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**Submission in relation to draft General Comment 33  
of the Human Rights Committee on States Parties'  
obligations under the first Optional Protocol to the  
International Covenant on Civil and Political Rights**

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**About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre ('**HRLRC**') is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

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## 1. Introduction and Summary

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### 1.1 Consultation Process

1. During its 92<sup>nd</sup> and 93<sup>rd</sup> sessions held in March and July 2008 respectively, the Human Rights Committee (**Committee**) initiated the drafting of a new General Comment on States parties' obligations under the first Optional Protocol to the International Covenant on Civil and Political Rights (**General Comment**).
2. The Committee has sought comments on the Draft General Comment from interested parties, in particular State parties to the *International Covenant on Civil and Political Rights* (**Covenant**), UN specialised agencies and non-governmental organisations.<sup>1</sup>

### 1.2 Overview of this Submission

3. The HRLRC recognises and affirms the importance of the individual communication process in ensuring effective protection for individuals who may have suffered a violation of rights afforded them under the Covenant.
4. This submission addresses the following areas considered in the General Comment:
  - (a) the obligation of States parties to cooperate with procedures (section 2);
  - (b) the force, nature and effect of the Committee's views (section 3); and
  - (c) interim measures (section 4).
5. The HRLRC supports the position taken in the General Comment that the Committee's views are 'not merely recommendatory'.<sup>2</sup> Rather, the obligation to respect, reconsider and act in good faith in relation to Committee procedures and views forms an essential element of States parties' legal obligations under both the *Optional Protocol to the International Covenant on Civil and Political Rights* (**Optional Protocol**) and the Covenant.<sup>3</sup>
6. The purpose of this submission is to consider in detail the nature of States parties' obligations to co-operate with the Committee in good faith and to respect the Committee's views.

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<sup>1</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976)

<sup>2</sup> General Comment [34].

<sup>3</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 302 (entered into force 23 March 1976)

**1.3 Recommendations**

7. Consistent with our comments in this submission, we have prepared and set out in an Annexure a proposed revised draft of the General Comment for the Committee's consideration. The highlighted text contained in the proposed revised draft constitutes our recommendations as to changes which should be made to the General Comment.

## **2. Obligations of States parties to cooperate with procedures**

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### **2.1 Reference to the General Comment**

8. This section addresses paragraphs 3 to 11 of the General Comment. The HRLRC recommends that the General Comment be amended to:
- (a) address the importance of States parties providing adequate responses to communications including all relevant information and documentation; and
  - (b) give further guidance on the precise meaning of the requirement that domestic remedies be exhausted.

### **2.2 Timeliness of responses**

#### ***(a) Written replies to individual communications***

9. The General Comment confirms that States parties have an obligation to respond to claims made by individuals against that States party within six months of the Committee notifying the State party, as specified by article 4(2) of the Optional Protocol.<sup>4</sup> The Committee's Rules of Procedure clarify the operation of time limits relating to State party responses, depending upon which matters the State party will address in its written response.<sup>5</sup>
10. The Committee's Rules of Procedure also provide that a State party must observe specified time limits where:
- (a) the Committee has requested the State party to submit additional written information or observations relevant to the question of admissibility of the communication or its merits; or
  - (b) the Committee has afforded the State party the opportunity to comment on submissions made by the author of the communication.

The relevant time periods applicable in such cases are at the discretion of the Committee.

11. The General Comment appropriately identifies that the obligation of timeliness is not always respected by States parties. For example, recently the HRLRC has acted as legal representative in Communication No 1557/2007 lodged with the Committee in April 2007. The

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<sup>4</sup> General Comment [9].

<sup>5</sup> Rules 91(2) & (6) in relation to admissibility and merits of violations identified in a communication and Rules 93(2) & (3) in relation to additional information or observations in relation to the merits.

State party did not submit its response to the individual communication until February 2008. Similarly, an earlier communication (Communication 1243/2004) was lodged by the Public Interest Law Clearing House ('PILCH') (one of the founding parties of the HRLRC) on behalf of an individual in January 2004, in which the State party did not submit its response until October 2004.

