

4-24-2002

The Legalization of World Politics and the Future of U.S. Human Rights Policy

Derek P. Jinks
Saint Louis University School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Derek P. Jinks, *The Legalization of World Politics and the Future of U.S. Human Rights Policy*, 46 St. Louis U. L.J. (2002).

Available at: <https://scholarship.law.slu.edu/lj/vol46/iss2/6>

This Respondent is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

THE LEGALIZATION OF WORLD POLITICS AND THE FUTURE OF U.S. HUMAN RIGHTS POLICY

DEREK P. JINKS*

The accelerating pace of globalization and economic liberalization have placed traditional conceptions of state sovereignty under unprecedented strain. These processes have simultaneously enabled transnational actors to conceive of problems of governance as global and strengthened the commitment of these actors to the pursuit of common objectives through multilateralism. The prospect of effective modes of “global governance” has, in turn, raised vexing questions about the optimal allocation of regulatory authority. The territorial limitations of state regulatory power clearly limit the capacity of states to govern effectively with respect to many transnational problems. Nevertheless, the nation-state retains its status as the primary political actor in global politics.¹ Indeed, global governance is mediated through international institutions whose design, legitimacy, and purpose originate in and derive from the authority of sovereign states.

Because of these developments, national governments are, by and large, committed to the development of effective international institutions even as they strive to insulate national decision-making processes from international

* Assistant Professor of Law, Saint Louis University School of Law. This response benefited greatly from the generous input of several colleagues including Harold Hongju Koh, Joel Goldstein, Ryan Goodman and David Sloss.

1. See, e.g., Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 168 (1999). Although the optimal allocation of regulatory authority has certainly changed, nation-states continue to be the most important and influential actors in world society. See, e.g., Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997). In fact, many scholars have argued that the regulatory capacity of states has not eroded significantly in the twentieth century. See, e.g., STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); Geoffrey Garrett, *Global Markets and National Politics: Collision Course or Virtuous Circle?*, 52 INT’L ORG. 787, 788 (1998) (arguing that globalization has not significantly constrained domestic policy choices); Janice E. Thomson & Stephen D. Krasner, *Global Transactions and the Consolidation of Sovereignty*, in GLOBAL CHANGES AND THEORETICAL CHALLENGES: APPROACHES TO WORLD POLITICS FOR THE 1990s, at 195, 206 (Ernst-Otto Czempiel & James N. Rosenau eds., 1989) (arguing that state control over cross border flows has not significantly eroded); Janice E. Thomson, *State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research*, 39 INT’L STUD. Q. 213, 214 (1995) (“State control has waxed and waned enormously over time, regions, and issue-areas while the state’s claim to ultimate political authority has persisted for more than three centuries.”).

supervision. United States human rights policy clearly exhibits this dual orientation to the international order. The United States has, of course, been an important player in the development and enforcement of international human rights law even as it has resisted the application of international human rights law to itself.² The central problem is whether this contradiction—irrespective of whether it is understood as a “double standard” or a “structural tension” — can be negotiated in principled and pragmatic ways. In this Comment, I offer two suggestions to guide further exploration of this problem. First, international lawyers and policy-makers must acknowledge that these contradictory impulses reflect deep conflicts between important liberal values. Second, international human rights law should address these conflicts directly through the elaboration of “principles of accommodation” that would define more clearly (and sensibly) the relationship between international and domestic law.

Building effective institutions to define and enforce international human rights standards³ presents many confounding problems.⁴ Two types of concerns predominate. What norms should, as a matter of principle, qualify as universal human rights standards? And, what institutional arrangements would, as a practical matter, make violations of these standards (however defined) less likely and less frequent? In his illuminating and inspirational essay, Harold Hongju Koh, Yale Law professor and former Assistant Secretary of State for Democracy, Human Rights, and Labor, offers nothing less than a principled and pragmatic manifesto for U.S. human rights policy.⁵ Because I fundamentally agree with the substance of Professor Koh’s recommendations, I aim simply to clarify and analyze an important structural tension in the international legal and political order that greatly complicates the task of

2. See Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 365, 365 (1998).

3. The most prominent agreements are, in chronological order: the Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; the International Convention on the Elimination of All Forms of Racial Discrimination, *adopted, opened for signature and ratification* Dec. 21, 1965, 60 U.N.T.S. 195; the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3; the International Covenant on Civil and Political Rights, *adopted, opened for signature, ratification and accession* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; the Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted, opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85; and the Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 28 I.L.M. 1448.

4. See Laurence R. Helfer, *Concretizing Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 533, 535-36 (1998); HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY (Louis Henkin & John Lawrence Hargrove eds., 1994).

5. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002).

fashioning an appropriate U.S. human rights policy. In short, I argue that the principled incorporation of international human rights norms into domestic law should be one of the pillars of U.S. human rights policy.

As Professor Koh points out, two related macro-level developments are redefining the nature of world politics: the “globalization of freedom”⁶ and the “globalization of terror.”⁷ Since September 11th, the centrality of this tension is beyond dispute. Overemphasis of this dynamic, however, risks obscuring the contradictory impulses that have characterized the “globalization of freedom” itself. More specifically, the “globalization of freedom,” at a high level of generality, has involved two related developments: the “globalization of human rights” and the “globalization of democracy.” In many important ways, these two trends are mutually reinforcing. In at least one crucial sense, they are, however, arguably in tension. The difficulty is clear: An increasingly precise body of universally-applicable human rights standards developed through various global associational processes will increasingly constrain the policy options of nation-states. Democratic polities will be governed, in part, by exogenously-defined legal norms. As a consequence, one of the most important challenges of the twenty-first century will be to articulate and institutionalize rules that govern the relationship between international law and domestic law.

This problem is, of course, particularly acute for U.S. human rights policy. Although the United States actively promotes universal human rights standards, it also actively resists the application of international human rights norms in domestic law. For example, courts in the United States routinely reject claims brought under the International Covenant on Civil and Political Rights (ICCPR) without consideration of their merits because the President and Senate have attached conditions to U.S. ratification of the treaty.⁸ Both sides of this “double standard” reflect important principles of international society: state sovereignty and fundamental human rights. The prospects for a durable, just international order turn on the degree to which these two principles are mediated. My central thesis is that U.S. human rights policy should promote the legalization of international human rights standards by pursuing the “principled accommodation” of its national interests.

