

Petition to the Human Rights Committee - Abortion is NOT a Human Right

Petition to: Members of the Human Rights Committee

Mr. Yuval Shany, Chair;
Members of the Human Rights Committee:

The International Covenant on Civil and Political Rights (ICCPR) guarantees the right to life for every human being:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” (ICCPR, art. 6(1)).

However, paragraphs 8 and 9 of “General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life” would seek to actively deny the right to life to entire subsets of humanity, namely, the unborn and certain “afflicted adults.”

Let us make this very clear: abortion is not a human right.

Nowhere in the text or preamble of the Covenant can there be found a right to abortion access under any circumstances. Neither can there be found a right to abortion access anywhere in the preparatory work (*travaux préparatoires*) of the Covenant, nor in subsequent agreements, nor in subsequent state practice, nor in customary norms of international law (see Annex below).

Neither the work nor the jurisprudence of the Committee supersedes the ordinary meaning of the text of the ICCPR or subsequent agreements agreed to by state parties, or subsequent state practice. The Committee is not operating within its mandate when it seeks to interpret a treaty in manner not stated or implied by the text of the treaty or by state parties.

The Human Rights Committee has no authority to assert that states “must provide safe, legal and effective access to abortion” under any circumstances. The Committee has no right to urge states to remove criminal sanctions on abortion, to remove “barriers” to “legal abortion,” or to “revise their abortion laws.” These interpretations of the right to life in the ICCPR are not substantiated by the text of the treaty or by any valid general or supplementary means of interpretation under the Vienna Convention on Law of Treaties.

We, the undersigned, call on the Committee to immediately replace General Comment No. 36 with a new general comment that does not seek to interpret the Covenant as creating an obligation on states to provide access to abortion.

We also ask the Committee to stop calling on state parties to “decriminalize” or legalize abortion under any circumstances. We ask the Committee to refrain from asking states to loosen restrictions on abortion or to remove “barriers” to abortion access.

Sincerely,

Annex

Nowhere in the text or preamble of the ICCPR can the treaty be interpreted as creating an obligation on state parties to make abortion available under any circumstances. Rather, the Article 6(1) of the ICCPR guarantees the right to life for all human beings:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” (ICCPR, art. 6(1)).

Furthermore, Article 6(5) was included in the Covenant by state parties specifically to protect the life of the unborn child from the death penalty:

“Sentence of death ... shall not be carried out on pregnant women.” (ICCPR, art. 6(5)).

As the *travaux préparatoires* of the ICCPR makes clear, Article 6(5) was included in the Covenant primarily to protect the life of the unborn child. The annotation of the draft Covenant noted that Article 6(5) was “inspired by humanitarian considerations and by consideration for the interests of the unborn child.” (U.N. G.A., 10th Sess., Draft International Covenants on Human Rights, Annotation, ¶10, U.N. Doc. A/2929 (Jul 1, 1955)). Delegates to the Third Committee made this point clear, stating that “the authors of the original text had specified that sentence of death should not be carried out on a pregnant woman principally in order to save the life of an innocent unborn child,” (A/C.3/SR.819, ¶33) and again “the main reason for inserting the provision concerning pregnant women was to avoid involving in the death penalty a person who was not connected with the crime” (A/C.3/SR.820, ¶6).

The Vienna Convention on the Laws of Treaties (VCLT) requires that treaties adopted by states that have ratified the Convention 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.” (VCLT, art. 31). An overwhelming majority of state parties to the Covenant have ratified or acceded to the VCLT. It is furthermore universally accepted that treaties ought to be interpreted according to the ordinary meaning given to the terms of the text.

Paragraph 8 of General Comment No. 36 seeks to reinterpret the Covenant as requiring that “States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, and where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable” (Human Rights Comm., General Comment No. 36, ¶8, U.N. Doc. CCPR/C/GC/36).

However, this interpretation, along with the rest of paragraph 8, has no basis anywhere in the text of the ICCPR. Neither can these interpretations be substantiated by the *travaux préparatoires* of the ICCPR, nor by any subsequent agreements or state practice nor by customary norms of international law.

The Human Rights Committee should be aware that a provision very similar to the above quoted section of paragraph 8 of the draft General Comment No. 36 was explicitly and resoundingly rejected by the Working Party for the International Covenant on Human Rights.

