

AN EMPIRE ABOVE THE LAW

by Kenneth Roth

It is sadly academic to ask whether international human rights law should trump U.S. domestic law. That is because, on the few occasions when the U.S. government has ratified a human rights treaty, it has done so in a way designed to preclude the treaty from having any domestic effect. Washington pretends to join the international human rights system, but it refuses to permit this system to improve the rights of Americans.

This approach reflects an attitude toward international human rights law of fear and arrogance—fear that international standards might constrain the unfettered latitude of the global superpower, and arrogance in the conviction that the United States, with its long and proud history of domestic rights protections, has nothing to learn on this subject from the rest of the world. As other governments increasingly see through this shortsighted view of international human rights law, it weakens America's voice as a principled defender of human rights around the world and diminishes America's moral influence and stature.

The U.S. government's approach to the ratification of international human rights treaties is unique. Once the government signs a treaty, the pact is sent to Justice Department lawyers, who comb through it looking for any requirement that, in their view, might be more protective of Americans' rights than pre-existing U.S. law. In each such case, a reservation, declaration, or understanding is drafted to negate the additional rights protection. These qualifications are then submitted to the Senate as part of the ratification package.¹

For example, Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR) prohibits the imposition of the death penalty "for crimes committed by persons below eighteen years of age." To preserve the power to execute such juvenile offenders, the U.S. government insisted on a reservation effectively negating this provision.² In taking this extraordinary step, the United States ensured its place with the mere handful of governments worldwide that persist in the barbaric practice of executing offenders who were children when they committed their crimes—such paragons of human rights virtue as Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen.³ Indeed, this U.S. reservation was particularly egregious because it concerned a right—the right to life—from which the ICCPR precludes derogation.⁴

Similarly, the U.S. government entered a reservation limiting the conduct prohibited by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"). The problem, from the government's perspective, was that Article 16 of the convention precludes not only "cruel and unusual punishments"—the prohibition contained in the Eighth Amendment of the U.S. Constitution—but also "degrading treatment." To avoid any possibility of this provision being interpreted to impose a higher official standard of conduct, the U.S. government adopted a reservation stating that the Torture Convention prohibits no more than the "cruel and unusual punishment" provision of the U.S. Constitution.⁵

After this exercise of stripping human rights treaties of any protections that might add to U.S. law, the government takes out a sort of insurance policy against the possibility that the Justice Department lawyers might have made a mistake. To ensure that, heaven forbid, some new hidden right is not lurking in parts of the treaty for which no reservation, declaration, or understanding was entered, the U.S. government first declares that the treaty is “not self-executing,”⁶ meaning that it has no force of law without so-called implementing legislation. This step is not necessarily objectionable in itself, since it ensures that new rights are endorsed by both houses of Congress through the traditional legislative process, rather than through the unicameral ratification process that requires the consent of only the Senate. But then, the government announces that implementing legislation is unnecessary because, according to the Justice Department lawyers, all the rights for which reservations, declarations, or understandings were not registered are already protected by U.S. law.

The result is that Americans are left with no capacity to invoke the treaty in the U.S. courts. The non-self-executing declaration precludes stating a cause of action under the treaty, and the lack of implementing legislation means that there is no alternative route to assert a claim.

One other way that Americans might have invoked their treaty rights would be by appealing to one of the UN review committees established by many human rights treaties. For example, the ICCPR creates the Human Rights Committee—a group of independent experts elected by the states that are party to the Covenant with the responsibility, among others, of hearing complaints brought by people who believe their treaty rights have been violated. However, complaints can be heard only against governments that have ratified the (first) Optional Protocol to the ICCPR, which the U.S. government has not done. Nor has it consented to have individual complaints of rights violations heard by any of the other treaty bodies.

Another possible way to give meaning to the ratification of human rights treaties is to take seriously the periodic self-assessment—a report to the relevant treaty body of experts—that is required of all states that are party. But the U.S. government has treated these reports as little more than an opportunity for self-congratulation. Its first report under the ICCPR, in July 1994, was a lengthy review of relevant U.S. laws with minimal reference to actual practices. Its first report under the Torture Convention, in October 1999, was only slightly better. As of May 2000, the U.S. government is five years overdue in submitting what may be its most sensitive report—its first report under the International Convention on the Elimination of All Forms of Racial Discrimination.

This refusal to apply international human rights law to itself renders U.S. ratification of human rights treaties a purely cosmetic gesture. It allows the U.S. government to pretend to be part of the international human rights system, but in fact it does nothing to enhance the rights of Americans.

