US Reservations to Human Rights Treaties: All for One and None for All?\(^1\)

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JungSeok Memorial Library,
INHA University
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The purpose of this presentation is to examine US treaty-making practice in the particular context of reservations to human rights treaties. In the past decade or so the US has ratified a number of international human rights treaties, including the 1948 Genocide Convention, the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 Convention on the Elimination of Racial Discrimination and the 1984 Torture Convention. However, particularly in the case of the ICCPR, ratification was accompanied

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\(^1\) This presentation is based on the chapter of the same title in M.Byers and G.Nolte, eds., United States Hegemony and the Foundations of International Law (Cambridge University Press, 2003), Ch.14.

* 영국 옥스포드 대학의 Catherine Redgwell 교수(Reader in Public International Law, University of Oxford 현 재, Professor of International Law, University College London)의 위 글로는, [2003 년] 인하대학교 법학연구소 제7차 학술포럼인 “국제법 주간: 21세기 국제법의 현안과 전망”에서 발표된 것이다. 발표는 2003년 11월 24일(월), 1:00 p.m., 인하대학교 정서동서관 6층 국제회의실에서 이루어졌다.
by five reservations, five understandings and five declarations (RUDs) which significantly modify the Convention in its application to the US and, indeed, in at least two instances may be argued to run contrary to the object and purpose of the Convention.

Unsurprisingly therefore, rather than leading to widespread praise and support for the US in buttressing human rights guarantees on the international level, US ratification of the ICCPR has led to criticisms of the insulation of the US domestic legal order from external influences in the human rights field and the resulting manifestation of what Pierre Klein refers to as an isolationist "superiority complex."2) Indeed, the US approach to ratification of human rights treaties has been characterised by an "la carte multilateralism"3) both in terms of the (more limited) number of treaties accepted and of the (qualified) obligations assumed. The US "remains an anomalous outlier with respect to many widely ratified conventions (e.g. the Convention on the Elimination of Discrimination Against Women or the Convention on the Rights of the Child)"4) and it has entered the highest number of reservations by States Party to the Torture Convention, the Convention on the Elimination of Racial Discrimination, and the ICCPR.

This "pick 'n mix" approach has provoked strong reactions prompted by two major concerns. The first concern is the negative

2) Ch.13, ibid.
3) This terminology derives from a special issue of the European Journal of European Law examining the roles and limits of unilateralism in international law (Volume 11, issue 1, 2000).
impact on the universalising effect of human rights norms. The second flows from the perception of a double standard, given the fact that the United States has not hesitated to raise human rights issues internationally and to rely on "bilateral enforcement" through conditionality attached to foreign aid, loans and military assistance. Louis Henkin uses the analogy of a cathedral supported by (external) flying buttresses to describe this bilateral process, with the US supporting the international human rights edifice largely from the outside, rather than as a pillar within the cathedral.5) With its increased participation in international human rights instruments coming without an unqualified acceptance of the obligations contained therein, the concern arises that the US "pillar" rests on shaky foundations.

There are thus two possible levels of analysis of the impact of US practice regarding reservations to human rights treaties: the impact on human rights and the impact upon general treaty law. This lecture is primarily concerned with the latter, and will focus on US ratification of the ICCPR in particular, drawing therefrom some conclusions regarding the effect of US predominance on the evolution of the law of treaties concerning reservations. It is divided into three parts: first, a brief consideration of the pertinent international legal rules governing reservations to treaties; secondly, consideration of reservations to the ICCPR; and thirdly, analysis of the US reservations to the ICCPR. I will then proffer some overall conclusions.