6. *Id.* at 295.

7. *Id.*

8. *See, e.g.*, *Domingues v. State*, 961 P.2d 1279, 1280 (Nev. 1998); *Newman v. Deiter*, 702 N.E.2d 1093, 1098-99 (Ind. Ct. App. 1998), *cert. denied*, 120 S. Ct. 329 (1999); *United States v. Any & All Radio Station Transmission Equip.*, 19 F. Supp. 2d 738, 741 (E.D. Mich. 1998), *rev'd and remanded*, 204 F.3d 658, 668 (6th Cir. 2000); *United States v. Any & All Radio Station Transmission Equip.*, 976 F. Supp. 1255, 1256 (D. Minn. 1997), *rev'd and remanded*, 169 F.3d 548, 554 (8th Cir. 1999), *superseded by* 207 F.3d 458, 462 (8th Cir. 2000); *Ralk v. Lincoln County*, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000).

I. LEGALIZATION AND INTERNATIONAL HUMAN RIGHTS NORMS

In the final decades of the twentieth century, international human rights institutions have assumed an increasingly *legal* character.⁹ This “legalization” of human rights institutions, which represents one instance of the broader trend of legalization of international institutions generally,¹⁰ is characterized by three

9. The ICCPR established the United Nations Human Rights Committee (HRC or Committee) to monitor State parties’ compliance with the treaty. *See* ICCPR, *supra* note 3, art. 40(4). This monitoring function involves three complementary procedures. First, the ICCPR establishes a periodic reporting process. *See id.* at art. 40(1). Under the reporting process, the Committee receives periodic written reports from State parties which explain the measures they have taken to protect the rights recognized in the treaties. *See id.* Government representatives present the reports to the Committee in public sessions; Committee members question the representatives about issues raised in the reports and the Committee publishes comments and recommendations on how to improve the protection of human rights in the State in question. Second, the Committee drafts “general comments” typically concerning the interpretation of the substantive rights and freedoms contained in the treaty each Committee oversees. *See, e.g.,* DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 95 (1991) (“The general comments serve rapidly to develop the jurisprudence of the HRC under the Covenant.”). Third, and most important, the Committee receives written “communications” or “petitions” from individuals alleging that a State party has violated one or more rights protected by the ICCPR. *See* Optional Protocol to the International Covenant on Civil and Political Rights, *adopted, opened for signature, ratification and accession* Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter First Optional Protocol]; Torkel Opsahl, *The Human Rights Committee, in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 370 (Philip Alston ed., 1992). This procedure is optional, however, and many States party to the ICCPR do not recognize the competence of the Committee to receive individual petitions. *See* Human Rights Committee, at <http://www1.umn.edu/humanrts/hrcommittee/hrc-page.html> (last visited Feb. 24, 2002) [hereinafter Optional Protocol] (stating that 95 of the 144 parties to the ICCPR have ratified the First Optional Protocol). Under the First Optional Protocol to the ICCPR, the Committee performs a quasi-judicial function when reviewing individual petitions. If numerous admissibility requirements are satisfied, the Committee determines the merits of the complaint. *See* TOM ZWART, *THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS: THE CASE LAW OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS AND THE HUMAN RIGHTS COMMITTEE* (1994). Note that the Committee’s decisions are not legally binding, although many view them as persuasive authority, and several states have implemented the Committee’s interpretation of the treaty. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 344 (1997).

10. *See, e.g.,* Judith Goldstein et al., *Legalization and World Politics*, 54 INT’L ORG. 385 (2000); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709 (1999); *see also* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (Michael Byers ed., 2000). One strong indicator of increasing levels of legalization in international institutions is the proliferation of international and supranational tribunals. *See generally* MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS (Philippe Sands et al. eds., 1999) (compiling basic documents concerning all existing international judicial bodies, as well as several other quasi-judicial, implementation, control and dispute settlement mechanisms). These include: the International Court of Justice (ICJ) (governed by U.N. CHARTER arts. 7(1), 36(3), 92-

related developments: (1) increasingly *obligatory* norms; (2) increasingly *precise* norms; and (3) the *delegation* of authority to supranational bodies to interpret, implement, and apply these norms.¹¹

Further legalization of international human rights institutions promises to strengthen substantially the durability and viability of international human rights regimes. Legalization tends to bolster the credibility of normative commitments,¹² increase compliance with international norms,¹³ and provide a

96); the International Tribunal for the Law of the Sea (ITLOS) (governed by U.N. Convention on the Law of the Sea (UNCLOS), art. 287, 21 I.L.M. 1261 (1982)) (Part XV, § 2 of the UNCLOS is dedicated to the peaceful settlement of disputes and the ITLOS Statute is contained in Annex VI of the UNCLOS); the European Court of Human Rights (governed by Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* on Sept. 3, 1953, *as amended by* Protocol 11 to the European Convention on Human Rights, 213 U.N.T.S. 222); the Court of Justice of the European Communities (ECJ) (governed by Treaty Establishing the European Economic Community, *entered into force* Jan. 1, 1958, 298 U.N.T.S. 11); the International Criminal Tribunal for Former Yugoslavia (ICTY) (governed by Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. SCOR, 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993)); the International Criminal Tribunal for Rwanda (ICTR) (governed by Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda, U.N. SCOR, 3453rd mtg. at 1, U.N. Doc. S/RES/955 (1994)); and the World Trade Organization's (WTO) dispute settlement mechanism (governed by General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 I.L.M. 1125, 1226-47 (1994)) (Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes).

11. See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L. ORG. 401 (2000) (defining the concept of international legalization as a form of institutionalization characterized by three dimensions: obligation, precision, and delegation).

12. See, e.g., LISA L. MARTIN, *DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION* (2000); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L. ORG. 421 (2000); Miles Kahler, *Legalization as Strategy: The Asia-Pacific Case*, 54 INT'L. ORG. 549 (2000); Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT'L. ORG. 661 (2000).

13. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 17-23 (1995); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

Some empirical evidence suggests that the legalization of institutions does not necessarily increase levels of compliance. See, e.g., Abbott & Snidal, *supra* note 12, at 421 (noting the many advantages of "soft legalization"); Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L. ORG. 633 (2000) (arguing that increased legalization does not explain increased compliance with human rights norms in Latin America); Ronald B. Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48 INT'L. ORG. 425 (1994) (suggesting that some international regimes are efficacious because their mechanisms for compliance are decentralized); John J. Mearsheimer,

highly rationalized mode of clarifying and resolving interpretive disagreements.¹⁴ The transformation of human rights norms into “hard law” also necessarily entails significant “sovereignty costs” in that national action is evaluated by international actors applying international norms. Moreover, these constraints on sovereignty are often concentrated in issue-areas that directly impact important national interests.¹⁵

The range of justificatory practices utilized by states demonstrates the importance of these issues. Broadly conceived, states employ two types of justifications for controversial practices. First, states assert that unique contextual factors justify an idiosyncratic substantive interpretation of international human rights norms.¹⁶ Second, states suggest that extraordinary circumstances (that rise to the level of a national emergency) justify temporary suspension of certain fundamental international rights guarantees. In international human rights law, “derogation regimes” define the degree to which states may suspend rights protections in formal states of emergency¹⁷ and “limitations clauses” authorize restrictive interpretations of certain human rights norms when necessary to promote important national interests.¹⁸ These concepts are secondary or “interstitial” rules regulating the circumstances in which other rules, here the primary human rights norms, are applicable.¹⁹ I

The False Promise of International Institutions, 19 INT’L SEC. 5 (1994) (arguing that international institutions do not have a significant impact on state behavior).

14. See, e.g., Robert Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L. ORG. 457 (2000); Abbot & Snidal, *supra* note 12, at 421.

15. See DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY (Thomas M. Franck ed., 2000); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 677 (1999); Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1944-45 (1997) (arguing that the “practical devolution of decisionmaking authority to international institutions is the essence of the loss of national sovereignty” and that “it is a process that will continue as the forces of globalism accelerate in the next century”).

16. I have explored this theme in previous work. See Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT’L L. 311 (2001).

17. See generally ANNA-LENA SVENSSON-MCCARTHY, *THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION* (1998); JOAN FITZPATRICK, *HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY* (1994); JAIME ORAA, *HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW* (1992).

18. See generally Alexandre Charles Kiss, *Permissible Limitations on Rights*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 290 (Louis Henkin ed. 1981).

19. See Vaughn Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS*, *supra* note 10, at 212-21.

refer to these concepts as “accommodation principles,”²⁰ in that they determine the degree to which international law authorizes *departures* from established international rules in certain specified “states of exception.”²¹

Of course, states often also assert that domestic policy preferences concerning such sensitive matters cannot be meaningfully constrained by international human rights law because international human rights law acquires meaning only through the application of norms in domestic practices.²² In the

20. For an interesting discussion of a similar dynamic in the international trade context, see Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 194 (1996) (“It would seem clear that the [relevant] international agreement does not permit a national government’s determination always to prevail (otherwise the international rules could be easily evaded or rendered ineffective). . . . [However, the very notion of sovereignty suggests that international bodies] should respect national government determinations, up to some point.”).

21. National security exceptions provide an excellent example. Hannes L. Schloemann and Stefan Ohlhoff described the problem succinctly.

National security is the Achilles’ heel of international law. Wherever international law is created, the issue of national security gives rise to some sort of loophole, often in the form of an explicit national security exception. As long as the notion of sovereignty exerts power within this evolving system, national security will be an element of, as an exception to, the applicable international law.

Hannes L. Schloemann & Stefan Ohlhoff, “*Constitutionalization*” and *Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AMER. J. INT'L L. 424, 426 (1999). “National security” may be invoked as a justification for the abrogation or qualification of international legal obligations in many issue areas including international trade law. See The General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXI, 55 U.N.T.S. 194; GUIDE TO GATT LAW AND PRACTICE 599-610 (rev. 6th ed. 1995). Article XXI of the General Agreement on Tariffs and Trade (“GATT”) provides for a general exception to all GATT obligations with respect to disclosure of national security information, regulation of fissionable materials, regulation of traffic in arms, and action in pursuance of U.N. Charter obligations related to the maintenance of international peace and security. See also JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 983-86 (3d ed. 1995); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 748-52 (1969); Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception*, 12 MICH. J. INT'L L. 558 (1991).

22. Many new constitutions explicitly make international law part of domestic law. See, e.g., PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES (Philip Alston ed., 1999); S. AFR. CONST. ch. 14 § 232; see also The Human Rights Act of 1998 (U.K.), available at <http://www.legislation.hms0.gov.uk/acts/acts1998/19980042.htm> (incorporating wholesale the European Convention on Human Rights into domestic law). In the United States, “foreign affairs exceptionalism”—the notion that the usual constitutional constraints on the government’s power do not apply in matters relating to foreign affairs—has recently come under tremendous strain. See, e.g., G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 2-3 (1999); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1618 (1997); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1226 (1995). The classic in this area remains LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996).

United States, several scholars argue that constitutional principles preclude giving independent domestic legal effect to customary international law²³ and certain types of treaties.²⁴

The question is whether international law imposes any “limitations on [these] limitations.”²⁵ To what degree may states invoke contextual circumstances to justify specific domestic policy choices? To what degree may states invoke contextual factors to justify restrictions on rights? These questions are merely academic puzzles in an institutional environment unregulated by precise, obligatory norms. These issues, however, will assume tremendous importance as international human rights law acquires more of the characteristics of a fully developed legal system.²⁶

The emerging tension between internationalism and constitutionalism threatens to compromise the ability of either approach to accomplish its central objective: the realization of humane and effective governance. International

23. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2260 (1998); Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999). The recent ascendancy of this view has prompted extensive critical commentary. See, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371-72 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 FORDHAM L. REV. 393, 395 (1997); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 471-72 (1997).

24. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 391 (1998) (arguing that federalism concerns should invalidate treaties that do not regulate genuinely international matters); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2093 (1999) (arguing that “courts should obey the presumption that when the text of a treaty is silent, courts ought to assume that it is non-self-executing,” meaning, in his view, that the treaty is not the “supreme law of the land”). For an extended critique to Professor Bradley’s position, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1077 (2000). For Professor Bradley’s rebuttal, see Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000). For critical commentary on Professor Yoo’s thesis, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2154-55 (1999).

