1. This brief paper is prepared in response to a direct invitation to submit evidence regarding the topic in hand, and with particular reference to certain of the specific questions formulated by the Committee in that regard. It follows on from the Treaty Centre’s earlier submission to the Joint Committee of both Houses of Parliament in 2008,¹ during the process which led in due course to the adoption of the Constitutional Reform and Governance Act 2010 (CRGA). The observations made draw primarily upon experience of the international aspects of the treaty-making process, and do not directly address the issues specifically related to ‘Brexit’ (the significance of which for the general process of treaty scrutiny I am inclined to think has been somewhat exaggerated) or, for the most part, on the fine detail of internal constitutional arrangements in the UK or elsewhere.

Questions 1, 3, 6, 10

2. The current arrangements for Parliamentary scrutiny, while not entirely without merit, appear to be of very limited utility as a mechanism either for ‘holding the government to account’ or for ‘helping it to get the best agreements possible’, not least because they do not really seem to be designed with such ambitious aspirations in mind. Rather, they are effectively confined to offering a last-ditch opportunity to prevent the assumption by the UK of ill-advised or improvident commitments operating within the international legal order. Yet it could be argued that they are not actually applicable in those very situations where a restraining hand might most be needed. Furthermore, the particular way in which they contrive to frame the issue of scrutiny seems of itself to be unfortunate in principle, since it serves to consolidate an impression of international agreements as, in essence, potential threats to the interests of the UK and its populace from which protection is needed, when for the most part exactly the opposite is the case. These points will be considered in turn.

(a) The limited utility of the ‘restraining hand’. It would seem that, just as the operation of the ‘Ponsonby’ rule produced rather few discernible effects during the time of its operation, the restraining powers conferred upon Parliament in 2010 have not in practice produced any significant substantive impact on the process of treaty ratification by the UK.² This is

² See generally A. Lang, Parliament’s Role in Ratifying Treaties (House of Commons Library Briefing Paper No 5855, 17 February 2017).
not particularly troubling or surprising in itself, since close observation and evaluation of the treaty-making process generally provides little reason to doubt the inherent competence of the British government and its established mechanisms and procedures in this field, and one would therefore expect there to be relatively few instances where intervention by Parliament, or any other agency, would actually be urgently needed.

All the same, such cases are by no means unimaginable, and it seems reasonable to suppose that by far the most likely scenario in which ill-judged or over-hasty governmental decisions might be made in this field would be one involving a situation of perceived ‘emergency’ (whether real, exaggerated or largely imagined), when public feelings might be running high and the flames of political intemperance might most easily be fanned.

Yet these are precisely the circumstances in which Parliamentary scrutiny is most likely to be excluded, there being two principal routes through which such exclusion might seemingly occur. The first permits ratification of treaties without prior reference to Parliament under the rubric of ‘exceptional cases’, a category which remains totally undefined in the Statute but is widely supposed to have emergency situations in mind. The substantive indeterminacy of this escape clause was the subject of considerable adverse comment during the previous consultation process, but was left unresolved in the legislation.

The second operational limitation of the statutory scheme for scrutiny is that it applies only to the process of ‘ratification’, which, as defined in subsections 3 and 4 of section 25, CRGA, does not appear to cover all the means by which a government may lawfully ‘express its consent to be bound’ by a treaty within the meaning of the 1969 Vienna Convention on the Law of Treaties (VCLT). In particular, Articles 11 and 12 VCLT expressly contemplate the possibility of expressing such consent through signature alone, a process which does not seem to entail the ‘deposit or delivery’ either of ‘an instrument’ or a ‘notification’ as contemplated by section 25(4) CRGA. The primary legal purpose of signature in this context

