S. HRG. 111–576

THE LAW OF THE LAND: U.S. IMPLEMENTATION OF HUMAN RIGHTS TREATIES

HEARING

BEFORE THE

SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

DECEMBER 16, 2009

Serial No. J–111–68

Printed for the use of the Committee on the Judiciary

QUESTIONS AND ANSWERS

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#1)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

1. Regarding the U.N.'s role in overseeing U.S. compliance with human rights treaties:
a. What is the process for presenting U.S. reports on these treaties to the U.N.?
b. Who from the U.N. hears the presentations and reviews the reports? What human rights qualifications and credentials do those who review the reports hold?
c. How does the U.N. evaluate reports?
d. Does the U.N. make an assessment as to whether a country is in compliance with a treaty?
e. What authority does the U.N. have over parties to human rights treaties?
f. Does the U.N. make recommendations to treaty signatories regarding compliance and implementation? If so, how do these influence U.S. behavior and how will past recommendations affect the content of the next reports we submit?
g. Is there any mechanism for the United States to dispute any of the U.N.'s response or recommendations to the reports we submit?
h. What effect does a negative response from the U.N. have on the United States' image both in the U.N. and around the world?

Joint Answer:

After the Senate provided its advice and consent to ratification, the United States ratified each of the following human rights treaties:

- International Covenant on Civil and Political Rights (entered into force for the United States on September 8, 1992);

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force for the United States on November 20, 1994);
- International Convention on the Elimination of All Forms of Racial Discrimination (entered into force for the United States on November 20, 1994);
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (entered into force for the United States on January 23, 2003); and
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (entered into force for the United States on January 23, 2003).

Each of these treaties requires States Parties to report, shortly after ratification and periodically thereafter, on their implementation of the treaty. Each treaty (or the underlying Convention, in the case of the two Protocols) establishes a "treaty body," a committee of experts with responsibilities related to the treaty. The members of each treaty body are generally required to be "experts of high moral standing and recognized competence in the field of human rights." (This wording is from the Convention Against Torture; the other treaties use similar but slightly different phrases.)

Each of these treaty bodies has authority to review the initial and periodic reports submitted by states detailing the measures they have taken to implement their treaty obligations, and to issue non-binding and non-authoritative responses. Depending on details specific to the treaty, including in some cases whether a State Party has made an optional declaration or ratified an optional protocol, the treaty bodies may also have authority to

receive complaints about that State Party from other states or from individuals, if the State Party in question has accepted such authority. In these cases as well, the views or findings of the Committees are not legally binding.

Each State Party's report under these treaties is presented at a scheduled hearing held by the relevant treaty body. In the case of the United States, at such a hearing, a large and senior-level led interagency delegation typically presents the U.S. report and answers questions. Following consideration of a State Party's report, the relevant treaty body provides written observations and recommendations. The treaties describe these written products using words that identify their non-binding nature, such as "suggestions," "observations," "recommendations," and "comments." These comments may include the treaty body's assessments and recommendations regarding implementation of treaty obligations.

Through interagency deliberations, the United States reviews the conclusions and recommendations of the treaty bodies on its reports and, in subsequent U.S. reports to the treaty bodies, it provides its official reactions. Where the United States has changed its practices along the lines of a treaty body's recommendation, it may explain that change in a subsequent response. To the extent that the United States government disagrees with, or

concludes that it will not act pursuant to, treaty body comments or recommendations, it explains its position in its official follow-up responses. It may also explain its position in public statements or media interviews.

As to whether responses from the treaty bodies can affect a country's image, this is exactly what the United States intended by agreeing to the reporting process in the negotiations resulting in these treaties. The spotlight that these processes focus on each States Parties' actions and the resulting effects on a country's image can be significant tools to persuade these countries to implement the treaties. This is particularly significant with respect to States Parties that consistently violate their citizens' human rights. Such potential positive impacts on human rights practices are one reason the United States takes seriously these reports and the treaty body responses to them. We expect our principled engagement, including when we disagree with a committee, to show that the United States is a country that leads the world in taking seriously its human rights obligations and that is open to discussing and defending its record in public at the UN.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#2)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

Please describe the response of the U.N. to the reports submitted by past administrations.

Joint Answer:

There have been many positive responses by the bodies created by UN human rights treaties and charged with monitoring implementation of these treaties, but these treaty bodies have also made negative comments regarding numerous issues, including the death penalty, police treatment of suspects or prisoners, and the detention facilities at Guantanamo Bay. All of the treaty body responses to the U.S. reports submitted during the last Administration are posted on the State Department website at:

http://www.state.gov/g/drl/hr/treaties/

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#3)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

Mr. Perez, you testified that the U.S. government has come into compliance with our reporting requirements under the human rights treaties within your jurisdiction. Mr. Posner, you testified specifically that the Bush Administration achieved timely compliance with these requirements and sent teams to present U.S. reports to the U.N.
a. Can either/both of you explain the process used by past administrations to fulfill these reporting responsibilities? (i.e., agencies and officials involved, time spent working on the reports, consultation with Congress, etc.)
b. Can you provide more details about the reports submitted by past administrations? (i.e., description of content, length, scope, etc.)
c. Do you believe these past reporting practices have been effective?
d. Does this administration intend to follow these past reporting practices? What, if anything, do you intend to change?

Joint Answer:

U.S. reporting requirements under human rights treaties began after the United States became a party to the International Covenant on Civil and Political Rights (ICCPR), on September 8, 1992. ICCPR Article 40 required our first report within one year of that date. As detailed in answer #1, in 1994 and 2003 the United States became a party to other human rights treaties with similar reporting requirements. For several years after we first became subject to these reporting requirements in 1993, our human rights

treaty reports were overdue, in part because of resources and priorities. The belatedness of our reports was criticized by the treaty bodies (the committees of experts that are created by human rights treaties and charged with monitoring their implementation, as described further in the first answer), and hampered our ability to criticize other countries for inadequate reporting and other noncompliance with their human rights obligations. During the past ten years, the United States made a concerted effort to bring its reporting up to date, and that effort was successful. Today, the United States is among a small number of countries around the world that is fully up to date in meeting all of its human rights treaty reporting deadlines. As reflected in the U.S. government's timely submission on January 22, 2010, of reports on its implementation of two optional protocols to the Convention on the Rights of the Child, the Obama Administration intends to continue to produce timely human rights treaty reports, while improving their quality and continuing to increase our international engagement.

