

Comments of the Netherlands to the Draft General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on Right to Life

1. The Government of the Netherlands welcomes the initiative by the Human Rights Committee to prepare a revised General Comment on the Right to Life. In response to the Committee's call for comments the Government of the Netherlands would like to submit the following comments on the draft text.

General

2. The Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to Life is based on an expansive scope as regards the interaction between article 6 and other provisions in the ICCPR. This runs the risk of contradicting General Comments already issued or making the provisions of the ICCPR codependent instead of independently interactive across the ICCPR as a whole. The Netherlands requests the Committee to pay special attention to this.

Specific

3. Paragraph 2 refers to 'other public emergencies'. The Netherlands assumes that the Committee does not intend to expand the scope of article 4 of the Covenant and requests to add the wording 'which threatens the life of the nation'. This would be in line with the Committee's views set forth in General Comment 6 (1982) and paragraph 68 of the present draft text ('public emergency').

4. In paragraph 3, it is unclear what is meant by 'dignity' ('a life with dignity') in the context of the views of this draft General Comment as regards the right to life and the ICCPR as a whole. Therefore, the Netherlands suggests clarifying this phrase.

5. In paragraph 7, the Netherlands would like to see a reference to the criteria set out by the ECtHR in *Osman v. the UK*. This case contains a number of crucial criteria, conditions, and limitations as regards the obligation of States to refrain from engaging in conduct resulting in arbitrary deprivation of life. The ECtHR ruled that 'not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing'. The determining factor in the question whether the State is under a positive obligation to protect in a specific situation is whether 'the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.' This positive obligation only exists under certain, strict circumstances. Leaving out these criteria, conditions and limitations would render this obligation unworkable and unrealistic.

The Netherlands would therefore welcome a revision of this paragraph that incorporates a reference to the criteria set out in *Osman v. the UK* to ensure that this section is in line with the case law of the ECtHR. This comment equally applies to paragraph 22 of the present draft.

6. Paragraph 8 of the draft text deals with 'enforced disappearances'. It seems a bit odd that the Committee takes up this topic as the first substantive issue, as it does not belong to the core of the right to life. The Netherlands would see it more fit to discuss this topic later in the revised General Comment.

7. In paragraph 9, the Committee sets out its views on the right to life of pregnant women. The Netherlands welcomes this and supports the Committee's view that State parties should provide access to safe abortion and not criminalize girls and women who have undergone an abortion, nor the service provider. The Netherlands also welcomes that State parties should take measures to prevent unplanned pregnancies through adequate information and services and the recognition of their reproductive rights.

8. In paragraph 10, it is suggested to leave out the term 'catastrophically', as this would set an unduly high threshold.

9. In paragraph 11, the Netherlands welcomes a revision of the first sentence, and suggests the following wording:

When private individuals or entities are empowered or authorized by a State party to employ force with potentially lethal consequences, the State party is under an obligation to *take measures to* ensure their compliance with article 6 and *may be* responsible for any failure to comply with the provisions of article 6.

The rationale behind this is that article 6 cannot be interpreted in such a way that a State would automatically be responsible for a violation of the right to life by a private individual or entity empowered or authorized by that State party to employ force. Under the law of State responsibility, such responsibility would only result if the person or entity were acting in that capacity in the particular instance. There is nothing in article 6 that suggests this would be different in the context of the right to life.

10. In paragraph 12, the Netherlands would prefer to see the following modifications. The use of the term 'lacking in human compassion' in the second sentence of this paragraph is too vague. Furthermore, its meaning and scope in relation to the requirements of International Humanitarian Law (IHL) (including art. 36 of the First Additional Protocol to the Geneva Conventions of 1977 (AP 1)) or the requirements under the ICCPR are unclear. As regards the suggested third sentence, the Netherlands is of the opinion that this sentence should not be included in the paragraph. The references in this sentence conflate the use of autonomous technology and (the prohibition of) extrajudicial killings. The first is a concern in relation to the technology itself (and should be addressed *inter alia* via art. 36 of AP 1), while the second is a method of operation that is not dependent on, nor automatically derives from, the means by which those acts are carried out. More generally, this paragraph conflates the requirements under IHL and those under international human rights law, far beyond the complementary nature of those two bodies of law.

