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# ARTICLES

## INVALID RESERVATIONS TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: IS THE UNITED STATES STILL A PARTY?

*by William A. Schabas\**

### I. INTRODUCTION

On June 8, 1992, the United States deposited its instrument of accession to the International Covenant on Civil and Political Rights (Covenant).<sup>1</sup> The Covenant came into force for the United States three months later, when it became the one hundred and fifteenth state party to a treaty which constitutes the cornerstone of modern international human rights law. The United States accompanied its accession with several reservations and interpretative declarations, two of which seek to exclude from the Covenant's scope<sup>2</sup> current practices relating to the death penalty. Eleven European states parties to the Covenant filed objections condemning these reservations as invalid.<sup>3</sup> Although the United States has not recognized the individual petition mechanism set out in the Optional Protocol to the Covenant,<sup>4</sup> it is bound, under article 40, to submit peri-

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1. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

2. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS OF DEC. 31, 1994, at 117, 118, U.N. Doc. ST/LEG/SER.E/13, U.N. Sales No. E.95.V.II (1995) [hereinafter MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994].

3. *Id.* at 123.

4. Optional Protocol to the International Covenant on Civil and Political

odic reports on its compliance to the Human Rights Committee (Committee).<sup>5</sup> When the first of these reports was examined by the Committee, in March and April 1995, it affirmed that at least some elements of the reservations dealing with the death penalty are "incompatible with the object and purpose of the Covenant," and, consequently, these reservations are invalid.<sup>6</sup>

In its statement on the reservations, the Committee did not discuss the consequences of such a conclusion, although this issue is of considerable legal significance. If the invalid reservations can be severed or separated from the U.S. accession to the treaty, then the United States remains bound by the Covenant, including its provisions dealing with the death penalty. Therefore, the United States would be in breach of its international obligations. Article 6, paragraph 5 of the Covenant prohibits executions of individuals for crimes committed while they were under the age of eighteen.<sup>7</sup> However, state governments have carried out such executions on several occasions since September 1992, when the Covenant came into force for the United States. Furthermore, the United States would also be in violation of article 7, which prohibits, according to the Committee, execution by asphyxiation in the gas chamber, as practiced in California.<sup>8</sup>

Alternatively, if the invalid reservations cannot be separated from the U.S. accession, then the United States is not a party to the instrument. This result would be a terrible blow to the protection of human rights within the United States as well as a setback to the universal system of human rights of which the Covenant is the centerpiece. It would also call into question the validity of recent elections to the Committee, in which the United States participated as a state party.<sup>9</sup> In par-

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Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter *Optional Protocol*].

5. International Covenant on Civil and Political Rights, *supra* note 1, art. 41, 999 U.N.T.S. at 181.

6. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee*, 53d Sess., 1413th mtg. ¶ 14, at 4, U.N. Doc. CCPR/C/79/Add.50 (1995) [hereinafter *Consideration of Reports*].

7. International Covenant on Civil and Political Rights, *supra* note 1, art. 6, ¶ 5, 999 U.N.T.S. at 175.

8. *Views of the Human Rights Committee: Communication No. 469/1991, Ng v. Canada*, 49th Sess., Annex, at 21, U.N. Doc. CCPR/C/49/D/469/1991 (1993) [hereinafter *Communication No. 469/1991*].

9. International Covenant on Civil and Political Rights, *supra* note 1, art. 30,

ticular, the position of Thomas Buergenthal, who was recently elected to the Committee after being nominated by the United States, would be in doubt.<sup>10</sup>

The belated ratification of the Covenant by the United States completed a process begun forty-five years earlier by Eleanor Roosevelt, who chaired the early sessions of the United Nations Commission on Human Rights (Commission) as it prepared the initial drafts of the instrument.<sup>11</sup> Following election of a Republican administration in 1952, Roosevelt was replaced on the Commission, and the new representatives announced that the United States no longer had any intention of ratifying the instrument.<sup>12</sup> Until their conclusion in 1966, the United States continued to attend the debates concerning the drafting of the Covenant in the Commission and in the Third Committee of the General Assembly. Nevertheless, it did not play an active part and abstained from voting.<sup>13</sup> In February 1978, President Jimmy Carter submitted the Covenant to the Senate for its advice and consent, in accordance with the U.S. Constitution.<sup>14</sup> However, the matter was not further pursued under the Reagan administration.<sup>15</sup> Finally, in late 1991, President Bush resubmitted the treaty to the Senate, accompa-

¶ 4, 999 U.N.T.S. at 180.

10. Members of the Committee must be nominated by states parties. *Id.* art. 29. Moreover, they must be nationals of a state party. *Id.* art. 29, ¶ 2.

11. Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in *THE INTERNATIONAL BILL OF RIGHTS* at 32, 33, 39 (Louis Henkin ed., 1981).

12. *Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st Sess. 825 (1953) (statement of John Foster Dulles, Secretary of State).

13. See David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 40 (1978).

14. U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? 85-87 app. (Richard B. Lillich ed., 1981) (President's Message to the Senate Transmitting Four Treaties Pertaining to Human Rights); Weissbrodt, *supra* note 13, at 36.

15. The Reagan administration did, however, proceed with ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, something that had been proposed by U.S. presidents since Truman. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 278 (entered into force Jan. 12, 1951) [hereinafter *Genocide Convention*]; see Nicholas F. Kourtis & Joseph M. Titlebaum, U.S. Foreign Policy, *International Convention on the Prevention and Punishment of the Crime of Genocide: United States Senate Grant of Advice and Consent to Ratification*, 1 HARV. HUM. RTS. Y.B. 227, 232-233 (1988); Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90, 99 (1989).

nied by the controversial reservations, and ratification was authorized early in 1992.<sup>16</sup>

The U.S. government associated its acceptance of the Covenant with no less than five reservations, four interpretative declarations and five "understandings"—an unprecedented number.<sup>17</sup> Some of these reservations, declarations and understandings echo similar statements made by other states parties at the time of their ratification or accession, and are not particularly controversial.<sup>18</sup> The same cannot be said of the reservations to articles 6 and 7, which concern the death penalty.

Article 6 of the Covenant reads as follows:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes commit-

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16. For the Report of the Committee on Foreign Relations recommending accession to the Covenant, see SENATE COMM. ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. 10, 21 (1992) [hereinafter FOREIGN RELATIONS REPORT].

17. See MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 125-26.

18. They include reservations to article 20 (prohibition of hate propaganda), article 15 ¶ 1 (right to the lesser punishment where it has been reduced since commission of the crime), and to articles 10 ¶ 2(b), 10 ¶ 3, and 14 ¶ 4 (with respect to detention of juveniles). See MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2.

ted by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.<sup>19</sup>

The U.S. reservation to article 6 states:

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 eighteen years of age.<sup>20</sup>

Article 7 reads as follows:

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>21</sup>

The U.S. reservation to article 7 states:

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 punish-

19. International Covenant on Civil and Political Rights, *supra* note 1, art. 6, ¶¶ 1-6, 999 U.N.T.S. at 175.

20. MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 126. For additional discussion on the reservations, see M. Christian Green, *The 'Matrioshka' Strategy: US Evasion of the Spirit of the International Covenant on Civil and Political Rights*, 10 S. AFR. J. HUM. RTS. 357 (1994); Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311 (1993); John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993); Edward F. Sherman, Note, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formulation*, 29 TEX. INT'L L.J. 69 (1994); David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77, 82 (1993).

21. International Covenant on Civil and Political Rights, *supra* note 1, art. 7, at 175.

ment prohibited by the Fifth, Eighth or Fourteenth Amendments to the Constitution of the United States.<sup>22</sup>

The reservation to article 6 does not merely contemplate the execution of juvenile offenders, as has sometimes been suggested.<sup>23</sup> The specific and otherwise superfluous mention that the United States reserves the right to impose the death penalty in situations "including" crimes committed by offenders under the age of eighteen makes the intention to do so quite clear. Furthermore, the intention to give a broad scope to the reservation is also evidenced in the explanation submitted by the Bush administration to the Senate. It notes in particular "the sharply differing view taken by many of our future treaty partners on the issue of the death penalty (including what constitutes 'serious crimes' under article 6(2))."<sup>24</sup> This explanation leaves no doubt that the reservation looks far beyond the question of juvenile executions and intends to exclude the United States from virtually all international norms respecting the death penalty. Unquestionably, the reservation to article 7 is intended to avoid the precedent established by the European Court of Human Rights in the case of *Soering v. United Kingdom*,<sup>25</sup> as the comments submitted by President Bush to Congress make abundantly clear.<sup>26</sup> The U.S. administration has imposed a similar condition, known as "the Soering understanding,"<sup>27</sup> to its ratification of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or

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22. MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 126.

23. See, e.g., Stewart, *supra* note 20, at 82. The reservation was presented in this fashion to the Committee by the United States representative, on March 29, 1995. See also Human Rights Committee Begins Considering Initial Report of United States, Hum. Rts. Comm., 53d Sess., 1401st mtg., U.N. Doc. HR/CT/400 (Mar. 29, 1995), available in >gopher://gopher.undp.org:70/100/uncurr/press\_releases/HR/CT/95\_03/400; Maria N. Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 589, 591 (1995) (U.S. Presentation Before the Human Rights Committee (1995)).

24. FOREIGN RELATIONS REPORT, *supra* note 16, at 11.

25. 161 Eur. Ct. H.R. (ser. A) (1989). The Judicial Committee of the Privy Council has reached a similar conclusion. See *Pratt v. Attorney Gen.*, 4 All. E.R. 769 (P.C. 1993) (appeal taken from Jamaica), cited in 14 HUM. RTS. L.J. 338 (1993); see also Catholic Comm'n for Justice and Peace in Zimb. v. Attorney Gen., Judgment No. S.C. 73/93 (June 24, 1993), cited in 14 HUM. RTS. L.J. 323 (1993).

26. FOREIGN RELATIONS REPORT, *supra* note 16, at 12.

27. Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128, 148 (1991).

Punishment (Torture Convention).<sup>28</sup>

It is a common practice in the making of reservations to give specific references to the domestic legislation that the state party intends to shelter from the treaty.<sup>29</sup> This practice gives great precision to a reservation, and helps other states parties to establish their own positions with respect to the reservation, in full knowledge of its implications.<sup>30</sup> The United States chose not to follow this route and, consequently, the legality of its reservation must be assessed with reference to the worst possible hypotheses. For example, in excluding only pregnant women from the death penalty, the United States leaves open the possibility of execution of very young children,<sup>31</sup> the insane, or the severely mentally handicapped.<sup>32</sup>

28. *Reports of the Secretary-General*, G.A. Res. 39/46, U.N. GAOR 3d Comm., 39th Sess., 93d plen. mtg., Annex, Agenda Item 99, at 1665, U.N. Doc. A/39/PV.93 (1985); 22 UNITED NATIONS RESOLUTIONS 395-99 (Dusan J. Djonovich ed., 1988); see also *Torture Convention Adopted After Seven Years' Work*, 22 UN CHRON. 31 (1985); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1994) (entered into force June 26, 1987). The United States ratified the Torture Convention on October 21, 1994. MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 177, 179; see also Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

29. In some cases, the state making the reservation to the treaty is required to give specific references to domestic legislation. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 64, 213 U.N.T.S. 221, 252 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights]. On reservations to the European Convention on Human Rights, see Jochen Abr. Frowein, *Reservations to the European Convention on Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 193 (Franz Matscher & Herbert Petzold eds., 1988); S. Marcus-Helmons, *L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme*, 45 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ [R.D. INT'L & D. COMP.] 7 (1968); William A. Schabas, *Article 64*, in LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: COMMENTAIRE ARTICLE PAR ARTICLE 923 (L.E. Pettiti et al. eds., 1995).

30. On the unacceptability of vague or imprecise reservations, see *Temeltasch v. Switzerland*, App. No. 9116/80, 31 Eur. Comm'n H.R. Dec. & Rep. 138, 145-49 (1983); see also Pierre-Henri Imbert, *Les réserves à la Convention européenne des droits de l'homme devant la Commission de Strasbourg (Affaire Temeltasch)*, 1983 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [REV. GÉN. D. INT'L PUB.] 580, translated in 33 INT'L. & COMP. L.Q. 558 (1984).

31. Several states have no restriction on execution of children. Others set minimum ages going as low as twelve. The age limit for executions according to the Constitution is still unclear. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

32. See William A. Schabas, *International Norms on Execution of the Insane and the Mentally Retarded*, 4 CRIM. L.F. 95 (1993).



By reserving the norm requiring that the death penalty be imposed for only the "most serious crimes," even in the future, the United States allows for capital punishment for crimes without violence, crimes against morality, or political crimes. In making a reservation to the "arbitrary" use of the death penalty, the United States permits imposition of death sentences in the absence of stringent procedural safeguards, going as far as the suspension of the presumption of innocence.<sup>33</sup> The method of execution is also excluded from the scope of the Covenant by the reservation to article 7. Consequently, the reservation would allow the United States to impose unquestionably inhuman punishments, such as stoning or public beheading, without running afoul of its obligations under the Covenant.