I. Reservations to Treaties

In traditional treaty-making the integrity of the treaty text was paramount, with unanimity the typical method of treaty negotiation. In a multilateral context a reservation had to be accepted by all other States party in order for the reserving State to become a party to the treaty. However, following the Advisory Opinion of the International Court of Justice in the Reservations to the Genocide Convention case, States were quick to adopt a more flexible practice. Reservations might be made to treaties either silent on the matter (as with the Genocide Convention itself, with compatibility with the object and purpose of the treaty the test of validity) or in accordance with the reservations clause, which will permit departure from the treaty text in general and/or specified circumstances. In either situation it is necessary for only one other State to accept the reservation (or to object to the reservation, but not to treaty relations arising) for the reserving State to become a party to the treaty. This modern approach is enshrined in Articles 19–23 of the 1969 Vienna Convention on the Law of Treaties, with Article 19(c) reflecting the "object and purpose" test of compatibility enunciated by the International Court of Justice in the Reservations to the Genocide Convention case. It is the interaction between the validity/permissibility (Article 19) and opposability (Article 20) elements of the Vienna Convention which, in the absence of a competent organ to determine such matters under the particular treaty in question, has proved the most problematic in state practice. It has provoked what the International Law Commission refers to as a "doctrinal quarrel", with the permissibility school holding that the test of validity is a threshold
test in Article 19 which must be met before any issue of opposability arises under Article 20, whilst the opposability school views all reservations as open to acceptance or rejection. This is of particular import in the human rights field. Jochen Frowein, for example, argues that treating a State which ratifies a human rights treaty with an incompatible reservation as a non-party if the offending reservation is not withdrawn is an untenable approach given the uncertainty which would arise regarding which States are party to global human rights treaties.\(^6\) Indeed, the adherence of the US to the traditional Vienna Convention approach for human rights treaties provides a further basis for criticism of the US practice in respect of such treaties.

It is particularly in the last decade or so that the application without modification of the Vienna Convention regime to human rights treaties has been the subject of considerable academic debate; addressed in a General Comment by the Human Rights Committee under the ICCPR and been an issue within the topic of reservations to treaties in the recent work of the International Law Commission. While the Commission’s work on this topic has yet to be completed, what has been clear virtually from the outset of its work in 1994 has been the commitment of States, including the US, to retaining the three Vienna Conventions in their current form. Equally clear is the view of Special Rapporteur Alain Pellet that there is nothing in the Vienna Convention reservations regime that renders it inapplicable per se to the category of human rights treaties. This view was set forth in response to the controversy

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surrounding the US reservations and the Human Rights Committee's General Comment, with the Special Rapporteur considering it desirable for the Commission to express a preliminary view on the matter rather than waiting for the completion of its work on the topic. "Preliminary Conclusions of the International Law Commission on reservations to normative multilateral treaties, including humanrights treaties" were adopted in 1997, including reiteration of the unity of reservations regime. The Conclusions subsequently met with widespread support in an extensive debate within the Sixth Committee of the United Nations General Assembly.

There is thus little doubt that the US reservations to the ICCPR had a catalytic effect and were partly responsible for the Human Rights Committee's adoption of its General Comment. This in turn prompted the International Law Commission to take its preliminary view on the issue of reservations to normative multilateral treaties. Nonetheless, it should be stressed that the US was not the first State to make sweeping reservations to a human rights instrument with the legal intent of insulating existing national law from the effect of international obligations. Indeed, its reservations are less egregious than many, in that they demonstrate a particularised, rather than generalised, subordination of international law to domestic law. Nor is this the first instance where States have responded to reservations by objecting to their incompatibility with the object and purpose of the convention while not opposing the entry into force of the convention between themselves and the reserving State.

Nonetheless, it is my thesis that the practice of the US in this
area, given its position as the sole superpower and an avowed human rights adherent, risks undermining not only the integrity of the treaty text in question, but also the premise that domestic law cannot prevail over internationally assumed obligations. After all, "[t]reaty ratification normally implies a purpose of conforming domestic law to international obligations, not the reverse."7) The US reservations, taken "[c]ollectively all but nullify the legal effect of the ratification on both the international and domestic planes."8) At worst they call into question the very basis for consent to, and obligations arising under, international treaties; at best, they serve to highlight the persisting confusion regarding the response to and legal effect of impermissible reservations. In the specific instance of the US reservations, the fundamental role of consent on the ratifying State's terms has been decisively underscored by prioritising the consent to be bound under the protective cover of the offending reservations ("all for one") rather than either severing the reservations and holding the reserving State exposed to the unmodified obligations, or refusing to consider the US a party at all. The effect is to undermine universal acceptance of human rights and the multilateral institutional mechanism for their enforcement ("none" – or at least less "for all"). Yet promoting universal acceptance of universal human rights norms is part of the mission of the UN, as reflected in the commitment, expressed in the Millennium Report of the Secretary-General to the General Assembly, to advance the international rule of law through, inter alia, encouraging States to ratify international treaties.

