

**Observations of the United States of America
on the Human Rights Committee's
General Comment 33: The Obligations of States Parties under the Optional
Protocol to the International Covenant on Civil and Political Rights
December 22, 2008**

1. The United States Government appreciates the opportunity to respond to General Comment 33 regarding the obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights.¹ Although the United States is not a Party to the Optional Protocol, it nevertheless has a substantial interest in General Comment 33, most notably because although the 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, the underlying logic of some of the problematic assertions in the General Comment would seem to have implications, if correct, for the status of pronouncements issued by other human rights treaty bodies.
2. The United States takes extremely seriously its obligations under the Covenant and under other human rights treaties to which it is Party, and therefore considers it necessary to record its strong disagreement with important aspects of General Comment 33. These disagreements, registered by a State Party to the Covenant, preclude any claim that the assertions made in General Comment 33 regarding the Committee’s legal authorities represent an international consensus of any kind.
3. The United States Government and a substantial number of other governments provided comments to the Human Rights Committee on the draft of General Comment 33 circulated to States Parties of the Covenant in September 2008. The United States appreciated the opportunity to comment on the draft circulated by the Committee. We note that the final General Comment takes into consideration some of the concerns raised by the United States and other governments and we appreciate the effort made by the Committee to make improvements. Nevertheless, while some of the flawed reasoning and problematic conclusions contained in the initial draft have been eliminated, the main conclusions of General Comment 33 remain unsupported by the plain text of the Covenant, its Optional Protocol, the negotiating history of the two treaties, and international law on treaty interpretation. Without addressing all of the statements in the General Comment with which the United States may not agree, these observations address those statements that the United States considers to be most problematic.
4. First and foremost, it is 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 clear with respect to the functions and authorities established by States

¹ *General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, Human Rights Committee, ninety-fourth session, Geneva, Oct. 13-31, 2008. Available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

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 “authoritative,” “determinative,” or “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 General Comment 33, however, the Committee purports to arrogate to itself a legal authority that is unsupported by the texts or negotiating records of either the Covenant or its Optional Protocol.

I. Non-judicial nature of the Committee

5. Paragraph 11 of *draft* General Comment 33 stated that the views of the Committee “exhibit most of the characteristics of a judicial decision, follow a judicial method of operation, and are issued in a judicial spirit.” Paragraph 11 of General Comment 33 now asserts that the Committee’s views “exhibit some important characteristics of a judicial decision” (emphasis added) and are “arrived at in a judicial spirit.”
6. The United States fails to see a substantive distinction between these two sentiments and reiterates its disagreement with the conclusion that continues to follow from such an assessment. Whether the Committee’s views exhibit “most” or merely “some important” characteristics of a judicial decision has no bearing on the underlying legal character of the Committee’s pronouncements. 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, and has no procedure for re-hearings or appeals. The Committee is not composed of judges, and indeed the Committee has had several members who were active duty diplomats during their period of service. It is authorized to issue only its “views” under the Optional Protocol and not legally binding “decisions” or “judgments.”
7. 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.”²
8. 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 of the current 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 considered 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.”³ Rather, they intended the

² 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).

³ 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.

Committee to be a “committee of experts” that could include “a wide range of persons, such as statesmen, historians, philosophers and jurists.”⁴ 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.”⁵

II. Legal character of the Committee’s views

9. 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 conciliation.⁶ 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 to the extent that the Parties have agreed, either in the treaty at issue or through a separate agreement, to submit the dispute to an international organ for such an authoritative interpretation or decision. With respect to the Covenant and the Optional Protocol, States Parties have given no such authority to the Committee. Accordingly, it is the States Parties to the Covenant and Optional Protocol that remain the authoritative interpreters of the instruments. The Covenant and Optional Protocol make clear that the Committee is intended to assist and facilitate States Parties’ implementation of the Covenant, including by studying the reports of States Parties under the Covenant, examining communications under the Optional Protocol, and transmitting to States Parties its comments and views.⁷

10. Nevertheless, paragraph 11 of General Comment 33 asserts that there is a “determinative character of the decisions” of the Committee. Paragraph 13 elaborates, stating that “[t]he views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument.” Legally and factually, it is not the case that the Committee is charged under the Covenant with interpreting the instrument. The Covenant contains, and the Committee cites, no such authority or responsibility. Further, even if the Covenant had charged the Committee with responsibility for “interpreting the instrument,” it does not logically follow that its “views” issued under the Optional Protocol -- a separate treaty -- would necessarily carry authoritative weight, particularly with respect to parties to the Covenant that are not parties to the Optional Protocol.

