UN Human Rights Committee Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights: Analysis and Recommendations

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The purpose of the present analysis is to identify and propose solutions to certain remaining problems in the draft General Comment (hereinafter “GC”) and thereby increase the likelihood of widespread acceptance of the eventual final version by States parties, other international actors, and publics.

The following excerpts from paragraphs 2 through 7 of the GC provide a necessary context for addressing difficulties identified in paragraphs 9 and 10. Additionally, paras. 2 and 3 themselves suffer from partial ambiguity.

**Para. 2** of the draft GC emphasizes that Article 6 of the Covenant “recognizes and protects the right to life of all human beings… is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies…It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right…”

This lucid affirmation establishes a solid foundation for what follows. But it is clouded by the addition (not found within the Covenant) of the ambiguous catchall clause “and whose content can be informed and infused by other human rights.” This language could be used to initiate claims unrelated to the actual content of the Covenant or to the ”ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” -- the basic criterion for interpreting any treaty (Vienna Convention on the Law of Treaties, Article 31). Its deletion is therefore strongly recommended.

**Para. 3:** “The right to life should not be interpreted narrowly.” This would seem to mean that it extends to all human beings without exception, at all stages of life and in all circumstances including illness and disability, who are all therefore entitled “to be free from acts and omissions intended or expected to cause their unnatural or premature death”. The final sentence of para.3 “Article 6 guarantees this right [to life] for all human beings, without distinction of any kind….” clearly reaffirms this reading.

However, the phrase added at the end of the second sentence “as well as to enjoy a life with dignity,” introduces an element of uncertainty. If it were revised to read “as well as to respect for their inherent human dignity” it would be both clear and appropriate. But if it refers instead to the conditions in which someone is living, which are of course changeable and can become more or less “dignified,” then the passage is relevant to the Covenant on Economic, Social and Cultural Rights, but constitutes an overly expansionist reading of Article 6 and should be deleted.

**Para. 4**: Reaffirms that Art.6 “provides that no one shall be arbitrarily deprived of his life and that the right shall be protected by law. It lays the foundation for the obligation of States parties to respect and to ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life.” There is no ambiguity here.

**Para. 5**: Prohibits arbitrary deprivation of life in applying the death penalty.

**Para. 6**: Defines deprivation of life as ”a deliberate or otherwise foreseeable and preventable life-terminating harm or injury caused by an act or omission….”

**Para. 7**: Outlines the duty of States parties “to refrain from …conduct resulting in arbitrary deprivation of life …[and to] exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State….[This obligation] extends to all threats that can result in loss of life.”

**Para. 9:** This paragraph is stunningly disorienting in its abrupt reversal of commitment to the fundamental values and principles set forth in paragraphs 2 through 7 which, inter alia, “recognize and protect the right to life of all human beings” as “the supreme right from which no derogation is permitted, and [which] ”inheres in every human being”. Also,that“Article 6 guarantees the right [to life] for all human beings, without distinction of any kind,” that “no one shall be arbitrarily deprived of his life and that the right shall be protected by law.” There is no daylight between these affirmations, but they disappear in para. 9.

Accordingly, upon reaching para. 9 a reader might be forgiven for thinking that he or she has suddenly entered an alternate universe where the foregoing paragraphs suddenly mean nothing with regard to an entire group of human beings who have mysteriously vanished from the planet. The only member of this group mentioned in the GC is a “foetus suffering from fatal impairment.” One might have the impression that a healthy embryo or foetus does not exist. The effect is more than strange, because the evidence of embryology, genetics and other biological sciences overwhelmingly affirms the existence and humanity of the unborn child as a living member of the human species, and thus a “member of the human family” who as such has the right to *continue* living.

He or she is not a “potential life” because such a thing does not exist. No one has ever seen a potentially living individual.

Para. 9 assumes, without saying so, that a right to abort exists in international law. But it cannot be found in the Covenant or any other universal agreement. Existing state practice also demonstrates the fact: a sizable majority of States parties have domestic laws extending significant protection to the unborn child, banning abortion on demand and specifying the limited grounds on which it can be legally performed.

As presently written, para. 9 calls for legislation and policies to legalize abortion on demand. Missing is any acknowledgement that this privatizes justice and thereby smothers a core value of society. Moreover, the Covenant was not and is not meant to promote or facilitate making people dead. Rather the opposite, as the Covenant drafters demonstrated in the inclusive and protective language in Article 6 itself. They imposed no restriction on who counts as a human, and the GC should certainly not attempt to do so.

