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THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE SUPREMACY CLAUSE

*John Quigley**

INTRODUCTION

When President George Bush urged the U.S. Senate to consent to the ratification of the International Covenant on Civil and Political Rights (Covenant), one might have expected him to say that ratification would improve rights protection in the United States. Far from that, Bush assured the Senate that ratification would require no change in U.S. practice. By a written statement, he sought to ensure that the Covenant would not be enforceable in U.S. courts. Regarding issues on which the Covenant sets stricter standards than U.S. law, he formulated reservations. Bush insulated the United States from external scrutiny by refusing to ratify the Covenant's separate protocol, which gives an individual the right to file a complaint against a state.

Bush's message confirmed the opinion of some analysts that he ratified merely to enhance U.S. stature for criticizing other states for rights violations. The long-time U.S. refusal to ratify the Covenant, drafted in 1966, was frequently cited by other states in response to U.S. criticism.

The Senate gave consent to ratification on the terms proposed by Bush. This Article examines the question of what reality the Covenant has for the United States, particularly in the domestic arena. It asks whether, despite Bush's and the Senate's intentions, the Covenant constitutes law for U.S. courts.

I. GENESIS OF THE QUALIFICATION CLAUSES

The International Covenant on Civil and Political Rights is the product of extensive efforts made through the United Nations to commit states to protect human rights. The effort began with the

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U.N. Charter itself, which required states to work with the organization to promote rights.¹ The Charter did not, however, include a listing of rights. The General Assembly in 1948 filled that void by adopting the Universal Declaration of Human Rights (Declaration), which enumerated rights to be guaranteed by states to any individual, whether an alien or a citizen.²

The Declaration, however, as a resolution of the General Assembly, did not create obligations binding on states.³ The Assembly next put the rights specified in the Universal Declaration into treaty form, so that they would be binding. That effort resulted in the Assembly's adopting in 1966 the text of the International Covenant on Civil and Political Rights.⁴ In 1976, following the requisite number of ratifications, the Covenant entered into force.⁵

Even though the United States had been a prime promoter of the drafting process, it refused to sign the Covenant. In the United States, there was considerable opposition to international scrutiny.⁶ A U.S. delegate told the United Nations that the reason the United States would not sign was that "persuasion, education and example

1. U.N. CHARTER arts. 1, 55, 56.

2. G.A. Res. 217A, U.N. GAOR, 3d Sess., Res. 71, U.N. Doc. A/810 (1948).

3. U.N. CHARTER art. 10 ("The General Assembly may discuss any questions or any matters within the scope of the present Charter . . . and . . . may make recommendations . . . on any such questions or matters."). Given state practice since 1948, however, the Declaration is today binding on states as reflecting customary norms of international law. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) (stating that the Universal Declaration is "a powerful and authoritative statement of the customary international law of human rights"); *Filaritiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (stating that customary international law on human rights is "evidenced and defined by the Universal Declaration of Human Rights"); see also MYRES S. McDOUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 272-74, 302, 325-30 (1980) (discussing the extent to which provisions of the Declaration have achieved status as customary international law); Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 570 n.182, 595-96, 611-18 (1989) (discussing instances where U.S. courts have made reference to international human rights accords when deciding issues of domestic law); Humphrey Waldo, *Human Rights in Contemporary International Law and the Significance of the European Convention*, 14 INT'L & COMP. L.Q. (supp. publication No. 11) at 15 (1965).

4. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

5. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992) [hereinafter ICCPR]. The drafting took so long, in part, because the socialist States stressed economic rights, while the Western States stressed political rights. As a result, the drafting split into two tracks. Separate treaties were written for the two groups of rights. The other treaty was called the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Mar. 23, 1976).

6. Louis B. Sohn, *United States Attitudes Toward Ratification of Human Rights Instruments*, 20 GA. J. INT'L & COMP. L. 255, 260-61 (1990).

would have more satisfactory results than formal undertakings, which would lead to some countries imposing their social and moral standards on others."⁷ Only in 1977 did the United States sign the Covenant, during the administration of President Jimmy Carter. The Covenant requires ratification,⁸ and under the U.S. Constitution, the president may ratify only after Senate consent.⁹ President Carter asked the Senate to give consent so that he could ratify.¹⁰

The Senate, however, did not act on the Covenant during Carter's tenure. The Reagan Administration backed off seeking Senate action,¹¹ and as a result, the Covenant lay dormant in the Senate through the 1980s.¹² In 1991, President Bush urged the Senate to take up the Covenant,¹³ and he proposed to the Senate a package of qualifying statements.¹⁴ The qualifications were calculated to limit U.S. obligations under the Covenant. Bush denominated five of them "reservations."¹⁵ A reservation exempts a state from a particu-

7. U.N. GAOR, 12th Sess., C.3, 812th mtg. at 250 U.N. Doc. A/C.3/SR.812 (1957) (statement of Mr. Meany, U.S.A.).

8. ICCPR, *supra* note 5, art. 48, 999 U.N.T.S. at 185.

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

10. Remarks on Signing International Covenants on Human Rights, 13 WEEKLY COMP. PRES. DOC. 1488 (Oct. 5, 1977). Under U.S. procedure, the person who deposits the instrument of ratification is the president. The president negotiates a treaty and then, after consultation with the Senate, puts it into force for the United States by ratifying it. The power to make treaties is found in the U.S. Constitution in Article II (executive power), which gives the president "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ." U.S. CONST. art. II, § 2, cl. 2.

11. According to the Senate Committee on Foreign Relations, "the Reagan Administration did not indicate any interest in ratifying the Covenant." SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. NO. 23, 102d Cong., 2d Sess. 2 (1992), *reprinted in* 31 I.L.M. 645, 649 (1992).

12. Unlike unadopted legislation, a submitted treaty does not "expire" at the end of a term of Congress. Thus, the Senate remained seized of the Covenant during the years Reagan refrained from seeking action on it. Craig H. Baab, *The Process for United States Ratification of Human Rights Instruments*, 20 GA. J. INT'L & COMP. L. 265, 269 (1990).

13. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 11, at 25, *reprinted in* 31 I.L.M. at 660 (including the text of Letter from President Bush to Clairborne Pell, Chairman, Senate Committee on Foreign Relations (Aug. 8, 1991)); *Bush Urges Senate to Ratify U.N. Civil Rights Covenant*, Reuters AM Cycle, Sept. 10, 1991, available on LEXIS, Nexis library, Currnt File.

14. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 11, at 2, *reprinted in* 31 I.L.M. at 660.

