁷ Professor Henkin sums up the conventional wisdom when he concludes that “U.S. [human rights treaty] ratification practice threatens to undermine a half-century of effort to establish international human rights standards as international law.”⁸

This essay seeks to deflate some of this conventional wisdom about the U.S. RUDs practice. Most of the essay is devoted to showing that, as a descriptive matter, and contrary to conventional wisdom, the U.S. RUDs are not unique, even among liberal democracies. Rather, as parts I and II show, the U.S. RUDs practice is functionally similar to the practice of other liberal democracies (including European liberal democracies) which, like the United States, take reservations to important human rights treaties, decline to make these treaties domestically enforceable, and generally show a preference for local and regional human rights norms and institutions over international ones. Part III of the essay then sketches an explanation and defense of this practice.

I. THE UNEXCEPTIONAL U.S. RESERVATIONS AND UNDERSTANDINGS

Reservations and understandings are ways that States qualify consent to treaties. Reservations are acts of nonconsent to particular treaty terms.⁹ Understandings are “interpretive statements that clarify or elaborate”¹⁰ the meaning of particular treaty terms as understood by the consenting State. In examining the U.S. practice of imposing reservations and understandings, I will focus attention on the International Covenant on Civil and Political Rights (ICCPR), “the cornerstone of modern international human rights law.”¹¹ The ICCPR is the best treaty to study in connection with the exceptionalist charge, because it is the most important and comprehensive human rights treaty, touching on every conceivable political and civil right.

The U.S. consented to almost all of the provisions in the ICCPR. It took reservations to four provisions: the limitations on capital punishment, the prohibition on hate speech and war propaganda, the rule that a convicted

6. *Id.*

7. *Id.* at 348.

8. *Id.* at 349.

9. Cong. Research Serv., *Treaties and Other International Agreements: The Role of the U.S. Senate*, Sen. Comm. Print 106-71 at 125 (Jan. 2, 2001) (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.pdf) [hereinafter *CRS Study*] (defining reservations as “specific qualifications or stipulations that modify U.S. obligations without necessarily changing the treaty language”); cf. *Vienna Convention on the Law of Treaties* art. 2(1)(d) (May 23, 1969), 8 I.L.M. 679, 681 (defining reservation as “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”).

10. *CRS Study*, *supra* n. 9, at 125.

11. William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 *Brook. J. Intl. L.* 277, 277 (1995).

criminal can take advantage of postconviction sentence reductions, and the prohibition on treating juveniles as adults. In addition, the United States made clear its understanding that certain provisions that it did consent to—the prohibition on cruel, inhuman, and degrading treatment; certain rules concerning discrimination and the right to counsel; the process of compensating those wrongly convicted; and certain aspects of double jeopardy—were no more stringent than analogous rules under the U.S. Constitution.¹² These reservations and understandings had overwhelming bipartisan support.¹³

There is nothing unusual about the practice of imposing reservations to human rights treaties to conform the treaty obligations to the contours of domestic law. To the contrary, the practice is common. Over one-third of the parties to the ICCPR have qualified their consent to the ICCPR through reservations or understandings to all but one of the rights provisions in the ICCPR.¹⁴ This means that the U.S. ICCPR reservations and understandings, though a minority practice, are not especially unusual.

The practice seems significantly less unusual when we consider the identities of the parties that make reservations and understandings, and contemplate why they may do so. As the following chart demonstrates, liberal democratic nations that tend to respect human rights and international law tend to ratify the ICCPR with reservations and understandings; nonliberal democracies that tend less to respect human rights and international law do not attach reservations to the ICCPR. It turns out that U.S. reservations and understandings are not materially different than ones taken by other liberal democracies.

12. Off. U.N. High Comm. for Human Rights, *For the Record, United Nations, International Covenant on Civil and Political Rights*, <http://www.hri.ca/fortherecord2003/documentation/reservations/ccpr.htm> (2003) [hereinafter *For the Record*].

13. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. Pa. L. Rev. 399, 414–16 (2000).

14. Yogesh Tyagi, *The Conflict of Law and Policy on Reservations to Human Rights Treaties*, 71 British Y.B. Intl. L. 181, 187 n. 18 (2000).

RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS (RUDs) TO THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.¹⁵

States	RUDs
United Kingdom	16
United States	12
Austria	9
France, Netherlands, Trinidad and Tobago	8
Monaco, Switzerland	7
Belgium, Italy, Malta	6
Denmark, Lichtenstein, Luxembourg	5
Bangladesh, Germany, Iceland, Ireland, Mexico, New Zealand, Norway, Thailand, Turkey	4
Algeria, Australia, Belize, Finland, India, Kuwait, Sweden	3
Botswana, Guyana, Romania, South Korea, Syrian Arab Republic	2
Afghanistan, Argentina, Barbados, Bulgaria, Congo, Gambia, Guinea, Hungary, Iraq, Israel, Japan, Libyan Arab Jamahiriya, Mongolia, Russian Federation, Ukraine, Venezuela, Vietnam, Yemen	1
Albania, Angola, Armenia, Azerbaijan, Belarus, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, Colombia, Costa Rica, Côte D'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Gabon, Georgia, Ghana, Greece, Grenada, Guatemala, Haiti, Honduras, Iran (Islamic Republic of), Jamaica, Jordan, Kenya, Kyrgyzstan, Latvia, Lebanon, Lesotho, Lithuania, Macedonia, Madagascar, Malawi, Maui, Mauritius, Moldova, Morocco, Mozambique, Namibia, Nepal, Nicaragua, Niger, Nigeria, North Korea, Panama, Paraguay, Peru, Philippines, Portugal, Rwanda, Saint Vincent and the Grenadines, San Marino, Senegal, Serbia and Montenegro, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Tajikistan, Tanzania, Timor-Leste, Togo, Tunisia, Turkmenistan, Uganda, Uruguay, Uzbekistan, Zambia, Zimbabwe	0

15. This chart was previously published as Table 4.2 in Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 129 (Oxford U. Press 2005).

This table was derived from four sources: (1) the most recent RUDs collection for the ICCPR that we could find, see www.hri.ca/fortherecord@2003/documentation/reservations/ccpr.@htm; (2) a United Nations collection of RUDs to the Covenant on Economic, Social, and Cultural Rights, which also contains necessary information on RUDs to the ICCPR for some states, see www.unhchr.ch/html/menu3/b/treaty4_esp.htm; (3) the latest United Nations information we could find on ratification of the ICCPR, see www.unhchr.ch/pdf/report.pdf; and (4) a source indicating Swaziland's status as an ICCPR party, see web.amnesty.org/web/wire.nsf/June2004/Swaziland. All of these sources were last visited on August 16, 2004.

Counting reservations, understandings, and declarations (RUDs) is difficult and requires judgment calls. For this table, we counted only those RUDs that actually qualify state consent to the ICCPR. This means, for example, that we did not count the United States declaration that the ICCPR is non-self-executing. A more vexing problem is how to count a RUD that qualifies consent to two parts of one article in a treaty. Where the two references within the same article are closely related, we conservatively count this as a single RUD. For example, Finland, Iceland, and other states reserve the

Consider the United Kingdom. It opted out of the ICCPR's rights to (a) free expression and assembly, to the extent that these rights conflicted with extant UK legislation; (b) free legal assistance, in certain places; (c) equality of marriage rights, when doing so conflicted with local domicile law; (d) vote and serve in public office, in various contexts; (e) segregate juvenile and adult prisoners, both convicted and accused; (f) freedom from imprisonment for contract violations, in Jersey; (g) freedom from arbitrary deprivation of the right to enter one's own country, to the extent that it conflicted with extant UK immigration law; (h) require that children have a nationality, to the extent that this right conflicted with extant UK law; and (i) to avoid marriage "without the free and full consent of the intending spouses" for customary marriages in the Solomon Islands. In addition, the UK broadly reserved the right to apply to certain persons (including military personnel and lawfully detained persons) "such laws and procedures as they may from time to time deem to be necessary for the preservation of service and custodial discipline."¹⁶

Similarly, France entered several reservations and understandings to qualify its consent to the ICCPR. It declined to consent to the ICCPR's limitation on emergency powers to the extent the limitation might affect French presidential power and other aspects of French domestic law. It opted out of an array of criminal procedure rights insofar as they applied to "the disciplinary régime in the armies." It insisted on the right to "make limited exceptions" to the right to have one's conviction and sentence reviewed by a higher tribunal. It declined consent to the requirements for expelling aliens to the extent that this requirement conflicted with extant French law. It made clear that various rights of expression, assembly, and association in the ICCPR must conform to the free expression rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms. It limited its consent to the ICCPR prohibition on "propaganda for war" to legal wars, and stated that it understood this provision to be no more demanding than French law in any event. And finally, France declined its consent to the ICCPR provision that guaranteed "ethnic, religious or linguistic minorities" the right to "enjoy their own culture, to profess and practice their own religion, or to use their own language" in light of Article 2 of