25. See HENKIN & HARGROVE *supra* note 4, at 220-24 (describing the balance needed to adjudicate between preferred constitutional individual rights and the prevailing public interest).

26. See, e.g., HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 573 (2d ed. 2000) (“[I]nternational organizations with powers of elaboration, implementation, application and enforcement pose issues of state sovereignty in the most acute form.”).

human rights law must, therefore, fashion coherent “accommodation principles” that define more clearly the relationship between international and domestic law.²⁷

The challenge for U.S. human rights policy is to maximize the benefits while minimizing the costs of the legalization of human rights norms. International human rights institutions should be structured so as to accommodate reasonable domestic policy choices without compromising the normative integrity of international human rights agreements. To further this objective, U.S. human rights policy should promote and accept as binding “accommodation principles” that take seriously both sides of this structural tension. To illustrate the problem and proposed solution more clearly, I consider the example of U.S. anti-terrorism policy in the wake of the September 11th terrorist attacks. After briefly analyzing a few important aspects the United States’ legal response to the terrorist attacks, I conclude that the United States must acknowledge that international human rights law constrains the available policy options even in the area of anti-terrorism (and even in the context of war).

II. LEGALIZATION AND THE PRINCIPLED ACCOMMODATION OF U.S. NATIONAL INTERESTS: THE EXAMPLE OF U.S. ANTI-TERRORISM POLICY

Legislation enacted long before the September 11th terrorist attacks provides the foundation of the anti-terrorism regime in the United States. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) authorizes the Secretary of State to designate an organization as a foreign terrorist organization if the Secretary finds that the organization is a foreign organization, the organization engages in terrorist activity, and the terrorist activity of the organization threatens the security of U.S. nationals or the national security of the United States.²⁸ The designation by the Secretary of State results in blocking any funds that the organization has on deposit with any financial institution in the United States. Representatives and certain members of the organization are then barred from entry into the United States. Perhaps most importantly, all persons within or subject to jurisdiction of the United States are forbidden from “knowingly provid[ing] material support or resources” to the organization.²⁹

27. See José E. Alvarez, *Multilateralism and its Discontents*, 11 EUR. J. INT’L L. 393 (2000).

28. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §302, 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1189(a)(1) (Supp. IV 1998)).

29. 18 U.S.C. § 2339B(a)(1) (Supp. IV 1998). Therefore, the designation of a group as a “foreign terrorist organization” under AEDPA has three legal consequences. First, United States financial institutions possessing or controlling any funds in which a designated foreign terrorist organization or its agent has an interest are required to block all financial transactions involving those funds. § 2339B(a)(2) (Supp. IV 1998). Second, representatives and specified members of a designated foreign terrorist organization are inadmissible to this country. 8 U.S.C. §

The Secretary's power to designate groups as "terrorist" is, however, subject to judicial supervision. For example, the law requires the Secretary of State to compile an administrative record supporting the findings that an entity is a foreign organization engaging in terrorist activities that threaten the national security of the United States. This record serves as the basis for judicial review of the Secretary's findings. The Court of Appeals is to decide if the Secretary, on the face of things, had enough information to come to the conclusion that the organizations were foreign and engaged in terrorism, and the Secretary's designation of one such organization as an alias of another is subject to the same scrutiny. In addition, due process requires that the Secretary of State must give notice to a putative foreign terrorist organization that such a designation is impending, and the Secretary of State also must provide such an entity with the opportunity to present rebuttal evidence.³⁰ Furthermore, any prosecutions brought under the AEDPA must comply with the considerable requirements of U.S. constitutional criminal procedure; that is, the AEDPA does not establish separate procedures for the trial of individuals accused of terrorist activity.

The USA Patriot Act of 2001 (USA Patriot Act), enacted in the aftermath of the September 11th attacks, establishes many important changes in U.S. law.³¹ Specifically, the USA Patriot Act (1) expands the wiretapping and intelligence gathering powers of the federal government;³² (2) grants the Attorney General the authority to certify that an alien meets the criteria of the terrorism grounds of the Immigration and Nationality Act, or "is engaged in any other activity that endangers the national security of the United States[.]" upon a "reasonable grounds to believe" standard, and take such aliens into custody;³³ and (3) establishes a new criminal prohibition against harboring terrorists, similar to the current prohibition against harboring spies, and makes it an offense when someone harbors or conceals another they know or should have known had engaged in or was about to engage in federal terrorism

1182(a)(3)(B) (Supp. IV 1998). Third, it is illegal for persons within the United States or subject to its jurisdiction to "knowingly" provide "material support or resources" to a designated foreign terrorist organization. 18 U.S.C. § 2339B(a)(1) (Supp. IV 1998). The Act defines "material support or resources" to mean "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A(b) (1994 & Supp. IV 1998); *see also* 18 U.S.C. § 2339B(g) (4) (Supp. IV 1998).

30. *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001), *reh'g denied* (Aug. 27, 2001).

31. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, Pub. L. No. 107-56, 115 STAT. 272 (2001) [hereinafter USA Patriot Act].

32. *Id.* §§ 201-25.

33. *See id.* § 412(a)(1)-(3).

offenses.³⁴ Each of these changes constitutes an important expansion of federal law enforcement powers. By way of illustration, I further explicate the provisions empowering the Attorney General to detain aliens.

