

# WHAT RIGHTS, IF ANY, DO THE UNBORN HAVE UNDER INTERNATIONAL LAW?

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## INTRODUCTION

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This chapter draws significantly on an earlier article which I co-authored with Michael Hains and which was published in the Australian Bar Review.

Barristers and solicitors have traditionally looked to case law as an important source of interpreting domestic law. With the increasing globalisation of world trade, tourism, the breaking down of language barriers, and improvements in international relations international law has emerged as a further important influence. International law has traditionally focused on governing relations between independent nation states. However, in the aftermath of the Second World War the United Nations was formed on the basis of a Charter which committed the members of the UN to “take joint and separate action in cooperation with the Organization” to achieve “the purposes set forth in Article 55 [of the Charter]”.<sup>1</sup> Article 55 committed the UN to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>2</sup>

One important consequence of this major development in international relations has been the “demise of Oppenheim’s doctrine that ‘States solely and exclusively are the subject of International Law’ ... [I]t is [now] ... the case that inter-state treaties are increasingly concerned with the ‘trans-national’ affairs ... of private individuals and companies.”<sup>3</sup> DJ Harris, in a later discussion of the activities of the UN Commission on Human Rights, also points out that “the idea that the treatment of a state’s own nationals is a matter within its own jurisdiction has been abandoned.”

The practice of the Commission shows clearly the acceptance by the states, as they respond without question to allegations against them, that *the protection of human rights is now within the domain of international law*.<sup>4</sup>

A further important consequence of these developments in international law has been the increasing number of Declarations and Conventions which can potentially affect our municipal laws. The areas of domestic law which are potentially influenced are immense; they include administrative law, family law especially custody matters, discrimination laws, medical negligence, succession, immigration and refugee law, criminal law and human rights.

Practitioners need to be aware of how this may be relevant. The High Court in the *Minister for Immigration and Ethnic Affairs v Teoh*<sup>5</sup> held that entry into a treaty by Australia creates a “legitimate expectation”—in administrative law—that the Executive Government and its agencies will act according to the treaty, even where those terms

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<sup>1</sup> *Charter of the United Nations*, Article 56.

<sup>2</sup> *Ibid.*, Article 55 (c).

<sup>3</sup> DJ Harris, *Cases and Materials on International Law Fourth Edition*, (London: Sweet and Maxwell, 1991), 18.

<sup>4</sup> *Ibid.*, 604.

<sup>5</sup> (1995) 183 CLR 273.

were *not* incorporated in Australian law.<sup>6</sup> Moreover, there is a presumption that the legislature intends to give effect to Australia's obligations under international law. Where a statute or subordinate legislation is ambiguous it should be construed in accordance with those obligations, particularly where they are undertaken in a treaty to which Australia is a party.<sup>7</sup> These rulings of the High Court can profoundly influence many aspects of our municipal law. We will look at these issues in the context of the rights of the unborn, if any, under international law and their implications for Australian domestic law.

In 1996 considerable public controversy about the legality of abortion arose when the High Court of Australia was called upon to consider an appeal from the judgment of the New South Wales Court of Appeal in *CES v Superclinics (Australia) Pty Ltd.*<sup>8</sup> The Court of Appeal, by majority, approved, but did not apply, the principle in *R v Wald*<sup>9</sup> Devine J. in that case had held that: first, an abortion may be lawful if the person performing the abortion, or the woman upon whom it is performed, has an honest belief on reasonable grounds that what was done was necessary to preserve the woman involved from serious danger to her life, or physical or mental health, which the continuance of the pregnancy would entail, not merely the normal danger of the pregnancy and childbirth; and secondly a woman upon whom an abortion is performed is not guilty of aiding or abetting that act if she honestly and reasonably holds the appropriate belief, irrespective of the beliefs of the person performing the act. The High Court granted Special Leave to Appeal on 15 April 1996<sup>10</sup> and the Court subsequently granted representative interest groups leave to intervene. The proceedings were, however, settled during the course of argument and the Court was not called upon to give judgment. But the case highlights an instance where international law may be relevant to domestic laws. The issue of the unborn has again arisen in the context of the United Nations *Convention on the Rights of the Child 1989*.

On 28 August 1995 the Attorney-General of Australia referred to the Australian Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission ("the Commissions") "for inquiry and report, matters relating to children and young people and the legal process."

In May 1997 a Draft Recommendations Paper entitled "A matter of priority: Children and the legal process" (the "Paper") was jointly published by the Commissions. This

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<sup>6</sup> The precise status of various Declarations and Conventions under Australian law is unclear, but it is fair to say that some uncertainty exists as to their status. At one extreme if Parliament has merely approved and repeated the treaty in legislation, without implementing it, the Act will give rise to no rights: see *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582, noted (1974) 48 ALJ 368. However, the High Court subsequently in *Minister for Immigration and Ethnic Affairs v Teob* (1995) 183 CLR 273 held that entry into a treaty by Australia creates a "legitimate expectation"—in administrative law—that the Executive Government and its agencies will act according to the treaty, even where those terms were *not* incorporated in Australian law (cf the proposed Administrative Decisions (Effect of International Instruments) Bill 1997). At the other extreme where a Convention has been implemented it gives rise to enforceable rights beyond that of legitimate expectations, eg the *Racial Discrimination Act 1975* (Cth.) (implementing the International Convention on the Elimination of All Forms of Racial Discrimination) and the *Sex Discrimination Act 1984* (Cth.) (implementing the Convention on the Elimination of All Forms of Discrimination Against Women). The Declarations and Conventions attached as schedules to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth.) fall between these two extremes. Thus their precise status under Australian law is unclear.

<sup>7</sup> *Minister for Immigration and Ethnic Affairs v Teob* (1995) 183 CLR 273 at 287, 315. Followed in *Krueger v The Commonwealth* (1997) 146 ALR 126. Brennan J. in *Mabo (No. 2)* (1992) 175 CLR 1 at 42 referred to international instruments as "legitimate and important influences on the development of the common law, especially when international law declares the existence of universal human rights."

<sup>8</sup> (1995) 38 NSWLR 47.

<sup>9</sup> (1971) 3 NSWDCR 25.

<sup>10</sup> (1996) 136 ALR 16 (SLA).

chapter, based largely on the Authors' Submission to those Commissions, considers the rights of the unborn under international law. These considerations are even more appropriate in the 21<sup>st</sup> century as particular elites continue their campaign for a universally recognised "right to abortion", usually pursued under the rubric of 'the right of access to reproductive health care service' or, to use the apt words of Richard Wilkins, "illusive legal constructs" such as 'forced pregnancy'.<sup>11</sup>

In 1997 the Commissions adopted the definition of "child" used in the United Nations *Convention on the Rights of the Child 1989*,<sup>12</sup> ("CRC") i.e. a person under the age of eighteen. Despite that definition, the Paper did not consider the rights of all children under the age of eighteen, failing to discuss the rights of unborn children and the issue of abortion. The implication here is that this is a group of human beings who are not to receive moral consideration as human beings with fundamental rights and nor are they to be afforded the protection of the law.

So, while the Paper emphasised the importance of the CRC it failed to acknowledge that it must be interpreted in the light of the Charter of the United Nations,<sup>13</sup> the *Universal Declaration of Human Rights 1948*,<sup>14</sup> the *International Covenant on Civil and Political Rights 1966*, the *Declaration of the Rights of the Child 1959*, and other fundamental human rights documents. This is a common mistake and a serious one indeed since, as we shall see, those foundational documents have much to say on the rights of the unborn bearing directly on ambit claims being made for the recognition of a "right to abortion".

