

Observations of the United States of America
On the Human Rights Committee's Draft General Comment No. 36
On Article 6 - Right to Life

October 6, 2017

1. The United States welcomes the opportunity to respond to draft General Comment No. 36 regarding Article 6 of the International Covenant on Civil and Political Rights (ICCPR) and the right to life,¹ and it appreciates the important work that the Human Rights Committee performs under its mandate as set out in the ICCPR and related Protocols. The United States is firmly committed to carrying out its obligations under the ICCPR and under other human rights treaties to which it is Party. The obligations of a State Party under Article 6 provide important protections for individuals within its territory and subject to its jurisdiction, and the United States supports the Committee's efforts to assist and facilitate States Parties' implementation of their ICCPR obligations.

2. The observations of the United States reflect general observations of overarching concern and do not include a comprehensive catalogue of all issues in the draft comment on which we disagree. With the limited time that the Committee has provided for States Parties to respond, it is not feasible to address fully in our response each of the issues raised, although we do highlight by example some of our most serious concerns. The United States urges the Committee to take the United States' views into consideration in its final general comment on Article 6.

I. General Observations

3. As discussed below, the range of issues the Committee considers to fall within the scope of the inherent right to life and the obligations of States Parties under Article 6 is overly expansive and the Committee provides little or no authoritative legal support or treaty analysis grounded in established rules of treaty interpretation under international law to support many of its positions. The Committee's citations to its own work products, whether in the form of general comments, concluding observations and recommendations, or "views" on Protocol communications, do not in and of themselves provide legal support under international law. They merely represent a collection of the Committee's prior consistent, non-binding views and carry no greater weight or authority than when first published.²

¹ Draft General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, available at http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf.

² See, e.g., U.N. Human Rights Committee, *Annual Report*, p. 151, U.N. Doc. A/43/40 (1988) ("The Committee's decisions on the merits are non-binding recommendations and as such are referred to as 'views' under article 5, paragraph 4, of the Optional Protocol.").

Treaty Interpretation

4. As with any treaty provision, a sound interpretation of Article 6 must be based on established rules of international law regarding treaty interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).³ Of primary importance, under Article 31(1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Furthermore, under these rules, as reflected in Articles 31 and 32, treaties are authoritatively interpreted by the parties themselves through mutual agreement by them all, either in connection with the conclusion of the treaty or subsequently in a manner that establishes all parties’ agreement regarding its interpretation.⁴ The Committee has, however, failed to support its views regarding the meaning of the ICCPR with any treaty analysis grounded in VCLT Articles 31 and 32, and no such support exists.

5. As the United States has stated previously, it is for each State to decide as an exercise of its sovereignty to assume treaty obligations which, once entered into, it has a legal obligation to fulfill.⁵ The United States, for example, becomes bound to treaty obligations that have entered into force at the time it becomes a party by operation of its Constitutional processes. The process involved in the United States’ becoming party to a treaty is closely related to the way the United States approaches questions of how its treaty obligations are to be interpreted and how those obligations might be changed.⁶ As a general matter, under international treaty law, treaty parties could, through provisions in the treaty, agree to allow another entity to render authoritative treaty interpretation or to resolve definitively legal disputes or questions relating to their obligations, but this is not the case for the ICCPR.⁷ States Parties to the ICCPR have not given authority to the Human Rights Committee or to any other entity to fashion or otherwise determine their treaty obligations.⁸

6. The United States has previously observed in its dialogue with the Committee that many of the Committee’s more ambitious opinions appear to reflect an attempt to fill what it may

³ See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. While the United States has signed but not ratified the treaty, it considers the Vienna Convention to be the “authoritative guide” to treaty law and practice. See “Letter of Submittal from Secretary of State Rodgers to President Nixon Transmitting the Vienna Convention on the Law of Treaties,” Oct. 28, 1971, Ex. L., 92d. Cong. 1st Sess. at 1.

⁴ See Observations of the United States of America on the Human Rights Committee’s General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights December 22, 2008 (hereinafter “U.S. Observations on General Comment No. 33”), paragraph 9, available at <https://www.state.gov/documents/organization/138852.pdf>.

⁵ See Statement of Robert K. Harris to the UN Human Rights Committee, July 17-18, 2006, reprinted in Digest of United States Practice in International Law 2006 (hereinafter “Harris Statement,” pp. 284-287 at p. 285, paragraph 2, available at <https://www.state.gov/s/l/2006/98334.htm>.

⁶ *Id.* at 286, paragraph 3.

⁷ *Id.*

⁸ *Id.* See also U.S. Observations on General Comment No. 33, *supra* note 4 at paragraph 9.

consider to be gaps in the reach and coverage of the Covenant.⁹ And indeed, as noted below, some of the positions advanced in draft General Comment 36 purport to interpret Article 6 in ways that were proposed and debated by various negotiating delegations, but were excluded from the final text when agreement could not be reached. If one believes there to be gaps in a treaty, the proper approach to take under international treaty law is to *amend* the treaty to fill those gaps.¹⁰ It is for each Party to decide for itself, as an exercise of its sovereignty, whether it will be bound by what are, in fact, new treaty obligations.¹¹

7. In this regard, it is also of concern that the Committee has looked to interpret or fill what it may consider to be gaps in the ICCPR by importing requirements from other human rights treaties. Any such Committee interpretation, expanding on the terms of the ICCPR itself, is inconsistent with a proper interpretive analysis under VCLT Articles 31 and 32, ignores the express terms of the ICCPR, and fails to consider that not all ICCPR States Parties have ratified these other treaties or otherwise consented to such obligations. For example, the Committee's importation in paragraph 8 of requirements under the International Convention for the Protection of All Persons from Enforced Disappearance and in paragraph 28 of requirements under the Convention on the Rights of Persons with Disabilities, however they may also contribute to the right to life, ignores the terms and scope of application of those treaties. And it is unclear on what basis the Committee would suggest in paragraph 30 an implied duty under Article 6 to address "the general conditions in society that may eventually give rise to direct threats to life" or other health-related measures, as characterized by the Committee under paragraphs 9, 10, and 20 of its draft general comment. State Party obligations with respect to health-related rights, for example, are set forth in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which establishes in its Article 12 the right to the enjoyment of the highest attainable standard of physical and mental health. Given that ICESCR was negotiated and concluded in parallel with the ICCPR specifically to address such rights separately and that States party to ICESCR agreed, pursuant to Article 2 of that Covenant, to take steps "with a view to achieving progressively the full realization" of such rights, there is no basis to infer that the negotiators would have considered such measures to be required or necessary to also give effect to the right to life within the meaning of Article 6. Thus, in the context of the right to health contained in the ICESCR, which is the proper lens by which to examine rights characterized as health-related human rights, there is no obligation as part of that right to give effect to the right to life. The right to the enjoyment of the highest attainable standard of health is not commensurate with a right to be healthy or a right not to succumb to disease. It is, instead, oriented toward the progressive realization, in accordance with a State's available resources, of the right for an individual to enjoy the *highest attainable standard* of health. For these reasons, and bearing in mind the history of the negotiations of the two Covenants, any issues concerning access to abortion (paragraph 9 of the Committee's draft) are outside the scope of Article 6. Although the

⁹ Harris Statement, *supra* note 5 at 286, paragraph 3.

