

The Process for United States Ratification of Human Rights Instruments

*Craig H. Baab**

If this is the heartbeat of America, maybe I should change jobs and sell Chevies. Professor Wilner, thank you, and in absentia, Dean Ellington, and President Sohn. As is customary in gatherings such as this, the participants usually commend the conveners for convening such a distinguished group; and if that is not presumptuous enough, we usually do it before we say anything. But in this case, I do want to join those who have preceded me in thanking the students here at the University of Georgia School of Law for putting in a tremendous amount of work. With all that is going on in Eastern Europe and the Soviet Union, and in every continent except Antarctica, the topics of this meeting could not be more timely.

I also want to take the opportunity to thank Professor Sohn not only for convening this group, but for being, as was suggested earlier, not only Mr. International Law, but Mr. Human Rights. There is little which is being discussed today, that has been discussed for a long time, and that will be discussed for a long time to come in these areas which does not emanate from the massive amount of information and insight and intelligence of Professor Sohn, and we thank you.

Yesterday's Washington Post had an article by former Austrian ambassador Henry Greenwald captioned "We Can Manage Without an Enemy." It suggested that during the current sea changes in Eastern Europe, the Soviet Union, and elsewhere we need to understand how we function differently in this world, what our foreign policy is going to be, and how it will evolve if we do not have the evil empire lurking over our shoulder. Certainly that article and I are not the first to suggest that all of the changes going on in other countries are highlighting the fact that the United States right now, not necessarily being caught short, is in a position for the first time in a long time of having to give serious reevaluation to what our foreign policy is in relationship to that of our domestic policy. I mention

* Staff Director for Governmental Liaison, American Bar Association Governmental Affairs Office, Washington, D.C.

that because obviously the nexus of those two in many instances is international treaties and the consideration of those treaties by the Congress.

There also was in recent weeks an editorial piece in *Time Magazine* which I thought nicely defines much of what we are dealing with here. The thesis of that editorial was that questions of human rights are not a footnote in the foreign policy of this country or in any other country. Human rights are not some afterthought to which all we need to give is lip service; they are, as the article highlighted, what the fight is all about. Again, I would only note that in the context of what is going on in the world (the *United States v. Verdugo-Urquidez* decision concerning the applicability of certain of our constitutional protections extraterritorially, the pending cases against Marcos, the action by the United States in Panama, and the extradition of Mr. Noriega to the United States to stand trial) we are discussing very significant kinds of questions relative to the applicability of domestic United States law overseas. What we are talking about in this context is the increasing establishment of an international law of human rights. This law exists, but how do we apply it domestically in the United States, and what would be the meaning of this law relative to our relations with other countries?

If the events going on right now, and in this last year, were in a military context, they would be called a revolution. The fact that they are not military—the fact that they are happening quietly, and not only quietly but certainly peacefully—ought to suggest that it is no less of a revolution because of the changes they are bringing into the world that we are functioning in now. I would like to focus quickly on two general areas, as a follow-up to Professor Sohn's presentation, and then to open up discussion following Professor Lillich's presentation.

The first area, adhering to our topic of process and obstacles to ratification of human rights instruments, is briefly what that process is. As lawyers, we all know that you do not have to talk about process and obstacles in separate breaths; we are here, and all of you are spending huge amounts of money to be taught how the process is an obstacle, all the time. And it is no less so in the consideration of human rights treaties, or for that matter for any treaty. The basic process that we are talking about is established by Article 2, Section 2, Clause 2 of the Constitution, which provides that the President shall have the power by and with the advice and consent of the Senate to make treaties, providing two-thirds of the Senate goes along. The implementation is established through the

rules of the Senate and the rules of the Senate Foreign Relations Committee. If you go back to the time before all of this became the law of the land, and I refer to both Hamilton's and Jay's papers in the Federalist Papers, it is instructive that at that time there was a good bit of confusion and pitched debate over whether the treaty making power should be in the President, the Senate, or both houses of Congress. The initial draft that came out in fact had the Senate as the sole body responsible for treaties. It was only later that those who felt that treaties were a strange bird—they are not really legislation and not really foreign policy, but something in the middle—with the President to the process. I would only say at the beginning of this discussion that that indeed raises problems, particularly domestic political problems in getting treaties through the Senate. But I think that the basic notion of involvement both of the Senate and of the President is one that should be maintained, because we are dealing with something that is more significant than purely domestic legislation. It raises a number of questions which, although they already get wrapped up in domestic political concerns, still need to have the active involvement of both branches.