---

3 2010 Act, s 22.
4 Lang (note 2 above), para 5.1.
6 Except to the extent that the exceptional cases exemption may not, it seems, be invoked in circumstances where either House has already resolved that the treaty should not be ratified: Section 22(2).
7 Thus ratification does not cover any act ‘which establishes as a matter of international law the United Kingdom’s consent to be bound’ by a treaty, but only ‘an act of a kind specified in subsection 4’ of Section 25. This formula would appear to include the processes of ratification strict sensu, acceptance, approval and accession, as well as notification of the completion of relevant domestic procedures, where that has been stipulated as a prerequisite to consent.
is, of course, merely to authenticate the text of a treaty as a faithful record and reflection of what was indeed agreed by the negotiating states,\(^8\) consent to be bound being typically a separate and subsequent process, at least where multilateral treaties are concerned. Yet there is no doubt that signature may, in appropriate circumstances, legitimately serve the additional purpose of definitively expressing consent to be bound – namely, where the intention of the state concerned is to that effect and the treaty does not specify ratification as a requirement.\(^9\)

Although the UK does not, so far as I am aware, usually employ this method of expressing consent with regard to multilateral treaties, it is clear that it has done on occasion – almost certainly in recognition of the perceived urgency of the situation – and in such cases no opportunity for advance Parliamentary scrutiny would seemingly arise. Furthermore, if it is correct that such cases fall outside the statutory scheme entirely, then even the limited postliminary safeguards applicable to ‘exceptional’ cases by virtue of Section 22(3) CRGA will be formally inapplicable.\(^{10}\) It is not at all difficult to imagine that governmental engagement in treaty-making of an under-prepared or ill-considered character might result from this regime, and one strongly arguable case of such an instrument is identified in the Annex, purely by way of illustration.

These inherent limitations of the current arrangements seem if anything to enhance the case for Parliamentary involvement of a more active and constructive character, and at an earlier stage of the treaty-making process.

\[(b) \textit{The untapped potential of the ‘guiding hand’}.\] The potential for such a contribution to be made by Parliament to the treaty-making process was canvassed quite extensively by the Joint Committee in 2008, culminating in the proposal for a new Joint Committee incorporating expertise from both Houses,\(^{11}\) and much of that discussion would seem to remain relevant today. Thus, rather than characterising the role of Parliament as being solely to protect us from the assumption of inappropriate legal commitments on the international plane, there may be much to be said for expanding its potential for contributing actively to our engagement in these transnational initiatives in legal regulation. In particular, the

---

\(^8\) VCLT, Article 10. It also creates a provisional obligation to refrain from acts which would defeat the object and purpose of the treaty until such time as the state in question has made clear its intention not to become a party: VCLT, Article 18(a).

\(^9\) VCLT, Articles 12(1), 14. A. Aust, \textit{Modern Treaty Law and Practice} (3\textsuperscript{rd} edn., 2013), at 89, suggests that this practice is in fact ‘quite common’, at least where bilateral treaties are concerned

\(^{10}\) Though they might perhaps be honoured in practice.

\(^{11}\) Joint Committee Report (note 5 above), paras 233-238.
absence of evidence of any general governmental disposition to commit us to international legal initiatives from which we might require to be rescued by Parliament plainly does not exclude the possibility that the latter institution might have had something of positive value to contribute in advance, during the course of negotiations, thereby potentially enhancing and enriching the substantive content or reshaping the overall orientation of the instrument in question.

It may also be important to acknowledge that the benefits of greater Parliamentary involvement in the treaty-making process would certainly not be entirely one-way. In particular, the Parliamentary process itself may have much to gain through enhanced involvement in the international elements of legal regulation. Given the extreme intricacy and inter-dependence of our increasingly globalised society, especially in such fields as trade, investment, travel, leisure, communications and education, and the attendant problems that have emerged with regard to inter-governmental cooperation generally and the protection of human rights and the environment in particular, it is essential to recognise that there are now increasingly few significant social, political or economic problems that are amenable to effective solution on a purely national basis. Accordingly, any reform which serves to dilute or counteract the more insular and parochial perspectives that have traditionally characterised our processes of governance deserves the most serious consideration.