¹⁰ *Id.* at 287, paragraph 3.

¹¹ *Id.*

United States agrees that human rights treaties may be mutually reinforcing, this does not mean that the contents of obligations contained within one human rights treaty can be imputed or read into other human rights treaties. Doing so would render meaningless the right of each State to decide for itself whether to accept particular legal obligations associated with particular human rights treaties.

8. We are particularly concerned about the suggestion in paragraph 65 that obligations of States under the ICCPR and international environmental law depend on each other or are changed by each other in their interpretation or application. The Committee has no mandate to suggest that Article 6(1) obligations “must reinforce” States’ relevant obligations under international environmental law, or that international environmental law should necessarily “inform the contents” of States Parties’ obligations under Article 6(1). Nor can such an interpretation of Article 6(1) find any support in accepted principles of treaty interpretation reflected in VCLT Articles 31 and 32. This would set up an inaccurate description of the legal relationship between the ICCPR and international environmental law, and it would create significant legal uncertainty about the scope and meaning of important environmental obligations if they were reinterpreted based on a separate area of law like the ICCPR. The relevant treaties cover wholly distinct areas (one of which barely existed at the time the ICCPR was negotiated) and do so with different and varied approaches that are tailored to the particular goals of each treaty. Obligations in environmental treaties, for example, generally do not take a human rights-based approach. The ICCPR thus cannot be a lens through which environmental obligations must be viewed, nor vice versa; that would be beyond the intent of the negotiators that created the ICCPR and particular environmental obligations in various agreements.¹²

9. The United States also believes the Committee is mistaken in paragraph 69 in its view that entry of a reservation with respect to Article 6 would be incompatible with the object and purpose of the ICCPR, especially in light of the article’s peremptory and non-derogable nature. The Committee relies solely on its previous General Comment No. 24 for this position. We refer the Committee to the United States’ Observations on General Comment No. 24¹³ for a detailed explanation of why the assertion is contrary to the Covenant and international law.

¹² Moreover, paragraph 65 of the draft refers to the so-called “precautionary principle;” the United States has long opposed such a term, as there is no uniform understanding of precaution that could be said to constitute a “principle,” let alone a legal principle of general applicability.

¹³ See Observations of the United States of America on the Human Rights Committee’s General Comment 24, transmitted March 28, 1995 (hereinafter “U.S. Observations on General Comment No. 24”), reprinted in substantial part in Digest of United States Practice in International Law 1991-1999, available at <https://www.state.gov/documents/organization/139394.pdf>, at pp. 880-881, and generally pp. 878-883 (“It is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations. The proposition that any reservation which contravenes a norm of customary international law is *per se* incompatible with the object and purpose of this or any convention, however, is a much more significant and sweeping premise. It is, moreover, wholly unsupported by and is in fact contrary to international law.”).

Committee Mandate

10. In response to a number of prior general comments, the United States has expressed concerns with the Committee's interpretive practice generally, explaining in detail our view that it is beyond the Committee's authority and mandate and contrary to international law.¹⁴ The United States reiterates those concerns here with regard to draft General Comment No. 36.¹⁵

11. Most recently in 2014, in our observations on draft General Comment No. 35, we stated, "The United States believes the views of the Committee should be carefully considered by the States Parties. Nevertheless, they are neither primary nor authoritative sources of law and the impression should not be given that they are being cited as such." The United States encouraged the Committee at that time "to refrain from categorical statements regarding State Party obligations unless grounded in and referring to the specific text of the Covenant or other sources of treaty interpretation, rather than being based only on observations and comments of the Committee."¹⁶

12. At minimum, the United States would urge the Committee to make explicit at the beginning of any final general comment that it reflects the Committee's views, which are not legally-binding, and that the purpose of the general comment is to provide recommendations to States Parties with regard to their implementation of the Covenant and in fulfilling their periodic

¹⁴ The United States notes in this regard, that in previewing this general comment during an informal meeting with States Parties on July 20, 2017, the Rapporteur for the general comment, Mr. Shany, summarized the Committee's view of its practice as follows: "Although general comments were not binding legal obligations, they were a highly influential source of norms for the Committee; they guided the work of the Committee and impacted its decisions and those of other international entities such as the International Court of Justice; they eventually shaped State practice and treaty interpretation; and they often evolved into customary international law." See Summary record (partial) of the 3400th meeting of the Human Rights Committee, 20 July 2017, paragraph 13, CCPR/C/SR.3400. We do not consider a purpose of influencing other international entities or an evolution of customary international law to fall within the Committee's mandate either under Article 40 or the Protocol, and no general comment should be drafted with such goals in mind.

¹⁵ Previous concerns were initially articulated in 1995 in its observations on General Comment No. 24, submitted in conjunction with presentation of its initial report before the Committee. In that context, the Committee sought to dispense with established rules of interpretation of treaties governing the question of acceptability of reservations and to arrogate to itself authority to make binding legal determinations. The United States responded, "This would be a rather significant departure from the Covenant scheme, which does not impose on the States Parties an obligation to give effect to the Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant." See U.S. Observations on General Comment No. 24, *supra* note 13, p. 879. In our response to General Comment No. 33 in 2008, the United States reiterated that, as a matter of international law, the Committee enjoys only those powers and authorities granted to it by the ICCPR and the Optional Protocol. The Committee is not a body established pursuant to the Covenant that is intended to provide authoritative interpretations of the treaty. Rather, the Committee is intended to assist and facilitate States Parties' implementation of the Covenant. See U.S. Observations on General Comment No. 33, *supra* note 4 at paragraph 9. The States Parties to the Covenant and Optional Protocol remain the authoritative interpreters of the instruments as discussed above. *Id.* at paragraph 12, and *generally* at paragraphs 5-13.

