

General Questions for All Sessions

- Are the core assumptions underlying each paper generally accepted by all participants, or are there fundamental disagreements that warrant preliminary discussion?
- Is the paper generally successful in advancing arguments and recommendations that can appeal both to expert policymakers and to a broader audience, including leading representatives of both major parties, members of the media, and other opinion-leaders?
- Are there any specific factual errors, omissions or distortions?
- Does the paper take proper account of the full range of pertinent factors, including up to the minute developments of which we may be unaware? Given that many policy issues are “moving targets,” have we presented the material in a way that will give the report a long shelf-life, or does it risk being overtaken rapidly by events?
- Have we made a strong case for why our recommendations in each topic area are in the national interest?
- How broad an appeal do our arguments have? Are they likely to be persuasive to the various target audiences we have in view? Where are the principal sources of bureaucratic or political resistance to our arguments?
- Are our recommendations politically feasible? Are they practical and is it realistic to expect their implementation? Do they contain measurable objectives and benchmarks, so that we will recognize when we have been successful?

U.S. Domestic Compliance with Human Rights Treaties

Wednesday, November 3, 1999

1:30 – 4:30 p.m.

Participant List

Scott Busby	National Security Council
James Castello	Department of Justice
Rev. Joe Eldridge	American University
Daniel Feldman	National Security Council
Julie Fernandes	Department of Justice
Wade Henderson	Leadership Conference on Civil Rights
Rosetta Hillary	Department of Education
Richard Jerome	Department of Justice
Kim Robinson	USAID
Meg Roggensack	Hogan & Hartson
Erika Schlager	Commission on Security & Cooperation in Europe
Steven Shapiro	ACLU
Andre Surena	Department of State
Mona Younis	Joyce Mertz-Gilmore Foundation

THE SECRETARY-GENERAL

19 January 1999

Excellency,

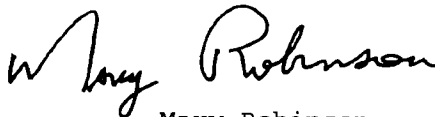
We have just concluded the historic commemoration of the 50th Anniversary of the Universal Declaration of Human Rights. We are most grateful to you and your Government for your participation in this event and for your affirmation of commitment to the purposes of the Universal Declaration.

The United Nations and its Member States could pay no greater tribute to those who framed the Universal Declaration of Human Rights than by giving practical meaning to their ideas and vision. We would jointly urge all Governments to set themselves the following objectives:

- All States should sign and ratify the two Covenants and the four principal Conventions within the next five years;
- All States should make the Universal Declaration known to every one of their citizens, starting by introducing it to all primary education curricula;
- All states should implement the General Assembly's Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms, not just formally but in a true spirit of support for human rights defenders everywhere;
- Most importantly, all States should redouble their efforts to implement the 30 Articles of the Universal Declaration in full.

We look forward to hearing from you on the progress made by your Government in implementing the above.

Accept, Excellency, the assurances of our highest consideration.



Mary Robinson
High Commissioner for Human Rights



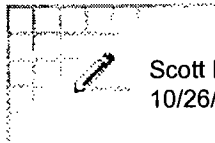
- Kofi A. Annan

His Excellency
Mr. William J. Clinton
President of the United States of America
Washington, D.C.

CEDAW ACTION PLAN

1. Four strategies: a. straight to floor; b. action-forcing event with key Republican Senators to trigger new hearings; c. all Democratic Senators in support with VP leadership; d. new package of reservations and understandings (this option disfavored)
2. DRL (Koh, Arriaga) and S/PICW meet to develop approach initial strategies to NGOs, members of Congress, and other key administration officials; consult with Office of First Lady, Office of VP, NSC, IWG.
3. Interagency team meets with key NGOs to discuss approaches to key Republican senators. Preliminary discussions already held with Amnesty, Human Rights Watch, Lawyers Committee. Search for support from other NGOs.
4. Briefing on Hill with Sen. Boxer, et al. During Women's Month; consultations with key staffs (e.g. Biden, Collins, Snowe) re preferred option. Search for "neutral" Senator (Moynihan?, Lieberman?) to take "Proxmire role."
5. Plan for High level White House rollout of initiative (President, First Lady, VP, SecState, AG, SecLabor, SecHHS, key Senators)
6. Private calls to SFRC members and chair seeking new hearing date.
7. Mobilization of House-side support
8. High-Level testimony (SecState, AG)
9. Calls to key Senators re Floor vote.
10. Floor vote

Call Reda R
re: Report - Jones
C. + Michael J.



Scott Busby
10/26/99 12:12:21 PM

Record Type: Record

To: Scott Busby/NSC/EOP@EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: Lawyers Committee report on domestic implementation of human rights norms

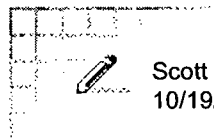
Two things:

(1) As many of you already know, the Lawyers Committee is hosting a set of meetings next week to discuss generally what the USG should be doing on human rights issues. The meetings will include USG officials as well as NGOs. One of these meetings will be specifically devoted to the domestic implementation of international human rights norms. The meeting will include discussion of the report that was the subject of my original e-mail. I have spoken to the Lawyers Committee and we have agreed that this meeting would be the best forum in which to obtain USG feedback on the report. So, I would encourage any and all of you to attend this meeting.

The meeting will take place on Wednesday, November 2 from 1:30-4:30 p.m. at the offices of Arnold & Porter, 555 12th St. Call David Schorr at the Lawyers Committee to RSVP, 547-5692.

(2) The next meeting of the IWG has been postponed until Monday, November 1 at 4 p.m. Still in OEOB, 208.

Scott Busby



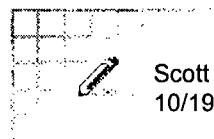
Scott Busby
10/19/99 04:34:00 PM

Record Type: Record

To: Scott Busby/NSC/EOP@EOP
cc: See the distribution list at the bottom of this message
bcc: Records Management@EOP
Subject: Re: Lawyers Committee report on domestic implementation of human rights norms

Note : The next IWG meeting has been pushed back to 4:30 on the 27th. Same place.

Scott Busby



Scott Busby
10/19/99 02:21:42 PM

Record Type: Record

To: See the distribution list at the bottom of this message
cc: Daniel F. Feldman/NSC/EOP@EOP, Eric P. Schwartz/NSC/EOP@EOP
Subject: Lawyers Committee report on domestic implementation of human rights norms



Lawyers Committee report

Human Rights IWG colleagues --

Attached is a draft report prepared by the Lawyers Committee for Human Rights about the ways in which Canada, Australia and the U.S. implement domestically international human rights obligations. (I know that several of you were interviewed by Anne Lawson, the consultant who prepared the report.) I think the report and its recommendations will be of interest to you and your agencies and to the IWG generally. (In printing out the report, beware -- it's over 90 pages.)

Before going final with the report, the Lawyers Committee would like to gain the benefit of comments by relevant USG officials. I have suggested to them that I would try to arrange a meeting at which they could briefly summarize the content of the report and then hear our reactions. In preparation for such a meeting, I urge you and other interested members of your agencies to review the report. (Please share copies of the report with others in your agencies who may not be addressees on this e-mail. In particular, Rosa, would you share a copy with Harold, Leslie, Steve and anyone else relevant at DRL?)

We plan to further discuss at the next meeting of the IWG, which is scheduled for next Weds, Oct. 27 at 4 p.m. in Rm 208, OEOB. We will be faxing you an agenda for this meeting in the next couple of days.

Let me know if you have Qs.

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Message Copied To:

DRAFT 10/06/99

**Domestic Structures and Practices for Implementation of
International Human Rights Treaties: Comparing Canada, Australia
and the United States, in light of Presidential Executive Order 13107**

**A research paper prepared for the Lawyers Committee for Human
Rights by Anne Lawson, Consultant**

Executive Summary

This paper is divided into two parts. The first 40 pages provide a summary of the institutional practices, procedures and mechanisms that exist in Canada, Australia and the United States respecting ratification and implementation of the six major human rights treaties of the United Nations.

The status of human rights treaty ratification in each of the three countries is reviewed, as is the legal process of ratification, and the effects of federalism. A description of the federal-state consultative mechanisms established in both Canada and Australia respecting human rights treaty ratification and implementation is provided.

Government procedures in all three countries "pre-ratification" and "post-ratification" are discussed. This includes a description of how the review of domestic legislation is conducted prior to ratification; how the ratification decision is made; how new legislation is reviewed for compliance with existing treaty obligations; and the processes developed for responses to individual complaints, and preparation and presentation of compliance reports to the United Nations. Government practices respecting internal training and public education on international human rights issues are then briefly addressed.

The last 15 pages of the paper are devoted to options for consideration in the United States, given the requirements of Executive Order 13107 ("Implementation of Human Rights Treaties") and the experience of Canada and Australia. The point of this section is to provide the Lawyers Committee for Human Rights with ideas about follow-up steps that could be recommended to the U.S. government, in light of the Executive Order. The options suggested are as follows:

- I The establishment of a Federal-State Network on International Human Rights Treaties.
- II The creation of an Office of International Human Rights in the United States Department of Justice.
- III The establishment of a permanent secretariat for the Interagency Working Group on Human Rights Treaties.
- IV Increased resources for the human rights treaty reporting process.
- V The "cataloguing" of existing human rights treaty obligations in domestic subject areas.
- VI The development of government training materials on international human rights.
- VII The development and maintenance of a website on international human rights.
- VIII The consideration of legislative options in any future human rights treaty ratification.
- IX The review of international human rights treaties by Congress after five (or more) years.

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Introduction

This paper is the result of a consultancy contract with the Lawyers Committee for Human Rights (LCHR) which requested the preparation of "a substantial paper... outlining follow-up steps the LCHR can recommend that the U.S. government take in order to achieve the goals set out in the December 10, 1998 Executive Order on the implementation of human rights treaties." (A copy of the Executive Order is included as Appendix A to this paper.) It was expected that the paper would address selected models of implementation used in other countries, in particular Canada and Australia, given their federal structure, and make recommendations about the usefulness of adapting these models in the U.S. context.

It should be stressed that the aim of this paper is not to measure the substantive outcomes of rights protection in any of the countries considered. As such, it should not be understood to evaluate the merits of government approaches, policies or institutions in this area. Instead, the aim is (1) to describe the structures, practices and policies currently in place respecting human rights treaty implementation in Canada, Australia and the United States, and (2) to provide ideas, for the LCHR to consider, about practices and procedures that might be put into place in the United States in light of the Executive Order. While governmental structures should not be understood to guarantee particular outcomes, they are nevertheless one part of the human rights-protection process – as is demonstrated by the existence of the Executive Order itself.

What follows concentrates exclusively on implementation practices relating to the six main human rights treaties of the United Nations: the *International Convention on the Elimination of Racial Discrimination* (CERD), the *International Covenant on Civil and Political Rights* (ICCPR) together with its first *Optional Protocol* which allows for the filing of individual petitions (Opt. Prot.); the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); the *Convention on the Elimination of Discrimination Against Women* (CEDAW); the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); and the *Convention on the Rights of the Child* (CRC). As such, there is no review of any of the practices, policies or procedures that relate to, among other things, states' participation in regional human rights conventions,¹ the *Geneva Conventions* or the conventions relating to employment and labour rights under the International Labour Organization. There is also no reference to international customary law.

The structure of the paper is as follows. Part I provides a general review of human rights treaty ratification and implementation procedures in place in all three countries. It proceeds on the basis of four sections: a description of the status of human rights treaty ratification in each country; a brief explanation of the legal process of ratification;

¹ There is one exception here relating to Canada and U.S. responses to complaints under the *Inter-American Declaration on Human Rights*. This issue has been included as it is one of the few international complaint mechanisms applicable to the United States.

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a description of the effects of federalism on the ratification and implementation process; and finally a selective review of federal government procedures respecting ratification and implementation.

Part II provides a list of options to be considered by the Lawyers Committee as ways of following up on the requirements of the 1998 Executive Order.² Where relevant, it is indicated where an option comes out of an implementation practice in place in Canada and/or Australia.³

This paper is based on research and interviews conducted over three months in the summer of 1999. A list of individuals interviewed in Canada, Australia and the U.S. and a bibliography of sources consulted are provided (see Appendix E and Bibliography). The views in the paper are those of the author alone, and should not be attributed to the Lawyers Committee for Human Rights.⁴

PART I: REVIEW OF PRACTICES RESPECTING HUMAN RIGHTS TREATY RATIFICATION AND IMPLEMENTATION

Status of Human Rights Treaty Ratification

Before reviewing the legal and practical procedures relating to human rights treaty ratification, it is essential to be reminded of the basic details respecting treaty

² It should be noted that the Executive Order itself in some measure comes out of the work of the LCHR. See Lawyers Committee for Human Rights, *In the National Interest: 1996 Quadrennial Report on Human Rights and U.S. Foreign Policy* (1996), Topic Seven, "Human Rights in the United States: Domestic Implementation of Treaty Obligations," pp. 61-68, which recommends, among other things, the creation of a federal inter-agency committee for human rights. The idea first dates from a comment made by John Shattuck, then Assistant Secretary of State for Democracy, Human Rights and Labor, at the presentation to the U.N. of the first U.S. report under the *International Covenant on Civil and Political Rights*. During the course of the presentation, Mr. Shattuck indicated that the U.S. "would consider establishing an inter-agency working group at the federal level to centralize implementation activities." See Summary record of 1405th meeting of Human Rights Committee, 24/04/95, CCPR/C/SR.1405, at para. 4.

³ Anyone interested in the subject matter of this paper may wish to follow the much more comprehensive study of the entire U.N. human rights treaty system currently being conducted by Professors Anne Bayefsky (Canada) and Christof Heyns (South Africa), with the collaboration of the Office of the United Nations High Commissioner for Human Rights. This study will examine the implementation of human rights treaties in approximately 20 countries chosen from the 5 U.N. regions, 4 countries each, based on a variety of criteria. The countries are as follows: (Africa) Egypt, Zambia, South Africa, Senegal; (Western Europe and other) Canada, Finland, Spain, Australia; (Asia) Japan, India, Philippines, Iran; (Latin America) Colombia, Brazil, Mexico, Jamaica; (Eastern Europe) Czech Republic, Romania, Estonia, Russia. Professors Bayefsky and Heyns aim to have their study completed by the spring of 2000, in the form of a report to the U.N. High Commissioner for Human Rights, containing recommendations for change both at the international and the domestic level. The report will not include country-specific recommendations, however.

⁴ Nor should the views be attributed to the Canadian Department of Justice, from which the author is currently on an unpaid leave of absence.

ratification in all three countries, as illustrated by the following chart:⁵

	Treaty	Canada	Australia	United States
1969	CERD	(1970) no RUDs	(1975) R re art. 4	(1994) R re arts 2-5, 7, 22, U re federal implementation, D re non-self-executing
1976	ICCPR	(1976) D re art. 41	(1980) R re arts. 10, 14, 20, D re art 41, federal	(1992) R re 14, 15, 20, death penalty,

⁵ The treaties are listed in chronological order, based on their coming into force internationally. The date of ratification by each country, where appropriate, is provided in brackets under the country name. The letters R, U and D indicate reservations, understandings and declarations currently in place. A complete list of reservations, understandings and declarations is provided in Appendix B.

⁶ Various additional reservations made to the ICCPR by Australia at the time of ratification were withdrawn in 1984. This is discussed *infra* at page 27 and note 108.

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1976	Opt. Prot.	(1976) no RUDs	(1991) no RUDs	n/a
1976	ICESCR	(1976) no RUDs	(1975) no RUDs	n/a
			1981 CEDAW	(1981) no

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⁷ A declaration made by Canada at the time of CEDAW ratification respecting art. 11(1)(d) (equal remuneration) was withdrawn in 1992.

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1987	CAT	(1987) D re arts. 21, 22	(1989) D re arts. 21, 22	(1994) R re arts. 16, 30, U re 1, 3, 14, death penalty, arts. 10-14 and 16 federal implementation, D re arts. 1-16 non-self- executing, 21
1990	CRC	(1991) R re arts. 21, 37, U re art. 30	(1990) R re art. 37	n/a

Legal Process of Treaty Ratification

What follows is a brief description of the legal process of ratification in each of the three countries. While the systems in place in Canada and Australia are similar as compared to the United States, they nevertheless contain some important differences and are thus treated separately below.

Canada

Treaty ratification in Canada is an executive act, part of the Royal Prerogative which is the residue of authority left in the Crown. Although it can always be sought, Parliamentary consent is not required for Canada to enter into international treaties.

Given its dualist system modelled on the United Kingdom, international human rights treaties do not have domestic force of law in Canada.⁸ To use the American terminology, treaties are necessarily "non-self-executing". Absent implementing legislation – *i.e.* action by the legislative as well as the executive arm of government –

⁸ *Baker v. Canada (Minister of Citizenship and Immigration)*, released July 9, 1999 (S.C.C.).

ratified human rights treaties have no direct application, and cannot, for example, form the basis for a domestic cause of action.

This is not to say that international human rights treaties are irrelevant domestically, however. While the Supreme Court of Canada has yet to directly assess the impact of a ratified human rights treaty on the interpretation of domestic laws when such laws were not passed in furtherance of the treaty,⁹ several basic principles of interpretation have been established: that as a general matter, courts should presume when they interpret laws that Parliament intended to legislate in conformity with Canada's international obligations; that where legislation is passed in furtherance of a treaty, courts should strive to interpret it in a manner consistent with the treaty;¹⁰ that if such legislation expresses a contrary intention, domestic courts are bound to apply it, regardless of conflict with the terms of a treaty;¹¹ that international obligations can be a "relevant and persuasive factor" in interpreting the *Canadian Charter of Rights and Freedoms*, although they are not determinative; and that the *Charter* should generally be presumed to provide protection that is at least as great as that protected in human rights treaties ratified by Canada.¹²

Recently, in the case of *Baker v. Canada (Minister of Citizenship and Immigration)*, released July 9, 1999, the Supreme Court of Canada addressed the applicability of the *Convention on the Rights of the Child* (ratified by Canada in 1991) to the exercise of discretion by the Minister of Citizenship and Immigration under the *Immigration Act* on the basis of "humanitarian and compassionate considerations." The Court held that children's interests should be an important factor in the exercise of Ministerial discretion under the Act; one of the indications that this should be the case was Canada's ratification of the CRC. The Court stated that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."¹³ (The dissenting judges challenged the majority's reference to CRC values in the course of statutory interpretation, believing it to be inconsistent with the separation of powers between Parliament and the executive.)

