Washington International Law Journal

Volume 30
Number 2 *A Global Reckoning: Answering Calls for Change*

3-2021

American Judicial Rejectionism and the Domestic Court's Undermining of International Human Rights Law and Policy After Human Right Violations Have Occurred in the State

Jessika L. Gonzalez

American Judicial Rejectionism and the Domestic Court's Undermining of International Human Rights Law and Policy After Human Right Violations Have Occurred in the State

Jessika L. Gonzalez[†]

Abstract: Ahmaud Arbery, Breonna Taylor, and George Floyd's executions ignited protests across the world. These protests raised debate over the United States Supreme Court's creation of qualified immunity for police misconduct. This in turn creates an appropriate opportunity to stop and take stock of United States law surrounding protections and immunities afforded to law enforcement officials, relative to international law and policy on law enforcement accountability and oversight. In doing so, this article uncovers how the American judiciary carries out a new form of American rejectionism powered by its use of qualified immunity doctrine, which in practice, results in a lack of accountability for law enforcement officials. This effectively undermines international human rights law ratified by the State such as the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and the International Convention on the Elimination of All Form of Racial Discrimination (ICERD). The State judiciary's exercise of qualified immunity doctrine also dismisses international policy developed by international organizations like the United Nations Office on Drugs and Crime (UNODC). The issue is unsettling for two reasons: (1) it effectively nullifies the treaty making process and (2) perpetuates a system where domestic courts are not accountable to international law ratified and enforced by the nation's other two branches of government. This article proposes a new approach to this area of the law: reforming Reservations, Understandings, and Declarations (RUDs) so as to not limit treaties' domestic effect within the State's judicial system and instilling within it greater and more principled acceptance of international legal norms.

Cite as: Jessika L. Gonzalez, *American Judicial Rejectionism and the Domestic Court's Undermining of International Human Rights Law and Policy After Human Right Violations Have Occurred in the State*, 30 WASH. INT'L L.J. 397 (2021).

INTRODUCTION

The execution of Ahmaud Arbery, Breonna Taylor, and George Floyd has inspired people across the globe to call attention to laws that have consistently protected law enforcement officials and authorized them to act with absolute impunity. Such laws appropriately examined in this context have included the United States Supreme Court's creation of qualified immunity for police misconduct.[1] In examining for the first

[†] J.D. Candidate, University of Washington School of Law, Class of 2021. I want to thank Mike Angiulo and Jackie Cross for their insight and input into this Comment. I

time how United States' law surrounding protections and immunities afforded to law enforcement officials square with international law and policy on law enforcement accountability and oversight, this article uncovers how the United States' highest court carries out an explicit form of American rejectionism powered by and through the continual use of the qualified immunity doctrine.

Internationally prescribed law and policy is undermined or rejected when judiciaries—like in the United States—develop legal doctrines akin to that of qualified immunity. The doctrine protects a law enforcement official from being held personally liable for human rights violations, so long as the official does not violate clearly established law. This in turn allows police officers to escape accountability.

International human rights law ratified by the United States sets out legal standards on the fundamental rights entitled to individuals in the context of policing. Practical guidance is also developed by international organizations to support States,[2] like the United States, in an endeavor to provide transparency, accountability, and police oversight, through disciplinary proceedings against law enforcement officials. Despite these legal obligations and guidance, the United States' Supreme Court stays firm and determined in their dismissal of international law and policy. This attitude threatens to delegitimize the treaty making process and perpetuates a system where State domestic court systems are not accountable to international law ratified by the State where the domestic courts sit.

This article proceeds in four parts. Part I provides a brief introduction to the qualified immunity doctrine, following its evolution before discussing how its evolved presence in the United States today results in a lack of accountability for law enforcement officials. Part II unpacks three international treaties undermined by the qualified immunity doctrine, while also discussing international standards that detail and put forth guidance for a more transparent and accountable State policing model. Part III illustrates how the United States' qualified immunity doctrine undermines international law and policy and explains why this is of notable importance. A brief Part IV recommends solutions to improve the United States' domestic court policy on this front. Among these solutions are reforming Reservations, Understandings, and Declarations ("RUDs") so as to not restrict the domestic effect treaties

would also like to thank the Editorial Staff at *Washington International Law Journal* for their hard work, insightful comments, and incredible attention to detail, especially Sean Hyde, Kolby Cameron, and Katrina Mendoza.

[1] *See* Pierson v. Ray, 386 U.S. 547 (1967).

[2] For the purposes of this article, "State" refers to a sovereign whose citizens are relatively homogenous.

have within the State court system, and instilling within the State, greater and more principled acceptance of international legal norms.

I. THE UNITED STATES SUPREME COURT'S QUALIFIED IMMUNITY DOCTRINE

To understand why the United States' judiciary's use of qualified immunity undermines international law, one must first understand: (a) what qualified immunity is, and (b) how the doctrine's expansion over time results in decreased accountability and oversight for law enforcement. These understandings bring larger arguments about the undermining of international law and policy into focus.

A. Qualified Immunity as a Law Enforcement Official Legal Defense to Standing Civil Trial

"Qualified immunity is a defense to standing civil trial" as a law enforcement official.[3] When granted, officials exercising discretionary functions are given immunity from civil suit in cases dealing with statutory or constitutional rights violations.[4] Law enforcement officials can raise qualified immunity as an affirmative defense at all times when their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[5] The doctrine affords "government officials a 'margin of error' to make mistakes in the course of their work."[6] It also protects their "judgment calls made in a legally uncertain environment,"[7] and intends to protect "all but the plainly incompetent or those who knowingly violate the law."[8]

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[3] Tim Miller, *Part IX Qualified Immunity*, FLETC, https://www.fletc.gov/sites/default/files/PartIXQualifiedImmunity.pdf.

[4] Pearson v. Callahan, 555 U.S. 223, 231 (2009); Sebesta v. Davis, 878 F.3d 226, 233 (7th Cir. 2017); Robbins v. Becker, 715 F.3d 691, 694 (8th Cir. 2013); *see also* Liff v. Office of Inspector Gen. for U.S. Dep't of Labor, 881 F.3d 912, 917–18 (D.C. Cir. 2018) (noting that qualified immunity is an entitlement given by the court to not have to stand trial or face other burdens of litigation); WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, *POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS* (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10492.

[5] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[6] Morse v. Cloutier, 869 F.3d 16, 22 (1st Cir. 2017).

[7] Ryder v. United States, 515 U.S. 177, 185 (1995).