¹⁶ See Observations of the United States of America on the Human Rights Committee's Draft General Comment 35: Article 9, June 10, 2014 (hereinafter "U.S. Observations on Draft General Comment No. 35"), *excerpted in* Digest of U.S. Practice in International Law 2014, p. 179, at paragraph 4, available at <https://www.state.gov/documents/organization/244445.pdf>.

reporting requirements under Article 40. In keeping with its advisory mandate, the Committee should refrain from providing its recommendations in imperative (“must”) or mandatory (“required”) terms. To the extent that the Committee undertakes to express its views regarding States Parties’ obligations or how it believes a provision should be interpreted beyond the terms contained in the treaty text, we urge the Committee to frame any such interpretation as Committee views regarding best practices, and to ensure that the opposing views of States Parties, including the United States, are also reflected in the text of the general comment, in order to avoid the impression that the interpretation advanced is authoritative, legally-binding, or otherwise accepted by the States Parties.

II. General Issues of Overarching Concern

Territorial Scope

13. Throughout the draft general comment, references are made to the application of the Covenant to actions outside the territory of a State Party. Particularly problematic is the assertion in paragraph 66 that Covenant obligations extend to “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.” As the United States has previously advised, the Covenant applies only to individuals who are both within the territory of a State Party and subject to its jurisdiction. This interpretation is the most consistent with the ordinary meaning of Covenant text and its negotiating history, and also accords with longstanding international legal principles of treaty interpretation. The United States has explained the legal basis for this position on a number of occasions and in considerable detail, including in response to the Committee’s General Comment No. 31¹⁷ and draft General Comment No. 35,¹⁸ and during dialogues with the Committee in March 1995, July 2006, and March 2014. The United States refers the Committee to these Observations and to these prior dialogues for further information on this point.

14. We likewise do not agree that an individual on State-Party-registered ships located beyond that State Party’s territorial sea, or on State Party-registered aircraft flying in international airspace (or in another State’s airspace), would be located within the territory of that State Party for purposes of application of ICCPR rights. Merely being on a ship or aircraft registered in a State (and thereby being generally subject to its exclusive jurisdiction on the high seas, for example) does not constitute being in a State’s territory. And with respect to individuals in distress, search and rescue regions are expressly distinct from questions of jurisdiction and

¹⁷ See Observations of the United States of America on Human Rights Committee General Comment 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant, dated December 27, 2007, paragraphs 3-9 (hereinafter “U.S. Observations on General Comment No. 31”), available at <http://2001-2009.state.gov/s/l/2007/112674.htm>.

¹⁸ See U.S. Observations on Draft General Comment No. 35, *supra* note 16 at paragraph 5.

control.¹⁹ Even the reliance on the concept that there are “areas of the high seas over which particular States Parties have assumed *de facto* responsibility” is at odds with fundamental law of the sea principles. We therefore urge deletion of these assertions.

15. Although some States Parties may have accepted somewhat broader jurisdictional obligations as parties to regional human rights conventions,²⁰ or because doing so might correspond with their domestic laws, the United States has not done so. To the extent that there are differing views among States Parties, the Committee has no mandate to resolve them or to interpret authoritatively the Convention’s terms. Thus, we urge the Committee to refrain from any characterization of the jurisdictional and territorial scope of ICCPR obligations that deviates from the express treaty text.

Armed Conflict

16. Paragraph 67 of the Committee’s draft states: “Like the rest of the Covenant, article 6 continues to apply also [to the conduct of hostilities] in situations of armed conflict to which the rules of international humanitarian law are applicable. While rules of international humanitarian law may be relevant for the interpretation and application of article 6, both spheres of law are complementary, not mutually exclusive. Uses of lethal force authorized and regulated by and complying with international humanitarian law are, in principle, not arbitrary. By 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.”

17. The United States disagrees. Although the United States would agree as a general matter that armed conflict does not suspend or terminate a State’s obligations under the Covenant within its scope of application, we do not believe that the Committee’s views, reflected here or in prior general comments addressing military operations, accord sufficient weight to the well-established principle that international humanitarian law (IHL) is the *lex specialis* with respect to the conduct of hostilities and the protection of war victims (*e.g.*, prisoners of war, civilian internees, persons placed *hors de combat*) in any armed conflict. It would appear from the bracketing in the Committee’s draft that not all Committee members agree with the formulation either. We therefore commend for the Committee’s more careful consideration the views we submitted on this issue when it arose in connection with General Comment No. 31 and draft

¹⁹ See International Convention on Maritime Search and Rescue, 1979, done at Hamburg, April 27, 1979, as amended, Annex paragraph 2.1.7.

²⁰ See, *e.g.*, Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”); and Article 1(1) of the American Convention on Human Rights (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”)/

General Comment No. 35,²¹ and urge the Committee to refrain from expressing views regarding the applicability of the ICCPR to any aspect of the conduct of hostilities and the protection of war victims in an armed conflict, which falls beyond its competence and mandate.

18. In this regard, we reject the suggestions and assertions in paragraph 67 of the Committee's draft, including that States Parties should disclose information on the use of weaponry and targeting, the process for identifying military targets, the degree to which it considers non-lethal alternatives, and other details concerning the means and methods of warfare. Although these particular disclosure recommendations are framed in advisory terms, the Committee offers no support for such suggestions or in stating that States Parties "must also investigate allegations of violations of article 6 in situations of armed conflict in accordance with the relevant international standards."²²

19. The Committee begins paragraph 13 of its draft with this unsupported statement: "The [threat] or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and can destroy human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law." As an initial note, the International Court of Justice (ICJ) acknowledged in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons that "[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use" of nuclear weapons as such.²³ The Committee provides no legal support for its speculation; to the contrary, and moreover, these views go far beyond the Committee's mandate under the ICCPR. The questions regarding legality of the threat or use of nuclear weapons or other weapons of mass destruction pertain to the conduct of hostilities and the protection of war victims in an armed conflict and are therefore governed by IHL, as the ICJ indicated in that same advisory opinion ("Whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself").²⁴ The Committee should not seek to opine on issues related to IHL with respect to the study, development, acquisition, adoption, or use of various types of

²¹ See U.S. Observations on General Comment No. 31, *supra* note 17, paragraphs 24-27; and U.S. Observations on Draft General Comment No. 35, *supra* note 16 at paragraph 5.

