

## Draft General Comment on Article 6 - on Right to life

### Introduction

1. Founded in 2008, the Christian Legal Centre is a legal and advocacy association based in London, the United Kingdom. It is dedicated to a plethora of issues, including the right to life from conception. The purpose of this written submission is to address the Draft General Comment on Article 6 and its potential for being used to advocate pro-abortion positions which are not in line with agreed upon treaty language.
2. The following written submission will look primarily at the growing corpus of international law on the subject of human life and the protections it should be afforded prior to birth. To this end, three submissions will be made: (1) an emerging consensus is developing which recognises life as commencing from the moment of conception; (2) no competing right to abortion has ever been recognised in international law; and (3) intergovernmental institutions, without legal justification, have become increasingly aggressive in undermining state sovereignty over the issue of life and abortion

### Right to Life in International Law

#### (i) The Law

3. No right exists under the law which is more foundational than the right to life. The right to life is a precondition for the enjoyment of all other rights. This fact is clearly recognised by the pre-eminence given to the right to life in international treaty law:
  - i. European Convention of Human Rights art. 2.1: *“Everybody’s right to life shall be protected by law. No one shall be deprived of his life intentionally save the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law.”*<sup>1</sup>
  - ii. Charter of Fundamental Rights of the European Union art. 2.1: *“Everyone has the right to life.”*<sup>2</sup>
  - iii. Universal Declaration of Human Rights art. 3: *“Everyone has the right to life.”*<sup>3</sup>
  - iv. International Covenant on Civil and Political Rights art. 6.1: *“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.”*<sup>4</sup>

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<sup>1</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, art. 2.1.

<sup>2</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, art. 2.1.

<sup>3</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), art. 3.

<sup>4</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 6.1.

- v. International Covenant on Civil and Political Rights art. 6.5: “*Sentence of death shall not be imposed for crimes committed by people below eighteen years of age and shall not be carried out on pregnant women.*”<sup>5</sup>
- vi. United Nations’ Convention on the Rights of the Child art. 6: “*Every child has the inherent right to life...State parties shall ensure...the survival and development of the child.*”<sup>6</sup>
4. By way of comparative jurisprudence, the legislative history of the European Convention of Human Rights indicates that its drafters modelled Article 2 from the right to life draft article of the International Covenant of Civil and Political Rights, which at that time declared: “*Every human being from the moment of conception has the inherent right to life.*”<sup>7</sup> The ICCPR also holds this right to be non-derogable.<sup>8</sup>
  5. Through the *Doha Declaration*, the United Nations again reaffirmed the necessity of enforcing positive obligations by Member States to ensure adequate safeguards for unborn children before birth: “*We recognize the inherent dignity of the human person and note that the child, by reason of his physical and mental immaturity, needs special safeguards and care before as well as after birth...Everyone has the right to life, liberty and security of person.*”<sup>9</sup>
  6. In October 2011, the Grand Chamber of the Court of Justice of the European Union in the case of *Brüstle v. Greenpeace* ruled that in the context of patent law, life must be seen as beginning from the moment of conception.<sup>10</sup> The importance of the *Brüstle* decision is two-fold. Fundamentally, it is the first intergovernmental court judgment stating that life must be protected from conception, even if the context is only within the sphere of patent law. This is vital because no other intergovernmental court has ruled otherwise. As such, *Brüstle* stands alone as the sole authoritative case on the issue of at what point life begins and the appropriate protections that arise from that deduction.
  7. Second, the *Brüstle* judgment gives us the interpretive lens by which the European Community is to define human dignity within Article 1 of the Charter of Fundamental Rights of the European Union.<sup>11</sup> To this extent, we must also look to the Oviedo Convention on Human Rights and Bio-medicine.<sup>12</sup> Article 1 of the Oviedo Convention calls for the protection of human dignity, and guarantees respect for each individuals’ physical integrity within the context of biology and medicine.<sup>13</sup>

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<sup>5</sup> *Id.*, art. 6.5. The prohibition of capital punishment specifically against pregnant women in the ICCPR is a *de facto* recognition of the right to life of the unborn child and his separate and autonomous legal existence from their mother.