The process, as most of you know from Professor Sohn, that we are talking about here is one which begins with negotiation of treaties, proceeds through the signing of a treaty (which concludes the negotiating process), and moves on to the approval by the Senate—advice and consent, if you will—of that treaty, thereafter ratification by the President, exchange of ratification documents with other parties, and ultimately the proclamation by the United States that we are now a party to this treaty. The responsibility of the Senate to participate both in advising and consenting to the ratification of a treaty is a distinction which is not frequently discussed publicly or very carefully, but it is an important one to keep in mind. Although our focus here is specifically the responsibility of the Senate, in consenting to ratification of a treaty, the advising responsibility of the Senate, indeed of both houses of Congress, is, I think, a given. I do not know when I would mark the beginning of it, but the involvement of Congress began either in passing simple resolutions in either house concerning various foreign policy activities or the participation of the Senate Foreign Relations Committee and the House Foreign Affairs Committee and a lot of people who are not even in Congress in suggesting how the President ought to undertake negotiations in the arms control area. The law of the sea was mentioned earlier as another area where there was very heavy Congressional involvement in advising the President during the negotiation

process. It frequently takes on a less formal role, but has increasingly taken on a more important role for the simple reason that what we are talking about ultimately is making a political judgment in the United States that a particular treaty ought to be approved; and where we find difficulty, we find there is either ignorance or a lack of broad-based support for that treaty. This involvement of more elements of Congress, particularly the Senate, in formal negotiations with the Executive Branch during negotiations with the United Nations, the Organization of American States, or in various bilateral treaties, is a clock that cannot be turned back. In addition, it is essential for the Executive to know that its negotiations have support in the body which ultimately must give advice and consent to ratification.

The process following the negotiation commences with a formal submission by the President of an executive document to the Senate. That document is accompanied by an opinion of the Secretary of State, usually a memorandum of law to the President outlining the conclusion of the negotiations, the summary of the content of the treaty, and any recommended qualifications, which is to say reservations, declarations, or understandings to the ratification document. The President then submits this package, which again is not done in a vacuum. It is the result of negotiations between the Congress, particularly the Senate, before that document has even been submitted. Again, it is for the simple reason, not dissimilar from any other aspect of the legislative process, that the President does not want to undertake the initiative if there ultimately is no support for it in Congress. Following the submission, it is hoped that the next step will be for the Foreign Relations Committee to undertake formal public hearings to hear both from the Executive Branch and from various nongovernmental organizations and others who may have something to say about the treaty. The initial difficulty comes at this stage, and one point that I want to highlight here, and we can get back to later on in terms of any possible needed changes in the process, is one of time. Almost exactly a year ago, the administration submitted a document to the Senate calling for Senate advice and consent to ratification of the United Nations Torture Convention. The Assistant Secretary of State for Human Rights, under the latter part of President Reagan's tenure and currently under President Bush, was very heavily involved in negotiating that treaty, and he remains in office today. There is provided some continuity which I suggest is an important reason why a treaty submitted just a year ago had its hearings concluded a month ago. Serious negotiations with the Defense Department, the State Department, and the Justice Depart-

ment led to various qualifiers being attached to that treaty before the hearings were concluded.