15. *Id.* at 11-12, *reprinted in* 31 I.L.M. at 653-54. The Committee report delineates the five reservations: (1) that the Covenant's requirement to prohibit war propaganda and the advocacy of national, racial, or religious hatred must be read consistent with the U.S. Constitution; (2) that, contrary to the Covenant, the United States reserves the right to impose capital punishment on persons who were under eighteen at the time of their crimes; (3) that the Covenant language on cruel and degrading treatment or punishment is no broader than that concept as it appears in the U.S. Constitution; (4) that the United States will not comply with the Covenant provision that states that when new legislation reduces the penalty for crime, anyone currently under sentence for the crime shall benefit from the new legislation; and (5) that the United States reserves the

lar provision of a treaty and is considered legitimate, so long as the reservation is not incompatible with the object and purpose of the treaty.¹⁶ Beyond the five reservations, the president denominated other qualification statements as "understandings" and "declarations."¹⁷ These statements interpreted the Covenant, or explained how the United States would carry out its obligations.

The Senate Foreign Relations Committee held hearings and, by a unanimous vote, reported the Covenant to the Senate, adding on a "proviso" to give the U.S. Constitution priority over the Covenant.¹⁸ With the qualifying statements, the Committee on Foreign Relations believed that the Covenant did not impose on the United States standards any stricter in the protection of rights than those currently found in U.S. law. The Committee stated that "[t]he overwhelming majority of the provisions in the Covenant are compatible with existing U.S. domestic law. In those few areas where the two diverge, the Administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States."¹⁹

Not all senators agreed with all the qualifications,²⁰ but more than the requisite two-thirds voted their consent to ratification.²¹ On

right to treat juvenile offenders as adults, despite language in the Covenant that calls for separate procedures and separate incarceration for juveniles.

16. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 19, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980). The determination regarding what is compatible is left to the other part(ies) to the treaty. *Id.* arts. 20-23, 1155 U.N.T.S. at 337-38, 8 I.L.M. at 687-89. If a State Party accepts a reservation, it may so inform the depositary agency, or it may remain silent, and the result is that the two (or more) States are mutually bound by the treaty, except for the clause to which the reservation was entered. *Id.* art. 20, 1155 U.N.T.S. at 337, 8 I.L.M. at 687. On the other hand, if another State Party finds a particular reservation incompatible with the treaty, it may state its objection in writing. This action, taken alone, still renders the treaty binding as between the two States, just as if the second State had accepted the reservation. If, however, in its communication, the objecting State also says that, as a result of the reservation, it does not consider itself in treaty relations with the reserving State, then there are no obligations under the treaty between the two States. *Id.*

17. 138 CONG. REC. S4783-84 (daily ed. Apr. 2, 1992).

18. 138 CONG. REC. S4096 (daily ed. Mar. 24, 1992); see *U.N. Treaty, Americans' Rights*, WASH. POST, Mar. 8, 1992, at C6 (asserting that ratification of the Covenant, even with its reservations, will help increase U.S. participation and influence in the formulation of international standards on political and human rights); see *infra* notes 113-22 and accompanying text (discussing the proviso to the Covenant).

19. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 11, at 3, *reprinted in* 31 I.L.M. at 650.

20. See, e.g., 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (statement of Sen. Moynihan).

21. *Id.* The vote was conducted by asking the senators to stand, and the chair ruled that more than two-thirds had stood to indicate consent. Those who opposed certain qualifications yet voted in favor did so apparently on the theory that it was better that the president ratify subject to the qualifications than that he not ratify at all.

June 1, 1992, President Bush signed the instrument of ratification,²² and the U.S. Ambassador to the United Nations deposited it with the U.N. Secretary-General on June 8, 1992, bringing the treaty into force for the United States on September 8, 1992.²³

The Covenant does not represent the first U.S. subjection to international standards of human rights. The United States was already bound by the international customary law of human rights.²⁴ Custom is a body of international law found in no treaty yet binding on states on the theory that the norms in question have been tacitly accepted by states.²⁵ It was not always clear, however, precisely which human rights issues were covered by customary norms. Torture, for example, was prohibited by customary law, but it was unclear whether many other basic rights, including freedom of expression, were covered.²⁶ The Covenant broadens the sphere of rights the United States is bound to observe and, through its definitions of rights, makes obligations more explicit.

Despite President Bush's assurances to the Senate, the International Covenant on Civil and Political Rights may require changes in rights protection in the United States. The right of privacy is

22. White House Statement on Signing the International Covenant on Civil and Political Rights, 28 WEEKLY COMP. PRES. DOC. 1008 (June 5, 1992). President Bush remarked during the signing ceremony that "I . . . ratify and confirm the said Covenant, subject to the said reservations, understandings and declarations."

23. 3 U.S. Dep't of State Dispatch (no. 45), Nov. 9, 1992; see also ICCPR, *supra* note 5, art. 48, 999 U.N.T.S. at 185 (designating the U.N. Secretary-General as the depositary agency for the Covenant); *id.* art. 49, 999 U.N.T.S. at 185 (stating that the Covenant enters into force three months after deposit of the instrument of ratification).

24. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) [hereinafter RESTATEMENT (THIRD)]; see David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332 (1988) (surveying the arguments for and against recognition of customary international law by domestic courts); Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 65 n.14, 81-90 (1990) (asserting that customary international law is part of the law of the United States).

25. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-12 (3d ed. 1979). See generally ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971) (explaining the sources for and historical underpinnings behind customary international law); Paust, *supra* note 24, at 59-67 (equating customary international law with the reasonable expectations of mankind).

26. RESTATEMENT (THIRD), *supra* note 24, § 702 (listing as the acts prohibited by customary law: genocide, slavery, murder, causing disappearance, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of rights). *But cf. id.* § 702 cmt. a ("The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future."); Paust, *supra* note 3, at 570-610 (discussing other rights protected under customary law).

protected more explicitly in the Covenant than in U.S. law, a fact that may have implications for the issues of abortion and gay rights.²⁷ The Covenant requires States Parties to "ensure the equal right of men and women to the enjoyment of all civil and political rights,"²⁸ a provision that may put into U.S. law something equivalent to the Equal Rights Amendment that has been much discussed in the United States but not put into force.

The Covenant contains extensive provisions on the criminal process that may impact U.S. criminal trials²⁹ on such issues as burden of proof on defenses,³⁰ the scope of criminal discovery,³¹ and the exclusion from capital juries of persons opposed to capital punishment.³² The Covenant may also affect the U.S. practice of kidnaping a suspect abroad for trial in the United States,³³ and it may

27. ICCPR, *supra* note 5, art. 17, 999 U.N.T.S. at 173 ("No one shall be subjected to arbitrary or unlawful interference with his privacy . . ."); *see also* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 27 (1981) (holding that the privacy right elucidated in the Covenant is violated by sodomy statutes).

28. ICCPR, *supra* note 5, art. 26, 999 U.N.T.S. at 179 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground (including sex) . . .").

29. *See generally* John Quigley, *Criminal Law and Human Rights: Implications of United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993).

