To the distinguished members of the Human Rights Committee,

The Committee’s Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights is, in most respects, an admirable document. However, one sentence of the Committee’s Draft raises several concerns. According to the Committee’s Draft,

Uses of lethal force authorized and regulated by and complying with international humanitarian law are, in principle, not arbitrary. (para 67)

I encourage the Committee to delete this sentence, for two reasons.

First, there is a long-running debate over whether international humanitarian law *authorizes* uses of lethal force or merely *restrains* uses of lethal force. For example, the distinguished authors of the International Committee of the Red Cross’ [Commentary](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D80D14D84BF36B92C12563CD00434FBD) on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 write that

The law relating to the conduct of hostilities is primarily a law of prohibition: it does not authorize, but prohibits certain things. (para 2238)

Many leading scholars agree that international humanitarian law restrains but does not authorize uses of lethal force, including Richard Baxter, Hersch Lauterpacht, and Michael Schmitt. One argument for this view, which may be of interest to the Committee, is that international law cannot simultaneously authorize and prohibit the same act. Accordingly, an act of aggression that complies with international humanitarian law cannot be simultaneously prohibited (by the *jus ad bellum*) and authorized (by the *jus in bello*). Instead, such an act would be prohibited by the *jus ad bellum* but neither prohibited nor authorized by the *jus in bello*.

In my view, at a minimum, the Committee should avoid taking sides in this debate. Otherwise, the Committee would have to explain how an act of aggression that fully complies with international humanitarian law could be simultaneously authorized (by international humanitarian law) and prohibited (by the UN Charter). The Committee would then have to explain why such acts of aggression should be considered arbitrary despite having a legal basis (in international humanitarian law) and conforming to life-protecting rules (of international humanitarian law). I suspect that the Committee has higher priorities than resolving these conundrums, and would prefer to simply delete the words “authorized and.”

Second, it is not clear what the phrase “in principle” could mean in this context. According to the Committee’s Draft, acts of aggression regulated by and complying with international humanitarian law are nevertheless arbitrary. So “in principle” cannot mean “in general,” let alone “as a matter of principle,” since most international armed conflicts begin with one party committing an act of aggression against another.

One possibility is that “in principle” means “without more” or “unless such uses of lethal force violate other life-protecting laws” such as the general prohibition of interstate force. On this view, human rights law does not itself restrain the conduct of hostilities, beyond what other rules of international law provide. This reading seems hard to reconcile with an earlier passage of the Committee’s Draft, which states:

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 law as well as elements of reasonableness, necessity, and proportionality. (para 18)

Similarly, in my view, “arbitrariness” in armed conflict should not be equated with “against other rules of international law.” For example, international humanitarian law does not prohibit killing combatants who could be safely captured (for a contrary view see here). Nevertheless, such unnecessary killing might be considered arbitrary under human rights law. As the African Commission on Human and Peoples’ Rights [observes](http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf#page=16),

Where military necessity does not require parties to an armed conflict to use lethal force in achieving a legitimate military objective against otherwise lawful targets, but allows the target for example to be captured rather than killed, the respect for the right to life can be best ensured by pursuing this option. (para 34)

In my view, the Committee should not foreclose the possibility that human rights law imposes its own restraints on the conduct of hostilities, prohibiting arbitrary deprivations of life not prohibited by other rules of international law. Instead, the Committee should simply delete this sentence, which seems to raise more questions than it resolves.

I thank the Committee for inviting comments, and for considering my submission.

Sincerely,

