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**THE INTERNATIONAL COMMISSION OF JURISTS' INITIAL COMMENTS IN VIEW OF  
THE HUMAN RIGHTS COMMITTEE'S ELABORATION OF A NEW GENERAL COMMENT  
ON ARTICLE 6, THE RIGHT TO LIFE, OF THE INTERNATIONAL COVENANT ON  
CIVIL AND POLITICAL RIGHTS**

Submitted on 12 June 2015

*Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.*

**THE INTERNATIONAL COMMISSION OF JURISTS' INITIAL COMMENTS IN  
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**Introduction**

1. The International Commission of Jurists (ICJ) welcomes the opportunity to provide the following initial comments to the Human Rights Committee (the Committee) in view of the Committee's elaboration of a new General Comment on Article 6 of the International Covenant on Civil and Political Rights (the Covenant): the right to life.<sup>1</sup>
2. The ICJ understands that the new General Comment on Article 6 will revisit and expand, particularly in the light of experience obtained in the review of State reports and communications and the adoption of general comments on related issues,<sup>2</sup> the Committee's earlier General Comments on the Article 6 of the Covenant, namely, No. 6<sup>3</sup> and 14.<sup>4</sup>
3. This submissions touches only on a highly limited selection of issues that the Committee are likely to address in General Comment 36. The ICJ intends to comment further on these issues, but also on other aspects of article 6 concerns, at further stages in the Committee's deliberations, for example when a draft text might be elaborated and made available for consultation.
4. The present submission is divided into four sections:

I. Comments on the principles of non-discrimination, equality before the law, equal protection of the law and the right to life;

II. Comments on the scope and nature of the duty to respect and ensure the right to life pursuant to article 6, paragraph 1: "Every human being has the inherent right to life" of the Covenant;

III. Comments on the right to life and armed conflict; and

IV. Comments on the death penalty.

**I. The principles of non-discrimination, equality before the law and equal protection of the law and the right to life**

5. Discrimination, including multiple and compounded discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, age, disability, sexual orientation and gender identity, marital or family status, property, descent or other status, may well be a cause or factor facilitating violations of the right to life or place people at risk of being deprived of life. In this connection, the ICJ requests the Committee, in accordance with its

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<sup>1</sup> See, *Draft general comment No. 36 - Article 6: Right to life - Draft prepared by Yuval Shany and Nigel Rodley, Rapporteurs\** - Issues for consideration during the half-day general discussion in preparation for a general comment on article 6 (right to life) of the International Covenant on Civil and Political Rights, adopted by the Committee at its 113th session (16 March - 2 April 2015), available at [CCPR/C/GC/R.36](http://ccpr/c/gc/r.36).

<sup>2</sup> *Ibid*, para. 2.

<sup>3</sup> See, General comment No. 6: Article 6 (Right to life), adopted by the Committee at its Sixteenth session in 1982, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6630&Lang=enb](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6630&Lang=enb).

<sup>4</sup> See, General comment No. 14: Article 6 (Right to life), adopted by the Committee at its Twenty-third session in 1984, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4723&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4723&Lang=en).

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commentary and jurisprudence and that of other treaty bodies,<sup>5</sup> to ensure that the principles of non-discrimination and the right to equality before the law and equal protection of the law, as they apply to the right to life, be set out at the very outset of the new general comment and inform the content of the new General Comment throughout.

**II. The scope and nature of the duty to respect and ensure the right to life pursuant to article 6, paragraph 1: "Every human being has the inherent right to life" of the Covenant**

*Non-state actors*

6. In its General Comment 31, the Committee set out its views that:

*the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities.<sup>6</sup>*

7. The duty to protect against the conduct of non-State actors that nullifies or impairs human rights is well established in international human rights law.<sup>7</sup> The principle is

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<sup>5</sup> Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994); General Comment No. 28, Article 3 (The equality of rights between men and women), HRI/GEN/1/Rev.9 (Vol. I); General comment No. 23(50) (art. 27), CCPR/C/21/Rev.1/Add.5, 26 April 1994.

<sup>6</sup> Article 2 of the Covenant; Human Rights Committee [General Comment 31](#) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 8. In respect of death threats by non-state actors, for example, when state authorities know, or ought to know, that lives may be at risk, they must respond effectively by taking adequate measures to protect the lives of those threatened. See, Communication No. 6/2005, *Yildirim v. Austria*, Views adopted by the Committee on the Elimination of Discrimination against Women on 21 July 2004, paras. 12.1.4-12.1.6. The European Court of Human Rights has held that a violation occurs when "the authorities knew or ought to have known ... of the existence of a real and immediate risk to the life of an identified individual ... from the criminal acts of a third party and that they failed to take measures ... to avoid that risk", see Application No. 23452/94, *Osman v United Kingdom*, Judgment of 28 October 1998, para. 116.

<sup>7</sup> See, e.g. footnote 126 of the Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, which, *inter alia*, states, "See also General Comment No. 12, supra note 12, ¶ 15 ("The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food"); *Young and Webster v. United Kingdom*, App. No. 7601/76; 7806/77, 1981 Eur. Comm'n H.R. (ser. A) No. 44, ¶ 49; *X and Y v. Netherlands*, App. No. 8978/80, Eur. Comm'n H.R. (ser. A) No. 91, 27 (1985); under the Eur. Consult. Ass., *Marangopoulos Found. for Human Rights (MFHR) v. Greece*, Eur. Comm. of Social Rights, Doc. No. 1 (4 April 2005): [T]he state is responsible for enforcing the rights embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the complainant's allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator.

