PANEL II—THE POTENTIAL FOR UNITED STATES RATIFICATION AND ENFORCEMENT OF THE COVENANTS ON CIVIL AND POLITICAL RIGHTS AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Potential for the United States Joining the Covenant Family

*Alfred de Zayas**

It is an honor and a pleasure to be here today. I will try not to overlap too much with the other panelists. Indeed, Professor Lillich has said almost everything I would have wanted to say. Thus I shall endeavor to describe the Covenants and their respective Committees from the perspective of an international civil servant working in the Centre for Human Rights.

It is now fourteen years since the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights entered into force. Nearly one hundred states, including almost all the European and Latin American countries, have ratified or acceded to these instruments. The United States remains the only important country outside the United Nations' system of monitoring compliance with the Covenants that emerged from the Universal Declaration of Human Rights. Twelve years after President Jimmy Carter sent the Covenants to the Senate, advice and consent has not been given. Moreover, there still appears to be a lack of political will to place the Covenants' ratification on the agenda and to have Senate hearings reopened.

In November 1979, when the first hearings were held, some members of the Senate were concerned, in light of the East-West conflict, that the Covenants might be misused. There was also a general atmosphere of suspicion, not only vis-à-vis the Soviet Union, but also concerning the United Nations and the ratification of international instruments. Were these suspicions jusitified? Have the Covenants been politically misused? The answer is an unmistakable no. Fourteen years of practice in the Human Rights Committee and four years in the Committee on

* First Human Rights Officer, United Nations Centre for Human Rights, Geneva, Switzerland.

Economic, Social, and Cultural Rights (established by resolution of the ECOSOC in 1985) have proven them to be very serious and respectable bodies. I can assure you from personal experience that political rhetoric and inappropriate East-West conflicts have been—perhaps untypically—absent in the work of these two bodies. Thus, there is no basis for mistrust in respect of these Committees. Today, when the East-West confrontation is giving way to cooperation, no justification exists to fear participation in these bodies.

Unlike the Commission on Human Rights, which is a functional commission of ECOSOC, composed of forty-three delegations from member states of the United Nations, members of the two Committees are independent experts. The Committee on Economic, Social and Cultural Rights and the Human Rights Committee are each composed of eighteen independent experts nominated by their respective countries, which, of course, must be parties to the Covenants. They are elected for a term of four years and elections are held every two years. The members of the Human Rights Committee are distinguished professors of international law, judges, and lawyers who act in their own capacities and not upon instructions from their respective governments.

A country with a human rights record and a commitment to internationalism, such as the United States, would be well served by ratifying the Covenants. Considering, after all, that the establishment of the United Nations was an idea of President Franklin Delano Roosevelt and that the Commission on Human Rights was once under the chairmanship of Eleanor Roosevelt, it is an anomaly that no United States member sits as an expert in either the Human Rights Committee or in the Committee on Economic, Social and Cultural Rights and thus cannot contribute to the further development of international law in the field of human rights.

As shown below, these two bodies function very similarly, and have established effective procedures in monitoring implementation of the obligations under the Covenants.

I. COMMITTEE FUNCTIONS

A. State Reports

States parties to the Covenants submit periodic reports on the legislative, administrative, or judicial measures adopted to implement their obligation thereunder. Consideration of reports is carried out in an atmosphere of cooperation and collegiality. The summaries of proceedings can be read in the respective annual reports of the two

Committees to the General Assembly, which are public documents. Reports are taken up by the members of the respective Committees after being introduced to the Human Rights Committee by a state delegation. Quite recently, the third periodic report of the Soviet Union was introduced to the Human Rights Committee by the Minister of Justice of the Soviet Union, himself, Mr. Yacoblev. Following a general introduction, an exchange of questions with members of the Committee takes place. The members also give a list of written questions to the delegation. Sometimes this list of questions is given to the mission ahead of time, allowing the delegation a few days to consult with the competent authorities at home and to prepare its answers for the Committee. There is a second series of questions and answers in which an effort is made to focus on very specific problems. Committee members have an opportunity here to learn what the human rights situation really is in the country under examination. Obviously, a state report prepared by the foreign office or respective ministry of justice may be incomplete and self-serving. But the members invariably go for the lacunae in the reports. This procedure of examination of state reports thus far has been quite successful in identifying problems and also in applying a certain amount of moral pressure on governments so as to induce them to envisage possible modifications to their legislation or judicial practice.

