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UNITED STATES RATIFICATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

MALVINA HALBERSTAM*

I. INTRODUCTION

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW or Convention) was adopted by the United Nations General Assembly on December 18, 1979.[1] It was opened for signature on March 1, 1980, and entered into force on September 3, 1981,[2] when it had been ratified by twenty states, as provided for by Article 27 of the Convention.[3] It is the most comprehensive Convention dealing with women's rights.[4] As of October 7, 1997, it has been ratified by 161 states.[5]

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1. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW]. For the full text of the Convention, see Appendix I.

2. CEDAW, *supra* note 1, at 14 n.1.

3. *Id.* art. 27, at 23.

4. A number of other conventions deal with women's rights in specific areas. *See, e.g.*, *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR 3d Comm., 21st Sess., Supp. No. 16, art. 26, at 55-56, U.N. Doc. A/6316 (1966) [hereinafter *ICCPR*] (entered into force with respect to the United States on September 8, 1992) (providing, *inter alia*, that "[a]ll persons are equal before the law," and that "the law shall prohibit any discrimination . . . on any ground such as race, colour, [or] sex"); Convention Against Discrimination in Education, *opened for signature* Dec. 14, 1960, art. 3, 429 U.N.T.S. 93, 98 (requiring parties "to [a]brogate any statutory provision" and "to discontinue any administrative practices which involve discrimination in education," and to ensure nondiscriminatory "admission of pupils to educational institutions"); Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, arts. 1-3, 27 U.S.T. 1909, 1911, 193 U.N.T.S. 135, 136-38 (entered into force with respect to the United States on July 7, 1976) (providing that "[w]omen shall be entitled to vote in all elections on equal terms with men," that "[w]omen shall be eligible for election to all publicly elected bodies . . . on equal terms with men," and that they "shall be entitled to hold public functions . . . on equal terms with men"); Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, *opened for signature* June 29, 1951, art. 2, 165 U.N.T.S. 303, 306 (requiring members to "ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value").

5. *Committee on the Elimination of Discrimination Against Women to Hold 18th Session at Headquarters*, M2 Presswire, Jan. 19, 1998, *available in* 1998 WL 5046149. For a complete list

The Convention was submitted to the Senate for its advice and consent to ratification by President Carter in 1980[6] and again by President Clinton in 1994.[7] The Senate Foreign Relations Committee reported it favorably to the Senate in September 1994.[8] The Senate has taken no action on the Convention, however. The United States is the only western democracy that has not ratified the Convention.[9]

This Article briefly summarizes the provisions of the Convention and its history in the United States and analyzes the reservations, understandings, and declarations (RUDS) proposed by the Clinton administration and the Senate Foreign Relations Committee. The Article concludes that the United States should ratify the Convention and should do so without a non-self-executing declaration. Such a declaration, coupled with the assertion that no implementing legislation will be adopted, raises serious questions of good faith under international law and of constitutionality under the Supremacy Clause, and would be undesirable as a matter of policy.

II. The Convention

The Convention defines discrimination against women as "any distinction, exclusion or restriction," based on sex, that "has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women" of "human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" on the "basis of equality of men and women."[10] It requires states to "embody the principle of the equality of men and women" in their constitutions or appropriate legislation;[11] "to modify or abolish existing laws, regulations, customs and practices" that discriminate against women;[12] "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise";[13] and "to ensure through competent national tribunals and other public institutions the effective protec-

of CEDAW signatories as of October 7, 1997, and their dates of accession or ratification, see Appendix III.

6. President's Message to the Senate Transmitting the Convention on the Elimination of All Forms of Discrimination Against Women, Pub. Papers 2715 (Nov. 12, 1980).

7. S. Exec. Rep. No. 103-38, at 2 (1994).

8. *Id.* at 1.

9. Switzerland, the only other western democracy that had not ratified the Convention, acceded on March 27, 1997. *See* Appendix III.

10. CEDAW, *supra* note 1, art. 1, at 16.

11. *Id.* art. 2(a), at 16.

12. *Id.* art. 2(f), at 16.

13. *Id.* art. 2(e), at 16.

tion of women against any act of discrimination."[14] In addition to these broad provisions, there are specific provisions dealing with political rights,[15] education,[16] employment,[17] legal status,[18] nationality,[19] marriage,[20] mortgages and other forms of credit,[21] recreation,[22] health and social services,[23] traffic in women and prostitution,[24] and the special problems of rural women.[25]

Article 7 requires parties to "ensure to women, on equal terms with men" the right to vote,[26] to "hold public office,"[27] to participate in the formulation of governmental policy,[28] and to "participate in non-governmental organizations and associations concerned with the public and political life of the country."[29] Article 10 requires states to "eliminate discrimination against women" and to "ensure to them equal rights with men in the field of education"[30] by providing the "same conditions . . . for access to studies" at various levels from pre-school to professional education and for all types of vocational training;[31] the "same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality";[32] "[t]he same opportunities to benefit from scholarships and other study grants";[33] "[t]he same opportunities for access to programmes of continuing education";[34] and "[t]he same opportunities to participate actively in sports and physical education."[35] Although the Convention does not mandate coeducation, it does provide for

14. *Id.* art. 2(c), at 16.
15. *See id.* art. 7, at 17.
16. *See id.* art. 10, at 17-18.
17. *See id.* art. 11(1), at 18.
18. *See id.* art. 15, at 20.
19. *See id.* art. 9, at 17.
20. *See id.* art. 16, at 20.
21. *See id.* art. 13(b), at 19.
22. *See id.* art. 13(c), at 19.
23. *See id.* art. 12, at 19; *see also id.* arts. 10(h), 11(1)(f), 11(2)(c)-(d), at 18-19.
24. *See id.* art. 6, at 17.
25. *See id.* art. 14, at 19-20.
26. *Id.* art. 7(a), at 17.
27. *Id.* art. 7(b), at 17.
28. *Id.*
29. *Id.* art. 7(c), at 17.
30. *Id.* art. 10, at 17.
31. *See id.* art. 10(a), at 18.
32. *Id.* art. 10(b), at 18.
33. *Id.* art. 10(d), at 18.
34. *Id.* art. 10(e), at 18.
35. *Id.* art. 10(g), at 18.

the "elimination of any stereotyped concept of the roles of men and women . . . by encouraging coeducation."[36]

Article 11 requires states to "take all appropriate measures to eliminate discrimination against women in the field of employment"[37] and to ensure equality of men and women to "the same employment opportunities,"[38] to "choice of profession and employment,"[39] to "equal remuneration" and "equal treatment [for] work of equal value,"[40] to social security,[41] and to health and safety conditions.[42] In addition, Article 11 provides that, "[i]n order to prevent discrimination against women on the grounds of marriage or maternity,"[43] states shall take measures to prohibit dismissal on the basis of marital status, pregnancy, or maternity leave;[44] "[t]o introduce maternity leave with pay" and without loss of seniority;[45] and to "encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life."[46] This article also requires, however, that states "provide special protection to women during pregnancy in types of work proved to be harmful to them."[47] While it further provides that protective legislation must be "reviewed periodically in the light of scientific and technological knowledge and . . . revised, repealed or extended as necessary,"[48] the Convention makes no attempt to find a solution to the problem of protective legislation used as a means of discriminating against women. Indeed, it provides in another article that "special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."[49]

Article 16 requires states to take measures to eliminate discrimination against women "in all matters relating to marriage and family relations and [to] . . . ensure, on a basis of equality of men and

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36. *Id.* art. 10(c), at 18.
37. *Id.* art. 11(1), at 18.
38. *Id.* art. 11(1)(b), at 18.
39. *Id.* art. 11(1)(c), at 18.
40. *Id.* art. 11(1)(d), at 18.
41. *Id.* art. 11(1)(e), at 18.
42. *Id.* art. 11(1)(f), at 18.
43. *Id.* art. 11(2), at 18.
44. *Id.* art. 11(2)(a), at 18.
45. *Id.* art. 11(2)(b), at 19.
46. *Id.* art. 11(2)(c), at 19.
47. *Id.* art. 11(2)(d), at 19.
48. *Id.* art. 11(3), at 19.
49. *Id.* art. 4(2), at 17.

women,"[50] various rights including "[t]he same right to enter into marriage";[51] "[t]he same rights and responsibilities during marriage and at its dissolution";[52] "[t]he same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation";[53] and "[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property."[54]

In addition to the provision requiring states to take "all appropriate means" to eliminate discrimination against women in general and in the areas and manner specified,[55] the Convention also provides that states "shall take all appropriate measures"[56] to "modify the social and cultural patterns of conduct . . . which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women";[57] to "ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children";[58] to "ensure the full development and advancement of women";[59] and to ensure that "temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination" under the Convention.[60]

