To: The Office of the United Nations

High Commissioner for Human Rights

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**Re: Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to Life**

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# Introduction

The Human Rights Committee (the “Committee”) begins the draft comment with:

Article 6 recognizes and protects the right to life of all human beings…**It is most precious for its own sake as a right that inheres in every human being**, but it also constitutes a fundamental right, whose effective protection is the prerequisite for the enjoyment of all other human rights.[[1]](#footnote-1)

ARPA Canada submits that the Committee has failed to give effect to this precious right by refusing to recognize the right to life of unborn children. Article 6 of the *International Covenant on Civil and Political Rights* (“the Covenant”) is foundational, does not permit derogation, and should not be interpreted narrowly,[[2]](#footnote-2) but extends to all regardless of age. By failing to recognize unborn children’s right to life while finding a right to abortion, the Committee is creating an arbitrary gap in the General Comment and creating human rights law without reference to the treaty they are charged with interpreting.

# The Unborn Child’s Right to Life

## Unborn Children as Human Beings Deserving Protection

 The failure to recognize the rights of unborn children contradicts the science of conception and the development of the human person. Embryologists agree that a human being comes into existence when there is a single, unified and self-integrated biological system. This happens at syngamy, where two gametes combine to form a zygote in the womb – a genetically distinct individual.[[3]](#footnote-3)

Once conceived, an unborn child is a “determinate and enduring individual” [[4]](#footnote-4) who does not change except in size, development, age, and environment. None of these characteristics serve as the foundation of human rights. We do not recognize tall people as having more rights than short people; nor do the developmentally challenged forfeit their rights. Human rights and, as the most foundational, the right to life, are inherent to **all human beings**. There is no reason to recognize the right to life for infants, but not for unborn children. As such, unborn children have the right to life and need legal protection.

Both the *United Nations Declaration of the Rights of the Child* and the *Convention on the Rights of the Child* recognize that “the child, by reason of physical and mental immaturity, needs special safeguards and care, including appropriate legal protection **before** as well as after birth.”[[5]](#footnote-5) It is imperative that the Committee recognize the right to life of unborn children in the General Comment.

## Article 6(5)’s Recognition of the Right to Life of Unborn Children

 Previous drafts of the General Comment recognized the legitimacy of States upholding the rights of unborn children. Omitting this recognition is inconsistent with Article 6, particularly Article 6(5) which states:

“Sentence of death shall not be **imposed** for crimes committed by persons below eighteen years of age and shall not be **carried out** on pregnant women.” [Emphasis added]

This article permits the death penalty to be *imposed* on adults, even a pregnant woman, but it may only be *carried out* on her when she is no longer pregnant.[[6]](#footnote-6) The purpose of the carve-out for pregnant women is to protect unborn children from losing their life because of the crimes of the parent. This is a clear signal that the Covenant considers unborn children’s right to life as meriting protection.

 In the previous draft of the General Comment, the Committee recognized this and remarked that special protection from the death penalty is afforded to pregnant women **for the sake of the unborn fetus** and the fetus’ father. This was an expression of the Covenant drafter’s intention, and the most logical interpretation of Article 6(5)’s purpose,[[7]](#footnote-7) but was only excluded from this General Comment to avoid unnecessary controversy.[[8]](#footnote-8)

 The Committee may intend to avoid taking a side, but the draft General Comment favours a right to abortion at the expense of unborn children’s right to life. A right to abortion was never the intention of the original drafters of the Covenant and was explicitly excluded in discussions leading to the drafting of the Covenant.[[9]](#footnote-9) The issue of the Covenant interpretation is discussed further in section II of our submission.

## The Consequence of Failing to Safeguard the Right to Life

 The Committee rightly recognizes the need to uphold an individual’s right to life in order to provide “effective remedies and reparation to **all** victims of violations of the right to life.”[[10]](#footnote-10) Refusing to recognize the right to life of the most vulnerable cannot be justified; it “amounts to an apology for the decisions of those in power to treat as non-persons those without power and without adequate social support to provide protection.”[[11]](#footnote-11)

The failure to uphold unborn children’s right to life impacts other rights in the Covenant, most notably the right to be free from discrimination in Article 26 of the Covenant. Abortion has been used to discriminate against women and those with disabilities.[[12]](#footnote-12) The failure to uphold the right to life of unborn children in these circumstances weakens the right to life of women and those with mental and physical disabilities even after they are born. Recognizing this connection is imperative to maintaining the integrity of the right to life and ensuring that it is offered for all members of society.