12. These delays in submitting responses by the State party, in this case Australia, are consistent with delays the Committee has observed in relation to other States parties' responses to communications. A delayed response by the State party may both undermine the efficacy of the complaints process and result in the continuing violation of Covenant rights.

**(b) Appropriateness of time frames**

13. We consider that these time frames, and the discretion of the Committee in setting timeframes which are not fixed, are appropriate and adequate for the purposes of the communications procedure.
14. The obligation on States parties to comply with the Committee's timeframes is consistent with generally accepted principles in respect of the procedural rules of tribunals issuing views of a legal character.
15. The obligation to comply with timeframes is also informed by article 14 of the Covenant which provides for the right to be tried without undue delay. This right is intended, among other things, to ensure that individuals are not kept for too long in a state of uncertainty about their fate and to 'serve the interests of justice'.<sup>6</sup>
16. In its General Comment No. 32 on article 14, the Committee states that the protection afforded by Article 14 extends to:<sup>7</sup>

(a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law... In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.

17. In addition, the time limits and procedures set out for the response of States parties under the Committee's Rules of Procedure are consistent with those governing other treaty bodies which receive individual communications, including the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of persons with Disabilities.

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<sup>6</sup> Human Rights Committee, *General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 23 August 2007 [35].

<sup>7</sup> *Ibid* [16].

18. The Committee on the Elimination of Racial Discrimination requires States parties to submit responses to individual communications within three months of notification by the Committee.<sup>8</sup> However, as a matter of process and procedure, this shorter time period may be considered appropriate given that CERD receives relatively fewer communications and, as such, claims are typically resolved more quickly by CERD than in the case of other treaty bodies.
19. If a State Party has a legitimate reason for not being able to comply with the Committee's set timeframes, then that State Party should formally request an extension of time from the Committee. The request should include a detailed justification for the need for an extension and should be forwarded to the Committee and the relevant author.

### **2.3 Adequacy of Responses**

20. Article 4(2) of the Optional Protocol requires States parties to submit 'written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State'. The Committee's Rules of Procedure provide that the substance of the State party's submission may cover questions of admissibility, or merits, or both.<sup>9</sup>

#### **(a) Provision of Relevant Information**

21. States parties are required to disclose to both the Committee and the author the information relied upon in a response to an individual communication. This requirement applies to information pertaining to admissibility and merits.
22. In *Wolf v Panama* the Committee stated that:<sup>10</sup>
- it is implicit in rule 91 of the Committee's rules of procedure and article 4, paragraph 2, of the Optional Protocol, that a State party to the Covenant should make available to the Committee all the information at its disposal...
23. The Committee went on to comment on the inadequacy of Panama's response, which 'confined itself to statements of a general nature by categorically dismissing the author's claims as baseless and asserting that the judicial procedures in the case complied with the requirements of Panamanian law'.<sup>11</sup>

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<sup>8</sup> Committee on the Elimination of Racial Discrimination, *Rules of Procedure*, rule 94, UN Doc CERD/C/35/Rev.3 (1989).

<sup>9</sup> Human Rights Committee, *Rules of Procedure*, rule 91, UN Doc CCPR/C/3/Rev.8 (2005).

<sup>10</sup> Human Rights Committee, *Wolf v Panama*, Communication No. 289/1988, 26 March 1992, [5.5].

<sup>11</sup> *Ibid*, [6.1].



24. The Committee has indicated that the burden of proof in relation to a communication cannot rest with the author alone, especially considering that 'the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information'.<sup>12</sup>
25. The importance of the disclosure of relevant information by a State party is illustrated in *Taha v Australia*.<sup>13</sup> In that communication (concerning the return of a failed asylum seeker to Syria), Australia asserted that it had acted on its understanding that asylum seekers returning to Syria were released when Syrian authorities established they were not wanted for previous criminal activities.<sup>14</sup> Australia did not provide the evidence upon which this assertion was based, making reference only to 'research' conducted by the Department of Immigration and Multicultural Affairs. This research was not provided to the author, despite its request of 23 December 2004, nor was it provided to the Committee. In the absence of the relevant evidence, both the Committee and the author are unable to assess its reliability.<sup>15</sup>
26. The Committee against Torture has similarly required that all relevant information and documentation be provided to it by the State party. In *Sweden v Agiza* the Committee against Torture noted in relation to Sweden's failure to co-operate fully with the individual communications procedure under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>16</sup>

