

The Right to Life & the Right to Housing

Presentation to the Human Rights Committee

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this regard

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Introduction

Thank you for generously setting aside time during your 117th session to meet with me, in my capacity as Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this regard.

I am delighted to be engaged in a conversation with you about the Draft general comment 36. It comes at a good time as I am in the midst of preparing my next report to the General Assembly about the relationship between the right to life in article 6 of the International Covenant on Civil and Political Rights (ICCPR) and the right to adequate housing – an issue which I have come to recognize as critical to my mandate. Of course the Draft general comment No. 36 on article 6 of the Covenant (right to life) which the Committee is in the process of discussing, may have a significant influence on the way in which the relationship between the right to life and the right to adequate housing is understood.

It's also timely in light of it being the 50th anniversary of the 2 Covenants which provides us with a moment in time to reflect on the impact of the division into two categories of what are unified rights in the Universal Declaration of Human Rights. What does it mean for the broad struggle for the protection of human rights, that the right to life, well recognized as the “supreme” human right, “belonging at the same time to the domain of civil and political rights, as well as economic, social and cultural rights”¹, was placed within only one of the Covenants, and interpretation granted to a single Committee? No doubt a question you've been seized with yourselves on more than one occasion.

So, in light of my own work and in light of where I think we are at in the big struggle for the protection of human rights, I will be honest to say that I come here today with some real concerns about the September 2015 draft General Comment 36, particularly with respect to paragraphs 5 and 28, and their implications. As you continue your deliberations, I would like to offer some food for thought, which I hope you will take in the spirit of engendering constructive dialogue.

¹ Street Children Case (*Morales v Guatemala*), Joint Concurring Opinion of Judges A.A. Cancado Trindade & A. Abreu-Burelli, Inter-Am. Ct. H.R. (Ser. C) No. 63, ¶¶ 2-4, available at http://www.corteidh.or.cr/seriecing/VotocancadoabreuSerie_c_63_ing.doc .

Chief Concerns

My overarching concern is that in the current draft of general comment 36, the right to life is being interpreted in a restrictive fashion. For example, references to the right to life involving deliberate infliction of life terminating harm or injury, and under the Optional Protocol, the requirement that individuals claiming to be victims of a violation can only invoke short-term obligations.

This restrictive approach, in my opinion, is out of step with:

- 1) the lived experiences of some of the most vulnerable populations experiencing egregious rights violations – those living in homelessness and grossly inadequate housing;
- 2) emerging regional and national level jurisprudence and
- 3) and its inconsistent with the big human rights project, with the Committee's own direction and if left in its current form, would deny access to justice to a particular set of human rights claimants in a discriminatory manner.

Let me briefly address each of these in turn.

1) The Right to Housing and The Right to Life: Lived Experiences

One of the things I have noticed in the past two years is that the right to a dignified and secure life free of the threat of disease, displacement, family break-up, and risk of death is central to the human rights claims advanced by those who are homeless or living in grossly inadequate housing. It is the connection between the right to adequate housing and the right to a life of dignity and security that makes access to adequate housing a fundamental human right.

But what I see happening internationally and domestically, including within general comment 36, is the conceptual separation of the right to housing from the human rights values which form its core –to live in peace, security and dignity, which is in fact the definition of the right to adequate housing ascribed by the ICESCR. And this separation has meant, I think, that homelessness and grossly inadequate housing has not been addressed as a serious human rights violation demanding urgent and concerted attention. For example:

- Absent from the Millennium Development goals and absent from the 2030 Agenda for Sustainable Development
- Domestic courts and human right bodies have rarely engaged with governments about their human rights obligations to address and eliminate homelessness and intolerable living conditions
- In the forty years in which this Committee has received communications, it has rarely been asked to consider and has, to my knowledge, never addressed failures of governments to adequately respond to inadequate housing and homelessness as a violation of the right to life.

The absence of the urgency around issues of homelessness and grossly inadequate housing stands in stark contrast to what I hear and experience when on official country mission. I visit people's homes, where residents of all ages and abilities are hanging by a thread, living in unimaginable circumstances, amid excrement and garbage, with no safe drinking water or proper sanitation, no security of tenure, in over-crowded structures, with illnesses left untreated, who despite all of this, present themselves with dignity and humanity.