A. *U.S. Anti-terrorism Law after September 11*

The USA Patriot Act grants the Attorney General the authority to certify that an alien meets the criteria of the terrorism grounds of the Immigration and Nationality Act, or is engaged in any other activity that endangers the national security of the United States, upon a “reasonable grounds to believe” standard, and take such aliens into custody.³⁵ The Attorney General must either begin removal proceedings against such aliens or bring criminal charges within seven days, or release them from custody.³⁶ An alien who is charged but ultimately found not to be removable is to be released from custody. An alien who is found to be removable but has not been removed, and “whose removal is unlikely in the reasonably foreseeable future,” may be detained if the Attorney General demonstrates that release of the alien will adversely affect national security “or the safety of the community or any person.”³⁷ Judicial review of any action taken under this section, including review of the merits of the certification, is available through habeas corpus proceedings, with appeal to the U.S. Court of Appeals for the District of Columbia Circuit.³⁸ The Attorney General must review his certification of an alien every six months.³⁹

The upshot of these provisions is that the USA Patriot Act permits indefinite detention of immigrants and other non-citizens. Section 412 requires that immigrants “certified” by the Attorney General be charged within seven days with a criminal offense or an immigration violation (which need not be on terrorism grounds).⁴⁰ That is, the USA Patriot Act does not require that those who are detained indefinitely be removable because they are terrorists. For example, it authorizes indefinite detention of immigrants based upon an immigration status violation (such as overstaying a visa) if the Attorney General is unable to deport any such immigrant, as is the case when the deportable immigrant’s country refuses to accept them. Detention is allowed on the Attorney General’s finding of “reasonable grounds to believe” the immigrant involved in terrorism or activity that poses a danger to national security; and indefinite detention is authorized following a determination that

34. *See id.* § 803.

35. *See id.* § 412(a)(1)-(3).

36. USA Patriot Act, § 412(a)(5).

37. *Id.* § 412(a)(6).

38. *Id.* § 412(b).

39. *Id.* § 412(a)(7).

40. *Id.* § 412(a)(5) (amending 8 U.S.C. § 1101 *et seq.* (2000) by adding §§ 236A(a)(3), 236A(a)(6)).

such an individual threatens national security, or the safety of the community or any person.⁴¹

This broad detention power arguably curtails fundamental constitutional guarantees. For example, the U.S. Supreme Court held that the indefinite detention of immigrants who could not be deported poses a “serious constitutional problem.”⁴² The Supreme Court did not allow the government to hold such immigrants, even those who the government said were dangerous and who did not have a right to remain in the United States, for longer than would be “reasonably necessary” to secure removal from the U.S.⁴³ Although the Court did not address indefinite detention of persons ordered removed on terrorism grounds,⁴⁴ the Court made clear that such detention would violate the Constitution without “strong procedural protections.”⁴⁵ Moreover, the Court emphasized that indefinite detention would not be allowed “broadly [for] aliens ordered removed for many and various reasons, including tourist visa violations.”⁴⁶

In this way, the USA Patriot Act arguably fails to satisfy the minimum constitutional requirements outlined by the Supreme Court. Under the USA Patriot Act § 412, immigrants who are ordered removed but cannot be deported in the reasonably foreseeable future are entitled to reviews, at least each six months, of whether they continue to pose a danger.⁴⁷ But the USA Patriot Act provides for indefinite detention without a trial, or any other adversarial hearing, in which the government would have to prove that any such immigrant is engaged in terrorist activity. Moreover, it authorizes indefinite detention merely on the basis of vague allegations of threats to national security.

B. Arbitrary Detention and International Human Rights Law

Pursuant to these provisions (and an emergency interim regulation promulgated by the Attorney General),⁴⁸ the United States has detained well over 1000 individuals in connection with its investigation of the September 11th attacks. These expanded law enforcement powers are in many respects inconsistent with international human rights standards. For example, the detention provisions of the USA Patriot Act authorize deprivations of personal liberty without sufficient procedural or substantive guarantees. In this respect, the detentions under § 236 arguably constitute “arbitrary detention” within the

41. *Id.* § 412(a)(3)-(6).

42. *Zadvydas v. Davis*, 121 S. Ct. 2491, 2498 (2001).

43. *Id.*

44. *Id.* at 2499.

45. *Id.*

46. *Id.*

47. USA Patriot Act, § 412 (a)(6)-(7), 115 STAT. at 350-51.

48. *See* Disposition of Cases of Aliens Arrested Without Warrant, 8 C.F.R. § 287.3 (2001).

meaning of prevailing international legal standards. Under Article 9(1) of the ICCPR, however, no one shall be “subjected to arbitrary arrest or detention”⁴⁹ or “deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁵⁰ The “principle of legality” recognized in this provision purports to regulate both the substantive grounds upon which the detention or arrest is based, and the procedure utilized to effect and confirm the arrest or detention.⁵¹ “Law” in this provision references the general principles central to the “rule of law” including the requirement that abstract, accessible, and generally applicable norms dictate the substance and procedure of any deprivation of personal liberty. Although the ICCPR does not provide a list of the grounds upon which detentions may be ordered, the prohibition of arbitrariness does ensure that the law itself is not arbitrary. That is, the deprivation of liberty is not “manifestly unproportional, unjust or unpredictable, and [that] the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case.”⁵² Definitions of terrorism for which non-nationals can be detained or deported under the USA Patriot Act are impermissibly broad and include membership in, or any “material support” for, any foreign or domestic organization designated as a “terrorist organization” by the Secretary of State or any group that publicly endorses acts of terrorism, and membership in or support for (including soliciting funds) any group not designated as “terrorist” but deemed to support terrorism in some way. In the latter cases, the burden is placed on the detainee to prove that his or her assistance was not intended to further terrorism.

Article 9(2) of the ICCPR provides that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”⁵³ These provisions mandate that anyone who is arrested must be informed of the general reasons for the arrest “at the time of arrest,” while formal legal charges or accusations must be furnished “promptly.”⁵⁴ There must be sufficient information in these

49. ICCPR, *supra* note 3, art. 9(1), 999 U.N.T.S. at 175.

50. *Id.*

51. See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 174-76 (1993) (proscribing both the right to be informed and special rights for persons in custody).

52. See *id.* at 173; see also *Womah Mukong v. Cameroon*, Comm. No. 458/1991, U.N. Hum. Rts. Comm., 51st Sess., U.N. Doc. CCPR/C/51/D/458/1991, at 12 (1994), available at <http://www1.umn.edu/humanrts/undocs/vs45851e.pdf> (last visited Mar. 12, 2002).

