



HARVARD LAW SCHOOL
CAMBRIDGE – MASSACHUSETTS – 02138

26 June 2015

**Human Rights Committee Half Day Discussion in Preparation for a
General Comment on Article 6—Right to Life**

As the issue of abortion has repeatedly come before this committee, this brief submission is written to suggest how Article 6.1 might be better clarified in order to give guidance to states parties to the International Covenant on Civil and Political Rights (Covenant). It focuses particularly on the meaning of “every human being,” the connection between the right to life and health, and a few implications for the meaning of “protected by law.”

“Every human being”

1. Article 6.1 of the ICCPR states that: “Every human being has the inherent right to life.” It is well settled that states parties’ obligations to protect the right to life do not apply before birth. Proposed amendments to Article 6 (1) of the Covenant protecting the right to life from the moment of conception were soundly rejected during its drafting, as they were regarding the Convention on the Rights of the Child.¹ Although arguments continue to be advanced that the fetus is a bearer of rights, no international treaty body or regional human rights court or commission has interpreted the words “Every human being” to extend to potential life, although there may be an emerging, minority view that potential life may enjoy some kind of claim to human rights protection.² At this point, the majority opinion on human rights standards is clear; the bearers of human rights, the right to life specifically, are those individuals already born.

¹ See UN GAOR Annex, 12th Session, Agenda Item 33, at 96, A/C.3/L.654; UN GAOR, 12th Session, Agenda Item 33, at 113, A/3764, 1957; UN Commission on Human Rights, Question of a Convention on the Rights of a Child: Report of the Working Group, 36th Session, E/CN.4/L/1542 (1980)). For a comprehensive discussion see Rebecca J. Cook and Bernard M. Dickens. “Human rights dynamics of abortion law reform,” *Human Rights Quarterly* 25.1 (2003): 1-59 and Rhonda Copelon et al., “Human Rights Being at Birth: International Law and the Claim of Fetal Rights”, *Reproductive Health Matters* 13 (2005): 120-129.

² The Committee on the Rights of Persons with Disabilities may be recognizing the right to non-discrimination regarding potential life. See paragraph 10 of this submission for further discussion. The Inter-American Commission has considered a different formulation of the right to life [Art. 4.1] in the Baby Boy case, challenging the legalization of abortion in the United States. Inter-American Commission on Human Rights, Baby Boy (case 2141), Resolution 23/81, 6 March 1981, 25/OEA/ser.L/V/II.54, Doc. 9 Rev.1[interpreting language the right to life “in general, from the moment of conception,” to allow abortion]; and Vo v. France, No. 53924/00 Eur. Ct. H. R., para. 82 (2004). A recent decision by the Inter-American Court, challenging a ban of in vitro fertilization, reviewed scientific evidence, its jurisprudence and that of the European Court of Human Rights. Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., series C, No. 257, (Nov. 28, 2012). There, it held:

“... ‘conception’ in the sense of Article 4 (1) occurs at the moment when the embryo becomes implanted in the uterus, which explains why, before this event, Article 4 of the Convention [the Right to Life] would not be applicable. Moreover, it can be concluded from the words “in general” that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development” Artavia Murillo et al. at para. 264.

The Inter-American Court appears to recognize the salience of the right to life once a pregnancy is established. As Artavia Murillo concerned in vitro fertilization and not abortion, the court did not elaborate its reasoning. An African regional human rights treaty explicitly permits abortion when pregnancy poses risks to life and health: see Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, adopted July 11, 2003, art. 14(2)(c).