by making the declaration provided for in article 22 [equivalent of articles 1-5 of the Optional Protocol]... a State party assumes an obligation to co-operate fully with the Committee, through the procedures set forth in article 22 and in the Committee's Rules of Procedure. In particular, article 22, paragraph 4 [equivalent of Article 5(1) of the Optional Protocol], requires a State party to make available to the Committee all information relevant and necessary for the Committee appropriately to resolve the complaint presented to it... It follows that the State party committed a breach of its obligations under article 22 of the Convention by neither disclosing to the Committee relevant information, nor presenting its concerns to the Committee for an appropriate procedural decision.

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<sup>12</sup> Human Rights Committee, *Larrosa v Uruguay*, Communication No. 88/1981, 29 March 1983.

<sup>13</sup> *Taha v Australia*, Communication No. 1243/2004.

<sup>14</sup> See Response to the Australian Government's Submission on Admissibility and Merits, 10 February, [129].

<sup>15</sup> This Communication was withdrawn on 23 November 2006 after the author, Mr Taha, was granted a permanent protection visa.

<sup>16</sup> Committee against Torture, *Sweden v Agizia* (333/2003).

27. This reasoning can be applied to the Human Rights Committee's procedures and supports the argument that failure to provide all relevant information constitutes a breach of a States parties' under the Optional Protocol.

**(b) Ratione Temporis**

28. As part of a State party's general obligation to provide an adequate response, the General Comment notes that States parties have a particular obligation to invoke the *ratione temporis* rule, if the State party wishes to rely on the rule.<sup>17</sup>

29. In addition, a State party invoking the *ratione temporis* rule should respond to any express or implied evidence that the violation continues or has effects that continue.<sup>18</sup>

**(c) Inadequate Responses**

30. The General Comment notes that States parties who respond inadequately to an individual communication put themselves at a disadvantage, as an inadequate response prevents the Committee from being able to consider the communication in light of the full information relevant to the substantive merits of the communication.<sup>19</sup>

31. In the case of *Wolf v Panama*, referred to above, the State Party failed to provide information regarding the remedies pursued by and the remedies available to the author.<sup>20</sup> As a consequence the Committee found that there was no reason to revise their decision on admissibility.<sup>21</sup>

32. The Centre endorses this approach as being appropriate, given that the Committee's ability to properly consider the communication is wholly dependent on the quality of the information provided to it by the author and relevant State party.

**2.4 Exhaustion of local remedies**

33. The HRLRC supports the approach taken by the Committee towards Article 2 of the Optional Protocol. This admissibility issue is a common reason for the Committee to reject an individual communication. In light of the importance of this admissibility requirement to

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<sup>17</sup> General Comment [10].

<sup>18</sup> See, for example, Human Rights Committee, *Konye and Konye v Hungary* (520/92); *Adam v Czech Republic* (586/1994).

<sup>19</sup> General Comment [10].

<sup>20</sup> *Wolf v Panama*, above n 10 at [5.5].