[There is no global data on the number of deaths, egregious injury or life threatening disease, caused by inadequate housing and homelessness and national level data is scarce, but there is no question that the numbers are astronomical. What we do know is that the death rate among homeless people ranges from two to ten times higher than for those who are not homeless.² It has been estimated that one third of deaths globally are linked to poverty and inadequate housing.³ Water and sanitation-related illnesses kill close to 1 million people each year and are among the leading causes of preventable mortality and morbidity.⁴ It's a global crisis. I was in India earlier this year where I learned that in the last 6 years in those states where records are available, close to 24,000 homeless people died as a result of their living conditions including because of infectious diseases, road accidents, and exposure to the elements.⁵ Even in the most affluent countries, including those with extensive health and social services, homelessness and precarious housing can have significant effects on life and health. In the UK, for example, homeless women can expect to live to age 43 compared to 80 years for women in the general population.]

On more than one occasion I have been told by people living in homelessness and inadequate housing that they feel they are not treated as human, that whether they are alive or dead is of little significance to government officials. [These are of course global experiences in affluent and developing economies equally].

These encounters more than anything have me convinced that a proper response to their experiences requires openness, not just to claims for the right to adequate housing but also to more central or core claims to a right to a dignified life. You can see from this perspective, [and as Prof. Sandra Fredman has said], a narrow or traditional interpretation of the right to life would be of little value to people who are homeless or inadequately housed. They hardly need freedom from state interference with bodily integrity. What they need is positive state action to give meaning to their right to life.

I think its these lived realities that should be the starting point for determining whether a rights holder has a valid right to life claim, rather than beginning with specific State acts, such as deportation or eviction, and then limiting obligations to protect against homelessness to those contexts. Even though people who are homeless and grossly inadequately housed represent a big percentage of the world's population, we have to remember that each is an individual rights holder and they must be able to claim their rights.

² Anne-Emanuelle Birn "Addressing the societal determinants of health: the key global health ethics imperative of our times", in Benatar, Solomon, and Brock, Gillian, eds. *Global Health and Global Health Ethics* (Cambridge: Cambridge University Press, 2011) at 41.

³ *Ibid* at 43.

⁴ World Health Organization and UNICEF Joint Monitoring Programme (JMP). (2015) Progress on Drinking Water and Sanitation, 2015 Update and MDG Assessment.

⁵ Response to Questionnaire on the right to life and to adequate housing, July 7, 2015.

Whether homelessness and inadequate housing are the result of an eviction, a deportation or long term systemic patterns of social exclusion and destitution, the experience of the rights holder is the same: preventable illnesses, shortened life span, and the deprivation of dignity and security.

So, where homeless and inadequate housing are related to ongoing systemic patterns, a determination of whether the right to life is relevant requires a shift away from whether the State took decisions that *caused* the homelessness (which could easily run afoul of arguments by the State regarding direct causality, and thus direct our focus away from the experiences of homelessness) toward an assessment of whether there are actions which the government can reasonably be expected to take in response to homelessness, in order to ameliorate the circumstances. Some violations of the right to life may be subject to immediate remedy; others may require longer-term solutions, but regardless, the core right remains the same and access to justice is essential.

A child facing homelessness as a result of deportation or eviction needs to have the deportation or the eviction prevented to protect her right to life. A child born into homelessness, on the other hand, needs governments to adopt positive measures to address homelessness and ensure access to housing to protect her right to life. The right to life ought to be considered of the same importance in both cases and it needs to be protected in both cases. It simply needs to be protected in different ways. Rather than narrowing the scope of the right so as to exclude claimants in need of positive measures of protection, courts and human rights bodies must employ different remedial strategies in different contexts. The right to life must be universal and it must always be subject to the requirement of effective legal remedies.

2) **Emerging National and Regional Jurisprudence:**

A broader approach has emerged in national and regional jurisprudence. My research has shown that at the domestic level the right to adequate housing is most effectively claimed and adjudicated when it is linked to the right to life and other core human rights principles. I have found jurisprudence from India, Colombia, Argentina, and South Africa that have understood the way in which the right to life and the right to housing necessarily interact.

Courts have played a leading role in elucidating the connection between the right to life in article 21 of the Indian Constitution and the right to adequate housing. In the 1981 case of *Francis Mullins v the Administrator Union* the Supreme Court recognized that: “the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”⁶ This case was followed by the *Olga Tellis* decision of the Supreme Court which explicitly recognized the right to livelihood forms an integral part of the right to life. A position reaffirmed in a number of cases that followed.