[8] Mullenix v. Luna, 577 U.S. 7, 12 (2015) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)); Anderson v. Creighton, 483 U.S. 635, 638 (1987) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)); Dang *ex rel.* Dang v. Sheriff, Seminole Cty., 871 F.3d 1272, 1278 (11th Cir. 2017) (quoting Lee v. Ferraro, 284 F.3d 1188, 1994 (11th Cir. 2002)); West Virginia State Police v. Hughes, 238 W. Va. 406, 411 (2017) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)); *see also* Andrea M. Alonso & Kenneth E. Pitcoff, *A Closer Look at Qualified Immunity*, N.Y. L.J. (Jul. 23, 2020, 10:10 AM), https://www.law.com/newyorklawjournal/2020/07/23/a-closer-look-at-qualified-immunity/ (explaining

B. The Doctrine's Jurisprudence Results in a Lack of Accountability for Law Enforcement Officials

Qualified immunity's evolution over time led to a lack of accountability for law enforcement officials. This development began when the Court wished to clarify causes of actions that could be made against government officials under the Civil Rights Acts of 1871, and its statutory cause of action, Section 1983.[9] The statute and its statutory cause of action provided people with an avenue to file suit for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by persons acting "under color of any statute, ordinance, regulation custom, or usage, of any State or Territory."[10] When that person happened to be a law enforcement official, Section 1983, as written by the Congress, allowed civil legal remedies for individuals to seek legal redress for human right violations recognized under the Constitution.[11] This included the "right to be free from excessive force under the Fourth Amendment[,]" for example.[12] Indeed, Section 1983 is seen as a "vital component" to redeeming constitutional guarantees for two reasons.[13] Criminal prosecutions of police officers are scarce, so a plaintiff's "most plausible avenue for redress [is] often a civil suit for monetary damages."[14] It also provides a plaintiff with another avenue for redressability.

Pierson v. Ray was the first time the Court sought to clarify what causes of action could be made under Section 1983.[15] *Pierson* involved an action against city officers and municipal police for false arrest, imprisonment, and damages for the deprivation of the petitioner's civil rights.[16] Writing for the majority, Chief Justice Warren expanded the defense of good faith and probable cause, initially available to officers in common-law actions for false arrest and imprisonment, to

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qualified immunity is not a catchall, and that "it is available to all government officials except those officers who, on an objective basis, are either 'plainly incompetent' or 'knowingly violates the law.").

[9] NOVAK, *supra* note 4, at 2.

[10] *Id.*

[11] *Id.*

[12] *Id.*; U.S. CONST. amend. IV, § 4; *see also Fourth Amendment*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/fourth_amendment (last visited Mar. 10, 2021) (noting that all searches and seizures under the Fourth Amendment must be reasonable, and that no excessive force shall be used).

[13] NOVAK, *supra* note 4, at 2.

[14] Marcus R. Nemeth, *How Was* That *Reasonable? The Misguided Development of the Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 991–92 (2019).

[15] Pierson v. Ray, 386 U.S. 547, 551 (1967).

[16] *Id.* at 548–50.

actions under Section 1983.[17] The Court clarified that because there was no legislative record indicating an intent to abolish such immunities, the "principle of law" establishing immunities for law enforcement officials, had not been abolished by Section 1983's creation.[18]

Over time, these officer protections expanded.[19] Whereas the Court in *Pierson* had initially found that qualified immunity applied in instances where police officers exhibited "good faith" and "probable cause," the Court in *Harlow v. Fitzgerald* enlarged the standard by requiring that there be "clearly established" law for the types of violations committed, to overcome such immunities.[20] The Court reasoned that there should be balance between "the importance of a damages remedy to protect the rights of citizens" with "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[21] The Court clarified that its purpose for reaching such conclusions was to allow "officials to do their jobs and to exercise judgment, wisdom and sense without worry of being sued."[22] Thus, the test we see today for qualified immunity was born: when government officials' conduct does not amount to a violation of "clearly established statutory or constitutional rights" that a reasonable person would have known, they are entitled to qualified immunity.[23]

The doctrine's expansion serves as a barrier for holding law enforcement officials accountable because the legal standard, since *Pierson* and its progenies, made it more difficult to bring claims against law enforcement officials as a civil plaintiff.[24] The difficulty arises because the legal standard requires a civil plaintiff to identify not only a

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[17] *Id.* at 557.

[18] *Id.* at 554.

[19] Nimra Azmi, *The Supreme Court's Insidious Development of Qualified Immunity*, JUST SECURITY (June 12, 2020), https://www.justsecurity.org/70751/the-supreme-courts-insidious-development-of-qualified-immunity/ (explaining how since its inception, "qualified immunity's protections for officers have only expanded" and that the doctrine has since grown "as a barrier to justice in . . . intertwined ways.")

[20] *Id.* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[21] *Harlow*, 457 U.S. at 807.

[22] West Virginia Lottery v. A-1 Amusement, Inc., 807 S.E.2d 760, 776 (2017) (quoting West Virginia Bd. of Educ. v. Marple, 783 S.E.2d 75, 82 (2015)).

[23] *Id. See also* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (holding that qualified immunity protects police from civil suit as long as their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."); Nemeth, *supra* note 14, at 998–99.

[24] *See* Azmi, *supra* note 19; *see* JAY SCHEWEIKERT, CATO INSTITUTE, POLICY ANALYSIS NO. 901, QUALIFIED IMMUNITY: A LEGAL, PRACTICAL, AND MORAL FAILURE (Sept. 14, 2020), https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf (strongly indicating that the qualified immunity doctrine's expansion has resulted in a lack of accountability for law enforcement officials due to its legal standard).

"clear legal rule[,] but a prior case" with identical facts.[25] Civil plaintiffs struggle to show that the law or right was clearly established at the time the violation was committed.[26] This conundrum is due to the United States' Supreme Court having not yet clearly defined what it means for a right to have been "clearly established."[27] Specifically, the doctrine remains unclear "with respect to the nature of authority required to find a clearly established right."[28] Instead of providing guidance, the Court provides vague generalities that "existing precedent should place the constitutional question 'beyond debate.'"[29]

When the Court does provide some guidance, it has been contradictory.[30] At times, the Court paid little attention to the sources of law, and instead focused on how specifically the right had been defined.[31] In these cases, the Court held that the right must be defined with enough clarity that a reasonable official would know that what he or she is doing violated a right.[32] At other times, the Court stated that the facts of a prior case need not be "materially similar," and that although the exact action in question does not have to be proved unlawful, prior existing law should make the unlawfulness of an action apparent.[33] Thus, the degree "to which the specific facts of the violation need to match

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[25] SCHEWEIKERT, *supra* note 24 (noting that in practice, the legal standard is a "huge hurdle for civil plaintiffs because it generally requires them to identify not just a clear legal rule, but a prior case with functionally identical facts").

