PANEL II - GENERAL DISCUSSION

Alfred de Zayas:

I would like to make two brief footnotes to Mr. Stewart's presentation. I do not believe ratification of the Optional Protocol by the United States has to take place in the immediate future. After all, it is not a prerequisite for being elected a member of the Committee. One question that frequently arises is "How is it possible that countries which have not ratified the Optional Protocol have a member sitting on the Committee?" The answer is that it suffices for a country to have ratified the Covenant in order to nominate one of its nationals for election to the Committee. Admittedly, one of the Committee's major activities is the consideration of individual complaints. But, when I joined the Secretariat and began servicing the Committee, its composition was such that of the eighteen members of the Committee only seven came from countries that had also ratified the Optional Protocol. At present, the situation has improved. Currently, ten members come from countries that have ratified the Optional Protocol and eight come from countries that have not.

The Human Rights Committee has similarly been confronted with the issue raised in the *Soering* case. For us it concerned Article 7 of the Covenant which prohibits torture or other forms of inhuman and degrading treatment. The issue arose in the case *Earl Pratt and Ivan Morgan v. Jamaica.*[1] The consensus of the Committee was that these facts, similar to those in the *Soering* case, would not constitute a violation of Article 7, because if one complained about being on death row too long, the only solution would be early execution! Under this logic, we would have to inform a state party that it is violating Article 7 by not executing the person on death row. Pratt and Morgan can be happy with the delay because in addition to staying alive, the Committee has adopted a decision recommending a commutation of their sentences.

There was, however, a finding of a violation of article 7 on different grounds. When the Committee requested a stay of execution, the stay was granted. But Jamaica held the prisoners in the death cell over twenty-four hours before telling them that the stay of execution

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[1] CCPR/C/35/D/210/1986 and CCPR/C/35/D/225/1987.

had been granted. In fact, Morgan and Pratt were removed from the death cell forty-five minutes before the scheduled execution. This twenty-four hour period was quite unnecessary, for they could have been taken out of the death cell immediately. This was found to be cruel and inhuman treatment in violation of Article 7. Nevertheless, Pratt's and Morgan's original argument that the nine year death row period was in itself a violation of Article 7 was essentially rejected by the Committee. In short, it was silent rejection.

Those of you who have the opportunity to look at the decisions of the Human Rights Committee will probably be disappointed. In an effort to reach consensus, the Committee will agree on the result but not on the *ratio decidendi*. Therefore, the full rationale of a decision is rarely provided. If this case or one like *Soering* ever comes before us again, the Committee is not likely to find a violation of Article 7.

David Stewart:

I think the concern was less about the case's outcome and more a generalized concern that the court in Strasbourg would be in a position to determine how the prosecution in Virginia would be conducted. The basic problem is how to encourage the legal and political communities in the United States to accept to some degree participation in a regional or multilateral system? Participating in the Committee Against Torture would be a step in the right direction. Once we work within such a committee, I believe we will find that it does not harm our interests but instead permits us to advance our interests. We may then find a greater willingness to participate in another. Unfortunately, a barrier exists in the requirement of obtaining two-thirds of the Senate's approval.

Louis B. Sohn:

First, someone mentioned that people think there is no need to ratify a convention because our law already conforms to its standards. That reminded me of an article about the debate in the United Kingdom over the adoption of the European Convention. The Government declared: "Of course we can ratify the Convention. No problems shall arise as our law is perfect." The United Kingdom ratified the Convention and just a few months later all the cases of Indian refugees from East Africa were filed. Suddenly, the Government discovered that the European Commission on Human Rights thought that several of the petitions had merit to them! Some of the

cases even went to the Court. This forced the British to change their administrative procedures concerning the admission of aliens. The necessary changes were made, but only with respect to those cases which had been submitted. Others immediately complained to the Commission. The Commission rebuked the British by declaring that the changes should be applied as a general rule and not merely to the early claimants. Moreover, any legal change in the future must apply to everybody. Meekly, the British acquiesced.

Last, I would like to ask a question about the Genocide Convention. I recall that hidden somewhere in the Convention is a provision stating that it applies only to genocide committed in the United States by the United States Government. Therefore, if a Khmer Rouge entered the United States and the question arose whether he had committed genocide, we could neither try nor extradite him. Is that correct?

David Stewart:

Yes. The Convention provides in Article VI that any person charged with the commission of any of the five enumerated genocidal acts shall be tried by a court of the state in whose territory the act was committed (or by such international penal tribunal as may have jurisdiction with respect to those states accepting such jurisdiction). The United States implementing legislation[2] applies only if the offense is committed in the United States or if the alleged offender is a national of the United States.[3] So an act of genocide in Cambodia would not violate United States law unless committed by a United States national.