It is an insufficient answer to cite the reference to the U.S. Constitution in the reservations to articles 6 and 7, and argue that domestic law provides incomparable protection. Even if the U.S. Constitution now offers satisfactory guarantees in death row cases, its interpretation may vary over time and, furthermore, it is subject to amendment. Article 27 of the Vienna Convention on the Law of Treaties states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>34</sup> Reservations to human rights treaties that make general allusions to domestic law have frequently been criticized for vagueness and have often provoked formal objections.<sup>35</sup>

33. At the very least, in a time of national emergency, the fair trial provisions could be suspended pursuant to article 4 of the Covenant. Although procedural safeguards in the United States are, at present, fairly comprehensive, there is still room for improvement. For example, the United States Supreme Court refused to intervene in a case where a man sentenced to death had found considerable evidence demonstrating his innocence. *Herrera v. Collins*, 113 S. Ct. 853 (1993). International human rights bodies might well side with Justice Blackmun's dissent in which he stated that the reasoning of the majority had come "perilously close to simple murder." *Id.*

34. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 339 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

35. The United States accompanied its ratification of the Genocide Convention, *supra* note 15, with a similar reference to the United States Constitution. Kourtis & Titlebaum, *supra* note 15, at 230-31. Objections to this reservation were filed by Denmark, Estonia, Finland, Germany, Greece, Ireland, Italy, the Netherlands, Mexico, Norway, the United Kingdom, Spain and Sweden. MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 87-89. The objections cited the uncertainty of such reservations, and in some cases referred to art. 27 of the Vienna

In its comments on the initial report by the United States concerning compliance with the Covenant, issued April 6, 1995, the Committee declared the reservations to article 6, paragraph 5 (although not to article 6 as a whole) and article 7 to be invalid.<sup>36</sup> In accordance with Committee practice, the comments were adopted by consensus with no further explanation or justification for such a conclusion. Some guidance as to the Committee's views may, however, be found in the individual comments of Committee members made during the presentation of the initial report.<sup>37</sup> This article attempts to explain the Committee's position and to examine the legality of the U.S. reservations to the death penalty provisions of the Covenant in the light of the comments by Committee members, the objections formulated by other states parties, and general sources of public international law. The examination of the reservations' legality is followed by a discussion of the Committee's competence to make such conclusions and of the consequences of a finding of illegality with respect to the rights and obligations of a contracting state.

## II. THE LEGALITY OF RESERVATIONS TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A determination of the legality of the U.S. reservations first involves a finding as to the admissibility and permissible scope of reservations in general. Some jurists have argued that reservations to substantive provisions are excluded by the very nature of human rights conventions, although the prevailing view appears to be that reservations are permitted, even to non-derogable provisions, provided they do not deprive the pro-

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Convention on the Law of Treaties. *Id.*; see also Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 13, 22 (Article 24 provides that "[s]tates parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention."); Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L. L. 281, 310-12 (1991).

36. *Consideration of Reports*, *supra* note 6.

37. *Human Rights Committee Concludes Consideration of Initial Report of United States*, Hum. Rts. Comm., 53d Sess., 1406th mtg., U.N. Doc. HR/CT/405 (1995), available in <gopher://gopher.undp.org:70/00/uncurr/press\_releases/HR/CT/95\_03/405, [hereinafter *Hum. Rts. Comm. Concludes Consideration of U.S. Initial Report*].

vision in question of its basic purpose. An examination of this issue requires a study of the *travaux préparatoires* as well as other sources. In this respect, helpful reference may be made to reservations to the death penalty provisions found in other human rights and humanitarian law treaties, as well as to the status of the death penalty in customary international law.

#### *A. The System of Reservations to the International Covenant on Civil and Political Rights*

While it is open to the drafters of a multilateral treaty to exclude<sup>38</sup> or to permit<sup>39</sup> the possibility of reservations, or to limit their scope in either form<sup>40</sup> or content,<sup>41</sup> no such provision was included in the Covenant.<sup>42</sup> Traditionally, the law of

38. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *done* Sept. 7, 1956, art. 9, 266 U.N.T.S. 3, 44 (entered into force Apr. 30, 1957); Convention Against Discrimination in Education, *adopted* Dec. 14, 1960, art. 9, 429 U.N.T.S. 93, 102 (entered into force May 22, 1962); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *done* Apr. 28, 1983, art. 4, Europ. T.S. No. 114.

39. Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, art. VII, 193 U.N.T.S. 135, 140 (entered into force July 7, 1954).

40. Article 64 of the European Convention on Human Rights provides no limitation on the content of reservations, other than that they must not be "general." *Supra* note 29, 213 U.N.T.S. at 252. However, it imposes several requirements of form, such as the need to cite the domestic legislation being reserved, and to provide a brief description of this legislation. *Id.*

41. Convention Relating to the Status of Refugees, July 28, 1951, art. 42, ¶ 1, 189 U.N.T.S. 137, 182 (entered into force Apr. 22, 1954); Convention on the Nationality of Married Women, *done* Feb. 20, 1957, art. 8, 309 U.N.T.S. 65, 71-72 (entered into force Aug. 11, 1958); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 20, 660 U.N.T.S. 195, 236 (entered into force Jan. 4, 1969) [hereinafter Convention on Elimination of Racial Discrimination]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. VII, 606 U.N.T.S. 267, 272-74 (entered into force Oct. 4, 1967); Convention on the Elimination of All Forms of Discrimination Against Women, art. 28, *supra* note 35, 1249 U.N.T.S. at 23; *see also* American Convention on Human Rights: "Pact of San Jose, Costa Rica," *adopted* Nov. 22, 1969, art. 75, 1144 U.N.T.S. 123, 161 (entered into force July 18, 1978) [hereinafter American Convention on Human Rights]. This Convention expressly adopts the regime of the Vienna Convention on the Law of Treaties, *supra* note 34, art. 19, 1155 U.N.T.S. at 337, which is tantamount to allowing reservations that are not contrary to the "object and purpose" of the instrument. *Id.*

42. For a review of the *travaux préparatoires* dealing with the issue of reservations, see PIERRE-HENRI IMBERT, *LES RÉSERVES AUX TRAITÉS MULTILATÉRAUX* 411-13 (1979); Pierre-Henri Imbert, *Les réserves, les dérogations: La question des réserves et les conventions en matière de droits de l'homme*, in ACTES DU CINQUIÈME COLLOQUE INTERNATIONAL SUR LA CONVENTION EUROPÉENNE DES DROITS

treaties contemplated reservations in a contract law context, as a form of counter-offer, requiring manifestations of express or tacit acceptance before the treaty, as reserved, could come into force between states parties. In 1951, the International Court of Justice (ICJ) recognized that, in the absence of a provision to the contrary, reservations to multilateral treaties are permissible to the extent that they do not conflict with the "object and purpose" of the treaty.<sup>43</sup> The Court ruled, in a seven to five decision, that classic rules derived from the law of contracts cannot easily be applied in the multilateral treaty context.<sup>44</sup> In that opinion, the Court found that the contracting parties to the Genocide Convention wanted to stimulate widespread ratification and did not intend that "an objection to a minor reservation" should result in inapplicability.<sup>45</sup> The "object and purpose" principle stated in the Court's advisory opinion has since been codified in the Vienna Convention on the Law of Treaties.<sup>46</sup>

The possibility of reservation facilitates the ratification of treaties, encouraging their acceptance by states that generally respect the obligations set out but fail to comply on one or another point. However, the widespread use of reservations in human rights treaties has been frequently criticized for weakening the overall effectiveness of the norms which, by and

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DE L'HOMME 119-120, 126-28 (1982), *translated in* 6 HUM. RTS. REV. 28, 38-39, 42-43 (1981) [hereinafter *Les réserves, les dérogations*].

43. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28). The Court's opinion was accepted by the General Assembly. G.A. Res. 598(VI), U.N. GAOR, 6th Sess., 360th plen. mtg. at 84, U.N. Doc. A/L.37 (1952).

44. 1951 I.C.J. at 21.

45. *Id.* at 24.

46. Vienna Convention on the Law of Treaties, *supra* note 34, art. 19, 1155 U.N.T.S. at 336. On reservations to multilateral treaties, see D. W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT'L L. 67 (1978); G. G. Fitzmaurice, *Reservations to Multilateral Conventions*, 2 INT'L & COMP. L.Q. 1 (1953); John K. Gamble, Jr., *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372 (1980); KAYE HOLLOWAY, *LES RÉSERVES DANS LES TRAITÉS INTERNATIONAUX* (1958); FRANK HORN, *RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES* (1988); IMBERT, *LES RÉSERVES AUX TRAITÉS MULTILATÉRAUX*, *supra* note 42; Imbert, *Les réserves, les dérogations*, *supra* note 42; Joseph Nisot, *Les Réserves aux traités et la Convention de Vienne du 23 mai 1969*, 77 REV. GÉN. D. INT'L PUB. 200 (1973); Jose M. Ruda, *Reservations to Treaties*, 146 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 95 (1975); Gérard Teboul, *Remarques sur les réserves aux conventions de codification*, 86 REV. GÉN. D. INT'L PUB. 679 (1982).

large, are expressed as minimum standards.<sup>47</sup> Human rights treaties have a very high rate of reservation,<sup>48</sup> with the Convention on the Elimination of All Forms of Discrimination Against Women<sup>49</sup> having the highest number of reservations. Addressing this problem, the 1992 meeting of the heads of treaty bodies labelled the practice of reservations to human rights treaties as "alarming," and concluded that:

each State that is considering ratification of a treaty should be urged to give the most careful consideration to any proposed reservation thereto and should do its utmost to keep the number and scope of such reservations to a minimum . . . . States that are already parties to a particular treaty should give full consideration to lodging an objection on each occasion when that may be appropriate.<sup>50</sup>

The Vienna Declaration and Programme of Action, adopted in 1993 at the close of the World Conference on Human Rights, urges states to avoid the practice of reservations as much as possible and to limit the scope of those deemed necessary.<sup>51</sup>

Approximately forty states parties to the Covenant have accompanied their instruments of ratification or accession with reservations or interpretative declarations.<sup>52</sup> The largest number of these are to specific provisions of article 14, which enumerates the procedural guarantees essential to a fair trial. There are also a substantial number of reservations to articles 9, 10, 13, 19 and 20, and a few to articles 1, 4, 6, 8, 12, 15, 21, 22, 23, 25, 26, 27, 48, and 50. There have been only occasional

47. Clark, *supra* note 35; Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 648-50 (1990); FRÉDÉRIC SUDRE, DROIT INTERNATIONAL ET EUROPÉEN DES DROITS DE L'HOMME 97-98 (1989).

48. Clark, *supra* note 35, at 316-20.

49. *Id.* at 317.

50. *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights: Note by the Secretary-General*, U.N. GAOR., 47th Sess., Agenda Item 97, at 12, 18, U.N. Doc. A/47/628 (1992).

51. *Report of the World Conference on Human Rights*, U.N. GAOR, ch. III, at 32, U.N. Doc. A/CONF.157/24 (Part I) (1993).

52. MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 118-26. A complete list of reservations to the Covenant is also published in MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (1993). See also Dinah Shelton, *State Practice on Reservations to Human Rights Treaties*, 1983 CAN. HUM. RTS. Y.B. 205, 213-14.

objections to these reservations.<sup>53</sup> A reservation by Trinidad and Tobago,<sup>54</sup> directed at article 4, paragraph 2, article 10, paragraph 2, article 10, paragraph 3, article 12, paragraph 2, article 14, paragraph 5, article 14, paragraph 6, article 15, paragraph 1, article 21 and article 26, was challenged as being incompatible with the object and purpose of the Covenant in objections formulated by Germany and the Netherlands.<sup>55</sup> Australia's very extensive list of reservations,<sup>56</sup> most of which have since been withdrawn, provoked an objection from the Netherlands.<sup>57</sup> Korea's reservation,<sup>58</sup> which subjected certain provisions of the Covenant to its own domestic law, was deemed illegal in objections filed by the former Czechoslovakia, Germany, the Netherlands, and the United Kingdom.<sup>59</sup>

Prior to the U.S. accession, there had never been a reservation to article 7. Aside from the recent reservation by the United States, there have been only two other reservations to article 6 of the Covenant by Norway and Ireland.<sup>60</sup> Norway ratified the Covenant on September 13, 1972, with a reservation to article 6, paragraph 4.<sup>61</sup> Norway later explained that its legislation did not fully conform to article 6, paragraph 4, because its military courts could rule that a death sentence be carried out irrespective of the existence of a right to appeal.<sup>62</sup>

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53. MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 127-30.

54. *Id.* at 124.

55. *Id.* at 128.

56. International Covenant on Civil and Political Rights, Ratification by Australia, Dec. 16, 1966, 1197 U.N.T.S. 411.

57. MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 128.

58. *Id.* at 123.