[26] James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1602–03 (2011) (stating that the lack of accountability stems from the inability to meet such a demanding standard to overcome such immunities awarded to law enforcement officials).

[27] *Id.* John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1298–99 (2012) (describing how the Supreme Court has not given a definition of what it means for rights to have been "clearly established").

[28] Tyler Finn, *Qualified Immunity Formalism: 'Clearly Established Law' and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 450 (2019).

[29] Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (holding that plaintiffs seeking to overcome qualified immunity are required to present "existing precedent" that places the legal question "beyond debate"); *see also* Mullenix v. Luna, 577 U.S. 7, 12 (2015); Finn *supra* note 28, at 450.

[30] Williams, *supra* note 27, at 1305.

[31] Kisela v. Hughes, 138 S. Ct. 1148, 1154 (2018) (clarifying that lower courts should not read precedent broadly when determining if new facts should be governed by clearly established law); District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) (noting that whether facts fall into the "clearly established" standard requires a "high 'degree of specificity'"); *see* Finn *supra* note 28, at 451 (explaining how the "Supreme Court has concentrated little attention on the relevant sources of law, instead focusing its holding on the specificity with which the right must be defined").

[32] Hope v. Pelzer, 536 U.S. 730, 739 (2002); *Ashcroft*, 563 U.S. at 741; *see* Finn *supra* note 28, at 451 (emphasizing how the Supreme Court has looked for the invoked right to have been "defined with sufficient clarity so a reasonable official would understand that what she is doing violates that right").

[33] Finn, *supra* note 28, at 452.

existing precedent" is unclear.[34] The inconsistency is problematic because it continues to present difficulties for lower courts who are responsible for initially determining what "clearly established" law is for rights.[35] This, in turn, results in an ambiguous standard.

Because of the lack of clarity in the standard, the doctrine in practice protects law enforcement officials from even getting to trial.[36] Judges, in their "arbitrary degree of factual specificity in making that judgment . . . ultimately leave the protections afforded by important rights unpredictable"[37] and err on the side of granting rather than denying qualified immunity. In other words, the expansive judicial discretion self-created by the decreased uniformity of qualified immunity rulings results in more protections for police and decreased protections for plaintiffs whose rights have been violated.[38] Moreover, deciding cases in this discretionary way leaves certain constitutional analysis unaddressed, which means the law is never left clear, never grows, and stalls.[39] This stalling leaves civil plaintiffs without a remedy for the violation of their rights.[40] As Justice Sotomayor's dissenting opinion notes in *Kisela*, this approach towards qualified immunity "transforms the doctrine into an absolute shield for law enforcement officers" and is "symptomatic of 'a disturbing trend regarding the use of the Court's resources' in qualified immunity cases."[41] Indeed, a Reuters study confirms not only the growing inclination of the appellate courts to grant police immunity but also large geographical disparities in the rate that officers receive immunity.[42]

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[34] *Id.*

[35] *Id.*

[36] *See* Nemeth, *supra* note 14, at 992.

[37] Aaron Belzer, *The Audacity of Ignoring Hope: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights*, 90 DENV. U. L. REV. 647, 647 (2012).

[38] Williams, *supra* note 27, at 1299; Belzer, *supra* note 37.

[39] *Id.*

[40] *Id.*

[41] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

[42] Reuter's analysis found notable distinctions in how district court judges in two different states ruled on qualified immunity requests. For instance, Texas judges granted immunity more frequently to officers who used force against unarmed civilians than California judges did in cases where civilians were armed. Andrea Januta & Jackie Botts, *Taking the Measure of Qualified Immunity: How Reuters Analyzed the Data*, REUTERS (Dec. 23, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-methodology/.

II. INTERNATIONAL LEGAL OBLIGATIONS UNDER HUMAN RIGHTS TREATIES AND INTERNATIONAL LEGAL STANDARDS ON POLICE ACCOUNTABILITY

The ICCPR, the UNCAT, and the ICERD, set out legal standards applicable to both policing and the fundamental rights of an individual for States to observe. In addition, practical guidance developed by international organizations—like the UNODC—is given to support States like the United States, in an endeavor to provide transparency, accountability, and oversight in policing, as specific to disciplinary proceedings against law enforcement officials. To better understand the drawn connection, one need first know what the aforementioned treaties represent and the United States' role in the treaties. Similarly, practical guidance as carried out by UNODC must first be illustrated in order to bring forth the connection that this article presents.

A. International Legal Obligations Under the ICCPR, UNCAT, and the ICERD

In the international human rights arena, there are three treaties of notable importance that set out guiding principles on the fundamental rights of a person for ratifying States to observe and that are particularly undermined by the U.S. judiciary's creation and practice of the qualified immunity doctrine: the ICCPR,[43] the UNCAT,[44] and the ICERD.[45] Subject to RUDs,[46] ratifying States are bound by the respective treaty provisions.[47]

1. The ICCPR Guarantees Right to Effective Remedy for Civil Rights Violations. — The ICCPR is a multilateral treaty adopted by the United Nations Assembly that commits its parties to respect an individual's civil and political rights, including the right to life, human dignity, and freedom from torture.[48] Imbedded into the treaty is the

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[43] G.A. Res. 2200A (XXI) (Dec. 16, 1966).

[44] G.A. Res. 39/46, Convention Against Torture (Dec. 10, 1984).

[45] G.A. Res. 2106 (XX) (Dec. 21, 1965).

[46] RUDs are attachments to treaties that explain how a treaty will be interpreted with a State's domestic law once ratification is complete. RUDs limit the domestic effect of treaties and reframe certain provisions from the treaties in ways that make it consistent with American practices. Eric Chung, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126 YALE L.J. 170, 170 (2016).

[47] The Restatement (Third) of the Foreign Relations Law of the United States sets out basic principles of how customary law should be incorporated into the "law of the land" under Article IV of the Constitution. As the Court holds, "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." The Paquete Habana, 175 U.S. 677, 700 (1900).