right to ignore the juvenile segregation provisions in articles 10(2) and 10(3); we counted this as a single RUD. Similarly, many EU states qualify their acceptance of articles 19, 21, and 22 by stating that they accept only those portions that are not in conflict with European human rights treaties; again, this is treated as one RUD. In addition, when a state qualifies its consent without specific reference to a provision in the treaty, this is counted as a single RUD. This occurs, for example, when countries declare that ratification does not entail recognition of the state of Israel. Even with these guiding principles, some of our interpretations were, at the margins, difficult. Any disagreements at the margins, however, do not affect the overall pattern of the table, which clearly demonstrates that liberal states are much more inclined than nonliberal states to condition consent to the ICCPR with RUDs.

Id. at 231 n. 1.

16. See *For the Record*, *supra* n. 12.

the French Constitution, called “On Sovereignty,” which specifies (among other things) that the language of the Republic shall be French.¹⁷

Other prominent European liberal democracies—the Netherlands (8), Switzerland (8), Austria (6), Belgium (6), Italy (6), Germany (4), Liechtenstein (5), Iceland (4), Ireland (4), Denmark (3), and Finland (3)—have made numerous reservations/understandings to the ICCPR.¹⁸ These reservations cover many topics, including various trial rights, free speech rights, immigration rights, and voting rights.¹⁹

In addition to these extensive ICCPR reservations/understandings, international law and human-rights-loving European States use other mechanisms to favor regional community norms and institutions over the universal ICCPR and its associated institutions. Several rights contained in the ICCPR—including the right of self-determination, the rights of aliens against expulsion, and the right of ethnic and other minorities to enjoy their own culture, religion, and language—have no counterpart in the European Convention on Human Rights and its Protocols.²⁰ Nonetheless, the EU and EU States have developed a variety of procedures—including “same matter” reservations, and declarations to Article 41 of the ICCPR—designed to steer human rights complainants away from international bodies like the ICCPR Human Rights Committee, and toward the regional EU system.²¹ These procedures result in the systematic underenforcement of ICCPR norms when they conflict with EU norms or with State laws that are the subjects of a reservation or declaration.²² The ICCPR Human Rights Committee has complained about “the apparent preference accorded, in domestic law [of EU states] as well as in legal doctrine and jurisprudence, to the European Convention . . . as against the [ICCPR],”²³ and has recommended that EU States alter their constitutions to reflect the provisions of the ICCPR.²⁴ The EU has ignored this recommendation.

In addition to this systematic exclusion of the ICCPR from the European human rights system, the European Court of Human Rights (and its predecessor, the European Commission) engage in the functionally similar

17. *Id.*

18. *Id.*

19. *Id.*

20. See Tyagi, *supra* n. 14, at 208 n. 106; A.H. Robertson, *The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights*, 43 *British Y.B. Intl. L.* 21, 37–40 (1968–1969); Hellenic Resources Network, *European Convention On Human Rights and its Five Protocols*, <http://www.hri.org/docs/ECHR50.html> (Sept. 27, 1995).

21. See Tyagi, *supra* n. 14, at 195–96, 206–08.

22. See *id.* at 205–13 (documenting many examples).

23. U.N. Human Rights Comm., *Report of the Human Rights Committee Vol. I* ¶ 76, U.N. Doc. A/49/40 (Sept. 21, 1994) (supplement to volume I).

24. See *id.* at ¶¶ 80, 123, 128; U.N. Human Rights Comm., *Report of the Human Rights Committee Vol. II* ¶¶ 61, 184, U.N. Doc. A/54/40 (Jan. 1, 2000); U.N. Human Rights Comm., *Report of the Human Rights Committee Vol. II* ¶ 65, U.N. Doc. A/52/40 (Jan. 1, 1999); see generally Tyagi, *supra* n. 14, at 208–09.

practice of embracing national or regional human rights norms and rejecting more rights-protecting human rights treaty standards when the two conflict. These bodies have, for example, interpreted European law to provide narrower protections than the ICCPR, as interpreted by the ICCPR Human Rights Committee, in areas ranging from conscientious objection, to due process guarantees for civil servants, to the right of privacy in connection with religious practices.²⁵

In these and many other ways, European States engage in practices functionally similar to U.S. RUDs—practices that have the effect of excluding the ICCPR when it conflicts with European understandings about the proper content of and enforcement mechanism for human rights. One might try to deflect the significance of the point by arguing that Europe's chauvinistic rejection of international norms and institutions, unlike the United States', sometimes (though not always or even usually) takes place in favor of a regional system that is itself constituted by international law. After all, the EU States developed this regional human rights system after concluding that domestic institutions could not prevent reoccurrence of the atrocities committed in World War II. One might think that the EU States are at least beholden to an international institution, albeit a regional one that (like the U.S. system) reject full incorporation of ICCPR norms.