The process, in a nutshell, has functioned as it should. I will compare that to a number of the treaties that Professor Sohn mentioned, the five other human rights treaties which have been pending for ten years or longer, dealing with racial discrimination, discrimination against women, civil and political rights, economic, social and cultural rights and the American Convention on Human Rights, which will be the subject of discussion tomorrow. There have been no hearings on these treaties. The last action taken on them was back in 1979, the time of their initial submission by President Carter. They are currently on the lists submitted by the Secretary of State as under study, as opposed to the Torture Convention, which has top priority and is moving very quickly. I draw this distinction for a moment, not getting into any substantive concerns about any of these treaties, but merely to highlight that a treaty, as opposed to legislation, is a continuing matter of business before the Senate of the United States.

At the conclusion of a Congress, legislation which ultimately has not been passed and been sent to the President dies; a treaty does not. That is good news, because you do not have to go through the whole process of redrafting and resubmitting. The bad news is that if you do not act on it relatively quickly, then you get further away in time from those responsible for initially negotiating the treaty. There is not the kind of institutional knowledge, commitment, nor the kind of ownership of the issue which will bring it to fruition. There are many other reasons why some of these treaties may not have moved ahead, and it is always dangerous to generalize in this way just as it is dangerous to generalize as to why the Torture Convention is moving so quickly. But this time lapse does deserve serious thought and needs to be kept in mind in advocating any of these treaties. It will not do to simply say how outrageous it is that a treaty has been pending for so long. Who opposes the establishment or recognition of basic civil and political rights which the rest of the world has recognized? We are not dealing with somebody writing an article or giving a speech; we are dealing with members of Congress. Unless there is some commitment to what is going to happen or some attachment to the initial negotiating process, we are a long way away, unfortunately, from President Roosevelt and those that brought us into the current age of international human rights. That is half of the bad news. The other half of the bad news is that many of their

progeny have not been acted upon because of the passage of time. Ultimately it becomes a self-fulfilling prophecy.

The hearings serve an important function not in and of themselves, but for what they represent. The Torture Convention is an example. It was stated to be a top priority of the administration. Of all of the pending treaties, those of us who have been working on these were of the view, just in political terms, that nobody could support torture. Well, we all know some people can practice torture, but who is going to say they are not against torture? And so we thought it would be easier to proceed with this particular treaty. When the Foreign Relations Committee scheduled hearings last fall, there were some initial meetings with some people from Amnesty International (from whom you will hear later). Then the hearings were put off because of some conflicts. The pressure of having all of us testify, and then the administration appearing before the public in a hearing of the Senate Foreign Relations Committee and saying it wanted this treaty but with the certain qualifications attached to it, did a terrific job of getting the attention of all of us involved in the process. I believe the hearings were scheduled and canceled for various reasons on three or four different occasions, but the final result was, and it really was a textbook example of how this should work and rarely does, that by the end of last year, the administration had done all of its internal negotiating. It had its ducks in a row, and it had concluded what its position was. That made it easier for all of the other nongovernmental organizations and for the Senate to give some thought as to what their positions were. Instead of a process of fencing and bidding to and seeing if you get to bid on the other side, it was a fairly decent process in a regulatory context. I would refer to it as regulatory negotiations of everybody with an interest in the process sitting down around the table, laying their cards down, and talking honestly and directly. The result of it was very sound.

Very little came out of some of the hearings. As you may know, rarely is a mind changed in a Congressional hearing. In fact, rarely is anything of much significance said in a Congressional hearing. But it is a good opportunity to force the process of establishing a record. There are some members of the Supreme Court now who suggest that legislative history means very little unless the face of a statute is so unalterably unclear that we cannot make any sense out of it. Being relatively closely involved in the legislative process, and without expressing an ideological view, there is sound reason for that concern. The statements made in hearings and subsequent discussions resulting in a report to the Senate on a treaty are carefully worked out by

the administration, by outside organizations who have been particularly involved, and by various Senators who have had an interest in the issue.