The Convention provides for the establishment of a Committee on the Elimination of Discrimination Against Women for "the purpose of considering the progress made in the implementation" of the Convention.[61] States parties are required to submit a report to the U.N. secretary-general for consideration by the committee,[62] (the first one must be submitted within one year after the Convention enters into force for that state; subsequent reports must be made at least every four years, and whenever the committee requests)[63] "on the legislative, judicial, administrative or other

50. *Id.* art. 16(1), at 20.
51. *Id.* art. 16(1)(a), at 20.
52. *Id.* art. 16(1)(c), at 20.
53. *Id.* art. 16(1)(g), at 20.
54. *Id.* art. 16(1)(h), at 20.
55. *See id.* art. 2, at 16.
56. *Id.* art. 5, at 17.
57. *Id.* art. 5(a), at 17.
58. *Id.* art. 5(b), at 17.
59. *Id.* art. 3, at 16.
60. *Id.* art. 4(1), at 16.
61. *Id.* art. 17, at 21.
62. *Id.* art. 18(1)(a), at 22.
63. *Id.* art. 18(1)(b), at 22.

measures which they have adopted to give effect to the provisions" of the Convention.[64]

III. U.S. Ratification of the Convention

A. *Historical Background*

The Convention was signed on behalf of the United States on July 17, 1980, and submitted to the Senate for its advice and consent to ratification by President Carter on November 12, 1980.[65] The State Department report to the Senate, however, suggested the need for numerous reservations.[66] The Senate took no action.[67]

At the time, the Senate had not given its advice and consent to ratification of any major human-rights convention, even the Genocide Convention, which had been submitted to it for its advice and consent to ratification by President Truman in 1949[68] and was supported by every president, Democrat or Republican, thereafter.[69] In 1986, the Senate finally gave its advice and consent to U.S. ratification of the Genocide Convention,[70] but conditioned it on the enactment of implementing legislation by Congress.[71] Such legislation was enacted on November 4, 1988,[72] and President Reagan ratified the convention on November 14, 1988.[73] Following ratification of the Genocide Convention, the Senate gave its advice and consent, and the United States ratified several other human-rights conventions. President Bush ratified the Covenant on Civil and

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64. *Id.* art. 18(1), at 22.

65. President's Message to the Senate Transmitting the Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 6, at 2715.

66. For a discussion of the State Department's suggested reservations, see Malvina Halberstam and Elizabeth F. Defeis, Women's Legal Rights: International Covenants an Alternative to ERA? 61-63 (1987).

67. *See* Martha White, *Protecting the Human Rights of Women*, Hum. Rts., Fall 1995, at 5, 7.

68. *See* President's Special Message to the Senate Transmitting the Convention on the Prevention and Punishment of the Crime of Genocide, Pub. Papers 121 (June 16, 1949).

69. *See* Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. Rep. No. 100-333, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4156, 4157 (citing support from Presidents Kennedy, Johnson, Nixon, Carter, and Reagan).

70. *See* S. Res. 347, 99th Cong., 132 Cong. Rec. 2349 (1986) (enacted).

71. *See* S. Exec. Rep. No. 99-2, at 27 (1985). The Senate's consent to ratification of the Genocide Convention included the following reservation: "[N]othing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." *Id.*

72. Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. §§ 1091-1093 (1994)).

73. *See* U.S. Dep't of State, Treaties in Force 367 (1996) (entered into force with respect to the United States on February 23, 1989).

Political Rights in 1992,[74] and President Clinton ratified both the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment[75] and the Convention on the Elimination of Racial Discrimination in 1994.[76]

In the spring of 1993, sixty-eight members of the Senate signed a letter asking President Clinton to take the necessary steps to ratify the Convention.[77] On September 13, 1994, President Clinton informed the Senate that he strongly favored ratification of the Convention with four reservations, three understandings, and two declarations.[78] On September 27, 1994, the Foreign Relations Committee held a hearing on the Convention and the proposed reservations, understandings, and declarations.[79] On September 29, 1994, the committee voted thirteen to five to report favorably to the Senate on the Convention,[80] with the reservations, understandings, and declarations prepared by the Clinton administration as well as an additional understanding added by Senator Helms and adopted by the committee.[81] No further action has been taken by the Senate.

B. *Proposed Reservations, Understandings, and Declarations*

1. Reservations

After an article by article analysis of the Convention and comparison with current domestic law, the State Department concluded that four reservations were necessary to bring the Convention into

74. *US Ratifies UN Convenant* [sic], 3 U.S. DEP'T ST. DISPATCH 457, 457 (1992).

75. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE 442-43 (1996) (entered into force with respect to the United States on November 20, 1994).

76. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE 422-23 (1996) (entered into force for the United States on November 20, 1994).

77. Letter from Sixty-Eight U.S. Senators to President Bill Clinton Requesting Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (Apr. 23, 1993) (on file with *The George Washington Journal of International Law and Economics*); *see also Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the Senate Comm. on Foreign Relations*, 103d Cong. 21 (1994) [hereinafter *Senate Hearings*] (prepared statement of Professor Robert F. Drinan, S.J.).

78. S. EXEC. REP. NO. 103-38, at 2 (1994). For the text of the reservations, declarations, and understandings, see Appendix II.

79. S. EXEC. REP. NO. 103-38, at 2. Both the Foreign Relations Committee as a whole, and Senator John Kerry of Massachusetts individually, held earlier hearings on CEDAW in 1988. *Id.* The Committee held additional hearings on the Convention in 1990. *Id.*

80. *Id.* at 3. Ayes: Senators Pell, Biden, Sarbanes, Dodd, Kerry, Simon, Moynihan, Robb, Wofford, Feingold, Mathews, Murkowski, and Jeffords. Nays: Senators Helms, Kassebaum, Brown, Coverdell, and Gregg.

81. *Id.*; *see also infra* text accompanying notes 105-108 (discussing the understanding proposed by Senator Helms).

compliance with existing U.S. law.[82] These reservations involve private conduct, women in the military, comparable worth, and maternity leave.[83] Specifically, they provide that the United States does not accept any obligation under the Convention (1) "to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States";[84] (2) "to assign women to all military units and positions which may require engagement in direct combat";[85] (3) "to enact legislation establishing the doctrine of comparable worth";[86] and (4) "to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances."[87]

The underlying premise of the State Department memorandum is that ratification of the Convention would not change domestic law. The article by article comparison of the Convention with current U.S. law concludes, after each article, either with a statement that current U.S. law is consistent with the requirements of the Convention or with a recommendation for a reservation.[88] For example, in discussing maternity leave and benefits, the report notes that Article 11(2)(b) of the Convention requires states to take appropriate measures "[t]o introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances."[89] The report concludes:

> No federal law requires employers to hold vacant the position of a woman who has taken maternity leave or to reinstate her without loss of seniority or allowances. Nor does U.S. law requires [sic] provision of "comparable social benefits" in lieu of paid maternity leave.
>
> *Reservation. Accordingly,* ratification should be conditioned upon an express reservation to the requirements of Article 11(2)(b), as follows:

82. *See* S. Exec. Rep. No. 103-38, at 18-51.

83. *Id.* at 51; *see also* Appendix II.

84. S. Exec. Rep. No. 103-38, at 51.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.* at 18-50. As noted by the Lawyers Committee for Human Rights, the reservations, understandings, and declarations proposed by the administration, with the exception of the understanding relating to freedom of speech, "are all designed to support the Administration's view that this treaty should not, in any way, change, or commit us to change anything in U.S. law or practice, now or in the future." *See Senate Hearings, supra* note 77, at 77 (letter from the Lawyers Committee for Human Rights to Senator Pell).

89. CEDAW, *supra* note 1, art. 11(2)(b), at 19.

> Current U.S. law contains substantial provisions for maternity leave in many employment situations but does not require paid maternity leave. *Therefore*, the United States does not accept an obligation under Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.[90]

Indeed, in her testimony to the Senate Foreign Relations Committee at the hearings on the Convention, the deputy legal adviser emphasized "we are not talking about . . . changing U.S. law in any respect."[91]

This approach is troubling. If each state party to the Convention were to adopt such an approach, that is, to ratify the Convention only to the extent that it parallels existing domestic law and to make reservations with respect to any matters on which its domestic law differs from the Convention, the Convention would have no impact at all. It would, obviously, not achieve the purpose of the Convention, as stated in its title—the elimination of all forms of discrimination against women.[92] The point is not that a state should only ratify the Convention if it agrees with every provision in it. The Convention is very broad and a state may not be willing or able to accept every provision. However, states should at least consider changing domestic law rather than automatically making a reservation whenever their law differs from the requirements of the Convention, as the State Department memorandum recommends.

Nevertheless, U.S. law is consistent with the goal of the Convention—gender equality—and largely consistent with its specific provisions. The State Department position—that even in those areas where U.S. law may need to be changed, the ratification of the Convention should not be the vehicle for doing so[93]—may well be correct as a political matter. The Convention should, however, at least serve as a catalyst for considering such changes.