11. As for paragraph 13, the Netherlands would like to see this entire paragraph deleted for the following reason. The paragraph greatly expands the scope and comments of General Comment 14 and significantly extends and expands the views expressed by the ICJ in its advisory opinion into a prohibitive approach that is incompatible with the state practice of a large number of States, including of all the member States of the North Atlantic Treaty Organization.

12. In paragraph 14, the Netherlands advises to expand the reference to 'law-enforcement agents' as those who may use less-lethal weapons to public agents in general. Not all public agents authorized to use weapons (even outside the scope of an armed conflict) are necessarily law-enforcement agents but may be acting in support of (and under the direction and authority of) law-enforcement agents. Such situations include military support to civilian authorities as prescribed and governed by law in some States (including the Netherlands).

The last sentence of this paragraph, as currently formulated, could be read as suggesting that less-lethal weapons can never be used during demonstrations and situations of crowd control. It does not reflect the fact that such situations can deteriorate quickly and that under certain circumstances the use of less-lethal weapons might be necessary. What should be determinative is not the type of situation, but whether the use of certain means is necessary and proportional. The current wording could discourage consideration of deployment and use of less lethal weapons, leading to there being no alternative for the use of lethal weapons. This would be inconsistent with the text accompanying footnote 46 in the present draft text.

Finally, the reference in footnote 34 presumably should be to the Concluding Observations of 2002 (CCPR/CO/74/SWE), rather than of those of 2012.

13. In paragraph 15, the Netherlands would like to see that the Committee clarifies that for article 6 to be applicable, the test set out in article 2 of the ICCPR should also be met. This paragraph rightly underlines that States are only responsible for conduct that violates the ICCPR, including Article 6, when that conduct is attributable to a State party. Although this may be unintentional, this could be

read to suggest that this is necessary and sufficient for Article 6 to be applicable in a specific case. This is however not the case. For the article to be applicable to a specific individual, that individual must be within the territory and subject to the jurisdiction of a State party in accordance with article 2 of the Covenant.

14. In paragraph 18, it is unclear what the phrase 'such as protecting private property' encompasses. Does it extend to government property representing a vital security interest (e.g. military weapons depots, critical command, control, communication, computers and intelligence (C4I) nodes, depots or buildings containing highly classified information representing vital security interests of the State, etc.) or would the use of force in defending such property be considered proportionate if the threat against that property is of sufficient gravity? The Netherlands would like to see a clarification on this point.

15. Paragraph 20 deals with two different procedures that, in the opinion of the Netherlands, should not be combined in one paragraph. It is suggested therefore to divide the text into two separate paragraphs, one dealing with the death penalty and one dealing with other procedures.

16. In paragraph 21, the first sentence seems to be formulated in rather absolute terms. In the view of the Netherlands, more differentiation is called for and the Committee is requested to revise the text to that effect. The example of 'the use of force resulting in the death of demonstrators exercising their right of freedom of assembly' already shows the need for more differentiation, since incidental or accidental loss of life resulting from riot control activities cannot realistically be considered 'arbitrary', and is even recognized in article 2, paragraph 2 ECHR. Here it is suggested to refer to 'the *intentional* use of deadly force'.

17. As for paragraph 22, the Netherlands wishes to refer to its comment on paragraph 7.

18. As for paragraph 26, the Netherlands suggests deleting the second sentence of paragraph 26 of this General Comment. It is unclear which activities, besides the activities taken by corporate entities, are referred to in this sentence. Additionally, the text of paragraph 26 referring to corporate entities goes beyond the UN Guiding Principles on Human Rights and Business, which does not require States to regulate extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.

19. The current text of paragraph 27, and in particular the last sentence, fails to indicate what effect the measures ought to have. Instead, the paragraph only lists measures to be taken, which might not be realistic or appropriate in every situation. The Netherlands therefore suggests describing the effect that the adopted measures should have, while leaving the choice of means at the discretion of the States in question and based on the specific circumstances of the individual cases.

20. In paragraph 28, the phrase 'ensuring access of persons with disabilities to essential goods and services' is formulated too broadly. The Netherlands would like to see it limited to 'essential *facilities* and services', which is in line with article 9 of the CRPD.

