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**ECLJ's Contribution to the drafting of the
General Comment No. 36 on article 6 of the International
Covenant on Civil and Political Rights, on the right to life**

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The European Center for Law and Justice (ECLJ) has the honor to submit to the Human Rights Committee its contribution to the revision of the General Comment No. 36 on its behalf, and that of the *American Center for Law and Justice* and more than 133,000 people who wished to lend their support to the guarantee of the right to life from conception to natural death.

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EXECUTIVE SUMMARY

The *European Center for Law and Justice* (ECLJ) has taken note of the draft General Comment No. 36 on the right to life issued by the United Nations Human Rights Committee, regarding the interpretation of Article 6 of the International Covenant on Civil and Political Rights (“the Covenant”). The ECLJ would like to submit to the Committee the following brief comments on paragraphs 2 and 3 (I), as well as substantial comments with regard to paragraphs 9 and 10 (II).

Paragraphs 2 and 3 of the draft Comment broadly reaffirm the right of life. However, as discussed in more depth below, the caveat in paragraph 3 regarding to the right “*to enjoy a life with dignity*”, as well as the content of paragraphs 9 and 10, substantially diminish the originally broad scope on the right to life.

The ECLJ points out the extreme gravity of paragraphs 9 and 10, the intent of which is to imply from the right to life an alleged general right to abortion, as well as a right to assisted suicide or even euthanasia. These provisions are inconsistent with the Project as a whole, they are contrary to international law, and based on erroneous assumptions.

First of all, it is not honest to speak of abortion solely on the basis of the right to life of the mother and ignore the right of the child. Abortion, by definition, pits the will of the woman against the life of the child. **The refusal to acknowledge the very existence of the fetus leaves human life before birth without protection** from abortion and all forms of manipulation and exploitation, including current and future biotechnology. The Covenant protects the tangible reality of human life itself, that is, the vital biological process from conception to death, which exists independently of the consciousness of the subject.

The decision to ignore human life before birth is legally incorrect because it is contrary to reality and to various provisions of the Covenant and international law that recognize human beings as existing before birth. It would also be contrary to the drafters’ intention of the 1966 Pact and the Universal Declaration of Human Rights, which only tolerated abortion.

Regarding pregnancies, the text chooses to require States to legalize abortion and not to help women having children through a social policy. Yet, abortion is most often the result of social constraints on women, which States should prevent as part of their international commitment to “*reduce the recourse to abortion*”. Moreover, the mother’s health and life would be much better served and ensured by promoting birth rather than abortion.

To infer a right to suicide and euthanasia from the right to life is impossible for at least two reasons: first because it would be contradictory, secondly because the creation of an exception to the right to life would exceed the intent of the Committee. Moreover, it would introduce an inconsistency regarding States' obligations.

If accepted as drafted, States would be obligated to both prevent and sometimes facilitate suicide, according to their very relative appreciation of the autonomy and the will of the person.

Under the guise of a progress for individual autonomy, asserting a “freedom to die” and a “right to kill” is **a regression of human rights**: a regression driven by an inegalitarian conception of human worth which admits, and even encourages the sacrifice of the weakest.

Those weakest are the poor and isolated women, the elderly, the sick, the disabled and the unborn children. They will be the victims, as the statistics of abortion and euthanasia already show. If such an interpretation is allowed to prevail, respect for human life will only be guaranteed to those who are both born and healthy beings. The most fragile lives will be subjected to the power of the strongest, paving way to eugenics and transhumanism.

This conception of humanity is precisely that which was condemned in 1948. It is no coincidence that abortion and euthanasia were first legalized in USSR and in Nazi Germany.



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I. PARAGRAPHS 2 AND 3: AFFIRMING THE HIGHEST AND MOST ABSOLUTE PROTECTION OF THE RIGHT TO LIFE

The ECLJ acknowledges the effort to define the right to life in the first paragraphs of draft General Comment No. 36, specifically in paragraph 3, as *“concern[ing] 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”*, but it has reservations concerning the expression *“to enjoy a life with dignity”*. This term suggests that human dignity depends on subjective factors, while the dignity of every human being is actually inherent, as stated by the Universal Declaration of Human Rights (UDHR) in its preamble mentioning the *“recognition of the inherent dignity of all members of the human family”*.

The ECLJ appreciates the fact that the right to life is asserted right away in paragraph 2 as being of *“all human beings”*, *“the supreme right from which no derogation is permitted”* and which *“has crucial importance both for individuals and for society as a whole”*, *“most precious for its own sake as a right that inheres in every human being”* and *“a fundamental right, whose effective protection is the prerequisite for the enjoyment of all other human rights”*. In addition, paragraph 3 states that the right to life is *“a right which should not be interpreted narrowly”* and also asserts that it is guaranteed *“for all human beings, without distinction of any kind”*.

Sadly, this broad scope is being diminished through in an unacceptable way in paragraphs 9 and 10 which address the issues of abortion and assisted suicide/euthanasia. There, the wording definitely does not fit with the goals of the General Comment and is clearly incoherent and incompatible with the rest of the draft. It is important to notice that previous general comments on the right to life, in 1982 and 1984, did not come to the issues of abortion and assisted suicide/euthanasia.

II. PARAGRAPHS 9 AND 10: THE UNADMISSIBLE CREATION OF A RIGHT TO ABORTION AND TO ASSISTED SUICIDE AND EUTHANASIA

Provisions of paragraphs 9 and 10 are very serious: they attempt to imply that the right to life also includes two so-called rights to abortion and to assisted suicide/euthanasia.

