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International Human Rights and Domestic Law Focusing on U.S. Law, with Some Reference to Israeli Law

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It is a great honor and privilege to be here to participate in the celebration of the fiftieth anniversary of the Supreme Court of Israel and the fiftieth anniversary of the Universal Declaration of Human Rights. I have very strong feelings about both.

In Siberia and Kirgistan, where my family and I survived World War II, we could not even have imagined the State of Israel that exists today. To keep up our spirits, when there was no food or heat, my mother, "T," would sing in Hebrew. The lines of one wistful song have always stayed with me, though I've never heard anyone else sing it: "Omrim yesh na aretz, Aretz kulah shemesh, Aifo he ha'aretz, Ayeh hu hashemesh?" ["They say there is a land. A land full of sunshine. Where is that land? Where is that sunshine?"]1 Who would have even dreamed, in those dark days of World War Two, that less than ten years later the State of Israel would be established and that only fifty years after that we would have the great State of Israel that exists today! It has served as a refuge for millions of Jews from every corner of the world, fulfilling the prophecies of Yeshayahu and Yermiyahu. It has not only survived, but has thrived, despite constant attacks by its enemies. That it has done so as a democracy, and has succeeded in preserving fundamental human rights to the extent that it has, is a credit to Israel and a tribute to its courts.

The Universal Declaration of Human Rights2 is one of the great documents in the history of humankind. It proclaims that the individual has rights. The right to "life, liberty and security of person;"3 "to equal protection of the law;"4 and "to an effective rem-
edy before a competent national tribunal.” It provides that “no one shall be held in slavery;” “no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment;” and “no one shall be subjected to arbitrary arrest.” Although at the time of its adoption it did not create legally binding rights, it was the basis for the Covenants that did create such rights. But, perhaps even more importantly, it was the basis for a revolution in the way individual rights are viewed by international law. At the time of its adoption, it was generally agreed that only states had rights under international law. Today, it is universally accepted that individuals have rights which the state cannot take away.

It is appropriate that the celebration of the fiftieth anniversary of the Universal Declaration of Human Rights and the fiftieth anniversary of the Supreme Court of Israel are combined in this Conference. Both the Universal Declaration of Human Rights and the State of Israel were dreams fifty years ago; both are realities today far beyond the hopes of their dreamers.

I have been asked to address international human rights and domestic law. I will do so focusing primarily on U.S. law, with some reference to Israeli law.

Most of the rights proclaimed in the Universal Declaration of Human Rights are guaranteed by the U.S. Constitution. Some are specifically guaranteed by the Bill of Rights and the Civil War amendments; others are based on judicial interpretation of the Constitution. Indeed, Eleanor Roosevelt, who was the driving force behind the Universal Declaration of Human Rights, based it on the Bill of Rights.

4 Id. art. 7.
5 Id. art. 8.
6 Id. art. 4.
7 Id. art. 5.
8 Id. art. 9.
9 On presenting the Declaration to the U.N. General Assembly, Eleanor Roosevelt said,

In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms . . . to serve as a common standard of achievement for all peoples of all nations.

United States law goes far in protecting individual rights, perhaps further than the laws of any country in the world. I had long assumed that Israeli law was similar to U.S. law insofar as fundamental freedoms are concerned. Following the Oslo accords, and particularly following the tragic assassination of Prime Minister Rabin, I discovered that that was not true - at least with respect to freedom of speech. There were restrictions on expression and on demonstrations in Israel that, in the United States, would clearly violate the First Amendment as interpreted by the U.S. Supreme Court. I was shocked to read, for example, that the Minister of Education warned that “educators who express extreme right-wing views will be suspended,” and called on “students and parents to report on what is happening in the schools,” noting that some reports had already been received and some teachers were being interviewed by the police. It brought back memories of my early school days in Soviet Russia, when we were extolled by “Comrade Stalin” to report our parents and teachers if they criticized the government. Other examples included a warning by the then Attorney General to newspapers that if they reported statements that constituted “incitement” they would be held criminally liable, and a demand by the Religious Affairs Minister demanded that rabbis who signed a statement that it is forbidden to give up any parts of Eretz Yisrael remove their names from the document or face disciplinary measures.