59. *Id.* at 127-30.

60. *Id.* at 121, 123.

61. International Covenant on Civil and Political Rights, *supra* note 1, 999 U.N.T.S. at 172, 297 ("Norway enters reservations with respect to: Article 6, paragraph 4, . . .")

62. Norway: *Initial Report*, [1977] 2 Y.B.H.R. Comm. 112, U.N. Doc. CCPR/C/1/Add.5. Article 6 stated that:

Norwegian law does not fully conform to the requirement in *paragraph 4* prescribing that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. According to section 242 of the Military Criminal Procedures Act of 29 March 1900 No. 2, there are no legal remedies against judgments rendered by the Court Martial and, according to section 243, a Court Martial's sentence of death shall be carried out immediately. Furthermore, according to section 208 of that

In practice, Norway had conducted no executions since the trials of collaborators that followed the Second World War.<sup>63</sup> On November 21, 1979, Norway withdrew its reservation to article 6, paragraph 4,<sup>64</sup> following its abolition of the death penalty in wartime as well as peacetime.<sup>65</sup> There were no objections to Norway's reservation by other states parties.

Ireland ratified the Covenant with a reservation to article 6, paragraph 5 that suggested its legislation was inconsistent with the Covenant. However, the reservation indicated that, in practice, the Irish government would take into account its obligations under the Covenant.<sup>66</sup> Ireland admitted its legisla-

Act (cf. section 211), the ordinary military courts may, in wartime and subject to specific conditions, decide that a sentence of death shall be carried out irrespective of the normal rules of appeal procedure. According to section 18 of the Military Criminal Procedures Act and section 14 of the Act of 15 December 1950 No. 7 relating to Emergency Measures in Wartime, the King may in certain instances decide that the High Court (Criminal Division) shall act as the court of final instance so that the right of appeal ceases to apply.

The reason for these special provisions is that it may well happen that, in a wartime emergency, the Supreme Court will be cut off from contact with certain parts of the country or that for other reasons it may prove impossible to get appeals dealt with by the Supreme Court within a reasonable space of time.

Before Norway ratified the Covenant, due consideration was given to the question of amending Norwegian legislation on these points. However, it was instead decided to make a reservation in respect of paragraph 4, and the legal situation remains the same today.

Capital punishment may not be imposed under normal conditions, but military legislation does contain certain such provisions, but always as an alternative punishment to deprivation of liberty.

*Id.* at 113.

63. *Report of the Human Rights Committee*, U.N. GAOR, 33d Sess., Supp. No. 40, at 41, U.N. Doc. A/33/40 (1978).

64. *Notification of Withdrawal of Certain Reservations and Declarations*, [1982] 2 Y.B.H.R. Comm. 430, U.N. Doc. CCPR/C/2/Add.4 and 5.

65. U.N. GAOR, Hum. Rts. Comm., 13th Sess., 301st mtg. at 2, U.N. Doc. CCPR/C/SR.301 (1981). A brief account of the Norwegian debate on abolition is presented in H. Rostad, *The International Penal and Penitentiary Foundation and the Death Penalty*, 58 REVUE INTERNATIONALE DE DROIT PÉNAL [R. INT'L. D. PÉN.] 345 (1987). The author notes that the Norwegian government announced it was abolishing the death penalty for wartime offenses on the same day that it declared the award of the Nobel Peace Prize to Amnesty International. *Id.* at 348.

66. MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 123. Article 6, paragraph 5 provides that:

Pending the introduction of further legislation to give full effect to the provisions of paragraph 5 of article 6, should a case arise which is not covered by the provisions of existing law, the Government of Ireland will have regard to its obligations under the Covenant in the exercise of its

tion was inconsistent with the Covenant, but that its intention was to comply with the provisions by use of executive power. As in the case of Norway, the reservation is of little more than theoretical interest, because Ireland has abolished the death penalty *de facto*. Again, no states parties have ever raised objections to Ireland's reservation.

The reservations by Norway and Ireland to article 6 of the Covenant are minor in scope when compared with the far-reaching U.S. reservation. They identify a specific paragraph of article 6, in comparison with the U.S. reservation, which encompasses virtually the entire provision. Furthermore, the reserving states point to specific domestic legislation with which the Covenant may be incompatible. In other words, they indicate to their treaty partners that their legislation is not yet fully in line with the Covenant and, implicitly at least, suggest this inconsistency will change. Therefore, the existence of these two other reservations to specific paragraphs of article 6, without objection from other states parties to the Covenant, can hardly be considered a precedent favorable to the United States. Furthermore, the absence of other reservations to articles 6 and 7, with these two relatively minor exceptions, supports the view that states parties consider broad reservations to the provisions to be inadmissible.

An argument can be made that all of the Covenant's substantive provisions are essential to its "object and purpose," and that, as a consequence, reservation to any such provision is illegal. When the ICJ outlined the "object and purpose test" in the Genocide Reference,<sup>67</sup> the reservations that had provoked the General Assembly's request for an advisory opinion concerned the competence of the ICJ to consider interstate complaints of violation of the Convention,<sup>68</sup> rather than the

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power to advise commutation of the sentence of death.

67. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28).

68. Genocide Convention, *supra* note 15, art. IX, 78 U.N.T.S. at 282. This is the provision under which Bosnia and Herzegovina seized the International Court of Justice, and under which provisional measures were ordered by the court. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 3 (Apr. 8); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 325 (Sept. 13).



norms prohibiting genocide. In other words, procedural and non-substantive provisions of the instrument were at issue, and the Court was clear in noting that each individual case would have to be determined on its merits.<sup>69</sup> The Covenant has several such non-substantive provisions, and reservation to these may be considered less controversial.

However, if the fundamental purpose of the Covenant is "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family,"<sup>70</sup> then how can a reservation be accepted to any of these rights? This rather extreme view was expressed by Judge Jan De Meyer of the European Court of Human Rights (European Court) in his individual concurring opinion in *Belilos v. Switzerland*.<sup>71</sup> "It may even be thought that such reservations, and the provisions permitting them, are incompatible with the jus cogens and therefore null and void, unless they relate only to arrangements for implementation, without impairing the actual substance of the rights in question."<sup>72</sup> Without entering into the debate on whether such norms actually constitute jus cogens, the comment by Judge De Meyer emphasizes their importance. Judge De Meyer suggested that states parties might be allowed "a brief spree" after ratifying in order to bring their legislation into line and that reservation could be tolerated solely for this purpose.<sup>73</sup>

Nevertheless, state practice generally indicates that reservations to substantive provisions of human rights treaties in general, and the Covenant in particular, are not in and of themselves incompatible with the object and purpose of the treaty. A large number of such reservations have been made to various international human rights instruments, without any opposition, based on the notion that these are prima facie unacceptable. The Inter-American Court of Human Rights has recognized that reservations to substantive provisions of human rights treaties cannot be excluded.<sup>74</sup> The Committee has

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69. See 1993 I.C.J. 3; 1993 I.C.J. 325.

70. The phrase is taken from the first preambular paragraph, International Covenant on Civil and Political Rights, *supra* note 1, 999 U.N.T.S. at 172.

71. *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988).

72. *Id.* at 36.

73. *Id.*

74. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, 3 Inter-Am. Ct. H.R. (ser. A)

reached the same result in its 1994 General Comment on reservations.<sup>75</sup>

The question becomes whether the same can be affirmed for the non-derogable provisions, that is, whether the fact that the drafters of an international human rights treaty have deemed that certain rights are so fundamental that they can never be suspended. Within the substantive provisions of the Covenant, a relatively small number of provisions are classified as non-derogable provisions—rights so fundamental and so essential that they brook no exception, even in emergency situations.<sup>76</sup> Articles 6 and 7 of the Covenant belong to this category.<sup>77</sup>

Reservations to the non-derogable provisions of the Covenant are very uncommon. The Congo made a reservation to article 11—imprisonment for debt—citing its domestic law which provided for the possibility of detention when an individual was in default on financial obligations.<sup>78</sup> Belgium and the Netherlands objected to this reservation, not because they considered the legislation in question to be actually contrary to article 11, but because they did not want to set a precedent by which reservations to non-derogable articles might be tolerated.<sup>79</sup> When the United Kingdom reserved application of article 11, with respect to Jersey, there were no objections.<sup>80</sup> Nor has there been any objection to the interpretative declarations of

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at 83 (1983).

75. *General Comment No. 24 (52) relating to Reservations*, U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1382d mtg. ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), reprinted in 15 HUM. RTS. L. J. 464 [hereinafter *General Comment*]; see also *Hum. Rts. Comm. Concludes Consideration of U.S. Initial Report*, *supra* note 37, at 2 (remarks of Human Rights Committee Chairman Francisco José Aguilar Urbina).

76. International Covenant on Civil and Political Rights, *supra* note 1, art. 4, 999 U.N.T.S. at 174; see Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72, 73-91 (Louis Henkin ed., 1981).

77. At least one scholar has argued that article 6 constitutes a norm of jus cogens. W. Paul Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 120, 125-159 (B.G. Ramcharan ed., 1985); *Questions of Human Rights in Chile*, U.N. GAOR, Hum. Rts. Comm., 39th Sess., Agenda Item 5, U.N. Doc. E/CN.4/1983/9 (1983).

78. MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 119.

79. *Id.* at 127-28.

80. *Id.* at 125, 127-30.

Italy<sup>81</sup> and Argentina<sup>82</sup> to article 15, dealing with the non-retroactivity of criminal law, or to that of Mexico<sup>83</sup> to article 18, concerning the protection of religious freedom. In its objection to the U.S. reservation to article 7, the Netherlands declared that "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."<sup>84</sup>

The Inter-American Court of Human Rights (Inter-American Court) has taken the position that reservations to non-derogable provisions are not a priori unacceptable, although it affirms that blanket reservations to the right to life are incompatible with the object and purpose of the Convention.<sup>85</sup> According to the Court, reservations seeking only to restrict certain aspects of a non-derogable right cannot be presumed to be invalid, providing they do not deprive the right of its basic purpose.<sup>86</sup>

The Human Rights Committee took a similar view in its General Comment on reservations.<sup>87</sup> It noted that not all rights of profound importance are deemed non-derogable, citing in this respect article 9, respecting the protection of persons detained or arrested, and article 27, dealing with minority rights.<sup>88</sup> Some rights have been made non-derogable, suggests the Committee, merely because their suspension is irrelevant to the legitimate control of national emergency by the state.<sup>89</sup> An example is imprisonment for debt, prohibited by article 11 of the Covenant.<sup>90</sup> In other cases, the Committee stated that derogation is forbidden because it is impossible to control. An example is article 18 dealing with the freedom of conscience.<sup>91</sup>

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81. *Id.* at 127.

82. *Id.* at 124.

83. *Id.* at 128.

84. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 129. Similar statements were made by Denmark, Norway, and Finland. *Id.* at 127, 129.

85. See Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, 3 Inter-Am. Ct. H.R. (ser. A) at 83 (1983).

86. *Id.*

87. See *General Comment*, *supra* note 75.

88. *Id.* ¶ 10.

89. *Id.*

90. *Id.*

91. *Id.* This is a curious comment by the Committee because if the state can-

The Committee concluded that "[w]hile there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation."<sup>92</sup> However, at least two members of the Committee, Fausto Pocar and Prafulla Chandra Natwarlal Bhagwata, still appear favorable to the thesis that reservations directed against non-derogable rights under the Covenant are questionable.<sup>93</sup>

The Committee suggested another test to assist in establishing whether a reservation is compatible with the Covenant's "object and purpose." In its General Comment, the Committee declared that provisions in the Covenant that are also norms of customary international law may not be the subject of reservations.<sup>94</sup>

Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to a fair trial would not be.<sup>95</sup>

The General Comment implies that the U.S. reservation to article 6, paragraph 5 of the Covenant, with respect to the execution of individuals for crimes committed while under the

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not limit freedom of conscience, then why bother including it in the Covenant at all.

92. *General Comment*, *supra* note 75, ¶ 10.

93. *Hum. Rts. Comm. Concludes Consideration of U.S. Initial Report*, *supra* note 37, at 3, 8.

94. *General Comment*, *supra* note 75, ¶ 8.

