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Should International Human Rights Law Trump US Domestic Law?

Jack Goldsmith*

I. INTRODUCTION

Consider the following claims raised in US courts under the International Covenant of Civil and Political Rights (“ICCPR”)¹, a treaty ratified by the United States:

- Nevada sentenced Michael Domingues to death for murdering two people when he was sixteen years old. Domingues argued that his sentence, though valid under the Eighth Amendment, should nonetheless be set aside because it violated Article 6(5) of the ICCPR.² Article 6(5) prohibits capital punishment for crimes committed under the age of eighteen.
- Lawrence and Beverly Newman sued state officials involved in proceedings related to the Newmans’ adoption of two children. The Newmans argued that Article 2(3)(a) of the ICCPR overrode otherwise-applicable state and federal immunities.³ In Article 2(3)(a), each signatory nation promises to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”
- Several unlicensed radio operators have challenged Federal Communications Commission (“FCC”) licensing requirements under Article 19(2) of the ICCPR.⁴ Article 19(2) provides that “[e]veryone shall have the right to

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1. International Covenant on Civil and Political Rights, 999 UNTS 171, 6 ILM 368 (1966).
2. See *Domingues v Nevada*, 961 P2d 1279 (Nev 1998).
3. See *Newman v Deiter*, 702 NE2d 1093 (Ind App 1998), cert denied, 120 S Ct 329 (1999).
4. See, for example, *United States v Any and All Radio Station Transmission Equipment Located at 2903 Bent Oak Highway*, 19 F Supp 2d 738 (E D Mich 1998), revd and remanded, 204 F3d 658 (6th Cir 2000);

freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds . . . through any other media of his choice.”

- Several plaintiffs in Washington state have argued that the Washington Persistent Offender Accountability Act, otherwise valid under state and federal law, violates Article 10(3) of the ICCPR.⁵ Section 10(3) provides that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”
- An organizer of educational trips argued that federal restrictions on travel to Cuba violated Article 12(3) of the ICCPR, which requires travel restrictions to be “necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others.”⁶
- Fleming Ralk alleged that Georgia officials violated Article 10(1) of the ICCPR when they denied him, as a prisoner awaiting trial, access to adequate reading materials, clothing, and medical attention.⁷ Article 10(1) provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”
- Rene Benitez was extradited to the United States for crimes committed against US officials in Colombia. Benitez had already been convicted and incarcerated for the crime in Colombia. He alleged that his subsequent prosecution in the United States, though consistent with US law, violated Article 14(7) of the ICCPR.⁸ Article 14(7) provides that “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

In all these cases, the party invoking the ICCPR claims that (a) the treaty provides broader individual rights protection than domestic law and (b) the treaty rights should apply in the domestic realm to invalidate governmental action that is otherwise valid under state and federal law. These claims have an initial plausibility. Article VI of the US Constitution makes treaties the supreme law of the land that, if self-executing, bind the President and supersede prior inconsistent state and federal

United States v Any and All Radio Station Transmission Equipment at 97.7 MHz Located at 1400 Laurel Ave, 976 F Supp 1255 (D Minn 1997), revd and remanded, 169 F3d 548 (8th Cir 1999), superseded by 207 F3d 458 (8th Cir 2000).

5. See, for example, *Washington v Parra*, 977 P2d 1272 (Wash App 1999); *Washington v Russ*, 969 P2d 106 (Wash App 1998).
6. See *Freedom to Travel Campaign v Newcomb*, 82 F3d 1431 (9th Cir 1996).
7. See *Ralk v Lincoln County*, 81 F Supp 2d 1372 (SD Ga 2000).
8. See *United States v Benitez*, 28 F Supp 2d 1361 (SD Fla 1998), affd as *United States v Duarte-Accero*, 2000 US App LEXIS 6680 (11th Cir 2000).

law. And the broad language of the ICCPR provides colorable support for the claims on the merits.

Nonetheless, US courts reject these claims under the ICCPR, usually without consideration of their merits. The main reason they do so is that the President and Senate have attached conditions to US ratification that preclude the ICCPR from being a source of domestic law. The United States has attached similar conditions to the other modern human rights treaties it has ratified—the Genocide Convention, the Torture Convention, and the Race Convention.