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90. S. EXEC. REP. NO. 103-38, at 39 (emphasis added).

91. *Senate Hearings*, *supra* note 77, at 13 (prepared statement of Jamison S. Borek, deputy legal adviser, U.S. Department of State).

92. *See id.* at 77 (letter from the Lawyers Committee for Human Rights to Senator Pell) ("The first principle—that the United States will undertake to do only what it is already doing—is incompatible with the object and purpose of the treaty.").

93. *See, e.g.*, *id.* at 4 (statement of Jamison S. Borek, deputy legal adviser, U.S. Department of State) ("There is room for continued debate domestically over the role of women in combat, but we do not believe that ratification of this Convention should be the vehicle to preempt or settle the question.").

2. Understandings

The State Department also proposed three understandings.[94] Although CEDAW, unlike the International Covenant on Civil and Political Rights[95] and the Convention on the Elimination of Racial Discrimination,[96] does not include any provisions limiting freedom of speech, the State Department was concerned that some articles might be so interpreted. Therefore, it recommended an understanding that the United States would not be obligated to adopt any legislation or measure that would restrict freedom of speech, expression, or association to the extent that it is protected by the Constitution and laws of the United States.[97]

The resolution giving advice and consent also states that it is the understanding of the United States that Article 12 permits states to determine what health care services are appropriate in connection with family planning, pregnancy, confinement, and post-natal care, and does not mandate the provision of particular services on a cost-free basis.[98]

The "federalism" understanding states that the "United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered [by the Convention], and otherwise by the state and local governments."[99] It does not stop there, however. It continues, "[t]o the extent that state and local governments exercise jurisdiction over such matters, *the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.*"[100] The State Department explained at the hearings that although the Convention will not be used to "federalize" matters that are presently within the regulatory purview of state and local governments, the federal government will "ensure that the fundamental requirements of the Convention are respected and com-

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94. *See* S. Exec. Rep. No. 103-38, at 10-11.

95. *See ICCPR, supra* note 4, art. 20(2), at 55 ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

96. *See* International Convention on the Elimination of All Forms of Racial Discrimination, art. 4(a), S. Exec. Doc. C, 95-2, at 3 (1978), 660 U.N.T.S. 195, 220 (requiring signatories to "declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred").

97. *See* S. Exec. Rep. No. 103-38, at 11.

98. *Id.* at 52.

99. *Id.* at 51.

100. *Id.* (emphasis added).

plied with at all levels of government within the United States."[101] Presumably, this means that Congress will not substitute federal legislation for state regulation on matters presently regulated by state and local governments, but the United States is not limiting application of the Convention only to those matters that are presently subject to federal regulation.

In this respect the Clinton proposal is a great improvement over the Carter proposal, which suggested the need for a reservation with respect to numerous articles of the Convention on the ground that in the United States the matter is regulated by the states.[102] Such a reservation is, of course, constitutionally unnecessary. Over half a century ago in *Missouri v. Holland*,[103] the Supreme Court made clear that Congress may enact legislation to implement a treaty, even if in the absence of the treaty the matter is subject to state regulation and outside the enumerated powers of Congress.[104]

Another understanding, proposed by Senator Helms, was added by the Foreign Relations Committee.[105] It states that "nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning."[106] The Convention makes no reference to abortion. It is, in the words of the State Department, "abortion neutral."[107] The first clause of this understanding merely makes that clear. The second clause, however, goes beyond that to express a policy against abortion under certain circumstances. Abortion is a very controversial issue in the United States. The resolution giving advice and consent to ratification of the Convention should not be used to further any particular position on abortion.[108] It should, like the Convention, remain abortion-neutral.

101. *Senate Hearings*, *supra* note 77, at 11 (prepared statement of Jamison S. Borek, deputy legal adviser, U.S. Department of State).

102. *See* Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, S. EXEC. DOC. R, 96-2, at viii (1980) (letter from Edwin R. Muskie, secretary of state, to President Carter).

103. Missouri v. Holland, 252 U.S. 416 (1920).

104. *See id.* at 433.

105. S. EXEC. REP. No. 103-38, at 3.

106. *Id.* at 52. For the full text of the understanding, see Appendix II.

107. *See Senate Hearings*, *supra* note 77, at 13 (prepared statement of Jamison S. Borek, deputy legal adviser, U.S. Department of State).

108. It would be regrettable if some members of the Senate voted against U.S. ratification of the Convention because they differed with the view expressed in the last clause of this understanding.

3. Declarations

The State Department also proposed two declarations, which are included in the resolution adopted by the Foreign Relations Committee. One declaration, specifically authorized by the Convention,[109] opts out of the provision giving the International Court of Justice (ICJ) jurisdiction over disagreements about the interpretation or application of the Convention and provides that U.S. consent to jurisdiction is required on "a case-by-case basis."[110] The United States has included similar provisions in other conventions providing for ICJ jurisdiction,[111] following U.S. withdrawal in 1985 of its declaration accepting compulsory jurisdiction,[112] prompted by the court's assertion of jurisdiction in the *Nicaragua* case.[113]

The other declaration states that, "for the purposes of [U.S.] domestic law, the provisions of the Convention are non-self-executing."[114] The effect of this declaration is more far-reaching than a reservation making a particular provision of the Convention inapplicable to the United States. It bars the invocation of *any* provision of the Convention in a U.S. court, either as the basis of a claim or as a defense. It thus negates with respect to all the rights provided by the Convention a very important element—some would say the most important element—of a legal right, the possibility of asserting it in a court as the basis of a claim or defense.[115]

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109. CEDAW, *supra* note 1, art. 29(2), at 23.

110. *See* S. EXEC. REP. NO. 103-38, at 52.

111. *See, e.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, art. 16, S. TREATY DOC. NO. 101-1, at 7 (1989).

112. The United States gave notice of its withdrawal of U.S. acceptance of compulsory jurisdiction on October 7, 1985. The withdrawal became effective six months later. *See* Letter from George P. Shultz, Secretary of State, to Dr. Javier Perez de Cuellar, Secretary-General of the United Nations (Oct. 7, 1985), *reprinted in* 24 I.L.M. 1742 (1985). The United States accepted the compulsory jurisdiction of the International Court of Justice on August 14, 1946. *See* Declaration of the United States of American Recognizing as Compulsory the Jurisdiction of the Court, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice, Aug. 14, 1946, 1 U.N.T.S. 10, 10.

113. Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 4 (Nov. 26) (judgment on jurisdiction); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27) (judgment on the merits). In that case the court invoked a clause in the Friendship and Commerce treaty between Nicaragua and the United States giving it jurisdiction to interpret that treaty as a basis for jurisdiction in the action by Nicaragua against the United States. *Military and Paramilitary Activities*, 1984 I.C.J. at 53.

114. S. EXEC. REP. NO. 103-38, at 52.

115. *See* The Western Maid, 257 U.S. 419, 433 (1922) ("Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp."); Oliver Wendell Holmes, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 173 (1920) ("The prophecies of what the courts will do . . . are what I mean by the law."); OLIVER WENDELL HOLMES, THE COMMON LAW 214 (1881) ("Just so far as the aid of the public force is given a man, he has a legal right . . . ."); *see also* WALTER WHEELER COOK, THE LOGICAL

The argument that existing U.S. laws already provide the necessary remedies[116] is disingenuous. If there already are U.S. laws implementing *all* the rights under the Convention, the non-self-executing clause is superfluous. To the extent that it is not superfluous, the non-self-executing clause leaves some of the rights provided for by the Convention and accepted by the United States internationally, without enforcement domestically.

Although there have been other instances in which the Senate's resolution of advice and consent to ratification stated that a treaty would not be self-executing, the intent generally was that implementing legislation would be adopted, and it was.[117] That is not

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AND LEGAL BASES OF THE CONFLICT OF LAWS 30 (1949) ("'Right,' [and] 'duty,' . . . are . . . not names of objects or entities which have an existence apart from the behavior of the officials in question, but terms by means of which we describe to each other what prophecies we make as to the probable occurrence of a certain sequence of events . . . ."); KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 21 (1962) ("[S]tatements of 'rights' would be statements of likelihood that in a given situation a certain type of court action loomed in the offing.").

A "general comment" on reservations to the International Covenant on Civil and Political Rights, adopted by the Human Rights Committee, states, in part:

> Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (article 2(2)).
>
> . . . .
>
> The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party's jurisdiction. . . . Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. . . . Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

See General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, paras. 9, 12, at 3, 4-5, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter *General Comment*].

116. *See* S. EXEC. REP. NO. 103-38, at 7-8.