Australia

As in Canada, treaty ratification in Australia is an executive act, part of the Royal Prerogative. As a matter of law, there is no restriction on the ability of the executive to

⁹ See Irit Weiser, "Effect in Domestic Law of International Human Rights Treaties Ratified without Implementing Legislation," to published as part of 1998 proceedings of the Canadian Council on International Law.

¹⁰ *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.

¹¹ *Capital Cities Communications Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141.

¹² *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 349, *per* Dickson C.J., and *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. It should be noted that references to international law have been made by the Supreme Court of Canada both to define *Charter* rights and to define appropriate limits on these rights.

¹³ See *Baker*, *supra* note 8 at para. 70, *per* L'Heureux-Dubé J.

ratify international agreements. As a matter of practice, however, recent Australian reforms have increased the role played by Parliament in the treaty ratification process.

Treaty-making reforms were introduced in 1996, largely to improve public access to the process. Included among the reforms was a requirement that treaties be tabled in Parliament at least 15 sitting days (about 30-100 calendar days) before the government takes binding action, except in unusual cases of urgency. Treaties are tabled with a "National Interest Analysis" (NIA), which notes the reasons why Australia should become a party to the treaty.¹⁴ A new Parliamentary Joint Standing Committee on Treaties then considers tabled treaties and NIAs, conducting public hearings and reporting to Parliament. Although the executive is not required to adopt any of the recommendations of the Joint Standing Committee, it nonetheless provides an important formal role for Parliament in the treaty-making process.¹⁵ (The 1996 treaty-making reforms also included a formalized process for state and territorial consultation on treaties and the establishment of an Australian Treaties Library, both of which are discussed below.)

As in Canada, human rights treaties do not have domestic force of law in Australia, given its dualist system, absent implementing legislation.¹⁶ Nevertheless, they have been interpreted by the judiciary to be domestically relevant. As in Canada, it is established that legislation should generally be applied in a manner consistent with international law;¹⁷ that where legislation is ambiguous, courts should favour an interpretation that accords with Australia's international obligations, at least where the legislation is enacted with reference to the international instrument;¹⁸ that in the event of a clear conflict between international obligations and a domestic law, however, the courts are obligated to apply the latter.¹⁹ The High Court has also accepted that international human rights treaties can influence the development of the common law

¹⁴ The Department with primary carriage of a treaty (according to its substantive subject matter) is responsible for preparing the NIA. According to the government's own documents, "[t]he NIA will include a discussion of the foreseeable economic, environmental, social and cultural effects of the treaty; the obligations imposed by the treaty; its direct financial costs to Australia; how the treaty will be implemented domestically; what consultation has occurred in relation to the treaty and whether it provides for withdrawal from the treaty". Where reservations, understandings or declarations to a treaty are believed by the government to be appropriate, these also would be included in the NIA. See *Negotiation, Conclusion and Implementation of International Treaties and Arrangements* (March 1999), Treaties Secretariat, Department of Foreign Affairs and Trade, Canberra.

¹⁵ In August 1999, the Commonwealth Government issued a document entitled "Review of the Treaty-Making Process," which reported favourably on the effect of the 1996 reforms, while noting some areas for improvement. During the course of its review, the Government accepted 66 submissions from interested parties, including the Parliamentary Joint Standing Committee on Treaties, all state and territorial governments, and a variety of groups and individuals.

¹⁶ *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 C.L.R. 273.

¹⁷ *Jumbunna Coal Mine NL v. Victorian Coal Miners' Association* (1908), 6 C.L.R. 309.

¹⁸ *Teoh's Case*, *supra* note 16.

¹⁹ *Politics v. The Commonwealth*, (1945) 70 C.L.R. 60; *Lim v. Minister for Immigration, Local Government and Ethnic Affairs*, (1992) 176 C.L.R. 1.

²⁰ *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1; *Dietrich v. R.* (1992), 177 C.L.R. 292.

(Australian having no statutory or constitutional "bill of rights").²⁰

Unlike in Canada, the Australian High Court has additionally held that a ratified human rights treaty can have a direct impact on the exercise of administrative discretion. In *Teoh's Case*,²¹ the High Court held that Australia's ratification of the CRC created a "legitimate expectation" on the part of Australian citizens under administrative law that the executive would act in conformity with the terms of the treaty (and therefore, on the facts of *Teoh's Case*, that the best interests of Mr. Teoh's children would be "a primary consideration" in the decision made under the *Migration Act* concerning his deportation). The Court held that if the Convention was not going to be followed, procedural fairness required that notice be given to the applicant, in order that he might make a case in favour of applying the CRC.²² Mason C.J. and Deane J. wrote:

Ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in accordance with the Convention and treat the best interests of the child as a 'primary consideration.'²³

Teoh's Case was not warmly received by the Australian Commonwealth Government, and has been the subject of significant controversy. Soon after the decision was released, the Minister for Foreign Affairs and the Attorney-General issued a Joint Executive Statement purporting to restore the legal situation to that prior to *Teoh's Case*, on the basis that ratified treaties are not part of Australian law absent implementing legislation by Parliament. Since then, two different governments have attempted to pass an *Administrative Decisions (Effect of International Instruments) Bill*, in 1995 and 1997 (both of which lapsed with a federal election).²⁴ These bills have been known as the "anti-*Teoh*" bills, in that they have been specifically designed to counter the effect of *Teoh's Case* on administrative decision-making, in particular to refute the existence of any "legitimate expectation" based on treaty ratification that

²⁰ *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1; *Dietrich v. R.* (1992), 177 C.L.R. 292.

²¹ *Supra* note 6.

²² This conclusion was rejected in Canada in *Baker*, *supra* note 8.

²³ *Teoh's Case*, *supra* note 16 at p. 291, *per* Mason C.J. and Deane J.

²⁴ See *Administrative Decisions (Effect of International Instruments) Bill*, 1995 (Cth) and *Administration Decisions (Effect of International Instruments) Bill*, 1997 (Cth). South Australia has passed a similar *Administrative Decisions (Effect of International Instruments) Act*, 1995 (SA).

²⁵ Section 5 of the 1997 bill provided that "[t]he fact that: (a) Australia is bound by, or party to, a particular international instrument; or (b) an enactment reproduces or refers to a particular international instrument; does not give rise to a legitimate expectation of a kind that might provide a basis at law for invalidating or in any way changing the effect of an administrative decision. Section 7 provided that "[t]o avoid doubt, section 5 does not affect any other operation or effect, or use that may be made, of an international instrument in Australian law."

could be used to challenge the effect of an administrative action.²⁵ A third *Administrative Decisions (Effect of International Instruments) Bill* is forecast for introduction in Parliament before the end of 1999.²⁶

United States

Article II, Section 2 of the U.S. Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur". While the President has the authority to sign treaties for the United States, article II means that ratification cannot take place without the consent of two-thirds of the Senate.²⁷

Treaties referred to the Senate are considered by the Foreign Relations Committee, which conducts public hearings and makes a recommendation to the full Senate as to whether the treaty should be approved, conditionally approved, or rejected. If two-thirds approval by the Senate is given, international treaties are, as a general rule, "self-executing", and become part of U.S. law without the need for additional legislation, according to clause 2, Article VI of the U.S. Constitution (the supremacy clause).²⁸

²⁵ Section 5 of the 1997 bill provided that "[t]he fact that: (a) Australia is bound by, or party to, a particular international instrument; or (b) an enactment reproduces or refers to a particular international instrument; does not give rise to a legitimate expectation of a kind that might provide a basis at law for invalidating or in any way changing the effect of an administrative decision. Section 7 provided that "[t]o avoid doubt, section 5 does not affect any other operation or effect, or use that may be made, of an international instrument in Australian law."

²⁶ The advisability of such a bill, and the legal effect of *Teoh's Case* generally in Australia has been the subject of an extremely heated debate. Critics say the "anti-*Teoh*" bill is designed to ensure that ratified treaties have no effect in Australia, whereas others argue that *Teoh* itself was a significant and inappropriate extension of the doctrine of legitimate expectations, which would dramatically complicate Commonwealth government operations. For a review of some of the arguments on both sides, see "Administrative Decisions (Effect of International Instruments) Bill 1995," Report by the Senate Legal and Constitutional Legislation Committee, 1995. See also Margaret Allars, "International Law and Administrative Discretion" in Brian R. Opeskin and Donald R. Rothwell (eds.) *International Law and Australian Federalism* (Victoria: Melbourne University Press, 1997), pp. 232-279.

²⁷ At least two others means for concluding international agreements exist in the United States, but will not be discussed herein as they do not apply to human rights treaties. The first is the ability of the President to make "executive agreements" without the Senate's consent, and the second is the Congressional-Executive agreement process, in which the Congress passes a joint resolution or passes legislation authorizing or approving the conclusion of an international agreement by the President.

²⁸ The supremacy clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (emphasis added). The question of whether or not a treaty is self-executing is for judicial determination; see *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), and Carlos Manuel Vasquez, "The Four Doctrines of Self-Executing Treaties" (1995), 89 A.J.I.L. 695. See also *Restatement (Third) of Foreign Relations Law of the United States*, para. 111. In case of a conflict between a self-executing treaty provision and a federal statute, the later in time prevails; see *Whitney v. Robertson*, 124 U.S. 190 (1888). A treaty provision that conflicts with the Constitution will not be given effect in U.S. law; see *Reid v. Covert*, 354 U.S. 1 (1957).

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In the case of human rights treaties, each act of ratification has been accompanied by a declaration on the part of the Senate that the treaty be "non-self-executing".²⁹ While the meaning of this phrase is controversial,³⁰ it seems to suggest that ratified human rights treaties in the U.S. should be viewed as analogous to ratified human rights treaties in Canada and Australia: that is, at a minimum, no private right of action is created for individuals in domestic courts based on the contents of the treaty. Nevertheless, as in Canada and Australia, this does not mean that a ratified treaty has no meaning domestically. As in the other two countries, the task for the courts (and for the government) is to determine what legal consequences result domestically from the act of human rights treaty ratification.

The Effects of Federalism on the Process of Human Rights Treaty Ratification and Implementation

One of the reasons that the experiences of Canada and Australia are relevant to the United States with respect to the ratification and implementation of international human rights treaties is because, like the U.S., they are federations. This section briefly catalogues the impact federalism has had in all three countries in this area – both constitutionally and in terms of institutional practice.

Canada

The effect of federalism on international treaty-making in Canada has been especially clear in the human rights area. The leading interpretive case on the issue of treaty implementation is the *Labour Conventions* case, in which the federal government sought to implement various ratified ILO conventions by means of federal legislation in an area of jurisdiction, labour relations, which otherwise fell under provincial authority.³¹ The Privy Council concluded that the division of powers in the Canadian Constitution actually precluded such action, and that the federal government could not gain for itself, pursuant to its power to ratify treaties, any additional jurisdiction that it would not

²⁹ There is some question as to the constitutionality of such a declaration, given Article VI of the U.S. Constitution. Louis Henkin has suggested that "... as a general practice, such a declaration is against the spirit of the Constitution; it may be unconstitutional. Article VI of the Constitution provides expressly for lawmaking by treaty: treaties are declared to be the supreme law of the land. The Framers intended that a treaty should become law *ipso facto*, when the treaty is made; it should not require legislative implementation to convert it into United States law. In effect, lawmaking by treaty was to be an alternative to legislation by Congress." See Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker" (1995), 89 A.J.I.L. 341 at p. 346. Elsewhere the same author has stated that "[a] tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of Article VI of the Constitution." See Louis Henkin, *Foreign Affairs and the United States Constitution*, Oxford: Clarendon Press, 1996, at p. 201. See also Vasquez, *supra* note 28 at p. 708, and Lori Fisler Damrosch, "The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties" (1991), 67 Chi-Kent L. Rev. 515.

³⁰ See Vasquez, *supra* note 28.

³¹ See *A.G. Canada v. A.G. Ontario (The Labour Conventions Case)*, [1937] A.C. 355 (P.C.).

otherwise have under the traditional division of powers.³²

This means that while the federal government has the power to ratify treaties, it has no power to implement them in areas of provincial jurisdiction. Provincial cooperation before a treaty is ratified is therefore crucial to ensuring Canadian compliance with its contents where they trench on areas of provincial jurisdiction (as is the case regarding human rights treaties, which cover areas under both federal and provincial jurisdiction).

The key moment of federal-provincial cooperation respecting human rights treaties came in 1975, at the first Federal-Provincial Ministerial Conference on Human Rights. The main objective of this meeting was to achieve unanimity between the federal and provincial governments respecting Canada's accession (in 1976) to the ICCPR and its Optional Protocol, and to the ICESCR. (Consultations with the provinces had been ongoing since 1967, with various provinces expressing concerns about Canada's ratification.³³) At the 1975 conference, the Ministers agreed to a series of "Modalities and Mechanisms" respecting the implementation of human rights treaties (see Appendix C). These procedures have been followed in Canada ever since, and can be summarized as follows:

- before acceding to, or denouncing, an international human rights instrument, or before supporting an amendment to an instrument, Canada will engage in a process of consultation with the provinces and territories³⁴
- should a province or territory wish to withdraw an earlier commitment to implement aspects of an international instrument to which Canada is a party, the federal government may in such a circumstance find it desirable to denounce the instrument in question
- the provinces and territories will be consulted as to the composition of delegations to meetings arising out of an international human rights instrument, and such delegations should include provincial and territorial representatives
- provinces and territories should be consulted on the nomination of Canadian

³² The Canadian Constitution actually contains no treaty-making power, as at the time that it was originally enacted in the British Parliament it was not contemplated that Canada would become an independent nation. Instead, Canada's power to make treaties derives from "the instrument by which the King or Queen in Great Britain delegated the prerogative powers over foreign affairs to the Governor General of Canada." See Peter W. Hogg, *Constitutional Law of Canada* (3rd ed.) (Toronto: Carswell, 1992) at p. 282 (ch. 11.2). Although s. 132 of the Constitution provides for Parliamentary authority to implement treaties "as part of the British Empire, towards foreign countries," this power was held in the *Labour Conventions Case* to be inapplicable to Canada as an independent nation.

³³ See "Canada's Experience with United Nations Human Rights Treaties", a paper by Phillipe LeBlanc (November 1994) available on the UNAC website at www.unac.org/unreform/leblanc.html. LeBlanc notes that in face of provincial resistance to ratification, the federal "Department of External Affairs undertook a program to create among the provincial governments a better understanding of how international human rights instruments are understood by member states of the UN. The program included activities such as appointing provincial representatives to the Canadian observer delegations to ECOSOC meetings. It was hoped that this exercise would bring all the provinces on board. By early 1973, there were only two hold-outs: Quebec and British Columbia."

³⁴ The territories were included in 1980.

candidates to sit on bodies established pursuant to human rights instruments

- provinces and territories will have fully opportunity to respond in the event of criticism by an international body of a provincial law or institution³⁵
- provinces and territories will be consulted in the preparation of reports to international bodies, and will prepare reports on their own human rights activities, to be submitted as part of the Canadian report
- there should be regular federal-provincial-territorial meetings of ministers responsible for human rights, and there should be a continuing committee of officials responsible for human rights that also meets regularly in various locations across the country

Perhaps the most important outcome of the First Ministers Meeting was the creation, pursuant to the "Modalities and Mechanisms", of the Continuing Committee of Officials on Human Rights.³⁶ The Continuing Committee, which has met twice a year since its inception in 1976, is generally comprised of officials responsible for human rights issues in the federal, provincial and territorial governments.³⁷ It is the main forum for federal-provincial-territorial coordination and cooperation on treaty implementation.³⁸

The Continuing Committee meets in the fall in Ottawa, and then in the spring somewhere else in Canada, following the annual conference of human rights

³⁵ The concluding observations of U.N. treaty bodies upon their review of Canadian reports are distributed to the provinces and territories by the federal government as soon as they are available. According to the Continuing Committee of Officials on Human Rights "Guidelines to Address the Concerns, Suggestions and Recommendations Raised by International Bodies upon their Review of Canadian Reports," each Canadian jurisdiction is free to determine the manner in which it will deal with the issues raised by U.N. treaty bodies.

³⁶ A review of the first ten years of this committee's activities is provided in Daniel Turp, "Le Comité permanent fédéral-provincial-territorial des fonctionnaires chargés des droits de la personne et sa participation à la mise en oeuvre des traités" (1985) *Annuaire Canadien des droits de la personne* 77. The Committee is governed by a mandate, discussed *infra* at note 101, and the following guidelines, which are available from the Department of Canadian Heritage: "Working Group on Reports to International Organizations", "Guidelines to Address the Concerns, Suggestions and Recommendations Raised by International Bodies upon their Review of Canadian Reports", and "Guidelines for Responses in Respect of Communications Concerning Provincial Governments Pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights".

³⁷ Although see note 31 below.

³⁸ There has been no Ministerial Conference on Human Rights since 1988. Other federal-provincial-territorial gatherings may provide the occasion for discussion of international human rights issues, notably the meeting of Ministers of Justice on Social Issues, where criminal law is discussed, and the annual human rights conference of officials, which brings officials from the Attorneys General offices around the country together (mostly litigators) to discuss issues relating to the *Canadian Charter of Rights and Freedoms*.

³⁹ The fact that the Continuing Committee meetings follow the meeting of human rights commissions has meant that many provincial and territorial governments rely on representation at the Continuing Committee meetings of human rights commission officials, rather than officials from the Attorney General's Ministry or the Cabinet office. This is not ideal, in that human rights commissions are intended to be independent from government, and therefore the provincial and territorial officials who attend have no policy-making responsibility, or capacity to provide internal government legal advice, assistance or education (*i.e.* they are not the provincial and territorial officials who are actually doing the work of treaty

commissions.³⁹ Each participant in the Committee is responsible for paying the costs associated with its attendance at the meetings. The Committee operates by consensus, and is not open to the public. By default, the federal government has remained in the position of chair, and is supported by a secretariat in the Human Rights Directorate of the Department of Canadian Heritage, which sets the agenda for meetings,⁴⁰ arranges the printing, translation and circulation of all relevant documents and maintains a permanent Committee archive.

Australia

In contrast to Canada, the Australian federal government has clear constitutional authority to pass legislation implementing an international treaty, even where such legislation trenches on an area of otherwise state authority. In a series of cases beginning with *Commonwealth v. Tasmania*, (1983) 158 CLR 1, the High Court of Australia has interpreted the "external affairs" power in section 51(xxix) of the Australian Constitution in a very broad fashion, allowing the federal government substantial leeway in implementing international treaties. Commonwealth legislation that is "capable of being reasonably considered to be appropriate and adapted" to giving effect to a treaty will be constitutionally valid, even in areas that would otherwise fall under state responsibility.⁴¹ According to s. 109 of the Constitution, where federal legislation is inconsistent with state legislation, it renders the latter invalid, and this means that federal legislation held to implement a treaty will prevail.