The Colombian Constitutional Court in its historic T-025 decision on the constitutional obligations to address the needs of Internally Displaced Persons (IDPs) in Colombia, affirmed that the right to life requires positive measures, many of which can only be implemented over a

⁶ *Francis Mullins v the Administrator Union* at 518.

period of time, to address the needs of IDPs in the fields of housing, access to productive projects, healthcare, education and humanitarian aid.

Regional systems have also developed a rich understanding of the meaning and application to the right to life. For instance, through its jurisprudence over the last 15 years, the Inter-American Court of Human Rights (IAC) has developed the concept of *vida digna* (the right to a dignified life). This concept was first referenced in the Court's landmark decision *Villagrán Morales et al* ("*Street Children*") *v Guatemala* and is, perhaps, nowhere more eloquently articulated:

The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.

Thus the IAC understands the right to life as imposing on States both negative and positive obligations and as a right that bridges the civil and political, social, economic and cultural rights divide. [The IAC has also indicated that these measures are particularly necessary to protect vulnerable groups. In *Sawhoyamaxa v Paraguay*, an Indigenous community was displaced from their lands and left to live on the side of a road. The court found a violation of article 4, stating, "the physical conditions in which the members of the Sawhoyamaxa Community have been living, and still live, as well as the death of several persons due to such conditions, are a violation of article 4 of the Convention".⁷]

A similar approach has been adopted in the African regional HR system and the European Social Rights Committee has emphasized in a number of cases that the "right to shelter is closely connected to the right to life and to the right to respect of every person's human dignity."⁸

An exception to the general swing toward a more substantive and inclusive understanding of the right to life and its relation to the right to adequate housing is found in the jurisprudence of the European Human Rights Committee.

3) The Committee's Responsibility and Access to Justice:

In General Comment 6, this Committee rejected a restrictive, negative rights approach to Article 6, and affirmed instead that the protection of the "inherent right to life" requires that States adopt positive measures. And in the context of periodic reviews, this Committee has also affirmed that Article 6 requires states to adopt positive measures to address homelessness, in order to attend to its effects on health and life itself.⁹

⁷ Case of the *Sawhoyamaxa Indigenous Community v. Paraguay* 2006 online at http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf

⁸ *European Roma and Travellers Forum v France* at 41; *Conference of European Churches (CEC) v Netherlands* at 137.

⁹ Concluding Observations on Canada, 1999.

It is this approach that I am urging this Committee to remain committed to and to expand upon in General Comment 36.

But as it stands, there appears to be a divide between your position in general comment 6 and your position in jurisprudence under the OP. And this divide seems to be replicated in the draft General Comment 36.

On my reading, the Committee seems to be saying that the right to life might impose positive obligations on a State to address homelessness and inadequate housing in the context of a review of a State Party's compliance, but that these positive obligations do not necessarily extend to an individual suffering homelessness, for example, who wants to make a right to life claim.

I am not suggesting that the Committee is unsympathetic to homelessness and grossly inadequate housing as a claimable human rights issue. Nor am I saying that the Committee doesn't understand interdependence. In fact, I'd say, the Committee has made incredibly important advancements in this regard – advances that I rely upon frequently in my work. For example, in your jurisprudence under the OP you've elucidated the degree of convergence and overlap in the protections from forced eviction under article 11 of the ICESCR and articles 7 and 17 of the ICCPR; in the context of deportation you would not expose vulnerable families or individuals with mental illness to homelessness.

These advances, however, have been restricted to a traditional negative rights paradigm and have not invoked article 6, relying instead on other Articles such as 7 and 17. And the Committee has only addressed State obligations with respect to housing and homelessness within the more limited context of deportation or interference with home. It has not, to date, considered whether domestic law and policy resulting in homelessness is subject to the same standards. It has also not indicated whether failures to take positive measures to address homelessness in contexts other than forced evictions violates the right to life.

In part, this simply reflects a general pattern in the types of communications the Committee receives and the types of allegations lawyers are likely to advance.

On the other hand, the Committee's jurisprudence might be interpreted by advocates as discouraging housing related claims linked to the right to life. The Committee has not, to my knowledge, addressed a complaint in which an author has alleged that a State has violated article 6 by failing to take positive measures to address homelessness.

By focusing on claims that can show intentional direct causation on the part of the State and that don't require long-term remedies, suggests that the Committee is doing some legal gymnastics in order to avoid a particular class of claims, based on the idea that somehow right to life claims should somehow be insulated from social and economic claims.