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reflected not only in the jurisprudence of the Committee and other treaty bodies, but also by the political bodies. For instance, the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights,<sup>8</sup> the entire first pillar of which is devoted to describing the legal obligation of States to "protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."<sup>9</sup>

8. In this context, the ICJ would welcome express clarification, consistent with the Committee's own commentary and jurisprudence,<sup>10</sup> and that of other treaty bodies, that States Parties' obligations pursuant to article 6 of the Covenant extend to taking measures to respect, protect and fulfill the right to life, including in respect of the investigation, prosecution and punishment of acts committed by non-state actors that impair the enjoyment of or nullify the right to life.
9. Furthermore, in respect of the duty of states to protect the right to life by law,<sup>11</sup> the ICJ urges the Committee to include gender-based violence, including "honour" killings,<sup>12</sup> other forms of gender-based violence against women,<sup>13</sup> and violence

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American Convention on Human Rights, signed 22 Nov. 1969, arts. 1–2, O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force 18 July 1978). See also *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (29 July 1988). : An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

*Commission nationale des droits de l'Homme et des libertés v. Chad*, App. No. 74/92, Afr. Comm'n on Human and Peoples' Rights, 9th Annual Activity Report, ¶¶ 18–22 (1995–1996) ("The Charter specifies in Article 1 that the States parties shall not only recognise the rights, duties and freedoms adopted by the Charter, but they should also 'undertake . . . measures to give effect to them'. In other words, if a State neglects to ensure the rights in the African Charter, this may constitute a violation, even if the State or its agents are not the immediate cause of the violation"), or *Soc. and Econ. Rights Action Ctr. and Ctr. for Econ. and Soc. Rights v. Nigeria* (Merits), App. 155/96, Afr. Comm'n on Human and Peoples' Rights, 15th Annual Activity Report, 30th Sess., ¶ 46 (27 Oct. 2001): [T]he State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms", *Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights and Commentary*, Human Rights Quarterly 34 (2012) 1084–1169, footnote 126 of the Commentary, available online at <http://www.icj.org/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf>.

<sup>8</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, the Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

<sup>9</sup> *Ibid*, Guiding Principle 1.

<sup>10</sup> E.G., Human Rights Committee Concluding Observations: [Israel](#), UN Doc. CCPR/C/ISR/CO/4 (2014), para. 16; [Yemen](#), UN Doc. CCPR/C/YEM/CO/5 (2012), para. 24; [Albania](#), UN Doc. CCPR/C/ALB/CO/2 (2013), para. 10; Sweden, UN Doc. CCPR/CO/74/SWE (2002) para. 8; [Guatemala](#), UN Doc. CCPR/C/GTM/CO/3(2012), paras. 18 and 19.

<sup>11</sup> *Draft general comment No. 36 - Article 6: Right to life - Draft prepared by Yuval Shany and Nigel Rodley, Rapporteurs*, para. 6(a).

<sup>12</sup> See, Human Rights Committee, General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women, 29 March 2000, CCPR/C/21/Rev.1/Add.10, in particular, para. 10 of which states, *inter alia*, "States parties should also report on measures to protect women from practices that violate their right to life, such as female infanticide, the burning of widows and dowry killings"; Human Rights Committee Concluding Observations: [Sweden](#), UN Doc. CCPR/CO/74/SWE (2002) para. 8, [Uzbekistan](#), UN Doc. CCPR/CO/71/UZB (2001) para. 19, [Russia](#), UN Doc. CCPR/C/RUS/CO/6 (2009) para. 10, [Guatemala](#), UN Doc. CCPR/C/GTM/CO/3 (2012) para 19, [Kuwait](#), UN Doc. CCPR/C/KWT/CO/2(2011),para. 15 , [Dominican Republic](#), UN

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against individuals based on their real or imputed sexual orientation and/or gender identity or expression<sup>14</sup> among the conduct that States have a duty to criminalize, investigate, prosecute and punish in order to protect and ensure the right to life.

10. In addition to a general obligation to protect, there are particular situations involving the conduct of non-state actors that may impair or nullify the right to life, thus engaging the responsibility of the State under general principles of State responsibility taken together with the Covenant Obligations. In particular, State responsibility extends to:
  - a. acts and omissions of non-state actors acting on the instructions or under the direction or control of the State; and
  - b. acts and omissions of persons or entities that are not organs of the State, such as corporations and other business enterprises, where they are empowered by the State to exercise elements of governmental authority, provided those persons or entities are acting in that capacity in the particular instance.<sup>15</sup>
11. The Committee against Torture has underscored that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment imposes obligations on States Parties who "bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law."<sup>16</sup> Similarly, under the Covenant the State is responsible for acts or omissions entailing violations of the right to life of private actors to whom it delegates its functions.
12. In light of this, the ICJ recommends that the new General Comment should reflect the Committee's own commentary<sup>17</sup> and jurisprudence,<sup>18</sup> and that of other treaty bodies by making clear that States Parties' obligations under article 6 extend to ensuring that private individuals and companies, such as private security companies,

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Doc. CCPR/C/DOM/CO/5(2012), para. 11; [Sri Lanka](#), UN Doc. CCPR/C/LKA/CO/5 (2014) , para 9 ; General Assembly [resolution 59/167](#), para. 4; [resolution 58/147](#); [resolution 55/66](#), Preambular para. 3 and Operative para. 4(b) and [resolution 59/165](#), para. 3(b) and (c)

<sup>13</sup>The most obvious examples of gender-related killings include, *inter alia*, rape-murder, intimate-partners violence escalating into murder, dowry-deaths, so-called "honour killings" and deaths arising from harmful practices or neglect. Human rights treaty bodies and special procedure mandate holders have condemned specific forms of gender-related killings, including femicide, honour-related killings, systematic killings, disappearances and witchcraft-related killings of women. See, Gender-Related Killings of Women and Girls, OHCHR, available at [http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Gender\\_motivated\\_killings.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Gender_motivated_killings.pdf).