The external affairs power has in fact been used specifically to enact legislation implementing human rights treaties. In *Koowarta v. Bjelke-Petersen*, (1982) 153 CLR 168, for example, the *Racial Discrimination Act 1975* (Cth), which implemented the treaty obligations of the CERD, was upheld as a law with respect to external affairs even though (i) the Commonwealth government possesses no specific power to legislate with respect to racial discrimination, and (ii) the law applies equally to Commonwealth and state governments.

Recently, the Commonwealth government relied on the external affairs power to enact a law in response to the negative decision of the U.N. Human Rights Committee respecting a prohibition in the Tasmanian criminal code on private sexual contact between consenting men. The Committee found that the prohibition violated the right to privacy under article 17 of the ICCPR.⁴² The Commonwealth government of the time reacted by passing the *Human Rights Sexual Conduct Act, 1994* (Cth), the stated purpose of which is "to implement Australia's international obligations under Article 17" of the ICCPR. Section 4(1) of this Act provides "[s]exual conduct involving consenting

implementation). The timing of Continuing Committee meetings in this respect is currently under review.

⁴⁰ Continuing Committee meetings follow a regular agenda, which includes reporting on international developments, follow-up on outstanding communications, discussion of new instruments for review, status of compliance reports, and a round table for information-exchange.

⁴¹ See *Commonwealth v. Tasmania*, at p. 260, *per* Deane J.

⁴² See *Nicholas Toonen and Australia*, Communication No. 488/1992, U.N. Human Rights Committee.

adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the [ICCPR]." (Soon after the passage of this act, Tasmania repealed its offending legislation.)

Despite the Commonwealth government's broad legal authority to legislate in areas of state jurisdiction when it comes to treaty implementation, however, political pressures (as well as the wide expanse of state legislative authority under the constitution) have led the federal government, as a rule, generally to be reluctant to proceed in this manner. In 1996, a series of reforms were introduced to the treaty making process in Australia to increase state involvement. It is notable that the federal government's own public information on treaty-making makes no reference to the external affairs power, and instead describes the extensive consultation that takes place between the two levels of government.⁴³

The 1996 reforms to the treaty-making system in Australia are referred to above, in the context of the increased role created for Parliament in the treaty making process. The other major prong of the reforms was to formalize state and territorial participation in international treaty-making.⁴⁴ Most importantly, the reforms led to the adoption, by the Council of Australian Governments, of a revised set of *Principles and Procedures for Commonwealth-State Consultation on Treaties*, which now generally govern Commonwealth-state-territorial relations with respect to all new international treaties. (The *Principles and Procedures* are included as Appendix D to this paper.)

The *Principles and Procedures* contain the following requirements:

- to seek and take into account the views of the states and territories, wherever practicable, in formulating Australian negotiating policy, and before becoming a party to a treaty
- to provide information to the states and territories in a timely manner in all cases and at an early stage of any treaty discussions in which Australia is considering becoming a party
- to establish a Treaties Council of the Prime Minister and Premiers and Chief Ministers which will have an advisory function, and meet at least once a year⁴⁵
- to establish a Standing Committee on Treaties consisting of Commonwealth and state

⁴³ The Australian "Core Document" before the U.N. states the following at para. 180: "Exercise of [the federal power over external affairs] alone... would not be an adequate or efficient means for Australia to give effect to its international obligations. Much of the public infrastructure within Australia is at the state level. The States also administer significant elements of the Australian legal system. The States already, therefore, exercise responsibility in many matters of relevance to the implementation of human rights."

⁴⁴ The federal reforms have provoked particular interest and scrutiny at the state level in Victoria. See the First Report on the Inquiry into Overlap and Duplication of the Victorian Federal-State Relations Committee, "International Treaty Making and the Role of the States" (October 1997). As a result of this Committee's recommendation, international treaties being considered for ratification by Australia are now also tabled in the Victorian Parliament.

⁴⁵ In fact the Treaties Council has only met once, very briefly, since its formation.

and territorial officials⁴⁶ which will meet at least twice a year to identify treaties of sensitivity to the states and territories; to decide whether consultation with the Treaties Council is necessary; to review the implementation of existing treaties; to ensure that states and territories receive adequate information; and coordinate the participation of state and territory representation on international delegations where appropriate

- to include representatives of states and territories in appropriate cases in delegations to international conferences
- to consult and secure agreement with states and territories on the implementation of international obligations
- to consult states and territories and take their views into account in the preparation of reports to international bodies on implementation

Federal-state consultation in Australia with respect to human rights treaties predates the 1996 reforms. In each case where a human rights treaty has been ratified, efforts have been made by the Commonwealth government to secure state support – or at least to prevent state opposition – prior to ratification.⁴⁷ Ongoing consultation respecting to human rights treaty issues currently takes place in the context of meetings of the Standing Committee of Attorneys General (SCAG), which meets around three times a year. There is a Working Group on Human Rights at the official level which also meets three times a year, and serves as a coordinating network for international human rights treaty issues, among other things.⁴⁸ (The SCAG generally is supported by a secretariat in the Attorney General's Department; the Human Rights Working Group has no separate administrative structure.)

United States

Constitutionally, the United States appears to be in the same position as Australia when it comes to human rights treaties, in that the federal government has the constitutional authority to "implement" international treaties in areas that would otherwise be under state jurisdiction (although this is currently a subject of some academic debate⁴⁹). The

⁴⁶ This Committee has met twice a year since its establishment, with each of the parties paying for its own participation. Officials generally come from the offices of Premier (or Prime Minister) and Cabinet.

⁴⁷ See Charlesworth, "International Human Rights Law and Australian Federalism" in Brian R. Opeskin and Donald R. Rothwell (eds.) *International Law and Australian Federalism* (Victoria: Melbourne University Press, 1997) pp. 280-305, at pp. 292-297. Charlesworth notes that the practice of consultation with the states has led to a number of delays in human rights treaty ratification and implementation, despite the Commonwealth government's clear constitutional authority in the field.

⁴⁸ While the Ministers in the SCAG move around the country for their meetings, the officials in the Human Rights Working Group meet regularly in Sydney. Each government is responsible for its own costs associated with these meetings. The meetings are not open to the public.

⁴⁹ See for example, most explicitly, Curtis A. Bradley, "The Treaty Power and American Federalism" (1998), 97 Mich. L. Rev. 390, and Curtis A. Bradley and Jack L. Goldsmith, "The Abiding Relevance of Federalism to U.S. Foreign Relations" (1998), 92 A.J.I.L. 675. Bradley and Goldsmith argue that the treaty power should not be exempt from the Supreme Court's recent judicial protection of federalism. See also Ronan Doherty, "Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility under International Law" (1995), 82 Va. L. Rev. 1281 (suggesting the assumption of federal hegemony in this area is on shaky ground), Peter Spiro, "The States and International Human Rights"

supremacy clause in the Constitution, referred to above, gives self-executing treaties the same normative rank as valid federal legislation, ensuring that they are "the Supreme Law of the Land." A self-executing treaty therefore takes precedence over conflicting state legislation, and is sometimes said to "federalize" subjects that may previously have been governed by state law.⁵⁰

Even in the case of a non-self-executing treaty, Congress has significant authority to act in areas otherwise regulated by the states. Implementing legislation might be passed by Congress pursuant to its power to do what is "Necessary and Proper" to carry out treaty obligations,⁵¹ or, depending on the subject of the legislation, pursuant to Congress's power to legislate under the Commerce Clause, its power to enforce the Fourteenth Amendment (sec. 5) or its power to define and punish "Offenses against the Law of Nations" under Article I (sec. 8, cl. 10).⁵²

Despite this constitutional situation, as in Australia, political and other pressures have dictated that federal authority not be exercised over the states to implement human rights treaties. As noted above, these treaties have been ratified accompanied by a declaration that they are non-self-executing, and they have also been accompanied by a statement of understanding respecting implementation, which highlights the U.S. constitutional division of powers.⁵³ To date no federal measures have been taken to

(1997) 66 Fordham L. Rev. 567 at p. 576 (questioning whether the treaty power now encompasses a federal capacity to overcome state laws in the case of human rights) and Thomas Healy, "Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power" (1998), 98 Colum. L. Rev. 1726 (warning, in contrast, against the risks of limiting federal authority over foreign affairs).

⁵⁰ *Missouri v. Holland*, 252 U.S. 416 (1920).

⁵¹ Henkin has written "[a]s *Missouri v. Holland* confirmed, Congress has the power to do what is 'necessary and proper' to implement a treaty even if its action might not have been within other Congressional powers." See Henkin, *Foreign Affairs*, *supra* note 29, 109 at p. 204. See also Gerald L. Neuman, "The Global Dimension of RFRA" (1997), 14 Const. Commentary 33 (suggesting the *Religious Freedom Restoration Act* of 1993 could have been enacted under the "necessary and proper" clause as implementing legislation to article 18 of the ICCPR), and Susan Kilbourne, "The Convention on the Rights of the Child: Federalism Issues for the United States" (1998), V:2 Georgetown J. on Fighting Poverty 327 at pp. 331-332, 334 (suggesting that, despite having limits, the "necessary and proper" clause could be used to justify "acceptable federal legislation" in the U.S. implementing the CRC).

⁵² See Henkin, "Bricker," *supra* note 29 at p. 345. See also Michael H. Posner and Peter J. Spiro, "Adding Teeth to United States Ratification of The Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993" (1993), 42 DePaul L. Rev. 1209 at pp. 1220-1227, Nina Shou, Junior Fellow, Center for International Studies, New York University School of Law, "Instances of Human Rights Regimes" prepared for the Conference on Delegated Sovereignty: Constitutional and Legal Implications of U.S. Participation in Treaty Regimes (1999), at pp. 44-51, and David P. Stewart, "United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations" 42 DePaul L. Rev. 1183 at p. 1206, shortened version published at 14 Hum. Rts. L.J. 77 (1993).

⁵³ This understanding is not a "federal clause" in the traditional sense, which would deny international responsibility for matters outside the constitutional authority of the federal government. Instead, the U.S. understanding in the ICCPR suggests a cooperative approach to implementation: "this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take

override state legislation as a result of treaty ratification.

The United States has no established mechanism for consultation or information-exchange with the states respecting international human rights treaty issues.⁵⁴

Federal Government Procedures Respecting Human Rights Ratification and Implementation

The following section outlines the way in which Canada, Australia and the United States approach the ratification and implementation of human rights treaties. Under each country heading there is a description of governmental practices and procedures "pre-ratification" and "post-ratification". The "pre-ratification" section includes a description of the procedures relating to domestic legislative review and the decision respecting whether to amend or add to domestic legislation or instead lodge RUDs to the treaty. The "post-ratification" section includes a review of the practices relating to the review of new legislation for compliance with international treaties, the response to international complaints, and the preparation and presentation of compliance reports. Finally, a section on "human rights education" includes a brief summary of the practices in each country relating to human rights training within government, as well as public education generally on human rights issues.⁵⁵

Canada

International human rights treaties issues are dealt with principally by officials in three different federal departments in Canada: the Department of Foreign Affairs and

measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfilment of the Covenant." David Stewart has written that this understanding is not intended to limit U.S. obligations under the ICCPR, but "serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the state and local governments or to use the provisions of the Covenant to 'federalize' matters now within the competence of the states." See Stewart, *supra* note 52 at p. 1202. The CERD contains a similar understanding to the ICCPR, as does the CAT, which tracks the first half of the wording above, and then provides that "[a]ccordingly, in implementing articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfilment of the Convention."

⁵⁴ This is not to say that no such consultation or information-exchange has ever taken place, but just that no formalized structure has been developed.

⁵⁵ Obviously "human rights education" is a potentially enormous field, and treatment of the subject in a paper such as this is necessarily selective. The topic here is limited to direct education by federal governments of (i) their own officials and (ii) the public at large. Not included are other extremely important areas such as (1) judicial education, (2) liaison between government and schools and universities for primary, secondary and post-secondary education on human rights, and (3) liaison with private and other public sector actors, such as the American Bar Association, local bar associations and NGOs for general human rights education programs and initiatives. Finally, the paper also does not cover "indirect" human rights education initiatives by government such as funding educational programs or initiatives conducted by other actors, such as NGOs, think tanks or academics.

International Trade (DFAIT), the Department of Justice Canada and the Department of Canadian Heritage.

DFAIT is responsible for the foreign policy aspect of international human rights treaties. The key policy division is the Human Rights, Humanitarian Affairs, International Women's Equality Division (AGH), assisted on the legal side by lawyers in the J-Branch (JLAH). When it comes to the domestic aspect of human rights treaty ratification and implementation, counsel from the Human Rights Law Section of the Department of Justice play a lead role. Domestic implementation also takes place as a result of the activities of the Human Rights Directorate at the Department of Canadian Heritage, as described below.

Pre-ratification procedures

Review of domestic legislation

When a human rights treaty is initially being considered for ratification by Canada, DFAIT initiates a review of domestic legislation. This is a federal-provincial-territorial government-wide exercise. At the federal level, this process is conducted by the Human Rights Laws Section of the Department of Justice (HRLS).

Although there is no formal inter-departmental human rights network at the federal level equivalent to the new U.S. Interagency Working Group on Human Rights Treaties, HRLS is assisted in coordinating the federal review by the fact that nearly all counsel in the federal government system are ultimately responsible to the federal Attorney General. Although they work "in house" in other government departments, counsel throughout the federal government are representatives of the Attorney General (with the exception of international lawyers in DFAIT and military lawyers in the Department of Defence). This "Justice connection" facilitates coordinated action and review. (In some cases, inter-departmental committees have been set up to handle specific treaties, such as the Inter-departmental Committee on the Convention on the Rights of the Child,⁵⁶ which supervises both the preparation of reports on the Convention and follow-up to the concluding observations of the Committee on the Rights of the Child on Canada's reports. This committee was also active at the time of legislative review prior to ratification.)

HRLS also engages in a lengthy process of consultation with the provinces and territories. The membership of the Continuing Committee of Officials on Human Rights provides essential contacts -- generally individuals in the provincial and territorial Attorney General offices -- who can direct the respective provincial and territorial processes of legislative review. Provinces and territories are given the opportunity to identify possible reservations to the terms of a treaty, in the event that the treaty is

⁵⁶ Membership on this Committee includes officials from Justice, DFAIT, Health Canada, Indian and Northern Affairs Canada, Canadian Heritage, Canada Citizenship and Immigration and Human Resources and Development Canada.

incompatible with a provincial or territorial law and there is unwillingness to change that law.

Since the "Modalities and Mechanisms" for federal-provincial cooperation were first agreed to in 1975, the federal government has been successful in securing provincial consent (or at least lack of provincial opposition) respecting human rights treaty ratification in all instances but one. In 1991, the CRC was ratified despite the opposition of the province of Alberta, which was concerned about possible infringement on the rights of parents.⁵⁷ In January 1999, the Alberta government changed its position and consented to ratification of the CRC, based on a stated provincial understanding that the CRC will not limit parental responsibility.

Ratification decision

Ultimately a legal assessment respecting ratification is put together by federal officials for consideration by Cabinet.⁵⁸ This will include recommendations respecting any legislative amendments or additions that may be necessary in order to ensure that Canada's federal and provincial laws meet the terms of the treaty, contrasted against the option of reserving against various aspects of the treaty. It will also include a summary of any consultations that were done by government officials with outside interests. (Although outside consultations, such as with NGOs or affected individuals, are not routine, they are an increasing trend and were widely done with the CRC, for example.)

Canada has entered very few reservations to human rights treaties. There have been exceptions, notably the CRC, where two reservations were entered: one respecting art. 37(c) which requires children to be kept in separate detention facilities from adults, and another respecting art. 21 which provides that adoptions can only be authorized by competent authorities (thus threatening customary forms of adoption in the Aboriginal community). Interestingly, both of these reservations were lodged by the federal government in light of outside pressures: from the provinces respecting art. 37(c) and Aboriginal groups respecting art. 21.

Implementing legislation has also been rare in the context of human rights treaties in Canada. Only in the case of the CAT was a legislative change made, with the addition of an indictable offence of torture to the *Criminal Code*, to which was attached universal jurisdiction. Human rights treaties have generally been ratified on the basis that existing domestic legislation already meets the terms of the treaty, although the *Canadian Charter of Rights and Freedoms*, which was enacted in 1982, has been said by at least one commentator to constitute formal implementation of the ICCPR.⁵⁹

⁵⁷ The treaty was ratified on the basis of a federal government conclusion that there was no inconsistency between the Convention and Alberta law.

⁵⁸ Similar executive consideration may also take place at the provincial and territorial level.

⁵⁹ See Anne F. Bayefsky, "International Human Rights Law in Canadian Courts" in B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts*, (The Netherlands: Kluwer Law

The instrument of treaty ratification for Canada is nearly always signed by the Minister of Foreign Affairs. Once a treaty is ratified, any substantive participation of officials in DFAT in the human rights treaty process diminishes. While they continue to be involved in all matters relating to human rights treaties, the substantive work on post-ratification issues is mostly done by officials responsible for domestic policy making and legal advice in other federal Departments (notably Justice).

Post-ratification procedures

Review of proposed legislation for compliance

The Human Rights Law Section at the Department of Justice is in a position to review proposed federal legislation for compliance with human rights treaties once they are ratified. HRLS's role in this respect is assisted by its responsibility for reviewing legislation for compliance with (domestic) constitutional human rights obligations. Section 4.1 of the *Department of Justice Act*, R.S.C. 1985 c. J-2, obliges the Minister of Justice to evaluate proposed federal legislation for consistency with the *Canadian Charter of Rights and Freedoms* and to report any inconsistency to the House of Commons.⁶⁰ HRLS is intended, among other things, to provide the legislative review function that enables the Minister of Justice to meet this statutory commitment, advising within the federal government as to potential *Charter* problems, both at the policy-making stage and when legislation is being drafted.⁶¹ In their review of legislation for compliance with the *Charter*, counsel in the Human Rights Law Section can at the same time note potential inconsistencies with international human rights commitments, where these are different from *Charter* guarantees, and bring them to the attention of political decision-makers. (HRLS also gives advice respecting human rights issues,

International, 1997) pp. 295-328 at pp. 308-312.