 While the original draft of the General Comment had a detailed dialogue concerning State recognition of the right to life of unborn children,[[13]](#footnote-13) the newest draft omits this discussion. The Committee should reintroduce the discourse about the purpose of Article 6(5) as recognizing the rights and interests of unborn children and allowing States to uphold this right.

**Recommendation:** The beginning of paragraph 9 should note that “such measures must not result in violation of the right to life of a pregnant woman or her other rights under the Covenant” and that they must not result in violation of the right to life of unborn children or any other rights they enjoy under the Covenant.

# The Human Rights Committee’s Role to Interpret the Covenant

The Committee’s mandate is to interpret the Covenant,[[14]](#footnote-14) not to create new human rights law. By reading in the right to abortion the Committee is overstepping its mandate. In interpreting the Covenant, the Committee must use the *Vienna Convention on the Law of Treaties* which codifies much of customary international law on treaty interpretation. This means starting with the Article 31(1) rule of interpreting the treaty “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” [[15]](#footnote-15)

## Interpretation of the Covenant Supports either Right to Life for Unborn Children or a Respect for State Sovereignty on the Issue

Article 6 states that “no one shall be arbitrarily deprived of his life.” The context of Article 6(5) (as discussed above) includes a recognition of unborn children’s right to life in the context of the death penalty. It is impossible to sever this context as it is directly implicated: the finding of a right to abortion is not a neutral stance on the question of whether unborn children have the right to life. Creating a right to abortion necessarily means the Committee is denying that unborn children have a right to life. This stance is contrary to the text of the Covenant. One author explains:

If a legal instrument is prima facie silent on such a right, while also silent on the status of the unborn human being, then an interpretation that appends a right to abortion onto, say, an enumerated right to health, cannot claim neutrality on the question of the status of the unborn child—it will have decided against the unborn being a human rights subject in a particular context. So an instrument like the ICCPR which does recognize the unborn as a human rights subject (Article 6(5)) and does not provide for a right to abortion in its text…and is thus positively disposed to the human rights status of the unborn, can only be read to provide for a right to abortion by suppressing rather than unpacking both its text and travaux.[[16]](#footnote-16)

The Covenant does not explicitly mention unborn children. The context (including Article 6(5) and the debates surrounding the creation of the Covenant) permits only two interpretations of that silence. The first is to understand that silence as necessary for conciseness. The term human being is used without the need to expressly mention every category. The treaty also fails to mention those with disabilities or the elderly. Yet, no one would argue that the silence indicates a lack of rights for those individuals. The Covenant acknowledges the right to life of all human beings. Unborn children are human beings and, therefore, have human rights.

The second interpretation is that the protection for unborn children was left out for State sovereignty reasons. Understanding that there is disagreement in this area, the Covenant is silent allowing for States to come to their own conclusion.[[17]](#footnote-17) Neither interpretation is consistent with a right to abortion. Either a right to abortion conflicts with the right to life, or the treaty is neutral, leaving the matter up to States.

## There is No Customary International Law Supporting a Right to Abortion

Neither is there a right to abortion in customary international law. State practice does not indicate a consensus on the right to abortion. According to a UN Department of Economic and Social Affairs report, one third of countries did not permit abortion where the physical or mental health of the mother was endangered and half did not permit it in cases of rape, incest, or foetal impairment. This demonstrates a lack of consensus on the issue which is necessary to establish a customary international law.[[18]](#footnote-18)

## Any Discussion of Abortion as a Women’s Right is Misplaced in Article 6

While Article 6 should recognize the right to life of unborn children, abortion as a women’s right is completely misplaced in this Article. In the past, the Committee has placed obligations on States to ensure access to abortion to save the life of the woman[[19]](#footnote-19) or to ensure access to what has already been declared a legal abortion by that State.[[20]](#footnote-20) But such obligations have always been found under Article 7, not Article 6. Even when finding Ireland’s abortion law to be contrary to the Covenant (an incorrect finding that is addressed below), the Committee found the law infringed Article 7, Article 17, and Article 26 – not Article 6.[[21]](#footnote-21)

This is an important consideration as Article 6 allows for no derogation. Transplanting the obligations of article 7 into article 6 is adding significant obligations to States under this Article that they did not have before.

