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Joint Submission to the Human Rights Committee by the American Civil Liberties Union, Columbia Law School Human Rights Clinic, the International Commission of Jurists, the Open Society Justice Initiative, and Rights Watch UK

Draft General Comment 36 on Article 6, on the right to life

6th October 2017

Introduction

1. Columbia Law School's Human Rights Clinic, the International Commission of Jurists, the Open Society Justice Initiative, and the American Civil Liberties Union welcome the opportunity to provide the Human Rights Committee (the Committee) with the following observations on its draft General Comment on Article 6 (the draft) of the International Covenant on Civil and Political Rights (the Covenant) on the right to life, ahead of its second reading. The following submission focuses exclusively on five right to life issues relating to the use of force:

- I General scope of Article 6;
- II Rules governing the use of force under Article 6;
- III Extraterritorial use of force;
- IV Use of force in situations of armed conflict; and
- V The duty to investigate incidents involving the use of force.

The submission will touch upon aspects of paragraphs 7, 14, 16, 18, 19, 23, 24, 26, 31, 32, 33, 66, and 67 in the Committee's draft.

I Scope of Article 6 obligations (paragraphs 7 and 26 of the draft)

2. In **paragraph 7** the draft correctly explains that States parties must "refrain from engaging in conduct resulting in arbitrary deprivation of life." It would be helpful to further clarify that, consistent with their Article 6 obligations, States parties cannot lawfully consent to acts on their territory or otherwise under their jurisdiction that would be unlawful under the Covenant if the territorial State carried out such acts, nor can they help other States to breach Article 6.¹ A State

¹ Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 16, 20; Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions (Christof Heyns), A/68/382, para. 38; cf. *Lopez Burgos v. Uruguay*, para. 12.3, and *Celiberti de Casariego v. Uruguay*, para. 10.3 ("it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to

party would need to ensure that such consent is consistent with its Covenant obligations, as well as its other domestic and international legal obligations.

Suggested amendment to paragraph 7 underlined

7. *States parties have the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. States parties cannot lawfully consent to acts on their territory that would be unlawful if the territorial State carried out such acts, nor can they lawfully provide aid or assistance to other States in the commission of a breach of Article 6. They must also exercise due diligence...*

3. In **paragraph 26** the draft also provides useful clarifications on State parties' obligations to "take appropriate measures to protect individuals against deprivation of life by other States operating within their territory." In the context of Article 6, it would be helpful to clarify further that, where an intervening State applies a more permissive interpretation of circumstances in which force may be used and how it may be used, the territorial State must, pursuant to its obligations to protect, have in place sufficient safeguards to ensure that any use of force on its territory or otherwise under its jurisdiction is consistent with Article 6. A failure to do this would be inconsistent with the Covenant and may render the territorial State complicit in violations.

Suggested amendment to paragraph 26 underlined

26. *States parties must take appropriate measures to protect individuals against deprivations of life by other States operating within their territory² or in other areas subject to their jurisdiction. This entails an obligation for States parties to make adequate inquiries and have in place sufficient safeguards to ensure that acts by other States on their territory comply with the territorial State's obligations under the Covenant. They must also ensure...*

II Use of force (paragraphs 14, 16, 18, 19, 23 and 24 of the draft)

4. In **paragraph 14**, the draft correctly articulates that the use of less-lethal weapons in law enforcement is subject to the requirements of proportionality and necessity. Paragraph 14 also states that less-lethal weapons can only be employed "in situations of exceptional nature in which other less harmful measures have proven to be, or clearly are inadequate." To ensure that the Comment is consistent with the Basic Principles on the Use of Force and Firearms standard of using force only when it is "strictly necessary," and to clarify the meaning of the word "inadequate", we recommend adding to the end of that sentence "to address the threat and only to the minimum extent necessary."³

Suggested amendment to penultimate sentence of paragraph 14 underlined

14. *States parties should monitor the impact on the right to life ... Furthermore, such less-lethal weapons can only be employed, subject to requirements of necessity and proportionality, in situations of exceptional nature in which other less harmful measures have proven to be, or clearly are inadequate to address the threat and only to the minimum extent necessary.⁴ For example ...*

5. **Paragraph 18** addresses the notion of "arbitrariness" in two distinct contexts. First, in the second sentence of **paragraph 18**, the draft describes the quality of the domestic law regulating the use of force, and the characteristics that may render

permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.")

² Communication No. 319/1988, *García v. Ecuador*, Views adopted on 5 Nov. 1991, paras. 5.1-5.2.

³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), para. 13.

⁴ Cf. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), para. 14.

such law arbitrary. This is distinct from the third sentence of paragraph 18, which relates to the notion of arbitrariness in relation to the “application of lethal force” itself. Accordingly, as these are different requirements — arbitrariness in the law and arbitrariness in the actual and practical use of force — the third sentence in **paragraph 18** is not an illustration of the content of the second sentence in **paragraph 18**, and the words “For example” should therefore be deleted.