95. *Id.* However, in the past, the Committee has given effect to reservations or interpretative declarations concerning provisions that are almost certainly declaratory of customary norms. *Report of the Human Rights Committee: Communication No. 228/1987, C.L.D. v. France*, U.N. GAOR, 43d Sess., Supp. No. 40, at 252, U.N. Doc. A/43/40 (1988).

age of eighteen, is illegal because it violates a customary norm. The General Comment could have been more explicit, for it refers only to a prohibition "to execute pregnant women or children," whereas article 6, paragraph 5 of the Covenant speaks of "crimes committed by persons below eighteen years of age."<sup>96</sup> The Inter-American Commission on Human Rights has already held that there is a customary norm prohibiting execution of children, but that the norm only extends to some unspecified age which is lower than eighteen.<sup>97</sup> The Convention on the Rights of the Child defines a "child" as a person under eighteen.<sup>98</sup>

### *B. Interpreting the Covenant Provisions on the Death Penalty*

Article 6 of the Covenant is quite unique in its formulation. In the first paragraph, it states the right to life in general terms and then devotes four of the remaining five paragraphs to circumscribing the principal exception to that right, the death penalty.<sup>99</sup> Various sources assist in interpreting article 6, including the *travaux préparatoires*,<sup>100</sup> the initial and periodic reports of states parties pursuant to article 40 of the Covenant,<sup>101</sup> the "caselaw" of the Committee under the Optional

96. See *supra* note 19 and accompanying text.

97. Case 9647, Inter-Am. C.H.R. 61, OEA/ser. L/V/II.71, doc. 9 rev.1 (1987); see also Resolution No. 3/87, Case 9647: *Application of Death Penalty on Juveniles in the U.S./Violation of Human Rights Obligation Within the Inter-American System*, 8 HUM. RTS. L.J. 355 (1987) (reported and accompanied with Note by Dinah Shelton); Dinah Shelton, *The Prohibition of Juvenile Executions in International Law*, 58 REV. INT'L. D. PÉN. 773 (1987); David Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 AM. U. J. INT'L L. & POL'Y 339 (1988); but see Christina M. Cerna, *U.S. Death Penalty Tested before the Inter-American Commission on Human Rights*, 10 NETH. Q. HUM. RTS. 155, 162 (1992) (reply to Professor Weissbrodt's criticism of the Inter-American Commission's report by a lawyer for the Commission).

98. *Report of the Third Committee on Agenda Item 108*, U.N. GAOR, 44th Sess., Annex, Agenda Item 108, at 15, U.N. Doc. A/44/736 (1989).

99. See *supra* note 19 and accompanying text.

100. See Marc J. Bossuyt, *The Death Penalty in the «Travaux Préparatoires» of the International Covenant on Civil and Political Rights*, in ESSAIS SUR LE CONCEPT DE "DROIT DE VIVRE" [ESSAYS ON THE CONCEPT OF A RIGHT TO LIVE] 251 (Daniel Prémont ed., 1988); see also WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 53-93 (1993).

101. See DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 328-46 (1991); see also Dana D. Fischer, *Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee*,

Protocol,<sup>102</sup> and scholarly writings.<sup>103</sup> These sources leave no doubt that the principal purpose of article 6 is protection of the individual against the intentional taking of life, of which the death penalty is a paramount manifestation. Furthermore, the thrust of article 6 is towards abolition of capital punishment, as paragraphs (2) and (6) indicate. The right to life provision in the Covenant is derived, of course, from article 3 of the Universal Declaration of Human Rights (Declaration).<sup>104</sup> Article 3 states the right to life without any qualification or limitation: "Everyone has the right to life, liberty and security of the person."<sup>105</sup> Unlike many other provisions of the Declaration, such as the right to a fair trial or the right to property, article 3 was not simply borrowed from human rights provisions in domestic constitutions. There were, to be sure, texts in national laws which ensured the right to life, except in the execution of a capital sentence. The classic example is the Fifth Amendment to the U.S. Constitution, which provides that the right to life may not be breached without due process of law.<sup>106</sup> The drafters of the Declaration sought to do much more, creating a new right, one not previously recognized in domestic legislation.

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76 AM. J. INT'L L. 142 (1982); Jose L. Gomez del Prado, *United Nations Conventions on Human Rights: the Practice of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination in Dealing with Reporting Obligations of States Parties*, 7 HUM. RTS. Q. 492 (1985); Farrokh Jhabvala, *The Practice of the Covenant's Human Rights Committee, 1976-82: Review of State Party Reports*, 6 HUM. RTS. Q. 81, 95-106 (1984).

102. See P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication*, 57 BRIT. Y.B. INT'L L. 201 (1986); Jakob Möller, *Recent Jurisprudence of the Human Rights Committee: A Brief Overview*, 1992 CAN. H.R.Y.B. 79; Avv. Fausto Pocar, *Legal Value of the Human Rights Committee's Views*, 1992 CAN. H.R.Y.B. 119; B.G. Ramcharan, *The Emerging Jurisprudence of the Human Rights Committee*, 6 DALHOUSIE L.J. 7, 33-40 (1980); Markus Schmidt, *The Optional Protocol to the International Covenant on Civil and Political Rights: Procedure and Practice*, 4 INTERRIGHTS BULL. 27 (1989); A. de Zayas et al., *Application by the Human Rights Committee of the International Covenant on Civil and Political Rights Under the Optional Protocol*, 1986 CAN. H.R.Y.B. 101; Ton J.M. Zuijdewijk, *The Right to Petition the United Nations Because of Alleged Violations of Human Rights*, 59 CAN. BAR REV. 103 (1981).

103. See Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 76, at 114, 114-137; MCGOLDRICK, *supra* note 101; SCHABAS, *supra* note 100.

104. Universal Declaration of Human Rights, G.A. Res. 217 (III)(A), U.N. GAOR, 3d Sess., pt. 1, at 72, U.N. Doc. A/810 (1948).

105. *Id.*

106. U.S. CONST. amend. V.

During the debate in the Third Committee in the autumn of 1948 on article 3 of the Declaration, discussion focussed on the abolition of capital punishment.<sup>107</sup> An amendment that would have made article 3 explicitly abolitionist did not succeed,<sup>108</sup> as this was considered to be premature and many states were not yet ready for such a step. Nevertheless, the *travaux préparatoires* of the Declaration indicate that a central object and purpose of the right to life provision is the limitation of the death penalty, with a view to its abolition.<sup>109</sup> Subsequent interpretation of article 3 of the Declaration by the United Nations General Assembly confirms that it is a provision dealing in large measure with the limitation and eventual abolition of the death penalty.<sup>110</sup>

The drafters of the Covenant intended to promulgate binding norms that would give effect to the "common standard of achievement" set out in the Declaration. In keeping with the general purpose of the right to life provision as expressed in the Declaration, the Covenant's drafters provided a more explicit definition of the limitations on the death penalty. It was not to be imposed arbitrarily, or upon pregnant women, or for juvenile offenses, and only for the most serious of crimes. The goal of abolition was implied in the opening words of paragraph 2: "In countries which have not abolished the death penalty . . ."<sup>111</sup> In order to clarify the "general purpose" of the

107. See Lilly E. Landerer, *Capital Punishment as a Human Rights Issue Before the United Nations*, 4 HUM. RTS. J. 511, 516-18 (1971); ALBERT VERDOODT, *NAISSANCE ET SIGNIFICATION DE LA DÉCLARATION UNIVERSELLE DES DROITS DE L'HOMME* 95-100 (1964); SCHABAS, *supra* note 100, at 30-45.

108. *Draft International Declaration of Human Rights*, U.N. GAOR 3d Comm., 3d Sess., U.N. Doc. A/C.3/265 (1948).

109. SCHABAS, *supra* note 100, at 25-50.

110. See *Capital Punishment*, G.A. Res. 2393 (XXIII), U.N. GAOR 3d Comm., 23d Sess., Supp. No. 18, at 41, U.N. Doc. A/7218 (1968). In a later resolution, the General Assembly:

[a]ffirm[ed] that, in order fully to guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries.

*Capital Punishment*, G.A. Res. 2857 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, ¶ 3, at 94, U.N. Doc. A/8429 (1972).

111. The Working Party of the Third Committee stated that "[w]ith reference to the text of paragraph 2 proposed by the working party, it was interesting to note that the expression 'in countries which have not abolished the death penalty' was intended to show the direction in which the drafters of the Covenant hoped

right to life, the drafters added paragraph 6, which contemplates the eventual abolition of the death penalty, stating that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."<sup>112</sup> Paragraph 6 is not in fact a normative provision at all, but rather a statement of intentions, and, as such, is really more preambular in nature. The drafters of article 6 provided explicit clues to its general purpose within the text itself.

Therefore, the *travaux préparatoires* indicate that the general purpose of article 6 of the Covenant is the limitation of the death penalty, with a view to its eventual abolition. This conclusion is strengthened by state practice under the Covenant. Many of the initial and periodic reports of states parties to the Covenant, required pursuant to article 40, thoroughly review the limitation and abolition of the death penalty in their discussion of compliance with article 6. Typically, during presentation of their periodic reports, states parties are closely questioned about capital punishment, and members of the Committee often urge them to limit further and eventually abolish the death penalty. That death penalty issues are central to the general purpose of article 6 is also apparent from its importance in the first General Comment on the provision issued by the Committee.<sup>113</sup>

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that the situation would develop." *Draft International Covenants on Human Rights*, U.N. GAOR 3d Comm., 12th Sess., 816th mtg., Agenda Item 33, ¶ 19, at 271, 273, U.N. Doc. A/C.3/SR.816 (1957).

112. See *supra* note 19 and accompanying text.

113. *General Comment 6 (16) of Article 6*, U.N. GAOR, Hum. Rts. Comm., 16th Sess., 378th mtg. at 2-3, U.N. Doc. CCPR/C/21/Add.1 (1982). A second comment on the right to life deals with issues of war and nuclear weapons. *General Comment 14 (23) of Article 6*, U.N. GAOR, Hum. Rts. Comm., 14th Sess., Annex VI, Supp. No. 40, at 162, U.N. Doc. A/40/40 (1985). During the drafting of General Comment 6 (16), some members of the Committee felt it important to stress the need to eliminate the social and economic conditions that lead to crime as preliminary to the abolition of capital punishment, but no amendment in this sense was ever made. See U.N. GAOR, Hum. Rts. Comm., 16th Sess., 369th mtg. ¶¶ 22, 24, & 29, at 2, 6-7, U.N. Doc. CCPR/C/SR.369 (1982); see also *General Comment 6 (15)*, U.N. GAOR, Hum. Rts. Comm., 16th Sess., 370th mtg. ¶¶ 19 & 29, at 2, 6, 8, U.N. Doc. CCPR/C/SR.370 (1982). In the Third Committee, at the thirty-seventh session of the General Assembly, there was widespread satisfaction with General Comment 6 (16). One of the few critical voices came from the German Democratic Republic, which felt that describing the abolition of the death penalty as being desirable was inappropriate, because states had a duty laid down in article 6 that went well beyond the merely desirable. *Torture and Other Cruel, Inhuman or Degrading*



Some have gone a step further, arguing that article 7 of the Covenant, dealing with torture or cruel, inhuman or degrading treatment or punishment, rules out the death penalty. Such a position was advanced, in the context of comparable provisions in the European Convention on Human Rights (European Convention), by Judge Jan de Meyer in the *Soering* case.<sup>114</sup> However, Judge de Meyer was the only member of the European Court prepared to give the European Convention such a radically dynamic interpretation.<sup>115</sup> All of the other judges took the view that because the European Convention explicitly recognized the death penalty as an exception or limitation to its right to life provision, and because the states parties had also prepared an additional, as opposed to an "amending," protocol whose sole purpose was to neutralize that anachronistic provision,<sup>116</sup> article 3 could not be construed in an abolitionist sense.<sup>117</sup> However, article 3 of the European Convention, which is comparable to article 7 of the Covenant, was held by the European Court to apply to the death penalty within the context of the "death row phenomenon," a term which describes the lengthy incarceration under gruesome conditions of individuals awaiting execution.<sup>118</sup>

The Committee, in its interpretations of article 7 of the Covenant, has been very reluctant to follow the example of the European Court.<sup>119</sup> In its decision in a Jamaican death row case, the Committee stated that "prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, even if they may be a source of mental strain and tension for detained persons."<sup>120</sup> This oft-cited precedent of

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*Treatment or Punishment*, U.N. GAOR 3d Comm., 37th Sess., 52d mtg., Agenda Item 88, ¶ 4, at 2-3, U.N. Doc. A/C.3/37/SR.52 (1982).

114. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 51 (1989).

115. *Id.*

116. See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, April 28, 1983, Europ. T.S. No. 114.

117. See *Soering*, 161 Eur. Ct. H.R. (ser. A).

118. *Id.* at 99.

119. Issues respecting prisoner treatment on death row may also arise under article 10 of the Covenant, to which the United States has made no reservation. See Report of the Human Rights Committee: Communication No. 240/1987, *Collins v. Jamaica*, U.N. GAOR, 47th Sess., Supp. No. 40, at 227, U.N. Doc. A/47/40 (1992); see also Report of the Human Rights Committee: Communication No. 232/1987, *Pinto v. Trinidad and Tobago*, U.N. GAOR, 45th Sess., Supp. No. 40, at 74, U.N. Doc. A/45/40 (1990).

