**Remarks of Poland to the General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life.**

**INTRODUCTORY REMARKS**

According to art. 31 (1) of the Vienna Convention on the Law of Treaties (VCLT), “A treaty shall be interpreted in good faith in accordance with the ordinary meaningto be given to the terms of the treaty in their contextand in the light of its object and purpose”.[[1]](#footnote-1) Thus, the Covenant should be interpreted in the light of its aim, namely to provide further protection of human rights, especially to the vulnerable. Article 6 is an expression of the right to life, which, according to the Preamble to the Covenant, is **derived from the inherent dignity of the human person**. The Article 6 (1) describes the right to life as “inherent” and belonging to “[e]very human being”.

**Inherent human right**

Accordingly, the term “inherent” means an inseparable and permanent quality of a specific reality, which is neither acquired nor lost in course of its development, but is present in every case in which the reality is so qualified. Saying that a right to life is inherent to every human being is to say that it belongs to all human beings, as long as they are human beings – regardless of the duration of time they are human beings.

The inherent and inalienable right to life is an attribute of every human being and international human rights instruments properly recognize it as a primary right,[[2]](#footnote-2) being a precondition for the enjoyment of any other human right. This means Article 6 (1) protects the life of every human being in every stage of its development, as the inherent dignity of a human person starts with the very first moment of its existence.

As to the beginning of the existence and further development of the human being, it is undisputable that, from the point of view of science, human life begins at conception. It is then that every uniquely defined individual member of humanity is formed and begins to exist.[[3]](#footnote-3) This was also confirmed in the ruling by the Grand Chamber of the Court of Justice of the European Union in Oliver Brüstle v. Greenpeace e.V.(2011)[[4]](#footnote-4), where it was clearly stated, that “fertilisation is such as to commence the process of development of a human being”.[[5]](#footnote-5) From this moment, legal protection derived from inherent human dignity, begins.

**Every human being**

Despite the different words used to describe the various stages of the development of a human being (zygote, blastocyst, embryo, foetus, infant, child, adolescent, adult, and elderly), it is not a specific stage of life that is subject to legal protection as provided by the Art. 6 (1), but the life **itself** of each human being. Different stages of the development of human life does not confer to a human being any new quality which might be described as inherent to human being. For this reason, protection of human life as a fundamental human right must be granted irrespective of a particular developmental stage of the human being. Any other interpretation would be inconsistent with the Covenant’s prohibition on discrimination based on birth or status.[[6]](#footnote-6) Protection of every child must be recognized regardless of age, including gestational age.

**The only legitimate derogation to the protection of the right to life**

The only non-discriminatory exception limiting protection of human life as provided by ICCPR Article 6 (1), is related NOT to a particular stage of the human life but to the imposition of the death penalty in situations emerging from a voluntarily committed, “serious crime”.

According to the Article 6 (2) the death penalty shall only be tolerated “for the most serious crimes in accordance with the law in force at the time of the commission of the crime”. This provision, especially if read together with the provisions of art. 6 (4)—(6), shows that this unique derogation from the protection of human life (a restrictively enacted and restrictively applied death penalty), is to be construed in a way narrowing the scope of this derogation. This amounts to the *a contrario* conclusion, that protection of the right of every human being to continue her/his life is to be construed in a widest possible manner and this is applicable to every stage of human life.

The death penalty was authorised as a legitimate derogation from the protection of the human right to life (subject to many restrictions), only because an individual had committed a “most serious crime” which endangers society and its members. Otherwise, article 6 (1) must be construed as **protecting** **every innocent human being regardless its stage of development**. Additionally, it also protects those who have committed crimes, which are not “most serious”. It is unequivocally clear that no derogation from the right to life can be considered acceptable with respect to an innocent human being.

