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42 U.S.C. § 1983: A Legal Vehicle with No International Human Rights Treaty Passengers

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42 U.S.C. § 1983: A Legal Vehicle with No International Human Rights Treaty Passengers

Abstract

[Excerpt] “How do international human rights treaties interact with the domestic civil rights law of the United States and, particularly, 42 U.S.C. § 1983? How should international human rights treaties interact with the domestic civil rights law of the United States? —International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. The United States is obligated to respect the international treaties it ratifies, whether they are fully implemented in domestic law or not. In practice, however, exactly how has this been done, or not done, regarding 42 U.S.C. § 1983 and international human rights treaties?”

This article begins with an examination of the three most recent international human rights treaties ratified by the United States of America: 1) the International Covenant on Civil and Political Rights; 2) the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and 3) the International Convention on the Elimination of All Forms of Racial Discrimination. This article also addresses the conditions upon which the United States ratified these three conventions. Next, this article addresses the international reaction to the United States’ position with regard to the ratification of international human rights treaties. This article then analyzes the applicability of 42 U.S.C. § 1983 as an appropriate legal vehicle for the domestic litigation of international treaty violations. Next, this article discusses, in more detail, exactly what it means for a treaty to contain a non-self-executing declaration and how such a declaration directly affects the attempted use of 42 U.S.C. § 1983 to litigate international treaty violations in domestic courts. Finally, this article sets forth a few theories for why the United States has not ratified human rights treaties on an all-inclusive basis and concludes that, nevertheless, the ratification of international human rights conventions by the United States is a positive first step. However, it is now time for the United States to take the next logical step in promoting civil and human rights by withdrawing its reservations, understandings, and declarations to the international human rights conventions it has ratified.”

Keywords

civil rights law, United States, international human rights, CCPR, CAT, CERD, United Nations

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MATTHEW J. JOWANNA*

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Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they *are* the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.

- Eleanor Roosevelt¹

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1. Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM J. INT'L L. 38, 38 (2003).

I. INTRODUCTION

How do international human rights treaties interact with the domestic civil rights law of the United States and, particularly, 42 U.S.C. § 1983? How should international human rights treaties interact with the domestic civil rights law of the United States? “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”² The United States is obligated to respect the international treaties it ratifies, whether they are fully implemented in domestic law or not.³ In practice, however, exactly how has this been done, or not done, regarding 42 U.S.C. § 1983 and international human rights treaties?

This article begins with an examination of the three most recent international human rights treaties ratified by the United States of America: 1) the International Covenant on Civil and Political Rights;⁴ 2) the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;⁵ and 3) the International Convention on the Elimination of All Forms of Racial Discrimina-

2. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

3. See Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1235 (2005); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”).

4. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter CCPR]. The CCPR was signed by the United States on October 5, 1977, and ratified by the United States on June 8, 1992. Status of the International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (last visited Nov. 7, 2010).

5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT]. The CAT was signed by the United States on April 18, 1988. *Id.*, S. TREATY DOC. NO. 100-20. It was ratified by the United States on October 21, 1994. Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en (last visited Nov. 7, 2010).

tion.⁶ This article also addresses the conditions upon which the United States ratified these three conventions. Next, this article addresses the international reaction to the United States' position with regard to the ratification of international human rights treaties. This article then analyzes the applicability of 42 U.S.C. § 1983 as an appropriate legal vehicle for the domestic litigation of international treaty violations. Next, this article discusses, in more detail, exactly what it means for a treaty to contain a non-self-executing declaration and how such a declaration directly affects the attempted use of 42 U.S.C. § 1983 to litigate international treaty violations in domestic courts. Finally, this article sets forth a few theories for why the United States has not ratified human rights treaties on an all-inclusive basis and concludes that, nevertheless, the ratification of international human rights conventions by the United States is a positive first step. However, it is now time for the United States to take the next logical step in promoting civil and human rights by withdrawing its reservations, understandings, and declarations to the international human rights conventions it has ratified.

II. HUMAN RIGHTS TREATIES CONDITIONALLY RATIFIED BY THE UNITED STATES

The three major human rights treaties, most akin to what many in the United States may refer to as constitutionally protected civil rights, that the United States has ratified are the International Covenant on Civil and Political Rights (CCPR);⁷ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);⁸ and the International Convention on the Elimina-

6. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195 [hereinafter CERD]. The CERD was signed by the United States on September 28, 1966. *Id.*, 660 U.N.T.S. at 303. It was ratified by the United States on October 21, 1994. Status of the International Convention on the Elimination of All Forms of Racial Discrimination, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&mtds_g_no=IV-2&chapter=4&lang=en (last visited Nov. 7, 2010).

7. See CCPR, *supra* note 4.

8. See CAT, *supra* note 5.

tion of All Forms of Racial Discrimination (CERD).⁹ These three international human rights treaties provide individuals with civil and political rights, including the right to protection from torture, cruelty, and discrimination. While certainly not an exhaustive list of all rights provided, these three international human rights treaties provide individuals with express rights, such as: 1) the right to life;¹⁰ 2) “the right to liberty” and “freedom of movement”;¹¹ 3) the right to freedom of peaceful assembly and association;¹² 4) the right to privacy;¹³ 5) “the right to freedom of thought, conscience, and religion”;¹⁴ 6) the right to freedom of opinion and expression;¹⁵ 7) the right to be free from torture and inhuman or degrading treatment;¹⁶ 8) the right to be secure as an individual and to be free from governmental violence or bodily harm;¹⁷ 9) the right to make official complaints of torture;¹⁸ 10) if a victim of torture, the right to adequate compensation;¹⁹ 11) the right to preclude the judicial use of statements and confessions obtained as a result of torture;²⁰ 12) the right to equality before the law and the equal administration of jus-

9. See CERD, *supra* note 6.

10. CCPR, *supra* note 4, 6 I.L.M. at 370, 999 U.N.T.S. at 174, pt. III, art. 6.1.

11. *Id.*, 6 I.L.M. at 372, 999 U.N.T.S. at 176, art. 12.1; CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 4, 660 U.N.T.S. at 220, pt. I, art. 5(d)(i).

12. CCPR, *supra* note 4, 6 I.L.M. at 374, 999 U.N.T.S. at 178, pt. III, arts. 21–22; CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 4, 660 U.N.T.S. at 222, pt. I, art. 5(d)(ix).

13. CCPR, *supra* note 4, 6 I.L.M. at 373, 999 U.N.T.S. at 177, pt. III, art. 17.

14. *Id.*, 6 I.L.M. at 374, 999 U.N.T.S. at 178, art. 18.1; CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 4, 660 U.N.T.S. at 222, pt. I, art. 5(d)(vii).

15. CCPR, *supra* note 4, 6 I.L.M. at 374, 999 U.N.T.S. at 178, pt. III, arts. 19.1–19.2; CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 4, 660 U.N.T.S. at 222, pt. I, art. 5(d)(viii).

16. CAT, *supra* note 5, S. TREATY DOC. NO. 100-20 at 20, 23, 1465 U.N.T.S. at 114, 116, pt. I, arts. 4.1, 16; CCPR, *supra* note 4, 6 I.L.M. at 370, 999 U.N.T.S. at 175, pt. III, art. 7.

17. CCPR, *supra* note 4, 6 I.L.M. at 371, 999 U.N.T.S. at 175, pt. III, art. 9.1; CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 4, 660 U.N.T.S. at 220, pt. I, art. 5(b).