120. Report of the Human Rights Committee: Communication Nos. 270/1988

the Committee has been frequently challenged,<sup>121</sup> and it appears that the Committee is now modifying its view of the "death row phenomenon," so as to harmonize it with the case law of the European Court<sup>122</sup> and the Judicial Committee of the Privy Council.<sup>123</sup> In its views in the matter of *Cox v. Canada*, published in December 1994, the Committee suggests that remedies against the death penalty be provided within a reasonable time.<sup>124</sup> An evolution in the Committee's approach is also implied in the individual opinions of Kurt Herndl and Waleed Sadi<sup>125</sup> and the opinion of Bertil Wennergren.<sup>126</sup> This tendency is confirmed by the Committee's recent comments on the initial report of the United States, which express its concern with "the long stay on death row which, in specific instances, may amount to a breach of article 7 of the Covenant."<sup>127</sup>

The Committee has, of course, recognized "that the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person encompasses [questions such as] the provision of adequate medical care during detention, and that this obligation, obviously, extends to persons under the sentence of death."<sup>128</sup> The Committee has also recognized that article 7 applies to the technique of

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and 271/1988, *Barrett v. Jamaica*, U.N. GAOR, 47th Sess., Supp. No. 40, at 250-51, U.N. Doc. A/47/40 (1992); see also *Report of the Human Rights Committee: Communication No. 250/1987, Reid v. Jamaica*, U.N. GAOR, 45th Sess., Supp. No. 40, at 92, U.N. Doc. A/45/40 (1990) (in which the Committee said such allegations were insufficiently substantiated); *Report of the Human Rights Committee: Communication Nos. 210/1986 and 225/1987, Morgan v. Jamaica*, U.N. GAOR, 44th Sess., Supp. No. 40, at 230, U.N. Doc. A/44/40 (1989).

121. See the views of Christine Chanet in *Communication Nos. 270/1988 and 271/1988*, *supra* note 120.

122. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 99 (1989).

123. *Pratt v. Attorney Gen.*, 4 All. E.R. 769 (P.C. 1993) (appeal taken from Jamaica).

124. See *Extradition to the United States to Face the Possible Imposition of the Death Penalty not Considered to Violate the CCPR/Cox v. Canada*, 15 HUM. RTS. L. J. 410, 417 (1994).

125. *Id.* at 418-19.

126. *Id.* at 421.

127. *Consideration of Reports*, *supra* note 6, ¶ 16, at 4; see also *Hum. Rts. Comm. Concludes Consideration of U.S. Initial Report*, *supra* note 37, at 4, 8 (remarks of Committee members Andreas Mavromattis and Prafullachandra Natwarlal Bhagwati during presentation of the initial report of the United States).

128. *Communication No. 232/1987, Pinto v. Trinidad and Tobago*, *supra* note 119, ¶ 12.7, at 74.

execution. In its General Comment on article 7, the Committee noted that "when the death penalty is applied by a State party for the most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering."<sup>129</sup> In 1993, the Committee condemned California's use of the gas chamber as constituting a violation of article 7 of the Covenant.<sup>130</sup>

### *C. Reservations to death penalty provisions in other international instruments*

A review of reservations to the death penalty provisions in other international instruments may be of some assistance in assessing the legality of the U.S. reservations. These sources confirm that the U.S. reservations are an extraordinary departure from current practice, which, while permitting reservations to provisions dealing with the death penalty, confines their scope to the strict necessities of the situation.

There have been no reservations to the capital punishment provisions of the European Convention of Human Rights.<sup>131</sup> There have been three reservations concerning the death penalty to article 4 of the American Convention on Human Rights (American Convention)<sup>132</sup> by Barbados, Guatemala, and Trin-

129. *General Comments Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil And Political Rights: General Comment 20 (44)*, U.N. GAOR, Hum. Rts. Comm., 44th Sess., ¶ 6, at 2, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992). The Committee also took the occasion to reiterate that article 6 of the Covenant refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable. *Id.*

130. *See Communication No. 469/1991*, *supra* note 8.

131. European Convention on Human Rights, *supra* note 29, art. 2, ¶ 1, 213 U.N.T.S. at 224. The right to life is set out generally in article 2. *Id.* Malta has made a reservation to article 2, paragraph 2, to the effect that the right to self-defense also includes defense of property. *Id.* The reservation provides that:

The Government of Malta, having regard to article 64 of the Convention, declares that the principle of lawful defence admitted under sub-paragraph (a) of paragraph (2) of Article 2 of the Convention shall apply in Malta also to the defence of property to the extent required by the provisions of paragraphs (a) and (b) of section 238 of the Criminal Code of Malta.

Convention for The Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 590 U.N.T.S. 300 (ratification by Malta). A similar reservation by Liechtenstein was made at the time of ratification, but it was withdrawn a decade later. Council of Europe, *Doc. H/INF (91) 2*, INFO. SHEET NO. 28, Nov. 7, 1990-Apr. 1991, at 1.

132. American Convention on Human Rights, *supra* note 41, 1144 U.N.T.S. 123.

idad and Tobago. Article 4 of the American Convention was modelled on article 6 of the Covenant, which it closely resembles. When Barbados ratified the Convention in 1982, it made a reservation to article 4, paragraph 4, noting that, under its criminal law, treason was punishable by death, although the whole matter of the death penalty was under review.<sup>133</sup> A second reservation to article 4, paragraph 5, stated that while youth or old age may be factors to be considered by the Privy Council in deciding whether the death penalty should be carried out, Barbadian legislation allowed the execution of persons over sixteen and set no upper age limit.<sup>134</sup> There have been no objections to this reservation.

Guatemala's reservation to article 4, paragraph 4, which excludes the death penalty for political crimes,<sup>135</sup> has been

Reservations to the American Convention are permitted under article 75, "in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969". *Id.* at 161.

133. Barbados' reservation stated that:

In respect of 4(4) the criminal code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point in as much as treason in certain circumstances might be regarded as a political offence and falling within the terms of section 4(4).

American Convention on Human Rights: "Pact of San José, Costa Rica," Nov. 22, 1969, 1298 U.N.T.S. 441 (ratification by Barbados). Barbados also made a reservation to article 4, paragraph 5, which provided that:

In respect of 4(5) while the youth or old age of an offender may be matters which the Privy Council, the highest Court of Appeal, might take into account in considering whether the sentence of death should be carried out, persons of 16 years and over or over 70 years of age may be executed under Barbadian law.

134. *Id.* No similar reservation was made by Barbados when it ratified the Covenant, which has an identical provision.

In 1982, Martin Marsh, who was convicted of murder committed while seventeen years of age, was executed by Barbados. AMNESTY INTERNATIONAL, WHEN THE STATE KILLS . . . : THE DEATH PENALTY: A HUMAN RIGHTS ISSUE 106-07 (1989). There have been no executions in Barbados since 1984. *Id.*

135. The reservation states that:

The Government of the Republic of Guatemala ratifies the American Convention on Human Rights, signed at San José, Costa Rica, on November 22, 1969, with a reservation as to article 4, paragraph 4, thereof, since the Constitution of the Republic of Guatemala, in its article 54, only excludes the application of the death penalty to political crimes, but not to common crimes related to political crimes.

American Convention on Human Rights, *supra* note 41, 1144 U.N.T.S. at 210. Article 4, paragraph 4 states that "[i]n no case shall capital punishment be inflicted for political offenses or related common crimes." *Id.* at 145.

the subject of an advisory opinion of the Inter-American Court. The issue arose after four politically-related death sentences were handed down in Guatemala and the matter was submitted to the Inter-American Commission of Human Rights.<sup>136</sup> The four convicts were eventually executed by firing squad, having been sentenced by "Courts of Special Jurisdiction."<sup>137</sup> The Inter-American Court found the reservation to be legal but inadequate in scope and concluded that it was ineffective to block application of article 4, paragraph 2 of the American Convention.<sup>138</sup> The reservation was withdrawn on August 12, 1986.<sup>139</sup>

Trinidad and Tobago ratified the American Convention, with a reservation noting that its laws do not prohibit execution of a person over age seventy.<sup>140</sup> There have been no objections. The reservations by Barbados and Trinidad and Tobago are similar to those made by Ireland and Norway to article 6 of the Covenant,<sup>141</sup> in that they attempt to account for existing legislation not in line with the international obligations being undertaken, and are not aimed at preserving a state's freedom to maneuver on the question in the future.

The United States participated fully in the drafting of the American Convention. At the final drafting conference in 1969, it urged deletion of the "political offense" exception, suggesting that this might benefit the assassin of a president.<sup>142</sup> At the

136. Case 8094, Inter-Am. C.H.R. 176, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1993); Case 9038, Inter-Am. C.H.R. 176, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1993).

137. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, 3 Inter-Am. Ct. H.R. (ser. A) at 83 (1983).

138. *Id.* at 90.

139. ORGANIZATION OF AMERICAN STATES, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1985-1986, at 158, OEA/ser. L/V/II.68, doc. 8 rev. 1 (1986).

140. "As regards Article 4(5) of the Convention the Government of The Republic of Trinidad and Tobago makes a reservation in that under the laws of Trinidad and Tobago there is no prohibition against the carrying out a sentence of death on a person over seventy (70) years of age." American Convention on Human Rights: "Pact of San Jose, Costa Rica," registered Jan. 4, 1994, Registration No. 17955.

141. International Covenant on Civil and Political Rights, *supra* note 1, 999 U.N.T.S. at 297; MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 121, 123.

142. ORGANIZATION OF AMERICAN STATES, OBSERVATION OF THE GOVERNMENTS OF THE MEMBER STATES REGARDING THE DRAFT INTER-AMERICAN CONVENTION ON PREVENTION OF HUMAN RIGHTS, at 150, O.A.S. Doc. OEA/ser. K/XVI/1.1 doc. 10 (Eng.) (1969).

same time, it did not object to the "most serious crimes" provision. The United States also urged deletion of the prohibition of juvenile executions, because "the proscription of capital punishment within arbitrary age limits presents various difficulties in law." However, the United States couched its proposal in abolitionist terms, noting that such a provision weakened the text, given "the general trend, already apparent, for the gradual abolition of the death penalty."<sup>143</sup> The U.S. representative subsequently withdrew this proposal.<sup>144</sup>

Death penalty provisions are also found in the third<sup>145</sup> and fourth<sup>146</sup> Geneva Conventions, and in the two Additional Protocols of 1977.<sup>147</sup> Only the provision in the fourth Geneva Convention Relative to the Protection of Civilians (fourth Geneva Convention) has provoked reservations. Article 68, paragraph 2 of that instrument states that the death penalty may not be imposed in wartime on civilian populations by an occupying power if it has previously been abolished in peacetime.<sup>148</sup> Adoption of the provision at the diplomatic conference of 1949 was accompanied by identical reservations from the United States, Canada, the United Kingdom, New Zealand, Australia, and the Netherlands for the purpose of protecting "... the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to

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143. *Id.*

144. O.A.S. Doc. OEA/ser. K/XVI/1.1, doc. 40, corr. 1 (1969). As evidence of its rejection of the norm concerning execution of juveniles, the United States contended that the U.S. delegate, during drafting of the American Convention on Human Rights, *supra* note 41, 1143 U.N.T.S. at 145, pointed out that the United States had problems with Article 4, paragraph 5's arbitrary age limit of eighteen which conflicted with its federal structure. Case 9647, Inter-Am. C.H.R. 61, 71, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987).

145. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 3(I)(d), 87, 100, 101, 107, 75 U.N.T.S. 135, 136-38, 202, 210-12, 216 (entered into force Oct. 21, 1950).

146. Geneva Convention Relative to the Protection of Civilians, Aug. 12, 1949, arts. 3(I)(d), 68, 74, 75, 75 U.N.T.S. 287, 288-90, 330, 334-36 (entered into force Oct. 21, 1950).

147. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to The Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, art. 77, 1125 U.N.T.S. 3, 39 (entered into force Dec. 7, 1978); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to The Protection of Victims of Non-International Armed Conflicts, *adopted* June 8, 1977, art. 6, 1125 U.N.T.S. 609, 613-14 (entered into force Dec. 7, 1978).

148. Geneva Convention Relative to the Protection of Civilians, *supra* note 146, 75 U.N.T.S. at 330.

whether the offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins."<sup>149</sup> Canada's reservation was not maintained at the time of ratification,<sup>150</sup> and those of the United Kingdom and Australia were later withdrawn.<sup>151</sup> The International Committee of the Red Cross does not consider the reservations to article 68 to be "incompatible with the aims and objects of the [fourth Geneva] Convention."<sup>152</sup> It should also be noted that at the time of ratification, the United States made no reservation to article 68 of the fourth Geneva Convention, which prohibits execution of protected persons in occupied territories for offenses committed under the age of eighteen.<sup>153</sup>

The Convention on the Rights of the Child<sup>154</sup> contains a provision that in effect repeats the prohibition on execution for crimes committed by persons under the age of eighteen found

149. Pakistan, Australia, the Republic of Korea and Suriname made the same reservation at the time of ratification of the fourth Geneva Convention. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 96 U.N.T.S. 326, 314 U.N.T.S. 333, 334, 575 U.N.T.S. 285, 286, 1151 U.N.T.S. 390. Romania made an objection to the Korean reservation, stating it was incompatible with the purpose of the fourth Geneva Convention. 609 U.N.T.S. 253. In addition, Australia specified that it interpreted the term "military installations," as used in article 68, paragraph 2, to mean installations having a military interest that were essential for the occupying power. 314 U.N.T.S. at 334.