With respect to the questions regarding the report writing process, the production of these reports usually begins with a tasking by the National Security Council to all agencies that have responsibilities for implementing the various provisions under the relevant treaties to provide updates and reporting to the State Department. The Department then works intensively

with the interagency community over the course of about a year to write each of the reports. These reports and the responses to the relevant treaty bodies' observations are lengthy and detailed, frequently covering several hundreds of pages. In the immediate run-up to the U.S. government's presentation before the relevant treaty body, the treaty body will submit questions for the United States. Answers to these questions and to subsequent questions posed at the hearing itself can also be in excess of one hundred pages. Although not required under the treaties, many of the treaty bodies have requested one year follow-up submissions by States Parties. The U.S. reports and related materials submitted during the last Administration are posted at the State Department's website at: http://www.state.gov/g/drl/hr/treaties/

With each report, we have learned lessons about self-reporting and improving the efficiency and impact of this complex interagency process. We plan to continue the Executive Branch commitment to timely reporting. We hope to increase the time and resources dedicated to this reporting process as well to engage in deeper and more frequent consultation with civil society, as well as interested members of Congress.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#4)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

What specific efforts will this Administration undertake to promote and preserve U.S. sovereignty as it works to ensure compliance with international treaty obligations?

Joint Answer:

The founders of this country drafted a Constitution that was predicated on a commitment to human rights and fundamental freedoms. Under the U.S. Constitution, all treaties, including international human rights treaties, that the United States has ratified after the Senate has given its advice and consent to ratification are part of the "supreme law of the land." Key human rights treaties ratified by the U.S. government include those identified in response to the first question, as well as the Convention on the Prevention and Punishment of the Crime of Genocide.

The United States is proud of its efforts and record on human rights, and welcomes the opportunity to discuss them publicly at the UN, and is committed to leading by example. This commitment includes transparently

presenting the successes we have achieved, and soliciting constructive recommendations on how to improve further.

None of these processes interfere with the exercise by the United States of its sovereignty. As a matter of longstanding policy, the United States has supported these processes as a way of encouraging other countries to comply with their human rights obligations and commitments. The recommendations offered during the Universal Periodic Review session and by the treaty bodies are not legally binding. As a matter of longstanding U.S. policy, we intend to listen to such recommendations with an open mind, in part so as to set a positive example for other countries around the world.. The Administration views implementation of our human rights obligations and reporting on them as an exercise of sovereignty and as an opportunity to communicate to the world the robust protection that the U.S. Constitution and laws afford to human rights within the United States. Compliance with our human rights treaty obligations also assists the United States by enhancing our credibility when we promote human rights in other countries.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#5)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

Treaty obligations require the United States to submit reports on its compliance measures. What obligations do the U.N. reviewing committees have to the United States when reviewing those reports? (i.e., reviewing and responding to the content of submitted reports, U.S. domestic law, the U.S. Constitution, American values and public opinion, treaty reservations, etc.)

Joint Answer:

Human rights treaty bodies ought to review U.S. reports carefully, fairly and in light of the applicable treaty obligations, including any U.S. reservations, understandings, or declarations (RUDs). Those RUDs have been carefully drafted and endorsed by both the Executive Branch and the Senate to address any necessary legal, including Constitutional, or other significant concerns. In addition to reviewing U.S. reports, treaty bodies also review reporting from civil society about the state of human rights in the United States. As a matter of practice, human rights treaty bodies frequently make observations and recommendations to States Parties to take actions that extend beyond their treaty obligations. However, these recommendations are not legally binding in nature.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#6)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

Have the U.N. review committees – specifically the CERD Committee – acted within the bounds of the treaties to which the U.S. is a party, as those treaties were understood at the time they were ratified?

Joint Answer:

As previously noted, in no case involving any of the UN human rights treaties to which the United States is a Party does any provision of those treaties vest the treaty bodies (the committees of experts that are created by human rights treaties and charged with monitoring their implementation, as described further in the first answer) with legally binding authority over a State Party. The treaty bodies are, or course, free to take different views on the meaning and scope of the underlying treaty, just as the Government of the United States is free to disagree with the treaty bodies, as we often do in our treaty reports and presentations before the treaty bodies.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#7)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

Have the U.N. review committees – specifically the CERD Committee – exhibited any anti-U.S. bias in their response to U.S. reports?

Joint Answer:

The treaty bodies often issue opinions and make recommendations with which we disagree, as discussed more fully in the first answer, but we respect their ability to hold such views. We also recognize that they may hold the United States, and other countries that are firmly committed to respecting human rights, to a higher standard than they may apply to other countries. As a matter of practice, treaty bodies also make recommendations on subjects related to the relevant treaty that extend beyond the State Party's treaty obligations. Whether or not the United States government agrees with or intends to implement all such recommendations, it engages in an open and respectful dialogue with the treaty bodies because we accept the roles they were assigned pursuant to the treaties. We also believe in setting an example for other countries regarding robust, transparent and constructive reporting and dialogue on these important human rights matters.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#8)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

You both made reference to participation in an interagency process on human rights led by the National Security Council. Can you expand on that a bit? Who is involved? What does the process entail? What did the process begin? What are the group's responsibilities?

Joint Answer:

An Interagency Working Group on Human Rights Treaties was established under Executive Order 13107, issued by President Clinton on the 50th anniversary of the Universal Declaration of Human Rights in 1998. The group is chaired by the designee of the Assistant to the President for National Security Affairs and includes representatives of the Departments of State, Justice, Labor, Interior, Health and Human Services, Education, Homeland Security, and Defense; the Equal Employment Opportunity Commission; and other agencies will be added as the chair deems appropriate. It met periodically on a limited number of issues under the Bush Administration, and the current Administration intends to have it meet on a more regular basis and with a broader agenda. The current Administration further intends to significantly reinvigorate the group to

resume meeting at the Assistant Secretary level on a regular, perhaps quarterly, basis with a broader agenda. Also, mid-level officials will likely convene on a regular basis as sub-groups as needed on specific issues.

The working group will address a wide array of issues relating to implementation of U.S. human rights obligations in a number of ways, including: ensuring timely and thorough reporting under the relevant human rights treaties and following up on issues that arise during the reporting process; identifying problems that may require regulatory or legislative action; exploring strategies to integrate fully consideration of our human rights obligations into our domestic policies and programs; and promoting greater awareness of these obligations, both within the federal government and at the state and local levels.

The working group has already held one consultation with a broad range of civil society organizations on these issues, and the Administration intends for the group to continue to hold such consultations in the course of its ongoing work.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#9)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

U.S. reports on two human rights treaties are due soon — one in January 2010 and one in August 2010.
a. When did the Administration begin preparing these reports?
b. Which agencies have been involved in compiling and drafting the reports?
c. Who will present these reports to the U.N.?

Joint Answer:

On January 22, 2010, the United States government submitted periodic reports under the two Optional Protocols to the Convention on the Rights of the Child (one on the involvement of children in armed conflict and the other on the sale of children, child pornography, and child prostitution). We began preparing these reports in January 2009. Many agencies have provided input and guidance on these reports, including: the Departments of Justice, Defense, Homeland Security, Health and Human Services, Labor, and Education, the U.S. Agency for International Development, as well as many offices and bureaus at the State Department, including the Office to Monitor and Combat Trafficking in Persons, the Office of the Legal Adviser, the Bureau of International Organization

Affairs, and the Bureau of Democracy, Human Rights and Labor. We also reached out to non-governmental organizations for input on the reports. Our Mission in Geneva formally submitted the reports to the Committee on the Rights of the Child, and the United States will likely be called up to present our reports and answer the Committee's questions in 2011 at the earliest. We have not yet decided the composition of that delegation.

