**Submission on Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to life**

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With congratulations to the UN Human Rights Committee on its completion of the revised draft of General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, this submission aims to provide information and drafting suggestions to assist the Committee with its finalisation of General Comment No. 36.

1. **Weapons of mass destruction (paragraph 13)**

There is no common, fixed definition of the term ‘weapons of mass destruction’ in international law.[[1]](#footnote-1) Although US law[[2]](#footnote-2) and certain commentators[[3]](#footnote-3) have in practice focused on biological weapons, chemical weapons and nuclear weapons, others have adopted different typologies[[4]](#footnote-4) and new weapon designs and technologies continue to emerge. There have been attempts to argue that at least nuclear weapons are not indiscriminate by nature because it can be used in a way that discriminates,[[5]](#footnote-5) despite their retaining massive destructive potential, the possibility of their misuse in a way that is indiscriminate and the risk of their accidental leakage causing incalculable loss of human lives. In any event, some conventional weapons can also be considered to be indiscriminate by nature.[[6]](#footnote-6) What singles out weapons of mass destruction as a particular threat to the right to life is not their allegedly indiscriminate nature or usage, but the structural violence and unconspicuous hazards they cause by their very existence and potentiality that pose annihilative threats, drain resources, trigger arms race and make large-scale wars more likely, all of which undermine the right to life.[[7]](#footnote-7)

Drafting suggestion for paragraph 13: removal of the square brackets around the word ‘threat’ and removal of the wording ‘are indiscriminate in effect and’.

1. **Consistency with General Comment No. 35 on the relationship between legality and arbitrariness (paragraph 17)**

Paragraph 11 of the HRC General Comment No. 35 regarding the right to liberty states the following:

‘The second sentence of paragraph 1 prohibits arbitrary arrest and detention, while the third sentence prohibits unlawful deprivation of liberty, i.e., deprivation of liberty that is not imposed on such grounds and in accordance with such procedure as are established by law. The two prohibitions overlap, in that arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful.’

Its counterpart in General Comment No. 36, paragraph 17, however does not contemplate any situation where an illegal deprivation of life would not be arbitrary but states the following:

‘The second sentence of paragraph 1 requires that the right to life be protected by law, while the third sentence requires that no one should be arbitrarily deprived of life. The two requirements overlap in that a deprivation of life that lacks a legal basis or is otherwise inconsistent with life-protecting laws and procedures is, as a rule, arbitrary in nature.’

This effectively renders the relative scope of ‘arbitrary’ deprivation of life to ‘illegal’ deprivation of life more expansive than the relative scope of ‘arbitrary’ detention to ‘illegal’ detention because a deprivation of life that violates a law is deemed necessarily arbitrary while a deprivation of liberty that violates a law is not necessarily deemed arbitrary. This distinction unnecessarily creates a discrepancy between the right to life and the right to liberty that does not appear to be based on past jurisprudence or justified by the structure of the two rights, both of which require a legal basis for deprivation of life/liberty despite their different formulations catering to the different nature of the actions involved. This discrepancy will also have other knock-on effects on various parts of the General Comments. To maintain consistency with General Comment No. 35, a killing that violates an applicable law should not be deemed to necessarily violate the ‘non-arbitrary’ requirement but should be deemed to necessarily violate the requirement to protect the right to life by law, which includes the requirement that ‘States parties must ensure full compliance with all of the relevant legal provisions’.[[8]](#footnote-8) It is of course also possible that a deprivation of life could violate both requirements, as can a deprivation of liberty.

Drafting suggestion for paragraph 17: replacement of the wording ‘The two requirements overlap in that a deprivation of life that lacks a legal basis or is otherwise inconsistent with life-protecting laws and procedures is, as a rule, arbitrary in nature.’ with ‘The two requirements overlap, in that a deprivation of life may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful.’

1. **Arms trade (paragraph 25)**

Article 6(2) of the Arms Trade Treaty provides that ‘[a] State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party’. The Arms Trade Treaty now has 92 state parties and 130 signatories, [[9]](#footnote-9) most of which are parties to the ICCPR, under which they have the obligation to ‘ensure that all activities taking place in whole or in part within their territory and in other areas subject to their jurisdiction, but having a [direct,] significant and foreseeable and significant impact on the right to life of individuals outside their territory … are consistent with article 6’.[[10]](#footnote-10) Even if article 6 of the Arms Trade Treaty is for any reason not triggered, article 7 of the Arms Trade Treaty provides that an arms ‘exporting State Party shall not authorize the export’ if ‘there is an overriding risk’ that the arms ‘could be used to … commit or facilitate a serious violation of international human rights law’ after assessment and mitigation.