<sup>14</sup> Human Rights Committee Concluding Observations: [Guatemala](#), UN Doc. CCPR/C/GTM/CO/3 (2012), para. 11; [Dominican Republic](#), UN Doc. CCPR/C/DOM/CO/5(2012), para. 16; [Uruguay](#), CCPR/C/URY/CO/5 (2013) para. 12. See also *Discrimination and violence against individuals based on their sexual orientation and gender identity - Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23*, submitted to the Human Rights Council on violence and discrimination against individuals based on their sexual orientation and gender identity, paras. 26-30.

<sup>15</sup> Articles 5 and 8 of the Articles on [Responsibility of States for Internationally Wrongful Acts](#), adopted by the International Law Commission (2001), (commended to governments by the UN General Assembly including in [resolution 65/19](#), para. 1).

<sup>16</sup> See [CAT General Comment 2](#), para. 15.

<sup>17</sup> Human Rights Committee, General Comment No. 31, para. 8, cited above; and "Human Rights Committee [General Comment 35](#), UN Doc. CCPR/C/GC/35 (2014), para. 8.

<sup>18</sup> See, [Cabal and Pasini Bertran v Australia](#), UN Doc CCPR/C/78/D/1020/2001 (2003) para.7.2; [B.d.B. et al v. The Netherlands](#), Communication no. 273/1988, UN Doc. CCPR/C/35/D/273/1988(1989) para. 6.5; Human Rights Committee Concluding Observations: [Guatemala](#), UN Doc. CCPR/C/GTM/CO/3(2012), para. 16; Human Rights Committee Concluding Observations: [United States](#), UN Doc. CCPR/C/USA/CO/4 (2014) para. 5.

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to whom the State contracts out its functions or authority, including, for example, law enforcement or military authority or duties that the State owes, for instance, to persons deprived of their liberty, respect the right to life. Furthermore, States' responsibility extends to situations in which the private individual or company acts beyond the scope of authority delegated or contravenes the instructions given by the State.<sup>19</sup>

13. In consideration of the above and Consistent with the Committee's jurisprudence, including its recently adopted General Comment 35,<sup>20</sup> the new General Comment should make clear that States should take measures to protect the right to life against deprivation by third parties, including individuals and enterprises.
14. In addition, consistent with the Committee's jurisprudence, the ICJ requests the Committee to ensure that new General Comment expressly affirm that a State Party may incur responsibility under the Covenant for infringements of article 6 committed on its territory by another State or entity.<sup>21</sup>

*Relationship of article 6 to other international human rights instruments*

15. The ICJ welcomes the fact that, in the context of outlining the scope and nature of the duty to respect and ensure the right to life, the document prepared by the Rapporteurs mentions the relationship of article 6, paragraph 1: "Every human being has the inherent right to life" to other international human rights instruments, e.g., article 12 of the International Covenant on Economic, Social and Cultural Rights.<sup>22</sup> In this respect, the ICJ recommends the new General Comment unequivocally acknowledge that, in certain circumstances, violations of certain economic, social and cultural rights may amount to violations of the right to life under the Covenant. In this context, the ICJ invites the Committee to consider the relationship of the right to life with certain economic, social and cultural rights. This interplay goes beyond the

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<sup>19</sup> Article 7 of the Articles on [Responsibility of States for Internationally Wrongful Acts](#), adopted by the International Law Commission (2001), (commended to governments by the UN General Assembly including in [resolution 65/19](#), para. 1).

<sup>20</sup> General Comment 35 (Article 9 Liberty and security of person CCPR/C/GC/35), paras 7 and 8 of which state, "7. States parties have the duty to take appropriate measures to protect the right to liberty of person against deprivation by third parties. States parties must protect individuals against abduction or detention by individual criminals or irregular groups, including armed or terrorist groups, operating within their territory. They must also protect individuals against wrongful deprivation of liberty by lawful organizations, such as employers, schools and hospitals. States parties should do their utmost to take appropriate measures to protect individuals against deprivation of liberty by the action of other States within their territory. 8. When private individuals or entities are empowered or authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence and ensuring adherence to article 9. It must rigorously limit those powers and must provide strict and effective control to ensure that those powers are not misused, and do not lead to arbitrary or unlawful arrest or detention. It must also provide effective remedies for victims if arbitrary or unlawful arrest or detention does occur," footnotes in the original omitted.

<sup>21</sup> *Hero et al v. Bosnia and Herzegovina*, CCPR/C/112/D/1966/2010, Communication No. 1966/2010, 27 November 2014, paras 9.3 and 9.6 of which, inter alia, state, "The Committee observes that the term "enforced disappearance" may be used in an extended sense, referring to disappearances initiated by forces independent of or hostile to a State party, in addition to disappearances attributable to a State party"; "The Committee considers that the authorities investigating enforced disappearances must give the families a timely opportunity to contribute their knowledge to the investigation, and that information regarding the progress of the investigation must be made promptly accessible to the families. It also takes note of the anguish and distress caused to the authors by the continuing uncertainty resulting from the disappearance of their relative. The Committee concludes that the facts before it reveal a violation of articles 6; 7 and 9, read in conjunction with article 2, paragraph 3, of the Covenant with regard to the victim, and article 7, read in conjunction with article 2, paragraph 3, of the Covenant, with regard to the authors." See also, *mutatis mutandis*, *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006).