18. See CAT, *supra* note 5, S. TREATY DOC. NO. 100-20 at 22, 1465 U.N.T.S. at 116, pt. I, art. 12 (discussing State Party investigation whenever there is “reasonable ground to believe that an act of torture has been committed”).

19. *Id.*, S. TREATY DOC. NO. 100-20 at 22–23, 1465 U.N.T.S. at 116, art. 14.1.

20. *Id.*, S. TREATY DOC. NO. 100-20 at 23, 1465 U.N.T.S. at 116, art. 15.

tice;²¹ 13) the right to be free from “arbitrary arrest or detention”;²² 14) the right to be treated equally and without discrimination;²³ 15) the right to racially-equal elections and governmental participation;²⁴ and 16) the right to equal pay.²⁵ The United States ratified these treaties with a number of reservations,²⁶ understandings,²⁷ and declarations²⁸—sometimes referred to as RUDs.

21. CCPR, *supra* note 4, 6 I.L.M. at 372, 999 U.N.T.S. at 176, pt. III, art. 14.1; CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 4, 660 U.N.T.S. at 220, pt. I, art. 5(a).

22. CCPR, *supra* note 4, 6 I.L.M. at 371, 999 U.N.T.S. at 175, pt. III, art. 9.1.

23. *Id.*, 6 I.L.M. at 375, 999 U.N.T.S. at 179, art. 26; CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 4, 660 U.N.T.S. at 216, pt. I, art. 2.1.

24. CCPR, *supra* note 4, 6 I.L.M. at 375, 999 U.N.T.S. at 179, pt. III, art. 25; CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 4, 660 U.N.T.S. at 220, pt. I, art. 5(c).

25. CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 4, 660 U.N.T.S. at 222, pt. I, art. 5(e)(i).

26. U.N. Secretary-General, *Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Reservations, Declarations and Objections Under the Convention*, at 19–20, U.N. Doc. CAT/C/2/Rev.5 (Jan. 22, 1998) [hereinafter CAT RUDs]; U.N. Secretary-General, *Declarations, Reservations, Withdrawals of Reservations, Objections to Reservations and Declarations Relating to the International Convention on the Elimination of All Forms of Racial Discrimination*, at 28, U.N. Doc. CERD/C/60/Rev.4 (May 16, 2001) [hereinafter CERD RUDs]; U.N. Secretary-General, *Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto*, at 40–41, U.N. Doc. CCPR/C/2/Rev.4 (Aug. 24, 1994) [hereinafter CCPR RUDs]. The following are the CAT Reservations:

1. That the United States considers itself bound by the obligation under article 16 to prevent “cruel, inhuman or degrading treatment or punishment”, only in so far as the term “cruel, inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

2. That pursuant to article 30 (2) the United States declares that it does not consider itself bound by Article 30 (1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

CAT RUDs, *supra*, at 19–20. The following are the CERD Reservations:

(1) 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 4 and 7, 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.

(2) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in article 1 to fields of "public life" reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs (1) (c) and (d) of article 2, article 3 and article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

(3) That with reference to article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

CERD RUDs, *supra*, at 28. The following are the CCPR Reservations:

(1) That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age.

(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the fifth, eighth, and/or fourteenth amendments to the Constitution of the United States.

(4) That because United States law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the

United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18.

CCPR RUDs, *supra*, at 40–41.

27. See CAT RUDs, *supra* note 26, at 20–21; CERD RUDs, *supra* note 26, at 28–29; CCPR RUDs, *supra* note 26, at 41–42. The following are the CAT understandings:

1. (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality;

(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control;

(c) That with reference to article 1 of the Convention, the United States understands that "sanctions" includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. None the less, the United States understands that a State party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture;

(d) That with reference to article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity;

(e) That with reference to article 1 of the Convention, the United States understands that non-compliance with applicable legal procedural standards does not *per se* constitute torture;

2. That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture", as used in article 3 of the Convention, to mean "if it is more likely than not that he would be tortured".

3. That it is the understanding of the United States that article 14 requires a State party to provide a private right of action for damages only

for acts of torture committed in territory under the jurisdiction of that State party;

4. That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty;

5. That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the State and local governments. Accordingly, in implementing articles 10–14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.

CAT RUDs, *supra* note 26, at 20–21. The following are the CERD understandings:

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.

CERD RUDs, *supra* note 26, at 29.

The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.

Id. at 28. The following are the CCPR understandings:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex, language, re-

ligion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to ‘exceptional circumstances’ in paragraph 2 (a) of article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual’s overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3 (b) and (d) of article 14 do not require the provision of a criminal defendant’s counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3 (e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defence. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

(5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial 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 take measures appropriate to the Federal system to the end that the competent authorities of the State or local Governments may take appropriate measures for the fulfillment of the Covenant.

CCPR RUDs, *supra* note 26, at 41–42.

28. The following are the CAT declarations made by the United States: “That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing.” CAT RUDs, *supra* note 26, at 21. “The Government of the United States of America reserves the right to communicate, upon ratification, such reservations, interpretive understandings, or declarations as are deemed necessary.” *Id.* at 19. The following is the CERD declaration made by the United

While the United States referenced its own Constitution in understanding the rights it ratified in these treaties,²⁹ it nevertheless made a point to declare that the rights contained within the ratified treaties are not self-executing.³⁰ The circular reasoning of adopting international human rights treaties with the basic understanding that the United States already complies with the treaties by and through its pre-existing national law, while at the same time reducing the United States' treaty obligations to non-justiciable issues in national courts, is the primary focus of this article. In this regard, the effect of such non-self-executing declarations³¹ will be explained in more

States: "That the United States declares that the provisions of the Convention are not self-executing." CERD RUDs, *supra* note 26, at 29. The following are the CCPR declarations:

(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

(3) That the United States declares that the right referred to in article 47 may be exercised only in accordance with international law.

CCPR RUDs, *supra* note 26, at 42.

29. See CAT RUDs, *supra* note 26, at 20–21; CERD RUDs, *supra* note 26, at 28; CCPR RUDs, *supra* note 26, at 41–42.

30. See CAT RUDs, *supra* note 26, at 21; CERD RUDs, *supra* note 26, at 29; CCPR RUDs, *supra* note 26, at 42.

31. See generally Rep. of the Comm. on the Elimination of Racial Discrimination, 58th sess, Mar. 6–23, 2001, 59th sess, July 30–Aug. 17, 2001, ¶¶ 390–91, U.N. Doc. A/56/18; GAOR, 56th Sess., Supp. No. 18 (2001) [hereinafter CERD Report 2001]; Comm. Against Torture, Summary Record of the First Part (Public)* of the 427th Meeting, ¶ 8, U.N. Doc. CAT/C/SR.427 (May 11, 2000) [hereinafter Sum. Record 427th Mtng.]; Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Reports of States Parties Due in 1995, ¶¶ 56, 60, U.N. Doc. CAT/C/28/Add.5 (Oct.

detail as this article progresses. However, if the United States truly already complies with human rights treaty norms domestically, then why did it agree to international responsibility by ratifying the conventions? Conversely, if ratifying these conventions instituted at least one new human rights obligation, then why not provide judicially enforceable rights? How did the international community react to the reservations, understandings, and declarations made by the United States? These questions are answered below.

