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International Human Rights Treaties and the United States: Myth and Reality

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Abstract

Treaties play an important role in international law, particularly in situations where Contracting States are willing to bind each other with certain obligations and duties. Thus, a treaty is one of the most evident ways in which rules binding on two or more States may come into existence, and thus an evident of formal source of law. The same is true when it comes to international human rights regime and its core conventions. The United States has historically championed respect for fundamental human rights and individual freedoms. Yet, at times, it has been hesitant to commit itself to certain core human rights treaties. The paper illustrates two cases in point, which are the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which it has not ratified, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which it ratified subject to certain Reservations, Understandings, and Declarations (RUDs). The work discusses the US position regarding these treaties, explaining its opposition to their ratification or its insistence on doing so subject to reservations. Moreover, we will examine the essence of these objections or reservations and their justifiability.

Keywords: *International law, International human rights law, US, treaty, CEDAW, CAT, RUDs*

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1. Introduction

Before proceeding to the discussion of the US approach to the core human rights instruments, particularly, the CAT and CEDAW, it is important to consider a role of treaties in international law.

In international law, perhaps the most important mechanism is the international agreement (or treaty), and the most important principle of international law is *pacta sunt servanda*: agreements shall be observed¹. The principle *pacta sunt servanda* is the basis for the binding nature of treaties. The significance and effect of treaties is expressed in the principle

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¹ Louis, Henkin. (1979). *How Nations Behave: Law and Foreign Policy*, 2nd Edition, pp. 13-27, 92-95, 98, Published for the Council on Foreign Relations by Columbia University Press, New York.

pacta sunt servanda.² Thus, a treaty is one of the most evident ways in which rules binding on two or more States may come into existence, and thus evidence of a formal source of law³.

Treaties as a formal source of international law are stipulated in Article 38 of the Statute of the International Court of Justice⁴ (stating that The Court “shall apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting States.....”).

The Vienna Convention on Law of Treaties⁵ sets forth a comprehensive set of rules governing the formation, interpretation, and termination/denunciation of treaties.

The Vienna Convention uses the term “treaty” in a broader sense than does in the US Constitution. In US practice a “treaty” is only one of four types of international agreement. Article VI of the Constitution set out the role of treaties in the US legal system as follows:

This Constitution and the Laws of the US which shall be made in Pursuance thereof; and all Treaties made, under the Authority of the US, shall be the supreme Law of Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding (Hugh, 2019).

It means that Article VI Supremacy Clause places treaties higher than state constitutions and laws in the hierarchy of domestic law, and it confers equal status to federal laws and treaties⁶. However, from the US legal system perspective (it is called a “dualism theory”), treaties are divided into two categories: ‘self-executing’, which become domestically enforceable federal law upon ratification or accession, and ‘non-self-executing’, which only become domestically enforceable through implementing legislation passed by Congress.

It is indeed true that the US played a leading role in establishing the United Nations and drafting the Universal Declaration of Human Rights. However, since 1950s, the US has had an uneasy relationship with human rights treaties. Moreover, even though the US has ratified several of them, they are not domestically enforceable because of their ‘non-self-executing’ nature or they are subject to several Reservations, Understandings, and Declarations (RUDs) by the US, which make them nothing except ‘paper’ treaties. As Louis Henkin says that by adhering to human rights conventions subject to the reservations, the US, it is charged, is pretending to assume international obligations but in fact, is undertaking nothing⁷.

Below I will provide the US approach to the core human rights conventions with comments. The US actively participated in drafting the Universal Declaration of Human Rights (1948) and declared it as a non-binding instrument. The US ratified the International Covenant on Civil and Political Rights in 1992 with substantive reservations and declared it as ‘non-self-executing’⁸. Although US signed the International Covenant on Economic, Social, and Cultural Rights in 1977, the ratification faced challenges in Congress and President administration so far.

Despite its limited embrace of international human rights treaties, the US has enacted legislation implementing some of the human rights treaties it has ratified. In connection with its ratification in 1988 of the Genocide Convention, the US enacted the Genocide Convention Implementation Act⁹, which makes genocide a federal crime (subject to declarations). In connection with its ratification in 1994 of the Torture Convention, the US enacted provision making torture outside the US a federal crime¹⁰, however, the CAT is subject to several RUDs, which we will discuss more later.