This approach suggests a view that human rights treaties should be embraced only insofar as they codify existing U.S. practice, not if they would compel any change in U.S. behavior. Indeed, one is hard-pressed to identify any U.S. conduct that has changed because of the government’s supposed embrace of international human rights standards.

The only two ratification-induced changes that come to mind are the government's establishment and enhancement of criminal and civil liability in the United States for those responsible for torture and other severe mistreatment in other countries, as required by the Torture Convention, and the outlawing of genocide, as required by the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").⁷

In February 2000, for the first time of which I am aware, the U.S. government vowed to change not only its laws but also its conduct because of a human rights treaty—in this case a proposed treaty. At issue was the use of children under 18 years of age as soldiers—a severe problem that plagues an estimated 300,000 children in conflicts around the world. A broad coalition sought to enact a prohibition against such abuse of children by adding an optional protocol to the Convention on the Rights of the Child. To the dismay of many, the U.S. government at first opposed the protocol because it wanted to continue recruiting youths immediately upon their graduation from high school, whether or not they had turned 18. Indeed, quite apart from rejecting the protocol, the U.S. government blocked other governments from adopting it for fear that its existence would make the U.S. look bad. It sustained this position even though the United States is one of only two countries not to have ratified the underlying Convention on the Rights of the Child (the other being Somalia, which has no functioning government).

In January 2000, the U.S. government agreed to a compromise. It would accept a rule barring the deployment of children under 18 in combat and the involuntary drafting of them. But the proponents of a child-soldiers ban were forced to allow continued voluntary recruitment of children under 18. This was a problematic compromise, because in civil wars the line between voluntary and coerced recruitment is often blurred. But if the U.S. government ratifies the protocol as it has suggested it will and then changes its military recruitment and deployment practices, it would at least mark the first time that government behavior, rather than law, has changed because of a human rights treaty. Whether this marks a new attitude toward international human rights law remains to be seen, but its very rarity suggests how entrenched the view is in Washington that the U.S. government ordinarily should not embrace international human rights law except insofar as it parallels existing U.S. practice.

Informing this view is the assumption that the United States has nothing to learn from the rest of the world when it comes to human rights—that American human rights protections are already state-of-the-art, and that improvement upon them is either inconceivable or undesirable. The ratification process is treated not as an opportunity to bring U.S. conduct up to the level of international standards, but as a legal exercise in "dumbing down" international standards to equate them with U.S. practice.

Such arrogance might be understandable if U.S. human rights practice was beyond reproach, but it is not. The United States certainly has much to boast about when it comes to human rights. The fact that I can criticize the government in this article without fear of an official "knock on the door" is one illustration of the many rights and liberties that Americans in fact enjoy. But many Americans, particularly those who are politically weak and disfavored, continue to suffer violation of their rights. The arbitrary application of the death penalty, the lack of accountability for police abuse or misconduct by prison

officials, the racially discriminatory impact of the war on drugs, and the lack of legal protection against discrimination toward gays and lesbians are among the serious human rights violations in the United States that existing law does not adequately address.⁸

The ratification process might have been considered an opportunity to examine critically these deficiencies in American human rights practice and to commit the government to improvements. It might have been seen as an opportunity to build a backstop of international legal protection should constitutional or statutory guarantees fail. Instead, this opportunity was squandered; ratification was treated as a mere charade for external consumption, with no impact on these or any other human rights problems in the United States.

The U.S. government's attitude toward human rights treaties differs from its view of other international accords. Washington routinely accepts changes in its conduct when negotiating trade or security agreements—by, for example, lowering trade barriers or reducing missile or bomb deployments. But when it comes to human rights treaties, ratification will evidently be considered only if it is cost-free.

What lies behind this cynical treatment of international human rights law? There are several possible answers, none of which speak well for Washington. One possible explanation is isolationism—the determination not to sacrifice U.S. sovereignty to rule by “foreigners.” But international human rights law is hardly a step toward global governance. Indeed, even if the U.S. government were to declare human rights treaties to be self-executing or enact implementing legislation, the effect would simply be that alleged victims of human rights abuse in the United States would have an opportunity to state a claim *before a U.S. judge*.

Another possible explanation is a determination that America, with its advanced system for protecting rights, has nothing to learn from other countries. International standards invite consideration of how other governments protect rights—a practice that is quite common among the courts of other countries. But why bother if improvement on American democracy is inconceivable?

