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**The Obligations of States Parties under the Optional Protocol to the International
Covenant on Civil and Political Rights**

1. The Optional Protocol to the International Covenant on Civil and Political Rights was adopted and opened for signature, ratification or accession by the same act of the United Nations General Assembly, resolution 2200 A (XXI) of 16 December 1966, that adopted the Covenant itself. Both the Covenant and the Optional Protocol entered into force on 23 March 1976.
2. Although the Optional Protocol is consequently to be regarded as organically related to the Covenant, it is not automatically in force for all States parties to the Covenant. Article 8 of the Optional Protocol provides that States parties to the Covenant may become parties to the Optional Protocol only by a separate act of ratification or accession. A majority of States parties to the Covenant has also become parties to the Optional Protocol.
3. The preamble to the Optional Protocol states that its purpose is “further to achieve the purposes” of the Covenant by enabling the Human Rights Committee, established in part IV of the Covenant, “to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.” The Optional Protocol sets out a procedure, and imposes obligations on States parties to the Optional Protocol arising out of that procedure, in addition to their obligations under the Covenant.
4. Article 1 of the Optional Protocol provides that a State party to it 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. States parties are obliged not to hinder access to the Committee or to institute retaliatory measures against any person who has addressed a communication to the Committee.

5. (Deleted)

6. Article 2 of the Optional Protocol requires that individuals who submit communications to the Committee must have exhausted all available domestic remedies. In its response to a communication, a State party, where it considers that this condition has not been met, is under an obligation to specify the available and effective remedies that the author of the communication has failed to exhaust.

6(a) In determining whether a potential avenue open to the author is an “available domestic remedy”, the Committee will have regard to whether a remedy is effective. To be effective, a remedy should have a binding effect, rather than being merely recommendatory.¹ While both judicial and non-judicial remedies will be considered, judicial remedies are preferred, particularly in cases of serious violations.² Pursuit of a judicial remedy may be considered futile if the author will not be afforded a fair and public hearing by a competent and independent tribunal, or if the author does not have any prospect of success.³ The financial means and particular characteristics of an author will also be relevant to whether a remedy is “available”.⁴

7. Although not a term found in the Optional Protocol or Covenant, the Human Rights Committee uses the description “author” to refer to an individual who has submitted a communication to the Committee under the Optional Protocol. The Committee also favours the use of the mandated term “communication” instead of such terms as “complaint” or “petition”, although the latter term is reflected in the current administrative structure of the Office of the High Commissioner for Human Rights, where communications under the Optional Protocol are initially handled by a section known as the Petitions Team.

8. Terminology similarly reflects the nature of the role of the Human Rights Committee in receiving and considering a communication. Subject to the communication being regarded as admissible, after considering the communication in the light of all written information made available to it by the individual author and by the State party concerned, “the Committee shall forward its views to the State party concerned and to the individual.”⁵

9. The first obligation of a State Party, against which a claim has been made by an individual under the Optional Protocol, is to respond to it within the time limit of six months set out in article 4 (2). Within that time limit, “the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State.” The Committee’s Rules of Procedure amplify these provisions, including the possibility in certain cases of treating separately questions of the admissibility and merits of the communication, and the need for a State

¹ *C v Australia* (900/99) at [7.3].

² *Vicente et al v Colombia* (612/96)..

³ 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, [9]-[11].

⁴ *Henry v Jamaica* (230/87); *Douglas et al v Jamaica* (352/89); *Brough v Australia* (1184/2003).

⁵ Optional Protocol, article 5(4).

to comply with time limits in other circumstances, such as where the Committee requests additional information from the State.⁶ In formulating its written explanations and statements, the State has an obligation to provide all relevant information and documentation to enable the Committee to resolve the complaint presented to it.⁷ This requirement applies to information concerning both the admissibility and merit of a communication and recognises that the author and the State do not have equal access to the relevant evidence and information.⁸

10. In the experience of the Committee some States do not always respect the obligation to provide an adequate and timely response at obligation. In failing to respond to a communication, or responding inadequately, a State which is the object of a communication puts itself at a disadvantage, because the Committee is then compelled to consider the communication in the absence of the full information it desires for consideration of the communication. In such circumstances, the Committee is entitled to regard the allegations contained in the communication as true, if they appear from all the circumstances to be substantiated. Further, in failing to respond within the prescribed time limit, or providing an inadequate response, a State which is the object of a communication is potentially extending the commission of a continuing violation of the right or rights alleged to have been breached.

10 (bis.) Another, and more particular, obligation of a State party in responding to a communication that appears to relate to a matter arising before the entry into force of the Optional Protocol for the State party (the *ratione temporis* rule) is to invoke that circumstance explicitly, if it wishes to rely on it. A State party relying on the *ratione temporis* rule should also respond to any express or implied evidence that the violation continues or has continuing effects which render the communication admissible *ratione temporis*.