HARVARD LAW SCHOOL
CAMBRIDGE – MASSACHUSETTS – 02138

2. The duties states parties therefore owe are to women, pregnant or not. Laws that purport to protect “unborn” life *tout court* are incompatible with well-established human rights doctrine and practice as: a. such laws tend to subordinate women’s rights to the pregnancy without regard for their life or health;³ and b. frequently err in applying limiting principles.⁴
3. Some states parties purport to protect a woman and the fetus’s life equally; assuming *ad arguendo* that a state party might recognize a fetal right to life on par with that of a woman, in practice, it is often the woman’s health, liberty, and life that are compromised.⁵
4. Thus, any laws or policies that a state might direct towards the protection of a pregnancy [or of the unborn] ought to be seen as derivative of the duty owed to the woman carrying the pregnancy, especially regarding her life, health, non-discrimination and other human rights.⁶

Rights to life and health

5. This committee has previously advised states parties that obligations under the right to life include taking positive measures: “In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”⁷ This formulation has been foundational in establishing a human right to survive pregnancy and childbirth, through the provision of emergency (and comprehensive) obstetrical care.⁸

³ The Inter-American Court and Commission have issued precautionary measures against the application of laws which protected fetal life at the expense of the woman’s health and life. See *Matter of B.*, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R., para. 2(i)-(ii) (May 29, 2013) and “*Amelia*,” Precautionary Measures MC 43-10, Inter-Am. Comm’n HR, (2010).

⁴ Any limitation on the woman’s right to life must meet the test laid out in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985): limitations must be prescribed by law, serve a legitimate aim be necessary for achieving that aim and be proportional. The limitations, moreover, must neither affect the essence of the right so limited, nor provide unbounded discretion to the state party. Jeopardizing women’s right to life to protect prenatal life fails on its face to comply with the terms of the Covenant and has not met strict criteria imposed on limitations on rights through judicial and committee review. See e.g. Concluding Observations of the HRC regarding: Ireland, 24 July 2014 CCPR/C/IRL/CO/4 at para 9; Chile, 18 May 2007, CCPR/C/CHL/CO/5 at para. 8; and Madagascar, 11 May 2007, CCPR/C/MDG/CO/3 at para. 14.

⁵ See for example, Article 40.3.3 (the Eight amendment), Irish constitution; and *A, B and C v. Ireland*, No. 25579/05 Eur. Ct. H. R. (2010). In contrast, Germany seems to be an exception (that might prove the rule). The right of life of the woman and the fetus is equally recognized in the Constitution but the “indications” regime [Court developed and legislature ratified] grants to women the right to terminate a pregnancy for reasons of threat to her life, mental and physical health or due to rape, incest, and for fetal abnormalities. See 15 StRAndG, 1976 BGB I 1213 and Judgment of Feb. 25, 1975, BVerf3, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE]1; for a similar holding post-reunification see 88BVerfGE 203 (1993). See also Gerald L. Neuman, “Casey in the mirror: abortion, abuse and the right to protection in the United States and Germany.” *The American journal of comparative law* (1995): 273-314.

⁶ See Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, para. 14. [Noting a duty toward pregnancy and child-birth outcomes through the provision of reproductive and sexual health services.]

⁷ Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994). para 5.

⁸ See Human Rights Council, Resolution 11/8. (11th session, 17 June 2009), Preventable maternal mortality and morbidity and human rights. In addition, this committee has frequently commented on the connection between restrictive abortion laws and high rates of maternal mortality. See e.g., Chile, 30 March 1999, CCPR/C/79/Add.104 at para. 15; Colombia, 1 April 1997, CCPR/C/79/Add.76 at para. 24; Ecuador, 18 August 1998, CCPR/C/79/Add.92 at para. 11; Guatemala, 27 August 2001, CCPR/CO/72/GTM at para. 19; Mali, 16 April 2003, CCPR/CO/77/MLI at para. 14; Mongolia, 25 May 2000,