II. Reservations to the International Covenant on Civil and Political Rights (ICCPR)

In 1994, the supervisory body established under the ICCPR, the Human Rights Committee, issued General Comment No.24 (52) on Reservations to the ICCPR. As of 1 November 1994, 46 of the 127 States then parties to the Covenant had entered a collective total of 150 reservations to it. This constituted 36% of the States then party to the Covenant. No guidance on the making of reservations is to be found in the Covenant or its First Optional Protocol: both documents are silent on the matter of reservations (there is a reservations clause in the Second Option Protocol, which largely prohibits them). The "compatibility with the object and purpose" test consequently applies as a matter of general international law. The Committee considers that the object and purpose of the Covenant "is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken" (Comment, para.7). The reservations which have been made to the Covenant vary in significance, with the Comment dividing into three categories those reservations likely to impair its effective implementation. These are: (1) reservations excluding the duty to provide and guarantee particular rights in the Covenant; (2) reservations couched in general terms "often directed to ensuring the continued paramountcy of certain domestic legal provisions";

9) For general discussion see Catherine Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No.24(52)" (1997) 46 International and Comparative Law Quarterly 390.
and (3) reservations affecting the competence of the Human Rights Committee. It should be stressed that the Committee does not rule out the use of reservations altogether; indeed, it is difficult to see how this could be done without an express prohibition on reservations in the Covenant. In fact such prohibitions are rare in human rights treaties. In any event, the advantage of permitting States to accept the generality of an instrument while entering reservations in respect of those rights which may be difficult initially to guarantee is explicitly recognised in the Comment. Nor should it be assumed that the mere fact of making a reservation is evidence of an unwillingness to comply with human rights principles, not least because of the variety of reasons for and scope of actual reservations made by States. However, there is little doubt that the general tenor of the language used in the Comment is disapproving of "permanent" reservations. A restrictive approach to such reservations is clearly favoured, in the interests of the integrity of the Covenant. This reflects the essential paradox in permitting reservations to human rights instruments which are intended to guarantee common international minimum standards. As Frowein observes, "[a] permanent reservation lowering the minimum standard is incompatible with this basic idea" of universalising minimum human rights standards.\(^{10}\)

A temporary derogation from the full rights and obligations of the State under the treaty is, however, unexceptional, pending the realignment of national law. Such a derogation does not run afoul of the basic international law prohibition, embodied in Article 27 of the Vienna Convention, against invoking the provisions of internal law as justification for the failure to perform international obligations, in such a way that no real international rights or

\(^{10}\) Supra, note 6, at p.412.
obligation have been accepted. It is also arguably consistent with Article 2(2) of the Covenant which obliges States "to take the necessary steps, in accordance with constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant". Reservations may also allow a State to 'hedge its bets' against the uncertain application of new treaty obligations, providing the "assurance that the States' interests will be preserved in all circumstances".11)

The confusion which the lack of clarity in Articles 19–23 of the Vienna Convention has engendered in State practice is another reason the Committee provides for rejecting the application of those articles to human rights treaties. The confusion is well-illustrated by the objections to the United States' RUDs. Only eleven of the 127 States then party to the Covenant objected. Five did so on the basis of incompatibility with the object and purpose of the Covenant (Denmark, Finland, France, Spain and Sweden), three on the basis of incompatibility with a particular article of the Covenant (Belgium, Germany and Italy), and three used both bases (Netherlands, Norway and Portugal). None expressly objected to treaty relations arising with the United States in consequence of its objections. In the light of the strength of these objections, the question must be asked whether concern to ensure the participation of the United States in the Covenant has overcome concerns regarding that treaty's integrity. Let us explore the US reservations in more depth in the third part of this presentation, before arriving at some overall conclusions.

III. US Reservations to the ICCPR

The five reservations, five understandings and three declarations made by the United States upon ratification of the Covenant on 8 June 1992 furnish examples of reservations falling in each of the three categories which I have mentioned were identified by the Human Rights Committee as impairing effective implementation of the ICCPR. The five reservations limit or exclude the effects of:

1. Article 20 (prohibitions on war propaganda and hate speech). Concerns about the compatibility of this provision with free speech guarantees have led a number of other States to make similar reservations, and no objections were raised to this US reservation.

2. Article 6 (limitations on the application of the death penalty). The US is the only State currently to maintain a reservation against this provision, which has provoked a number of objections.