30. ICCPR, *supra* note 5, art. 14(2), 999 U.N.T.S. at 176-77 (stating that the accused has the right to be presumed innocent); *Report of the Human Rights Committee*, U.N. GAOR, 39th Sess., Supp. No. 40, at 144, U.N. Doc. A/39/40 (1984) (explaining that the Covenant's guarantee of presumption of innocence means that "the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt"). The concept of construing doubt to the benefit of the accused is taken in civil law States to require prosecution to carry the burden of persuasion on defenses. *See* M.S. STROGOVICH, *UCHENIE O MATERIAL'NOI ISTINE V UGOLOVNO M PROTSESSE* [A Study on Material Truth in Criminal Procedure] 260 (1947); Jean Patarin, *Le particularisme de la théorie des preuves en droit pénal*, in *QUELQUES ASPECTS DE L'AUTONOMIE DU DROIT PÉNAL* 2, 14 (G. Stefani ed., 1956) ("This presumption [of innocence] logically is reflected in an allocation of the burden of proof particularly favorable to the accused."); *cf.* *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987) (holding that it is no violation of due process to require the accused in a murder case to sustain the burden of proving self-defense by a preponderance of the evidence).

31. *Report of the Human Rights Committee*, *supra* note 30, at 145 (stating that, under the Covenant, the accused is entitled to have "access to documents and other evidence which the accused requires to prepare his case"). *But cf.* FED. R. CRIM. PRO. 16 (providing less access to prosecution information than is required in many other States).

32. ICCPR, *supra* note 5, art. 14(1), 999 U.N.T.S. at 176 (stating that an accused has the right to be tried by an "impartial tribunal"). *Compare* *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (allowing the prosecution to exclude from a jury persons strongly opposed to capital punishment) *with* *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (stating that such an exclusion produces "conviction-prone" juries).

33. ICCPR, *supra* note 5, art. 9(1), 999 U.N.T.S. at 175 (prohibiting arbitrary detention); *cf.* *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (permitting the trial in a U.S. court of

require U.S. courts to refuse to extradite a person who is in danger of being physically abused by authorities of the requesting state.³⁴

II. ENFORCEMENT OF THE COVENANT ON THE INTERNATIONAL PLANE

Beyond the question of coverage, the next important issue is how Covenant rights are implemented. The Covenant is enforced at two levels — the international and the domestic. At the international level, the United States, like all States Parties, must file periodic written reports with an eighteen-member Human Rights Committee (Committee) established under the Covenant to monitor compliance.³⁵ This procedure exerts a certain pressure on states because the Committee not only analyzes the reports but presses states for answers regarding areas of questionable compliance.

In addition, the Covenant provides for complaints to the Human Rights Committee by one state party against another. This procedure applies only if both states have filed a declaration submitting themselves to the Human Rights Committee.³⁶ When it ratified, the United States filed such a declaration.³⁷ As a result, other States Parties that have also filed Article 41 declarations may file com-

a person kidnapped abroad at the behest of the U.S. government). See generally John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on United States v. Alvarez-Machain*, 68 NOTRE DAME L. REV. 723 (1993) (criticizing the Supreme Court for ignoring human rights violation involved in a kidnapping abroad).

34. ICCPR, *supra* note 5, art. 7, 999 U.N.T.S. at 175 (prohibiting cruel, inhuman, or degrading treatment). See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 50 (1989) (holding it a violation of a comparable European human rights treaty for the United Kingdom to extradite to Virginia a person sought on a capital charge, since pre-execution incarceration in Virginia would be cruel, inhuman, or degrading). See generally John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C. J. INT'L L. & COMM. REG. 401 (1990) (discussing U.S. case law where extraditees claim they will be physically abused if extradited); Jordan J. Paust, *Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT'L L. 235, 247-49 (1987).

35. ICCPR, *supra* note 5, arts. 28, 40, 999 U.N.T.S. at 179, 181-82 (requiring reports from States Parties); see Farrokh Jhabvala, *The Practice of the Covenant's Human Rights Committee, 1976-82: Review of State Party Reports*, 6 HUM. RTS. Q. 81, 95-104 (1984) (discussing reporting requirements and implementation by States Parties); Dana D. Fischer, Note, *Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee*, 76 AM. J. INT'L L. 142, 144-53 (1982) (discussing the reporting requirements of Article 40).

36. ICCPR, *supra* note 5, art. 41, 999 U.N.T.S. at 182-83.

37. The U.S. Ambassador to United Nations deposited the U.S. declaration June 8, 1992, pursuant to a corresponding declaration by the Senate "that the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant." 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992).

plaints against the United States with the Committee. The Committee would hear the matter in a closed hearing with a right to the two states to make oral and written submissions.³⁸ The Committee would then submit a report in writing.³⁹ The Covenant does not require a state to comply with the view of the Committee, but a report by the Committee is strong evidence of what the Covenant requires.

While this procedure may seem to subject the United States to substantial international scrutiny, the likelihood of filings against it in fact is slight. As of 1992, only thirty-four states had filed an Article 41 declaration.⁴⁰ Thus, the number of potential plaintiff States is small. States are reluctant to jeopardize relations with other States by filing complaints.⁴¹ To date, not a single complaint has been filed by one State Party against another.⁴²

One other, and more serious, enforcement mechanism at the international level is complaints to the Human Rights Committee by individual persons. Individuals may file complaints against States with the Committee. Before a State is subject to this procedure, however, it must adhere to the Covenant's Optional Protocol (Protocol).⁴³ To date, sixty-five States are parties to the Protocol.⁴⁴ Unlike the Article 41 mechanism, the Optional Protocol procedure has resulted in numerous filings, and the Committee has developed an extensive body of case law.⁴⁵

For the present, however, an individual may not file a complaint against the United States before the Committee because the United

38. ICCPR, *supra* note 5, art. 41, para. 1(d), (g), 999 U.N.T.S. at 182.

39. *Id.* art. 41, para. 1(h), 999 U.N.T.S. at 183.

40. As related to author by Treaty Section, U.N. headquarters, July 28, 1992. See also *Report of the Human Rights Committee*, U.N. GAOR, 44th Sess., Supp. No. 40, at 155, U.N. Doc. A/44/40 (1989).

41. See John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 75, 86-87 (Maarten Bos ed., 1973) (noting the reluctance of States Parties to file a complaint which might jeopardize friendly relations); see also Scott Leckie, *The Inter-State Complaint Procedures in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, 10 *HUM. RTS. Q.* 249, 253-54 (1988) (identifying "political and economic considerations" as a major source of "the reluctance among states to utilize inter-state complaint procedures").

42. P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication*, 57 *BRIT. Y.B. INT'L L.* 201, 204 (1986); Leckie, *supra* note 41, at 266, 303.