The human rights community has fiercely criticized the United States' failure to make international human rights treaties a source of law in the domestic realm.⁹ In this essay, I defend US practice against these criticisms. To focus the analysis, I simplify in two ways. First, I consider only the ICCPR, the most ambitious of the international human rights treaties. Second, I assume that the US practice of not incorporating the ICCPR into the domestic realm is legally valid under both international law and domestic constitutional law.¹⁰ I thus concentrate only on the policy question whether the US should apply the ICCPR in the domestic realm.

The analysis proceeds as follows. I begin with some background points about the ICCPR. I then consider whether, from a purely domestic perspective, the United States should apply the ICCPR on the domestic plane. I conclude that from this perspective, incorporation of the ICCPR would bring significant costs and very few benefits. I next consider whether these purely domestic costs are outweighed by benefits—to the United States and to other countries—at the international level. I conclude that they are not.

II. THE ICCPR

The ICCPR is the most ambitious human rights treaty to emerge from the mid-century human rights revolution. It was designed to give legal force to the terse human rights commitments of the United Nations ("UN") Charter, and to the more elaborate but technically non-binding UN General Assembly Declaration of Human Rights. The ICCPR has 53 Articles that guarantee dozens of civil and political rights.

The large majority of the ICCPR's rights are like those guaranteed by US domestic constitutional and statutory law. But the ICCPR rights are couched in different language than analogous domestic US protections. Consider a few of many examples:

9. See, for example, Louis Henkin, *US Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 Am J Intl L 341 (1995); Amnesty International, *United States of America: Rights for All — Amnesty International's Recommendations to the United States Government to Address Human Rights Violations in the USA*, AMR 51/46/98 (1998).

10. This assumption is defended at length in Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 Penn L Rev (forthcoming 2001).

- The ICCPR provision analogous to the US Equal Protection Clause and various anti-discrimination statutes provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political¹¹ or other opinion, national or social origin, property, birth or other status.

- The ICCPR analogue to the Due Process clauses and various state tort laws provide:

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.¹²

- The ICCPR analogues to the freedom of speech provisions of the First Amendment provide:

Everyone shall have the right to hold opinions without interference.¹³

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.¹⁴

The right of peaceful assembly shall be recognized.¹⁵

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.¹⁶

- The ICCPR analogue to several provisions in the Fourth and Fifth Amendments, and to various state tort laws, provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.¹⁷

- The ICCPR analogue to certain aspects of the First Amendment, Fourth Amendment, substantive due process, and state tort law provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or¹⁸ correspondence, nor to unlawful attacks on his honour and reputation.

There are dozens of similar examples.

11. ICCPR, Art 26 (cited in note 1).

12. *Id.* at Art 6(1).

13. *Id.* at Art 19(1).

14. *Id.* at Art 19(2).

15. *Id.* at Art 21.

16. *Id.* at Art 22.

17. *Id.* at Art 9.

18. *Id.* at Art 17.

Although the large majority of ICCPR rights have US domestic law analogues, some of its rights clearly go further than US law. For example, the ICCPR's prohibitions on "[a]ny propaganda for war" and on "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"¹⁹ are probably inconsistent with First Amendment free speech rights. Similarly, the ICCPR's prohibition on discrimination on the basis of "any . . . status"²⁰ contemplates broader and more open-ended anti-discrimination protection than US domestic law. And the ICCPR's prohibition on the execution of juvenile murderers²¹ is inconsistent with the practice of a few states.

In addition to guaranteeing these substantive rights, the ICCPR sets up a Human Rights Committee ("HRC"). Parties to the ICCPR are required to submit reports to the HRC on measures taken to implement the ICCPR and on progress made in the enjoyment of those rights. The HRC is supposed to "study" these reports and make any comments "it may consider appropriate."²² The HRC provides a forum for international scrutiny of nations' human rights practices. It does not have official judicial or enforcement authority in connection with state party reports.

The US treaty-makers ratified the ICCPR in 1991, consenting to the large majority of its obligations and to the reporting requirements before the HRC. Presidents Carter and Bush proposed, and the Senate consented to, several conditions to the US ratification. Two conditions have particular relevance here. First, the treaty-makers declined consent to terms that would violate the US Constitution or that would impose an international obligation more demanding than extant domestic law. Second, the treaty-makers made the ICCPR non-self-executing. This means that the ICCPR has no domestic force unless and until Congress enacts implementing legislation.