As you noted, we also have another report due in August 2010 – our periodic report under the International Covenant on Civil and Political Rights (ICCPR) to be submitted to the Human Rights Committee, which is the treaty body created by the ICCPR and charged with monitoring implementation of the treaty. We began working on this report in April 2009. A number of agencies are assisting with the preparation of this report, including the Departments of Justice, Homeland Security, Defense, Interior, Education, Health and Human Services, and Labor, along with the Equal Employment Opportunity Commission, as well as several State Department offices. We have also begun to reach out to non-governmental organizations and to state human rights and civil rights commissions, and will continue to do so as we work on this report. We anticipate that the Human Rights Committee, in keeping with its normal practice, will schedule a hearing on this report within a year or two after receiving the U.S. report. We have not

yet determined the composition of our delegation to present this report to the Human Rights Committee.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#10)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

I would like for each of you to give your opinion as to whether the U.S. is in compliance with each of the following treaties. Please answer "yes" or "no." If not, why not?
a. International Convention on Civil and Political Rights
b. Convention Against Torture and All Forms or Cruel Inhuman or Degrading Treatment or Punishment
c. International Convention on the Elimination of All Forms of Racial Discrimination
d. Convention on the Prevention and Punishment of the Crime of Genocide
e. Optional Protocols to the Convention on the Rights of the Child

Joint Answer:

In a country as large and diverse as the United States, it is impossible to state categorically that human rights obligations are subject to perfect enforcement and implementation. More meaningful and important is the commitment by all relevant U.S. institutions -- including all three branches of the Federal government -- to fulfill human rights protections accorded under the U.S. Constitution, U.S. domestic laws and human rights treaties to

which the United States is party, to vigilantly implement such obligations, and to hold accountable individuals and institutions that fail to abide by these essential requirements.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner and
Assistant Attorney General Thomas E. Perez by
Senator Tom Coburn (#11)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

Each of the following recommendations was made by the 2008 CERD Committee report, urging the United States to take specific action. With respect to each, please explain: (i) whether and how each recommendation relates to the elimination of racial discrimination in the United States, (ii) whether and how the Obama Administration intends to respond to each recommendation, and (iii) whether each recommendation is contemplated by the CERD treaty?

a. Ensure the right to judicial review for enemy combatants held at Guantanamo Bay, Cuba
b. Place a moratorium on the death penalty
c. Restore voting rights to convicted felons
d. Protect illegal aliens from discrimination in the workplace
e. Prohibit the sentence of life without parole for defendants under age 18

Joint Answer:

Treaty bodies frequently make observations and recommendations that extend beyond the States Parties' obligations under the relevant treaties,

as discussed in the fifth response. These observations and recommendations are not legally binding. In the process of writing its next periodic report, due in November 2011, on its implementation of the Convention to Eliminate All Forms of Racial Discrimination (CERD), after careful interagency review of relevant U.S. law and human rights policy and in consultation with U.S. civil society, the United States will examine and respond to all of the observations and recommendations of the CERD Committee, including those described in this question.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Tom Coburn (#12)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

You testified that U.S. obligations under human rights treaties "largely mirror our own domestic requirements under the U.S. [C]onstitution and our laws." Yet, there are provisions in treaties that we have signed and ratified that clearly conflict with our Constitution. For example, Article IV of the CERD prohibits certain forms of hate speech and requires treaty parties to make such acts punishable by law. The U.S. filed a reservation on this point. The CERD Committee, however, repeatedly ignores this reservation, and in 2008, it recommended that the U.S. "consider withdrawing or narrowing the scope" of this reservation.

(a) How should the United States respond to this request, in order to make clear that we will not elevate the opinions of an international body at the expense of our own Constitution?
(b) Given the committee's disregard for this reservation, how can the United States be sure that future constitutional reservations are both effected and respected?

Answer:

(a) At the outset, it is imperative to point out that the United States would never consider assuming a treaty obligation that would violate the U.S. Constitution or that would somehow undermine the freedoms enshrined in the Constitution. As a matter of their general practice, the treaty bodies established by human rights treaties to which the United States is a party

routinely request the United States and other States Parties to consider withdrawing or narrowing the scope of their reservations, understandings and declarations. As a matter of general U.S. treaty practice, the reservations, understandings and declarations the United States makes to treaties to which it becomes a party are formulated to be permissible under international law.

Regarding the formal treaty reservation referred to in these questions, the United States expressly conditioned its ratification of both the Convention on the Elimination of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR) on reservations that made clear that the U.S. Constitution and laws contain extensive protections of individual freedom of speech, expression and association, and that the United States does not accept any obligation under those Conventions to restrict those rights in a manner contrary to our Constitution. When we report to the treaty bodies we vigorously defend our right to adopt such reservations. Particularly when it comes to issues relating to freedom of expression, we go to great lengths to explain to the treaty bodies, and to the world, how U.S. constitutional protections relating to freedom of expression and association exceed the available protections under the CERD or the ICCPR. Indeed, the United States believes so

strongly that the correct approach for combating intolerance and hatred is through a free marketplace of ideas, rather than restrictions or criminalization of speech, that we are seeking every available opportunity in UN fora to advocate such an approach.

(b) As noted previously, treaty body comments are not legally binding, and a recommendation by a treaty body to withdraw a U.S. treaty reservation could have no effect whatsoever on the obligation and abiding responsibility of the United States Government to execute fully and faithfully its obligations under the Constitution of the United States.

Questions for the Record Submitted to

Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#1)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

You testified that the State Department will "participate in the newly revitalized interagency process on human rights implementation led by the National Security Council to explore ways that we can enhance compliance with and implementation of our human rights commitments." Please provide additional information on this interagency group, including a) which agencies take part in the group; b) how frequently it meets; c) its main responsibilities and functions; d) whether it meets with human rights and civil rights groups and other stakeholders; and 3) how it will enhance compliance with our human rights treaty obligations.

Answer:

An Interagency Working Group on Human Rights Treaties was established under Executive Order 13107, issued by President Clinton on the 50th anniversary of the Universal Declaration of Human Rights in 1998. The group is chaired by the designee of the Assistant to the President for National Security Affairs and includes representatives of the Departments of State, Justice, Labor, Interior, Health and Human Services, Education, Homeland Security, and Defense; the Equal Employment Opportunity Commission; and other agencies will be added as the chair deems appropriate. It met periodically on a limited number of issues under the

Bush Administration, and the current Administration intends to have it meet on a more regular basis and with a broader agenda. The current Administration further intends to significantly reinvigorate the group to resume meeting at the Assistant Secretary level on a regular, perhaps quarterly, basis with a broader agenda. Also, mid-level officials will likely convene on a regular basis as sub-groups as needed on specific issues.