43. ICCPR, *supra* note 5, Optional Protocol, 999 U.N.T.S. at 302 [hereinafter *Optional Protocol*].

44. Confirmed to author by Treaty Section, U.N. headquarters, July 28, 1992.

45. See *International Covenant on Civil and Political Rights, Human Rights Committee, Selected Decisions Under the Optional Protocol (Second to Sixteenth Sessions)*, U.N. Doc. CCPR/C/OP/1 (1985) (a collection of 31 opinions of the Committee).

States did not ratify the Protocol. President Bush did not mention the Protocol when he submitted the Covenant to the Senate, and the United States has not explained why it did not adhere to the Protocol. For whatever reasons, the United States is unwilling to allow itself to be brought before the Human Rights Committee by persons alleging rights violations.

The U.S. concern about individual complaints is exaggerated. The Human Rights Committee has developed a reputation for competence and objectivity.⁴⁶ Although the Committee does not shrink from insisting on rights when States violate them, its approach has been one of moderation. In a case from Finland, the complainant was convicted of smuggling hashish into Finland.⁴⁷ He claimed that the Finnish court used unreliable evidence, in particular testimony from a mentally disturbed co-defendant who retracted his testimony during trial.⁴⁸ The Committee found no violation by Finland, however, stating "that the assessment of evidentiary material is essentially a matter for the courts and authorities of the State party concerned" and that the Committee "is not an appellate court."⁴⁹

The Committee, moreover, has no enforcement power. A State against which a complaint is filed must respond to the Committee in writing,⁵⁰ but there is no hearing involving the complainant and the State.⁵¹ The Committee publishes its decisions in an annual compilation, and that may embarrass a State that has violated a right. But a State is not required under the Optional Protocol to follow the Committee's decision.

As a result of the United States' failure to adhere to the Optional Protocol, the enforcement of the Covenant against it at the international level will be modest. The United States will make periodic reports to the Human Rights Committee, which, in turn, will press the United States for explanations. There will be no complaints against the United States by individuals and few, if any, by States. The lack of significant international enforcement means that if the

46. Ghandhi, *supra* note 42, at 214, 249-50.

47. J.H. v. Finland, comm. no. 300/1988, *Report of the Human Rights Committee*, *supra* note 40, at 298.

48. *Id.*

49. *Id.* at 299.

50. Optional Protocol, *supra* note 43, art. 4, 999 U.N.T.S. at 303.

51. ICCPR, *supra* note 5, art. 2, para. 3, 999 U.N.T.S. at 174 ("The Committee shall hold closed meetings when examining communications . . .").

Covenant is to have any substantial impact, it will have to be in U.S. courts.

III. DOMESTIC ENFORCEMENT OF THE COVENANT

The second level of enforcement of the Covenant is domestic. The Covenant requires self-policing by each State Party. In Article 2, the parties agree "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,"⁵² that rights shall be "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State,"⁵³ and that the State shall "develop the possibilities of judicial remedy."⁵⁴ Since the United States has no legislative or administrative mechanism available to individuals, the only possible remedy is judicial.

Thus, as applied to the United States, paragraph 3 of Article 2 requires that the courts ensure observance of the Covenant.⁵⁵ This means, at a minimum, that a court may not permit prosecution and conviction for an act protected under the Covenant, and that a court may entertain a suit by a person whose Covenant rights are violated and provide injunctive and compensatory relief.⁵⁶

A key mechanism for construing treaty provisions is the practice of States in implementing it.⁵⁷ If States routinely apply a treaty provision in a certain fashion, that is evidence of what they intended.⁵⁸ Importantly, no State Party to the Covenant has formulated a qualifying statement like that of the United States to preclude applica-

52. *Id.* art. 2, para. 3(a), 999 U.N.T.S. at 174.

53. *Id.* art. 2, para. (3)(b), 999 U.N.T.S. at 174.

54. *Id.*

55. This means both state and federal courts. By virtue of the power over foreign affairs vested in the federal government by the Constitution, the states are obliged to conform to treaties to which the United States is a party. Thus, state courts must enforce Covenant rights.

56. See William M. Walker, Note, *The Remedies of Law of the International Covenant on Civil and Political Rights: Current Trends and a Conceptual Framework for the Future*, 20 N.Y.U. J. INT'L L. & POL. 525, 530-37 (1988) (asserting that States Parties are obliged to afford declaratory, injunctive, and compensatory remedies where necessary). Walker reviews reports of the Human Rights Committee which also declare that States must provide compensation and injunctive relief as appropriate to remedy violations. *Id.* at 540-42. See generally Paust, *supra* note 3, at 611-28 (discussing the right to a private remedy for deprivation of rights under international law).

57. Vienna Convention on the Law of Treaties, *supra* note 16, art. 31, para. 3(b), 1155 U.N.T.S. at 340, 8 I.L.M. at 692.

58. LORD MCNAIR, *LAW OF TREATIES* 424-29 (1961).

tion of the Covenant in its courts.⁵⁹

The Human Rights Committee, in inquiring of States about their implementation of the Covenant, routinely asks questions aimed at ensuring that the Covenant is used before the courts.⁶⁰ Thus, the Committee evidently believes that the courts of States Parties are required to use the Covenant as domestic law. States have generally replied in the affirmative to such inquiries. States Parties report that the Covenant is cited before their courts as a basis for establishing a right and that their courts rely on the Covenant as a basis for rights.⁶¹ For instance, the Netherlands reported, in 1989, that fifty-eight judgments in Dutch courts had referred to provisions of the Covenant during 1986 and that the Covenant created rights enforceable in Dutch courts.⁶² The Human Rights Committee has stated that in the Netherlands, "any legislative act contrary to a provision of the Covenant would become inapplicable."⁶³

Italy replied that, under its constitution, treaties become domestic law without specific adoption, but that the Covenant had nonetheless been adopted into domestic law by specific legislation of the Italian parliament.⁶⁴ It said that provisions of the Covenant are frequently invoked by Italian courts.⁶⁵

France reported in 1988 that its courts had relied on the Covenant in about twenty decisions.⁶⁶ Japan reported that under its constitution, treaty provisions prevail over domestic legislation before Japanese courts, and that this rule applies to the Covenant.⁶⁷

IV. THE UNITED STATES DECLARATION ON SELF-EXECUTION

President Bush and the Senate, in connection with ratification, appended to the Covenant a "declaration" that Articles 1 to 27 are

59. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1991 at 132-42, U.N. Doc. ST/LEG/SER.E/10, U.N. Sales No. E.92.V.4 (1992).

60. See, e.g., *Report of the Human Rights Committee, supra* note 40, at 12 (question addressed to Norway); *id.* at 21 (question addressed to Mexico); *id.* at 44 (question addressed to the Netherlands); *id.* at 121-22 (question addressed to Italy).

