

## Few Reservations About Reservations

Madeline Morris\*

### I. INTRODUCTION

The United States practice of attaching a package of reservations, understandings, and declarations (“RUDs”)<sup>1</sup> to its ratification of international human rights conventions has been the subject of severe criticism by some human rights advocates. As Professor Henkin has said,

United States adherence to human rights conventions, after decades of resistance, should please all who support the international human rights movement. In fact, many are not pleased. For the United States has attached to each of its ratifications a “package” of reservations, understandings and declarations (RUDs), which has evoked criticism abroad and dismayed supporters of ratification in the United States. As a result of those qualifications of its adherence, US ratification has been described as specious, meretricious, and hypocritical.<sup>2</sup>

Professor Goldsmith’s paper<sup>3</sup> lays out a cogent argument in defense of the American practice. The present essay will consider some of the implications of Professor Goldsmith’s article beyond the specific questions of US law. In particular, this essay will argue that, far from representing a net loss for the cause of human rights, RUDs actually play an important role in fostering the advancement of those rights. The International Covenant on Civil and Political Rights (“ICCPR”) will serve as an example.<sup>4</sup>

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\* Professor of Law, Duke University School of Law.

1. See, for example, US Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, Ex Cal 17, 102d Cong, 2d Sess, in 138 Cong Rec S 4781 (Apr 2, 1992).
2. Louis Henkin, *US Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am J Intl L 341, 341 (1995).
3. See Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?* 1 Chi J Intl L 327, 335 (2000).
4. International Covenant on Civil and Political Rights, 999 UNTS 171 (1966).

## II. THE FLEXIBLE RESERVATIONS REGIME AS A HUMAN RIGHTS STRATEGY

The ICCPR permits reservations. Permitting reservations reflects a strategy of garnering the greatest possible adherence to the precepts of the treaty by allowing states to undertake some of the treaty's provisions while rejecting others.<sup>5</sup> The advantages of such a strategy are obvious. But there are alternative strategies for promoting human rights that could be adopted. One alternative strategy would be to apply pressure to all states to adopt an ambitious set of substantive legal norms together with relatively specified mechanisms for their implementation and enforcement. This approach, if successful, presumably would provide the greatest protection for human rights. But states may be unwilling or unable to undertake or to fulfill some proposed human rights provisions, for a range of reasons. The more expansive and extensive the substantive norms proposed and the more highly specified the implementation mechanisms prescribed, the less likely it will be that broad and uniform adherence will be gained. To the extent that breadth and uniformity of adherence are lost, the normative force of the rules will be reduced.

Looking specifically at the choices made by the United States concerning whether to adopt each provision of the ICCPR, one may question whether the optimal choice has been made in each instance. But the process has been the right one; the decisions have been made through the appropriate political decision-making process. A political decision *could* have been made simply to adopt the ICCPR wholesale, but that was not the choice made. Had the ICCPR by its terms required wholesale adoption—had it been an all-or-nothing choice—then the treaty might well have been rejected by the United States. Happily, the decision reflected in the ICCPR itself is *not* to require wholesale adoption. Rather, by permitting reservations, the treaty allows states to pick and choose which obligations to undertake, as long as those choices are not incompatible with the object and purpose of the treaty.<sup>6</sup>

This limitation—that reservations are permissible if and only if they are compatible with the object and purpose of the treaty—makes that compatibility determination crucial. There are a number of possible approaches to determining whether particular reservations are compatible with the object and purpose of a

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5. For a discussion of the historical development of the flexible regime governing reservations to multilateral treaties, see Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 64 *British YB Intl L* 245 (1993).

6. As stated in the Vienna Convention on the Law of Treaties:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Vienna Convention on the Law of Treaties, 1761 UNTS 316, Art 19 (1969).

human rights treaty.<sup>7</sup> (And there remains the related question, which I will not consider here, of who is to make that compatibility determination.)<sup>8</sup> In pursuing the strategy of garnering the greatest possible treaty adherence by allowing states flexibility in selecting the provisions to which they will adhere, it would seem advisable to take an inclusive rather than a restrictive approach to permitting reservations. If a state's ratification of the ICCPR genuinely advances some of the treaty's purposes but, due to reservations, does not advance all of the treaty's purposes, the reservations are not thereby necessarily rendered "incompatible" with the treaty's purposes.

