

**Comments of the United States of America
on the Human Rights Committee’s “Draft General Comment 33:
The Obligations of States Parties Under the Optional Protocol to the International
Covenant Civil and Political Rights”**
October 17, 2008

1. The United States Government appreciates the opportunity to comment on Draft General Comment 33 regarding the obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights. Although the United States is not a Party to the Optional Protocol, it nevertheless has a substantial interest in Draft General Comment 33, most notably because although the Draft General Comment purports to address only the “obligations of States Parties under the Optional Protocol,” it contains reasoning and conclusions that directly affect all States Parties to the Covenant, irrespective of whether they have joined the Optional Protocol. In addition, some of the problematic assertions in the Draft General Comment would seem to have implications, if correct, for the status of pronouncements issued by some other human rights treaty bodies. The United States takes its obligations under the Covenant and other human rights treaties to which it is Party extremely seriously, and therefore considers it critical to record its strong disagreement with the current Draft General Comment 33.
2. As set forth below, the United States finds the main conclusions of Draft General Comment 33 to be unsupported by the plain text of the Covenant and its Optional Protocol, the negotiating history of the two treaties, and international law on treaty interpretation. The United States therefore urges the Committee to withdraw this document. If the Committee decides to move ahead and conclude this General Comment, the United States considers that the Committee should re-circulate a substantially revised draft prior to finalization. The fundamental nature of the issues raised in the Draft General Comment makes it particularly important for the Committee to give additional and careful consideration to its content in light of the input received from States Parties.
3. Although there are a substantial number of legal statements and conclusions in the Draft General Comment with which the United States does not agree, these comments address only a select number of subjects that the United States considers to be most problematic.

I. The Committee and the legal nature of its “views”

4. First and foremost, the United States considers it axiomatic that the functions and authorities of the Committee are those set forth in the Covenant and its Optional Protocol. The texts of these treaties are, in the view of the United States, sufficiently clear with respect to the functions and authorities established by States Parties for the Committee. In particular, it is clear from these instruments that the Committee does not have the authority to issue views that are judicial in character. As discussed below, resort to the *travaux préparatoires* powerfully underscores the clear intent of the negotiators with respect to those functions and authorities. In Draft General Comment 33, however, the Committee purports to arrogate to

itself additional authorities that have not been given to the Committee by the States Parties to the Covenant or its Optional Protocol and are likewise unsupported by the negotiating record.

5. Contrary to the suggestion in paragraph 11 of Draft General Comment 33, there is nothing in the Convention or Optional Protocol that suggests the Committee is a judicial body, either in fact or “spirit.” The Committee has no rules of evidence, does not conduct oral hearings, is not composed of judges, and is authorized to issue “views” under the Optional Protocol rather than legally binding “decisions” or “judgments.” The *travaux préparatoires* show that the term “Human Rights Committee” was chosen by the drafters of the Covenant over other potential designations, including “Human Rights Tribunal.” Indeed, the rationale for avoiding the term “tribunal” was that such a term “would be inappropriate for a body which was not of a judicial or arbitral character, nor confined to deliberative functions.”¹
6. Negotiations over the requisite qualifications for members of the Committee also reflect a decision of the drafters to avoid creating a body to serve a judicial function. Although most members of the Committee have legal training, the *travaux* reveal that the drafters did not want to require members to have judicial experience because it was not a juridical organ. Multiple States agreed that it was “necessary to avoid the impression that the intention was to set up a judicial organ when in fact it was not the case.”² Rather, they intended the Committee to be a “committee of experts” that could include “a wide range of persons, such as statesmen, historians, philosophers and jurists.”³ This view is reflected in the Covenant itself, which stipulates that members are to be “persons of high moral character and recognized competence in the field of human rights.” Under the terms of the Covenant, far from being a requirement for membership on the Committee, only “consideration” is to be “given to the usefulness of the participation of some persons having legal experience.”⁴
7. The Draft General Comment reasons, erroneously, that because the Committee has decided *on its own* to issue “views” that “exhibit most of the characteristics of a judicial decision,” its work is therefore to be treated by States Parties as if it has a judicial character. The United States does not accept that views issued by the Committee -- either pursuant to its functions under the Covenant or the Optional Protocol -- are “to be regarded as determinative” of the issues for States Parties, even if the Committee styles its views as judicial determinations.
8. Paragraph 14 states that the views of the Committee under the Optional Protocol “represent an authoritative determination of a body established under the Covenant itself as the [an] authentic interpreter of that instrument.” It is a fundamental and long-standing principle of customary international law that treaties are authoritatively interpreted by the Parties themselves through mutual agreement, either directly through the ordinary channels of international relations or indirectly as the result of recourse to good offices, mediation, or

¹ U.N. Comm’n H.R., 6th Sess. (1950), 7th Sess. (1951), 9th Sess. (1953) U.N. Doc. A/2929, Ch. VII, § 2, E/CN.4/SR.214, 7 (1950), in MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 502 (1987) (emphasis added).