The working group will address a wide array of issues relating to implementation of U.S. human rights obligations in a number of ways, including: ensuring timely and thorough reporting under the relevant human rights treaties and following up on issues that arise during the reporting process; identifying problems that may require regulatory or legislative action; exploring strategies to integrate fully consideration of our human rights obligations into our domestic policies and programs; and promoting greater awareness of these obligations, both within the federal government and at the state and local levels.

The working group has already held one consultation with a broad range of civil society organizations on these issues, and the Administration intends for the group to continue to hold such consultations in the course of its ongoing work.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#2)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

Human Rights First's Elisa Massimino, a witness on the second panel, recommended that the Executive Branch review legislation it proposes to ensure it conforms with our human rights treaty obligations. Does the State Department currently review proposed legislation for compliance with human rights treaties the United States has ratified? If so, what is the vetting process? If this is not being done, should it be?

Answer:

The State Department endeavors to review all Executive Branch legislative proposals related to foreign relations and other State Department activities through the OMB-led interagency review process. Legal analysis of those proposals is an important part of the State Department's review, and it includes review for consistency with all U.S. obligations under international law, including human rights and other treaties.

Questions for the Record Submitted to

Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#3)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

When we ratify a human rights treaty, the United States frequently attaches Reservations, Understandings and Declarations (RUDs), which limit the application of the treaty. Ms. Massimino also recommends that the Executive Branch regularly review our RUDs to human rights treaties, with the goal of eliminating these limitations. Does the Administration have any plans to review the United States' RUDs to human rights treaties?

Answer:

The treaty bodies charged with monitoring compliance with UN human rights treaties often recommend that the United States consider modifying its RUDs, and in particular withdrawing its reservations. In preparing its periodic reports to each treaty body, the Executive Branch reviews each treaty body's recommendations and develops a formal, written response to each recommendation. In preparing its periodic reports, the Executive Branch considers these recommendations regarding the RUDs, assesses whether any could be removed, and provides a response to the treaty bodies. When U.S. laws have changed in a way that makes a RUD unnecessary, it may be appropriate for the executive branch in consultation

with the legislative branch to consider whether removal of the relevant RUD would be appropriate. It should be noted, however, that RUDs are usually submitted by the Senate as a condition of granting its advice and consent to U.S. ratification of a human rights treaty.

Question for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#4)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

You testified that the Universal Periodic Review (UPR) is a new process that ensures the Human Rights Council reviews every country's human rights record. a) How is this different from the practice under the Human Rights Council's predecessor? b) What are the benefits of participating in the UPR for the United States?

Answer:

The UPR did not exist under the UN Commission on Human Rights. It was established when the Human Rights Council was created on March 15, 2006 by the UN General Assembly (UNGA). UNGA resolution 60/251 mandated the Council to "undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States."

By participating in the UPR at the UN, the United States will have an opportunity to discuss its many accomplishments promoting and protecting human rights, as well as the challenges it still faces. Ultimately, our goal is

to engage in a process that will set an example for the rest of the world. We hope to show that a country can undertake robust self-examination of its human rights record and engage in serious dialogue about its record with other countries and civil society. We believe that setting such an example will help us promote human rights in other countries.

Additionally, given the UPR preparation process involves extensive consultation with civil society and community and local government leaders throughout the United States, this will provide an opportunity for the U.S. Government to hear the concerns of its citizens, to highlight existing laws, policies and programs relevant to our international human rights obligations, and to identify potential areas of improvement for possible follow up by domestic agencies.

Question for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#5)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

Please provide additional information on the Administration's plans for the UPR, including: a) where and when the "listening sessions" will be held; b) what other Federal agencies will be involved; c) whether Members of Congress and state and local agencies will be consulted; and d) how the UPR process will help increase understanding of U.S. human rights treaty obligations by government agencies and the broader public.

Answer:

Administration plans for the UPR review of the United States include extensive consultation with domestic and international NGOs. As part of this review, the Administration will participate in consultation sessions in several locations, led by local civil society organizations, between January and April. The first consultations were held in New Orleans, on January 27-28; in Chicago, on February 18; in Washington, D.C. (for national NGO representatives), on February 19; and in New York, on February 25-26. The remainder of the schedule is not yet definite, but the current plan is to hold additional consultations in Birmingham, Alabama; El Paso, Texas; Albuquerque, New Mexico and Window Rock, Arizona; Detroit and

Dearborn, Michigan; San Francisco and Berkley, California; and Chicago, Illinois.

The State Department will attend each of these consultations, with other Federal agencies. The specific agencies may differ depending on the location, but may include the Departments of Justice, Homeland Security, the Interior, Health and Human Services, Education, Labor and Housing and Urban Development, as well as the Environmental Protection Agency. The Congress is being briefed.

We expect that the UPR process will increase understanding of U.S. human rights treaty obligations. Particular aspects that will do so include these consultations, the opportunities for NGO submissions to the UN process, the State Department's UPR website (http://www.state.gov/g/drl/upr/index.htm) and e-mail address (upr_info@state.gov), and the necessary cooperation among federal agencies and with state and local governments.

Question for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#6)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

The U.S. government has provided important assistance to other countries, such as Angola, Afghanistan, Colombia, and Liberia, to support the demobilization of child combatants and their reintegration into society. This assistance has included training judges, public defenders and authorities on the legal protection framework for former child soldiers. Has the U.S. government developed similar guidelines and training in the United States to ensure former child soldiers are not penalized for the acts they committed while they were combatants?

Answer:

As a general matter the United States does not have its own "former child soldiers," as the U.S. armed forces do not recruit or use children in a manner contrary to international law. The U.S. armed forces only voluntarily recruit those 17 and over, and take all feasible measures to ensure that service members under 18 do not take direct part in hostilities. Nevertheless, the Department of Defense is adding training on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol) to existing training modules

on Combating Trafficking in Persons. This training will be required of all military and civilian personnel annually.

The U.S. Government generally advocates that child soldiers be treated as victims. However, the Optional Protocol does not impose a legal obligation on the USG to rehabilitate a child who was recruited or used in conflict outside of the jurisdiction of the United States, nor does it limit the ability to detain or prosecute child soldiers consistent with international and U.S. law.

Questions for the Record Submitted to

Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#7)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

Under the Genocide Convention, the U.S. government has undertaken obligations to prevent and punish genocide. What is the State Department's policy for preventing genocide, pursuant to our obligations under the Genocide Convention?

Answer:

As President Obama noted to the UN General Assembly, we "begin with an unshakeable determination that the murder of innocent men, women and children will never be tolerated," and as he expressed earlier this year at the Holocaust Museum, "we have ... an obligation to confront" the scourges of mass atrocity and do "everything we can to prevent and end atrocities like those that took place in Rwanda."