<sup>21</sup> *Ibid.*

- individual communications, we submit that the General Comment should further outline the Committee's position in relation to information or substantiation by an author necessary to satisfy this admissibility requirement.
34. The requirement to establish that all domestic remedies have been exhausted (or that they have not been exhausted as the case may be) can raise complex issues for both authors and States parties. It has been noted that contentious issues can arise in relation to admissibility where:
- (a) the domestic remedies which may be sought by the author may reasonably be viewed as futile;
  - (b) those remedies may be expensive to pursue; and
  - (c) the pursuit of domestic remedies is prolonged while the author continues to suffer from the alleged violation (this is included in the Convention Against Torture's Rules of Procedure in Rule 107).<sup>22</sup>
35. In paragraph 6 of the General Comment, reference is made to the burden of proof that is placed on the State party to show the nature of the domestic remedies that the author has failed to exhaust. Indeed, in some cases, the relevant State party has been subject to a substantial burden in proving the existence and efficacy of domestic remedies.<sup>23</sup>
36. We submit, in order to give guidance to prospective authors, that the General Comment should clarify the burden of proof that the author bears in order to establish that he or she has exhausted all available domestic remedies. The following principles emerge from Committee jurisprudence in relation to admissibility of individual communications and should be referred to in the General Comment:
- (a) the remedies covered by section 5(2)(b) are remedies which are both effective and available;<sup>24</sup>
  - (b) for a remedy to be effective, the remedy must have a binding effect, rather than being merely recommendatory;<sup>25</sup>

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<sup>22</sup> Sarah Joseph, Katie Mitchell, Linda Gyorki & Carin Benninger-Budel, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, November 2006, pages 67 – 71. [http://www.omct.org/pdf/UNTB/2006/handbook\\_series/vol4/eng/handbook4\\_eng\\_02\\_part2.pdf](http://www.omct.org/pdf/UNTB/2006/handbook_series/vol4/eng/handbook4_eng_02_part2.pdf)

<sup>23</sup> *C.F. v Canada* (118/81).

<sup>24</sup> *Ominayak et al v Canada* (167/84) at [13.2].

<sup>25</sup> *C v Australia* (900/99) at [7.3].

- (c) judicial remedies are usually considered the most likely remedies to be effective and are therefore the most relevant remedies for the purposes of section 5(2)(b).<sup>26</sup> Accordingly, domestic remedies are usually deemed to be exhausted when a final judicial decision, from which there is no available appeal, has been handed down.<sup>27</sup> However, in certain cases, exhaustion of non-judicial remedies (including administrative and disciplinary measures) may be required;<sup>28</sup>
- (d) the Committee has traditionally taken a cautious approach to the effectiveness of executive or 'extraordinary' remedies;<sup>29</sup>
- (e) the availability of administrative and disciplinary measures will not be sufficient where the alleged violation is particularly serious (for example, where there has been a violation of the right to life),<sup>30</sup>
- (f) pursuit of judicial remedies may be considered futile if the author will not be accorded a 'fair and public hearing by a competent, independent and impartial tribunal';<sup>31</sup>
- (g) the exhaustion of domestic remedies rule does not require an author to exhaust futile remedies (in other words, remedies that objectively have no prospect of success);<sup>32</sup>
- (h) the financial means of the author may be relevant when determining which domestic remedies are available to an author. In particular, where legal aid is not available to indigent persons, a person may more readily be found to have exhausted all available remedies,<sup>33</sup> and

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<sup>26</sup> *R.T. v France* (262/87); Joseph at 106.

<sup>27</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (2000), 14, 106.

<sup>28</sup> *Patino v Panama* (437/90).

<sup>29</sup> *Ellis v Jamaica* (276/88); *Muhonen v Finland* (89/81); Joseph, Shultz and Castan, above n. 27 at 106; cf *Jonassen et al v Norway* (942/00) at [8.6] to [8.10].

<sup>30</sup> *Vicente et al v Colombia* (612/96).

<sup>31</sup> *Arzuaga Gilboa v Uruguay* (147/83).

<sup>32</sup> *Pratt and Morgan v Jamaica* (210/86, 225/87)

<sup>33</sup> *Henry v Jamaica* (230/87) and *Douglas et al v Jamaica* (352/89).