⁶⁰ The Minister is responsible for reporting inconsistencies in both proposed laws and regulations. Regulations are independently scrutinized pursuant to s. 3 the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, which requires the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, to examine regulations to ensure that, among other things, they are not inconsistent with the *Charter*. Another form of domestic human rights review of regulations takes place after the regulations are published, in the Standing Joint (Parliamentary) Committee for the Scrutiny of Regulations. This Committee is analogous to the scrutiny committees in Australia, as described below. (The role of the Canadian Committee is described in the "Background Notes on Parliamentary Scrutiny of Regulations" prepared for members of the Standing Joint Committee for the Scrutiny of Regulations by François Bernier, Peter Bernhardt, and Jacques Rousseau, May 1989, revised June 1999). Among the responsibilities of the Standing Joint Committee is to consider whether regulations conform with the *Charter*. Another criterion of review is whether regulations "trespass unduly on rights and freedoms". While this could permit scrutiny of regulations on the basis of international human rights commitments, so far this has not occurred.

⁶¹ The drafters of legislation in the Department of Justice are also required to keep *Charter* issues in mind during the drafting process, and can bring them to the attention of policy-makers and/or the Human Rights Law Section. The internal review conducted by Justice lawyers under s. 4.1 of the *Department of Justice Act* is described in Janet L. Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Social Policy" (July 1999), 5:3 Choices at pp. 6-9.

both domestic and international, to federal litigators.⁶²⁾

Response to individual complaints

Counsel in HRLS also play a lead role in responding on behalf of the Canadian government to complaints that are lodged before the UN. Canada receives individual complaints under the First Optional Protocol to the ICCPR, the CAT and the *Inter-American Declaration on the Rights of Man*.⁶³ Complaints are received by DFAIT and forwarded to HRLS as well as any other federal government department, or provincial or territorial government, that may be implicated. Where the complaint is made against federal government action, HRLS drafts the reply communication, consulting closely with the affected government department and DFAIT. Where the complaint is against a province, officials in the provincial Ministry of the Attorney General may draft the reply communication, working together with HRLS.⁶⁴ Again, coordination with the provinces takes place by means of the contacts provided by the Continuing Committee of Officials on Human Rights.⁶⁵ Once the content of the government's communication is approved by all necessary parties,⁶⁶ DFAIT forwards it to the appropriate U.N. body.

Preparation of reports

⁶² Legal positions taken by the Attorney General in the Supreme Court of Canada must, before being sent for approval to the Deputy Attorney General and Attorney General, also must be approved by a committee of senior officials called the Litigation Committee. This Committee includes representation from managers responsible for the Human Rights Law Section.

⁶³ Like other countries, Canada is also subject to different, more generalized human rights complaints under the U.N. system, such as, for example, the concerns raised by Special Rapporteurs, or the "1503 procedures" of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities. Named after the Economic and Social Council resolution which gave it life, the "1503 procedure" is designed for dealing with communications "which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms," and is not an individual complaint mechanism.

⁶⁴ In this way the submissions of the province can be made to the U.N. "through the federal government". See for example *Ballantyne, Davidson, McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Human Rights Committee, in which the province of Quebec sought (unsuccessfully) to defend its "French-only" commercial language law. (The law was later modified.)

⁶⁵ In 1986, the Continuing Committee approved the "Guidelines for Responses in Respect of Communications Concerning Provincial Governments Pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights." (Similar procedures apply to communications received under all human rights treaties.) The guidelines require that communications involving a province be forwarded through DFAT to Justice and then to the relevant province "by the most expeditious means." Subsequent federal-provincial liaison and consultation is the responsibility of the Department of Justice and whatever provincial office is designated to handle the communication. These two offices are to develop a work plan with an agreed timetable. As described above, the province will draft the reply submission, working in close cooperation with Justice and any other relevant federal departments.

⁶⁶ Approval within the Department of Justice now requires passage through the internal Litigation Committee of officials described above in note 62. Making international complaints subject to the same internal processes as other high profile domestic litigation increases awareness among senior Justice officials as to Canada's participation in this form of "litigation".

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The Human Rights Directorate at Canadian Heritage assumes general responsibility for the preparation of Canada's compliance reports to the UN, including coordinating input from provincial and territorial governments. The substantive content of the reports is written by various departments, depending on the report. The Human Rights Law Section at Justice has overall responsibility for reports under the ICCPR and the CAT, and shared responsibility with Health Canada for the CRC. Canadian Heritage has the lead for reports under the CERD and the ICESCR and the Office of the Status of Women is responsible for the CEDAW report. The federal component of these reports is drafted by officials in the relevant department, consulting with colleagues in affected areas. NGOs are asked to provide written input to the report, which may either be included or forwarded separately to the U.N.; usually very little is provided. NGOs do not see draft reports. The Canadian Human Rights Commission is also invited to make submissions to Canada's reports, but does not often do so.

According to the "Modalities and Mechanisms" agreed to in 1975, each province and territory prepares and submits its own portion for inclusion in Canada's reports, which is inserted by Canadian Heritage unedited in the final version (creating a somewhat unwieldy report, with the federal review at the beginning, followed by twelve individual chapters for each province and territory). The provinces and territories bear the costs of their participation in this process. Canada's reports are not submitted to the U.N. until contributions have been received from all the provinces and territories, and internal deadlines are set accordingly.⁶⁷

Presentation of reports

Ultimately DFAIT files the reports with the UN. When the reports are presented orally, delegations are generally led by DFAIT, and contain representatives from the Department of Justice and other departments whose policies and programs are covered in the report. The provinces and territories are invited to send representatives (at their own expense), although provincial and territorial participation in human rights delegations to date has been slight outside Quebec. Once they are completed, reports are distributed inside and outside government and made available on the world wide web.

Human rights education⁶⁸

Training within government

The primary unit responsible for providing education within the federal government respecting Canada's international human rights commitments and their legal meaning is

⁶⁷ The practice of coordinating submissions from 14 jurisdictions can lead to long delays in report submission.

⁶⁸ See above at note 55 for an explanation of what is meant by "education" in this context.

⁶⁹ DFAT provides training on international human rights to foreign service officers as part of their

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the Human Rights Law Section of the Department of Justice.⁶⁹ There is no formalized process of education nor established training materials, but the Section conducts seminars on international human rights law for other federal government lawyers on a periodic basis, and occasionally also produces papers on international human rights treaty issues. More specifically, counsel from the Department of Justice working in the Department of Citizenship and Immigration Canada conduct training sessions for immigration officials on the requirements of the CAT (as well as other international treaties), specifically the manner in which international human rights commitments may constrain decisions leading to deportation.

Canadian Heritage has recently played a lead role respecting education of the provinces and territories on the compilation of compliance reports for the United Nations. In 1997, the Human Rights Directorate prepared a document entitled "Trainer's manual: Training workshop for the preparation of human rights reports," which was the basis of a series of seminars that were conducted with provincial and territorial officials by a private consultant hired by Canadian Heritage, in order to emphasize the requirements, benefits and need for accurate and up to date provincial and territorial reporting on human rights issues.

Public education

The Department of Canadian Heritage is responsible for public education on human rights issues. The Human Rights Directorate makes available copies of the *Canadian Charter of Rights and Freedoms*, an explanatory *Guide to the Charter*, as well as the *Universal Declaration* and the human rights treaties to which Canada is a party, and the final versions of Canada's compliance reports filed with the United Nations. This division also maintains a website at www.pch.gc.ca/ddp-hrd which has a heading entitled "Canada and the International Human Rights System." This contains a brief explanation of how Canada works with the U.N. (including a description of the Continuing Committee of Officials on Human Rights), copies of the six major human rights treaties ratified by Canada and Canada's most recent reports to the monitoring bodies, the "Core Document" which accompanies all Canada's reports to the U.N., and a Table of Concordance linking all the related provisions of the various ratified treaties together by subject-matter.

The website of the Human Rights, Humanitarian Affairs, International Women's Equality Division of the Department of Foreign Affairs (at www.dfait-maeci.gc.ca/human-rights) also plays a role in educating the public about international human rights issues, in that it contains links to a wide variety of U.N. documents and information, including an excellent resource provided by Human Rights Internet (with generous financial support from DFAIT) entitled "For the Record 1998: The United Nations Human Rights System". This resource can be found at www.hri.ca/fortherecord1998, and constitutes a summary of the human rights documentation produced, and activities undertaken, by the U.N. in

general training program, but DFAT courses are not offered to individuals in other departments.

1998. It is organized both thematically and by country (with each country heading providing a brief summary of the major U.N. treaties ratified by that country, and the status of its compliance reports). The electronic version contains links to all documents cited.

Australia

International human rights issues are handled primarily in Australia by both the Department of Foreign Affairs and Trade (DFAT) and the Attorney General's Department. Compared to Canada, there is greater Parliamentary involvement in international treaty issues, in light of the 1996 reforms discussed above. The Australian Human Rights and Equal Opportunity Commission also plays an interesting role.

As in Canada, DFAT is the department primarily responsible for the foreign policy aspect of human rights treaties. The key policy division in DFAT is the Human Rights and Indigenous Issues Section, supported on the legal side by the International Organisations and Legal Division (ILD). During the process of negotiation, signature and ratification of international instruments, DFAT works closely with whichever domestic department has line responsibility for the subject matter at issue. In the case of human rights, line responsibility falls to the Attorney General's Department. This department then has primary responsibility for the domestic aspects of treaty implementation.

In the Attorney General's Department there are two divisions responsible for international human rights issues. The first is the Human Rights Branch of the Civil Law Division and the second is the Office of International Law (OIL). The former is responsible for domestic human rights issues generally, while the latter handles issues relating to international law; officials in both sections therefore work closely when these two subjects meet in international human rights treaties.

Pre-ratification procedures

Review of domestic legislation

As in Canada, prior to human rights treaty ratification extensive review of federal and state legislation takes place. Federally, the process is formally initiated by DFAT, then undertaken by the relevant line area, usually in the Attorney-General's Department and often by the Human Rights Branch. There is no formal network of inter-departmental contacts for legislative review;⁷⁰ the process instead takes place on an informal but routine basis. Contact with the states and territories takes place by means of the Human Rights Working Group of the Standing Committee of Attorneys General; this group provides the names of those in the states to be contacted for the purposes of state and territorial legislative review. Consultations may in some cases also be

⁷⁰ Nor are counsel throughout government responsible to the Attorney General, as in Canada.

conducted with NGOs or other affected individuals prior to ratification.

Ratification decision

Ultimately, a legal assessment is put together by Commonwealth officials as to whether amendments or additions are necessary to Australian legislation prior to treaty ratification, or whether instead reservations are necessary. While Cabinet is kept informed throughout the treaty-making process, in most cases the ratification decision is made by the relevant Minister in consultation with the Prime Minister.⁷¹ State and territorial executives may also be informed by their officials.

While the more recent Australian practice has been to minimize reservations to human rights treaties, this has not historically been the case. When the ICCPR was ratified in 1980, it contained an extensive package of reservations and declarations that related almost exclusively to concerns expressed by the states and territories.⁷² (These RUDS were mostly withdrawn in 1984.⁷³)

In some cases Australia has ratified human rights treaties on the basis that domestic legislation is already in compliance with the treaty, and therefore no new laws are required; this was true of the ICESCR, for example.⁷⁴ In other cases, legislative action has been taken -- most significantly in the area of non-discrimination law. Ratification of the CERD led to the *Racial Discrimination Act 1975* (Cth), for example, and the CEDAW led to the *Sex Discrimination Act 1984* (Cth).⁷⁵

⁷¹ See Anne Twomey, "International Law and the Executive" in Opeskin and Rothwell eds., *International Law and Australian Federalism* (1997: Melbourne University Press, Victoria), pp. 79-103 at p. 81.

⁷² See Charlesworth, *supra* note 47 at p. 294.

⁷³ In 1984, the original federal reservation lodged by Australia to the ICCPR was replaced by a declaration (analogous to the understandings lodged by the US under the ICCPR, the CERD and the CAT) stating: "Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise." Australia has made a similar declaration under the CEDAW.

⁷⁴ This was also largely true of the CRC, although it was added as a schedule to the *Human Rights Commission Act, 1986*, as described below.

⁷⁵ The *Racial Discrimination Act* applies fully to state governments, whereas the *Sex Discrimination Act* is only partially applicable. Both acts also apply to the private sector. These pieces of legislation, along with the *Disability Discrimination Act, 1992* (Cth), are now administered by the Human Rights and Equal Opportunity Commission (HREOC). HREOC itself is a human rights treaty implementation tool, in that it resulted from ratification of the ICCPR. Ratification of the CAT was accompanied by legislation enabling the domestic prosecution of torturers, as well as regulations respecting application of the CAT in the context of extradition. See the *Crimes (Torture) Act, 1988* (Cth), which allows Australian citizens or persons present in Australia to be prosecuted for torture that took place elsewhere, if at the time it took place it would have constituted an offence in Australia. See also 1990 No. 269 *Extradition (Torture) Regulations*.

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Since 1996, as noted above, the federal Parliament and the state and territorial governments have been more formally involved in the treaty ratification process than previously. Although the new procedures have not been tested in the context of a human rights treaty, since all were ratified prior to 1996, they are worth describing nevertheless, since they may well have implications in the future (and have already been relevant to a review of the government's obligations under the CRC, discussed below). As described above, the 1996 reforms created a Parliamentary Standing Joint Committee on Treaties in the federal Parliament, which holds public hearings to consider the contents of a treaty proposed by the executive, once it has been tabled in Parliament with a "National Interest Analysis" (NIA), at least fifteen sitting days before ratification. Among other things, the NIA contains a summary of any reservations, understandings or declarations proposed for Australia's ratification. Although the government is free to disregard the Standing Committee's recommendations, Committee hearings are nevertheless an important point of public access to the ratification process.

Ultimately, the instrument of ratification for an international treaty is signed by the Minister of Foreign Affairs. As in Canada, once a treaty is ratified, officials in DFAT are not generally as substantively involved in the issues as they were prior to ratification. Instead, primary responsibility for international human rights issues transfers to a domestic department, *i.e.* the Attorney General's.

Post-ratification procedures

Review of proposed legislation for compliance

Australia has no formalized process of legislative review for compliance with domestic human rights obligations analogous to the statutory requirement to consider the *Charter of Rights and Freedoms* in Canada. Human rights issues -- both domestic and international -- are nevertheless raised by counsel in the Attorney General's Department at the policy-making stage, and advice is often given as to the consistency between a governmental initiative and Australia's domestic statutory human rights legislation and/or international treaty commitments. Legislative drafters also have a responsibility to ensure that proposed legislation does not unnecessarily impact on civil liberties, and, as happens in Canada, will ask for assistance from counsel in the Human Rights Branch at the Attorney General's, who can provide advice at the drafting stage respecting the risks of human rights violation. (Counsel in the Human Rights Branch also sometimes provide advice on human rights issues when they arise in the course of domestic litigation.)

Response to individual complaints

Since 1991, Australia has been subject to individual complaints under the ICCPR, pursuant to ratification of the first Optional Protocol. In 1993, Australia deposited declarations making itself additionally subject to complaints under the CERD and the CAT.⁷⁶

Once the complaints are received by DFAT, the government's responses are prepared by the Office of International Law in the Attorney General's Department, in consultation with other government departments as necessary. When the complaint is against the action of a state government, the state will work with the OIL in preparing Australia's response. (In the recent *Toonen* case, which involved a complaint against Tasmanian legislation, the Commonwealth government took a different position than the state of Tasmania, and simply incorporated into its submissions the contrary position of the Tasmanian government.⁷⁷) The list of officials from the Human Rights Working Group of the Standing Committee of Attorneys General provides the appropriate contact people within state or territorial governments for the purposes of responses to complaints.⁷⁸

Preparation of reports

As in Canada, Australia's reports to the U.N. are compiled by various different Departments. The Office of International Law handles the ICCPR, the CAT and the CRC; DFAT handles the ICESCR and the CERD; and the Office of the Status of Women within the Department of Prime Minister and Cabinet handles CEDAW. Whichever federal department is responsible for the report consults with other relevant federal departments, including the Human Rights and Equal Opportunity Commission, and also accumulates reporting information from the states and territories, working with officials in the Human Rights Working Group of the SCAG.⁷⁹ Although the Office of the

⁷⁶ Like Canada, Australia is also subject to other U.N. complaint processes, such as the 1503 procedure described above, *supra* note 52 and the issues raised by Special Rapporteurs.

⁷⁷ See *Nicholas Toonen and Australia*, *supra* note 42.

⁷⁸ There is a Cooperative Agreement regarding International Communications and Reports dating from 1995 that now governs Commonwealth-State-Territorial interaction on these issues within the SCAG. This document is not publicly available, but it apparently reiterates that meeting and implementing Australia's international human rights obligations is a co-operative endeavour between the Commonwealth and state and territorial governments. When international complaints are received that concern a state or territory, the Office of International Law in the federal Attorney General's Department is required according to the Agreement to notify the relevant jurisdiction within 72 hours of receiving the complaint. The state or territory is then requested to provide material relevant to the complaint, as well as their views on whether admissibility should be contested, and on the merits of the complaint. The Australian response is drafted by the OIL, clearing drafts with the relevant jurisdiction. In the event of an adverse view on the complaint from the ruling international body, the state or territory is expected to provide an appropriate remedy. (Since 1995 there have been no adverse views in complaints involving a state or territory.)

⁷⁹ "The production of Australia's reports requires extensive liaison and consultation. For example, over one hundred State and Territory agencies were consulted during the preparation of Australia's first

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Status of Women has provided financial support to the states and territories to assist them in the reporting process, this is unusual; generally states and territories are expected to assume the costs of their reporting obligations.

Traditionally, Australian reports have followed the standard recitation of articles in a convention, inserting relevant information beneath each article, starting with the Commonwealth government and then adding each of the states and territories under different headings. More recently, however, like some other countries, Australia has started to write thematic reports, condensing and summarizing information relating to several different articles of a convention under one sub-heading. Under this approach, information provided by state and territorial officials is included in the thematic summaries prepared by Commonwealth government officials. Before being submitted to the UN, reports are circulated for comment to all the states and territories in draft form, and are also increasingly being shown in draft to interested NGOs, with the caveat that NGOs are told they should not expect to have any influence over the contents of the final report. Once completed, reports are distributed both inside and outside government, made available on the web and also now tabled in Parliament.

Presentation of reports

Reports are submitted by DFAT to the UN. Australian delegations involved in the oral presentation of the report are not necessarily from DFAT, and are just as likely to be run out of the Attorney General's Department or the Office of the Status of Women. Officials from other relevant federal departments may also attend. State and territorial governments are invited to participate, at their own expense. (A state representative was included in the 1997 delegation that presented the CRC report.)

report under the *Convention on the Rights of the Child*." See *Human Rights Protection in Australia*, A Report prepared for the Australian Human Rights Centre, March 1998, by Sarah Pritchard and Catherine Mogg, at p. 104. As in the Canadian case, such extensive consultation leads to delays in the submission of Australian reports. Cooperation with the states and territories on report preparation has been governed, since 1995, by the Cooperative Agreement regarding International Communications and Reports referred to *supra* note 78.