Needless to say, the capitalisation of such potential as Parliament might possess in this regard would be dependent on ensuring the establishment of suitable institutional structures, as well as the development of appropriate technical expertise regarding both the national and international, and the substantive and procedural, aspects of the treaty-making process. Without that, Parliamentary involvement might even prove a positive impediment to national efforts in this regard. The specification of an appropriate model for this purpose is probably best left to those with specialist expertise in constitutional process, though one general point that perhaps deserves to be taken into account is that the institutional arrangements that typically function most effectively are those where the fine detail of powers and operations is not laid down exhaustively in advance, but established initially only in general terms and left to evolve gradually, and in the light of experience. Thus, the more useful and efficient Parliamentary involvement proved to be, the more its scope might be allowed to expand.

One feature that is sure to prove crucial concerns the precise composition of any new institution to be created, and it seems likely that a structure of some sophistication would be needed. In particular, while smaller committees tend to be more efficient in operation, they carry the risk of failure to incorporate an array of expertise appropriate to the ambit of the
agenda. In this case, the multi-layered technical complexity of the treaty-making function might suggest the need for a relatively small core membership coupled with a much wider constituency of associate members, to be co-opted ad hoc in light of the particular business that falls for consideration on any given occasion. This point is of particular importance in view of the considerations that follow.

**Question 5**

3. The crucial point to note here, experience suggests, is that treaties are unhelpfully resistant to neat and orderly classification into predetermined categories – there is, in other words, no simple, widely agreed, all-purpose taxonomy of such instruments. Instead, they are commonly typologised by reference to a variety of concurrent and multi-layered criteria, reflecting such diverse considerations as ‘form’, ‘normative effect’ and substantive ‘content’.

Although it seems most natural and convenient to classify them as instruments in the fields of ‘human rights’, ‘trade’, ‘education’, ‘environment’ etc – not least because that tends to map most easily onto existing institutional structures and reservoirs of expertise – such an approach (at least if applied in isolation) might very well prove inappropriate or counter-productive in practice. For one thing, the precise boundaries of such categories are by no means conceptually clear or incontestable; for another, many treaties quite deliberately straddle two or more such subject areas, with the consequence that such duality/multiplicity of focus would have of necessity to be taken into account.

4. Furthermore, one particularly valuable function of enhanced treaty scrutiny would actually be to detect and hopefully address any unforeseen, tangential and purely incidental potential impacts of draft instruments emerging from one subject area on the fundamental principles of another – for example, the collateral implications of a trade or investment treaty upon principles of human rights or environmental protection. The absence of a dedicated institutional mechanism for addressing such incongruities on the international plane has recently been identified as a key weakness and contributory factor to the progressive fragmentation of international law, a phenomenon of considerable contemporary concern. Accordingly, any arrangement capable of detecting such problems at the national level might prove very welcome, but would probably demand a rather complex and multi-dimensional process of scrutiny, embracing specialist, trans-disciplinary and generalist expertise, as foreshadowed above.

---


Illustrative Appendix: Safety and Security at Sporting Events

5. Following the tragic and deplorable events at the Heysel Stadium in 1985, which resulted in the banning of English football teams from European competition for several years, the UK government moved very quickly to initiate a formal ‘legislative’ response within the Council of Europe (CE), where the general problem of violence within society had been a matter of concern for some time. Indeed, the European Convention on Spectator Violence and Misbehaviour at Sport Events and in particular at Football Matches was drawn up and adopted in less than three months from the occurrence of the tragedy itself. In an apparent departure from its normal practice, the UK expressed its consent to be bound by signature alone, simultaneously with the treaty’s adoption. The impression of extreme, and arguably undue, haste surrounding the conclusion of the instrument was underlined by the fact that, most unusually for a CE Convention, it was not accompanied by an Explanatory Report outlining the key provisions and the background to their adoption.

6. The text focused almost exclusively upon spectator violence and misbehaviour, addressing such matters as co-operation between police forces, the prosecution of offenders and the application of appropriate penalties, the strict regulation of ticket sales, segregation of rival fans and exclusion of known trouble-makers, and restrictions on the sale of alcoholic drinks. While none of these measures could sensibly be regarded as inherently inappropriate or objectionable, the clear overall impression created was one of an unduly selective, regrettably unbalanced and ultimately prejudicial approach to football’s problems, where the well-being of spectators had long been much more seriously and pervasively affected by other considerations, including the sub-standard condition of many sporting stadia, the apparent indifference towards spectator interests of football clubs themselves and the widespread deficiencies in policing and stewarding arrangements.