3. Article 7 (definition of cruel, inhuman or degrading treatment or punishment). A number of objections were made to this reservation.

4. Article 15(1) (reduction of penalties for certain offences). As with Article 20, other States have made similar reservations and no State has objected to this US reservation.

5. Article 10(2)(b) and (3) (treatment of juvenile offenders). Similar reservations have been entered to these provisions by other States, including Australia whose reservation (subsequently withdrawn) prompted a Netherlands objection. No State has objected to this US reservation.

In assessing the situation, Shelton presciently observes that
"[p]articularly because the Covenants are deemed to constitute minimum standards of state conduct towards individuals and groups, there may be objections to the number and scope of U.S. conditions taken together."\(^{12}\) Objections there have been, but as we have seen, they come from only eleven States. Attracting the most objections are reservations (2) and (3) which relate to articles 6 (protecting the right to life) and 7 (guaranteeing freedom from torture or cruel, inhuman or degrading treatment or punishment), respectively, and which state:

(2) 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.

(3) That 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 punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

Both are non-derogable provisions, though the Human Rights Committee in its General Comment rightly does not make an automatic correlation between reservations to non-derogable provisions and reservations which offend against the object and purpose of the Covenant. It does, however, assert that "a State has a heavy onus to justify such a reservation." (Comment, para.10)

\(^{12}\) Shelton, supra note 7, at p.272.
The United States' explanation for attaching conditions to ratification was to make a reservation wherever incompatibilities between the Covenant and domestic law were found. David P. Stewart, the then Assistant Legal Adviser for Human Rights and Refugees in the US Department of State, notes in connection with reservation (2) that "however much one might disagree with [the continued use of capital punishment] in the United States, one could not realistically expect adoption of the Covenant to overrule the democratically expressed desires of a majority of citizens in a majority of states." 13) This point was also made by the United States delegation before the Human Rights Committee, where the then State Department Legal Adviser Conrad Harper indicated that the decision to retain the death penalty "reflected a serious and considered democratic choice of the American public" which it was not appropriate to dismiss. 14) This prioritising of (in)compatible domestic law over international law in the human rights sphere is commented upon by Jos Alvarez in his recent critique of Anne-Marie Slaughter's liberal theory. He notes that the United States' stance with respect to international human rights conventions may pose troublesome arguments for liberal assumptions about treaty compliance, including the argument that "in liberal states with 'legitimate' law-making institutions, domestic rights norms — such as those arising from the Supreme Court's interpretation of the US Constitution — have greater legitimacy than those created by remote, unrepresentative international processes. Under this view, even when domestic and

international human rights norms diverge, the latter should not prevail.\textsuperscript{15)\textsuperscript{16)\textsuperscript{17)}}

The US approach was criticised by individual members of the Human Rights Committee during consideration of the United States' report, and is reflected in the Committee's Comment on that report:\textsuperscript{16})

The Committee regrets the extent of the [United States'] reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.

The Committee stopped short, however, of declaring the incompatible reservations invalid and severing them from the US consent to be bound, notwithstanding espousing this approach in General Comment No.24. The general view appears to be that the Committee does not have the legal competence to make such a determination with binding effect upon the Parties. In the event, in considering the United States' report the Committee, among other things, "recommends that that State party review its reservations, understandings and declarations with a view to withdrawing them, in particular reservations to article 6, paragraph 5, and article 7 of the Covenant."\textsuperscript{17)} This recommendation is consistent with the

\textsuperscript{15) Supra note 4, at p.195.\
16) CCPR/C/79/Add.60, para.14 (53rd session).}
International Law Commission's view that it is only the reserving State that has the responsibility to take action in the event of the incompatibility with the object and purpose of the treaty of a reservation which it formulated. This action could include forgoing participation in the treaty, withdrawing the reservation, or modifying it to rectify the incompatibility.

