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# U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence

Kristina Ash\*

¶1 Post-September 11, 2001, the United States found itself in a predicament: even though it possessed exceptional global power, the terrorist attacks exposed an extraordinary security vulnerability.<sup>1</sup> In response, the Bush administration instituted “sweeping strategies of domestic security, law enforcement, immigration control, security detention, governmental secrecy. . .[and] forced disarmament of any country that poses a gathering threat.”<sup>2</sup> These policies have restricted individual rights in the United States,<sup>3</sup> and have created international hostility towards Western nations.<sup>4</sup>

¶2 Often, if the United States does not involve itself in issues concerning human rights, “nothing happens, or worse yet, as in Rwanda and Bosnia, disasters occur.”<sup>5</sup> Thus, it is important that the U.S. have a voice in global leadership so that it may prevent these human rights atrocities. The tragedy of current U.S. foreign policy is that by excepting itself from international standards and policies, the US undermines its role in global leadership and activism, and allows grave human rights violations to proliferate.<sup>6</sup>

¶3 The United States must reevaluate its foreign policy. A starting point is the International Covenant on Civil and Political Rights (“ICCPR”).<sup>7</sup> The ICCPR is an early United Nations treaty which “guarantees a broad spectrum of civil and political rights.”<sup>8</sup>

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<sup>1</sup> Harold Hongju Koh, *On American Exceptionalism*, 55 STAN.L.REV 1479, 1497(2003).

<sup>2</sup> *Id.*

<sup>3</sup> See Susan M. Akram & Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295-96 (2002)(stating that “[s]upporters and critics alike saw the federal government as ‘pushing the envelope’ in restricting civil liberties in the name of national security”).

<sup>4</sup> See e.g. Sark Starr & Nicki Gostin, *Anti-Americanism: Will We Be Boomed?*, NEWSWEEK, Feb. 23, 2004, at 14 (discussing the “I’m afraid of Americans” t-shirts worn at Fashion Week in New York, the protests over the American anthem during the Athens Games, and the “hatred of America...so endemic everywhere in Europe”).

<sup>5</sup> Koh, *supra* note 1, at 1488 (citing Richard C. Holbrooke, *To End A War* (1998); Samantha Power, *A Problem from Hell: America and the Age of Genocide* (2002)).

<sup>6</sup> *Id.* at 1487 (naming its “exceptional global leadership and activism” as “the most important respect in which the United States has been genuinely exceptional”).

<sup>7</sup> International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The United States ratified the treaty Sept. 8, 1992 [hereinafter ICCPR].

<sup>8</sup> Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1 (102d Sess. 1992), reprinted in 31 I.L.M. 645 (1992) [hereinafter Senate Comm. Report].

In 1992, the United States ratified the ICCPR, twenty-six years after it was unanimously adopted by the United Nations General Assembly and fifteen years after President Carter signed the covenant.<sup>9</sup> With its ratification, the United States attached “an unprecedented number”<sup>10</sup> of reservations, understandings, and declarations (“RUDs”), specifically five reservations, five understandings, four declarations, and one proviso.

¶4 When it was considering the ratification of the ICCPR, the Senate Committee on Foreign Relations articulated two goals. First, it sought to underscore its commitment to the protection of human rights. Criticizing other countries’ human rights violations while refusing to sign the international treaty has made the United States appear hypocritical in the view of other states.<sup>11</sup> Second, ratification of the treaty would allow the United States to participate in the Human Rights Committee, a committee established in the ICCPR to “monitor compliance.”<sup>12</sup> This would allow the United States to actively participate in the development and enforcement of human rights around the world.

¶5 This article proceeds in three parts: Part I provides a framework with which to evaluate the U.S. reservations to the ICCPR. Part II analyzes the reservations taken by the U.S. to determine whether its goals in ratification are adequately served. Part III offers solutions to maximize U.S. influence on international human rights.

## I. BACKGROUND

¶6 The ICCPR has nearly unanimous support around the world, signaling the universality of its provisions.<sup>13</sup> Even so, many countries have elected to make certain reservations, understandings, and declarations (“RUDs”). None of the countries have made more RUDs than the United States. This section provides the background necessary to examine U.S. participation in the ICCPR, including the ICCPR history, its major provisions, and the U.S. RUDs to the convention.

### A. History

¶7 When the Allied forces discovered the human rights atrocities committed during World War II, they were appalled. Shortly after the United Nations was formed, member states moved to create a Universal Bill of Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political rights.<sup>14</sup> Given its instrumental role

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<sup>9</sup> *Id.* at 2 (President Carter signed the ICCPR Oct. 5, 1977).