- (i) the particular characteristics of the of an author may be considered by the Committee in determining whether effective judicial remedies were available to them. For example in *Brough v Australia* Committee considered that:<sup>34</sup>
- [g]iven the author's age, his intellectual disability and his particularly vulnerable position as an Aboriginal, the Committee concludes that he made reasonable efforts to avail himself of existing administrative remedies, to the extent that these remedies were known to him and insofar as they can be considered to have been effective.
- (j) access to an effective remedy may also be frustrated - and rendered effectively futile - by barriers to access to justice such as burdensome court fees, lack of access to interpreters, disproportionate adverse costs risks and the like.<sup>35</sup>
37. These principles indicate that the Committee adopts an approach based on the reasonableness of the availability and the effectiveness of the remedies sought domestically by the author. As the Committee has consistently engaged this general approach in its consideration of the admissibility of individual communications, we submit that it is appropriate that further guidance as to this approach be included in the General Comment.

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<sup>34</sup> See *Brough v Australia* (1184/2003) where the Committee considered that '[g]iven the author's age, his intellectual disability and his particularly vulnerable position as an Aboriginal, the Committee concludes that he made reasonable efforts to avail himself of existing administrative remedies, to the extent that these remedies were known to him and insofar as they can be considered to have been effective.' At [8.9]

<sup>35</sup> Human Rights Committee, *General Comment No. 32*, above n 6, [9]-[11].

### **3. Force, nature and effect of Committee's views**

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#### **3.1 Reference to the General Comment**

38. This section on the force, nature and effect of the Committee's views addresses paragraphs 12 to 24 of the General Comment.
39. The HRLRC supports the Committee's position in relation to the force, nature and effect of the committee's views. The remainder of this section provides further jurisprudential support for the Committee's position and expands upon the content of States parties' obligation to 'reconsider' matters and to 'act in good faith' and 'respect' Committee views.

#### **3.2 The Legal Status of Views**

40. Under article 1 of the Optional Protocol to the Covenant each State Party:
- recognises the competence of the Committee to receive and consider communications from individuals ... who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.
41. Unlike the European Convention on Human Rights, which specifically states that States parties will 'abide by the final judgments of the Court in any case to which they are parties'<sup>36</sup>, the legal nature and status of the Committee's views are not expressly addressed in the Optional Protocol.
42. Nevertheless, as pointed out by Hanski and Scheinin, the Committee's views are:<sup>37</sup>
- the end result of a quasi-judicial adversarial international body established and elected by the States parties for the purpose of interpreting the provisions... and monitoring compliance with them.
43. A body of jurisprudence has emerged as to the legal nature of the Committee's views. The jurisprudence demonstrates that, although the Committee is not a court, its views do have some legal force. Committee views are not binding in the way that decisions of domestic courts are binding; nor are States free to disregard them at will. The legal force of Committee views lies between these two extremes.
44. The General Comment states that:<sup>38</sup>

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<sup>36</sup> Article 46, paragraph 1 *European Convention on Human Rights* - see summary at: <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Execution/How+the+execution+of+judgments+works/>

<sup>37</sup> Hanski and Scheinin, *Leading Cases of the Human Rights Committee* (2003), 22.

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.<sup>39</sup> A duty to cooperate with the Committee arises from an application of the principle of good faith to the discharge of treaty obligations, which leads to an obligation to respect the views of the Committee in the given case<sup>40</sup> [original footnotes].

45. The remainder of this section examines the jurisprudential support for this position under the Optional Protocol, article 2 of the Covenant and general international law. The following section (3.2) aims to give content to the precise obligations of States Parties in relation to the Committee's views.

**(a) Optional Protocol**

46. By recognising that the Committee is competent to receive and hear communications and give its views on those communications, States Parties to the Optional Protocol implicitly agree to cooperate with the Committee and to respect its views.<sup>41</sup> In practice, most States accept the Committee's decisions as 'an authoritative interpretation of their legal obligations under the Covenant in specific individual cases'.<sup>42</sup>
47. As expressed in the General Comment, the views of the Committee have been described as being issued 'in a judicial spirit'<sup>43</sup> and following a 'judicial pattern'.<sup>44</sup> Domestic Courts in some

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<sup>38</sup> General Comment, [16].

<sup>39</sup> S. Joseph et al, 24; N. Ochoa Ruiz, 374; C. Tomuschat, "Human Rights, Petitions and Individual Complaints", in *United Nations : Law, Policies and Practice* (R. Wolfrum, ed.) (1995), 183; A. de Zayas, "The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights", in *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (G. Alfredsson et al., eds) (2001), 117.