<sup>22</sup> *Draft general comment No. 36 - Article 6: Right to life - Draft prepared by Yuval Shany and Nigel Rodley, Rapporteurs*, para. 5(a)(II).



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right to the highest attainable standard of health (safety of medicine; medical negligence, etc.)<sup>23</sup> and may arise in other contexts, including, safety at work;<sup>24</sup> housing (regulation of construction plans and of development permissions/zoning, technical criteria for safety and habitability, non exposure to toxics, etc.); of food (including food safety); water, etc. In light of this, the ICJ requests that the Committee ensure that the new general comment expressly affirms that States have an obligation to take substantial and effective measures, including legislative, administrative, judicial, regulatory or other measures, to prevent violations of economic, social and cultural rights that lead or amount to violations or impairments to the right to life.

### *Extraterritorial reach of the Covenant*

16. The Committee has long recognized the extraterritorial reach of the Covenant and has set out its views on the general obligations in respect of extraterritorial obligations of States Parties in its General Comment 31, paragraph 10:

*States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.*

17. While the Committee's views on the general obligations should certainly be reaffirmed in the particular context of the Article 6 right to life obligations, the ICJ considers it would be important that the Committee's views be further developed to take account of the specific considerations regarding the right to life, as well as developments in international law and the Committee's own jurisprudence.
18. In particular, the ICJ calls upon the Committee to make clear that pursuant to Article 2(1) of the Covenant, States Parties' jurisdiction, and thus state responsibility, is engaged where the State in any matter **exercises or engages in conduct pursuant to its authority (State agent authority)** on the territory of another

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<sup>23</sup> Even in the area of health, the ICJ invites the Committee to acknowledge that the relevance of the right to highest attainable standard of health for the right to life arises not only in circumstances of denial of urgent medical treatment (e.g. non-removal of undocumented foreign nationals on humanitarian grounds in extreme/urgent health cases), but can also arise in connection with denial of care for chronic/non communicable diseases.

<sup>24</sup> The European Court on Human Rights has made the link especially in cases relating to safety and health at the workplace: for instance in *Vilnes v. Norway* (judgment 5 Dec 2013, para. 220) and *Kolyadenko and others v. Russia* (judgment 28 February 2012, para. 158) regarding the protection of workers' lives vis-à-vis the dangerous work they have to perform. In the latter cases, emphasis should be placed on regulations to address the special features of the activity in question, in particular the level of potential risk to human lives. The regulations must govern the licensing, setting up, operation, security and supervision of the activity. They must make compulsory to take practical measures to ensure the effective protection of individuals whose lives might be endangered by the inherent risks. The same considerations/reasoning of the *Kolyadenko* case for industrial dangerous activities can be applied for the activities of security companies that have also inherent high level risks for human lives.

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State, so as to bring about effects on the enjoyment of Covenant rights. The Committee could accomplish this clarification either by stating that this "State agent authority" falls under the category of "power or effective control" identified in General Comment 31, or as a separate category additional to that of "power or effective control."

19. This precision would make clear that where a State acts in the knowledge that its actions will bring about effects on the enjoyment of human rights in another State, or where such effects are the reasonably foreseeable consequence of such conduct, its responsibility will be engaged under the Covenant. Thus, the use of lethal force by military or security forces, whether it occurs on the ground, territorial waters or airspace of the affected State or another State and which may lead to foreseeable right to life violations would be encompassed. Similarly, for example, the poisoning of waterways that may be reasonably foreseen to have lethal effects in the territory of another State situated in the trajectory of the waterway may engage obligations under the Covenant.<sup>25</sup>
20. Although in such situations the victim could be deemed to be "in the power" of the other State, the new General Comment should make clear that in fact such situations are not necessarily limited to circumstances where coercive power or custodial control is being exercised, but may also extend to any situations in which a State projects the reach of its authority to the territory of another State. The Committee has already implicitly adopted this approach. During its consideration of the United States (paragraph 22, UN Doc. CCPR/C/USA/CO/4), concerning the National Security Agency surveillance, the Committee expressed its concern "about the surveillance of communications in the interest of protecting national security, conducted by the National Security Agency (NSA) both within and outside the United States" and recommended that the State party "[t]ake all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, including article 17; in particular, measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity, regardless of the nationality or location of the individuals whose communications are under direct surveillance."
21. The International Court of Justice has repeatedly adopted an expansive view of the extraterritorial application of human rights treaties. For example affirming in the 2008 decision on Provisional Measures in the case of *Georgia v. Russian Federation* that "there is no restriction of a general nature in CERD [Convention on the Elimination of Racial Discrimination] relating to its territorial application [...] [T]he Court consequently finds that these provision of CERD generally appear to apply, **like the other provisions of instruments of that nature**, to the **actions** of a State party **when it acts beyond its territory**."<sup>26</sup> The International Court of Justice had of course previously discussed and affirmed the extraterritorially application of the Covenant in other cases.<sup>27</sup>
22. It should be noted that recent international jurisprudence seems to suggest that States may effectively extend jurisdiction where they produce human rights effects, without consideration to the exercise of effective control or where persons are under their "power". Thus, the European Court of Human Rights, in defining the scope of obligations under the European Convention has noted that jurisdiction "may extend

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<sup>25</sup> See, e.g., Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights and Commentary, Human Rights Quarterly 34 (2012) 1084–1169, available at <http://www.icj.org/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf>.

