Modern Constitutions and Human Rights Treaties

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I. INTRODUCTION

Professor Louis Henkin has devoted a substantial part of his distinguished scholarly career to the study of the relationship between American constitutional law and international law. He has a very special interest in problems relating to the domestic implementation of treaties in general and human rights treaties in particular.[1] Besides serving as the master teacher on these subjects to generations of lawyers from around the world, he has over the years devoted a considerable amount of his time and professional skill to demonstrating that the practice of the United States with regard to the domestic implementation of human rights treaties has been unnecessarily restrictive. In his view, the numerous reservations, understandings, and declarations—or so-called RUDs—that the U.S. Senate has attached to these treaties seriously impede international efforts to promote the observance of human rights around the world.[2]

Although I do not share Professor Henkin's view that it would have been better for the United States not to ratify human rights treaties at all rather than to do so with numerous debilitating RUDs,[3] I agree

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1. See the list of Professor Henkin's publications in his general course given at the Hague Academy of International Law, Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS [REC. DES COURS] 18 (1989-IV).

2. For Professor Henkin's most recent article on the subject, see generally Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

3. In my opinion, it was important to get the United States to ratify these treaties in the first place and to attempt thereafter to get the Senate gradually to withdraw some of the RUDs. Moreover, even though the United States ratified with many RUDs, including reservations designed to ensure that these ratifications did not compel the United States to change its domestic law, it is clear that the United States assumed significant international human rights obligations under international law with regard to those international human rights that do not conflict with U.S. law. This is so because the ratifications have the effect of internationalizing these rights, thus obligating the United States to protect such rights both as a matter of domestic and international law. Of course, it would have been preferable not to have the reservations, but this conclusion does not detract from the fact that internationalization of this vast catalogue

completely that contemporary U.S. practice with regard to such treaties is neither constitutionally necessary nor compatible with the long-term interest of the United States in promoting the world-wide observance of human rights. It is also worth noting, in this connection, that while the United States once had a legal system that was international-law friendly, this is certainly no longer true today. In fact, the United States has moved from being a pioneer in this area to being a country that, unlike some other Western democracies, puts increasing obstacles in the way of giving domestic effect to its international legal obligations. That is particularly evident when one compares the recent treaty practice of these other nations with the policies of the U.S. Senate towards treaties and the increasingly restrictive manner in which U.S. courts interpret treaties.

It is also relevant to note that the principle, first enunciated in the U.S. Constitution and adopted by other states, that treaties and national statutes enjoy the same normative rank in the hierarchy of domestic law, is gradually being rejected by an increasing number of states, particularly Western democracies, in favor of legal regimes that accord a higher normative status to treaties in general and human rights treaties in particular.[4] Thus, for example, while it is becoming more and more difficult in the United States fully to transform international human rights obligations into directly applicable domestic law, the opposite trend is in evidence in a growing number of democratic countries. Moreover, the very thought that the United States will in the near future adopt similar measures or attitudes towards human rights treaties would strike knowledgeable Americans as utterly utopian.

This paper describes the constitutional developments in those countries that have taken an increasingly internationalist attitude towards the implementation and observance of international agreements in general and international human rights in particular. It ends with some reflections on contemporary U.S. human rights treaty practice. As we shall see, the internationalist trend is driven by the institutional needs of supranational organizations, on the one hand, and the growing number of international human rights bodies with jurisdiction to interpret and apply human rights treaties, on the other. Not to be overlooked, in this connection, is the fact that the suffering caused in some states by past dictatorial regimes has played an important role in

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of rights is a major step forward.

4. *See generally* Antonio Cassese, *Modern Constitutions and International Law*, 192 REC. DES COURS 331 (1985-III); Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 REC. DES COURS 303 (1992-IV).

encouraging the adoption of domestic constitutional mechanisms that strengthen the power of an independent judiciary to enforce international human rights guarantees in conflict with national law and to implement the rulings of international tribunals.