Critics maintain that the United States should consent to all of the terms in the ICCPR, and should make the ICCPR directly enforceable by courts on the domestic plane. In short, the critics would like the ICCPR to be the functional equivalent of a domestic federal statute. The appropriate normative questions are thus (a) should the United States enact a domestic federal law with the content of the ICCPR and (b) should this domestic federal law be made by the President and two-thirds of the Senate rather than through the bicameral legislative process?

19. *Id.* at Art 20.

20. *Id.* at Art 26.

21. *Id.* at Art 6(5).

22. *Id.* at Art 40(4), 40(1).

III. DOMESTIC COSTS AND BENEFITS

The ICCPR touches on every conceivable political and civil right. If proposed as a federal statute, it would be the most ambitious domestic human rights law ever introduced, touching on topics regulated by the Bill of Rights, the Reconstruction Amendments, dozens of civil and political rights statutes, and numerous state tort laws. The domesticated ICCPR would supersede prior inconsistent state and federal law. When ICCPR rights were more protective than domestic constitutional rights, the ICCPR would apply. The ICCPR could not violate domestic constitutional protections; if it purported to do so, domestic constitutional rights would trump.

Neither the treaty-makers (President and Senate) nor the lawmakers (President, House, and Senate) could responsibly enact the ICCPR as domestic federal law. To see why, consider first the ICCPR analogues to US domestic law. The ICCPR protections are couched in different terms than domestic legal protections. Thus its differently worded terms would lead to litigation in every circumstance in which the terms differed. Consider Article 26, the ICCPR's equal protection provision. Would its guarantee of equal protection without "any" discrimination eliminate all forms of affirmative action in the United States? How would its guarantee of "effective" in addition to "equal" protection change domestic anti-discrimination law? Would its "protection against discrimination on *any* ground," including "*status*," extend to discrimination on the basis of homosexuality? Age? Weight? Beauty? Intelligence?

These are just a few of the broader questions raised by Article 26. There are hundreds of other smaller details of domestic anti-discrimination law—statutes of limitation, burdens of proof, disparate impact analysis, immunity rules, and scores of other case-law intricacies—that would be open to litigation and potential change. The case law examples in the introduction—examples that have arisen in a world in which the ICCPR is clearly *not* supposed to be a domestic source of law—indicate that a similar set of questions could be raised about every Article in the ICCPR. A brief perusal of the ICCPR calls to mind dozens of domestic laws potentially called into question.

In short, a domesticated ICCPR would generate enormous litigation and uncertainty, potentially changing domestic civil rights law in manifold ways. Human rights protections in the United States are not remotely so deficient as to warrant these costs. Although there is much debate around the edges of domestic civil and political rights law, there is a broad consensus about the appropriate content and scope of this law. This consensus has built up slowly over the past century. It is the product of years of judicial interpretation of domestic statutory and constitutional law, various democratic processes, lengthy and varied experimentation, and a great deal of practical local experience. Domestic incorporation of the ICCPR would threaten to upset this balance. It would constitute a massive, largely standardless delegation of power to federal courts to rethink the content and scope of nearly every

aspect of domestic human rights law. To see its implications this way is to see why a domesticated ICCPR is unacceptable.

Two further considerations should be mentioned. First, the traditional bicameral process, and not the treaty-making process, is the appropriate venue to make domestic civil rights law. There is a powerful case to be made that human rights treaties, which do not involve reciprocal obligations,²³ and which only regulate domestic relations between a nation and its citizens, are beyond the scope of the treaty power. Conventional academic wisdom suggests that the treaty power has no subject matter limitation.²⁴ But this view is little more than an academic *ipse dixit*. The Supreme Court has long recognized that the treaty power contains subject matter limits.²⁵ It has never backed away from this view. Just as important, the treaty-makers have recognized these limits. In the non-self-execution clauses attached to human rights treaties, for example, they acknowledge that domestic civil and political rights law should be made by Congress and the President, not the Senate and the President.

Second, a domesticated ICCPR would raise a concern about excessive delegation. When federal courts interpret international human rights norms, they look to “writings of jurists” as a genuine source to give the norms content.²⁶ They do so in part out of fealty to a common law tradition that has no relevance in the modern world. And they do so in part because of their relative ignorance about international law. Who are these jurists? For the most part, they are legal academics, human rights activists, and international institutions like the ICCPR’s Human Rights Committee. These are not groups whose democratic pedigrees inspire confidence. Academic commentary and the work of the HRC are far more progressive than American political (and judicial) institutions. For these reasons, the double-delegation entailed by a domesticated ICCPR—first to unelected federal courts, and then to unelected “jurists”—is unwarranted. This is so whether one views the problem in constitutional terms (excessive delegation, or an appointments clause violation) or from the perspective of democratic legitimacy.