In paragraph 9, in using peremptory words such as *“the States must provide safe access to abortion”*, and very vague terms to provide situations in which women must have access to abortion, the Committee interprets Article 6 of the Covenant

guaranteeing the right to life as requiring the legalization of abortion in a very broad way.

Indeed, in providing that safe abortion should be accessed “*in situations in which carrying a pregnancy to term would cause the woman substantial pain or suffering (...)*”, the Committee indicates that the list of the situations in which abortion should be accessed – including when the life of the mother is not at stake¹ – is not exhaustive. It clearly opens the door to “*abortion on demand*” and this, until the very birth of the child. Furthermore, any restrictions on access to abortion “*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*”: this statement means that not having access to abortion would constitute a *cruel, inhuman and degrading treatment*. Regarding the unborn child, he is totally missing from these provisions, being only mentioned as one that can be aborted as soon as he would “*suffer from fatal impairment*”. It does not weigh up the right to life of the child and the rights of the mother that are the only ones taken into account here. Thus, the unborn child does not benefit anymore from any protection.

In paragraph 10, the Committee creates a right to assisted suicide and euthanasia² in assuming their legality regarding the right to life; either in using the wording “*States parties should recognize*” providing a simple possibility, or “*should not prevent*” which raises a true obligation for the Member States. This is made in very vague terms, leaving a wide-open door to abuses: for instance, which kind of situation is covered by “*[catastrophically] afflicted adults*”?

Thus, despite of the strong affirmation of the right to life as benefiting to every human being without any distinction, some find themselves deprived of any protection, while some others, wishing to die, have a right to be killed. Such provisions are incoherent with the whole draft General Comment on the right to life (A). Moreover, adopting such a text would result in violating international law and the Covenant itself (B).

¹ When the life of the mother is threatened, abortion does not constitute an exception to the right to life. The intent is not to terminate the life of the unborn child but to ‘accept’ his death as an unintended and undesirable consequence of the prescribed treatment in order to save the life of the mother.

² It is not only about assisted suicide here but also about euthanasia (death is voluntarily given by another person, with or without the consent of the interested party): “*It also referred to euthanasia*” as the Rapporteur Yuval Shany stated:
[https://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/63DFCD1C5D062A11C1258163005E6C74?OpenDocument](https://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/63DFCD1C5D062A11C1258163005E6C74?OpenDocument)

A. Provisions in contradiction with the whole draft General Comment on the right to life

The Committee acknowledges in paragraph 37 that “*given the anomalous nature of regulating the application of the death penalty in an instrument enshrining the right to life, the contents of paragraph 2 [should/have to] be narrowly construed*”. It would be equally anomalous to regulate abortion, euthanasia and assisted suicide in an instrument enshrining the right to life. As M. de Frouville stated in the course of the Committee debate, “*inflicting the death penalty on a person is treating him/her solely as an object, forgetting that he/she is a purpose in himself/herself*”:³ that truth does apply to abortion, euthanasia and assisted suicide.

1. Some falsehoods as premises of the affirmation of a right to abortion

The ECLJ would like to underline the fact that provisions related to abortion are based on some falsehoods. Firstly, the draft General Comment assumes that the right to life of women is threatened in case of “*unsafe abortion*”, i.e. illegal abortion. This suggests that abortion is risky only when practiced clandestinely. However, this is forgetting that any abortion includes risks for women’s life and physical and mental health, as many studies have found.⁴ Comparative studies contradict the assumption that maternal mortality rate would be higher in countries with restrictive regulation regarding abortion: this rate is actually lower in countries that limit access to abortion in their national legislation.⁵

The draft General Comment on the right to life indicates that States would have a “*duty to ensure that women do not have to undertake unsafe abortions*”. In fact, Member States of the United Nations pledged to adopt abortion prevention policies, so that women do not have to resort to abortion. This positive obligation undertaken by States is grounded in some general principles: the duty to protect family,⁶ the duty to protect maternity⁷ and the duty to protect human life. During the Cairo

³ Personal translation: <http://webtv.un.org/meetings-events/human-rights-treaty-bodies/human-rights-committee/watch/part-one-general-comment-on-article-6-3391st-meeting-120th-session-of-human-rights-committee/5506947723001/?term=>

⁴ See « Les conséquences médicales et relationnelles de l’avortement », in Grégor Puppincq (dir.), *Droit et prévention de l’avortement en Europe*, 2016, p. 51-71.

⁵ In 2010, maternal mortality rate was 1 to 2 deaths for 100,000 births in Ireland versus 10 deaths for 100,000 births in England and Wales (P. Carroll, *Ireland’s Gain: The Demographic Impact and Consequences for the Health of Women of the Abortion Laws in Ireland and Northern Ireland since 1968*, Pension and Population Research Institute, Dec. 2011). Cf. World Health Organisation, *World health statistics 2015*, p. 58, 62 & 66:

http://apps.who.int/iris/bitstream/10665/170250/1/9789240694439_eng.pdf?ua=1&ua=1; E. Koch, J. Thorp, M. Bravo et al., “Women’s Education Level, Maternal Health Facilities, Abortion Legislation and Maternal Deaths: A Natural Experiment in Chile from 1957 to 2007”, *PLoS ONE*, Vol. 7, n° 5, e36613, May 4th, 2012.

⁶ See *Social Summit +5 (2000)*.

