



Note No. 234/2008

The Australian Permanent Mission presents its compliments to the Office of the United Nations High Commissioner for Human Rights and has the honour to provide the comments of the Australian Government to the Human Rights Committee's draft General Comment on States Parties' Obligations under the Optional Protocol to the International Covenant on Civil and Political Rights.

The Australian Permanent Mission takes this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.



3 October 2008

**Views of the Australian Government on draft General Comment 33:
'The Obligations of States Parties under the Optional Protocol to the
International Covenant on Civil and Political Rights'**

Australia's general comments

Australia commends the Committee for its initiative in drafting the General Comment. Australia is a longstanding party to the Covenant and the Optional Protocol, and is firmly committed to upholding its international obligations under these treaties. Australia welcomes the Committee's elaboration, in paragraphs 1 to 8 of the draft General Comment, of the purposes of the Optional Protocol and the communication procedure it has established. Australia supports the important role of the Committee under the Covenant in reviewing States Parties' reports and issuing general comments on the Covenant, and in receiving and considering communications and issuing views under the Optional Protocol.

Australia is concerned, however, that the draft General Comment appears to expand States Parties' obligations beyond the scope of the Optional Protocol. The making of General Comments is, of course, not a legal means by which international obligations of parties to the Covenant can be created or amended. In Australia's view, the legal obligations for States Parties are those established by the Optional Protocol itself. In a spirit of cooperation with the Committee in its work, and of maximising the credibility of the General Comment, Australia makes the following comments.

The nature of the Committee's views

1. As currently worded, the draft General Comment suggests that the views of the Committee are binding upon States Parties. For example, paragraph 13 states that it is 'not a justifiable conclusion' that 'the Committee's views are purely advisory or recommendatory'. Paragraph 29 states that the Committee considers its views 'not merely recommendatory'. Further, paragraph 11 states that 'the work of the Committee is to be regarded as determinative of the issues presented'. As authority for this proposition, the Committee cites only the views of academic commentators. The Committee does not cite any examples of State practice that would support an interpretation of the Optional Protocol by which the Committee's views would be considered 'determinative,' in the sense of being formally binding upon States. It would be helpful if the Committee could clarify its intended meaning of the term 'determinative'. Australia's view is that the accurate legal position remains that, although the views of the Committee are not regarded as formally binding in law, they are to be considered in good faith. Pursuant to Article 1 of the Optional Protocol, a State becoming party to the Optional Protocol 'recognizes the competence of the Committee to receive and consider communications ...'. It does not state that the Committee's views on such communications are binding. As such, States Parties have not given consent to be bound by the Committee's views. Any change to this legal position would need to be established by the amendment procedures laid down in Article 11 of the Optional Protocol and require the consent of States Parties.

2. The Committee asserts in paragraph 11 that its views 'exhibit most of the characteristics of a judicial decision, follow a judicial method of operation and are issued in a judicial spirit'. While States Parties to the Optional Protocol accept the compulsory procedure established by it, the Committee is not, and was never intended to be, a body with a judicial character. The Committee can be contrasted with formal adjudicative bodies (for instance: it is constituted by experts rather than judges; it does not render binding decisions; it does not conduct oral hearings; it does not have formal evidential rules; and it has functions of a policy nature outside normal judicial work, like monitoring compliance with and implementation of the Covenant). Furthermore, in Australia's view, the nature of the Committee's operations and functions do not lead to a conclusion that its work is to be regarded as 'determinative'.

3. At several points in the draft General Comment, the Committee refers to the concept of 'respect' for the views of the Committee. For example:
 - paragraph 14 states that: 'Respect for the obligations voluntarily assumed by States parties under the Covenant extends also to *the respect owed to views* expressed by the Human Rights Committee in individual cases under the Optional Protocol by reason of the integral role of the Committee under both instruments' (emphasis added).
 - Paragraph 16 states that '*respect is due* to the views of the Committee by reason of 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' (emphasis added).
 - Paragraph 16 further refers to 'an obligation to *respect the views* of the Committee in the given case' (emphasis added).

It is unclear precisely what the intended meaning of 'respect' is and what is the legal effect of having 'an obligations to respect'. It would be helpful if the Committee could clarify its intended meaning. Australia would interpret it to mean that a State Party should give considerable weight to the views and consider them in good faith. Australia considers that a more expansive interpretation would exceed the scope of the Optional Protocol.

4. In paragraph 14, both 'the' and 'an' are used before the phrase 'authentic interpreter of that instrument'. We assume that this point will be clarified in the final text of the General Comment. Australia considers that it would be much more accurate to describe the Committee as 'an' authentic interpreter of the Covenant, albeit one whose interpretation carries considerable weight. States Parties to a treaty are of course also capable of providing authentic interpretations to that treaty.

5. Paragraph 15 states that '[a] finding of a violation by the Committee engages the legal obligation of the State party to reconsider the matter'. As authority for this proposition, the Committee only cites works by academic commentators. Such a proposition would be stronger if supported by other sources, such as some evidence of State practice. It is unclear what the meaning of 'reconsider' is intended to be. Consequently, it is unclear what the Committee considers the exact nature of such an 'obligation to reconsider' to be and what consequences it considers such an obligation would entail for States Parties. It would be helpful if

the Committee could clarify and elaborate upon what it means by an obligation to 'reconsider' the matter. Such an obligation is not contained in the Optional Protocol itself.