Scrutiny of Bills Committees

Three other post-ratification mechanisms of implementation in Australia deserve comment. The first is the effect of Scrutiny of Bills Committees of Parliament, which exist at the Commonwealth level, in the Australian Capital Territory and in the states of Victoria and Queensland.⁸⁰ These committees scrutinize and make comments on legislation once it has been introduced by Parliament. Among other things, the Committees scrutinize bills as to whether they unduly interfere with rights or freedoms. While the definition of "rights or freedoms" in this context is generally narrowly applied (referring primarily to the common law rights in the criminal process), international human rights concerns nevertheless do sometimes play a role.⁸¹ Parliament is always free to disregard the comments of the Scrutiny Committee, which are publicized in formal reports to Parliament, but they do at least provide a forum in which international human rights concerns can be raised at the time new legislation is proposed. (These Committees also partially help to fill the gap created in Australia by the absence of a domestic bill of rights.⁸²)

Joint Standing Committee on Treaties

The Parliamentary Joint Standing Committee on Treaties has already been referred to above, as part of the 1996 treaty-making reforms. Although this Committee has not yet had a chance to play a "pre-ratification" role in the context of a human rights treaty, since all were ratified before its creation, it has nevertheless assumed for itself a surprisingly important "post-ratification" role with respect to the *Convention on the Rights of the Child*, and could, on similar grounds (one presumes), play a similar role with respect to other human rights treaties. In the case of the CRC, the Committee engaged in an extensive review of this Convention in 1997, soon after the Committee's creation. It conducted public hearings in all states and territories with 270 witnesses. Eventually, the Committee prepared a lengthy report containing 49 recommendations, including among other things the development of a coordinated mechanism for ongoing monitoring of CRC implementation. The government has not yet responded to the Committee's report.

⁸⁰ The Senate Standing Committee for the Scrutiny of Bills at the Commonwealth level was established in 1981. The Senate Standing Committee on Regulations and Ordinances provides similar scrutiny of delegated or subordinate legislation. In 1992, Victoria established a Scrutiny of Acts and Regulations Committee and in 1995, Queensland set up the Scrutiny of Legislation Committee and the Australian Capital Territory established the Standing Committee on Scrutiny of Bills and Subordinate Legislation.

⁸¹ See Janet L. Hiebert, "A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny" (1998), 26:1 Fed. L. Rev. 115 at 131-137, where the author describes the role of the Commonwealth Scrutiny of Bills Committee in raising international human rights law concerns during a controversial Parliamentary debate over immigration legislation in 1996.

⁸² At the federal level, Canada has one parallel in the Standing Joint Committee for the Scrutiny of Regulations, which is described above at note 60.

Human Rights and Equal Opportunity Commission

Finally, while both Canada and the United States have federal human/civil rights commissions, the Human Rights and Equal Opportunity Commission in Australia is unique in that it results directly from the country's ratification of international human rights instruments. The original Human Rights Commission was created in 1981 in response to Australia's ratification of the ICCPR and the current Commission exists pursuant to the *Human Rights and Equal Opportunity Commission Act, 1986* (Cth).⁸³ One of its original roles was to receive and investigate human rights complaints against "acts or practices" (*i.e.* not laws) of federal agencies, based on the terms of international human rights instruments appended to the Act. The first instrument was the ICCPR; HREOC now accepts human rights complaints under seven international instruments, including the CRC as well as the ICCPR.⁸⁴ In the event of non-conciliation of the complaints, HREOC has authority only to make recommendations to the Attorney General, which, although they are tabled in Parliament, may or may not be acted upon.⁸⁵

Generally HREOC acts as a national advocate on human rights issues. Specifically included among the Commission's functions relating to "human rights" (which are defined by reference to the appended international instruments) are: "to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister;" and "to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument" (s. 11).

Human rights education

⁸³ HREOC is comprised of a President and six Commissioners responsible for the following subject areas: human rights, disability discrimination, race discrimination, Aboriginal and Torres Strait Islander social justice, sex discrimination and privacy. Aside from the *HREOC Act*, HREOC also administers the *Racial Discrimination Act, 1975* (Cth), the *Sex Discrimination Act, 1984* (Cth), and the *Disability Discrimination Act, 1992* (Cth). It is involved in the administration of the *Privacy Act 1988* by the Privacy Commissioner and certain functions performed by the Aboriginal and Torres Strait Islander Social Justice Commissioner under the *Native Title Act, 1993* and the Sex Discrimination Commissioner under the *Workplace Relations Act, 1996*.

⁸⁴ Currently included as schedules to the Act are the following seven international instruments: the ICCPR, the International Labour Organisation Discrimination (Employment and Occupation) Convention ILO 111, the CRC, the Declaration of the Rights of the Child, the Declaration on the Rights of Disabled Persons, the Declaration on the Rights of Mentally Retarded Persons, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. "Human rights" under the Act are defined by reference to these instruments.

⁸⁵ HREOC's remedial authority under the various anti-discrimination laws it administers is much more generous, in that determinations can be enforced through the federal court system.

Training within government

Within government, education on international human rights matters is done principally by DFAT. In 1998, to honour the 50th anniversary of the *Universal Declaration of Human Rights*, the Department reproduced the "Human Rights Manual" which provides a detailed summary of the international human rights system -- its history, principles and relevant instruments. The interaction between ratified treaties and domestic law in Australia is briefly summarized. This Manual was designed primarily for the purpose of training government officials in DFAT and the Australian International Development and Assistance Bureau, and is the basis for a training course offered to these individuals annually. Systematic training on international human rights issues for officials outside of these two governments is not undertaken at the federal, state or territorial levels. The Department of Immigration and Multicultural Affairs has, however, upon request had training provided by the Attorney General's Department on international human rights instruments, specifically Australia's non-refoulement obligations under the CAT and the ICCPR.

Public education

Copies of the international human rights treaties to which Australia is a party are publicly available through DFAT, as are Australia's compliance reports to the U.N. Additionally, the Australian government maintains a variety of websites relevant to international human rights treaty issues. DFAT maintains the extensive "Australian Treaties Library" at www.austlii.edu.au/au/other/dfat/, which results from the 1996 treaty-making reforms. This site provides access to the text of all treaties to which Australia is a party (including human rights treaties), as well as to a variety of other relevant items such as "National Interest Analyses" of treaties currently being considered for ratification, and recent human rights compliance reports to the U.N. One interesting resource, among many others, is the "Australia and International Treaty Making Information Kit," which contains a detailed explanation of the treaty-making process, as well as a summary of all treaties to which Australia is a party and copies of other relevant government statements and documents.

The Human Rights and Indigenous Issues Section at DFAT has a website specifically devoted to human rights and indigenous issues at www.dfat.gov.au/hr/. This site contains an electronic version of the Human Rights Manual referred to above, as well as Australia's most recent U.N. reports, and other relevant foreign policy statements on human rights. In addition, access is provided to Australia's "National Action Plans" on human rights. The proposal for National Actions Plans arises out of an Australian initiative at the 1993 World Conference on Human Rights, and was applied in Australia in 1994, with updates in 1995 and 1996-1997. The aim of the Plan is to pull together Australian human rights policy in a wide variety of areas (civil, political, economic, social and cultural) and establish goals for future government action to promote international human rights treaty observance and implementation. Work on another National Action Plan update is currently being undertaken by DFAT.

One of the most comprehensive public education documents on international human rights issues and Australia is available through the HREOC website at www.hreoc.gov.au, and is entitled "Human Rights Explained". This document was prepared in part with a \$30,000 grant from the Attorney General's Department in honour of the 50th anniversary of the Universal Declaration. It provides a comprehensive summary of international human rights generally (attempting to answer such questions as "what are human rights?" and "are they universal?" as well as summarizing international instruments and processes), and then situates Australia in the international context of rights-protection, in an interesting chapter entitled "Human Rights in Australia." This chapter summarizes what and how human rights are protected in Australia, and also includes a section entitled "the good, the bad and the ugly" which reviews Australia's human rights record. "Human Rights Explained" provides a very detailed set of hyperlinks to other relevant government, NGO and private websites on international human rights issues, as well as a comprehensive list of (non-electronic) bibliographic sources.

United States

Traditionally, matters relating to international human rights have been handled almost entirely in the U.S. by the State Department. The Bureau of Democracy, Human Rights and Labor,⁸⁶ headed by an Assistant Secretary of State, is generally responsible for formulating U.S. human rights foreign policy, and therefore plays a role in U.S. negotiation and ratification of human rights instruments. On the legal side, the key actor is the Assistant Legal Adviser for Human Rights and Refugees (L/HRR). This office seems to have had lead responsibility on most aspects of the ratification and implementation of the three international human rights treaties acceded to by the United States to date.⁸⁷

Outside of State, the other key player has been the Immigration and Naturalization Service at the Department of Justice (INS), which has taken a lead role respecting implementation of the CAT, as described below.

Given the Executive Order issued in December 1998, and the establishment of the Interagency Working Group on Human Rights Treaties ("the IAWG"), international human rights processes within the U.S. government are currently in a period of transition. Other government agencies now have an increased formal role to play in domestic implementation. The two most important of these, alongside the State Department, are the National Security Council (NSC) and the Department of Justice (DOJ).

⁸⁶ This office encompasses the former Bureau of Human Rights and Humanitarian Affairs.

⁸⁷ The Assistant Legal Adviser at the State Department has also to date had the lead respecting the CEDAW. In 1994, the Senate Committee on Foreign Relations recommended Senate consent to the CEDAW, together with a package of RUDs. The Senate has not yet acted on this Convention.

*Pre-ratification procedures**Review of domestic legislation and ratification decision*

In the three cases where human rights treaties have been ratified by the U.S. to date, the submissions for the Senate from the Administration were prepared by the Office of the Assistant Legal Adviser for Human Rights and Refugees at the State Department, after an extensive inter-agency review of domestic legislation, as well as consultations with outside interests such as NGOs. Counsel throughout the various federal agencies were contacted by the Assistant Legal Adviser's Office, and asked to review the impact of the proposed treaty in the areas of domestic legislation for which there were responsible. DOJ was among those departments contacted, and in some instances it played a critical role respecting domestic legislative review.

Ultimately, the Legal Adviser in each case prepared for the Administration an extensive set of reservations, understandings and declarations to be attached to the treaty when ratified, in order to ensure consistency with U.S. law. Although state governors, attorneys general and bar associations were sent copies of the treaties being proposed for ratification, as well as the Administration submissions to the Senate, no input was received from the states, and therefore no formal review of state legislation was conducted prior to ratification.⁸⁸

In each case, the Senate accepted the package of RUDs proposed by the Administration without change.⁸⁹ Having obtained the assent of the Senate, the President was in a position to ratify the treaty in question for the United States, including the RUDs accepted by the Senate. In all three cases, human rights treaties have been declared by the Senate to be "non-self-executing", as described above.

In the case of the ICCPR and the CERD, no additional implementing legislation has been passed by Congress, on the basis that existing U.S. legislation, combined with the RUDs, already meets – and therefore implements – the terms of the treaties. Significant implementing legislation has been introduced under the CAT, however. In November 1994, Congress created a new federal offense for acts of torture committed outside the U.S. where the offender is a U.S. citizen or a foreign national who is subsequently found on United States territory.⁹⁰ In October 1998, Congress

⁸⁸ In the case of the ICCPR at least, state attorneys general were also again informed of U.S. ratification after the fact, and asked to review state laws for conformity. See John Shattuck, "Works in Progress: Human Rights and Domestic Law After the Cold War" (1995), 9 Emory Int'l L. Rev. 377 at 385.

⁸⁹ For the Senate Committee on Foreign Relations Report on the CAT endorsing the RUDs proposed by the Administration, see S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 1 (1990); for the ICCPR Report, see S. Exec. Rep. No. 23, 102d Cong., 2d sess. 2 (1992), reprinted in 31 I.L.M. 645 (1992); for the CERD Report, see S. Exec. Rep. 29, 103d Cong., 2d Sess. 21-24 (1994).

⁹⁰ A new chapter was added to Title 18 of the U.S. Code; see 18 U.S.C. 2340-2340B. See also the 1992 *Torture Victim Protection Act*, 28 U.S.C. 1350, which provides a federal cause of action for torture victims.

additionally enacted legislation to implement the CAT's prohibition on returning persons to places where they will likely face torture; the INS promulgated regulations under this legislation in 1999.⁹¹

When new treaties are considered for ratification by the US, it is likely now that the IAWG will be involved.⁹² This may provide a formal means of coordinating legislative review prior to treaty ratification, consulting with outside interests (including possibly the states), and advising whether RUDs are necessary, or whether legislative amendment or additions may be possible instead.

Post-ratification procedures

Review of proposed legislation for compliance

Currently, there is no process for reviewing new federal legislation for consistency with the terms of ratified human rights treaties. Both the Office of Legal Counsel at DOJ (OLC) and the Assistant Legal Adviser for Human Rights and Refugees in the State Department have a role to play in determining the domestic legal effect of a ratified human rights treaty. Both would also be consulted in the cases where specific litigation raised such interpretative issues or where a domestic law or proposed legislation was controversial precisely on the point. As a routine matter, however, no consideration is given in the executive policy-making process to international human rights commitments. The same is true of legislation that originates in Congress; while it must pass through the Office of Legislative Counsel in either the House or the Senate, these offices do not play a substantive role in reviewing legislative proposals for anything other than constitutionality.

Response to individual complaints

As the U.S. has not ratified the Optional Protocol to the ICCPR, nor accepted the jurisdictions of the Committees under the CERD or the CAT to rule on specific complaints, there is no formal process within the government for preparing the responses to U.N. complaints. The United States is subject, however, like Canada, to complaints under the *Inter-American Declaration on the Rights of Man*.⁹³ In such cases, the petitions or requests for information have been handled by various divisions of the Legal Adviser's Office at the State Department, depending on the subject matter and area of the complaint. Consultation has taken place with officials at Justice and elsewhere in the federal government on an ad hoc basis as necessary, and also in

⁹¹ See *Omnibus Appropriations Bill*, H.R. 4328, P.L. 105-277, Sec. 2242, 144 Cong. Rec. H11044-03, at H11265 and *Regulations Concerning the Convention Against Torture*, Fed. Reg. Vol. 64, No. 33, February 19, 1999.

⁹² The IAWG had its first meeting in January 1999.

⁹³ Like Canada and Australia, the United States is also the subject of "1503 procedures" submitted to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, described *supra* note 63, and the comments and concerns raised by Special Rapporteurs.

some cases with state officials.

Preparation of reports

To date the U.S. has filed only one compliance report with the UN, the initial submission under the ICCPR which was filed in 1994. This report was prepared by the Assistant Legal Adviser for Human Rights and Refugees at the State Department, consulting broadly with officials elsewhere in the federal government, and to a certain degree with NGOs. No consultation took place with the states when the report was being prepared. Once completed, the ICCPR report was distributed to members of Congress and to the states, as well as made publicly available in libraries and over the internet.

Compliance reports continue to be written by the Assistant Legal Adviser for Human Rights and Refugees at the State Department,⁹⁴ who now has at his or her disposal a more formal way in which to consult with and receive the cooperation of officials working in other federal agencies, through the mechanism of the IAWG. There is still no consultation with officials in state governments, although this may change in the future. Currently, letters from NGOs are accepted and considered, although there is insufficient staff for formal face-to-face meetings with the NGO community respecting U.S. reports, nor are the reports shown to NGO representatives in draft form.

Presentation of reports

The first report was presented orally to the U.N. by a delegation headed by five Assistant Secretaries from three U.S. departments: DOJ, the State Department and the Department of the Interior. The report's presentation was coordinated by the office of the Assistant Legal Adviser for Human Rights and Refugees in the State Department. No state representatives attended the presentation.

Human rights education

Training with government

Training has been conducted within the INS respecting the U.S. obligation under the CAT not to return aliens to places where they will likely face torture; since 1999, administrative procedures implementing this obligation have been formalized by way of regulation. To date, no organized training has been conducted within the U.S. government with respect to the ICCPR or the CERD.

Public education

⁹⁴ The first U.S. reports under both the CAT and the CERD, and the second ICCPR report, are currently in the process of preparation, with the CAT report due for imminent release.

Copies of the first U.S. report to the U.N. under the ICCPR are available to the public through the State Department, and the report is also available on line at <http://dosfan.lib.uic.edu/ERC/law/Covenant94/index.html>, through the Electronic Research Collection of the Department of State Foreign Affairs Network (although it is identified as the 1994 Covenant itself, rather than the government's report). No federal Department appears to provide general information about international human rights law, the treaties ratified by the U.S., or Executive Order 13107. The State Department has a great deal of excellent information about human rights in other countries, provided in the Country Reports on Human Rights Practices, but nothing on human rights within the U.S. While the human rights site at the State Department provides a link to the Universal Declaration of Rights alongside the U.S. Constitution and Bill of Rights, it does not cross-reference human rights treaties ratified by the U.S., nor is there any information about the Executive Order.

The only place where the Executive Order and international human rights treaties ratified by the U.S. are identified in a government site appears to be in the human rights page of the U.S. Information Agency website at www.usia.gov/topical/rights/hrpage/.⁹⁵ This site provides cross-references to the three ratified treaties (although it does not explain why they are listed), as well as the Executive Order and the first U.S. report under the ICCPR.

PART II: OPTIONS FOR CONSIDERATION IN THE UNITED STATES, IN LIGHT OF EXECUTIVE ORDER 13107

What follows is a list of ideas for governmental structures that the Lawyers Committee for Human Rights may wish to consider recommending for use in the United States in order to meet some of the requirements of the Executive Order. In some instances, the structures proposed are based on models in place in Canada and Australia; where this is so it is indicated.

OPTION I – THE ESTABLISHMENT OF A FEDERAL-STATE NETWORK ON INTERNATIONAL HUMAN RIGHTS TREATIES

Section 4(c)(v) of the Executive Order obliges the newly-created IAWG to develop “recommended proposals and mechanisms for improving the monitoring of the actions of the various States, Commonwealths, and territories of the United States.... including the review of State, Commonwealth, and territorial laws for their conformity with relevant treaties, the provision of relevant information for reports and other monitoring purposes, and the promotion of effective remedial mechanisms.”⁹⁶

⁹⁵ Note that the principal role of this agency is to provide information about the United States to foreigners, not to U.S. citizens (although both groups can of course get the same access to the information over the internet).

