**Submission on behalf of Comunidad y Justicia**

**Consultation on a New Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights.**

* ***Comunidad y Justicia*** is a Human Rights nonprofit NGO, founded in 2012 and based in Santiago, Chile. The organization’s objective is to promote and defend human rights, with a special emphasis in fundamental liberties, parental rights, and the protection of the right to life for all human beings. In order to fulfill its mission, *Comunidad y Justicia* works in research and dissemination of human rights information, judicial representation and legislative lobbying.
* ***Comunidad y Justicia*** welcomes the opportunity to provide advanced comments on the Draft General Comment being considered by the Committee. We celebrate the thoughtful work being undertaken by the Committee on matters regarding the legal necessity of States to establish effective criminal prohibitions on all forms of deprivations of the life of individuals, in order to secure the enjoyment of the inherent right to life of all human beings, acknowledged in article 6.
* That notwithstanding, we disagree with the assessment of the Rapporteur on a number of issues, as set out in the DGC, in which we believe there is a lack of adherence to binding international law norms pertaining to the interpretation of the Covenant as a treaty, as well as the existing *opinio juris* of the international community with respect to myriad issues regarding the right to life.
* It is our understanding that the mandate of the Committee on Human Rights provides few specifics with respect to the content of the General Comments that the Committee may issue as it considers appropriate. Article 40(4) of the Covenant merely states that this can be done, setting no guidelines to determine the specific content of the General Comments as such. Further, Article 28(1) of the Covenant merely states that there shall be a Human Rights Committee, but makes no mention of what its purpose or mission shall be.
* Because this is the case, it is plausible to argue that the Committee is not bound to simply interpret the Covenant in accordance with the law of treaties, but rather is allowed by its broad mandate to set out its policy views on how the Covenant should be applied by the States[[1]](#footnote-1). However, there is an important distinction between presenting policy views detached from the text of the Covenant, as opposed to actually undertaking a good faith interpretation of the treaty, in accordance with the law, which is then set out in a General Comment. For reasons later explained in this submission, we believe that unless the Committee alters the DGC prior to its final form, one cannot but conclude that its content is not a faithful interpretation of the Covenant as is written and ratified by the States, but rather a policy suggestion from Committee members to the member States. A policy suggestion cannot by itself be taken as binding, for it is not part of the obligations expressly undertaken by State parties.
* We are concerned with the Committee’s view that the right to life should be interpreted to include in its scope a “life with dignity”, as stated in §3 of the DGC. However well intentioned, this approach seems to be misguided since it blurs the contours of the right in question by proposing that it encompasses not only the right to life in terms of the continuity of physical existence, but the enjoyment of a “life with dignity” as well. Such a reading will most likely create more problems than solutions. It can be argued that the constituent elements of a life with dignity, as a legal matter, are the other recognized human rights in the Covenants, whose enjoyment fulfills the requirements of a just and good life for all individuals. Such a reading has the virtue of giving certainty of what exactly it is that State are obligated to do with respect to human beings within their jurisdictions. But a general appeal to “dignity” as part of the right to life –as opposed to the foundation from which the right to life, as well as all others, is derived– creates interpretative issues on account of the inexistence of an agreed upon notion of what dignity is and what it entails.
* Furthermore, such a reading of the right to life, which goes beyond to the clear terms of article 6 of the Covenant, is not in keeping with the applicable rules of interpretation as set out in the Vienna Convention on the Law of Treaties. It would certainly be inadmissible to advance an interpretation which reduces the scope of article 6 as written. But it is another thing altogether to go beyond the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose so as to broaden the scope of the right in question. The treaty says what it says, no less, but no more either.
* No doubt, many other commentators will note that the proposal of the Committee in the DGC directly contradicts the very terms of the treaty in article 6(5), insofar as it purports to deny the right to life of unborn individuals. While the DGC does not do so explicitly, there is no other possible reading in light of §9, which for the first time ever, claims the existence of a right to abortion. Thus, the Committee makes the baseless assertion that States may regulate access to abortion, but never forbid it. As is always the case, the issue of abortion involves competing notions of rights. The affirmation of a right to abortion always requires the *de jure* or *de facto* denial of the right to life of the unborn, which is contrary to the proper interpretation of the Covenant.