<sup>10</sup> William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 BROOKLYN J. INT’L L. 277, 280 (1995).

<sup>11</sup> Senate Comm. Report, *supra* note 8, at 3. (“In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the covenant is conspicuous and, in the view of many, hypocritical”).

<sup>12</sup> *Id.* (“Ratification will enable the United States to participate in the work of the Human Rights Committee established by the Covenant to monitor compliance”).

<sup>13</sup> See Schabas, *supra* note 10, at 277 (stating that 114 states signed the ICCPR before the U.S. became a party).

<sup>14</sup> Michael H. Posner & Peter J. Spiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*. 42 DEPAUL L. REV. 1209, 1211 (1993).

in creating this Universal Bill of Rights, it is no surprise that the three covenants are primarily consistent with the Bill of Rights in the United States Constitution.<sup>15</sup>

¶8 On December 16, 1966, the United Nations General Assembly unanimously adopted the ICCPR.<sup>16</sup> Less than ten years later, the covenant was entered into force;<sup>17</sup> however, the United States was conspicuously missing from the group of countries which had ratified the covenant.

¶9 Congress was considering ratification of the treaties in the 1950s. During that time, state-sponsored segregation was prevalent in the United States.<sup>18</sup> Senator Bricker was concerned because ratification of the treaties would invalidate thousands of laws which discriminated against minorities.<sup>19</sup> He proposed a constitutional amendment that would severely limit the treaty power given in the Constitution, making all international agreements non-executing.<sup>20</sup>

¶10 While the Bricker amendment did not pass, its shadow still looms over U.S. foreign policy. The United States did not become party to any international human rights treaties until 1988 when it ratified the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>21</sup> Moreover, as Professor Taifa notes, the “current U.S. approach of attaching non-self-executing declarations to such covenants and conventions [effectively] accomplishes the original goal sought by Senator Bricker and others - to render international human rights treaties impotent in U.S. law.”<sup>22</sup>

¶11 In 1977, President Carter signed the ICCPR, but according to the Senate Committee Report, “domestic and international events at the end of 1979. . . prevented the Committee from moving to a vote on the Covenant.”<sup>23</sup> In 1991, President H.W. Bush urged the Senate to renew its consideration of the ICCPR.<sup>24</sup> In 1992, after attaching a number of RUDs which rendered the treaty powerless under domestic law, the United States Senate finally voted to ratify the ICCPR, twenty-six years after it was unanimously adopted by the U.N.

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<sup>15</sup> *Id.* (noting that the bills of rights share “freedom of thought, conscience, and religion; freedom of opinion and expression; the right of peaceful assembly; the right to vote; equal protection of the law; the right to liberty and security of the person, including protection against arbitrary arrest or detention; the right to a fair trial, including the presumption of innocence; the right of privacy; freedom of movement, residence, and emigration; freedom from slavery and forced labor; and the general right to protection of life, including protection against the arbitrary deprivation of life”)

<sup>16</sup> Senate Comm. Report, *supra* note 8, at 2.

<sup>17</sup> *Id.* (entered into force March 23, 1976).

<sup>18</sup> Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOW. L.J. 641, 651 (1997).

<sup>19</sup> *Id.* at 652.

<sup>20</sup> *Id.*

<sup>21</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force for the United States Feb. 23, 1989), G.A. Res. 260A, U.N. GAOR, 3d Sess., Supp. No. 1, at 174, U.N. Doc. A/810 (1948); See David P. Stewart, *The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1185 (1993).

<sup>22</sup> Nkechi Taifa, *supra* note 9, 40 How. L.J. at 652.

<sup>23</sup> Senate Comm. Report, *supra* note 8, at 2.