While the Genocide Convention requires parties both to prevent and punish genocide, the two actions are related. Effective punishment of genocide sends a message that such crimes will not be tolerated. The Office of War Crimes Issues in the Department of State works to ensure that when genocide occurs, as it did in Rwanda, it is appropriately punished. But we

also recognize that preventing genocide requires a broad range of other initiatives, and the Administration is exploring additional ways to advance this agenda. Within the Department of State, we have been assessing ways to strengthen our responses to the threat such atrocities pose, focusing on several core issues.

First, we are working to strengthen existing tools for conflict management, promotion of human rights, humanitarian response, and protection of people vulnerable to abuse. For example, in her December 2009 speech at Georgetown University setting out the four aspects of our human rights approach – accountability, principled pragmatism, partnering from the bottom up, and keeping a wide focus where rights are at stake – the Secretary of State committed the Department to using all the tools at our disposal in pursuit of our human rights agenda. For example, she explained that we are working for positive change within multilateral institutions, such as the United Nations, where our presence has a constructive influence. These institutions are valuable tools that can, when operating at their best, leverage the efforts of many countries around a common purpose.

Second, we are working to further strengthen our ability to receive timely information about at-risk populations. Various watch lists already exist and in many of the countries at risk of genocide or other mass

atrocities, the Bureau of Democracy, Human Rights and Labor at the State Department funds projects that can help prevent such tragedies. The Bureau of Population, Refugees, and Migration also provides assistance and advocates strongly for those fleeing conflict and persecution, so that they may be protected from potential atrocities. Likewise, the Bureau of International Organization Affairs works to help give UN peacekeeping missions the mandates and resources needed to protect the innocent. However, we are all keenly aware that more must be done to ensure that we are alert to the specific risks and pathways of mass atrocity crimes. While there will never be one approach, formula, doctrine or theory that can be easily applied to every situation, we can continue to improve our understanding of how to interrupt escalations of violence.

Third, we are working to ensure a tight and timely connection between the information we receive and the decision-making processes that trigger effective policy responses. The Obama administration is reinvigorating the inter-agency working group under the leadership of the National Security Council that will aim to ensure that the information on such situations is getting to the right people within the government and that appropriate actions are being taken to address them. And we need to find ways to mobilize action before situations become acute. The Secretary of State has made clear that we will not ignore or overlook places of seemingly intractable tragedy and despair and we must do what we can when human lives hang in the balance.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Richard J. Durbin (#8)
Senate Judiciary Committee,
Subcommittee on Human Rights and the Law
December 16, 2009

Question:

The last Administration took the position that U.S. human rights treaty obligations, including the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, did not apply to U.S. personnel operating outside the United States. The relevant treaty bodies have been consistent in stating that these treaties extend to places where a state has either formal jurisdiction or effective control over a territory or persons, and that these human rights treaties still apply even where the law of armed conflict is applicable. What is the position of the Obama Administration on whether: a) the International Covenant on Civil and Political Rights applies to U.S. personnel abroad; and b) whether the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment applies to U.S. personnel abroad?

Answer:

At the outset, we note that it is impossible to generalize about the extraterritorial scope of all human rights treaties, and that the analysis of the scope of application of treaty obligations by necessity begins with the text of the relevant treaty. Each treaty contains somewhat differently expressed provisions related to its territorial scope, while some -- most notably the

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment -- contain within the same instrument provisions with different territorial scopes. To note some examples, one may compare, for example, Article 2(a) of the International Covenant on Civil and Political Rights ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals **within its territory and subject to its jurisdiction** the rights recognized in the present Covenant...") with Article 2(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) (CAT) (requiring that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture **in any territory under its jurisdiction**) with CAT Article 5(1) (which requires States Parties to establish criminal jurisdiction over acts of torture committed by their nationals **wherever such acts occur**).

It must also be noted that under the longstanding legal doctrine of *lex specialis* (a doctrine providing that when two different set of legal rules purport to govern a particular situation, the more specialized body of law governs), the applicable rules for the lawful conduct of armed conflict are found in the Geneva Conventions and other international humanitarian law instruments, as well as in customary international law.

Determining the applicable international law that applies to a particular action taken by a government outside of its territory is thus a fact-specific determination, which cannot be easily generalized. In the context of preparing its reports on its implementation of human rights treaties, the United States government will examine the views and recommendations of the relevant human rights treaty bodies, which include recommendations regarding the issue of extraterritoriality, and will respond to those recommendations in those reports. As part of this process, the Department of State and concerned Executive Branch agencies will consult with Congress and U.S. civil society.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
U.S. Senator Russell D. Feingold (#1)
Senate Judiciary Committee,
Human Rights and the Law Subcommittee
December 16, 2009

Question:

On October 15, 2009, Senators Leahy, Kerry, Cardin, Franken and I sent Secretary Clinton and Attorney General Holder a letter seeking recommendations for implementation of the International Court of Justice decision in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) and the U.S. Supreme Court decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The ICJ – whose jurisdiction the U.S. had voluntarily agreed to – determined that the United States was out of compliance with its obligations under the Vienna Convention on Consular Relations, and the U.S. Supreme Court determined that Congress must take action to implement that judgment. The Vienna Convention is a key protection on which U.S. citizens abroad rely, so I am concerned about the ongoing failure of the U.S. to comply, and would appreciate the Department's input.

I look forward to the Department's prompt response to our letter. Please provide a copy of that response for the record of this hearing.

Answer:

The Department shares your desire to ensure that the United States complies fully with its international obligation to provide consular notification to foreign nationals, and your goal of ensuring compliance with the *Avena* judgment. Toward those ends, the Department is actively working to identify and evaluate possible avenues for ensuring compliance, working closely with the rest of the Administration. We regret the delay in responding to your letter of October 15, 2009, but as soon as we are in a position to outline the avenues we have identified, we will finalize a response.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
U.S. Senator Russell D. Feingold (#2)
Senate Judiciary Committee,
Human Rights and the Law Subcommittee
December 16, 2009

Question:

I appreciate your commitment at the hearing that you will provide an expeditious written response on the following issues: (1) whether the International Committee of the Red Cross (ICRC) has access to all detention facilities in Afghanistan; and (2) what constitutes "timely notice" to the ICRC under section 4(b) of Executive Order 13491. Please provide a copy of that response for the record of this hearing.

Answer:

I appreciate the importance of this question and your interest in this topic. Given the subject matter, I would refer you to the Department of Defense for details about this issue.

Questions for the Record Submitted to
Assistant Secretary Michael H. Posner by
Senator Russell D. Feingold (#4)
Senate Judiciary Committee,
Human Rights and the Law Subcommittee
December 16, 2009

Question:

At the hearing, you indicated that fulfilling our legal obligations under the Geneva Convention raises the question of how as a practical matter we can best prevent and punish genocide. What steps is the Obama administration taking to improve our institutional capacity as a government to identify, investigate, and respond to situations where genocide may be happening?