The restrictions and warnings clearly had a chilling effect on expression. For example, when, at a dinner at a friend’s house, several of us expressed dismay at what was happening, the husband of one friend said in a very agitated voice, “I want you to stop talking about this. You, Malvina, will return to the U.S. in a few days, but my wife will remain here and may be arrested.” The atmosphere was captured in a cartoon, showing a dentist saying to his patient in the dentist’s chair, “I realize opening your mouth is dangerous

12 Ben-Yair Tells Media: No Quotes From Inciters, JERUSALEM POST, Nov. 9, 1995, at 3.
these days, but there is no other way I can treat your teeth.”

When I asked a young, obviously very bright, recent Israeli law graduate whether he thought there was freedom of speech in Israel, he replied, “Of course there is freedom of speech. It just depends on what you say.” He did not realize the irony of his statement.

I refer to this not to criticize Israel, but to raise a cautionary note. Every country tends to overreact in time of crisis. Even the United States, which I consider to be one of the greatest democracies in history, reacted to the Japanese bombing of Pearl Harbor by putting its Japanese citizens into camps. The Japanese-Americans confined in these camps had done nothing wrong. Many of those confined were second and third generation American citizens and some had family members serving in the armed forces of the United States. Yet the U.S. Supreme Court held this constitutional. In contrast, Israel, to the best of my knowledge, took no action against its Arab citizens who, according to media reports, danced on the roofs when Saddam Hussein fired missiles at Israel during the Gulf War. It shows remarkable self restraint and re-

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15 Todd S. Purdum, U.S. Starts to Dust off a Dark Spot in History for All to See, N.Y. Times, June 2, 1998, at A6 (“In all, 10 internment camps in inland areas of California and in Arizona, Arkansas, Colorado, Idaho, Utah and Wyoming held about 120,000 Japanese-Americans who were interned for more than three years under Executive Order 9066, which President Franklin D. Roosevelt issued in February 1942 in the name of national security.”).
spect for freedom of expression for a state to take no action against those who publicly rejoice at its imminent destruction, while that state is literally under fire. But sadly, as already noted, Israel did take action against Jews who spoke out and demonstrated against the Oslo Accords, restricting their freedom of expression. Hopefully, the Knesset will enact a basic law, or the Supreme Court will interpret an existing law, to prevent such restrictions on freedom of expression in the future. Every state tends to overreact in time of crisis, but that is exactly why it is imperative that there be laws protecting freedom of expression.

It has been suggested that U.S. law may go too far in protecting individual freedom. The U.S. Supreme Court has interpreted the First Amendment to protect hate speech, even incitement to violence, unless there is a “clear and present danger” that it will be acted upon. As a result, the United States could not prohibit incitement to genocide or incitement to racial discrimination, as required by the Genocide Convention and the Racial Discrimination Convention, respectively, and had to enter reservations with respect to each. The Supreme Court has interpreted the Fourth Amendment prohibition of unreasonable searches and seizures to

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20 The Senate Resolution giving advice and consent to U.S. ratification of the Genocide Convention includes the following reservation: “[N]othing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.” S. EXEC. REP. NO. 99-2, at 27 (1985). The Senate Resolution giving advice and consent to U.S. ratification of the Racial Discrimination Convention states:

1. The Senate’s advice and consent is subject to the following reservations:

(1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

140 CONG. REC. S7634 (daily ed., June 7, 1994).
21 The Fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
require exclusion of evidence — something the amendment does not provide for by its terms — with the result that persons who have committed the most horrendous crimes may go free, even though there is incontrovertible evidence to establish their guilt. This may happen, even though a majority of all the judges who consider the case conclude, as did the police officer on the scene, that there was probable cause to search, if the Supreme Court decides 5 to 4 that there was not. It is difficult to see what possible deterrent effect exclusion of the evidence under those circumstances can have. As Justice Cardozo once put it, "The criminal is to go free because the Constable has blundered."