⁷ See *International Covenant on Economic, Social and Cultural Rights*, Article 10.2, the Preamble of the *Convention on the Elimination of All Forms of Discrimination against Women*, the Programme

Conference in 1994, the governments pledged to “take appropriate measures to help women avoid abortion, which in no case should be promoted as a method of family planning” (7.24) and to “reduce the recourse to abortion” (8.25). Similarly, during the Fourth Conference on Women, also called the Beijing Conference, the States strengthened their commitment made in Cairo and affirmed that “every attempt should be made to eliminate the need for abortion” (§ 160.k). In Europe, the Parliamentary Assembly of the Council of Europe (PACE) reaffirmed many times⁸ that “abortion can in no circumstances be regarded as a family planning method. Abortion must, as far as possible, be avoided. All possible means compatible with women’s rights must be used to reduce the number of both unwanted pregnancies and abortions.”⁹

Furthermore, paragraph 9 is assessed on a fatalistic and wrong basis in assuming that the pregnant woman has no free will and that restrictive abortion policy necessarily leads her to resort to unsafe abortion. A pregnant woman, as a legally capable human being, has the faculty to choose to abort or not to abort. If a woman chooses to abort out of the legal framework, the Committee shifts woman’s responsibility to the State, claiming that the latter should have prevented the woman to break the law by deleting the restriction provided by law. In denying States parties the right to penalize recourse to abortion or to regulate access to it, the Committee questions the dissuasive and educational purposes of criminal law, as well as its very efficiency.

2. Blatant contradictions with other provisions of the draft

Abortion and reference to the “lives of many thousands of innocent human beings”

It makes no sense to demand a wide and universal legalization of abortion while paragraph 70¹⁰ states that “wars and other acts of mass violence continue to be a scourge of humanity resulting in the loss of lives of many thousands of innocent human beings every year”. Abortion precisely results “in the loss of lives of many thousands of innocent human beings every year.” Indeed, a human being, before as well as after birth, is a human being. The fetus is not a “non-human being”. The protection enshrined under Article 6 concerns biological human life, that is the body, and not merely the conscience or personal autonomy. There is a scientific agreement on the fact that each human life is a *continuum* that begins at conception and advances in

of Action of the Beijing Conference (1995), the Preamble of the Maternity Protection Convention (revised) (n° 183).

⁸ See also PACE, Resolution 1347 (2003), Impact of the “Mexico City Policy” on the free choice of contraception in Europe, 30 Sept. 2003, § 6; PACE, Resolution 1399 (2004), European strategy for the promotion of sexual and reproductive health and rights, 5 Oct. 2004.

⁹ PACE, Resolution 1607 (2008), Access to safe and legal abortion in Europe, 16 April 2008, § 1.

¹⁰ Like General Comment No 6 on the right to life, ¶ 2 (1982) and General Comment No 14, ¶ 2 (1984).

stages until death.¹¹ The European Court of Human Rights (ECHR) found that “it may be regarded as common ground between States that the embryo/fetus belongs to the human race”¹² and that the “potentiality of that being and its capacity to become a person (...) require protection in the name of human dignity”.¹³

Accordingly, the Court of Justice of the European Union ruled that “any human ovum must, as soon as fertilised, be regarded as a ‘human embryo’ (...) since that fertilisation is such as to commence the process of development of a human being”.¹⁴ Therefore, if the human being to be born belongs to human race, he must benefit from the “inherent dignity of all members of the human family”.¹⁵ Thus, to ignore the existence of the prenatal stage of any individual human life and to oblige States to legalize abortion in an extensive way result in denying humanity of every person before birth.

Abortion and prohibition of death penalty on pregnant women

Article 6.5 of the Covenant prohibits that a sentence of death shall be carried out on pregnant women,¹⁶ which is also set out in paragraph 52 of the draft General Comment. What is the foundation of such a prohibition? The *Travaux Préparatoires* to the Covenant explicitly show that the original intention of the writers of the text was to protect the right to life of the innocent unborn child in the womb of his mother sentenced to death.¹⁷ On this point, the ECLJ points out that it is regrettable that the following sentence – initially drafted in paragraph 50 of the 2015 draft General Comment– has been removed from the current draft: “The special protection afforded to pregnant women stems from an interest in protecting the rights and interests of affected family members, including the unborn fetus and the fetus’s father”. Such a statement, recognizing the unborn child, goes against the recognition of a right to abortion as currently set out in paragraph 9.

¹¹ See San Jose Articles, Articles 1 and 2; Sadler, T.W. Langman’s Medical Embryology, 7th edition. Baltimore: Williams & Wilkins 1995, p. 3; Moore, Keith L. and Persaud, T.V.N. The Developing Human: Clinically Oriented Embryology, 7th edition, Philadelphia: Saunders 2003, p. 2.

¹² ECHR, *Vo v. France*, No. 53924/00, [GC], 8 July 2004, § 84.

¹³ *Idem*.

¹⁴ Court of Justice of the European Union (Grand Chamber), 18 October 2011, C-34/10 *Oliver Brüstle /Greenpeace eV*, § 35.

¹⁵ Preamble of the Universal Declaration of Human Rights. See also San Jose Articles, Article 4.

¹⁶ A similar provision appears in article 4(5) of the 1969 American Convention on Human Rights.

¹⁷ See Thomas Finegan, “International Human Rights Law and the “Unborn”: Texts and Travaux Préparatoires”, Tulane Journal of International & Comparative Law, 2016, Vol. 25, Issue 1, p. 20; Marc J. Bossuyt, Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights, Dordrecht: Martinus Nijhoff Publishers, 1987, A/C.3/SR.810 § 2; A/C.3/SR.811 § 9; A/C.3/SR.812 § 7; A/C.3/SR.813 § 36; A/C.3/SR.815 § 28; William A. Schabas, The abolition of the death penalty in international law (3rd ed. 2002), at 134.