The concern during the hearings simply was where will the opposition, if it exists, likely come from? You are never sure if it is going to come out at a public hearing; it may happen in a nonpublic setting. But frequently it does happen publicly before the Foreign Relations Committee, and in this case it did. We were somewhat concerned, given the experience with the Genocide Convention, that Senator Helms might be reliably expected to raise concerns about infringements on the sovereignty of the United States and some of the concerns along the lines of the Bricker Amendment which Professor Sohn alluded to earlier. Indeed he did, and this is another helpful element of public hearings, because no number of private meetings with staff ultimately can get you to the position of a Senator as Senator Helms did at these hearings. He asked questions that had been raised in the context of other treaties, not necessarily human rights treaties. It was important to know on the record that these concerns existed and that he was prepared to advocate these concerns. He was concerned because he felt that he had not been consulted sufficiently. All of these are pieces of information that sort of get put into the computer to make judgments, ultimately political judgments and legal judgments of how to proceed with the ratification process. But in this case, the statements Senator Helms and a couple of other senators made at the hearing were very instructive, not for the substance of what was said so much as for the signal that there was some possible concern and some possible opposition, and, in any event, the Convention was not necessarily going to be a quick pass. The result is that there are continuing meetings with outside organizations and government people, both with Senator Helms and with other members of the Foreign Relations Committee, to make sure that any additional questions that might exist are resolved and the report is definitely prepared by the Committee.

At the conclusion of this part of the process, when the Committee feels that the opposition has been overcome, or simply that the votes exist on the side of the chairman to do whatever the chairman wishes to do, the Committee moves as it does in any other legislative process to what is called "mark-up" or formal consideration of the provisions of the treaty. It can consider, as was the case with the Panama Canal Treaties where the Foreign Relations Committee considered and ultimately the floor of the Senate approved, amendments to the treaty itself. Given the nature of a multilateral treaty, amendments to the

treaty are frowned upon. This is because if, as was proposed by the opponents of the Genocide Convention, an amendment is successfully made to a treaty or proposed, and there is a vote on the Senate floor to amend the conventions, that will be viewed almost universally by every other party to that convention as a nonratification by the United States, unless it involves only a very miniscule or technical area. Change of the body of the treaty itself is viewed, as in contract law, as a counter-offer, and is not viewed as a ratification. For this reason, although the Foreign Relations Committee and ultimately the Senate gives consideration to the treaty itself, changes in the text of the treaty are not made in the amendments to the treaty. Rather, they are made in qualifying language to the resolution which carries the treaty to the Senate floor for resolution and ratification.

The process, increasingly in the last couple of years, and not just in the context of human rights treaties, has begun to develop some precedent which troubles a number of people because issues are raised which increasingly are not even contested. I am not saying that they should be contested, but it is moving us into a new area where qualifications to treaties are beginning to redefine what we mean by treaty law. I was amused last year at a program on the pending treaties by a response from one of the most well regarded human rights advocates in Great Britain, commenting that she hoped that the United States would put no qualifiers whatsoever on any of the pending treaties. She hoped that the United States simply would ratify the treaties, even though there some provisions coming close to or causing problems with various Constitutional protections in the United States. There was general support for what she was saying, until it was pointed out by one of the participants in that panel discussion that, as opposed to Great Britain, the United States has this little thing called a *written* Constitution. There are certain protections which we must take. It simply highlights the fact that we are not necessarily dealing in each of these cases with substantive provisions of a treaty, but rather the applicability of those provisions to the domestic law of the signatory country.

Following consideration by the Foreign Relations Committee, the treaty and the resolution for ratification will then be sent to the Senate for formal advice and consent. As you know, the final vote on whether to give advice and consent to ratification requires a two-thirds vote; all of the votes up to that point on additions to or amendments to any of the provisions of the resolution of ratification are simply by majority vote. This can be troubling because it takes only a majority, as we found in a couple of the recent treaties, to

approve a reservation along the lines of the one which was recommended on the Torture Convention and which is just a rewrite of the general provisions of the Bricker Amendment, to which Professor Sohn alluded. The reservation is that nothing in this ratification will suggest that the United States will permit this treaty to direct us to do anything which is otherwise prohibited by the United States Constitution. Last time any of us checked, we were not allowed to do anything prohibited by the United States Constitution. When we raised that issue, the response was all you are doing is stating a fact. Why do we not just put it in to make sure nobody is going to violate the Constitution? It is a very troubling provision, but one, I fear, that is going to be with us continually. It is troubling in part because it is a throwback to a different age. It is a throwback to a time when the understanding of treaties, and particularly international human rights law, was in its infancy. There were certainly human rights issues before the United Nations, but the contemporary history of what we are talking about began at that time. All of the concern about the United Nations and world governments and what international law is really all about still hangs on in some corners of the Senate and public generally. These are the issues with which we must continue to deal.