While the U.S. protects individual rights to a very high degree under its domestic law, it has been very slow in ratifying international conventions on human rights. The U.S. only ratified the Genocide Convention in 1988, even though it was submitted to the Senate for its advice and consent by President Truman in 1949 and was supported by almost every president, Democrat or Republican, thereafter. One of the long-time arguments made against ratification of these conventions was that ratification would violate the rights of states, which, under the U.S. Constitution, regulate much of the conduct that is the subject of these conventions. However, as far back as 1920, the U.S. Supreme Court held in Missouri

U.S. Const. amend. IV.

24 See, e.g., United States v. Spinelli, 393 U.S. 410 (1969). In that case, ten judges — the district judge, six judges of the court of appeals and three Justices of the Supreme Court — held there was probable cause, and seven judges — two judges on the Court of Appeals and five Justices of the Supreme Court — held there was no probable cause (Justice Marshall did not participate in the decision of the Supreme Court). See id. at 430 (Black, J., dissenting).
27 See 95 Cong. Rec. 57825 (June 16, 1949).
v. Holland, a landmark decision by Justice Holmes, that the enumerated powers of Congress are not a limitation on the treaty power; that the U.S. can enter into a treaty even though it deals with matters not within the enumerated powers of Congress. Furthermore, Congress may then enact legislation to implement that treaty, even if in the absence of the treaty the matter would be one that was within the powers reserved to the states and not subject to regulation by Congress. An attempt to change that by a Constitutional Amendment, the so-called Bricker Amendment, which provided that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty," failed.

The United States has now ratified a number of human rights treaties, including the Genocide Convention, the Covenant on Civil and Political Rights, the Covention on the Elimination of all Forms of Racial Discrimination, and the Convention Against Torture. It has not yet ratified the Convention on the Elimination of All Forms of Discrimination Against Women. That convention has, however, been submitted to the Senate for its advice and consent. All these ratifications have included reservations and some commentators are very critical of the reservations.

29 252 U.S. 416 (1920).
31 Id.
32 Genocide Convention, supra note 18.
34 Racial Discrimination Convention, supra note 19.
With respect to several conventions, the resolution giving Senate advice and consent to ratification also includes a declaration that the convention is not self-executing. That means that it cannot be invoked as law in U.S. courts unless implementing legislation is adopted.\textsuperscript{39} Such a declaration was included in the Senate resolutions giving advice and consent to ratification of the Covenant on Civil and Political Rights\textsuperscript{40} and the Convention on the Elimination of Racial Discrimination\textsuperscript{41} and was proposed for the resolution on the Convention on the Elimination of All Forms of Discrimination Against Women,\textsuperscript{42} which is still pending in the Senate. No implementing legislation has been adopted either for the Covenant on Civil and Political Rights or for the Convention on the Elimination of Racial Discrimination,\textsuperscript{43} and it is clear from the hearings that there is no intention to adopt implementing legislation for the Convention on Women’s Rights.\textsuperscript{44}

International law does not require states to make treaties self-executing.\textsuperscript{45} It does, however, require states to act in good faith.\textsuperscript{46}

\textsuperscript{39} See Restatement (Third) of the Foreign Relations Law of the United States, \textsuperscript{3}§ 111(3) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self executing' agreement will not be given effect as law in the absence of necessary implementation."). See also Malvina Halberstam, United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, \textsuperscript{3}31 Geo. Wash. J. Int’l L. & Econ. 49, at 60 (1997).

\textsuperscript{40} See 138 Cong. Rec. S4781 (April 2, 1992) (statement of Senator Pell). For the text of the Senate resolution giving advice and consent to the Covenant, see id. at 4783-84. For criticism of the non-self-executing declaration with respect to U.S. ratification of the Covenant on Civil & Political Rights, see Jordan J. Paust, Avoiding “Fraudulent” Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights, \textsuperscript{4}42 DePaul L. Rev. 1257 (1993); and Henkin, supra note 38.


\textsuperscript{42} See S. Exec. Rep. No. 103-38, at 3. For a discussion of the reservations, declarations and understandings to CEDAW, see Halberstam, supra note 39.