7. Such matters should surely have been equally in the forefront of political consideration at the time, especially bearing in mind that the Bradford City fire, in which 56 people were killed and over 250 injured, had occurred less than a month before Heysel itself. While the Convention did call for parties

---

14 The disaster occurred on 29 May 1985, before the start of the European Cup Final between Liverpool and Juventus, held at a neutral venue in Belgium. Following confrontations between rival fans, the breach of a dividing fence and an ensuing crush of supporters against a retaining wall, 39 (mostly Italian) spectators were killed and over 600 injured.
15 ETS 120, which entered into force on 1 November 1985.
16 There were those who argued that such considerations were a factor even in the Heysel disaster itself, though official accounts placed the blame squarely on the fans.
17 The fire occurred at a Third Division match held at the Valley Parade stadium on 11
‘to secure that the design and physical fabric of stadia provide for the safety of spectators’, this exhortation was, somewhat bizarrely, formally limited by Article 3(4) to situations ‘where outbreaks of violence and misbehaviour by spectators are to be feared’. Despite these deficiencies, the Convention attracted fairly widespread support from CE member states.

8. Over the course of time, however, even the Standing Committee charged with overseeing the implementation of the Convention came to appreciate that it was out of harmony with contemporary needs, and the negotiation of a replacement instrument was initiated. The Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events was duly adopted at Saint-Denis on 3 July 2016, offering a far more balanced and systematic approach to the matter in hand, including (alongside the prevention and punishment of offensive behaviour) attention to securing active multi-agency cooperation in the running of football matches, proper regulation of stadium infrastructure and a welcoming atmosphere and safe and accessible environment for fans. It has now attracted 30 signatures, seven of which have been followed by ratification. It is accordingly already in force, since only three ratifications were necessary to bring about that outcome. Upon expressing their consent to be bound, states must denounce the earlier agreement.

9. It is important to understand that the deficiencies of the earlier instrument were not merely that they omitted to address such crucial matters at all, but that they positively put some of them at risk through the confrontational relationship that was generated between the police and football spectators in particular, and the policy of strict confinement and control adopted towards the latter. In that sense, they merely set the scene, at least within the UK, for further tragedy, which was to materialise in the Hillsborough Stadium disaster of 15 April 1989, which saw the deaths of 96 Liverpool fans and injuries to over 750 others. This sorry legacy of misadventure in legal regulation was further manifest in the succession of false narratives that were

---

May 1985, and was caused by the accidental ignition of debris which had accumulated over time under the wooden stand. It led to various legal proceedings, the holding of the Popplewell Inquiry and, ultimately, to new safety standards. For an account by a survivor, see M. Fletcher, *Fifty Six: The Story of the Bradford Fire* (2015).

18 See also, however, Article 6(1), which might conceivably be interpreted to slightly less callously restrictive effect, though only in the context of future cooperation between governments, sports organisations and clubs.

19 The total number of parties peaked at 42 during 2013, but has subsequently declined as a result of denunciation by several states.

20 For information on this matter, see the Explanatory Report to the 2016 replacement Convention, available from the Council of Europe’s treaty database.

21 CETS 218.

22 Article 16(3). Denunciation, of course, is merely the established technical treaty law term for withdrawal, and does not of itself imply moral or political condemnation of the instrument denounced (although, in this particular case, an element of such disapproval may arguably be implicit.)
disseminated in the aftermath of the tragedy with a view to vilifying Liverpool fans and defending the position of the authorities. It is an episode from which the police, the government of the day and their supporters in the press emerge with very little credit indeed, and is only now beginning to be resolved, thirty years on.

10. The key point for present purposes, however, is that, given that the inadequacies of the 1985 Convention’s approach were so very evident from the outset, an established tradition of greater Parliamentary involvement in the treaty drafting process might just have assisted in redirecting the normative content and overall approach of this particular instrument to more socially constructive effect. Even now, it might be utilised to encourage the UK government’s engagement with the replacement convention, which, disappointingly, it does not yet seem to have signed or ratified.

7 December 2018