² U.N. Comm’n H.R., 6th Sess. (1950), 7th Sess. (1951), 9th Sess. (1953), U.N. Doc. A/2929, Ch. VII, § 4, E/CN.4/SR.187, § 63 (F), E/CN.4/SR.214, 8 (RL); E/CN.4/SR.346, 6 (AUS), 7 (RL), in BOSSUYT, 507.

³ *Id.*

⁴ International Covenant on Civil and Political Rights [“Covenant”], Article 28.2 (emphasis added).

conciliation.⁵ A treaty may be authoritatively interpreted by an international body in the case of a dispute regarding the interpretation of a provision, but only if and only to the extent that the Parties agree, either in the treaty at issue or through a separate agreement, to submit the dispute to such an international organ. With respect to the Covenant, States Parties have given no such authority to the Committee under the Covenant or the Optional Protocol. The Committee is not a body established pursuant to the Covenant that is intended to provide authoritative interpretations of the treaty. Rather, the Committee is intended to assist and facilitate States Parties' implementation of the Covenant. The States Parties to the Covenant and Optional Protocol remain the authoritative interpreters of the instruments.

9. Like paragraph 11, paragraph 14 reaches its conclusion through tautological and conclusory reasoning. According to the Draft General Comment, the “integral role of the Committee under both instruments” is the “reason” why its views are to be accorded the same respect as obligations enshrined in the Covenant itself. This extraordinary assertion has no basis in the text of the Covenant or the Optional Protocol and cannot be accepted. Paragraph 18 uses similarly problematic and conclusory reasoning, stating that “[t]he legal character of the Committee’s views is reflected in the consistent wording adopted by the Committee in issuing its views in cases where a violation has been found.”⁶ The circularity of this argument suggests that the Committee is empowered to decide for itself its “legal character.” The Committee as a matter of international law enjoys only those powers and authorities granted to it by the States Parties to the Covenant and the Optional Protocol. Citations to the Committee’s own working methods or work products cannot provide, or even support, an inference of new powers and authorities not given to the Committee under those treaties. This is the central, fundamental analytical failure of Draft General Comment 33, in which the Committee purports to define its own authorities without regard to the instruments drafted by States that actually specify those authorities.
10. The draft also suggests in paragraph 14 that the Committee’s views regarding communications received under the Optional Protocol have some bearing on the interpretation of rights and obligations of States Parties to the Optional Protocol, and also to States Parties to the underlying Covenant that have not joined the Optional Protocol. This cannot be the case for either group of States Parties. The Optional Protocol is a distinct agreement requiring separate ratification, which simply authorizes the Committee to “receive and consider communications” from individuals claiming to be victims of violations by States Parties to the Covenant that are also a Party to the Optional Protocol, and to forward its “views” about communications to the relevant individuals and States. At no point does the Optional Protocol provide that its States Parties are obliged to “respect” or follow

⁵ See e.g., Harvard Research in International Law, Draft Convention on the Law of Treaties, Comment. 29 Am. J. Int'l L. Supp. (1935) 975-976.

⁶ The United States further objects to the substance of the Committee’s “consistent wording,” which states, *inter alia*, that “the State Party has undertaken to ensure to all individuals within its territory *or* subject to its jurisdiction the rights recognized in the Covenant....” (Paragraph 18 of the Draft General Comment 33; emphasis added). This characterization dispenses with the actual text of Article 2 of the Covenant -- which refers to “individuals within its territory *and* subject to its jurisdiction” -- in favor of the Committee’s formulation as set out in its General Comment 31, which has no basis in either the text or negotiating history of the Covenant. See “Observations by the United States of America on Human Rights Committee General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant,” transmitted to the Human Rights Committee on Dec. 27, 2007.

interpretations made by the Committee regarding provisions of the Covenant -- and certainly nothing in the Covenant provides that the Committee's views are to be accorded such authority.⁷ If the countries that negotiated the Optional Protocol intended to provide such far reaching authorities to the Committee, they would certainly have specifically included treaty text providing for such authority.