II. THE TRADITIONAL APPROACHES

In the past, the vast majority of states followed one of two approaches in giving domestic legal effect to international agreements. One, based on the U.S. constitutional scheme, accords duly ratified treaties the same normative rank as national statute law. Under this system, a later treaty overrides an earlier statute in conflict with it and vice versa. In order for the treaty to take precedence over an earlier statute, the treaty must be self-executing. That is, it has to be capable of judicial application without additional implementing legislation. In most states where this system is in force, the national constitution has precedence over both treaty and statute. Germany and Italy, for example, also apply this constitutional scheme to treaties, although general principles of international law enjoy a higher normative rank than statute law in both countries.[5]

The other approach to treaties, reflected in British and Australian constitutional practice and to a lesser extent in some Scandinavian countries, is governed by the proposition that a treaty becomes domestic law only when the national parliament has conferred that status on it by special legislation.[6] Here, although a duly ratified treaty binds the state internationally, it has no domestic legal effect unless the national parliament adopts the requisite incorporating legislation. The need for such legislation in the British system can be attributed to the fact that, in the United Kingdom and in most other Commonwealth countries, treaties are ratified by the executive branch alone without parliamentary consent. In this context, it makes a great deal of sense to require parliamentary approval before the ratified treaty is given the status of domestic law. It should be noted, in this connection, that the resulting implementing legislation has the same normative rank as any other

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5. *See* GRUNDGESETZ [Constitution] [GG] art. 25 (F.R.G.) and COSTITUZIONE art. 10 (Italy). For a discussion of the interrelationship in these countries between treaties and general principles of international law, see Buergenthal, *supra* note 4 at 342-44.

6. *See generally* Rosalyn Higgins, *United Kingdom*, *in* THE EFFECT OF TREATIES IN DOMESTIC LAW 123 (F.G. Jacobs & S. Roberts eds., 1987); Buergenthal, *supra* note 4, at 363-67.

parliamentary enactment and can, therefore, be superseded by one later in time.

The states that follow the U.S.-based approach to treaties have tended to incorporate into their constitutions language similar to that found in the supremacy clause of the U.S. Constitution. For example, both Argentina[7] and Mexico[8] initially copied almost verbatim the language of article VI of the U.S. Constitution. Moreover, in some states where the constitution failed to deal expressly with the question of the domestic status of treaties, the courts have on their own adopted the article VI solution, provided always that the national parliament had a role in the ratification process.[9]

Although these traditional approaches served their purpose in earlier times, they began to pose problems with the emergence of supranational organizations, such as the European Communities, that established their own autonomous legislative and judicial systems. The enactments and decisions of these institutions had to be given direct effect domestically, unencumbered by national legislative or judicial obstacles, and that was difficult to achieve within the framework of the traditional methods of treaty transformation or incorporation. Similar problems arose with the entry into force of human rights treaties, particularly those that created international tribunals with jurisdiction to find states in violation of their obligations under these agreements in cases brought by individuals. To avoid being found in violation of their international human rights commitments, states would have continuously to amend or enact new legislation to keep up with the rulings of these tribunals. This proved to be a costly process that could last years without ever being fully satisfactory. Ways had to be found, therefore, to ensure the supremacy, on the domestic plane, of international obligations against ordinary national legislation and to enable national courts to follow precedents established by international tribunals even where such rulings were in conflict with national laws, either prior or later in time. Countries that had lived under non-democratic regimes in the past were especially eager to provide their courts with the legal power not to give effect to national laws or executive decisions in conflict with the states' international human rights obligations.

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7. *See* CONST. art. 31 (Arg. 1853).

8. *See* CONST. art. 133 (Mex. 1917).

9. This is the case in Uruguay, for example. *See* Héctor Gros Espiell, *Los Tratados sobre Derechos Humanos y el Derecho Interno*, *in* 2 ESTUDIOS EN HOMENAJE AL DOCTOR HECTOR FIX-ZAMUDIO 1025, 1027-28 (Instituto de Investigaciones Jurídicas, 1988).

These considerations explain why recent decades have witnessed a growing trend in many countries to come up with national constitutional schemes designed to strengthen and make more effective the domestic application and enforcement of international obligations. These changes, some quite dramatic when compared to applicable U.S. practice, will be described in the section that follows.