<sup>26</sup> Provisional Measures in the case of *Georgia v. Russian Federation*, 2008, No. 35/2008, I.C.J. para. 109 (15 October 2008).

<sup>27</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 109 (9 July 2004); Armed Activities on the Territory of the Congo (DRC v Uganda), 2005 I.C.J. 26 (19 December 2005)



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to acts of its authorities **which produce effects** outside its own territory."<sup>28</sup> The Inter-American Commission on Human Rights has similarly affirmed that "a state party to the American Convention may be responsible under certain circumstances for the acts and omission of its agents which **produce effects or are undertaken outside that state's** own territory."<sup>29</sup>

23. This Committee itself has applied a variant of the effects test, which looks at foreseeability of consequences, rather than power or control: "a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time".<sup>30</sup>

*The non-refoulement content of article 6*

24. The ICJ welcomes the fact that, in setting out the issues that may arise for consideration in the new General Comment with regard to article 6, paragraph 1: "No one shall be arbitrarily deprived of his life", the document prepared by the Rapporteurs mentions relevant *non-refoulement* obligations.<sup>31</sup> With respect to this area, however, the organization considers that it would be more apt to enunciate the general *non-refoulement* content of article 6 at the very outset of the new General Comment, since *non-refoulement* is one of the general obligations that may arise in connection with the duty to respect and ensure the right to life, and thus should be more appropriately set out in the section at the beginning of the new General Comment where the Committee will enunciate the scope and nature the duty to respect and ensure the right to life.<sup>32</sup>
25. Further and consistent with General Comment No. 31,<sup>33</sup> and the jurisprudence of the Committee,<sup>34</sup> as well as international refugee law,<sup>35</sup> the ICJ would welcome the inclusion of a statement to the effect that,

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<sup>28</sup> *Case of Al-Skeini and Others v. the United Kingdom*, Appl. No. 55721/07 at para 133 (citations omitted).

<sup>29</sup> *Victor Saldano v. Argentina*, Petition, Report No. 38/99, Inter-Am. C.H.R., OEA/Ser.L/V/II 95 Doc. 7 rev. At para. 17.

<sup>30</sup> *Munaf v. Romania*, Communication NO. 1539/2006, adopted 30 July 2009, UN Human Rights Committee, 98th session, UN Doc, CCPR/C/96/D/1539/2006 82009), para. 14.2.

<sup>31</sup> *Draft general comment No. 36 - Article 6: Right to life - Draft prepared by Yuval Shany and Nigel Rodley, Rapporteurs*, para. 7(b)(VII).

<sup>32</sup> Thus, it would be more appropriate to mention *non-refoulement* as of one the issues arising for consideration as per list provided at para. 5(a) in the draft prepared by the Rapporteurs.

<sup>33</sup> General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 12 of which states, inter alia, "12. Moreover, the article 2 obligation requiring that States parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."

<sup>34</sup> See, e.g., Communication No. 1898/2009, *Choudhary et al v. Canada*, CCPR/C/109/D/1898/2009, 17 December 2013, paras. 9.8 and 10; Communication No. 1908/2009, *X v. Republic of Korea*, 25 March 2014, para. 11.5. See, also, e.g., the Concluding observations of the Human Rights Committee to the Russian Federation, UN Doc. CCPR/C/RUS/CO/6, 24 November 2009, para. 17; Concluding observations of the Human Rights Committee to the USA, UN Doc. CCPR/C/USA/CO/4, 23 April 2014, para.13; and Concluding observations of the Human Rights Committee to Sudan, UN Doc. CCPR/C/SDN/CO/4, 19 August 2014, para.23.

<sup>35</sup> See, *inter alia*, Article 33 - Prohibition of expulsion or return ("refoulement"), of the 1951 UN Convention Relating to the Status of Refugees, para. 1 of which states "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

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- a. *non-refoulement* obligations under article 6 arise whenever States Parties know or ought to know that the removal of a person from their jurisdiction, whatever its manner, would expose the concerned individual to a real risk of a violation of article 6;
- b. *non-refoulement* obligations under article 6 arise whether the threat to the right to life of the individual concerned emanates from States or non-state actors;<sup>36</sup>
- c. *non-refoulement* obligations enjoin States from removing the concerned person from their jurisdiction by whatever means and/or require them to take all necessary measures to prevent third parties from doing so;
- d. States that have abolished capital punishment also have an obligation to ensure that persons deported or extradited to other States will not be exposed to a "real risk" of being executed;<sup>37</sup> and
- e. States that have failed to comply with their *non-refoulement* obligations under article 6 must employ effective means to monitor the fate of the affected individuals,<sup>38</sup> and take appropriate remedial action.<sup>39</sup>

### **III. Comments on the right to life and armed conflict**

26. Concerning the application of Article 6 during situations of armed conflict, the ICJ draws attention to the following.

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<sup>36</sup> See, e.g. *Choudhary et al v. Canada*, cited above, para. 9.8 of which states, inter alia, that "[w]hile death sentences have reportedly not been carried out, several instances of extrajudicial assassination, by private actors, of members of religious minorities accused under the blasphemy law have been reported, without the Pakistani authorities being willing, or able, to protect them"; Communication No. 2053/2011, *B.L. v. Australia*, views adopted on 7–31 October 2014, para 7.4.

<sup>37</sup> See, *inter alia*, Communication No. 829/1998, *Judge v. Canada*, Views adopted by the Human Rights Committee on 5 August 2003, para. 10.4.

<sup>38</sup> Concluding observations of the Human Rights Committee to the Russian Federation, UN Doc. CCPR/C/RUS/CO/6, 24 November 2009, para. 17.