Even under Article 7, the obligations that the States have is allowing aborting where the life of the woman is endangered and not preventing women from obtaining a legal abortion by that State’s own law. States do not have a duty to provide access to abortion in cases of rape, incest, or if an unborn child has a fatal impairment. Any other interpretation ignores the right of the unborn child to life and is adding obligations that are not grounded in international law or the Covenant.

## The General Comment uses Vague Language

The language of the General Comment is vague and provides little guidance to States on their obligations under Article 6 of the Covenant with respect to abortion. The absence of clear language means States risk violating Article 6(1) of the Covenant, which outlines that “no one shall be arbitrarily deprived of his or her life and that right shall be protected by law.”[[22]](#footnote-22) An unclear General Comment leaves States in uncertainty as to what is required of them.

 For example, it is not clear what constitutes an “unreasonably burdensome requirement” on women seeking abortion. In any circumstance that a woman is denied or delayed in obtaining an abortion, how is a state to determine whether they have imposed an unreasonably burdensome requirement? The General Comment does not clarify any of these issues and does not provide appropriate guidance for States parties to balance competing interests and to uphold Article 6.

## The General Comment Imposes Broad Requirements

 While the Committee outlines that States parties “may adopt measures designed to regulate terminations of pregnancy” they go on to state that “States parties must provide safe access to abortion to protect the life and health of pregnant women.”[[23]](#footnote-23) It leaves no room for States to undertake reasonable alternatives to mitigate the risks to life and health of pregnant women in these circumstances, while continuing to comply with Article 6 of the Covenant.

These requirements are too broad and imply that all countries must ensure safe access to abortion in their country. Essentially, the Committee is implementing a right to abortion that was never intended by the drafters and has the potential to be broadly applied in ways that negatively impact the right to life under Article 6. Most notably, the Committee has failed to take into account the numerous studies that show the negative effects of abortion on the life and health of women, and the dangers that could be associated with requiring access to abortion.[[24]](#footnote-24)

**Recommendation:** The vague language surrounding abortion in paragraph 9 of the draft General Comment creates an unqualified right to abortion, which is inconsistent with Article 6, and should be omitted.

# State Sovereignty and Abortion

The Committee must respect States’ sovereignty to regulate in accordance with their conscience rather than imposing one ideological stance. By favoring “abortion rights” over the right to life of unborn children, the Committee is usurping the sovereignty of States in a manner that is grounded neither in treaty nor in international customary law.

The principle of state sovereignty means that States are free to act unless otherwise prohibited. The Committee is attempting to compel action, not based on the Covenant, but based on their own ideological beliefs. This ignores state sovereignty, overlooks complex moral issues, and violates the conscience of nations.

## States Recognize Right to Life of Unborn Children

 The potential right to life of unborn children is recognized by the majority of States party to the Covenant and is consistent with scientific findings regarding early human development. While States parties may disagree about the exact nature of the balance of the rights of unborn children with reproductive autonomy rights, most countries recognize a right to life at some point before the birth of a child. For many countries party to the Covenant, this includes gestational restrictions for abortion on request between 13-18 weeks.[[25]](#footnote-25)

The necessary acknowledgement of the right to life of unborn children is relevant to States even beyond the issue of abortion. Areas such as medical negligence, wrongful death cases, unborn children as victims of crime, and capital punishment all are implicated by the status of the unborn.[[26]](#footnote-26)

## States have Utilized Different Regulatory Schemes

In practice, States have approached the issue in a variety of ways. Examples of elements common to abortion regulatory schemes include:

* Whether unborn children’s human rights are recognized
* The number of weeks into the pregnancy that an abortion may be obtained
* Waiting periods to ensure that the choice is a considered one
* Counseling requirements to ensure that the woman is knowledgeable of her options
* Where abortions may be performed
* Allowable reasons for obtaining an abortion
* Whether multiple doctors are required[[27]](#footnote-27)

These are choices that should be left up to States especially as some restrict abortion to protect the right to life. The Committee should not condemn an attempt to uphold the very right that they are discussing.

## States need to Consider Conscience Rights and the Moral Questions

Regulating abortion involves a number of moral questions. As mentioned above, the status of unborn children and women’s reproductive choices are intimately involved. These are moral and religious questions both for the State, those seeking an abortion, and doctors. Article 18 of the Covenant guarantees that “no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” For many, abortion is a religious or conscience issue wherein the sanctity of life, even before birth, is inviolable. By ignoring this widespread belief, the Committee is putting States in the position of legislating in a way that infringes conscience rights.