<sup>24</sup> *Id.*

### B. Major Provisions in the ICCPR

¶12 The rights protected in the ICCPR are rights “rooted in basic democratic values and freedoms.”<sup>25</sup> The Covenant seeks to promote “the inherent dignity and . . . equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world.”<sup>26</sup> To further this goal, the Covenant proffers twenty-seven articles which give individuals around the world various civil and political rights “without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>27</sup>

¶13 Among the enumerated rights are self-determination,<sup>28</sup> right to life,<sup>29</sup> right to liberty and security of person,<sup>30</sup> right to compensation for unlawful detention,<sup>31</sup> freedom of thought, conscience, and religion,<sup>32</sup> freedom of opinion,<sup>33</sup> right to peacefully assemble,<sup>34</sup> right to freedom of association,<sup>35</sup> rights of the family,<sup>36</sup> right to participate in the public process<sup>37</sup>, and equal protection under the law.<sup>38</sup>

¶14 The Covenant also prohibits governments from numerous activities including torture or cruel, inhuman or degrading treatment or punishment,<sup>39</sup> slavery or other compulsory labor,<sup>40</sup> propaganda for war,<sup>41</sup> and advocacy of national, racial, or religious hatred.<sup>42</sup>

¶15 In addition, the covenant establishes a Human Rights Committee to oversee compliance of the various articles by the Parties to the covenant. Countries may recognize the committee’s competence to consider complaints made by other parties to the treaty.<sup>43</sup>

### C. United States Reservations to the ICCPR

¶16 Even though U.S. Congressmen “recognize[d] the importance of adhering to internationally recognized standards of human rights,”<sup>44</sup> they nonetheless excepted the United States from several provisions in the treaty by making an unprecedented number of RUDs.

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<sup>25</sup> *Id.* at 1.

<sup>26</sup> ICCPR, *supra* note 7, at Prmb1.

<sup>27</sup> *Id.* at Art. 2(1).

<sup>28</sup> *Id.* at Art. 1.

<sup>29</sup> *Id.* at Art. 6.

<sup>30</sup> *Id.* at Art. 9-11.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at Art. 18.

<sup>33</sup> *Id.* at Art. 19.

<sup>34</sup> *Id.* at Art. 21.

<sup>35</sup> *Id.* at Art. 22.

<sup>36</sup> *Id.* at Art. 23-24.

<sup>37</sup> *Id.* at Art. 25.

<sup>38</sup> *Id.* at Art. 26.

<sup>39</sup> *Id.* at Art. 7.

<sup>40</sup> *Id.* at Art. 8.

<sup>41</sup> *Id.* at Art. 20.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at Art. 41.

<sup>44</sup> Senate Comm. Report, *supra* note 8, at 5.

¶17 The U.S. made reservations to the ICCPR's provisions on prohibition of war propaganda,<sup>45</sup> capital punishment,<sup>46</sup> cruel, inhuman or degrading treatment,<sup>47</sup> criminal penalties,<sup>48</sup> and juveniles.<sup>49</sup> It made understandings concerning the provisions on equal protection,<sup>50</sup> compensation for illegal arrests,<sup>51</sup> separate treatment of the accused from the convicted,<sup>52</sup> and right to counsel,<sup>53</sup> and the extension of the provisions in the treaty to federal states.<sup>54</sup> Finally, it made declarations with regard to the treaty being non-self-executing,<sup>55</sup> the rights that may be taken away during emergencies,<sup>56</sup> the Human Rights Committee,<sup>57</sup> and the savings clause on natural wealth and resources.<sup>58</sup>

¶18 Eleven countries made objections to the U.S. reservations, understandings, and declarations included in its ratification.<sup>59</sup> It is important to note that while each of these countries objected to certain provisions, none of the countries objected to the majority of the U.S. reservations.<sup>60</sup>

¶19 All eleven countries objected to the second U.S. reservation to Article 6 of the ICCPR. Section 2 of Article 6 requires that the "sentence of death may be imposed only for the most serious crimes."<sup>61</sup> Section 5 states that the death penalty "shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."<sup>62</sup> The United States reservation states:

[t]hat the United States reserves the right. . . 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,

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<sup>45</sup> *Id.* at 7. (making a reservation to the prohibition of "propaganda for war and advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence" in Art. 20 of the ICCPR).

<sup>46</sup> *Id.* (making a reservation to the limitation concerning the "circumstances in which capital punishment is imposed" in article 6 of the ICCPR).

<sup>47</sup> *Id.* at 8 (limiting the definition of "cruel, inhuman, or degrading treatment or punishment" in article 7 of the ICCPR).

<sup>48</sup> *Id.* (making a reservation to article 15 of the ICCPR).

<sup>49</sup> *Id.* (making a reservation to article 10 of the ICCPR).

<sup>50</sup> *Id.* at 9 (understanding that legal distinctions made in U.S. law are not inconsistent with article 26 or article 2).

<sup>51</sup> *Id.* at 16-17 (understanding that the right to seek compensation satisfies the provision's right to compensation in article 9(b) and article 14(6)).