<sup>6</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, art. 6(1) and (2). Art. 6 of the Convention must be read through the interpretive lens of the Convention’s preamble which explicitly recites the need of a child for: “special safeguard and care, including appropriate legal protection, **before** as well as after birth.” [emphasis added].

<sup>7</sup> See, e.g., Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff Publishers, 1987, p. 121; UN Commission on Human Rights, 6<sup>th</sup> Session, E/CN.4/L.365, p.24.

<sup>8</sup> International Covenant on Civil and Political Rights, Articles 42(2) and (6).

<sup>9</sup> Conference to Celebrate the Tenth Anniversary of the International Year of the Family, Doha, Qatar, Nov. 29-30, 2004, Report on the Doha International Conference for the Family, U.N. Doc. A/59/599 (Dec. 7, 2004), §15.2.

<sup>10</sup> *Oliver Brüstle v. Greenpeace e.V.* [Grand Chamber], Case C-34/10, 18 October 2011, § 35.

<sup>11</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02. Article 1 states: “Human dignity is inviolable. It must be respected and protected.”

<sup>12</sup> Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, 4 April 1997, ETS No. 164. [Hereafter “*Oviedo Convention*”].

<sup>13</sup> *Id.*, Article 1 reads: “Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with

8. The *Brüstle* judgment was not drafted in a vacuum. Rather, the guidelines of the European Patent Office were amended several years prior, having identical protections in place to protect the unborn human embryo as well as prohibiting the commoditisation of components of the human body.<sup>14</sup> The Oviedo Convention, in a similar vein, prohibits the commoditization of the human embryo and forbids the creation of embryos for research purposes.<sup>15</sup>
9. What we are therefore seeing in the development of law for the scientific and medical research community is an ever-increasing and robust protection of the unborn child from conception, and an extremely conservative definition of human dignity.
10. The case law of the European Court of Human Rights in areas dealing with procreation has likewise been conservative. In October 2011, the Grand Chamber took a complimentary position to that of the Luxembourg Court in *Brüstle*, in finding that Austria did not violate the Convention by prohibiting the use of sperm from a donor for in vitro fertilization and ova donation in general. Its reasoning, in part, was that the best interests of the unborn child were compelling enough to prohibit these two forms of artificial procreation.<sup>16</sup>
11. When these decisions from two of the most authoritative courts in Europe are viewed together, we see a major paradigm shift in how we define human life and human dignity and the legal protections stemming therefrom.
12. The European Court of Human Rights' refusal to confer a right to abortion under the Convention is also significant. In *Vo v France*<sup>17</sup>, the Grand Chamber considered the issue of the applicability of *Article 2* to the unborn foetus in the absence of criminal penalties for accidentally ending the 'life' of the foetus. In paragraph 80 of the Court's decision, it held that Convention institutions, under certain circumstances, may require extending safeguards to the unborn child. The Grand Chamber thereafter importantly held that: "*the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere.*"<sup>18</sup> Furthermore, it continued: "*at the European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus, although they are beginning to receive some protection in the light of scientific progress ... At best, it may be common ground between States that the embryo/foetus belongs to the human race. The potentially of that being and its capacity to become a person .... require protection in the name of human dignity....*"<sup>19</sup>

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regard to the application of biology and medicine. Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention."

<sup>14</sup> European Patent Office, *Guidelines for Examination in the European Patent Office*, 11 November 2015, Rule 28(c), which reads in relevant part: "A claim directed to a product, which at the filing date of the application could be exclusively obtained by a method which necessarily involved the destruction of human embryos from which the said product is derived is excluded from patentability under Rule 28(c), even if said method is not part of the claim (see G 2/06). The point in time at which such destruction takes place is irrelevant (T 2221/10)." The Guidelines are practice notes interpreting the *European Patent Convention*, 16<sup>th</sup> Edition, June 2016. Article 53(a) of the Convention states in relevant part: "inventions the commercial exploitation of which would be contrary to *"ordre public"* or morality; such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States..."

<sup>15</sup> *Oviedo Convention*, Art. 18, "1. Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo. 2 The creation of human embryos for research purposes is prohibited." and Art. 21, "The human body and its parts shall not, as such, give rise to financial gain."