⁹⁶ Although this paragraph of the order also refers to Native Americans and Federally recognized Indian tribes, these will not be discussed in this paper. The manner in which federal governments treat

Both Canada and Australia are interesting models for the United States on this point. Canada, with its unusual constitutional structure, has been forced to set up mechanisms for federal-provincial consultation respecting treaty ratification and implementation, for without provincial cooperation Canada is powerless to implement treaties in areas of provincial jurisdiction. While no such formal power-sharing is required in Australia, given federal authority to implement treaties within areas of traditional state concern, mechanisms for federal cooperation with the states and territories have nevertheless been developed. Although such mechanisms do not guarantee a uniformity of perspectives when it come to human rights treaty issues (nor can they of course guarantee any particular outcome), they nevertheless serve an important information-exchange and coordination role, and can provide a forum for consensus-building.⁹⁷

In light of the experience in these two other countries, an option that is worth considering in the U.S. is the establishment of a Federal-State Network on International Human Rights Treaties.⁹⁸ This Network could function as the main forum for communication, consultation, and information-sharing on international human rights issues within the U.S. by the federal and state governments, in the manner described below.

Of course the practice of consultation and cooperation is substantially easier in a country with 6 states and 3 territories such as Australia, or 10 provinces and 3 territories as in Canada, than it will be in a country such as the United States, with 50 states and numerous territories and Commonwealths. Nevertheless, it cannot be impossible to consult and cooperate with sub-units even in the U.S., provided, of

their Aboriginal populations with respect to international obligations is an important and difficult subject in its own right, but beyond the scope of this paper. (It is possible that mechanisms developed for federal-state consultation might also one day be used in the Aboriginal context.)

⁹⁷ It should be noted, of course, that there is a potential downside to state participation in international treaty-making, which is that it may slow down – or even limit – the process. The more actors involved, the more difficult it may be to obtain consensus.

⁹⁸ This Network would be intended to cover the Commonwealths and territories of the U.S., as well as its states. Reference is made to "states" alone for the sake of convenience, and is not meant to be exclusive.

⁹⁹ In this respect, an example of federal-state consultation and information-exchange already apparently exists in the trade area. This issue is briefly discussed by Eschrat Rahimi-Laridjani, Junior Fellow, Center for International Studies, New York University School of Law, in his paper entitled "The Instance of Trade and Commerce Regimes," prepared for the Conference on Delegating Sovereignty: Constitutional and Legal Implication of U.S. Participation in Treaty Regimes (1999). Rahimi-Laridjani writes at pp. 22-23: "[The Uruguay Round Agreements Act, 19 U.S.C. para. 3512 (b)(1)(A) and (B)] requires the President to consult with the states to achieve conformity of State laws and practices with UR Agreements. It also establishes a federal-state consultation process in which the Trade Representative (USTR) continuously communicates with the states regarding issues arising under the UR Agreements that impact states' rights. The aim of these consultations is to achieve the greatest possible degree of voluntary state compliance." States are apparently also involved in dispute settlement proceedings implicating a state law, and with the USTR in formulation of the U.S. response, although the "

course, that sufficient political will exists on all sides to do so.⁹⁹

The Network

The Federal-State Network on International Human Rights Treaties could begin as a list of names, compiled by the federal government, of individuals in each of the states, Commonwealths and territories in the United States who would act as contacts on international human rights issues. For reasons that will become obvious below, DOJ is probably in the best position to compile this list.

While much of the work of the Federal-State Network could take place by way of paper-exchange, it would seem advisable to at least start the process by way of conference. An appropriate place to begin might be after the next conference of the National Association of Attorneys General, for that would ensure a suitable gathering of state legal officials. The federal Attorney General could propose an additional day (or half-day) conference tacked on to the end of the NAAG meeting, to discuss international human rights issues. This conference could be relatively open in its agenda: it would introduce the idea of a Federal-State Network, and provide information on international treaties currently ratified by the U.S., as well as on outstanding treaties. States could be encouraged to express their views on, and begin to participate in, the treaty implementation process.

Ultimately, a Federal-State Network would have to have a guiding set of practices and procedures (a "mandate" as is the case with the Canadian Continuing Committee of Officials on Human Rights, for example¹⁰⁰). This would provide a structure within which federal-state cooperation could develop, with all parties understanding the ground rules.

Issues that could be addressed would include:

- the role of the Federal-State Network (to provide for information-exchange, consultation and cooperation between the federal government and the states on international human rights issues, with genuine state participation)
- the practical workings of the Federal-State Network (it would be financially onerous

United States does reserve the right to bring a domestic judicial action against a state for the purpose of declaring a state law or its application invalid on the grounds that it is inconsistent with the UR Agreements" (at p. 23). At pp. 37-38 Rahimi-Laridjani discusses a similar consultative regime established with the states under the NAFTA.

¹⁰⁰ The mandate of the Canadian Continuing Committee of Officials on Human Rights indicates that the Committee "maintains consultation and collaboration among governments in Canada with respect to the domestic implementation of international human rights instruments." In particular, "[w]hile respecting the autonomy of each jurisdiction," the Continuing Committee encourages information-exchange among governments respecting interpretation and implementation of human rights treaties; facilitates the preparation of reports; provides views with respect to Canada's position on international human rights issues; encourages research in the field; and participates in the preparation and follow-up of ministerial meetings on human rights (which have not in fact taken place since 1988).

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and likely unworkable to suggest that officials meet twice or three times a year as in Canada or Australia; a meeting once a year, instead, would seem advisable, with the rest of the interaction taking place by way of paper and/or bilateral federal-state or federal meetings where necessary)

- the role of the states in reviewing state legislation prior to treaty ratification, and in proposing RUDs to be made at the time of ratification by the federal government
- the role of the states in responding to international complaints when they concern actions or laws of a state government
- the role of the states in submitting information for U.S. reports (it would obviously be impossible to submit a report with 50 plus chapters to address each of the states and territories individually, as is done in Canada, or to include their submissions article by article, as in Australia, but still a portion of the report could surely be devoted to "state concerns"; alternatively states could be asked to comment on portions of the federal draft)
- the responsibility of the states to review proposed legislation for compliance with international human rights obligations
- the role of states in international negotiation delegations on human rights issues (including sub-units in country delegations at the time of negotiation has proven to be useful in both Canada and Australia as a means of educating them as to how international commitments are developed)
- the possibility of sending officials in interested states to view a meeting of the Human Rights Committee, the Human Rights Commission, or the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, for example, in order to better understand the international process.

One member of the IAWG could also be a member of the Federal-State Network, and could serve as the main point of contact between the two bodies. Staff in this person's office could also act as a permanent secretariat to the Network, planing the agendas, distributing all relevant materials, keeping an ongoing list of members etc. Given that the Network will be based on legal contacts in the states, the most appropriate place to locate a federal secretariat would seem to be in the federal Department of Justice, as discussed below.

OPTION II – THE CREATION OF AN OFFICE OF INTERNATIONAL HUMAN RIGHTS IN THE UNITED STATES DEPARTMENT OF JUSTICE

The U.S. Department of Justice (DOJ) is the federal government's central agency for enforcing domestic human rights laws. Generally, the implementation of an international treaty is a domestic issue, handled by whichever domestic department has responsibility for the subject-matter of the treaty (*i.e.* international agreements respecting aviation are implemented by the FAA, international agreements respecting telecommunications are handled by the FCC, *etc.*). It therefore makes sense that an international agreement respecting human rights would be implemented in large part by the federal department most clearly responsible for human rights protection at the domestic level: the Department of Justice.

In both Canada and Australia, the Department of the Attorney General takes the lead when it comes to the domestic side of human rights treaty implementation. Similarly, in the U.S., DOJ could play a lead role in the following areas, cooperating with the State Department, the IAWG, and other affected agencies where appropriate:

Review of federal legislation prior to treaty ratification, in order to determine the extent of consistency between U.S. laws and the terms of a treaty. This is an area where DOJ has already been involved, but where the Assistant Legal Adviser for Human Rights and Refugees at the State Department has to date played the major coordinating role. Legislative review prior to ratification is essentially a domestic function, and therefore although the State Department will inevitably have to be closely involved since the matter concerns ratification of an international document, the government's lead domestic legal agency should also have a high profile in the process.

Review of proposed legislation for consistency with international human rights obligations. Section 4(c)(iv) of the Executive Order obliges the IAWG to develop "effective mechanisms to ensure that legislation proposed by the Administration is reviewed for conformity with international human rights obligations and that these obligations are taken into account in reviewing legislation under consideration by the Congress as well". The most obvious place for such "mechanisms" to be located would seem to be in the Department of Justice, given its responsibility for the legality of domestic legislation generally. (Currently the Office of Legal Counsel at DOJ provides a analogous legislative review function with respect to constitutional issues.)

Coordination and consultation with the states on international human rights issues. As indicated above, an obvious forum for consultation with the states on international human rights issues would seem to be through the offices of Attorneys General, since they are they lead domestic government lawyers at all levels. Representative of the federal Attorney General are thus well placed to play the federal leadership role.¹⁰¹

Enforcement of international human rights. This is a tricky issue in that all of the ratified human rights treaties have been declared non-self-executing and therefore do not create any enforceable rights domestically. Implementing legislation has been introduced under the CAT, however, to allow for the prosecution in the US of foreign nationals who may have committed torture elsewhere, and the enforcement of this piece of legislation falls to DOJ. Also, DOJ is the Department responsible for the enforcement of civil rights legislation in the U.S., which is one of the major ways in which the U.S. ensures that at the same time it can meet its international human rights commitments; to this extent DOJ is actually already in the business of enforcing international human rights treaties.

¹⁰¹ Already the Department of Justice coordinates inter-governmental activity out of the Office of Intergovernmental Affairs. This office would likely be of assistance in establishing a Federal-State Network on International Human Rights Treaties.

Responses to international complaints. The response to human rights complaints before international bodies generally involves a defence of the respondent country's domestic legal system with respect to rights protection. Often a detailed explanation of this system is required, as is an explanation of the exhaustion of domestic remedies. As the government's chief expert on these sorts of issues, DOJ should be integrally and consistently involved in preparing responses to international human rights complaints.

Preparation of compliance reports to the United Nations. One of the chief purposes of compliance reports to the U.N. is to provide a summary of the domestic policy and legal system of rights-protection, as measured against the requirements of the relevant international treaty system. Again, given its expertise respecting domestic legal issues – particularly those raised by the three treaties to which the U.S. is a party – DOJ has a crucial role to play in formulating the government's reports. Whether or not the State Department continues to manage the reporting process, a solid and formal link to DOJ needs to be maintained. (More is said on the reporting process below.)

Training and education on international human rights within government. A training and education program on international human for counsel throughout the federal government system is desirable, given treaty ratification. As the government's lead domestic legal agency, this training program would seem most appropriately to come out of DOJ, in the context of its ongoing responsibility for domestic legal education. (More is said on internal training and education below.)

The Office of International Human Rights

All of these Justice-related responsibilities suggest that it would be advisable to create a new, permanent (i.e. non-political) office in DOJ responsible for international human rights issues. This office could be located among the Legal and Policy Offices of the Department, or, given its subject matter, could be created as a section within the Civil Rights Division. In either position, it could serve as the key DOJ connection on international human rights issues.¹⁰²

Ideally, the Office of International Human Rights would be staffed by several people, who could be responsible for some or all of the following:

- coordinating the review of (federal) domestic legislation prior to treaty ratification, working in close cooperation with the other members of the IAWG (especially State)
- ensuring that some process exists within DOJ for the review of proposed legislation for compliance with international human rights commitments, most likely by working with the Office of Legal Counsel (both to enable the review of bills proposed by the Administration, and to ensure that international human rights considerations are included, where necessary, in any documentation prepared by the Office of Legislative Affairs as to the Executive's reaction to legislation proposed in Congress)
- managing the establishment and continuation of the Federal-State Network on International Human Rights Issues, as described above, by providing the secretariat for this Network (organizing meetings, drafting agendas etc.) and being its main federal member
- ensuring the proper flow of information between the federal government (the IAWG) and the states (the Network) on international human rights issues
- working with the Civil Rights Division and the INS to ensure that international human rights commitments are properly enforced by means of domestic legislation
- working with the Solicitor General and other litigators together with the Office of Legal Counsel, the Legal Adviser in the State Department and the members of the IAWG in developing the federal government's position in litigation raising international human rights issues¹⁰³
- working with the State Department and any other affected federal and/or state agencies on the U.S. government response to international complaints
- working with the State Department to supervise the organization of, and draft, U.S.

¹⁰² The only "international" office in DOJ to date is the Office of International Affairs, located within the Criminal Division, which deals with such matters such as extradition and mutual legal assistance.

¹⁰³ A good example is the case of *Domingues v. Nevada*, 119 S. Ct. 2044 (1999), currently on petition for *certiorari* before the U.S. Supreme Court. This case involves a challenge to the Nevada law that permits the death penalty to be imposed on minors. Michael Domingues, who was 16 when he committed the murders for which he is sentenced, challenges the law on the basis that it is inconsistent with the ICCPR, customary international law and *jus cogens*. With respect to the ICCPR, he argues that the U.S. reservation respecting the imposition of capital punishment is inconsistent with the object and purpose of the treaty, and therefore invalid. The Supreme Court has invited the Solicitor General to file a brief in the case "expressing the views of the United States." An Office of International Human Rights could assist in coordinating the government's position.

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compliance reports for the U.N., with broad federal and state input

- developing a legal position paper (in cooperation with the other members of the IAWG, in particular the State Department) on the nature of U.S. human rights treaty commitments, and their domestic consequences (more is said on this below)
- developing a program for education and training of counsel throughout the federal government on international human rights commitments
- coordinating the cataloguing of international human rights treaty provisions agency-by-agency within the federal government in order that counsel and officials throughout the federal system may understand these commitments, and perform their functions in a manner that respects them (more is said on this below)

OPTION III - THE ESTABLISHMENT OF A PERMANENT SECRETARIAT FOR THE INTERAGENCY WORKING GROUP ON HUMAN RIGHTS TREATIES

In order to ensure its long-term viability and impact, the Interagency Working Group would benefit from a permanent secretariat. This need not be an elaborate enterprise; at a minimum all that is required is a designated administrative support person and a filing cabinet -- both of which likely already exist. The point would be to keep an archival record of the IAWG's activities, as a means of assisting its focus and continuation, despite inevitably changing membership (as well as inevitably changing Administrations).

For the reasons given above, such a secretariat might properly be located in the new Office of International Human Rights in the Department of Justice -- representing a domestic and non-political focus. Given the role of the National Security Council as lead agency in the IAWG, however, a secretariat in this agency seems more likely (and to a certain extent already undoubtedly exists).

(The Domestic Policy Council is another place where perhaps a secretariat to the IAWG could be created. Accepting that the IAWG should continue to be directed out of the White House, moving its leadership from the NSC to the DPC would be consistent with a focus on international human rights implementation in the U.S. being essentially a domestic issue. However, a move to the DPC, as to DOJ, would appear to involve a shift away from the specific terms of the Executive Order.)

Wherever the permanent secretariat for the IAWG is located, it should maintain formal records of IAWG meetings, and ensure that a proper agenda is prepared for each meeting (with a variety of stock items, such as "report from the Federal-State Network", "status of compliance reports", "outstanding complaints" etc.). An effort could be made to establish a regular framework for consultation with NGOs on human rights issues. Some sort of workable schedule could also be developed for completing U.S. compliance reports for the U.N.; this schedule could then be distributed to federal agencies and to the states via the Network, in order to appraise them of relevant deadlines.

OPTION IV - INCREASED RESOURCES FOR THE HUMAN RIGHTS TREATY REPORTING PROCESS

Currently, reporting under the three ratified human rights treaties takes place out of the office of the Assistant Legal Adviser for Human Rights and Refugees at the State Department. Whether reporting continues to take place from this office, or whether in accordance with the above option it is moved into a new Office of International Human Rights at DOJ, it would be worth considering devoting more resources to this process so that more than one person can be made responsible for the reports.

Ideally, one person could have ongoing responsibility for each report. (This option has currently been proposed within the Legal Adviser's office.) These individuals could maintain familiarity with relevant federal laws and legal developments in the sphere of "their" particular treaty; could develop reasonable timelines for preparation of each new report, including deadlines for submissions from other federal agencies and from the states; and could establish regular lines of communication, including face-to-face meetings, with interested NGOs. Regular briefings as to the status of report preparation could be provided to the IAWG. Once reports were completed, the same designated officials could be responsible for coordinating the lead-up to the oral presentation of the reports to the U.N.

OPTION V - THE "CATALOGUING" OF EXISTING HUMAN RIGHTS TREATY OBLIGATIONS IN DOMESTIC SUBJECT AREAS

Section 2(a) of the Executive Order provides that "[a]ll executive agencies... shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully." In order for agencies to be able to perform this requirement effectively, an initial list of all international human rights obligations "relevant to the functions" of each agency needs to be prepared.

Catalogue of Treaty Obligations

An individual working in the new DOJ Office of International Human Rights could be responsible for supervising this process. This individual could prepare a preliminary list of treaty commitments "catalogued" according to their impact in the various areas of domestic law administered by U.S. agencies. This would involve identifying in broad brush (1) all the subject-areas covered by federal law, and then (2) all the treaty provisions relevant to these subject-areas (*i.e.* immigration implicates various articles of the CAT and the ICCPR, health policy implicates articles x and y of the CERD and z of the ICCPR *etc.*). To a certain extent this information will be available as a result of the process of legislative review that took place prior to ratification.

The Executive Order identifies executive departments and agencies "as defined in 5 U.S.C. 101-105, including boards and commissions." After compiling a list of all such

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departments and agencies, the designated DOJ officer could work together with one legal officer from each department and agency to review the nature of the department's or agency's functions and then identify the various treaty commitments "relevant to their functions" as required by the Executive Order, in accordance with the cataloguing process described above. Ultimately, "one-pagers" could be prepared as reference material for counsel (and others) in each department and agency, identifying the existing human rights treaty obligations relevant to their work, and giving a brief description of the content of these obligations. This would be the first step in assisting government workers to perform their functions "so as to respect and implement those obligations fully" in accordance with the Executive Order. (The second step is described below, which is to explain what ratified human rights treaty actually mean in the United States.)

Status Review

As well as helping to meet the requirements of sec. 2(a) of the Executive Order, the "cataloguing" exercise, once it was completed, would also assist the IAWG in performing its responsibility under sec. 4(c)(vii). This section obliges the IAWG to coordinate and direct "an annual review of United States reservations, declarations and understandings to human rights treaties, and matters as to which there have been nontrivial complaints or allegations or inconsistency with or breach of international human rights obligations, in order to determine whether there should be consideration of any modification of relevant reservations, declarations, and understandings to human rights treaties, or United States practices or laws."