Despite these points, no normative significance attaches, for present purposes, to the formalism of a human rights system that is regional and supranational as opposed to domestic and supreme. It is unclear whether the EU system is properly analyzed as constituted by international law, or whether it is better viewed as a transitional, fledgling "domestic" constitutional system (or at least a constitutional community apart from the "international community") akin to the United States under the Articles of Confederation.²⁶ But even assuming (as few do) that the EU is a pure international law institution, it is still a nonglobal institution that is narrower than international institutions like the ICCPR, and its member states are bound by global treaties like the ICCPR in all of their actions, including their EU-related actions. Just as the United States could not skirt its international obligations by entering into a treaty with Canada in which the two countries agreed to be bound by a regional court that would apply U.S. domestic civil rights law, as a formal matter the EU States and the EU system remain governed by the ICCPR and similar institutions. The fact that the EU established a human rights system via regional international law

25. See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. Pa. L. Rev. 285, 331–33 n. 168 (1999).

26. The emerging conventional wisdom is that it is a constitutional system. See e.g. Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 European L. J. 125 (2001); Joseph Weiler, *European Constitutionalism: Beyond the State* (Cambridge U. Press 2003); J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 European L.J. 219, 220–21 (1995).

mechanisms rather than through domestic constitutional reform is of no consequence from the perspective of the obligations of the ICCPR and related institutions. For these reasons, the rationale for the critics insisting that the United States must fully embrace and domesticate the ICCPR should apply with full force to EU States, either at the regional or the national level.

In sum, the practice of European States and of other liberal democracies shows that the U.S. reservation/understanding practice with regard to the ICCPR is not exceptional. Neither the number nor the type of U.S. reservations and understandings to the ICCPR differ from the ones made by other liberal democracies in Europe and elsewhere. With regard to the U.S. reservation/understanding practice and the broader charge of conforming international obligations to extant domestic law, the exceptionalism charge is simply false.

II. NON-SELF-EXECUTING DECLARATIONS

The United States has also attached declarations to all of the major human rights treaties except the Genocide Convention. Declarations are “statements of purpose, policy, or position related to matters raised by the treaty in question but not altering or limiting any of its provisions.”²⁷ By far the most important and controversial U.S. declaration is the one rendering the human rights treaties non-self-executing. This declaration means that the human rights treaties are not enforceable by domestic courts unless and until the political branches act to make them so. In effect, a non-self-executing declaration delegates to the U.S. political branches, rather than to U.S. courts, the task of implementing international human rights obligations into domestic law whenever domestic law fails to satisfy these obligations.

Non-self-executing declarations are consistent with the human rights treaties, which do not require domestic judicial enforcement.²⁸ Moreover, the U.S. political branches take seriously their duty to implement international human rights law when necessary. Congress has enacted implementing criminal legislation for the Torture Convention and the Genocide Convention.²⁹ It also enacted war crimes legislation to satisfy the human rights requirements of the Geneva Convention.³⁰ And although Congress has never seen fit to implement any parts of the ICCPR, President Clinton

27. *CRS Study*, *supra* n. 9, at 126.

28. See *International Covenant on Civil and Political Rights* art. 2(2) (entered into force Mar. 23, 1976) T.S. 14668 (available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art. 2, U.N. Doc. A/39/51 (Dec. 9, 1975). The Human Rights Committee recognizes that the ICCPR “generally leaves it to the States parties concerned to choose their method of implementation in their territories.” U.N. Human Rights Comm., *Article 2, Implementation at the National Level, General Comment No. 3*, at 4 (1994) (thirteenth session of the commission).

29. 18 U.S.C. § 2340 (2000), 18 U.S.C. § 1091 (2000).