III. THE INTERNATIONAL REACTION

The reservations, understandings, and declarations the United States made concerning the CCPR did not go unnoticed by the international community. Belgium,³² Denmark,³³ Finland,³⁴ France,³⁵

15, 1999) [hereinafter Consideration of Art. 19 Reports, Addendum]; Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, ¶¶ 11, 18, U.N. Doc. CERD/C/USA/CO/6 (Feb. 18–Mar. 7, 2008) [hereinafter Consideration of Art. 9 Reports]; Comm. on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention: Third Periodic Reports of States Parties Due in 1999, ¶¶ 169–73, U.N. Doc. CERD/C/351/Add.1 (Sept. 21, 2000) [hereinafter Art. 9 Reports, Addendum]; Human Rights Comm., Summary Record of the 1405th Meeting, ¶ 7, U.N. Doc. CCPR/C/SR.1405 (Mar. 31, 1995) [hereinafter Sum. Record 1405th Mtng.]; Human Rights Comm., Summary Record of the 1402d Meeting, ¶¶ 3, 25, 37, U.N. Doc. CCPR/C/SR.1402d (Mar. 29, 1995) [hereinafter Sum. Record 1402d Mtng.]; Human Rights Comm., Summary Record of the 1401st Meeting, ¶¶ 12, 34, U.N. Doc. CCPR/C/SR.1401 (Mar. 29, 1995) [hereinafter Sum. Record 1401st Mtng.]; Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Reports of States Parties Due in 1993, ¶¶ 8, 129, annex III (I), U.N. Doc. CCPR/C/81/Add.4 (July 29, 1994) [hereinafter Consideration of Art. 40 Reports, Addendum]; *see also infra* Part IV.

32. Belgium stated that:

The Government of Belgium wishes to raise an objection to the reservation made by the United States of America regarding article 6, paragraph 5, of the Covenant, which prohibits the imposition of the sentence of death for crimes committed by persons below 18 years of age.

The Government of Belgium considers the reservation to be incompatible with the provisions and intent of article 6 of the Covenant which,

as is made clear by article 4, paragraph 2, of the Covenant, establishes minimum measures to protect the right to life.

The expression of this objection does not constitute an obstacle to the entry into force of the Covenant between Belgium and the United States of America.

CCPR RUDs, *supra* note 26, at 48.

33. Denmark stated that:

[H]aving examined the contents of the reservations made by the United States of America, Denmark would like to recall article 4, paragraph 2, of the Covenant according to which no derogation from a number of fundamental articles, *inter alia* 6 and 7, may be made by a State Party even in time of public emergency which threatens the life of the nation.

In the opinion of Denmark, reservation (2) of the United States with respect to capital punishment for crimes committed by persons below 18 years of age, as well as reservation (3) with respect to article 7, constitute general derogations from articles 6 and 7, while according to article 4, paragraph 2, of the Covenant such derogations are not permitted.

Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations.

These objections do not constitute an obstacle to the entry into force of the Covenant between Denmark and the United States.

Id. at 49.

34. Finland stated that:

It is recalled that under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Understanding (1) pertaining to articles 2, 4 and 26 of the Covenant is therefore considered to constitute in substance a reservation to the Covenant, directed at some of its most essential provisions, namely those concerning the prohibition of discrimination. In the view of the Government of Finland, a reservation of this kind is contrary to the object and purpose of the Covenant, as specified in article 19 (c) of the Vienna Convention on the Law of Treaties.

As regards reservation (2) concerning article 6 of the Covenant, it is recalled that according to article 4 (2), no restrictions of articles 6 and 7 of the Covenant are allowed for. In the view of the Government of Finland, the right to life is of fundamental importance in the Covenant and the said reservation therefore is incompatible with the object and purpose of the Covenant.

Germany,³⁶ Italy,³⁷ the Netherlands,³⁸ Norway,³⁹ Portugal,⁴⁰ Spain,⁴¹ and Sweden⁴² all commented or objected to the conditioned ratifica-

As regards reservation (3), it is in the view of the Government of Finland subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.

For the above reasons the Government of Finland objects to reservations made by the United States to articles 2, 4 and 26 (cf. Understanding (1)), to article 6 (cf. Reservation (2)) and to article 7 (cf. Reservation (3)). However, the Government of Finland does not consider that this objection constitutes an obstacle to the entry into force of the Covenant between Finland and the United States of America.

Id. at 49–50.

35. France stated that:

At the time of the ratification of the [CCPR], the United States of America expressed a reservation relating to article 6, paragraph 5, of the Covenant, which prohibits the imposition of the death penalty for crimes committed by persons below 18 years of age.

France considers that this United States reservation is not valid, inasmuch as it is incompatible with the object and purpose of the Convention.

Such objection does not constitute an obstacle to the entry into force of the Covenant between France and the United States.

Id. at 50.

36. Germany stated that:

The Government of the Federal Republic of Germany objects to the United States' reservation referring to article 6, paragraph 5 of the Covenant, which prohibits capital punishment for crimes committed by persons below 18 years of age. The reservation referring to this provision is incompatible with the text as well as the object and purpose of article 6, which, as made clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life.

The Government of the Federal Republic of Germany interprets the United States' reservation with regard to article 7 of the Covenant as a reference to article 2 of the Covenant, thus not in any way affecting the obligations of the United States of America as a state party to the Covenant.

Id. at 51–52.

37. Italy stated that:

The Government of Italy objects to the reservation to article 6, paragraph 5, which the United States of America included in its instrument of ratification.

In the opinion of Italy reservations to the provisions contained in article 6 are not permitted, as specified in article 4, paragraph 2, of the Covenant.

Therefore this reservation is null and void since it is incompatible with the object and the purpose of article 6 of the Covenant.

Furthermore in the interpretation of the Government of Italy, the reservation to article 7 of the Covenant does not affect obligations assumed by States that are parties to the Covenant on the basis of article 2 of the same Covenant.

These objections do not constitute an obstacle to the entry into force of the Covenant between Italy and the United States.

Id. at 52.

38. The Netherlands stated:

The Government of the Kingdom of the Netherlands objects to the reservation with respect to capital punishment for crimes committed by persons below 18 years of age, since it follows from the text and history of the Covenant that the said reservation is incompatible with the text, the object and purpose of article 6 of the Covenant, which according to article 4 lays down the minimum standard for the protection of the right to life.

The Government of the Kingdom of the Netherlands objects to the reservation with respect to article 7 of the Covenant, since it follows from the text and the interpretation of this article that the said reservation is incompatible with the object and purpose of the Covenant.

In the opinion of the Government of the Kingdom of the Netherlands this reservation has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogations, not even in times of public emergency, are permitted.

It is the understanding of the Government of the Kingdom of the Netherlands that the understandings and declarations of the United States do not exclude or modify the legal effect of provisions of the Covenant in their application to the United States, and do not in any way limit the competence of the Human Rights Committee to interpret these provisions in their application to the United States.

Subject to the proviso of article 21, paragraph 3, of the Vienna Convention of the Law of Treaties, these objections do not constitute an obstacle to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States.

CCPR RUDs, *supra* note 26, at 54.

39. Norway stated that:

1. In the view of the Government of Norway, the reservation (2) concerning capital punishment for crimes committed by persons below eighteen years of age is according to the text and history of the Covenant, incompatible with the object and purpose of article 6 of the Covenant.

According to article 4, paragraph 2, no derogations from article 6 may be made, not even in times of public emergency. For these reasons the Government of Norway objects to this reservation.

2. In the view of the Government of Norway, the reservation (3) concerning article 7 of the Covenant is according to the text and interpretation of this article incompatible with the object and purpose of the Covenant. According to article 4, paragraph 2, article 7 is a non-derogable provision, even in times of public emergency. For these reasons, the Government of Norway objects to this reservation.

The Government of Norway does not consider this objection to constitute an obstacle to the entry into force of the Covenant between Norway and the United States of America.

