Panel I - General Discussion

Craig Baab:

There really is not anybody here today who does not have either some prior interest in or knowledge of international human rights issues. That is good but also part of the problem. It is relative to the last point that Professor Lillich raised, and I think it is important. If there is to be an advocacy group, it needs to be other than us preaching to the choir. We need to go out to the people we would like to think are involved in this sort of thing, whether it is Fortune 500 companies, groups other than the usual labor or religious groups, and the others that we are working with right now. If we do not broaden that base, we are not going to be any more successful than we are now.

Alfred de Zayas:

A comment on what has been said by Mr. Baab and Mr. Lillich. In regard to the building of a constituency, it is evident that nothing in Washington happens without lobbying. In Geneva NGOs actively and successfully lobby in the Commission on Human Rights. I am quite surprised that the American NGOs have not been doing as much to encourage the United States Congress to ratify the Covenants. Mr. Lillich's second point raised the question of the President's committment. I think the lack of political will seen in the Reagan Administration, and thus far in the Bush Administration, can be changed. I believe President Bush can be approached personally and I have attempted to do this through a good friend Ambassador Armando Valladares, Chief of the American Delegation to the Commission on Human Rights. Ambassador Valladares is a person who has the ear of the President, and he has promised to do his best to convey this message.

Craig Baab:

Let me be a little bit defensive. There is a bit more activity occurring than perhaps has been discussed. The fact that more people here are not aware of it is, I think, evidence enough that we are not doing something right, and so we accept that. The group of nongovernmental organizations, generally drawn from the religious community, Amnesty International, and a number of others, including the Amer-

ican Bar Association, started working on all this in 1983. We began with a conscious decision that with all these treaties pending we had to start someplace. We decided to start with the Genocide Convention, and for only one reason: it was so laden with political and legal history that if we did not get it out of the way first, it would block the doorway. We just had to throw the dice and do what we could to get the Genocide Convention ratified first. If we lost, we were going to be in serious trouble; but if we won, then all of that political history, going back to the early 1950s, would have been put behind us, and we could proceed with the other treaties. We shall see whether that strategy is going to work, but that is why that decision was made.

In the last two years, the same groups of people have been meeting every couple of weeks to work on all of the human rights instruments pending before the Senate. In particular, Amnesty International has a major "Ratification Now" program it started about two years ago. I think that they are now going to try to appeal to a broader section of the public. It is in part responsive to what is or is not going on in the Executive Branch.

I would only say that relative to the establishment of political will, I agree with Professor Lillich that these things happen in incremental steps. Perhaps it is worthwhile to recall that at the beginning of the Reagan Administration, after a massive political victory by the Republicans in the United States Senate, an upending of the political system occurred in this country. Ronald Reagan could have done no wrong and could have done anything he wanted. Early on, as was pointed out, there was a major focus on keeping in existence the Office of Human Rights in the State Department, contrary to its proposed abolition. When a decision was made to keep it, a decision was also made to appoint an Assistant Secretary of State for Human Rights, one who might not be viewed as being the strongest advocate for human rights. We should not forget that that person was not confirmed. This happened in an early stage of the Reagan Administration, when the Republicans controlled the Senate and human rights were, using Assistant Secretary Derian's term, basically something to be laughed about. Notwithstanding all of this, that person's nomination was defeated in the Senate. This is simply to note the ongoing institutionalization of human rights as part of the government. If we accomplish that and it takes us eight years, that is a step. All I'm saying is that these things do take some time.

Doug Donahoe:

My question is fairly simple. Does it make sense to go forward with this push for the ratification of human rights conventions given the current reservations? Would this send the wrong signal overseas? Would it be better to keep up the pressure so some day we might be able to ratify the Conventions without the reservations?

Richard Lillich:

Of course, simple questions require complex answers. There was a lot of debate about this from the beginning. One of the major mistakes of the Carter Administration was to send up the President's message with all the declarations, understandings, and reservations attached. The mistake was not their presence, but the Adminstration's failure to consult with the NGOs before including them. The preparation of the message as an in-house matter taken under the assumption that the human rights community would rally around the message, the NGOs would not oppose the treaties no matter how encumbered, and that there was greater support for them in the Senate than eventually materialized, was a major mistake. It came as a great shock to Ms. Derian and the Legal Adviser to find that there was widespread opposition. If you read the book *Ratification of the Human Rights Treaties*, the speaker on the Economic, Social, and Cultural Covenant not only analyzed the Covenant, but other instruments as well, indicating that he had some serious doubts about whether it was worthwhile to ratify them with all of the barnacles attached. Indeed, many people believe that we achieved very little by ratifying the Genocide Convention in the way we did, merely to have the symbolic effect that Mr. Baab indicated. Even in 1979, the Assistant Legal Adviser for Treaties, Mr. Rovine, argued that if one wanted to achieve ratification of the treaties one must be prepared to make compromises. The contrary argument was why make concessions at the outset. If you throw in the towel at the beginning you are going to be pushed around even more.

