**Response to Call for Submissions Regarding Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to Life**

1. This submission is made by Prof. Noam Lubell and Dr. Daragh Murray, based at the University of Essex School of Law and Human Rights Centre. The authors appreciate this opportunity to engage with the Human Rights Committee in relation to Draft General Comment No. 36, and would like to congratulate the Committee on their work to-date. The authors are ready to engage further with the Committee should any questions arise in relation to the below content.
2. This submission will briefly address two issues: the extraterritorial application of international human rights law in the context of the right to life, and the relationship between international humanitarian law and international human rights law.

**The Extraterritorial Application of International Human Rights Law**

1. As currently presented, draft paragraph 66 may be interpreted as unnecessarily restricting the extraterritorial application of international human rights law. There is a clear trend in international human rights case law to establish extraterritorial jurisdiction when State agents exercise authority and control over an individuals’ human rights.[[1]](#footnote-1) In this context, international human rights law may be ‘divided and tailored’ whereby a State exercises control over some, but not all, of an individual’s rights, and jurisdiction is therefore established solely in relation to the rights over which control is exercised. Equally, dependent upon the level of control exercised, jurisdiction may only be established in relation to certain components of the right. For instance, the obligation to respect may be brought into play, while the obligation to protect may not.
2. The reasoning underpinning this approach to extraterritorial jurisdiction is persuasive. If a State exercises direct control over an individuals’ rights, it is appropriate that jurisdiction be established with respect to those rights. To hold otherwise would create a vacuum of human rights protection, and allow States to do abroad what they cannot do at home.
3. This form of extraterritorial jurisdiction is most clearly established – as noted by the Committee – during detention operations, when State agents exercise physical authority and control over an individual.[[2]](#footnote-2) In such circumstances, rights such as the right to liberty, the right to life, and the prohibition of torture or cruel, inhuman or degrading treatment or punishment are brought into play.
4. However, international case law has established that extraterritorial jurisdiction may also arise in other situations involving the exercise of authority and control, but where this authority does not have the same physical basis as during detention operations. For instance, in *Isaak v. Turkey*, the European Court of Human Rights held that a person beaten to death in a UN buffer zone, while Turkish soldiers either participated or looked on, fell within the authority and control of the Turkish soldiers.[[3]](#footnote-3) Equally, in *Jaloud v. The Netherlands*, the European Court of Human Rights found that State agents exercised authority and control over persons as they passed through a checkpoint.[[4]](#footnote-4)
5. International case law clearly indicates that extraterritorial jurisdiction may be established when State agents exercise authority and control over an individuals’ rights. The exercise of authority and control must be direct, but it need not be based on physical control. Accordingly, extraterritorial jurisdiction should be established in relation to the right to life on the basis of targeting or the use of force. When a State agent places an individual ‘within their crosshairs’ they exercise direct authority and control over an individual’s right to life. This was the explicit finding of the Inter-American Commission on Human Rights in *Allejandre Jr. and Others v. Cuba*.[[5]](#footnote-5) The case of *Pad v. Turkey* is also relevant. This case was found inadmissible based on the failure to exhaust domestic remedies. However, in the admissibility decision it was held that victims of airborne Turkish helicopter gunfire in Northern Iraq would have fallen within Turkey’s jurisdiction.[[6]](#footnote-6)
6. The final sentence of draft paragraph 66 could be taken to imply that in extraterritorial situations, complete control over the person (such as through detention) is required before an obligation can be found with regard to the right to life. This would have the unfortunate effect of excluding situations such as a deliberate killing of an individual absent detention (e.g. by a sniper rifle). In order to remove any impression that the Committee is unnecessarily restricting the exercise of extraterritorial jurisdiction it is suggested that draft paragraph 66 be modified in order to make clear that extraterritorial jurisdiction may arise on the basis of direct control over the individual’s right to life, even if the individual is not physically held by State agents.