<sup>52</sup> *Id.* at 17-18 (understanding that consideration of the person's dangerousness and allows the accused to waive his right is allowed under the "exceptional circumstances" in article 10).

<sup>53</sup> *Id.* at 18-19 (understanding that the right to counsel only attaches in criminal cases and does not afford the defendant the right to choose his counsel).

<sup>54</sup> *Id.* at 19-20 (understanding that given the federal system of government, the federal government will implement the treaty to the extent that it is able and remove any impediments to states to fulfill their obligations under the treaty.)

<sup>55</sup> *Id.* at 20 (declaring that the treaty does not create a private cause of action in the U.S.).

<sup>56</sup> *Id.* at 20-21 (declaring that even in times of emergency, the U.S. will adhere to its Constitution).

<sup>57</sup> *Id.* at 21-22 (declaring that it is the intention of the U.S. to accept the competence of the Human Rights Committee).

<sup>58</sup> *Id.* at 22 (declaring that the right in article 47 must comport with international law).

<sup>59</sup> The objecting countries were Belgium, Denmark, Finland, France, Germany, Italy, The Netherlands, Norway, Portugal, Spain, and Sweden.

<sup>60</sup> ICCPR, Objections, United Nations Treaties Collections (Feb. 5, 2002) *available at* [http://www.unhchr.ch/html/menu3/b/treaty5\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm) [hereinafter ICCPR Objections].

<sup>61</sup> ICCPR, *supra* note 7, at Art. 6 § 2.

<sup>62</sup> *Id.*, Art 6 § 5.

including such punishment for crimes committed by persons below the age of eighteen years of age.<sup>63</sup>

¶20 Countries objected to the U.S. reservation because it allegedly went against the object and purpose of the treaty. Article 4 of the ICCPR allows for derogation from the covenant during times of national emergency.<sup>64</sup> However, Article 4 Section 2 prohibits States from derogating from essential articles in the Covenant.<sup>65</sup> These articles include the right to life,<sup>66</sup> the right to be free of torture<sup>67</sup> and slavery<sup>68</sup>, right to be free of imprisonment for breach of contractual obligations<sup>69</sup>, right to be free of *ex post facto* laws,<sup>70</sup> right to be recognized as a person before the law,<sup>71</sup> and freedom of thought, conscience, and religion.<sup>72</sup> Arguably, the most essential of these articles is the right to life. By reserving the right to sentence persons under the age of eighteen to death, the United States contravened a major object and purpose of the treaty.

¶21 Nine of the eleven countries also objected to the third U.S. reservation regarding article 7 of the ICCPR.<sup>73</sup> Article 7 states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”<sup>74</sup> The U.S. reservation states that Article 7 will only apply “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.”<sup>75</sup>

¶22 States objected to this reservation on a variety of grounds. First, some objected for the same reason that they objected to the reservation to article 6, namely that the reservation is an essential article in the covenant and thus contravenes the object and purpose of the treaty.<sup>76</sup> Like the previous reservation to the right to life, the right to be free of torture is an essential civil and political right that cannot be modified even in times of national emergency. Second, States objected on the basis that a country cannot

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<sup>63</sup> ICCPR, Declarations and Reservations, *available at* [http://www.unhcr.ch/html/menu/b/treaty5\\_asp.htm](http://www.unhcr.ch/html/menu/b/treaty5_asp.htm) (February 5, 2002) [hereinafter ICCPR Reservations].

<sup>64</sup> ICCPR, *supra* note 7, Art. 4 §1 (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”).

<sup>65</sup> *Id.* at Art 4 §2. (“No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision”).

<sup>66</sup> *Id.* at Art. 6.

<sup>67</sup> *Id.* at Art 7.

<sup>68</sup> *Id.* at Art 8.

<sup>69</sup> *Id.* at Art 11.

<sup>70</sup> *Id.* at Art 15.

<sup>71</sup> *Id.* at Art 16.

<sup>72</sup> *Id.* at Art 18.

<sup>73</sup> The nine countries are Denmark, Finland, Germany, Italy, The Netherlands, Norway, Portugal, Spain, and Sweden.

<sup>74</sup> *Id.* at Art 7.

<sup>75</sup> ICCPR Reservations, *supra* note 63.