30. 18 U.S.C. § 2441 (2000).

issued an order making human rights treaties binding on executive branch officials in certain contexts.³¹

Setting aside the fact that the United States has in fact domesticated some important international obligations, there is nothing exceptional about the general U.S. practice of declaring human rights treaties to be non-self-executing. The majority of ICCPR parties, including many liberal democracies, do not apply the ICCPR in domestic courts.³² For example, all Commonwealth countries view *all* treaties to be non-self-executing. In these States, constitutional law prohibits human rights treaties from becoming judicially enforceable domestic law in the absence of separate implementing legislation. Many of these Commonwealth states, and many other “progressive” States that do not automatically incorporate human rights treaties—including Australia, Canada, Denmark, New Zealand, Norway, Sweden, and the United Kingdom—have not in fact enacted legislation to make the ICCPR part of domestic law.³³ And many liberal democracies that have nominally incorporated the ICCPR into domestic law have no reported decisions of domestic courts relying on this law. In most States that have enacted legislation making the ICCPR part of domestic law, courts have not relied on the treaty as a source of domestic law. In these nations (which include Germany, Mexico, Poland, and Russia) the ICCPR has nominal domestic status but no domestic legal force.³⁴

These examples suggest that there is no relationship between (a) domestic incorporation or domestic judicial enforcement of human rights treaties, and (b) human rights practices on the ground.³⁵ This suggestion is confirmed by the list of States (such as Algeria, Cambodia, Columbia, Egypt, Guatemala, Haiti, Iran, Iraq, Rwanda, and Syria) that *have* incorporated the ICCPR into domestic law but who do not generally respect human rights.³⁶ Even when domestic courts invoke the ICCPR (as in the Dominican Republic, Ecuador, Nigeria, Senegal, and Venezuela), it is no guarantee of a commitment to international human rights or international human rights law.³⁷ In short, incorporation of human rights treaties does not correlate with respect for human rights. As Harland wryly notes, “The ICCPR

31. Exec. Or. 13107, 3 C.F.R. 234 (1999).

32. See Christopher Harland, *The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents*, 22 Human Rights Q. 187 (2000); Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 Human Rights Q. 483 (2001).

33. Harland, *supra* n. 32, at 193.

34. *Id.*

35. *Id.*

36. *Id.* at 257–60; see U.S. Dept. St., *Country Reports on Human Rights Practices* (available at <http://www.state.gov/g/rl/hr/c1470.htm>) (last updated Feb. 2005).

37. Harland, *supra* n. 32, at 193.

does not exist in domestic Swedish law, while in Rwanda, at the time of the 1994 genocide, the ICCPR ranked above its domestic legislation.”³⁸

In sum, the U.S. non-self-executing declarations are not uncommon. Most nations, including many liberal democracies, have not made the ICCPR part of domestic law enforceable by domestic courts.

III. WHY DO LIBERAL DEMOCRACIES FAIL TO INCORPORATE INTERNATIONAL HUMAN RIGHTS LAW?

Parts I and II showed that the United States’ practice of declining consent to a small number of provisions in the primary human rights treaties, and of rendering these treaties non-self-executing, cannot meaningfully be described as “exceptional.” Most liberal democracies conform international human rights law obligations to the contours of local law via reservations and related mechanisms, and many do not permit the treaties to be enforced in domestic courts. As Tyagi accurately notes, “It is apparent that, in spite of assuming the leadership of the human rights movement, *the West* remains unwilling to accept international human rights law wholeheartedly.”³⁹

Why would liberal democratic States that are among the most successful in the world in protecting human rights decline to fully embrace the international human rights law system? Why has the U.S. critics’ preferred approach to human rights enforcement—domestic judicial enforcement of human rights treaties ratified without qualification—been expressly rejected by the two most successful human rights systems in the world (the EU system and the U.S. system)? These questions present major and largely unconsidered puzzles for the international human rights movement that demand explanation and, if possible, normative justification. This part sketches tentative answers.

1. *Respect for International Law*

One possible explanation for reservations to human rights treaties is that the reservations evince *respect* for international law—especially when reservations are taken to just a few of many provisions. This was the view of Senator Moynihan, a friend of international law.⁴⁰ He defended the ICCPR reservations by noting that the United States “has undertaken a meticulous examination of U.S. practice to insure that the United States will in fact comply with the obligations that it is assuming,” which “can certainly

38. *Id.*

39. Tyagi, *supra* n. 14, at 189 (emphasis added).

40. See Daniel Patrick Moynihan, *On the Law of Nations* (Harv. U. Press 1990) (arguing for strong adherence by the United States to international law).

be viewed as an indication of the seriousness with which the obligations are regarded rather than as an expression of disdain for the obligations.”⁴¹

In the Moynihan view, U.S. RUDs demonstrate that the United States has taken great care in examining whether it can conform its domestic behavior to the treaty norms, and, on the expectation that it intends to comply, it declines consent in the relatively few instances when it cannot. The Moynihan view seems especially compelling because, as figure 1 shows, the ICCPR signatories that are least respectful of human rights and international law tend not to take any reservations to the ICCPR.⁴²

2. *Mature Domestic Systems*

The second reason why liberal democracies have rejected the internationalist approach is that they have flourishing, mature, organic legal protections for human rights under domestic and regional systems that would be jeopardized by the wholesale incorporation of international law. Quite simply, the losses of wholesale incorporation of international norms outweigh the gains from a human rights perspective.