\textsuperscript{43} See Henkin, supra note 37, at 347.


\textsuperscript{45} See Louis Henkin et al., International Law: Cases and Materials 140 (2d ed. 1987).

While most of the rights provided in the above conventions are also protected by existing U.S. laws, to the extent that there are rights in a convention that are not covered by existing U.S. law, the declaration that the convention is non-self-executing, coupled with an intent not to enact implementing legislation, raises serious questions of good faith under international law.

In my view, it also contravenes Article VI of the U.S. Constitution. Article VI provides:

This Constitution, and the laws of the United States . . . and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby. . . .

This language, making treaties the supreme law of the land, and the parallel provisions in article III giving federal courts jurisdiction in cases involving treaties, was adopted to avoid the problems that existed under the Articles of Confederation, which had left the enforcement of treaties to the legislatures of each of the states.

The history of the clause makes clear that the framers intended treaties to have immediate effect as domestic law and to be interpreted and applied by the courts “like all other laws.” Thus, Hamilton wrote in the Federalists, “Treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must like all other laws, be ascertained by judicial determination.” Justice Story wrote,

It is . . . indispensable that [treaties] should have the obligation and force of a law, that they may be executed by the judicial power and be obeyed like other laws. . . . If they are supreme laws, courts of justice will enforce them directly in all cases, to which they can be judicially applied.

The proposition that in the United States treaties may be self-executing or non-self-executing is generally attributed to Justice

47 U.S. CONST. art. VI.
50 Id.
51 The Federalist No. 22, at 197 (Alexander Hamilton), quoted in Paust, supra note 49, at 762.
52 3 Joseph Story, Commentaries on the Constitution of the United States 695 (1833).
Marshall’s decision in *Foster & Elam v. Neilson*.

However, these terms (self-executing/non-self-executing) do not even appear in the opinion. Nor did Marshall suggest that the Senate has the constitutional authority to provide by declaration (or reservation) that a treaty ratified by the United States shall not be applied by the courts. On the contrary, he stressed that unlike the situation in other states, in the United States treaties have the force of law as soon as they are ratified and must be applied by the courts. Justice Marshall said:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. *In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.*

It is only where the treaty by *its terms* requires legislative action that it cannot be applied by the courts directly. Marshall’s position, that treaties that require legislative action by their terms cannot be enforced directly by the Courts, was later transformed into a rule that in the United States treaties may be self-executing or not, depending on the intent of the Senate in giving advice and consent and the intent of the President in ratifying the treaty.

Although it has become accepted black letter law that in the United States treaties may be self-executing or non-self-executing, a number of prominent scholars and commentators have recently challenged or questioned the constitutionality of a Senate ratification. The following are some examples:

54 Id. at 314 (emphasis added); see also *U.S. v. Rauscher*, 119 U.S. 407, 418 (1886); *Head Money Cases*, 112 U.S. 580, 598-99 (1884) (“A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.”); *U.S. v. Puentes*, 50 F.3d 1567, 1573 (11th Cir. 1995) (citing *Rauscher*, 119 at 418) (“Under our Constitution . . . a treaty is the law of the land and the equivalent of an act of the legislature.”).
55 See *Vasquez*, supra note 48, at 704; *Paus*, supra note 49, at 767 (“Later commentators have distorted [Marshall’s] meaning . . .”).
56 See *Restatement (Third)*, supra note 39, § 111.
declaration that a treaty is not self-executing.  

Professor Jordan Paust states:

The distinction found in certain cases between “self-executing” and “non-self-executing” treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that “all treaties . . . shall be the supreme law of the land.”

Professors Riesenfeld and Abbott state:

The framers of the Constitution intended that treaties be given direct effect in U.S. law when by their terms and context they are self-executing. An ancillary power of the Senate to deny self-execution contradicts this intent.

Professor Damrosch states:

A Senate declaration purporting to negate the legal effect of otherwise self-executing treaty provisions is constitutionally questionable as a derogation from the ordinary application of Article VI of the Constitution.