I do not want to overstate the extent to which federal courts applying a domesticated ICCPR would rearrange domestic human rights law protections. Judges

23. See, for example, Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ 15, 32.

24. See, for example, 1 Restatement (Third) of Foreign Relations § 302 cmt c (1987); Lori Damrosch, *The Role of the United States Senate Concerning the “Self-Executing” and “Non-Self-Executing” Treaties*, 67 Chi Kent L Rev 515, 530 (1991).

25. See, for example, *In re Ross*, 140 US 453, 463 (1891); *Geofrey v Riggs*, 133 US 258, 267 (1889). See generally Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich L Rev 390, 419–29 (1998). As Bradley shows, even the Supreme Court’s broadly deferential stance in *Missouri v Holland*, 252 US 416 (1920), suggested that there were subject matter limitations on the treaty power. See Bradley, 97 Mich L Rev at 424, 429.

26. See *Filartiga v Pena-Irala*, 630 F2d 876 (2d Cir 1980); *The Paquete Habana*, 175 US 677 (1900).

do not defer wholly to jurists, and judicial decisionmaking is not an abstract exercise in interpretation. Judicial elaboration of human rights law involves judgment about political morality that takes into account numerous pragmatic concerns, including tradition and experience. Nonetheless, it seems clear that a domesticated ICCPR would create extensive confusion and uncertainty. There would be litigation over the manifold ways in which the terms of the ICCPR depart from domestic law. This litigation would invariably produce some, and perhaps many, changes in domestic human rights protection. And there is no way to tell in advance whether these changes would expand or contract domestic human rights protections, much less whether the changes would be wise.

I can imagine at least two objections to the analysis thus far. The first is that Congress could diminish the uncertainties of a domesticated ICCPR by enacting implementing legislation to clarify the details of its domestic scope. I doubt that it is possible to capture by code the variety of issues that will arise under a document as broadly worded as the ICCPR. But in any event, the President and the Senate have carefully considered this issue, and they have decided that, except for the few ICCPR provisions to which the United States did not consent, US domestic law already meets the requirements of the ICCPR. Many in the human rights community read the ICCPR's vague terms far more broadly than US officials and disagree with the treaty-makers' assessment. It is hard to resolve this debate in the abstract, for there is no authoritative interpreter of the ICCPR. But uncertainty about the meaning of the ICCPR's vague terms only strengthens the case for non-self-execution, for it keeps the content and scope of US non-constitutional civil and political rights—at least in first instance—in the hands of elected officials rather than unelected courts and jurists.

A second objection is that I have overlooked the many deficiencies of domestic human rights protection that might be rectified by a domesticated ICCPR. Nothing in my analysis suggests that US domestic human rights protections are perfect, either as written or as enforced. Many contend, and I do not here argue otherwise, that domestic US law and enforcement are inadequate in many respects, especially concerning immigration, discrimination, police abuse, and the death penalty.²⁷ Even assuming this is so, these deficiencies should not be viewed as costs of failing to incorporate the ICCPR, and certainly not costs that warrant incorporating the ICCPR. In the United States, enactment of a vaguely worded international human rights treaty is not an appropriate or effective remedy for particular gaps in domestic human rights protection. Any such deficiencies will be most effectively and legitimately rectified through targeted democratic lawmaking, not through wholesale incorporation of what would in effect be a new constitution for civil and political rights.

27. For a comprehensive statement of this view, see Amnesty International, *Rights for All* (cited in note 9).

There is no denying that a domesticated ICCPR would bring relief to what some view as human rights abuses. With regard to the ICCPR's prohibition on the juvenile death penalty—one of the few determinate prohibitions in the ICCPR—this is clearly so. I do not here defend the practice of executing juvenile murderers. The practice is authorized by a democratic process, and it has been deemed, within limits, to be consistent with the US Constitution.²⁸ These facts do not by themselves mean that the practice is morally defensible. But it is equally wrong to conclude, as many do, that it is morally indefensible simply because it is prohibited by most other nations. The United States has a well-established and highly successful system for sorting out the moral conundrum of how to punish juvenile murderers. This system involves a complicated dialogue between democratic processes and courts interpreting domestic constitutional commitments in light of American traditions. This process produces results that are viewed, on the whole, as legitimate within the United States. This is no small achievement in a pluralistic democracy. There is certainly no reason whatsoever to think that a more legitimate consensus would be reached through domestication of the ICCPR.