During the course of the systematic review proposed above, careful attention could be paid to two things, in line with sec. 4(c)(vii). The first is whether existing RUDs continue to be appropriate or necessary, in light of an assessment of the impact of the ratified treaties in each of the line departments and agencies. The second is almost the reverse of the first, and that is whether U.S. laws and policies in the various areas are sufficient to meet current U.S. treaty commitments, taking into account the RUDs. If changes in U.S. practices or laws are advisable to remedy gaps in implementation, or, alternatively, if it no longer appears necessary to retain RUDs in certain areas in light of U.S. laws and practice, these issues could be brought to the attention of the IAWG. Section 4(c)(viii) of the Executive Order empowers the IAWG to make any recommendation to the President concerning human rights treaty implementation that it deems appropriate.

OPTION VI – THE DEVELOPMENT OF GOVERNMENT TRAINING MATERIALS ON INTERNATIONAL HUMAN RIGHTS

As noted above, while identification of relevant international human rights treaty commitments in the various subject-areas of federal government practice may be beneficial, it only accomplishes part of what is necessary to assist federal workers in performing their functions "so as to respect and implement those obligations fully," in

the manner dictated by sec. 2(a) of the Executive Order. In order to respect international commitments, officials need to know what these commitments actually mean.

With this in mind, it would be useful for a generic training document to be prepared, under the *aegis* of the IAWG, on the subject of international human rights treaty ratification and implementation. Such a document could presumably be written in large part on the basis of existing material – legal opinions already prepared, for example, either at the time of treaty ratification or subsequently (perhaps in preparation for litigation or, with respect to CAT, during the course of legislative implementation¹⁰⁴).

The existence of a general document could provide the backbone for a program of government-wide education on human rights treaty commitments. It could be combined with the results of the "cataloguing" exercise above, for example, to provide training materials on a department- or agency-specific basis. It could also be rewritten into various formats, with a different focus in each, that would be useful for training litigators, law enforcement officers or any number of other groups of individuals in the federal system who should be made aware of American human rights commitments. In a revised form, it might also be a useful document to distribute to the states.

Summary of U.S. International Human Rights Commitments

The proposed paper could provided, in plain language, a summary of U.S. international human rights commitments and their legal consequence. It could review the three existing ratified treaties, explain their content, and explain the meaning of the RUDs attached to them, in particular the one making them non-self-executing (in so far as this can be clearly explained!). Although the treaties do not create any actionable claim for relief in the U.S., they are not without domestic impact, and the nature of this impact should be made clear.

At a minimum, ratified human rights treaties impose reporting requirements on the

¹⁰⁴ In an article prepared for a N.Y.U. School of Law Conference in 1999, referred to *supra* note 52, Nina Shou details the process of U.S. implementation of the CAT obligation not to return individuals to places where they will likely face torture. Although Congress had not introduced legislation on this issue, the INS had accepted its obligations under the treaty and developed an ad hoc procedures for those who could make a "substantial" showing under article 3 of the Convention, and the Office of the General Counsel at the INS issued a memo of interpretation on the subject. Shou writes: "Despite the declaration that Articles 1 through 16 of the Convention are non-self-executing, the General Counsel explained: '[A]s a provision in a treaty to which the United States is a party, Article 3 is United States law, equal in force to a federal statute. See Article VI, clause 2 of the U.S. Constitution. Such a non-self-executing treaty provision imposes on the United States 'an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement'. See *Restatement of the Law (Third) The Foreign Relations Law of the United States* (1987), sec. 111, comment h (1986). Thus, the INS has a legal duty to ensure compliance with Article 3 in the cases of aliens it may remove from the United States.'" See Shou, *supra* note 52 at 54-56 (quotation from footnote 317). This sort of documentation would be useful in preparing a generic paper on the meaning of ratified human rights treaties in the U.S.

U.S., and this should be explained. The required content of the U.N. reports and the process of their presentation could be reviewed, as could the Human Rights Committee practice of issuing "Concluding Observations", and the consequences of such Observations.

The position paper could also briefly review the implementing legislation under the CAT, as an example of an area where U.S. practice has changed as a result of participation in an international treaty. To the extent that implementing legislation has not been seen to be necessary elsewhere, given the pre-existence of American statutory and constitutional protections for human rights, the reasons for this could also be briefly detailed. (As a matter of education, attorneys in the Civil Rights Division at DOJ, for example, should be aware that when they enforce domestic civil rights legislation they are at the same time implementing international obligations incurred by the United States under the ICCPR, the CAT and the CERD.)

Finally, brief reference could be made to the effect international human rights commitments may have on the development of the common law, or the interpretation of domestic statutes. The government may not have a clear legal position to advance on this point, but the fact that international commitments may be raised during the course of domestic litigation should at least be identified (particularly in any training that is provided for U.S. litigators).

This general document could be prepared in the new Office of International Human Rights in DOJ, working closely with the Legal Adviser's Office (and perhaps also the Office of Legal Counsel). Ultimately, it would need to be endorsed by the IAWG. As noted above, once prepared, such a document could form the core training resource in a program of federal government education on human rights. It could also be used in an education campaign with the states, conducted through the Federal-State

¹⁰⁵ A relevant model here with respect to state education might be the recent State Department initiative (Assistant Legal Adviser for Consular Affairs) to educate state officials as to the requirements of consular notification under the *Vienna Convention on Consular Relations* (VCCR). Article 36 of the VCCR (i) obliges a receiving state to inform detainees that consular officials from their home state may be notified of their detention, and (ii) requires that upon the request of a detainee, the consul of the detainee's state must be notified that one of its nationals has been detained, placed in custody, arrested or imprisoned. Deficiencies in consular notification by U.S. state officials have been the subject of litigation in U.S. courts and internationally; see Agora: *Breard* (1998), 92 A.J.I.L. 666, and Shou, *supra* note 52 at pp. 10-13. Over the last few years, the State Department has engaged in a fairly extensive campaign to educate state and local government officials about the requirements of the VCCR, preparing written materials on the subject and conducting a variety of seminars and outreach programs, particularly in states with large populations of foreign nationals. The Department has asked each state to identify a coordinator to work with them on education as to the VCCR's requirements, and has prepared both a pocket card (4 pages index size) and a detailed manual (72 pages) on the subject of consular notification and access. Part Five of the manual is called "legal material," and includes a description of the VCCR, its operational requirements, and its binding legal nature on the United States including state and local governments. Both the pocket card and the manual are available from the State Department free of charge to those who require the information for official purposes. The manual is also publicly available over the internet at www.state.gov/www/global/legal_affairs

Network, as to what U.S. treaty commitments mean.¹⁰⁵

OPTION VII – THE DEVELOPMENT AND MAINTENANCE OF A WEBSITE ON INTERNATIONAL HUMAN RIGHTS

Sec. 4(c)(vi) of the Executive Order obliges the IAWG to develop “plans for public outreach and education concerning the provisions of the ICCPR, CAT, CERD, and other relevant treaties, and human rights-related provisions of domestic law.”

Obviously, there are lots of ways for a government to engage in outreach. Some of them come naturally out of what has been reviewed above: making the compliance reports to the U.N. publicly available, for example. The IAWG could also work with the ABA and local bar associations, as well as law schools and academics, to encourage the distribution of information relating to international human rights law throughout the legal community.

One of the most basic ways for a government to engage in education these days, however, is to make use of the world wide web. To varying degrees, both Canada and Australia provide information on government websites about human rights treaties issues, situating their country in the international context. It does not appear that the U.S. provides any analogous resource.

An “international human rights” website could be created by the government, with links to other existing government sites on human rights issues (such as, for example, the State Department Country Reports on Human Rights Practices, making the connection between rights elsewhere and rights in the U.S.). The new website could refer to the human rights treaties ratified by the United States, summarize their content, along with the attached RUDs, and perhaps also describe their effect, in line with some of the reference materials developed above. Parallels could be drawn at the site between the international instruments ratified by the U.S. and existing U.S. human rights documents, such as the Bill of Rights and civil rights legislation. The new site could also include the Executive Order and describe the Interagency Working Group. Finally, the site could be updated on a regular basis to include compliance reports filed by the U.S. with the U.N., as well as U.N. reactions to these reports and any subsequent U.S. statements or responses.

OPTION VIII – THE CONSIDERATION OF LEGISLATIVE OPTIONS IN FUTURE HUMAN RIGHTS TREATY RATIFICATION

Consideration of international treaties by the Senate prior to ratification provides an excellent public point of access for treaty-making, not constitutionally required in either Canada or Australia. Maximum benefit would be obtained from this open and public

/ca_notification/ca_prelim.html. The training document and the process of state education on VCCR obligations may well be of interest in the human rights context, despite the differing subject matter.

process, however, if the Senate was asked not only to give its advice and consent to the international treaty, but also to consider the competing merits of RUDs vs. legislative change.

To date, treaties have been submitted to the Senate together with a package of reservations, understandings and declarations prepared by the Administration. In most cases, these RUDs have been prepared out of a desire to ensure that no changes to U.S. law are required (or effected) by treaty ratification.

While this outcome may not change in the future, a fruitful public debate could nevertheless be generated by the Senate being presented with two options at the time of treaty consideration, instead of only a package of RUDs to endorse. The first option could be to ratify the treaty with a package of RUDs to ensure that no changes to U.S. law are necessary. The second option could be to ratify the treaty only after a series of legislative amendments are passed by Congress in order to ensure consistency between domestic and international law.

Draft amendments could be presented to the Senate Foreign Relations Committee during the course of their hearings on the treaty, in order for the Committee to be aware of what changes to U.S. law would be necessary absent RUDs. Were it to believe that some of the proposed amendments were preferable to lodging a reservation, understanding or declaration to the treaty, the Committee could recommend to the full Senate that Congress and the Administration proceed in this way. Treaty ratification could be postponed until after the legislative changes were made.¹⁰⁶ (The Senate Committee might choose to recommend a combination of options, involving some RUDs and some legislative changes.)

Proceeding in this manner would ensure that all options were before the Senate at the time it considered international human rights treaties. In some cases, the ease and attractiveness of legislative change might minimize treaty RUDs; in other cases, the complexity or significance of the legislative changes required might strengthen the case for a reservation, understanding or declaration. Both scenarios would result in

¹⁰⁶ This is what happened with respect to the CAT, which was not ratified by the U.S. until after the passage of implementing legislation on the subject of jurisdiction for prosecution.

¹⁰⁷ David Stewart suggests a similar practice, at least where the Administration believes that legislative change is desirable, in light of his experience with ratification of the ICCPR, when he was Assistant Legal Adviser for Human Rights and Refugees at the State Department. He writes: "The experience gained in obtaining advice and consent to ratification of the Covenant suggests strongly that, in pursuing ratification of additional human rights treaties, serious consideration should be given to the simultaneous submission of proposed implementing legislation wherever U.S. law differs from the treaty requirements and it is determined that conforming changes to that U.S. law are desirable.... Proposed changes to U.S. law should be presented in the form of draft legislation at the time the Senate considers the question of advice and consent to ratification. Where changes are not desirable, ratification should be conditioned upon an appropriate caveat. Ideally, both the Executive Branch and the Congress would work in open partnership with each other in this process, together with interested nongovernmental organizations and knowledgeable individuals." See Stewart, *supra* note 52 at pp. 1206-1207. A different approach, which

the benefits of transparency and accountability in decision-making.¹⁰⁷

OPTION IX – THE REVIEW OF INTERNATIONAL HUMAN RIGHTS TREATIES BY CONGRESS AFTER FIVE (OR MORE) YEARS

Recent reforms in Australia respecting the international treaty-making process, described above, included the establishment of the Parliamentary Standing Joint Committee on Treaties. Although this Committee did not come into being until after Australia ratified the six major human rights instruments considered in this study, one of its first self-appointed tasks was to review the impact of one of these very instruments. In February 1997 the Committee resolved to enquire into the status in Australia of the U.N. *Convention on the Rights of the Child* (ratified in 1990).

The Standing Committee conducted public hearings in all states and territories with 270 witnesses representing 170 organizations or individuals, including a number of children. The terms of reference of the Committee were as follows:

In relation to the implementation of the *United Nations Convention on the Rights of the Child* in Australia the Joint Standing Committee of Treaties resolves to inquire into:

- the domestic ramifications of Australia having ratified the Convention;
- Federal and State progress in complying with the Convention;
- the difficulties and concerns arising from implementation in its current form;
- possible inconsistencies between domestic jurisdictions and the need for agreed national standards;
- the need for a mechanism to promote, monitor and report publicly on compliance and implement public consultation processes;
- the adequacy of the administrative, legislative and legal infrastructure in addressing the needs of children;
- the adequacy of programs and services of special importance to children; and
- any further action in relation to the Convention.

As a result of its review, the Committee submitted 49 recommendations to the government in August 1998 on a wide variety of matters ranging from the regulation of advertising designed to appeal to children, to the education of government officials as to international treaty commitments and the establishment of an Office for Children.

recommended legislative change in nearly all instances of inconsistency between U.S. law and the ICCPR, was suggested by the Lawyers Committee for Human Rights. The Lawyers Committee proposed a "Human Rights Conformity Act" to eliminate the need for RUDs in all cases except unconstitutionality. See Michael H. Posner and Peter J. Spiro, "Adding Teeth to United States Ratification of The Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993" (1993), 42 DePaul L. Rev. 1209.

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Among other things, the Committee recommended that Australia's current reservation to the CRC (respecting the separate incarceration of juvenile offenders) should be withdrawn, and that declarations should be lodged to ensure appropriate recognition of parental rights and responsibilities. At the time of writing, there has been no response to the Committee's report from the government.

This model may be of some interest for use in the United States. As a means of raising public awareness, measuring implementation, and evaluating the benefits and disadvantages of human rights treaties in the U.S, there may be merit in proposing that Congress be invited to inquire into the status of human rights treaties five (or more) years after their ratification. As noted above, sec. 4(c)(vii) obliges the IAWG to coordinate a direct annual review of treaty RUDs and nontrivial complaints "in order to determine whether there should be consideration of any modification of relevant reservations, declarations, and understandings... or United States practices or laws." This process might be assisted by an invitation to Congress – perhaps the House Judiciary Committee – to review the status of human rights treaties in the U.S. some time after ratification.

Conclusion

No amount of institutional procedure or practice will ensure, in and of itself, that a country fully implements its obligations under international human rights treaties. While established structures and mechanisms do not themselves guarantee compliance, however, they are an important piece of the treaty-implementation puzzle.

Full human rights treaty implementation – including the development of institutional structures – requires political will. It also requires the allocation of financial resources. Executive Order 13107 suggests a commitment by the U.S. government on both fronts. It is hoped that the information and ideas presented in this paper will be of use to the Lawyers Committee for Human Rights, and perhaps also to the U.S. government, in their continuing efforts to ensure the priority of international human rights treaty implementation in the United States.

**Reservations, Understandings and Declarations lodged by Canada, Australia
and the United States respecting United Nations Human Rights Treaties**

International Convention on the Elimination of Racial Discrimination

Australia

"The Government of Australia . . . declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a)."

Declarations recognizing the competence of the Committee on the Elimination of Racial Discrimination in accordance with article 14 of the Convention:

"The Government of Australia hereby declares that it recognises, for and on behalf of Australia, the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by Australia of any of the rights set forth in the aforesaid Convention."

United States

Upon signature:

"The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America."

Upon ratification:

"I. The Senate's advice and consent is subject to the following reservations:

(1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

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(2) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in article 1 to fields of 'public life' reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs (1) (c) and (d) of article 2, article 3 and article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

(3) That with reference to article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

II. the Senate's advice and consent is subject to the following understanding, which shall apply to the obligations of the United States under this Convention:

That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfilment of this Convention.

III. The Senate's advice and consent is subject to the following declaration:

That the United States declares that the provisions of the Convention are not self-executing."

International Covenant on Civil and Political Rights

Canada

Declarations recognizing the competence of the Human Rights Committee under article 41:

"The Government of Canada declares, under article 41 of the International Covenant on Civil and Political Rights, that it recognizes the competence of the Human Rights Committee referred to in article 28 of the said Covenant to receive and consider communications submitted by another State Party, provided that such State Party has,

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not less than twelve months prior to the submission by it of a communication relating to Canada, made a declaration under article 41 recognizing the competence of the Committee to receive and consider communications relating to itself."

*Australia*¹⁰⁸

Reservations:

Article 10

"In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively. In relation to paragraph 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned".

Article 14

"Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision."

Article 20

"Australia interprets the rights provided for by article 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters."

Declaration:

"Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise."

Declaration recognizing the competence of the Human Rights Committee under article 41:

¹⁰⁸ By a communication received on 6 November 1984, the Government of Australia notified the Secretary-General of its decision to withdraw the reservations and declarations made upon ratification with regard to articles 2 and 50, 10, 14, 17, 19, 20, 25. For the text of the reservations and declarations, see United Nations, Treaty Series, vol. 1197, p. 411.

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"The Government of Australia declares that it recognizes, for and on behalf of Australia, the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the aforesaid Convention."

United States

Reservations:

"(1) That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

"(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

"(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

"(4) That because U.S. law generally applies to an offender the penalty in force at the time the offense was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.

"(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18."

Understandings:

"(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency,

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based 'solely' on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

"(2) That the United States understands the right to compensation referred to in articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

"(3) That the United States understands the reference to 'exceptional circumstances' in paragraph 2 (a) of article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

"(4) That the United States understands that subparagraphs 3 (b) and (d) of article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3 (e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

"(5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant."

Declarations:

"(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.

"(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the

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exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

"(3) That the United States declares that the right referred to in article 47 may be exercised only in accordance with international law."

Declarations recognizing the competence of the Human Rights Committee under article 41:

"The United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.

Convention on the Elimination of Discrimination Against Women

Australia

Reservations:

"The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents.

"The Government of Australia advises that it is not at present in a position to take the measures required by article 11 (2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

"The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat and combat-related duties. The Government of Australia is reviewing this policy so as to more closely define 'combat' and 'combat-related duties'."

Declaration:

"Australia has a Federal Constitutional System in which Legislative, Executive and

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Judicial Powers are shared or distributed between the Commonwealth and the Constituent States. The implementation of the Treaty throughout Australia will be effected by the Commonwealth State and Territory Authorities having regard to their respective constitutional powers and arrangements concerning their exercise."

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Australia

Declarations recognizing the Competence of the Committee against Torture under articles 21 and 22:

"The Government of Australia hereby declares that it recognises, for and on behalf of Australia, the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the aforesaid Convention; and

The Government of Australia hereby declares that it recognises, for and on behalf of Australia, the competence of the Committee to receive and consider communications from or on behalf of individuals subject to Australia's jurisdiction who claim to be victims of a violation by a State Party of the provisions of the aforesaid Convention."

