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**From:** D. Brian Scarnecchia, main United Nations Representative and Treasurer for Society of Catholic Social Scientists, an NGO in consultative status with the UN and as President and main United Nations representative of International Solidarity and Human Rights Institute, an NGO in consultative status with the UN

**To:** Office of the United Nations High Commissioner

**Date:** October 2, 2017

**Re:** "General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life"

Dear High Commissioner Zeid,

### *Introduction*

The Society of Catholic Social Scientists (SCSS) is a scholarly, interdisciplinary organization dedicated to promoting and conducting rigorous social scientific research within the parameters of orthodox Catholic doctrine. The SCSS boldly challenges a secularized approach to the social sciences by combining objective scholarly analysis with fidelity to the Magisterium.

Through a collegiality of Catholic scholars, professors, researchers, practitioners, and writers, the SCSS brings credible scholarship to political, social, and economic questions. SCSS members approach their work in both a scholarly and evangelical spirit. They are expected to observe the highest scholarly and professional requirements of their disciplines as they examine their data in light of Church teaching and the natural law. In this way, the Society seeks to obtain objective knowledge about the social

order, provide solutions to vexing social problems, and further the cause of Christ.

The International Solidarity and Human Rights Institute (ISHRI) is committed to establishing solidarity among people worldwide by promoting authentic human rights based on natural law principles, as set forth in such documents as the *Declaration of Independence*, the *Universal Declaration of Human Rights*, and the *Charter of the Rights of the Family*. Its mission is informed and motivated by respect for the inherent dignity and equality of all human beings created in the image of God as understood by the teaching office of the Catholic Church.

The work of both organizations involves education and research, public interest litigation, mediation, and works of mercy so as to eliminate human rights violations. These organizations, acting alone or in conjunction with other like-minded institutions, inform the public, students, government officials, international organization delegates, and financial, educational and cultural leaders and assists them to promote solidarity and human rights.

### *Comments on Para 9: Abortion*

Paragraph 9 of the Draft contends that criminalizing abortion violates Article 6 of the Covenant since pregnant women are forced to seek unsafe abortions. The hard fact is, if there is a risk to life, it is because such women choose to take it, not because States Parties impose it. Even if the deprivation is attributable to States Parties, they are obligated not to deprive life arbitrarily. Fetuses, and the zygotes and embryos from which they develop are genetically human and genetically unique from the parents who have begotten them. They come alive at fertilization and begin to grow. Though they must implant in the womb to continue alive, that is a reason to aid them not an excuse to kill them. Put simply, Paragraph 9 would recognize for the first time in international law a human right to kill innocent human beings. Far from an arbitrary deprivation, the rejection of a right to kill innocent human beings is eminently reasonable.

Paragraph 9 further argues that banning abortions imposes degrading treatment on victims of rape and incest and women bearing fetuses with fatal anomalies, in violation of Article 7. Any stigma, however, is not attributable to States Parties who intend, by banning abortions, not to degrade such women but to protect their fetuses, i.e., prenatal children. To claim instead that it is not just the intent but also the consequences of such bans that comes in conflict with Article 7 would start us down a slippery slope. Why is it, for example, that only a fatal anomaly, and not one likely to cause permanent disability, causes stigma? Why not a pregnancy result-

ing from a non-marital or extra-marital affair, which both still carry stigma in most societies? After all, "[e]very principle tends to expand itself to the limit of its logic."[1]

Moreover, the federal court in Canada recently ruled that the best interests of the child protected under the Convention on the Rights of the Child (hereafter referred to as CRC) apply equally to born and unborn children of immigrants in Canada:

> *[T]he clear and reasonable best interests of the child analysis . . . apply equally to any unborn child*. There are no distinguishing factors that would make the case of an unborn or newborn child any different. (emphasis added)[2]

The Canadian federal court overruled the decision of the Immigration Appeal Division that decided "that until there is a live birth there are per se no best interests to take into consideration such that the best interests of this yet to be born child would be determinative of the appeal."[3] Paragraph 9 of the Draft, like the faulty decision of the Immigration Appeal Division of Canada, completely ignores the best interests of the unborn children of Canada's immigrant population. The Draft conflicts with federal law in Canada.

