[UN]BOUND? A CRITICAL ASSESSMENT OF THE NATURE OF INTERIM MEASURES REQUESTS BY THE HUMAN RIGHTS COMMITTEE

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In this article, we critically examine the nature and legal force of interim measures requests (IMRs) issued by the Human Rights Committee (HR Committee) in response to communications received under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1). Despite the lack of express provisions in the Covenant or the Optional Protocol regarding the power of the HR Committee to issue IMRs or the obligation of States to comply with them, the HR Committee has established its own Rules of Procedure to issue purportedly binding IMRs in certain circumstances. This article is the first thorough examination of whether IMRs are binding and, if so, on what basis. We conclude that States parties must comply with IMRs in good faith under Article 26 of the Vienna Convention on the Law of Treaties. However, we note that this interpretation requires a forward-leaning approach that privileges the object and purposes of the ICCPR-OP1. The article contributes to the ongoing debate surrounding the legal nature and force of IMRs issued by the HR Committee.

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I. INTRODUCTION

The Human Rights Committee ("HR Committee") is a body of independent experts established under the *International Covenant on Civil and Political Rights 1966* ("the *Covenant*").[1] It issues interim measures requests ("IMRs") in situations where an individual author has submitted a communication under the *Optional Protocol to the Covenant on Civil and Political Rights* (*ICCPR-OPI*) ("*Optional Protocol*"),[2] and where the HR Committee considers that interim measures by a State party are "necessary to avoid possible actions which could have irreparable consequences for the rights" of the individual.[3] The most common circumstances in which IMRs have been issued are cases where rights breaches have been alleged in connection with the death penalty, extradition and deportation, and detention.[4]

Neither the *Optional Protocol* nor the *Covenant* expressly stipulates that the HR Committee has the power to issue IMRs, or that States are obliged to comply with them.[5] Nonetheless, Article 39(2) of the *Covenant* provides that the HR Committee "shall establish its own rules of procedure,"[6] and the HR Committee has relied upon that article to establish Rules of Procedure that make provision for purportedly binding IMRs to be issued where an individual communication has been received under the *Optional Protocol*.[7]

Numerous scholars have written supporting the view that the HR Committee's IMRs are binding.[8] Regrettably, though, the arguments

1. International Covenant on Civil and Political Rights art. 28, Dec. 19, 1966, 999 U.N.T.S. 171, 179 [hereinafter ICCPR].

2. Optional Protocol to the International Covenant on Civil and Political Rights arts. 1–2, Dec. 16, 1966, 999 U.N.T.S. 171, 302 [hereinafter Optional Protocol to ICCPR].

3. Hum. Rts. Comm., Rules of Procedure of the Hum. Rts. Comm., U.N. Doc CCPR/C/3/Rev.12 at 17 (Jan. 4, 2021).

4. Eva Rieter, Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication 103–4 (Mar. 12, 2010) (Doctoral dissertation, Maastricht University) (on file with author).

5. ICCPR, *supra* note 1; Optional Protocol to ICCPR, *supra* note 2.

6. ICCPR, *supra* note 1, art. 39(2).

7. Rules of Procedure of the Hum. Rts. Comm., *supra* note 3.

8. *See*, *e.g.*, Roísín Pillay, *The Politics of Interim Measures in International Human Rights Law*, *in* URGENCY AND HUMAN RIGHTS: THE PROTECTIVE POTENTIAL

that have been advanced are often made in passing during a broader thematic discussion and without detailed analysis. [9] The mere existence of these arguments of the binding nature of IMRs is surprising when one recalls that the HR Committee has the status of a "quasi-judicial organ"[10] and that its final decisions are not binding on States parties.[11] It is also surprising in light of the rigorous debate that has historically been waged over whether interim measures issued by international courts and tribunals are binding, which was resolved in part through recourse to the terms of individual treaties, paired with rules of customary international law and general principles that—at least arguably—apply only to courts and tribunals.[12] And while there might be consensus on the part of human rights scholars and the HR Committee that IMRs are binding,[13] the same cannot be said when it

AND LEGITIMACY OF INTERIM MEASURES 65, 66 (Eva Rieter & Karin Zwaan eds., 2021); Helen Keller & Cedric Marti, *Interim Relief Compared: Use of Interim Measures by the UN Human Rights Committee and European Court of Human Rights*, 73 ZAÖRV 325, 345 (2013) (noting that the HRC "has implicitly endowed its interim measures with obligatory character in so far as it considers incompliance as a separate or autonomous breach of the Optional Protocol and the Covenant"); Sandy Ghandi, *The Human Rights Committee and Interim Measure of Relief*, 13 CANTERBURY L. REV. 203, 224–26 (2007); Jo M. Pasqualucci, *Interim Measures in International Human Rights: Evolution and Harmonization*, 38 VAND. J. TRANSITIONAL L. 1, 12–13 (2005) (outlining interim measures by various bodies); Gino J. Naldi, *Interim Measures in the UN Human Rights Committee*, 53 INT'L & COMPAR. L. Q. 445, 445 (2004); Joanna Harrington, *Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection*, 48 MCGILL L. J. 55, 67–81 (2003) (cataloging the evolving views by various parties on the binding nature of interim IMRs); Hannah Garry, *When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention on Human Rights*, 7 EUROPEAN PUB. L. 399, 404–06 (2001) (observing that interim measures in Bosnia and Herzegovina should be treated as legally binding).

9. Keller & Marti, *supra* note 8; Ghandi, *supra* note 8; Pasqualucci, *supra* note 8; Garry, *supra* note 8.

10. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 506–08 (1993).

11. Rules of Procedure of the Hum. Rts. Comm., *supra* note 3.

12. *See* CAMERON A MILES, PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS 133–73, 275–98 (2017).

13. Piandiong v. Philippines, Views, H.R.C., Communication No. 869/1999, U.N. Doc. CCPR/C/70/D/869/1999, ¶ 5.1 (2000) ("It is incompatible with [the Optional Protocol] obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the

comes to States parties to the *Optional Protocol*: a considerable number of States parties, including Australia, Canada, and New Zealand, dispute that they are under an obligation to comply with the HR Committee's IMRs.[14]

Our contribution is to offer a more balanced and detailed assessment of one basis for concluding that States parties must comply with IMRs, being that compliance is required as a matter of good faith within the meaning of Article 26 of the *Vienna Convention on the Law of Treaties* ("*VCLT*").[15] We have decided to focus on good faith chiefly because the HR Committee tends to frame the obligation in those terms.[16] Our analysis demonstrates that credible doctrinal arguments can be made both in favor and against the proposition that States parties have a good faith obligation to comply with IMRs. Ultimately, we consider that the better view is that such an obligation does exist, even if one adopts a fairly black-letter approach. Having said that, at each juncture in the analysis leading to that result, it is necessary to adopt the more forward-leaning position on States' obligations and to favor an interpretative result that privileges the object and purposes of the *Optional Protocol*.

II. THE COVENANT AND OPTIONAL PROTOCOL

It is convenient to start with a brief outline of the relevant provisions of the *Covenant* and the *Optional Protocol*, which were adopted by the General Assembly on 16 December 1966 and came into force on 23 March 1976.[17] Starting with the *Covenant*, under Article 2:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein

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communication, and in the expression of its Views.").

14. *See infra* Part III.

15. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339 [hereinafter VCLT].

16. Piandiong, Communication No. 869/1999 ¶ 5.1.

17. ICCPR, *supra* note 1; Optional Protocol to ICCPR, *supra* note 2.

> recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity . . . [18]

The HR Committee is established under Article 28 of the *Covenant*, which provides that it is composed of "nationals of the States Parties . . . who shall be persons of high moral character and recognized competence in the field of human rights."[19] The HR Committee's functions under the *Covenant* include reviewing States parties' reports on compliance with the *Covenant* and hearing inter-State disputes.[20] As to procedure, Article 39(2) of the *Covenant* provides that the HR Committee "shall establish its own rules of procedure," with the only express limits being that the HR Committee's rules must require a quorum of twelve and a decision by majority vote.[21]

The *Optional Protocol* establishes an individual complaints mechanism, whereby the HR Committee is to "receive and consider . . . communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant."[22] The *Optional Protocol*, Article 1, provides that:

> 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. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.[23]

Article 2 provides that an individual (herein referred to as an "author") who claims that "any of their rights enumerated in the *Covenant* have been violated may submit a written communication to the Committee for consideration."[24] Unless the communication is

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18. ICCPR, *supra* note 1, art 2.
19. *Id.* art. 28.
20. *Id.* arts. 40–41.
21. *Id.* art. 39(2).
22. Optional Protocol to ICCPR, *supra* note 2, pmbl.
23. *Id.* art. 1.
24. *Id.* art. 2.

inadmissible under Article 4, the HR Committee "shall" bring the communication to the attention of the State party alleged to be violating the *Covenant*, and the State "shall" submit to the HR Committee "written explanations or statements clarifying the matter and remedy, if any, that may have been taken by that State."[25] Article 5 provides:

> 1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned . . .
>
> 4. The Committee shall forward its views to the State Party concerned and to the individual.[26]

Finally, under Article 12(1) of the *Optional Protocol*, any "State Party may denounce the present Protocol at any time by written notification addressed to the [U.N.] Secretary-General."[27] The denunciation takes effect after three months.[28] However, Article 12(2) goes on to provide that "[d]enunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under Article 2 before the effective date of denunciation."[29]