Canada

Declarations recognizing the Competence of the Committee against Torture under articles 21 and 22:

"The Government of Canada declares that it recognizes the competence of the Committee Against Torture, pursuant to article 21 of the said Convention, to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under this Convention.

"The Government of Canada also declares that it recognizes the competence of the Committee Against Torture, pursuant to article 22 of the said Convention, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a state party of the provisions of the Convention."

United States

Upon signature :

Declaration:

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"The Government of the United States of America reserves the right to communicate, upon ratification, such reservations, interpretive understandings, or declarations as are deemed necessary."

Upon ratification :

Reservations:

"I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to article 30 (2) the United States declares that it does not consider itself bound by Article 30 (1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to article 1 of the Convention, the United States understands

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that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not per se constitute torture.

(2) That the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'

(3) That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfilment of the Convention.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing.

Declarations recognizing the Competence of the Committee against Torture under articles 21 and 22:

"The United States declares, pursuant to article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above-mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration."

Convention on the Rights of the Child

Canada

Reservations:

"(i) Article 21

With a view to ensuring full respect for the purposes and intent of article 20 (3) and article 30 of the Convention, the Government of Canada reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among aboriginal peoples in Canada.

"(ii) Article 37 (c)

The Government of Canada accepts the general principles of article 37 (c) of the Convention, but reserves the right not to detain children separately from adults where this is not appropriate or feasible.

Statement of understanding:

"Article 30:

It is the understanding of the Government of Canada that, in matters relating to aboriginal peoples of Canada, the fulfilment of its responsibilities under article 4 of the Convention must take into account the provisions of article 30. In particular, in assessing what measures are appropriate to implement the rights recognized in the Convention for aboriginal children, due regard must be paid to not denying their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language."

Australia

Reservation:

"Australia accepts the general principles of article . In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37 (c)."

**Canadian Modalities and Mechanisms
for implementing the United Nations International Covenant on Economic,
Social and Cultural Rights; the International Covenant on Civil and Political
Rights, and the Optional Protocol to the latter Covenant
(approved by Ministers in 1976)**

Procedures for agreement to accede

It was agreed that, before Canada acceded to future international human rights covenants, there should be a process of consultation like the one conducted for the December 1975 Federal-Provincial Ministerial Conference on Human Rights.

Procedures for denunciation

There provinces will be consulted before the federal government denounces an international human rights Covenant. Similarly, in the same spirit, should a province wish to withdraw an earlier commitment on its part to implement within its jurisdiction an international Covenant to which Canada is a party, it should consult the federal government and the other provinces. It was recognized that, in such an event, the federal government might, in due course, find it desirable to denounce the Covenant in question.

Procedures for amendment

The federal government will consult the provinces before supporting any amendment to an international human rights Covenant.

Procedures relating to the composition of Canadian delegations

The provinces will be consulted as to the composition of Canadian delegations to meetings arising out of the Covenants. There should be provincial participation in such delegations.

Procedures for selecting Canadian candidates

The selection of a Canadian candidate to sit on a body established as the continuing apparatus for an international human rights Covenant should be the subject of consultation and action in concert with the provinces.

Procedures as to reports on human rights activities under the Covenants

Procedures for reporting under the Covenants are outlined in paragraph 8 of this document.

Procedures to be following in the event of criticism by an international body of a

provincial law or institution

In such a situation, arrangements should be made for the provinces concerned to have the opportunity:

to explain, defend, or justify to the international body involved the law or institution being criticized, whether orally or in writing, and
to have a representative in the Canadian delegation should such an explanation, defence or justification need to be made at an international meeting. Speaking as a member of the delegation, this person would in "concertation" with the federal government and any other concerned provinces, have the opportunity to explain and defend the law or institution of the province which had come under criticism.

Procedures for the preparation and communication of commentaries and information

There should be consultation with respect to the preparation and submission of Canadian reports to international bodies on human rights activities under the Covenants recognizing:

the rights of a province to prepare reports on its own provincial human rights activities, and
the responsibility of the Federal Government acting in concert with the Provincial Governments, to present Canadian reports.

Proposals for continuing intergovernmental consultation and coordination related to the implementation of the Covenants

There should be federal-provincial meetings of ministers responsible for human rights, at regular intervals and perhaps with a rotating chairmanship.

There should be a continuing federal-provincial committee of officials responsible for human rights, meeting at regular intervals, with rotating chairmanship and sessions held in different locations across the country.

The Committee would exercise a continuing liaison function among provincial and federal departments and agencies interested in human rights questions, both within Canada and in the international field.

**Australian Principles and Procedures for Commonwealth-State
Consultation on Treaties (1996)**

Part A: Introduction and Principles

These principles and procedures are adopted subject to their operation not being allowed to result in unreasonable delays in the negotiating, joining or implementing of treaties by Australia.

1 Introduction

1.1 The Council of Australian Governments agreed at its meeting in June 1996 that this set of Principles and Procedures should be adopted in order to achieve the best possible outcome for Australia in the negotiation and implementation of international treaties. They update those adopted in 1992.

2 Instruments covered by these Principles and Procedures

2.1 These Principles and Procedures relate to treaties of sensitivity and importance to the States and Territories.

2.2 Treaties are multilateral, limited party (plurilateral and trilateral) or bilateral agreements which create legally binding obligations under international law. Treaties pertaining to matters of national security are excluded from these Principles and Procedures.

2.3 Having regard to these Principles and Procedures, the Commonwealth will inform the States and Territories of other international instruments where they cover matters of sensitivity and importance to the States and Territories such as the United Nations Draft Declaration on the Rights of Indigenous Peoples.

3 Principles

3.1 In the interests of achieving the best possible outcome for Australia, and where a treaty or other international instrument is one of sensitivity and importance to the States and Territories, the Commonwealth should, wherever practicable, seek and take into account the views of the States and Territories,

- . in formulating Australian negotiating policy, and
- . before becoming a party to, or indicating its acceptance of, that treaty or instrument.

The Commonwealth should then also keep the States and Territories informed of the determined policy.

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3.2 The consultative process will be continued through to and include the stage of implementation, if any.

3.3 The States and Territories will each be responsible for the timely development of their own whole of government position with respect to any aspect of the consultation and, where they choose, for the development of a consolidated States and Territories position.

3.4 The States and Territories will establish and advise the Commonwealth on the appropriate channels of communication, and persons responsible for consultation, to ensure that the Commonwealth can discharge its international responsibilities in a timely manner.

Part B: Procedures

4 Information

4.1 The Commonwealth will inform States and Territories in all cases and at an early stage of any treaty discussions in which Australia is considering participation. Where available, information on the long-term treaty work programs of international bodies will be provided to the States and Territories.

4.2 There will be various ways in which information on treaty negotiations is provided to the States and Territories.

(a) Information about treaty discussions is forwarded to Premiers'/Chief Ministers' Departments or Cabinet Offices on a regular basis through the Department of the Prime Minister and Cabinet and the Treaties Secretariat of the Department of Foreign Affairs and Trade. One vehicle for making information about current treaties and negotiations available will be the Treaties Schedule.

(b) The Commonwealth will provide the States and Territories every six months with a list of current and forthcoming negotiations (forecasting 12 months ahead) and of matters under consideration for ratification, accession etc. Updates of this list will be provided at three monthly intervals.

(c) National Interest Analyses (NIAs) will be prepared by the Commonwealth for all treaties. States and Territories will be consulted at an early stage in the preparation of NIAs in relation to those treaties in which they have a major interest. NIAs will be finalised in time for tabling in Parliament. NIAs will represent the best understanding of the Commonwealth at the time they are prepared. A National Interest Analysis which includes the elements in the NIA pro forma (Appendix 1) will accompany each treaty tabled in Parliament.

(d) the Commonwealth will whenever practicable provide States and Territories with a

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report on the outcome of international negotiating sessions which are of sensitivity and importance to the States and Territories. These may be provided on a confidential basis.

4.3 The provision of the above information will not affect the flow of information on treaties to the States and Territories which occurs on an ongoing basis from the time that negotiations begin.

5 Consultation mechanisms

The Treaties Council

5.1 There will be a Treaties Council consisting of the Prime Minister, Premiers and Chief Ministers. The Treaties Council will have an advisory function.

5.2 The role of the Treaties Council is to consider treaties and other international instruments of particular sensitivity and importance to the States and Territories either of its own motion, or where a treaty is referred to it by any jurisdiction, a Ministerial Council, an intergovernmental committee of COAG or by SCOT. Senior Officials will co-ordinate and prepare the agenda for the Treaties Council. The Treaties Council will also be able to refer treaties to Ministerial Councils for consideration.

5.3 The Treaties Council will meet at least once a year. The Prime Minister will chair the meetings, with the Minister for Foreign Affairs in attendance when appropriate. Meetings of the Treaties Council will normally take place at the same time and place as COAG.

Standing Committee on Treaties

5.4 There will be a Standing Committee on Treaties consisting of senior Commonwealth and State and Territory officers which will meet twice a year, or more often if required, to identify treaties and other international instruments of sensitivity and importance to the States and Territories and:

- . decide whether there is a need for further consideration by the Treaties Council, a Ministerial Council, a separate intergovernmental body or other consultative arrangements;
- . monitor and report on the implementation of particular treaties where the implementation of the treaty has strategic implications, including significant cross-portfolio interests, for States and Territories;
- . ensure that appropriate information is provided to the States and Territories; and
- . co-ordinate as required the process for nominating State and Territory representation

on delegations where such representation is appropriate.

5.5 In identifying treaties and other international instruments of particular sensitivity and importance to the States and Territories, the Committee should have regard to their potential to affect the finances or current or future policy decisions of the States and Territories or the need for State and Territory participation in implementation, including legislation.

Ministerial Councils and other consultation mechanisms

5.6 Subject to any recommendation of the Standing Committee, as a general practice, consultation will be conducted by the functional Commonwealth/State and/or Territory Ministers for Departments concerned. Exceptions will exist where there are significant cross-portfolio interests.

5.7 In general, existing Commonwealth/State and Territory Ministerial Councils and consultative bodies will be used as the fora in which detailed discussions of particular treaties and other international instruments take place.

5.8 When issues are to be discussed that are of particular significance to either State and Territory or Commonwealth authorities other than those directly represented on the Commonwealth/State and Territory consultative bodies, representatives of such authorities may be invited to attend the meetings in an observer role.

5.9 The protocols relating to the operation of Ministerial Councils will apply to these consultations - including those relating to Representation of Constituent Governments and Liaison between Councils (Commonwealth-State Ministerial Councils, A Compendium, May 1994).

6 Participation on International Delegations

6.1 In appropriate cases, a representative or representatives of the States and Territories may be included in delegations to international conferences which deal with State and Territory subject matters. Subject to any special arrangements, the purpose is not to speak for Australia, but to ensure that the States and Territories are well informed on treaty matters and are always in a position to put a point of view to the Commonwealth. However, State and Territory representatives will be involved as far as possible in the work of the delegation.

6.2 The States and Territories will normally initiate moves for inclusion in a delegation, but the Commonwealth should endeavour to keep State and Territory interests in mind.

6.3 Unless otherwise agreed, the costs of the State and Territory representatives are a matter for State and Territory governments.

7 Implementation

7.1 Before the Commonwealth becomes a party to any international treaty of particular sensitivity and importance to States and Territories, the Commonwealth and the States and Territories will consult in an effort to secure agreement on the manner in which the obligations incurred should be implemented.

7.2 Where the preparation of reports to international bodies on implementation action is required, States and Territories will be consulted and their views taken into account in their preparation.

8 "Federal - State" Aspects

8.1 The Commonwealth does not favour including federal clauses in treaties and does not intend to instruct Australian delegations to seek to include them. In the Commonwealth's view, the international community sees the pursuit of federal clauses in treaties generally as an attempt by the "Federal State" to avoid the full obligations of a party to the treaty. The Commonwealth's experience at a number of International Conferences has shown that these clauses are regarded with disfavour by almost the entire international community. Further, its experience is that a federal clause tailored to the needs of one federation will be unacceptable to other federations. The Commonwealth believes that instructing an Australian delegation to press for a federal clause only diverts its resources from more important tasks.

8.2 The Commonwealth does not object to Australia making unilaterally a short "Federal Statement" when it signs or ratifies certain appropriate treaties, if this statement clearly does not affect Australia's obligations as a party. An "appropriate" treaty would be one where it is intended that the States and Territories will play a role in its implementation. An appropriate form for a statement like this is at Appendix 2.

8.3 The normal practice is that Australia does not become a party to a treaty containing a federal clause until the laws of all States and Territories accord with the mandatory provisions of the treaty. However, where a suitable "territorial units" federal clause is included in a treaty, the possibility of Australia acceding only in respect to those States and Territories which wish to adopt the treaty might be considered on a case by case basis where appropriate, perhaps in some private law treaties.

8.4 The Commonwealth will consider relying on State and Territory legislation where the treaty affects an area of particular concern to the States and Territories and this course is consistent with the national interest and the effective and timely discharge of treaty obligations. However, the Commonwealth does not accept that it is appropriate for the Commonwealth to commit itself in a general way not to legislate in areas that are constitutionally subject to Commonwealth power.

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**List of Individuals Contacted in Canada, Australia and the United States
June - September 1999**

CANADA

Federal Government

Kerry Buck, Deputy Director, Human Rights, Humanitarian Affairs and International
Women's Equality Division, Department of Foreign Affairs and International Trade
Dawn Edlund, Senior Counsel, Citizenship and Immigration Legal Services
Elisabeth Eid, Counsel, Human Rights Law Section, Department of Justice
Annemieke Holthius, Counsel, Human Rights Law Section, Department of Justice
Johanne Levasseur, Counsel, Human Rights Law Section, Department of Justice
Elaine Menard, Counsel, Human Rights Law Section, Department of Justice
Sabine Nolke, Foreign Service Officer, United Nations, Human Rights and
Humanitarian Law Section, Department of Foreign Affairs and International Trade
John Scratch, Assistant Deputy Attorney General, Citizenship and Immigration Legal
Services
Bruno Sheire, Human Rights Manager, Human Rights Directorate, Department of
Canadian Heritage
Irit Weiser, General Counsel, Director, Human Rights Law Section, Department of
Justice

Ontario Government

William Bromm, Policy Adviser, Human Rights and Disability Access, Ministry of
Citizenship, Culture and Recreation
Robert Charney, Counsel, Constitutional Law Branch, Ministry of the Attorney General
Carol Creighton, General Counsel, Constitutional Law Branch, Ministry of the Attorney
General
Elizabeth Goldberg, Chief Constitutional Counsel and General Counsel, Constitutional
Law Branch, Ministry of the Attorney General
Sarah Kraicer, Counsel, Constitutional Law Branch, Ministry of the Attorney General
David Lillico, Counsel, Legal Services Branch, Ministry of Citizenship, Culture and
Recreation
Hart Schwartz, Counsel, Constitutional Law Branch, Ministry of the Attorney General
Richard Stewart, Counsel, Constitutional Law Branch, Ministry of the Attorney General

Canadian Parliament

Louise Pronovost, Administrative Assistant, Standing Joint Committee for the Scrutiny
of Regulations

Academics

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Anne Bayefsky, Director, Centre for Refugee Studies, York University
Peter Leuprecht, Dean, Faculty of Law, McGill University
Janet Hiebert, Professor, Department of Political Studies, Queen's University

AUSTRALIA

Commonwealth Government

Susan Coles, Head, Human Rights & Social Law Unit, Legal Branch, International Organizations & Legal Division, Department of Foreign Affairs and Trade
Robyn Frost, Senior Government Lawyer, Public International Law Branch, Attorney General's Department
Joan Sheedy, Senior Government Lawyer, Human Rights Branch, Attorney General's Department
Brian Slee, Executive Officer, Treaties Secretariat, Department of Foreign Affairs and Trade

Victorian Government

Donald Speagle, Department of Premier and Cabinet
Ruvani Wickremesinghe, Department of Justice

Human Rights and Equal Opportunity Commission

David Kinley, Visiting Fellow, Faculty of Law, University of New South Wales
Susan Roberts, Director, Legal Services

Commonwealth Parliament

Grant Harrison, Secretary, Joint Standing Committee on Treaties
Pauline Moore, Secretary, Senate Legal and Constitutional Committee
James Warmenhoven, Secretary, Scrutiny of Bills Committee

Victorian Parliament

Andrew Homer, Senior Legal Adviser, Scrutiny of Acts and Regulations Committee
Patrick Emerton, Research Officer, Federal-State Relations Committee
Lilian Topic, Executive Officer, Federal-State Relations Committee

Academics

Peter Bailey, Professor, Faculty of Law, Australian National University
Hilary Charlesworth, Director, Centre for International and Public Law, Faculty of Law, Australian National University
Brian Opeskin, Senior Lecturer, Faculty of Law, University of Sydney

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Robert McCorquodale, Associate Professor of International and Human Rights Law,
Head of Law School, Faculty of Law, Australian National University
Garth Nettheim, Visiting Professor, Faculty of Law, University of New South Wales
Sarah Pritchard, Senior Lecturer, Faculty of Law, University of New South Wales
Cheryl Saunders, Professor, Faculty of Law, University of Melbourne
Phillip Tahmindjis, Head of School, Law School, Queensland University of Technology
George Williams, Senior Lecturer in Law, Faculty of Law, Australian National
University

Private Bar

Carolyn Graydon, Barrister, Refugee and Immigration Legal Centre
George Lombard, George Lombard Consultancy Ltd
Nick Poynder, Barrister-at-Law
Christopher Ward, Barrister-at-Law

UNITED STATES

Federal Government

Catherine Brown, Assistant Legal Adviser for Consular Affairs, Department of State
Scott Busby, Director of Multilateral and Humanitarian Affairs, National Security
Council
James Castello, Associate Deputy Attorney General, Department of Justice
David Stewart, Assistant Legal Adviser, Office of African Affairs
Andre Surena, Assistant Legal Adviser, Office of Human Rights and Refugees
Chris Tenorio, Special Assistant to the Deputy Attorney General, Department of
Justice
Steven Wagenseil, Director, Office of Multilateral Affairs, Bureau of Democracy,
Human Rights and Labor, Department of State

Academics

Louis Henkin, University Professor Emeritus, Special Service Professor, Columbia
Law School

Lawyers Committee for Human Rights

Stefanie Grant, Director, Program and Policy
Elisa Massimino, Director, Washington DC
Michael Posner, Executive Director
David Shorr, Consultant, National Interest Project

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