<sup>39</sup> Concluding observations of the Human Rights Committee to the USA, UN Doc. CCPR/C/USA/CO/4, 23 April 2014, para.13. See also, the judgment of the European Court of Human Rights in the case of *Al Nashiri v. Poland*, [28761/11](#), Judgment, 24 July 2014, where the Court held, "in certain particular situations, the Court may find it useful or, indeed, even necessary to indicate to the respondent Government the type of measures that might or should be taken by the State in order to put an end to the situation that gave rise to the finding of a violation. Sometimes the nature of the violation found may be such as to leave no real choice as to the individual measures required [...]. In particular, in cases where a removal of an applicant from the territory of the respondent State – notwithstanding whether by means of a lawful procedure such as, for example, extradition or deportation [...] or by means of a forcible transfer [...] has exposed him to a serious risk of being subjected to ill- treatment contrary to Article 3 or to the risk of the death penalty being imposed on him, the Court may require the State concerned to "take all possible steps" to obtain the appropriate diplomatic assurances from the destination State. Those representations may be required even if an applicant has already been transferred from the territory of the respondent State but the risk still continues [...]. In the Court's view, these principles apply a fortiori in cases where a person, as in the present case, has been subjected to extraordinary rendition" – "an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system" [...]. The current state of development of international law and international relations does not make it impossible for the respondent State to take tangible remedial measures with a view to protecting the applicant against the existing risks to his life and health in a foreign jurisdiction [...]. The Court has already found that, through the actions and inaction of the Polish authorities in the context of their complicity in the operation of the CIA HVD Programme on its territory, the applicant has been exposed to the risk of the death penalty being imposed on him (see paragraph 579 above). Even though the proceedings against him before the military commissions are still pending and the outcome of the trial remains uncertain, that risk still continues (see also paragraph 276 above). For the Court, compliance with their obligations under Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 to the Convention requires the Government to seek to remove that risk as soon as possible, by seeking assurances from the US authorities that he will not be subjected to the death penalty", paras 587-589.

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27. No derogation from the right to life under Article 6 may be permitted, even in time of public emergency that threatens the life of the nation.<sup>40</sup>
28. The right to life is applicable in situations of armed conflict within the meaning of international humanitarian law (IHL). In General Comment 31, the Committee has expressed its views regarding the general obligation under Covenant as follows,

*the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.*<sup>41</sup>

The ICJ considers that the Committee should enjoin states to desist from conflating counterterrorism and similar security operations and internal disturbances with armed conflict, where IHL may be applicable.<sup>42</sup> The lowest threshold of armed conflict is governed by Common article 3 of the 1949 Geneva Conventions applying to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." According to the ICRC Commentary by Jean Pictet, to distinguish an armed conflict from "a mere act of banditry or an unorganized short-lived insurrection", one must look to the degree of organization of the military force whether there is an authority responsible for the acts of that force; whether the acts occur within the determinate territory; whether the armed group has the means of ensuring respect for the Geneva Conventions and whether it acts as de facto governing entity."<sup>43</sup> More recently the International Criminal Tribunal for the former Yugoslavia (ICTY) set out an authoritative two pronged test for determination of the existence of an armed conflict: "the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is [...] irrelevant."<sup>44</sup> The ICJ would request the Committee to make clear that if these criteria are not met there is no question of an armed conflict or the invocation of IHL rules to displace or complement the Covenant provisions.

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<sup>40</sup> ICCPR, Article 4(2); Human Rights Committee, General Comment No 6, para 1; Human rights Committee, General Comment No 14, para. 1.

<sup>41</sup> Human Rights Committee, General Comment No 31, 'Nature of the general legal obligation imposed on states parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 11. See also: Human Rights Committee, General Comment No 29, 'States of Emergency (Article 4)', UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para 3; See also *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict*, Advisory Opinion (1996) ICJ Reports, paras 24-25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Reports, para 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits (2005) ICJ Reports, paras 216-220; and General Assembly resolution 2675(XXV) (1970), para 1.

<sup>42</sup> See, e.g., the report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman, appointed pursuant to Commission resolution 2004/87C to the UN Commission on Human Rights, E/CN.4/2005/103, 7 February 2005 (in particular, paras. 16-31), available at <http://www2.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf>; and Assessing Damage, Urging Action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, An Initiative of the International Commission of Jurists, 2009, available at <http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf>.

<sup>43</sup> The Geneva Conventions of 12 August 1949. Commentary, Jean S. Pictet, General Editor, Volume IV: Relative to the Protection of Civilian Persons in Time of War, pp. 35-36.

<sup>44</sup> *PROSECUTOR v. FATMIR LIMAJ, HARADIN BALA, ISAK MUSLIU*, ICTY, Case No. IT-03-66-T, 30 November 2005, para. 170, available at <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>; see also, *Prosecutor v. DU[KO TADI] a/k/a/ "DULE"*, ICTY, Case No. IT-94-1-T, 7 May 1997, para. 562, available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