Moreover, the US ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1994¹¹, however, the US declares that the provisions of the Convention are non-self-executing.

² Hugh, Thirlway. (2019). *The Sources of International Law*. 2nd Edition, p. 37, Oxford University Press.

³ See Id.

⁴ Statute of the International Court of Justice, October 24, 1945, available at <https://www.icj-cij.org/en/statute>

⁵ Vienna Convention was adopted at Vienna on May 23, 1969 and entered into force on January 27, 1980. United Nations, Treaty Series, Vol. 1155, p. 331// available at: [volume-1155-I-18232-English.pdf](https://www.un.org/Depts/los/convention_agreements/convention_treaties.html) (un.org)

⁶ Carter, Weiner. and Hollis. (2018). *International Law*, 7th Edition, p. 191, Wolters Kluwer in New York.

⁷ Louis Henkin. (1995). U.S. Ratification of Human Rights Conventions: the Ghost of Senator Bricker, *Am. J. Int’l.*, 89, 341.

⁸ Bartram, S. Brown. (2004). US Reservations, Understandings and Declarations Upon Ratification of the International Covenant on Civil and Political Rights, available at US Ratification of the International Covenant ([kentlaw.edu](https://www.kentlaw.edu))

⁹ S.1851 - Genocide Convention Implementation Act of 1987 (the Proxmire Act) // available at S.1851 - 100th Congress (1987-1988): Genocide Convention Implementation Act of 1987 (the Proxmire Act) | [Congress.gov](https://www.congress.gov) | Library of Congress

¹⁰ 8 CFR §208.18 – Implementation of the Convention Against Torture// available at 8 CFR §208.18 – Implementation of the Convention Against Torture. | [CFR](https://www.cfr.gov) | US Law | LII / Legal Information Institute ([cornell.edu](https://www.cornell.edu))

¹¹ See for more information at Treaty Document 95-18, International Convention on the Elimination of All Forms of Racial Discrimination | [Congress.gov](https://www.congress.gov) | Library of Congress

The US signed the following conventions, but has not taken any actions to their ratification so far:

- Convention on the Elimination of All Forms of Discrimination against Women signed by the US in 1980 which we will discuss more later;
- Convention on the Rights of the Child signed by the US in 1995; and
- Convention on the Rights of Persons with Disabilities signed by the US in 2009.

The US has not taken any actions to either sign or ratify the International Convention for the Protection of all Persons from Enforced Disappearance and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families¹².

2. US and CEDAW: Oppositions to Ratification

The Convention on the Elimination of All Forms of Discrimination against Women¹³ (the CEDAW) was adopted by the UN General Assembly in 1979. The Convention focuses on tackling discrimination against women and improving their equality with men while being attentive specifically to women's particular experiences that need to be addressed. Nearly all member nations have ratified the document¹⁴. Conspicuously absent is the US, which has never formally done so¹⁵.

The US, as part of the Working Group of the Whole on the Drafting of the CEDAW during the 34th session of the United Nations General Assembly, was active in contributing to the CEDAW's creation.¹⁶ Although the US submitted several suggestions and edits to the CEDAW, it never went so far as to ratify the document.¹⁷

As mentioned above, the US signed the CEDAW in 1980 but has not taken any action to ratify it. Here it is worth recalling the history of attempts to ratification of the CEDAW in the US.

Ratification of the CEDAW has been considered by the US on several occasions. The Senate Foreign Relations Committee (SFRC), which is charged with ratifying treaties and international agreements, has debated CEDAW five times since 1980. In 1980, President Carter signed the CEDAW, at which point it was presented to the SFRC. Both the Reagan and H.W. Bush administrations opposed the CEDAW, and in 1988, 1990, 1994, and 2002, the SFRC held hearings on the CEDAW, yet failed to ratify the treaty.¹⁸ Under the Clinton administration, ratification of the CEDAW seemed imminent: 68 senators signed a letter to then-President Clinton in 1993 urging him to take necessary steps to pass the legislation. However, attempts at ratification remained unsuccessful.

In May 2009, the Obama administration prioritized the CEDAW for ratification.¹⁹ Revitalized interest in the CEDAW during the Obama administration not only sparked renewed opposition from conservatives, but from liberals as well.²⁰

¹² See, for more information at – OHCHR Dashboard.