As the Article 6 of the ICCPR contains only one exception – capital punishment – there is no legitimate interpretation to find new exceptions not present in the text itself. The ICCPR read as a whole, cannot on the one hand protect the inherent right to life and at the same time provide a license to deprive an innocent human being of life. To the contrary, numerous instruments of international law provide for special protection of vulnerable persons such as children, the sick, disabled, and elderly people.[[7]](#footnote-7) In this context, Resolution n°1859/2012 of the Parliamentary Assembly of the Council of Europe (PACE) must be mentioned. It clearly states: “Euthanasia, in the sense of the intentional killing by act or omission of a dependent human being for his or her alleged benefit, must always be prohibited.”

**Protection of the human life in its early stage**

The most challenging aspect of the international protection of human life concerns the early, i.e., prenatal stage of its development. Therefore it is worth some special attention[[8]](#footnote-8).

**Prenatal protection of human life in Article 6 (5) ICCPR**

The interpretation of Article 6 (1) ICCPR as covering all stages of human development also conforms to the content of Article 6 (5) which states: “Sentence of death shall not be carried out on pregnant women.” Whereas a woman might be eligible for a sentence of death after committing the “most serious crime”, her life is still protected as a means of protecting the life of her innocent baby. This distinct protection of the life of the unborn baby is effective even if the protection of life of its mother might otherwise be derogated in conformity with art. 6 (2). This is acknowledged in the Preparatory works for the ICCPR which are, in accordance with the Article 32 of the *Vienna Convention on the Law of Treatie*s, “supplementary means of interpretation”[[9]](#footnote-9). The UN reports from preparatory works clarify the rationale for the provision of art. 6 (5): enacted in “consideration for the interests of the unborn child”[[10]](#footnote-10) and in order to “save the life of an innocent the unborn child”[[11]](#footnote-11).

**Similar protection in other UN treaties**

Article 6 of the Second Additional Protocol to the Geneva Conventions[[12]](#footnote-12) contains a similar objective, calling for avoidance of “the pronouncement of the death penalty on pregnant women”. For the same reason, an expectant mother is also protected by the Article 16 of the Geneva Convention relating to the Protection of Civilian Persons in Time of War[[13]](#footnote-13).

**Rights of the child as applied to prenatal stage of its development in the UN Convention on the Rights of the Child**

The preamble of the Convention on the Rights of the Child (CRC)[[14]](#footnote-14), which provides necessary interpretive context for this treaty[[15]](#footnote-15), explicitly recognizes that a “child, by reason of his physical and mental immaturity, need special safeguards and care, including appropriate legal protection, before as well as after birth.” This interpretative context requires that the definition of a “child” as provided in Article 1 of the CRC must include children at the prenatal stage of their development. Those conclusions are particularly important in the context of the CRC Article 6 which declares: “States Parties recognize that every child has the inherent right to life” and calling upon the States Parties to “ensure to the maximum extent possible the survival and development of the child.”

**Other corresponding provisions from regional human rights systems**

Protection of the life of the unborn child is also envisaged in regional human rights treaties. The American Convention on Human Rights stipulates in Article 4 (1) “Every person has the right to have his life respected.  This right shall be protected by law and, in general, from the moment of conception.  No one shall be arbitrarily deprived of his life.”

The Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states “Everyone’s right to life shall be protected by law”.

Protection of the unborn child, irrespective of the stage of development (e.g. embryo, foetus), is also present in other European legal instruments such as the Convention on Human Rights and Biomedicine (“Oviedo Convention”) with its Additional Protocol on the Prohibition of Cloning Human Beings and the Additional Protocol on Biomedical Research.[[16]](#footnote-16)

The proper meaning of **Article 6 ICCPR must protect the life of every innocent human being regardless her/his stage of development**. This is the only reasonable and coherent way of protecting human life as an “inherent” and “inalienable” human right. It is an urgent need to emphasize that the right to life is an attribute of every human being, and as such deserves especially intensive protection as a pre-condition of the enjoyment of any other human right.

Protection of the human right to life might be limited only in case of a person, endangered with a death penalty, who has voluntarily committed a “most serious crime”. In all other cases, the life of every innocent human being deserves the strongest possible protection.