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29. The second question to be determined is, if there is an armed conflict, whether the conflict is of an international or non-international character. The ICJ notes that in the absence of specific international rules, at least treaty-based rules, governing the conduct of hostilities in non-international armed conflict, the applicable legal regime is the one governing the use of force in human rights law and law enforcement, including as set out in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. While in many respects there is an overlap between these rules they are not coterminous. Of particular importance for this General Comment is the principle, expressed in Principles 11 that intentional lethal force may only be used "when strictly unavoidable to protect life. This means that in the course of armed conflict, unless strictly unavoidable to protect the life, there is a duty to arrest or capture rather than use lethal force. The ICJ considers invites the Committee to emphasize this principle expressly in the new General Comment.
30. Rules relevant to the conduct of hostilities in international armed conflict are found principally in the first Additional Protocol to the Geneva Conventions, many provisions of which are also applicable to non-States Parties through customary international law.<sup>45</sup> These include among others, the rules of distinction between civilians and combatants, the rules of distinction between civilian objects and military objectives, the prohibitions against indiscriminate attacks and disproportionate attacks and obligations to take precautions to avoid, among other things, loss of life to civilians. The breach of many of these rules may constitute or lead to human rights violations but also to war crimes, including under the ICC Statute. The ICJ invites the Committee to emphasize in the new General Comment that such crimes would also constitute article 6 violations.
31. In the context of lethal force directed towards civilians who directly participate in hostilities, it should be recalled that direct participation in hostilities (DPH) acts as an exception to the normal protection of civilians.<sup>46</sup> Bearing in mind that one of the key objectives of IHL is the protection of civilians, and also reflecting the complementary nature of IHL and human rights law:
- a) A narrow interpretation of what amounts to 'direct' participation should be applied,<sup>47</sup> and must at the very least be restricted to specific hostile acts.<sup>48</sup>
  - b) The lethal targeting of such civilians should be limited to 'temporary, activity-based loss of protection'. The ICJ would caution against recognition of the notion of a 'continuous, status-or function-based loss of protection', which renders such persons lawful targets of lethal force anywhere and at any time, in the same way as a 'combatant' in an international armed conflict.<sup>49</sup> As noted by the former Special Rapporteur on extrajudicial, summary or arbitrary executions,<sup>50</sup> this approach is inconsistent with the language of Article 51(3) of the First Additional Protocol to the Geneva Conventions.<sup>51</sup>

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<sup>45</sup> See, Customary International Humanitarian Law, Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC and Cambridge University Press, Vol I, 2005, reprint 2009 (Vol II, 2005), available at <https://www.icrc.org/eng/resources/documents/publication/pcustom.htm>.

<sup>46</sup> As reflected in: Article 51(3) of the First Protocol Additional to the Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); and Article 13(1) of the Second Protocol Additional to the Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

<sup>47</sup> As argued, for example, by Antonio Cassese in *International Law* (Oxford: Oxford University Press, 2<sup>nd</sup> Edition, 2004), p. 421.

<sup>48</sup> As confirmed by the International Committee of the Red Cross, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90(872) *International Review of the Red Cross* 991, at p. 1014.

<sup>49</sup> ICRC Interpretive Guidance, *ibid*, p. 1015.

<sup>50</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 'Study on targeted killings', UN Doc A/HRC/14/24/Add.6 (2010), para. 65.

<sup>51</sup> Protocol I, Article 51(3), provides that: "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities" (emphasis added).

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- c) Any determination concerning the nature and timing of a civilian's DPH, and of his or her identity, must be based on verified information.<sup>52</sup>
  - d) A civilian suspected of DPH may not be the object of lethal targeting if less harmful means can be employed.<sup>53</sup> States have an obligation to minimize the level of force used, e.g. through the use of warnings, restraint, capture and the graduated use of force.<sup>54</sup>
  - e) In the context of targeted killings taking place in the context of armed conflict, there have been repeated calls for States to disclose: the full legal basis for their recourse to targeted killings; the procedural and other safeguards in place to ensure that targeted killings are lawful and comply with IHL and human rights law, and that any unlawful killing results in accountability; the facts upon which it has been determined that a person should be on a kill list; and the measures taken to ensure that a particular killing has been proportional, including information on civilian casualties and injuries that occurred as a result of the targeted killing.<sup>55</sup>
32. Where there are credible allegations that the deprivation of life in armed conflict has not been in compliance with IHL concerning the conduct of hostilities, this may engage the responsibility under the Covenant, as a potentially arbitrary deprivation of the right to life. In this regard, the State has a continuing duty to effectively, promptly, thoroughly and impartially investigate those allegations and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.<sup>56</sup>
33. Where the deprivation of life in armed conflict has not been in compliance with IHL concerning the conduct of hostilities, the State has a continuing duty to provide the

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<sup>52</sup> See, for example, *The Public Committee against Torture in Israel et al v The Government of Israel et al*, HCJ 769/02, judgment of 22 December 2005, para 40.

<sup>53</sup> See, for example, *The Public Committee against Torture in Israel et al v The Government of Israel et al*, HCJ 769/02, judgment of 22 December 2005, para. 40, which favourably cited the decision of the European Court of Human Rights in *McCann v United Kingdom* (1995) 21 EHRR 97.

<sup>54</sup> 'Study on targeted killings', above, paras 32 and 74.

<sup>55</sup> See, for example, 'Study on targeted killings', above, paras 87-92.

<sup>56</sup> See, General Comment 31, State Parties are "[...] required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies [...]. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy", para. 15; and "[w]here the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7)", para. 18. See, also, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in its resolution 60/147 (2006), Principle 3(b). See, for example: *Fedsi v Algeria*, UN Doc CCPR/C/111/D/1964/2010, para 7.2; *Bouzaout v Algeria*, UN Doc CCPR/C/111/D/1974/2010; *Guezout et al v Algeria*, UN Doc CCPR/C/105/D/1753/2008, para 8.2; *Faraoun v Algeria*, UN Doc CCPR/C/109/D/1884/2009, para 7.2; *Hero v Bosnia and Herzegovina*, UN Doc CCPR/C/112/D/1966/2010, para 3.2; *Selimović et al v Bosnia and Herzegovina*, UN Doc CCPR/C/111/D/2003/2010; and *Al-Skeini and Others v UK* (2011) 53 EHRR 18, especially paras 171-172.