 The General Comment provides no opportunity for States parties to object to providing abortion for either individual or collective religious or conscientious reasons. It is our hope that there is recognition of Article 18 and the freedom of individuals or collective societies to promote the rights of unborn children and to oppose a right to abortion.

In *Mellet v Ireland*, the author argued that “the protection of the ‘right to life of the unborn’, per the Irish Constitution, can be seen as a moral issue. Defining the moral interest in protecting foetal life as superior to the author’s right to mental stability psychological integrity and reproductive autonomy, goes against the principle or proportionality.”[[28]](#footnote-28)

This argument ignores the weight that these moral issues have. The moral issue of the right to life of children or those with disabilities is of huge importance to all and is the underpinning of international human rights law. Understanding that the right to life is inherent in all human beings regardless of age, race, disability, creed, etc. and that such a right cannot be derogated from is a profound moral question that should not be lightly tossed aside.

When dealing with this argument in *Mellet v Ireland*, the Committee does not even acknowledge what objective the State is pursuing nor whether it is a worthy objective. They merely assert that the impact on the author is significant and make a finding of arbitrariness with no real analysis of the right to life for unborn children nor for the profound moral considerations underlying Ireland’s abortion scheme.[[29]](#footnote-29)

## Post-natal care

Additionally, the Committee should not require States to ensure prenatal and post-abortion care for pregnant women without also requiring post-natal care. When a State sponsors only one option, women are not given an actual choice. Providing access to post-natal care is in keeping with the 1989 *United Nations Convention on the Rights of the Child* Article 24 which says, “States Parties shall pursue full implementation of this right [to the highest attainable standard of health] and, in particular, shall take appropriate measures…[t]o ensure appropriate pre-natal and **post-natal health care** for mothers.”[[30]](#footnote-30)

**Recommendation: The Covenant either supports a right to life for unborn children or it allows for State sovereignty on the issue.** The Committee must consider the religious and conscientious objections to a right to abortion and should not impose obligations contrary to these considerations. The Committee should also recognize and mention the importance of States parties providing adequate post-natal care for the health and life of mothers.

# Conclusion

 The Committee has gone beyond their purview and recognized a right to abortion that has no basis in the Covenant. This conflicts with the right to life of unborn children and state sovereignty. ARPA Canada respectfully submits that the Committee take into consideration our recommendations and adequately recognize the right to life for unborn children in Article 6 of the Covenant. This will provide a correct interpretation of Article 6 in the General Comment and safeguard the precious and fundamental right to life for all human beings.

1. Human Rights Committee (HRC), *General Comment No. 36: On Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, Revised Draft Prepared by the Rapporteur, available at [http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6\_EN.pdf](https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf) at para 2 *emphasis added* (“Draft Comment”). [↑](#footnote-ref-1)
2. UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, available at: http://www.refworld.org/docid/45388400a.html at para 1;

UN Human Rights Committee (HRC), *CCPR General Comment No. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life*, 9 November 1984, available at: <http://www.refworld.org/docid/453883f911.html> at para 1. [↑](#footnote-ref-2)
3. Dr. Dianne N. Irving, “When do human beings begin? ‘Scientific’ myths and scientific facts” (1999) International Journal of Sociology and Social Policy, 19:3/4:22-36, online: <https://www.princeton.edu/~prolife/articles/wdhbb.html>.

See also Keith L. Moore, *The Developing Human: Clinically Oriented Embryology*, 7th edition (Philadelphia, PA: Saunders, 2003) at 16: “Human life begins at fertilization, the process during which a male gamete or sperm unites with a female gamete or oocyte (ovum) to form a single cell called a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual.”

See also Signorelli et al., “Kinases, phosphatases and proteases during sperm capacitation”, Cell Tissue Res. 349(3):765 (Mar. 20, 2012) where they write: “Fertilization is the process by which male and female haploid gametes (sperm and egg) unite to produce a genetically distinct individual.”

See also Ronan O’Rahilly and Fabiola Mueller*, Human Embryology and Teratology*, 3rd edition (New York: John Wiley & Sons, 2000), at 8: “Although life is a continuous process, fertilization… is a critical landmark because, under ordinary circumstances, a *new, genetically distinct human organism is formed* when the chromosomes of the male and female pronuclei blend in the oocyte.”