III. DISAGREEMENT BETWEEN THE HR COMMITTEE AND STATES PARTIES

A. THE HR COMMITTEE'S POSITION

As is evident from the above exposition, the HR Committee has no express power to issue an IMR directed to a State party subject to individual communication under the *Optional Protocol*.[30] Likewise, a State party has no express obligation to abide by any IMR the HR Committee issues.[31] However, the HR Committee has a general power

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25. *Id.* art. 4.
26. *Id.* art. 5.
27. Optional Protocol to ICCPR, *supra* note 2, art. 12(1).
28. *Id.*
29. *Id.* art. 12(2).
30. *Id.* art. 1
31. *Id.* art. 12.

to "establish its own rules of procedure" under Article 39(2) of the *Covenant*, which the HR Committee has relied upon to establish rules for issuing IMRs.[32] Rule 94 of the *Current Rules of Procedure* provides:

> 1. At any time after the registration of a communication and before a determination on the merits has been reached, the Committee may request that the State party concerned take on an urgent basis such interim measures as the Committee considers necessary to avoid possible actions which could have irreparable consequences for the rights invoked by the author.
>
> 2. When the Committee requests interim measures under the present rule, it will indicate that the request does not imply a determination on the admissibility or the merits of the communication, but that failure to implement such measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol.
>
> 3. At any stage of the proceedings, the Committee will examine any arguments presented by the State concerned on the request to take interim measures, including reasons that would justify the lifting of the measures.
>
> 4. The Committee may withdraw a request for interim measures on the basis of information submitted by the State party and the author(s) of the communication.[33]

The HR Committee has long criticized States for refusing to comply with IMRs, labeling such refusal as, for instance, "a failure to cooperate."[34] However, it was not until *Piandiong v. The Philippines* that the HR Committee unambiguously adopted the view that States were under an obligation to comply with IMRs.[35] The communication

32. ICCPR, *supra* note 1, art. 39(2).

33. Rules of Procedure of the Hum. Rts. Comm., *supra* note 3.

34. *See*, *e.g.*, Rep. of the Hum. Rts. Comm., U.N. Doc A/48/40, ¶ 796 (1993); Harrington, *supra* note 8, at 71 ("Any act that has the effect of preventing or frustrating consideration by the Committee of a communication alleging a violation of the ICCPR, or that renders such examination by the Committee moot and the expression of its views nugatory and futile, will be seen as a serious breach of the Optional Protocol and as a failure to demonstrate even the most elementary good faith required of a state party to the ICCPR regime.").

35. Piandiong v. Philippines, Views, H.R.C., Communication No. 869/1999, U.N. Doc. CCPR/C/70/D/869/1999, ¶ 5.1 (2000).

was brought by three men sentenced to death following a conviction for a violent robbery.[36] The HR Committee's request that the executions not be carried out while the communication was under consideration was refused.[37] In submissions, the Philippines asserted that counsel for the prisoners had waited until the last minute to lodge a communication with the HR Committee, making "a mockery of the Philippine justice system and of the constitutional process," and maintained the men had received a fair trial in any event.[38] But in the HR Committee's view:

> 5.1 By adhering to the Optional Protocol, a State party . . . recognizes the competence of the . . . 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 frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.
>
> 5.2 . . . 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. In respect of the present communication . . . the State party breaches its obligations under the Protocol, if it proceeds to execute the alleged victims before the Committee concludes its consideration and examination, and the formulation and communication of its Views.
>
> 5.4 Interim measures pursuant to . . . the Committee's rules adopted in conformity with Article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim . . . undermines the protection of Covenant rights through the Optional

36. *Id.*

37. *See id.* ¶¶ 1.3–1.4 (noting the executions were scheduled notwithstanding the Committee's request under Rule 86 because the State averred the defendants received a fair trial).

38. *Id.* ¶ 3.5.

Protocol.[39]

The HR Committee has since reaffirmed the binding nature of its IMRs in numerous communications.[40] It has also done so in its *General Comment No. 33: The Obligations of States Parties under the Optional Protocol*.[41] In General Comment 33, the HR Committee observes that States are obliged to "act in good faith" concerning "their participation in the procedures under the Optional Protocol."[42] After recounting the high threshold for issuing IMRs, the HR Committee concludes that a failure to abide by IMRs "is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol."[43]

Relatedly, the HR Committee also took the opportunity in General Comment 33 to address its role and the status of its final "Views."[44] While not saying that its Views are binding in so many words, the HR Committee's observations imply that its Views effectively have that status.[45] The HR Committee acknowledged that its function in considering individual communications "is not, as such, that of a judicial body."[46] Nonetheless, the HR Committee observed that "the Views issued by the Committee . . . exhibit some important characteristics of a judicial decision."[47] For, the HR Committee observed, its Views are "arrived at in a judicial spirit, including the

39. *Id.* ¶¶ 5.1–5.2, 5.4.

40. Maksudov v. Kyrgyzstan, Views, H.R.C., Communications Nos. 1461/2006, 1462/2006, 1476/2006 & 1477/2006, U.N. Doc. CCPRC/93/D/1461, 1462, 1476 & 1477/2006, ¶ 10.2 (2008) (reiterating the "grave breach[]" of actions frustrating the requirements of the Optional Protocol); *see also* Rep. of the Hum. Rts. Comm., *supra* note 34 and accompanying text.

41. *See* Hum. Rts. Comm., General Comment No. 33 on Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/GC/33, ¶ 19 (2009) [hereinafter ICCPR General Comment 33].

42. *Id.* ¶ 15.

43. *Id.* ¶ 19.

44. *Id.* After the HR Committee has considered a complaint, the committee transmits its decision (described as 'Views') to the author and State party in accordance with Article 5(4) of the Optional Protocol.

45. *See id.*

46. *Id.* ¶ 11.

47. *Id.*

impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions."[48] The HR Committee indicated that its Views "represent an authoritative determination by the organ established under the Covenant" and "charged with the interpretation of that instrument."[49] The character of the Views is also said to be "further determined by the obligation of States parties to act in good faith . . . in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself,"[50] with the "duty to cooperate with the Committee [arising] from an application of the principle of good faith to the observance of all treaty obligations."[51] The HR Committee also linked respect for the Views with States parties obligation to afford an effective remedy.[52] It concluded that "States parties must use whatever means lie within their power in order to give effect to the Views."[53]

B. THE POSITION OF STATES PARTIES

States parties seem to honor IMR requests made by the HR Committee, including by asking that the IMR be lifted if the State disagrees with it, under the *HR Committee's Rules of Procedure*.[54] Nonetheless, States do not appear to do so because they consider themselves under a legal obligation, and quite a few have expressly rejected that proposition when pressed.[55]

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48. *Id.*
49. *Id.* ¶ 13.
50. *Id.* ¶ 15.
51. *Id.*
52. *Id.* ¶ 14.
53. *Id.* ¶ 20.
54. *See* Harrington, *supra* note 8, at 66 (stating there may be a trend against compliance with IMRs in the human rights context in more recent years). *But see* Eva Rieter, *Introduction: Perspectives on the Protective Potential of Interim Measures in Human Rights Cases and the Legitimacy of Their Use*, *in* URGENCY AND HUMAN RIGHTS: THE PROTECTIVE POTENTIAL AND LEGITIMACY OF INTERIM MEASURES 1, 2–3 (Eva Rieter & Karin Zwaan eds., 2021) (showing that there may be a trend against compliance with IMRs in the human rights context in more recent years).
55. *See generally* Rieter, *supra* note 54, at 3 (summarizing that states are increasingly not abiding by IMRs because of national security concerns as they are prioritizing the security of "the people" over the violation of human rights of

1. Early Pushback in Response to the HR Committee's Views

There are several early examples of States disregarding the HR Committee's IMRs in cases involving the death penalty during the 1990s.[56] At this stage, it appeared generally accepted that IMRs were not legally binding but carried considerable "moral weight."[57]

Following the HR Committee's decision in *Piandiong v. The Philippines*,[58] there was fairly immediate pushback by some States parties regarding the bindingness of IMRs.[59] The most prominent example is the case of *Ahani v. Canada* (2002), a case involving the deportation from Canada of an alleged Iranian assassin, named Mansour Ahani, on national security grounds, despite the risk of torture faced by Ahani on being returned.[60] Ahani filed a communication with the HR Committee, which issued an IMR requesting Canada refrain from deporting him while his communication was on foot.[61] The Canadian Government refused to comply, so Ahani applied to the Ontario Court of Appeal for an injunction to restrain his deportation.[62] The Court refused, primarily on the basis that the *Covenant* and *Optional Protocol* had no binding effect domestically,[63] but Judge John B. Laskin also observed that "neither the Committee's views nor its interim measures are binding on Canada as a matter of international law," and in doing so observed (albeit unconvincingly) that States parties had agreed to binding obligations under other treaties but elected not to do so concerning the *Covenant* and *Optional Protocol*.[64]

"individuals").

56. *See* Harrington, *supra* note 8, at 69–72.

57. *See* Naldi, *supra* note 8, at 446 n.7, 447 n.16 (explaining this was also the predominant view in scholarship in the 1990s).