Article 4, paragraph 2 of the an early draft of the ICCPR stated that “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 in cases “where the pregnancy is the result of rape,” or “to prevent the birth

of a child of unsound mind” (Commission on Human Rights, 2nd Sess., Rep. of the Working Party on an International Convention on Human Rights, pg. 6, E/CN.4/56 (Dec. 11, 1947)). This last exception, for “a child of an unsound mind,” is logically analogous to the Committee’s case when the pregnancy “is not viable” as the aim in both cases is to prevent the birth of a child believed to have a severely debilitating disability.

During a discussion on the draft text of Article 4, the Commission on Human Rights member from Chile, Mr. Cruz Coke, condemned paragraph 2 as “unscientific” and reminiscent of the “Hitler regime” (Commission on Human Rights, 2nd Sess., Summary Record of the 35th Mtg., pg. 12-13 & 16, E/CN.4/SR.35 (Dec. 12, 1947)). Mr. Amado, the member from Panama criticized the provision as “not legally admissible” and “dangerous in the highest degree” (*Id.*). The member from the U.K. was the only member to defend each of the exceptions laid out in paragraph 2. Mrs. Begtrup, Chairman of the Commission on the Status of Women, defended only the exception in paragraph 2 that allowed abortion in cases “to preserve the life of the woman” (E/CN.4/SR.35, pg. 13). Paragraph 2 was decisively struck from the draft of the Covenant by a vote of 10 to 3.

The ICCPR does not preclude the unborn from the right to life. Nowhere in the text of the ICCPR is the right to life limited those already born. Rather, the right to life is guaranteed for “Every human being.” As the Committee correctly noted in its General Comment No. 6, “The expression “inherent right to life” cannot properly be understood in a restrictive manner,” (Human Rights Comm., General Comment No. 6, ¶15) and therefore, the Committee ought not to interpret the ‘right to life’ in a restrictive manner by excluding an entire subset of humanity, namely the unborn, regardless of the fact that the legal status of abortion, like the death penalty, differs greatly from state to state.

During the drafting process of the ICCPR, not once was an amendment ever proposed or an argument made that the unborn should be positively be precluded from legal protection in the interest of safeguarding their life. And not once during the drafting process was an amendment ever offered or an argument even made that there exists a ‘right’ to abortion or that states “must” provide access to abortion under any circumstances.

There is also no evidence that states intended to preclude the unborn from the right to life. At the time the ICCPR was drafted, an overwhelming majority of states prohibited the practice of abortion (*see* Statement of Mr. Serrarens (International Federation of Christian Trade Unions), E/CN.4/SR.35, pg. 12) and demonstrated no intention of changing their laws on this issue.

To the contrary, many states asserted that the unborn have a positive right to life (India: “the right to life extended not only to persons who were already alive, but also to those not yet born.”; A/C.3/SR.813, ¶136) and that this right should be protected by law (*see* next paragraph).

During the drafting of the ICCPR, a substantial number of states sought to include an amendment specifically protecting the right to life “From the moment of conception” (A/C.3/L.654). Several states made clear their support for this language, including Belgium (A/C.3/SR.813, ¶15; A/C.3/SR.821, ¶19), Mexico (“human beings should be protected even before birth, which would inter alia imply the prohibition of voluntary abortion”; A/C.3/SR.812, ¶17), Ecuador (A/C.4/SR.815, ¶28), El Salvador (“Since many national legislations afforded protection to the unborn child, the Covenant should do no less”; A/C.3/817, ¶25), Yugoslavia (A/C.3/SR.818, ¶13), Venezuela (A/C.3/SR.816, ¶18), Brazil (“There were many precedents of long standing for the protection of life from the moment of conception and she did not

think that there could be much disagreement on the principle “; A/C.3/SR.815, ¶15), and Colombia (A/C.3/SR.820, ¶29).

While the sentence from amendment A/C.3/L.654 including the language “From the moment of conception” was ultimately not included in the final draft of the ICCPR, the reasons states gave for not supporting the amendment varied. Of the states that made their opposition to A/C.3/L.654 known, the vast majority of states opposed the amendment, not because they disagreed with the legal protection of unborn life, but because they found the phrase “From the moment of conception” to be unclear or difficult to enforce legally: Belarus (“She would vote against the five-Power amendment (A/ C. 3/L. 654), which was not sufficiently clear and was weaker than the original text”; A/C.3/SR.818, ¶19), Ukraine (“the provision was too vague”; A/C.3/SR.819, ¶6), Saudi Arabia (“It was impossible for the State to determine the moment of conception and accordingly to undertake to protect life from that moment”; A/C.3/817, ¶137), Canada (“that provision might be interpreted as prohibiting any measure which sought to protect the mother, when her life was in danger”; A/C.3/SR.821, ¶13).