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deceased person's family with equal and effective access to justice in order to seek and obtain effective remedies and reparation.<sup>57</sup>

34. States have a supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life, including by collective measures to strengthen international peace and security.<sup>58</sup>

### IV. The death Penalty

35. The ICJ opposes the death penalty unconditionally and in all circumstances and considers that its imposition in all cases is a violation of the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.
36. The ICJ encourages the Committee to note, in the General Comment, the world-wide trend towards abolition and the repeated call in multiple resolutions by increasingly large majorities of the General Assembly on States which retain the death penalty to impose a moratorium, with a view to the abolition of capital punishment.<sup>59</sup> In addition to the General Assembly, this trend extends to, the UN Secretary-General, the Office of the High Commissioner for Human Rights, the Council of Europe, the Inter-American Commission on Human Rights.<sup>60</sup> At its 56<sup>th</sup> session the African Union adopted a Protocol for the abolition of the death penalty. The Committee should underscore that the Covenant was adopted not only before the second optional protocol, but before the prohibitions were established under regional treaties. For the 81 States Parties to the Second Optional Protocol to the Covenant, as well as for the significant number of other States that have abolished the death penalty under domestic law, the provisions of article 6(2) already are inoperative.
37. The ICJ would consider it appropriate, for the Committee to highlight that States should move toward a moratorium in view of abolition and the article 6(2) provisions are to be construed as having only temporary and provisional effect until such time as a moratorium or abolition has been accomplished. Furthermore, in relation to the meaning of "most serious crimes" in Article 6(2), (listed in Paragraph 8(b) as one of the issues to be addressed in the General Comment), the ICJ urges the Committee to adopt an approach similar to that of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions. Following an exhaustive study of the jurisprudence of UN Bodies, in 2007, the Special Rapporteur clarified that this should be understood to mean that crimes punishable by death must be limited to those in which it is proved that "there was an intention to kill and which resulted in the loss of life".<sup>61</sup> In 2012, including in the light of the recognition of the prohibition of the mandatory death sentences in international human rights law,<sup>62</sup> the Special Rapporteur further

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<sup>57</sup> ICCPR, Article 2(3); Basic Principles on the Right to Remedy and Reparation, above, Principle 3(c) and (d); Updated set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1 (2005), Principles 2 and 4; and *Bamaca Velasquez v. Guatemala*, IACtHR (2000), para 197. See, for example: *Kožljak v Bosnia and Herzegovina*, UN Doc CCPR/C/112/D /1970/2010; and *Duric v Bosnia and Herzegovina*, UN Doc CCPR/C/111/D /1956/2010.

<sup>58</sup> General Comment No 6, above, para 2. See also General Comment 14, para 2.

<sup>59</sup> E.g. UN General Assembly [resolution 67/167](#), para 4(d)

<sup>60</sup> [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/115.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/115.asp)

<sup>61</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. [A/HRC/4/20](#)(2007) paras 53, 65.

<sup>62</sup> E.g., *Thompson v St Vincent*, UN Doc. CCPR/C/70/D/806/1998 (2000), para 8.2; *Kennedy v Trinidad and Tobago*, UN Doc CCPR/C/74/D/845/1998 (2002) §7.3, *Carpo et al v The Philippines*, UN Doc. CCPR/ C/ 77/D/1077/2002 (2003) §8.3, *Larrañaga v The Philippines*, UN Doc. CCPR/C/87/D/1421/2005 (2006) §7.2, *Mwamba v Zambia*, UN Doc. CCPR/C/98/D/1520/2006 (2010) §6.3; Inter-American Court: *Hilaire, Constantine, Benjamin et al v Trinidad and Tobago*, (2002) §§84-109, *Boyce et al v Barbados*, (2007) §§47-63, *Raxcacó-Reyes v Guatemala*, (2005) §§73-82; *Jacob v Grenada* (12.158), Inter-American Commission (2002) §§70-71.



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clarified that this safeguard "should be understood to mean: 'In countries which have not abolished the death penalty, capital punishment may be imposed **only for intentional killing, but it may not be mandatory in such cases**.'"

38. Finally, the ICJ requests the Committee to ensure that the new General Comment elucidates the following in respect of the retention, imposition and the carrying out of capital punishment in connection with real or purported engagement in consensual sexual relations.
39. Laws criminalizing real or purported engagement in consensual sexual relations, including extramarital sex and premarital sex -- whatever the sexual practice, proclivity and the gender identity or expression and/or sexual orientation of the persons concerned -- contravene international human rights law and standards, including the Universal Declaration of Human Rights, the Covenant and the International Covenant on Economic, Social and Cultural Rights. These core global instruments each affirm the universal and inalienable rights to human dignity, equality and non-discrimination.
40. Legal provisions criminalizing consensual sexual relations necessarily result in violations of, and generally impair the exercise of, a number of rights. These include the rights to dignity; equality, including equality before the law and equal protection of the law; non-discrimination; liberty and security of person; privacy; opinion and expression; association and peaceful assembly. They may also often lead to denials of the right to access health services and care without discrimination. In addition, although such laws may be gender neutral and may not directly discriminate against women, in practice their application and enforcement often disproportionately and discriminately affect women's enjoyment of their rights.
41. Moreover, the retention, imposition and the carrying out of capital punishment in connection with real or purported engagement in consensual sexual relations contravene the right to life and freedom from cruel, inhuman or degrading treatment or punishment.