6. The clarity and coherence of this section of the draft would be enhanced significantly by moving the explanation of how the term “arbitrariness” is to be construed (presently the entire second sentence in paragraph 18)⁵ from **paragraph 18**, which relates specifically to the use of lethal force, to **paragraph 16**, which relates more generally to the concept of arbitrariness. In addition, we recommend that a footnote be inserted at the very end of that sentence to indicate that the definition of the term “arbitrariness” is also found in paragraph 12 of General Comment No. 35 on Article 9 of the Covenant (Liberty and Security of person). Further, we recommend that the Committee include in its working definition of “arbitrariness” the notion that arbitrariness may be inferred from laws and practices that violate the principle of non-discrimination.⁶
7. We commend the exhortation to States parties in **paragraph 19** to ensure that “all operations of law enforcement agents should comply with relevant international standards, including the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials” (the Basic Principles). These important universal standards must inform any interpretation of Article 6 obligations. We also note that **paragraph 14** of the draft affirms, among other things, that, “less-lethal weapons can only be employed, **subject to requirements of necessity and proportionality**, in situations of exceptional nature in which other less harmful measures have proven to be, or clearly are inadequate....” (**emphasis added**, see above at paragraph 4 for additional comments on paragraph 14).
8. In contrast to these references in paragraphs 19 and 14, paragraph 18, as currently formulated, does not accurately reflect the international law test for the use of lethal force. It introduces the notion of “reasonableness”, which modifies — and in so doing falls short of — the established test for use of force; as such, it carries a significant risk of violations of Article 6.⁷ As noted above, the actual test under

⁵ “The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality.” Footnote in the original omitted.

⁶ We also refer the Committee to paragraphs 27 to 35 in the recent Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, which discuss the notion of “arbitrariness” in the context of deprivation of life (A/HRC/35/23, 6 June 2017, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/156/19/PDF/G1715619.pdf?OpenElement>).

⁷ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 30 August 2011, A/66/330, para. 48 (“The terms “proportionality” and “necessity” are typically used on the international level, while both these terms as well as the term “reasonable” (in some, but not all, instances to encompass both proportionality and necessity) are often used on the domestic level. One of the challenges is to make sure that the concept of reasonableness is not used in ways that pose lower standards than those posed by proportionality and necessity.); Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 23 May 2011, A/HRC/17/28, para. 93 (“The test in countries with a special regime applicable during protest action is mostly whether the use of force is “reasonable” or “necessary,” without further limitations. It is a matter of concern that such provisions could be interpreted to constitute a subjective test, leaving it to the discretion of individual police officers to decide whether to shoot to kill. This can be taken as a licence to kill.”).

Article 6 for the use of force is that it must be strictly necessary and proportionate.⁸ In line with Principle 9 of the Basic Principles, this entails that the use of force must be absolutely necessary to protect life and that, to be lawful, the use of force must be proportionate to the threat posed, even in circumstances where it is strictly necessary to protect life. Accordingly, the word “reasonable” in the third sentence of paragraph 18 should be removed.

9. For the same reasons, the reference to “as far as possible” in the third sentence of **paragraph 18** should be deleted,⁹ as it is inconsistent with the Basic Principles. Without this deletion, paragraph 18 could be read as countenancing the use of potentially lethal force in circumstances beyond those permitted by the Basic Principles and by Article 6 — namely, that force must always be directed exclusively against the attacker.
10. With respect to the fourth sentence of **paragraph 18**,¹⁰ we commend the intent behind this sentence, namely, to provide examples of circumstances where the use of potentially lethal force would be inconsistent with Article 6 of the Covenant. However, we are concerned that, by addressing the use of potentially lethal force in connection with threats described as “not of extreme gravity”, rather than speaking of circumstances that constitute an imminent threat of death, the phrasing of this sentence remains ambiguous and could be misconstrued. We therefore recommend that the Committee reformulate this sentence to underscore that the use of potentially lethal force for law enforcement purposes — whether “deliberate” or otherwise — to address a threat merely against property or solely to prevent escape from custody is inconsistent with Article 6(1) of the Covenant.

Suggested amendments to paragraph 16 underlined

16. *Although it inheres ... Such exceptional measures should be established by law and accompanied by effective institutional safeguards designed to prevent arbitrary deprivations of life. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law¹¹ as well as elements of reasonableness, necessity, and proportionality.¹² Arbitrariness may also be inferred from laws and practices that violate the principle of non-discrimination.¹³ Furthermore, countries which have not abolished ...*

⁸ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 2 September 2016, A/71/372, paras. 51-54; Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states, “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

⁹ “the force applied must be carefully directed, **as far as possible**, only against the attacker” (emphasis added).

¹⁰ “The deliberate use of potentially lethal force for law enforcement purposes which is intended to address threats, not of extreme gravity, such as protecting private property or preventing the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others, cannot be regarded as a proportionate use of force.” Footnotes in the original omitted.

¹¹ Communication No. 1134/2002, Gorji-Dinka v. Cameron, Views adopted on 14 March 2005, para. 5.1; Communication No. 305/1988, Van Alphen v. The Netherlands, Views adopted on 23 July 1990, para. 5.8.

¹² General Comment 35, para. 12.

¹³ The Committee takes the view that the principle of non-discrimination is also part of obligations under Article 6 not to use force in an arbitrary manner, and to protect people from the use of force by third parties.