In connection with the examination of state reports, and in light of the advisory services and technical assistance programs of the Centre for Human Rights, it has been possible to assist countries not only in the preparation of their reports to the various committees, but also in amending their legislation. Thus, a very productive and fruitful exchange has developed between states parties to these Covenants and the Centre for Human Rights.

B. General Comments

Another very interesting activity of the Human Rights Committee, to a certain extent related to that of the International Law Commission in the further development of international law, has consisted in formulating so called General Comments. These General Comments are authoritative interpretations of the provisions of the Covenants. Where the Covenants are not clear (and all legal texts have their ambiguities) the Committee issues interpretations of two or three pages to explain the various aspects of these provisions and what they mean concretely. These have been well received in the countries concerned and we now see the effect of these General Comments upon the second and third periodic reports from states parties.

C. State Complaints

Furthermore, Article 41 of the Covenant on Civil and Political Rights foresees a possibility of having states' complaints examined and conciliation procedures engaged. Thus far, although twenty-seven states have given a declaration recognizing the right of other states to submit state complaints, none has been received. Therefore, unlike the European system where such interstate complaints have already been examined, the United Nations Human Rights Committee has no experience in this field.

D. Individual Complaints

Probably the most promising of all the aspects of the work of the Human Rights Committee is the examination of individual complaints. In this respect, observers have noted that the Human Rights Committee is developing into a *de facto* international court of human rights. Not only are its decisions being quoted more and studied by the faculties of many universities, the states parties are implementing the recommendations of the Committee. As you know, the Committee does not have the competence to issue binding judgments. The drafters of the Covenants were afraid of their own courage, and when the Optional Protocol was adopted they decided that instead of calling decisions on the merits Judgments or *Rapports* as in the European Commission and Court, they would call them "Views under Article 5, paragraph 4, of the Optional Protocol." Whatever you want to call these final decisions on the merits, the fact is that countries voluntarily accepting the competence of this international procedure of examination of individual complaints are also carrying out its recommendations. A number of states like Canada, Finland, Mauritius, and the Netherlands, have changed their legislation following the adoption of views by the Committee. Also, in the course of the examination of a case, some states have enacted the necessary legislative measures to correct what subsequently has been found to have constituted a violation of the Covenant.

In a number of cases, persons who were detained and whose attorneys had submitted communications to the Human Rights Committee on their behalf were released either in the course of the examination of their cases or subsequent to the adoption of views by the Committee, e.g. in Madagascar, Uruguay, Zaire and several other countries. A recent case concerned a person accused of a common-law crime. In *Bolaños v. Ecuador* (Case No. 238/1987) Mr. Bolaños was suspected of complicity in murder and was kept in detention for six years before

trial. The Committee found a violation of Article 9, paragraph 3, of the Covenant, and Mr. Bolaños was released two months after the adoption of views by the Committee. The state party even notified the Secretariat that they found him a job afterwards. In a number of other cases compensation has been paid to the victims. It is quite encouraging to see that the Committee's work is yielding positive results.

On the other hand, the Committee has no enforcement possibilities. Even if the United States were to ratify the Optional Protocol, which I doubt very much as it has not even been sent to the Senate for advice and consent, the United States would not be absolutely bound to carry out Committee decisions, nor would the Committee have the means to enforce them. Thus, even from this standpoint there is no need to fear the Optional Protocol procedure.