Although the Restatement of U.S. Foreign Relations Law appears to accept the validity of a non-self-executing declaration by the Senate, Professor Louis Henkin, its Chief Reporter, has recently written, “such a declaration is against the spirit of the Con-

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58 Paust, supra note 49, at 1 (emphasis in original).

59 Riesenfeld and Abbott, supra note 57, at 599.

60 Damrosch, supra note 57, at 527. Damrosch adds, “accordingly, it should not be sustained unless there is some constitutionally based justification for the Senate to inject itself into the question.” Id. at 527. She then proceeds to discuss and refute various arguments that might be made to justify a non-self-executing declaration. She concludes that “it would be far preferable for the Senate to discontinue the device of non-self-executing treaty declarations. . . . The effectiveness of international law would be strengthened by eliminating this unnecessary impediment to judicial enforcement of treaties.” Id. at 532.

61 RESTATEMENT (THIRD), supra note 39, § 111(4)(b), and cmt. h. For a critique of the reasoning of the Restatement, see Vasquez, supra note 48, at 707.
stitution; it may be unconstitutional." He adds in a footnote, "If what I wrote might be interpreted as supporting a general principle that would allow the President, or the Senate, to declare all treaties non-self-executing, that is not my opinion.

Although the Supreme Court has stated that in the U.S. a treaty may be self-executing or non-self-executing, it has never ruled on the enforceability of a treaty provision which by its terms was self-executing, but which the Senate declared to be non-self-executing. In *Power Authority of New York v. Federal Power Commission*, the Court of Appeals for the District of Columbia held, in a two to one decision, that a reservation that would have had the effect of making a treaty provision non-self-executing was invalid. That a practice has long been assumed to be constitutional does not make it so, as the Supreme Court made clear in *I.N.S. v. Chadha*.

In that case, the Court held unconstitutional the legislative veto, even though it had been used in nearly 200 statutes between 1932 and 1975. Thus, the Court might well hold that if a treaty (or treaty provision), by its terms, establishes rights or imposes obligations that can be enforced by the courts directly, a declaration barring the courts from enforcing such rights would violate Articles III and VI of the Constitution.

Moreover, as the State Department acknowledges, "declaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter of international law." Therefore, to the extent that U.S. law is not consistent with the Convention, and no implementing legisla-

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63 Id. at 347 n.26.
64 247 F.2d 538 (D.C. Cir. 1957), vacated as moot, 355 U.S. 64 (1957).
65 The case involved a reservation in the Senate Resolution giving advice and consent to U.S. ratification of the Niagara Waters Treaty with Canada, Treaty Relating to Uses of Waters of the Niagara River, Feb. 27, 1950, 1 U.S.T. 694, providing that "no project for redevelopment of the United States' share of such waters shall be undertaken until ... specifically authorized by Act of Congress." Id. at 699. For a discussion of that case, see Malvina Halberstam, *A Treaty Is a Treaty is a Treaty*, 33 VA. J. INT'L L 51, 55-58 (1992).
67 Id. at 944 ("The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.").
68 For a suggestion that U.S. courts could ignore such a declaration, "since it is not part of the treaty," see Richard E. Lellich, *International Human Rights* 229 (2d ed. 1981). If the treaty by its terms requires legislation then the non-self-executing declaration would not be unconstitutional; it would merely be superfluous.
tion is adopted, the U.S. would be in violation of its international obligations. One of the purposes of Article VI, however, was to avoid precisely that result.\textsuperscript{70}

In sum, U.S. domestic law guarantees to a very large extent most of the rights proclaimed in the Universal Declaration of Human Rights and amplified and made legally binding in the various covenants on human rights. The U.S. has, however, long refrained from ratifying the covenants and now that the U.S. has ratified a number of human rights treaties it has included a declaration, with respect to several, stating that the treaty in question is non-self-executing. That declaration raises serious questions under international law and under Article VI of the U.S. Constitution and should be discontinued.

Thus, both the United States and Israel can take great pride in the protection of human rights by domestic law, but in both further action is essential: in the United States ratification and implementation of human rights treaties, in Israel protection of freedom of expression.

\textsuperscript{70} See Vasquez, supra note 48, at 699.