Peculiarities of different stages of development of a human being, especially these stages in which she or he is particularly weak, vulnerable or otherwise less autonomous, must not be considered as an excuse to limit or diminish the protection of the human right to life. To the contrary: vulnerable, weak, or less autonomous human beings, whether in the early (prenatal) or late (terminal) stages should be considered as deserving stronger, and not weaker, protection of their rights, with particular emphasis on their right to life.

**DETAILED AMENDMENTS TO THE TEXT OF THE GENERAL COMMENT No 36 ON ARTICLE 6
OF THE ICCPR**

**Ad. I. 3.**

**Proposed amendment:**

The right to life is a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions intended or expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. The Committee emphasizes that every child has the inherent right to life. The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. Article 6 guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.

**Explanation of position:**

This proposed addition to the text is in line with Convention on the Rights of the Child.

**Ad. par. I. 9**

**Comment to par. I. 9:**

Our proposal would be to delete the wording of this paragraph, due to the fact that it provides an interpretation of the right to life for pregnant women, however, only in the context of access to abortion.

It seems that the reference in the considered document, which should be of a general nature, to such a detailed issue is a manifestation of an overly casuistic approach. Consequently, and in the view of the fact that the right to life in the context of abortion is interpreted exclusively from the point of view of the right to life of a pregnant women, we would like to propose deletion of this text.

**Alternatively we could also accept the following amendments:**

1. (…) *to ensure access for women and men and in particular, adolescents, to information and education about reproductive options and to a wide range of contraceptive methods*. ***At the same time, States Parties should have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.***
2. *Thus, any legal restriction on the ability of women to seek abortion must not, inter alia, jeopardize their life or ~~subject them to physical or mental pain or suffering which violates article 7~~ health.*

**Explanation of position:** More general reference seems more appropriate in this context.

Proposed deletion of the paragraph:

1. *~~In situations in which carrying pregnancy to term would cause the women substantial pain or suffering, most notably when the pregnancy is the result of rape or incest or when the foetus suffers from fatal impairment~~*

**Explanation of position:**The issue of conditions/circumstances for the termination of pregnancy should be specified within domestic legislation.

Proposed deletion of the following wording:

1. *[For example, they should not take measures such as criminalizing pregnancies by unmarried women ~~or applying criminal sanctions against women undergoing abortion or against physicians assisting them in doing so, when taking such measures is expected to significantly increase resort to unsafe abortions].~~*

**Explanation of position:**According to Art. 152 of the Polish Criminal Code: the one who performs an abortion, with the consent of a woman, with violation of the provisions of the law, is subject to the penalty of imprisonment for up to 3 years. The same sentence is imposed on the one who assists a pregnant woman in termination of her pregnancy with violation of the provisions of the law or persuades her into termination of pregnancy. What is more, the one who performs the above-mentioned actions when unborn child is potentially capable of living outside the woman's body is sentenced to prison from 6 months to 8 years.

**Taking into consideration the above-mentioned amendments, the text of paragraph I.9 would read:**

Although States parties may adopt measures designed to regulate terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or her other rights under the Covenant, including the prohibition against cruel, inhuman and degrading treatment or punishment. Thus, any legal restrictions on the ability of women to seek abortion must not, inter alia, jeopardize their lives or **health ~~subject them to physical or mental pain or suffering which violates article 7~~**. States parties must provide safe access to abortion to protect the life and health of pregnant women, **~~and in situations in which carrying a pregnancy to term would cause the woman substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or when the foetus suffers from fatal impairment~~.** States parties may not regulate pregnancy or abortion in a manner that runs contrary to their duty to ensure that women do not have to undertake unsafe abortions. [For example, they should not take measures such as criminalizing pregnancies by unmarried women **~~or applying criminal sanctions against women undergoing abortion or against physicians assisting them in doing so, when taking such measures is expected to significantly increase resort to unsafe abortions~~**]. Nor should States parties introduce humiliating or unreasonably burdensome requirements on women seeking to undergo abortion. The duty to protect the lives of women against the health risks associated with unsafe abortions requires States parties to ensure access for women and men, and, in particular, adolescents, to information and education about reproductive options, and to a wide range of contraceptive methods. **At the same time, States Parties should have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.** States parties must also ensure the availability of adequate prenatal and post-abortion health care for pregnant women.