Id. at 54–55.

40. Portugal stated that:

The Government of Portugal considers that the reservation made by the United States of America referring to article 6, paragraph 5 of the Covenant which prohibits capital punishment for crimes committed by persons below eighteen years of age is incompatible with article 6 which, as made clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life.

The Government of Portugal also considers that the reservation with regard to article 7 in which a State limits its responsibilities under the Covenant by invoking general principles of National Law may create doubts on the commitments of the Reserving State to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of International Law.

The Government of Portugal therefore objects to the reservations made by the United States of America. These objections shall not constitute an obstacle to the entry into force of the Covenant between Portugal and the United States of America.

Id. at 55–56.

41. Spain stated that:

[A]fter careful consideration of the reservations made by the United States of America, Spain wishes to point out that pursuant to article 4, paragraph 2, of the Covenant, a State Party may not derogate from several basic articles, among them articles 6 and 7, including in time of public emergency which threatens the life of the nation.

The Government of Spain takes the view that reservation (2) of the United States having regard to capital punishment for crimes committed by individuals under 18 years of age, in addition to reservation (3) having regard to article 7, constitute general derogations from articles 6 and 7, whereas, according to article 4, paragraph 2, of the Covenant, such derogations are not to be permitted.

tion of the CCPR by the United States. Likewise, the reservations, understandings, and declarations the United States made concerning the CAT did not go unnoticed by the international community either. Finland,⁴³ Germany,⁴⁴ the Netherlands,⁴⁵ and Sweden⁴⁶ all com-

Therefore, and bearing in mind that articles 6 and 7 protect two of the most fundamental rights embodied in the Covenant, the Government of Spain considers that these reservations are incompatible with the object and purpose of the Covenant and, consequently, objects to them.

This position does not constitute an obstacle to the entry into force of the Covenant between the Kingdom of Spain and the United States of America.

Id. at 56.

42. Sweden stated that:

In this context the Government recalls that under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government considers that some of the understandings made by the United States in substance constitute reservations to the Covenant.

A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties.

Sweden therefore objects to the reservations made by the United States to:

- article 2; cf. Understanding (1)
- article 4; cf. Understanding (1)
- article 6; cf. Reservation (2)
- article 7; cf. Reservation (3)
- article 15; cf. Reservation (4)
- article 26; cf. Understanding (1)

This objection does not constitute an obstacle to the entry into force of the Covenant between Sweden and the United States of America.

Id. at 56–57.

43. Finland stated that:

A reservation which consists of a general reference to national law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself

to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle to treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.

The Government of Finland therefore objects to the reservation made by the United States to article 16 of the Convention (cf. Reservation I. (1)). In this connection the Government of Finland would also like to refer to its objection to the reservation entered by the United States with regard to article 7 of the International Covenant on Civil and Political Rights.

CAT RUDs, *supra* note 26, at 26–27.

44. Germany articulated that with respect “to the reservation under I (1) and the understanding under II (2) and (3)” made by the United States of America upon ratification, “[i]t is the understanding of the Government of the Federal Republic of Germany that [the said reservations and understandings] do not touch upon the obligations of the United States of America as State Party to the Convention.” *Id.* at 27.

45. The Netherlands stated that:

The Government of the Kingdom of the Netherlands considers the reservation made by the United States of America regarding article 16 of the Convention to be incompatible with the object and purpose of the Convention, to which the obligation laid down in article 16 is essential. Moreover, it is not clear how the provisions of the Constitution of the United States of America relate to the obligations under the Convention. The Government of the Kingdom of the Netherlands therefore objects to the said reservation. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the United States of America.

The Government of the Kingdom of the Netherlands considers the following understandings to have no impact on the obligations of the United States of America under the Convention:

II. 1a This understanding appears to restrict the scope of the definition of torture under article 1 of the Convention.

1d This understanding diminishes the continuous responsibility of public officials for behaviour of their subordinates.

The Government of the Kingdom of the Netherlands reserves its position with regard to the understandings II. 1b, 1c, and 2 as the contents thereof are insufficiently clear.

Id. at 28–29.

46. Sweden stated that:

[T]he Government of Sweden would like to refer to its objections to the reservations entered by the United States of America with regard to ar-

mented or objected to the conditioned ratification of the CAT by the United States. However, unlike the CCPR and the CAT, the international community was, at least initially, relatively silent regarding the reservations, understandings, and declarations the United States made concerning its conditioned ratification of the CERD.⁴⁷ However, as will be discussed below, this silence did not last throughout the interaction between the United States and the respective treaty committees.

In their objections, Finland, the Netherlands, Portugal, and Sweden appear to have hit the nail squarely on the head.⁴⁸ Specifically, concerning the CCPR, Finland's objection correctly set forth that "a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."⁴⁹ Portugal's objection set forth:

[T]he reservation . . . in which a State limits its responsibilities under the Covenant by invoking general principles of National Law may create doubts on the commitments of the Reserving State to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of International Law.⁵⁰

Sweden, in its objection to the United States' conditioned ratification of the CCPR, clearly set forth that it was completely unsatisfactory for the United States to take the position that it can comply with a treaty by and through its already existing national laws.⁵¹ Specifically, Sweden set forth:

title 7 of the International Covenant on Civil and Political Rights. The same reasons for objection apply to the now entered reservation with regard to article 16 reservation I (1) of the Convention. The Government of Sweden therefore objects to that reservation.

It is the view of the Government of Sweden that the understandings expressed by the United States of America do not relieve the United States of America as a party to the Convention from the responsibility to fulfill the obligations undertaken therein.

Id. at 30–31.

47. See CERD RUDs, *supra* note 26, at 28–29, 34–44.

48. See *infra* notes 49–54 and accompanying text.

49. CCPR RUDs, *supra* note 26, at 49.

50. *Id.* at 55.

51. *Id.* at 57.

A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties.⁵²

In regard to the CAT, the Netherlands, through its objection to the reservations, understandings, and declarations of the United States, set forth that “it is not clear how the provisions of the Constitution of the United States of America relate to the obligations under the Convention. The Government of the Kingdom of the Netherlands therefore objects to the said reservation.”⁵³ Sweden, through the same method, referred to its previous objections to the reservations, understandings, and declarations entered by the United States concerning the CCPR; and then, concerning the reservations, understandings, and declarations of the United States regarding the CAT, asserted an objection based on the same reasoning.⁵⁴ Likewise, while referring to its previous objection regarding the United States and the CCPR, Finland set forth the following concerning the CAT:

A reservation which consists of a general reference to national law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also . . . subject to the general principle of treaty interpretation according to which a party may not

52. *Id.*

53. CAT RUDs, *supra* note 26, at 28–29.

54. *See id.* at 30–31.

invoke the provisions of its internal law as justification for failure to perform a treaty.⁵⁵

Finland, the Netherlands, Portugal, and Sweden appear to be uniform in their opposition to the understandings of the United States that attempt to limit its international human rights responsibilities and obligations to the scope and provisions of the Constitution of the United States and other domestic law.⁵⁶ These countries raise a very valid point. The reservations, understandings, and declarations made by the United States in ratifying the CCPR, CAT, and CERD may substantially frustrate the true intent and purpose of the treaties. The United States, by conditioning the human rights elicited from the CCPR, CAT, and CERD to the confines of existing domestic law,⁵⁷ deprives the international community of the commitment of the United States to the full scope of the rights these treaties purport to provide. Moreover, by not making the treaty obligations self-executing,⁵⁸ as more fully discussed below, the United States also denies its own citizens any new enforceable human rights that may not otherwise be domestically codified. While it is arguably true that the purpose and intent of a treaty cannot be fully obtained when reservations are asserted, the narrowing of obligations by declaration is a particularly salient point when the treaty obligations involve human rights that become illusory and unattainable when those rights cannot be judicially enforced.