58. Piandiong, Communication No. 869/1999 ¶¶ 7.4, 8.

59. Dar v. Norwegian Immigr. Appeals Board, Sup. Ct. of Norway, Apr. 16, 2008, Case No. HR-2008-681-A, Norwegian Sup. Ct. Gazette (Rt, Retstidende) 513, ¶¶ F7–F8 (concerning a complaint lodged with the Committee against Torture).

60. Ahani v. Canada, [2002] S.C.R. 72, 73 (Can.); *see also* Harrington, *supra* note 8, at 58–61, for an in-depth assessment of the case.

61. *See* Harrington, *supra* note 8, at 60.

62. *See id.* at 57.

63. *See* Ahani, 156 O.A.C., 37, ¶ 31.

64. *See id.* ¶¶ 32–57.

2. *Response to Draft General Comment 33*

The most significant evidence of States parties' position on the bindingness of IMRs has been in response to the HR's Committee's draft General Comment 33.[65] Of the twenty-one States that commented on the draft, many objected to the HR Committee's characterization of its final Views as "binding" and the suggestion that States parties are obligated to comply with IMRs. In total:

- Eleven States parties expressly rejected the notion that IMRs are binding,[66] five did not address the issue directly, but made

65. *See Calls for Input: Rep. on General comment No. 33 on Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, OHCHR, https://www.ohchr.org/en/calls-for-input/general-comment-no-33-obligations-states-parties-under-optional-protocol [hereinafter ICCPR Calls for Input].

66. Those States are Australia, Belgium, Canada, France, Japan, New Zealand, Norway, Poland, Russia, Sweden, and Switzerland. *See* 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," in statement from Australian Permanent Mission to the United Nations, addressed to the Office of the High Comm'r for Hum. Rts., ¶ 9 (Oct. 3, 2008); Concerne: projet d'observation générale sur les obligations des Etats parties en vertu du Protocole facultative se rapportant au Pacte international relative aux droitx civils et politiques [Concerning the draft General Comment on the obligations of State Parties under the International Covenant on Civil and Political Rights] in commentary from the Kingdom of Belgium to the United Nations, addressed to the Office of the High Comm'r for Hum. Rts. (Oct. 24, 2008) (Belg.) [hereinafter Commentary of Belgium on draft General Comment 33]; Government of Canada, 6th Rep. of Canada on the International Covenant on Civil and Political Rights, at 1, 3 (Apr. 9, 2013); Commentaires de la France sur le projet d'observation générale No.33 sur les obligations des Etats parties en vertu du Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques [Commentary of France on Draft General Comment 33 on the obligations of State parties under the International Covenant on Civil and Political Rights] in statement from France to the United Nations, addressed to the Office of the High Comm'r for Hum. Rts. (Oct. 8, 2008) (Fr.) [hereinafter Commentary of France on draft General Comment 33]; Comments from the Government of Japan on draft General Comment No. 33 to the United Nations, addressed to the Hum. Rts. Comm., ¶ 1 (Oct. 3, 2008); Response of the Government of New Zealand to request OHCHR/GVA0812, Human Rights Committee's Draft General Comment 33 Concerning the Obligations of States Parties under the Optional Protocol, to the United Nations, addressed to the Hum. Rts. Comm., ¶¶ 7–8 (Sept. 12, 2008); Comments by the Norwegian Government on Draft General Comment on States Parties' obligations under the first Optional

comments which imply that position;[67]

- Sixteen States parties expressly rejected that the HR Committee's Views are binding;[68] and

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Protocol to the International Covenant on Civil and Political Rights, to the United Nations, addressed to the Hum. Rts. Comm. at 1; Poland's Commentary to the Draft General Comment No. 33 of the Human Rights Committee, to the United Nations, addressed to the Hum. Rts. Comm., ¶ 2; Kommyentariy rossiskoy fyedyeratzii k proyektoo zamyechaniya obshyeva poryadka nomyer 33 komityeta po pravam chyelovyeka po voprosoo ob obyazatyelʲstvakh gosoodarstv-oochastnikov pyervovo fakooltativnovo protokola k myezhdoonarodnomoo paktoo o grazhdanskikh i politichyeskikh pravakh 1996 g [Comment by the Russian Federation on the draft general comment No. 33 of the Human Rights Committee on the obligations of States parties to the First Optional Protocol to the International Covenant on Civil and Political Rights of 1966] (Oct. 1, 2008) (Rus.) [hereinafter Comment by the Russian Federation on draft General Comment 33]; Comments by the Government of Sweden on Draft General Comment No. 33: "The Obligations of State Parties under the Optional Protocol to the International Covenant on Civil and Political Rights" to the United Nations, addressed to the Sec. of the Hum. Rts. Comm., at 2 (Oct. 3, 2008); Réponse de la Suisse concernant le Projet d'observation générale no 33 (Deuxième version révisée au 18 août 2008), "Les obligations des États parties en vertu du Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques" [Response of Switzerland concerning the draft General Comment 33 (Second version revised on Aug. 18, 2008), "The obligations of State parties under the International Covenant on Civil and Political Rights"] to the United Nations (Oct. 23, 2008).

67. Those States are Finland, Germany, Romania, United Kingdom, and the United States. *See* Ministry for Foreign Affairs of Finland, Letter addressed to Sec. of U.N. Hum. Rts. Comm. (Oct. 22, 2008); Note Verbale from the Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the other International Organizations, statement to the United Nations addressed to the U.N. High Comm'r for Hum. Rts., at 1 (Oct. 15, 2008); Romania Ministry for Foreign Affairs, Letter from the Dir. General for the Romania Ministry for Foreign Affairs to the United Nations, addressed to the Sec. of U.N. Human Rights Comm., at 2 (Oct. 16, 2008); Comments of the Government of the United Kingdom of Great Britain and Northern Ireland on draft General Comment 33: "The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights" to the United Nations, addressed to the Hum. Rts. Comm., at 1 (Oct. 17, 2008); Comments of the United States of America on the Human Rights Committee's "Draft General Comment 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant Civil and Political Rights," to the United Nations, addressed to the Hum. Rts. Comm., at 5 (Oct. 17, 2008).

68. Those States are Australia, Belgium, Canada, Finland, France, Germany, Japan, New Zealand, Norway, Poland, Romania, Russia, Sweden, Switzerland,

- Three States refrained from any adverse comment (or specific endorsement) in response to the HR Committee's position on IMRs and the status of its Views.[69]

Several lines of objection emerge from the comments of States parties. The first is that the HR Committee is not an international court or tribunal, and therefore, has a more limited mandate. For instance, Sweden observed that:

> The Human Rights Committee is not a court and its Views do not have the same effect as for example judgments from the European Court of Human Rights, which by comparison are binding on States parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, in accordance with its Article 46.[70]

The United Kingdom went further, rejecting a characterization of

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United Kingdom, and the United States. *See* Views of the Australian Government on draft General Comment 33, *supra* note 66; Commentary of Belgium on draft General Comment 33, *supra* note 66; Government of Canada, *supra* note 66; Ministry for Foreign Affairs of Finland, *supra* note 67; Commentary of France on draft General Comment 33, *supra* note 66; Permanent Mission of the Federal Republic of Germany, *supra* note 67; Comments from the Government of Japan, *supra* note 66; Response of the Government of New Zealand, *supra* note 66, ¶ 8; Comments by the Norwegian Government, *supra* note 66; Poland's Commentary to the Draft General Comment No. 33, *supra* note 66; Romania Ministry for Foreign Affairs, *supra* note 67; Comment by the Russian Federation on draft General Comment 33, *supra* note 66; Comments by the Government of Sweden on Draft General Comment No. 33, *supra* note 66, at 2; Commentary of Belgium on draft General Comment 33, *supra* note 66; Comments of Great Britain and Northern Ireland, *supra* note 67; Comments of the United States of America, *supra* note 67.

69. Those States are Mexico, Turkey, and Ecuador. Mision Permanente de Mexico [Permant Mission of Mexico], Statement addressed to the U.N. Office of the High Comm'r for Hum. Rts. (Oct. 2, 2008); Permanent Mission of the Republic of Turkey, Turkey's Views on the Draft General Comment No. 33: "The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights," addressed to the U.N. Office of the High Comm'r for Hum. Rts., ¶¶ 1–2 (Sept. 29, 2008) [hereinafter Turkey's Views on the Draft General Comment No. 33]; Ministerio de Relaciones Exteriores, Comercio e Integracion de Ecuador [Ministry of Exterior Relations, Commerce and Integration of Ecuador], Statement dated Sept. 29, 2008 from the Advisor Minister of Justice and Human Rights addressed to the Human Rights Committee, No. 0970 (Sept. 29, 2008) [hereinafter Statement from Government of Ecuador].