150. Geneva Convention for the Protection of War Victims, *done* Aug. 12, 1949, 1965 Can. T.S. 20 (Canada's Instruments for Ratification deposited May 14, 1965).

151. The United Kingdom's reservation was withdrawn February 2, 1972. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 811 U.N.T.S. 376; *see also* G.I.A.D. DRAPER, *THE RED CROSS CONVENTIONS* 44 (1958). Australia's reservation was withdrawn February 21, 1974. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 949 U.N.T.S. 310 (withdrawal of reservation).

152. Claude Pilloud, *Reservations to the Geneva Conventions of 1949*, 181 INT'L REV. RED CROSS 163, 185 (1976).

153. The United States delegate to the 1949 diplomatic conference, during first reading of the provision in Committee III, said: "The abolition of the death penalty in the case of protected persons under eighteen years of age (last paragraph) was a matter which called for very careful consideration before such a sweeping provision was adopted." Record of the Diplomatic Conference of Geneva of 1949, Vol. IIA, Berne: Federal Political Department, Summary record of nineteenth meeting of Committee III, 673.

154. Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 28 I.L.M. 1448. "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment . . . shall be imposed for offenses committed by persons below 18 years of age." *Id.* ¶ 37(a).

in article 6, paragraph 5 of the Covenant, article 4, paragraph 5 of the American Convention, and article 68, paragraph 4 of the fourth Geneva Convention. Myanmar is the only state to have made a reservation to this provision.<sup>155</sup> The reservation does not even seem to be aimed at the issue of the death penalty, but rather at the subject of juvenile justice systems in general. Myanmar's reservation inspired three objections, from Germany, Ireland and Portugal,<sup>156</sup> and it has subsequently

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155. The reservation towards article 37 provides that:

The Union of Myanmar accepts in principle the provisions of article 37 as they are in consonance with its laws, rules, regulations, procedures and practice as well as with its traditional, cultural and religious values. However, having regard to the exigencies of the situation obtaining in the country as present, the Union of Myanmar states as follows:

1. Nothing contained in Article 37 shall prevent, or be construed as preventing, the Government of the Union of Myanmar from assuming or exercising, in conformity with the laws for the time being in force in the country and the procedures established thereunder, such powers as are required by the exigencies of the situation for the preservation and strengthening of the rule of law, the maintenance of public order (*ordre public*) and, in particular, the protection of the supreme national interest, namely, the non-disintegration of the Union, the non-disintegration of national solidarity and the perpetuation of national sovereignty, which constitute the paramount national causes of the Union of Myanmar.

2. Such powers shall include the powers of arrest, detention, imprisonment, exclusion, interrogation, enquiry and investigation.

MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 202.

156. Germany:

The Federal Republic of Germany considers that the reservations made by the Union of Myanmar concerning articles 15 and 37 of the Convention on the Rights of the Child are incompatible with the object and purpose of the Convention (article 51, paragraph 2) and therefore objects to them.

This objection shall not preclude the entry into force of the Convention as between the Union of Myanmar and the Federal Republic of Germany.

*Id.* at 200. Ireland's objection provides that:

The Government of Ireland considers that such reservations, which seek to limit the responsibilities of the reserving State under the Convention, by invoking general principles of national law, may create doubts as to the commitment of those States to the object and purpose of the Convention.

This objection shall not constitute an obstacle to the entry into force of the Convention between Ireland and the aforementioned States.

*Id.* Portugal's objection provides that:

The Government of Portugal considers that reservations by which a State limits its responsibilities under the Convention by invoking general principles of National law may create doubts on the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of International law. It is



been withdrawn.<sup>157</sup>

*D. Articles 6 and 7 as the Crystallization of Emerging Norms of Customary Law*

At least some of the elements of articles 6 and 7 of the Covenant represent a crystallization of emerging norms of customary international law. A state cannot, in making a reservation to a multilateral treaty, set aside its obligations under customary norms. In its General Comment on reservations, the Committee has affirmed that the prohibition of torture, cruel, inhuman or degrading treatment or punishment, and the execution of pregnant women or children, constitute customary norms.<sup>158</sup>

The Inter-American Commission of Human Rights did not agree to the existence of a norm of customary international law establishing eighteen as the minimum age for imposition of the death penalty, but concluded that such a norm was "emerging."<sup>159</sup> In any case, it said that even if a customary norm did exist, it would not bind a state which had protested the norm.<sup>160</sup> Because the United States government had proposed to ratify the American Convention with a reservation to article 4, paragraph 5 stating that the United States "reserves the right in appropriate cases to subject minors to procedures and penalties applicable to adults," the Inter-American Commission of Human Rights considered that it had protested the norm.<sup>161</sup>

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in the common interest of States that treaties to which they have chosen to become parties also are respected, as to object and purpose, by all parties. The Government therefore objects to the reservations.

This objection shall not constitute an obstacle to the entry into force of the Convention between Portugal and Myanmar.

*Id.* at 201.

157. *Id.* at 202.

158. *General Comment*, *supra* note 75, ¶ 8. However, in the past, the Human Rights Committee has given effect to reservations or interpretative declarations concerning provisions that are almost certainly declaratory of customary norms. *Report of the Human Rights Committee: Communication No. 228/1987, C.L.D. v. France*, U.N. GAOR, 43d Sess., Supp. No. 40, ¶ 3, at 252, U.N. Doc. A/43/40 (1988).

159. *See* Case 9647, Inter-Am. C.H.R. 61, 82, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987).

160. *See id.* at 77.

161. *See id.* at 78.

The ICJ has reviewed the customary nature of common article 3 to the Geneva Conventions of August 12, 1949,<sup>162</sup> which proscribes the carrying out of executions "without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>163</sup> At the very least, common article 3 requires that the death penalty not be imposed "arbitrarily," and without appropriate judicial guarantees. To the extent that the United States reserves application of paragraphs 1 and 2 of article 6 of the Covenant which, like common article 3, prohibit "arbitrary" executions without due process, it is an illegal attempt to set aside a customary norm, and one to which the United States obviously cannot claim to have been a persistent objector.<sup>164</sup> The same can be said of the prohibition of torture, which makes up one of the "core" rights that are often elevated to the status of norms of *jus cogens*.<sup>165</sup>

As satisfying as the Human Rights Committee's conclusion that juvenile executions violate a customary norm may be from a humanitarian standpoint, this controversial affirmation is not supported by any demonstration of either practice or *opinio juris*. In our view, it is far from obvious that a prohibition on juvenile executions constitutes a norm of customary law, as this is generally defined.<sup>166</sup> The problem of such wishful thinking among human rights jurists, who invoke ill-defined "custom" as a substitute for serious and sometimes frustrating efforts at treaty interpretation, is not a new one. Critical of overly optimistic assessments of the scope of customary rules, Theodor Meron has drawn attention to a "tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) and to assume that noble humanitarian principles that deserve recognition as the positive law of

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162. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

163. *Id.* at 115.

164. *See id.*

165. This "core" right is elevated to the status of norms of *jus cogens* pursuant to article 53 of the Vienna Convention on the Law of Treaties, *supra* note 34, 1155 U.N.T.S. at 344. Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946 (1967).

166. William A. Schabas, *The Death Penalty for Crimes Committed by Persons Under Eighteen Years of Age*, in *MONITORING CHILDREN'S RIGHTS*, (E. Verhellen ed., forthcoming 1995).

the international community have in fact been recognized as such by states. The 'ought' merges with the 'is,' the *lex ferenda* with the *lex lata*.<sup>167</sup>

### III. CONSEQUENCES OF THE ILLEGALITY OF THE UNITED STATES RESERVATION

International law recognizes the right of states parties to a multilateral treaty to formulate objections to reservations. This right amounts to a technique for establishing the admissibility of reservations, but it only operates on a bilateral basis. It suggests that the matter of the legality of reservations is entrusted solely to the states parties. Some international treaties have provided a mechanism for the determination of the legality or illegality of reservations. For example, the International Convention on the Elimination of All Forms of Racial Discrimination states that a reservation will be deemed incompatible with the object and purpose of the treaty if at least two-thirds of states parties object to the reservation.<sup>168</sup>

#### A. *Objections by States Parties*

The U.S. reservations to articles 6 and 7 of the Covenant were answered with objections from eleven European states parties.<sup>169</sup> Sweden was the first, timing its objection to coincide with the World Conference on Human Rights, in June 1993, for publicity reasons.<sup>170</sup> These reservations are worded in similar terms and suggest a considerable degree of cooperation.

According to the Vienna Convention on the Law of Treaties, states parties have a period of twelve months in which to object to a reservation.<sup>171</sup> If a party objects, then it is not bound by the reserved provision, at least with respect to its obligations vis-a-vis the reserving state.<sup>172</sup> The technique of

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167. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 361 (1987).

168. International Convention on Elimination of All Forms of Racial Discrimination, *supra* note 41, art. 20, ¶ 2, 660 U.N.T.S. at 236.

169. See MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2.

170. *Id.*

171. Vienna Convention on the Law of Treaties, *supra* note 34, art. 20, ¶ 5, 11, 1155 U.N.T.S. at 337.

172. *Id.*

objections was developed in the context of multilateral treaties not concerned with human rights and is aimed at preserving the reciprocity of obligations between contracting states. Suitable as this mechanism may be in the case of some multilateral treaties, its significance is very slight when human rights instruments are concerned. As the European Court has observed on at least two occasions, reciprocity is a concept that does not fully apply to human rights treaties.<sup>173</sup> By their nature, human rights stipulations in international conventions create obligations for a state party in favor of individuals. It would be absurd to conclude that the objections by Sweden and other European states to the U.S. reservations on the death penalty discharge them from complying with articles 6 and 7 to the extent that they concern the United States, and this was surely not their intention in formulating such objections.<sup>174</sup>

Support for this position is also found in the caselaw of the Inter-American Court of Human Rights. Although there had been no objections to Guatemala's reservation to article 4, paragraph 4 of the American Convention, the absence of objections did not prevent either the Inter-American Commission of Human Rights or the Inter-American Court from examining the matter. Another advisory opinion of the Inter-American Court, *The Effect of Reservations on the Entry into Force of the American Convention* (articles 74 and 75), also speaks to this point.<sup>175</sup> The Court noted that the principles dealing with reservation and objection found in the Vienna Convention:

reflect the needs of traditional multilateral international instruments which have as their object the reciprocal exchange, for the mutual benefit of the States Parties, of bargained for rights and obligations. . . . It permits States to ratify many multilateral treaties and to do so with the reservations they deem necessary; it enables the other contracting States to accept or reject the reservations and to determine whether they wish to enter into treaty relations with the reserving States; and it provides that as soon as at least one

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173. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 90 (1978); *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988).

174. Imbert, *Les réserves, les dérogations*, *supra* note 42, at 46.

175. *The Effect of Reservations on the Entry into Force of the American Convention* (Arts. 74 and 75), Advisory Opinion OC-282, 2 Inter-Am. Ct. H.R. (ser. A) (1982).

other State Party has accepted the reservation, the treaty enters into force with respect to the reserving State.

The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange or rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings.<sup>176</sup>

These words echo similar comments in an early report from the European Commission on Human Rights (European Commission):

the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.<sup>177</sup>

When France lodged an interstate application against Turkey alleging a breach of article 15 of the European Convention, Turkey complained that France had itself filed a reservation to article 15, and was therefore barred from blaming Turkey.<sup>178</sup> The European Commission dismissed the argument, noting the "objective character of the [European] Convention."<sup>179</sup>

In *Belilos v. Switzerland*, the Swiss government objected that the European Court was foreclosed from considering the illegality of its reservation because there had been no objection by other states parties or by the depository.<sup>180</sup> The European Court replied laconically: "the silence of the depository and the

176. *Id.* at 15-16.

177. *Austria v. Italy*, App. No. 788/60, 1961 Y.B. Eur. Conv. on H.R. 116, 140 (Eur. Comm'n on H.R.); *see also* *Cyprus v. Turkey*, App. No. 8007/77, 1978 Y.B. Eur. Conv. on H.R. 226 (Eur. Comm'n on H.R.).

178. *France v. Turkey*, App. No. 9940/82, 1983 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm'n on H.R.).

179. *Id.*

180. *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988). It had hinted at the same argument in *Temeltasch v. Switzerland*, App. No. 9116/80, 31 Eur. Comm'n H.R. Dec. & Rep. 138 (1983); *see also* GÉRARD COHEN-JONATHAN, *LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* 87-88 (1990).