Thus response to these reservations, understandings and declarations is governed by the "traditional modalities of control" exercised by the contracting Parties in accordance with Articles 19–23 of the Vienna Convention. As already indicated, the United States' reservations provoked objections from a small number of States Parties to the Covenant, including a strongly worded Swedish one which states, inter alia, that "[r]eservations of this nature contribute to undermining the basis of international treaty law." Nonetheless all the objecting Parties appear to have assumed, notwithstanding their objections even on grounds of incompatibility with the object and purpose of the Covenant, that treaty relations would arise and that the matter could perhaps be treated as one of opposability. If the US reservations are objected to on such a basis, then Article 21 of the Vienna Convention provides that the provisions to which the reservations relate do not apply to the objecting States, to the extent of the reservations. The further legal effect of no treaty relations arising is rebutted by the express declaration by all of the objecting States (save for Germany, where silence has the same effect under Art.20(4)(b)) that their objections do not prevent the entry into force of the Covenant between themselves and the US. This approach

17) Ibid., para.27.
underscores one motivation for the objections to the reservations, namely, the objecting States' desire to register publicly their opposition to the stance taken by the United States — without taking the more drastic step of stipulating that no treaty relations arise between them. As a general "sanction" for incompatible reservations the latter approach is of limited effect in a multilateral treaty whose normative obligations are owed non-reciprocally. Moreover, the US would become a party to the ICCPR having reciprocal relations with the vast majority of States parties, namely those who did not object to the reservations. Even if the two-stage process of the Vienna Convention in respect of permissibility (Article 19) and opposability (Article 20) were meticulously observed, there is no automaticity to a determination of incompatibility. It is ultimately for other State Parties to assess compatibility and to act on the basis of that assessment. Though some would argue that the reserving State cannot be considered a party to the treaty at all in consequence of a reservation incompatible with its object and purpose, the bulk of State practice supports participation notwithstanding such a reservation (as is the case here with the US).

The Vienna Convention does not espouse the "Strasbourg approach" of severing the offending reservation(s). (This has been done by the European Court of Human Rights, for example in the Belilos Case.) Although General Comment No.24 highlighted this as one possible approach to invalidity, the Human Rights Committee did not adopt this approach when considering the US reservations in 1995. Not surprisingly, the United States has objected to the Committee's assertion of its competence to render such determinations with legally binding effect and considers
severance of invalid reservations "completely at odds with the established legal practice and principles and even the express and clear terms of adherence by many States". In respect of its own reservations it has indicated that: "The reservations contained in the United States instrument of ratification are integral parts of its consent to be bound by the Covenant and are not severable. If it were to be determined that any one or more of them were ineffective, the ratification as a whole could thereby be nullified."

18)

Presumably the ultimate choice for any State facing the "Strasbourg approach" and desiring its consent to be bound to be on its terms is to denounce the treaty (assuming that it has already become a party to the treaty). But in response to an attempt by North Korea to denounce the Covenant (which is silent on denunciation and withdrawal, with the default rule of Article 56 of the VCLT thus applying) the Human Rights Committee indicated that this was not permitted. Amongst other things, it notes that "it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation"and, further, that "[t]he rights enshrined in the Covenant belong to the people living in the territory of the State party. once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding [inter alia] any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant".

19) Human Rights Committee General Comment No.26(61).
Advocacy of a severance approach uncaterea for in the VCLT, and the apparent absence of an 'exit door' to the Covenant, highlights not only the difficulty in applying the general law of the Vienna Convention to this special category of treaty, but also the broader question of whether such law should be applied. It will be remembered that when the Human Rights Committee voiced doubts about the utility of the reservations provisions of the Vienna Convention with regard to the Covenant, this was heavily criticised by, among others, the UK and the US. The British Government insisted that "the correct approach is to apply the general rules relating to reservations laid down in the Vienna Convention in a manner which takes full account of the particular characteristics of the treaty in question". Indeed, the controversy surrounding reservations to human rights treaties, deepened in consequence of the US reservations, is reflective of a broader debate regarding the potential "fragmentation" of international law.

As indicated, one of the explicit rationales for the US reservations is to ensure "the continued paramountcy of certain domestic legal provisions" where these differ from the Covenant - the second in the Committee's tripartite classification of the types of reservations likely to impair effective implementation. Writing in 1979 in the context of President Carter's 1978 proposal to ratify the ICCPR, Oscar Schachter referred to the US approach as giving rise to "[a] more subtle problem of possible non-implementation". He contrasted the US approach, of adopting reservations up front in an effort to render the international obligations compatible with domestic law, with other States' sweeping assertions, in the