70. Comments by the Government of Sweden on Draft General Comment No. 33, *supra* note 66, at 2.

the HR Committee as "a court" or "a body with a quasi-judicial mandate," concluding that it "was not intended to be a body with judicial character."[71] Germany added that "the Committee—even if it sees itself operating under a judicially-shaped procedure—is not a legal bench in terms of structure or personnel."[72] Similarly, the United States drew attention to the characteristics of the HR Committee that were not "judicial":

> The Committee has no rules of evidence, does not conduct oral hearings, is not composed of judges, and is authorized to issue "views" . . . rather than legally binding "decisions" or "judgments." The travaux préparatoires show that the term "Human Rights Committee" was chosen by the drafters of the Covenant over other potential designations, including "Human Rights Tribunal." Indeed, the rationale for avoiding the term "tribunal" was that such a term "would be inappropriate for a body which was not of a judicial or arbitral character, nor confined to deliberative functions."[73]

As to the mandate that the HR Committee does enjoy, States parties characterized it as providing "recommendations" and "guidance," and as giving "non-binding" indications. Those characterizations were then relied on to treat the HR Committee's Views and IMRs as non-binding. For instance, Norway brought to the HR Committee's attention a recent decision of the Norwegian Supreme Court wherein the Court distinguished the position of treaty monitoring bodies from international courts as a basis for concluding that IMRs issued by the former were not binding.[74]

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71. Comments of Great Britain and Northern Ireland, *supra* note 67; *see* Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) [2006] UKHL 26, [23] (appeal taken from Eng.) (noting that the Committee against Torture is "not an exclusively legal and not an adjudicative body. . . .").

72. Permanent Mission of the Federal Republic of Germany, *supra* note 67.

73. Comments of the United States of America, *supra* note 67; *see also* Views of the Australian Government on draft General Comment 33, *supra* note 66, ¶ 8 (making similar comments that although the Committee's views should be "given considerable faith", they do not have an inherent "legal character").

74. *See* Comments by the Norwegian Government, *supra* note 66 ("In a recent decision of 16 April 2008 (Dar v. the State) . . . the Norwegian Supreme Court found that requests for interim measures made by the U.N. Committee against Torture are not binding under international law . . . [T]he Committee against Torture is a monitoring body that issues non-binding opinions in respect of individual communications."); Dar v. Norwegian Immigr. Appeals Board, Sup. Ct. of Norway, Apr. 16, 2008, Case No. HR-2008-681-A, Norwegian Sup. Ct. Gazette (Rt,

More broadly, States were adamant that a requirement to comply with the HR Committee's Views and/or IMRs was contrary to their intentions when establishing the HR Committee under the *Covenant* and the communications procedure under the *Optional Protocol*. In addition to pointing to the status of the HR Committee as a non-judicial body, States parties pointed in their comments to the lack of any express reference to such wide-reaching powers in the *Covenant* or *Optional Protocol*. For instance, Belgium noted that "such a constraining character would amount to going beyond the terms by which the mission of the Committee was circumscribed and entrusted to this body" and would "extend the limits of its powers beyond [what] . . . States Parties agreed to grant at the time of its creation";[75] and France emphasized that "the letter of the Protocol is what the States have committed to and that they cannot be held . . . beyond their commitments."[76] For its part, Switzerland considered that the HR Committee's stance extended "the obligations of the States parties under the *Optional Protocol* by basing itself mainly on academic positions which reflect neither majority doctrine nor case law."[77] And Japan noted that "it is important for the Committee to keep its authority within the scope stipulated in the legal documents (the Covenant and the Optional Protocol) and that such position is quite important in making the Optional Protocol more universal."[78]

Retstidende) 513, ¶ H4 ("There was nothing in the wording of the CAT to substantiate the argument that requests for interim measures were binding under international law. There was no reference to such requests in the CAT, and the UNCAT's views on individual complaints were not binding under international law."); On the non-binding nature of the Committee's views generally, *see also* Conseil d'État [administrative supreme court], Oct. 11, 2001, No. 238849 (Fr.) (noting that the HRC was a non-judicial organ); Commonwealth v. Judge, 916 A.2d 511, 526–27 (Pa. 2007) (describing the Committee's determinations as non-binding); Singarasa (Nallaratnam) v. Attorney General, (2006) SC Spl (LA) No. 182/99, ¶¶ H2, H5 (expressing that the HRC is not reposed with any judicial power).

75. Commentary of Belgium on draft General Comment 33, *supra* note 66.

76. Commentary of France on draft General Comment 33, *supra* note 66; *see also* Views of the Australian Government on draft General Comment 33, *supra* note 66, ("In Australia's view, the legal obligations for States Parties are those established by the Optional Protocol itself.").

77. Response of Switzerland concerning the draft General Comment 33, *supra* note 66.

78. Comments from the Government of Japan, *supra* note 66.

Most States parties also reformulated the "good faith" obligation as limited to due consideration of the HR Committee's Views.[79] Four States also expressly accepted that the same good faith requirement applies concerning the HR Committee's IMRs.[80] Other States did not accept (at least expressly) a good faith obligation to consider IMRs, but they still noted that it was their practice to consider them.[81]

3. Subsequent Practice

The only subsequent practice we have identified has involved States denying that the HR Committee's IMRs are binding.[82] A prominent recent example is the Australian Government's decision not to comply with the HR Committee's IMR concerning a young girl seeking asylum in Australia.[83] The IMR, issued in 2019, requested that Australia release her from detention while her asylum application was determined.[84] It seems that the stand-off between the Australian Government and the HR Committee was finally resolved in 2022, when the newly elected federal Labour Government decided to grant

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79. *See*, *e.g.*, Views of the Australian Government on draft General Comment 33, *supra* note 66 (clarifying that the Committee's ability to bind is limited to only be considered in good faith); Comments from the Government of Japan, *supra* note 66, ¶¶ 1, 18 (recommending substituting language calling for finding a violation with a good faith consideration obligation); Response of the Government of New Zealand, *supra* note 66, ¶ 10 (interpreting its obligations in relation to the Committee's Views is simply consideration in good faith).

80. Views of the Australian Government on draft General Comment 33, *supra* note 66; Commentary of Belgium on draft General Comment 33, *supra* note 66; Commentary of France on draft General Comment 33, *supra* note 66; Response of the Government of New Zealand, *supra* note 66, ¶ 12.

81. *See* Government of Canada, Perm. Mission of Canada to the U.N. and WTO, General Comments No. 33, Note No. YTGRO593 (Oct. 17, 2008) (renewing assurance to the Committee of its highest consideration).

82. *See* Lyubov Kovaleva v. Belarus, Views, H.R.C., Communication No. 2120/2011, U.N. Doc. CCPR/C/106/D/2120/2011, ¶ 6.3 (2012) (noting that the Committee's request not to execute Mr. Kovalev while the communication is pending is not binding).

83. *See* Tracey Shelton, *Tamil family remain in detention as Australia mulls UN request*, AL JAZEERA (Oct. 15, 2019), https://www.aljazeera.com/news/2019/10/15/tamil-family-remain-in-detention-as-australia-mulls-un-request (describing Australia's decision to keep a family in detention despite U.N. request to release them to their home).

84. *Id.*

the girl and her family visas to remain in Australia. However, this decision was not directly in response to the HR Committee's IMR, but rather in response to community pressure.[85]

Another recent example is the statement made by Canada in its Sixth Report to the HR Committee.[86] In addition to maintaining that IMRs are not binding, Canada outlined practical concerns that can arise when asked to comply with IMRs:

> It is difficult for Canada to continue to respect an IMR where a person, who is found to represent a danger to the public, has been determined by domestic processes not to face a substantial risk upon removal. While a person who is considered a danger can be held in detention pending removal, an IMR of long duration means that the person could spend a long time in detention or may be released, potentially putting others at risk. Canada also gives serious consideration to the views of the Committee . . . [but] does not always agree with the Committee's views on whether Canada has violated its Covenant obligations.[87]

IV. A MATTER OF GOOD FAITH?

There has been little development in international jurisprudence of the notion of good faith as a basis for asserting that IMRs are binding. That is chiefly because most international courts and tribunals have instead been able to rely on an express power to grant interim measures in their constituent treaties, together with other general principles applicable to judicial bodies.[88] For that reason, it is necessary to consider the status and content of the obligation to perform treaties in good faith as it has been developed and articulated

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85. There does not appear to be an official record of the communication, *but see* Eden Gillespie, *Nadesalingam family feel 'peace' after being granted permanent residency in Australia*, THE GUARDIAN (Aug. 5, 2022, 3:21 PM), https://www.theguardian.com/australia-news/2022/aug/05/biloelas-nadesalingam-family-feel-peace-after-being-granted-permanent-residency-in-australia.

86. Government of Canada, *supra* note 66, ¶ 9.

87. *Id.*

88. *See* MILES, *supra* note 12, at 28–81, 135; Andrew D. Mitchell & David Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 MICH. J. INT'L L. 560, 565–66 (2010) (" . . . inherent powers as requiring no 'express basic authorization' in an international tribunal's constitutive statute, whereas implied powers exist 'on the basis of an express authorization.'").

in wider scholarship and judicial decisions.

A. STATUS AND CONTENT OF THE GOOD FAITH OBLIGATION

"Good faith" is one of the most well-established principles of international law.[89] It has long been treated as a customary law principle and as a general principle of international law within the meaning of Article 38(1)(c) of the *Statute of the International Court of Justice*.[90]

In its ordinary meaning, good faith has been said to involve an "honesty of purpose or sincerity of declaration" or the "expectation of such qualities in others."[91] As a legal principle, it is "an abstract and value-oriented notion that combines moral elements such as trust, honesty, fairness, loyalty or reasonableness."[92] At that level of abstraction, it has sometimes been criticized as "ambiguous if not amorphous or elusive."[93] And yet, it is a principle that is arguably essential in any legal system, for "without good faith, social relations would be doomed to fail."[94]

Numerous concrete principles, doctrines, and rules flow from the principle of good faith, which have been described as "manifestations" or "illustrations" of the principle and give rise to legal obligations for international actors.[95] Those doctrines include, for instance, abuse of

89. *See* Steven Reinold, *Good Faith in International Law*, 2 UCL J. L. & JURIS. 40, 47 (2013) (" . . . [G]ood faith in international law has been subject to concertisations.").