One of the aspects that I wanted to highlight, is the increasing number of communications that are currently being submitted. The number of states that have ratified the Optional Protocol right now stands at fifty, and we expect ratification from Czechoslovakia and Poland very soon. The Soviet Union and several other countries are also considering ratification. With the success of our world information campaign, more people are becoming aware of the procedure and submitting communications for examination by the Committee, which, however, does not have its own Secretariat but is serviced by the United Nations Centre for Human Rights. The Centre is composed of forty-six professionals and twenty-eight general service staff, and is responsible for servicing not only the Human Rights Committee and the Committee on Economic, Social, and Cultural Rights, but also the Committee on the Elimination of Racial Discrimination, the Committee Against Torture, the Commission on Human Rights, the Subcommission on Elimination of Discrimination and Protection of Minorities, eleven special rapporteurs, fourteen working groups, and all sorts of other *ad hoc* bodies. You may ask yourself how is it possible for a staff of less than seventy-five people to carry out the mandates that have been entrusted to it. It is useful to recall that an NGO like Amnesty International, which has a more limited mandate than the Centre, has a staff of 250 at its International Secretariat in London. If the number of communications and the number of mandates entrusted to the Secretariat continue to grow, it is evident that those mandates will not be implemented in the manner expected by the various bodies concerned.

Therefore, it appears that we are the victims of our own success. It will now be for those who prepare the budget of the United Nations

in New York to give the Centre for Human Rights more than 0.7% of the budget to assure competent servicing of the bodies concerned. This is an issue that I felt I should broach because along with ratification of the Covenants come certain responsibilities and obligations. One of these responsibilities is financial. Every ratification has financial implications because of the resulting increase in the work burden. Unless this financial aspect is taken care of, the administration of the Covenants and other human rights instruments we wish to see ratified by the United States will be frustrated.

I should now turn briefly to the Committee on Economic, Social and Cultural Rights. This Committee has the responsibility of examining state reports with respect to the measures taken by states parties to implement the Covenant's obligations. Hitherto, discussions have been serious, well-focused, and non-political. Bearing in mind that the Covenant on Economic, Social and Cultural Rights envisages that these rights will be achieved progressively, the Committee has encouraged but not pressured states parties. This reminds me of certain concerns expressed at the Senate hearings on the ratification of this Covenant and the idea of inserting a reservation with regard to the non-self-executing character of that instrument. Evidently, it is intrinsic in a covenant that is to be implemented progressively that it is *not* self-executing. So, among the many reservations, understandings, and declarations that were submitted by the Carter Administration to the Senate, that one was unnecessary.

Beyond these two Covenants there are, of course, other treaties, the ratification of which is being considered. We have heard this morning about the Convention Against Torture. The Committee Against Torture is composed of ten independent experts, unlike the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, which are both composed of eighteen independent experts. I underline the fact that no United States member sits in this body. Fortunately, Professor Burns from Canada, a person who represents the Anglo-American legal tradition, is on the Committee, but certainly it is to be hoped that in the course of this year the Convention shall be ratified and perhaps it will set the stage for the ratification of other conventions.

II. RESERVATIONS

It has been mentioned that upon ratification of the Covenants, many states also included reservations. Although the reservations

proposed by the Carter Administration were not necessarily useful in my opinion, it may be preferable to have a ratification with certain reservations than no ratification at all.

A volume published by the Senate Committee on Foreign Relations on the hearings held in November 1979, contains all of the Carter Administration's reservations, declarations, and understandings. Moreover, it contains a valuable critique thereof submitted by the Lawyer's Committee for International Human Rights.

These reservations were ostensibly drafted in order to avoid having to change any laws, to prevent upsetting the federal-state balance in the United States, and to make sure that the Covenant's provisions were not self-executing. Quite apart from the question of whether these purposes are legitimate and reasonable, it should be noted that while many States have made reservations when ratifying or acceding to the Covenants, very few States have objected to such reservations. Thus, it would be conceivable for the Senate to entertain a variety of reservations, although a thorough discussion might show that the majority of the proposed reservations are really unnecessary.

Let us briefly examine some of these proposed reservations. With regard to Article 6 of the Covenant on Civil and Political Rights, which protects the right to life, we know that the penal laws of some states in the United States allow the execution of convicted persons under eighteen years of age. It would be desirable to change these laws to make United States state law and practice compatible with Article 6 of the Covenant. If these laws are not changed, a reservation would be appropriate. With regard to Article 9, paragraph 5, of the Covenant, which grants victims of unlawful arrest or detention an enforceable right to compensation, additional legislation should be enacted at the federal and state levels. Such enactment would not impose undue burdens and would be preferable to a reservation. With respect to the guarantees for a fair trial enshrined in Article 14 of the Covenant, United States law and practice largely complies with the Covenant's standards. With regard to the prohibition of double jeopardy, decisions of the United States Supreme Court have held that successive prosecutions before federal and state courts are permissible. If the United States were to ratify the Covenant on Civil and Political Rights, the stricter double jeopardy provisions of Article 14(7) would no doubt be taken into account by the courts.