<sup>76</sup> *Id.* (Denmark, Norway, and Spain gave this reason for their objection).

site domestic law as a reason not to fulfill its obligations under a treaty.<sup>77</sup> Third, a couple of States interpreted the U.S. reservation “as a reference to article 2 of the Covenant, thus not in any way affecting the obligations of the United States.”<sup>78</sup>

¶23 Finland and Sweden also objected to the U.S.’ first understanding to the ICCPR, considering it to be a reservation in substance. That understanding is as follows:

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 government 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, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.<sup>79</sup>

¶24 Like the third reservation, this “understanding” relies on domestic law to alter the U.S.’ responsibilities under the ICCPR. Moreover, the “rational basis” standard carries an extremely low burden for the state, so it likely does not meet the standard defined by the ICCPR.

¶25 In order to analyze the various RUDs, the U.S. must consider these objections as well as the implications of all RUDs. To do this, the U.S. should categorize each of the RUDs, and decide whether they are necessary in light of U.S. goals in signing the ICCPR.

## II. ANALYSIS

¶26 The Senate Committee on Foreign Relations issued in 1992 a report on the ICCPR, urging Congress to ratify the treaty and naming two goals: (1) to “remove doubts about the seriousness of the U.S. commitment to human rights”; and (2) to “strengthen the impact of U.S. efforts in the human rights field.”<sup>80</sup> However, in the same report, the committee recommended a substantial number of RUDs.<sup>81</sup> While U.S. RUDs in and of themselves do not necessarily undermine the first goal expressed by the committee, the excessive number of RUDs submitted by the U.S. could easily raise doubts as to U.S. commitment to the international human rights standards embodied in the ICCPR. Indeed, eleven countries issued objections, mainly on the grounds that the RUDs went against the

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<sup>77</sup> Finland and Portugal.

<sup>78</sup> ICCPR Objections, Objections taken by Germany. *See also* Objections taken by Italy.

<sup>79</sup> ICCPR Reservations, *supra* note 63.

<sup>80</sup> Senate Comm. Report, *supra* note 8, at 3.

<sup>81</sup> *Id.* at 7-11 (suggesting five ICCPR Reservations, five understandings, and four declarations).

object and purpose of the treaty.<sup>82</sup> In objecting to the U.S. reservation to article seven, Portugal explicitly stated its skepticism of U.S. commitment to the covenant.<sup>83</sup>

¶27 This is not to say that all reservations are intolerable.<sup>84</sup> In fact, of the considerable quantity of RUDs taken by the United States, countries only made objections to three of the U.S. reservations and one of the understandings.<sup>85</sup> Therefore, in order to achieve the goals set forth in the Senate Committee Report, it is not necessary for the U.S. to eliminate all of its RUDs. Instead, the U.S. need merely reexamine its RUDs and determine whether they undermine U.S. goals.

¶28 In his article on American exceptionalism, Professor Koh described the world's perception of the United States as "pushy, preachy, insensitive, self-righteous, and usually, anti-French."<sup>86</sup> Professor Koh attributes this image to four types of American exceptionalism: distinctive rights, different labels, the "flying buttress" mentality, and double standards.<sup>87</sup> Under this theory, it is the double standards that are the most dangerous and destructive to Americans.<sup>88</sup> By using this system of categorization, one can evaluate U.S. RUDs to the ICCPR and determine which of those RUDs the U.S. should withdraw.

#### A. *Distinctive Rights*

¶29 Distinctive rights refer to those rights that have become more celebrated and protected as a result of American policies and values which developed through America's unique culture and history.<sup>89</sup> Examples of these rights are nondiscrimination based on race or protections of speech and religion.<sup>90</sup> RUDs falling into this category should not give cause for concern because even under European Union law, these differences between nations are allowed.<sup>91</sup>

¶30 The United States made a reservation to Article 20 of the treaty,<sup>92</sup> which bans propaganda for war as well as "national, racial or religious hatred that constitutes

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<sup>82</sup> See ICCPR Reservations, *supra* note 63; ICCPR Objections, *supra* note 60 (the eleven countries were Belgium, Denmark, Finland, France, Germany, Italy, The Netherlands, Norway, Portugal, Spain, and Sweden).

<sup>83</sup> *Id.*, at Portugal (October 5, 1993) ("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." (emphasis added)).

<sup>84</sup> Koh, *supra* note 1, at 1484 ("not all the ways in which the United States exempts itself from global treaty obligations are equally problematic").

<sup>85</sup> ICCPR Objections, *supra* note 60 (Eleven States objected to the second U.S. reservation; nine objected to the third reservation; one objected to the fourth reservation, and two objected to the first understanding).

<sup>86</sup> Koh, *supra* note 2, at 1480.

