Human Rights Committee, Draft General Comment No. 36
on Article 6 of the International Covenant on Civil and Political Rights – Right to life

COMMENTS BY THE GOVERNMENT OF CANADA

1. The Government of Canada appreciates the work of the Human Rights Committee in monitoring States Parties' implementation of the *International Covenant on Civil and Political Rights* ("the Covenant"). Canada wishes to thank the Committee for the opportunity to comment on Draft General Comment No. 36 on the right to life ("the Draft General Comment").[1] Canada welcomes constructive dialogue and engagement between the United Nations treaty bodies and States Parties on issues such as the content of General Comments.

2. Canada recognises the independence and impartiality of the Committee, and its ability to issue General Comments. Canada reiterates, however, that General Comments are capable only of providing guidance to States Parties in their interpretation of their obligations. The Comments do not create binding legal obligations in and of themselves, nor do they reflect an interpretation of the Covenant that is necessarily agreed upon by States Parties.

3. The specific comments below are not exhaustive, but rather highlight areas of concern. Silence in respect of other areas does not constitute acquiescence in the Committee's interpretation of States' obligations. Canada has seven main areas of comment in relation to the Draft General Comment.

4. As a general comment, Canada recommends that the Committee clearly distinguish between obligations under Article 6 and what the Committee considers to be best practices for implementation of Article 6. Canada recommends reserving the verb "must" when describing obligations and using the verb "should" when describing best practices.

5. Article 6 does not provide the authority for the Committee to expand the scope of measures required by the Covenant to prevent violations of the right to life. It is appropriate for the Committee to recommend effective measures and "best practices". The Committee should refrain from intimating that these measures are legally required to be adopted by States Parties pursuant to Article 6. A General Comment should not endeavour to alter the plain and ordinary meaning of treaty provisions, or to expand the obligations they contain beyond the scope of States' consent.

6. Canada has observed that Draft General Comment raises issues that fall more squarely within other bodies' mandates, particularly the mandates of the Committee against Torture and the Committee on Economic, Social and Cultural Rights. Canada urges this Committee to focus on its core mandate.

[1] CAT/C/60/R.2/General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22. Adopted by the Committee on first reading on 6 December 2016.

(1) ***Comments concerning the extraterritorial application of the Covenant***

Paragraphs 26 and 66

7. As a State Party, Canada has undertaken to respect and to ensure the Covenant rights of all individuals within its territory and subject to its jurisdiction. Article 2(1) of the Covenant states clearly that a State Party has the obligation to respect and ensure the Covenant rights of all individuals within its territory and subject to its jurisdiction. Article 2(1) reflects the principle that the jurisdictional competence of a State is primarily territorial. Exceptions to that general rule are generally defined and limited by the sovereign territorial rights of the other relevant States. The Committee's interpretation of Article 6 attempts to expand the scope of the Covenant beyond the territory under the jurisdiction of the State. Such an interpretation would impinge on well-established principles of sovereignty. Canada requests that the General Comment reflect the exact language of Article 2(1) of the Covenant.

(2) ***Canada's position on the Death Penalty under the Covenant***

Paragraphs 5, 6, 16-17, 34 and 55

8. The right to life is fundamental. Canada opposes the death penalty. Canada has abolished the death penalty and encourages the abolition of the death penalty internationally. Where the death penalty is still in use, Canada advocates full respect for international human rights, and other safeguards and standards, including respect for due process and fair trial rights. Canada also seeks clemency for every Canadian facing the death penalty abroad.

Comments on Specific Paragraphs

9. In paragraph 5 of the Draft General Comment, Canada agrees with the Committee that the prohibition on "arbitrary" deprivations of life in Article 6 places constraints on the imposition of the death penalty, such as its imposition at the outcome of unfair legal processes.

10. In paragraph 6, Canada would focus the definition of "deprivation of life" on intention, rather than a "deliberate… act or omission". Thus, Canada would rephrase the sentence as follows:

> "Deprivation of life involves the termination of life through a harm or injury to the person that is caused by another's act or omission, where that termination of life was either intentional or was a reasonably foreseeable and preventable outcome."