Suggested amendments to paragraph 18 struck through and underlined

18. ~~A deprivation of life may be authorized by domestic law and still be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law¹⁴ as well as elements of reasonableness, necessity, and proportionality. For example, In order not to be qualified as arbitrary under Article 6, the application of lethal force by a person acting in self-defense, or by another person coming to his or her defence, must be reasonable and strictly necessary in view of the threat posed by the attacker; it must represent a method of last resort after non-lethal alternatives, including warnings,¹⁵ have been exhausted or deemed inadequate;¹⁶ the amount of force applied must be proportionate and cannot exceed the amount strictly needed for responding to the threat; the force applied must be carefully directed, as far as possible, only against the attacker;¹⁷ and the threat responded to must be extreme, involving imminent death or serious injury.¹⁸ The deliberate use of potentially lethal force for law enforcement purposes, which is intended to address circumstances that do not constitute an imminent threats of death or serious injury, of extreme gravity, such as protecting private property from theft or damage¹⁹ or preventing the escape from custody of a suspected criminal or a convict who, in turn, does not pose an serious and imminent threat to the lives or bodily integrity of others, cannot be regarded as a proportionate use of force.²⁰~~

11. **Paragraph 19** of the draft rightly sets out a series of measures necessary to prevent arbitrary deprivations of life, including legislative, procedural, reporting, and investigation requirements set out in the Basic Principles on the Use of Force and Firearms and the Code of Conduct for Law Enforcement Officials. We recommend that the draft clarify that the obligation to prevent arbitrary deprivations of life applies broadly to all State officials, and the specific requirements set out in the Basic Principles and the Code of Conduct apply to all State officials authorized to use force, including those in law-enforcement and other security-related agencies. We further recommend that the Committee apply these rules not only to “lethal incidents”, but, in accordance with the Basic Principles and the Code of Conduct, also to incidents involving serious injury or other grave consequences since they, in turn, may have Article 6 implications.²¹

¹⁴ Communication No. 1134/2002, *Gorji-Dinka v. Cameron*, Views adopted on 14 March 2005, para. 5.1; Communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8.

¹⁵ Cf. *Giuliani and Gaggio v. Italy*, Judgment of the ECtHR of 24 March 2011, para. 177.

¹⁶ Communication No. R.11/45, *Suarez de Guerrero v. Colombia*, Views adopted on 31 March 1982, para. 13.2.

¹⁷ Communication No. R.11/45, *Suarez de Guerrero v. Colombia*, Views adopted on 31 March 1982, para. 13.2-13.3.

¹⁸ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 23 May 2011, para. 60.

¹⁹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 1 April 2014, para. 72.

²⁰ Cf. *Kazingachire v Zimbabwe*, Report of the ACHPR of 12 Oct. 2013, para. 118-120.

²¹ While lethal incidents are subject to mandatory reporting and investigation under the Basic Principles, the reporting requirements are actually broader. Principle 22 of the Basic Principles states that “Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11(f),” and further that “In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.” Principle 6 requires that “Where **injury or death** is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with Principle 22” (**emphasis added**). Principle 11(f) requires a that governments “provide for a system of reporting **whenever law enforcement officials use firearms** in the performance of their duty” (**emphasis added**).

Suggested amendments to paragraph 19 struck through and underlined

19. States parties are expected to take all necessary measures intended to prevent arbitrary deprivations of life by public authorities, including their law-enforcement organs and other security forces, or those exercising delegated public authority. These measures include: appropriate legislation controlling the use of lethal force by all State officials, such as law enforcement officials; procedures designed to ensure that ~~their law-enforcement~~ actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life;²² mandatory reporting, review, and investigation of all incidents involving the use of force by public authorities, including their law-enforcement organs and other security forces; detailed reporting of all ~~lethal~~ incidents involving death, serious injury, or other grave consequences;²³ and the equipping of ~~police~~ forces responsible for crowd control with effective non-lethal means and adequate protective gear in order to obviate their need to resort to lethal force.²⁴ In particular, all operations and personnel of law enforcement ~~agents~~ and security agencies, and other State officials authorized to use force, should comply with relevant international standards, including the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990),²⁵ and law enforcement and other security agents should undergo appropriate training designed to inculcate these standards so as to ensure, in all circumstances, the fullest respect for the right to life.

12. In **paragraph 23**, the draft helpfully underscores that any authorization for the use of force must be “prescribed by law and defined with sufficient precision”. We recommend that it also specify that this entails a transparency requirement, which reflects the Committee’s own concern on this issue, and is consistent with international human rights law.²⁶ The draft features a similar requirement in **paragraph 67**, namely, to “disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life.” Paragraph 67 relates to situations of armed conflict, but a transparency requirement should also be explicitly included in paragraph 28 to avoid it being misconstrued as only applying to armed conflict contexts.

Suggested amendment to paragraph 23 underlined

23. The duty to protect by law the right to life entails that any substantive ground for deprivation of life must be prescribed by law, and defined with sufficient

Accordingly, the obligation extends beyond than just the “mandatory reporting and investigation of *lethal incidents*” to all incidents involving the use of firearms by law enforcement officials, and specific requirements for incidents of death, serious injury, or involving other grave consequences.

²² Cf. *McCann v UK*, Judgment of the ECtHR of 27 Sept, 1995, para. 150.

²³ Concluding Observations: Chile (2013), para. 11.

²⁴ Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, 4 Feb. 2016, para. 54.

²⁵ Concluding Observations: Nepal (2014), para. 10; Concluding Observations: Liechtenstein (2004), para. 10.

²⁶ Concluding Observations: USA (2014), para. 9(b); General Comment 34, para. 19 (“To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest.”); *Nachova v UK*, Judgment of ECtHR of 6 Jul. 2005, paras. 99-102; African Commission on Human and Peoples’ Rights, General Comment No. 3: The Right to Life (Article 4), November 2015 (ACHPR, General Comment No. 3), http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf, para. 21; The Global Principles on National Security and the Right to Information (Tshwane Principles), Principle 10.C(2); Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, 1 April 2014, A/HRC/26/36, para. 57.