Wholesale incorporation of RUD-less human rights treaties would inject into the domestic legal system a host of new and differently worded norms that would require interpretation and elaboration. The sudden, direct application of these new and differently worded norms could affect the domestic civil and political rights system in multiple unforeseen ways, and would potentially require reinterpretation and reelaboration of every domestic civil and political right.

Government officials in liberal democracies could not responsibly superimpose the later-in-time ICCPR system on its organic domestic human rights system. The vast majority of the ICCPR’s rights are like those guaranteed by U.S. domestic constitutional and statutory law—this is why the United States ratified the treaty with very few reservations. But to consent to the vaguely worded norms and promise to act consistent with them is one thing; it is something quite different to make these differently worded norms subject to litigation in and interpretation by domestic courts. For the ICCPR rights are couched in different language than analogous domestic U.S. protections. Its differently worded terms would thus lead to litigation in every circumstance in which the terms differed.

Consider one of dozens of possible examples. Article 26(1) of the ICCPR provides:

41. 138 Cong. Rec. S4783 (daily ed. Apr. 2, 1992).

42. Cf. Arthur Rovine, *Defense of Declarations, Reservations, and Understandings*, in *U.S. Ratification of the Human Rights Treaties: With or Without Reservations?* 54, 57 (Richard B. Lillich ed., U. Press of Va. 1981) (“It is very easy to sign a human rights treaty without any reservations. . . . Many authoritarian regimes have done so.”).

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴³

Imagine the questions that this provision would raise if it were made part of domestic law. Would the guarantee of equal protection without “any” discrimination eliminate all forms of affirmative action in the United States? Would the guarantee of “effective” in addition to “equal” protection entail an effects test for all U.S. discrimination law? What other changes would it bring? Would its “protection against discrimination on *any* ground,” including “*status*,” extend to discrimination on the basis of homosexuality? Age? Weight? Beauty? Intelligence? These are just a few of the broader questions raised by Article 26. There are hundreds of other smaller details of domestic anti-discrimination law—statutes of limitation, burdens of proof, disparate impact analysis, immunity rules, and scores of other case-law intricacies—that would be open to litigation and potential change.

It would be easy to walk through the ICCPR and raise hundreds, indeed thousands, of similar questions. The answers to these questions might change U.S. civil and political rights significantly. Even if U.S. judges interpreted these provisions in accordance with American traditions and experience, a domesticated ICCPR would create extensive confusion and uncertainty, and might change in unpredictable directions. There would be litigation over the manifold ways in which the terms of the ICCPR depart from domestic law. This litigation would invariably produce some, and perhaps many, changes in domestic human rights protection. There is no way to tell in advance whether these changes would expand or contract domestic human rights protections, much less whether the changes would be wise. The potential changes to the United States’ enormously complex, well-developed, and largely successful human rights system would be so extensive and so uncertain that, I submit, we cannot really imagine responsible politicians embracing these changes.

This is not just a concern of the United States. It is also why Europe has declined to incorporate the ICCPR into its domestic and regional human rights regimes. Europe’s reasons for preferring the EU system to the ICCPR are similar to the reasons why the United States prefers its rights system to the international system: because the EU system is older than the ICCPR system, because review of EU decisions by ICCPR bodies “might create the impression of an ‘appeal’ from the former to the latter and undermine, or at least weaken, the authority of [EU] Institutions,” because they worry about

43. *International Covenant on Civil and Political Rights*, *supra* n. 28, at art. 26.

an overly “liberal interpretation” by the ICCPR Human Rights Committee of “some of the general provisions” of the ICCPR, and because “they prefer the more exclusive approach of the European Convention, in contrast with the thrust of the UN human rights treaties.”⁴⁴

There is a larger point here. Liberal democracies decline consent to some aspects of international human rights law and resist its wholesale domestic incorporation because the abstract norms in the international treaties, if directly incorporated as the RUDs critics would like, would lack local legitimacy. RUDs critics would like a direct pipeline from international treaties to domestic judicial enforcement, without the intermediating influences and compromises of democratic politics. In the domestic legal system in the United States, both the constitutional and legislative articulation of these rights are subject to, and informed by, vigorous public debate and influence through the electoral and judge-confirmation processes, among others. These democratic influences, in turn, make the human rights that emerge from this system legitimate to the citizens who enjoy, and often must sacrifice for, these rights. But without such debates and compromises and accommodations of vague international norms to local conditions and traditions, there is little reason to believe that the people in liberal democracies—at least in the United States—would accept such norms and view them as legitimate.