117. For example, see the Senate resolution giving advice and consent to ratification of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR 3d Comm., 39th Sess., Annex, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), which provides that the Convention will not be self-executing. S. TREATY DOC. NO. 100-20, at 2 (1988). Implementing legislation was adopted for the Convention. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463-64 (1994) (codified at 18 U.S.C. §§ 2340-2340B (1994)). Although the Senate gave its advice and consent in 1988, the Convention was only ratified in 1994 after Congress enacted the implementing legislation. *See* 136 CONG. REC. 36,198-99 (1990) (providing the resolution of ratification); *see also supra* text accompanying notes 68-73 (discussing the Genocide Convention). The implementing legislation, however, is not as broad as the Convention. For example, there is no counterpart in the statute to the provision in Article III of the Convention that no state shall "extradite a person to another

true here. The committee report makes clear that there is no intent to adopt implementing legislation after ratification.[118] Similarly, non-self-executing declarations were recommended by the Bush administration and included by the Senate in its resolution giving advice and consent to ratification of the International Covenant on Civil and Political Rights,[119] and recommended by the Clinton administration and adopted by the the Senate with respect to the Convention on the Elimination of Racial Discrimination.[120] No implementing legislation has been adopted or recommended with respect to either treaty.[121] As a prominent commentator noted:

> The pattern of non-self-executing declarations threatens to subvert the constitutional treaty system. That, for the present at least, the non-self-executing declaration is almost exclusively a concomitant of U.S. adherence to human rights conventions will appear to critics as an additional indication that the United States does not take such conventions seriously as international obligations.[122]

IV. The Non-Self-Executing Declaration Under International Law and the U.S. Constitution

In addition to depriving the treaty of any domestic effect, the declaration that the Convention is non-self-executing, coupled with an intent not to enact implementing legislation, raises very serious concerns under international law, under the U.S. Constitution, and as a policy matter.

State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

118. *See* S. Exec. Rep. No. 103-38, at 8. "[T]he [Clinton] administration sees no need for the establishment of additional private causes of action or new avenues of litigation in order to enforce the essential requirements of the Convention. The administration, therefore, proposes to declare the provisions of the Convention non-self-executing." *Id.*

119. *See* 138 Cong. Rec. S4781 (daily ed. Apr. 2, 1992) (statement of Sen. Pell). For the text of the Senate resolution giving advice and consent to the International Covenant on Civil and Political Rights, see *id.* at S4783-84. For criticism of the non-self-executing declaration with respect to U.S. ratification of the International Covenant on Civil and Political Rights, see Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DePaul L. Rev. 1257 (1993); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341, 348 (1995).

120. *See International Convention on the Elimination of All Forms of Racial Discrimination: Hearing Before the Senate Comm. on Foreign Relations*, 103d Cong. 13 (1994) (statement of Conrad K. Harper, legal adviser, U.S. Department of State). For the text of the Senate resolution giving advice and consent to the Convention, see 140 Cong. Rec. S7634 (daily ed. June 24, 1994).

121. *See* Henkin, *supra* note 119, at 348.

122. *Id.*

A. *International Law*

International law permits each state to determine how it will implement its treaty obligations.[123] The laws of some states provide that treaties ratified by the state automatically become the law of that state.[124] The laws of other states provide that treaties have no domestic effect without implementing legislation.[125] Still others have hybrid systems, in which some treaties are self-executing, while others require implementing legislation.[126] International law, however, does require states to act in good faith.[127] That means, *inter alia*, that if a state ratifies a treaty, it is required to implement it; a state should not ratify a treaty that it does not intend to implement. Although U.S. law already may be "largely consistent" with CEDAW, as the report states,[128] to the extent that it is not consistent, the proviso that the Convention is non-self-executing, coupled with an intent not to enact implementing legislation, is a violation of that principle.

Stated differently, although international law does not require a state to make treaties self-executing, it requires a state that does not make treaties self-executing to enact implementing legislation.[129] This is especially important with respect to human-rights treaties, whose purpose is to regulate how a state treats its own citizens.[130] A state that ratifies a treaty that is not self-executing and for which it

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123. *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 140 (2d ed. 1987).

124. *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 157 (3d ed. 1993) (discussing the Swiss Federal Constitution, which provides that treaties become municipally applicable upon their international entry into force).

125. *Id.* at 154-55 (noting that treaty law in the Federal Republic of Germany acquires local validity only after a special transformation act).

126. The United States, for example. *See* Restatement (Third) of the Foreign Relations Law of the United States § 111(3) & cmt. h (1987) [hereinafter RESTATEMENT].

127. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); *see also* Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 4, 19 (Dec. 20) ("[Good faith is] [o]ne of the basic principles governing the creation and performance of legal obligations . . . .").

128. S. EXEC. REP. No. 103-38, at 4 (1994).

129. *See* RESTATEMENT, *supra* note 126, § 111 cmt. h ("If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement."); *see also id.* § 111 reporters' note 5 ("If a treaty is not self-executing for a state party, that state is obliged to implement it promptly, and failure to do so would render it in default on its treaty obligations.").

130. *See General Comment*, *supra* note 115, para. 8, at 3.

does not intend to enact implementing legislation is violating its obligation to act in good faith.[131]

B. *The U.S. Constitution*

The declaration that the Convention is non-self-executing, coupled with an intent not to enact implementing legislation, is also problematic as a constitutional matter. A declaration that a treaty (or treaty provision) that by its terms would be self-executing is not self-executing is inconsistent with the language, history, and purpose of Article VI of the U.S. Constitution. Article VI provides: "This Constitution, and the Laws of the United States . . . and *all* Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."[132] Article III provides: "The judicial Power [of the United States] shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[133] This language, making treaties the supreme law of the land, and the parallel provisions in Article III, giving federal courts jurisdiction in cases involving treaties, was adopted to avoid the problems created by the system that existed under the Articles of Confederation, which left the enforcement of treaties to the legislatures of each of the states.[134]

The history of the clause makes clear that the framers intended treaties to have immediate effect as domestic law[135] and to be interpreted and applied by the courts "like all other laws."[136] Thus, Hamilton wrote in *The Federalist*, "[t]he treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations."[137] Justice Story wrote:

> It is . . . indispensable, that [treaties] should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws. . . . If they are supreme

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131. See *supra* note 127 and accompanying text.

132. U.S. CONST. art. VI (emphasis added).

133. *Id.* art. III, § 2.

134. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 695-96 (1833).

135. For a review of this history, see Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 761-64 (1988).

136. THE FEDERALIST NO. 22, at 161 (Alexander Hamilton) (Franklin Library ed. 1980).

137. *Id.*

> laws, courts of justice will enforce them directly in all cases, to which they can be judicially applied . . . .[138]

A treaty that is not self-executing is not the supreme law of the land. For example, if a treaty requires *a*, existing law requires *not-a*, the treaty is not self-executing, and no implementing legislation has been enacted, then a court will be required to apply *not-a*, rather than *a*. Thus, *not-a*, rather than *a*, is the supreme law of the land. Even if implementing legislation is enacted, it is the statute implementing the treaty that is the supreme law of the land, rather than the treaty, as provided for by Article VI.[139]

Although the proposition that in the United States treaties may be self-executing or non-self-executing is generally attributed to Justice Marshall's decision in *Foster & Elam v. Neilson*,[140] these terms (self-executing/non-self-executing) do not even appear in the opinion. Nor did Marshall suggest that the Senate has the constitutional authority to provide by declaration (or reservation) that a treaty ratified by the United States shall not be applied by the courts. On the contrary, he stressed that, unlike the situation in other states, in the United States treaties have the force of law as soon as they are ratified and must be applied by the courts. Justice Marshall said:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> *In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.*[141]

It is only where the treaty *by its terms* requires legislative action that it cannot be applied by the courts directly. That, in Marshall's view,

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138. 3 STORY, *supra* note 134, at 694-95.

139. RESTATEMENT, *supra* note 126, § 111 cmt. h. If the implementing legislation is identical to the treaty, the distinction is purely theoretical and has no practical effect.

140. Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

141. *Id.* at 314 (emphasis added); *see also* United States v. Rauscher, 119 U.S. 407, 418 (1886) (quoting the aforementioned text of *Foster & Elam, supra*); Head Money Cases, 112 U.S. 580, 598-99 (1884) ("A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."); United States v. Puentes, 50 F.3d 1567, 1573 (11th Cir. 1995) (citing *Rauscher, supra*).

was the case in *Foster & Elam v. Neilson*. In that case the plaintiff claimed title to land based on a treaty between the United States and Spain.[142] The treaty provided that all grants of land made by Spain "shall be ratified and confirmed to the persons in possession of the lands."[143] This language, as initially interpreted by Marshall, did not ratify and confirm title to the land of those who held it under Spain; rather, it obligated the United States to enact legislation ratifying and confirming title.[144] Marshall stated:

> The article under consideration does not declare that all the grants . . . shall be valid . . . . It does not say that those grants are hereby confirmed. *Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it*; but its language is that those grants shall be ratified and confirmed to the persons in possession . . . . By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject.[145]

Marshall made it clear, however, that absent language of contract, the treaty would be enforceable by the court in the same manner as a statute.[146] Indeed, when it was brought to his attention in a subsequent case that the Spanish version of the treaty, which was equally authentic, provided that the grants by Spain "shall remain ratified and confirmed," he held the treaty self-executing.[147]

Marshall's position in *Foster & Elam v. Neilson*—that a treaty which by its terms imposes an obligation on the state parties to enact legislation, rather than establishing rights or imposing obligations directly, cannot be enforced by the courts—is entirely consistent with the Supremacy Clause. The treaty is the supreme law, but what the treaty by its terms requires is that the legislature act (something the court cannot enforce). Although it may not always be clear whether a treaty establishes rights and obligations directly, imposes an obligation to enact legislation, as the treaty in *Foster & Elam v. Neilson* demonstrates, some treaties very clearly require states to enact legislation—particularly those involving criminal responsibility—[148] whereas others do not require legislation to

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142. *Foster & Elam*, 27 U.S. (2 Pet.) at 299-300.