61. Cindy A. Cohn, *The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights*, 13 HUM. RTS. Q. 295, 316-20 (1991).

62. *Id.* at 316.

63. *Report of the Human Rights Committee, supra* note 40, at 44.

64. *Id.* at 121.

65. *Id.* at 122.

66. *Report of the Human Rights Committee*, U.N. GAOR, 43d Sess., Supp. No. 40, at 83, U.N. Doc. A/43/40 (1988).

67. *Id.* at 137.

not self-executing.⁶⁸ These articles are the provisions that impose obligations on States. "The intent," explained the Foreign Relations Committee, "is to clarify that the Covenant will not create a private cause of action in U.S. courts. . . . [E]xisting U.S. law generally complies with the covenant; hence implementing legislation is not contemplated."⁶⁹ This prescription potentially jeopardizes domestic enforcement of the Covenant in the United States.

Only once before has the Senate included a similar declaration in its resolution of consent to a treaty, doing so in 1990 when approving the Convention on Torture.⁷⁰ The Convention on Torture, however, has yet to be ratified by the president, and thus the question of whether the treaty's operative provisions are self-executing has not reached the courts.

The Senate, by including this "declaration" on non-self-execution, has implicitly asserted a power to determine that treaty provisions are not self-executing. However, this is a function normally exercised by the courts, which decide whether a particular treaty, or a particular treaty provision, is one that grants rights enforceable before the court.⁷¹ The *Restatement (Second) of Foreign Relations Law of the United States* reflects U.S. Supreme Court practice on the matter: "Whether an international agreement of the United States is or is not self-executing is finally determined as a matter of interpretation by courts in the United States if the issue arises in litigation."⁷²

If a litigant claims a right under a treaty in a federal or state court, the court decides whether the treaty is one that gives the liti-

68. 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992).

69. See SENATE COMM. ON FOREIGN RELATIONS, *supra* note 11, at 19, reprinted in 31 I.L.M. at 657.

70. 136 CONG. REC. S17,492 (daily ed. Oct. 27, 1990) (declaring portions of the Convention on Torture to be non-self-executing).

71. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (holding that "[o]ur Constitution declares a treaty to be the law of the land. . . . to be regarded in Courts of Justice as equivalent to an Act of the Legislature, whenever it operates itself without the aid of any Legislative provision," but noting that some treaties do not operate of themselves); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 767 (1988) (noting that the class of treaties which the *Foster* Court describes as not operating of themselves was limited to those treaties which by their own terms are not self-executing). See generally Stephen A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI-KENT L. REV. 571, 608-09 (1991) (commenting on the role of courts in interpreting treaties and declarations that are not self-executing).

72. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154(1) (1965).

grant an enforceable right. The determination entails an assessment of whether the treaty appears to confer a right on the person claiming it. If, for example, a treaty between the United States and another State grants citizens of both States a right to engage in commerce in the territory of the other, and a citizen of the other State is subjected to discrimination in starting a business in the United States, that person will likely be permitted to sue in either a state or federal court in reliance on the treaty provision. In one such case, a U.S.-Japan treaty granted mutual rights to engage in commerce on the same terms as citizens, but a Seattle ordinance limited the issuance of licenses for the pawnbroking business to U.S. citizens. The Japanese citizen sued the city of Seattle in state court, claiming that Seattle had violated his right under the treaty. When the case reached the U.S. Supreme Court, it ruled that the treaty provision granting rights in commerce gave the Japanese citizen a right to start a pawnbroking business, despite the Seattle ordinance.⁷³

In determining whether a treaty is self-executing, the courts ask whether the intent of the parties was to confer rights on individuals. In an early case, the issue was whether a U.S.-Spain treaty provision on land grants given by the Spanish government in Florida prior to Spain's cession of Florida to the United States could be used by the grantees to claim title to land.⁷⁴ The Supreme Court looked to the intent of Spain and the United States on the matter as reflected in the treaty and concluded that "the security of private property was intended by the parties"⁷⁵ Since the quieting of land titles in Florida apparently was an aim of Spain and the United States, the Court recognized the title given by Spain.⁷⁶

In this and later cases, the Court developed a doctrine that came to be known as that of "self-executing treaties." To treaty provisions that operated in themselves to create rights, the Court contrasted treaty provisions that contain "words of contract," meaning that the parties were agreeing to take future action that remained executory at the time of concluding the treaty.⁷⁷ This approach was a marked departure from that of British courts, which found treaties to be effective as domestic law only if implemented by parliament by spe-

73. *Asakura v. City of Seattle*, 265 U.S. 332 (1924).

74. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 82 (1833).

75. *Id.* at 88.

76. *Id.*

77. *Id.*; see *Viterbo v. Friedlander*, 120 U.S. 707, 727 (1887); *Burgess v. Gray*, 57 U.S. 48 (16 How.) 48, 50-52 (1856).

cial legislation.⁷⁸ In the United States, however, the Constitution included a provision that treaties should be the "supreme law of the land," a phrase that has come to be called the Supremacy Clause.⁷⁹ On the basis of this provision, the Supreme Court decided that treaties create law binding on the courts, but with the qualification that the parties must have so intended.⁸⁰

In a more recent case, the Federal Court of Appeals elaborated on the test for "self-executing treaties" as follows:

The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.⁸¹

The court of appeals had before it a provision in the trusteeship treaty for Saipan that guaranteed inhabitants against the loss of lands or resources. Inhabitants objected to the planned construction of a hotel that had been approved by the government of Saipan, arguing that the hotel complex would negatively impact the environment.⁸² The court decided that the treaty aimed to protect the environment of Saipan on behalf of the inhabitants, and thus that the inhabitants had a cause of action to challenge the construction.⁸³

V. THE SELF-EXECUTING CHARACTER OF THE COVENANT

The International Covenant on Civil and Political Rights falls into the category of treaties that the courts have called "self-executing." The parties clearly intend that the various rights guaranteed should inure to the benefit of individual persons. That, to be sure, is the only reason for a treaty on human rights. A human rights treaty confers rights on individuals. It is not merely a promise by States to promote rights, but a promise to protect rights in the concrete, in any situation where they are jeopardized.

78. BROWNIE, *supra* note 25, at 49-50.

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

80. *Percheman*, 32 U.S. (7 Pet.) at 82; *see also Burgess*, 57 U.S. at 50 (noting that although the words "shall be ratified and confirmed" presage some future legislative act, parties could actually intend that they could be ratified and confirmed by "force of the instrument itself").

81. *Saipan v. United States Department of the Interior*, 502 F.2d 90, 97 (9th Cir. 1974).

82. *Id.* at 93-94.

83. *Id.* at 98.