*precision to avoid overly broad or arbitrary interpretation or application.*²⁷ States parties must publicly disclose the international and domestic legal framework for the use of force, as well as the basis, criteria, and reasoning for the use of force.²⁸ *Since deprivation of life...*

13. We recommend clarifying in paragraph 24 that State parties have the obligation to enact a legal framework that includes effective legal prohibitions not only on “disproportionate”, but also “unnecessary”, use of firearms.²⁹

Suggested amendment to the first sentence of paragraph 24 underlined

24. *States parties must enact a protective legal framework which includes effective criminal prohibitions on all forms of arbitrary deprivations of life by individuals, including intentional and negligent homicide, disproportionate or unnecessary use of firearms,*³⁰ ...

III. Extraterritorial Use of Force (paragraph 66 of the draft)

14. We welcome the current formulation of the first sentence of paragraph 66, which correctly sets out the scope of the Covenant’s extraterritorial jurisdiction. In particular, it makes clear that, pursuant to the Covenant, States parties’ jurisdiction arises where their exercise of power or effective control is capable of affecting the enjoyment of an individual’s right to life. To further enhance this sentence’s clarity, the Committee should make it clear that a State party can exercise power or effective control *de jure* or *de facto*.³¹ We also recommend deleting the word “found” because it is redundant and could be misconstrued.

15. With respect to the second sentence of paragraph 66, as currently formulated, we share the Committee’s concern about the impact on persons situated outside the territory effectively controlled by a State party, but who are nevertheless impacted by its military or other activities. Indeed, we are concerned with various methods of use of force abroad. In this context, however, we do not consider that “[direct], significant and foreseeable manner” is the accurate legal test to determine when a person has come under the power or effective control of a State through its use of force. The Committee uses this test in paragraph 26 to describe a State’s right to life obligations when third parties, such as corporate entities, operate within a State’s territory or under its jurisdiction and engender extraterritorial effects on the right to life. This, however, is wholly different from, for example, the use of armed ‘Unmanned Aerial Vehicles’ (UAVs) where the State is the principal user of force. With respect to the resort to UAVs or other similar methods of use of force, the use of lethal force against a person by a State *per se* brings that person under the power or effective control of that State. The same use of force norms guaranteeing the right to life therefore apply to a State using armed UAVs wherever the effects of the use of force take place and regardless of where the use of force emanates or is

²⁷ Cf. General Comment 35, para. 22.

²⁸ Concluding Observations: USA (2014), para. 9(b); General Comment 34, para. 19 (“To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest.”); *Nachova v UK*, Judgment of ECtHR of 6 Jul. 2005, paras. 99-102; ACHPR, General Comment No. 3, para. 21; Tshwane Principles, Principle 10.C(2); Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, 1 April 2014, A/HRC/26/36, para. 57.

²⁹ Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, 1 April 2014, A/HRC/26/36, para. 55.

³⁰ Concluding Observations: Liechtenstein (2004), para. 10; Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, 1 April 2014, A/HRC/26/36, para. 55.

³¹ HRC, General Comment No. 31, para. 10, stating that the principle of “power or effective control” applies “regardless of the circumstances in which such power or effective control was obtained.” See, also, UNCAT, General Comment No. 2, para. 16.

directed from, geographically speaking. This interpretation is in keeping with the first sentence of paragraph 66 and the Committee's own jurisprudence, namely, that it would be "unconscionable" to interpret the "responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."³² The African Commission on Human and Peoples' Rights General Comment on the right to life similarly states that, "[a] State shall respect the right to life of individuals outside its territory."³³ In the Americas, the Inter-American Commission on Human Rights has adopted a similar view.³⁴

16. The provision by States of international assistance and cooperation can lead to deprivation of life. States parties should not provide international assistance or cooperation where they know or ought to know that there are substantial grounds for believing that there is a real risk that the provision of assistance or cooperation would aid or assist in an Article 6 violation. Similar to the Committee's *non-refoulement* test,³⁵ States parties have Article 6 responsibilities for international assistance decisions that have Article 6 effects extraterritorially. The United Nations took this approach in its *Human Rights Due Diligence Policy on UN Support to Non-UN Security Forces*.³⁶
17. We recommend that the Committee further strengthen its important language on State parties' Article 6 obligations to those in distress at the high seas. As currently formulated, the Comment applies State parties' Article 6 obligations to "individuals who due to a situation of distress in sea [find] themselves in an area of the high seas over which particular States parties [assume] de facto responsibility." While this formulation is correct, as noted above, States parties' jurisdiction also arises where their exercise of power or effective control is capable of affecting the enjoyment of an individual's right to life. That being the case, Article 6 obligations apply where those in distress on the high seas come under a State's power or effective control when a State is foreseeably capable of rendering them assistance, and not only in "an area of the high seas over which particular States parties have assumed de facto responsibility". In these situations, States are responsible under Article 6 for acts or omissions that detrimentally affect the lives of those in distress. This interpretation of Article 6 is, moreover, consistent with other coterminous bodies of international law, chiefly the Law of the Sea, which place similar obligations on States to render assistance to those in distress.³⁷
18. With respect to the last sentence of paragraph 66, the Committee should make it clear that all acts of deprivation of liberty by a State party (including, *inter alia*,

³² *Lopez Burgos v. Uruguay*, para. 12.3; *Celiberti de Casariego v. Uruguay*, para. 10.3.