[48] G.A. Res. 2200A, *supra* note 43, pmbl.

guaranteed right to due process and a fair trial when those rights have been violated.[49]

The ICCPR establishes an international legal framework for a right to remedy, wherein the covenant compels ratifying State governments to take judicial measures in order to protect the rights afforded in the treaty provisions and allows for effective remedies to ensue.[50] As stated more specifically in the ICCPR, ratifying States need to have an adequate process in place, by which people can seek redress if their civil or political rights have been violated.[51] Notably, each State Party shoulders a burden:

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislature authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[52]

In 1992, the United States Senate ratified the ICCPR.[53] As a result, the ICCPR effectively became the "supreme law of the land" and now carries the weight of federal law in the United States.[54] In carrying this status, the ICCPR obligates the United States to protect basic human rights including in instances where government entities and agents are involved.[55] To that end, the covenant compels the United States' government to take judicial measures towards protecting the rights listed in the treaty's provisions and to provide an effective remedy when those

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[49] *Id.* pt. 2, art. 2.

[50] *FAQ: The Covenant on Civil & Political Rights*, ACLU (Apr. 2019), https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr.

[51] U.N. OFFICE ON DRUGS AND CRIME, HANDBOOK ON POLICE ACCOUNTABILITY, OVERSIGHT, AND INTEGRITY, at 21, U.N. Sales No. E.11.IV.5 (2011), https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf.

[52] G.A. Res. 2200A, *supra* note 43, pt. 2, art. 2, ¶ 3.

[53] ACLU, *supra* note 50.

[54] *Id.*

[55] *Id.*

rights have been violated.[56] Subject to RUDs made at the time of ratifying the ICCPR, the United States cannot take measures that contradict or violate such provisions.[57]

Here, it is important to note that at the time of U.S. ratification of the ICCPR, there was a RUD rendering the treaty non-self-executing.[58] This RUD, in effect, limits litigants' ability to sue in court for direct enforcement of the treaty provisions.[59] Despite this, the United States is still obligated to uphold the object and purpose of the ratified treaty.[60]

2. Right to Prompt and Impartial Investigations, and Fair and Adequate Compensation under the UNCAT. — The UNCAT is a human rights treaty with the objective to help eliminate cruel, inhumane treatment across the international community.[61] This treaty is applicable to policing, specifically in terms of policing behavior (like torture).[62] UNCAT requires its signatories to take effective measures to avoid torture and other acts of cruel or inhuman treatment within their jurisdiction.[63] Upon the State's ratification, it must ensure that when there is inhumane treatment in violation of the treaty's provisions, it is made possible for an individual to initiate and proceed with a prompt and impartial investigation in the State.[64] Specifically, Article 12 and 13 obligate the ratifying State to ensure competent authorities promptly and impartially investigate, when there is reasonable belief that an act of torture has occurred in its jurisdiction.[65] Article 14 obligates the State party to ensure redress in its legal system for an act of torture.[66] This includes providing "an enforceable right to fair and adequate compensation" and in the event of the victim's death "as a result of torture, his [or her] dependents shall be entitled to compensation."[67]

Upon United States ratification in October 1994, the UNCAT became binding in the United States, consequentially expanding its

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[56] *Id.*

[57] *Id.*

[58] S. Res. 95-20, 102d Cong., 138 Cong. Rec. S478-01 (1992) (enacted).

[59] ACLU, *supra* note 50.

[60] Vienna Convention on the Law of Treaties, art. 19, May 23, 1969, 1155 U.N.T.S. 331 (A "State is obliged to refrain from acts which would defeat the object and purpose of a treaty").

[61] *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation*, EVERYCRSREPORT.COM (Jan. 19, 2010), https://www.everycrsreport.com/reports/RL32438.html.

[62] U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at 21.

[63] G.A. Res. 39/46, *supra* note 44.

[64] *Id.* arts. 12–13.

[65] *Id.*

[66] *Id.* art. 14.

[67] *Id.*

application to all actions in the State, notably, actions involving "government entities and agents," down to the state and local level.[68] In effect, the Convention applies to police departments and other law enforcement agencies.[69] Though, in similar fashion to the ICCPR, the United States Senate, at the time of ratification, submitted a declaration, rendering the previously mentioned treaty provisions non-self-executing.[70]

3. The Ratifying State's Obligation to Review Governmental Policies that Perpetuate Racial Discrimination under ICERD. — The ICERD is a convention that commits its signatories to the elimination of racial discrimination and sets forth principles by which signatories can work to eliminate racial discrimination.[71] Notably, State parties guarantee that they will "take effective measures to review governmental, national, and local policies, and amend, rescind, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."[72] Moreover, State parties shall ensure to those in their jurisdiction effective remedy procedures.[73]

Upon ratification of the ICERD in 1994, the United States committed itself to upholding equality and non-discrimination in the criminal legal system, and access to justice.[74] Similar to the ICCPR and UNCAT, the ICERD provisions apply to "government entities and agents, including all federal, state, city, and county and all forms of local government entities" in the United States.[75] Further, the ICERD carries the same weight as federal law, subject to RUDs filed at the time of ratification.[76] Similar to the RUDs filed upon the ratification of the ICCPR and UNCAT, the United States declared the ICERD treaty to be

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[68] *FAQ: The Convention Against Torture*, ACLU, https://www.aclu.org/other/faq-convention-against-torture.

[69] *Id.*

[70] S. Res. 100-20, 101st Cong., 136 Cong. Rec. S17486-01 (1990) (enacted).

[71] G.A. Res. 2106, *supra* note 45.

[72] *Id.* art. 2, pt. 1(c).

[73] *Id.* art. 6.

[74] The United States commits itself to upholding ICERD's treaty provisions upon ratification. Though, the State has fallen short due to nullifying RUDs. Maya K. Watson, *The United States' Hollow Commitment to Eradicating Global Racial Discrimination*, AM. B. ASS'N (Jan. 6, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/the-united-states--hollow-commitment-to-eradicating-global-racia/.

[75] *Frequently Asked Questions Convention on the Elimination of All Forms of Racial Discrimination*, ACLU, https://www.aclu.org/sites/default/files/field_document/cerd_faqs.pdf (last visited Feb 19, 2021).