<sup>87</sup> *Id.* at 1483.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (citing that "the U.S. First Amendment is far more protective than other countries' laws of hate speech, libel, commercial speech, and publication of national security information" (citations omitted)).

<sup>91</sup> *Id.* ("judicial doctrine of 'margin of appreciation,' familiar in European Union law, permits sufficient national variance as to promote tolerance of some measure of this kind of rights distinctiveness"); See also Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843 ("each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions").

<sup>92</sup> 138 CONG. REC. S4781, S4783 (1992).

incitement to discrimination, hostility or violence.”<sup>93</sup> Concerned that this provision would violate freedom of speech protected by the First Amendment, the Senate adopted a reservation “[t]hat Article 20 does not . . . restrict the right of free speech and association protected by the Constitution and laws of the United States.”<sup>94</sup> Where U.S. duties under a treaty conflict with rights protected in the U.S. Constitution, rights in the Constitution must prevail.<sup>95</sup> This provision protects a distinctive right (free speech) and has been given more protection in the United States than in some other countries.<sup>96</sup>

¶31 In accordance with Koh’s theory, making a reservation to Article 20 did not detract from the United States’ commitment to promoting human rights standards. First, Article 20 features two competing rights, both of which are represented in the treaty. Even though the human rights commission did not believe that the two rights need necessarily conflict, by clarifying its commitments under the ICCPR, the U.S. was able to protect its sovereignty without risking violating the article and thus undermining its commitments to human rights standards.<sup>97</sup> Second, many established democracies took exceptions to this article, including Belgium, Denmark, Finland, France,<sup>98</sup> Ireland, the Netherlands, Sweden, and the United Kingdom,<sup>98</sup> so the U.S. is not contravening an internationally established practice.

¶32 The United States also made a declaration regarding Article 19 of the treaty.<sup>99</sup> Article 19 protects freedom of expression subject to certain restrictions regarding “respect of the rights or reputations of others [and] the protection of national security or of public order . . . public health or morals.”<sup>100</sup> The declaration states that the United States would “whenever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions are permissible under the Covenant.”<sup>101</sup> For this reason, the U.S. declared that it would continue to grant the more expansive protection of free speech under the U.S. Constitution.<sup>102</sup> This is essentially protecting the same distinctive right as the reservation regarding free speech.

¶33 A second U.S. reservation that falls under this category is the reservation to the ICCPR provision which holds that “[i]f, subsequent to the commission of the [criminal] offence, provision is made by law for the imposition of a lighter penalty, the offender

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<sup>93</sup> ICCPR, *supra* note 7, Art. 20.

<sup>94</sup> 138 CONG. REC. at S4783.

<sup>95</sup> *Reid v. Covert*, 354 U.S. 1, 16-17 (1957)(stating “[i]t would be manifestly contrary to the objectives of those who created the Constitution. . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions”).

<sup>96</sup> See e.g. Thomas Lundmark, *Free Speech Meets Free Enterprise in the United States and Germany*, 11 IND. INTL & COMP. L. REV. 289, 300 (2001) (comparing the more expansive protection of speech in the United States to Germany’s test which balances “the rights of the speaker . . . against those of the person being injured by his speech”); Tammy Joe Evans, Comment, *Fair Trial vs. Free Speech: Canadian Publication Bans versus the United States Media*, 2 SW. J. OF L. & TRADE AM. 203, 203 (1995) (stating that publication bans frequently used in Canada to ensure a fair trial would be unconstitutional in the United States).

<sup>97</sup> ICCPR, *supra* note 7, gen. cmt. 11, 19th Session, July 7, 1983, available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+11.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+11.En?OpenDocument).

<sup>98</sup> ICCPR Reservations, *supra* note 63.

<sup>99</sup> Senate Comm. Report, *supra* note 8, at 20-21.

<sup>100</sup> ICCPR, *supra* note 7, art. 19(3).

<sup>101</sup> Senate Report, *supra* note 8, at 20-21.

<sup>102</sup> *Id.*

shall benefit thereby.”<sup>103</sup> Given that one of the goals of the criminal justice system is to deter crimes, the Senate believed that the sentence that was in place at the time the offense was committed should be imposed.<sup>104</sup> No objections were raised to this reservation.<sup>105</sup> Moreover, Germany also made a similar reservation.<sup>106</sup>

### B. Different Labels

¶34 Different labels refers to “America’s tendency to use different labels to describe synonymous concepts.”<sup>107</sup> “Refusing to accept the internationally accepted human rights standard as the American legal term . . . reflects a quirky, nonintegrationist feature of our cultural distinctiveness.”<sup>108</sup> RUDs falling under the “different labels” category include the U.S. reservation regarding torture and the U.S. understandings regarding compensation for unlawful arrests and the right to counsel.