The fact is that the rights of the unborn were discussed in the drafting stages of the *Universal Declaration of Human Rights 1948* (UDHR) as well as in the drafting stages of the CRC. The matter is also referred to in the *International Covenant on Civil and Political Rights 1966* (ICCPR). That this subject did not merit discussion by the Commissions is, therefore, a cause for great concern. It is also a matter for concern that academic lawyers seem unwilling to deal with these issues preferring instead to simply assert that the UDHR and the ICCPR contain nothing that would suggest that the unborn have rights.

The importance of the abortion issue in the Australian legal context is further underscored by the fact that the *Declaration of the Rights of the Child 1959* was attached as a Schedule to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth.) following discussions with the Right to Life Association,<sup>15</sup> such was the importance of this matter. As a consequence the *Declaration of the Rights of the Child*

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<sup>11</sup> Richard C Wilkins and Jacob Reynolds, "International Law and the Right to Life, *Ave Maria Law Review*, 4:1 Winter 2006, 1213-124

<sup>12</sup> The *Vienna Convention on the Law of Treaties 1969* applies to the interpretation of the CRC because it entered into force after 27 January 1980, the operative date of the Vienna Convention. The Vienna Convention expressly provides it does not apply retrospectively (see Article 4).

<sup>13</sup> Australia has approved and repeated the United Nations' Charter in the *Charter of the United Nations Act 1945* (Cth.). However the Act does not *implement* the United Nations Charter into municipal law: see *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582, noted (1974) 48 ALJ 368. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287, 298, 304, 315.

<sup>14</sup> The Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 (1968) notes:

2. The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community;

<sup>15</sup> Peter Bailey, *Human Rights, Australia in an international context*, Butterworths, 1990, 111.

1959,<sup>16</sup> is part of Australian municipal law, although what legal rights to which this may give rise is debatable.<sup>17</sup> Accordingly it is not good enough within the Australian context to simply describe the Declaration on the Rights of the Child as “a non-binding international instrument.”<sup>18</sup>

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## HUMAN RIGHTS AND THE UNBORN CHILD

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### CRC AND ABORTION

The CRC, adopted by the General Assembly of the United Nations on November 20, 1989, and ratified<sup>19</sup> by Australia,<sup>20</sup> reiterates the positions taken by the *Universal Declaration of Human Rights 1948*, which have been adopted and proclaimed by Australia, about the “equal and inalienable rights of all members of the human family” as the “foundation of freedom, justice and peace in the world”, and that the “United Nations has proclaimed that childhood is entitled to special care and assistance”.<sup>21</sup> In particular the CRC asserts: “States Parties recognize that every child has the inherent right to life”<sup>22</sup> and that “States Parties shall ensure to the maximum extent possible the survival and development of the child.”<sup>23</sup>

Regarding abortion, the CRC bears in mind that, “as indicated in the *Declaration of the Rights of the Child*, ‘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’ ”.<sup>24</sup> Does it necessarily follow from this that the right to life of the pre-born child is protected? Senator Gareth Evans, the then Minister for Foreign Affairs and Trade, told the Australian Senate on October 26, 1989 that the Australian Government understands the reference to the rights of the child “before as well as after birth” in a way that does not preclude abortion. However, Australia made no such reservation or interpretation<sup>25</sup> at the time of ratification.<sup>26</sup> Acknowledging that the reference to the

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<sup>16</sup> On 22 December 1992 the Federal Attorney General declared, under section 47 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth.), that the CRC was an “international instrument” concerning “human rights and freedoms” under the Act.

<sup>17</sup> *Op. cit.* n 6.

<sup>18</sup> Alison Duxbury and Christopher Ward, “The International Law Implications of Australian Abortion Law” (2000) 23(2), *UNSW Law Journal* 17

<sup>19</sup> Article 2(b) of the *Vienna Convention on the Law of Treaties 1969* defines:

‘ratification’, ‘acceptance’, ‘approval’ and ‘accession’ [to] mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

<sup>20</sup> Australia signed the Convention on 22 August 1990 and ratified it on 17 December 1990.

<sup>21</sup> Preamble, *Convention on the Rights of the Child 1989*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

<sup>22</sup> *Op. cit.* n 21, Article 6(1).

<sup>23</sup> *Op. cit.* n 21, Article 6(2).

<sup>24</sup> *Op. cit.* n 21, Preamble. See also footnote 28.

<sup>25</sup> At signature or ratification a State may, but not afterwards, make a reservation or interpretation: Paul Sieghart, *The International Law of Human Rights*, Clarendon Press Oxford, 1983, 36. Article 2(d) of the *Vienna Convention on the Law of Treaties 1969* defines a reservation to mean:

... a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

<sup>26</sup> According to United Nations ratification information Australia only placed one reservation on the CRC, being:

rights of the child “before as well as after birth” does appear in the *Preamble* in the then draft Convention, “at the same time a statement in the *travaux préparatoires* - the preparatory materials - makes it clear that the contentious issue of the child’s rights before birth is a question to be determined by individual states parties.”<sup>27</sup>

Senator Evans’ statement on this matter is seriously misleading. When they were debating this aspect of the *Preamble*, some delegations supported it precisely because it offered protection to the unborn child.<sup>28</sup> Other delegations, of which Australia was one, opposed “what in their view amounted to re-opening the debate on this controversial matter [abortion] which, as they indicated, had been extensively discussed at earlier sessions of the Working Group with no consensus achieved. It was also pointed out by some delegations that *an unborn child is not literally a person* whose rights could already be protected, and that the main thrust of the Convention was deemed to promulgate the rights and freedoms of every human being after his birth and to the age of 18 years.”<sup>29</sup> (Emphasis added)

As a consequence of the debate they amended the *Preamble* such that the text would no longer say “Recognising that . . .” but “Bearing in mind that . . .”, as indicated in the *Declaration of the Rights of the Child 1959*, “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”. Further, the following statement was, by agreement, placed in the *travaux préparatoires*: “In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1<sup>30</sup> or any

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Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37 (c). [United Nations, *Treaty Series*, vol. 999, p. 171 and vol. 1057, p. 407]

<sup>27</sup> Hansard, *Australian Senate*, 26 October 1989, 2309.

<sup>28</sup> For example, Malta and Senegal. In the United Nations ratification information concerning the CRC, Ecuador expressly declared:

In signing the Convention on the Rights of the Child, Ecuador reaffirms . . . [that it is] especially pleased with the ninth preambular paragraph of the draft Convention, which pointed to the need to protect the unborn child, and believed that that paragraph should be borne in mind in interpreting all the articles of the Convention, particularly article 24. While the minimum age set in article 38 was, in its view, too low, [the Government of Ecuador] did not wish to endanger the chances for the Convention’s adoption by consensus and therefore would not propose any amendment to the text. [Doc. A/RES/44/25]

The Holy See also declared:

. . . that the Convention represents an enactment of principles previously adopted by the United Nations, and once effective as a ratified instrument, will safeguard the rights of the child before as well as after birth, as expressly affirmed in the ‘Declaration of the Rights of the Child’ [Res. 136 (XIV)] and restated in the ninth preambular paragraph of the Convention. The Holy See remains confident that the ninth preambular paragraph will serve as the perspective through which the rest of the Convention will be interpreted, in conformity with article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. [Doc. A/RES/44/25]

According to a UN Glossary of Terms “states make ‘declarations’ as to their understanding of some matter or as to the interpretation of a particular provision. Unlike reservations, declarations merely clarify the state’s position and do not purport to exclude or modify the legal effect of a treaty. Usually, declarations are made at the time of the deposit of the corresponding instrument or at the time of signature.” These two quotes were the only references in the formal ratification information concerning the unborn.

<sup>29</sup> Sharon Detrick compiler and editor, *The United Nations Convention on the Rights of the Child, A Guide to the “Travaux Préparatoires”*, (Dordrecht: Martinus Nijhoff Publishers, 1992), 109.