³³ ACHPR, General Comment No. 3, para. 14.

³⁴ The Inter-American Commission on Human Rights has similarly said that a person "may be responsible under certain circumstances for the acts and omissions of its agents which *produce effects* or are undertaken outside that state's own territory." The Commission has emphasized that jurisdiction is a notion linked to the "authority and control" that a State has not only over an individual, but also over its local officials operating abroad. Inter-American Commission, *Victor Saldaño v. Argentina*, Report No. 38/99, paras. 17 and 21. (Emphasis added.) See also *Coard et al v. United States*, Case 10.951, Report No 109/99, 29 Sept.1999, para. 37.

³⁵ General Comment 31, para. 12.

³⁶ Human rights due diligence policy on United Nations support to non-United Nations security forces,

http://www.ohchr.org/Documents/HRBodies/SP/AMeetings/20thsession/IdenticalLetterSG25Feb2013_en.pdf, para. 1. See also, *Tugar v. Italy*, European Commission of Human Rights, <http://echr.ketse.com/doc/22869.93-en-19951018/view/>.

³⁷ See above at paragraph [16] of this submission.

arrest and detention), irrespective of their lawfulness under the Covenant,³⁸ bring people under that State party's power or effective control.

Recommended amendments to paragraph 66 struck through and underlined

66. In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under Article 6 of all persons who are ~~found~~ within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it is capable of affecting through the exercises of power or effective control,³⁹ regardless of the circumstances in which such power or effective control was obtained.⁴⁰ This includes persons located outside any territory effectively controlled by the State whose right to life is ~~are~~ nonetheless impacted by its military or other activities in a ~~direct~~, significant and foreseeable manner.⁴¹ States also have obligations under Article 6 not to provide assistance or cooperation in situations when they know or ought to know that there are substantial grounds for believing that there is a real risk that the provision of that assistance or cooperation would aid or assist in an Article 6 violation.⁴² Furthermore,⁴³ States parties must respect and protect the lives of individuals located in territories, which are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. They are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them, and of those individuals who due to a situation of distress ~~in~~ at sea found themselves in 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.⁴⁴ Additionally, those in distress in the high seas come under a State's power or effective control when a State is foreseeably capable of rendering them assistance. In these situations, States parties are responsible under Article 6 for acts or omissions that detrimentally affect the lives of those in distress. Given that any deprivation of liberty, including ~~the act of~~ arrest or detention,⁴⁵ brings a person within a State's power and effective control, States parties must respect and protect the right to life of all individuals deprived of liberty ~~arrested or detained~~ by them, even if the deprivation of liberty occurs held outside their territory.⁴⁶

³⁸ Seem General Comment No. 35, para. 5; see also, *Guzzardi v. Italy*, ECtHR, para. 95.

³⁹ HRC, General Comment No. 31, para. 10; Concluding Observations: United Kingdom (2008), para. 14.

⁴⁰ HRC, General Comment No. 31, para. 10, stating that the principle of "power or effective control" applies "regardless of the circumstances in which such power or effective control was obtained." See, also, UNCAT, General Comment No. 2, para. 16.

⁴¹ Concluding Observations: USA (2014), para. 9 ("The Committee is concerned about the State party's practice of targeted killings in extraterritorial counter-terrorism operations using unmanned aerial vehicles"); *Lopez Burgos v. Uruguay*, and *Celiberti de Casariego v. Uruguay*. See, also, ACHPR, General Comment No. 3, para. 14.

⁴² General Comment 31, para. 12; Human rights due diligence policy on United Nations support to non-United Nations security forces, http://www.ohchr.org/Documents/HRBodies/SP/AMeetings/20thsession/IdenticalLetterSG25Feb2013_en.pdf, para. 1. See also, *Tugar v. Italy*, European Commission of Human Rights, <http://echr.ketse.com/doc/22869.93-en-19951018/view/>.

⁴³ ~~See paragraph 26 above; Concluding Observations: USA (2014), para. 9 ("The Committee is concerned about the State party's practice of targeted killings in extraterritorial counter-terrorism operations using unmanned aerial vehicles").~~

⁴⁴ Concluding Observations: Malta (2014), para. 17.

⁴⁵ See General Comment No. 35, para. 5; see also, *Guzzardi v. Italy*, ECtHR, para. 95.

⁴⁶ General Comment No. 31, para. 10; Communication No. 12/52, *Saldías de Lópe v. Uruguay*, Views adopted on 29 July 1981, paras. 12.1-13; Communication No. R.13/56, *Celiberti de Casariego v. Uruguay*, Views adopted on 29 July 1981, para. 10.1-11; Communication No. 623/1995 *Domukovsky v. Georgia*, Views adopted on 6 April 1998, para. 18.2.