[76] *Id.*

non-self-executing upon ratification.[77] In the same vein, this prevents litigants from bringing ICERD claims into U.S. courts.[78]

B. International Policies on Police Accountability

In the policing arena, the United Nations has been anything but silent about the need for criminal legal system reform. Notably, the United Nations' High Commissioner for Human Rights led efforts to address systemic racism against African American individuals by adopting resolutions to condemn racial discrimination and violent practice at the hands of law enforcement.[79] Moreover, throughout the years, the United Nations and other international organizations created standards for countries to use as a way to hold police officers more accountable in the context of disciplinary proceedings initiated against them. The intention is to assist policymakers and key players within the State in helping to improve, promote and protect human rights at the domestic level.[80] In the context of policing, these sort of standards, guidelines, and norms projected by the international community serve as readymade tools for States across the globe by which accountability can be reinforced in their jurisdictions.[81]

1. International Standards and Practices Specific to Disciplinary Proceedings Against Police Officers. — At its core, international norms involving disciplinary proceedings against police officers communicate a need for States to respect and protect human rights. Narrowing into what exactly this entails, State police overseers have to be willing to hold police accountable. With this form of accountability "disrespect must be followed by appropriate disciplinary proceedings."[82] In other words, there must be a willingness to provide individuals with certain protections, which include disciplinary proceedings when violations have occurred. Specifically, these proceedings should not be limited to criminal proceedings, but should include both "civil and public administrative proceedings for compensation or redress."[83] Notably, international standards for policing include the ability for a fair trial to be conducted, where there is the

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[77] Watson, *supra* note 74.

[78] *Id.*

[79] *Human Rights Council Calls on Top UN Rights Official to Take Action on Racist Violence*, UN NEWS (June 19, 2020), https://news.un.org/en/story/2020/06/1066722.

[80] U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at 2.

[81] *Id.* at 32.

[82] Int'l Comm. of the Red Cross [ICRC], *International Rules and Standards for Policing* at 53 (June 2015), https://www.icrc.org/en/doc/assets/files/other/icrc-002-0809.pdf.

[83] *Id.* at 56.

"disclosing [of] dockets and other pieces of work-related information that may be self-incriminating."[84] In situations where "the complainant is injured, or the victim has died as a result of police action, the burden of proof falls on the police to explain" how this happened.[85]

This becomes especially important in the context of policing where "successful civil suits filed by victims [become] a critical tool for police departments to identify and remedy widespread abuses" in a way that criminal charges against police officers cannot.[86] Indeed, the UNODC emphasized the usefulness of a complainant filing a civil suit against the police officer or police agency accused of misconduct.[87] UNODC reasoned that it is a better accountability mechanism than existing police accountability systems, as civil litigation is historically a strong deterrent against future violations.[88]

III. QUALIFIED IMMUNITY DOCTRINE UNDERMINES INTERNATIONAL LAW AND POLICY, COMPROMISING ACCOUNTABILITY

Despite the law and policy put into place by the international community, the United States judicially created qualified immunity doctrine for law enforcement officials undermines the measures meant to secure law enforcement accountability. Although domestic courts in the State are not obligated to enforce treaties that are bound to non-self-executing RUDs or pay mind to what the international community offers as "advice" about domestic affairs,[89] creating this form of domestic court precedent poses bigger challenges to the treaty making process's legitimacy and it feeds into a system wherein State domestic court systems are held less accountable to treaties the State itself ratified.

A. The Lack of Clarity Found in the Doctrine Undermines International Law and Policy.

As discussed in Part I, the highest court in the United States has never given a clear definition of what it means for a right to be "clearly established,"[90] which has resulted in a lack of accountability for law

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[84] U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at 41.

[85] *Id.* at 37.

[86] *Fact Sheet: Civil Lawsuits Lead to Better Safer Law Enforcement*, CTR. FOR JUST. & DEMOCRACY AT N.Y. LAW SCH. (June 20, 2017), https://centerjd.org/content/fact-sheet-civil-lawsuits-lead-better-safer-law-enforcement.

[87] U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at 37.

[88] *Id.*

[89] Carlos Vasquez, T*he Distinction Between Self-Executing and Non-Self-Executing Treaties in International Law*, OXFORD LAW (May 10, 2018), https://www.law.ox.ac.uk/events/distinction-between-self-executing-and-non-self-executing-treaties-international-law.

[90] Williams, *supra* note 27, at 1298–99.

enforcement officials.[91] This lack of accountability, whether intentional or not, undermines and rejects international law and policy that requires a State to hold law enforcement officials accountable after a human rights violation occurs in its territory.

The ICCPR provides for an individual's right to effective remedy after a civil or political rights violation occurs in the ratifying State.[92] However, a State domestic court system undermines such State obligations when it creates doctrines like qualified immunity, which compromises the State's obligation of "ensur[ing] that any person whose civil rights or freedoms are violated[,] have an effective remedy," and that said remedy is guaranteed and enforced by judicial authorities.[93] Although the ICCPR does not explicitly consider civil legal redress to be a sign of ensuring effective remedy, it is arguable that not having civil legal redress in the United States compromises remedies' adequacy and effectiveness. In the United States, police officer criminal prosecutions are scarce and a plaintiff's "most plausible avenue for redress often is civil suit for monetary damages."[94] Thus, by limiting avenues for civil remedy as a result of the difficult standard that must be met to surpass qualified immunity, there are functionally no options in remedy.

Similarly, the qualified immunity doctrine undermines provisions under the UNCAT that guarantee an individual's right to prompt and impartial investigations, and fair and adequate compensation in the United States when acts of cruel, inhuman treatment are exhibited by law enforcement officials.[95] There is a lack of prompt and impartial investigations when a State domestic court doctrine limits the ability for an officer to even stand civil suit in the first place. This practice hinders both the ability to promptly redress violations against victims and judicial impartiality, by wielding vague legal standards to dismiss a civil case without having to analyze its implications. Moreover, the qualified immunity doctrine rejects much of the language in Article 14 which ensures that ratifying States provide redress for an act of torture and that a plaintiff have an enforceable right to fair and adequate compensation.[96] This is because the doctrine's application limits the ability to seek civil damages against officers who may have exercised cruel and inhuman treatment against an individual.

The doctrine also undermines ICERD provisions that speak to amending, rescinding or nullifying laws that have the effect of creating

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91 SCHEWEIKERT, *supra* note 24.
92 G.A. Res. 2200A, *supra* note 43.
93 *Id.* pt. 2, art. 2, ¶ 3.
94 Nemeth, *supra* note 14, at 991–92.
95 G.A. Res. 39/46, *supra* note 44, art. 12–4.
96 *Id.*

or perpetuating racial discrimination.[97] The doctrine in itself perpetuates egregious and racist conduct exercised by police officers because its standard makes it almost impossible to sue a police officer for damages.[98]

In short, international standards and practice specific to disciplinary proceedings against law enforcement officials are also undermined when State domestic court doctrine ignores the need for civil suits and standards in disciplinary proceedings.