<sup>30</sup> Article 1 of CRC states:

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

other provision of the Convention by States Parties.”<sup>31</sup> No doubt this is the statement to which Senator Evans referred. However, this was not the end of the matter.

The representative of the United Kingdom sought “confirmation from the Legal Counsel that the statement would be taken into account if, in the future, doubts were raised as to the method of interpreting article 1.”<sup>32</sup> That advice was annexed to the report of the Working Group. It gives no such assurance and by no means allows the matter of abortion to be automatically reserved to the judgment of states parties.

The Response of the Legal Counsel certainly allows such an interpretative statement to be included in the *travaux préparatoires*. However, the Legal Counsel cautioned that:

seeking to establish the meaning of a particular provision of a treaty, through an inclusion in the *travaux préparatoires* may not optimally fulfill the intended purpose, because, as you know, under article 32 of the Vienna Convention on the Law of Treaties, *travaux préparatoires* constitute a “supplementary means of interpretation” and hence recourse to *travaux préparatoires* may only be had if the relevant treaty provisions are in fact found by those interpreting the treaty to be unclear.<sup>33</sup>

It is by no means certain that those international courts that have to interpret international law will find the treaty unclear, especially as it is to be understood, not by itself, but with reference to and guided by the *Universal Declaration of Human Rights 1948*, the *International Covenant on Civil and Political Rights 1966* and other international covenants.

In his account of the abortion debate, in the context of the CRC, Philip Alston claims that:

the acceptance of a preambular paragraph recognizing that “the child . . . needs special safeguards and care, including appropriate legal protection, before as well as after birth” cannot be interpreted as an indirect reversal of that explicit rejection [of proposals to recognize the right to life of the unborn]. To do so would be to attribute to the preamble an importance considerably in excess of that which may reasonably be accorded to such broad policy pronouncements.<sup>34</sup>

Alston believes that the CRC leaves the matter of abortion as an open question such that those States that wish to prohibit abortion and those that wish to approve it are on an equal footing. He believes that existing international human rights law does not provide for the status of the unborn child, and that the CRC is in conformity with that position. But Alston overlooks the fact that a reference in the Preamble is part of the treaty itself,<sup>35</sup> whereas the *travaux préparatoires* is a supplementary means of interpretation to be used in limited circumstances.<sup>36</sup>

Alston is simply not entitled to this conclusion on the basis of the facts that he, himself, has outlined. As we have already noted, some delegations favoured the inclusion of the

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<sup>31</sup> Sharon Detrick. *op. cit.* n 29, 110.

<sup>32</sup> *Ibid.*

<sup>33</sup> Carl August Fleischhauer, The Legal Counsel, 9 December 1988, Response of the Legal Counsel E/CN.4/1989/48, Annex p. 144, Sharon Detrick. *op. cit.* n 29, 113.

<sup>34</sup> Philip Alston, “The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child”, *Human Rights Quarterly* 12 (1990) 156, 177.

<sup>35</sup> *Vienna Convention on the Law of Treaties 1969*, Articles 2(1)(a) and 31(2).

<sup>36</sup> *Vienna Convention on the Law of Treaties 1969*, Article 32.

words “the child . . . needs special safeguards and care, including appropriate legal protection, before as well as after birth” precisely because they believed that it offered protection to the unborn child while others opposed it because they saw it “re-opening the debate on this controversial matter (abortion).”<sup>37</sup> The fact is that with a minor change in words (“Recognising that” was changed to “Bearing in mind that”) these contentious words were included in the Preamble of the CRC. That clearly means the abortion issue was left on the table as both those who opposed its inclusion and those who favoured its inclusion have testified.

In any case, since the CRC has to be interpreted in the light of and consistently with the *Universal Declaration of Human Rights 1948* and the *International Covenant on Civil and Political Rights 1966*<sup>38</sup> then the question of the rights of the unborn child has to be resolved against a broader landscape than the CRC seen in isolation. Alston’s contention that “existing international human rights law” does not recognise the right to life of the unborn would, if it were true, help those who deny that the right to life of the unborn is recognised by the CRC.

However, in this article, we will see that Alston’s contention, far from being certain, is almost certainly false.

First, during the drafting of the *International Covenant on Civil and Political Rights 1966* an amendment, to article 6, submitted by Belgium, Brazil, El Salvador, Mexico and Morocco<sup>39</sup> led to a discussion as to whether the right to life should be protected by law “from the moment of conception”. “Those supporting the amendment maintained that it was only logical to guarantee the right to life from the moment life began.”<sup>40</sup> The amendment was rejected.<sup>41</sup>

It was pointed out that the legislation of many countries accorded protection to the unborn child. On the other hand, the amendment was opposed on the grounds that it was impossible for the State to determine the moment of conception and hence, to undertake to protect life from that moment. Moreover, the proposed clause would involve the question of the rights and duties of the medical profession. Legislation on the subject was based on different principles in different countries and it was, therefore, inappropriate to include such a provision in an international instrument.<sup>42</sup>

The toleration of abortion played no part in the rejection of the amendment.

Secondly, in the context of the CRC, Malta and Senegal proposed an amendment to draft Article 1 to explicitly protect the rights of the unborn child from conception.<sup>43</sup>

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<sup>37</sup> Cf. evidence cited in Sharon Detrick, *op. cit.* n 29, 109. See also footnote 28.

<sup>38</sup> There was no mention of abortion in connection with privacy (Article 17) during the discussions on the *International Covenant on Civil and Political Rights 1966*.

<sup>39</sup> A/C.3/L.654.

<sup>40</sup> §112 A/3764.

<sup>41</sup> 30 votes against the amendment, 20 for and 17 abstentions: §119 A/3764.

<sup>42</sup> §112 A/3764.

<sup>43</sup> Malta proposed:

In article 1, after the words ‘human being’, add the words ‘from conception’. [E/CN.4/1989/WG.1/WP.9]

Senegal’s proposal was:

According to the present Convention a child is every human being, *from his conception until at least*, the age of 18 years . . . [E/CN.4/1989/WG.1/WP.17]

These proposals were not rejected by the Member States but were withdrawn by Malta and Senegal “in the light of the text of preambular paragraph 6 as adopted” which referred to the rights of the child “before as well as after birth.”<sup>44</sup>

Thirdly:

The representative of Italy observed that no State was manifestly opposed to the principles contained in the Declaration of the Rights of the Child and, therefore, according to the Vienna Convention on the Law of Treaties, the rule regarding the protection of life *before birth* could be considered as “jus cogens” since it formed part of the common conscience of members of the international community.<sup>45</sup> (Emphasis added.)

Jus cogens (or *ius cogens*) is a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>46</sup> The right to life of all human beings has the nature of an intransgressible norm already contained in the *Universal Declaration of Human Rights 1948*, the *International Covenant on Civil and Political Rights 1966* and the *Declaration of the Rights of the Child 1959*. In other words, under international law the unborn child is protected and it was not permissible at this late stage to attempt to allow a liberal abortion agenda under the CRC.

Fourthly, the *Declaration on the Rights of the Child 1959*, which carries the same preambular reference to the rights of the child before as well after birth, is part of our municipal law.<sup>47</sup> In his statement to the Senate Senator Evans did not take account of these legal obligations. This, however, does not absolve the Commissions from taking seriously the issue of the rights of the unborn in the context of Australia’s human rights obligations. Moreover, as has been established, these issues fall within the Commissions’ Terms of Reference and must be addressed.

Finally, explicit protection is extended to the unborn child in the *International Covenant on Civil and Political Rights 1966* and in the *Convention on the Prevention and Punishment of the Crime of Genocide 1948*. These protections will be discussed later in the Article.