143. Treaty of Peace and Friendship, Feb. 22, 1819, U.S.-Spain, art. 6, 8 Stat. 254, 258.

144. *Foster & Elam*, 27 U.S. (2 Pet.) at 314-15.

145. *Id.* (emphasis added).

146. *Id.* at 314.

147. United States v. Percheman, 32 U.S. (2 Pet.) 51, 68-69, 88 (1833).

148. For example, the treaties dealing with airplane hijacking, hostage taking, attacks on diplomats, and seizure of ships on the high seas, all provide that the state parties shall

implement the rights established.[149] In some states, domestic law may require implementing legislation for all treaties. That apparently was the general rule in Marshall's time.[150] But, as Marshall made clear, in the United States "a different principle [was] established."[151] The Constitution declared treaties to be "the law of the land," to be regarded by the courts "as equivalent to an act of the legislature."[152] Marshall's position—that treaties that require legislative action by their terms cannot be enforced directly by the courts—was later transformed into a rule that, in the United States, treaties may be self-executing or not, depending on the intent of the Senate in giving advice and consent, and the intent of the president in ratifying the treaty.[153]

The proposition that a treaty cannot be enforced by the courts if the president and/or Senate declare that it is not self-executing, even if the treaty by its terms establishes rights or imposes obligations, is inconsistent with the view expressed by Marshall. Further, the proposition clearly contravenes the command of the Constitution that *all* treaties are the supreme law of the land and that the judges of every state shall be bound thereby.[154] It is only where the treaty by its terms requires further government action, that is, where the international obligation is to enact legislation, that a treaty can be said to be the supreme law of the land even if it cannot be invoked as the basis of a claim or defense. That is so because the treaty does not purport to establish any rights, but only to obligate the state-parties to establish such rights.

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make the prescribed conduct an offense under domestic law. *See* Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, art. 5, S. TREATY DOC. No. 101-1, at 2 (1989); International Convention Against the Taking of Hostages, Dec. 17, 1979, art. 2, T.I.A.S. No. 11,081, at 1, 5, 1316 U.N.T.S. 205, 207; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, art. 2, T.I.A.S. No. 8532, at 1975, 1978, 1035 U.N.T.S. 167, 169; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 3, 24 U.S.T. 565, 569, 974 U.N.T.S. 177, 181; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 2, 22 U.S.T. 1641, 1644, 860 U.N.T.S. 105, 107.

149. *See, e.g., ICCPR, supra* note 4, art. 12(2), at 54 ("Everyone shall be free to leave any country, including his own.").

150. *See supra* text accompanying note 141.

151. *Foster & Elam*, 27 U.S. (2 Pet.) at 314.

152. *Id.*

153. *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 704 (1995); Paust, *supra* note 135, at 767 ("Later commentators . . . have distorted [Marshall's] meaning . . . .").

154. U.S. CONST. art. VI. While Article VI refers to state judges, it cannot be suggested that state judges would be bound by the treaty whereas federal judges would not.

Although it has become accepted black letter law that in the United States treaties may be self-executing or non-self-executing,[155] a number of prominent scholars and commentators have recently challenged or questioned the constitutionality of a Senate declaration that a treaty is not self-executing.[156] Professor Jordan Paust states, "[t]he distinction found in certain cases between 'self-executing' and 'non-self-executing' treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that '*all* Treaties . . . shall be the supreme Law of the Land.'"[157] Professors Stefan Riesenfeld and Frederick Abbott state, "[t]he framers of the Constitution intended that treaties be given direct effect in U.S. law when by their terms and context they are self-executing. An ancillary power of the Senate to deny self-execution directly contradicts this intent."[158] Professor Lori Damrosch states, "[a] Senate declaration purporting to negate the legal effect of otherwise self-executing treaty provisions is constitutionally questionable as a derogation from the ordinary application of Article VI of the Constitution."[159]

Although the *Restatement (Third) of Foreign Relations Law* appears to accept the validity of a non-self-executing declaration by the Senate,[160] Professor Louis Henkin, its chief reporter, recently wrote, "such a declaration is against the spirit of the Constitution; it may

155. *See* RESTATEMENT, *supra* note 126, § 111.

156. *See* Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHICAGO-KENT L. REV. 515, 516-18 (1991); Paust, *supra* note 135, at 760-61; Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHICAGO-KENT L. REV. 571, 631 (1991); *see also International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong. 89 (1980) (statement of Professor Oscar Schachter) ("I see no reason why the United States, which has a clear constitutional provision making treaties the law of the land, should deprive the citizens of the United States of the advantage of that constitutional provision."); Charles H. Dearborn III, Note, *The Domestic Legal Effect of Declarations that Treaty Provisions are Not Self-Executing*, 57 TEXAS L. REV. 233, 233-34 (1979) ("This Note argues that [ ] declarations [making a treaty non-self-executing] are of dubious validity . . . .").

157. Paust, *supra* note 135, at 760.

158. Riesenfeld & Abbott, *supra* note 156, at 599.

159. Damrosch, *supra* note 156, at 527. Damrosch adds, "accordingly [the Senate Declaration] should not be sustained unless there is some constitutionally-based justification for the Senate to inject itself into the question." *Id.* Damrosch then discusses and refutes various arguments that might be made to justify a non-self-executing declaration. *See id.* at 527-32. She concludes that "[i]t would be far preferable for the Senate to discontinue the device of non-self-executing treaty declarations . . . . [T]he effectiveness of international law would be strengthened by eliminating this unnecessary impediment to judicial enforcement of treaties." *Id.* at 532.

160. RESTATEMENT, *supra* note 126, § 111(4)(b) & cmt. h. For a critique of the *Restatement's* reasoning, see Vázquez, *supra* note 153, at 707-08.

be unconstitutional."[161] He added in a footnote, "[i]f what I wrote might be interpreted as supporting a general principle that would allow the President, or the Senate, to declare all treaties non-self-executing, that is not my opinion."[162]

Although the Supreme Court has stated that in the United States a treaty may be self-executing or non-self-executing, it has never ruled on the enforceability of a treaty provision which by its terms was self-executing, but which the Senate declared to be non-self-executing.[163] In *Power Authority of New York v. Federal Power Commission*,[164] the Court of Appeals for the District of Columbia held, in a two to one decision, that a reservation that would have had the effect of making a treaty provision non-self-executing was invalid.[165]

That a practice has long been assumed to be constitutional does not make it so, as the Supreme Court made clear in *INS v. Chadha*.[166] In that case, the Court found use of the legislative veto unconstitutional even though it had been used in nearly 200 statutes between 1932 and 1975.[167] Thus, the Court might well hold that if a treaty (or treaty provision) by its terms establishes rights or imposes obligations that can be enforced by the courts directly, a declaration that would bar the courts from enforcing these rights violates Articles III and VI of the Constitution.[168]

Moreover, as the State Department acknowledges, "[d]eclaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter

161. Henkin, *supra* note 119, at 346.

162. *Id.*

163. *See* Vázquez, *supra* note 153, at 706-07.

164. Power Auth. of New York v. Federal Power Comm'n, 247 F.2d 538 (D.C. Cir.), *vacated and remanded with instructions to dismiss as moot sub nom.* American Pub. Power Ass'n v. Power Auth. of New York, 355 U.S. 64 (1957).

165. *Id.* at 543. The case involved a Senate reservation to the Niagara Waters treaty with Canada, Treaty Relating to Uses of Waters of the Niagara River, Feb. 27, 1950, U.S.-Can., 1 U.S.T. 694, providing that "no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress." *Id.* at 699. For a discussion of *Power Authority of New York*, see Malvina Halberstam, *A Treaty Is a Treaty Is a Treaty*, 33 VA. J. INT'L L. 51, 56-58 (1992).

166. INS v. Chadha, 462 U.S. 919 (1983).

167. *Id.* at 944 ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.").