Contracting States does not deprive the [European] Convention institutions of the power to make their own assessment.”<sup>181</sup>

The Committee has also taken this position in its recent General Comment on reservations. The Committee states that the objections mechanism of the Vienna Convention on the Law of Treaties (Vienna Convention) is “inappropriate” to human rights treaties:

[H]uman rights treaties . . . and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee’s competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States *inter se*.<sup>182</sup>

Though they should not operate in the manner envisaged by the Vienna Convention, objections may still serve a useful purpose in treaty interpretation. To this effect, in its March 23, 1995 judgment in *Loizidou v. Turkey*, the European Court appears to breathe new life into the significance of objections in the context of human rights treaties.<sup>183</sup> The European Court considered that objections “lend convincing support” to arguments that a reserving state should have been well aware

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181. *Belilos*, 132 Eur. Ct. H.R. at 23.

182. *General Comment*, *supra* note 75, ¶ 17, at 467.

183. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995).

that a given reservation was dubious.<sup>184</sup>

### B. Adjudication of the Issue

The Covenant has no conventional provision for the adjudication of the legality of reservations. International law has traditionally regarded this as a matter between states, but for the reasons mentioned above, the logic of this view is undermined by the special nature of human rights treaties. According to the scholar Nguyen Quoc Dinh, when a human rights treaty creates a control body for conventional obligations, such a body should be entitled to determine the legality of reservations.<sup>185</sup> However, this view is not shared by all scholars,<sup>186</sup> and the Committee for the Elimination of Racial Discrimination has explicitly refused to assume this role.<sup>187</sup> The power of the Strasbourg organs to rule on the legality of reservations to the European Convention on Human Rights is now beyond question.<sup>188</sup>

184. *Id.* ¶ 95.

185. NGUYEN QUOC DINH ET AL., *DROIT INTERNATIONAL PUBLIC* 181 (5th ed. 1994). For a detailed discussion of this point, see Gérard Cohen-Jonathan, *Les Réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt Belilos du 29 avril 1988)*, REV. GÉN. D. INT'L PUB. 273, 279-86 (1989).

186. Imbert, *Les réserves, les dérogations*, *supra* note 42, at 50 nn.4-5, 57 n.74.

187. See *Report of the Committee for the Elimination of Racial Discrimination*, U.N. GAOR, 33d Sess., Supp. No. 18, at 85, 86, U.N. Doc. A/33/18 (1979); see also *Selected Legal Opinions of the Secretariat of the United Nations and Related Intergovernmental Organizations*, 1976 U.N. Jurid. Y.B. 159, 219-221, U.N. Doc. ST/LEG/SER.C/14, U.N. Sales No. E.84.I.1 (opinion of the Legal Office of the United Nations). This is explained by the fact that the International Convention on Elimination of All Forms of Racial Discrimination, *supra* note 41, 660 U.N.T.S. 195, provides expressly for a mechanism of determining the legality of reservations, something which is not present in the Covenant. Nevertheless, given that the International Convention on the Elimination of all Forms of Discrimination provides for individual petitions, should not an individual who files a communication be entitled to contest the legality of a reservation? See IMBERT, *supra* note 42, at 125. During presentation of periodic reports, members of the Committee for the Elimination of Discrimination Against Women have questioned states parties about their reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 35, 1249 U.N.T.S. 13. See e.g., CENTRE FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS, REPORTS OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, U.N. Doc. ST/CSDHA/5, U.N. Sales No. E.89.IV.4 (1989) (initial report of Egypt); *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 44th Sess., Supp. No. 38, at 18, 53, U.N. Doc. A/44/38 (1990) (initial report of Ireland and Belgium).

188. See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995); *Chorherr v.*

The Committee has made it clear, in its 1994 General Comment on reservations, that it considers itself to be competent to address the legality of reservations.<sup>189</sup> It may do this in the form of conclusions during the presentation of periodic reports, or in its views issued pursuant to individual or inter-state petitions. This follows upon a position adopted by the chairpersons of the various treaty bodies, recommending "that treaty bodies state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law."<sup>190</sup> This dynamic view is to be welcomed, as the multitude of reservations not only to the Covenant but also to other similar treaties has pushed human rights law into a crisis. As shown, the traditional approach to the question, by the technique of objections, is totally inappropriate. If an instrument creates a treaty body whose mission it is to study and comment upon "the measures [states parties] have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights,"<sup>191</sup> then the treaty body must inevitably examine just what norms actually bind the state party. To do this, it must pronounce itself on the validity of reservations. That is what the Committee has done, and not a minute too soon.

The new chairperson of the Committee, Francisco José Aguilar Urbina, pointed out to the U.S. delegation during the presentation of its initial report, in March 1995, that "[w]hile the general comment did not suggest that the Committee's interpretations were binding; the Committee hoped they would be given careful consideration by State parties."<sup>192</sup> Of course, on a strict reading of the Covenant, nothing that the Committee says is really "binding" upon states parties. States that

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Austria, 266 Eur. Ct. H.R. (ser. A) at 7 (1993); Weber v. Switzerland, 177 Eur. Ct. H.R. (ser. A) at 5 (1990); Belilos v. Switzerland, 132 Eur. Ct. H.R. (ser. A) (1988); Temeltasch v. Switzerland, App. No. 9116/80, 31 Eur. Comm'n H.R. Dec. & Rep. 138 (1983).

189. *General Comment*, *supra* note 75.

190. See e.g., *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, U.N. GAOR, 49th Sess., Agenda Item 100, ¶ 30, U.N. Doc. A/49/537 (1994).

191. International Covenant on Civil and Political Rights, *supra* note 1, art. 40, 999 U.N.T.S. at 181.

192. *Hum. Rts. Comm. Concludes Consideration of U.S. Initial Report*, *supra* note 37, at 2.



ratify the Covenant only undertake to submit periodic reports to the Committee, and this implies little more than a dialogue or exchange of information and views between the Committee and state party. On the other hand, the United States has made an additional declaration accepting the interstate petition mechanism created by article 41 of the Covenant.<sup>193</sup> It has therefore manifested its willingness to participate in one of the two contentious mechanisms falling within the competence of the Committee.<sup>194</sup>

The argument that the Committee has an inherent authority to rule on the legality of reservations is on even more solid ground in the context of the petition mechanisms. Surely a petitioner state party is entitled, in the course of an interstate petition, to invoke the invalidity of a reservation made by the respondent state party. The Committee charged with adjudicating such a complaint must take a position on the question. In this context, it should be added that a state that volunteers to participate in a mechanism, whereby an allegation of a breach of the Covenant may be determined by the Committee, should also be prepared to abide by the Committee's conclusions in good faith and to adjust its legislation or practice in accordance.

### *C. Consequences of the Illegality*

The Committee has determined that the U.S. reservations to articles 6, paragraph 5 and 7 of the Covenant are contrary to the object and purpose of the treaty and consequently invalid.<sup>195</sup> If the reservations are illegal, the question becomes whether the United States remains bound by the Covenant, including articles 6 and 7. Examining the matter narrowly, it would appear that the United States has never consented to be bound by articles 6 and 7 of the Covenant as far as the death penalty is concerned. Accession to an international treaty is a form of international contract, and a state cannot be bound to obligations against its will. However, if the matter is examined

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193. International Covenant on Civil and Political Rights, *supra* note 1, art. 41, 999 U.N.T.S. at 182.

194. The other being the individual petition mechanism created by the International Covenant on Civil and Political Rights, Optional Protocol, *supra* note 1, art. 41, 999 U.N.T.S. at 181.

195. See *supra* note 192 and accompanying text.

from another angle, it is also clear that the United States intends generally to be bound by the Covenant. The issue is one of severability or separability, that is, whether the reservations to articles 6, paragraph 5 and 7 can be dissociated from the accession to the Covenant. If the answer is no, then the United States is not a party to the Covenant. If the answer is yes, then the United States is bound by the Covenant, including articles 6 and 7. It is not plausible to conclude that the United States should remain bound by the Covenant, with the exception of the death penalty provisions, for this would mean that the result is the same, whether or not the reservation is illegal. As Judge R. St. John MacDonald of the European Court of Human Rights has written, "[t]o exclude the application of an obligation by reason of an invalid reservation is in effect to give full force and effect to the reservation."<sup>196</sup>

When they formulate objections to reservations, states sometimes indicate the consequences they attribute to the illegal reservation. France objected to India's reservation to article 1 of the Covenant, adding that the objection should not be considered an obstacle to the instrument's entry into force between the two parties.<sup>197</sup> Similar statements were made by the Netherlands and the former Czechoslovakia concerning Korea's reservation.<sup>198</sup> Yet some objections filed by Germany, the Netherlands and the United Kingdom, make no comment on the consequences.<sup>199</sup> Several of the European states which have objected to the U.S. reservations to articles 6 and 7 of the Covenant have stated that they do not consider the objection to be an obstacle to the Covenant entering into force between themselves and the United States.<sup>200</sup>

The Vienna Convention seems to contemplate such statements. It declares that: "[w]hen a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the

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196. R. St. J. MacDonald, *Reservations Under the European Convention on Human Rights*, 21 REVUE DE BELGE DE DROIT INTERNATIONAL [R.B.D.I.] 429, 449 (1988).

197. MULTILATERAL TREATIES, STATUS AS OF DEC. 31, 1994, *supra* note 2, at 128.

198. *Id.* at 127-28.

199. *Id.*

200. *Id.* at 127-30.

extent of the reservation."<sup>201</sup> But for the grounds outlined above dealing with reciprocity, this is obviously not the reason why states have objected to the reservations of the United States, and it is certainly not the reason why they have made such statements. Rather, these declarations must be interpreted as indicating the views of the objecting states to the effect that the United States is bound by the entire Covenant, including the illegally reserved provisions.

International tribunals have only rarely examined the consequences of an illegal reservation to a multilateral treaty. The matter was considered by Sir Hersh Lauterpacht of the ICJ, in his separate opinion in the Norwegian Loans case.<sup>202</sup> France had formulated a reservation at the time of its declaration, recognizing the competence of the ICJ. After finding the reservation to be incompatible with the Statute of the ICJ, Judge Lauterpacht addressed the issue of severability as a "general principle of law," asking whether it was possible "having regard to the intention of the parties and the nature of the instrument" to sever the offending reservation from the declaration as a whole.<sup>203</sup> Two years later, Judge Lauterpacht revisited the question in his dissenting opinion in the *Interhandel* case.<sup>204</sup> The judge sought to determine the intent of the United States with respect to a reservation—known as the "Connelly Amendment"—to the Declaration concerning jurisdiction of the Court.<sup>205</sup> A review of U.S. practice over several decades left no doubt that it considered the issue of the reservation to be a *sine qua non* of its acceptance of the treaty as a whole.

If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration.<sup>206</sup>

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201. Vienna Convention on the Law of Treaties, *supra* note 34, art. 21, ¶ 3, 1155 U.N.T.S. at 337.

202. Case of Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 43-66 (July 6).

203. *Id.* at 56-57.

204. *Interhandel* Case (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21).

205. *Id.*

206. *Id.* at 117.

Judge Lauterpacht made particular reference to the debates in the Senate when advice and consent was given to the matter.<sup>207</sup>

In its 1988 judgment in *Belilos v. Switzerland*, the European Court not only ruled that Switzerland's "reservation," (Switzerland had called an "interpretative declaration") to article 6, paragraph 1 of the European Convention was invalid, it went on to find that Switzerland was bound by the European Convention as a whole and that the "reservation" was therefore severable from the ratification.<sup>208</sup> The Court summarily considered the consequences, applying the test of intention of the reserving state, and concluded that "it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration."<sup>209</sup> Counsel for Switzerland had simplified matters for the European Commission when it admitted this during the oral hearing.<sup>210</sup>

There was no such admission from Turkey when the European Court ruled illegal its "reservations" to articles 25 and 46 of the European Convention in a judgment issued March 23, 1995, only a week prior to presentation by the United States of its initial report to the Committee.<sup>211</sup> In the *Loizidou* case, Turkey's declarations recognizing the individual petition mechanism before the European Commission (article 25) and European Court (article 46) included statements to the effect that it only applied in territory "to which the Constitution of the Republic of Turkey is applicable" or to the "national territory of the Republic of Turkey."<sup>212</sup> The declaration was objected to by Greece, and several other states parties reserved their right to object at a later date.<sup>213</sup> Subsequently, a series of petitions

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207. *Id.* at 105 (citations omitted).

208. *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988).

209. *Id.* at 28. On the *Belilos* case, see MacDonald, *supra* note 196; Susan Marks, *Reservations Unhinged: The Belilos Case before the European Court of Human Rights*, 39 INT'L & COMP. L.Q. 300 (1990).

210. COUNCIL OF EUROPE, EUROPEAN COURT OF HUMAN RIGHTS, Doc. Cour/Misc (87) 237, 45 (verbatim record of the public hearings held on Oct. 26, 1987).