As noted in Part II, international organizations such as the International Committee of the Red Cross (ICRC) and the UNODC suggest that there be civil proceedings for redress because of civil litigation's ability to serve as a strong deterrent against future violations.[99] Civil suits serve as a uniquely strong deterrent for a few reasons. First, litigation through Section 1983 tends to be "the only legal tool that is available to reach the nearly 18,000 police departments nationwide."[100] Second, civil suits against police officers are vital because modern discovery allows for information accumulation that can then be assessed "for trends . . . suggesting problem officers, units and practices."[101] In the same way, one could also review evidence developed through case law "for personnel and policy lessons."[102]

However, the qualified immunity doctrine undermines these processes by preventing cases from ever coming to court. As a result, the doctrine's limitations do not pay enough attention to international policy stressing the importance for civil suits against police officers. Thus, the doctrine undermines international standards and norms that call for fair trials outside of criminal proceedings against law enforcement officials.[103] This includes a means for disclosure of self-incriminating information,[104] an ability for an accurate balancing of evidence,[105] and the burden falling on the law enforcement officials to explain how the

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[97] G.A. Res. 2106, *supra* note 45, art. 2, pt. 1(c).

[98] Ian Millhiser, *Why Police Can Violate Your Constitutional Rights and Suffer No Consequences in Court*, VOX (June 3, 2020, 8:00 AM), https://www.vox.com/2020/6/3/21277104/qualified-immunity-cops-constitution-shaniz-west-supreme-court.

[99] Int'l Comm. of the Red Cross, *supra* note 82, at 56; U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at 37.

[100] Lynda G. Dodd, *Civil Right Suits Against the Police Are an Essential Tool for Enforcing the Constitution. But Cops Rarely Pay and Settlements Don't Lead to Change*, LSE US CENTRE (Nov. 18, 2015), https://blogs.lse.ac.uk/usappblog/2015/11/18/civil-rights-suits-against-the-police-are-an-essential-tool-for-enforcing-the-constitution-but-cops-rarely-pay-and-settlements-dont-lead-to-change/.

[101] *Fact Sheet: Civil Lawsuits Lead to Better Safer Law Enforcement*, *supra* note 86.

[102] *Id.*

[103] U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at 41.

[104] *Id.*

[105] *Id.*

violation might have occurred.[106] The U.S. judiciary's rejectionism in this way fails to acknowledge the advice given by international organizations, like ICRC and UNODC, that there is value in the ability to file civil suit against a law enforcement official. If there were an honest acknowledgement of such international policies, the U.S. judiciary would not make it so difficult to sue a law enforcement official in a non-criminal proceeding.

B. U.S. Rejectionism Delegitimizes the Treaty-making Process, and Results in a Lack of Accountability

As noted, State domestic courts are not obligated to enforce treaties that are bound to non-self-executing RUDs,[107] nor are States obligated to follow advice given by the international community. However, this does not stop domestic disregard of international law and policy through court precedent from being unimportant. Creating domestic court precedent that undermines international law and policy delegitimizes the treaty making process and further perpetuates the notion that State domestic courts need not give credence to international law the State itself ratified.

Of course, international human rights law must be delicately balanced with sovereignty principles, especially in cases where sovereignty principles are exercised through the State domestic court system.[108] However, State domestic court rejectionist policy that undermines international law meant to combat a lack of accountability for law enforcement officials ends up incapacitating treaties the U.S. signs and ratifies. International treaties are built on shared interests, trust and are meant to promote greater cooperation among States.[109] In other words, State parties to an international treaty are supposed to have greater confidence that the terms to which they have agreed are followed by other State parties signing on.[110] Therefore, when domestic court precedent undermines such provisions, built confidence and trust established among signatories is jeopardized. Such undermining also presents larger issues regarding the treaty-making process's legitimacy and what it means for there to be international law if such undermining, whether intentional or not, is permitted by the State's branches of government.

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[106] *Id.* at 37.

[107] Vasquez, *supra* note 89.

[108] Watson, *supra* note 74.

[109] Stanford Law Sch. & The Am. Univ. of Iraq, Sulaimani, *Public International Law: Treaties and International Organizations* 8 (Iraq Legal Education Initiative (ILEI) of Stanford Law School, Working Paper, 2016), https://law.stanford.edu/wp-content/uploads/2018/04/ILEI-Treaties-and-Intl-Orgs-2016.pdf.

[110] *Id.*

Further, allowing State domestic court systems to create a doctrine that rejects or disregards international law feeds into a larger problem. Namely, State domestic courts do not have to enforce treaty provisions the State itself ratifies due to federalism principles. Federalism principles rely on the notion that it is the legislature's job to implement the provisions of the treaty before it may be applied by the courts.[111] However, what is actually created is a State domestic court system that not only reverts to "local and regional human rights norms and institutions over international ones," but also creates precedent that undermines international laws that the State opted to be held accountable to.[112]

IV. RESOLUTIONS

Recommendations to combat instances where a State domestic court system creates doctrine that undermines international law and policy include the development of greater and more principled acceptance of international human right legal obligations and norms by domestic courts. The first specific suggestion broadly considers limiting the use of RUDs, so as to not restrict the domestic effect of treaties like the ICCPR, the UNCAT, and ICERD within the State court system. The second suggestion considers reforming a specific type of RUD: non-self-executing declarations, so that treaties like the ICCPR, the UNCAT, and ICERD can be acknowledged and enforced in domestic courts. A last recommendation calls for greater State recognition and integration of norms set forth by international communities.

A. Reforming RUDs to Counteract U.S. Judiciary Rejectionist Policy

Considering an appropriate use of RUDs is a positive step towards limiting cases where the State's domestic court system may be more inclined to create policy that undermines international law, whether explicitly or not.

RUDs lay out how a treaty will be interpreted under a State's laws,[113] as they are attachments put on an international treaty that clarify how the respective treaty will be interpreted in the ratifying State.[114] In other words, RUDs are a way for States to qualify their consent to a

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[111] Vasquez, *supra* note 89.

[112] Jack Goldsmith, *The Unexceptional U.S. Rights RUDs*, 3 U. ST. THOMAS L.J. 311, 312 (2005).

[113] Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT'L & COMP. L. REV. 89, 99–122 (1996).