Most Americans who read the ICCPR would admire the large majority of its norms. They would probably think that these rights were inspired by the US Constitution, and that almost all of the rights are part of domestic law. And they would be right. But it does not follow that the United States should make these international norms, as written, enforceable in the domestic realm by federal courts. The United States has a vigorous, and successful method for human rights protection. Decisions about the future course of civil and political rights on issues such as homosexuality, immigration, age, hate speech, family structure, and genetics will shape the character of our nation. In a flourishing constitutional democracy with a powerful tradition of domestic human rights protection, such issues should not be decided by international norms and institutions.

IV. INTERNATIONAL CONCERNS

Even though the costs of a domesticated ICCPR outweigh its benefits from a domestic perspective, there might be reasons having to do with international relations and, more generally, the international human rights law movement, that argue for domestic incorporation.

Critics of the United States' failure to domesticate human rights treaties have picked up on Samuel Huntington's claim that "in the eyes of many countries it [the United States] is becoming the rogue superpower . . . [and] the single greatest external threat to their societies."²⁹ These critics contend that the US practice of not

28. See *Stanford v Kentucky*, 492 US 361 (1989).

29. Samuel P. Huntington, *The Lonely Superpower*, *Foreign Aff* 35, 42–43 (Mar/Apr 1999).

domesticating human rights treaties is evidence of US arrogance. On this view, the failure to apply international human rights law domestically (a) makes US human rights commitments hollow promises; (b) shows that the United States does not take international law seriously; and (c) has a detrimental effect on the international human rights movement, both because it weakens American influence, and because it leads other nations to take international human rights law less seriously. For these reasons, critics conclude, the United States should incorporate international human rights norms into its domestic realm.

None of these claims withstands scrutiny.³⁰ First, US conditions on ratification of human rights treaties do not render them hollow promises. The United States altered its domestic law to satisfy the requirements of the Torture and Genocide Conventions.³¹ It did not do so with respect to the ICCPR, but this was because the treaty-makers determined that domestic US law already satisfied ICCPR obligations. Ratification of the ICCPR obligates the United States to maintain these domestic civil and political rights, and to file human rights reports before the ICCPR Human Rights Committee (which the US has done). Many conservatives view these commitments to be inconsistent with US sovereignty. Whether or not this is true, clearly the treaties are not hollow promises.

Second, US practice with respect to human rights treaties shows no disrespect for international law. To the contrary, when the United States refuses to consent to a small number of treaty norms (such as the ICCPR's prohibition on hate speech protection or the juvenile death penalty), it takes international law very seriously because it declines to make a legal commitment it cannot uphold. This is not an aberrational practice—many western European nations also decline to consent to ICCPR terms that are inconsistent with fundamental domestic law commitments. (These practices can profitably be compared to ICCPR ratifications by Iraq and Libya, which contain no such conditions.) Similarly, the US refusal to make the ICCPR self-executing shows no disrespect for international law. Neither the ICCPR, nor international law generally, requires a nation to enact domestic implementing legislation, and many nations do not give treaties automatic domestic force. In any event, the United States is fully justified in concluding that its extant domestic law provisions satisfy its obligations under the ICCPR.

The (inaccurate) charge of disrespect toward international law is often tied to a broader claim that the US failure to bring human rights law home weakens US human rights influence abroad. This purported connection is belied by the fact that the extraordinary achievements in international human rights have come during a period when the United States resisted ratification, much less domestication, of

30. The points in the next three paragraphs are elaborated in more detail in Bradley and Goldsmith, 149 *Penn L Rev* (cited in note 10).

31. See 18 USC § 1091 (1994) (genocide); 18 USC § 2340A (1994) (torture).

international human rights treaties. The United States exercises an enormous influence on human rights practices abroad through three mechanisms: (a) the example of its domestic human rights practices; (b) selective economic and military sanctions; and (c) victory in the cold war. The failure to domesticate human rights treaties has had no effect on these mechanisms. Nor will it going forward. As the United States' assumption of financial and military responsibilities for punishing Serbia last summer suggests, US leadership and resources will remain crucial to the enforcement of human rights norms. Similarly, even critics of US opposition to the proposed International Criminal Court as currently envisioned agree that US financial and military support will be crucial to the Court's success.

