**To: United Nations Human Rights Committee**

**From: Regent Law Center for Global Justice, Human Rights, and the Rule of Law; Jeffrey Brauch; S. Ernie Walton**

**Re: Comment to Draft General Comment on Article 6**

**Date: 5 October 2017**

## **Introduction**

In July 2017, the UN Human Rights Committee published for comment its first reading of draft General Comment on Article 6 of the International Covenant on Civil and Political Rights (ICCPR).[[1]](#footnote-1) This Comment is submitted by Regent University School of Law Professors S. Ernie Walton[[2]](#footnote-2) and Jeffrey Brauch[[3]](#footnote-3) and the Regent Law Center for Global Justice, Human Rights, and the Rule of Law.[[4]](#footnote-4) The Committee’s mandate to States Parties to legalize, promote, and protect the “right” to abortion violates international law in at least two distinct ways. First, it alleges that the ICCPR grants a right to abortion, which is false. Second, the comment usurps the lawmaking role of states in international law and seeks to impose an obligation on states to which they never agreed.

## **The ICCPR Does Not Grant a Right to Abortion and at Worst Is Silent on Whether Article Six Encompasses Unborn Children**

Treaties must be “interpreted 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.”[[5]](#footnote-5) And with the right to life, the Committee has previously noted that “the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner.”[[6]](#footnote-6) The Comment ignores both of these interpretive guides. The Comment contradicts the ordinary meaning of the text and the context in which Article 6 is written and interprets the right to life in a “narrow” fashion.

1. *The Comment Contradicts the Ordinary Meaning of Article Six*

Article 6(1) of the ICCPR guarantees that *“****[e]very human being*** has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”[[7]](#footnote-7) Interpreting the phrase “every human being” as excluding unborn children and promoting a right to abortion contradicts the ordinary meaning of the text and constitutes an improper “narrow” interpretation of who enjoys the right to life.[[8]](#footnote-8) Considering that the right to life serves as the foundation for all other human rights, any ambiguity should be interpreted in favor of life, just as the Committee has indicated previously. “Every human being” should therefore be interpreted broadly and naturally to include individuals both born and not yet born.

1. *The Comment Ignores the Context of Article Six and Extends It Beyond the Article and Treaty’s Object and Purpose*

Not only does the Comment contradict the ordinary meaning of Article 6(1), it also contradicts the context of Article 6 and the object and purpose of the ICCPR. “Context” in Article 31 of the Vienna Convention on the Law of Treaties should certainly include other articles in the same treaty. Accordingly, Article 6(1) should be construed consistently with other articles in the ICCPR that address the right to life and unborn children. As the Comment begrudgingly acknowledges in paragraph 52, when the ICCPR mentions the unborn it does so in favor of life, by prohibiting the imposition of the death penalty on pregnant women.[[9]](#footnote-9) Despite this textual reference in the ICCPR to protecting the life of an unborn child, the Comment does not discuss this in any fashion. It simply acknowledges its existence and moves on as if it is not part of the treaty nor in any way relevant to understanding the meaning of Article 6(1).

In striking contrast to how the Comment ignores the ICCPR’s reference to protecting unborn children in Article 6(5), the Comment explains and supports in detail the other prohibition on the death penalty in Article 6(5)—against persons below the age of 18.[[10]](#footnote-10) Here, the Committee chooses to give the benefit of doubt, i.e., err on the side of life. When there is no “reliable and conclusive proof” that the person was not below the age of 18 at the time the offence was committed, says the Comment, Article 6(5) mandates that states parties refrain from imposing the death penalty.[[11]](#footnote-11) This makes complete sense: there is an express prohibition in the treaty, and the context and object and purpose of the article and treaty favor life. Yet the Committee does not apply the same benefit of the doubt to unborn children—despite the implicit reference to protecting unborn children in Article 6(5) and the guarantee of the right to life in Article 6(1).[[12]](#footnote-12) At a minimum, the textual reference in Article 6(5) to a right to life for unborn children mandates that the Comment be neutral with respect to abortion in Article 6(1). But the Comment refuses again to follow basic principles of treaty interpretation. Instead, the Comment mandates that states parties allow the death of unborn children in a myriad of cases, even though Article 6 nowhere mentions a right to abortion and Article 6(5) implicitly mentions a right to life for unborn children by way of forbidding the execution of pregnant women.[[13]](#footnote-13)

## **Creating a Right to Abortion in the ICCPR Violates Fundamental Principles of International Law**

The Human Rights Committee has no authority to seek to impose on states parties an obligation to which the states never agreed. Sovereign equality is still the cornerstone of international law. The familiar Article 2 of the United Nations Charter states it this way: “This organization is based on the principle of the sovereign equality of all its Members,”[[14]](#footnote-14) and “[n]othing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . .”[[15]](#footnote-15) One consequence of sovereign equality is that a state is not bound to a treaty’s provisions unless it gives consent.