Having rehearsed these arguments in 1997<sup>48</sup> one might have thought that they would have been taken seriously by academics interested in this area. Instead Duxbury and Ward simply dismiss this position, without argument, and reassert Alston’s position as if it had never been seriously challenged.

It has been suggested that international law does recognize the right to life of the unborn child and therefore domestic cases should be argued with that in mind [reference to Fleming and Hains article]. However, at present it would appear that international human rights law does not recognise the *absolute* right to life of the unborn child.<sup>49</sup> [emphasis added]

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<sup>44</sup> Sharon Detrick, *op. cit.* 29 at 118.

<sup>45</sup> Sharon Detrick, *op. cit.* 29 at 109.

<sup>46</sup> The *Vienna Convention on the Law of Treaties 1969*, Article 53.

<sup>47</sup> Schedule 3 *Human Rights and Equal Opportunity Commission Act 1986* (Cth.).

<sup>48</sup> J Fleming and M Hains, “What Rights, If Any, Do the Unborn Have Under International Law?” (1997) 16 *Australian Bar Review* 181 at 198

<sup>49</sup> Alison Duxbury and Christopher Ward, *op. cit.*, 17

This also begs the question as to why Duxbury and Ward qualified the term “right to life” with the word “absolute” when it applies to the unborn. What point are they trying to make? Are they concerned that the recognition of the right to life of the unborn child would imply that the law of the land could not allow abortion in any case, including when there is a direct threat to the life of the mother? Is that why the word “absolute” is used, to head off at the past an unpalatable conclusion? That the pursuit of the truth may involve unpalatable conclusions is no reason to engage in obfuscations and distortions. And in any case the documents give no guidance as to how such a conflict between competing rights to life must be resolved.

As Duxbury and Ward continue their article it becomes clear that they do not pick up on some of the most important provisions of the various international human rights instruments which call into question the provisions of Australian (and British and American) law. More of that later.

#### THE RIGHT TO LIFE OF THE UNBORN AND INTERNATIONAL LAW

Within what limits may a state party provide for legal abortion? To find the answer to this question, full account has to be taken of the provisions of the United Nations Charter, the *Universal Declaration of Human Rights 1948* that seeks to amplify Article 55 of the United Nations Charter, and the *International Covenant on Civil and Political Rights 1966*. Article 55 commits the United Nations to “promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>50</sup>

The *Universal Declaration of Human Rights 1948* is founded upon the notion that there are human values and these values are inherent in the human individual. In the *Preamble* the Declaration states that “the foundation of freedom, justice and peace in the world” is the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family”.<sup>51</sup>

As far as the Declaration is concerned there are human values *inherent* in all members of the human family because of their “inherent dignity”. Since “dignity” is about true worth or excellence [“dignus” L. means worthy], and, in the context, human worth, then the claim for the inherent dignity of human beings is a claim for basic human values.

Further, the *Preamble* links human dignity, human values with human rights that it describes as “inalienable rights”, rights of which we may not be deprived and cannot deprive ourselves. I must not be sold into slavery and I am to be restrained from selling myself into slavery.

These human rights which reflect human values must, says the *Preamble*, “be protected by the rule of law” otherwise humankind may be driven, “as a last resort, to rebellion against tyranny and oppression”. This protection of the rule of law is necessary not only for human beings to live together peaceably within the State, but also so that nations may live together in peace.

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<sup>50</sup> *Charter of the United Nations*, Article 55(c).

<sup>51</sup> In *Secretary, Department of Health and Community Services v. J.W.B. and S.M.B.* (Marion's case.) (1992) 175 CLR 218 Brennan J. emphasised:

The law will protect equally the dignity of the hale and hearty and the dignity of the weak and lame; of the frail baby and of the frail aged; of the intellectually able and of the intellectually disabled . . . Our law admits of no discrimination against the weak and disadvantaged in their human dignity.

The *Universal Declaration of Human Rights 1948* presents itself to the world as “a common standard of achievement for all peoples and all nations” and as a guide for every structure in society and for every individual in order that the rights identified in the Declaration may have “their universal and effective recognition and observance” secured.

Article 1 of the Declaration asserts certain things about human beings that affect the understanding of the rest of the document. Human beings, it says, “are born free and equal in dignity and rights”. This value of equality of human beings, this injunction not to show preference between individuals in the recognition of “the rights and freedoms set forth in this Declaration”, is further specified in Article 2. In particular, in the entitlement to the rights and freedoms in the Declaration there is to be no distinction of any kind, “such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

In this way the Declaration excludes discrimination against the elderly and the very young, the physically and mentally disabled and the chronically ill. All have equal claim to the rights and freedoms enunciated in the Declaration.

Article 3 of the Declaration begins the articulation of the human values to be defended in terms of human rights. “Everyone has the right to life, liberty and the security of person.” Thus, human life is held to be both inviolable and inalienable. The Declaration does not begin with hard cases or exceptions, but with the general proposition which concerns the value of human life. Noting the order of the rights articulated is also interesting - life first, then freedom [liberty], and then security of person. Unless the State can guarantee the right to life then there are no meaningful rights to freedom or to security of person. The right to life is logically prior to considerations of the quality of the individual’s life.

Does this right to life extend to the unborn child? When Article 3 of the *Universal Declaration of Human Rights 1948* was being drafted there were several proposals for the provision of an explicit protection for the unborn child.<sup>52</sup> These proposals were certainly debated.

In the event, none of the relevant proposals was pushed to a vote and the final text stated only that ‘everyone had the right to life . . .’<sup>53</sup>

The fact that the matter was not pushed to a vote does not mean that one can conclude that the rights of the unborn child are not covered by the *Universal Declaration of Human Rights 1948*. The text clearly states that everyone has the right to life, and that what is meant by everyone is “every member of the human family”<sup>54</sup>, that is, all human beings. Here is the nub of the matter. Some of those nations who opposed an understanding of the CRC’s Preambular reference to “the child, by reason of his physical and mental immaturity” needing “special safeguards and care, including appropriate legal protection, before as well as after birth,” as including abortion did so on the basis of attitudes which violate explicit provisions of the *Universal Declaration of Human Rights 1948* and the *International Covenant on Civil and Political Rights 1966*.

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<sup>52</sup> Philip Alston, *op. cit.* n 34, 159.

<sup>53</sup> *Ibid.*

<sup>54</sup> Preamble, *Universal Declaration of Human Rights 1948*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

That opposition was on the basis “that *an unborn child is not literally a person* whose rights could already be protected, and that the main thrust of the Convention was deemed to promulgate the rights and freedoms of every human being after his birth and to the age of 18 years.”<sup>55</sup> (Emphasis added) These are mere assertions of opinion, opinion which is not universally shared in the way that the various human rights instruments are universally agreed, and in fact is opinion which is in conflict with universally agreed human rights instruments.

Michel Meslin, however, has shown that “the concept of person is one of the most difficult concepts to define - even though it is always burdened with hopes and revendications. It is neither a simple fact, nor evident throughout history.”<sup>56</sup> The briefest of surveys of the literature provides ample evidence to support Meslin’s contention. Concepts of personhood based upon science and philosophy abound. For some, personhood begins at syngamy. For others it is at fourteen days after fertilisation, twelve weeks, twenty-eight weeks, birth, three months after birth and so on. There is no agreement in science or philosophy about when personhood begins or where it ends or how it should be defined. The only agreement one finds is in the embryological text books, that human life begins at fertilisation. It is the fertilisation of a human egg by a human sperm that produces a member of the human species, the human family. The main results of fertilisation are:

(a) **restoration of the diploid number of chromosomes**, half from the father and half from the mother. Hence, the zygote contains a new combination of chromosomes, different from both parents; (b) **determination of the sex** of the new individual. An X-carrying sperm will produce a female (XX) embryo, and a Y-carrying sperm a male (XY) embryo. Hence, the chromosomal sex of the embryo is determined at fertilization; (c) **initiation of cleavage**. Without fertilization the oocyte usually degenerates 24 hours after ovulation.<sup>57</sup>

Anthony Fisher has assembled other citations from many medical and biological textbooks, all of which underscore the scientific consensus that “the human embryo is a genetically human, discrete and an alive unit, organically single and individual, with a self-contained power to organise his or her own growth, multiplication and differentiation in a way that ordinarily leads to a human adult.”<sup>58</sup> R. Yanagimachi begins his essay on “Mammalian Fertilization” with the statement: “Fertilization in mammals normally represents the beginning of life for a new individual.”<sup>59</sup>

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<sup>55</sup> Sharon Detrick. *op. cit.* n 29, 109.