90. *See* Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELBOURNE J. OF INT'L L. 339, 339 (2006) (" . . . [G]ood faith is almost certainly a general principle of law and a principle of customary international law."); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 114 (The Burlington Press 1987) (1953) ("'General principles of law recognized by civilized nations' are one of the sources of law included first within the Statute of the Permanent Court of International Justice, and subsequently in Article 38(1)(c) of the Statute of the International Court of Justice.").

91. Mitchell, *supra* note 90, at 340.

92. Andreas R. Ziegler & Jorun Baumgartner, *Good Faith as a General Principle of (International) Law*, *in* GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 9, 11 (Andrew D. Mitchell et al. eds., 2015).

93. Markus Kotzur, *Good Faith (Bona Fide)*, *in* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW ¶ 1 (2009).

94. Ziegler & Baumgartner, *supra* note 92, at 9.

95. *See id.* at 12. Whether the principle of good faith has any operation as a

rights.[96] The principle of good faith also has an "overarching role in treaty relations," with concrete good faith requirements governing "treaties from the time of their formation to the time of their extinction."[97] Some obligations that flow from the principle of good faith in the context of treaty relations have been codified in the *VCLT*.[98] Other treaties also expressly incorporate good faith obligations, perhaps most notably Article 2(2) of the *Charter of the United Nations*, which requires Members to "fulfill in good faith the obligations assumed by them in accordance with the present Charter."[99]

For this article, we are concerned with the obligation to perform treaties in good faith, which is stated succinctly under Article 26 of the *VCLT* (headed "*pacta sunt servanda*"). Article 26 contains two elements: first, it establishes that treaties are "binding upon the parties" while in force, and second, that treaties "must be performed by [the parties] in good faith."[100] The text of Article 26 of the *VCLT* undoubtedly codified what was already customary international law.[101] There is more room for debate, though, regarding the content of the good faith obligation.

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freestanding obligation (i.e., apart from its more specific manifestations) is a debate that we need not weigh in on in this article.

96. *See* ROBERT KOLB, GOOD FAITH IN INTERNATIONAL LAW 62–63 (2017) (stating that good faith has "two main meanings in the context of interpretation, one being the 'primacy of the spirit of the treaty over an excessive attachment to the black-letter wording' which is 'directed mainly at negatively eliminating interpretations which are abusive and often made in bad faith,' bringing us into the 'context of the prohibition of abuse of rights'").

97. Ziegler & Baumgartner, *supra* note 92, at 11 (citing Cheng, *supra* note 90, at 106).

98. *See* VCLT, *supra* note 15, arts. 18, 26, 31(1) (codifying the obligation not to defeat the object and purpose of a treaty prior to its entry into force, *pacta sunt servanda*, and the general rule of interpretation).

99. U.N. Charter art. 2, ¶ 2. For an overview of other treaties incorporating good faith requirements, *see* Kotzur, *supra* note 93, ¶¶ 11–14 (incorporating good faith).

100. VCLT, *supra* note 15.

101. Article 26 also arguably reflects a general principle of law. Jean Salmon, *Article 26 (1969)*, *in* 1 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 661, 661–62, 681 (Olivier Corten & Pierre Klein eds., 2011).

1. Minimum Standard of Good Faith

In terms of what good faith might require, it has been said that States must observe the "spirit" and not just the "letter" of the treaty.[102] At a minimum, that means that States parties to a treaty must "deal honestly and fairly with each other," "act reasonably," and "refrain from taking unfair advantage due to a literal interpretation [of an obligation], if the mere focus on the wording would fall short of respecting the objects, purposes, and spirit of the agreement."[103] Another minimum condition is that States parties must cooperate in their treaty relations.[104] As the International Court of Justice ("ICJ") has observed, "co-operation between States is governed by the principle of good faith . . . [t]hat applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States."[105]

A plethora of state practice, scholarly writing, and judicial opinion support this minimum formulation of good faith.[106] We, therefore, assume that, if nothing else, States parties to the *Optional Protocol* would agree with this minimum content. Indeed, States' acceptance of a good faith duty to give due regard to the HR Committee's Views and IMRs supports that assumption.

2. A More Extensive Formulation of Good Faith

In addition to the minimum content of good faith described above, it has also been said that good faith encompasses a prohibition on States parties evading treaty obligations by "indirect means" (i.e., by doing indirectly what is not permitted to be done directly under the treaty in question);[107] and a duty not to defeat the object and purpose

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102. KOLB, *supra* note 96, at 23; CHENG, *supra* note 90.

103. Kotzur, *supra* note 93, ¶ 20.

104. KOLB, *supra* note 96, at 67.

105. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 145 (Apr. 20).

106. *See generally* Salmon, *supra* note 101, at 661–80 (chronicling how the duty to perform a treaty has inherently evoked a duty to perform a treaty in good faith in international law, practice, and interpretation).

107. CHENG, *supra* note 90, at 117; *see* ARNOLD MCNAIR, THE LAW OF TREATIES 540 (1961) (explaining that certain action as well as inaction may implicate good faith obligations).

of the treaty.[108] The latter duty is complemented by Article 18 of the *VCLT*, which provides that before a treaty enters into force, States to become parties to it are "obliged to refrain from acts which would defeat the object and purpose" of the treaty.[109] International lawyer, Robert Kolb, has succinctly put the rationale for this more extensive formulation of good faith:

> There is a distinction between the black-letter provisions of the treaty and its object and purpose, i.e., the underlying conditions for its proper execution. Not all can be written down . . . even by the most prudent drafters. Certain matters must and do remain presupposed. It would be contrary to good faith to be free to defeat these underlying conditions for a proper execution, while taking care not to breach any black-letter injunction.[110]

However, State practice does not support this more extensive formulation of what good faith requires.[111] Therefore, whether one is convinced by it turns to some degree on what one considers may be properly divined from the general requirement of good faith, and to what extent one is willing to rely on subsidiary sources of international law to guide that divination process.

For present purposes, a couple of illustrations of the more extensive formulation of good faith will suffice. An early example can be found in English judge Sir Robert Phillimore's *Commentaries Upon International Law*.[112] Sir Phillimore recounts that Article 9 of the *Treaty of Utrecht* required France to destroy the Dunkirk port.[113] But while the King of France at that time complied with that requirement, he constructed another port of "greater dimensions and importance,"

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108. KOLB, *supra* note 96, at 68–71; Guy Goodwin-Gill, *State Responsibility and the "Good Faith" Obligation in International Law*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 75, 88 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004).

109. VCLT, *supra* note 15, art. 18.

110. KOLB, *supra* note 96, at 68–69.

111. *See* Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 284–85 (2001) (offering several examples in which parties sought to establish institutional norms beyond what contractual obligations existed).

112. SIR ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 102–03 (London, Butterworths 3rd ed. 1882).

113. *Id.* at 102.

"a mere league" from Dunkirk.[114] Doing so clearly frustrated the treaty's object and purpose, which was to "prevent the existence of a French port . . . in the midst of the Channel."[115] The English Government complained, and the French eventually relented.[116]

Other early examples are supplied in British legal scholar Bin Cheng's monograph on general principles of international law.[117] Cheng thought that it would be contrary to good faith for a State to comply with the letter of a treaty, but then engage in acts that indirectly undermine it.[118] Several Permanent Court of International Justice cases supported him to some degree in that argument.[119] For instance, in *Free Zones of Upper Savoy and The District*, the Court observed that "France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon."[120]

B. WHY MIGHT GOOD FAITH REQUIRE RESPECT FOR IMRS?

Turning back to IMRs issued by the HR Committee, determining whether States might be under a good faith obligation to adhere to an IMR depends a little on how one characterizes the object and purpose of the *Optional Protocol* and the harm caused by States parties refusing to comply with IMRs. After addressing those factors, we will examine three possible articulations of a good faith obligation.

1. *Purpose of Compulsory Communications Procedure*

As a starting point, it is clear from the express terms of the *Optional Protocol* that States parties intended to establish a compulsory communications procedure, as they expressly agreed under Article 1 of the *Optional Protocol* to "recognise" the competence of the HR

114. *Id.* at 103.
115. *Id.* at 102–03.
116. *Id.* at 103.
117. *See* CHENG, *supra* note 90, at 114–19 (urging that treaty obligations be carried out in accordance with the common and real intentions of the parties, in furtherance of the spirit of the treaty).
118. *Id.* at 117.
119. Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), Judgment, 1932 P.C.I.J. (ser. A/B) No. 46, ¶ 225 (June 7); Oscar Chinn (U.K. v. Belg.), Judgment, 1934 P.C.I.J. (ser. A/B) No. 63, ¶¶ 71, 84–85, 87 (Dec. 12).
120. Fr. v. Switz., 1932 P.C.I.J. ¶ 225.