I have not had the time to discuss all the other reservations, aside from the ones in the President's message, that have been suggested. In 1979, Senator Helms proposed another reservation to the effect that, although the Civil and Political Covenant does not mention property, the right is enshrined in Article 17 of the Universal Declaration and is part of international human rights law. I am not supporting or rejecting the Helms proposal at this time. I am just suggesting that there are very difficult trade-offs involved, and one

cannot make rational decisions until one looks at the total package. If one does not make a thorough survey of each of these proposals to discover which are serious and which are not, one cannot make a judgment about which to accept as the price for ratification.

I think we went so far on the Genocide Convention as to raise serious doubts about our good faith in ratifying that treaty. I greatly credit David Stewart and his colleagues who were able to roll back some of the proposed reservations to the Torture Convention. However, they did not roll back enough of them. I also should note that the Genocide and Torture Conventions are criminal treaties. The other treaties discussed today are basically civil rights ones. We must address them as civil rights legislation, much as one would civil rights bills in Congress and civil rights cases before the Supreme Court.

As I indicated, I am not particularly optimistic about whether a groundswell of support exists for civil rights in the United States at the present time. Members of the current Supreme Court, led by Justice Scalia, my good friend and former tennis partner, have attacked the use of international human rights instruments, even as persuasive evidence in determining constitutional law norms. Professor Sohn mentioned the UN Standard Minimum Rules for the Treatment of Prisoners. The Supreme Court, starting back in the 1940s as Professor Lockwood has shown in an article he published in 1984,[1] has never held international human rights instruments to be self-executing treaties. Yet it has referred to documents like the Standard Minimum Rules, not as customary international law but as guides to ascertaining constitutional norms. Some people, like Justice Scalia, want to eliminate even this minimal impact of international human rights instruments. They do not want human rights instruments to play any role in the United States jurisprudence. We now have three, maybe four, justices who have adopted this position. It is frankly stated in the first footnote in Justice Scalia's opinion in *Stanford v. Kentucky*,[2] a recent death penalty case. To me it simply reflects the lack of enthusiasm for civil rights present throughout our society today. If I am correct in this view, then one cannot be overly optimistic about ratification of the two Covenants, much less other human rights treaties, in the immediate future.

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[1] Lockwood, The United Nations Charter and United States Civil Rights Litigation: 1946-1955, 69 Iowa L. Rev. 901 (1984).

[2] 109 S. Ct. 2969, 2975 n.1 (1989).

Louis B. Sohn:

The basic problem is that we are putting the cart before the horse. In short, it is only after we ratify a non-self-executing treaty that we, Congress permitting, enact domestic legislation. It took us two or three years to do this with the Genocide Treaty. It seems to me that we should be doing it the other way around. We should send the legislation through Congress first, then ratify the treaty. If the Senate adopts the legislation by a two thirds vote, there will be no trouble with treaty ratification. We have done things like that before. In fact, that was the preferred solution after the Second World War. The Food and Agriculture Constitution was adopted that way. After first adopting the legislation by a two thirds vote of the Senate, people said there was no reason for it to have even gone through the Senate. Several other treaties have been dealt with in the same way.

It seems to me that the adoption of legislation first is the better method. There is no need to worry whether the treaty is self-executing if the legislation already accomplishes that. Of course, as we have seen in the Genocide Convention and more recently in the Torture Convention, the legislation appears to reinterpret the Convention. However, as Professor Lillich said a few minutes ago, these are simply interpretations which may be binding on the United States to some extent, but not on the international level. It is very interesting that most people fail to look at the enacting legislation. I believe not one country looked at our enacting legislation on the Genocide Convention. They were satisfied that the United States ratified the treaty and had enacted some legislation to do so. Only if a case actually should arise against the United States concerning genocide, which I hope will never happen, a study of the legislation might be of some value. It might be used by the alleged offender if the United States should bring a case against him. The offender might argue that the case may not be brought because the enacting legislation says something different than the treaty. As I said at the beginning, the crucial point is to enact the legislation first and then ratify the convention. It has been suggested that something like this should be done now with respect to the Law of the Sea treaty.

Craig Baab:

One short point. I agree generally with what both of my colleagues have said, particularly with Professor Lillich regarding this mass of qualifiers that are added or proposed to be added to treaties. However, I think that we are now at a time when treaty law generally, and

human rights treaties in particular, is in the middle of a sea change. We do not really know where it is going to go. I would note by way of the incremental progress made to date that the Third Restatement of Foreign Relations of the United States contains for the first time a chapter on international human rights law. All of this suggests that the changes that we are seeing, or will be seeing, in terms of what international law means and how it is understood domestically, its applicability both in domestic courts and relative to our relations to other countries, are substantial compared to the starting point of the early 1950s. We are out of that initial stage and are moving into adolescence. It really means that we are moving into a very dangerous time. Those of us on the other side of the equation, the advocates, need to be prepared to do some orginal thinking along the lines that have been suggested here. Regarding the meaning of reservations, understandings, and declarations, I am not sure that I would share your view that some of those are simply outrageous and ought to be intolerable. That reaction is based on those who were on the other side of the equation early in the 1950s. That is our reaction as much to those people as it is to the specific legal instrument itself. I am just saying that we must be prepared to think novelly, creatively, and thoughtfully if we are going to try to take the meaning of international human rights into a new era where it really will mean something in our court decisions and our relations with other countries.