It may be that certain ICCPR provisions should be considered absolute minimum standards and, perhaps, reservations to those provisions should be considered incompatible with the treaty's purposes. If so, then those provisions could be identified as such (though that process of identification would itself be complex and controversial).<sup>9</sup> There is, in any case, no basis for presuming that the ICCPR consists entirely of irreducible minima<sup>10</sup> such that no substantive reservations could be compatible with the treaty's purposes. There is a difference between frustrating the purposes of a treaty and fulfilling some, but not all, of its purposes. The effect of arguing that virtually all substantive reservations are incompatible with the object and purpose of the ICCPR is to lose the strategic benefits that the flexible reservations regime was designed to afford. Putting the point differently, we cannot have it both ways; we will have to accept rejection of some ICCPR provisions if we are to have the benefits of broader participation that the flexible reservations regime offers.

The flexible reservations regime, with its object-and-purpose test, is designed to maximize treaty participation by states with different political, cultural, and economic circumstances while, at the same time, retaining the integrity of the treaties sufficiently for them to be meaningful and effective.<sup>11</sup> Looking at the relationship of the United States and of other states to the ICCPR, we will find that different types of flexibility will be required for different reasons if we are to have the broadest possible meaningful participation in the treaty.

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7. On the range of approaches that have been proposed, see Catherine Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 J Intl & Comp L Q 390, 402-04 (1997).
  8. *Id.* at 392-93, 404-08; Redgwell, 64 British YB Intl L at 255-59, 270-71 (cited in note 5).
  9. For discussion of the identification of particular provisions in human rights treaties that are to be regarded as minimum standards, see Redgwell, 64 British YB Intl L at 280-81 (cited in note 5); Antonio Cassese, *A New Reservations Clause*, in *Recueil d'Etudes de Droit International en Hommage à Paul Guggenheim* 304 (1986).
  10. Compare with Dinah Shelton, *Issues Raised by the United States Reservations, Understandings and Declarations*, in Hurst Hannum and Dana D. Fischer, eds, *US Ratification of the International Covenants on Human Rights* 269, 272 (1993) ("[T]he Covenants are deemed to constitute the minimum standard of state conduct . . .").
  11. See Redgwell, 64 British YB Intl L at 279-80 (cited in note 5); P. H. Imbert, *Reservations and Human Rights Conventions*, 6 Hum Rts Rev 28, 30 (1981).

In examining the relationship of the United States to the ICCPR, one may begin by observing that the law of the United States is so largely consistent with the norms embodied in the ICCPR that major changes in US law would not be expected to come about in response to the treaty.<sup>12</sup> The major precepts of human rights law embodied in the ICCPR (such as equality before the law; freedoms of belief, expression, and association; rights to privacy and the like) are already essential features of US constitutional law. The features of the ICCPR that the United States has not adopted (such as the prohibition of execution of juveniles<sup>13</sup> or the prohibition of “hate speech”<sup>14</sup>) concern matters that have been considered and rejected in legitimate domestic lawmaking processes. These “omitted rights” are, indeed, matters about which reasonable persons, apparently, may disagree. It is not clear why such matters should be viewed as outside the realm of regular political decision-making. If a functioning democratic process produces a decision not to undertake a particular human rights treaty obligation, then it is hard to see what more there is to say about it—other than to seek further change, if it is desired, through the political process.

In the United States, democratic processes have thus far precluded adherence to some aspects of the ICCPR and some other human rights treaty provisions. Other states may confront other circumstances that preclude their undertaking or fulfilling some provisions of the ICCPR and other human rights treaties.