Committee to "receive" and "consider" communications.[121] Under Article 4, States parties have imposed an obligation on the HR Committee to consider and forward the communication to the respondent State.[122] They have agreed that the respondent State "shall" submit "written explanations or statements clarifying the matter and the remedy" to the HR Committee within six months.[123] Under Article 5, States parties have directed that the HR Committee "shall" forward its Views to the respondent State and complainant.[124] Finally, under Article 12, States parties have agreed that once a communication is lodged under Article 2, a State cannot avoid its obligation to engage in the procedure by denouncing the *Optional Protocol*, because any communication lodged before the denunciation remains on foot, and so do the State's and HR Committee's procedural obligations.[125]

One could characterize the purpose of the procedure established under the *Optional Protocol* as fulfilled when each of the procedural steps expressly stipulated under the *Protocol* has been completed concerning any communication lodged. However, that tick-the-box characterization ignores the underlying purposes the communications procedure is clearly designed to fulfill.

As a guide to those underlying purposes, the preamble to the *Optional Protocol* indicates that States parties have agreed to it, "[c]onsidering that in order to further achieve the purposes of the . . . *Covenant*" and the "implementation of its provisions," that it "would be appropriate to enable" the HR Committee to be able to "receive and consider . . . communications."[126] In turn, the object and purposes of the *Covenant* include establishing an obligation for States parties to respect and protect individuals' rights enumerated under the *Covenant*, and to provide effective remedies when those rights are breached.[127]

But it might be asked: how does the communications procedure further the object and purposes of the *Covenant*? States parties can

121. Optional Protocol to ICCPR, *supra* note 2, art. 1.
122. *Id.* art. 4(1).
123. *Id.* art. 4(2).
124. *Id.* art. 5(4).
125. *Id.* arts. 2, 12.
126. *Id.* pmbl.
127. ICCPR, *supra* note 1, pmbl., art. 2.

assess their compliance with obligations under the *Covenant* without the assistance of the HR Committee, can receive petitions directly from individuals who claim that their rights have been violated, and can provide a remedy to them.[128] Indeed, under the *Optional Protocol*, individuals must exhaust "all domestic remedies" before they can bring a communication under the *Optional Protocol*.[129] Therefore, States parties will have often already assessed an individual's complaint and found it lacking.[130] At a minimum, then, the value-add must be that the communications procedure provides individuals with an avenue of complaint independent of the respondent State, which results in the State being provided with Views by the HR Committee on whether the State has breached its obligations under the *Covenant*. In turn, and at a minimum, this compulsory communications procedure creates the potential for respondent States to be persuaded that a breach of the *Covenant* has occurred, upon receiving the HR Committee's Views, and to take action to remedy any breach of the author's rights. In this way, the communications procedure bolsters States parties' respect and protection of human rights.

2. Good Faith Consideration of Views

Considering the above, it is perhaps not surprising that numerous States parties have accepted that they are obligated to consider the HR Committee's Views in good faith, despite rejecting any notion that those Views are binding or that they are otherwise obligated to adhere to them.[131] If a State party refuses to *consider* the HR Committee's Views, then the communications procedure will be deprived of any real purpose. That is because, as described above, the minimum value-add of the communications procedure must lie in the prospect that a State respondent may change its mind and act accordingly upon receiving the HR Committee's Views.

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128. *See generally* ICCPR, *supra* note 1.
129. Optional Protocol to ICCPR, *supra* note 2, art. 2.
130. *Id.*
131. Comments by the Government of Sweden on Draft General Comment No. 33, *supra* note 66.

3. *The Harm in Refusing to Comply with Interim Measures Requests*

As noted earlier, the HR Committee's threshold for issuing IMRs is that the "Committee considers [the IMR] necessary to avoid possible actions which could have irreparable consequences for the rights invoked by the author."[132] That means that the HR Committee only issues IMRs when it considers that there are steps that the respondent State must take, or refrain from taking, so that an effective remedy can be provided if the author's complaint is upheld. A stark example is the death penalty cases, where the authors complain that they have been denied a fair trial. An IMR that asks the State to refrain from executing the author while the HR Committee considers the communication ensures that the State can remedy any violation by granting a new trial in response to the HR Committee's Views. If an author is executed, any subsequent remedy would be futile.

There have been occasions where States parties have assessed an IMR and considered that it is not warranted in the circumstances of the case because in the State's view there is no risk of irreparable harm and/or the author's rights have not been breached.[133] In those situations, a State may argue that there is no harm in acting contrary to the IMR because if there is no irreparable harm, then the State can still grant an effective remedy at a later stage.[134] If there is no underlying breach of rights, the State will not need to grant an effective remedy in any case.

However, what that ignores is the harm done to the purpose of the communications procedure. In ignoring the IMR, the respondent State is foreclosing the possibility that it might be persuaded by the HR Committee that a breach has occurred and that a particular remedy is warranted. Consequently, when the State respondent later considers

132. Rules of Procedure of the Hum. Rts. Comm., *supra* note 3.

133. *See*, *e.g.*, Piandiong v. Philippines, Views, H.R.C., Communication No. 869/1999, U.N. Doc. CCPR/C/70/D/869/1999, ¶¶ 3.1–3.6 (2000) (detailing an instance in which the State party noted that counsel found no need to address the Committee during the year his clients were on death row after all domestic remedies had been exhausted).

134. *Id.* ¶¶ 3.1, 3.5–3.6; *see generally* Naldi, *supra* note 8, at 447–49 (discussing *Piandiong* within the context Committee's practice on the indication of interim measures of protection).

the HR Committee's Views, it can only be described as a rather hollow showing of good faith. Moreover, because the HR Committee's Views can no longer serve the function of persuading a State party to remedy any breach of the author's rights, acting contrary to the IMR does, in effect, "frustrate consideration by the Committee of a communication," and render "examination by the Committee moot and the expression of its Views nugatory and futile."[135]

While the HR Committee is not a "court," the harm done to the communications proceeding is very similar to the damage done when IMRs are ignored in proceedings before an international court.[136] In the latter context, the purpose of IMRs and the harm done when they are ignored was summed up nicely by the European Court of Human Rights ("ECtHR") in *Mamatkulov v. Turkey*:[137]

> [I]nternational courts and institutions have stressed the importance and purpose of interim measures and pointed out that compliance with such measures was necessary to ensure the effectiveness of their decisions on the merits . . . the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law.[138]

The European Court of Human Rights also characterized a lack of compliance with interim measures as "destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure."[139] A similar point has been made by the Inter-American Court of Human Rights, which has repeatedly observed that compliance with provisional measures is necessary to ensure the effectiveness of its decisions on the merits.[140]

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135. Piandiong, Communication No. 869/1999 ¶¶ 5.2, 7.2–7.3, 8; Comments by the Government of Sweden on Draft General Comment No. 33, *supra* note 66; Comments by the Norwegian Government, *supra* note 66.

136. Mamatkulov v. Turkey, App. Nos. 46827/99 and 46951/99, Eur. Ct. H.R. ¶¶ 113–14 (Feb. 5, 2005).

137. *Id.* ¶¶ 113, 124.

138. *Id.* ¶ 113.

139. *Id.* ¶ 102.

140. *See generally* Chunimá Case, Provisional Measures, Order of the Court, Inter-Am Ct. H.R. (ser. E), ¶ 5 (Aug. 1, 1991) (emphasizing the distinction between provisional measures and emergency measures regarding the effect of the Court's

4. *A Duty of Cooperation?*

We will first consider whether States parties' duty of cooperation in implementing obligations under the *Optional Protocol* might extend to a requirement that States parties comply with IMRs.

It is well established that the duty of cooperation may extend to cooperating with international organizations and other bodies established under a treaty, so States parties could hardly object to a duty of cooperation with the HR Committee *per se*.[141] But two more credible objections could be raised. The first is that the duty of cooperation traditionally attaches or relates to the express terms of a treaty.[142] Under the *Covenant* or *Optional Protocol* there is no express reference to IMRs, or more generally, to the conduct that States parties might expect while a communication remains on foot.[143] Second, it might also be objected that in no other context has a duty of cooperation been found to be so prescriptive, such that a State party is under a duty to comply with a direction issued by a treaty body (or, indeed, another State party to a treaty).

As to the former objection, it is true that the duty of cooperation ordinarily attaches or relates to express terms in a treaty.[144] However, a duty of cooperation that entails specific action has been divined from even the most general terms. For instance, in the advisory opinion on the Interpretation of the Agreement of 25 March 1951 between the World Health Organization ("WHO") and Egypt, the ICJ considered that a duty of cooperation between Egypt and the WHO arose from the "very fact'" of Egypt's membership in the WHO under the *Constitution of the World Health Organization*,[145] and that it also arose

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decision).

141. *See generally* Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶ 48 (Dec. 20) (discussing the mutual obligations the Organization and the host State to cooperate under the applicable legal principles and rules).

142. KOLB, *supra* note 96, at 67; Mark Clodfelter, *Do States have a Duty to Cooperate in the Interpretation of Investment Treaties*, 108 AM. SOC'Y INT'L L. 188, 189 (2014).