11. (Deleted)

12. The function of the Human Rights Committee in considering individual communications has been described as not fully that of a judicial body.⁹ However, the views issued by the Committee under the Optional Protocol exhibit most of the characteristics of a judicial decision, follow a judicial method of operation, and are issued in a judicial spirit¹⁰. Hence, the work of the Committee is to be regarded as determinative of the issues presented.¹¹

13. The term used in the Optional Protocol to describe the decisions of the Committee is “views”. In the French text it is “constatations” and in the Spanish “determinas”.

⁶ Rules of Procedure of the Human Rights Committee, Rules 97-100. UN Doc. CCPR/C/3/Rev.8, 22 September 2005.

⁷ Human Rights Committee, *Wolf v Panama*, Communication No. 289/1988, [5.5]

⁸ Human Rights Committee, *Larrosa v Uruguay*, Communication No. 88/1981.

⁹ Human Rights Committee, (1990) 2 Selected Decisions H.R.C. 1-2; Annual Report of the Human Rights Committee, 2002, 225; N. Ando, “L’avenir des organes de supervision: Limites et possibilités du Comité des droits de l’homme”, Canadian Yearbook of Human Rights (1991-92), 186 ; H. Steiner, “Individual Claims in a World of Massive Violations : What Role for the Human Rights Committee ?” in *The Future of UN Human Rights Treaty Monitoring* (P. Alston and J. Crawford, eds) (date), 18.

¹⁰ Tomuschat, 624; T. Zwart, *The Admissibility of Human Rights Petitions* (1994), 19.

¹¹ Tomuschat, 185; McGoldrick, 151; R. Hanski and M. Scheinin, *Leading Cases of the Human Rights Committee* (2003), 22.

14. This terminology might be thought to imply that the Committee's views are purely advisory or recommendatory. However, this is not a justifiable conclusion to be drawn, having regard to the place and function of the Optional Protocol in the system of standard-setting and monitoring of obligations established by the International Covenant on Civil and Political Rights.

15. In the first place, the views of the Committee under the Optional Protocol, when a violation is found following a careful analysis of the communication, represent an authoritative determination of a body established under the Covenant itself as the [an] authentic interpreter of that instrument. 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.

16. Second, under article 2, paragraph 3 of the Covenant, each State party to the Covenant undertakes "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity." A finding of a violation by the Committee engages the legal obligation of the State party to reconsider the matter.¹²

(16a) Reconsideration of a matter must be independent, performed in good faith and should be followed by the provision of an effective remedy in respect of the identified breach in accordance with article 2, paragraph 3 of the Covenant.

(16b) A finding of a violation by the Committee may also invoke a States parties' obligation under article 2, paragraph 2 of the Covenant, to make changes to their laws and practices to ensure conformity with the Covenant.

17. Third, 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.¹³ 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.¹⁴

(17a) A State Party has not adequately reconsidered a matter or acted in good faith if it has merely outlined its reasons for failing to implement the Committee's view. Such a

¹² M. Nowak, U.N. Covenant on Civil and Political Rights: ICCPR Commentary (2nd revised edition), 893; N. Ochoa Ruiz, Los Mecanismos Convencionales de Protección de los Derechos Humanos en las Naciones Unidas (2004), 375; F. Pocar, "La Valeur juridique des constatations du Comité des droits de l'homme" Canadian Yearbook of Human Rights (1991-92), 129-130.

¹³ 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.

¹⁴ 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.

response undermines the legal nature of the Committee's views and is inconsistent with States Parties' voluntary submission to the procedure under the Optional Protocol.

18. In relation to the general body of jurisprudence generated by the Committee, it may be considered that it constitutes "subsequent practice in the application of the treaty which establishes the agreement of the 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.¹⁵

19. (Deleted).

20. The 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:-

"In accordance with article 2, paragraph 3(a) of the Covenant, the State party is required to provide the author with an effective remedy. 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 and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views."

21. Consistently with this evaluation of the legal character of its views, the Committee decided, in 1997, and under its rules of procedure, to appoint a member of the Committee as Special Rapporteur for the Follow-Up of Views.¹⁶ That member, through written representations and frequently also through personal meetings with diplomatic representatives of the State party concerned, urges compliance with the Committee's views and discusses factors that may be impeding their implementation. In a number of cases this procedure has led to acceptance and implementation of the Committee's views where previously the transmission of those views had met with no response.

22. It is to be noted that failure by a State party to implement the views of the Committee in a given case becomes a matter of public record through the publication of the Committee's decisions on the website of the Office of the High Commissioner for Human Rights, and on other web sites, and in its annual reports to the General Assembly of the United Nations. Such failure may potentially also prompt censure and criticism, both domestically and internationally.¹⁷

23. Some States parties, to which the views of the Committee have been transmitted in relation to communications concerning them, have failed to accept the Committee's views, in whole or in part, or have attempted to re-open the case. . In a few of those cases these responses have been made where the State party took no part in the procedures,

¹⁵ Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies. Report of the 71st Conference of the International Law Association, Berlin, 2004, 621 at 628-629.