Other states such as the United Kingdom and Sri Lanka expressed concern that the amendment would interfere with the national laws of state parties on abortion (A/C.3/SR.815, ¶137; A/C.3/SR.817, ¶15). However, they did not assert any circumstances under which they believed that abortion should be made available by all state parties. The U.K. urged that it would be “inappropriate” to include provisions on abortion in an “international instrument” such as the ICCPR as “[l]egislation on the subject was devised on different principles in different countries” (A/C.3/SR.815, ¶137). Thus, the U.K. delegate made it clear that the issue of the legal status of abortion should be dealt with through the legislative processes particular to each country.

It is significant to note that the U.K. delegate was the only delegate during the drafting process in the Third Committee to have opposed including language in the treaty specifically safeguarding the legal protection of unborn life. But even the U.K. delegate did not posit a right to abortion or that there are any cases under which all states ought to provide women with abortion access. Rather, the U.K. delegate merely asked that this question be dealt with by states independently through their own national legislative processes.

A rejection of a proposition does not positively affirm its contrapositive. Consequently, the Third Committee’s rejection of amendment A/C.3/L.654 in no way indicates that states thereby meant to assert that the unborn do not have a right to life. As mentioned, the amendment was rejected for a variety of reasons and none of the reasons provided by states during the drafting procedure would in any way limit state parties from restricting abortion according to their national laws and legislative processes. Indeed, two years after the Committee rejected amendment A/C.3/L.654, the U.N. General Assembly adopted the Declaration of the Rights of the Child which acknowledged that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” (Declaration of the Rights of the Child, Preamble).

Similarly, in an early draft of the Covenant, the Working Group for the Convention on Human Rights had considered an alternate text proposed by the rapporteur from Lebanon to stipulate that it shall be unlawful to deprive a person of life or bodily integrity “from the moment of conception” (Commission on Human Rights, Drafting Comm. on an International Bill of Human Rights, 1st Sess., Rep. of the Drafting Comm. to the Commission on Human Rights, Annex G, pg.82, E/CN.4/21 (Jul 1, 1947)). Although this alternate text was not adopted, this did not mean that states did not believe that the unborn child should be protected. To the contrary, the committee member from Egypt expressed support for

purpose of the proposal but saw the phrase “from the moment of conception” as unnecessary due to the fact that legal protections for the unborn child already existed in prevailing law. The committee member from Egypt “thought the inclusion of his text in a Convention would not be of much practical importance, since the penal codes of most countries strictly prohibited abortion” (Statement of Mr. Loutfi (Egypt), Commission on Human Rights, 2nd Sess., Working Group on Convention on Human Rights, Summary Record of the First Meeting, pg. 5, E/CN.4/AC.3/SR.1 (Dec. 5, 1947)). The Committee member from China also found the text to be “superfluous since, as the mother was protected, the child would also be protected from its conception to birth” (Statement of Mr. Wu, Nan-Ju, pg. 6, E/CN.4/AC.3/SR.1).

The international consensus agreed to by 179 nations at the 1994 International Conference on Population and Development made clear that states believe that the issue of whether or not to legalize abortion “can only be determined at the national or local level according to the national legislative process.” (Programme of Action of the International Conference on Population and Development, ¶8.25, A/CONF.171/13/Rev.1). The Covenant does not require states to provide access to abortion under any circumstances, and the Human Rights Committee has no right to urge states to provide such access.

No subsequent agreement or treaty agreed to or ratified by a large percentage of state parties to the ICCPR requires state parties to provide access to abortion under the conditions that the Human Rights Committee is claiming that they ought to be provided.

Moreover, state practice since the ICCPR was drafted has not changed the obligations state parties have under the treaty on the issue of abortion. The pattern of state practice has in no way created a legal obligation on states requiring them to provide access to abortion under any circumstances. A majority of state parties to the ICCPR do not permit abortion under even the minimum cases that the Human Rights Committee in General Comment No. 36 is claiming that they “must” be provided. As such, it is impossible for the Human Rights Committee to assert that customary norms require states to provide abortion in cases of rape, incest, fetal disability, or health of the mother.

The Committee’s jurisprudence and work—including General Comments, concluding observations of state party reports under Article 40 of the Covenant, or views adopted by the Committee under the First Optional Protocol—cannot validly interpret the ICCPR in a manner not intended by state parties or evident in state party agreements or practice.