<sup>16</sup> ECHR, *S.H. and Others v. Austria* [GC], application no. 57813/00, judgment of 3 November 2011, § 113-114.

<sup>17</sup> Appl. No. 53924/00; (2005) 40 EHRR 12

<sup>18</sup> *Id.*, §82.

<sup>19</sup> *Id.*, § 84.

13. The Centre for Reproductive Rights' own research states that 68 countries around the world either fully ban abortion, or have an exception only to save the mother's life. An additional 35 countries limit abortion only to cases where the protection of the mother's life and health are compromised.<sup>20</sup>
14. In June 2009, the Slovak Republic passed amendments to its abortion laws creating requirements for mandatory counselling, a 3-day waiting period and mandatory consent requirements for minors.<sup>21</sup>
15. In 2010, the Dominican Republic enacted a new Constitution creating a total prohibition on abortion. Article 37 of the Constitution states: "*The right to life is inviolable from conception to death.*"<sup>22</sup>
16. In 2011, Hungary enacted a new Constitution which provides the framework to ban abortion in its basic law. Article 2 of the Hungarian Constitution states: "*Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.*"<sup>23</sup>
17. Courts have historically protected life from conception. In striking down a law permitting abortion, the Polish Supreme Court used language applicable to the instant case: "*There are no satisfactorily precise and proved criteria for such differentiation depending on the particular stage of human life. From conception, however, human life is a value constitutionally protected. It concerns the pre-natal stage as well.*"<sup>24</sup> The German Constitutional Court upheld the primacy of the right to life by declaring that "*human life even before birth is worthy of protection and which requires protection,*" and that "*every individual life enjoys the protection of the fundamental right [to life] but even more decisively that violations of the fundamental right with respect to (biological) life lead to the total annihilation of the basis of human existence.*"<sup>25</sup> Spain's Constitutional Court correctly held that the life of the unborn child is a reality distinct from the mother from conception and therefore the one to be born must be considered a "*legal good*" worthy of Constitutional protection.<sup>26</sup>

(ii) **Personhood**

18. Fundamentally, the unborn child is deserving of protection from conception because the fertilisation of the egg by the sperm is indeed the commencement of personhood. The first cell created at the moment of conception is known as a zygote. Further earlier development of the human person are the morula and blastocyst stages.<sup>27</sup> That initial zygote already contains human DNA and other human molecules unique to that human being.<sup>28</sup> Within the DNA of the zygote, that first human cell, is the complete and unique design of that individual including hereditary traits in childhood and adulthood such as eye and hair colour.<sup>29</sup> Conception is

<sup>20</sup> See [http://reproductiverights.org/sites/crr.civicactions.net/files/pub\\_fac\\_abortionlaws2008.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/pub_fac_abortionlaws2008.pdf).

<sup>21</sup> Act No. 345/2009 Coll. of Laws Amending Act No. 576/2004 Coll. on Healthcare, Healthcare-related Services and Amending and Supplementing Certain Acts, as amended.

<sup>22</sup> Dominican Republic 2010.

<sup>23</sup> Hungary 2011 (rev. 2013).

<sup>24</sup> Decision of the Constitutional court of the Polish Republic sp.zn. K 26/96, published in OTK ZU from year 1997, Nr 2, cmt. 19.

<sup>25</sup> BVerfGE 39, 1 (1975), § IA6, II 2.

<sup>26</sup> Spanish Abortion Case, Constitutional Court of Spain, Judgment of 11 April 1985.

<sup>27</sup> Marjorie A. England, "What Is An Embryo?" in *Life Before Birth*, Marjorie A. England (London: Mosby-Wolfe, 1996).

<sup>28</sup> Keith L. Moore and T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology* (Philadelphia: W.B. Saunders Co., 1998): 77, 350.