¹³ The CEDAW was adopted and opened for signature, ratification, and accession by General Assembly resolution 34/180 of December 18, 1979 and entered into force September 3, 1981, in accordance with article 27(1). Text of the Convention is available at Microsoft Word – Document1 (ohchr.org)

¹⁴ As of March 2022, 189 states ratified it // available at: OHCHR Dashboard.

¹⁵ The US signed the CEDAW in 1980 but has not ratified it yet (There is Palau except the US which signed the Convention but did not ratify it. In addition, there are only 6 countries which have not taken any action to sign or ratify the Convention (Islamic Republic of Iran; Holy See, Niue, Somalia, Sudan, Tonga).

¹⁶ See, United Nations, Report of the Working Group of the Whole on the Drafting of the Convention on the Elimination of Discrimination Against Women, U.N. Doc. A/34/60 (March 2, 1979) (demonstrating that the United States was active in contributing to the CEDAW's creation).

¹⁷ The combination of America's leadership and resistance in the realm of human rights illustrates American exceptionalism, including the practice of negotiating treaties but refusing to ratify them.

¹⁸ See, generally Madeleine Giansanti Çag. (2010). Women's Interest Network, *Int'l Law.*, 44, 415, <https://www.jstor.org/stable/40708256?refreqid=excelsior%3A317a718d5a330f4cb7f68543b35b227a> (explaining that although President Carter signed the CEDAW, both the Reagan and H.W. Bush administrations opposed the CEDAW, and that in 1988, 1990, 1994, and 2002, the SFRC held hearings on the CEDAW but failed to ratify the treaty).

¹⁹ See, US: Ratify Women's Rights Treaty, *Human Rights Watch* (July 15, 2010), <https://www.hrw.org/news/2010/07/15/us-ratify-womens-rights-treaty> (stating that under the Obama administration, America's willingness to sign the UN Convention on the Rights of Persons with Disabilities made ratification of the CEDAW seem like a possibility and in May 2009, the Obama administration prioritized the CEDAW for ratification).

²⁰ See, Julia, Schast. (2014). Battle of the Sexes: Why the United States Has Not Yet Ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), *Interdisc. J. Undergraduate Res.*, 3(10), 11, <https://digitalcommons.northgeorgia.edu/cgviewcontent.cgi?article=1081&context=papersandpubs> (demonstrating that the Obama administration sparked opposition from both conservatives and liberals upon revitalizing interest in the CEDAW).

Despite the Obama administration's demonstrated expression of interest to ratify the treaty, it failed to achieve this goal in 2010²¹. The Trump, and then Biden administrations have remained silent on ratification of the CEDAW.

According to the opinions of many opponents of the US to ratification, they often point to American exceptionalism by claiming the US is unique and implying that it is not just different but better than other countries. For example, in 1994 the SFRC, after hearings, recommended ratification to the Senate, subject to various reservations, understandings and declarations, including the following:

The Constitution and laws of the US establish extensive protections against discrimination, reaching all forms of governmental activity as well as significant areas of non-governmental activity. However, individual privacy and freedom from governmental interference in private conduct are also recognized as among the fundamental values of our free and democratic society. The US understands that by its terms the Convention requires broad regulation of private conduct, in particular under Articles 2, 3, and 5. The US does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except mandated by the Constitution and laws of the US.²²

As it is seen from the above RUDs from 1994, the US treaty-makers consider that by ratifying the treaty, the US subordinates the Constitution to international law which can be a direct threat to US sovereignty. In addition to it, the minority views in the 2002 the SFRC report stated that the Convention represents "a disturbing international trend" of favoring international law over US constitutional law and self-government, thereby undermining US sovereignty.²³

The next objection to the ratification of the CEDAW stemmed from the fact that parts of the Convention text could be interpreted to undermine current US abortion law²⁴. Specifically, some have taken issue with Article 12(1) of the Convention, which states that countries "shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure.....access to health care services, including those related to family planning".²⁵

Other opponents expressed that any obligation under Articles 5, 7, 8, and 13 of the Convention might restrict constitutional rights to speech, expressions, and association²⁶.