The proper result will be for the courts to resolve that the prescriptive provisions of the Covenant are self-executing. In 1950, in *Sei Fujii v. State*,⁸⁴ a California appellate court decided that the human rights provisions of the U.N. Charter were self-executing, in a case where a Japanese citizen challenged a California law requiring escheat to the state of land owned by aliens.⁸⁵ The Supreme Court of California reversed, finding those provisions too vague to create rights enforceable in a court of law.⁸⁶

The U.N. Charter contains no specific delineation of rights but merely calls on States to promote the observance of human rights.⁸⁷ The Covenant, however, gives specific definitions of rights. Thus, the obstacle to a finding of the self-executing character of the U.N. Charter provisions on human rights is not present in the Covenant. There is no reason that a court, state or federal, should not determine that the rights specified in the Covenant are enforceable in litigation before it.

The United States Senate, by its declaration that the Covenant was not to be self-executing, purported to preempt this question, presumably for both the federal and the state courts. If valid and binding on the courts, the declaration would put the United States in violation of its obligations under the Covenant. That fact should weigh heavily on the courts when they address the question of whether the Covenant is self-executing. A court cannot lightly presume that the United States adhered to the Covenant in such a way that it would be violating it. A State adhering to a treaty has an obligation to fulfill its obligations in good faith.⁸⁸

The fact that the Senate consented on condition of the declaration might seem to cast doubt on the validity of the consent. The *Restatement (Third) of Foreign Relations Law of the United States* declares:

Since the President can make a treaty only with the advice and consent of

84. 217 P.2d 481 (Cal. Dist. Ct. App. 1950), *rev'd*, 242 P.2d 617 (1952).

85. *Id.* at 486 (stating that the Charter is supreme law of the land under the Supremacy Clause).

86. *Sei Fujii v. State*, 242 P.2d 617, 621 (Cal. 1952) (striking down a statute on the grounds that it violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment); see Jordan J. Paust, *Human Rights: From Jurisprudential Inquiry to Effective Litigation*, 56 N.Y.U. L. REV. 227, 239-42 (1981) (discussing grounds for contemporary elimination of the two bases of the *Sei Fujii* rationale).

87. U.N. CHARTER arts. 1, 55, 56.

88. Vienna Convention on the Law of Treaties, *supra* note 16, art. 26, 1155 U.N.T.S. at 339, 8 I.L.M. at 690.

the Senate, he must give effect to conditions imposed by the Senate on its consent. The President generally includes a verbatim recitation of any proposed reservation, statement of understanding, or other declaration relevant to the application or interpretation of the treaty contained in the Senate resolution of consent, both in the instrument notifying the other state or the depositary of United States ratification or accession and in the proclamation of the treaty.⁸⁹

If the condition was found invalid, the court would have to decide whether the consent was valid. A decision by a court that Articles 1 to 27 are self-executing, however, would not impair the validity of the Senate's consent.⁹⁰ Once a treaty is ratified by the president following a Senate resolution of consent, the United States is bound and the treaty is the "law of the land." If one were to assume that the Senate has a power to impose conditions on its consent, the treaty would nonetheless be binding on the United States. International law follows a rule comparable to the *ultra vires* rule in corporation law to protect other States Parties. Under this rule, a state is bound by a treaty despite an internal defect in the process leading to its adherence, unless the defect was obvious and fundamental.

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.⁹¹

Here the defect, if it be such, is hardly "manifest." The question of the effect of the invalidity of a condition imposed by the Senate is uncertain as a matter of U.S. law. From the standpoint of other States Parties, the matter is even more opaque.

VI. DETERMINING WHETHER THE DECLARATION REGARDING SELF-EXECUTION HAS LEGAL SIGNIFICANCE

Simply from the formal standpoint, moreover, the validity of the

89. RESTATEMENT (THIRD), *supra* note 24, § 314 cmt. b (1987).

90. *Power Auth. v. Federal Power Comm'n*, 247 F.2d 538, 544 (D.C. Cir. 1957). The *Power Authority* court cited in support of its decision *New York Indians v. United States*, 170 U.S. 1 (1898), in which the Supreme Court held that the Senate's consent to a treaty with the American Indians was effective, even though the Senate never attached amendments to the treaty which were therefore not part of the treaty. *Id.* at 22-24; *see also* *Belilos Case*, 132 Eur. Ct. H.R. (Ser. A) at 28 (1988) (holding that the invalidity of a declaration that was tantamount to a reservation did not affect Switzerland's adherence to a European human rights treaty).

91. *Vienna Convention on the Law of Treaties*, *supra* note 16, art. 46, 1155 U.N.T.S. at 343, 8 I.L.M. at 697.

declaration on non-self-execution is doubtful. The declaration is not part of the treaty. What is "law" under the Supremacy Clause is the "treaty." A treaty includes the text of the treaty, as qualified by any reservations. Additional statements are not part of the treaty and thus are not "law" under the Supremacy Clause.⁹²

"Declaration" is a category not unknown to international law in this context. States sometimes "declare" in a way that constitutes a reservation.⁹³ The style of presentation of the U.S. statements, made in the Senate consent to ratification and included by President Bush when ratifying the Covenant, suggests that the United States did not consider the statement on non-self-execution to be a reservation. Paragraph I was called "reservations," Paragraph II "understandings," and Paragraph III "declarations." President Bush and the Senate thus did not consider the "understandings" or "declarations" to be reservations.

That leaves the question of what legal effect such statements may have. The authors of the *Restatement (Third) of the Foreign Relations Law of the United States* opine that such statements have a binding effect as domestic law in U.S. courts, on the rationale that they are conditions to the Senate's consent, and that the consent is constitutionally required.⁹⁴ There is, however, little case law on the matter, and none to back the *Restatement* view.

In the only decided case on point, *Power Authority v. Federal Power Commission*,⁹⁵ the Court of Appeals for the District of Columbia Circuit held that a qualification statement, other than a reservation, made by the Senate in a resolution of consent had no force

92. RESTATEMENT (THIRD), *supra* note 24, § 111 cmt. b ("A rule of international law or a provision of an international agreement derives its status as law in the United States from its character as an international legal obligation of the United States."); *see also id.* § 314, cmt. b ("If a treaty is ratified or acceded to by the United States with a reservation effective under the principles stated in § 313, the reservation is part of the treaty and is law of the United States.").

93. Consider, for instance, a statement by France regarding the Covenant, wherein it "declares that article 13 cannot derogate" from certain provisions of French law. This seems to be a reservation because France was saying that its domestic law would prevail. *See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL*, *supra* note 59, at 136; *see also* McNAIR, *supra* note 58, at 158 ("It is not easy to distinguish from a Reservation a 'Declaration' . . .").

94. RESTATEMENT (THIRD), *supra* note 24, § 303 cmt. d ("The Senate may also give its consent on conditions that do not require change in the treaty but relate to its domestic application, e.g., that the treaty shall not be self-executing . . ."); *see also* Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151, 1176-77 (1956) (stating that a Senate condition that is not part of the treaty can nonetheless be valid as domestic law).