Abortion, assisted suicide/euthanasia and non-discrimination

To assert a right to abortion, assisted suicide and euthanasia does not make sense in the light of the provisions of the draft related to non-discrimination. Paragraph 3 provides that “Article 6 guarantees this right [to life] for all human beings, without distinction of any kind”, while paragraph 64 is even more precise, saying that “The right to life must be respected and ensured without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status, including caste, sexual orientation and gender identity, disability albinism and age. Legal protections for the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination.” Any kind of discrimination in the enjoyment of the right to life is thus firmly condemned.

In this context, provisions related to suicide, found in paragraph 10, are inconsistent: on one hand, States should prevent suicides and on the other hand tolerate them, or even allow them when they occur in a medical context. This would mean that self-committed suicide and without medical aid must be prevented, while assisted suicide and euthanasia are encouraged.

Regarding abortion, unborn children may be discriminated against on the grounds of their medical condition, their sex, or the parental project, that is to say the individual will of the mother or of the parents. Indeed, the wording used to deal with the different cases in which a woman should have access to abortion is deliberately broad. This may encompass all kinds of situation such as gender-based abortion, or where the unborn child may suffer from minor disability or disease, whether proved or only suspected. These are all discriminatory grounds, furthermore condemned, which could be invoked to terminate a pregnancy, if carrying the baby to term were likely to cause the woman “considerable pain or suffering”.

Abortion and femicide

This is even more inconsistent regarding discrimination based on the sex since the text is firmly condemning “femicide” as stated in paragraph 64 as constituting “a particularly grave form of assault on the right to life”. Yet, abortion on the basis of the sex of the child is a widespread practice, targeting mainly female fetuses. This practice occurs as soon as the sex of the fetus is revealed within the legal limit for abortion.¹⁸ Thus, the draft General Comment would paradoxically result in encouraging what the very text seeks to avoid. The 1994 Cairo conference associated prenatal sex selection with female infanticide.¹⁹ During the Fourth World

¹⁸ See « L'avortement en raison du sexe de l'enfant », in Grégor Puppincq (dir.), op. cit., p. 163-184.

¹⁹ Cairo Conference on Population and Development (1994): “4.16. To eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection”. See also Preventing gender-biased sex selection, An interagency statement OHCHR, UNFPA, UNICEF, UN Women and WHO, 2011 at the following link:

Conference on Women in Beijing (1995), the prenatal selection was described as an act of violence against women.²⁰ In 1998, the UN General Assembly “*urge(d) all States to enact and enforce legislation protecting girls from all forms of violence, including female infanticide and prenatal sex selection (...)*.”²¹ Accordingly, in the “*Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children*”, the United Nations Sub-Commission on the Promotion and Protection of Minorities provides in paragraph 49 that “*Female infanticide and female foeticide should be openly condemned by all Governments as a flagrant violation of the basic right to life of the girl-child*”²².

In 2005, the UN Committee on the Rights of the Child condemned sex-selective abortions against girls, providing that “*Article 2 of the Convention on the rights of the child ensures rights to every child, without discrimination of any kind*” and “*Discrimination against girl children is a serious violation of rights, affecting their survival and all areas of their young lives as well as restricting their capacity to contribute positively to society. They may be victims of selective abortion, genital mutilation, neglect and infanticide, including through inadequate feeding in infancy*”.²³ The same year, the UN Committee on the Elimination of Discrimination against Women (CEDAW) invited Member States to adopt national legislation prohibiting prenatal sex selection of the foetus,²⁴ as well as the Committee of Ministers of the Council of Europe did in 2002.²⁵ The PACE²⁶ and the Commissioner for Human Rights Nils Muižnieks²⁷ also firmly condemned this practice.

http://www.who.int/reproductivehealth/publications/gender_rights/9789241501460/en/index.html

²⁰ See Programme of action, § 38, 39 and 115:

<http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>

²¹ General Assembly, Resolution on the girl child, 11 Feb. 1998, A/RES/52/106, § 3 :

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/52/106&referer=/english/&Lang=E

²² E/CN.4/Sub.2/1994/10/Add.1 et Corr.1, cited by UN Women:

<http://www.endvawnow.org/en/articles/606-preference-donnee-aux-garcons-infanticide-des-filles-avortements-pratiques-enraison-du-sexe-du-foetus.html>

²³ UN Committee on the Rights of the Child, General Comment No 7 on the international Convention on the Rights of the Child (CRC) “*Implementing child rights in early childhood*”, § 11 et § 11, b, i.

²⁴ See for instance U.N. Doc. CRC/C/CHN/CO/2 (2005).

²⁵ Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence adopted on 30 April 2002 and Explanatory Memorandum, at the 794th meeting of the Ministers' Deputies.

²⁶ On 3rd October 2011, the Parliamentary Assembly of the Council of Europe adopted Resolution 1829 (2011) on prenatal sex selection stressing that “*the social and family pressure placed on women not to pursue their pregnancy because of the sex of the embryo/foetus is to be considered as a form of psychological violence and that the practice of forced abortions is to be criminalised*” and Recommendation 1979 (2011) on prenatal sex selection, admitting that abortion has negative effects on society and therefore, should not only be limited, but also regulated when legalised.

²⁷ Nils Muižnieks, “*Sex-selective abortions are discriminatory and should be banned*”, 15 Jan. 2014.