[114] *Id.* Common Grounder, *Do Reservations, Understandings, and Declarations in a Treaty Have Legal Weight?*, WE CAN DO THIS IF WE TRY (Oct. 12, 2013, 1:49 PM), http://wecandothisifwetry.blogspot.com/2013/10/do-reservations-understandings-and.html.

particular treaty.[115] In some ways, they can be seen as a State, at the outset, rejecting particular provisions of the treaty and usurping the treaty's law for a State's domestic needs.[116] It also seems to set a tone in the tension that exists between State sovereignty and "the notion of international order based on law."[117]

In the United States, RUDs are adopted by the Senate when it consents to the treaty and are included when the President decides to ratify the treaty.[118] Due to RUDs' ability to void States' obligations under provisions within treaties, international law scholars raise the concern that RUDs get in the way of "an international order that seeks to encourage genuine and full treaty participation" by the State as a whole.[119] Indeed, supporters of ratification view certain aspects of RUDs as warping the treatymaking process under the United States Constitution to the point of even reinvigorating the Bricker Amendment—which, if adopted, would have wreaked damage on treaty power by making all treaties not self-executing.[120]

Consequently, RUDs should be limited. Treaty drafters should disallow RUDs and instead include no-reservation clauses and/or provisions limiting the use of RUDs.[121] This would make the State more accountable to the obligations listed within the provisions of a treaty. To be clear, there are cases where limiting RUDs will not be possible.[122] In those cases, the United States should not ratify the treaty.[123] Instead the United States should consider whether or not it should even sign onto such a treaty in the first place, and thereby risk violating the "object and purpose" of the treaty's enactment.[124] Limiting the broad overuse of RUDs may then be able to reorient the tone that the U.S. customarily projects when it comes to meaningfully upholding treaty mandates.[125]

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[115] Goldsmith, *supra* note 112, at 312.

[116] *See* Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 L. & CONTEMP. PROBS. 115, 117–18 (2008).

[117] *Id.* at 115.

[118] Chung, *supra* note 46, at 173.

[119] *Id.* at 176.

[120] Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L. L. 341, 349 (1995) (conceding that "in retrospect, the Bricker Amendment, if adopted would have damaged the treaty power by making all treaties not self-executing"); *see also* Justin M. Loveland, *40 Years Later: It's Time for U.S. Ratification of the American Convention on Human Rights*, 18 SEATTLE J. FOR SOC. JUST. 129, 149 (2020) (explaining how the "Bricker Amendment" of the 1950s "engendered many aspects of both RUDs and the US exceptionalism ideology.")

[121] Chung, *supra* note 46, at 209.

[122] *Id.* at 220 (for example, cases when the treaty would be inconsistent with the Constitution or other domestic law and practices).

[123] *Id.*

[124] *Id.*

[125] Watson, *supra* note 74.

More importantly, limiting RUDs in this way might rebuild sentiment within the United States government, including the State's domestic court system, when it comes to paying mind to international law and policy because the State would only be signing treaties it is truly committed to upholding.

The possibility of limiting RUDs is not so far out of reach. The Senate push backed against limiting RUDs, due to the Senate's obvious need to conform international law to the Constitution.[126] However, the Senate has given consent to treaties that carry RUD limiting provisions although clarifying that their approval should "not be construed as precedent for such clauses in future agreements."[127] This suggests that progress can be made towards limiting the practice of RUDs.

This article is not denying the possibility that this shift might make the United States reconsider signing onto treaties altogether.[128] The United States has a history of being reluctant participation in multilateral treaties, unless significant reservations to the treaty can be attached.[129] Examples include referring back to the ICCPR, UNCAT, and ICERD, where the United States attached reservations in all three treaties that effectively excluded State's domestic courts from enforcing the treaty's provisions.[130] Additionally, when the United States became a party to the ICCPR, the State attached reservations that excluded U.S. obligations under the treaty that added to already-existing U.S. law.[131]

There is also the possibility that other State actors might determine "the United States' use of RUDs in important treaties more inappropriate and its ratification less important."[132] In this case, treaty drafters might be more willing to pass treaties with these sorts of provisions that limit RUDs and leave "the United States behind in the treatymaking process."[133] This means that other members of the international community might start creating RUD-limiting treaties that prevent the United States from joining if the United States "unnecessarily concerns itself with the enforceability of its RUDs."[134] Indeed, treaties have no sign of slowing anytime soon, and in instances

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[126] Chung, *supra* note 46, at 210.

[127] *Id.*

[128] *Id.*

[129] Frederic L. Kirgis, *Reservations to Treaties and United States Practice*, AM. SOC'Y OF INT'L L. (May 4, 2003), https://www.asil.org/insights/volume/8/issue/11/reservations-treaties-and-united-states-practice.

[130] S. Res. 95-20, 102d Cong., 138 Cong. Rec. S478-01 (1992) (enacted); S. Res. 100-20, 101st Cong., 136 Cong. Rec. S17486-01 (1990) (enacted); Watson, *supra* note 74.

[131] Kirgis, *supra* note 129.

[132] Chung, *supra* note 46, at 211.

[133] *Id.*

[134] *Id.*

where the United States ratifies less treaties, other states will continue signing and ratifying multilateral treaties without the United States.[135]

B. Rethinking RUD Non-Self-Executing Declarations

The United States' practice of declaring treaties non-self-executing via RUDs notably contributes to judicial rejectionist policy, as non-self-executing declarations mean that legislative action is required before it may be applied by the courts.[136] Without legislative action then, non-self-executing treaties are seen as a way for domestic courts to disregard treaties the State itself ratifies, which further perpetuates sentiment that United States domestic courts find no need to take human rights treaties seriously.[137] Most importantly, it allows domestic courts to create doctrines that undermines international legal obligations. In order to combat or limit such practices non-self-executing declarations should be reformed dramatically.

Notably, non-self-executing declarations are among the most important forms of RUDs, largely due to their remarkable ability to render human rights treaties unenforceable by domestic courts.[138] As previously mentioned, this is because these declarations make it so that a treaty is only enforceable in State domestic courts if the United States' political branches act to make it so.[139] Thus, this sort of RUD alleviates domestic courts from obligations tied to the provisions of a given treaty, and instead, punts the "task of implementing human rights obligations into domestic law" to the other branches of State government.[140]

Proponents of such practices cite that political branches have a legitimate need in preserving the domestic implementation of such treaties, and that the power over the conduct of U.S. foreign relations should be left to the political branches.[141] However, such propositions are one-dimensional since they fail to acknowledge that all branches of the United States government should be accountable to internationally recognized and binding law and should act accordingly because treaties enjoy the benefit of the Supremacy Clause. One cannot be accountable to a treaty's provisions if there is no power to uphold or enforce it. An attachment to the treaty's ratification should not dramatically change it

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[135] *Id.* at 212.
[136] Vasquez, *supra* note 89.
[137] Goldsmith, *supra* note 112, at 311–12.
[138] *Id.* at 318.
[139] *Id.*
[140] *Id.*
[141] David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 3 (2002) (noting that "[o]n the one hand, the political branches have a legitimate desire to preserve their flexibility to manage the domestic implementation of treaties.")

in this way. Instead, domestic courts should be empowered to uphold the supreme law of the land, which is what a treaty becomes upon ratification. This is important, as all branches should be accountable to the law and play an active role in upholding it, not just two of three branches of the government.