* States agreed upon the use of the expression “human beings” instead of persons, so as to identify the protected subjects under article 6 of the Covenant, which necessarily extends the protection to the unborn on account of their belonging to the universe of human beings themselves. To deny them protection is an arbitrary decision, which is especially egregious since no reason is given to why this should be the case. The Committee simply affirms that this is so by its own will, without presenting any argument based on the text of the treaty, the *travaux préparatoires* or some other point of law.
* States also agreed to forbid the imposition of the death penalty on pregnant women. It is hard, if not impossible, to find a justification for this decision other than the fact that member States acknowledge the existence of a separate and distinct human individual whose life is in itself valuable and worthy of protection. As the Committee notes in its DGC, the Covenant does not prohibit the death penalty in absolute terms, and women are liable to receive such a sentence in ordinary circumstances. The ban on the death penalty for crimes committed by those under the age of eighteen is justified by the presumption that they always lack the full moral agency to take responsibility for their actions. The same rationale does not and cannot extend to pregnant women; they are exempt exclusively on account that the death sentence would not only kill them, but the innocent child as well.
* It is true that the Covenant does not mention the unborn in explicit terms, but from this it does not follow that the unborn is therefore barred from receiving the protection of the State, under the Covenant, with respect to his or her right to life. We have already established that the terms of the Covenant, in their ordinary meaning –under article 31 of the Vienna Convention on the Law of Treaties– do not exclude outright the unborn, for they qualify both as “individuals” and as “human beings”. Thus, at best one could accept that the ordinary meaning of the words neither confirms nor denies the exclusion of the unborn. And if one were to interpret the Covenant in such a way that those not yet born are excluded from protection, then recourse to the *travaux préparatoires* should be able to confirm such a conclusion or resolve the persisting obscurity, in light of article 32 of the aforementioned Vienna Convention. This is, not the case, however.
* The full examination of the record on the drafting of the Covenant shows, beyond the vote count, that the exclusion of the unborn was not the intent of the States at the time of the treaty’s drafting. The record shows that there was an attempt to include a specific provision –similar to the one that would later be included in the American Convention on Human Rights–, stating not only that the right to life is inherent of all human persons, but that it was to be protected by law from the moment of conception. This proposal was ultimately rejected, not because there was no intent to protect the unborn, but because of two specific sets of reasons linked to the text of the proposed amendment (protection since conception). Only two delegations objected to the extension of the right to life to ante-natal existence (the UK and Ceylon). All other delegations that spoke on the issue opposed the proposal based on the difficulty of determining when conception had occurred, or that they considered the specific framing of the proposed provision to be vague. But this is different from a positive affirmation that the unborn has no right to life and that it was not the intent of the States to give them protection under the Covenant, especially when it is clear that this is the case regarding the imposition of the death penalty on pregnant women.
* The DGC affirms that the State’s role in regulating “termination of pregnancy” cannot result in a violation of the right to life of a pregnant woman –a right to life that, according to the same DGC, includes “life with dignity”, without specification of what this entails– or other rights, including the prohibition against cruel, inhuman and degrading treatment of punishment. Further, any regulation must stop short from having the effect of prohibiting access to abortion, for this would go against a claimed duty of States to ensure that women do not have to undertake unsafe abortions. In other words, criminal liability for abortion is no longer possible. Thus, it is clear from the text of the DGC §9 that the proposed interpretation amounts to a right to abortion and a prohibition on States to prohibit certain forms of abortion. As written, the DGC purports to command not only those States who retain a complete prohibition on abortion, but also to the majority of the international community of States that views abortion as a criminal act in general, even if allowing for certain exceptions based on the right to life of the mother, her health or other narrow ground. This is clearly outside of the scope of the Covenant, and does not reflect the current state of international law and the *opinio juris* surrounding this issue.
