UN Human Rights Committee General Comment No. 36 – Article 6: Right to life
Supplementary written submission from Penal Reform International

Introduction

This submission supplements and follows from PRI's previous contributions to the Human Rights Committee General Comment 36, following our written submission and oral statement at the half-day discussion on 14 July 2015. This supplementary submission focuses on questions asked by Committee members during the half day discussion and relates to issues regarding military and special courts, on the most serious offences committed in wartime, and on the extent of the 'nursing mothers' protection that we advocated in our previous submission.

This supplementary submission should be read in concert with PRI's previous written submission, oral statement and our publication *Strengthening Death Penalty Standards*, which is available at: http://www.penalreform.org/resource/strengthening-death-penalty-standards/. The publication also considers other human rights impacts of capital punishment beyond those clearly linked to ICCPR Article 6.

Military and special courts*

A question was raised during the half-day discussion about PRI advocating for a prohibition on military (or special) courts passing death sentences. Our reasoning has two elements. Firstly, we would encourage the General Comment to be clear that *any* death sentence passed without meeting fair trial standards should be considered arbitrary, regardless of who passes that sentence. Key aspects of fair trial standards include independence of the court from prosecuting authorities, for trials not to be held secretly or (generally) in private, and for information that is relevant or used in the trial to be available to the defendant and/or their lawyers. It is our understanding that, in practice, military and special courts more commonly contravene these fair trial standards than do regular civilian courts.

Related to this, a number of international and regional bodies, including the Human Rights Committee, have raised concerns about the repeated failure of military courts to conform with fair trial procedures. Several have recommended limits on the authority of military courts to impose and apply death sentences, due to the way that military courts have operated in practice. These are covered in detail in our previous written submission, but in summary:

1. The Human Rights Committee raised concerns (in 1984 and in General Comment 32 in 2007) about military courts trying civilians. This was, it stated, because such courts are often established 'to enable exceptional procedures to be applied which do not comply with normal standards of justice.'[1]
2. The UN Working Group on Arbitrary Detention has raised concerns, most recently in June 2014, that the importance for military officials to be obedient to their superiors is at odds with the centrality of a judge's independence and that 'military tribunals are often used to deal with political opposition groups, journalists and human rights

* The terms 'military court', 'military tribunal' and 'military jurisdiction' are all used in this section of the submission, as different quoted bodies have used different terms. They should be considered to be interchangeable and to refer to military justice bodies in general.

defenders.'[2] Among the minimum principles it set out for military justice to follow was that military tribunals should never be competent to impose the death penalty.[3]

3. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions in 1994 reported that the use of military jurisdiction in relation to human rights violations 'almost always results in impunity for the security forces'.[4] Additionally, and not covered in our original submission, in 2012 the Special Rapporteur again highlighted concerns about the fairness of military jurisdictions, including 'not allowing individuals adequate preparation of their defence'.[5] He stated: 'Military or other special jurisdictions are ill suited to ensuring full compliance with fair trial standards as required in capital cases (E/CN.4/1996/40, para. 107). They should not have the power to impose sentences of death on anyone'.[6]
4. The 1985 Basic Principles on the Independence of the Judiciary state that 'Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals' (Principle 5).
5. The 1994 Inter-American Convention on Forced Disappearance of Persons, Article IX stated that only ordinary courts could prosecute in cases of forced disappearance. Military jurisdictions were specifically excluded.
6. The 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa includes as Guideline L a specific right of civilians not to be tried by military courts.
7. A 2014 expert consultation on 'the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations', held under the auspices of the OHCHR, echoed many earlier concerns about the independence, impartiality and competence of military tribunals, fair trial concerns and issues around competence of military tribunals to try civilians.[7]

We believe that the combination of the requirement for fair trial processes to take place to prevent arbitrariness in passing death sentences or executions, the repeated and documented failure of military (and special) courts to reliably uphold these standards, and the weight of international and regional standards, expert opinion and/or jurisprudence mean that military (and special) courts should be prohibited from imposing death sentences.

Military jurisdiction in wartime

In the half-day discussion there was a question about military jurisdiction in wartime and how PRI's support for a prohibition on military courts imposing death sentences would interact with the situation that exists in wartime. It was asked whether ICCPR Optional Protocol 2 (OP2, which allows the retention of the death penalty in wartime for 'a most serious crime of a military nature committed during wartime') indicates a background assumption that during wartime, the extreme conditions prevailing may need greater or more robust application of criminal law in the military context, and may presumably render the involvement of civilian courts more difficult.

Firstly, PRI believes that the permissibility of an exemption from the death penalty in wartime is declining, as seen by the changes in international standards on this issue. While the 1983 Protocol 6 to the European Convention on Human Rights (ECHR) allowed an open-ended exemption from abolition in wartime (and for times of 'imminent threat of war', something not repeated in subsequent instruments), OP2 (1989) and the Protocol to the American Convention on Human Rights (1990) only permitted the wartime exemption if made at the time of ratification or accession. The most recent instruments, Protocol 13 to the ECHR (2002) and the draft Protocol to the African Charter on Human and Peoples' Rights on the

Abolition of the Death Penalty (currently awaiting adoption by the African Union) allow no exemptions to abolition.

Secondly, PRI is of the opinion that, should the death penalty in wartime remain, the biggest problem with this provision is the lack of guidance about what constitutes 'a most serious crime of a military nature committed during wartime'. As stated in our earlier written submission and oral statement, in practice states have legislated for the death penalty for a wide range of offences in wartime, many of which go considerably beyond the 'most serious offences' as conceived in peacetime. These include:

- Wilful destruction or damage to (among other things) public utilities, supplies, medicines or other items that are intended for or may be used for defending the country, if committed in wartime;
- Cowardice; and
- Voluntary self-mutilation aimed at making oneself unfit for service in time of war.