<sup>56</sup> Michel Meslin, “Religious traditions and the Human Person”, in *Concepts of Person in Religion and Thought*, eds. Hans G. Kippenberg, Yme B. Kuiper, and Andy F. Sanders, (Berlin: Mouton de Gruyter, 1990), 67.

<sup>57</sup> T.W. Sadler, *Langman’s Medical Embryology Sixth Edition*, (Baltimore: Williams & Wilkins, 1990), 30.

<sup>58</sup> Anthony Fisher, *IVF The Critical Issues*, (Melbourne: Collins Dove, 1989), 133. Fisher refers to W. J. Hamilton and H.W. Mossman, *Human Embryology 4th Edition*, (Cambridge: Plenum, 1972); L.B. Arey, *Developmental Anatomy 7th Edition*, (Philadelphia: Saunders, 1975); B. Alberts et al, *Molecular Biology of the Cell*, (New York: Garland, 1983); K.L. Moore, *Before We Are Born*, (Philadelphia: Saunders, 1983); L. Nilsson et al, *A Child Is Born*, (London: Faber & Faber, 1977).

<sup>59</sup> R. Yanagimachi, “Mammalian fertilization”, *The Physiology of Reproduction*, eds. E. Knobil, J. Neill et al, (New York: Raven Press, 1988), 135.

On the basis, then, of this standard text book definition of fertilisation it may reasonably be concluded that the embryo<sup>60</sup> is a “new individual”, genetically different from his or her parents, and containing all the necessary genetic information for further development. This embryological understanding of the beginning of human life has been expressed in various formulations. The Senate Select Committee On The Human Embryo Experimentation Bill 1985 [Australia] defined the human embryo:

The Committee, in adopting the usage ‘embryo’ to describe the fertilised ovum and succeeding stages up to the observation of human form, means to speak of genetically new human life organised as a distinct entity oriented towards further development.<sup>61</sup>

The testimony of C.R. Austin that the “stage which marks the start of a person is a matter of opinion”<sup>62</sup> is matched by Roger Short’s contention that the benchmark fourteen days, for which he argued, was nevertheless “a prejudice” and “purely arbitrary”.<sup>63</sup>

Recent research also indicates the dynamic and purposive nature of the early human embryo which discounts any idea of the embryo being a “featureless bundle of cells”. Richard Gardner repeated some little known experiments from the 1980s and published his results in *Nature* on 4 July 2002. He was able to confirm that the human body is shaped at the moment of fertilisation, that the side of the microscopic embryo which will form the back and the head are not left to later development but are set out in the minutes and hours after the sperm and egg unite to form a new human being. “Rather than being a naïve sphere, it seems that a newly fertilized egg has a defined top-bottom axis that sets up the equivalent axis in the future embryo.” Reviewing this work H Pearson makes this observation: “What is clear is that developmental biologists will no longer dismiss early mammalian embryos as featureless bundles of cells – and that leaves them with work to do.”<sup>64</sup>

Furthermore, the directedness of early embryonic development is revealed by the fact that the early embryo produces a variety of substances for various signalling purposes. hCG is produced by the embryo soon after conception and then by the *syncytiotrophoblast* (part of the placental tissue). Its role is to maintain and stimulate the corpus luteum (left after the egg has been released), which produces progesterone and estrogens to maintain the pregnancy. There is also some suggestion that hCG may have an immunosuppressive role that prevents rejection of the embryo by the mother,

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<sup>60</sup> It is interesting to note that Langman’s Medical Embryology Sixth Edition does not use the term “pre-embryo”, a term which is meant to refer to the entity up to 14 days. The comparative lawyer Albin Eser has suggested that “the naive (speaking from a normative-theoretical perspective) and rather simplistic efforts to get rid of the basic value problem through terminological ‘degradation’ of the pre-implantation embryo to the status of ‘pre-embryo’ or even to simple ‘seed’ or ‘germ’ should be abandoned. Rather than prejudicing the value questions involved through conceptual-terminological game-playing it would be better to concentrate on the question that is lastly decisive: To what extent does or should a species-specific human (since originating from human gametes) new entity of life - i.e., at least genetically capable of achieving the full potential of a human being - possess sufficient value to make us unwilling to allow for total freedom of choice with respect to maintaining or destroying this life?” A. Eser, “Experiments with embryos: legal aspects in comparative perspective”, UK National Committee of Comparative Law 1987 Colloquium Legal Regulation of Reproductive Medicine (Cambridge) cited in Anthony Fisher, *op. cit.*, 173-174.

<sup>61</sup> *Human Embryo Experimentation In Australia*, Senate Select Committee On The Human Embryo Experimentation Bill 1986, (Canberra: Australian Government Printing Service, 1986), xiii.

<sup>62</sup> C.R. Austin, *Human Embryos*, (Oxford: Oxford University Press, 1989), 31.

<sup>63</sup> *Senate Select Committee on the Human Embryo Experimentation Bill 1985, Official Hansard Report, op. cit. n 61*, 2161-2162. Professor R.V. Short was Chairman, Working Party on Human Embryo Experimentation, Australian Academy of Science, Canberra, Australian Capital Territory.

<sup>64</sup> H Pearson, *Nature* 418, 14-15, 2002

although this is still the subject of research.<sup>65</sup> Early Pregnancy factor (EPF)<sup>66</sup> has been studied extensively in many species. It has been detected in the sera of women 2-7 days after ovulation and its role appears to be immunosuppressant<sup>67</sup>. In this study, the authors describe the detection of EPF as a possible “super early indicator of pregnancy”.

A certain amount of programmed cell death occurs in normal embryological development. However, the rate is much higher when embryos are cultured alone and separate from the maternal reproductive tract. This suggests that there are survival factors in the maternal reproductive tract that afford protection for the developing embryo from excess apoptosis. Furthermore, when *in vitro* embryos are cultured in groups rather than alone, the rate of apoptosis is likewise reduced, suggesting that embryos themselves may release some factors that protect against excess apoptosis. These factors may include growth factors including one called transforming growth factor- $\alpha$  (TGF- $\alpha$ ).<sup>68</sup>

Embryonic trophoblastic cells release a substance called Trophoblastin (oTP) which, like hCG, acts to maintain the corpus luteum. oTP is an interferon and may also act as a “local immunoregulatory defense molecule during the implantation period”.<sup>69</sup>

Platelet Activating Factor (PAF) “is produced and released by the embryos of all mammalian species studied to date. ... Released PAF causes a range of alterations in maternal physiology, including platelet activation, changes in oviductal, endometrial and maternal immune function. PAF also acts in an autocrine fashion as a trophic/survival factor for the early embryo.” This suggests that PAF released by the embryo is involved with preparation for implantation and protection for the embryo prior to implantation.<sup>70</sup>

The hormone relaxin was identified over 75 years ago. Besides its location in many other systems, it is known to be released by the embryo. However, its role is unclear, although it has been speculated that relaxin may act as an implantation signal before attachment takes place.<sup>71</sup>

There is a widespread assumption in the public debate and commonly among philosophers that the early human embryo is undifferentiated or unspecialised and therefore less human and with diminished moral worth. But the science challenges that view revealing that, in fact, the early human embryo specialises in complex, directed, and precise ways from the moment of sperm penetration of the egg and onwards. The human embryo acts for his or her own survival, signalling the mother of his or presence, modifying the mother’s biological systems at the molecular level to ensure survival, and

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<sup>65</sup> C. Richard Parker, Endocrinology of Pregnancy In: *Essential Reproductive Medicine*, Eds. Bruce C. Carr, Richard E. Blackwell & Ricardo Azziz, McGraw-Hill, New York, 2005, 128-130

<sup>66</sup> Mesroglu et al., Early pregnancy factor as a marker for the earliest stages of pregnancy in infertile women. *Human Reproduction* 3(1):113-115, 1988.