Draft para 63 cites the CRC. It should be perfectly clear that when the CRC says "every child" and "all children" it means what it says and excludes no children, unborn or newborn, as federal courts in Canada have interpreted it:

> This article requires adoption of special measures designed to protect the life of *every child*, in addition to the general measures required by article 6 for protecting the lives of all individuals. When taking special measures of protection, States parties should be guided by the best interests of the child, by the need to ensure the survival and development of *all children*, and their well-being. (emphasis added)[4]

## *Comments on Para 10: Suicide*

**Endorsement and Incorporation by reference of Professor Stephen L. Mikochik's Letter to the Office of the United Nations High Commissioner dated September 21, 2017**

The Society of Catholic Social Scientists (SCSS) and the International Solidarity and Human Rights Institute (ISHRI) endorse and hereby incorporate by reference Professor Stephen L. Mikochik's Letter to the Office of the United Nations High Commissioner dated September 21, 2017 (see attached Exhibit A). His letter speaks exclusively to the provisions of paragraph 10 of the General comment No. 36 on Article 6 of the ICCPR

that concern suicide, in particular the euthanasia and assisted suicide of vulnerable persons with disabilities.

**The Convention on the Rights of Persons with Disabilities, Article 25 (f)**
We would like to add to Professor Mikochik's comments the mandate of the Convention on the Rights of Persons with Disabilities (hereafter referred to as CRPD) that vulnerable persons not be deprived of food and fluids. Article 25 (f) provides:

> Prevent discriminatory denial of health care or health services *or food and fluids* on the basis of disability. (emphasis added)

The legislative intent of the drafters of the CRPD regarding Article 25 (f) was not to guarantee potable water to persons with disabilities as some delegates disingenuously suggested soon after the passage of the convention. The very wording of Article 25 (f), "food and fluids," implies a health care setting. Water is often described as potable. However, potable is not an adjective commonly used to describe fluids. Moreover, members of the SCSS made several interventions during the negotiation of Article 25 (f) to ensure that persons with disabilities would not be arbitrarily dehydrated and starved to death simply because they suffered from a disability. One NGO representative of the SCSS made the following address to the full assembly of delegates from States Parties:

> As a young Catholic woman with a disability, I am . . . troubled by the lack of equal health care to persons with disabilities, when their life hangs in the balance. Therefore, I would urge the delegates to support Qatar's language, guaranteeing food and water to disabled persons whenever it would help to keep them alive. . . . Therefore, no [one] should be denied food and water because their life is deemed to be less valuable to others."[5]

After her intervention members of the disabilities caucus came up to her and congratulated her saying "you've convinced us," and the Chair had to admit that there was a growing consensus on this issue in the room.[6] It is clear that the CRPD intended by the inclusion of Article 25 (f) that assisted suicide by omission, through dehydration and starvation, would not be treated as an authentic human right. This provision applies with even greater force to active euthanasia by lethal injection or by any other method that by the intention of the actor or the methods used, directly suppresses the life of vulnerable persons with disabilities.

It should be noted that the negotiations surrounding what eventually became Article 25 (f) took into consideration what the original Draft para 10 referred to as "catastrophic" cases such as non-terminal patients suffering under the disability of a persistent vegetative state (PVS). They ap-

proved language that recognized that these vulnerable disabled persons (including those in a PVS) had a right to food and water as ordinary and proportionate care so long as food and water served to sustain their life without causing them further physical pain:

> The Chairman of the Convention was hostile to the inclusion of language from the delegation of Qatar that said that nutrition and hydration was a fundamental right of persons with disabilities, regardless of the quality of life, and especially when their life hangs in the balance. On the other hand, this language was supported by the Holy See, the United States, and many other delegations. The EU dismissed Qatar's language as "NGO language" and "bioethical language" reflecting only "First World concerns" or, more narrowly, the concerns of the United States": in fact, they stated that it was nothing more than "one American woman's story," i.e., that of Terry Schiavo.[7]