Answer:

As President Obama noted to the UN General Assembly, we "begin with an unshakeable determination that the murder of innocent men, women and children will never be tolerated," and as he expressed earlier this year at the Holocaust Museum, "we have ... an obligation to confront" the scourges of mass atrocity and do "everything we can to prevent and end atrocities like those that took place in Rwanda."

While the Genocide Convention requires parties both to prevent and punish genocide, the two actions are related. Effective punishment of genocide sends a message that such crimes will not be tolerated. The Office of War Crimes Issues in the Department of State works to ensure that when

genocide occurs, as it did in Rwanda, it is appropriately punished. But we also recognize that preventing genocide requires a broad range of other initiatives, and the Administration is exploring additional ways to advance this agenda. Within the Department of State, we have been assessing ways to strengthen our responses to the threat such atrocities pose, focusing on several core issues.

First, we are working to strengthen existing tools for conflict management, promotion of human rights, humanitarian response, and protection of people vulnerable to abuse. For example, in her December 2009 speech at Georgetown University setting out the four aspects of our human rights approach – accountability, principled pragmatism, partnering from the bottom up, and keeping a wide focus where rights are at stake – the Secretary of State committed the Department to using all the tools at our disposal in pursuit of our human rights agenda. For example, she explained that we are working for positive change within multilateral institutions, such as the United Nations, where our presence has a constructive influence. These institutions are valuable tools that can, when operating at their best, leverage the efforts of many countries around a common purpose.

Second, we are working to further strengthen our ability to receive timely information about at-risk populations. Various watch lists already

exist and in many of the countries at risk of genocide or other mass atrocities, the Bureau of Democracy, Human Rights and Labor at the State Department funds projects that can help prevent such tragedies. The Bureau of Population, Refugees, and Migration also provides assistance and advocates strongly for those fleeing conflict and persecution, so that they may be protected from potential atrocities. Likewise, the Bureau of International Organization Affairs works to help give UN peacekeeping missions the mandates and resources needed to protect the innocent. However, we are all keenly aware that more must be done to ensure that we are alert to the specific risks and pathways of mass atrocity crimes. While there will never be one approach, formula, doctrine or theory that can be easily applied to every situation, we can continue to improve our understanding of how to interrupt escalations of violence.

Third, we are working to ensure a tight and timely connection between the information we receive and the decision-making processes that trigger effective policy responses. The Obama administration is reinvigorating the inter-agency working group under the leadership of the National Security Council that will aim to ensure that the information on such situations is getting to the right people within the government and that appropriate actions are being taken to address them. And we need to find

ways to mobilize action before situations become acute. The Secretary of State has made clear that we will not ignore or overlook places of seemingly intractable tragedy and despair and we must do what we can when human lives hang in the balance.

Questions for the Record Submitted to
Assistant Secretary of State Michael H. Posner by
U.S. Senator Russell D. Feingold (#5)
Senate Judiciary Committee,
Human Rights and the Law Subcommittee
December 16, 2009

Question:

In recognition of our treaty obligations, the Foreign Assistance Act was modified to generally prohibit the provision of security assistance to countries with a consistent pattern of gross violations of internationally recognized human rights. I have repeatedly raised concerns about our provision of aid to countries which, according to State Department human rights reports, have for years engaged in torture, extrajudicial killing or prolonged arbitrary detention, including, for example, Chad. Please explain the legal reasoning behind the Department's decision to request military assistance for Chad in 2010 notwithstanding its long history of engaging in human rights abuses.

Answer:

We continue to engage with the Government of Chad (GOC) on its human rights record, which as you noted, is poor. Military assistance for Chad is requested to support three objectives: 1) develop capacity of the military as a non-political, professional force respectful of human rights; 2) increase counterterrorism capabilities and cooperation, including that provided through the Trans Sahara Counterterrorism Partnership (TSCTP)

program, and 3) enhance the security capacity of Chad to maintain territorial integrity. In particular, U.S. training through the International Military Education and Training (IMET) for Chad exposes the Chadian military to U.S. professional standards in areas such as civil-military relations and respect for human rights during military actions

The State Department vets in accordance with the Leahy amendment to prevent any unit of Chad's security forces from receiving assistance if the Department has credible evidence that such unit has committed gross violations of human rights. The State Department conducts thorough Leahy vetting for USG training of Chadian security officials or units, and in some cases has denied training due to credible evidence of gross violations of human rights. We regularly discuss with the GOC our concerns with reports of human rights abuses attributed to Chadian security forces.

Questions for the Record Submitted to
Assistant Secretary of State Michael H. Posner by
U.S. Senator Russell D. Feingold (#6)
Senate Judiciary Committee,
Human Rights and the Law Subcommittee
December 16, 2009

Question:

The Convention Against Torture, which the U.S. has ratified, prohibits sending individuals to countries where there are substantial grounds for believing the person would be in danger of being tortured. State Department human rights reports have made clear there is a direct connection between an individual being subjected to indefinite, incommunicado detention, and the likelihood that person will be tortured. If a country has a record of indefinite, incommunicado detention, does the United States still permit detainees to be transferred to that country?

Answer:

The United States does not transfer detainees to countries where it is more likely than not that they will be tortured. This assessment of whether a particular transfer can take place is necessarily undertaken on a case-by-case basis and taking into account relevant conditions of the country of origin. The person to be transferred, the government entity to which he is to be transferred, the human rights situation in the country to which he is to be transferred, including the country's record on indefinite, incommunicado detention, the prevailing political circumstances that may be related to the risks of torture an individual may face, and other factors relevant to the risk of torture all play critical roles in a U.S. determination regarding such transfers.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 5, 2010

The Honorable Richard J. Durbin
Chairman
Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Assistant Attorney General Thomas Perez before the Subcommittee on December 16, 2009, at a hearing entitled "The Law of the Land: U.S. Implementation of Human Rights Treaties." We hope that this information is of assistance to the Subcommittee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Tom Coburn
Ranking Minority Member

Hearing before the
Subcommittee on Human Rights and the Law
Committee on the Judiciary
United States Senate

Entitled
"The Law of the Land: U.S. Implementation of Human Rights Treaties"

December 16, 2009

Questions for the Record
Submitted to
Thomas E. Perez
Assistant Attorney General
Department of Justice

Questions Submitted by Senator Durbin:

Question:

1. You testified that the Justice Department is "actively participating in the newly revitalized interagency policy committee led by the National Security Council to explore ways in which we can enhance our compliance with and implementation of those international human rights norms by which we are bound." Please provide additional information on this interagency group, including: a) which agencies take part in the group; b) how frequently it meets; c) its main responsibilities and functions; d) whether it meets with human rights and civil rights groups and other stakeholders; and e) how it will enhance compliance with our human rights treaty obligations.