Then follows what is expected to be the successful approval by the Senate. The last treaty the Senate disapproved was the Versailles treaty. I think the Montreal Aviation Protocols, which in 1983 received a bare majority, thus falling short of the two-thirds vote required, is the first time in 60 or 70 years that the Senate considered but did not approve a treaty. Usually the process that I have outlined here is so lengthy and cumbersome that a vote is not likely ever to take place on a controversial issue like the Panama Canal Treaties or some arms control treaties, unless the administration, along with the leadership in the Senate, is certain that the ultimate vote will be successful.

The action following the Senate's approval of the resolution of ratification raises two very interesting and relatively new questions. One is that increasingly issues of whether treaties are non-self-executing have been raised where the treaty is one to which the Senate Foreign Relations Committee has attached a declaration simply stating that the United States will not deposit the articles of ratification until implementing legislation is passed. This, of course, is closely tied to the reservation that we have just been discussing, and it goes to the fear that a treaty is somehow superior to the Constitution of the United States. Such a concern is relieved by requiring that imple-

menting legislation be enacted by both houses of Congress and the President. This is a way of changing domestic law as opposed to changing or establishing domestic law simply through the ratification of a treaty. It is increasingly the case that implementing legislation is used if the Constitution simply calls for the role of the Senate. This is because, in a very real sense, the political reality of today requires a role for the entire Congress. The implementing legislation on the Genocide Convention, and undoubtedly on any of the other treaties that we are now considering, involved both the House and the Senate. Interestingly, many Senators do not think that there is anything more to do after acting on a treaty, even if they inserted a declaration saying that the Senate will require implementing legislation. But the involvement of the House of Representatives, as a much more broadly based body and one which is much more closely in tune with domestic politics, raises both helpful expectations and possible concerns, because the responsibility entrusted to the Senate by the founders, in conjunction with the President, is becoming an issue of pure domestic politics. The involvement of both houses in the consideration of implementing legislation necessarily raises this issue. I am not so certain that it is a bad development. If you get away from the issue of slowing down the process, I think that the importance of international human rights and the increasing applicability of them is enhanced, not detracted, by the involvement of the House of Representatives in enacting implementing legislation. Although there are problems associated with it, I think that it is not likely to be changed soon. I think it will establish a foundation upon which international human rights, particularly as established by treaties, will more and more be accepted not just as something we have done in a document, but something which is immediately applicable in our country.

Let me take about two more minutes to talk about a couple of concerns which all of this raises. The process which I have just gone through presents plenty of obstacles, and the more lawyers become involved in that process, the more obstacles we encounter. There are other questions which are raised and on which Professor Lillich will focus. One of them, to which I have been alluding throughout, is domestic policy-making, or domestic politics. This might be known as the political realities of an issue. One of the political realities, for instance, of a treaty that otherwise ought to be one of the first ones up because it concerns this hemisphere is the American Convention on Human Rights. It is most immediately affecting us. It is in effect; the Inter-American Commission and Court of Human Rights are