III. CONTEMPORARY PRACTICE

Contemporary constitutional practice relating to the domestic implementation of treaties began to depart in two distinct ways from the traditional approaches described above. One trend, which began in the post-World War II era and continues to this day, saw the enactment of constitutional amendments and decisions by national supreme courts that conferred on treaties a higher normative rank than national legislation. A second and more recent development has produced constitutional schemes that distinguish between ordinary treaties and human rights treaties, and that endow the latter instruments with a higher rank in the hierarchy of domestic norms.

A. Treaties in General

An increasing number of states have, in recent decades, begun to accord treaties in general a higher normative status than ordinary national legislation. At least one country, the Netherlands, appears to rank self-executing treaties above all national laws, including the constitution. The Netherlands achieved this result through a series of constitutional amendments adopted in 1953, 1956 and 1983.[10] Although few other countries have gone as far as the Netherlands, a growing number has elevated treaties to a higher rank than statutes while maintaining the requirement that both treaties and statutes conform to the national constitution. These changes have been achieved either by constitutional amendment or by decisions of the highest national courts.

One of the earliest provisions that accords a higher normative rank to treaties than statute law is article 55 of the French Constitution (1958), which reads as follows: "Treaties or agreements duly ratified

10. *See* Henry Schermers, *Netherlands*, *in* THE EFFECT OF TREATIES IN DOMESTIC LAW 109, 112-13 (F.G. Jacobs & S. Roberts eds., 1987); E.A. Alkema, *Foreign Relations in the Netherlands Constitution of 1983*, 31 NETH. INT'L L. REV. 307, 311-13 (1984).

and approved shall, upon publication, have an authority superior to that of legislation, subject, for each separate agreement or treaty, to reciprocal application by the other party."[11] Although the language of this provision appeared to leave no doubt that prior and later treaty provisions would prevail over conflicting national legislation, it took the French courts almost three decades after the adoption of the 1958 Constitution to settle this issue authoritatively by confirming the full supremacy of treaties and the power of courts to refuse to apply later laws in violation of prior international agreements.[12] A similar provision in the 1968 Costa Rican Constitution was also fully applied only years later and after the adoption of a special constitutional amendment designed to bring about that result.[13] In a decision rendered in 1971, the Belgian Supreme Court interpreted the Belgian Constitution in like manner despite its silence on the question.[14] Swiss courts have now apparently also opted for this approach.[15] Similar developments have taken place in other countries.[16]

B. Human Rights Treaties

A more recent trend, propelled by the dramatic proliferation of human rights treaties and the jurisdictional expansion of international judicial and quasi-judicial institutions supervising their observance, has prompted a number of states to accord human rights treaties a special or

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11. Translation by author.

12. *See* RONNY ABRAHAM, DROIT INTERNATIONAL, DROIT COMMUNAUTAIRE ET DROIT FRANÇAIS 117 (1989).

13. *See* Law No. 7128, art. 1, amending articles 10, 48, 105, and 128 of the Constitution of Costa Rica, Revista Jurisprudencia Constitucional, No. 1, at 13 (1989). *See generally*, Trejos, *La Convencion Americana sobre Derechos Humanos en la Jurisprudencia de la Sala Constitucional de Costa Rica*, REVISTA DE DERECHO CONSTITUCIONAL, No. 1, at 65 (1991).

14. *See* Cour de Cass., May 27, 1971, Pasicrisie Belge 1971, I, 886 at 915 (Belg.). *See also* P. De Visscher, *La Constitution Belge et le Droit International*, 19 REVUE BELGE DE DROIT INTERNATIONAL 5, 30-31 (1986).

15. *See gernerally* Lucius Caflisch, *La Pratique Suisse en Matière de Droit International Public 1986*, 43 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 156 (1986); Luzius Wildhaber, *Conclusion and Implementation of Treaties in Switzerland, in* SWISS REPORTS PRESENTED TO THE XIIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 173, 190 (Swiss Institute of Comparative Law, 1990). *But see* Lucius Caflisch, *Pratique Suisse en Matière de Droit International Public 1989*, 47 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 138 (1990).