<sup>40</sup> E. Klein, "Fall Faurisson zur Holocaust-Lüge – Die Arbeit des Menschenrechtsausschusses zum Schutz bürgerlicher und politischer Rechte, in *Menschenrechtsschutz in der Praxis der Vereinten Nationen* (G. Baum, E. Riedel and M. Schaefer, eds.) (1998), 121; S. Lewis-Anthony and M. Scheinin, "Treaty-Based Procedures for Making Human Rights Complaints Within the UN System", in *Guide to International Human Rights Practice* (H. Hannum, ed.) (2004), 51.

<sup>41</sup> See for example Elizabeth Evatt, 'Reflecting on the role of international communications in implementing human rights' 5(2) (1999) *Australian Journal of Human Rights* 20 - 43.

<sup>42</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2<sup>nd</sup> revised edition (2005), 895.

<sup>43</sup> Joseph, Schultz and Castan, above n 27, 14.

jurisdictions have gone further to describe the Committee as a 'judicial body of high standing'.<sup>45</sup>

48. The Committee considers a State party's reply to its views to be 'satisfactory' only where the state is 'willing to implement' the views or 'to offer ... an appropriate remedy',<sup>46</sup> further supporting the position that the views do have some legal force. There is an 'expectation' by the Committee that a State party will give effect to the views of the Committee whether or not it agrees with them.<sup>47</sup>
49. While, States parties generally have not sought to avoid compliance by arguing there is no legal obligation to provide a remedy or to change existing laws or practices in line with the Committee's views.<sup>48</sup>

**(b) Article 2 of the Covenant**

50. The conclusion that States Parties have an obligation to respect the views of the Committee is supported by the interaction of the Optional Protocol with article 2 of the Covenant. As discussed in paragraph 16 of the General Comment:

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.

51. This position is supported by Nowak, who argues that:<sup>49</sup>
- although the decision of the Committee and its holdings on appropriate remedies are not legally binding, the reference to Art. 2(3) of the Covenant makes it clear that these are not merely

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<sup>44</sup> J S Davidson, *Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee* 2001 New Zealand Law Review 125, 129.

<sup>45</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

<sup>46</sup> Elizabeth Evatt, 'Reflecting on the role of international communications in implementing human rights' 5(2) (1999) *Australian Journal of Human Rights* 20 - 43.

<sup>47</sup> See for example a discussion of the expectations of the Committee and Australian NGOs in Daryl Williams, 'Reforming human rights treaty bodies' 5(2) (1999) *Australian Journal of Human Rights* 158 - 166.

<sup>48</sup> J S Davidson, above n 44, 143. It should be noted, however, that some States Parties who strongly disagree with the Committee's views on a specific issue have chosen not to implement them on the basis that the Committee is not a Court.

<sup>49</sup> Nowak, above n. 42, 893.



recommendations but that States parties to the Covenant have a legal obligation to provide every victim of a violation of the Covenant with an effective remedy and reparation.

52. States parties have undertaken the obligation to ensure an adequate remedy by virtue of article 2(3) of the Covenant. Article 2(2) requires States Parties to adopt such laws and other measures as may be necessary to give effect to Covenant rights.
53. It is recognised that the Committee is the:<sup>50</sup>
- pre-eminent interpreter of the ICCPR which is itself legally binding. The [Committee]'s decisions are therefore, strong indicators of legal obligations, so rejection of those decisions is good evidence of a State's bad faith attitude towards its ICCPR obligations.
54. Article 2 of the Covenant requires a state to ensure individuals within its territory and jurisdiction enjoy the rights in the Covenant and to provide a remedy for any violation of a Covenant right. Where the Committee, as the authoritative interpreter of the Covenant, has found such a violation, article 2 is engaged, obliging the State party to reconsider the matter the subject of the communication.<sup>51</sup>
55. On this analysis, the Optional Protocol is seen to 'provide the machinery to establish whether such a violation has occurred.'<sup>52</sup> Accordingly, it is argued that, by signing the Optional Protocol, States express their acceptance of the Committee's views, as the Committee fulfils the role set out in article 2(3)(b) as a 'competent authority provided for by the legal system of the State' which can determine whether a person claiming a remedy is in fact entitled to one.<sup>53</sup>
56. This approach draws support from General Comment 31 of the Committee, which states that reservations to article 2 of the Covenant would be incompatible with the object and purpose of the Covenant, and that 'cessation of an ongoing violation is an essential element of the right to an effective remedy'. Thus, where a State party does not implement the views of the Committee it is acting in a manner which is incompatible with the object and purpose of the Covenant by failing to provide a remedy and in some cases failing to stop an ongoing violation (for example where the operation of a domestic law conflicts with Covenant rights).