See also Robert P. George, Christopher Tollefsen *Embryo: A Defense of Human Life*, (New York: Doubleday, 2008) at 39 (“*Embryo*”). [↑](#footnote-ref-3)
4. *Ibid, Embryo* at 49. [↑](#footnote-ref-4)
5. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html *emphasis added* (“CRC”)*.* [↑](#footnote-ref-5)
6. This assumption can be made based on the interpretation of this provision in the context of minors in Draft Comment, *supra* note 1, at para 52. [↑](#footnote-ref-6)
7. See also: UN General Assembly, *Draft International Covenants on Human Rights*, 1 July 1995, available at:

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N55/173/02/PDF/N5517302.pdf?OpenElement> at 85, para 10. [↑](#footnote-ref-7)
8. The Rapporteur, Mr. Shany, outlined his justification for omitting this explanation of Article 6(5) at the 119th Human Rights Committee meeting in March 2017. Ultimately, he concluded that he did not want the Committee to make a statement in regard to the controversial issues of abortion and the right to life of unborn children. [↑](#footnote-ref-8)
9. Thomas Finegan “International Human Rights Law and the “Unborn”: Texts and *Traveaux Prepatories”,* 25 Tul. J. Int’l & Comp. L. 89 (2016-2017) at 109-110 (“Finegan”). [↑](#footnote-ref-9)
10. Draft Comment, *supra* note 1, at para 4 emphasis added. [↑](#footnote-ref-10)
11. *Embryo, supra* note 4 at 130. [↑](#footnote-ref-11)
12. Sex selection abortion and the resulting gender imbalance ratio has been acknowledged by in the *Key Actions for Further Implementation of the Programme of Action of the International Conference on Population and Development.* (United Nations Population Fund, 2014) The recommendations in the report urge governments “to take the necessary measures to prevent infanticide [and] prenatal sex selection.” [↑](#footnote-ref-12)
13. CCPR/C/GC/R.36/Rev.2, para 7. [↑](#footnote-ref-13)
14. UN Human Rights Committee (HRC), *General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, CCPR/C/GC/33, available at: http://www.refworld.org/docid/4ed34e0f2.html at para 13. [↑](#footnote-ref-14)
15. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.refworld.org/docid/3ae6b3a10.html. [↑](#footnote-ref-15)
16. Finegan, *supra* note 10, at 122. [↑](#footnote-ref-16)
17. Finegan, *ibid,* at 109. [↑](#footnote-ref-17)
18. UN Department of Economic and Social Affairs Population Division, *Abortion Policies and Reproductive Health around the World*, 2014 available at: http://www.un.org/en/development/desa/population/publications/pdf/policy/AbortionPoliciesReproductiveHealth.pdf. [↑](#footnote-ref-18)
19. Communication No. 1153/2003. [↑](#footnote-ref-19)
20. Communication No. 1608/2007. [↑](#footnote-ref-20)
21. Communication No. 2324/2013. [↑](#footnote-ref-21)
22. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> at Article 6(1). [↑](#footnote-ref-22)
23. CCPR/C/GC/R.36 (Current Draft), para 9. [↑](#footnote-ref-23)
24. *Hush: The Documentary*, 2016, DVD (Mighty Motion Pictures: Punam Kumar Gill Film). For the 42 scientific, peer-reviewed and published medical studies cited in the film, see: [http://hushfilm.com/science/.](http://hushfilm.com/science/.%20)  [↑](#footnote-ref-24)
25. ARPA Canada *Respectfully Submitted: Pre-Born Children*, 2017 availabe at <https://arpacanada.ca/wp-content/uploads/2017/05/Respectfully-Submitted-Preborn-Children-final-draft.pdf> at 1.

See also: <http://www.un.org/esa/population/publications/abortion/profiles.htm> for more detailed profiles on Germany, Austria, Finland, France, Italy, Netherlands, Poland, Sweden, etc. [↑](#footnote-ref-25)
26. Finegan, *supra* note 20, at 92. [↑](#footnote-ref-26)
27. For example, see this comparative analysis of European abortion laws https://www.loc.gov/law/help/abortion-legislation/abortion-legislation.pdf. [↑](#footnote-ref-27)
28. Communication No. 2324/2013 at para 3.6 (“*Mellet*”). [↑](#footnote-ref-28)
29. *Mellet, ibid,* at para 7.8 [↑](#footnote-ref-29)
30. CRC, *supra* note 6 (emphasis added). [↑](#footnote-ref-30)