¹⁶ Rules of Procedure of the Human Rights Committee, Rule 101.

¹⁷ S. Joseph, J. Schultz and M. Castan, The International Covenant on Civil and Political Rights :Cases, Materials and Commentary (2nd edition, 2004), 24-25.

having not carried out their obligation to respond to communications under article 4, paragraph 2 of the Optional Protocol. In other cases, 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. Rejection of the Committee's views, even partial or reasoned rejection, is considered to be inconsistent with States parties obligations to perform their obligations under the Covenant and the Optional Protocol in good faith. In such cases, the Committee regards the case as one where dialogue between the Committee and the State party is ongoing. The Special Rapporteur for the Follow-up of Views conducts this dialogue, and regularly reports on progress to the Committee.

24. (Deleted)

25. Separate consideration is required of the legal nature of the obligation of States parties with regard to the issuance by the Committee of a request for interim measures of protection, where urgently required to preserve the situation of an individual, pending a consideration of the communication. In order that it could discharge its functions under the Optional Protocol, the Committee established, under its Rules of Procedure, the right to issue interim or provisional measures of protection.¹⁸ Measures may be requested by an author 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. Examples include the imposition of the death penalty, and the carrying out of an order of deportation.

(25a) However, these matters are not an exclusive list of issues in respect of which interim measures may be requested. The essential criterion for the request for interim measures is the irreversibility of the consequences, in the sense of the inability of the author to secure his or her rights, should there later be a finding of a violation of the Covenant on the merits.¹⁹

26. (Deleted)

27. Failure to implement provisional measures, indicated by the Committee in cases under the Optional Protocol with a view to avoiding irreparable harm pending the Committee's consideration of a case, is incompatible with the obligation to respect the Covenant in good faith, in particular article 2, and the right of individual communication under the Optional Protocol.

28. In the experience of the Committee, a few State parties have proceeded with the execution of authors or alleged victims even after having received from the Committee a request under Rule 92 (previously Rule 86) of its rules of procedure to refrain from such measures pending consideration of the case. In such cases the Committee has expressed itself in strong terms, regarding both the nature of the general obligation to respect the

¹⁸ Rules of Procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.8, 22 September 2005, Rule 92 (previously Rule 86):

“The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform the State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its Views on interim measures does not imply a determination on the merits of the communication.”

¹⁹ *Stewart v. Canada*: Communication No. 538/1993.

Committee's views and the indication of interim measures. Quite apart from any violation of the Covenant charged to a State party in a communication, a State party commits a grave breach 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. Flouting of the interim measures, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.²⁰

29. The Committee has emphasised on a number of occasions in Concluding Observations in relation to State parties' reports, and in General Comments²¹, the desirability of direct incorporation of the Covenant in the domestic laws of States parties. The Committee believes that Covenant guarantees receive enhanced protection in those States where the Covenant is automatically, or through specific incorporation, made part of the domestic legal order. The link between the Covenant and the Optional Protocol has been noted by the highest court of one State party, where it was stated that the ratification and entry into force of the Optional Protocol by that State party strengthened and deepened the status of Covenant rights in the general law.²²

30. (Deleted)

31. The Committee regards as totally unfounded any claim that, since the Optional Protocol has not been incorporated in a State's laws by statute, the views of the Committee have no legal force. Such an attitude is in contradiction to the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". As stated previously by the Committee:

"Although article 2, paragraph 2, allows States parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions.'" ²³

These observations in relation to the Covenant apply with equal force in relation to the Optional Protocol.

32. It has been noted that most States still lack enabling legislation to receive the views of the Committee into their domestic legal order.²⁴ The domestic law of some State parties do, however, specifically provide for the payment of compensation to the victims

²⁰ E.g. *Piandong v. Philippines* (Case No. 869/1999), Views of the Committee, paras. 5.1, 5.2, 5.4; *Weiss v. Austria* (Case No. 1086/2002), Views of the Committee, para. 7.2.

²¹ E.g. General Comment No.31 (2004), paragraph 13.

²² *Mabo v. Queensland* (1992), High Court of Australia, per Justice Sir Gerard Brennan.

²³ General Comment No.31, paragraph 4.

²⁴ *De Zayas*, 117.

of violations of human rights as found by international organs.²⁵ In any case, States parties must give full effect to the views of the Committee by whatever means lie within their power.

33. For the most part, the declared attitude of States parties, through their reports under article 40 of the Covenant, their participation in the process of individual communications, including the follow-up thereto, or through their courts, is that although the views of the Committee are not regarded as formally binding in law, they are to be considered in good faith, and fully respected by all state organs.

34. The Committee is therefore of the opinion that, on a correct interpretation of the Covenant and the Optional Protocol, the Views expressed by it in relation to individual communications 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.

²⁵ Colombia, Ley 288 de 1996, article 1. However, by Opinion 58481 of 9 November 2006, the Legal Adviser to the Colombian Foreign Ministry, declared that “there is no law that makes the Human Rights Committee’s decisions binding for the State.”