168. *See* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 271-72 (3d ed. 1991) (suggesting that U.S. courts could ignore such a declaration "since it is not technically part of the treaty"). If the treaty by its terms requires legislation, then the non-self-executing declaration would not be unconstitutional; it merely would be superfluous.

of international law."[169] Therefore, to the extent that U.S. law is inconsistent with the Convention, and no implementing legislation is adopted, the United States would be in violation of its international obligations. One of the purposes of Article VI was to avoid precisely this result.[170]

Such a declaration is also unnecessary with respect to this Convention because most of the substantive provisions of the Convention are by their terms non-self-executing. They call on states to "take appropriate measures," to "pursue by appropriate means," to "establish," and to enact or repeal legislation.[171] These words clearly require legislative action and are non-self-executing by the terms of the Convention. Therefore, with respect to these provisions, there is no need for a non-self-executing declaration. The few provisions in the Convention that would be self-executing in the absence of a declaration are consistent with U.S. law.[172]

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169. S. EXEC. REP. No. 103-38, at 49 (1994).

170. *See supra* text accompanying notes 134-138; *see also* Vázquez, *supra* note 153, at 699 ("The history of the Supremacy Clause thus shows that its purpose was to avert violations of treaties attributable to the United States . . . .").

171. The introductory paragraph of Article 2 provides that state parties "agree to pursue by all appropriate means" the elimination of discrimination. Most of the subsections similarly use words contemplating legislative action. Subsection (a) requires states "[t]o embody" the principle of equality; subsection (b) "[t]o adopt appropriate legislative and other measures"; subsection (c) "[t]o establish legal protection"; subsection (e) "[t]o take all appropriate measures"; subsection (f) "[t]o take all appropriate measures"; and subsection (g) "[t]o repeal." Articles 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, and 16 call on states to "take all appropriate measures" (including legislation) to establish the rights provided by the article.

172. The only provisions that may be self-executing are: (1) the first clause of Article 2(d); (2) Article 9; and (3) Article 16. The first clause of Article 2(d) calls on states "[t]o refrain from engaging in any act or practice of discrimination against women." *Id.* art. 2(d), at 16.

Article 9 provides:

> 1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
>
> 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Id. art. 9, at 17.

Article 16 provides:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (a) The same right to enter into marriage;
>
> (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
>
> (c) The same rights and responsibilities during marriage and at its dissolution;

V. Testimony on RUDS

At the congressional hearings, numerous organizations, including the American Bar Association (ABA), testified and submitted statements in support of U.S. ratification of the Convention.[173] Only one, the National Institute of Womanhood, appeared in opposition.[174] Several urged ratification without the reservations, understandings, and declarations recommended by the State Department.[175] A two-year study, prepared by a law firm on behalf of B'nai B'rith Women and a broad-based coalition of over sixty other organizations supporting ratification of the Convention, which resulted in a 150 page analysis of the Convention and U.S. law, concluded that current U.S. law complies "with the vast majority of the Convention's provisions"[176] and that aside from the understanding on federalism and a declaration on the First Amendment, no RUDS were necessary.[177]

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Id. art. 16, at 20.

Article 4, which does not fit in either category, permits temporary affirmative action to eliminate discrimination against women. *See id.* art. 4(1), at 16.

173. *See Senate Hearings, supra* note 77, at 20-21 (statement of Professor Robert F. Drinan, S.J., on behalf of the ABA).

174. *Id.* at 18-20 (statement of Cecilia Acevedo Royals, president, National Institute of Womanhood).

175. *See, e.g., id.* at 32-35 (statement of Gay J. McDougall, executive director, International Human Rights Law Group).

176. *Id.* at 16 (statement of Jonathan Band on behalf of B'nai B'rith Women). For the full text of Mr. Band's prepared statement, see *id.* at 17-18.

177. *Id.* at 18.

The International Human Rights Law Group[178] and the Lawyers Committee for Human Rights,[179] in a statement joined by the National Organization for Women Legal Defense Fund,[180] urged ratification of the Convention without RUDS.[181] The Lawyers Committee submitted a legal analysis of each of the RUDS proposed by the administration, indicating with respect to each, why it considered it unnecessary or undesirable.[182] "At most," the Lawyers Committee stated, it would find acceptable a reservation that "the U.S. is not required to forbid private discrimination which is protected by the Constitution."[183] Similarly the Human Rights Law Group indicated that, though it considered it unnecessary, it would not oppose an understanding to the effect that the United States will implement its obligations "with due regard for the rights of speech, press, association, religion or individual privacy protected by the Constitution of the United States."[184]

In its statement, the ABA "agree[d] with the Administration's position that the treaty is not self-executing,"[185] but the ABA statement went on to say that, "[i]f implementing legislation is necessary to make the Convention's terms enforceable, the ABA strongly urges the Administration to seek such legislation promptly following ratification."[186] Moreover, in his testimony on behalf of the ABA, Father Robert Drinan stated that ratification of the Convention "will do a lot to alleviate the discrimination against women *that still goes on in America*."[187] Thus, the ABA clearly expected that the Convention would be enforceable in the United States.

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178. *Id.* at 32-35 (statement of Gay J. McDougall, executive director, International Human Rights Law Group). For the full text of the International Human Rights Law Group's prepared statement, see *id.* at 35-52.

179. *Id.* at 77 (letter from the Lawyers Committee for Human Rights to Senator Pell). For the full text of the letter, see *id.* at 77-83.

180. *Id.* at 78.

181. *See id.* at 77-78.

182. *See id.* at 78-83.

183. *Id.* at 79.

184. *Id.* at 42 (prepared statement of the International Human Rights Law Group).

185. *Id.* at 24 (prepared statement of Professor Robert F. Drinan, S.J.). For the full text of Professor Drinan's statement, see *id.* at 21-32. Indeed, in the oral presentation, Father Drinan, appearing on behalf of the American Bar Association (ABA), stated that "the ABA recognizes that, in general, treaties should not be self-executing." *Id.* at 20. He did not indicate why the ABA takes this position.

186. *Id.* at 24-25.

187. *Id.* at 20 (emphasis added).

VI. THE IMPORTANCE OF RATIFICATION

The State Department and others who testified or submitted statements to the Senate Foreign Relations Committee emphasized that U.S. ratification of the Convention is important internationally. The letter from the secretary of state requesting the Senate's advice and consent to ratification stated that ratification of the Convention would provide an opportunity for the United States to play a more active role in the advancement of "equality for women around the world";[188] it would "underscore our commitment to women's rights and . . . enhance our ability to protect and promote those rights internationally."[189] It would permit the United States to participate in the work of the CEDAW Committee, which monitors compliance with the Convention, and thereby to play a "more active and effective role in the articulation and advancement of the principles of non-discrimination and equality for women around the world."[190]

Conversely, by failing to ratify the Convention, we would, according to Jamison Borek, the deputy legal adviser who testified on behalf of the administration, "exclud[e] ourselves from the process and dialog which is centered on this treaty, [thus] hamper[ing] our efforts to work effectively with other countries in promoting women's rights around the globe."[191] Further, Borek stated, "[n]ot ratifying the Convention hampers our ability to work specifically in the area of women's rights, and also, more generally, in human rights. We are accused often of being hypocritical, of having a double standard because we do not join these conventions."[192] The view that ratification would be significant internationally was echoed by others supporting ratification. The ABA statement asserted: "As one of the world's most powerful and influential nations, the United States must demonstrate leadership in promoting human rights around the globe."[193] A letter from several prominent Yale Law School professors in support of ratification noted: "The leadership of the United States in foreign affairs and human rights abroad will be strengthened by our adherence to this state-

188. S. EXEC. REP. No. 103-38, at 9 (1994) (letter from Secretary of State Warren Christopher to Senator Pell).

189. *Id.*

190. *Id.*

191. *Senate Hearings*, *supra* note 77, at 3 (statement of Jamison S. Borek, deputy legal adviser, U.S. Department of State). For the full text of Ms. Borek's prepared statement, see *id.* at 5-14.

192. *Id.* at 14.

193. *Id.* at 22 (prepared statement of Professor Robert F. Drinan, S.J.).

ment of basic norms protecting women. The Convention is crucial in setting a standard against which to measure foreign practices that fall short of American ideals."[194]

Ratification of the Convention in a manner that would deny it any domestic effect might also be viewed as hypocritical, however. As a letter from the Lawyers Committee for Human Rights stated:

> If the United States ratifies CEDAW subject to broad limitations that imply a lack of political commitment to observe international standards, its actions will rightly be decried by the international community. It will suggest that the U.S. views these international norms as being applicable only in other countries.
>
> . . . .
>
> . . . [T]he Administration's qualifying language applies one set of rules to the United States and another set of rules to the rest of the world. . . . Other countries . . . will continue to view ratification in this manner as hypocritical. They will see it as an attempt by the U.S. to obtain the benefit of being a party to the treaty without undertaking the obligations that accompany that status.[195]

Such accusations have been made with respect to U.S. ratification of other human-rights treaties.[196]

The problem is not the constitutionally required limitations dealing with First Amendment rights and private conduct. Nor is it the reservations dealing with specific substantive rights, such as comparable worth, women in combat, and paid maternity leave.[197] The problem is the non-self-executing declaration coupled with the stated intent *not* to adopt implementing legislation.