²² The sole reference cited as "relevant international standards" does not discuss or pertain to situations of armed conflict, nor can it accurately be characterized as "international standards." Rather it is a document produced by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions that was never endorsed, approved, or adopted in its final form by the Human Rights Council or any U.N. body of Member States. The draft general comment also inaccurately refers to it as the "Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2016)," which is not correct in view of its unapproved status. The OHCHR has published an advance version, entitled The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), available at <http://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx>.

²³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 266, paragraph 105(2)(B).

²⁴ *Id.* at p. 240, paragraph 25.

weapons, including non-lethal weapons, nor on the nature of obligations of parties to treaties other than the ICCPR, such as the Treaty on the Non-Proliferation of Nuclear Weapons.

20. In paragraph 71, the Committee asserts: “States parties engaged in acts of aggression contrary to the United Nations Charter violate ipso facto article 6 of the Covenant. Moreover, States parties that fail to take all reasonable measures to settle their international disputes by peaceful means so as to avoid resort to the use of force do not comply in full with their positive obligation to ensure the right to life.” We disagree. First, we do not believe that the right to life in Article 6 creates obligations with respect to any death that would in some way be caused by any violation of international law. As we noted in our comment on the international environmental law, Article 6 must not be understood automatically to “reinforce” other bodies of international law. Moreover, as noted above, the obligation under the ICCPR is to respect and ensure the right to life to individuals within a State Party’s territory and subject to its jurisdiction. Also, as noted above, in addition to the law of armed conflict being the *lex specialis* governing the conduct of hostilities and the protection of war victims in armed conflict, the law of armed conflict is also the *lex specialis* of the law concerning the resort to force. This part of the law of armed conflict is often referred to as the *jus ad bellum*. Moreover, a determination that a State has committed an act of aggression is one that, under the U.N. Charter, is entrusted to the U.N. Security Council, and not the Committee. Paragraph 71 is incorrect and outside the competence and authority of the Committee, and should, therefore, be removed.

Derogation

21. There is no question that the right to life, as codified in Article 6, is a non-derogable right under Article 4(2) of the Covenant, and that it, therefore, continues to apply in any circumstance within the Covenant’s scope of application.²⁵ Regardless of differing views regarding the scope of application, this phrase, “within the Covenant’s scope of application” needs to be added to the second sentence of paragraph 68 for accuracy.

22. Bearing in mind that IHL provides the *lex specialis* with respect to the conduct of hostilities and the protection of war victims in any armed conflict, as a general matter the question of derogation would only be relevant as to action within the Covenant’s scope of application, and not with respect to the conduct of hostilities and the protection of war victims in armed conflict. In addition, although no emergency measure may be adopted in derogation of Article 6, that non-derogation limitation under ICCPR Article 4 only precludes measures applicable to individuals who are both within the territory and subject to the jurisdiction of the State Party declaring the public emergency. The measure would be precluded only to the extent that it would violate obligations within the terms of Article 6, as interpreted pursuant to the rules of treaty interpretation set forth in international law (see Part I, Treaty Interpretation, above). The statement in paragraph 2 of the Committee’s draft that “no derogation is permitted even in

²⁵ See U.S. Observations on Draft General Comment No. 35, *supra* note 16 at paragraph 24.

situations of armed conflict” is imprecise and misleading. This inaccurate reference to armed conflict should be deleted from this introductory paragraph 2, and a reference to a situation of armed conflict could be correctly addressed in paragraph 68 as an example of public emergency.

23. The Committee further states in paragraph 68: “Although some Covenant rights other than the right to life may be subject to derogation, derogable rights which support the application of article 6 must not be diminished by measures of derogation.” An example cited is the right to a fair trial in a death penalty case. Although we agree that a State Party during a declared emergency, within the meaning of ICCPR Article 4, would be required to ensure that any death penalty imposed or carried out within the scope of ICCPR application would continue to be subject to the conditions and limitations under Article 6, this does not necessarily restrict its ability to take measures in derogation of the derogable fair trial guarantees under Article 14. There may well be other alternatives available to ensure conformity with the terms of Article 6. For example, if the State under a declared emergency were to conclude that derogating from fair trial guarantees was “strictly required by the exigencies of the situation,” it might decide to forgo resort to the death penalty for the duration of the emergency. A decision as to what measures would be necessary to ensure compliance with Article 6 and to strictly address the exigencies of the emergency would be for the State Party to determine and implement, consistent with both Article 2(2) and Article 4(2). While the Committee may offer its suggestion and guidance, it would be inappropriate and beyond its mandate to seek to impose one alternative rather than another.

Transfers to Other Countries (Non-Refoulement)

24. As with previous general comments from the Committee addressing other rights, draft General Comment No. 36 states, “The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that they would be deprived of their life in violation of article 6 of the Covenant.” Paragraph 35 goes further in stating, “The obligation not to extradite, deport or otherwise transfer pursuant to article 6 of the Covenant is broader than the scope of the principle of *non refoulement* under international refugee law, since it may also require the protection of aliens not entitled to refugee status.” Corresponding assertions are made in other paragraphs, notably paragraphs 38 and 46 in relation to the death penalty and paragraph 59 in relation to Article 7. The United States strongly disagrees for the reasons stated in its Observations on General Comment No. 31 and General Comment No. 35. As we have stated before, the Committee’s non-binding opinions on this matter have no legal basis in the text of the treaty or the intention of its States Parties at the time they negotiated or became parties to the ICCPR. The only obligations under international human rights and refugee law that the United States has assumed with respect to such transfers are the *non-refoulement* provisions contained in Article 33 of the Convention Relating to the Status of

Refugees (applicable to the United States by virtue of its ratification of the Protocol Relating to the Status of Refugees) and in Article 3 of the Convention Against Torture.²⁶

III. Specific Issues of Concern Related to Article 6(1)

25. The Committee should conform its language throughout draft General Comment 36 to the text of the obligations set out under Article 6(1), which are to ensure, within the scope of application of the treaty: (1) that the right to life “shall be protected by law” and (2) that “no one shall be arbitrarily deprived of his life.” These obligations also must be read in conjunction with the more general obligations under Article 2, in particular under Article 2(2) “[w]here not already provided for by existing legislative or other measures, . . . to take the necessary steps, in accordance with [a State Party’s] constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