53. ICCPR, *supra* note 3, art. 9(2), 999 U.N.T.S. at 175.

54. NOWAK, *supra* note 51, at 174-75.

disclosures to permit the detainee to challenge the legality of his or her detention.⁵⁵

Article 9(3) provides that all persons arrested or detained on a criminal charge “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”⁵⁶ Although no bright line test for “promptness” has emerged, the HRC held that an individual must be brought before a judge or other officer within “a few days.”⁵⁷ The ICCPR also provides for the right to

55. *See id.* at 175; *see also* *Caldas v. Uruguay*, Comm. No. 43/1979, U.N. Hum. Rts. Comm., U.N. Doc. Supp. No. 40 (A/38/40), at 192 (1983), *available at* <http://www1.umn.edu/humanrts/undocs/session38/43-1979.htm> (last visited Mar. 12, 2002).

56. ICCPR, *supra* note 3, art. 9(3). Note that Article 9(3) of the ICCPR applies only to individuals arrested or detained on a *criminal* charge, while the other rights recognized in the Article apply to all persons deprived of their liberty. People awaiting trial on criminal charges should not, as a general rule, be held in custody. In accordance with the right to liberty and the presumption of innocence, persons charged with a criminal offence, in general, should not be detained before trial. *See id.* art. 14(3). International standards explicitly recognize that there are, however, circumstances in which authorities may detain an accused pending trial. *See id.* art. 9(3); *see also* *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 39, U.N. Doc. A/43/49 (1988) [hereinafter *Body of Principles*], *available at* <http://www1.umn.edu/humanrts/instreetree/g3bpppdi.htm> (last visited Mar. 12, 2002); *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, G.A. Res. 45/110, U.N. GAOR, 45th Sess., Supp. No. 49A, at 6, U.N. Doc. A/45/49 (1990), *available at* <http://www1.umn.edu/humanrts/instreetree/i6unsmr.htm> (last visited Mar. 12, 2002); *American Convention on Human Rights*, July 18, 1978, art. 7.5, 1144 U.N.T.S. 123, *available at* <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> (last visited Jan. 27, 2002) [hereinafter *ACHR*]. For example, pre-trial detention is permissible if authorities determine that detention is necessary to prevent flight, interference with witnesses, or when the accused poses a clear and serious risk to others which cannot be contained by less restrictive means. *See* *Van Alphen v. The Netherlands*, Comm. No. 305/1988, U.N. Hum. Rts. Comm., 39th Sess., U.N. Doc. CCPR/C/39/D/305/1988, at 115 (1990), *available at* <http://www.unhcr.ch/tbs/doc.nsf> (last visited Mar. 12, 2002) (document can be located via “SEARCH THE DATABASE,” and “Hugo van Alphen;” or search “By Country,” then “Netherlands,” and the U.N. Doc. number). Therefore, pre-trial detention must not only be lawful, but must also be necessary and reasonable in the circumstances.

57. *Human Rights Committee, General Comment 8, Article 9, Compilation of General Comments and General Recommendations*, U.N. Hum. Rts. Comm., 16th Sess., at 2, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994) (adopted by Human Rights Treaty Bodies), *available at* <http://www1.umn.edu/humanrts/gencomm/hrcom8.htm> (last visited Mar. 12, 2002). Note that this provision does not explicitly recognize a right to counsel for all accused at this stage of the proceedings. The Human Rights Committee has stated, however, that “all persons [] arrested must [have] immediate[] access to counsel” *See Human Rights Committee, Concluding Observations on Georgia*, U.N. Hum. Rts. Comm., 59th Sess., 1564-1566th mtg., at 28, UN Doc. CCPR/C/79/Add.74 (1997) *available at* <http://www1.umn.edu/humanrts/hrcommittee/Georgia97.htm> (last visited Mar. 12, 2002). Arguably this right is implicit in the nature of the protection at issue in Article 9(3), but the lack of a clear requirement precludes universalization of this interpretation. Other non-binding international resolutions do, however, clearly indicate that the law is moving in this direction. *See, e.g.*, *Body of Principles*, *supra* note 56, at princ. 18(1);

habeas corpus, or *amparo*.⁵⁸ Under this provision, anyone deprived of liberty by arrest or detention has the right to “take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”⁵⁹ Moreover, this provision implies that the detainee has the right to continuing, periodic review of the lawfulness of his or her detention.⁶⁰ Clearly, the seven-day, extra-judicial detention authorized by the USA Patriot Act departs from prevailing international standards.

III. TOWARD THE PRINCIPLED ACCOMMODATION OF U.S. NATIONAL INTERESTS

United States officials justify deprivations of these rights by asserting, not without some validity, that the unique and grave threat of terrorism requires exceptional law enforcement measures.⁶¹ International human rights treaties

Basic Principles on the Role of Lawyers, 8th U.N. Congress on the Prevention of Crime and the Treatment of Offenders, at 1, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), available at http://www.unhchr.ch/html/menu3/b/h_comp44.htm (last visited Mar. 12, 2002) (stating that “[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”); *Id.* at princ. 7 (requiring governments to ensure that all persons arrested or detained have access to a lawyer within forty-eight hours from arrest or detention); *See also id.* at princ. 5 (providing that all persons arrested, charged or detained must be promptly informed of their right to legal assistance); *Id.* at princ. 8 (requiring authorities to ensure that all arrested, detained or imprisoned persons have adequate opportunities to be visited by and to communicate with their lawyer without delay, interception or censorship, in full confidentiality). It also has been widely recognized that prompt and regular access to a lawyer for all detainees is an important safeguard against torture, ill-treatment, coerced confessions and other abuses. *See, e.g., Human Rights Committee, General Comment 20, Article 7, Compilation of General Comments and General Recommendations*, U.N. Hum. Rts. Comm., 44th Sess., at 11, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) (adopted by U.N. Human Rights Treaty Bodies), available at <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm> (last visited Mar. 12, 2002); *U.N. Commission on Human Rights, Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Hum. Rts. Comm., 41st Sess., at para. 284, U.N. Doc. E/CN.4/1994/31 (1994).

58. ICCPR, *supra* note 3, art. 9(4).

59. *Id.*

60. *See* Body of Principles, *supra* note 56, at princs. 11(3), 32, 39.

61. *See, e.g.,* Attorney General John Ashcroft, Remarks to the Senate Committee on the Judiciary (Sept. 25, 2001), available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks9_25.htm.