<sup>67</sup> X.G. Fan & Z.Q. Zheng, A study of early pregnancy factor activity in preimplantation. *Am. J. Reprod. Immunol.* 37(5):359-64, 1997

<sup>68</sup> Keith E. Latham & Richard M. Schultz, Preimplantation embryo development. In: *Reproductive Medicine. Molecular, Genetic and Cellular Fundamentals*. Ed. Bart C.J.M. Fauser, Parthenon, New York, 2003, 435.

<sup>69</sup> Gérard Chaouat & Elisabeth Menu, Immunology of Pregnancy. In: *Reproduction in Mammals and Man*. Eds. Charles Thibault, Marie-Claire Levasseur & Ronald Henry Fraser Hunter, Ellipses, Paris, 1993, 463

<sup>70</sup> C. O’Neill, The role of paf in embryo physiology. *Human Reprod Update* 11(3):215-128, 2005

<sup>71</sup> Eric S. Hayes, Biology of primate relaxin: A paracrine signal in early pregnancy? *Reproductive Biology and Endocrinology* 2:36, 2004

at the same time engaging in a continuous process of development. Fertilisation, implantation, and birth are simply particular stages in the human life cycle.

There is, then, every good scientific reason to conclude that the early human embryo is one of us, a member of the human family. So while there is no agreed basis for dividing up the human family into persons and nonpersons, there is an agreement from science that from fertilisation we all share a common humanity, that we are all members of the “human family”, to use the words of the *Universal Declaration of Human Rights 1948*. This latter point has been conceded by strong supporters of the ‘pro-choice’ position, especially Peter Singer, Michael Tooley and Helga Kuhse. It is just that they do not believe that being a member of the human family is a sufficient reason to conclude that an individual has by reason of that fact alone the right to life. And history shows that attempts to disenfranchise some members of the human family from moral consideration has led to justifications of intolerable abuses of human rights including slavery, genocide, abortion, infanticide, non-voluntary sterilisation, non-voluntary and voluntary euthanasia of other human beings. It was precisely in reaction to these abuses of human rights that the United Nations was brought into being on the basis of its Charter.

In the current climate we need to appreciate that fashionable philosophical notions of human personhood which are being used to justify abortion are also being used to justify the killings of children up to three to *six months after birth*<sup>72</sup>. If the killing of a child *after birth* is considered to be in violation of our human rights obligations, then the killing of the child *before birth* on the same philosophical justification must also be considered a violation of that child’s right to life.

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#### DENYING PERSONHOOD USED TO JUSTIFY ABUSE OF HUMAN RIGHTS

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The eugenic impulse to kill fetuses and other members of the human family who have disabilities is still in evidence in the twenty first century<sup>73</sup> and is used together with a utilitarian moral philosophy to deny personhood, and therefore moral consideration, to those classes of human beings who constitute a burden to the community, a burden which it is often unwilling to accept. Abortion can then be advanced to parents who may feel unable to cope with that burden alone and without the support of the wider community.

There is a connection between the self-interest of communities and the line to be drawn between persons and non-persons. That self-interest may be driven by eugenic, economic, social and political factors such that those a society wishes to exclude are deemed to be non-persons. History is replete with examples of this phenomenon. Thus could Chief Justice Taney of the United States Supreme Court exclude Dred Scott (a

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<sup>72</sup> Michael Tooley, *Abortion and Infanticide*, (Oxford: Clarendon Press, 1983). Tooley argues that a child becomes a “quasi-person” at around three months after which time it might be thought wrong to kill the baby (see his conclusions, p. 424). Cf Helga Kuhse and Peter Singer, *Should the Baby Live?*, (Oxford: Oxford University Press, 1985) especially p. 131 where the authors describe Tooley’s argument as “basically sound”. For a refutation of Tooley see Bernard Williams, *Ethics and the Limits of Philosophy*, (London: Fontana Press/Collins, 1985), 114-115.

<sup>73</sup> It was also prevalent in the late nineteenth century and throughout the twentieth century. For example, “Eugenics aims to secure better babies.” (Margaret Sanger, *Medical Journalists Advocate Birth Control*, Birth Control Review, Volume II, Number 10 (October 1918), 4) and “. . . we need not more of the fit, but fewer of the unfit . . . Is it not time to protect ourselves and our children and our children’s children? The propagation of the degenerate, the imbecile, the feeble minded, should be prevented.” (Margaret Sanger, *Birth Control, Past, Present and Future*, Birth Control Review, Volume V, Number 8 (August 1921), 19.

Negro slave) from personhood,<sup>74</sup> could the Egyptian Pharaohs exclude the Israelites, could Hitler exclude Jews, Gypsies, the ‘degenerate’ and the asocials from personhood,<sup>75</sup> could the British tolerate the slave trade, and could some European Australians liquidate and repress the Aborigines.

The notion that certain classes of persons are non-persons is a not uncommon opinion. The *Canada Indian Act 1880* states that “the term person means an individual other than an Indian”.

In the *Canada Franchise Act 1885*, we learn that “[a person] is a male person, including an Indian and excluding a person of Mongolian or Chinese Race.” Here is progress; in only five years Indians were upgraded to personhood and Asians are called persons in the very clause denying them personhood. By 1925, Canadian legislation had determined that all races-and women-are persons. Changes in Canada continued. By 1980, the government had recognized the Inuit, or Eskimos, as Indigenous Peoples with entitlement to lands. And the nation had developed a cadre of advocates dedicated to the empowerment of the disadvantaged.<sup>76</sup>

The *Universal Declaration of Human Rights 1948*, following the United Nations Charter, rejects discrimination against any members of the “human family”, and requires the “recognition of the inherent dignity and of the equal and inalienable rights of *all* members of the human family” (Emphasis added). As far as human personhood is concerned, the Declaration does not allow discrimination on the basis of human personhood. Article 2 asserts firmly that “*everyone* is entitled to all the rights and freedoms set forth in this declaration, *without distinction of any kind . . .*” (Emphasis added) and Article 30 commands that “nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.” Article 6 specifically deals with the matter of the division of human beings into persons and non-persons in these terms:

Everyone has the right to recognition everywhere as a person before the law.<sup>77</sup>

It is true that the practice of abortion is widespread and, in many countries, legal at least in some circumstances. There is, however, a mismatch between the human rights requirements of international law and the practice of individuals and nation states in the same way that there is a mismatch between the rights of women and the practice of individuals and nation states. It is interesting to note that, in their discussion of the common law tradition that a human being is not a person until birth, Duxbury and Ward make no reference to article 6 of the UDHR or article 16 of the ICCPR. That is, the very provisions in international which most call into account current Australian (and other Western) legal notions of personhood. One wonders why.