26. Article 2(2) is foundational to the reading of any Article setting forth ICCPR-recognized rights. It establishes, as a general matter, that the decision as to the most appropriate means of domestic implementation of ICCPR obligations is left to the internal law and constitutional processes of each State Party. Thus, to the extent that specific conditions, measures or requirements necessary to give effect to an ICCPR right are not expressly set forth in the relevant article, and therefore not an obligation undertaken upon ratification by the State Party, any elaboration of the measures necessary to give it effect are for the State Party to determine and implement in accordance with its laws and any other relevant ICCPR obligations. This is a reflection of a conscious decision of the drafters of the ICCPR, in an effort to protect human rights and secure the widest possible adherence.²⁷

Arbitrary Deprivation of Life

27. Article 6(1) provides that no one shall be arbitrarily deprived of his life. The Committee has undertaken, in paragraphs 18 and 19, to give the word “arbitrarily” a uniform meaning expressed in mandatory terms, by elaborating on how it understands the meaning of the treaty provision. The Committee states that this treaty term “must be interpreted more broadly to include” a list of specific elements apparently drawn from individualized, non-binding findings on communications it has considered under the Optional Protocol, inapplicable jurisprudence of the European Court of Human Rights, and reports of U.N. Human Rights Council Special Rapporteurs. As drafted, these elements appear intended to apply in all contexts, without any reference to or consideration of the differing legal systems and constitutional requirements and standards that may pertain in implementing Article 6(1). The Committee recognizes in

²⁶ See U.S. Observations on General Comment No. 31, *supra* note 17, paragraphs 19-23; and U.S. Observations on Draft General Comment No. 35, *supra* note 16 at paragraph 43.

²⁷ See U.S. Observations on General Comment No. 24, *supra* note 13, p. 880 at paragraph 3.

paragraph 20 that the Covenant does not provide a list of permissible grounds for the taking of a life. For the same reason that the negotiators were unable or unwilling to include such specificity in the treaty, the Committee should refrain from seeking to do so through its general comment practice. As reasonable as these elements may be to consider in adopting domestic measures, assessing self-defense, or justifying the use of force by law enforcement officials in a given situation, it would be more appropriately within the Committee's mandate for it to recommend consideration of such "elements" by States Parties as best practices in implementing their obligations within their legal systems.

28. In pursuing this approach, the Committee is substituting its judgment for that of each of the States Parties who, under the terms of the Covenant, are required to determine the steps necessary in accordance with its constitutional processes, whether by legislative or other means, to give effect to the Covenant rights. Neither the text of Article 6(1), as interpreted pursuant to Articles 31 and 32 of the VCLT, nor its *travaux préparatoires* support a requirement for such specific domestic measures, nor that they be uniform for all States Parties. In fact, the Committee's approach is contrary to what was agreed by the drafters.

29. As the *travaux* reveal, defining States' legal obligations under paragraph 1 while acknowledging that protection of life could not be absolute was a difficult and contentious task throughout the drafting process from 1948 through 1957. The United Kingdom (UK) favored the approach of a broad prohibition coupled with a list of exceptions or justifications for the deprivation of life, including acts such as self-defense, preventing the commission of a crime, or quelling a riot or insurrection.²⁸ Although States initially proposed other possible exceptions to add to this list, many expressed dissatisfaction with this structure, acknowledging that no list could encapsulate all possibilities. The United States opposed such a list as an infringement on domestic law and existing criminal codes.²⁹ It favored the simple affirmation that "no one shall be arbitrarily deprived of life" so as to obviate the necessity of setting out the possible exceptions in detail.³⁰ This debate continued in 1957 in the Third Committee of the U.N. General Assembly between those who supported the simpler approach favored by the U.S. and Chile ("arbitrarily deprived of life") and those who favored the more specific enumeration of exceptions favored by the UK, and later by the Netherlands.³¹ In the end, the majority retained the simpler approach concluding that any enumeration would necessarily be incomplete and tend to convey the impression that more importance was being given to exceptions than to the right itself.³² A number of delegations in the Third Committee also felt the simpler clause that "no one shall be arbitrarily deprived of life" would indicate that the right to life was not absolute and would

²⁸ GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 116 (Marc. J. Bossuyt ed., 1987) [hereinafter Bossuyt]; E/CN.4/SR.139, pp. 5-8 (March 30, 1950).

²⁹ *Id.* at pp 4-5; *see also* U.N. GAOR, 5th Sess., at 8, U.N. Doc. E/CN.4/SR.90, p. 9 (May 18, 1949) (U.S.).

³⁰ U.N. Doc. E/CN.4/SR.97, p. 6 (U.S.) (May 24, 1949).

³¹ *See* Report of the Third Committee, 12th Sess., U.N. Doc. A/3764, paragraph 114.

³² *Id.*; *see also* Bossuyt at 124.

obviate the necessity of setting out the possible exceptions in detail, thus maintaining a compromise that had been reached by the Human Rights Committee.³³ During the course of that earlier Commission debate, many States had expressed interest in leaving individual crimes and exceptions to “the internal machinery of the individual States” and keeping the focus of the covenant “on the much higher level of the international community.”³⁴

Protecting the Right to Life by Law

30. With regard to the general heading, “duty to protect life,” we note that the obligation in Article 6(1) is that “[t]his right shall be protected by law.” The Committee should conform the heading accordingly, as well as any references to this obligation throughout the text.

31. The Committee undertakes in paragraph 22 of its draft to elaborate on this obligation by asserting that, “The duty to protect the right to life by law also includes an obligation for States parties to take appropriate legal measures in order to protect life from all foreseeable threats, including from threats emanating from private persons and entities.” The draft, however, offers no legal support for these assertions or indication of ICCPR State Party agreement with this view. The draft general comment goes further by stating in paragraph 24, “States parties must enact a protective legal framework which includes effective criminal prohibitions on all forms of arbitrary deprivations of life by individuals.”