95. 247 F.2d 538 (D.C. Cir. 1957).

as domestic law.⁹⁶ The dispute in *Power Authority* involved a U.S. treaty with Canada that regulated electrical power generation on the St. Lawrence River, and whether the U.S. share of the power could be allocated by the State of New York. The Senate had declared, in a statement accompanying its consent to ratification of the treaty, that the power accruing to the United States under the treaty could be allocated only by act of Congress.⁹⁷ The court of appeals held that this statement had no effect on the allocation decisions of the State of New York because the statement was not a reservation to the treaty.⁹⁸ It reasoned that the only way such a qualification could have the force of law would be as part of the treaty, since a treaty becomes the "law of the land" under the Supremacy Clause.⁹⁹ The court concluded that since a qualification statement other than a reservation is not part of the treaty, the Senate's statement was not the "law of the land."¹⁰⁰

VII. THE OBLIGATION OF THE UNITED STATES TO USE THE COVENANT TO CONSTRUE RIGHTS

The meaning of the Senate declaration that the Covenant is not self-executing is far from clear. It is not obvious that by the declaration President Bush or the Senate meant to preclude reliance upon the Covenant by U.S. courts. Under the principles enunciated in *Power Authority*, had the Senate intended to exclude application of the Covenant in U.S. courts, it would need to enter a reservation to Article 2 of the Covenant.

The Senate Foreign Relations Committee, as indicated previously, explained that the declaration meant only that no private cause of action could be based on the Covenant.¹⁰¹ Thus, the declaration may mean only that a litigant suing the United States may not assert that federal courts have subject-matter jurisdiction based on the

96. *Id.* at 543-44.

97. *Id.* at 539.

98. *Id.* at 543-44.

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

100. According to the Supreme Court, Congress has the power to alter treaty obligations by subsequent legislation, at least as regards their effect in courts of the United States. Under this premise, Congress could pass a statute stating that the Covenant is not to be enforced as law in federal courts. It might also have a similar power to impose such a qualification upon state courts. Such legislation, however, would place the United States in violation of its Article 2(3) obligation under the Covenant. Nevertheless, according to the Supreme Court, it would be domestically effective legislation.

101. See *supra* note 69 and accompanying text.

Covenant. The Senate may have intended to exclude from the jurisdiction of federal courts cases in which the Covenant would serve as the basis for a right.

A person who holds rights under a treaty to which the United States is a party, and who alleges that the United States has violated those rights, may sue the United States in a federal district court.¹⁰² Such jurisdiction is provided by the federal code, which states, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."¹⁰³ Interpreting the Senate declaration on self-execution in the context of federal statutory law, it is possible to conclude that the Senate meant to exclude the Covenant from the statutory definition of "treaty" for purposes of jurisdiction.

Thus, even if the declaration has legal significance, it would not bar a litigant who is asserting a constitutional right from relying on the Covenant for support. For example, a person convicted of sodomy who challenges the conviction in a state or federal court as a violation of privacy rights would be able to rely on the Covenant's privacy provision, and the court would apply that provision as the "law of the land." The Covenant is applied in this fashion by the courts of a number of States Parties, particularly those of the common law world, where incorporation of treaties into domestic law is not the rule.

In the United Kingdom, although the Covenant has not been transformed by Parliament into domestic law,¹⁰⁴ lawyers invoke the Covenant in seeking to establish rights, and British courts have used the Covenant as a basis for finding rights.¹⁰⁵ Australia presents a parallel situation. Both Australia and the United Kingdom do not deem treaties to be domestic law, and neither state has a Bill of Rights.¹⁰⁶ However, as in the United Kingdom, courts in Australia view the Covenant as applicable in determining the content of

102. *Bodemüller v. United States*, 39 F. 437, 439 (W.D. La. 1889).

103. 28 U.S.C.A. § 1331 (West Supp. 1992).

104. *Derbyshire County Council v. Times Newspapers Ltd.*, 1992 Q.B. 770, 827 (opinion of Butler-Sloss, L.J.). In the United Kingdom, which has no rule comparable to Article VI of the U.S. Constitution that would make treaties the "law of the land," a treaty does not become domestic law unless explicitly transformed into domestic law by an act of parliament.

105. *Id.* at 894 (holding that the Covenant applies in determining the scope of free speech in the United Kingdom); see also Cohn, *supra* note 61, at 319-20 (discussing generally the use of the Covenant in the United Kingdom).

106. *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168, 224-25 (1982) (Austl.) (stating that a treaty becomes domestic law in Australia only if an implementing statute is adopted).

rights.¹⁰⁷ In Canada, the Ontario High Court used Article 14(3) of the Covenant, which details the right to be informed of the criminal charges, to construe the Canadian Charter provision on a similar right.¹⁰⁸

Given the Article 2 obligation to enforce domestically the provisions of the Covenant, even if United States courts were to rule the Covenant not to be self-executing, they should apply it in the determination of constitutional rights. U.S. courts have, in fact, used the Covenant in this way even prior to ratification.¹⁰⁹

If U.S. courts apply the Covenant in this fashion, they would maintain fidelity to the proposition that the Senate intended not to permit a litigant to file a case based solely on the Covenant.¹¹⁰ However, U.S. courts would still be giving the Covenant a certain degree of domestic enforcement. In order to comply with Article 2 of the Covenant, the United States must afford that right.

VII. THE HELMS PROVISIO

Another qualification statement affecting U.S. obligations under the Covenant is a "provisio" entered by the Senate in its resolution of consent, stating, "Nothing in this Covenant 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."¹¹¹ The "provisio" was not proposed by President Bush but was added by the Senate Foreign Relations Committee on

107. *Mabo v. Queensland*, 107 A.L.R. 1 (1992) (Austl.). On the use of the Covenant in Commonwealth courts, see *Papers of the Judicial Colloquium, Balliol College, Oxford, 21-23 September 1992* (Commonwealth Secretariat & Interights 1993).

108. *Re Warren*, 35 C.R. 3d 173, 177 (1983); see Walter S. Tarnopolsky, *The Canadian Experience with the International Covenant on Civil and Political Rights Seen from the Perspective of a Former Member of the Human Rights Committee*, 20 AKRON L. REV. 611, 627 (1987).

109. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988) (citing the Covenant's prohibition on the execution of juveniles in the course of a decision finding it unconstitutional to execute one who was fifteen years of age at time of offense); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 4-5 (1983); Farooq Hassan, *The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights?*, 5 HUM. RTS. Q. 68, 83-84 (1983); Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 413-20 (1979); Paust, *supra* note 3, at 609-11.

110. Since the Covenant does not contain rights for which there is no analogue in U.S. constitutional law, the issue may never be litigated. It would seem that almost any plaintiff who desires to rely on a Covenant right could base the action on a provision of a state constitution or the Federal Constitution.

111. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 11, at 24, *reprinted in* 31 I.L.M. at 660.

a motion by Senator Jesse Helms.¹¹² The Foreign Relations Committee suggested that the president not communicate the proviso to the U.N. Secretary-General when he deposited the instrument of ratification, on the rationale that the issue of the relationship between the Covenant and the Constitution was a domestic matter.¹¹³ President Bush followed this suggestion and did not communicate the proviso to the Secretary-General.¹¹⁴

The intent of the proviso evidently was to ensure that, even apart from those provisions to which other qualification statements were made, the United States would not consider itself bound by any provision of the Covenant that differed from those contained in the U.S. Constitution. It thus appears to exempt the United States from the obligation to protect a right more broadly than it is protected by the U.S. Constitution.

Senator Daniel Moynihan objected to a comparable proviso entered by the Senate in its resolution of consent to the Convention on Torture in 1990.¹¹⁵ Moynihan said that the proviso created confusion as to U.S. obligations: "It says to every other nation in the world that they must figure out for themselves whether we adhere to a particular provision or not. It purports to condition every provision of the entire treaty on the entire corpus of constitutional jurisprudence."¹¹⁶

The Human Rights Committee would clearly not be bound by the proviso if another state party filed a complaint against the United States under the Article 41 procedure, because the proviso was not denominated a reservation and was not communicated to the secretary-general. Thus, the proviso has no relevance to the United States' international obligations under the Covenant.

The Senate, by its proviso on the Covenant, may have intended only to limit U.S. obligations internally. On one reading, the proviso might be taken as a reaffirmation of the U.S. reservation to Article 20, exempting the United States from the obligation to outlaw "hate

112. *Id.* at 3, reprinted in 31 I.L.M. at 649.

113. 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992) (statement of Sen. Pell).

114. White House Statement on Signing the International Covenant on Civil and Political Rights, *supra* note 22.

115. 136 CONG. REC. S17,489 (daily ed. Oct. 27, 1990) (statement of Sen. Moynihan).

116. *Id.*; see also Letter from Lawyers Committee for Human Rights to Senator Clairborne Pell, Chairman, Senate Foreign Relations Committee, Dec. 10, 1991 (stating that the proviso on this reading would be incompatible with the object and purpose of the Covenant) (on file with author).

speech."¹¹⁷ Such legislation would be in violation of the U.S. Constitution as interpreted by the U.S. Supreme Court. If read more broadly, the proviso would mean that, at least domestically, the Covenant would require no more rights protection than that provided under domestic constitutional law. On this latter interpretation, the proviso would be duplicative of the declaration regarding the self-executing character of the Covenant.

Another possible reading of the proviso is that it protects individuals from a loss of their constitutional rights by virtue of the Covenant. This again would have particular relevance to Article 20, which protects speech rights less rigorously than U.S. constitutional law. Objecting to the comparable proviso in the Convention on Torture, Senator Moynihan said that he thought the proviso unnecessary, because the U.S. Supreme Court has already ruled, as a matter of U.S. constitutional law, that an individual who enjoys a constitutional right may not be deprived of it by treaty.¹¹⁸ Moynihan cited *Reid v. Covert*,¹¹⁹ in which the Court said that the right to trial by jury in a criminal case could not be defeated by an international agreement that called for dependents of U.S. service personnel abroad to be tried by court-martial, where jury trial would not be available.¹²⁰

Senator Moynihan thought that this qualification had no legal effect. Pointing out that it did not alter U.S. obligations to other States Parties, he said that the Senate "is simply stating a constitutional truism."¹²¹ Whatever its meaning, the proviso should not be read to affect U.S. obligations under the Covenant, either internationally or domestically. Moreover, the proviso is not the "law of the land," because it was not incorporated as part of the treaty or a reservation to it.¹²²

IX. THE SIGNIFICANCE OF THE COVENANT FOR THE UNITED STATES

The United States has played a significant role in the develop-

117. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2358 (1992) (holding that "hate speech" is a protected form of public discourse, reasoning that the marketplace of ideas demands varying viewpoints in order to reach the truth).

118. 136 CONG. REC. S17,490 (daily ed. Oct. 27, 1990) (statement of Sen. Moynihan).

119. 354 U.S. 1 (1957).

120. *Id.* at 7-8.

121. 136 CONG. REC. S17,490 (daily ed. Oct. 27, 1990) (statement of Sen. Moynihan).

122. See *supra* notes 88-100 and accompanying text.

ment of human rights. Its Bill of Rights influenced the development of human rights worldwide. The human rights that emerged as international law in the twentieth century owe a considerable debt to the U.S. Bill of Rights and to cases decided under it by the U.S. Supreme Court. It thus seems anomalous that once these rights are affirmed in a solemn document like the Covenant, the United States should seek to protect itself.

The aim of the Bush Administration was evidently to improve the ability of the United States to criticize other states. However, by accepting the Covenant in such limited fashion, the United States fails in that objective. Others understand the limitations on U.S. acceptance, and thus the U.S. moral standing to raise human rights criticisms against others is not improved, and, if anything, is diminished. Others will view the U.S. action as a public relations effort rather than an assumption of obligations.

The Clinton Administration, of course, is not bound by the view of the Bush Administration. It should ask the Senate to consent to ratification of the Optional Protocol.¹²³ It should repudiate the Bush view that the Covenant's operative provisions are not self-executing. It should, moreover, do so quickly, before a case reaches the courts on the matter. The change in administration should, in any event, make the matter easier for the courts. To decide that the Covenant is self-executing, the courts will not have to take a stand opposite to that of the Bush Administration. Thus, even if the Clinton Administration is silent on the issue, the way to a proper result in the courts is eased.

What is most important in regard to the Covenant is that rights be protected. The Covenant is an important tool in that respect. If the result is a highly limited view of the Covenant's applicability, U.S. litigants will have fewer options to enforcing rights than persons in many other States. Canadian Indians, for example, have taken cases to the Human Rights Committee under the Optional Protocol on such matters as autonomy and status.¹²⁴ If the Covenant is enforced narrowly for the United States, American Indians will not have similar access.

123. See *supra* note 12 (stating that unlike conventional legislation, treaties do not expire if they are not consented to by the Senate before a legislative sessions ends).

124. *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40 (1981) (claim by Indian woman that her automatic loss, under Canadian law, of status as Indian upon marrying non-Indian violated the Covenant).

The U.S. courts have a major role to play in implementing the Covenant. Domestic enforcement is the heart of the Covenant's implementation process. Few cases go to the Human Rights Committee, but domestic courts deal daily with rights issues. Regarding domestic enforcement of the Covenant, U.S. courts should apply traditional jurisprudence on self-execution to find that the Covenant is the "law of the land" in the United States.