IV. Use of Force in Situations of Armed Conflict (paragraph 67)

19. **Paragraph 67** of the draft aptly reaffirms the Committee’s previous commentary in General Comment 31 and 29: “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.” While it is important to underscore the applicability of Article 6 to the conduct of hostilities, clearly the right to life extends not only to the operative phases of the hostilities themselves, but also more broadly to threats to the enjoyment of the right to life arising in specific contexts within an armed conflict. Such circumstances may include, for example, anything from policing operations in situations of occupation, to interferences with critical infrastructure essential to sustain life. Accordingly, we recommend removing the brackets and simply adding the word “including” so that the first sentence of paragraph 67 would read: “...Article 6 continues to apply, including to the conduct of hostilities, in situations of armed conflict...”
20. We consider that the objectives of the first two sentences of paragraph 67 may be undercut by the following sentences, at least as presently formulated: “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... violate Article 6 of the Covenant.” While we recognize the applicability of international humanitarian law (IHL) to situations of armed conflict, in the absence of qualifying language, this sentence seems to suggest that it is enough to take into account only the rules of IHL and not any of the corresponding rules governing the use of force under international human rights law (IHRL). This approach lends itself to an under-inclusive interpretation as to how IHRL applies in situations of armed conflict and dilutes Article 6’s protections when they are needed the most. Instead, uses of lethal force authorized and regulated by and complying with international humanitarian law can only be determined as being compatible with Article 6 on a case-by-case basis. This approach is justified for several reasons:
- First, State forces may identify a person who is not a combatant within the meaning of the international armed conflict (IAC) rules, or who is not taking direct part in hostilities in non-international armed conflict (NIAC), as a member of or associated with an armed group. In such a context, lethal force cannot be used against such a person except when it complies with the rules of law enforcement and under the prescriptions identified in the reformulation we have recommended for paragraph 18 of the draft. In other words, lethal force may only be employed where it is strictly necessary in the prevailing circumstances to protect life, and where proportionate to that end, and precautions must be taken to protect life from lethal consequences.
 - Secondly, other situations may arise in the context of armed conflict where the use of State force should be regulated only by Article 6, and not by IHL. For example, even when an armed conflict exists, State security forces can never respond to common criminal activity, public demonstrations, or other such non-conflict-related activities using IHL’s permissive use of force rules.
 - Thirdly, Article 6 may, in some cases, place obligations on States that are additional to what IHL provides, as is the case with the Article 6 obligation to publicly disclose information such as the international and domestic legal framework for the use of force, as well as the basis and reasoning for the use of force. Using force without doing this may comply with IHL rules, but, nonetheless constitutes arbitrariness under Article 6.

21. For all these reasons we consider that it would be highly problematic, implicitly to undermine Article 6's obligations and protections by privileging the rules of IHL in such a broad and sweeping manner. Indeed, the Committee's own jurisprudence, as well as case-law from regional bodies, affirm the importance of only applying Article 6 obligations in contexts of armed conflict where the application of IHL would have been inappropriate.⁴⁷
22. We recognize that it is not the Committee's primary task to authoritatively interpret the rules of IHL, yet it is appropriate and would be helpful for the Committee to rely on its case law to provide in a non-abstract manner examples where it has decided that IHRL rules concerning the use of force exclusively applied in situations of armed conflict, or prevailed over applicable IHL rules, as reflected in *Suarez de Guerrero v. Colombia*, where an alleged member of an armed group was executed without being given a chance to surrender. In that case, this Committee found a violation of the Article 6 principles of necessity and proportionality as defined under IHRL, not IHL.⁴⁸
23. The fourth sentence of paragraph 67⁴⁹ should be supplemented by an additional sentence that underscores that for law enforcement scenarios, even within a broader context of armed conflict, the rules of proportionality and necessity as set out in the Basic Principles on the Use of Force and Firearms are therefore appropriate. It should track the language contained in paragraph 18 as reformulated above.
24. The fifth sentence of paragraph 67 contains the following bracketed text: "subject to compelling security considerations", which should be deleted. There are no compelling security considerations warranting non-disclosure of legal criteria; security considerations would come into play only in respect of particular operations, which are not addressed here. States often invoke "compelling security considerations" to conceal information of critical importance which, while they may be politically embarrassing, should be publicly disclosed in accordance with Article 19 of the Covenant, and such standards as the Global Principles on National Security and the Right to Information (see further below, paragraph 28 of this submission).
25. We recommend that the Committee expressly recognize that if a violation of the law of armed conflict engages Article 6 because it constitutes an arbitrary deprivation of life, the consequence is that the general Article 2 obligation under the Covenant necessarily comes into play. This consideration is only partly reflected in the last sentence of paragraph 67.⁵⁰ That sentence should also reference in its footnote paragraph 15 of the Committee's General comment 31. Critically, it is not simply that investigation that is at issue. It is also important that the paragraph refers to the obligation to bring to justice persons responsible for right to life violations arising out of armed conflict (citing paragraph 18 of GC 31), and to

⁴⁷ *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, 31 March 1982; see also, *Jaloud v. The Netherlands*, Judgment of 20 November 2014, in which the Court applied Article 2 right to life procedural obligations without consideration of IHL standards.

⁴⁸ *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, 31 March 1982, para. 13.2 ("[T]he police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned.").

⁴⁹ "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 measure of precautions to prevent collateral death of civilians and the use of human shields, violate Article 6 of the Covenant."