Article 15, paragraph 1, of the Covenant provides *inter alia* that a convicted person should benefit from a change in the law which reduces the penalty for the offense committed. Unfortunately, this provision does not specify whether or not this benefit should be

applied retroactively. Obviously, for practical reasons, the courts are in no position to reopen every case, although parole boards could take such considerations into account. A reservation like that introduced by Italy and other states would be advisable. It states: With reference to Article 15, paragraph 1, last sentence, 'If, subsequent to the Commission of the offence, provision is made by law for the imposition of a lighter penalty the offender shall benefit thereby', the Italian Republic deems this provision to apply exclusively to cases in progress. Consequently, a person who has already been convicted by a final decision shall not benefit from any provision made by law, subsequent to that decision, for the imposition of a lighter penalty.

Article 20 of the Covenant prohibits "any propaganda for war" and "advocacy of national, racial or religious hatred." Every Scandinavian country has introduced a reservation against this article in view of the dangers it poses to the enjoyment of the freedom of press and expression enshrined in Article 19 of the Covenant. To the extent that Article 20 could potentially conflict with the rights and freedoms in the United States Bill of Rights, a reservation would be advisable.

Professor Lillich has already mentioned other reservations and declarations, and I do not wish to overlap with other speakers. But I would still like to mention one objection to the Covenants, which Senator Jesse Helms has been making for the past fourteen years. It concerns the absence of an express guarantee of the right to property in the Covenants, as that enunciated in Article 17 of the Universal Declaration of Human Rights. Mr. Helms correctly made the point that the Soviet Union, the socialist states, and the new developing states knocked out the draft provision when the issue was discussed by the Commission on Human Rights and the Third Committee of the General Assembly. But the fact that the right to property is absent from the Covenants does not mean that the right does not exist, since nothing in the Covenant prejudices the existence or enjoyment of that right in any country which guarantees it in its constitution and laws. Jesse Helms has insisted on having the right to property incorporated into the Covenants by way of an amendment or renegotiation. An additional protocol would be a more sensible proposition. The other possibility, if the United States insisted, would be to include a declaration such as the following:

> The United States declares that nothing in the Covenants derogates from the equal obligation of all states to fulfill their responsibilities under international law. The United States understands that under

> the Covenant everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.[1]

This kind of an understanding or declaration could be added. It certainly does not hurt, nor does it bind anyone besides the United States.

III. RECENT OBJECTIONS

In June 1988 hearings were held before the House Committee on Foreign Affairs' Subcommittee on Human Rights. Among the issues raised by Congressman Yatron was the extent to which the non-ratification of human rights conventions undermines United States credibility on human rights issues. The Assistant Secretary of State for Human Rights, Richard Schifter, replied that, in an ideal world, countries would both ratify the Covenants and observe their obligations thereunder. If, however, one would have to choose only one of these, it would be better to observe the Covenants and not ratify them instead of ratifying them *pro forma* and then failing to respect them. The implication was that the United States fell in the former category. Notwithstanding this rhetorical comment, Schifter went on to make a substantive statement that does not hold up to scrutiny. He stated that:

> there isn't really a great deal of substantive difference between the Covenants on one hand and the Universal Declaration of Human Rights on the other in terms of its enforceability, and we invariably say we consider ourselves totally guided by the spirit of the Universal Declaration of Human Rights . . . Not much is added by the ratification of the Covenants to our commitment to the Universal Declaration. And, in fact, if you take a good look at it, the escape clauses in the Covenants are really more substantial and therefore really detract from the commitments entered more so than is the case with the Universal Declaration.[2]

First, it should be noted that while it is true that neither the Human Rights Committee nor the Committee on Economic, Social and Cultural Rights has direct enforcement competence, the respective state

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[1] *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 15 (1979) (statement by Sen. Javits).