143. ICCPR, *supra* note 1; Optional Protocol to ICCPR, *supra* note 2.

144. KOLB, *supra* note 96, at 67; Clodfelter, *supra* note 142, at 189.

145. Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶ 49.

from an agreement between Egypt and WHO to establish privileges and immunities concerning a Regional Office in Egypt.[146] In turn, the ICJ considered that the duty of cooperation that flowed from those treaties required Egypt and the WHO to consult and negotiate over the conditions, modalities, and arrangements needed to transfer the Regional Office to a place outside of Egypt, notwithstanding that no such specific requirements were mentioned in the treaties mentioned above.[147]

Another example is the *Rainbow Warrior Affair*, which concerned a dispute between France and New Zealand over an agreement under which two military officers would remain on an island for three years and could not leave without the mutual consent of the two Governments.[148] The special tribunal agreed with New Zealand that France was obliged to make a good faith effort to obtain New Zealand's consent before removing one of those officers from the Island.[149] That decision translated into rather specific cooperative steps, including for France to provide detailed information to ensure that New Zealand could make an informed decision on whether to consent to the removal, and for France to refrain from presenting the evacuation of the military officer from the island as a *fait accompli*.[150]

With that in mind, one can appreciate why the HR Committee might point to a duty of cooperation stemming from the terms of Article 1 of the *Optional Protocol*, under which States parties agree to recognize "the competence of the Committee to receive and consider communications."[151] Of course, if a State party does not comply with an IMR, it does not directly deny the HR Committee's competence to consider a complaint.[152] However, for the reasons outlined above, the State party effectively frustrates the HR Committee in that endeavor

146. *Id.* ¶ 43.

147. *Id.* ¶ 49.

148. Difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, 20 R.I.A.A. 215, 226 (1990) [hereinafter Rainbow Warrior Affair].

149. *Id.* at 262.

150. *Id.* at 260–64.

151. Optional Protocol to ICCPR, *supra* note 2, art. 1.

152. *Id.* arts. 1–2.

by making its consideration of the complaint futile and thereby undermining the purpose of the entire communications procedure. Therefore, it might be said that cooperation with IMRs is necessary to make recognition meaningful under Article 1.

But that still leaves the latter objection—that no comparable duty of cooperation has been recognized elsewhere. We have been unable to identify any similar case where a duty of cooperation has been so prescriptive. In other treaty contexts, for instance, a duty of cooperation has been said to require one State party to notify another of certain facts and events that might jeopardize the execution of the treaty;[153] to leave a reasonable time for withdrawal from a treaty to take effect, to protect the effectiveness of the treaty bond;[154] or to conduct meaningful negotiations, which required States parties to at least contemplate modifying their positions.[155]

Indeed, arguably, the most prescriptive requirement flowing from a duty of cooperation found to date was in the *Pulp Mills Case*.[156] In that case, the ICJ found that Uruguay was under an obligation not to authorize or carry out certain construction works for new channels on the River Uruguay, during the period in which those construction works were the subject of a compulsory negotiation procedure established under a treaty.[157] At the same time, the terms of the treaty clearly indicated that the States parties had contemplated that the authorization or carrying out of construction works would not occur until the negotiations had ended.[158] The same level of intent is not evident from the terms of the *Optional Protocol*.[159]

On the other hand, the existing cases also demonstrate that the *raison d'être* of the duty of cooperation is to ensure that the object and

153. Rainbow Warrior Affair, *supra* note 148, at 275.
154. Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, 1980 I.C.J. ¶ 49.
155. N. Sea Continental Shelf (Ger. v. Den; Gen. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 85(a) (Feb. 20).
156. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 ¶¶ 71–79 (Apr. 20).
157. *Id.* ¶ 275.
158. Statute of the River Uruguay, Uru.-Arg. arts. 59–60, Feb. 26, 1975, 1295 U.N.T.S. 331, 346–47.
159. Optional Protocol to ICCPR, *supra* note 2, art. 1.

purposes of the treaty, and the effectiveness of its provisions, are not undermined owing to a lack of cooperation, as illustrated nicely by the ICJ's observations in the *Pulp Mills Case*, where the Court observed that:

> [A]s long as the procedural mechanism for co-operation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, *a fortiori*, not to carry it out . . . The Court notes, moreover, that the [treaty] . . . is perfectly in keeping with the requirements of international law on the subject, since the mechanism for co-operation between States is governed by the principle of good faith . . . as reflected in Article 26 of the [*VCLT*] . . . That applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States . . . there would be no point to the co-operation mechanism provided for by . . . the [treaty] . . . if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose.[160]

If one accepts that logic, then a requirement to cooperate with the HR Committee by complying with an IMR might not seem so drastic or exceptional, provided that is what is needed to make recognition of the HR Committee's competence under Article 1 meaningful, and more broadly to ensure the compulsory communications procedure under the *Optional Protocol* is not rendered pointless.

5. A Necessity to Avoid Defeating the Object and Purpose of the Treaty?

An alternative good faith argument is that compliance with IMRs is required because States parties must avoid defeating the object and purpose of the *Optional Protocol*. There are several objections that States parties would likely make in response to such an argument, including that little State practice supports the existence of such an obligation,[161] and that, in any case, the standard for breaching any such

160. Arg. v. Uru., 2010 I.C.J. ¶¶ 144–45 (2010).

161. Practice Directions on Requests for Interim Measures, Rules of Court, Eur. Ct. H.R., 1 (May 3, 2022) https://www.echr.coe.int/documents/d/echr/pd_interim_measures_eng.

obligation is uncertain.[162] Arguments in favor of such an obligation have been made in detail by other authors, and it is not necessary to repeat those arguments here.[163] Instead, we will focus on whether the standard for a breach might be met if a State refuses to comply with an IMR, assuming the obligation does indeed exist.

A key issue is whether the obligation is only breached where a treaty has been frustrated or defeated in all its applications, or whether defeat concerning the application of a treaty to a particular circumstance will suffice. In *European Roma Rights Centre v. The Immigration Officer at Prague*,[164] Lord Justice Simon Brown considered that question about the *1951 Refugee Convention*, in circumstances where it was argued that the object and purpose of the *Convention* was being frustrated by the U.K. Government, which had established an immigration screening procedure at Prague Airport so that would-be asylum seekers could be identified and prevented from boarding a plane to the United Kingdom.[165] Lord Justice Brown did not consider that the scheme was in breach of international law.[166] In reaching that conclusion, he reasoned that while asylum seekers in Prague were being thwarted, many other asylum seekers in other locations continued to benefit from the *1951 Refugee Convention*, so it could not be said that the United Kingdom's actions had frustrated or defeated the purposes of the *Convention*.[167]

If the threshold is as high as Lord Justice Brown considered it to be, then it could not be said that a State party that ignores an IMR has defeated the object or purpose of the *Covenant*. However, we have not been able to locate any other authority supporting such a high

162. *Id.*

163. *See* KOLB, *supra* note 96, at 68–71 (noting that even when a treaty is not yet ratified, its parties have a legitimate duty to refrain from undermining its goals); Goodwin-Gill, *supra* note 108, at 88 (explaining that a country should apply and carry out a treaty after it goes into effect so not to frustrate the object and purpose).

164. European Roma Rights Centre & Others v. The Immigration Officer at Prague Airport, [2003] EWCA Civ 666 [99] (appeal taken from Eng.).

165. *Id.* at [1].

166. *Id.* at [50].

167. *Id.* at [47].

threshold.[168] The *Nicaragua Case*[169] appears to be the only international decision in which the threshold has been considered in detail. In that case, the ICJ found that the requirement to perform treaties in good faith entailed an obligation not to defeat the object and purpose of a treaty, irrespective of whether any provision in the treaty was itself breached.[170] The ICJ concluded that the United States had acted contrary to an obligation not to defeat the object and purpose of the *Treaty of Friendship, Commerce and Navigation of 1956*,[171] because "the whole spirit" of the *Treaty* had been undermined through activities attributable to the United States, including "direct attacks on ports" and the "mining of Nicaraguan ports."[172] The ICJ did not address whether, notwithstanding those hostile activities, other spheres of cooperation remained possible under the *Treaty*, which perhaps implies that the ICJ did not think the *Treaty* needed to be defeated in all its applications for a breach to be made out. The Court also provided helpful guidance on the level of specificity with which an object and purpose needed to be identified. In the ICJ's view:

> There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.[173]

A refusal to comply with an IMR does not compare to the damage wrought to the *Treaty of Friendship* in the *Nicaragua Case*. Still, the harm done can be characterized as defeating the object and purpose of the communications procedure concerning the particular communication under which the IMR is ignored. Further, that object and purpose is not a "vague" object of promoting human rights.

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168. *See*, *e.g.,* KOLB, *supra* note 96, at 41–118 (canvassing the other authority discussing the threshold of good faith in public international law and concerning pre-conventional obligations under the VCLT, *supra* note 15, art. 18).

169. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 270 (June 27).

170. *Id.* We note that Judges Oda and Jennings disagreed in dissenting opinions.

171. Treaty of Friendship, Commerce and Navigation, U.S.-Nicar., pmbl., Jan. 21, 1956, 367 U.N.T.S. 4, 4.

172. Nicar. v. U.S., 1986 I.C.J., ¶ 270.

173. *Id.* ¶ 273.

Instead, the object is more concrete, ensuring that the HR Committee's Views are meaningful and that the HR Committee is not frustrated in considering communications.