6. Similarly, the Australian Government is concerned that the meaning of the phrase 'duty to cooperate with the Committee' in paragraph 16 is unclear. Further, the Government questions the reasoning by which the Committee derives 'an obligation to respect the views of the Committee' from the principle of good faith. Paragraph 16 asserts that application of the principle of good faith to the discharge of treaty obligations gives rise to 'a duty to cooperate with the Committee', which in turn gives rise to 'an obligation to respect the views of the Committee in the given case'. Such an extension of the principle of good faith is not supported by international law.
7. Paragraph 21 asserts that the Committee regards cases where 'rejection of the Committee's views, in whole or in part, has come after the State party has participated in the procedure and where its arguments have been fully considered by the Committee', as 'one where dialogue between the Committee and the State party is ongoing'. The Australian Government is concerned that:
 - a. It is unclear precisely what this phrase is intended to mean, and in particular what it would mean in practice for the State Party. It would be helpful if the Committee could clarify this.
 - b. Further, there appears to be an inconsistency in, on the one hand, asserting that the Committee's views are 'determinative' of the issues presented (paragraph 11—not a view with which Australia agrees), and on the other hand, asserting that a State Party's rejection of the Committee's views results in the issues being considered the subject of ongoing dialogue between the Committee and the State Party. It would be helpful if the Committee could clarify whether it considers that a State would have the right to 'close' a case, where the State has given full consideration to the Committee's views. Australia would query an interpretation that would allow an 'ongoing dialogue' in perpetuity.
8. Paragraphs 18 and 19 refer to the 'legal character' of the Committee's views, and paragraph 18 states that this character 'is reflected in the consistent wording adopted by the Committee in issuing its views in cases where a violation has been found'. It is unclear what the Committee's intended meaning of the phrase 'legal character' is. As indicated above, Australia believes that States Parties should give considerable weight to the views and consider them in good faith. Further, it is not clear how any 'legal character' of the Committee's views would derive simply from the consistent use of particular wording adopted by the Committee in issuing its views. In addition, it is not clear how the substance of the wording cited by the Committee in paragraph 18 would give the Committee's views any 'legal character'.

Interim measures

9. The Australian Government recognises the importance of the ability of the Committee to issue a request for interim measures of protection, in cases 'when an action taken or contemplated by the State party would cause irreparable damage to the author or a victim unless withdrawn or suspended pending the full consideration of the communication by the Committee'(paragraph 22). However, Australia is concerned that paragraphs 23 and 24 appear to suggest that such interim measures requests are binding upon States Parties, which would exceed the scope of the Optional Protocol. Australia notes in this regard that interim measures are founded in the rules of procedure of the Committee, rather than the Optional Protocol, and in this sense cannot be considered binding on States Parties. In Australia's view, States Parties must consider an interim measure request made by the Committee in good faith and in light of the circumstances of the case.
10. The Australian Government is concerned about the use of the terminology 'grave breach' in order to describe a violation of the Optional Protocol (paragraph 24). This language comes from international humanitarian law, and is inappropriate to describe a violation of a human rights treaty. It would be preferable if the Committee could use the standard terms of 'violation' or 'breach'.

Reference to the Vienna Convention on the Law of Treaties

11. Paragraph 17 presents two alternative interpretations of the status of 'the general body of jurisprudence generated by the Committee', vis-à-vis the Vienna Convention on the Law of Treaties.
12. The first interpretation the Committee presents is that the Committee's general body of jurisprudence constitutes 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation', within the meaning of article 31(3)(b) of the Vienna Convention. As the views of the Committee do not reflect 'the agreement of the parties' regarding the interpretation of the Optional Protocol, Australia does not consider that this first interpretation presented by the Committee reflects an accurate statement of the position under international law.
13. Australia would agree that the second interpretation, namely that 'the acquiescence of States parties in those determinations' may constitute 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation', within the meaning of article 31(3)(b) of the Vienna Convention may be accurate as a matter of international law. However, such State practice could not be generated solely by one State's response to the Committee's views on a particular communication. The relevant State practice would be that developed over time by States Parties in general, and which demonstrates their agreement regarding the interpretation of the treaty. Further, given the lack of clarity in the phrase 'those determinations', it would be helpful for the Committee to clarify that this term refers to the Committee's views (if that is what is intended).

14. In addition, it would not just be the 'acquiescence' of States parties in the determinations of the Committee that would constitute the relevant 'subsequent practice' within the meaning of article 31(3)(b) of the Vienna Convention. Such 'subsequent practice' would include all State practice in relation to the Committee's interpretations—including States Parties' rejection of or expressions of disagreement with such determinations.

The citation of the Australian case of *Mabo v Queensland*

15. In advocating the direct incorporation of the Covenant in the domestic laws of States parties, paragraph 25 cites an Australian High Court case (*Mabo v Queensland (No 2)* [1992] HCA 23 (*Mabo*)), as one which draws a link between the Optional Protocol and the Covenant. It is not strictly correct to say Justice Brennan was of the opinion that Australia's accession 'strengthened and deepened the status of Covenant rights in the general law.' His Honour's actual words were '...brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.' In Australia, Covenant rights may have some influence in statutory interpretation and administrative law. However, the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions. This was stated by the High Court in *Dietrich v R* [1992] HCA 57. This position is not altered by Australia's accession to the First Optional Protocol to the ICCPR.
16. The Australian Government's strong preference is that the reference to the *Mabo* case be removed, or at least amended to reflect more accurately what Justice Brennan said.
17. The Australian Government reiterates its support for the work of the Committee, and again thanks the Committee for the opportunity to provide comments on the draft General Comment.