CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters shall be published and to edit any letters printed.

To THE EDITORS-IN-CHIEF:

In his recent editorial comment on the UN Civil and Political Covenant,[1] Oscar Schachter takes a number of nations to task for making blanket assertions that they are in compliance with the Civil and Political Covenant when thoughtful observers might well conclude that they are not. Without benefit of transition, he then proceeds to criticize the United States for following the opposite policy. When the President sent the Covenant to the Senate in 1978, his message enclosed a systematic evaluation of where U.S. domestic law stood in comparison to the Covenant.[2] When one considers the broad range of subjects covered by the Covenant, it should not be surprising that a country with a complex legal system like the United States would choose to submit approximately six understandings and reservations. Compared to the scope of the Covenant they are relatively minor. The Covenant was, after all, based on documents like our own Bill of Rights. However, in terms of acceptance by the United States, the reservations touch on issues of importance domestically such as free speech, the death penalty, and allocation of responsibility between the federal and state governments.

In the comment, Schachter states that it is one thing to make reservations "on their own merits" and another thing to make them based on problems presented by domestic law, and that the latter approach violates international law. This suggests that if the President had been less candid in his presentation, the reservations would have presented no problem. As a practical matter, the individual parties to the Covenant will separately judge the reservations. It is the prerogative of each party to the Covenant to accept or reject the proposed reservations and understandings based on whether it believes that the reservations are compatible with the object and purpose of the Covenant.[3] Presumably, the parties would accomplish this by weighing the significance of the reservations in terms of the purpose of the Covenant as a whole and the importance of having the United States as a party to the Covenant rather than whether the reservations have domestic legal implications.

The closest precedent for the Covenant is the European Convention on Human Rights. Article 64 of the European Convention expressly permits states to make reservations "to the extent that any law then in force in its territory is not in conformity" with a treaty provision. The pattern of reservations submitted by European democracies, such as Austria, Finland,

[1] *The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights*, 73 AJIL 462 (1979).

[2] Message from the President of the United States, transmitting four treaties pertaining to human rights, S. EXEC. Docs. C, D, E, and F, 95th Cong., 2d Sess. (1978).

[3] Vienna Convention on the Law of Treaties, Art. 19; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] ICJ REP. 15.

and Italy, to the UN Covenant show a comparable concern for domestic legal problems. One might expect that the difficulty in reconciling legal systems of the entire UN membership through the UN Covenants would produce a tolerance for reservation and compromise that might not, in fact, be necessary among the more homogeneous parliamentary democracies of Western Europe. It is thus difficult to assert, as the comment suggests, that reservations designed to accommodate domestic legal problems are per se incompatible with the Covenant or with international law. The proposed U.S. reservations show respect for the principle of international law that prevents states from citing domestic law as justification for failure to perform a treaty.[4] Without reservations, the United States would, upon ratification, be in violation of the Covenant's terms. By proposing appropriate reservations, the United States, like other democratic states, is demonstrating the importance of taking international obligations seriously.

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Oscar Schachter replies:

Mr. Goldklang both misses the point of my comment and puts words in my mouth. I did not suggest that reservations "based on problems presented by domestic law" violate international law nor did I object to the number of proposed reservations. What I questioned was a policy on reservations expressly designed to avoid any change *whatsoever* in existing U.S. law. To call that "minor" is surely disingenuous. To say that this policy is merely intended to "*accommodate domestic legal problems*" is playing with words. Would we want other states to use their existing law as the standard of compliance with Article 2? That the U.S. administration has been frank about its intention only makes it easier for others to follow suit.

Article 64 of the European Convention is cited as a "precedent." But the Covenant does not have a similar provision; a proposal for such a provision was rejected in the preparatory stage. Moreover, Article 64 of the European Convention refers to reservations "in respect of any particular provision" and expressly excludes "reservations of a general character." It is precisely the general character of the proposed U.S. policy on reservations that is objectionable. No party to the European Convention has adopted a similar policy.

Mr. Goldklang fears that without reservations the United States, upon ratification, would be in violation of the Covenant's terms. Every treaty allows a party a reasonable time to implement it. Were that not so, the United States could never adhere to non-self-executing treaties that require legislation to implement them. In fact, the legislative history of the Covenant shows clearly that parties are not required to have their legislation in complete harmony with the Covenant at the time of ratification. It was recognized that states may need time to take the necessary legislative or other measures required by Article 2 (UN Doc. A/2929, at 17, para. 8).

[4] Art. 27, Vienna Convention on the Law of Treaties. Prof. Schachter cites Article 2 of the Covenant which requires parties to take necessary steps to implement its provisions. The Covenant nowhere suggests, however, that the rights specified cannot be modified by reservation.

* The views expressed do not necessarily represent the views of the Department of Justice.