<sup>29</sup> *Id.*

merely the first stage of human growth, beginning a complex sequence of events allowing that person's continued growth and development. Just as being a baby, then a toddler, early childhood, through adolescence and so forth are parts of human development; so too are the prenatal process' which lead to life are necessary and inherent part of personhood. The San Jose Articles rightly hold: "*Each human life is a continuum that begins at conception and advances in stages until death. Science gives different names to these stages, including zygote, blastocyst, embryo, foetus, infant, child, adolescent and adult. This does not change the scientific consensus that at all points of development each individual is a living member of the human species.*"<sup>30</sup>

### **No Competing Right to Abortion in International Law<sup>31</sup>**

19. Advocates of abortion have created a false narrative that the termination of a pregnancy is a right. Internationally, this is not true. The European Court of Human Rights has itself stated unequivocally that there exists no right to abortion in the European Convention of Human Rights: "*Article 8 cannot, accordingly, be interpreted as conferring a right to abortion.*"<sup>32</sup> Furthermore, no binding international treaty recognises either a human right to abortion specifically, nor a right to abortion generally. No United Nations or European treaty mentions abortion either explicitly, or by implication. Only a single regional treaty in Africa mentions abortion. The African Union Convention on the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, known as the "Maputo Protocol," at art. 14(2)(c) holds that "*States Parties shall take all 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.*" However more than half of the state parties that signed the Protocol have not ratified it, which brings its legitimacy into question. Furthermore, many of those states which signed the Protocol have full criminal bans on abortions in their nations.
20. In fact, international law has always strived to limit or eliminate abortion. In the mid-1990's, which was arguably the zenith of the abortion lobby, efforts to create an international right to abortion failed both at the 1994 International Conference on Population and Development in Cairo and at the Fourth World Conference on Women that took place the following year in Beijing. On this issue, the Cairo document states: "*Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning.*"<sup>33</sup> The ICPD Programme of Action says that where abortion is legal, it should be safe.<sup>34</sup> However, two complimentary premises temper this. The first is that the call for safe abortions exist only where abortion is legal in a country. The underlying assumption is clear that member states are free to criminalise abortions and no right to abortion is meant to be inferred into the text of the document. Second, the document continues, and explicitly recognises, that the legislation of abortion belongs exclusively at the member state level.<sup>35</sup>
21. As Piero Tozzi, referencing Mary Ann Glendon, has rightly analysed: "*rather than treating abortion as a "right" that should be cherished and protected, like freedom of speech or freedom of religion, the Cairo outcome document says that government should*

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<sup>30</sup> San Jose Articles, Art. 2, *infra* fn. 46.

<sup>31</sup> See: Piero Tozzi, *International Law and the Right to Abortion*, Legal Studies Series, No. 1, International Law Group Organizations, 2010.

<sup>32</sup> ECHR, *A., B., and C. v. Ireland [GC]*, application no. 25579/05, judgment of 16 December 2010, § 214.

<sup>33</sup> ICPD Programme of Action § 7.24.

<sup>34</sup> ICPD Programme of Action § 8.25.

<sup>35</sup> *Id.*

seek to “reduce the recourse to abortion,” “eliminate the need for abortion” and strive to help women “avoid repeat abortions.” Presumably, if abortion were a “right” similar to freedom of speech, the drafters of the Cairo outcome document would not have called on governments to “reduce” and “eliminate” it.”<sup>36</sup> The Beijing concluding document echoes the language used in the Cairo Programme of action, and reaffirms the sovereign right of states to legislate on protections it wishes to provide the unborn child.<sup>37</sup>