3. US and CAT: Subject to RUDs

As we have mentioned above, the US ratified Torture Convention²⁷ subject to certain declarations, reservations, and understandings, including the Convention was not self-executing, and therefore required domestic implementing legislation to take effect²⁸. In connection with its ratification in 1994 of CAT, the US enacted a provision making torture outside the US a federal crime²⁹.

The RUDs of the US for human rights treaties, including the CAT, typically contain an understanding or other statement relating to 'federalism'. For example, the RUDs attached to the CAT provide that "the US shall implement the

²¹ de Silva de Alwis., Rangita. and Martin, Amanda M. (2018). "Long Past Time": CEDAW Ratification in the United States. Faculty Scholarship at Penn Law. 1987. https://scholarship.law.upenn.edu/faculty_scholarship/1987

²² See, S 384-10. Exec. Rep. Sen. Comm. on For. Rel., October 3, 1994.

²³ US Congress. Senate. Committee on Foreign Relations, "Convention on the Elimination of All Forms of Discrimination against Women," Report, September 6, 2002. Washington, DC, Government Printing Office (Senate Exec. Rept. 107-9, 107th Congress, 2d Session)// Available at: https://www.foreign.senate.gov/imo/media/doc/executive_report_107-09.pdf

²⁴ Luisa, Blanchfield. (2011). The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Issues in the US Ratification Debate, Congressional Research Service, June 28, 2011.

²⁵ However, the text of the Convention does not mention the word 'abortion' ever.

²⁶ Article 5 states that countries "shall take appropriate measures to modify the social and cultural patterns of conduct of men and women....", which may restrict constitutional rights to speech and expression. Article 7 is addressed at measures eliminating discrimination in public and political discourse to ensure equal voting and participation in a formulation of government. Article 8 is about ensuring the opportunity for women to represent their governments at the international level and to participate in the work of international organizations, which indirectly may restrict constitutional rights to association. Article 13 is addressed at the equal rights in economic sphere.

²⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter "CAT"]. (CAT took effect in 1987 and, as of March 2022, has been ratified by 173 parties // available at OHCHR Dashboard).

²⁸ See, Michael, John Garcia. (2009). The UN Convention Against Torture: Overview of US Implementation Policy Concerning the Removal of Aliens, Congressional Research Service,

²⁹ Text of the Implementation Act is available at 8 CFR §208.18 - Implementation of the Convention Against Torture. | CFR | US Law | LII / Legal Information Institute (cornell.edu)

Convention to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein;....”³⁰.

With respect to the provisions of the CAT Article 3 which used the phrase “where there are substantial grounds for believing that he would be in danger of being subjected to torture,” the US declared its understanding that this requirement meant for the US “if it is more likely than not that he would be tortured.”³¹.

As stated above, the Senate’s advice and consent to CAT ratification was subject to the declaration that the Convention was not self-executing.³² With respect to Article 16 of the Convention, which requires states to prevent lesser forms of cruel and unusual punishment that do not constitute torture³³, the Senate’s advice and consent was based on the reservation that the US considered itself bound to Article 16 to the extent that such cruel, unusual, and inhumane treatment or punishment was prohibited by the 5th, 8th, and/or 14th Amendments to the US Constitution³⁴.

The justification of the US for these substantive reservations is that they are based on potential conflicts between treaty provisions (in the above example, the definition and extent of “cruel, unusual, and inhumane treatment or punishment”) and US constitutional rights or on a political or policy disagreement with certain provisions of the treaty. For example, the 5th Amendment states that no person shall be compelled in any criminal case to be a witness against himself. The 8th Amendment states that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” which is different from the provisions of the CAT.

In providing its advice and consent to CAT, the Senate also provided a detailed list of understandings concerning the scope of the Convention’s definition of torture³⁵. These understandings are generally reflected via the specific US laws and regulations implementing the Convention³⁶. Importantly, under the US implementing legislation and regulations, CAT requirements are understood to apply to acts of torture committed by or at the acquiescence of a public official or other person acting in an official capacity.³⁷

The US also opted out of the dispute-settlement provisions of CAT Article 30³⁸, though it reserved the right to specifically agree to follow its provisions or any other arbitration procedure in resolving a particular dispute as to the Convention’s application.