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194. *Id.* at 84 (letter from Professors Myres S. McDougal, W. Michael Reisman, Ruth Wedgwood, Harold Hongju Koh, and Paul W. Kahn to Senator Pell).

195. *Id.* at 77-78 (letter from the Lawyers Committee for Human Rights to Senator Pell).

196. Thus, Louis Henkin notes:

> By adhering to human rights conventions subject to these reservations, the United States, it is charged, is pretending to assume international obligations but in fact is undertaking nothing. It is seen as seeking the benefits of participation in the convention (e.g., having a U.S. national sit on the Human Rights Committee established pursuant to the Covenant [of Civil and Political Rights]) without assuming any obligations or burdens. The United States, it is said, seeks to sit in judgment on others but will not submit its human rights behavior to international judgment. To many, the attitude reflected in such reservations is offensive: the conventions are only for other states, not for the United States.

Henkin, *supra* note 119, at 344 (footnote omitted). "U.S. ratification," he says, "has been described as specious, meretricious, [and] hypocritical." *Id.* at 341.

197. These rights may not even be required by the Convention. *See Senate Hearings*, *supra* note 77, at 15-18 (statement of Jonathan Band on behalf of B'nai B'rith Women); *id.* at 32-52 (statement of Gay J. McDougall, executive director, International Human Rights Law Group); *id.* at 77-79 (letter from the Lawyers Committee for Human Rights to Senator Pell).

VII. SUMMARY AND CONCLUSION

The Convention has been ratified by 161 states.[198] The United States is one of the few states and the only western democracy that has not ratified the Convention.[199] The Convention will undoubtedly be ratified by the United States. The question is when and with what limitations. The United States should ratify the Convention without further delay and without the non-self-executing declaration.

Although the report by the Senate Foreign Relations Committee states that ratification of the Convention "will reaffirm the United States' commitment to the . . . promotion and protection of women's rights *at home* and abroad,"[200] it would, in fact, be without any legal effect whatsoever domestically if ratified with the present RUDS. Indeed, the Clinton administration emphasized that ratification of the Convention would not involve "changing U.S. law in *any respect*."[201]

The purpose of the Convention is to *effect* domestic conduct. If there are any substantive provisions that the administration considers problematic, in addition to those with respect to which the administration has already proposed specific reservations, it should propose specific reservation with respect to those. The non-self-executing declaration, coupled with the stated intent not to enact any implementing legislation, denies the Convention *any* domestic effect. It also raises serious questions about the good faith of the United States, casting doubt on the validity of the ratification under international law. Further, it defeats the very purpose of ratification, urged by the secretary of state and the State Department—to refute accusations of hypocrisy and a double standard against the United States, and to enable the United States to work with other states in promoting women's rights and human rights. The inclusion of a non-self-executing clause coupled with an intent not to enact any implementing legislation would also raise serious constitutional questions. The Convention would not be "the supreme law of the land," as required by Article VI of the U.S. Constitution.

198. *Committee on the Elimination of Discrimination Against Women to Hold 18th Session at Headquarters*, *supra* note 5; *see also* Appendix III.

199. *See* Appendix III.

200. S. EXEC. REP. NO. 103-38, at 3-4 (1994) (emphasis added).

201. *Senate Hearings*, *supra* note 77, at 13 (prepared statement of Jamison S. Borek, deputy legal adviser, U.S. Department of State) (emphasis added).

Moreover, such a declaration is completely unnecessary with respect to this Convention, which is largely non-self-executing by its terms, and to the extent that it is self-executing by its terms, is consistent with existing U.S. law.[202] It seems particularly regrettable to include a declaration that would raise questions about the good faith of the United States and possibly subject it to charges of hypocrisy, thereby undermining the purposes that ratification is intended to serve, when it is unnecessary.

202. *See supra* note 176 and accompanying text. Indeed, U.S. law is much more consistent with both the broad purposes and the specific mandates of CEDAW than the laws of a number of other states that have ratified the Convention. *See, e.g.*, Julie A. Minor, Recent Development, *An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women*, 24 GA. J. INT'L & COMP. L. 137, 144-45 (1994) (discussing reservations made by Islamic countries).

APPENDIX I*

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

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* Reproduced in part from the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13.

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of *apartheid*, of all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, and in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article 1. For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(*a*) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(*b*) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(*c*) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(*d*) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(*e*) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(*f*) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(*g*) To repeal all national penal provisions which constitute discrimination against women.

Article 3. States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4. 1. Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5. States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6. States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7. States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8. States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9. 1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

PART III

Article 10. States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(*f*) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
(*g*) The same opportunities to participate actively in sports and physical education;
(*h*) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
(*a*) The right to work as an inalienable right of all human beings;
(*b*) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
(*c*) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
(*d*) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
(*e*) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
(*f*) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
(*a*) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
(*b*) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
(*c*) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in partic-

ular through promoting the establishment and development of a network of child-care facilities;

(*d*) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13. States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(*a*) The right to family benefits;

(*b*) The right to bank loans, mortgages and other forms of financial credit;

(*c*) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14. 1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(*a*) To participate in the elaboration and implementation of development planning at all levels;

(*b*) To have access to adequate health care facilities, including information, counseling and services in family planning;
(*c*) To benefit directly from social security programmes;
(*d*) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;
(*e*) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
(*f*) To participate in all community activities;
(*g*) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
(*h*) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15. 1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
(*a*) The same right to enter into marriage;
(*b*) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(*c*) The same rights and responsibilities during marriage and at its dissolution;

(*d*) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(*e*) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(*f*) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(*g*) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(*h*) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

PART V

Article 17. 1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

Article 18. 1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(*a*) Within one year after the entry into force for the State concerned; and

(*b*) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Convention.

Article 19. 1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elects its officers for a term of two years.

Article 20. 1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.

2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Article 21. 1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

2. The Secretary-General shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22. The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23. Nothing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

(a) In the legislation of a State Party; or

(b) In any other international convention, treaty or agreement in force for that State.

Article 24. States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

Article 25. 1. The present Convention shall be open for signature by all States.

2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.

3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26. 1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27. 1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28. 1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29. 1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30. The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

Appendix II*

Text of Resolution of Ratification

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the United Nations General Assembly on December 18, 1979, and signed on behalf of the United States of America on July 17, 1980, (Executive R), subject to the following Reservations, Understandings and Declarations:

I. The Senate's advice and consent is subject to the following reservations:

(1) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching all forms of governmental activity as well as significant areas of non-governmental activity. However, individual privacy and freedom from governmental interference in private conduct are also recognized as among the fundamental values of our free and democratic society. The United States understands that by its terms the Convention requires broad regulation of private conduct, in particular under Articles 2, 3, and 5. The United States does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States.

(2) That under current U.S. law and practice, women are permitted to volunteer for military service without restriction, and women in fact serve in all U.S. armed services, including in combat positions. However, the United States does not accept an obligation under the Convention to assign women to all military units and positions which may require engagement in direct combat.

(3) That U.S. law provides strong protections against gender discrimination in the area of renumeration, including the right to equal pay for equal work in jobs that are substantially similar. However, the United States does not accept any obligation under the Convention to enact legislation establishing the doctrine of comparable worth as that term is understood in U.S. practice.

(4) That current U.S. law contains substantial provisions for maternity leave in many employment situations but does not require paid maternity leave. Therefore, the United States does not accept an obligation under Article 11(2)(b) to introduce maternity

* Reproduced in part from S. Exec. Rep. No. 103-38, at 51-52 (1994).

leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

II. The Senate's advice and consent is subject to the following understandings:

(1) That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the State and local governments. To the extent that State and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary take appropriate measures to ensure the fulfillment of this Convention.

(2) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 5, 7, 8 and 13, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

(3) That the United States understands that Article 12 permits States Parties to determine which health care services are appropriate in connection with family planning, pregnancy, confinement and the post-natal period, as well as when the provision of free services is necessary, and does not mandate the provision of particular services on a cost-free basis.

(4) That nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that, for the purposes of its domestic law, the provisions of the Convention are non-self-executing.

(2) That with reference to Article 29(2), the United States declares that it does not consider itself bound by the provisions of Article 29(1). The specific consent of the United States to the jurisdiction of the International Court of Justice concerning disputes over the interpretation or application of this Convention is required on a case-by-case basis.