Moreover, international law scholars with federalism sympathy disregard that when one branch of government fails to act, the other must hold that branch accountable. Concerns over judicial activism are welcome, but one must also acknowledge the need for judicial oversight due to the separation of power principles. Domestic courts must have the ability to hold other branches of government accountable should those branches decide not to enforce and uphold treaty provisions the State itself committed to upholding. To do otherwise risks compromising the people's will, whose rights, as prescribed under treaties, are actively violated. Alternatively, one must consider the point of ratifying the treaty in the first place.

C. State Recognition and Integration of International Norms as a Means of Combatting Judicial Rejectionism

A final recommendation calls for wider acceptance of international norms and standards put into place by international organizations involving domestic affairs, such as policing. In theory, this would encourage greater domestic court recognition and aid in curbing domestic court precedent that undermines and discredits such standards and norms.

1. What Are International Organizations and Why Are They Important? — International organizations serve many functions, including gathering information, monitoring trends, delivering services and aid, and providing forums for States to work together to achieve common objectives.[142] Relevant to this discussion, international organizations, typically created by treaty,[143] involve multiple nations, working in "good faith, on issues of common interest."[144] Because the scale of problems States face might be too great to confront alone, international organizations, such as the UNODC, offer assistance and encourage cross-national approaches to action involving domestic issues

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[142] Karen Mingst, *International Organization*, BRITANNICA, https://www.britannica.com/topic/international-organization (last modified May 21, 2020).

[143] *How Do International Organizations Get Registered/Created?*, UNION OF INT'L ASS'NS, https://uia.org/faq/intorgs6 (last visited Feb. 19, 2021).

[144] *Intergovernmental Organizations (IGOs)*, HARVARD LAW SCHOOL, https://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-service-practice-settings/public-international-law/intergovernmental-organizations-igos/ (last visited Feb. 19, 2021).

such as policing.[145] Efforts through international organizations create systems that bring nations "together in the areas of peace and security."[146] This strengthens charity and clears the way for "equitable distribution of [international] resources in the world."[147] These resources include manuals from experts such as "police officers, members of independent oversight bodies, international consultants, human right activists, and academics."[148] In the policing arena, these efforts provide "a system of internal and external checks and balances" to make sure law enforcement officials carry out their duties properly and are held responsible when they do not.[149]

2. Why listen? — The big question that seems to follow is why the United States—specifically the United States judiciary—would want to listen, when it already has a tough time listening to loud and articulate voices that define problems and potential solutions within its jurisdiction. The answer might be that there is more to be gained than lost. Specifically, international standards and norms have the ability to shift the way the United States judiciary thinks about its own legal interpretation, especially with respect to qualified immunity. As associate justice of the Supreme Court of the United States, Justice Breyer, notes, "forces of globalism, internationalism, and interdependence" and "forces of localism" need not be "antithetical to" one another.[150] They can coexist, and both can be accounted for.[151] As Justice Breyer further suggests, "look[ing] beyond [your] own shores" is needed "to answer questions of local law,"[152] even for questions of local law that might involve domestic affairs, such as policing.

CONCLUSION

Whether doctrines at the State domestic judicial level can continue undermining and rejecting international law and policy remains central to the future of treatymaking. The doctrine examined here, qualified immunity, has undermined the ICCPR, the UNCAT, the ICERD, and international policy by international organizations.

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[145] *About the United Nations Office on Drugs and Crime*, U.N. OFFICE ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/about-unodc/index.html (last visited Feb. 19, 2021).

[146] *Intergovernmental Organizations (IGOs)*, *supra* note 144.

[147] Badrul Alam Nill, Why Do We Need IGOs? (Dec. 10, 2017) (student paper, Daffodil International University) (on file with academia.edu).

[148] U.N. OFFICE ON DRUGS AND CRIME, *supra* note 51, at iii.

[149] *Id.* at iv.

[150] Stephen Breyer, *America's Courts Can't Ignore the World*, ATLANTIC (Oct. 2018), https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360/.

[151] *Id.*

[152] *Id.*

The ICCPR does not specifically prescribe civil legal redress as an effective remedy that must be met by the ratifying State. However, in a State where criminal prosecutions of police officers are scarce, like the United States, difficulties to seek civil legal redress compromise the treaties provisions guaranteeing an effective remedy for victims.

Much in the same way, the qualified immunity doctrine also undermines provisions under the UNCAT, which guarantee prompt and impartial investigations and fair and adequate compensation in the ratifying State when law enforcement officials have exercised cruel and inhuman treatment against an individual. This is because the doctrine limits law enforcement officials from even being sued civilly.

Qualified immunity also undermines ICERD provisions that speak to reforming laws that have the effect of perpetuating racial discrimination. It perpetuates racist conduct by law enforcement officials because the standards for overcoming qualified immunity are so difficult to meet.

Likewise, the qualified immunity doctrine undermines international norms as it limits proceedings that are not criminal in nature and disregards the importance of civil proceedings.

If rejectionism by the United States' highest court continues, the treatymaking process stands to lose more than mere participation; it stands to lose weight and credibility. Future promises by the State will lack credibility, making it increasingly difficult to recapture the investment made as a ratifying State. Further, rejectionist practices will continue to encourage a system where State domestic courts do not have to enforce provisions of treaties that the State itself ratified. Further, RUDs in these treaties enable judicial rejectionism, relieves the judiciary from accountability, and endorses a branch of government's ability to create law that undermines international law. This article adds a new dimension to that debate by examining how the United States' highest court carries out rejectionist policy through the continual use of the qualified immunity doctrine, something seemingly domestic and far removed from international law and policy. Consequently, qualified immunity carries much more broad and far-reaching implications to the State's ability to ratify international treaties and a State judiciary's ability to undermine said treaties.

The future of treaty making is ultimately left in the hands of the United States and its allies. Reforming RUDs to not limit treaties' domestic effects within the State court system and instilling within the State greater and more principled acceptance of international legal norms has the ability to help lead a reoriented effort that sustain treatymaking's values.