11. In paragraph 16, the Committee asserts that the "principle of good faith to the discharge of treaty obligations...leads to an obligation to respect the view of the Committee in a given case." The United States clearly agrees that a State Party is required to perform its treaty obligations in good faith. However, the United States is unable to understand how the "principle of good faith" could create an entirely new and distinct obligation not found in either the Covenant or the Optional Protocol. The United States is similarly unable to understand how a State Party's obligations with respect to *procedures* constitute a legal basis for according "respect" to the *substantive* views of the Committee. The reasoning underpinning these arguments appears to the United States to be unsound and to have no basis in the actual text of the Optional Protocol.
12. In paragraph 29, the Committee states that its views in relation to an individual communication are not "merely recommendatory but constitute an essential element of the undertaking by States parties under article 2, paragraph 3 of the Covenant to afford an effective remedy to persons whose rights have been violated." A variant of this argument is made in Paragraph 15, in which the Committee asserts that a finding of a violation by the Committee engages a "legal obligation" of the State Party by virtue of article 2, paragraph 3 of the Covenant. Here again, these assertions appear to have no basis in the text of the Covenant or the Optional Protocol. Although the Committee can, of course, provide its views as to whether an individual's rights enumerated in the Covenant have been violated and to propose an effective remedy, the Committee's views are simply advisory. The Committee's views regarding a violation are not determinative of the issue and, furthermore, if the intent was to oblige States Parties to adhere to the Committee's views when considering an "effective remedy" in the context of article 2, paragraph 3 of the Covenant, language to that effect would have been added to the treaty text.
13. As noted above, the Optional Protocol establishes that, after "examining" a communication that it has received, the Committee is to forward its "views" to the State Party concerned and to the individual.⁸ The word "views" in Article 5.4 replaced "suggestions," which had been contained in an earlier draft of the Optional Protocol proposed by a ten-state cross-regional coalition. This change in wording was not intended to produce a substantive change, but rather to create consistency between Article 5.4 and the text of the Covenant, specifically Article 42.7(c), which spells out the role of a Conciliation Commission in the inter-State communication procedure.⁹ Like the Committee, a Conciliation Commission has no

⁷ This assertion is clearly without foundation in the texts of the underlying treaties, and would constitute an extraordinary and unprecedented expansion of the Committee's authorities. Even the Statute of the International Court of Justice – the primary judicial organ of the United Nations – makes clear that the Court's decisions have "no binding force except between the parties and in respect of that particular case." ICJ Statute, Art. 59.

⁸ Optional Protocol to the Covenant, Art. 5.4.

⁹ A/C.3/L.14.2/Rev.2; A/C.3/L.1411/Rev.2 in MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 708 (1993).

authority to make a “determinative” decision or an “authoritative determination” on the matter before it.¹⁰

14. The Human Rights Committee’s own reports and statements also recognize its inability to legally bind States Parties -- either with respect to its consideration of communications under the Optional Protocol or with respect to its “General Comments” or “Concluding Observations” issued under the Covenant. In its Annual Report for 1988, for instance, the Committee commented that “[t]he Committee’s decisions on the merits are non-binding recommendations.”¹¹ In its response to the Observations of the United States to General Comment 24, the Chairman of the Committee stated that it “would like to assure the delegation of the United States that General Comments do not suggest that the Committee’s interpretations are strictly binding.” The Chairman also expressed the “hope” that General Comments “carry a certain weight and authority” with States Parties.¹² Draft General Comment 33, at paragraph 13, now conveys the revolutionary assertion that it is “not a justifiable conclusion” to regard the Committee’s views as “recommendatory.”
15. To be sure, the United States considers that the views of the Committee are entitled to respect and should be considered carefully by States Parties. Such views are not, however, a source of international legal obligation, nor do they have a “determinative,” “authoritative,” or “judicial” character. Were the States Parties to the Covenant or the Optional Protocol to decide that it would be beneficial to alter and expand the authorities of the Committee in the manner suggested in this draft general comment, the way to do so under international law would be to amend those treaties or negotiate a new instrument to provide such authority with respect to those countries that became party to such an amendment or instrument. Under international law, it is not the provenance of the Committee itself to attempt to amend the Covenant or the Optional Protocol through the guise of issuing new interpretive assertions with respect to their scope and meaning. The United States is supportive of the important work the Committee is charged with under the Covenant and the Optional Protocol, and provides these comments in the belief that assertions by the Committee that have no basis in international law can actually serve to undermine the credibility of the Committee and thereby do unfortunate damage to the respect afforded to the Committee and its work products.