Besides the initial reaction of other states to the conditioned ratification of the CCPR, CAT, and CERD, of particular interest is the reporting requirement, found in the CCPR,⁵⁹ CAT,⁶⁰ and CERD.⁶¹ To satisfy this requirement, all participating members must report to the Secretary-General of the United Nations, for consideration by a

55. *Id.* at 26–27.

56. *See supra* notes 34, 38, 40, 42, 43, 45, 46 and accompanying text.

57. *See supra* note 30 and accompanying text.

58. *See id.*

59. *See* CCPR, *supra* note 4, 6 I.L.M. at 378, 999 U.N.T.S. at 181, pt. IV, art. 40.1–40.2.

60. *See* CAT, *supra* note 5, S. TREATY DOC. NO. 100-20 at 24–25, 1465 U.N.T.S. at 117–18, pt. II, art. 19.1.

61. *See* CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 6, 660 U.N.T.S. at 224, 226, pt. II, art. 9.1.

committee, regarding exactly what the reporting members have done legislatively, judicially, and administratively to give effect to the provisions in each ratified convention. Making suggestions and recommendations, along with comments from other members, each respective committee then reports to the General Assembly of the United Nations through the Secretary-General.⁶²

As part of this treaty-reporting process, the United States continues to make itself clear that in ratifying international human rights treaties, it does not intend to create any enforceable causes of action to allow for litigation in domestic courts.⁶³ The United States has purposefully done this due to a mandate by the Executive Branch and the Senate.⁶⁴ However, despite this fact, the United States is of the position that ratifying a treaty that cannot be domestically enforced by its own citizens does not affect the international treaty obligations of the United States.⁶⁵ It continues to be the position of the United States that, by and through the enforcement of its already existing laws, it already does everything required of it by the international human rights treaties it has ratified.⁶⁶ As an illustrative exam-

62. CAT, *supra* note 5, S. TREATY DOC. NO. 100-20 at 24–25, 1465 U.N.T.S. at 117–18, pt. II, art. 19; CCPR, *supra* note 4, 6 I.L.M. at 378, 999 U.N.T.S. at 181, pt. IV, art. 40; CERD, *supra* note 6, S. TREATY DOC. NO. 95-18 at 6, 660 U.N.T.S. at 224, 226, pt. II, art. 9.

63. *See* Sum. Record 427th Mtng., *supra* note 31, ¶ 8; Consideration of Art. 19 Reports, Addendum, *supra* note 31, ¶ 56; Art. 9 Reports, Addendum, *supra* note 31, ¶¶ 169–72; Sum. Record 1405th Mtng., *supra* note 31, ¶ 7; Sum. Record 1401st Mtng., *supra* note 31, ¶ 12; Consideration of Art. 40 Reports, Addendum, *supra* note 31, ¶¶ 8, 129, III (I).

64. Art. 9 Reports, Addendum, *supra* note 31, ¶ 170; Sum. Record 1405th Mtng., *supra* note 31, ¶ 8; Sum. Record 1401st Mtng., *supra* note 31, ¶ 12.

65. *See* Sum. Record 427th Mtng., *supra* note 31, ¶ 8; Consideration of Art. 19 Reports, Addendum, *supra* note 31, ¶¶ 57–60; Comm. on the Elimination of Racial Discrimination, Summary Record of the 1475th Meeting, ¶ 4, U.N. Doc. CERD/C/SR.1475 (Aug. 6, 2001) [hereinafter Sum. Record 1475th Mtng.]; Art. 9 Reports, Addendum, *supra* note 31, ¶¶ 170–73; Sum. Record 1405th Mtng., *supra* note 31, ¶¶ 7–8; Sum. Record 1401st Mtng., *supra* note 31, ¶¶ 38, 46; Consideration of Art. 40 Reports, Addendum, *supra* note 31, ¶ 8.

66. *See* Consideration of Art. 19 Reports, Addendum, *supra* note 31, ¶ 60; Consideration of Art. 9 Reports, *supra* note 31, ¶¶ 11, 18; Art. 9 Reports, Addendum, *supra* note 31, ¶ 171; Sum. Record 1402d Mtng., *supra* note 31, ¶¶ 22, 25; Sum. Record 1401st Mtng., *supra* note 31, ¶ 34; Consideration of Art. 40 Reports, Addendum, *supra* note 31, ¶ 8.

ple, in an addendum to its initial report to the Committee on the Elimination of Racial Discrimination, in relation to the CERD, the United States set forth:

This [non-self-executing] declaration has no effect on the international obligations of the United States or on its relations with States parties. However, it does have the effect of precluding the assertion of rights by private parties based on the Convention in litigation in U.S. courts. In considering ratification of previous human rights treaties, in particular the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1994) and the International Covenant on Civil and Political Rights (1992), both the Executive Branch and the Senate have considered it prudent to declare that those treaties do not create new or independently enforceable private rights in U.S. courts. However, this declaration does not affect the authority of the Federal Government to enforce the obligations that the United States has assumed under the Convention through administrative or judicial action.⁶⁷

....

The United States is aware of the Committee's preference for the direct inclusion of the Convention into the domestic law of States parties. Some non-governmental advocacy groups in the United States would also prefer that human rights treaties be made "self-executing" in order to serve as vehicles for litigation.⁶⁸

....

As was the case with prior human rights treaties, existing U.S. law provides protections and remedies sufficient to satisfy the requirements of the present Convention. Moreover, federal, state, and local laws already provide a comprehensive basis for challenging discriminatory statutes, regulations and other governmental actions in court, as well as certain

67. Art. 9 Reports, Addendum, *supra* note 31, ¶ 170.

68. *Id.* ¶ 173.

forms of discriminatory conduct by private actors. Given the adequacy of the provisions already present in U.S. law, there was no discernible need for the establishment of additional causes of action or new avenues of litigation in order to guarantee compliance with the essential obligations assumed by the United States under the Convention.⁶⁹

. . . Declaring 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 of international law. Neither does it contravene any provision of the treaty or restrict the enjoyment of any right guaranteed by U.S. obligations under the Convention.⁷⁰

However, if this is true, then why is it “prudent” to exclude international human rights treaties from domestic enforcement? Perhaps, the non-self-executing declarations of the United States are also a “safety valve” for the legislative and executive branches of government to prevent the domestic judiciary from gaining disproportional power over the legislature or from encroaching on the executive role of international policymaking. As more fully explained below, the answer may be that the United States is only willing to ratify international human rights treaties if a “safety valve” is included that prevents domestic litigation over treaty rights not codified in national law.⁷¹

The respective treaty committees appear to agree with the questions and points raised herein, and do not agree with the position of the United States on these issues.⁷² The respective treaty committees

69. *Id.* ¶ 171.

70. *Id.* ¶ 172.