With respect to extradition, parties agree under Article VII of the Convention to extradite persons accused of committing genocidal acts in accordance with their national laws and treaties. In giving its advice and consent to ratification, the Senate added an understanding on this point, which states: "the pledge to grant extradition in accordance with a state's laws and treaties in force found in Article VII extends only to acts which are criminal under the laws of both the requesting and requested state and nothing in Article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state." As you know, it is United States law and practice only to extradite pursuant to a bilateral treaty. This

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[2] Pub. L. 100-606, Nov. 4, 1988, 102 Stat. 3045, codified at 18 U.S.C. 1091.
[3] *See* 18 U.S.C. 1091(d).

requirement, together with the dual criminality requirement, makes extradition unlikely. In any event, no bilateral treaty would cover the situation you pose.

This issue has also arisen in connection with the Torture Convention, both in the context of a visiting foreign official charged with torture at home and a United States enforcement official charged by a foreigner with having tortured him or her during a visit to the United States. In the first instance, assuming no immunities applied, we would be obliged to extradite an alleged foreign torturer pursuant to a proper request under an applicable bilateral extradition treaty with another State party to the Convention, subject of course to all the procedural safeguards that otherwise exists under United States law. In the second instance, it is difficult to see how any valid claim of torture committed in the United States would not be dealt with in the first instance under United States law.

Your first comment reminds me of something that I meant to say. One of the byproducts of saying "the Torture Convention will not change our law because our law already prohibits torture" is that no legislation will be proposed to implement the Torture Convention domestically. Since we concluded that the Convention is implemented *ipso facto* by other law, we are left with proposed legislation to apply the Convention only to acts committed by our nationals extraterritorially and to implement our obligations under Article VI. This raises the issue of seeking extradition to the United States when the defendent is found abroad.

Louis B. Sohn:

What you said reminded me that people erroneously believe that because our law is consistent today that there is no reason to ratify a convention. One of the purposes of a convention is to prevent the future from *demoting* the law. This is a particular problem in the United States where a later law may alter the current protections. While the general object of international legislation is to prevent a demotion of the law, ratifying a convention in the United States does not offer this protection because the law can be changed for the worse.

Winston Nagan:

One area where an obvious inconsistency exists is in the context of capital punishment. You have the *McClesky* and *Stanford* decisions

involving the death penalty and issues of race, juveniles, and the mentally retarded. Unfortunately, capital punishment is such a volatile political issue that it is impossible to reasonably articulate a rational perspective of the issue without employing the problematic jingoism and nativism that go hand-in-hand with it in the political arena.

Richard Lillich:

I have a question for Mr. Stewart and then a plea for some elaboration by Mr. de Zayas.

In your follow-up remarks to the *Soering* case, David, you mentioned the great political ramifications that it created. To get Soering back, which it has done, the Commonwealth of Virginia had to agree not to ask for the death penalty. The United States made a commitment that Virginia would do that to have him returned. This commitment itself raises some interesting constitutional points. However, I did not quite follow your principal remarks concerning the need for some kind of reservation to take care of the *Soering* situation. After all, the decision of the European Court is not binding upon a United States court in determining what is cruel and unusual punishment.

Another interesting aspect of *Soering* is that not only will it block extradition from Europe in death penalty cases, but it also might block extradition from many Commonwealth countries that have constitutional provisions derived either from the Civil and Political Covenant or the European Convention. There is no way we can handle the problem except to reduce the charges. I do not believe that a reservation is necessary, however, because the *Soering* decision is merely persuasive.

Now, my questions to Alfred. One point that was legitimately raised at the 1979 hearings, and I think could still be legitimately raised today, concerns the jurisprudence of the Human Rights Committee. Oscar Schachter testified about that in some detail. The Committee at that time had only conducted three or four sessions and had yet to elaborate much of its jurisprudence. You have just told us, Alfred, that their opinions, as we know, are somewhat opaque and that they occasionally fail to elaborate their reasons for a decision. Can you offer us some data that would indicate that we can safely tell people that they should not be worried about the decisions of the Human Rights Committee?

David Stewart:

The answer, Professor Lillich, is the following: A reservation is necessary, as opposed to a declaration or an understanding, because we mean to limit the undertaking under the Convention to the concept of cruel and unusual punishment as embodied in the Fifth, Eighth, and Fourteenth Amendments and as interpreted by the Supreme Court. That is presumptively narrower than an obligation to prevent cruel, unusual, and degrading treatment or punishment. Initially we had proposed an understanding which we later upgraded to a reservation because, as we began to reconsider this issue, we realized we were really telling the international community that we were, in fact, limiting our undertaking.