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absence of such reservations, that no additional measures of domestic implementation were required. Schachter was critical of both approaches. He viewed the reservations approach, whereby "a state purports to accept its obligations and at the same time seeks to rule out any change in its law that would be required to meet those obligations", as weakening the regime of the Covenant. 21) Louis Henkin, for his part, categorised US reservations, understandings and declarations to human rights conventions as based on five principles: (1) constitutional limitations on treaties, that is to say, limitations required to ensure conformity with domestic constitutional law; (2) rejecting higher international standards, and thus ensuring no change in domestic law even where below international standards; (3) avoiding the compulsory jurisdiction of the ICJ, by rendering any submission of any dispute to the Court subject to express US consent in each instance; (4) a federalism clause; and (5) a non-self-executing declaration, to limit the impact of ratifying the ICCPR under domestic law by preventing it from giving rise to an independent cause of action whereby domestic courts could adjudge domestic human rights standards against international yardsticks. 22) The current US approach to the ratification of human rights treaties may be evidence of an undesirable shift or weakening in what Detlev Vagts refers to as the "penumbral obligation", that is to say, the factors explaining support for the binding quality of treaty obligations under US domestic law as reflected on the international law plane in the doctrine of pacta sunt servanda. 23)

21) Oscar Schachter, "The Obligations of the Parties to Give Effect to the Covenant on Civil and Political Rights" (1979) American Journal of International Law 462.
23) Detlev Vagts, "The United States and its Treaties: Observance and Breach" (2001) 95
IV. Conclusions

Writing in 1995, Louis Henkin was particularly concerned by the constitutional implications of the US reservations, understandings, and declarations to the ICCPR and by the impact this approach would have on international practice. In particular, he was concerned that the insulation of domestic law from international rules might be strengthened and the principle of pacta sunt servanda further undermined. Perhaps because a large number of States had already indicated their consent to be bound by the ICCPR and other major human rights instruments, it is difficult to detect that the US stance has had significant negative impact in the manner suggested. But it will certainly have reinforced the position of those States which had already made incompatible reservations to the Covenant and other human rights instruments. It will also have undermined further the generality of international human rights, not to mention the multilateral institutional machinery designed to ensure their observance, while strengthening an approach which prioritizes universality of participation over the integrity of the treaty text. One senses a lost opportunity strongly to support universal human rights, at least in so far as the ICCPR is concerned. This is one area where strong countervailing regional practice – the Strasbourg approach – may be having an impact on US predominance, particularly in the suggestions that the US should be considered bound to the ICCPR without reliance on incompatible reservations. Yet in terms of the evolution of the law of treaties, the US approach, in its response both to General Comment No.24 and to the work of the International Law

American Journal of International Law 313, at p.323
Commission on reservations to treaties, has been to buttress the traditional Vienna Convention approach to reservations. Both the US representative on the Sixth Committee of the UN General Assembly and the US member of the International Law Commission have repeatedly supported the Special Rapporteur's approach to reservations, namely, to retain the Vienna Convention formula while producing a guide to reservations practice. This ensures that States retain the flexibility to modify their participation in international treaty regimes to the extent compatible with specific reservations clauses or the default rule of compatibility found in Article 19(c) of the Vienna Convention. In the US case, reservations preserving the paramountcy of domestic (especially Constitutional) law as well as non-self-execution and the requirement of express consent for the invocation of any dispute settlement mechanism, insulate US law from challenge before both domestic and international. What has been left open is the reporting system under the ICCPR as a mechanism for the open scrutiny of, among other things, the compatibility of US reservations, understandings and declarations with the ICCPR. Perhaps in order to keep this mechanism working, the Human Rights Committee stopped short of explicitly pronouncing on the issue of severance of the offending reservations. Doing so would have undoubtedly provoked a strong US response and, no doubt, a "constitutional crisis" within the ICCPR as to the proper legal scope of the Committee's jurisdiction and functions. This restraint did not stop Congress from passing a bill (subsequently vetoed by President Clinton) which would have cut off funding for US obligations under the ICCPR unless the Human Rights Committee "expressly recognised the validity [of the US reservations, understandings and declarations] as a matter of international law".24)
Similar pressures have been brought to bear in connection with US membership on the Committee. It remains to be seen whether the US approach represents "due regard for time-tested and authentically American institutions and practices, or merely the arrogance of a superpower that exempts itself from the accommodation of international sensibilities that it demands of other states...".\(^{25}\).