The Comment attempts to impose an obligation on states parties to something to which they never gave their consent. The Comment effectively exempts unborn children from Article 6 and also grants a right to abortion in certain instances. States parties never consented to either of these “interpretations” of the ICCPR. The drafting history of the ICCPR makes this clear. During the drafting of the ICCPR, a proposal was made to include a provision protecting unborn children and outlawing abortion in most cases. The proposal was as follows:

It shall be unlawful to procure abortion except in a case in which it is permitted by law and is done in good faith in order to preserve the life of the woman, or on medical advice in order to prevent the birth of a child of unsound mind of parents suffering from mental disease, or in a case where the pregnancy is the result of rape.[[16]](#footnote-16)

The proposal was ultimately rejected—but *not* because the drafters supported a right to abortion. It was rejected because of the alleged ambiguity in the provision and concerns about state sovereignty.[[17]](#footnote-17) First, the provision lacked “legal clarity”; opposition to the provision included arguments that the provision was vague, that states would apply the provision inconsistently, and that the proposal was weaker than it should be.[[18]](#footnote-18) Second, others argued that abortion regulation was a matter that should be left to the “domestic jurisdiction”[[19]](#footnote-19) of states.[[20]](#footnote-20) Virtually all states parties, therefore, whether pro-life, pro-choice, or neither, agreed that the ICCPR was either silent on abortion or included a right to life from conception for those states whose domestic law granted such a right.

Accordingly, states parties never consented to grant a right to abortion when they signed the ICCPR. The Human Rights Committee has no authority to seek to impose on states parties an obligation to which the states never agreed. Although the Human Rights Committee’s general comments are not binding and not afforded the status of a source of international law,[[21]](#footnote-21) they are considered highly authoritative.[[22]](#footnote-22) This Comment ignores basic principles of treaty interpretation and usurps the lawmaking function of states in international law. If the Committee wishes to advance a right to abortion, it should work on an optional protocol like the Maputo Protocol[[23]](#footnote-23) that expressly includes a right to abortion, instead of “interpreting” the treaty’s text in a bad-faith manner. Shoehorning a right to abortion in the ICCPR where none exists undermines the rule of law in the international legal system and the legitimacy of the Committee as the implementing and overseeing body for the Treaty.

**Conclusion**

General Comment 36 to the ICCPR has no justification for including a right to abortion as a valid interpretation of the guarantee under Article 6(1) of a right to life for “every human being.” To do so contradicts the plain meaning of the text of Articles 6(1) and (5), flies in the face of the intentions of the drafters, and violates state sovereignty and good faith relationships with state parties. The right to life cannot be so narrowly construed as to give some human beings a right to life but not others—namely, the most innocent and vulnerable of us all.

1. Office of the High Comm’r, *Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to Life*, [http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx](https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx). [↑](#footnote-ref-1)
2. [S. Ernie Walton](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2129242) is a professor of International Law and serves as the Academic and Administrative Director of the Center for Global Justice, Human Rights, and the Rule of Law. [↑](#footnote-ref-2)
3. Jeffrey Brauch is the former Dean of Regent University School of Law and the Executive Director of the Center for Global Justice, Human Rights, and the Rule of Law. He teaches International Criminal Law and International & Comparative Human Rights, among other things, and has published [several articles](https://papers.ssrn.com/sol3/results.cfm) that relate to international human rights law. [↑](#footnote-ref-3)
4. The Center’s mission is to “to equip Christian advocates to promote the rule of law and seek justice for the world’s downtrodden—the poor, the oppressed, and the enslaved—and to serve and support those already engaged in such advocacy.” Center for Global Justice, Human Rights, and the Rule of Law, About, <https://www.regent.edu/acad/schlaw/globaljustice/about.cfm> (last visited 8 Aug. 2017). [↑](#footnote-ref-4)
5. Vienna Convention art. 31(1), 23 May 1969, 1155 U.N.T.S. 18232 (registered *ex officio* on 27 Jan. 1980). [↑](#footnote-ref-5)
6. International Covenant on Civil and Political Rights, Article 6(1), adopted 30 April 1982, HRI/GEN/1/Rev.9 (Vol. I) (hereinafter “ICCPR”). [↑](#footnote-ref-6)
7. ICCPR art. 6, ¶ 1 (emphasis added). [↑](#footnote-ref-7)
8. *See* Advanced Unedited General Comment 6, ¶ 3. [↑](#footnote-ref-8)
9. ICCPR art. 6, ¶ 5. [↑](#footnote-ref-9)
10. Advanced Unedited General Comment 36, ¶ 52. [↑](#footnote-ref-10)
11. *Id.* [↑](#footnote-ref-11)
12. ICCPR art. 6, ¶¶ 1, 5. [↑](#footnote-ref-12)
13. *Id.*  [↑](#footnote-ref-13)
14. U. N. Charter, art. 2, ¶ 1. [↑](#footnote-ref-14)
15. *Id.* art. 2, ¶ 7. [↑](#footnote-ref-15)
16. Thomas Finegan, *Int’l Human Rights Law & the “Unborn”: Text & Travaux Préparatories*, 25 Tul. J. Int’l & Comp. L. 89,101–09. [↑](#footnote-ref-16)
17. *Id.* at 101–03. [↑](#footnote-ref-17)
18. *Id.* at 106–07. [↑](#footnote-ref-18)
19. U. N. Charter, art. 2, ¶ 7. [↑](#footnote-ref-19)
20. Finegan, *supra* note 16, at 101–07. [↑](#footnote-ref-20)
21. Paula Gerber et al., *General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights: What is its Standing, Meaning and Effect?*, 14 Melb. J. Int’l L. 93, 99 (2016). [↑](#footnote-ref-21)
22. *Id.* at 99–101. [↑](#footnote-ref-22)
23. African Comm’n on Hum. & Peoples’ Rts., Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 14(2)(c), Sept. 13, 2000, CAB/LEG/66.6, *reprinted in* Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women*, 1 Afr. Hum. Rts. L.J. 40, 53 (2001) (HeinOnline). Under Article 14, states parties are obligated to “take appropriate measures to . . . protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.” *Id.* art. 14(2)(c). [↑](#footnote-ref-23)