21. In paragraph 30, footnote 97 refers to a case of severe pollution in Nigeria, and simultaneously to paragraph 65 of the present draft text. However, paragraph 65 has a much wider scope than such life threatening pollution of the environment, as it includes environmental degradation, climate change and non-sustainable development.

It is also unclear what the phrase 'may eventually give rise to', and subsequently paragraph 30 as a whole, encompass precisely. This paragraph refers to both short-term and long-term measures. It should be clarified when a measure is considered short-term and when it is long-term.

In addition, the reference to 'massive cyber attacks' needs further elucidation and substantiation, e.g. by defining this term and relating it to physical effects caused by such attacks or by clarifying which elements of the (vital) infrastructure of a State must be affected for this to be relevant for the right to life.

As regards paragraph 30, the Netherlands also prefers deleting the suggested reference to progressive realization, as this fits more within the sphere of economic and social rights. It seems more logical to approach the right to life from the perspective of positive obligations of States in this respect.

22. In paragraph 32, the Netherlands suggests to reconsider the reference to 'rigorous', since it seems that there should be a focus on the necessity that autopsy must be effective in terms of providing evidence or proof.

23. In paragraph 33, it is suggested to replace the first sentence with the following text:

The State should refrain from the intentional and unlawful taking of life. The State should also take appropriate steps to safeguard the lives of those within its jurisdiction. However, such an obligation has to be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities.

The presumption and reversal of burden of proof in the draft text does not seem reasonable. An unnatural death under these circumstances is often linked to an unavoidable case of suicide. It is odd that the consequences are also linked to this situation. The above suggested text is in line with the case law of the ECtHR.

The second sentence of this paragraph ("States parties also have a heightened duty... right to life by State authorities") covers a different situation and the Netherlands would therefore suggest inserting this sentence in a separate paragraph.

24. In paragraph 34, the Netherlands suggests to align the wording of the final sentence with the wording from the communication that is referred to in the footnote:

'When relying upon the assurances of treatment contrary to article 7...'

In addition, the final wording of the last sentence of paragraph 34 ('from the moment of removal onwards') seems unlimited while it cannot be that a State is infinitely bound to certain commitments. The Netherlands would welcome a revision of this sentence that includes a limitation in time.

25. In paragraph 35, it is suggested to delete the phrase 'origin access to refugee or other individualized status determination procedures', as access to asylum procedures should not fall within article 6. State parties must, however, offer all asylum seekers protection against refoulement whenever there is a real risk of a violation of their right to life.

26. In paragraph 38, it is suggested to insert 'unilaterally', after 'cannot', in the second sentence. A treaty that does not contain any provisions regarding its termination cannot be terminated unilaterally, unless one of the limited grounds recognized under the law of treaties (as codified in the Vienna Convention) would apply.

27. In paragraph 45, the Netherlands would like to see the reference to 'handcuffed during trial' restricted or deleted, as it is unclear whether handcuffing a violent and (therefore) dangerous suspect during trial will constitute a failure to respect the presumption of innocence, even if a security assessment indicates a significant risk of the suspect becoming a danger to him- or herself or others in the court.

28. With regards to paragraph 65, the Netherlands would like to make the following remarks:

The Declaration from 1972 referred to in footnote 248 does not mention the present-day terms such as climate change and non-sustainable development. The Netherlands would encourage the Committee to be more precise in this respect.

The document referred to in footnote 249 does not contain the term "precautionary principle", but rather refers to the "precautionary approach". Whether the precautionary principle as an unwritten principle of international law exists, and if so, what it entails is a matter of debate. The Netherlands

would therefore welcome a revision in line with the term used in the document referred to in the footnote.

Furthermore, the Netherlands would like to point out that these suggested (very specific) obligations of States parties broaden the scope of the right of life of individuals beyond the wording of article 6 and previous general comments nos. 6 and 14 in which there is no mention of the right to life implying the obligation of States parties to protect the environment against harm and pollution. The Netherlands would welcome more clarification. E.g. is the failure to conduct an environmental impact assessment for an activity likely to have a significant impact on the environment an infringement of the right to life, even in the absence of a specific obligation to conduct an environmental impact assessment?