71. For a further discussion of the “safety valve” theory, see Part VI.

72. *See* Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, ¶ 40, U.N. Doc. CAT/C/USA/CO/2 (May 1–19, 2006) [hereinafter Consideration of Art. 19 Reports]; Comm. Against Torture, Summary Record of 703d Mtng., ¶ 72, U.N. Doc. CAT/C/SR.703 (May 5, 2006) [hereinafter Sum. Record 703d Mtng.]; Art. 9 Reports, Addendum, *supra* note 31, ¶ 173; Sum. Record 1405th Mtng., *supra* note 31, ¶ 7; Comm. Against Torture, List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America, ¶ 5, U.N. Doc. CAT/C/USA/Q/2 (Nov. 7–

would prefer that the United States implement the ratified human rights treaties by direct inclusion of the conventions into domestic law.⁷³ In fact, the respective committees have taken the position that the stance of the United States on these issues actually contradicts the principle that international treaties should take precedence over domestic law.⁷⁴ As an exemplar of this sentiment, in 1995, Julio Prado Vallejo, an Ecuadorian national and a member of the Human Rights Committee, in response to a CCPR report submitted by the United States, noted the following:

The United States Government did not seem to have a high degree of commitment to changing domestic legislation if it conflicted with the provisions of the Covenant, although its article 2, paragraph 2, spelled out that obligation clearly. Moreover, some of the reservations could indeed affect the object and purpose of the Covenant. . . . The greatest cause for concern was the declaration that articles 1 to 27 of the Covenant were not self-executing and could only be applied if domestic laws already existed.⁷⁵

Furthermore, it has been relayed to the United States that it should rescind its non-self-executing declarations in order to demonstrate full support of the conventions.⁷⁶ As another literal example,

25, 2005) [hereinafter Issues Considered on U.S. 2d Report]; Comm. on the Elimination of Racial Discrimination, Summary Record of the 1474th Meeting, ¶ 30, U.N. Doc. CERD/C/SR.1474 (Aug. 3, 2003) [hereinafter Sum. Record 1474th Mtng.]; Sum. Record 1401st Mtng., *supra* note 31, ¶¶ 34, 46; *see also* Margaret Thomas, "Rogue States" Within American Borders: Remedying State Noncompliance with the International Covenant on Civil and Political Rights, 90 CALIF. L. REV. 165, 177 (2002); Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 461 (1997).

73. *See* Art. 9 Reports, Addendum, *supra* note 31, ¶ 173; Sum. Record 1402d Mtng., *supra* note 31, ¶¶ 22, 27; Sum. Record 1401st Mtng., *supra* note 31, ¶ 46. *See generally* Sum. Record 1474th Mtng., *supra* note 72.

74. *See* Sum. Record 1474th Mtng., *supra* note 72, ¶ 63; Sum. Record 1402d Mtng., *supra* note 31, ¶ 22; Sum. Record 1401st Mtng., *supra* note 31, ¶ 35.

75. Sum. Record 1401st Mtng., *supra* note 31, ¶ 38.

76. *See* Rep. of the Comm. Against Torture, 23d sess, Nov. 8–19, 1999, 24th sess, May 1–19, 2000, ¶ 180, U.N. Doc. A/55/44; GAOR, 55th Sess., Supp. No. 44 (2000); Consideration of Art. 19 Reports, *supra* note 72, ¶ 40; Sum. Record 703d Mtng., *supra* note 72, ¶ 72; Consideration of Art. 9 Reports, *supra* note 31, ¶¶ 11,

in response to a CAT report submitted by the United States, the Committee Against Torture relayed to the United States that “[t]he Committee reiterates its recommendation that the [United States] should consider withdrawing its reservations, declarations and understandings lodged at the time of ratification of the Convention.”⁷⁷

If the United States holds that the rights recognized under the covenants are already guaranteed in domestic law, then why are the domestic courts being deprived of the opportunity to rely on the conventions as the true law of the land?⁷⁸ Would it not be preferable to make ratified human rights treaties self-executing so that the people protected by such treaties could actually enforce their treaty rights in their own domestic court system?⁷⁹ In 2000, the Chairperson of the Committee Against Torture, Peter Thomas Burns, believed so.⁸⁰ At the 424th meeting in which the Committee Against Torture considered the initial report of the United States regarding the CAT, Mr. Burns stated: “Articles 1 to 16 were non-self-executing and yet, according to the report, their provisions indirectly formed part of United States law. Under those circumstances, would it not be preferable to make them self-executing so that individuals could invoke them in legal proceedings?”⁸¹ Since the conventions were intended to benefit individuals, exactly how are individuals being protected if the convention rights cannot be domestically enforced where domestic law may fall short of treaty obligations?⁸² As Omran El Shafei, an Egyptian national and a member of the Human Rights Committee, noted in 1995 at the 1401st meeting in which the Human Rights Committee considered the initial report of the United States in regard to the CCPR:

18; Sum. Record 1402d Mtng., *supra* note 31, ¶ 22; *see also* Issues Considered on U.S. 2d Report, *supra* note 72, ¶ 5; Sum. Record 1474th Mtng., *supra* note 72, ¶ 30; Sum. Record 1401st Mtng., *supra* note 31, ¶ 48.

77. Consideration of Art. 19 Reports, *supra* note 72, ¶ 40.

78. *See* Sum. Record 1401st Mtng., *supra* note 31, ¶ 34.

79. *See* Comm. Against Torture, Summary Record of the First Part (Public)* of the 424th Meeting, ¶ 16, U.N. Doc. CAT/C/SR.424 (May 10, 2000).

80. *Id.*

81. *Id.*

82. *See* Issues Considered on U.S. 2d Report, *supra* note 72, ¶ 5; Sum. Record 1475th Mtng., *supra* note 65, ¶ 4; Sum. Record 1405th Mtng., *supra* note 31, ¶ 7; Sum. Record 1401st Mtng., *supra* note 31, ¶ 34.

[T]he purpose of treaties [is] for States to undertake new obligations, and in the case of the International Covenant on Civil and Political Rights, to conform domestic law to international standards enshrined in the Covenant. It [is] regrettable that by its decision, the [United States] Government [has] prevented the Covenant from being tested in the United States courts.⁸³

IV. 42 U.S.C. § 1983

Probably the best-known vehicle in the United States used to enforce civil rights, and to civilly prosecute civil rights violations, is 42 U.S.C. § 1983.⁸⁴ 42 U.S.C. § 1983 does not, itself, provide any substantive rights.⁸⁵ Rather, § 1983 is a legal vehicle which is used to bring violations of federal law to court.⁸⁶ Accordingly, if one's civil rights are violated, a vehicle used to bring that claim before a court would be § 1983. Therefore, it would stand to reason if one's human rights were violated that § 1983 would also be an available vehicle to bring such a claim before a domestic court within the United

83. Sum. Record 1401st Mtng., *supra* note 31, ¶ 46.

84. Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006) (emphasis added).

85. *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). 42 U.S.C. § 1983 merely provides the method and judicial jurisdiction for enforcement of rights conferred elsewhere in the law. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85 (2002); *Baker*, 443 U.S. at 145 n.3.

86. *See Gonzaga*, 536 U.S. at 284–85; *Baker*, 443 U.S. at 145 n.3.

States.⁸⁷ This is particularly true if one traces the history of the statute.

When originally enacted as part of the Civil Rights Act of 1871, 42 U.S.C. § 1983 “provided a cause of action only for deprivation of rights ‘secured by the Constitution.’”⁸⁸ Therefore, as originally contemplated, § 1983 was not a vehicle for treaty violations.⁸⁹ However, Congress expanded the rights protected when it added the phrase “and laws” to the end of the phrase, “secured by the Constitution.”⁹⁰ But, does “and laws” also mean treaties? The U.S. Supreme Court has held that “and laws” does not just mean subsets of federal statutes; it means just that—laws.⁹¹ However, for the purposes of § 1983, are treaties “laws”? The U.S. Supreme Court has also held that “laws” specifically include “a congressionally sanctioned . . . compact.”⁹² Predicated on these analogous holdings, and without challenges to the applicability of § 1983 being raised, treaty rights have been previously asserted through the use of § 1983.⁹³ While not a U.S. Supreme Court case, perhaps the clearest case on this issue is the Seventh Circuit case, *Jogi v. Voges*.⁹⁴ While specifically dealing with rights conferred by the Vienna Convention on Consular

87. See generally Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 119–24 (2000); de la Vega, *supra* note 72, at 450–51; Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1141–57 (1992).