⁵⁰ "They must also investigate allegations of violations of Article 6 in situations of armed conflict in accordance with the relevant international standards."

provide for an effective remedy and reparation (GC paragraph 16). This is similarly provided for in the UN Basic Principles and Guidelines on the right to a remedy and reparation for gross violations of international human rights law and serious violations of international humanitarian law. The Comment should also highlight the specific requirement to carry out, at a minimum, assessments of all allegations of casualties in situations of armed conflict. While this may not require a criminal investigation in every case, some evaluation is essential to ensure compliance with IHL rules.⁵¹

Suggested amendments to paragraph 67 struck through and underlined

67. Like the rest of the Covenant, article 6 continues to apply, ~~including also~~ to the conduct of hostilities, in situations of armed conflict to which the rules of international humanitarian law are applicable. While the 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 measure of precautions to prevent collateral death of civilians, and the use of human shields, violate Article 6 of the Covenant. Additionally, situations can arise in the context of an armed conflict where only international human rights law applies — such as instances of common criminality and other circumstances calling for law enforcement operations — or where international human rights law should otherwise prevail over international humanitarian law, such as instances where the principle of necessity under Article 6 would prohibit the use of force.⁵² Nonetheless, uses of lethal force authorized and regulated by and complying with international humanitarian law can only be determined as compatible with Article 6 on a case-by-case basis, taking into account the factual context of particular operations. States parties should also ~~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 of methods of warfare have been used, and whether non-lethal alternatives for attaining the same military objective were considered. They must also investigate allegations of violations of Article 6 in situations of armed conflict promptly, thoroughly, effectively, and transparently through independent and impartial bodies; bring to justice those persons responsible for such violations; and provide an effective remedy and

⁵¹ Turkel Commission, Second report on ‘Israel’s mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law’, paras. 48-50 (highlighted the requirement that a post-operation assessment to establish the facts, including the accuracy of the targeting, be conducted where casualties are assessed to have resulted from an attack); Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para. 21; Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions (Philip Alston), E/CN.4/2006/53, para. 42 (stating “[w]hether, for example, the deceased was taking part in hostilities is an inherently factual question, requiring factual investigation”); Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism (Ben Emmerson), A/HRC/25/59, para. 32 (States have an “obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation of the results”, “whenever there is a plausible indication from any apparently reliable source that unintended civilian casualties may have been sustained.”); Report of the Special Rapporteur extrajudicial, summary, or arbitrary executions (Christof Heyns), A/68/382, para. 101 (“[c]ivilian casualties must be determined and should be disclosed”).

⁵² *Suarez de Guerrero v. Colombia*, Communication No. R.11/45, 31 March 1982

reparation for violations in accordance with the relevant international standards.⁵³
Additionally, during the conduct of hostilities, States parties must conduct, at a minimum, an assessment of all incidents resulting in casualties, at least to establish the facts and the accuracy and lawfulness of the targeting.⁵⁴

V. Duty to investigate (paragraphs 31-33)

26. **Paragraphs 31-33** of the draft General Comment rightly and helpfully sets out that an investigation into a right to life violation must be “independent, impartial, prompt, thorough, effective, credible and transparent.” On several specific points, the text could be strengthened further to clarify certain elements of the duty to investigate.
27. With respect to **paragraph 31**, where there are allegations of wrongdoing by a State on the territory of another State, or civilian casualties in situations of armed conflict, the territorial State will also have a duty to investigate such allegations and ensure accountability for all those involved.

Suggested amendment to paragraph 31 underlined

31. *An important element of the protection afforded to the right to life by the Covenant is the obligation to investigate and prosecute allegations of deprivation of life by State authorities,⁵⁵ by other States and international organizations, or by private individuals and entities,⁵⁶ including allegations of excessive use of lethal force.⁵⁷ ...*
28. We recommend strengthening the draft language in **paragraph 32** on the public interest exception to ensure States parties comply with the transparency component of the duty to investigate and respect the right to truth.⁵⁸ The test for withholding information “due to a compelling need to protect the public interest” may be

⁵³ General Comment 31, paras. 15, 16, 18; United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 (Basic Principles on the Right to a Remedy).

⁵⁴ Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2016), para. 21 (“Where, during the conduct of hostilities, it appears that casualties have resulted from an attack, a post-operation assessment should be conducted to establish the facts, including the accuracy of the targeting”); Turkel Commission, Second report on ‘Israel’s mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law’, paras. 48-50 (highlighted the requirement that a post-operation assessment to establish the facts, including the accuracy of the targeting, be conducted where casualties are assessed to have resulted from an attack); Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions (Philip Alston), E/CN.4/2006/53, para. 42 (stating “[w]hether, for example, the deceased was taking part in hostilities is an inherently factual question, requiring factual investigation”); Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism (Ben Emmerson), A/HRC/25/59, para. 32 (States have an “obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation of the results”, “whenever there is a plausible indication from any apparently reliable source that unintended civilian casualties may have been sustained.”); Report of the Special Rapporteur extrajudicial, summary, or arbitrary executions (Christof Heyns), A/68/382, para. 101 (“[c]ivilian casualties must be determined and should be disclosed”).

⁵⁵ See e.g., Communication No. 888/99, Telitsin v Russian Federation, Views adopted on 29 March 2004, para. 7.6.

⁵⁶ Concluding Observations: Yemen (2012), para. 24.

⁵⁷ Concluding Observations: Kyrgyzstan (2014), para. 13.