29. In paragraph 66, the wording of the sentence '[t]his includes persons located outside any territory effectively controlled by the State who are nonetheless impacted by its military or other activities in a [direct], significant and foreseeable manner' is vague and does not provide more clarity on the meaning of Article 6 or other parts of the Covenant. On the contrary, it is likely to lead to more confusion. To the extent that a General Comment on Article 6 should go into the scope of application of the Covenant at all, it should track the language of General Comment 31 as closely as possible. More specifically, "impacted" potentially has a very broad meaning, covering situations, which in our view do not fall within the scope of the Covenant, while "jurisdiction" is an essentially territorial notion. Consequently, conduct performed or producing effects outside of a State party's territory can only constitute an exercise of jurisdiction in exceptional cases. For example, the mere fact that a bullet hits an individual, missile, or rocket fired by armed forces does not bring that individual within the power or effective control of the State party. We believe that in this regard the case law of the European Court of Human Rights, and in particular *Bankovic and others v. Belgium and 16 other States*, should be taken into account. A clear distinction must be maintained between the question of attribution of conduct to a state for the purposes of state responsibility on the one hand, and the question of whether an individual falls within the territory and jurisdiction of a State party in the sense of Article 2, paragraph 1, of the Covenant on the other. The fact that conduct that affected an individual can be attributed because that conduct was under the effective control of a State party, does not necessarily mean that the individual affected by that conduct was within the jurisdiction of that State party. The Netherlands would therefore welcome a deletion of the second sentence of paragraph 66.

On a more editorial note, it can be noted that the reference to 'distress in sea' in paragraph 66 should read 'distress at sea'. The Netherlands would further like to mention that while the International Convention on Maritime Search and Rescue aims at protecting life at sea, this is a rather different concept than the obligations derived from effective control, etc., establishing jurisdiction in the sense of art. 2(1) of the ICCPR. The provisions of UNCLOS as regards the high seas also do not readily allow application of the concept of "jurisdiction" over areas of the high seas. Therefore, the Netherlands would welcome a deletion of the reference to 'an area of the high seas over which particular States parties have assumed de facto responsibility, including pursuant to the relevant international norms governing rescue at sea'.

30. Finally, the Netherlands would like to make the following remarks to paragraph 67:

It is proposed to delete the phrase 'authorized and regulated by and', in the third sentence. These words are redundant, as they are already covered by the words 'consistent with'. Use of force consistent with international humanitarian law is by definition also authorized and regulated by that law. Including this wording is likely to lead to confusion, because there are no IHL rules that explicitly authorize use of force against legitimate military objectives, including combatants and persons directly participating in hostilities. Such authority however is a fundamental principle underlying the whole system of IHL.

The Netherlands would like to see deletion of the statement '[b]y contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and persons hors de combat, including the targeting of civilians and civilian objects, indiscriminate attacks, failure to apply adequate

measures of precaution to prevent collateral death of civilians, and the use of human shields, violate article 6 of the Covenant'. This statement is overly broad and absolute. Not every practice inconsistent with IHL and entailing a risk, however small, to the lives of civilians or persons *hors de combat* is necessarily a violation of Article 6 of the Covenant. Practices inconsistent with the specific examples of IHL principles, such as targeting civilians (note that the term of art in IHL is "attacks" on civilians) clearly would constitute a violation of Article 6, but the same is not necessarily true for all other rules and principles of IHL. In any event, the text should not imply that all collateral deaths would constitute a violation of art. 6 ICCPR, since such an interpretation would clearly be incompatible with the provisions of IHL.

Lastly, the Netherlands does not share the view of the Committee that '[s]tates parties should [, subject to compelling security considerations,] disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether non-lethal alternatives for attaining the same military objective were considered'. This obligation cannot legally be derived from either the ICCPR or the provisions of IHL. IHL does not require disclosing criteria for attacking with lethal force, and this cannot be considered realistic in the face of the realities of military operations (including, as one of many reasons, the large number of individual uses of force within an operation or armed conflict as a whole). On the contrary, IHL takes account of the need for operational security during armed conflicts. [Disregarding]/[Not acknowledging] this would in effect make it impossible to conduct military operations during armed conflict. The widespread classification of Rules of Engagement used by armed forces, for example, is a clear reflection of this. Therefore, the Netherlands suggests the deletion of this sentence.