22. The United Nations Charter itself states that: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.”<sup>38</sup>

## **National Sovereignty and the Principal of Subsidiarity**

### **(i) United Nations**

23. In recent years, intergovernmental bodies, including most notoriously the United Nations and the European Court of Human Rights, have tried to create a right to abortion by stealth. This agenda based approach directly injures national sovereignty and does violence to genuine human rights dialogue.
24. Examples of U.N. compliance committees exceeding their remit by trying to bully nations into liberalising their abortion laws abound. For example, the Committee on Economic, Social and Cultural Rights, charged with implementing the International Covenant on Economic, Social and Cultural Rights, has taken Chile to task for constitutionally protecting life from conception<sup>39</sup>. In 2004 the Committee was so bold as to call for the decriminalisation of abortion in Chile.<sup>40</sup> Two years later the committee charged with monitoring the Convention on the Elimination of All Forms of Discrimination Against Women also called for the legalization of abortion in Chile.<sup>41</sup> The Human Rights Committee then, in 2007, labelled Chile’s abortion laws as “unduly restrictive” and called for them to be liberalised.<sup>42</sup>
25. Similar fates have befallen many other nations including El Salvador<sup>43</sup>, Poland<sup>44</sup>, Peru<sup>45</sup> and others. So strong has this artificially created pressure been, that the Colombian Supreme Court legalised abortion premised in part on the findings of treaty monitoring bodies.<sup>46</sup>
26. In recognition of the existential threat posed both to national sovereignty and to the unborn child by United Nations treaty monitoring bodies, a group of experts drafted and adopted the San Jose Articles to clarify the international position on abortion and the right to life.<sup>47</sup> Importantly, the Articles make clear the lack of authority of so-called United Nations “expert groups” and monitoring bodies. Article 6 states: “Treaty

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<sup>36</sup> Piero Tozzi, *International Law and the Right to Abortion*, Legal Studies Series, No. 1, International Law Group Organizations, 2010, p. 10. Quoting Mary Ann Glendon, “What Happened at Beijing,” *First Things* (Jan. 1996).

<sup>37</sup> Beijing Platform § 106(k).

<sup>38</sup> U.N. Charter Article 2(7).

<sup>39</sup> Chile 1980, 19(1).

<sup>40</sup> CESCR 33rd session; UN document E/C.12/1/Add.105; review on 18-19 & 26 November 2004 at § 53.

<sup>41</sup> CEDAW Committee Report (Chile), §§ 19-20 (2006).

<sup>42</sup> HRC 89th session; UN document CCPR/C/CHL/CO/5; review on 14-15 & 26 March 2007 at § 8.

<sup>43</sup> CESCR 37th session; UN document E/C.12/SLV/CO/2; review on 8-9 & 21 November 2006 at §§ 25 & 44.

<sup>44</sup> HRC 82nd session; UN doc. CCPR/CO/82/POL/Rev.1; review on 27-28 October & 4 November 2004 at § 8.

<sup>45</sup> Karen Noelia Llontoy Huamán v. Peru, Comm. No. 1153/2003, Oct. 24, 2005, U.N. document CCPR/C/85/D/1153/2003 (dated 22 November 2005).

<sup>46</sup> Tribunal Constitucional de Colombia, Sentencia C-355/2006.

<sup>47</sup> <http://www/sanjosearticles.com>

*monitoring bodies have no authority, either under the treaties that created them or under general international law, to interpret these treaties in ways that create new state obligations or that alter the substance of treaties.” Article 6 continues: “Accordingly, any such body that interprets a treaty to include a right to abortion acts beyond its authority and contrary to its mandate. Such ultra vires acts do not create any legal obligations for states parties to the treaty, nor should state accept them as contributing to the formation of customary or international law.”*

27. Article 7 of the San Jose Articles addresses the attempted redefinition of sexual and reproductive rights to include a right to abortion by stating: *“Assertions by international agencies or non-governmental actors that abortion is a human right are false and should be rejected. There is no international legal obligation to provide access to abortion based on any ground, including but not limited to health, privacy or sexual autonomy, or non-discrimination.”*

## **Conclusion**

28. An international consensus is beginning to emerge regarding the unborn child and their protection from conception. More states are amending their basic law or constitutional law to reflect this consensus. Intergovernmental courts, led by the Court of Justice of the European Union, have become far bolder in defining the commencement of life from the fertilisation of the egg. No competing right to abortion can be found in international law.
29. The Draft General Comment poses a serious existential threat to Member State sovereignty over the issue of defining protections for the unborn child. Furthermore, United Nation’s treaty monitoring bodies have shown an equally aggressive attack on national sovereignty over the issue of abortion. The Christian Legal Centre therefore calls upon the Draft Committee to maintain the integrity of the agreed upon language of the ICCPR. It does not have the remit to undermine either the national sovereignty of Member States or undo the language of the Covenant which was thoroughly debated, amended and agreed upon through the proper treaty drafting procedures.