Paragraph 10 in the Draft is an attempt to undo Article 25 (f) of CRPD by those ideologically committed to a utilitarian platform that favors the greatest good for the greatest number of healthy people at the expense of the common good of all people, healthy or ill. Draft para 10 violates the spirit and letter of Article 25 (f) of the CRPD and must be struck in its entirety wherein it states the following:

At the same time, States parties [may allow] [should not prevent] medical professionals to provide medical treatment or medical means in order to facilitate the termination of [catastrophically] afflicted adults, such as the mortally wounded or terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity.

### *Comments on Paras 27 and 64: Transgender and Gender Identity*

All agree that gender dysphoria is an objective disorder. The sexual ideations of gender dysphoric persons do not conform to the biological and reproductive orientation of their sex, male or female.[8] People disagree on whether the objective disorder of gender dysphoria is a disability to be accommodated at law or an illness to be cured by mental health professionals.

The legal accommodation of gender dysphoria includes the provision of transgender bathrooms as well as the hormone suppression of the secondary sexual characteristics of apparently transgender children at the onset of puberty.[9] In some jurisdictions the parents or legal guardians of gender dysphoric children are also permitted to have the child undergo sex reassignment surgery.[10] There is little hard evidence that persons who have undergone these chemical and surgical accommodations are happier or better adjusted psychologically afterwards.[11] What is undeniable is that the law in many jurisdictions allows young children to be sterilized because

they have allegedly been denied a good birth, supposedly born with the wrong primary sexual characteristics.

In the early twentieth century the pseudo-science of eugenics (good birth) flourished. During the height of its popularity the United States Supreme Court Justice Oliver Wendell Holmes allowed the State of Virginia to sterilize thousands of institutionalized persons deemed to be less intelligent or mentally fit than the average population (commonly referred to as feebleminded). He believed that feeblemindedness, criminality and prostitution were hereditary traits and that the state must legally accommodate these persons deprived of a good birth. Only after institutionalized feebleminded persons had been accommodated by sterilization could they be safely released back into society and allowed to engage in sexual activity without burdening themselves or society with more of their kind. He warned, "[t]hree generations of imbeciles are enough."[12]

The eugenics movement of the early twentieth century and the transgender movement of today share a common belief that some persons have been deprived of a good birth and, therefore, society should address their disability through institutional and structural accommodations and sterilization. Many persons were sterilized in the United States due to the misguided efforts of eugenicists in the past. Nazi medicine embraced it.[13] The United Nations should not embrace it by allowing transgender and gender identity to be included in a listing of categories of persons who are protected under the rubric of nondiscrimination and tolerance as the Draft proposes in paras 27 and 64. Nondiscrimination and tolerance should not be used as a legal wedge to effect the sterilization of children incapable of informed consent. One century of pseudo-science, medical quackery[14] and child abuse[15] is enough!

THEREFORE, for the forgoing reasons, Draft paras 9, 10, 27 and 64 should be amended to exclude ersatz rights such as abortion, suicide and transgender from the privileges and protections afforded under the ICCPR.

Respectfully submitted,

D. Brian Scarnecchia, M.Div., J.D.
On behalf of the Society of Catholic Social Scientists
and International Solidarity and Human Rights Institute

**EXHIBIT A**

Stephen L. Mikochik
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September 21, 2017

Office of the United Nations High Commissioner
For Human Rights
Palais Wilson
52 rue des Pâquis
CH-1201 Geneva, Switzerland.

Re: Human Rights Committee Revised Draft of General Comment 36

Dear High Commissioner Zeid:

My name is Stephen L. Mikochik. I am a Professor Emeritus at Temple University School of Law in Philadelphia, and a Visiting Professor at Ave Maria School of Law in Naples, Florida. Before joining the Temple faculty, I was an attorney with the Civil Rights Division, U.S. Department of Justice, where I worked to enforce laws prohibiting discrimination against people with disabilities. I have written extensively on the threat euthanasia and assisted suicide present to disabled people. If adopted, the Human Rights Committee Draft will intensify that threat.