Abortion and infanticide

Similarly, a significant inconsistency can be noticed between paragraph 9 and paragraph 24 which condemns infanticide. While it cannot be denied that abortion consists in killing a child, even if he is “unborn”, and that it constitutes as such an infanticide, it is also proven that a significant number of children are born alive during a late abortion.²⁸ These are then most often left without care, or killed actively.²⁹

Abortion, euthanasia and genocide

On this point, the ECLJ recalls that both abortion and euthanasia were practiced during the 20th century to implement genocidal policies.³⁰ They were by nature discriminatory as committed “*with intent to destroy, in whole or in part, a national, ethnical, racial or religious group*” under Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948). It is for instance by progressively reducing hydration and nutrition that thousands of disabled persons were euthanized by « Nazis doctors » during the Second World War. These practices were firmly condemned by the World Medical Association, the UN, and during the Nuremberg trials, that considered them as crimes against humanity.³¹ Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) mentions among others the following acts as material constituent elements of this crime: “*killing members of the group*” (a); “*causing serious bodily or mental harm to members of the group*” (b); “*imposing measures intended to prevent births within the group*” (d). Abortion and euthanasia are promoted in this draft General Comment in a very broad way. It is an open door to the legalization of eugenics without limits by operating a distinction in the enjoyment of the right to life on the ground of disability, which is condemned, is the draft in paragraph 64.³²

²⁸ A study published in the British Journal of Obstetrics and Gynaecology found that at 23 weeks of pregnancy, the rate of children surviving abortion is about 10 percent. Beezy Marsh, “66 babies in a year left to die after NHS abortions that go wrong”, Daily Mail, 4th February 2008, <http://www.dailymail.co.uk/health/article-512129/66-babies-year-left-die-NHS-abortionwrong.html#ixzz2rKnulOW6>

²⁹ « Enfants survivant à l’avortement et infanticides néonataux en Europe », in Grégor Puppink (dir.), op.cit., p. 137-161.

³⁰ On abortion, see Conclusions of Prosecutor McHaney: Opening Statement of the Prosecution in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10. Vol. 4: United States of America v. Ulrich Greifelt, et. al. (Case 8: 'RuSHA Case'), US Government Printing Office, District of Columbia: 1950. pp. 622-93. Part 1 [Tr. pp. 24-125, 10/20/1947]. On euthanasia, see Hoche and Binding's theories: Robert Proctor, “Racial Hygiene: Medicine under the Nazis”, p. 178.

³¹ On abortion, see: Nuremberg Trials Record: “The RuSHA Case”, Opinion and Judgment, “War Crimes and Crimes Against Humanity”, Vol. V, pp. 152 to 154 and pp. 160-2. On euthanasia, see Trials of the War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg October 1946-April 1949, Volume V, Washington, DC: Government Printing Office, 1950.

³² International and European law also condemned eugenics since Nuremberg trials, just like the United Nations Declaration on the Rights of Disabled Persons (Art. 4 and 10). The Universal

Eugenics, whether it is imposed by a totalitarian State or promoted in a liberal society, achieves the same result, since it is based on the same premise: a materialist conception of the human being reducing his dignity to his own will. To assert a general right to abortion or to euthanasia does not constitute a progress for human rights but a regression. Such practices existed before 1948 and were condemned in Nuremberg. They are based on a wrong conception of the human being, that consists in believing that only man's spiritual abilities (conscience, mind or will) would be worthy of protection. Fetus and unconscious patient would not be – or not anymore – human, while the person determined to kill himself would demonstrate his humanity in doing so. This conception of humanity that distinguishes between people according to their abilities is precisely the one that was condemned in 1948. It is no coincidence that both abortion and euthanasia were first legalized in the USSR and in Nazi Germany.

Abortion and euthanasia are so linked up with the crime of genocide that it would be unacceptable to see some of its forms promoted in such a text enshrining the right to life. This is even more inconsistent since the draft General Comment itself, in paragraph 42, condemns the crime of genocide in reminding all States parties *“their obligations to prevent and punish the crime of genocide, which include the obligation to prevent and punish all deprivations of life, which constitute part of a crime of genocide”*.³³

Therefore, all that the draft condemns and seeks to avoid is clearly promoted towards some human beings at their most vulnerable stage. However, as Mrs. Seibert-Fohr stated during the Committee's debates, *“the very purpose of our undertaking here by elaborating on General Comment on Article 6 is to protect life to the highest possible degree and not to elaborate on the limits of the right to life.”* In its current wording, the draft General Comment on the right to life clearly violates international law and the very content of the Covenant.

B. A blatant violation of international law and of the Pact itself

If some States do tolerate abortion, assisted suicide or euthanasia, international law does not provide any *right* to abortion (1) nor does it deduce from the right to life a right to euthanasia and assisted suicide (2). If the Committee were to interpret article 6 of the Pact as containing such rights, it would act in violation of international law and of the dispositions of the Pact concerning its mandate (3).

Declaration on the Human Genome and Human Rights, the Convention on the Rights of the Child and the Oviedo Convention contain similar provisions.

³³ See also § 71.