For instance, states that are emerging from violent conflicts involving widespread war crimes or crimes against humanity may need to place reservations on the human rights treaties to which they accede and, equally likely, may confront serious dilemmas in attempting to implement even rather major precepts of the human rights treaties to which they are already parties. The relevant treaties may arguably entail obligations to prosecute perpetrators of genocide, war crimes, or crimes against humanity.<sup>15</sup> But such states (particularly new or transitional regimes) may be unable to conduct such prosecutions without the risk of civil war or something closely resembling it.<sup>16</sup> These states also may have problems providing adequate due process at trial if they do conduct prosecutions and may have problems providing adequate conditions of

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12. In saying that US law is largely consistent with the ICCPR, I am speaking of the *content* of US law, not about its enforcement. Enforcement problems (which the United States certainly has) would not be remedied by changing the law to incorporate more substantive ICCPR norms.

13. See ICCPR at Art 6(5) (cited in note 4) and US Reservations, Understandings and Declarations at para I(2) (cited in note 1).

14. See ICCPR at Art 20 (cited in note 4) and US Reservations, Understandings and Declarations at para I(1) (cited in note 1).

15. See Naomi Roht-Arriaza, *Part I: The Legal Setting*, in Naomi Roht-Arriaza, ed, *Impunity and Human Rights in International Law and Practice* 24–70 (1995); Michael Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 *Tex Intl L J* 1 (1996).

16. See generally Roht-Arriaza, *Legal Setting* (cited in note 15); Scharf, 31 *Tex Intl L J* 1 (cited in note 15); Carlos Santiago Nino, *Radical Evil on Trial* (Yale 1996).

incarceration for such sentences as may be imposed.<sup>17</sup> The options available to states under these circumstances will include formal or de facto amnesties, prosecutions that fall below international human rights standards, or some combination of the two. Any such choices may run afoul of some provisions of human rights treaties to which the state is a party or would like to become a party.

In such post-conflict situations, full adherence to and compliance with all human rights treaty provisions may be precluded as a result of internally disrupted governmental systems. By contrast, in the United States (and some other states), full adherence to all human rights treaty provisions may be precluded precisely as a result of internally *functioning* governmental systems. For very different reasons in the two sorts of cases, compliance with the full set of human rights norms proposed in the ICCPR will not be forthcoming. There is also, no doubt, a third sort of case, in which adherence to or compliance with human rights obligations—even the very core human rights obligations—is not forthcoming because of internally nefarious governmental systems.

The crucial question is: What response would best serve the ultimate goals of human rights, given this array of reasons for less than full conformity with human rights treaties? It may be unwise to focus energies on pressing for full conformity in countries where the core human rights are legally protected but adherence to certain provisions is not forthcoming because of a reasoned choice that has emerged from a functioning democratic process. Similarly, as long as the core precepts are respected, it may not be wise to focus energies on pressing for full conformity with human rights treaties where conformity is not forthcoming because the governmental system has collapsed or is confronted with circumstances that prevent full conformity. A wiser strategy may be to reserve the focus of condemnation for regimes that violate the core precepts of human rights or fail to fulfill the human rights obligations that they have undertaken when they have the capacity to do so.

The best strategy for affording the greatest protection for human rights may thus be to focus on attaining compliance on the core issues while providing appropriate flexibility—a “margin of appreciation,” as the Europeans call it<sup>18</sup>—on issues as they move further from the core precepts. What that flexibility or margin of appreciation will entail will depend upon the specifics of the national context and the proximity of the issues at stake to the core human rights requirements. In some countries, applying this sort of approach may mean, for instance, accepting some forms of amnesty or other such concessions in post-conflict situations. In the United States, it may mean

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17. See Madeline Morris, *International Guidelines Against Impunity: Facilitating Accountability*, 59 L. Contemp. Probs. 29, 30–31, 35–38 (1996).

18. See Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 Cornell Int'l L.J. 133, 136–38 (1993).

accepting less than wholesale incorporation of human rights treaties like the ICCPR if that is what emerges from the political process.

How to evaluate the compatibility of reservations with the object and purpose of the ICCPR is a complex question. The rather modest point of the present essay is that the compatibility determination should be made in a manner consistent with a flexible strategy that fosters incremental progress through allowing for variation. The flexible reservations regime was designed to foster the acceptance, and hence the effectiveness, of treaties that foster human rights. We should not undermine that advance by interpreting the object-and-purpose test in such a way as to exclude most of the reservations that would be doing the work in garnering support and participation in the treaties.