¶35 The reservation regarding torture states that the U.S. only “considers itself bound by Article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means ‘cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendment.’”<sup>109</sup> Essentially, this reservation uses a different label for the same prohibited treatment. What is troubling about this reservation is that it allows some internationally questioned government practices, such as execution by asphyxiation in the gas chamber.<sup>110</sup> However, because the ICCPR does not ban the death penalty and because European Courts have indicated their willingness to expand the meaning of “cruel, inhuman or degrading treatment or punishment” to include the death penalty, it is understandable that the U.S. would make this reservation to protect itself from the evolving definition and allow changes to come about through legislation.<sup>111</sup>

¶36 Articles 9(5) and 14(6) of the ICCPR provide for compensating victims of unlawful arrest or detention.<sup>112</sup> The U.S. Senate Committee expressed concern that “it [was] possible that in some . . . situations a victim of unlawful arrest or detention might not in fact be able to recover compensation, notwithstanding the variety of compensatory schemes which have been adopted.”<sup>113</sup> The United States offered its citizens the same rights sought to be protected in the ICCPR, thus they were generally in compliance with the provision.

¶37 The U.S. also made an understanding regarding the right to counsel, because although the U.S. government did guaranteed its citizens the right to counsel, this right did not “entitle a defendant to counsel of his own choice when he [was] either indigent or

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<sup>103</sup> ICCPR, *supra* note 7, at art 15(1).

<sup>104</sup> Senate Report, *supra* note 8, at 14.

<sup>105</sup> ICCPR Objections, *supra* note 60.

<sup>106</sup> ICCPR Reservations, *supra* note 63, at Germany (providing that a greater sentence may be applicable in certain cases).

<sup>107</sup> Koh, *supra* note 1, at 1483.

<sup>108</sup> *Id.* at 1484 (comparing the use of these terms to American’s refusal to use the metric system).

<sup>109</sup> Senate Comm. Report, *supra* note 8, at 14.

<sup>110</sup> Schabas, *supra* note 10, at 278 (1995) (citing the practice in California).

<sup>111</sup> *See* Stewart, *supra* note 21, at 1193-94.

<sup>112</sup> ICCPR, *supra* note 7, at art. 9(5) (“Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”); ICCPR at art. 14(6) (providing for compensation when a guilty verdict has been reversed or the person has been pardoned because of a miscarriage of justice).

<sup>113</sup> Senate Comm. Report, *supra* note 8, at 16-17.

financially able to retain counsel in some other form.”<sup>114</sup> Additionally, criminal defendants couldn’t compel unnecessary witnesses to his defense.<sup>115</sup> These rights are protected in the United States, however, concern over American legal definitions compelled the Senate Committee to include clarifications of the definitions in the form of understandings.

### C. The “Flying Buttress” Mentality

¶38 The “flying buttress” mentality refers to the American policy of supporting rights, but not officially subjecting itself to the international standard, similar to the architectural device which upholds a structure from the outside.<sup>116</sup> The purpose is to comply while still seeming to maintain uninhibited sovereignty.<sup>117</sup> Unfortunately, the practical result of this policy is that the United States is alone with rogue states that do not officially support the various human rights. RUDs which exemplify a “flying buttress” mentality are the reservation regarding the treatment of juveniles and the understanding regarding the separate treatment of the accused.

¶39 The U.S. made a reservation to Articles 10(2)(b) and (3) regarding the treatment of juveniles.<sup>118</sup> The reservation acknowledged that “[t]he 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.”<sup>119</sup> However, the U.S. insisted upon a reservation which would allow it freedom during exceptional circumstances and where the juvenile has volunteered in the military prior to his or her eighteenth birthday.<sup>120</sup> Essentially, this reservation wholly supports the right protected in the covenant while still purporting to maintain freedom to deviate from that standard. Similarly, the U.S. understanding regarding separate treatment of the accused basically adheres to the standard set forth in the covenant while allowing deviation in “exceptional circumstances.”<sup>121</sup>

¶40 While this “flying buttress” mentality is not necessarily problematic, it is unnecessary. If the circumstances under which the U.S. deviates from the provisions in the ICCPR are truly exceptional, the U.S. should be able and willing to defend its departure. Therefore, these RUDs are unnecessary and give the appearance of diminishing U.S. commitment to the ICCPR.