**(c) Obligation to act in good faith**

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<sup>50</sup> Joseph, Schultz and Castan, above n 27, 14.

<sup>51</sup> Evatt, above n 46, 20 - 43.

<sup>52</sup> Davidson, above n 44, 130.

<sup>53</sup> Ibid, 130.

57. Article 26 of the *Vienna Convention on the Law of Treaties* states that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.' This principle, sometimes referred to as *pacta sunt servanda*, is also part of customary international law.<sup>54</sup>
58. In the *Case concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, the ICJ considered Article 26 of the Vienna Convention and stated that 'the principle of good faith obliges the parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realised.'
59. The obligation to act in good faith is attached to States parties' obligations under the Optional Protocol and the Covenant and lends further weight and substance to the view that the Committee's views have legal force and cannot be legitimately dismissed by States parties.

### **3.3 Obligations arising from Views**

60. The precise nature of States parties' obligations to 'respect' and 'act in good faith' merit further consideration and explication. The HRLRC considers that a State may respond to Committee views through either:
- (a) full implementation of the committee's view; or, alternatively
  - (b) independent, good faith reconsideration of the matter followed by the provision of an effective remedy in respect of the identified breach.
61. The fact that Committee views are not legally binding in a strict sense allows for a measure of flexibility in their implementation. However, rejection, including reasoned rejection, is not an open 'good faith' response and does not demonstrate 'respect' for the legal nature of the views as discussed above.
- (a) The obligation to 'reconsider'**
62. Reconsideration should be a genuine and independent exercise performed in good faith and with a view to the full realisation of a State Party's obligations under the Covenant, including the obligation to provide an effective remedy. In order to adequately reconsider a matter, States Parties may be required to compromise their previous position on the issue the subject of the Committee's view.
63. A State Party cannot claim to have 'reconsidered' a matter if it has merely outlined its reasons for failing to implement the Committee's view. Such a response undermines the legal nature

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<sup>54</sup> See Hans Wehberg, "Pacta Sunt Servanda", *The American Journal of International Law*, Vol. 53, No. 4 (Oct, 1959), 782-784.

of the Committee's views and is inconsistent with States Parties' voluntary submission to the procedure under the Optional Protocol.<sup>55</sup>

**(b) The obligation to 'respect'**

64. Respect for Committee views requires that States parties recognise the authoritative nature of the Committee's determination as to the existence of a violation and that they act to end the violation and provide an effective remedy.
65. It is recognised that the task of implementing Committee views may engage socially, politically and economically sensitive amendments to legislation, policy and practice. It is often the case that in formulating a response to Committee views 'a number of complex and difficult issues... will need to [be] consider[ed] carefully, in particular what measures may need to be taken to implement [the views].'<sup>56</sup> For this reason a measure of flexibility is afforded to States in the implementation of Committee views.
66. However, minimum standards remain and should be informed by States parties' obligations under article 2 of the Covenant, which requires States parties to:
- (a) refrain from violation of rights;
  - (b) adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations; and
  - (c) provide an effective remedy where a violation has occurred.
67. The standards set out in General Comment 31 should also be born in mind. General Comment 31 states that 'all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party'.<sup>57</sup>
68. This approach is consistent with article 27 of the *Vienna Convention on the Law of Treaties* which provides that a State party 'may not invoke the provisions of internal law as justification for its failure to perform a treaty' and with article 50 of the Covenant which states that the provisions of the Covenant 'shall extend to all parts of federal States without any limitations or exceptions'.