The import of the Committee's jurisprudence is felt at the domestic level, where governments take guidance from the Committee as to the nature of their obligations to protect the right to life and how this right should be interpreted and applied. Moreover, many courts, tribunals and human rights institutions and advocates are guided by the Committee's work to determine how the right to life should be interpreted, what claims should be advanced and what remedies should be available to claimants.

For most of those around the world whose fundamental rights are denied by circumstances of homelessness or intolerable living situations, access to justice may rely on how their courts interpret and apply the right to life. Successful claims have often relied either directly or indirectly on courts' commitments to protecting and enforcing the fundamental right to a dignified life and recognizing that such a life is impossible without access shelter and a secure place to live.

The narrowing of the right to life to what might be considered more of a "civil and political rights" paradigm effectively deprives millions of already disadvantaged individuals the full protection of this core right. In many instances, a restrictive definition of the right to life may effectively deny access to justice for violations of both the right to life and the right to adequate housing. In many domestic contexts, for example, the right to housing may not be enshrined in law and cannot be claimed directly, whereas the right to life appears in most Constitutions. In this context, a narrow interpretation of the right to life may prevent someone who is homeless or suffering severe housing inadequacy from making any human rights claim whatsoever.

Let me conclude with some recommendations that I advance for the consideration of the Committee in its further deliberations regarding draft general comment No. 36.

1. Overarching

1. Rather than seeking to distinguish the right to life from socio-economic rights such as the right to adequate housing, I would urge the Committee to adopt the opposite approach. In light of the scarcity of communications addressing the documented effects of homelessness and destitution on the right to life, I think the new general comment needs to emphasize indivisibility and interdependence.
2. The brief paragraph in general comment No. 6 which denounced narrow approaches to the right to life and affirmed positive obligations has been an essential reference for advocates seeking access to justice to claim the right to life. However, these dimensions of state obligations have continued to be neglected and ignored. The kinds of positive obligations that emanate from the right to life should be more prominent in the draft and the principle affirmed in general comment 6 needs to be substantially elaborated upon to clarify that positive obligations are central rather than peripheral to article 6.

2. Definition of deprivation of life: paragraph 5

3. I suggest that the Committee adopt a much broader definition of the deprivation of life than was included in paragraph 5 of the first draft of the general comment No. 36 (September 2015). Any definition adopted in the general comment should be, in my view, in line with positive developments in domestic and regional jurisprudence and provide support for, rather than undermining, access to justice. I do not believe that the general comment should restrict the right to life to protect only against harms that are directly caused by an act or omission, and I recommend that there be no reference to whether the deprivation is caused by an act that is deliberate or intentional.

4. As noted above, I believe the starting point should be the lived experience of the individual affected and that the right to life should be defined in relation to the interests it is meant to protect – not the type of actions that gave rise to the deprivation. The protection of the right should be universal, not dependent on whether the deprivation was caused by particular actions of states or on whether these actions were deliberate or intentional.
5. Any restriction of the right to life to deliberate acts causing direct harm would appear to be incompatible with the Committee's recognition that a failure to take positive measures to address homelessness may constitute a violation of article 6.

3. Short and long term measures: paragraph 28

6. Finally, I am extremely concerned by some aspects of paragraph 28 and suggest that it be substantially re-drafted. Paragraph 28 refers to the range of obligations on which the right to life of the greatest number of people depend. Obligations to address homelessness and extreme poverty and ensure access to health care are identified. However, the intent of the paragraph, as I understand it, is to distinguish these kinds of obligations from those which can be addressed in communications under the optional protocol. The suggestion is that homelessness and poverty require longer-term, systemic remedies aimed at ensuring conditions for a dignified existence, and that claims which require these kinds of remedies would not be admissible under the Optional Protocol. In my view, this kind of distinction between justiciable claims and longer-term goals is not only discriminatory against some of the most disadvantaged groups, but it represents a serious set-back, returning us to a dichotomy between justiciable and non-justiciable claims that has been largely abandoned.
7. The distinction between long-term and short-term measures is problematic and I urge that it be abandoned. It would have the effect of denying access to justice for claims engaging the most widespread and serious violations of the right to life. It seems inconsistent with the Committee's role and purpose to limit access to justice for violations of the right to life in such an extreme manner. I strongly urge the Committee to consider the significant impact that this kind of restriction on access to justice would have on the most marginalized and disadvantaged individuals and communities.

Thank You.

ENDS