32. Although it is true that Article 2(2) requires States to adopt legislation and other measures to the extent necessary to give effect to ICCPR rights, neither Article 2(2) nor Article 6(1) specifies the conduct to be criminalized, nor the elements or penalties commensurate with such crimes. Indeed, some of the provisions that the Committee appears to put forward as required would encompass dangers or threatening behavior regardless of whether the conduct to be criminalized results in deprivation of life (*e.g.*, “disproportionate use of firearms,” “blood feuds,” “death threats,” “manifestations of violence” or “incitement to violence”). These types of conduct do not clearly fall within the ordinary meaning of “deprivation of life” under Article 6(1), and although they may be worthy of criminalization, this is not expressly required within the ordinary meaning of Article 6(1). It is reasonable to expect States Parties to take steps to review their criminal codes and to adopt new laws as circumstances and threats as conditions demand;

³³ *Id.*; see also A/C.3/SR.815, paragraph 22 (Chile stating “the records of the debates in the Commission on Human Rights during the drafting of article 6 should be studied in connexion with the current discussion. The word ‘arbitrarily’ for instance, had been accepted in a spirit of compromise after much discussion in order to meet the position of those countries which could not accept the first sentence of paragraph 1 without qualification”).

³⁴ See, for example, U.N. GAOR, 6th Sess., at 12, U.N. Doc. E/CN.4/SR.140 (April 7, 1950) (Uruguay stating: “The draft covenant would become an international convention, as distinct from a penal code concerning crimes committed by individuals. . . . It was not a question of examining individual crimes; that was left to the internal legal machinery of the individual state.”). Chile stated that “in general states dealt satisfactorily” with the legal principle that people do not have a right to kill. While Lebanon supported the UK’s list of exceptions, it would have omitted exemptions/defenses for individuals and added language that “national law should prevail in other cases which resulted from acts occurring as between individuals.”

however, the ICCPR does not prescribe universal crimes or measures that each State Party “must” adopt to give effect to the right to life.

33. With respect to the Committee’s assertions that States Parties have a duty to take “reasonable positive measures” and exercise “due diligence” to respond to foreseeable threats by private persons and entities (*e.g.*, paragraph 25 of the Committee’s draft), the United States remains of the view that neither the text nor its negotiating history supports any such obligation under the ICCPR. On several occasions, the United States has advised the Committee of its long-standing position that as a general matter, with notable exceptions such as slavery, a human rights violation entails state action.³⁵ Human rights treaties may contain provisions that clearly and specifically impose obligations upon States Parties to prevent, in certain limited circumstances, particular kinds of misconduct by private parties or non-State actors.³⁶ Article 2, however, contains no language stating that Covenant obligations extend to preventing private, non-governmental acts, and no such obligations can be inferred from Article 2. Nor does Article 6(1) contain any express language requiring States Parties to regulate private, non-governmental conduct of non-State actors in relation to the deprivation of life. It is essential, to bear in mind, however, the legal distinction that governmental enforcement in these areas has been and will remain a matter of criminal law in the fulfillment of a State’s general responsibilities incident to ordered government, rather than as a requirement derived from a State Party’s obligations under the Covenant.³⁷

34. A review of the *travaux préparatoires* further underscores that the negotiators tried for nine years between 1948 and 1957 to reach agreement on this question, culminating in a compromise to express the obligation simply, that the right to life “shall be protected by law,” coupled with an understanding that this obligation would be implemented through domestic legislation in accordance with Article 2(2). From the start of negotiations in 1948, the United States maintained that the Covenant was intended to protect individuals from State action and that existing codes of criminal law already covered actions committed by individuals or groups, most States did not share the United States’ view. Although the negotiators were in agreement that the *primary* focus of Article 6 was protection of the individual from the State,³⁸ by 1950, the drafting committee acknowledged a fundamental difference of opinion as to whether the right to life under the Covenant included protection from private actors in addition to protection from the

³⁵ See U.S. Observations on General Comment No. 31, *supra* note 17, paragraphs 10-18; and U.S. Observations on Draft General Comment No. 35, *supra* note 16, paragraphs 10-18.

³⁶ *Id.*; see in particular U.S. Observations on Draft General Comment No. 35, enumerating a list of such treaties at paragraphs 14-17.

³⁷ See U.S. Observations on General Comment No. 31, *supra* note 17 at paragraph 8.

³⁸ U.N. GAOR, 6th Sess., at 3, 11, U.N. Doc. E/CN.4/SR.140 (April 7, 1950) (Chile) (“The principal aim of the draft covenant was to protect the individual against such action by governments,” and also stating that they “agreed with the Lebanese representative that the greatest danger to be guarded against was that of actions of the State against the individual” and while States generally dealt with violence among private persons, little protection was already in place to guard the individual from the State).

State.³⁹ A compromise was achieved in 1950 with the adoption of the clause: “Everyone’s right to life shall be protected by law.”⁴⁰ The clause was retained after renewed debate in the Commission’s Eighth Session in 1952.⁴¹ The majority found that the continuing debate showed the need “for a general rather than a detailed wording,”⁴² and that a “simple but categorical affirmation” would be most effective.⁴³ After extensive debate by the Third Committee during the Twelfth Session of the U.N. General Assembly in 1957, the clause was again retained and adopted in its current form.⁴⁴ During the debate, there were different opinions as to whether phrasing the obligation as protected by “the State” or “the law” would provide broader protections.⁴⁵ In response, a number of States expressed disagreement with revising the text from “the law,” expressing that action by the State was based on law and that it was the law, not the State, that should ensure protection.⁴⁶

35. The language approved by the Third Committee in 1957 essentially confirmed the compromise reached during the Human Rights Commission debate between 1949 and 1952. Overall, the delegation statements indicate that although the right in Article 6 is not restricted to protection from only State actions, the States generally considered that protection from non-State actors was already provided to individuals through national criminal laws. Therefore, the primary purpose of Article 6 was protection from State actors, while the method of protecting individuals from non-State actors would be left to the States Parties’ domestic criminal laws and law enforcement mechanisms.

³⁹ U.N. GAOR, 6th Sess., at 14, U.N. Doc. E/CN.4/SR.140 (April 7, 1950) (Australia) (proposing that two separate articles be drafted if the Commission decided that the article should apply to acts by private individuals as well as acts by the State); U.N. GAOR, 6th Sess., at 6, U.N. Doc. E/CN.4/SR.144 (April 3, 1950) (Lebanon) (stating that the Commission must solve the fundamental problem “of whether the Commission was trying to protect human life against actions by the State, or against actions by private persons as well as by the State,” and thought a solution might be to simply state “that it was the duty of every State to protect human life by law, without [...] entering into details of all the cases in which life must be protected and persons violating the penal code must be punished”).

⁴⁰ U.N. GAOR, 6th Sess., at 13, U.N. Doc. E/CN.4/SR.144 (April 12, 1950).