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<sup>74</sup> “Prior to the American Civil War and the antislavery amendments, such decisions as *Dred Scott v. Sandford* relegated slaves to the legal status of nonpersons in spite of clear biological evidence of their humanity.” John Warwick Montgomery, “Abortion and the Law: Three Clarifications”, in *New Perspectives on Human Abortion*, eds. Thomas W. Hilgers, Dennis J. Horan, and David Mall, (Frederick, Maryland: University Publications of America, Inc., 1981), 284. Cf. *Dred Scott v. Sandford*, 19 Howard 393 (1857) and the *Slavery Convention 1927*, Article 1.

<sup>75</sup> See RN Proctor, *Racial Hygiene: medicine under the Nazis* (Cambridge, MA: Harvard University Press, 1988); also RJ Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York, Basic Books, 1986).

<sup>76</sup> Hiram Caton and John I. Fleming, “Afterword: An Allegory”, in Hiram Caton and John I. Fleming eds., *Proceedings of the Bioethics Symposium: Limits on Care of the Ninth World Congress on Intellectual Disability*, (Canberra: National Council for Intellectual Disability, 1992), 67-68.

<sup>77</sup> Cf The *International Covenant on Civil and Political Rights 1966*, Article 16.

If the human rights of the unborn child are to be upheld in law there will need to be with it an acceptance of the obligation to provide the social, economic, and moral support that women need when faced with an unwanted pregnancy. The hard cases need to be seen as hard cases against the background of the inalienable right of the fetus to live (a right that the fetus shares with his or her fellow human beings) and the rights of everyone (in this context especially women) “to a standard of living adequate for the health and well being of himself and of his family . . . and the right to security in the event of unemployment . . . or other lack of livelihood in circumstances beyond his control.” And further,

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.<sup>78</sup>

Article 6(1) of the *International Covenant on Civil and Political Rights 1966* guarantees that “every human being has the inherent right to life.” The right to life is the only right in the Covenant that is *expressly* stated to be “inherent” to everyone. The Human Rights Committee<sup>79</sup> has described it as the “the supreme right.”<sup>80</sup> It is also one of the rights which cannot be derogated from,<sup>81</sup> even in a “time of public emergency which threatens the life of the nation.”<sup>82</sup> In its General Comment,<sup>83</sup> on Article 6, the Human Rights Committee has:

“. . . noted that quite often the information given concerning article 6 has been limited to only one or other aspect of this right. *It is a right which should not be interpreted narrowly.*”<sup>84</sup> And the “*expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.*”<sup>85</sup> (Emphasis added.)

That international law does envisage human rights protection for the unborn can be seen in the provision dealing with capital punishment in the *International Covenant on Civil and Political Rights 1966*:

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<sup>78</sup> *Universal Declaration of Human Right 1948*, Article 25.

<sup>79</sup> The Human Rights Committee is established under the *International Covenant on Civil and Political Rights 1966* to implement the Covenant, see Part IV of the Covenant. Mr Ganji, a former Human Rights Committee member, has provided useful insight to the Committee’s approach concerning Article 6. He has observed:

In order to exercise any rights with which the Committee was concerned an individual had to exist, and in order to exist, he must die neither before nor after birth and he must receive a minimum of food, education, health care, housing and clothing. There was undoubtedly an interconnexion between the right to life, the requirements of which were material and the right to exercise all other freedoms. [SR 67 pr. 78. Comments made during consideration of a report by the German Democratic Republic.]

<sup>80</sup> GC 7(16), Doc. A/37/40, 94. Also in Doc. C/21/Add. I.

<sup>81</sup> *International Covenant on Civil and Political Rights 1966*, Article 4(2).

<sup>82</sup> *International Covenant on Civil and Political Rights 1966*, Article 4(1).

<sup>83</sup> *International Covenant on Civil and Political Rights 1966*, Article 40(4).

<sup>84</sup> Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994) § 1.

<sup>85</sup> *Id.* at § 5.

Sentence of death shall not be imposed for crimes committed by persons *below eighteen years of age and shall not be carried out on pregnant women.*<sup>86</sup> (Emphasis added)

In this provision, a state may execute a woman only when she is not pregnant. The innocent are not to die along with the guilty.<sup>87</sup> Indeed the *travaux préparatoires* of the *International Covenant on Civil and Political Rights 1966* makes this abundantly clear:

The principal reason for providing in paragraph 4 [now Article 6(5)] of the original text that the death sentence should not be carried out on pregnant women was to save the life of an innocent unborn child.<sup>88</sup>

Here is an explicit recognition in international law that the human rights enjoyed by all other members of the human family are also to be enjoyed by the unborn. This fundamentally humane principle was reflected in the common law in England and Australia when each country had the death penalty.<sup>89</sup> Again, Duxbury and Ward make no reference to this provision. If this account of international law is wrong then it behoves those who deny human rights to some human beings to deal with the provisions of international law that seem to be saying that the unborn do have human rights.

Abortion advocates, however, have asserted that when Article 1 of the *Universal Declaration of Human Rights 1948* says that “all human beings are born free and equal in dignity and rights”, this means that “persons are recognized in international law, as human beings having been born.”<sup>90</sup> This deduction is without merit in the light of the detailed arguments we have already adduced. It cannot, in good faith, reasonably be deduced from Article 1, read in the context of the whole of the document and in the light of the Covenants which have further specified human rights, that unborn human beings are not persons with rights. The natural meaning of the text, in the light of the

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<sup>86</sup> Article 6(5) of the *International Covenant on Civil and Political Rights 1966*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. See also the United Nations *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty 1984*, Article 3.

<sup>87</sup> Marc J. Bossuyt in the *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, (Martinus Nijhoff Publishers, 1987) observes:

Commission on Human Rights, 5th Session (1949), 6th Session (1950), 8th Session (1952)

A/2929, Chapt. VI, §10: “It would seem that the intention of paragraph 4 [5] which was inspired by humanitarian considerations and by consideration for the interests of the unborn child, was that the death sentence, if it concerned a pregnant woman, should not be carried out at all. It was pointed out, however, that the provision, in its present formulation, might be interpreted as applying solely to the period preceding childbirth [E/CN.4/SR.311, p.7 (B)].”

Third Committee, 12th Session (1957)

A/3764, §118 [actually §117]: “There was some discussion regarding the meaning of paragraph 4 [5] of the draft of the Commission on Human Rights (E/2573, annex I B), which provided that the sentence of death should not be carried out on a pregnant woman. A number of representatives were of the opinion that the clause sought to prevent the carrying out of the sentence of death before the child was born [A/C.3/SR.809, §27 (CHI); A/C.3/SR.810, §2 (B), §7 (IR); A/C.3/SR.812, §32 (RI); A/C.3/SR.814, §42 (CDN)]. However, other (sic) thought that the death sentence should not be carried out at all if it concerned a pregnant woman [A/C.3/SR.810, §14 (PE); A/C.3/SR.811, §24 (SA)]. The normal development of the unborn child might be affected if the mother were to live in constant fear that, after the birth of her child, the death sentence would be carried out.”

<sup>88</sup> *Ibid.*, §118, A/3764.

<sup>89</sup> In *R v. Wycherley* 173 ER 486 the accused woman had been found guilty of murder and was sentenced to death. When asked whether she had anything to stay the execution she replied: “I am with child now.” A jury was empanelled and found that the woman was *not* pregnant. Nevertheless, the case highlights that the death penalty was stayed pending the resolution of the issue and logically would have been stayed until at least the birth had she been found to be pregnant.

<sup>90</sup> International Planned Parenthood Federation, *IPPF Charter on Sexual and Reproductive Rights*, 12.

other references in the relevant provisions of international law, is that human beings without distinction are born free and equal in dignity and rights because as members of the human family they have had that status from the beginning. The interpretation offered by abortion advocates is about as helpful as deducing from a statement that a baby is born human that it was not human before birth.