211. *Loizidou v. Turkey*, 131 Eur. Ct. H.R. (ser. A) (1995).

212. 1987 Y.B. Eur. Conv. on H.R. 8 (General Information).

213. It was also criticized by scholars. See e.g., Iain Cameron, *Turkey and Article 25 of the European Convention on Human Rights*, 37 INT'L & COMP. L.Q. 887 (1988); Cohen-Jonathan, *supra* note 185; Claudio Zanghi, *La Déclaration de la Turquie relative à l'article 25 de la Convention européenne des droits de l'homme*, 93 REV. GÉN. D. INT'L PUB. 69 (1989); see also ZAIN M. NECATIGIL, *THE CYPRUS*

from Greek Cypriots were filed with the European Commission alleging various violations of their rights in the Turkish occupied portions of northern Cyprus.<sup>214</sup> The European Commission concluded that the declaration, which was a form of reservation, was illegal, and that consequently an individual petition originating from occupied Cyprus was admissible.<sup>215</sup>

The Republic of Cyprus referred the *Loizidou* case to the European Court.<sup>216</sup> Turkey appeared and argued that it participated in the case as "amicus curia," but the European Court, sitting as a Grand Chamber, properly qualified it as a "respondent Government."<sup>217</sup> Relying for purposes of interpretation on articles 31, paragraph 1 (ordinary meaning, in context and in light of the object and purpose) and 31, paragraph 3(b) (subsequent practice) of the Vienna Convention on the Law of Treaties,<sup>218</sup> and downplaying the significance of the *travaux préparatoires* of the European Convention in favor of a dynamic interpretation,<sup>219</sup> the European Court held that Turkey's reservations were invalid.<sup>220</sup> As to the consequence of this conclusion, Turkey had argued before the European Court that if its reservations to its declarations under articles 25 and 46 were found to be invalid, then the declarations themselves were inoperative.<sup>221</sup> It was essential for the European Court to rule on this point because had Turkey been right, then after affirming the invalidity of the reservations it would be compelled to decline any further competence, the right of individual petition being of no effect. On this point, counsel for the Turkish government, Herbert Golsong, had noted that when Turkey first accepted the competence of the

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QUESTION AND THE TURKISH POSITION IN INTERNATIONAL LAW 147-150 (2d ed. 1993).

214. See, e.g., *Loizidou*, 310 Eur. Ct. H.R.

215. *Les restrictions faites par la Turquie concernant la reconnaissance de la compétence de la Commission selon l'article 25 CEDH sont invalides/Chrysostomos et al. c. Turquie*, 3 REVUE UNIVERSELLE DES DROITS DE L'HOMME [R.U.D.H.] 193 (1991).

216. Although not a party to the proceedings before the Commission, Cyprus was entitled to refer the case to the Court pursuant to article 48(b) of the European Convention on Human Rights, *supra* note 29, 213 U.N.T.S. at 246.

217. *Loizidou*, 310 Eur. Ct. H.R. at 15-16.

218. Vienna Convention on the Law of Treaties, *supra* note 34, 1155 U.N.T.S. at 340.

219. *Loizidou*, 310 Eur. Ct. H.R. at 23.

220. *Id.* at 27.

221. *Id.*

European Commission under article 25 in 1987, its delegate to the Committee of Ministers had made a statement:

in which the Delegate underlined that it had to be clearly understood that the conditions built into the Declaration are so essential that disregarding any of them would make the entire Declaration void and thus lead to the consequence of a complete lapse of Turkey's acceptance of the right of individual petition.<sup>222</sup>

Arguing the case in June 1994, Golsong insisted that he repeated the declaration for the purpose of article 46.<sup>223</sup> Furthermore, he added that Turkey's position was the "exact opposite" of Switzerland's in the *Belilos* case.<sup>224</sup>

The European Court dismissed the importance of Turkey's declarations to the effect that the illegal reservation could not be severed from the declaration as a whole. The European Court said Turkey "must have been aware" that there was a consistent state practice of parties to the European Convention to accept unconditionally the competence of the European Commission and the European Court, and that its purported reservations "were of questionable validity under the Convention and might be deemed impermissible by the Convention organs."<sup>225</sup> Moreover, the European Commission's view that any territorial *à la carte* declaration recognizing the competence of the European Convention organs was invalid had been expressed in pleadings during at least two earlier cases.<sup>226</sup> In the view of the Grand Chamber of the European Court, both the Greek objection and unfavorable reactions from Sweden, Luxembourg, Denmark, Norway, and Belgium to the Turkish declaration lent further support to the position that Turkey was well aware of its fragile position prior to making the declarations.<sup>227</sup> "Seen in this light," concluded the Court, "the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government's basic,

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222. COUNCIL OF EUROPE, EUROPEAN COURT OF HUMAN RIGHTS, Doc. Cour/Misc (94) 271, 35 (verbatim Record of the hearing held on June 22, 1994).

223. *Id.*

224. *Id.* at 36.

225. *Loizidou v. Turkey*, 131 Eur. Ct. H.R. (ser. A) at 28 (1995).

226. *Belgian Linguistics Case*, 1 Eur. Ct. H.R. (ser. B) at 432 (1967); *Kjeldsen v. Netherlands*, 21 Eur. Ct. H.R. (ser. B) at 119 (1978).

227. *Loizidou*, 131 Eur. Ct. H.R. at 28.

albeit qualified, intention to accept the competence of the Commission and Court.<sup>228</sup> The "special character" of the European Convention regime, which the European Court qualified as one of an "instrument of European public order ('ordre public')," therefore favored the severance of the invalid clauses from the declaration, as this would ensure the rights and freedoms enshrined in the European Convention for all areas falling within Turkey's jurisdiction.<sup>229</sup>

The European Court did not set aside the test of intention in determining whether a reservation is severable. Rather, it appears to highlight the difficulty in identifying such intention and expresses a disregard for such factors as formal declarations by the state. If the state ought to have been aware that its reservations were of doubtful legality, then the European Court suggests that it will be deemed to have accepted the fact that such reservations might be declared invalid.<sup>230</sup> This awareness, says the European Court, indicates an intention to be bound by the treaty whatever be the fate of its reservations.<sup>231</sup>

Certain aspects of U.S. practice lend weight to the argument that its general intent is to be bound by the Covenant, whatever the outcome of litigation concerning the legality of the reservations. It is useful to recall that Washington fully participated in the drafting of the American Convention<sup>232</sup> whose provisions are very similar to articles 6 and 7 of the Covenant and were in fact inspired by them. Richard D. Kearney, the U.S. representative intervened frequently in Committee 1 of the San José Conference, held during November 1969.<sup>233</sup> Although briefly questioning the juvenile death penalty and the exclusion of political crimes, he did not object in substance to the provisions dealing with the death penalty or torture. The United States signed the American Convention on June 1, 1977 without reservation.<sup>234</sup> Pending ratification

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228. *Id.*

229. *Id.* at 27.

230. *Id.* at 28.

231. *Id.*

232. American Convention on Human Rights, *supra* note 41.

233. O.A.S. Doc. OAS/ser.K/XVI/1.2, doc. 36 (1969); O.A.S. Doc. OAS/ser.K/XVI/1.2, doc. 38, corr. 1 (1969); O.A.S. Doc. OAS/ser.K/XVI/1.2, doc. 40, corr. 1 (1969).

234. O.A.S. Doc. OEA/ser. L/V/II.83, doc. 14, corr. 1, at 317 (1993).

of the American Convention, it is bound by international law to refrain from any acts that would defeat the object and purpose of the American Convention.<sup>235</sup>

In 1987, the Inter-American Commission of Human Rights found the United States to be in breach of the American Declaration of Human Rights with respect to imposition of the juvenile death penalty.<sup>236</sup> The United States was bound by the provisions of the Declaration by virtue of the Charter of the Organization of American States (Charter), as amended.<sup>237</sup> The United States has been free to denounce the Charter in response to this ruling, but has not done so.

Finally, in February 1995, the United States signed the Convention on the Rights of the Child<sup>238</sup> without formulating any reservations. Article 37(a) of the Convention on the Rights of the Child essentially repeats the norm against juvenile executions found in article 6, paragraph 5 of the Covenant. At the time, the United States knew from the objections by the European states, that many considered its reservations concerning juvenile executions to be inadmissible. Furthermore, a few months prior to signature of the Convention on the Rights of the Child, the Committee had announced that reservations concerning execution of children were incompatible with rules of customary international law.<sup>239</sup>

These elements of recent U.S. practice with respect to similar and related human rights instruments demonstrate that its government considers the sum to be more important than its parts. Therefore, the general intent of the United States is to assume the norms embodied in the Covenant, even if its reservations concerning the death penalty are deemed inadmissible.

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235. Vienna Convention on the Law of Treaties, *supra* note 34, art. 18, 1155 U.N.T.S. at 336.

236. See Case 9647, Inter-Am. C.H.R. 61, 82, ¶ 61, OEA/ser. L/V/II.71, doc. 9 rev.1 (1987)

237. Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 48 (entered into force Dec. 13, 1951); Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 32 (entered into force Feb. 27, 1970) (amendments to the Charter of Organization of American States); Case 2141, Inter-Am. C.H.R. 6, OEA/ser. L/V/II.52 doc. 48 (1984).

238. Recent Actions Regarding Treaties to Which the United States is a Party, 34 I.L.M. 847 (1995) (United States signed the Convention on the Rights of the Child on February 16, 1995).

239. See *General Comment*, *supra* note 75.



## IV. CONCLUSION

The Committee's conclusion that the U.S. reservations to articles 6, paragraph 5 and 7 of the Covenant are invalid is supported by recognized sources of international law, including legal scholarship, caselaw and state practice. The Committee is silent as to the consequences of its ruling, although other authorities, notably a recent judgment of the European Court,<sup>240</sup> as well as the objections of other states parties,<sup>241</sup> suggest that the United States is bound at law by the Covenant as a whole, including articles 6, paragraph 5 and 7.

With respect to article 6, paragraph 5, as there have been several juvenile executions since the Covenant came into force for the United States in September 1992, clear breaches of international law can be established.<sup>242</sup> In the case of article 7, because the Committee has already ruled that the gas chamber constitutes torture or inhuman treatment or punishment,<sup>243</sup> cases where this method of execution has been used since September, 1992 must also be added to the list of Covenant violations. As to the "death row phenomenon," the Committee's views appear to be in flux, and it may soon be ready to find violations on this ground as well.

The Committee does not address the legality of the reservation to article 6 as a whole, leaving some uncertainty as to its position. There is no doubt that the United States also intended to reserve the "most serious crimes" provision in article 6, paragraph 2. Although the Committee says it is "concerned by the excessive number of offenses punishable by the death penalty in a number of States," it does not pronounce itself on this aspect of the reservation.<sup>244</sup> The Committee also expresses its preoccupation with the execution of the mentally retarded.<sup>245</sup> Yet the broad reservation to article 6 also has the effect of excluding the issue of such executions from the obligations assumed by the United States. The Committee ought to have declared that the reservation to article 6 as a whole, as

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240. See *supra* note 211 and accompanying text.

241. See *supra* note 168 and accompanying text.

242. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: DEVELOPMENTS ON THE DEATH PENALTY DURING 1994 at 12-13 (1995).

243. See *Communication No. 469/1991*, *supra* note 8.

244. *Consideration of reports*, *supra* note 6, ¶ 16, at 4.

245. *Id.*

formulated, was invalid.

These criticisms notwithstanding, the Committee has shown unaccustomed boldness in its views on the issue of reservations in general and on the U.S. reservations in particular. The clarification of the issues that the Committee has already provided will hopefully have an influence upon public opinion in the United States. The accession to the Covenant, after decades of isolationism, indicated a recognition by the United States that its previous indifference to contemporary international human rights law was a source of embarrassment and had become a political liability.<sup>246</sup> The guardians of that law, the Committee, have now indicated that the United States will have to pay a price for this. It will be declared in breach of international law for human rights violations committed within its own territory, unless it is prepared to adjust its domestic legislation to the fundamental norms set out in articles 6 and 7 of the Covenant, notably by putting an end to juvenile executions.

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246. There already has been some negative reaction in the Senate to the conclusions of the Committee on the subject of the reservation by the United States. An amendment to legislation providing for appropriations to the State Department, presented to the Senate in June 1995, notes that the purpose of the Committee's position on the reservations "is to seek to nullify as a matter of international law the reservations, understandings, declarations, and proviso contained in the Senate resolution of ratification thereby purporting to impose legal obligations on the United States never accepted by the United States." S. REP. NO. 95, 104th Cong., 1st Sess. § 314(a)(5) (1995) (Draft of Bill S. 908), *available in* ><http://rs9.loc.gov/cgi-bin/query>. The amendment goes on to restrict any expenditure of funds relating to procedure before the Committee until the Committee changes its position on the subject of reservations and "expressly recognize[s] the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights." *Id.* § 314(b)(2)(B).