Our second concern was that a decision like the *Soering* case would drive development of the law under the Convention in ways that were unpredictable. It is the converse of the point Professor Sohn just raised, that buying into the international standard provides protection against future regression in United States law. That, of course, can be very important, particularly when you are looking at regressive or repressive regimes. We tend to think it is not important for the United States because our law progresses rather than regresses. By contrast, the fear is that the Court in Strasbourg might take this new and unarticulated concept and apply it in a way that is *completely* at odds with our own jurisprudence, especially in the area of criminal sanctions.

This issue arises in other contexts. Not long ago I was asked to approve a reservation to a treaty containing a mechanism whereby advisory opinions were adopted concerning the meaning and effect of the treaty's provisions. I will not name the treaty, but it had a mechanism similar to the Committee Against Torture. The proposal was that we would accept obligations under the treaty only to the extent that it had been interpreted by its advisory committee as of that date. In other words, the proposal was to "freeze" the interpretation of the treaty and to reject, in advance, its further evolution. Of course we could not agree to that. It would be entirely inappropriate to limit our undertakings in that manner.

Therefore, a more specific reservation to Article 16 was required because of the sense of uncertainty in the political dimension as to where the interpretive mechanism might take this new concept internationally in the future.

Alfred de Zayas:

Admittedly, the Committee had only a limited amount of experience with cases in 1979. Most of the cases that had been brought before the Committee at the time concerned two countries: Canada (Canadian Indian cases) and Uruguay (violations under a military regime). Jurisprudence was yet to develop. We now have thirteen years of experience. I assure you that an effort has been made by all members of the Committee to know their own jurisprudence, to be consistent with it, to be rather conservative and not terribly innovative. A non-legal argument heard again and again in the Committee's deliberations is that if they go too far other countries will not ratify the Optional Protocol, and old states parties may even denounce the Protocol under Article 12.

One particular decision of the Committee made history by expanding the scope of application of the Covenant on Civil and Political Rights.[4] The case concerned Social Security benefits in the Netherlands. A woman, according to legislation enacted many years ago, did not have the same benefits that a man would because she was not presumed to be the "bread-winner". According to the social and economic conditions in the Netherlands at the time of enactment, there had been no discrimination nor intent on the part of the drafters of the Dutch legislation to discriminate. Yet, over the years the socio-economic conditions in the Netherlands changed. This woman *was* a bread-winner. Unequal treatment existed, yet the Committee remained deadlocked for several sessions. Half of the Committee's members felt that it should not wander into the field of economic, social, and cultural rights and concluded that this matter should be considered inadmissible and outside of the scope of application of the Civil and Political Rights Covenant. The others felt that Article 26 of the Covenant established an autonomous right to non-discrimination, regardless of the subject matter. They argued that the Covenant does not require states to establish Social Security schemes, but once they do, only distinctions based on reasonable and objective criteria are allowed. After the Committee elections in the fall of 1986, five new members arrived, thereby altering the body's distribution and allowing a new consensus to emerge. This landmark decision was adopted by the Committee at its twenty-ninth session. This was

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[4] *See* Zwaan de Vries v. The Netherlands, CCPR/C/29/D/182/1984.

one case where members of the Committee were genuinely concerned that their decision could discourage states from ratifying the Optional Protocol. The Dutch Parliament seriously considered denouncing the Optional Protocol under Article 12 of the Protocol and ratifying anew with the addition of a reservation acknowledging acceptance of the Committee's jurisdiction to investigate anything but matters concerning economic, social, and cultural rights. Eventually, they decided not to denounce it.

With respect to other articles, the Committee has been reluctant to find violations unless they are very clearly established. For instance, Article 18 of the Covenant guarantees freedom of religion. Last session, this article was interpreted in *Bhinder v. Canada*.[5] Mr. Bhinder, a Sihk by religion, worked in the Toronto coach yard as a railroad electrician. This had been declared a hard-hat area. Bhinder refused to wear a hard hat, stating that his religion only allows him to wear a turban. The Committee found no violation of Article 18 and referred to paragraph 3 which provides that "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others." Yet recent legislation has been enacted in the United Kingdom to accommodate Sihks who want to wear turbans on construction sites, and cyclists in Europe have been allowed to wear their turbans instead of crash helmets. This is all fine and good, because states are always free to go beyond the provisions of the Covenant and grant their citizens more rights that those minimum rights guaranteed in the Covenant.

Winston Nagan:

I am inclined to go along with Professor Lillich's scepticism about the reservation to Article 16 which mirrors the caution found in the *Soering* case. I believe we are dealing with a political agenda. It is quite obvious that the issue of capital punishment will put the United States at odds more and more with the rest of humanity. This is sort of a finger-in-the-dike exercise. Amnesty International was appraised of it the morning before the Congressional hearing. It only indicates that we could have had a long public debate on capital punishment for a couple of years in the United States.

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[5] CCPR/C37/D/208/1986.