The American people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorist acts. The danger that darkened the United States of America and the civilized world on September 11 did not pass with the atrocities committed that day. Terrorism is a clear and present danger to Americans today. Intelligence information available to the FBI indicates a potential for additional terrorist incidents. This new terrorist threat to Americans on our soil is a turning point in America’s history. It is a new

allow the suspension of some rights in public emergencies.⁶² Article 4 of the ICCPR is representative. For example, it provides that in situations threatening the life of the nation, a government may issue a formal declaration suspending certain human rights guarantees as long as (1) a state of emergency that threatens the life of the nation exists;⁶³ (2) the exigencies of the situation

challenge for law enforcement. Our fight against terrorism is not merely or primarily a criminal justice endeavor—it is defense of our nation and its citizens. We cannot wait for terrorists to strike to begin investigations and make arrests. The death tolls are too high, the consequences too great. We must prevent first, prosecute second.

Id.

62. See, e.g., *Convention for the Protection of Human Rights and Fundamental Freedoms*, Eur. Ct. Hum. Rts., art. 15(1) (1950) (entered into force Mar. 9, 1953) [hereinafter “ECHR”] available at <http://www.echr.coe.int/convention/webConvenENG.pdf> (last visited Mar. 12, 2002):

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Id.

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law

ICCPR, *supra* note 3, art. 4(1).

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law

ACHR, *supra* note 56, art. 27(1).

The African Charter does not contain a provision allowing States to derogate from their obligations under the treaty in times of public emergency. See *African [Banjul] Charter on Human and Peoples’ Rights*, adopted June 27, 1981, 21 I.L.M. 58, available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm>.

63. See SVENSSON-MCCARTHY, *supra* note 17, at 195-281; FITZPATRICK, *supra* note 17; Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT’L L. J. 101, 103 (1995) (arguing that the concept of a “state of emergency refers to those exceptional circumstances resulting from temporary factors of a political nature, which, to varying degrees, involve extreme and imminent danger that threaten the organized existence of the state’); Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1367 (1996) (concluding that a state of emergency may be declared “only if an exceptional situation of crisis or emergency exists which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed can a derogation be invoked.”) (internal citations and alterations omitted) [hereinafter Ni Aolain, *Fortification of an Emergency Regime*]; *The Lawless Case (Merits)*, Eur. Ct. Hum. Rts., at para. 28 (Nov. 14, 1960) (holding that the ECHR’s derogation clauses may be invoked only in “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised

“strictly require” such a suspension;⁶⁴ (3) the suspension does not conflict with the nation’s other international obligations;⁶⁵ (4) the emergency measures are applied in a non-discriminatory fashion⁶⁶ and (5) the government notifies the United Nations (U.N.) Secretary-General immediately.⁶⁷ The only rights that are not subject to suspension in this situation are those specified in Article 4 as protected from derogation.⁶⁸ The ICCPR specifically identifies several non-derogable obligations including the rights to be free from arbitrary killing;⁶⁹ torture or other cruel, inhuman or degrading treatment or punishment⁷⁰ and slavery.⁷¹ Although the rights to fair trial and personal liberty are derogable provisions, the Human Rights Committee has suggested that restrictions of

life of the community of which the State is composed”), available at <http://fletcher.tufts.edu/staff/arubin/L201/L201.html>. The concept of emergency does include circumstances other than armed conflict. For example, national disasters and extreme economic crises may constitute “public emergencies.” See R. St. J. Macdonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT’L L. 225, 225 (1997). Furthermore, the emergency must be temporary, imminent, and of such a character that it threatens the nation as a whole. See SVENSSON-MCCARTHY, *supra* note 17; ORAA, *supra* note 17, at 11-33.

64. This requirement incorporates the principle of proportionality into derogation regimes. This principle requires that the restrictive measures must be proportional in duration, severity, and scope. Implicit in this requirement is that ordinary measures must be inadequate; and the emergency measures must assist in the management of the crisis. See, e.g., ORAA, *supra* note 17, at 143; Macdonald, *supra* note 63, at 233-35.

65. See SVENSSON-MCCARTHY, *supra* note 17, at 624-39.

66. *Id.* at 640-82.

67. *Id.* at 683-718; ICCPR, *supra* note 3, art. 4(3); ECHR, *supra* note 62, art. 15(3); ACHR, *supra* note 56, art. 27(3). The Human Rights Committee has emphasized the importance of notification for effective international supervision of derogations in states of emergency. See Annual Report of the Committee to the General Assembly, Through the Economic and Social Council, Under Article 45 of the Covenant and Article 6 of the Optional Protocol, U.N. GAOR, 36th Sess., Supp. No. 40, Annex VII, at 110, U.N. Doc A/36/40 (1981).

68. Each convention containing a derogation clause provides an explicit list of non-derogable provisions. See ICCPR, *supra* note 3, art. 4(2) (prohibiting derogation from Articles 6 (right to life), 7 (prohibition on torture), 8 (prohibition of slavery and servitude), 11 (imprisonment for failure to fulfill contractual obligation), 15 (prohibition on retrospective criminal offence), 16 (protection and guarantee of legal personality), and 18 (freedom of thought, conscience and religion)); ECHR, *supra* note 62, art. 15(2); 213 U.N.T.S. at 232 (prohibiting derogation from Articles 2 (right to life), 3 (freedom from torture), 4 (freedom from slavery), and 7 (retrospective effect of penal legislation)); ACHR, *supra* note 56, art. 27; Suspension of Guarantees, Interpretation, and Application, July, 1970, 9 I.L.M. 683 (prohibiting suspension of Articles 3 (right to juridical personality), 4 (right to life), 5 (right to humane treatment), 6 (freedom from slavery), 9 (freedom from ex-post facto laws), 12 (freedom of conscience and religion), 17 (right of the family), 18 (right to name), 19 (right of child), 20 (right to nationality), and 23 (right to participate in government)).