There is always a tension between legalization of human rights norms (whether domestically or internationally) and the resolution of conflicting conceptions of human rights through democratic governance. The United States has long struggled with this tension, usually in debates about the appropriate occasion for and scope of judicial enforcement of fundamental constitutional norms. In the past thirty years, the U.S. legal and political culture has become increasingly aware of the limitations of judicial control of human rights progress, and of the importance (both as a matter of fact, and as a normative matter) of democratic deliberation to resolve fundamental moral issues such as the death penalty, abortion, homosexual rights, discrimination, and the like.⁴⁵ Although there is much debate about where the line between judicial and democratic control should be drawn, the RUDs critics embrace an extreme position that rejects the importance of democratic deliberation altogether, even for rights at the margin of consensus. Although internationalist critics of U.S. human rights practices purport to be committed to liberal democracy as the optimal form of domestic govern-

44. Tyagi, *supra* n. 14, at 196, 207–08.

45. See e.g. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (U. of Chicago Press 1991); Mark Tushnet, *Taking the Constitution Away From the Courts* (Princeton U. Press 1999); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford U. Press 2004).

ance,⁴⁶ their RUDs position attempts to isolate human rights enforcement from democratic politics altogether.

Consider only a few of the more obvious differences between the U.S. and EU human rights systems—the two most successful such systems in the world. The U.S. system developed organically within domestic law. Its details reflect unique American historical and legal traditions and experiences, including (among many other things) the tradition of a written Constitution and judicial review, the centrality of slavery and its redress in the Civil War, the post-War Amendments, the civil rights revolutions of the twentieth century, and the continuing importance of federalism. Europe's much different approach to human rights law is based on entirely different historical and cultural traditions. If U.S. human rights law has been intimately informed by the problem of slavery and race relations, the European system has been intimately informed by the catastrophes of World Wars I and II, culminating in the horrors of the Holocaust. The post-World War II desire for human rights improvement among European States, combined with an absence of confidence in domestic institutions to achieve this aim and a relatively benign attitude (compared to the United States) toward transnational institutions, led Europeans to establish a human rights system at the regional level in combination with other elements of regional integration.

There are many differences of institutional detail between the two systems. European rights tend to have less legislative input on the front end prior to judicial interpretation, but European Court of Human Rights interpretations of European Convention norms lack direct force within any national system, but rather must be implemented by local legislatures. By contrast, the U.S. legislature has more influence over the creation of rights (through legislation and judicial confirmation), but U.S. judicial interpretations of rights provisions are directly enforceable against federal and state officials.

There are important differences in substantive detail as well. Article 20 of the ICCPR prohibits “any propaganda for war” and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”⁴⁷ These provisions reflect a highly contested conception of free speech, one that many ICCPR parties rejected or qualified through reservations and understandings. Similarly contested, even among liberal democracies, is the ICCPR's commitment to criminal rehabilitation (as opposed to deterrence or incapacitation),⁴⁸ to the segregation of juvenile criminals,⁴⁹ to a 1960s conception of property rights,⁵⁰ to

46. See e.g. *Deliberative Democracy and Human Rights* (Harold Hongju Koh & Ronald C. Slye eds., Yale U. Press 1999).

47. *International Covenant on Civil and Political Rights*, *supra* n. 28, at art. 20.

48. *Id.* at art. 10(2)(b).

49. *Id.* at art. 10(2).

50. *Id.* at art. 1(2).

prohibitions on racial and sexual and religious “distinctions of *any kind*,”⁵¹ and more.

Most observers would acknowledge that these abstract ICCPR rights are not necessarily optimal, and that there might be disagreements over whether they are always and everywhere appropriate. But once this possibility is admitted, and once we consider that we live in a world of States characterized by radically different rights cultures and legal traditions, radically different historical experiences, and radically different economic and social endowments, it becomes difficult to think that any single system for human rights creation and enforcement will always and everywhere be best.