**Ad. par. I. 10**

**Proposed amendment:**

 ~~[While acknowledging the central importance to human dignity of personal autonomy, the Committee considers that States parties should recognize that individuals planning or attempting to commit suicide may be doing so because they are undergoing a momentary crisis which may affect their ability to make irreversible decisions, such as to terminate their life. Therefore,]~~ States should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations. ~~At the same time, States parties [may allow] [should not prevent] medical professionals to provide medical treatment or the medical means in order to facilitate the termination of life of [catastrophically] afflicted adults, such as the mortally wounded or terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity. In such cases, States parties must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and, unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.~~

**Explanation of position:**

Paragraph 10, amended as suggested above, focuses on the substance of the problem discussed. The issue described in this paragraph is a problem that has to be analyzed individually using measures regulated by internal law measures.

**Ad. Par. II. 18**

**Comment:**

This paragraph seems not to include the case when a victim acts under a very stressful situation what in some cases may exclude the possibility of a warning. The condition that the application of lethal force by a person acting in self-defense must be reasonable and necessary in view of the threat posed by the attacker can be difficult especially in the situation of disproportionate capabilities between a victim and an attacker (differences because of age, physical strength etc.).

**Ad. par. III. 27**

**Proposed deletion of the paragraph:**

~~27. The duty to protect the right to life requires States parties to take special measures of protection towards persons in situation of vulnerability whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence. These include human rights defenders, journalists, prominent public figures, witnesses to crime and victims of domestic violence. They may also include street children, members of ethnic and religious minorities and indigenous peoples, displaced persons, lesbian, gay, bisexual, transgender and inter-sex (LGBTI) persons, persons with albinism, alleged witches, asylum seekers, refugees and stateless persons and, in certain situations, women and children. States parties must respond urgently and effectively in order to protect individuals who find themselves under a specific threat, including by adopting special measures such as the assignment of around-the-clock police protection, the issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and only with the free and informed consent of the threatened individual, protective custody.~~

**Proposed replacement of the deleted paragraph:**

**27. The state is obliged to protect the right to life of all persons under their jurisdiction without discrimination on any ground.**

**Explanation of position:**

The State should protect the right to life of all its citizens to the same extent, regardless of their age, health status, wealth status, race, beliefs, etc. Creating a list of separate categories of persons who deserve special measures of protection may lead to the conclusion that persons outside these categories are less protected.

**Ad. par. III. 32**

**Proposed amendment:**

Where relevant, the investigation should include a rigorous authopsy of the victim’s body, **~~whenever possible, in the presence of a pathologists  representing the victim’s family.~~ conducted by relevant experts/institutions in effective, independent, impartial and transparent manner.**

**Explanation of position:**

In the Polish legal system an expert physician, in the field of forensic medicine, performs autopsies in the presence of a public prosecutor or court. This questions is regulated by the Article 209 of the Polish Code of the Criminal Procedure. The regulations in Poland safeguard full level of protection because persons or institutions with specialist knowledge, appointed in criminal proceedings, are guarantees of an objective opinion independent from any of the parties to the proceedings. The opinion of the pathologist representing victim’s family can be dubious in the context of reliability and impartiality.

**Ad. par. IV. 38**

**Proposed amendment to the paragraph:**

States parties that have abolished the death penalty, through amending their domestic laws, acceding to the Second Optional Protocol to the Covenant or adopting another international instrument obligating them to abolish the death penalty, are barred from reintroducing it. ~~Like the Covenant, the Second Optional Protocol does not contain termination provisions and States parties cannot denounce it. Abolition of the death penalty is therefore legally irrevocable. Furthermore, States parties may not transform an offence, which upon ratification of the Covenant, or at any time thereafter, did not entail the death penalty, into a capital offence. Nor can they remove legal conditions from an existing offence with the result of permitting the imposition of the death penalty in circumstances in which it was not possible to impose it before.~~ States parties that abolished the death penalty cannot deport or extradite persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained. In the same vein, the obligation not to reintroduce the death penalty for any specific crime requires States parties not to extradite or deport an individual to a country in which he or she is expected to stand trial for a capital offence, if the same offence does not carry the death penalty in the removing State, unless credible and effective assurances against exposing the individual to the death penalty have been obtained.