functioning, and they are handing down opinions which are having an effect. The Convention has been pending before the Senate for 10 years. It contains some language regarding the right-to-life and abortion. One way or another, and regardless of one's view of the issue, the mere existence of that language is one of the political realities, I suspect, of why that convention has not moved on in the United States. The other political reality is that you do not speak publicly about problems of that nature. If you do discuss them, it becomes a self-fulfilling prophecy. For instance, everybody in this room might go out and say that the reason they are not moving the American Convention on Human Rights is because of the abortion issue. So, although I mentioned it with some hesitation, the fact of the matter is that all of these treaties raise controversial issues, whether abortion or any other issue that may currently be of political concern in a country. This highlights the fact that probably more than in the consideration of domestic legislation, perceptions are more important than the reality of what we are dealing with. I say that generally because of another problem, the general ignorance both of the Senate and the public on what treaties are all about. Because of this ignorance, and the uncertainty about just what it is we are doing by ratifying a treaty, there is a real skittishness to get anywhere near it. There is this sense that, as is the case where the ratification of a treaty means something a little more than just passing legislation, it commits us to do things relative to other countries which domestic legislation may not necessarily make us do.

In treaty consideration, domestic partisan politics are not unique to any other public policy formation. I think it is difficult to understand why treaties on racial discrimination and discrimination against women have been pending so long if it is not for some domestic political concern that the treaties would disadvantage or alienate some constituency. I do think, however, that some of those treaties do raise questions in another area, and that is, dare I say it, substantive questions of concern about the provisions of the treaty. Particularly in human rights treaties, as opposed to others, it is uniquely difficult for advocates of the treaty to say that this is a problem and that we need to address it. This seems to suggest that the treaty itself is flawed, that we cannot move ahead with it, and that we somehow made a mistake in the negotiating process. In short, it is difficult for us to say that while this is a great treaty, there are some problems with it which we need to address. I think that we are going to see this in the Convention on the Rights of Children. This treaty has not yet been submitted to the Senate and has already

received a great deal of publicity. It is an important document. It attempts to cover civil, political, economic, social, and cultural rights all in one document. It is a good document and a good treaty. But there are parts of it which probably are not good relative to the domestic laws of the United States. It will be difficult for people to say those things. If they do criticize the treaty, it will be perceived as somehow not dealing with the merits of the treaty; that somehow they are speaking against children. Who wants to speak against kids? Probably the same people who believe in torture.

Finally, and I alluded to this in the beginning, a major obstacle in the consideration of any of these treaties is a failure in determining the ownership of the treaty. And by this I mean who has an interest in it? Do any of you have a greater interest than I in discrimination against women, torture, or in civil and political rights? No. Is there a particular constituency? Perhaps there is in the Convention on Racial Discrimination and the Convention on the Discrimination against Women. But, in fact, probably not. The defining characteristic of a human rights treaty, as opposed to many other private international law treaties, is that they are not dealing with certain kinds of bilateral negotiations or tax benefits to citizens of this country or another; they are broadly applicable to everyone. And this comes down to the political reality of whether that treaty is owned, advocated, and pushed by the President, and whether outside organizations own and feel strongly enough about the treaty that they will push the President to push for the treaty. If neither of these happen, as we see right now with five of these pending treaties, it is the fault of there having been too much time between the negotiation of treaty and its ratification. As a result, the current President, although it was the Executive that negotiated the treaty, does not feel any involvement with it, any ownership of the treaty, nor does he feel he has a stake in it. Those of us on the outside advocating treaties may push publicly in the Congress that they ought to be ratified, but unless we succeed in pushing the Executive to *own* this issue, we are not going to succeed.

I will conclude by suggesting that a lot of this raises in my and others' minds the notion that we ought to give some thought to establishing in Congress, either by law, or by rule adopted by both Houses, a process along the lines of what was adopted a number of years ago for the Budget process. We have seen how well that has worked. Nevertheless, we ought to give some thought to establishing a discipline, a regimen, or a time frame within which treaties should be considered. Although the Senate under its rules has the authority

to send a treaty back to the President and the President has the authority to request the return of a treaty, it is rarely done. What would the public think if the President said, "Send me back the Racial Discrimination Treaty." He would not do it, but what he is doing now is just sitting on it. A process that would push for and require a treaty once submitted to be ratified within a certain period of time ought to move through the various hoops. If it is not concluded, then the Senate ought to return it to the President.