This “know-nothingism” does not stand up to scrutiny. For example, Article 6(1) of the ICCPR prohibits the arbitrary deprivation of life. Any honest assessment of whether the death penalty as applied in the United States violates this standard would benefit from considering the powerful and sophisticated arguments of the South African Constitutional Court finding the death penalty in violation of South Africa's new constitution.⁹ Why should the global marketplace of ideas, so vigorously upheld by Washington in other contexts, be judged irrelevant when it comes to rights protection?

Of course, a U.S. litigant could present the South African court's rationale, even under current law, as persuasive authority. But under existing U.S. law, U.S. judges are unlikely to pay much attention to these precedents because they are given no formal relevance to the interpretation of U.S. rights protections. By contrast, a system in which claims could be stated under the ICCPR would invite consideration of these global precedents. A U.S. judge might still decide not to follow a particular ruling by a foreign court or UN committee, but the process would at least have been enriched by his or her

consideration of it.

Washington's cynical attitude toward international human rights law has begun to weaken the U.S. government's voice as an advocate for human rights around the world. Increasingly at UN human rights gatherings, other governments privately criticize Washington's *a la carte* approach to human rights. They see this approach reflected not only in the U.S. government's narrow formula for ratifying human rights treaties but also in its refusal to join the recent treaty banning antipersonnel landmines and its opposition to the treaty establishing the International Criminal Court unless a mechanism can be found to exempt Americans. For example, at the March-April 2000 session of the UN Commission on Human Rights, many governments privately cited Washington's inconsistent interest in international human rights standards to explain their lukewarm response to a U.S.-sponsored resolution criticizing China's deteriorating human rights record.

The U.S. government should be concerned with its diminishing stature as a standard-bearer for human rights. U.S. influence is built not solely on its military and economic power. At a time when the U.S. government seems preoccupied with avoiding any U.S. casualties, the projection of U.S. military power is not easy. U.S. economic power, for its part, can engender as much resentment as influence. Much of why people worldwide admire the United States is because of the moral example it sets. That allure risks being tarnished if the U.S. government is understood to believe that international human rights standards are only for other people, not for Americans.

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- 1 This effort should be distinguished from the U.S. government's parallel, legitimate effort to ensure that the ratification process enhances Americans' rights by identifying and entering reservations to any treaty provision that might detract from pre-existing rights. For example, Article 20 of the International Covenant on Civil and Political Rights requires prohibition of "[a]ny propaganda for war." The U.S. ratification of the ICCPR appropriately contains a reservation rejecting any requirement that speech be restricted in a manner that violates the free speech provisions of the First Amendment of the U.S. Constitution.
 - 2 The reservation reads: "The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment."
 - 3 Human Rights Watch, *United States: A World Leader in Executing Juveniles* (New York, 1995).
 - 4 ICCPR Art. 4(2) (prohibiting derogation from, among others, Art. 6). See also Human Rights Committee decision (questioning appropriateness under Art. 4(2) of reservation concerning Art. 6(5))
 - 5 Cong. Rec. S17,492 (Oct. 27, 1990), at 491.
 - 6 See, e.g., Message from the President of the United States, Transmitting Four Treaties Pertaining to Human Rights, 95th Cong., prepared by Warren Christopher, Department of State.
 - 7 See Genocide Convention Implementation Act, 18 U.S.C. 1091-93 (creating crime of genocide); 18 U.S.C. 2340 and following section (extending U.S. criminal jurisdiction to acts of torture committed outside the United States); Torture Victims Protection Act, 28 U.S.C. 1350 (enhancing civil liability for acts of torture committed outside the United States), but note that foreigners could already bring civil suits against torturers under the Alien Tort Claims Act, 28 U.S.C. sec. 1350. Unfortunately, the U.S. government passed up its first opportunity to prosecute a torturer under this new power. Ricardo Tomas Anderson, a major in Peru's Army Intelligence Service whom the U.S. State Department had identified as a torturer (U.S. Department of State, *Country Reports on Human Rights Practices 1997 and 1999*; see also Human Rights Watch, *Torture and Political Persecution in Peru* (1997), was arrested upon U.S. Justice Department instructions in early March 2000, after he had flown to the United States to testify before the Inter-American Commission on Human Rights of the Organization of American States. However, under a strained and unsustainable interpretation of diplomatic immunity, Acting Secretary of State Thomas Pickering ordered his release. See "State Dept. Helped Peruvian Accused of Torture Avoid Arrest," *New York Times*, March 11, 2000.
 - 8 See, e.g., <http://www.hrw.org/us/index.php>.