16. For a complete survey, see Cassese, *supra* note 4.

preferred status with a normative rank higher than that of other treaties and ordinary domestic law.[17]

Various Latin American countries, no doubt influenced by article 10(2) of the Spanish Constitution of 1978, have accorded constitutional rank to human rights treaties. That article provides as follows: "[t]he norms relative to basic human rights and liberties which are recognized by the Constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain."[18] Article 10(2) has the effect of giving human rights treaties ratified by Spain, among them the European Convention on Human Rights[19] and the International Covenants on Human Rights,[20] constitutional status. This is so because, for purposes of interpretation, they are incorporated by reference into the human rights guarantees proclaimed by the Spanish Constitution.[21] One consequence of this development is that Spanish courts have, when interpreting the applicable provision of the Spanish Constitution, looked with increasing frequency not only to the wording of these treaties, but also to the case law of the relevant international institutions and, in particular, to the jurisprudence of the European Court of Human Rights. As a practical matter, this approach transforms the case law of the European Court into Spanish constitutional law.[22]

In 1989, Costa Rica amended its Constitution and established a Constitutional Chamber within its Supreme Court for the purpose of providing its inhabitants with greater constitutional protection. The

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17. For an interesting survey of the case law of the States Parties to the European Convention of Human Rights, see Jörg Polakiewicz & Valérie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of the Strasbourg Case-Law in States Where Direct Effect is Given to the Convention, (Parts I and II),* 12 HUM. RTS. L.J. 65, 125 (1991).

18. Translation by author.

19. European Convention for the Protection of Human Rights and Fundamental Freedoms, *done* Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 (entered into force Sept. 3, 1953).

20. International Covenant on Civil and Political Rights, *done* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (entered into force March 23, 1976); International Covenant on Economic, Social, and Cultural Rights, *done* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (entered into force Jan. 3, 1976).

21. *See* Luis Ignacio Sanches Rodríguez, *Los Tratados Internacionales Como Fuente del Ordenamiento Jurídico Español, in* CURSOS DE DERECHO INTERNACIONAL DE VITORIA-GASTEIZ 138, 167-70 (1984).

22. For an analysis of the relevant case law, see Eduardo García de Enterría, *Valeur de la Jurisprudence de la Cour Européenne des Droits de l'Homme en Droit Espagnol, in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION (STUDIES IN HONOUR OF GERARD J. WIARDA) 221 (1989).

legislation implementing the constitutional amendment granted the new Chamber the power to ensure the country's domestic compliance with its international obligations. In addition, it authorized the Chamber to issue writs of *habeas corpus* and *amparo* to protect individuals claiming the denial of rights guaranteed them not only under the Constitution itself but also under any human rights treaty to which Costa Rica is a party. Since the entry into force of the amendment and implementing legislation, the Constitutional Chamber of the Supreme Court has set aside a number of the country's laws it found to be incompatible with the American Convention on Human Rights and other human rights treaties. Moreover, in interpreting the Convention, the Chamber has relied in large part on the case law of the Inter-American Court of Human Rights.[23]

Some other countries, among them Argentina, have expressly conferred constitutional law status on various international human rights treaties. Argentina did so when it amended its Constitution in 1994. The new article 75(22) of the Constitution lists a large number of international human rights instruments, among them the American Convention on Human Rights and all major U.N. human rights treaties, including the two International Covenants on Human Rights and the U.N. Racial Convention, and proclaims their status as constitutional law.[24] Among the enumerated instruments, moreover, are two that are not treaties, namely, the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man. Here it will be recalled that article 10(2) of the Spanish Constitution also refers expressly to the Universal Declaration. These references to the Universal Declaration and the American Declaration, originally adopted as non-binding resolutions by the U.N. and the Organization of American States, respectively, no doubt reflect the views of an increasing number of states regarding the normative character of these

23. *See* Trejos, *supra* note 13. *See, e.g.*, Case No. 241-89, Supreme Court of Costa Rica (Constitutional Chamber), Dec. 1, 1989, Revista Jurisprudencia Constitucional, No. 1, at 133 (1989).

24. The amendment followed in the wake of a decision of the Argentine Supreme Court that reversed a series of earlier cases and ruled that treaties had to be accorded a higher rank than statutes under Argentine law. That same decision also gave effect to an advisory opinion of the Inter-American Court of Human Rights. *See* Ekmekdjian v. Sofovich, 315 Fallos 1492, 1511-15 (1992) (Arg.). For an extensive analysis of this case, see Thomas Buergenthal, *International Tribunals and National Courts: The Internationalization of Domestic Adjudication, in* RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: FESTSCHRIFT FÜR RUDOLF BERNHARDT 687, 695-99 (U. Beyerlin, et al. eds., 1995).

instruments, which in turn strengthens their transformation into binding international law rules.