88. John T. Parry, *A Primer on Treaties and § 1983 After Medellín v. Texas*, 13 LEWIS & CLARK L. REV. 35, 38 (2009); see Civil Rights Act, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (2006)).

89. See *supra* note 85 and accompanying text.

90. Civil Rights Act, ch. 24 § 1979, 93 Stat. 1284 (1979) (current version at 42 U.S.C. § 1983) (providing a cause of action for rights “secured by the Constitution and laws”); see Parry, *supra* note 88, at 38.

91. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); Parry, *supra* note 88, at 38–39.

92. *Cuyler v. Adams*, 449 U.S. 433, 442 (1981); Parry, *supra* note 88, at 39.

93. See, e.g., *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1272, 1274–75 (E.D. Va. 1996), *aff’d*, 134 F.3d 622 (4th Cir. 1998); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 663 F. Supp. 682, 684–86 (W.D. Wis. 1987), *app. dismissed*, 829 F.2d 601 (7th Cir. 1987); Parry, *supra* note 88, at 45; cf. *United States v. Washington*, 813 F.2d 1020, 1023 (9th Cir. 1987).

94. 480 F.3d 822 (7th Cir. 2007).

Relations, the *Jogi* decision “clearly and explicitly”⁹⁵ sets forth that an individual asserting self-executing treaty rights “is entitled to pursue his [or her] claim under § 1983.”⁹⁶ In support of this holding, the court in *Jogi* noted that § 1983 “was designed to be a remedy ‘against all forms of official violation of federally protected rights.’”⁹⁷ Currently, the *Jogi* opinion stands by itself as the only decision that so clearly and squarely addresses the issue of general treaty rights being litigated through the use of § 1983.⁹⁸ But, more importantly, to date, no other court has clearly ruled contrary to the *Jogi* decision on the issue of treaty rights being appropriately asserted through the use of § 1983.⁹⁹

Since § 1983 could be used to assert treaty violations, such as violations of international human rights treaties, and is widely used to assert civil rights violations, exactly what is the difference between a non-self-executing “human right” and a domestically enforceable “civil right”? Black’s Law Dictionary defines “civil right” as follows:

The individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act. Civil rights include esp[ecially] the right to vote, the right of due process, and the right of equal protection under the law.¹⁰⁰

Black’s Law Dictionary defines “civil liberty” as follows:

Freedom from undue governmental interference or restraint. This term usu[ally] refers to freedom of speech or religion. In American law, early civil liberties were promulgated in the Lawes and Libertyes of Massachusetts (1648) and the Bill of Rights (1791). In English law, examples are found in [the]

95. Parry, *supra* note 88, at 51.

96. *Jogi*, 480 F.3d at 835–36.

97. *Id.* at 827 (quoting *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 700–01 (1978)) (emphasis added); see Parry, *supra* note 88, at 50.

98. Parry, *supra* note 88, at 51.

99. *Id.*

100. BLACK’S LAW DICTIONARY 263 (8th ed. 2004).

Magna Carta (1215), the Petition of Right (1628), and the Bill of Rights (1689).¹⁰¹

So far, civil rights, as litigated in 42 U.S.C. § 1983 cases, sound a lot like the international human rights set forth in the CCPR, CAT, and CERD. Black's Law Dictionary defines "human rights" as: "The freedoms, immunities, and benefits that, according to modern values (esp[ecially] at an international level), all human beings should be able to claim as a matter of right in the society in which they live."¹⁰² By pure definition, it may appear that human rights are broader than civil rights; however, the CCPR, CAT, and CERD specifically and intentionally narrow the scope of rights from a broad definition of human rights, down to a very workable formula of specific rights, that are very analogous to domestic civil rights in the United States. Therefore, it would stand to reason that the CCPR, CAT, and CERD should be applicable to § 1983 cases. One could logically conclude that by ratifying the CCPR, CAT, and CERD, the United States would want to provide its own citizens with the rights and remedies that it projected as offering to the rest of the world as an international community. However, such is not the case.

V. NON-SELF-EXECUTING DECLARATIONS: THERE IS MORE TO IT

While the previous sections identified particular non-self-executing declarations of the United States, this section provides an explanation and analysis of what a non-self-executing declaration is and how it operates. The placement and order of this particular section of this article is due to the fact that it is important to first set forth the declarations of the United States before providing a legal analysis of those declarations. However, the United States is very clear in its intent to preclude the assertion of treaty rights in national courts that the definition, analysis, and effect of a non-self-executing declaration becomes patently obvious before the legal analysis can be set forth. By now, any reader could probably guess, based solely on the previous assertions of the United States, that "non-self-

101. *Id.*

102. *Id.* at 758.

executing” means that one cannot go down to his or her local courthouse in Anytown, USA and file a lawsuit. However, the analysis is a bit more complex than just that simple, yet accurate, description. How do the international human rights treaties at issue interact with the domestic civil rights law of the United States, and, particularly, 42 U.S.C. § 1983? How should international human rights treaties interact with the domestic civil rights law of the United States?

In the seminal case of *The Paquete Habana*,¹⁰³ Justice Gray, in his deliverance of the opinion for the U.S. Supreme Court, set forth: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”¹⁰⁴ Article III, Section 2, of the Constitution of the United States, in part, reads: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made*, or which shall be made, under their Authority.”¹⁰⁵ The Supremacy Clause, contained within Article VI of the Constitution of the United States, reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁰⁶

Therefore, it would appear, at least initially, that international human rights treaties would be treated by all courts within the United States as the “the supreme Law of the Land.”¹⁰⁷ However, a review of judicial interpretation reveals that the apparently clear words of the Constitution of the United States are not so clear.

103. 175 U.S. 677 (1900).

104. *Id.* at 700.

105. U.S. CONST. art. III, § 2 (emphasis added).

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

107. *See id.*

While the Supremacy Clause of the Constitution of the United States references “Treaties,”¹⁰⁸ the U.S. Supreme Court makes a distinction between treaties that are the judicial equivalent of legislative acts and treaties that are merely contracts of politics between nations and concludes that the latter is not a justiciable issue for the courts until and unless the legislature enacts positive domestic legislation thereon.¹⁰⁹ In *Foster v. Neilson*, the U.S. Supreme Court set forth:

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*. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, *the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court*.¹¹⁰

Accordingly, for the purpose of whether a treaty is justiciable, treaties have been assigned judicially to one of two categories: (1) self-executing, or (2) non-self-executing.¹¹¹ “[W]hile treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.’”¹¹² To provide further clarity on the issue, the U.S. Supreme Court has set forth precisely what it means:

The label “self-executing” has on occasion been used to convey different meanings. What we mean by “self-executing” is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a “non-self-executing” treaty does not by itself give rise to domestically enforceable feder-

108. *Id.*

109. *Foster v. Neilson*, 27 U.S. 253, 254 (1829), *overruled in part by* *United States v. Percheman*, 32 U.S. 51 (1833).

110. *Id.* (emphasis added).