Answer:

An Interagency Working Group on Human Rights Treaties was established under Executive Order 13107, issued by President Clinton on the 50th anniversary of the Universal Declaration of Human Rights in 1998. The group is chaired by the designee of the Assistant to the President for National Security Affairs and includes representatives of the Departments of State, Justice, Labor, Interior, Health and Human Services, Education, Homeland Security, and Defense; the Equal Employment Opportunity Commission; and other agencies will be added as the chair deems appropriate. It met periodically on a limited number of issues under the Bush Administration, and the current Administration intends to have it meet on a more regular basis and with a broader agenda. The current Administration further intends to significantly reinvigorate the group to resume meeting at the Assistant Secretary level on a regular, perhaps quarterly, basis with a broader agenda. Also, mid-level officials will likely convene on a regular basis as sub-groups as needed on specific issues.

The working group will address a wide array of issues relating to implementation of United States human rights obligations in a number of ways, including: ensuring timely and thorough reporting under the relevant human rights treaties and following up on issues that arise during the reporting process; identifying problems that may require regulatory or legislative action; exploring strategies to integrate full consideration of our human rights obligations into our domestic policies and programs; and promoting greater awareness of these obligations, both within the Federal government and at the State, local, and tribal levels.

The working group has already held one consultation with a broad range of civil society organizations on these issues, and the Administration intends for the group to continue to hold such consultations in the course of its ongoing work.

Question:

2. The Justice Department is the federal agency with primary responsibility for interpreting the law and determining whether the Federal government is complying with its legal obligations. a) What is the Justice Department's role in determining whether the Federal government is complying with our human rights treaty obligations? b) Does the Justice Department consult with the State Department's Legal Advisor on human rights treaty compliance? c) What office in the Justice Department is responsible for this function?

Answer:

The Department of Justice is responsible for fully and fairly enforcing the civil rights laws within its jurisdiction, and coordinating domestic civil rights enforcement across the Federal government. Today, the United States is party to several critical human rights treaties whose subject-matters coincide with the work of the Civil Rights Division, including the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; and the two Optional Protocols to the Convention on the Rights of the Child.

In recent years, under Presidents Clinton and Bush, the United States Government has come into compliance with our reporting obligations under these important treaties. Under President Obama's leadership, the Department is working with our colleagues at the State Department and elsewhere in the Federal government to ensure that we meet our reporting requirements in a timely and thorough fashion and that they accurately reflect both the strengths and areas of improvement in our civil and human rights enforcement program.

The Department is also committed to continuing to work in close partnership with the State Department in carrying out the Government's first ever participation in the United Nations' Universal Periodic Review process, which is reaching out to various civil society stakeholders and government agencies on the state of human rights in the United States and collecting that

information in a report. The Department is also actively participating in the newly revitalized interagency policy committee – led by the National Security Council – to explore ways in which we can enhance our compliance with and implementation of those international human rights norms by which we are bound. The Office of the Assistant Attorney General in the Civil Rights Division works closely with other Justice Department components to coordinate with the State Department on these issues.

Question:

3. Human Rights First's Elisa Massimino, a witness on the second panel, recommended that the Executive Branch review legislation it proposes to ensure it conforms with our human rights treaty obligations. Does the Justice Department currently review proposed legislation for compliance with human rights treaties we have ratified? If so, what is the vetting process? If this is not being done, should it be?

Answer:

The Office of Management and Budget leads an interagency review process of Executive Branch legislative proposals. As Mr. Posner described in his response to a similar question posed by Senator Durbin, during that process the State Department is the agency that primarily reviews proposed legislation for consistency with United States obligations under international law, including obligations arising from human rights treaties.

Question:

4. When we ratify a human rights treaty, the United States frequently attaches Reservations, Understandings and Declarations ("RUDs"), which limit the application of the treaty. Ms. Massimino also recommends that the Executive Branch regularly review our RUDs to human rights treaties, with the goal of eliminating these limitations. Does the Administration have any plans to review the United States' RUDs to human rights treaties?

Answer:

The treaty bodies charged with monitoring compliance with U.N. human rights treaties often recommend that the United States consider modifying its RUDs, and in particular withdrawing its reservations. In preparing its periodic reports to each treaty body, the Executive Branch reviews each treaty body's recommendations and develops a formal, written response to each recommendation. In preparing its periodic reports, the Executive Branch considers these recommendations regarding the RUDs, assesses whether any could be removed, and provides a response to the treaty bodies. When United States laws have changed in a way that makes a RUD unnecessary, it may be appropriate for the Executive Branch in consultation with the legislative branch to consider whether removal of the relevant RUD would be appropriate. It should be noted, however, that RUDs are usually submitted by the Senate as a condition of granting its advice and consent to United States ratification of a human rights treaty.

Question:

5. You testified that the Universal Periodic Review ("UPR") is a new process that ensures the Human Rights Council reviews every country's human rights record. a) How is this different from the practice under the Human Rights Council's predecessor? b) What are the benefits of participating in the UPR for the United States?

Answer:

The UPR did not exist under the U.N. Commission on Human Rights. It was established when the Human Rights Council was created on March 15, 2006 by the U.N. General Assembly ("UNGA"). UNGA resolution 60/251 mandated the Council to "undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States."

By participating in the UPR at the U.N., the United States will have an opportunity to discuss its many accomplishments promoting and protecting human rights, as well as the challenges it still faces. Ultimately, our goal is to engage in a process that will set an example for the rest of the world. We hope to show that a country can undertake robust self-examination of its human rights record and engage in serious dialogue about its record with other countries and civil society. We believe that setting such an example will help us promote human rights in other countries.

Additionally, given that the UPR preparation process involves extensive consultation with civil society and community and State, local, and tribal government leaders throughout the United States, this will provide an opportunity for the United States Government to hear the concerns of its citizens, to highlight existing laws, policies and programs relevant to our international human rights obligations, and to identify potential areas of improvement for possible follow up by domestic agencies.

Questions Submitted by Senator Feingold:

Question:

1. As we discussed at the hearing, on October 15, 2009, Senators Leahy, Kerry, Cardin, Franken and I sent Attorney General Holder and Secretary Clinton a letter seeking recommendations for implementation of the International Court of Justice decision in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) and the U.S. Supreme Court decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The ICJ – whose jurisdiction the U.S. had voluntarily agreed to – determined that the United States was out of compliance with its obligations under the Vienna Convention on Consular Relations, and the U.S. Supreme Court determined that Congress must take action to implement that judgment. The Vienna Convention is a key protection on which U.S. citizens abroad rely, so I am concerned about the ongoing failure of the U.S. to comply, and would appreciate the Department's input.

   I look forward to the Department's prompt response to our letter. Please provide a copy of that response for the record of this hearing.

Answer:

A copy of the Department's response is attached.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2010

The Honorable Russell D. Feingold
United States Senate
Washington, D.C. 20510

Dear Senator Feingold:

Thank you for your letter to the Attorney General dated October 15, 2009, requesting input from the Department of Justice ("the Department") on what steps may be taken to respond to the decision of the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008), and of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), regarding the obligation to provide consular notification for non-citizens arrested by law enforcement agencies in the United States. An identical letter is being sent to all signatories to your letter.