⁵⁸ Human Rights Council Resolutions 9/11 of 24 September 2008; Human Rights Council Resolution 12/12 of 1 October 2009; Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, UN Commission on Human Rights, resolution 2005/81, Principle 2; Basic Principles on the Right to a Remedy, para. 4.

vulnerable to overly broad interpretations that open the door to arbitrary secrecy based on vague and overbroad notions of what may be in the public interest. We also recommend amending draft **paragraph 32** so that it cannot be misconstrued as suggesting an all-or-nothing approach whereby the investigation results are either disclosed fully or fully withheld. The power to withhold information must be assessed in light of the duty to investigate, the right to truth and to a remedy, and the public interest in disclosing information about human rights violations, which may permit a State to withhold only part of the results of an investigation.⁵⁹ To that end, the draft would benefit from a clear explanation that information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to life, personal liberty and security, may never be withheld on grounds of national security.⁶⁰ Paragraph 32 should also specify that information about other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and may not be kept secret on national security grounds in a manner that would prevent accountability or deprive a victim of access to an effective remedy.⁶¹ This is particularly relevant for investigations, which are frequently one of the primary means for victims and society as a whole to find out the truth about violations of international human rights and humanitarian law.⁶² If a public interest exception is to be preserved, these considerations should be highlighted to underscore the very strong public interest in disclosure of information about violations of international human rights and humanitarian law. The names of individuals killed should also be disclosed.⁶³

Suggested amendments to paragraph 32 struck through and underlined

32. *Investigations into allegations of violation of Article 6 ... States parties need to take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life, including revealing the legal basis and reasons for targeting certain individuals and operations involving the use of lethal force, and the procedures employed by State forces before, during and after the time in which the deprivation occurred,⁶⁴ and identifying the names and bodies of individuals who had lost their lives.⁶⁵ ~~States parties should also disclose relevant details about the investigation to the victim's next of kin⁶⁶ and make public its findings, conclusions and recommendations,~~ subject only to redactions that are*

⁵⁹ *Contreras et al v El Salvador*, Inter-American Court of Human Rights, Judgment of 31 August 2011, paras. 26 and 173.

⁶⁰ Tshwane Principles, Principle 10.A(1).

⁶¹ *Ibid.*, Principle 10.A(2).

⁶² Concluding Observations: UK (2015), para. 8; *El-Masri v Macedonia*, Judgment of the ECtHR of 24 July 2014, para. 495; *Contreras et al v El Salvador*, Inter-American Court of Human Rights, Judgment of 31 August 2011, paras. 26 and 173; Basic Principles on the Right to a Remedy, para. 22(b).

⁶³ Mexico Supreme Court, *Cano case*, Amparo en revisión 911/2016, issued 1 February 2017; Tshwane Principles, Principle 10.A(6)(b).

⁶⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 28 May 2010, para. 93; General Comment 34, para. 19 (“To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest.”); ACHPR, General Comment No. 3, para. 21; Tshwane Principles, Principle 10.C(2); Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, 1 April 2014, A/HRC/26/36, para. 57.

⁶⁵ Report of the Working Group on Enforced or Involuntary Disappearances, 2 March 2012, para. 56, 59; Mexico Supreme Court, *Cano case*, Amparo en revisión 911/2016, issued 1 February 2017; Tshwane Principles, Principle 10.A(6)(b).

⁶⁶ Cf. *Ogur v Turkey*, Judgment of the ECtHR of 20 May 1999, para. 92.

⁶⁷ Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2016), para. 13; Cf. *Ramsahai v The Netherlands*, Judgment of the ECtHR of 15 May 2007, para. 353 (requiring sufficient public scrutiny of inquiry proceedings).

~~unless absolutely prevented from doing so necessary due to a compelling need to protect the public interest or the legal rights of directly affected individuals. There is a presumption in favour of disclosure of information about violations of international human rights and humanitarian law. In no circumstances may information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the right to life under article 6 be withheld. The withholding of information is also not permitted where it would prevent accountability or otherwise deprive a victim of a violation of a remedy. States parties must also...~~

29. **Paragraph 33** states that there is a “heightened obligation whenever State authorities have used or appear to have used firearms outside the immediate context of an armed conflict” to investigate. We recommend amending this sentence so it cannot be misconstrued as indicating that there is a lesser obligation to investigate in situations of armed conflict, when in fact the obligation in and outside an armed conflict is the same. In a situation of armed conflict, where the duty to investigate under Article 6 is triggered a State party must take all reasonable measures to conduct such an investigation, and it is only on a case-by-case basis that the exact modalities of the investigation may be affected by concrete constraints related to the armed conflict. Moreover, the investigation must never be reduced to a mere formality.⁶⁸

Suggested amendment to second sentence of paragraph 33 struck through and underlined

33. Loss of life occurring ... States parties must also ~~have a heightened duty to~~ investigate allegations of violations of Article 6 whenever State authorities have used or appear to have used firearms outside the immediate context of an armed conflict, for example, when live fire had been used against demonstrators,⁶⁹ or when civilians were found dead by firearms outside the theatre of military operations in circumstances fitting a pattern of alleged violations of the right to life by State authorities.⁷⁰

⁶⁸ ECtHR, *Al-Skeini and others v. UK*, Grand Chamber Judgment of 7 July 2011, para. 164; Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions (Philip Alston), E/CN.4/2006/53, para. 36.

⁶⁹ Communication No. 1275/2004, *Umetaliev v. Kyrgyzstan*, Views adopted on 30 Oct. 2008, para. 9.4; Communication No. 1828/2008, *Olmedo v. Paraguay*, Views adopted on 22 March 2012, para. 7.5.

⁷⁰ Comm. No. 1447/2006, *Amirov v Russian Federation*, Views adopted on 2 April 2009, para. 11.4.