11. The imposition of the death penalty often amounts to torture or cruel, inhuman or degrading treatment or punishment. Canada takes the view that the relationship between the death penalty and the Article 7 prohibition of torture, cruel, inhuman or degrading treatment CIDTP) or punishment is evolving, especially in light of the heightened obligations to prevent and ensure accountability for torture and other CIDTP that apply to States Parties to the Convention against Torture. Canada broadly agrees with the approach taken by the Committee in paragraph 55.

(3) Obligations in relation to non-State actors

Paragraphs 7, 11, 13, 25, 26, 27-31, 32, 57, 68

12. In Canada's view, the Draft General Comment would benefit from a more careful articulation of States parties' obligations to take reasonable measures to protect individuals from threats to their life by non-State actors, as distinct from the discussion of Article 6 as it applies to governmental action.

13. As noted above in paragraph 4, Canada requests that the General Comment clearly distinguish between obligations under Article 6 and what the Committee considers to be best practices for implementation of Article 6. This recommendation is particularly relevant to the parts of the General Comment discussing obligations to prevent and address harm by non-State actors.

14. Where the General Comment identifies positive obligations on the State to prevent or address harm by non-State actors, Canada requests that the Committee clearly explain the source of the obligation, with reference in particular to the language of the Covenant (e.g. Article 2) and the *Vienna Convention on the Law of Treaties*.

15. The Draft General Comment mixes the analysis of State and non-State action, for example when it refers to an obligation extending "to all threats that can result in loss of life". Canada does not view the Draft General Comment as providing clear or consistent guidance to States Parties on the scope of their obligations with respect to State and non-State action.

(4) The relationship between Article 6 and other obligations

Paragraphs: 3, 8, 30, 35, 63, and 65

16. Canada has serious concerns about the Draft General Comment's approach to the relationship between Article 6 and other Covenant obligations, as well as the relationship between Article 6 and other areas of international law. Canada regrets that the Committee has described Article 6 as encompassing many protections already protected under the rubric of other civil, political, economic, social and cultural rights. Its approach in the Draft General Comment is too expansive and does not provide helpful guidance to States on the implementation of their Article 6 obligations. Issues that are outside the scope of Article 6, such as enforced disappearances, torture and CIDTP, should be reserved for another Draft General Comment. Similarly, Canada urges the Committee to restrict its comments to the substantive and procedural obligations under the Covenant, rather than what is required under other branches of international law, such as refugee law.

Comments on Specific Paragraphs

Paragraph 65: The right to life and environmental protections

17. As a strong supporter of effective measures to support, protect and promote both human rights and environment protections, Canada fully recognizes the importance of protecting the environment and the positive impact this may have on the enjoyment of human rights. Nevertheless, Canada also notes that the importance of these issues should not lead us to confuse the relationship between the human rights and environmental protection. In this context, Canada has some concerns with how paragraph 65 addresses the right to life and environmental degradation. In particular, while Canada fully recognizes that Article 6 dealing with the inherent right to life is a key provision of human rights law, Canada also notes that it seeks to ensure that no one is arbitrarily deprived of his or her life without legal protection or recourse. As such, the overall premise of paragraph 65, which links environmental degradation, climate change and the undefined concept of non-sustainable development to the right to life, is not supported by the text of Article 6.

18. In addition, this paragraph attempts to overlay States Parties' right to life obligations onto international environmental obligations without legal justification. Canada appreciates that States carefully negotiate multilateral environmental agreements ("MEAs") and agree upon specific international environmental obligations to address specific environmental issues with a view to promoting and realizing overarching objectives of protecting human health and the environment. Nevertheless, the right to life is not defined by environmental considerations and threats such as those suggested by paragraph 65. Rather, international environmental obligations involve a careful balancing of interests, trade-offs and reasonable measures. The notion that Article 6 should "reinforce" international environmental obligations imposes a level of obligation on States that international environmental law does not contemplate and that States have not accepted under MEAs.