111. *Medellín v. Texas*, 552 U.S. 491, 504–05 (2008).

112. *Id.* at 505 (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)).

al law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.¹¹³

However, “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’”¹¹⁴ Based on this legal presumption, several federal appellate courts have noted that, absent express treaty language to the contrary, international treaties do not create privately enforceable rights and, therefore, do not create justiciable issues for individuals to litigate in domestic courts.¹¹⁵

VI. RATIFIED TREATIES NOW! RESCISSION OF RUDs LATER?

While treaties may be binding international law, the bottom line is that the non-self-executing declarations made by the United States in regard to the CCPR, CAT, and CERD make these human rights treaties nothing more than unenforceable ideals in the national

113. *Id.* at 505 n.2.

114. *Id.* at 506 n.3 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987)).

115. *See, e.g., id.*; *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 195, 198 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60–61 (1st Cir. 2000) (en banc); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979). *See generally* Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139 (2006); Aya Gruber, *Sending the Self-Execution Doctrine to the Executioner*, 3 FLA. INT’L U. L. REV. 57 (2007); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103 (2000) [hereinafter Sloss, *Ex Parte Young*]; David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999) [hereinafter Sloss, *Domestication of Int’l Human Rights*]; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) [hereinafter Vázquez, *Laughing at Treaties*].

courts.¹¹⁶ But why? Why would the United States do this? There are two possible theories: The “safety valve” theory and the “window dressing” theory.¹¹⁷ The “safety valve” theory is simply that the domestic law of the United States is not a complete redundancy of treaty rights and that, therefore, the non-self-executing declarations are a “safety valve” to preclude the judiciary from domestically enforcing any treaty rights that are not codified in existing national law.¹¹⁸ The United States takes the position that its domestic laws envelop its international human rights obligations.¹¹⁹ But just in case there is a new treaty right that is not a redundancy of national law, a non-self-executing declaration would act as a “safety valve” to prevent any separate and unique treaty-based right from being asserted in a national court.¹²⁰

The “window dressing” theory is that the United States made its domestic law understandings and non-self-executing declarations as a form of “window dressing” that, in theory, enabled the United States to fully comply with its treaty obligations while, at the same time, not disturbing pre-existing national law.¹²¹ This “window dressing” was then used as an enticement in order to secure the Senate votes necessary to ratify the treaties in the first place.¹²² If the national law already fully complies with treaty obligations, then there is certainly more incentive for the Senate to vote in favor of ratification over a situation where ratification would require comprehensive changes to domestic law. If the “window dressing” theory

116. *See, e.g.*, *Buell v. Mitchell*, 274 F.3d 337, 370–76 (6th Cir. 2001) (noting that non-self-executing treaties are not binding on the courts); *White v. Paulsen*, 997 F. Supp. 1380, 1386–87 (E.D. Wash. 1998) (holding that no private cause of action can be brought under the CCPR or CAT); *see Gabrielidis, supra* note 115, at 156; *Sloss, Ex Parte Young, supra* note 115, at 1120–23; *Vázquez, Laughing at Treaties, supra* note 115, at 2175–88.

117. *See Sloss, Domestication of Int’l Human Rights, supra* note 115, at 189.

118. *Id.*

119. *See* Consideration of Art. 19 Reports, Addendum, *supra* note 31, ¶ 60; Consideration of Art. 9 Reports, *supra* note 31, ¶¶ 11, 18; Art. 9 Reports, Addendum, *supra* note 31, ¶¶ 169–73; Sum. Record 1402d Mtng., *supra* note 31, ¶¶ 3, 25; Sum. Record 1401st Mtng., *supra* note 31, ¶ 34; Consideration of Art. 40 Reports, Addendum, *supra* note 31, ¶ 8.

120. *See Sloss, Domestication of Int’l Human Rights, supra* note 115, at 189.

121. *Id.* at 190.

122. *Id.*

were correct, and accommodations were made in order to obtain ratification as part of a better-than-nothing plan, then the next logical step would be to work on rescinding the original reservations, understandings, and declarations. If compromises were necessary to gain ratification, then it is about time to take the next step. The treaties are ratified. But where is the next move to rescind even a single line of the original reservations, understandings, and declarations? These rhetorical questions support a subscription to the “safety valve” theory. However, maybe it is all a matter of timing. Maybe the “window dressing” theory is correct, but the right time to rescind the reservations, understandings, and declarations has simply not yet arrived.

An argument could be made that, under either theory, the United States has violated general principles of international law by not ratifying the treaties in good faith. It is, arguably, less than good faith to enter into a treaty that may grant new and unique rights while also inserting a “safety valve” in order to ensure that any treaty rights are not judicially enforceable. The counterargument for justification of a “safety valve” is that it is perfectly permissible under international law to declare a treaty to be non-self-executing unless the treaty itself prohibits it. It is also, arguably, less than good faith to enter into a treaty that may require some modification of existing national law by hanging a negating “window dressing” in order to garner the ratification votes of lawmakers. While not really fitting into either theory, perhaps a beneficial result, intended or not, is that if an already-existing domestic law mirrors an international treaty obligation, then the legislative branch may just be reluctant to rescind any domestic law that has already been asserted as the domestic satisfaction of an international obligation. Therefore, at a minimum, an argument can certainly be made that the international human rights treaties ratified by the United States may at least, in part, preserve and maintain already existing domestic civil rights law.

No matter the reason why, the fact remains that the CCPR, CAT, and CERD have been ratified by the United States.¹²³ The first step has been accomplished. However, by declaring the CCPR, CAT, and CERD treaties to be non-self-executing, the United States de-

123. *See supra* notes 4–6 and accompanying text.

prives its own citizens of a form of justice by extinguishing additional sources of substantive rights that otherwise could be enforced through 42 U.S.C. § 1983. For this reason, § 1983 is truly a legal vehicle that is not being permitted to take on any international human rights treaty passengers.

VII. CONCLUSION

The United States, in ratifying the CCPR, CAT, and CERD by conditioning the human rights elicited to the confines of existing domestic law, deprives the international community of its commitment to the full scope of the rights the treaties were truly intended to provide and protect. Moreover, by not making the treaty obligations self-executing, the United States also denies its own citizens of any new domestically enforceable human rights and deprives its own citizens of a form of justice by squelching additional sources of substantive rights that otherwise could be enforced by the use of 42 U.S.C. § 1983. For these reasons, the United States should take the next step for the promotion of human rights and rescind these reservations, understandings, and declarations. By doing so, the United States would honor its international human rights obligations on a more even level with the rest of the international participants, while also providing its own citizens, through the use of § 1983, with new sources of enforceable substantive rights.

The reasoning of the United States appears to be circular in that it attempts to limit its international obligations by the scope of its national law while, at the same time, limiting its national law by making its international human rights obligations unenforceable in domestic courts. Arguably, this circular reasoning could be considered as the United States acting with less than complete good faith. However, the fact that the United States has ratified the CCPR, CAT, and CERD at all is still a very positive first step. Ratification now requires the United States to report to the United Nations, and subjects the United States to corrective criticism from the international community. While the author of this article is somewhat skeptical that the United States will ever actually withdraw its reservations, understandings, and declarations, the fact remains that the United States is required to continue in its reporting and will continue to be

critiqued by the rest of the world. Maybe, just maybe, the United States may actually implement a change for the better based upon the power of international suggestion. At least the seed has been planted. Maybe, one day, the choking weeds, in the form of reservations, understandings, and declarations, will be removed; thus, allowing a mighty tree of universally applied civil and human rights to grow.