The Department, and the Administration as a whole, take very seriously the international legal obligations of the United States. The Department is especially concerned with respect to the Vienna Convention on Consular Relations ("VCCR"), which, as you note in your letter, provides that a non-citizen who has been arrested or detained must be advised that he is entitled to have a consular official from his home country notified of the arrest or detention, as we want to ensure the same protection for United States citizens abroad.

Within the Department, we strive to ensure that our law enforcement officers and prosecutors comply with their obligations under the VCCR. We provide comprehensive guidance and training to all Department prosecutors and law enforcement agents regarding those obligations. They receive materials on the consular notification and access process prepared by the Department of State, which contain notices to foreign nationals translated into foreign languages. Prosecutors and agents also have electronic access to up-to-date listings and contact information for all foreign embassies and consular offices in the United States.

In addition, the Department has submitted to the Advisory Committee on the Criminal Rules a proposed amendment to Rule 5 of the Federal Rules of Criminal Procedure (as well as the corresponding Rule 58) which would require Federal courts to inform a defendant in Federal custody, at the initial court appearance, that if he or she is not a citizen of the United States, an attorney for the Government or Federal law enforcement officer will, upon request, notify a consular officer from his country of nationality of his arrest. Such an amendment could supplement efforts currently undertaken by Federal law enforcement agents and prosecutors to ensure that foreign defendants arrested pursuant to United States charges receive the notifications

Questions Submitted by Senator Coburn:

Question:

1. In your testimony, you expressed agreement with President Obama, that in order for the United States to be a "human rights beacon," we must "model at home the very human rights we seek to promote around the world." You also spoke about your commitment to "ensur[e] full political participation by qualified voters in our democratic process through enforcement of our voting rights laws."

   a. How, then, do you defend the Department's decision to dismiss criminal charges against members of the New Black Panther Party, who were videotaped at the entrance of a polling place brandishing weapons?

   b. Mr. Posner testified about the importance of the United States responding to complaints of human and civil rights violations issued by international bodies, in order to "demonstrate that democratic nations need not fear a discussion of their own record." Applying the same principle to the situation at hand, how do you defend the Department's recent instruction to attorneys who were subpoenaed by the Civil Rights Commission about this matter not to cooperate with that investigation?

Answer:

The Department is committed to the vigorous prosecution of those who intimidate, threaten, or coerce anyone exercising the right to vote. In the New Black Panther Party civil enforcement action, initiated by the Department on January 7, 2009, pursuant to Section 11(b) of the Voting Rights Act, the Department obtained an injunction against the only defendant known to have displayed a weapon outside the Philadelphia polling place on November 4, 2008. The injunction obtained by the Department prohibits that defendant from engaging in that conduct again and from otherwise violating 42 U.S.C. § 1973i(b)." The injunction remains under the supervision of the Federal district court until 2012, and the Department will fully enforce it. We are unaware of any evidence or allegation that more than one person brought a weapon to a Philadelphia polling place during voting hours on November 4, 2008.

The Department never dismissed any criminal charges arising from the November 4, 2008, incident because no Federal criminal charges were ever brought in connection with that matter. Our understanding is that local law enforcement officials also declined to pursue State criminal charges.

The Department did dismiss Federal civil claims against three defendants originally named in the complaint, i.e., an unarmed poll watcher present at the Philadelphia polling place during voting hours on November 8, 2008; the leader of the New Black Panther Party for Self-Defense, who was not at the polls when the incident occurred; and the party itself. The decision

to dismiss Federal civil claims against these three defendants was made by the career attorney serving as-Acting Assistant Attorney General for the Civil Rights at the time, with input from another long-time career attorney who was Acting Deputy Assistant Attorney General; they determined, after a review of the matter, that the facts and the law did not support pursuing those claims.

Regarding the U.S. Commission on Civil Rights, the Department wholeheartedly agrees with the proposition that "democratic nations need not fear a discussion of their own record," and is therefore working cooperatively with the Commission to accommodate the Commission's requests. The Department has responded to the Commission's requests for information, including by producing more than 4,000 pages of documents, and the Assistant Attorney General for Civil Rights has testified before the Commission. However, the Department has a longstanding policy of not providing career litigating attorneys to testify about particular decisions taken in the course of their professional duties. The Department has an institutional need to protect against disclosures of internal recommendations and deliberations of Department employees, particularly those related to prosecutorial decisions. Such disclosures would have a chilling effect on the open exchange of ideas, advice, and analyses that is essential to the decision-making process. It is essential that career attorneys know that they will not be subjected to public scrutiny if they make prosecutorial decisions that they believe are legally sound, but which may be politically unpopular.

Question:

2. You testified at length about the Obama Administration's goals for civil rights enforcement within your division at the Department of Justice, but you gave no details on what has been done over the years to enforce civil rights laws and, therefore, to comply with human rights treaty obligations. It is my understanding, however, that the Bush Administration submitted a lengthy report on compliance efforts to the U.N. CERD committee just a few years ago.

    a. Please outline for the subcommittee what compliance measures were highlighted in that lengthy report.

Answer:

In April of 2007, the United States submitted a report to the U.N. Committee on the Elimination of Racial Discrimination on measures giving effect to its undertakings under the International Convention on the Elimination of All Forms of Racial Discrimination. The report was prepared by the U.S. Department of State, with extensive assistance from the White House, the Civil Rights Division of the Department of Justice, the Equal Employment Opportunity Commission, and other relevant departments and agencies of the Federal government and of the States. The full report is available here: http://www.state.gov/documents/organization/83517.pdf

The report discussed numerous measures taken to ensure compliance with the various requirements of the Convention, including but not limited to the following:

- Continued enforcement of anti-discrimination statutes against public and private entities in the areas of employment, housing and housing finance, access to public accommodations, and education.

- The continued use of procurement programs in Federal contracting aimed at remedying the effects of past and present discrimination, for example the Small Business Act requirement that Federal agencies set goals for contracting with "small and disadvantaged businesses."

- Enforcement by the Civil Rights Division of several criminal statutes that prohibit hate crimes, including 18 U.S.C. § 241 (conspiracy against rights); 18 U.S.C. § 245 (interference with federally protected activities); 18 U.S.C. 247(c) (damage to religious property); 42 U.S.C. § 3631 (criminal interference with right to fair housing); and 42 U.S.C. § 1973 (criminal interference with voting rights).

- Enforcement by the Civil Rights Division of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789, which prohibit law enforcement agencies from engaging in a pattern or practice of violation of civil rights.

- Ensuring the right to participate fully in elections by enforcing the Voting Rights Act of 1965, as amended, the Uniformed and Overseas Citizen Absentee Voting Act of 1986, and the National Voter Registration Act of 1993, and other relevant Federal laws.