⁴¹ U.N. GAOR, 14th Sess., Suppl. no. 4, at 25, U.N. Doc. E/CN.4/669 (1952); *see generally*, U.N. GAOR, 8th Sess., U.N. Doc. E/CN.4/SR.309 (June 10, 1952); U.N. Doc. E/CN.4/SR.310 (1952); U.N. GAOR, 8th Sess., U.N. Doc. E/CN.4/SR.311 (June 12, 1952).

⁴² U.N. GAOR, 8th Sess., at 15, U.N. Doc. E/CN.4/SR.310 (June 11, 1952) (Chile). Pakistan also expressed that the text should be drafted in the broadest terms.

⁴³ U.N. GAOR, 14th Sess., Suppl. no. 4, at 25, U.N. Doc. E/CN.4/669 (1952).

⁴⁴ *See* U.N. GAOR, 3rd Committee, 12th Sess., U.N. Docs. A/C.3/SR.811-820 (1957).

⁴⁵ *See* El Salvador proposal at U.N. GAOR, 3rd Committee, 12th Sess., 811th mtg. at 245, U.N. Doc. A/C.3/SR.811 (1957), paragraph 4 (“The right to life is inherent in the human person and shall be under the protection of the State” As the representative further explained: “States would thus be placed under an obligation to protect the right, not merely to recognize it.”).

⁴⁶ States opposing El Salvador’s proposal included Italy, Australia, Peru, Israel, and the UK. *See, e.g.*, U.N. GAOR, 3rd Committee, 12th Sess., 812th mtg. at 252, U.N. Doc. A/C.3/SR.812 (1957) (UK stating: “a provision of that kind would make it possible to hold the State responsible for compensation in cases of deprivation of life.”); and 814th mtg. at 261, U.N. Doc. A/C.3/SR.814 (1957), paragraph 15 (Italy stating: “that change might create a misunderstanding with regard to the role of the State; for his delegation, action by the State was based on law, which was a broader notion than that of the State.”); and Paragraph 21 (Israel stating: “since that wording had given rise to the apprehension that States might thereby accept direct responsibility far beyond their normal capacities, she favored retention of the statement in its original text”).

36. What is also apparent from the debates throughout the negotiation of Article 6 is that the deprivation of life under discussion was generally understood to refer to actual killings of one person by another, whether attributable to State actors or private actors, and that the measures discussed and compromise achieved only contemplated that any protection to be afforded from the conduct of non-States actor would be pursuant to domestic criminal laws. Even among delegations that advanced the concept that the State had a duty to protect the life of the individual against anything that endangered it, the distinction was recognized between the danger coming from other men, with “protection against crime . . . inherent in the notion of civil and political rights,” and a danger coming from natural or social phenomena, with “the protection of life against accidents, sickness or poverty . . . inherent in the notion of economic and social rights.”⁴⁷ As expressed by the French representative in the Third Committee deliberations in 1957: “Article 6 should be concerned solely with the civil and political protection of the life of the individual,” and Article 6(1) “simply stated the need for legal systems so framed as to safeguard the security of citizens.”⁴⁸ None of the types of threats or dangers or threats identified in the Committee’s draft general comment were addressed during the negotiations, nor was any consideration given to measures to regulate weapons or of environmental- or health- or poverty-related threats.

37. In light of the ordinary meaning of Article 6(1) and this negotiating history, there is no basis to seek to further expand upon an obligation to ensure the right to life that would entail a duty to protect life from all foreseeable threats to life and to ensure the “effective enjoyment of the right life” (paragraph 28). The United States does not agree that “[t]he obligation of States parties to respect and ensure the right to life extends to all threats that can result in loss of life” and that “States parties may be in violation of article 6 even if such threats have not actually resulted in loss of life” as suggested in paragraph 7 of the draft. Similarly, the United States does not agree with the Committee’s assertions of the positive measures articulated in paragraphs 25, 26, 27 and 30.

38. Any suggestion, even if only by implication, of a duty to protect life that would extend to addressing “general conditions in society that may eventually give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity” strays beyond the mandate of the Committee and is unsupported by established rules of treaty interpretation with respect to Article 6. Whatever steps a State may take to address such conditions as those addressed in the draft such as environmental pollution, life threatening disease, the adequacy of health care, traffic and industrial accidents, hunger, poverty or homelessness, natural disasters or cyber-attacks, none of these fall within the scope of ICCPR obligations. Attention spent on such issues in the context of a general comment or State Party periodic reporting diverts attention from the essential issues for which the Committee has responsibility.

⁴⁷ U.N. GAOR, 3rd Committee, 12th Sess., 810th mtg., at 242, paragraph 10, U.N. Doc. A/C.3/SR.810 (1957)

⁴⁸ *Id.* at paragraph 11.

IV. Death Penalty

39. Consistent with its mandate, the sole responsibility of the Committee is to advise States Parties, which have not abolished the death penalty, on issues that arise in its application to individual cases within the terms of Article 6 (2)-(5). As the Committee correctly notes in paragraph 37 of its draft, Article 6 strictly limits the application of the death penalty leaving little room for further interpretation or elaboration. Any observations or advice by the Committee regarding State practices in implementing their obligations in this area need to be expressed as best practices or in advisory “should” terms, rather than obligatory terms such as “have to” or “must.”

40. Committee views regarding abolition of the death penalty, and in particular the view that abolition is “legally irrevocable” (paragraph 38), lack legal support grounded in the interpretive rules reflected in VCLT Article 31 and 32 and should either be deleted or expressed as views of the Committee regarding best practices. The ICCPR is silent on the question of reinstating the death penalty after abolition. This is in stark contrast with Article 4(3) of the American Convention on Human Rights, which states, “The death penalty shall not be reestablished in states that have abolished it.” Given absence of the same or similar language in the ICCPR, and the likelihood that the agreement of all States Parties to such a limitation would be as unachievable today as it would have been in the climate in which Article 6 was negotiated and concluded, the Committee’s does not have the authority to now infer such a limitation.