In effect, the laws of some states appear to permit severe punishments, including the death penalty, for almost any action that damages or intends to damage military operations, effectiveness or authority. Guidance from the Committee about which offences are the most serious in wartime could provide helpful clarity on this issue. The most serious offences restriction has been limited to 'intentional killing' in recent interpretations by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions (in 2012)[8] and the UN Secretary-General (in 2013).[9] Guided by this, PRI suggested in its oral statement that a most serious wartime offences definition could be: 'intention to kill resulting in the loss of life outside the scope of lawful acts of war'.

Regarding the issue of the possibly increased need for military courts in wartime, there are various points to make. Firstly and most importantly, a prohibition on military courts passing death sentences in no way limits their ability to operate, investigate or pass judgement on cases before them. Military (and other) courts can still function without the death penalty being among the sentencing options, just as they can function without corporal punishment.

Secondly, the operation of military (and civilian) courts in wartime is regulated by both human rights law and international humanitarian law (IHL). The situation of IHL is covered in more detail in PRI's previous written submission, but both the Third and Fourth Geneva Conventions (adopted in 1949) permit the use of military courts during wartime in some circumstances. Human rights law would apply in all situations: while some rights, including on trial standards, can be derogated from in an emergency (which war could constitute), death penalty standards cannot. The death penalty, even where permissible within treaty law, requires fair trial standards to be upheld before it can be non-arbitrarily imposed. This was stated by the Human Rights Committee in General Comment 29: 'as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 [administration of justice] and 15 [no retrospective prosecutions or penalties]'.[10] Developments in international law also show a move away from the use of military courts. Alongside the various standards and recommendations of international and regional human rights bodies outlined in the above section on *Military and special courts*, recent decades have seen the creation of the International Criminal Court (ICC), which covers crimes including genocide, war crimes and the crime of aggression (all of which primarily or exclusively take place in times of war) but does not include the death penalty as an available punishment.[*] While not operating in a war zone, the ICC does nonetheless demonstrate a movement away from the death penalty for even the most serious offences committed in extreme situations.

[*] The Rome Statute also includes the offence of crimes against humanity, which can be committed outside of times of war. It also does not have the death penalty as an available punishment.

Thirdly, the idea that the death penalty is required as an additional possible sentence in wartime would imply that it carries a unique deterrent effect and that 'harsh' sanctions are necessary to prevent lawlessness in an environment where law and order may have broken down or be more precariously defended than in times of peace. While PRI has not seen any analysis specifically looking at the deterrent effect of the death penalty in wartime, a 2012 analysis of 30 years of deterrence studies in the USA by the National Research Council of the National Academies found that no conclusions could be drawn 'about whether capital punishment decreases, increases, or has no effect on homicide rates'.[11] This is not to say that punitive sanctions have no deterrent effect, but that it could not be stated that the death penalty had an additional deterrent effect over and above other responses to offending. Additionally (again in peacetime), research has shown that would-be offenders are more deterred by the belief that they will be caught than by the severity of any sentence they may receive once caught.[12] PRI does not consider that the evidence exists to show that the death penalty in wartime is required on the grounds of deterrence or maintaining law and order.

Finally, PRI believes the Committee should pay heed to the suggestion that the death penalty itself constitutes torture, and that this understanding may be an emerging norm of customary international law.[13] Were this understanding to gain general acceptance, then the absolute nature of the prohibition on torture, which permits no derogation even in times of war, would mean that the death penalty is prohibited at all times, including wartime.

Pregnant women and mothers of small children

Further to PRI's previous written submission, we wish to clarify one aspect of the breadth of individuals covered by our recommended exemption for pregnant women and mothers of small children. Where considering 'nursing mothers', this should include all 'nursing women': the woman nursing a child in prison is not always the child's biological mother, but the child's heavy dependency on the woman will be the same as in cases where the biological mother is breastfeeding.

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[1] UN Human Rights Committee, 21st Session, *General Comment No. 13: Article 14 (Administration of justice)*, 1 January 1984, para. 4.
[2] UN Human Rights Council, 27th Session, *Report of the Working Group on Arbitrary Detention*, 30 June 2014, A/HRC/27/48, paras. 66-67.
[3] UN Human Rights Council, 27th Session, *Report of the Working Group on Arbitrary Detention*, 30 June 2014, A/HRC/27/48, para. 69.
[4] Federico Andreu-Guzmán, *Military jurisdiction and international law: Military courts and gross human rights violations (vol. 1)*, International Commission of Jurists, Geneva, 2004, p. 76 (*Military jurisdiction and international law*).
[5] UN General Assembly, 67th Session, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 9 August 2012, A/67/275, para. 31.
[6] UN General Assembly, 67th Session, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 9 August 2012, A/67/275, para. 33.
[7] Human Rights Council, 28th Session, *Summary of the discussions held during the expert consultation on the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations*, 29 January 2015, A/HRC/28/32.
[8] UN General Assembly, 67th Session, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 9 August 2012, A/67/275, para. 67.
[9] UN Human Rights Council, 24th Session, *Question of the death penalty: Report of the Secretary-General*, 1 July 2013, A/ HRC/24/18.
[10] UN Human Rights Committee, *General Comment No. 29: States of emergency (Article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 15.
[11] Daniel Nagin and John Pepper (eds.), *Deterrence and the Death Penalty*, National Research Council, USA, 2012, p. 2.
[12] Daniel Nagin and Greg Pogarsky, 'Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence' in *Criminology*, Vol 39, No. 4, 2001, quoted in Valerie

Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, The Sentencing Project, Washington D. C., November 2010, p. 4.

[13] See *Minimisation of suffering* section, above, for more on this argument.