3. *International Law Fetishization*

The internationalists’ preoccupation with full ratification of human rights treaties and with automatic domestic judicial control over their implementation is puzzling. Human rights treaties are not the product of democratic deliberation. Rather, they tend to be drafted by unaccountable bureaucrats that do not necessarily hail from rights-respecting States,⁵² and they tend to be written at a level of abstraction and compromise that is designed to maximize ratifications among very differently situated States. There is nothing inherently legitimate or necessarily optimal about the norms as worded in these treaties.

The internationalist insistence that States must embrace human rights treaties’ terms as written and enforce them domestically is all the more puzzling because there is no demonstrable relationship between the internationalists’ desired state of affairs and genuine respect for human rights. Empirical studies show no statistical relationship between human rights treaty ratification and either respect for human rights or improvement in human rights performance.⁵³ (By contrast, empirical studies do find statistical relationships between democracy, peace, and developed economies, on the one hand, and protection of human rights, on the other.)⁵⁴ Relatedly, as part I discussed, there is an inverse correlation between the number of reservations to the ICCPR and respect for human rights. The evidence in part I also suggested that there is no relationship whatsoever between the enforceabil-

51. *Id.* at art. 2(1).

52. For example, the ICCPR was drafted by the UN Commission on Human Rights and the Third Committee of the UN General Assembly.

53. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 *Yale L.J.* 1935 (2002); Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does it Make A Difference?* 36 *J. Peace Research* 95 (1999).

54. Steven C. Poe & C. Neal Tate, *Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis*, 88 *Am. Pol. Sci. Rev.* 853 (1994); Steven C. Poe, *The Decision to Repress: An Integrative Theoretical Approach to Research on Human Rights and Repression*, in *Understanding Human Rights Violations: New Systematic Studies* 16 (Sabine C. Carey & Steven C. Poe eds., Ashgate 2004).

ity of international human rights law in domestic courts and genuine respect for human rights.

This all suggests that in liberal democracies, something besides ratification and incorporation of human rights treaties is doing the work when human rights flourish. In this light, it is unclear why internationalists are so insistent that the relatively successful U.S. human rights system fully embrace the ratification/incorporation project.

A possible explanation for the insistence on full U.S. ratification and incorporation of universal human rights treaties is concern about the effect of the U.S. attitude to international human rights on countries in transition. Many scholars claim that the U.S. RUDs practice has bad effects on human rights in other countries, either because it gives other countries an excuse not to respect human rights, or because it undermines the United States' ability to exercise moral leadership in these countries.⁵⁵ This concern, however, rests on the same misplaced belief in the importance of ratification and incorporation of human rights treaties that form the basis of the RUDs criticism in the first place. The fact is that there is no evidence that the United States' failure to consent fully to human rights treaties or make them enforceable in U.S. courts has any effect whatsoever on international human rights practices in other States.

The United States began ratifying modern human rights treaties twenty years ago, and it has attached RUDs to all subsequent human rights treaties. During this same period, international human rights law has, by any measure, flourished. The claim that the U.S. RUDs practice harms the human rights movement becomes even less convincing when one considers the many ways that the United States influences human rights development around the world outside the context of the human rights treaties. The United States exerts much of its influence through the example of its own, non-treaty-based human rights standards, which RUDs have not diminished at all. The United States is also the nation that most aggressively pressures other nations to improve their human rights standards, through economic and military sanctions and through participation in international institutions. These practices once again are not affected by the RUDs. Probably the two greatest influences on the spread of human rights during the past twenty years has been the defeat of the Soviet Union in the Cold War and economic liberalization. The U.S. RUDs did not delay these accomplishments.

In the end the internationalist position probably rests on a belief that preferred civil rights outcomes—in terms of, say, capital punishment and prison practices—would be better secured by a regime of full ratification

55. See e.g. M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DePaul L. Rev. 1169, 1173 (Summer 1993); Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 Chi.-Kent L. Rev. 515, 515–16 (1991); Henkin, *supra* n. 1; *Deliberative Democracy and Human Rights*, *supra* n. 45.

and incorporation. This might be correct, but it might also not be, for reasons stated above. But even taking the argument on its own terms, the argument is couched at the wrong level of abstraction. Yes, there is certainly room for improvement in the civil rights practices of liberal democracies. But across-the-board criticisms of RUDs and related practices are overbroad formalistic arguments that do not get at what might or might not be wrong with these practices.