[2] *Hearings Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 100th Cong., 2d Sess. 91 (1988).

reporting procedures are very effective in identifying problems and suggesting concrete solutions. Even if the state parties are not bound to implement the recommendations of either Committee, experience shows that the monitoring activities of both Committees have yielded very positive results. This is because discussions of states' reports are held in public and the proceedings are published in both of the annual reports to the General Assembly. Thus, criticism of specific human rights problems comes out into the open and it places the concerned states parties under a certain moral pressure to improve human rights situations and to provide reparation to the victims. It is up to the activists and non-governmental organizations to attend the public meetings of the Committees in which the states reports are examined. Thus far the examination of reports has frequently led to the adoption of a variety of legislative, administrative, and judicial measures in compliance with a recommendation or comments made by members of the Committees.

Second, it should be noted that there are important differences between the Universal Declaration and the Covenants. While the Universal Declaration goes further by enunciating the right to property and the right to political asylum, the Covenants go much farther in specifying the content of the rights for which they do provide. An example is the right to a fair hearing (Article 14 of the Economic, Social and Cultural Rights) or in incorporating other rights, such as the rights of minorities to exercise their culture and language (Article 27 of the Covenant on Covenant on Civil and Political Rights) and the right to strike (Article 8 of the Covenant on Civil and Political Rights).

Third, as to so-called "escape clauses," the Covenants certainly do not detract at all from the commitments entered into by virtue of the Universal Declaration. What Mr. Schifter probably meant was the possibility of derogation from certain obligations in case of a national emergency. Derogation, however, is possible only with respect to certain articles, under specified conditions, and only for the duration of the emergency. This possibility of derogation has been used (e.g. by Colombia, Nicaragua, Uruguay), but thus far not misused or overused, by states parties. This is a "safety valve" that provides a certain amount of flexibility, which is reasonable and necessary in order to meet states of emergency. Mr. Schifter was probably also thinking of the clauses in Articles 12, 18, 19, 21, and 22 of the Covenant on Civil and Political Rights which provide that the enjoyment of the rights of freedom of movement, manifestation of one's religion, freedom of expression, peaceful assembly, and asso-

ciation may be subjected to certain restrictions as are established by law and are necessary to respect the rights of others and protect health, morals, public order (*ordre public*), or national security. Again, the review of states reports revealed that these restrictions are seldom arbitrary, and, when deemed unreasonable, Committee members have not failed to seek further explanation from the states parties' representatives. In any event, the "escape clauses" mentioned by Schifter are not immune to criticism, and surely in the course of the progressive implementation of human rights some of these restrictions will prove to be less necessary than they are today.

IV. CLOSING REMARKS

The participants at this Roundtable seem to agree that it would be a good thing if the United States were to ratify the Covenants in the near future. The reasons are obvious: the United States should not exclude itself from participation in the progressive development and implementation of human rights norms, which these two bodies have so successfully undertaken.

The initial hesitation to endorse these Committees for fear that they would engage in political mud-slinging or turn into useless debate societies has proven groundless. The fourteen-year track record of the Human Rights Committee shows that independent experts can indeed be objective and unpolitical. Further suspicion or mistrust is, in the light of experience, unreasonable. The same applies to the work of the Committee on Economic, Social and Cultural Rights.

Thus, the United States would be well advised to join the "Covenant family" by ratifying both instruments now. But, if the United States Senate has to choose, it should give priority to ratification of the Covenant on Civil and Political Rights, which more closely parallels the rights enshrined in the United States Bill of Rights and other Amendments to the Constitution. Moreover, it is the Human Rights Committee, thanks to its Optional Protocol procedure, that is developing more and more into a *de facto* international court of human rights. It would be anomalous for the United States, which has a judge sitting at the International Court of Justice at the Hague, not to have a member sitting in the Human Rights Committee. The best way to confirm the United States commitment to the noble goals of the United Nations, notably to the protection and promotion of human rights in the world, is to ratify the Covenants and actively participate in the exciting process which is taking the world into the

twenty-first century with the most serious machinery ever for the realization of human rights.