Article 75(22) of the Argentine Constitution also specifies that the treaties having constitutional rank may be denounced by the government only with the approval of a two-third vote of the total membership of both chambers of the Argentine Parliament. The experience of Argentina and Spain with dictatorial regimes no doubt explains the importance both countries attach to international human rights instruments and the role they assign to these instruments in their fundamental laws. Similar constitutional principles, also reflecting comparable political experience, have found expressions in the new Constitution of Chile[25] and the constitutional legislation of the emerging democracies of Eastern and Central Europe.[26]

A smaller number of countries have accorded constitutional rank to a single human rights treaty. Austria is a case in point as far as the European Convention on Human Rights is concerned. When initially giving its approval to the ratification of the Convention, the Austrian Parliament had assumed that, having complied with the requisite weighted voting requirement for that purpose, it had transformed the Convention into a constitutional law. The Austrian Constitutional Court found, however, that Parliament had not achieved that objective because it had failed to label the act approving the Convention as "constitutional law." After that same court also held two important provisions of the Convention to be non-self-executing, the Austrian Government resubmitted the Convention to Parliament. This time around, Parliament got it right and properly approved the Convention as "constitutional law." Had the Convention remained an ordinary law in Austria, the courts would not have been able to give effect to the provisions they deemed to be non-self-executing. But since the precision and detail required in Austria to make ordinary treaty provisions self-executing do not apply to treaties that have constitutional law status, Austrian courts no longer have any difficulty in fully enforcing the Convention.[27]

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25. *See* CONSTITUCIÓN DE CHILE art. 5 (1989).

26. *See generally* Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT'L L. 427 (1994). *See generally* Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451 (1994).

27. *See generally* Manfred Nowak, *Allgemeine Bemerkungen zur europäischen Menschenrechtskonvention aus völkerrechtlicher und innerstaatlicher Sicht, in* DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION IN DER RECHTSPRECHUNG DER ÖSTERREICHISCHEN HÖCHSTGERICHTE 37, 49-50 (1983). *See also* Buergenthal, *supra* note 4, at 356.

The interesting constitutional developments described above should not be confused with the practice adopted by the United Kingdom when it granted independence to its former colonies during the decolonization of the 1960s. In negotiating their independence, the United Kingdom frequently prevailed on these countries to incorporate into their new constitutions many of the rights proclaimed in the European Convention of Human Rights, which Britain had previously ratified.[28] This laudable practice did not necessarily produce the results that may have been anticipated. The absence of any formal reference to the European Convention in the incorporated provisions transforms the provisions but not the Convention as such into domestic constitutional law and, consequently, does not require the domestic judge to interpret those provisions by reference to the evolving jurisprudence of the European Court of Human Rights.[29]

IV. CONCLUDING REMARKS

As Professor Henkin showed in his recent article, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker,*[30] the United States has now ratified a number of important human rights instruments, but it has done so in such a manner as to prevent American courts from applying these treaties as domestic law. This result is attributable to the declaration that the U.S. Senate now routinely includes in the resolutions in which it gives its consent to the ratification of these treaties. The declaration proclaims all provisions of these treaties that guarantee specific rights to be non-self-executing. Although the declaration does not affect the the United States' legal obligation—the United States under international law must comply with the rights these treaties proclaim—it is intended to prevent individuals in the United States from suing in American courts to enforce them. The declaration has this effect because a non-self-executing treaty does

28. On this subject, see Lloyd Barnett, *The Domestic Appellate Review Process and the Inter-American Convention System: The English-Speaking Caribbean Perspective,* 3 EMORY J. INT'L DISP. RESOL. 25, 26-27 (1988).

29. For an overview of this practice, see Buergenthal, *supra* note 4, at 359-63. For an analysis of an interesting U.K. Privy Council case bearing on this subject, see Buergenthal, *supra* note 24, at 689-95.