* In the absence of a clear and indisputable meaning intended by the parties and manifested in the treaty text on whether or not the unborn are protected subjects under the Covenant, it is for the States to decide whether or not to interpret the Covenant in order to include the unborn under its protection. It is an undeniable principle under international law that States are allowed to do everything that is not forbidden by binding legal norms. The Covenant does not forbid in any way the interpretation under which the unborn are protected human beings, and right holders in themselves. The fact that the DGC purports to deny States the ability to recognize the unborn as a protected subject involves a violation of the Committee’s own mandate, and is at odds with international law principles[[2]](#footnote-2).
* Criminal prohibitions on abortion are not *per se* contrary to the Covenant or contrary to the right to life of women, as it has been interpreted by the community of States. Criminal legislation on this issue is compatible with the attainment of the highest levels of physical well-being for women. The Chilean natural experiment demonstrates this, being one of the few States that has a chance of reaching the millennium goals on maternal mortality rates, while having a complete prohibition on abortion, with exceptions in order to safeguard the life of the mother. The issue of “unsafe abortion” is a public health issue –as it has been understood by the international community of States since the meetings in Cairo (1994) and Beijing (1995), which must be dealt with, but does not impose on States a single directive on how to approach the issue. Criminal prohibition is not by itself prohibited as long as the issue is dealt with. This is not the approach that the DGC seeks to impose.
* Furthermore, the DGC proposition of a State duty to ensure that women “do not have to undertake” unsafe abortions is contrary to prevailing law on the matter. Aside from the fact it assumes that recourse to abortion is a necessity and not a choice –an unfounded assumption­–, the DGC ignores that the unbroken consensus in the international community since 1994[[3]](#footnote-3) by which access to abortion is not part of sexual and reproductive rights, and that only if a State has decided to make access to abortion legal, is there a subsequent duty to ensure that it is performed under adequate conditions. It is not a right of individuals to demand safe abortions when the conduct itself is not legal under the specific jurisdiction. To conclude otherwise involves affirming that individual persons can take advantage of their wrongdoing to pressure States into legalizing said conduct, which cannot be accepted in principle.
* Since 1994 and to this date, the previously agreed upon language for resolutions and the consensus by the States –the one and only authoritative interpreters of the obligations under the Covenant– is that access to abortion is not part of existing human rights, and that the current regime creates no duty on States to make abortion access easier.
* For the foregoing reasons submitted in this brief memo, we ask the Human Rights Committee to correct the DGC in keeping with international law norms on treaty interpretation and the existing *opinio juris* of States on the matter of the termination of unborn human life.

Respectfully submitted.

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1. We must note, however, that this understanding entails a questionable deference towards the Committee as a State created entity. It is a well-accepted principle, recognized by civilized nations, that the organs of the State and its subsidiaries have no other powers than those expressly delegated to them by their constituent power, and that those are to be understood in a restrictive manner, so as to limit the power of State. Thus, just as the State has no power other than those expressly given by the Constitution, treaty created entities like the Committee have no powers other than those that have been expressly granted, and the interpretation of the mandate cannot result in the arrogation of power that has not been expressly granted. [↑](#footnote-ref-1)
2. Especially, the “lotus principle” (France v. Turkey, The case of the S.S. Lotus, PCIJ, 1926), under which a sovereign state is free to act in any way they wish so long as they do not contravene an explicit prohibition, and the “Jaworzina principle” (Poland v. Czechoslovakia, Question of Jaworzina, PCIJ, 1923), under which the right to give an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it, which in this case is each individual State and the international community as a whole. [↑](#footnote-ref-2)
3. Cairo Program of Action, § 8.25. This document states, in no uncertain terms, that abortion is not to be considered a method of birth control or family planning; that all efforts must be made to eliminate the need for abortion; and that all measure or change with respect to abortion can only be determined at the national or local level, in accordance with the domestic legislative process. In those cases in which abortion is not against the law, the procedure must be done in adequate conditions. The Program of Action explicitly states that it does not create any new rights. [↑](#footnote-ref-3)