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<sup>55</sup> Hanski and Scheinin, above n 37, 11.

<sup>56</sup> UK State Report 2006 paragraph 69.

<sup>57</sup> Human Rights Committee, *General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, [4].

69. A similar approach is taken by the European Court of Human Rights whose decisions must be implemented by all appropriate State authorities. That is, regardless of the internal governance structure of a State, that State must identify the relevant domestic authorities that should be made aware of a judgment, particularly those responsible for implementing any execution measures required by the judgment.<sup>58</sup> This flexible, non-prescriptive approach to implementation focuses on ensuring the desired result is achieved and not on any particular method by which it is to be achieved.

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<sup>58</sup> Council of Europe, Human Rights and Legal Affairs, *Frequently Asked Questions*, available at: [http://www.coe.int/t/e/human\\_rights/execution/01\\_Introduction/02\\_FAQ.asp](http://www.coe.int/t/e/human_rights/execution/01_Introduction/02_FAQ.asp)

## 4. Interim measures

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### 4.1 Reference to the General Comment

70. This section addresses paragraphs 25 to 28 of the General Comment.
71. The HRLRC supports the Committee's position on the vital importance of State parties' implementation of interim measures requested by the Committee. Further, the HRLRC recommends that matters in relation to which interim measures may be requested should be presented as non-exclusive and evolving category.

### 4.2 Basis for interim measures requests

72. The Committee's Rules of Procedure provide for the Committee to consider the need for interim measures where desirable 'to avoid irreparable damage to the victim of the alleged violation'.<sup>59</sup> Accordingly, an author may include in their communication a request that interim measures be sought by the Committee from the State party the object of the communication. It is also possible that the Committee may seek the imposition of interim measures of its own volition.
73. This procedure is supported by General Comment 31 on the Covenant, which provides that 'the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations'.<sup>60</sup>
74. In *Piandiong et al v. The Philippines* the Committee stated that:<sup>61</sup>

By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and Article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (Article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or

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<sup>59</sup> Human Rights Committee, *Rules of Procedure*, rule 92, UN Doc CCPR/C/3/Rev.8 (2005).

<sup>60</sup> Human Rights Committee, General Comment No. 31, above n 57, [19].

<sup>61</sup> *Piandiong et al v. The Philippines*, Communication No. 869/1999, 19 October 2000, [5.1] – [5.2].

frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

Quite apart, then, from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile.

75. The International Law Commission has supported the view that the obligation of good faith requires that States refrain from acts calculated to frustrate the object of the treaty.<sup>62</sup>

#### **4.3 Matters in respect of which interim measures may be requested**

76. As stated above, an author may request interim measures in any instance where such measures are necessary to 'avoid irreparable damage to the victim of the alleged violation'. The Committee expanded upon the meaning of 'irreparable damage' in *Stewart v. Canada*:<sup>63</sup>

The Committee observed that what may constitute 'irreparable damage' to the victim within the meaning of rule 86 [now rule 92] cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits.

77. In the past, the Committee has requested by way of interim measures that a State party not expel an author, not carry out a death sentence and provide imprisoned authors with medical treatment.<sup>64</sup> However, these matters are by no means an exclusive list of issues in respect of which interim measures may be requested. In our view, the General Comment should recognise that this list is evolving and not exhaustive.

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<sup>62</sup> International Law Commission, *Yearbook of the International Law Commission*, 1966, Vol 2, 202.

<sup>63</sup> *Stewart v. Canada*: Communication No. 538/1993 1 November 1996.

<sup>64</sup> See Manfred Nowak, above n. 42, 849.

**Annexure: Revised Comment based on recommendations of this submission**

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The proposed revised text of the draft Comment is set out in a separate document following this cover sheet.

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