30. *See* Henkin, *supra* note 2.

not give rise to a cause of action in the absence of appropriate implementing legislation.[31]

What is most striking about the consequence and no doubt also the intended purpose of this senatorial declaration, as well as some of the other RUDs that now weigh down U.S. ratification of international human rights instruments, is that they prevent U.S. judges from doing what the U.S. Constitution in article III, section 2, empowers them to do when it declares that "the judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Law of the United States, *and Treaties made, or which shall be made,* under their Authority . . . ."[32] Probably no other body of judges in the world has as much experience as the U.S. judiciary in interpreting and applying domestic human rights guarantees comparable to those found in the human rights treaties that the United States has ratified. By barring American judges from performing the same task with regard to these treaties, the U.S. Senate deprives them, to the detriment of Americans and the international community, of the opportunity of enriching the emerging body of international law on the subject. It also prevents American judges from determining whether the rights the U.S. Government has undertaken to guarantee to all human beings within its jurisdiction are in fact being respected. It is sad that just when judges in other parts of the world are increasingly being given this opportunity and when international human rights law is playing an ever more vital role in promoting the rule of law, the U.S. Senate is once again marching to an isolationist drumbeat that raises questions about the seriousness of the U.S. commitment to comply with the obligations the country has assumed by ratifying these instruments.

Apart from the question whether the non-self-executing declaration is constitutional—and it may seriously be doubted that it is, since it limits powers the Constitution grants to the courts[33]—I would argue that in certain cases the declaration need not prevent American judges from giving direct effect to the provisions of some international human rights treaties. The declaration must be read together with the "federalism understanding" the U.S. Senate also insists on attaching to the instru-

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31. For a review of the intended meaning of these RUDs, see David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declaration,* 14 HUM. RTS. L. J. 77 (1993). *See also* THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS 176-98 (2d ed. 1995).

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

33. *See* Henkin, *supra* note 2, at 346-48, who albeit for different reasons also believes the practice to be unconstitutional.

ments of ratification of these treaties. The federalism understanding that the United States appended to its instrument of ratification of the International Covenant on Civil and Political Rights,[34] for example, reads as follows:

> 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 and local governments may take appropriate measures for the fulfillment of the Covenant.[35]

Reading the language of this understanding together with the non-self-executing declaration, I would argue that state courts are free to apply the Covenant directly—that is, to consider its provision to be self-executing—in litigation relating to matters falling within the jurisdiction of the state. This conclusion follows to the extent that, as the understanding provides, it is up to the states to take "appropriate measures for the fulfillment of the Covenant," which means that its institutions, including its courts, must be free to decide what is appropriate. Hence, state courts must be deemed to have the power to decide that the most appropriate measure is to give direct effect to the provisions of the Covenant relied upon by litigants in state court. Of course, these courts would still have to determine whether the relevant provision is self-executing under the traditional tests for making such a finding. Here it is clear that, in the absence of the above declaration, most provisions of the Covenant would be considered to be self-executing under U.S. law.

But whether or not some state courts would accept this argument for cases falling within the jurisdiction of states, it remains true that U.S. declarations making human rights treaties non-self-executing are ill-advised and probably unconstitutional. They should be withdrawn.[36]

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34. International Covenant on Civil and Political Rights, *done* Nov. 4, 1950, 213 U.N.T.S. 221.

35. Reservations, Understandings and Declarations to the International Covenant on Civil and Political Rights, 138 Cong. Rep. S4781 (Apr. 2, 1982).

36. For example, by not permitting the International Covenant on Civil and Political Rights, *supra* note 32, which the U.S. ratified with the non-self-executing declaration, to be directly invoked in U.S. courts and by not ratifying the Optional Protocol to this instrument, the U.S. has deprived all individuals subject to its jurisdiction of the possibility of challenging

The same can be said for some of the other RUDs. It is to be hoped that the time will come when the U.S. Senate recognizes that in attaching such declarations to human rights treaties, the United States is setting a bad example that is neither in the interest of the United States nor of human beings around the world who are struggling to ensure that their governments guarantee them the human rights these treaties proclaim.

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the legality of its actions under the Covenant in any forum, be it national or international. This approach is certainly in conflict with the commitment of the United States to the rule of law and the legal principles implicit in it.