19. Canada takes issue with the final sentence of paragraph 65 because it suggests that the only matters relevant to enjoyment of the right to life are environmental measures taken by States, which is not the case. There are other matters relevant to the enjoyment of the right to life. Finally, Canada notes that the reference to precaution at the end of paragraph 65 should be in terms of the "precautionary approach" consistent with the text of the Rio Declaration.

Paragraphs 3, 30, 63, and 65: Article 6 and economic, social and cultural rights

20. Canada disagrees with the Committee's assertion that the right to life includes a right to a life with dignity to the extent that this could be read to encompass certain socio-economic entitlements. Economic and social rights are protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR). Canada emphasizes that any discussion of the relationship between Article 6 and ICESCR rights must recognise that the ICESCR imposes a different standard of implementation of States Parties' obligations, which is progressive realization, as described in article 2(1) of ICESCR.

(5) Comments concerning the relationship of the Covenant to international humanitarian law

Paragraphs 11, 12, 67, 70 and 71

21. In relation to paragraph 11, Canada supports the "Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict"; however, this is not a legally binding document. States may not always be directly responsible for the actions of private individuals or entities. The Montreux document sets out circumstances to consider when determining responsibility.

22. Canada would insist on removing paragraphs 12, 67, 70 and 71. Canada would emphasize that international humanitarian law (IHL) is *lex specialis* during armed conflict, and IHL compliance is therefore the main consideration when assessing compliance with applicable human rights law in such situations. IHL is the appropriate body of law for consideration of the study, development, acquisition or adoption of a new weapon or weapon system. *Jus ad bellum* is governed by the United Nations Charter and customary international law, and compliance should therefore be assessed with reference to those bodies of law.

(6) Interim Measures Requests

23. Canada's next comment is on the nature of interim measures requests. The Draft General Comment suggests that the Committee's interim measures requests are binding on States Parties. Canada does not agree with this proposition. It is not accurate to characterize these interim measures requests as legally binding at international law. There is nothing in the plain text of the Covenant or the Optional Protocol to suggest that the Committee's requests are intended to be binding, and no record of State practice to indicate that this is an interpretation of the Optional Protocol accepted by States Parties.

24. Canada recognises the usefulness of the issuance of interim measures requests in order to avoid irreparable harm pending the Committee's consideration of a communication, and therefore takes indications of interim measures seriously and gives them careful consideration. However, Canada reiterates that interim measures requests, like the Committee's views, are not legally binding. The legal nature of interim measures in international law is dependent on the legal nature of the ultimate decision. As an illustration of this, interim measures of the International Court of Justice and of the European Court of Human Rights are binding because of the binding nature of the final decisions these courts are empowered to make.

25. Canada complies in good faith with its obligations under the Covenant and the Optional Protocol. Canada gives the views, recommendations, and requests of the Committee serious consideration. Canada recognises that pursuant to the principle *pacta sunt servanda* – codified in Article 26 of the Vienna Covenant on the Law of Treaties – States Parties are required to give effect to the obligations under the Covenant and the Optional Protocol in good faith, which in turn leads to an obligation to cooperate with the Committee by giving careful considerations to its views. However, Canada is concerned that paragraph 50 of the

Draft General Comment goes beyond what is required of States Parties when it states that "Failure to implement such interim measures is incompatible with the obligation to respect in good faith the procedures established under the specific treaties governing the work of the relevant international bodies."

26. Canada maintains its position that the issuance of interim measures requests should be subject to strict criteria. Interim measures requests should only be issued for communications in cases of real urgency and where there is a demonstrated risk that the individual will suffer irreparable harm. An interim measures request is not appropriate for communications that fail to demonstrate the basis for an alleged rights violation.