Dispute-settlement provisions of any international conventions may be subject to reservations by the US. The US treaty-makers have explained that such dispute-settlement reservations are designed “to retain the ability of the US to decline a case which may be brought for frivolous or political reasons.”³⁹

Some RUDs set forth the US’s interpretation of vague treaty terms, thereby clarifying the scope of the US consent. The US treaty-makers explain that such understandings can play as interpretive conditions which clarify the circumstances under which conduct will fall within the terms of this treaty. Similarly, the US made several understandings to the CAT as follows.

³⁰ Sen. Exec. RPT. 100-20, Resolution of Advice and Consent to Ratification (1990), I. (1). [hereinafter “Sen. Resolution”] // available at <https://www.congress.gov/treaty-document/100th-congress/20/resolution-text>

³¹ Id. at II. (2). Article 3 of CAT states prohibiting expulsion or refoulement of persons to states where substantial grounds exist for believing the person would be subjected to torture.

³² See, Sen. Resolution // available at <https://www.congress.gov/treaty-document/100th-congress/20/resolution-text>

³³ See, Article 16 of the CAT // available at OHCHR | Convention against Torture

³⁴ Sen. Resolution at I.(2). available at <https://www.congress.gov/treaty-document/100th-congress/20/resolution-text>; See the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution at U.S. Constitution | Constitution Annotated | Congress.gov | Library of Congress

³⁵ Michael John Garcia. (2009). The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens, Congressional Research Service.

³⁶ 8 CFR §208.18 – Implementation of the Convention Against Torture // available at 8 CFR § 208.18 – Implementation of the Convention Against Torture. | CFR | US Law | LII / Legal Information Institute (cornell.edu)

³⁷ Sen. Resolution at II.(1)(b) // available at <https://www.congress.gov/treaty-document/100th-congress/20/resolution-text>

³⁸ See Id. at I.(3). CAT article 30 provides that disputes between two or more signatory parties concerning the interpretation and application of the Convention can be submitted to arbitration upon request. CAT at art. 30(1). If, within six months of the date of request for arbitration, the parties are unable to agree upon the organization of the arbitration, any of the parties may refer the dispute to the International Court of Justice. Id. Article 30 contains an “opt-out” provision that enabled the United States to make a reservation to CAT’s dispute-settlement procedure. Id. at art. 30(2).

³⁹ Curtis A. Bradley and Jack L. Goldsmith. (2000). Treaties, Human Rights, and Conditional Consent. *U. Pa. L. Rev.*, 149, 416-423.

The Senate's advice and consent to CAT were also subject to particular understandings concerning "mental torture," a term that is not specifically defined by the Convention⁴⁰. The US understands mental torture to refer to prolonged mental harm caused or resulting from (1) the intentional infliction or threatened infliction of severe physical pain and suffering; (2) the administration of mind-altering substances or procedures to disrupt the victim's senses; (3) the threat of imminent death; or (4) the threat of imminent death, severe physical suffering, or application of mind-altering substances to another⁴¹.

4. Conclusion

To sum up, the following conclusions can be drawn from the US approaches to the tow above-mentioned convention. Firstly, the objections of US treatymakers to possible ratification of the CEDAW are mainly related to issues of sovereignty, the superiority of the Constitution and laws of the US, abortion rights as well as to some extent restriction of constitutional rights to freedom of speech, expression, and association.

Secondly, although the US ratified the CAT, with being subject to RUDs the US is pretending to abide by its international obligations but in fact, is complying with nothing. As we have studied above, the RUDs of the US to the CAT are mainly connected with substantive reservations (such as definitions of 'torture' and 'mental torture'), interpretive conditions (such as interpretation of 'cruel, inhuman, or degrading treatment or punishment'), non-self-execution declarations (it serves to immunize the US from external judgment, precisely, it keeps its own judges from judging the human rights conditions in the US by international standards), federalism understandings (setting up obstacles to the implementation of the Convention), dispute-settlement reservations (retaining the ability of the US to decline a case which may be brought for political reasons).

⁴⁰ Michael, John Garcia. (2009). The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens, Congressional Research Service.

⁴¹ Sen. Resolution at I. (1)(a). // available at <https://www.congress.gov/treaty-document/100th-congress/20/resolution-text>