**The relationship between international human rights law and international humanitarian law**

1. The authors would like to highlight some potential issues relating to how draft paragraph 67 risks being interpreted vis-à-vis the relationship between the right to life and the law of armed conflict/international humanitarian law. In this light, the submission will offer certain suggestions regarding how the complex relationship between international human rights law and international humanitarian law may be approached.
2. In draft paragraph 67, the Committee appropriately states in relation to international human rights law and international humanitarian law that ‘both spheres of law are complementary, not mutually exclusive’. However, when read as a whole, draft paragraph 67 risks being interpreted as proposing a variation of the *lex specialis* approach, whereby the right to life is always interpreted in light of international humanitarian law. For instance, draft paragraph 67 currently states that: ‘[u]ses of lethal force authorized and regulated by and complying with international humanitarian law are, in principle, not arbitrary.’
3. An interpretation that always gives precedence to international humanitarian law risks oversimplifying a complex relationship, and negating the continued contribution of international human rights law to the regulation of armed conflict. In particular, it should be highlighted that the international humanitarian law applicable in non-international armed conflict is significantly underdeveloped when compared to the law applicable in international armed conflict. During non-international armed conflict, international humanitarian law does not offer concrete guidance with respect to a number of issues that bring into play the right to life.
4. When approaching the relationship between international human rights law and international humanitarian law it is suggested that both bodies of law are applicable, and often capable of contributing to the regulation of the situation at hand. To facilitate the complementary co-application of international human rights law and international humanitarian law, one body of law should typically provide the initial reference point when approaching the legal regulation of a situation. The other body of law will then be applied and interpreted in that context.[[7]](#footnote-7) For instance, during situations of ‘active hostilities’ the initial reference point in relation to targeting decisions will be international humanitarian law. As such, and subject to the requirements of international humanitarian law, during active hostilities lethal force may be directed against all combatants, military objectives, members of an armed group belonging to a party to the conflict, and individuals directly participating in hostilities. International human rights law is applied in this context and will, for example, provide further detail regarding the precautions required in attack.[[8]](#footnote-8) However, there may be situations during an armed conflict which take place in circumstances that are not active hostilities. In such situations, even though international humanitarian law may be applicable, international human rights law may constitute the initial reference point. In these cases, status-based targeting is prohibited, and the use of force must be approached in accordance with the law enforcement framework: lethal force may only be used as a last resort, with the objective being the protection of life.
5. The level of control exercised by a State is one of the factors relevant to determining whether international humanitarian law or international human rights law constitutes the initial point of reference. In situations where a State does not exercise control – such as on the battlefield, along the frontline, or in areas controlled by an armed group – international humanitarian law should constitute the initial reference point. During an armed conflict, in the absence of control, States cannot conduct law enforcement operations as required by international human rights law. On the other hand, where a State does exercise control over the environment such that it is able to conduct law enforcement operations, international human rights law should constitute the initial reference point. It is emphasised that international human rights law is inherently flexible, and capable of adapting to such situations.[[9]](#footnote-9) For instance, if a civilian is directly participating in hostilities by sitting at a computer terminal transmitting targeting information or creating a cyber-attack – but is not directly engaging enemy forces (i.e. firing a gun) – in an area subject to the State’s control, where the State can feasibly capture and detain, international human rights law should provide the initial reference point for the use of force. The applicable international humanitarian law will recede to the background for these purposes.
6. In situations of belligerent occupation, the default should be that international human rights law constitutes the initial reference point vis-à-vis the use of force. The framework should only switch on the outbreak of active hostilities.
7. Additionally, it is highlighted that draft paragraph 67 currently reads as follows: ‘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.’ It is suggested that the proposed text ‘to the conduct of hostilities’ not be inserted. International human rights law and the right to life apply broadly in situations of armed conflict. Application is not restricted to the conduct of hostilities. For instance, the right to life is applicable to law enforcement operations occurring during armed conflict, including during situations of occupation, but which do not relate to the conduct of hostilities. Including the proposed text therefore risks adding unnecessary confusion and creating the impression that the applicability of the right to life is restricted to the conduct of hostilities.

1. In the European system, this is referred to as ‘State agent authority and control’. See, *Al-Skeini and Others v. the United Kingdom*, Judgment, European Court of Human Rights, App. No. 55721/07, 7 July 2011, paras. 133-137. [↑](#footnote-ref-1)
2. See, *Ocalan v. Turkey,* Judgment, European Court of Human Rights, App. no. 46221/99, 12 May 20015, para. 91. See also, *Al-Skeini and Others v. the United Kingdom*, Judgment, European Court of Human Rights, App. No. 55721/07, 7 July 2011, para. 136. [↑](#footnote-ref-2)
3. *Isaak v. Turkey*, Judgment, European Court of Human Rights, App. No. 44587/98, 24 June 2008, paras. 110-119. [↑](#footnote-ref-3)
4. *Jaloud v. the Netherlands*, Judgment, European Court of Human Rights, App. No. 47708/08, 20 November 2014, para. 152. [↑](#footnote-ref-4)
5. *Allejandre Jr. and Others v. Cuba*, Decision, Inter-American Commission on Human Rights, Case No. 11.589, 29 September 1999, para. 25. [↑](#footnote-ref-5)
6. *Pad v. Turkey*, Admissibility Decision, European Court of Human Rights, App. No. 60167/00, 28 June 2007, para. 54. [↑](#footnote-ref-6)
7. In the *Practitioners’ Guide to Human Rights Law in Armed Conflict* (OUP 2016) to which both authors contributed, situations in which international humanitarian law provides the initial reference point are regulated by what is referred to as the ‘active hostilities’ framework, while situations in which international human rights law provides the initial reference point are regulated by what is referred to as the ‘security operations’ framework. This is discussed further in Chapter 4 of the book. [↑](#footnote-ref-7)
8. See, for instance, *Kerimova and Others v. Russia*, Judgment, European Court of Human Rights, App. Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, 3 May 2011, para. 250; *Isayeva v. Russia*, Judgment, European Court of Human Rights, App. No. 57950/00. 24 February 2005, paras. 186-187. See further, *Practitioners Guide to Human Rights Law in Armed Conflict* (OUP 2016) paras. 5.57-5.68. [↑](#footnote-ref-8)
9. See, for example, the approach taken by the Court in *Finogenov v. Russia,* Judgment, European Court of Human Rights, App. No. 18299/03, 27311/03, 20 December 2011, paras. 210-216. [↑](#footnote-ref-9)