(7) The standard of risk

Paragraphs 15, 34, and 59

27. In relation to paragraph 15, Canada insists on the use of a consistent standard of risk needed to establish a *prima facie* case in the individual communications process. Canada would also support clearly indicating that this is a discussion of the individual complaints process. Canada would therefore rephrase paragraph 15 as follows:

> Individuals claiming to be victims of a violation of the Covenant, for the purposes of article 1 of the Optional Protocol must show, however, that their rights were violated by acts or omissions attributable to the State Party that is the subject of the individual's communication, or that their rights are under a foreseeable, real and personal risk of being so violated.

28. Similarly, Canada would use the standard of "foreseeable, real and personal risk" in paragraph 34. Canada agrees that general conditions in the receiving State are generally not sufficient to establish a personal and foreseeable risk, but would not foreclose the possibility that there may be cases in which general evidence of pervasive and systemic human rights abuses in the receiving State can form the basis for considering that the person sought faces a substantial risk of torture or mistreatment. Canada would add a reference to assurances and rephrase the first part of paragraph 34 as follows:

> The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries where there is a foreseeable real and personal risk that they would be deprived of their life in violation of article 6 of the Covenant. Such a risk must be personal in nature and cannot derive merely from the general conditions in the receiving State. For example, as explained in paragraph 38 below, it would be contrary to article 6 to extradite an individual from a country that abolished the death penalty to a country in which there is a real, foreseeable and personal risk that the death penalty will be imposed (for example, if no reliable assurances have been provided that the death penalty will not be sought or imposed).

29. More specifically in relation to assurances, Canada agrees with the statement in paragraph 38 that States Parties that abolished the death penalty cannot deport or extradite persons to a

country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained. Canada would also redraft the final sentence in paragraph 34 as follows:

> When relying upon assurances from the receiving State of treatment upon removal, the removing State should engage in a fair assessment of whether such assurances are credible and effective, and consider whether there are adequate mechanisms for ensuring compliance by the receiving State with the issued assurances.

(8) Other comments

30. In paragraph 6, Canada would focus the definition of "deprivation of life" on intention, rather than a "deliberate… act or omission". Thus, Canada would rephrase the sentence as follows:

> "Deprivation of life involves the termination of life through a harm or injury to the person that is caused by another's act or omission, where that termination of life was either intentional or was a reasonably foreseeable and preventable outcome."

31. In addition, Canada notes that the Covenant does not contain any obligation in either Article 2 or Article 6 to provide "the same remedies" for violations by States and abuses by non-State actors. Canada would thus rephrase paragraph 11 as follows, for consistency with the language of Article 2 of the Covenant:

> … They should also ensure that victims of arbitrary deprivation of life by private actors empowered or authorized by the State are granted an effective remedy.

32. Regarding paragraph 49, Canada objects to the overgeneralization of military tribunals as not being "sufficiently independent and impartial". The Covenant requires States to ensure that military tribunals comply with the Covenant, including the fair trial guarantees in Article 14.

33. Canada recommends clarification of paragraphs 32 and 33 regarding investigations. Investigations into violations of Article 6 must be prompt and impartial. Any person whose Covenant rights are violated must have an effective remedy in accordance with Article 2. Moreover, Canada disagrees with the shifting of the burden of proof onto the State when a loss of life occurs in custody. While Canada accepts that the State has the obligation to investigate such losses of life, the burden of proof under Article 6 remains on the person or representative alleging a rights violation. Canada would therefore rephrase paragraph 33 as follows:

> Loss of life occurring in custody, especially when accompanied by reliable reports of an unnatural death, create serious concerns that there has been an arbitrary deprivation of life by State authorities, which requires a prompt and impartial investigation on whether there has been an arbitrary deprivation of life or other human rights violations.

34. Finally, Canada would remove the term “peremptory” in paragraph 69, as this term should be reserved for peremptory norms of customary international law (*jus cogens*).

Conclusion

35. In conclusion, Canada reiterates its appreciation of the opportunity to review the Draft General Comment, and more generally its support for the work of the Committee. Canada avails itself of the opportunity to renew to the Committee the assurances of its highest consideration.

Ottawa
23 October 2017