69. See ICCPR, *supra* note 3, art. 6.

70. See *id.* art. 7.

71. See *id.* art. 8.

these rights are inappropriate even in times of emergency.⁷² The Committee, following the lead of the Inter-American Court of Human Rights,⁷³ strongly suggested that the right to habeas corpus (or *amparo*) is non-derogable.⁷⁴

In this way, international human rights treaties authorize states to restrict or suspend some rights, subject to several requirements, for an identified set of important public policy objectives.⁷⁵ These “states of exception,” strike a balance between universal human rights norms and national interests by specifying the circumstances in which derogations may be enacted lawfully.⁷⁶

72. Although the Human Rights Committee recommended against adopting an Optional Protocol to the ICCPR re-categorizing Articles 9 and 14 as non-derogable, the Committee noted that states should not derogate from several of the protections included in these articles. The Committee reasoned that:

The Committee notes that the purpose of the possible draft optional protocol is to add article 9, paragraphs 3 and 4, and article 14 to the list of non-derogable provisions in article 4, paragraph 2, of the Covenant. Based on its experience derived from the consideration of States parties' reports submitted under article 40 of the Covenant, the Committee wishes to point out that, with respect to article 9, paragraphs 3 and 4, the issue of remedies available to individuals during states of emergency has often been discussed. The Committee is satisfied that States parties generally understand that the right to habeas corpus and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole. Having this in mind, the Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite States parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency.

Human Rights Committee Annual Report to the U.N. General Assembly, U.N. G.A.O.R., 49th Sess., Supp. No. 40, Annex IX, at para. 2, U.N. Doc. A/49/40 (1994) [hereinafter *Human Rights Committee Annual Report*].

73. See *Habeas Corpus in Emergency Situations* (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Inter-Am. C.H.R. (ser. A) No. 8, at 33, OEA/ser.L./V/III.17, doc. 13 (1987) available at http://www1.umn.edu/humanrts/iachr/b_11_4h.htm (last visited Jan. 26, 2002). See also *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Inter-Am. C.H.R. (ser. A) No. 9, at 41, OEA/ser.L./VI/III.9, doc. 13 (1987) available at http://www1.umn.edu/humanrts/iachr/b_11_4i.htm (last visited Jan. 26, 2002). The Court unanimously held that “‘essential’ judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1)) . . .” *Id.*

74. *Human Rights Committee Annual Report*, *supra* note 72.

75. For useful surveys of this area of law, see SVENSSON-MCCARTHY, *supra* note 17; FITZPATRICK, *supra* note 17; ORAA, *supra* note 17.

76. See generally SVENSSON-MCCARTHY, *supra* note 17 (providing an exhaustive examination of the relevant treaty provisions and case-law).

This dimension of accommodation is central since states often justify rights restrictions by appeal to emergency conditions.⁷⁷

In light of these concerns, how much should the concern for sovereignty over such sensitive matters as anti-terrorism law after September 11 affect the participation of United States in international human rights regimes? The international law pertaining to “states of exception” provides an excellent example of the ways in which the United States might incorporate international norms without sacrificing sovereign autonomy in matters affecting national security. Under international human rights law, the United States may suspend various rights protections provided that such derogations are strictly required to meet the challenges posed by an emergency threatening the polity. These modest, but important, international legal requirements grapple with the structural tension between state sovereignty and universal justice. International human rights law must effectively constrain the ambitions of national governments. At the same time, fundamental threats to democracy (such as terrorism) might require a temporary suspension of certain rights to protect liberty in the long run. Recognizing the sovereign prerogative of states to make such choices, international human rights norms strive to condition the exercise of this power. In many respects, this “principled accommodation” of national interests reveals that international human rights law, properly conceived, poses no menacing threat to constitutionalism and democracy. That is, international human rights law in no way constrains the legitimate ambitions of national governments.

IV. CONCLUSION: LEGALIZATION, DOUBLE STANDARDS, AND U.S. HUMAN RIGHTS POLICY

The United States, like most national governments, resists any encroachment by outsiders on the sphere of autonomy over internal affairs. Indeed, the principle of non-interference in the domestic affairs of states is, in many respects, a necessary corollary to sovereign equality. International

77. For example, several governments point to emergency conditions to justify practices otherwise inconsistent with the ICCPR. See, e.g., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Reports of States Parties Due in 1977*, U.N. Doc. CCPR/C/1/Add.17, 3d. Sess., 67th mtg., Agenda Item 4 (1977) (discussing report filed by United Kingdom under Article 40 of Covenant); *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Reports of States Parties Due in 1977*, U.N. Doc. CCPR/C/1/Add.25, 4th Sess., 59th mtg., Agenda Item 4 (1978) (discussing report filed by Chile Under Article 40 of Covenant); *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, U.N. Doc. CCPR/C/1/SR.221, 10th Sess., 221st mtg. Agenda Item 4 (1980) (discussing report filed by Columbia under Article 40 of Covenant); Uruguay, in *Annual Report of the Committee to the General Assembly: 6th Report*, at 365, para. 265, U.N. Doc. CCPR/C/1/Add.57, 355th-357th, 359th, 373rd mtg. (1982) (discussing report filed by Uruguay under Article 40 of Covenant).

human rights law seems to violate these principles by opening states to outside investigation, influence, and criticism. International (and supranational) institutions serve to hold states accountable to other states for their legal commitments to respect human rights. In this important sense, international human rights law elevates the sensitive relationship of a state to its own citizens to a matter of international concern. This development, if taken seriously, strikes at the very core of state sovereignty. Through reporting procedures to U.N. treaty bodies, states engage in the unprecedented activity of self-assessment and disclosure of non-compliance to outsiders. In so doing, states send representatives to respond to questioning and are condemned for violations in the treaty bodies' reports. Furthermore, through political bodies, such as the U.N. Commission on Human Rights, states are subject to formal condemnation and even risk resolutions and sanctions by the U.N. Security Council. Given the trend toward further legalization of international human rights institutions, states will likely become more concerned about the imposition of exogenously-defined norms purporting to regulate state action in areas traditionally considered matters of domestic jurisdiction.

The progressive development of international human rights law, and in particular the emergence of increasingly legalized international organizations, has reinforced the political and economic interdependence of many nations. With this interdependence comes the inevitable tension between the need to adhere to international obligations and the wish to retain state sovereignty. States will, of course, struggle to retain sovereign authority to make fundamental policy choices consistent with national values and needs. Nevertheless, all states must accept constraints on their freedom of action in order to obtain the considerable benefits of collective, supranational regulation and to promote more humane systems of governance.