Drafting suggestion for paragraph 25: addition of the wording ‘and prevent arms transfers that could constitute or bear an overriding risk of facilitating the violations of the right to life’ after the words ‘including armed or terrorist groups’.

1. **Progressive realisation of human rights (paragraph 30)**

It has been recorded that ‘a great number of State representatives in both the HR Comm and the GA were not prepared to question the direct, immediate applicability of Covenant rights, although they accepted certain formulations indicating a dynamic element of progressive realization of human rights’. [[11]](#footnote-11) Dynamic interpretation of the European Convention of Human Rights (‘ECHR’) has also been adopted by the European Court of Human Rights (‘ECtHR’) to progressively enhance equality rights,[[12]](#footnote-12) the right of access to justice[[13]](#footnote-13) and the right to privacy.[[14]](#footnote-14)

Drafting suggestion for paragraph 30: replacement of the wording ‘Given their wide-ranging implications, some of the obligations relating to the general conditions necessary for full enjoyment of the right to life can only be realized progressively’ with ‘Given their wide-ranging implications, the immediate and direct applicability of the obligations relating to the general conditions necessary for full enjoyment of the right to life does not preclude the imposition of further requirements to progressively enhance the protection of the right to life’.

1. **Continuing application of article 6 ICCPR to the conduct of hostilities (paragraph 67)**

The ECtHR has routinely applied article 2 ECHR to the conduct of hostilities.[[15]](#footnote-15)

Drafting suggestion for paragraph 67: removal of the square bracket around the wording ‘to the conduct of hostilities’.

1. David Fidler, ‘Weapons of Mass Destruction and International Law’ (2003) 8 ASIL Insights. [↑](#footnote-ref-1)
2. United States Code, 2011 Edition, Title 18 - CRIMES AND CRIMINAL PROCEDURE§2332a. Use of weapons of mass destruction (c)(2). [↑](#footnote-ref-2)
3. William H Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press 2016); Daniel Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford University Press 2009). [↑](#footnote-ref-3)
4. AA Tikhonov, ‘The Inter-Relationship between the Right to Life and the Right to Peace: Nuclear Weapons and Other Weapons of Mass-Destruction and the Right to Life’ in Bertrand G Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff Publishers 1985). [↑](#footnote-ref-4)
5. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, United Kingdom’s Written Statement, p. 53, para. 3.70; United States of America, CR951 34, pp. 89-90. [↑](#footnote-ref-5)
6. E.g. Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. [↑](#footnote-ref-6)
7. ###  See Tikhonov (n 4) 99–100. See also *Mrs. Vaihere Bordes and Mr. John Temeharo v. France*, Communication No. 645/1995, U.N. Doc. CCPR/C/57/D/645/1995 (1996), at para 5.9, referring to HRC General Comment 14, 19 November 1984.

 [↑](#footnote-ref-7)
8. Revised draft of the General Comment No. 36, para 23. [↑](#footnote-ref-8)
9. https://www.un.org/disarmament/convarms/att/ [↑](#footnote-ref-9)
10. Revised draft of the General Comment No. 36, para 26. [↑](#footnote-ref-10)
11. Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd rev ed, NP Engel 2005) 723. [↑](#footnote-ref-11)
12. *Marckx v Belgium* (1979) 2 EHRR 330. [↑](#footnote-ref-12)
13. *Airey v Ireland* (1979) 2 EHRR 305. [↑](#footnote-ref-13)
14. *X and Y v the Netherlands* (1985) 8 EHRR 235. [↑](#footnote-ref-14)
15. See e.g. *Isayeva Yusupova and Bazayevav Russia*  (2005) 41 EHRR 39; *Isayeva v Russia* Application no. 57950/00, Judgement, Strasbourg, 24 February 2005; *Al-Skeini v UK* (2011) 53 EHRR 18. [↑](#footnote-ref-15)