**HARVARD LAW SCHOOL
CAMBRIDGE – MASSACHUSETTS – 02138**

6. Although the Covenant does not contain a “right to health” article, the committee has noted that right to health arguments are not precluded and can be raised under the right to life (Article 6).⁹ This committee has repeatedly stated its concerns regarding a host of states parties’ practices which compromise women’s health so significantly that their lives are put at risk.¹⁰
7. The recognition of interconnection between the right to life and to health is reflected not only in the output of this committee, but by other UN treaty body committees as well. For example, the Committee on Economic, Social and Cultural Rights, in its General Comment 14, notes the interdependence of the right to health “on the realization of other human rights, as contained in the International Bill of Rights, including the rights to ...life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.”¹¹
8. The intimate connection between the rights to health and life often is at issue with restrictive abortion laws in the following way: many states parties criminalize abortion, based on a stated interest in the protection of potential life, but make exceptions for medical and forensic “indications” – that is for pregnancies which pose risks to the woman’s life, physical or mental health, for cases of significant or severe fetal abnormalities, or due to a crime such as rape or incest. In fact, most of the world’s abortion laws follow such a regime.¹²

(Some) implications of “provided by law”

9. Where women are able to terminate an “indicated” pregnancy, states parties have established administrative mechanisms that enable, rather than encumber, access to appropriate, affordable, quality health services.¹³ Complaints and communications to regional human rights courts and the UN treaty bodies reflect (in the breach) the importance of such mechanisms to the protection and realization of a range of human rights, including those that are connected to the right to life.¹⁴

CCPR/C/79/Add.120 at para. 8(b); Peru, 15 November 2000, CCPR/CO/70/PER at para. 20; Poland, 29 July 1999, CCPR/C/79/Add.110 at para. 11; and United Republic of Tanzania, 18 August 1998, CCPR/C/79/Add.97 at para. 15.

⁹ *Cabal and Pasini v Australia*, Communication No. 1020/2001, Views of 7 August 2003 at para. 7.7.

¹⁰ For example, Concluding Observations of the HRC: Chile, 18 May 2007, CCPR/C/CHL/CO/5 at para. 8 (criminalization risks life of woman); Ecuador, 18 August 1998, CCPR/C/79/Add.92 at para. 11 (adolescent suicide); El Salvador, 22 August 2003, CCPR/CO/78/SLV at para. 14 (criminalization risks life of woman); Gambia, 12 August 2004, CCPR/CO/75/GMB at para. 17 (restrictions risk life of woman); Madagascar, 11 May 2007, CCPR/C/MDG/CO/3 at para. 14 (restrictions risk life of woman); Mali, 16 April 2003, CCPR/CO/77/MLI at para. 14 (restrictions risk life of woman); Mauritius, 27 April 2005, CCPR/CO/83/MUS at para. 9 (criminalization risks life of woman); Peru, 15 November 2000 at para. 20 (rape); Poland, 2 December 2004, CCPR/CO/82/POL at para. 81; and Venezuela, 26 April 2001, CCPR/CO/71/VEN at para. 19 (criminalization risks life of woman).

¹¹ See Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4, para. 3.

¹² Center for Reproductive Rights, *The World’s Abortion Laws 2015* (2015) at <http://worldabortionlaws.com/>.

¹³ See *infra* note 5 with regard to Germany.

¹⁴ Before UN treaty bodies see *K.L. v. Peru*, Human Rights Committee, Commc’n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); *L.M.R. v. Argentina*, Human Rights Committee, Commc’n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); *L.C. v. Peru*, Committee on the Elimination of Discrimination against Women (CEDAW Committee), Commc’n No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009 (2011); before the European Court of Human Rights:



HARVARD LAW SCHOOL
CAMBRIDGE – MASSACHUSETTS – 02138

10. This committee has previously remarked on the nature of Article 6 in conjunction with Articles 2.1 and 26 (rights to equality and non-discrimination).¹⁵ Recently, observations by the UN Committee on the Rights of Persons with Disabilities [CRPD] have been made regarding the laws that permit abortion on the basis of fetal anomalies, labeling them impermissible discrimination on the basis of disability.¹⁶ Some commentators have suggested that the CRPD is imputing human rights protections to the fetus, which if it were, would be unfounded, as already discussed.¹⁷ The CRPD's observations could be read more narrowly, and be limited to the singling out of fetal "disability" for exceptional treatment when compared to other legally sanctioned grounds: Spain, for example, allows abortion for any reason up to 14 weeks of gestation, but up to 22 weeks or beyond should there be "a risk of serious anomalies in the foetus...[or]an extremely serious and incurable illness is detected in the foetus".¹⁸ A remedy might therefore be to permit abortion for any reason without regard to gestational limit.¹⁹