6. *Doing Indirectly What Could Not Be Done Directly?*

A final approach might be to characterize States as acting contrary to good faith when refusing to comply with an IMR because States parties are indirectly doing what they are not permitted to do directly under the *Optional Protocol*.[174] States parties cannot opt out of participating in the compulsory communications procedure under the *Protocol* once a communication is on foot.[175] Therefore, it might be argued that acting contrary to an IMR is tantamount to "opting out" of participating in a communication. However, we do not think there is much force in this final formulation of a good faith obligation. In ignoring an IMR, a State party cannot wholly avoid its express obligations under the *Optional Protocol*.[176]

C. Further Counterarguments Explored

1. *Going Against the Intention of States Parties*

Up until now, we have avoided what appears to be States parties' primary objection to any good faith obligation to comply with an IMR, being that such an obligation goes beyond what was contemplated or intended by the States parties to the *Optional Protocol* and unduly interferes with States parties' sovereign rights and freedom of action, which was intentionally left untouched.[177]

If that argument is accepted, none of the above articulations of a good faith obligation could be sustained. That is because it is well established that the obligation to perform treaties in good faith does not require States parties to act in a manner contrary to what was intended under the treaty in question.[178] Indeed, in the *Nicaragua*

174. Optional Protocol to ICCPR, *supra* note 2, art. 1.

175. *Id.* arts. 1, 4.

176. *Id.* art. 1.

177. *See generally* Optional Protocol to ICCPR, *supra* note 2.

178. *See* ALEXANDER ORAKHELASVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 416–17 (2008) (explaining that courts are likely to use the plain text of a treaty to interpret the parties' intentions behind a

Case, the ICJ observed that:

> [A]n act cannot be said to be one calculated to deprive a treaty of its object and purpose, or to impede its due performance, if the possibility of that act has been foreseen in the treaty itself, and it has been expressly agreed that the treaty "shall not preclude the act".[179]

There is nothing expressly stated in the text of the *Covenant* or the *Optional Protocol* that categorically confirms that States parties did not intend to generate for themselves a good faith obligation to comply with the HR Committee's IMRs. Yet, States parties have pointed to what is said (and what remains unsaid) under the *Covenant* and *Optional Protocol* as strongly implying such an intention.[180] As will be recalled, States parties have pointed in particular to the fact that the HR Committee is given no express powers to direct the conduct of States parties, that it was established as a treaty body rather than a court, and that its final Views are non-binding.[181] In recognition of that, one might conclude that States parties clearly wished to preserve their positions as the final arbiters of their obligations, and to maintain, to the greatest extent possible, freedom to respond to a communication in the manner they consider appropriate.

On the other hand, States parties were willing to limit their freedom of action to some degree, given that they established a compulsory communications procedure.[182] And the limit on their freedom of action when complying with an IMR is temporary.[183] Suppose an IMR is a necessary step to preserve the application of the communications procedure. In that case, the IMR itself must be recognized as a part of the compulsory process to which States parties have consented.

treaty).

179. Nicar. v. U.S., 1986 I.C.J., ¶ 272; *see also* N. Atl. Coast Fisheries (U.K. v. U.S.), 11 R.I.A.A. 167, 186 (Perm. Ct. Arb. 1910); European Roma Rights Centre [2003] EWCA Civ 666 [95].

180. *E.g.*, Comments of the United States of America, *supra* note 67, at 4 (noting that parties to a treaty include and exempt specific provisions because this is what they intended).

181. *E.g.*, *id.* at 1 (stating that the treaties are quite clear on the "functions and authorities" of the Committee).

182. Optional Protocol to ICCPR, *supra* note 2, pmbl., art 1.

183. *Individual Communications*, OHCHR, https://www.ohchr.org/en/treaty-bodies/ccpr/individual-communications.

Moreover, States parties also intended the communications procedure to serve a purpose.[184] If IMRs are necessary for the realization of that purpose, then arguably, the intent of States parties is undermined if IMRs are ignored.

Therefore, in the end, whether States parties' intentions are undermined by a good faith obligation to comply with IMRs depends upon whether one emphasizes the fact that States shied away from any significant limitations on their freedom of action, or whether one underlines the desire for States to establish a procedure that, however modest, furthers the protection of human rights, at least to some degree. These dual possibilities can be described as the conflicting intentions that underlie the treaty.

In reconciling those conflicting intentions, the *travaux préparatoires* offer no assistance, perhaps unsurprisingly given that the *Optional Protocol* was drafted in a rush.[185] Therefore, one should arguably be guided by the object and purpose of the *Optional Protocol* and the need to preserve its effectiveness. Here, that means that one ought not to interpret the *Optional Protocol* as precluding a good faith obligation to comply with IMRs, when that is necessary to make the communications procedure effective per Article 31 of the VCLT.[186] Of course, if one accepts that the special character of human rights treaties calls for a particularly strong form of purposive interpretation, or justifies an evolutive interpretation, then the conclusion is only strengthened.[187]

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184. *Id.*

185. *See* Erik Mose & Torkel Opsahl, *The Optional Protocol to the International Covenant on Civil and Political Rights*, 21 SANTA CLARA L. REV. 271, 276 (1981) (noting that the hurried drafting of these specific provisions is a factor in interpreting the provisions).

186. *See* LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶¶ 107–08 (June 27) (resolving the longstanding debate over whether its own constituent treaty granted it a power to issue binding provisional measures incidentally, only by object and purpose).

187. *See* James Crawford & Amelia Keene, *Interpretation of the human rights treaties by the International Court of Justice*, 24 INT'L J. HUM. RTS., 935, 942 (2020) (indicating that the Court has been willing to apply an evolutive interpretation in light of present conditions or a purposive interpretation in light of particularly difficult cases of treaty interpretation).

2. *The Character of the HR Committee*

As noted above, States parties' responses to General Comment 33 emphasized that the HR Committee is not a "court" or "tribunal," and that its Views are not binding.[188] The preceding analysis setting out why States parties may have a good faith obligation to comply with IMRs does not depend upon the HR Committee being treated as a body akin to a court or tribunal (and therefore as deserving of the same powers on that basis), nor does it rely upon its Views as having anything other than a function of persuasion. We have not pursued such lines of argument because we doubt that they would ever persuade States parties, and because we find such arguments inherently unconvincing.

But in any case, we note that we do not consider that there is anything about the character of the HR Committee that would make it ill-equipped to issue IMRs that are, in effect, binding. While the HR Committee does not enjoy all the same characteristics of a court or tribunal,[189] States parties established the HR Committee as an independent treaty body with the primary function of supervising States parties' compliance with the Covenant and considered it appropriate to adjudge communications under the *Optional Protocol*.[190] In that role, the HR Committee has "built up a considerable body of interpretative case law," not only on the rights under the *Covenant*, but also concerning the circumstances in which IMRs are warranted.[191] We think expertise and the HR Committee's independence from States parties make it a suitable body to issue IMRs.

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188. *E.g.*, Comments of the United States of America, *supra* note 67, at 2 ("The Committee has no rules of evidence, does not conduct oral hearings, is not composed of judges, and is authorized to issue 'views' under the Optional Protocol rather than legally binding 'decisions' or 'judgments.'").

189. *See Individual Communications*, *supra* note 183 (noting that the Committees lack the authority to serve as an appeal court for national courts and tribunals).

190. *See Introduction to the Committee*, OHCHR, https://www.ohchr.org/en/treaty-bodies/ccpr/introduction-committee (asserting that the Committee is authorized to investigate specific complaints about suspected Covenant violations by States who signed the Protocol).

191. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639, ¶ 73 (Nov. 30).

3. *Rarity of "Bad Faith" Findings*

A final objection that States parties have not publicly expressed—but which, anecdotally, we understand some hold—is that it is incredibly rare for courts and tribunals to find that a State party has acted contrary to an obligation of good faith.[192] Indeed, ordinarily, the starting point is a presumption of good faith, and there must be considerable evidence to rebut that presumption.[193] Why then, it might be asked, should the HR Committee consider itself entitled to automatically conclude that a States party acts contrary to good faith if it does not comply with an IMR?

A partial answer is that the reluctance of international courts and tribunals to make a "bad faith" finding reflects to some degree a level of deference to States that is less appropriate in the context of a human rights treaty.[194] However, we do not consider that subjective bad faith is necessary to establish in this context. Instead, it is enough to assess whether what a State has done is objectively compatible with a "good faith" performance, e.g., whether the State's actions—objectively assessed—go against a duty of cooperation or defeat the object and purpose of the *Optional Protocol*.[195]

V. CONCLUSION

The preceding analysis demonstrates no easy answer to whether States parties to the *Optional Protocol* have a good faith obligation to

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192. *See* Steven Reinhold, *Good Faith in International Law*, 2 UCL J.L. & JURIS. 48, 50 (2013) (noting that states have broad discretion in regard to whether they are acting in good faith).

193. *See id.* (explaining that bad faith must be proven due to the automatic presumption of good faith).

194. *See id.* (detailing how the ICJ has found states to violate the obligation of good faith by just a unilateral act).

195. *See* KOLB, *supra* note 96, at 45 ("[S]ubjective bad faith of the state is neither required nor necessary. The standards under article 18 VCLT are objective. This is also the case for the good faith standard geared towards the protection of legitimate expectations."); *see also* Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 209 (1957) (stating that a State's actions and the intentions of those actions will be used in good faith obligation assessment); Philip Morris Asia Ltd. v. The Commonwealth of Australia, PCA Case Repository, PCA Case No. 2012-12, ¶ 537 (Perm. Ct. Arb. 2015).

comply with an IMR issued by the HR Committee. There are doctrinal arguments that can be mustered on both sides of the debate, which has often gone unacknowledged by States parties and those who consider IMRs to be binding.[196] On balance, we believe that there is more to be said in favor of States parties being under a good faith obligation, so that the object and purposes of the *Optional Protocol* can be fulfilled.

196. Practice Directions, *supra* note 161.