1. Absence of a right to abortion in international law

As stated by the Articles of San José, *“There exists no right to abortion under international law, either by way of treaty obligation or under customary international law. No United Nations treaty can accurately be cited as establishing or recognizing a right to abortion.”*³⁴ Indeed, neither the Universal Declaration of Human Rights, nor the Pact, nor the Declaration of the Rights of the Child and the Convention on the Rights of the Child, nor the European norms provide any right to abortion nor deny any protection to the unborn child.³⁵ Where the letter of the text does not include an explicit protection for the child before as well as after birth, the study of the preparatory works shows that it is a compromise position which was often adopted to let every State free to take their own sovereign decision regarding its legislation in the matter.³⁶

Abortion and the Universal Declaration of Human Rights (1948)

It is precisely such a compromise solution that is evident from the preparatory works to the Universal Declaration of Human Rights, from which the Pact is derived,³⁷ and it recognises in its preamble *“the inherent dignity of all members of the human family”*. It is admitted that the Universal Declaration can be interpreted as protecting, or not, life from conception, according to the choice of each State.³⁸ This point was debated and the proposition to explicitly protect the right to life of the unborn child was deemed hardly compatible with legislations that had legalised abortion in some cases.³⁹ This is how the position of remaining silent on the question prevailed. Considering the preparatory works, this silence can be interpreted on the one hand as the will to respect the sovereignty of States on this question, and on this other hand through stylistic considerations notably due to the need of concision while the text recognises otherwise human rights to every human being. Thus, neither the letter of the text, nor the minds of the writers refer to any right to abortion. There never was a denial of the fact that the unborn child, as a human being, is entitled to rights. As it is, this draft General Comment is thus contrary to the intentions of the writers of the Universal Declaration of Human Rights. Besides, in 1948 as well, the World Medical Association updated the Hippocratic Oath in adding a Geneva Declaration in the spirit of the San Francisco Charter. In this text, medical doctors had to promise to maintain *“the utmost respect for human life from the time of conception”*.

³⁴ <http://sanjosearticles.com/>

³⁵ Thomas Finegan, *op. cit.*, p. 37-38.

³⁶ See Thomas Finegan, *op. cit.*

³⁷ See Fact Sheet N° 15 (Rev.1) “Human Rights - Civil and Political Rights: The Human Rights Committee”, p. 1-2, published by the Office of the United Nations High Commissioner for Human Rights: <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>

³⁸ Preparatory works, E/CN.4/AC.1/SR.35 p. 1535.

³⁹ On all this point, see Thomas Finegan, *op. cit.*, p. 10-12.

Abortion and International Covenant on Civil and Political Rights (1966)

In 1957, during the preparatory works of the Covenant, a proposition asserting the protection of the right to life from the time of conception was rejected for the sake of concision of the text, and despite the numerous arguments in favour of such proposition,⁴⁰ for a minority of countries allowed abortion.⁴¹ This lack of precision regarding the beginning of the right to life absolutely did not aim at depriving human life of any protection before birth.⁴² On the contrary, a presumption in favour of the protection of the right to life of the unborn child corresponds to Article 6-5 of the Pact: the preparatory works show that the prohibition of the execution of pregnant women aims at protecting the unborn child. Finally, it should be noted that Article 6-1, stating that “[e]very human being has an inherent right to life”, was voted with 65 votes for, 3 against and 4 abstentions,⁴³ which is an overwhelming majority. However, one cannot deny that “human being” is a biological term of which the ordinary meaning includes the foetus or the unborn child.

Abortion and the rights of the child

Having regard to the standards concerning the rights of the child developed at the United Nations, it is impossible to interpret Article 6 of the Covenant as containing a right to abortion as expressed in the draft General Comment. It should be stressed that the Preamble of the United Nations 1959 Declaration of the Rights of the Child acknowledges that “the child ... needs special safeguards and care, including appropriate legal protection, before as well as after birth.” This explicit provision is precisely recalled in the Preamble of the 1989 United Nations Convention on the Rights of the Child (UNCRC) which is based on the Declaration of the Rights of the Child. It is worth noting that during the drafting phase of the UNCRC, Article 1 was providing that childhood begins at birth.⁴⁴ This provision was amended, indicating no *minimum* limit for the protection of human rights, and proposals designed to provide for protection from conception were also discussed. However, if the UNCRC is interpreted according to the requirements of the Vienna Convention on the Law of Treaties, it cannot be said that the unborn child has no protection at all.⁴⁵ Indeed the preamble of a treaty establishes its general framework; and it is about a protection before as well as after birth. Furthermore, Article 1 specifies for example that “a child means every human being below the age of eighteen years”, which is the case of the unborn child.⁴⁶ Some civilisations start counting the age of a person from conception, and not from birth. On this point, it can be concluded that neither the letter of the UNCRC nor the “*Travaux Préparatoires*” contain a right to abortion. The

⁴⁰ U.N. GAOR, 12th Sess., 813th mtg. at 253, ¶ 3, U.N. Doc. A/C.3/SR.813 (Nov. 18, 1957). Voir Thomas Finegan, *op. cit.*, p. 15-16.

⁴¹ Thomas Finegan, *op. cit.*, p. 17-18.

⁴² *Ibid.*, p. 18-23.

⁴³ U.N. GAOR, 12th Sess., 820th Mtg., at 290, ¶ 8, U.N. Doc. A/C.3/SR.820 (Nov. 25 1957).

⁴⁴ Thomas Finegan, *op. cit.*, p. 24.

⁴⁵ See notably Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156, 163 (1990).

⁴⁶ Thomas Finegan, *op. cit.*, p. 29.

recommendation of the United Nations Committee on the Rights of the Child, issued during a General Discussion Day on the rights of children with disabilities in 1997, can also be recalled: “States should review and amend laws affecting disabled children which are not compatible with the principles and provisions of the Convention, for example legislation which denies disabled children an equal right to life, survival and development, including—in those States which allow abortion— discriminatory laws on abortion affecting disabled children”.⁴⁷ Inferring a universal right to abortion from Article 6 of the Covenant is thus incompatible with international standards relating to the rights of the child.