Tysiāc v. Poland, No. 5410/03 Eur. Ct. H.R., (2007); P. and S. v. Poland, No. 57375/08 Eur. Ct. H.R. (2008); A, B and C v. Ireland, No. 25579/05 Eur. Ct. H.R., paras. 245-268. (2010) and R.R. v. Poland, No. 27617/04 Eur. Ct. H.R. (2011); and before the Inter-American Court of Human Rights see *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Aug. 24, 2010).

¹⁵ HRC, General Comment No. 28: Article 3 (Equality of rights between men and women), in *Compilation of General Comments supra n. 32* at 179, para. 10. [requesting that states parties to "give information on any measures taken by the State to help women prevent unwanted pregnancies," in reporting under Article 6, and "to ensure that they do not have to undergo life-threatening clandestine abortions."] The Committee on the Elimination of Discrimination against Women also considers restrictive abortion laws to violate women's rights to equality stating "it is discriminatory for a State Party to refuse to provide legally for the performance of certain reproductive health services for women." Committee on the Elimination of Discrimination Against Women, General Recommendation 24: Article 12 of the Convention (Women and Health), in *Compilation of General Comments* at 276, para. 11

¹⁶ Concluding observations of the CRPD: of Hungary, 22 October 2012, CRPD/C/HUN/CO/1 at paras 17-18; Spain, 19 October 2011, CRPD/C/ESP/CO/1 at paras 17-18.

¹⁷ See Carole J. Petersen, "Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities." *Journal of Law and Health* 28.1 (2015): 121, 161-163. [Discussing an attempted repeal of Spain's abortion law.] If the CRPD is concerned that such an indication reflects (or augments) stigma and discrimination towards those *already living* with disabilities, its observations may also accord with existing understandings. However the CRPD has not articulated its reasoning in this manner.

¹⁸ Concluding Observation, Spain, 19 October 2011, CRPD/C/ESP/CO/1 at paras 17.

¹⁹ Some fetal impairments, moreover, increase risks to a woman's health during childbirth; this specific indication might be viewed as reinforcing life and health exceptions to abortion laws. See International Federation of Gynaecologists and Obstetricians (FIGO), *INTRODUCTION TO PRINCIPLES AND PRACTICE OF BIOETHICS: CASE-STUDIES IN WOMEN'S HEALTH* By the Committee on Ethical Aspects of Human Reproduction and Women's Health, 2012, p. 23 ["Anencephaly is associated with risks if dysfunctional labour and complicated delivery, and stressful newborn care until death."]



**HARVARD LAW SCHOOL
CAMBRIDGE – MASSACHUSETTS – 02138**

Conclusion

- **This General Comment 36 presents an opportunity to clarify that laws prohibiting abortion or a pregnant woman's access to any other medical treatment through criminal or other sanctions, violate Article 6.1.**
- **This General Comment 36 could further articulate that states parties' laws and policies must, at the very least, permit abortion in cases where there are risks:**
 - **to the woman's life, physical or mental health,**
 - **of fetal impairment**
 - **or when the pregnancy is due to a crime (e.g. rape, incest).**
- **The committee could also take this occasion to clarify that indications for abortion on the basis of fetal impairment do not violate Articles 2.1, 6.1 or 26.**
- **This General Comment can stress to states parties that they must adopt measures to provide for an effective and accessible means of protecting women's rights, including a regulatory framework for their adjudication and enforcement, specifically tailored to the time constraints of pregnancy. Failure to do so would violate the content of Article 6.1 and Article 2.3 (the right to an effective remedy).**

Humbly submitted in my personal capacity (not on behalf of Harvard Law School or its Human Rights Program),

Mindy Jane Roseman, J.D., Ph.D.

Lecturer on Law

Academic Director, Human Rights Program