APPENDIX III*

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

States that have signed, ratified, acceded or succeeded to the Convention

7 October 1997

97 Signatures/161 ratifications and accessions

(Latest State: Myanmar, (22 July 1997))

STATES PARTIES TO THE CONVENTION		
State	Date of Signature	Date of receipt of the instrument of ratification, accession or succession
Afghanistan	14 August 1980	
Albania		11 May 1994 *a/*
Algeria		22 May 1996 *a/ b/*
Andorra		15 January 1997 *a/*
Angola		17 September 1986 *a/*
Antigua and Barbuda		1 August 1989 *a/*
Argentina	17 July 1980	15 July 1985 *b/*
Armenia		13 September 1993 *a/*
Australia	17 July 1980	28 July 1983 *b/*
Austria	17 July 1980	31 March 1982 *b/*
Azerbaijan		10 July 1995 *a/*
Bahamas	6 October 1993 *a/ b/*	
Bangladesh		6 November 1984 *a/ b/*
Barbados	24 July 1980	16 October 1980
Belarus	17 July 1980	4 February 1981 *c/*
Belgium	17 July 1980	10 July 1985 *b/*
Belize	7 March 1990	16 May 1990
Benin	11 November 1981	12 March 1992
Bhutan	17 July 1980	31 August 1981
Bolivia	30 May 1980	8 June 1990
Bosnia & Herzegovina		1 September 1993 *d/*
Botswana		13 August 1996 *a/*
Brazil	31 March 1981 *b/*	1 February 1984 *b/*
Bulgaria	17 July 1980	8 February 1982 *c/*
Burkina Faso		14 October 1987 *a/*

* Information provided by the State Department.

Burundi	17 July 1980	8 January 1992
Cambodia	17 October 1980	15 October 1992 *a/*
Cameroon	6 June 1983	23 August 1994 *a/*
Canada	17 July 1980	10 December 1981 *c/*
Cape Verde		5 December 1980 *a/*
Central African Republic		21 June 1991 *a/*
Chad		9 June 1995 *a/*
Chile	17 July 1980	7 December 1989 *b/*
China	17 July 1980 *b/*	4 November 1980 *b/*
Colombia	17 July 1980	19 January 1982
Comoros		31 October 1994 *a/*
Congo	29 July 1980	26 July 1982
Costa Rica	17 July 1980	4 April 1986
Cote d'Ivoire	17 July 1980	18 December 1995 *a/*
Croatia		9 September 1992 *d/*
Cuba	6 March 1980	17 July 1980 *b/*
Cyprus		23 July 1985 *a/ b/*
Czech Republic		22 February 1993 *c/ d/*
Denmark	17 July 1980	21 April 1983
Dominica	15 September 1980	15 September 1980
Dominican Republic	17 July 1980	2 September 1982
Ecuador	17 July 1980	9 November 1981
Egypt	16 July 1980 *b/*	18 September 1981 *b/*
El Salvador	14 November 1980 *b/*	19 August 1981 *b/*
Equatorial Guinea		23 October 1984 *a/*
Eritrea		5 September 1995 *a/*
Estonia		21 October 1991 *a/*
Ethiopia	8 July 1980	10 December 1981 *b/*
Fiji		28 August 1995 *a/ b/*
Finland	17 July 1980	4 September 1986
France	17 July 1980 *b/*	4 December 1983 *b/ c/*
Gabon	17 July 1980	21 January 1983
Gambia	29 July 1980	16 April 1993
Georgia		26 October 1994 *a/*
Germany	17 July 1980	10 July 1985 *b/*
Ghana	17 July 1980	2 January 1986
Greece	2 March 1982	7 June 1983
Grenada	17 July 1980	30 August 1990
Guatemala	8 June 1981	12 August 1982
Guinea	17 July 1980	9 August 1982
Guinea-Bissau	17 July 1980	23 August 1985

Guyana	17 July 1980	17 July 1980
Haiti	17 July 1980	20 July 1981
Honduras	11 June 1980	3 March 1983
Hungary	6 June 1980	22 December 1980 *c/*
Iceland	24 July 1980	18 June 1985
India	30 July 1980 *b/*	9 July 1993 *b/*
Indonesia	29 July 1980	13 September 1984 *b/*
Iraq		13 August 1986 *a/ b/*
Ireland		23 December 1985 *a/ b/ c/*
Israel	17 July 1980	3 October 1991 *b/*
Italy	17 July 1980 *b/*	10 June 1985
Jamaica	17 July 1980	19 October 1984 *b/*
Japan	17 July 1980	25 June 1985
Jordan	3 December 1980 *b/*	1 July 1992 *b/*
Kenya		9 March 1984 *a/*
Kuwait		2 September 1994 *a/ b/*
Kyrgyzstan		10 February 1997 *a/*
Lao Peoples Democratic Rep.	17 July 1980	14 August 1981
Latvia		14 April 1992 *a/*
Lebanon		21 April 1997 *a/ b/*
Lesotho	17 July 1980	22 August 1995 *a/ b/*
Liberia		17 July 1984 *a/*
Libyan A. Jamahiriya		16 May 1989 *a/ b/*
Liechtenstein		22 December 1995 *a/ c/*
Lithuania		18 January 1994 *a/*
Luxembourg	17 July 1980	2 February 1989 *b/*
Macedonia		18 January 1994 *d/*
Madagascar	17 July 1980	17 March 1989
Malawi		12 March 1987 *a/ c/*
Malaysia		5 July 1995 *a/ b/*
Maldives		1 July 1993 *a/ b/*
Mali	5 February 1985	10 September 1985
Malta		8 March 1991 *a/ b/*
Mauritius		9 July 1984 *a/ b/*
Mexico	17 July 1980 *b/*	23 March 1981
Moldova		1 July 1994 *a/*
Mongolia	17 July 1980	20 July 1981 *c/*
Morocco		21 June 1993 *a/ b/*
Mozambique		16 April 1997 *a/*
Myanmar		22 July 1997 *a/*

Namibia		23 November 1992 *a/*
Nepal	5 February 1991	22 April 1991
Netherlands	17 July 1980	23 July 1991 *b/*
New Zealand	17 July 1980	10 January 1985 *b/ c/*
Nicaragua	17 July 1980	27 October 1981
Nigeria	23 April 1984	13 June 1985
Norway	17 July 1980	21 May 1981
Pakistan		12 March 1996 *a/ b/*
Panama	26 June 1980	29 October 1981
Papua New Guinea		12 January 1995 *a/*
Paraguay		6 April 1987 *a/*
Peru	23 July 1981	13 September 1982
Philippines	15 July 1980	5 August 1981
Poland	29 May 1980	30 July 1980 *b/*
Portugal	24 April 1980	30 July 1980
Romania	4 September 1980 *b/*	7 January 1982 *b/*
Russian Federation	17 July 1980	23 January 1981 *c/*
Rwanda	1 May 1980	2 March 1981
Saint Kitts and Nevis		25 April 1985 *a/*
Saint Lucia		8 October 1982 *a/*
St.Vincent & the Grenadines		4 August 1981 *a/*
Samoa		25 September 1992 *a/*
Sao Tome and Principe	31 October 1995	
Senegal	29 July 1980	5 February 1985
Seychelles		5 May 1992 *a/*
Sierra Leone	21 September 1988	11 November 1988
Singapore		5 October 1995 *a/ b/*
Slovakia		28 May 1993 *d/*
Slovenia		6 July 1992 *d/*
South Africa	29 January 1993	15 December 1995 *a/*
South Korea	25 May 1983 *b/*	27 December 1984 *b/ c/*
Spain	17 July 1980	5 January 1984 *b/*
Sri Lanka	17 July 1980	5 October 1981
Suriname		1 March 1993 *a/*
Sweden	7 March 1980	2 July 1980
Switzerland	23 January 1987	27 March 1997 *a/*
Tajikistan		26 October 1993 *a/*
Tanzania	17 July 1980	20 August 1985
Thailand		9 August 1985 *a/ b/ c/*
Togo		26 September 1983 *a/*

Trinidad and Tobago	27 June 1985 *b/*	12 January 1990 *b/*
Tunisia	24 July 1980	20 September 1985 *b/*
Turkey		20 December 1985 *a/ b/*
Turkmenistan		1 May 1997 *a/*
Uganda	30 July 1980	22 July 1985
Ukraine	17 July 1980	12 March 1981 *c/*
UK & Northern Ireland	22 July 1981	7 April 1986 *b/*
United States of America	17 July 1980	
Uruguay	30 March 1981	9 October 1981
Uzbekistan		19 July 1995 *a/*
Vanuatu		8 September 1995 *a/*
Venezuela	17 July 1980	2 May 1983 *b/*
Viet Nam	29 July 1980	17 February 1982 *b/*
Yemen		30 May 1984 *a/ b/*
Yugoslavia	17 July 1980	26 February 1982
Zaire	17 July 1980	17 October 1986
Zambia	17 July 1980	21 June 1985
Zimbabwe		13 May 1991 *a/*

a/ Accession
b/ Declarations or reservations
c/ Reservation subsequently withdrawn
d/ Succession