The Draft interprets Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Article 6 recognizes that "every human being has the inherent right to life."[16] It is guaranteed for all people "without distinction."[17] Though the Right to Life "is not absolute,"[18] Article 6 affirms that "no one shall be arbitrarily deprived of his life."[19] The draft affirms that "any deprivation of life based on discrimination in law or fact is *ipso facto* arbitrary in nature."[20] It specifically recognizes that "the right to life must be respected and ensured without distinction . . . based on disability,"[21] and that people with disabilities are "entitled to special measures of protection so as to ensure their effective enjoyment of the right to life on an equal basis with others."[22] In sanctioning euthanasia and assisted suicide for disabled people while requiring suicide protection for others, the draft ignores its own prescriptions.

It is important first to understand what the Draft authorizes. Paragraph 10 provides that "States parties may allow medical professionals to provide medical treatment or the medical means in order to facilitate the ter-

mination of life of afflicted adults, such as the mortally wounded or terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity."[23] By allowing professionals to either "provide medical treatment or the medical means to end life," the Draft authorizes both euthanasia and assisted suicide. Next, since mortal wounds and terminal illness are merely illustrative, the Draft allows euthanasia and assisted suicide for "afflicted adults," a class broad enough to include people with disabling conditions. Thus, it legitimates the laws of those States Parties that have legalized euthanasia and assisted suicide for non-terminal conditions, and makes it the more likely that others considering end-of-life legislation will do the same.[24]

Even if the Draft is limited to terminal conditions, however, once euthanasia and assisted suicide are held consistent with the ICCPR, they will quickly extend to people with disabilities: If patients with only six months to live can end such distress, why not those who face it for a lifetime?

Finally, severe "mental" pain and suffering are sufficient grounds for people with disabilities to request assistance in dying under the Draft.[25] At bottom, all this requires is such patients' insistence that they cannot bear living the way they are. Adding safeguards "to verify that medical professionals are complying with the free, informed, explicit and, unambiguous decision of their patients."[26] At best ensures that, before assisting them to die, physicians are convinced that, in the eyes of their patients, there is no other acceptable solution; and nothing prevents patients from shopping for physicians willing to be convinced.

Yet, "research indicates . . . that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated."[27] Nothing in the Draft, however, requires physicians to refer patients for clinical evaluation and treatment before aid in dying is given.

Notwithstanding the Draft's attempt at interpretation, there is no basis in Article 6 for what Paragraph 10 proposes. To read a right to death into the Right to Life simply turns summersaults with the language of that provision. Reliance on Article 7 would prove no more successful. To claim that people with disabilities are subject to cruel and inhuman treatment if denied euthanasia or assisted suicide must assume that living with a disability is degrading. Yet, the many States Parties that have also ratified the Convention on the Rights of Persons with Disabilities (CRPD) have pledged "to promote respect for . . . the inherent dignity of all such persons."[28]

They have further guaranteed to ensure the Right to Life of persons with disabilities "on an equal basis with others."[29] Though recognizing a like obligation under Article 6,[30] the Draft nonetheless sanctions aid

in dying for disabled persons while requiring States Parties to "take adequate measures . . . to prevent suicides, especially among individuals in other particularly vulnerable situations."[31] The Draft thus flaunts its own rules that States Parties should ensure the Right to Life without distinction based on disability,[32]and should provide special measures so that people with disabilities can enjoy the right to life on an equal basis with others.[33] Judged by its own standards, the Draft's discriminatory approval of euthanasia and assisted suicide is "*ipso facto* arbitrary in nature."[34]

Equal Protection of the Laws means, at the very least, that government not discriminate in its defense of the Right to Life. In sanctioning euthanasia and assisted suicide for people with disabilities while securing the lives of others, the Draft affords disabled people neither equality nor protection. I therefore urge the Committee to strike Paragraph 10 from the Draft.