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<sup>114</sup> *Id.* at 18.

<sup>115</sup> *Id.*

<sup>116</sup> Koh, *supra* note 1, at 1484-85.

<sup>117</sup> *Id.*

<sup>118</sup> ICCPR, *supra* note 7, art. 10(2)(b) (“Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication”); art 10(3) (“The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status”).

<sup>119</sup> Senate Comm. Report, *supra* note 8, at 15.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 17-18.

#### D. Double Standards

¶41 While the other forms of American exceptionalism are caused by American culture and differences in terms, this policy of double standards actually applies different rules to Americans as to the rest of the world.<sup>122</sup> This creates problems because by excepting itself from international norms, the U.S. is often accompanied by notorious human rights violators such as Iran, Nigeria, and Saudi Arabia.<sup>123</sup> The American practice also “sharply weakens America's claim to lead globally through moral authority” which erodes at the U.S'. “soft power.”<sup>124</sup> Finally, because of the U.S'. unique position of power, excepting itself to international rules actually weakens the rules, which prevent the U.S. from using them against other countries in the future.<sup>125</sup>

¶42 Examples of RUDs which exemplify these double standards are the reservation regarding capital punishment of juveniles, the reservation regarding torture and punishment, and the understanding regarding non-discrimination. It is these provisions which the U.S. must remove in order to comport with the international standards and achieve its goal of removing doubts about the U.S. commitment to human rights.

¶43 First, the U.S. reserved the right “to impose capital punishment . . . for crimes committed by persons below eighteen years of age.”<sup>126</sup> The U.S. goal of promoting human rights standards is seriously undermined with this reservation. Since 2000, the Democratic Republic of Congo (DRC), Iran, Pakistan, and the United States are the only countries known to have executed juveniles.<sup>127</sup> Moreover, the majority of U.S. states do not allow the execution of minors.<sup>128</sup>

¶44 Article 4 of the ICCPR states that “[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made.”<sup>129</sup> If states may not derogate from this provision even in times of national emergency, it follows that those provisions are central to the object and purpose of the treaty. By making a reservation to Article 6, the United States' credibility is severely undermined, thus thwarting its primary goal in signing the treaty.

¶45 Second, the U.S. stated that it understood that distinctions based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status . . . to be permitted [when] such distinctions are, at minimum, rationally related to a legitimate government objective.”<sup>130</sup> Such an understanding is in effect a reservation because it changes the law for the United States.<sup>131</sup> As such, the United States, like Saudi Arabia and other Middle Eastern countries, to make discriminatory

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<sup>122</sup> Koh, *supra* note 1, at 1485-86.

<sup>123</sup> *Id.* at 1486-87.

<sup>124</sup> *Id.* at 1487.

<sup>125</sup> *Id.*

<sup>126</sup> Senate Comm. Report, *supra* note 8, at 13.

<sup>127</sup> *Death Penalty Facts*, Amnesty Int'l USA, at <http://www.amnestyusa.org/abolish/juveniles.html> (November 21, 2003) (noting that only four countries have executed juveniles since 2000; Pakistan has recently abolished the juvenile death penalty, and DRC has imposed a moratorium on it).

<sup>128</sup> Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard – Explanation, Example, and Avenues for Change*, 4 N.Y. City L. Rev. 59, 79-80 (2001) (noting that “[s]eventeen states . . . permit the execution of sixteen-year-olds, and another five states allow seventeen-year-olds to be put to death”).

<sup>129</sup> ICCPR, *supra* note 7, Art. 4 § 2.

<sup>130</sup> Senate Comm. Report, *supra* note 8, at 16.

<sup>131</sup> See ICCPR Objections, *supra* note 60, at Finland and Sweden.

laws against women. Thus, the international rule against gender discrimination is severely weakened.

### III. CONCLUSION

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In order to achieve its goals of removing doubts as to U.S. commitment to international human rights and of influencing the world community, the U.S. must make three changes: (1) the U.S. should withdraw its first reservation concerning the juvenile death penalty; (2) it should withdraw its first understanding concerning discrimination; and (3) the U.S. should modify its domestic laws in order to conform with the international standard. The U.S. should also consider withdrawing those RUDs which merely assert different labels or purport to exclude compliance during times of emergency. However, the U.S. should not be afraid to keep those RUDs which are distinctive rights, especially those which are also recognized under European law.