Abortion and European standards

According to the ECHR case-law, no right to abortion derives from the right to life guaranteed by Article 2 of the European Convention on Human Rights. In this field, it followed the approach of the Universal Declaration of Human Rights and ruled that “it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life”⁴⁸ or to make the opposite choice.⁴⁹ Thus, in principle, the unborn child is not excluded from any protection⁵⁰ but States are free to determine in their domestic law “when the right to life begins.”⁵¹ Through its case-law, the Court specified that the Convention does not guarantee a right to access abortion,⁵² a right to perform an abortion,⁵³ or even a right to contribute with impunity to realise it abroad.⁵⁴ Lastly, ban on abortion by a State does not violate the Convention.⁵⁵ The Court stated several times that the right to respect for private and family life (Article 8 of the Convention) which guarantees the right to personal autonomy “cannot ... be interpreted as conferring a right to abortion.”⁵⁶ There is thus no right to abortion under the European Convention, and especially not under the right to life. In the same way as the Court ruled about the Convention,⁵⁷ Article 6 of

⁴⁷ CRC/C/66, Annex V, 16th Session, 6 October 1997.

⁴⁸ ECHR, *A. B. C. v. Ireland*, [GC] No. 25579/05, 16 December 2010, § 222, confirming *Vo v. France*.

⁴⁹ See *H. v. Norway*, No. 17004/90, Decision of inadmissibility of the former Commission of 19 May 1992, p. 167. This position has been regularly reiterated: see *inter alia Brüggemann and Scheuten v. Federal Republic of Germany*, No. 6959/75, Report of the Commission, Decision of inadmissibility of the former Commission of 12 July 1977, § 60; *Vo v. France*, § 78.

⁵⁰ Even the legal advisors of the Centre for Reproductive Rights, which is the leading legal organisation promoting a right to abortion on demand, recognises this fact. See C. Zampas and J. M. Gher, “Abortion as a Human Right —International and Regional Standards”, *Human Rights Law Review*, 8:2(2008), p. 265, 276. As President Jean-Paul Costa explained in his Separate Opinion under *Vo v. France*, “Had Article 2 been considered to be entirely inapplicable, there would have been no point – and this applies to the present case also – in examining the question of foetal protection and the possible violation of Article 2, or in using this reasoning to find that there had been no violation of that provision.”, § 10.

⁵¹ *Vo v. France*, § 82.

⁵² ECHR, *Silva Monteiro Martins Ribeiro v. Portugal*, No. 16471/02, Déc., 26 October 2004.

⁵³ ECHR, *Jean-Jacques Amy v. Belgium*, No. 11684/85, 5 October 1988.

⁵⁴ ECHR, *Jerzy Tokarczyk v. Poland*, No. 51792/99, Déc., 31 January 2002.

⁵⁵ Voir notamment dans *A. B. et C. c. Irlande* les requérantes A. et B. qui ont contesté sans succès l’interdiction de l’avortement pour motif de santé et de bien-être.

⁵⁶ *A., B. C. v. Ireland*, § 214; ECHR, *P. and S. v. Poland*, No. 57375/08, 30 October 2012, § 96.

⁵⁷ ECHR, *Haas v. Switzerland*, No. 31322/07, 20 January 2011, § 54.

the Covenant should be read as a whole: States cannot be imposed at the same time an obligation to protect life and an obligation to extensively legalise deprivation of life at certain moments in existence.

Moreover, it is worth stressing that the Court of Justice of the European Union ruled that the embryo enjoys protection against patenting from the very moment of fertilization, when a patent requires prior destruction of human embryos. The principle of dignity and integrity of the person protects human embryos and stem cells obtained from it at any stage in their formation or development.⁵⁸ In several texts, PACE acknowledged a protection to unborn children as well. It stated that *“The rights of every child to life from the moment of conception, to shelter, adequate food and congenial environment should be recognised, and national governments should accept as an obligation the task of providing for full realisation of such rights.”*⁵⁹ It also declared that *“human embryos and fetuses must be treated in all circumstances with the respect due to human dignity”*⁶⁰ and that *“The destruction of human beings for research purposes is against the right to life of all humans and against the moral ban on any instrumentalisation of humans.”*⁶¹ Affirming the obligation for States to legalise abortion is thus inconsistent with European standards.

3. The impossibility to infer a right to die from the right to life

The provision concerning assisted suicide and euthanasia has no place in a text relating to the right to life as it consists in inferring a right to die from the right to life, i.e. a diametrically opposite right. Article 6-1 of the Covenant provides that *“[e]very human being has an inherent right to life.”* The right to life thus appears not to be a right guaranteed to each individual by society⁶² but a right held by each human being because of the very fact that he/she exists:⁶³ it is therefore inalienable

⁵⁸ Court of Justice of the European Union (Grand Chamber), 18 October 2011, C-34/10 *Oliver Brüstle /Greenpeace eV*, Recital (16): *Whereas patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person; whereas it is important to assert the principle that the human body, at any stage in its formation or development, including germ cells, and the simple discovery of one of its elements or one of its products, including the sequence or partial sequence of a human gene, cannot be patented; whereas these principles are in line with the criteria of patentability proper to patent law, whereby a mere discovery cannot be patented.*

⁵⁹ PACE, Recommendation 874 (1979) relating to a European Charter on the Rights of the Child, 17, 6, a.

⁶⁰ PACE, Recommendation 1046 (1986) on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes, Recital 10.

⁶¹ PACE, Resolution 1352 (2003) on human stem cell research, § 10.

⁶² See Marc J. Bossuyt, *op. cit.*, at 119. Others have noted the natural law dimension to this article. See, e.g., Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 105 (1993).