**Explanation of position:**

The deleted text in this paragraph suggests that the state which is a party to the Covenant or its protocols cannot renounce it.

**Ad. par. IV. 64**

**Comment:**

The list in this paragraph is not exhaustive, e.g. such issues as stages of development of a human being or genetic features could be added.

1. The VCLT, art. 31 (1). [↑](#footnote-ref-1)
2. Inter alia: *Universal Declaration of Human Rights,* G.A. Res. 217 (III) A. U.N. Doc A/RES/17 (III) (10 December 1948); the ICCPR; *United Nations Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV)( 10 December 1959); *Convention on the Rights of the Child*, G.A. Res. 44/25 (20 November 1989) [hereinafter: “the CRC”]; Declaration of the Rights and Duties of Man, 9th International Conference of American States, Bogota, Colombia, 1948; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14* (4 November 1950) [hereinafter: “European Convention on Human Rights”]; Organization of American States, *American Convention on Human Rights,* “*Pact of San Jose*”*, Costa Rica* (22 November 1969); Organization of African Unity, *African Charter on Human and Peoples' Rights (Banjul Charter) as amended by Protocol adopted in 1998* (27 June 1981); Cairo Declaration on Human Rights in Islam (5 August 1990). [↑](#footnote-ref-2)
3. *See* e.g., Sadler, T.W. *Langman’s Medical Embryology*, 7th edition. Baltimore: Williams & Wilkins 1995, p. 3 (noting that “the development of a human begins with fertilization, a process by which the spermatozoon from the male and the oocyte from the female unite to give rise to a new organism…”); Moore, Keith L. and Persaud, T.V.N. *The Developing Human: Clinically Oriented Embryology*, 7th edition. Philadelphia: Saunders 2003, p. 2 (noting that “the union of an oocyte and a sperm during fertilization” marks “the beginning of the new human being.”). [↑](#footnote-ref-3)
4. Oliver Brüstle v. Greenpeace e.V., C-34/10, decided on 18 October 2011 (hereinafter: Oliver Brüstle v. Greenpeace e.V.). [↑](#footnote-ref-4)
5. Oliver Brüstle v. Greenpeace e.V., para. 35. [↑](#footnote-ref-5)
6. The ICCPR, art. 24 and 26. [↑](#footnote-ref-6)
7. Inter alia: the CRC, art. 6 (1), art. 23; UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, art. 10, art. 25 (b), art. 28.2 (b); UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, art. 11.1 (e); UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, art. 1 (1); Universal Declaration, Art. 25 (1). [↑](#footnote-ref-7)
8. *Ordo Iuris* Institute for Legal Culture has recently published a collection of academic papers focused on this issue: A. Stępkowski (ed.), *Protection of Human Life in its Early Stage*, Peter Lang 2014. [↑](#footnote-ref-8)
9. United Nations, Treaty Series, vol. 1155, p. 331. [↑](#footnote-ref-9)
10. *See* A/2929, Chapter VI, §10. Report of the Secretary-General to the 10th Session of the General Assembly (1 July 1955). [↑](#footnote-ref-10)
11. *See* A/3764 § 18. Report of the Third Committee to the 12th Session of the General Assembly (5 December 1957). [↑](#footnote-ref-11)
12. International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609. [↑](#footnote-ref-12)
13. International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. [↑](#footnote-ref-13)
14. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. [↑](#footnote-ref-14)
15. According to art. 31 (2) of the VCLT. [↑](#footnote-ref-15)
16. Article 1 of that Convention (adopted by Council of Europe, 4 April 1997) emphasizes the need to “protect the dignity and identity of all human beings”. The scope of the “human being” as an undefined and broad term could thus be applied to the embryo and prenatal life. [↑](#footnote-ref-16)