41. The same applies to the Committee’s assertion in paragraph 38 of the draft that a State Party may not modify domestic laws after ratifying the Covenant in any way that would either create a new capital offense or remove legal conditions under an existing capital offense that would permit its imposition in circumstances not previously allowed.⁴⁹ The article is silent and the Committee has provided no authoritative legal support or treaty analysis grounded in established rules of treaty interpretation under international law. The only relevant ICCPR obligation is the requirement in Article 6(2) that the death penalty be imposed in accordance with the law in force at the time of the commission of the crime, applied in conformity with the Article 15 obligation that a heavier penalty not be imposed than the one applicable at that time. Certainly, if the States Parties had considered or agreed to any further restriction as proposed by the Committee, these provisions would not read as they do. The Committee’s related arguments in paragraph 38 are addressed in Part II above.

⁴⁹ To the extent that the Committee advances legal conclusions interpreting the Second Optional Protocol, the United States reminds the Committee that it has no mandate under that Protocol and it is beyond the Committee’s competence or authority to express its views on how State Party obligations should be interpreted under that Protocol.

Death Penalty in Relation to Other Covenant Provisions

42. We agree that under Article 6, the death penalty may not be imposed or carried out in a manner that is contrary to the provisions of the ICCPR, including Article 7 with respect to any method that would amount to torture or to other cruel, inhuman, or degrading punishment or punishment, and Article 14, with respect to fair trial and appeal guarantees. We also agree that violation of those articles in the course of applying the death penalty could also lead to a violation of Article 6. The plain language in Article 6(2) requires that it not be imposed contrary to other Covenant provisions.

43. However, the United States disagrees with several of the views expressed in paragraph 44 of the draft, particularly regarding certain methods of execution and the impact of solitary confinement or delays in carrying out the sentence. We suggest that any discussion of repercussions and potential violations of other Articles that do not lead to the death of an individual would more properly be addressed in Committee general comments on such other articles.

44. We cannot agree with the Committee's view that "a failure to promptly inform detained foreign nationals charged with a capital crime of their right to consular notification pursuant to the Vienna Convention on Consular Relations" could "render the imposition of the death penalty contrary to article 6 (paragraph 46)." As the Committee recognizes in paragraph 46, consular notification is not expressly required under Article 14 or any other Covenant provision, and the Committee has offered no treaty analysis grounded in VCLT Articles 31 or 32 to support such a view. Consular notification is not a "right" owed to a foreign national in detention. Rather, consular access and assistance is a right exercised by the detained individual's State of nationality. The consular notification protections under the Vienna Convention on Consular Relations (VCCR) are based on principles of reciprocity, nationality, and function. Nor is consular notification a necessary component of the right to a fair trial or the right to due process in criminal proceedings. The ICJ noted in the case of *Avena and Other Mexican Nationals (Mex. v. U.S.)* that neither the text, nor the object and purpose, nor the *travaux* of the VCCR supports the conclusion that consular notification is an essential element of due process in criminal proceedings.⁵⁰ As the plain text of Article 36(1)(c) of the VCCR provides: "*consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation*" (emphasis added). Nothing in this provision suggests that the right to access may be privately enforced by the detained individual. To suggest that a consular notification claim could amount to a human rights violation, let alone a violation of the right to life, would lead to the untenable conclusion that any foreign national who does not receive consular assistance from his or her country's

⁵⁰ See *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I. C. J. Reports 2004, p. 12 (March 31, 2004) ¶ 124.

consular officers, because of an absence of consular relations or because those consular officers did not provide such assistance, cannot receive a fair trial or due process of law.

45. We strongly disagree with the Committee's assertion in paragraph 50 that either the requirement of a final judgment before execution under Article 6(2) or the right of the sentenced person to seek pardon or commutation under Article 6(4) can be considered to encompass appeals to any and all "available non-judicial avenues," to include international commissions, monitoring bodies, or U.N. treaty bodies. Further, there is no support for the suggestion that a failure to implement non-binding recommendations, interim measures, or other requests in paragraph 50 by such international bodies would be contrary to any ICCPR obligation, including the reporting obligation under Article 40 to submit reports in response to the Committee's request. The requirement under Article 6(2) that the death penalty can only be carried out "pursuant to a final judgement rendered by a competent court" can only be read in conjunction with Article 14(1) and (5) to mean a competent, independent and impartial higher tribunal established by law. The United States is not subject to the jurisdiction of any international court that would fall within such terms. It is for States that are subject to the jurisdiction of such an international court to interpret the scope of their obligation in that regard.

46. With respect to the question of abolition, there is no basis for the assertion in paragraph 54 that Article 6, paragraph 6 reaffirms the position of States Parties that there should be "an irrevocable path towards complete abolition." Neither the wording nor the *travaux préparatoires* supports such a view, particularly in view of how controversial the subject was throughout the negotiation of Article 6. Although this may have been the view of some States during the drafting, it was not the view of all States, and the entire Article, including paragraph 6, was neutrally drafted for that reason. There is also no basis for the Committee to suggest that any steps taken by States Parties to increase or alter the use of the death penalty can reasonably be considered as contrary to the object and purposes of the ICCPR or what the Committee refers to as "the object and purpose of Article 6." Under the rules of treaty interpretation reflected in the VCLT, it is the treaty that has an object and purpose, not the individual provisions. But, more centrally, the only conditions that the ICCPR creates with respect to the application of the death penalty are those specified in the text of Article 6. While the provisions of Article 6 are, of course, to be interpreted in light of the Covenant's object and purpose, reference to the Covenant's object and purpose cannot create new conditions not specified in the text.

47. The Committee's statement in favor of abolition in paragraph 55 is clearly addressed to an audience other than the States Parties who do not support abolition and who continue to apply the death penalty and be bound by the conditions for its application contained in Article 6. With regard to the Committee's comments in paragraph 55 regarding abolition, the death penalty was a contentious issue in drafting Article 6. As the Committee has acknowledged, there was no consensus and there remains no consensus today, that the death penalty *per se* is cruel, inhuman

or degrading punishment, or otherwise unlawful under international law. One cannot presume that each of the 79 States Parties that have abolished the death penalty without reservation have done so because it has concluded that the death penalty is legally impermissible. Absent evidence of a State Party's legal theory in this regard, abolition is evidence of nothing more than a decision to cease applying the penalty for whatever legal or political reason.

48. In conclusion, the U.S. Government emphasizes again that the observations noted above are only examples of our numerous objections to the general comment as currently drafted. The United States fully appreciates the Committee's continuing efforts to advise States Parties on issues related to their implementation of the treaty and, in so doing, urges it to consider these observations, along with those received from other States Parties, as it pursues its work on this draft and to also reflect the positions of States Parties in any final general comment that is produced. The United States looks forward to its continuing dialogue with the Committee.