Lastly, the use of abortion as a means of genocide is raised in the *Convention on the Prevention and Punishment of the Crime of Genocide 1948*.<sup>91</sup> In Article II the Convention defines the “odious scourge”<sup>92</sup> of genocide to include “killing members of the group” and “imposing measures intended to prevent births within the group.”<sup>93</sup> The latter inclusion explicitly recognises the right to life of the unborn. In the same article genocide is conceived in terms of an intention “to destroy, in whole or in part, a national, ethnical, racial or religious group”. The question is, to what extent, if at all, does this apply to the practice of abortion in contemporary society?

Much depends on what should be understood by the term “in whole or in part of a national group”. The moral justification most frequently advanced for abortion is that, as a group or category of human beings, the unborn are not persons and accordingly have no right to life to protect. But, as we have already argued, the unborn are part of the human family. And the human family is itself broken down into nation states or groups. The unborn are, then, a sub-group of a national group. If the unborn, contrary to Article 6 of the *Universal Declaration of Human Rights 1948* and Articles 6 and 16 of the *International Covenant on Civil and Political Rights 1966*, are defined, as a group, as non-persons and therefore beyond moral and legal protection, does the crime of genocide apply to those countries that fail to give protection to that part of the national group?

Even more obviously, “disabled persons” are recognised in international law as a group which forms part of a nation.<sup>94</sup> These persons “have the same civil and political rights as other human beings”<sup>95</sup> and must be “protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.”<sup>96</sup> If it is legally permissible to end the life of unborn human beings with disabilities, and medical tests

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<sup>91</sup> 78 U.N.T.S. 277, the Convention entered into force on 12 January 1951. The Convention was signed by Australia on 11 December 1948 and ratified on 8 July 1949. Australia has approved and repeated the *Convention on the Prevention and Punishment of the Crime of Genocide 1948* in the *Genocide Convention Act 1949* (Cth.). However, the Act does not implement the Convention into municipal law, see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287, 298, 304, 315 and *Krueger v The Commonwealth*, unreported, High Court of Australia, 31 July 1997. Compare the comments of Justice Evatt who has argued:

Quite apart from conventions that Australia ratifies, some parts of that international law can, as a matter of common law, apply in Australia without any further action on the part of anyone. I think the recent High Court case of *Teoh* may have referred obliquely to this, but it could have said more about the fact that under common law, customary rules, and particularly principles of human rights, such as the principle against genocide and so on, are part of customary international law. Naturally as such, they can be overruled by legislation, as any part of the common law can. But we should not think of international law as being an entirely separate thing from the law of Australia. Some parts of it we would recognise. [Report by the Senate Legal and Constitutional References Committee, *Trick or Treaty?*, Commonwealth Power to Make and Implement Treaties, November 1995 at §6.6, see also §3.33.]

<sup>92</sup> *Convention on the Prevention and Punishment of the Crime of Genocide 1948*, Preamble.

<sup>93</sup> In *Thorpe v The Commonwealth* [No 3], unreported, High Court of Australia, 12 June 1997, Kirby J. observed “The definition of “genocide” in the [Genocide] Convention is very broad.”

<sup>94</sup> *Declaration on the Rights of Disabled Persons 1975*, proclaimed by the General Assembly Resolution 3447 (XXX) of 9 December 1975. The Declaration is attached as Schedule 5 to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth.).

<sup>95</sup> *Declaration on the Rights of Disabled Persons 1975*, Article 4.

<sup>96</sup> *Declaration on the Rights of Disabled Persons 1975*, Article 10.

are routinely applied to pregnant women to discover any fetal abnormality, would this not amount to the crime of genocide against the disabled unborn?

The Genocide Convention speaks of “imposing measures intended to prevent births within the group.” Does this mean that the Genocide Convention is limited only to cases where abortion is imposed *on women*? The answer to this question is no. Since the Genocide Convention defines genocide in terms of “killing members of the group”, since “measures intended to prevent births” clearly includes induced abortion, and since abortion involves the intentional killing of the unborn, then the Convention’s reference to “imposing measures” cannot be interpreted in a way that would limit its application to women who are forcibly aborted. And in any case, the Convention’s definition of genocide includes “killing members of the group”. This is sufficient by itself to raise serious questions as to whether the practice of abortion is genocide.

What often makes a group vulnerable to genocide is the denial of human rights, precisely what has occurred to the unborn in Australia and in many other countries.

The questions that supporters of legal abortion need to address, then, are these: how is it not genocide to define some members of the human family as non-persons, thereby allowing them to be directly and intentionally killed by induced abortion? How is it not genocide to legally prescribe and actively promote the induced abortion of human beings on the grounds of their actual or perceived disability? If it could be shown that homosexuality was genetically influenced, and homosexuality was thought of as a disability, would the routine abortion of homosexuals be considered the crime of genocide against homosexuals?

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## CONCLUSION

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The member nations of the United Nations are committed to the promotion of “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”<sup>97</sup> by way of a pledge.

All members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.<sup>98</sup>

What we have here is the idea of a *consensus gentium*, an agreement among the nations, consent to be bound by certain values expressed as human rights. This doctrine of consent involves the idea that the “basis of obligation of all international law, and not merely of treaties, is the consent of States.”<sup>99</sup>

Australia, like all the other nations of the world, has bound itself to membership of the United Nations, to the United Nations Charter, to the *Universal Declaration of Human Rights 1948*, the *Convention on the Prevention and Punishment of the Crime of Genocide 1948*, the *International Covenant on Civil and Political Rights 1966*, the *Convention on the Rights of the Child 1989*, and the *Declaration of the Rights of the Child 1959*. **These documents contain strong commitments to the protection of human rights of all without any distinction whatsoever.** Discrimination because of

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<sup>97</sup> United Nations Charter, Article 55(c).

<sup>98</sup> United Nations Charter, Article 56.

<sup>99</sup> *Parry and Grant Encyclopaedic Dictionary of International Law*, eds. Professor Clive Parry *et al.* (New York: Oceana Publications, Inc., 1986), 72.

age, personhood, status and disability are all examples of unjust discrimination, including when they are applied to unborn children.

There are, of course other important obligations under international law which, as we have already suggested, will influence municipal law in many other areas of the law. However, it is hard to imagine a more neglected area of human rights discussion, from the perspective of international law, than the rights of the unborn.

What I find particularly disappointing is the signal failure of the academy to honestly come to grips with and deal with the arguments set out in this chapter. The paper was originally published nearly 10 years ago in a reputable journal but there seems to have been little reaction to its findings. It seems that people want to read documents through the prism of their own ideological commitments or, worse, simply ignore passages which seem to challenge popular pro-choice rhetoric.

For too long nations, committees of inquiry, and academics failed to discuss these issues which they are obliged to discuss and taking full account of the provisions which challenge the widespread discrimination against the unborn. Any domestic cases involving the unborn including abortion, succession, medical negligence or the criminal law must have regard to our obligations under international law. Put succinctly, there is a case to be heard for the unborn based on Australia's existing human rights obligations, obligations which apply to all member states of the United Nations. Now is the time to adjust practice to principle rather than continuing to compromise principles to bring "principle" into line with practice.

#### About the author

Dr John Fleming, as President of Campion College, works with young people and has presented regular popular commercial radio talkback programs over many years, principally in Adelaide, South Australia. He is also a bioethicist and widely published in that field. He was a foundational member of UNESCO's International Bioethics Committee, which produced the Universal Declaration on the Human Genome and Human Rights. He is a member of the Vatican's Pontifical Academy for Life, the Gene Technology Ethics Committee (Commonwealth of Australia), and a member of the Council of the National Museum of Australia (Commonwealth of Australia). He has previously served the South Australian Parliament as a member of the SA Council on Reproductive Technology, and was a member of the Medical Practitioners Professional Conduct Tribunal (District Court, SA). Dr Fleming is a Catholic priest, married with three adult children.