**The following is proposed as a substitute for paragraph 9:**

BEGIN TEXT States parties should ensure the availability and accessibility by pregnant women of adequate pre-natal and post-natal or post-abortion health care and nutritional support, as well as housing as needed. States parties may adopt measures to protect the lives and right to life of unborn children, provided that such legislation also protects the lives and right to life of pregnant women. The law should therefore include a provision authorizing medical intervention necessary to preserve the life of the mother, even when such intervention could foreseeably cause the death of her unborn child. An unmarried woman should not face criminal sanctions for becoming pregnant, and a woman should not be subject to criminal sanctions for seeking or undergoing abortion. END TEXT

Adopting this substitute would respect and protect the right to life of the prenant woman and her unborn child, and bring para. 9 into alignment with paras. 2 though 7, 52. 63 and 69. This would produce greater coherence in the General Comment as a whole and contribute to more widespread acceptance of the document.

**Relationship of Article 6 (1) with Article 6(5)**

The case for substituting the foregoing text is further strengthened by the prohibition in Article 6(5) of the execution of a pregnant woman (noted in para. 52 of the GC). If an unborn child living in the womb has an independent claim to legal protection and thus to continue living, then logically all unborn children have that claim. Thus if States parties are obliged to enact legal protection for unborn children under Art. 6(5), are they not obliged to enact such protection under Art. 6(1) as well?

If one were to object that under 6(5) it is the fact that the baby is indirectly in State custody that imposes the obligation, this does not dispose of the more fundamental relevant fact that in both cases the babies are equally human, and that they are entitled to equal protection of their right to continue living. Art. 2(1) of the Covenant prohibits unjust discrimination, and the fact that the baby in 6(5) is in State custody does not justify discrimination against babies not in State custody.

The starting date for protection of the unborn child under 6(5) is necessarily the date on which the fact of pregnancy becomes known. But as the clear intent of the drafters of 6(5) was to spare the child, protection should begin as soon as pregnancy is suspected.. Paras. 9 and 52 of the GC should therefore state that “Article 6(5) presupposes that the protection of the unborn child applies from the time that the existence of pregnancy becomes known or is suspected.”

Human rights scholar William Schabas has written that during the debate in the Human Rights Commission on the draft Covenant, “With respect to the exclusion [from execution] of pregnant women, the Secretary-General’s Annotations suggest that the provision was added out of ‘consideration for the interests of the unborn child’”. Schabas added that “for the pregnant woman it is the unborn child’s protection that is envisaged, and the [death] sentence may well be ‘imposed’ although it may not be carried out.”[[1]](#footnote-1)

Paragraph 6(5) of the Covenant has near-universal support. It is mirrored in the American Convention on Human Rights, the African Convention on the Rights and Welfare of the Child, the Arab Charter on Human Rights, and the 1977 Protocols to the Geneva Conventions. Clearly there is widespread recognition of the humanity and rights of the unborn child. Analogous European human rights documents do not have such a provision only because the death penalty has been abolished. [[2]](#footnote-2)

The clear preponderance of the evidence from the text of the Covenant and other relevant treaties as well as State practice in national legislation, weighs convincingly in favor of protecting the unborn child from abortion on demand. .

**Paragraph 10** deals with the issue of assisted suicide. The first and second sentences seem unobjectionable. The third sentence, however, should be either deleted or reworked to read “States parties may allow medical professionals to provide medical treatment or the medical means sufficient to alleviate the pain of catastrophically afflicted adults, such as the mortally wounded or terminally ill, who experience severe physical or mental pain and suffering.” The fourth sentence should remain as it is.

1. William Schabas, *Abolition of the Death Penalty in International Law, 2nd ed.:*Cambridge, UK: Cambridge University Press, 1997, 120-25, 150., [↑](#footnote-ref-1)
2. Several other universal legal instruments not discussed here call for State action to provide practical protection and/or support for the lives of unborn children and their mothers, including the Declaration and Convention on the Rights of the Child, the Geneva Conventions, and the UN Declaration on Human Cloning. A solidly-researched comprehensive study of the role of the unborn child in the development of the Covenant and other international human rights agreements is by Rita Joseph, in *Human Rights and the Unborn Child,* (Leiden:Martinus Nijhoff, 2009) [↑](#footnote-ref-2)