⁴ *Id.*

⁵ International Covenant on Civil and Political Rights [“Covenant”], Article 28.2 (emphasis added).

⁶ *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.

⁷ *See* Covenant, Art. 40; Optional Protocol to the Covenant, Art. 5.

11. The Committee seems to base its extraordinary assertion of authority on three arguments, none of which are sound in law or logic. First, paragraph 13 of General Comment 33 states that the Committee’s “views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol” (emphasis added). The United States does not accept this reasoning. The fact that the Committee plays an “integral role” does not constitute a basis for the conclusion that its views and interpretations are authoritative or have a “determinative character” (paragraph 11).
12. Second, in paragraph 14, the Committee cites itself as an authority for the proposition that its views are authoritative. Specifically, the Committee notes that when it issues its views, it tells the State Party concerned that “By becoming a party to the Optional Protocol the state Party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not....” This statement is not legally accurate, as it contradicts the express language of Article 1 of the Optional Protocol.⁸ Furthermore, this argument misleadingly suggests that the Committee is empowered to decide for itself the legal character of its views. As a matter of international law, the Committee enjoys only those powers and authorities granted to it by 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 General Comment 33, in which the Committee purports to define its own authorities without regard to the express provisions in the instruments drafted by States that actually specify those authorities.
13. Third, citing the Vienna Convention on the Law of Treaties in paragraph 15 of General Comment 33, the Committee states that “[t]he character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.” Indeed, a State Party is required to perform its treaty obligations in good faith. But it is hard to understand how a “principle of good faith” can create an entirely new and distinct obligation that is not found in either the Covenant or the Optional Protocol. Any duty to cooperate with the Committee’s processes of examining and commenting on communications and reports would not imbue Committee views with an “authoritative” character or require States Parties to “give effect” to those views. The principle of *pacta sunt servanda* cannot create an obligation that goes beyond the obligations found in the treaties. The reasoning

⁸ The competence that a State recognizes in becoming a Party is set forth in Article 1 of the Optional Protocol: “A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant” (emphasis added). This is recognized by the Committee in paragraph 4 of General Comment 33, which contradicts the “...wording consistently used by the Committee in issuing its views...” cited in paragraph 14 of General Comment 33.

underpinning these arguments by the Committee is unsound and without basis in the actual text of the Covenant or the Optional Protocol.

III. The right to a remedy

14. In its *draft* General Comment 33, the Committee stated that its views 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.” General Comment 33 no longer makes this categorical assertion, but nevertheless invokes Article 2(3) in Paragraph 14 to argue that States Parties to the Optional Protocol are somehow obligated to follow the Committee’s recommendations. Similarly, paragraph 20 asserts that “States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee.”
15. Although the Committee can, of course, provide its views as to whether an individual’s rights enumerated in the Covenant have been violated and propose a remedy, the Committee’s views are simply advisory. The Committee’s views regarding a violation are not an authoritative determination that triggers obligations under Article 2(3) of the Covenant. If there was an intent to oblige States Parties to adhere to the Committee’s views when considering an “effective remedy” in the context of article 2(3) of the Covenant, the States that carefully negotiated the Covenant and the Protocol would have added language to that effect in the texts of those instruments.
16. 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.⁹ 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 was 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.¹⁰ Like the Committee, a Conciliation Commission has no authority to make an “authoritative determination” on the matter before it.¹¹
17. 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

⁹ Optional Protocol to the Covenant, Art. 5.4.

¹⁰ 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).

¹¹ 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).

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.”¹² 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.¹³

18. Although General Comment 33 is not as misplaced as the *draft* on which the United States and other States previously commented, it nevertheless retains the fundamentally problematic core proposition that the views of the Committee have a determinative, or legally binding, character that gives rise to substantive obligations to “give effect to the views issued by the Committee” (Paragraph 20).
19. 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. However, 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 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 *ex cathedra* assertions with respect to their scope and meaning. The United States is supportive of the important work with which the Committee is charged under the Covenant and the Optional Protocol, and provides these comments in the belief that claims of authority by the Committee that have no basis in international law could undermine the general credibility of the Committee and diminish the respect currently afforded to the Committee and its work products.

20. 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 General Comment 33, 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.

¹² U.N. Human Rights Comm., *Annual Report*, 151, U.N. Doc A/43/40 (1988).

¹³ “Chairman’s Statement on the Issue of Reservations,” Human Rights Committee, Mar. 31, 1995.