⁶³ Concerning the right to life in the European Convention on Human Rights, this is confirmed by the Consultative Assembly's preparatory work in 1949, which clearly shows that these are rights that one enjoys just because one exists: *“The task given to us by the Committee of Ministers was to*

and cannot be renounced by the mere individual will. So, putting on society an obligation to contribute by any means to one's suicide or euthanasia seems impossible.

Historically, several official texts were adopted after the Second World War to denounce euthanasia, at both the national and international level. The most important is that *"No one shall be deprived of his life intentionally"* in the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (1950). In Article 2, the latter provides an exhaustive list of tolerated exceptions to the right to life but the request or consent of the interested parties is not included. On November 14th, 1949, the French Académie des sciences morales et politiques adopted a declaration rejecting *"formally all methods designed to cause death of individuals described as monstrous, malformed, infirm or incurably ill"*, considering that *"euthanasia and generally speaking all methods leading to cause a "gentle and quiet" death out of compassion for the dying persons must also be excluded"*, otherwise physicians would give themselves *"a kind of sovereignty on life and death."*⁶⁴ Assisted suicide and euthanasia are thus inconsistent with ethical standards of medical professions.

Likewise, ECHR and PACE adopted similar positions by refusing to infer a right to die from the right to life, and by condemning euthanasia.⁶⁵

4. A violation of the Covenant in its provisions relating to the mandate of the Committee

By inferring a general right to die from the right to life, counter to the letter and the intention of the drafters of the Universal Declaration and the Covenant, the draft General Comment exceeds the rules set out in the Vienna Convention on the Law of Treaties, especially Articles 31 and 32⁶⁶ under which *"A treaty shall 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"* (Art. 31), and in the

make a list of the rights which a man, as a human being, ought naturally to enjoy", Preparatory work, vol. II, p. 88.

⁶⁴ Revue des Travaux de l'Académie des Sciences morales et politiques, procès-verbaux, 1949/2, p. 258 (personal translation). This very explicit declaration was signed, *inter alia*, by René Cassin and Doctor Debray.

⁶⁵ ECHR, *Pretty v. The United Kingdom*, No. 2346/02, 29 April 2002, § 39, 40.

PACE, Recommendation 779, 1976 Rights of the sick and dying, § 7.

PACE, Resolution 1859 (2012), Protecting human rights and dignity by taking into account previously expressed wishes of patients, § 5: *"Euthanasia, in the sense of the intentional killing by act or omission of a dependant human being for his or her alleged benefit, must always be prohibited"*.

PACE, Recommendation 1418 (1999), Protection of the human rights and dignity of the terminally ill and the dying, 1999.

⁶⁶ See Thomas Finegan, *op. cit.*, p. 34-35.

light of the preparatory work when the meaning remains ambiguous or obscure (Art. 32).

Hence affirming such “rights” would be – fortunately – acting *ultra vires*, because it infringes Article 40 of the Covenant on the Committee’s mandate. Adding or removing provisions which are so far from the spirit and letter of the Covenant does not fall within the competence of the Committee. Similarly, the Human Rights Committee is empowered to receive and consider communications from individuals under the First Optional Protocol to the Covenant, but its competence consists in “*forward[ing] its views to the State Party concerned and to the individual*” (Art. 5-4) and not in creating new obligations under international law.⁶⁷

⁶⁷ On this point, see Erik Möse & Torkel Opsahl, *The Optional Protocol to the International Covenant on Civil and Political Rights*, 21 SANTA CLARA L. REV. 271, 272-73, 327 (1981).

CONCLUSION AND RECOMMENDATIONS

The ECLJ would like to submit to the Committee the following recommendations, some of which were already submitted in 2015. Globally, it invites the Committee to take into account European standards.

Regarding paragraphs 2, the ECLJ applauds the Committee's strong stance on and commitment to protecting "*the right to life of all individuals*". It encourages the Committee to ensure that this strong and broad protection of life not be diminished in any way.

Regarding paragraph 3, the ECLJ recommends that the Committee reword the phrase "*to enjoy a life with dignity*" as the right "*to enjoy life*", thus ensuring a broader and comprehensive protection of the right to life. **Regarding paragraph 9**, the ECLJ invites the Committee to recognize the objective fact that the life of every human being starts at his/her conception and to remind the States parties of the commitment they have undertaken to prevent abortion.

A possible wording could be similar to the one used in the provisions on death penalty or on suicide. By analogy, with the provision related to death penalty found in paragraph 54, the ECLJ makes the following proposal: "*Abortion cannot be reconciled with full respect for the right to life, and its prevention is both desirable and necessary for the progressive development of human rights and enjoyment of the right to life*"; or by analogy with the provision on suicide found in paragraph 10: "*States parties should take appropriate measures, without violating their other Covenant obligations, to prevent resorting to abortion, especially among individuals in particularly vulnerable situations.*"

On this point, the ECLJ recommends the following additional provisions:

In connection with paragraphs 42 and 71, eugenic procedure of prenatal "screening-elimination" of viable children, for example with Down syndrome, should be abolished. Because the human embryo belongs to the human race, he enjoys protection by law from the stage of fertilisation against any violation of his dignity, integrity and life. Member States are called to enact and enforce legislation criminalizing the practice of gendercide as it represents an act of violence against women.

Member States are encouraged to take concrete measures to guarantee that children born alive, irrespective of the circumstances of their birth and of their parents' desire, enjoy the right to life and receive medical care and treatment that they are entitled to as human persons born alive.

Regarding paragraph 10 on assisted suicide and euthanasia, the ECLJ asks the Committee to assert that assisted suicide and 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”*, according to the wording adopted by the Parliamentary Assembly of the Council of Europe.