II. “Subsequent Practice” of the Parties

16. The current draft also makes a series of problematic assertions with respect to international treaty law in an effort to support its novel and non-textually-based interpretation of its authority. Notably, the Draft General Comment states in paragraph 17 that the “general body of jurisprudence generated by the Committee” may be considered to constitute the “subsequent practice in application of the treaty which establishes the agreement of the

¹⁰ Rather, it is to submit to the Committee a report that “embod[ies] its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter.” The States Parties concerned must then “notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.” Covenant, Articles 42.7(c) and (d).

¹¹ U.N. Human Rights Comm., *Annual Report*, 151, U.N. Doc A/43/40 (1988).

¹² “Chairman’s Statement on the Issue of Reservations,” Human Rights Committee, Mar. 31, 1995.

parties regarding its interpretation’ within the sense of article 31(3)(b) of the Vienna Convention on the Law of Treaties, or, alternatively, the acquiescence of States Parties in those determinations constitutes such practice.” The United States strongly disagrees with this extraordinary assertion.

17. The views of the Committee cannot as a legal matter constitute the “subsequent practice” of the States Parties to the Covenant. The United States is not a party to the Vienna Convention on the Law of Treaties, but nevertheless considers its Articles 31 and 32 on the interpretation of treaties to reflect customary international law. The provision referred to in this case, Article 31(3)(b), has never been interpreted, so far as the United States is aware, to include the views of expert bodies. The “subsequent practice” referred to in this provision is generally understood to mean the actual practice of the States Parties, provided that such practice is consistent and is common to, or accepted by, all the Parties.¹³ The “subsequent practice” of the States Parties cannot be the views of experts that “serve in their personal capacity”¹⁴ as to what the practice of States Parties *should* be in carrying out their rights and obligations under the Covenant.
18. Moreover, even if the Committee is simply suggesting that it is reflecting information received from States Parties regarding their practice, certainly a small number of States’ responses to the Committee’s views on a particular communication cannot be understood to provide a full record of the practice of States Parties. Moreover, the so-called “acquiescence” of States Parties in the views of the Committee cannot be seen either to reflect the practice of States in the application of the Covenant or to establish the agreement of the Parties regarding the Covenant’s interpretation as required by Article 31(3)(b). The United States, for one, does not consider that its silence in response to a particular treaty body General Comment, View, or Observation represents its acquiescence to the conclusions contained therein.
19. Apart from the legal infirmities in this line of argument, it should be noted as a factual matter that States Parties to the Optional Protocol do not invariably accept and implement the “views” of the Committee and follow their recommendations. Thus, there would be no factual basis to argue that the views of the Committee have become the consistent and common practice of States Parties to the Optional Protocol, much less the consistent and common practice of States Parties to the Covenant that are not States Parties to the Optional Protocol. This fact is also true with respect to other writings of the Committee, whether they be in the form of Concluding Observations on States Parties’ reports or General Comments. All of these are recommendatory materials, which countries are free to consider, but are not required to comply with. To cite just one example, the United States respects and carefully considers the views of the Committee, but does not follow recommendations with which it disagrees. Nothing in the Committee’s corpus of recommendatory writings could properly be considered to reflect the subsequent practice in application of either the Covenant or the Optional Protocol that establishes the agreement of the States Parties regarding its interpretation.

¹³ See e.g., US-France Air Services Arbitration 1963 (54 ILR 303).

¹⁴ Covenant, Art. 28.3.

III. Grave Breaches

20. Paragraph 24 of the Draft General Comment refers to a “grave breach of [a State Party’s] obligations under the Optional Protocol.” It is inappropriate for the Committee to determine what constitutes a “grave breach” of the Covenant or the Optional Protocol. Moreover, neither treaty uses the term “grave breach,” nor does either treaty establish separate categories of breach that differ with respect to their degree of seriousness. This differs from the Geneva Conventions, for instance, which do designate a set of “grave breaches” that are subject to a particular set of obligations.

21. The United States Government appreciates the important work the Human Rights Committee performs consistent with its mandate as set out in the Covenant and the Optional Protocol. Although the United States fundamentally disagrees with the content of Draft General Comment 33, and urges its withdrawal, it fully appreciates efforts undertaken by the Committee to improve implementation of the Covenant by States Parties, including by those Parties that have also joined the Optional Protocol.