Many nonetheless believe that the United States' failure to domesticate human rights treaties diminishes the legitimacy of international human rights law and makes it less likely that other nations will comply with this law. This position reflects an inappropriately law-centered conception of human rights progress. Nations that increase protection for their citizens' human rights rarely do so because of the pull of international law. Europe appears to be, but is not, a counterexample. As Andrew Moravcsik has shown, the successful European human rights system was made possible by a "prior convergence of domestic practices and institutions" in support of democracy and human rights.³² The European system provided the monitoring, information, and focal points that assisted domestic governments and groups already committed to human rights protections but unable to provide these rights through domestic institutions.³³ The European system contrasts with the international human rights regime in Latin America, which, though legally similar, has been relatively unsuccessful because it has little support from domestic groups there.³⁴

The inadequacy of a legalistic approach to human rights progress can be seen in another way. The two most influential human rights instruments this century—the Universal Declaration and the Helsinki Accords—were not legally binding documents. These instruments succeeded because their ideas, in combination with other world events, aroused domestic groups, helped them to organize, and incited them to action. Their technical status as non-legal documents mattered little to these ends. Similarly, neither the act of nor the success of human rights shaming strategies depend on the legal status of moral norms. China was criticized for its human rights abuses long before it signed the ICCPR. The United States was shamed before the world by its race discrimination practices in the 1950s and 1960s long before there was an international law prohibition against such discrimination. When nations criticize the United States for its juvenile death penalty, it matters not a bit that there is no

32. Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 2 *Eur J Intl Rel* 157 (1995).

33. *Id.*

34. See Stephen Krasner, *Sovereignty: Organized Hypocrisy* 32, 113–18 (Princeton 1999).

international rule binding on the United States that prohibits this practice. Of course, rhetoric of illegality is often—and often irresponsibly—used in criticizing human rights practices. But it is the moral quality of the act, and not its legal validity, that provokes such criticisms. When shaming works, it is the perceived moral quality of the shamed practice, and not its illegality, that matters.

Many claim that the US practice of not incorporating international human rights law is inherently immoral because it is hypocritical. Hypocrisy is the act of professing virtues one does not hold. Hypocrisy is not the unambiguous evil that it is usually made out to be; it often serves an honorable and important role in domestic and international politics.³⁵ But in any event, the US failure to domesticate international human rights law is not hypocritical, for the United States does not urge substantive standards on others that it does not itself embrace. It is, I believe, hypocritical when politicians in the United States who otherwise disdain international law invoke the rhetoric of international law in criticizing the behavior of other nations. But these hypocritical acts in no way impugn the United States's perfectly legal and appropriate disinclination to incorporate human rights law.

A final problem with claims that the US non-incorporation practice harms the international human rights movement is that it ignores the *ex ante* effect of the criticism. The United States has a long, deeply felt tradition of resisting international entanglements. Since World War II, human rights treaties have been a special cause for concern, for they strike at the heart of domestic self-governance. Opposition to ratifying these treaties was overcome only recently, and only because of the conditions to ratification that precluded these treaties from having domestic force. These conditions have for many years enjoyed the broad support of Democrats and Republicans alike in both the executive branch and the Senate. If the US treaty-makers' only option were to consent to all ICCPR provisions and incorporate them fully into the domestic realm, there is no doubt that they would reject this option. The only feasible alternative to ratification on condition of non-incorporation is no ratification whatsoever. It is hard to see how the failure to ratify the human rights treaties—the only viable option to the present approach—would help the international human rights movement.

V. CONCLUSION

Nations differ in their moral, political, legal, and cultural commitments. In and among pluralistic democratic societies, there is a reasonable scope for disagreement about what broadly worded human rights norms require. When the human rights community demands that the United States make international human rights treaties

35. See Ruth W. Grant, *Hypocrisy and Integrity: Machiavelli, Rousseau, and the Ethics of Politics* (Chicago 1997).

a part of domestic law in a way that circumvents political control, it evinces an intolerance for a pluralism of values and conditions, and a disrespect for local democratic processes. It also falls into absurd legal formalisms, suggesting, for example, that United States resistance to incorporation of human rights treaties has the same significance as similar practices by China and Iran. One of the many ironies of these exaggerated and impatient criticisms is that they only harden US skepticism toward international human rights institutions.