Respectfully submitted,

Stephen L. Mikochik

**Notes**

1. Benjamin N. Cardozo, *Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921), 51.

2. *Li v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 451, 460 citing *Hamzai v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1108 at para 33.

3. Ibid., 457.

4. Draft para 63.

5. D. Brian Scarnecchia, *Bioethics, Law, and Human Life Issues: A Catholic Perspective on Marriage, Family, Contraception, Abortion, Reproductive Technology and Death and Dying* (Lanham, Md.: Scarecrow Press, 2010), 386–87.

6. Ibid., 387.

7. Ibid., 386.

8. "Gender dysphoria involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender." American Psychiatric Association, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria, Last visited 10/4/2017.

9. See *Psychology Today*, https://www.psychologytoday.com/conditions/gender-dysphoria, Last visited 10/4/2017.

10. An Australian child of 4 undergoes a sex change surgery, http://www.wnd.com/2016/09/child-4-worlds-youngest-ever-sex-change-patient/.

11. See Dr. McHugh, "Transgender Surgery Isn't the Solution," https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120, https://couragerc.org/wp-content/uploads/Transgender Surgery.pdf; also see United States Supreme Court, Amici Curie Brief of Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., Ph.D., and Dr. Lawrence S. Mayer, Ph.D., in Support of Petitioners, *Gloucester County School Board v. G.G.* (January 17, 2017). https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2016_2017/16-273_amicus_pet_mchugh.authcheckdam.pdf.

12. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

13. Brendan Wolf, *Encyclopedia of Virginia*, a publication of the Virginia Foundation in partnership with Library of Virginia: "Eugenics had been popular in Germany before World War II (1939–1945), and at the Nuremberg Trials in 1945–1946, prosecutors took aim at sterilizations performed in concentration camps 'in the guise of scientific research.' Multiple Nazi defendants cited *Buck v. Bell* and Holmes's decision in their own defense." See https://www.encyclopediavirginia.org/Buck_v_Bell_1927, last visited 10/5/2017.

14. U.S. Supreme Court, Amici Curie Brief of Drs. McHugh, Hruz, and Mayer, 14.

15. Ibid., 22.

16. *ICCPR*, Art. 6 (1) (Right to Life), http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

17. Draft, para. 4, http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx.

18. Ibid., para. 16.

19. *ICCPR*, Art. 6(1).

20. Draft, para. 64 (footnote omitted).

21. Ibid.

22. Ibid., para. 28 (footnote omitted).

23. Ibid., para. 10 (footnote omitted).

24. In Europe, Belgium, Luxembourg, and the Netherlands have all legalized euthanasia and assisted suicide without the need to show the condition is terminal. Euthanasia-ProCon.org, https://euthanasia.procon.org/view.resource.php?resourceID=000136. By requiring only that "natural death has become reasonably foreseeable," Canada has in effect done the same. R.S.C. 1985, c. C-46, § 242.2(2) (d).

25. Significantly, over the nineteen-year history of the Oregon "Death with Dignity" Act, concern about pain-management was not a major reason why patients sought assistance in dying. Ore. Health Auth.: Ann. Reports: Year 19- 2016, http://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Pages/ar-index.aspx#main.

26. Draft, para. 10 (footnote omitted).

27. *Washington v. Glucksberg*, 521 U.S. 702, 730 (U.S. Sup. Ct. 1997) (citations omitted).

28. CRPD, Art. 1 (Purpose), https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-1-purpose.html. Thus far, 174 countries have ratified the Convention. CRPD| United Nations Enable, https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#content.

29. CRPD, Art. 10 (Right to Life), https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-10-right-to-life.html;Draft, para. 28.

30. Draft, para. 10.

31. Ibid. (footnote omitted). The "vulnerable situations" the Draft references concern reactions of certain adolescent girls to unwanted pregnancies. Ibid., note 23 (citing Concluding Observations: Ecuador (1998), para. 11).

32. Ibid., para. 64.

33. Ibid., para. 28.

34. Ibid., para. 64 (footnote omitted).