Do these rights apply to the unborn?

Response to question on notice
Senate Standing Committee on Legal and Constitutional Affairs Human Rights Bill Inquiry

Senator BARNETT—My last area for questioning relates to something that you hold very firmly, and that is the right to life. I have previously asked the question in this committee of an earlier witness, 'Do these rights apply to the unborn?' and the witness was not able to answer that question. But in your submission you have outlined very strongly your view that it does apply to the unborn. Do you want to just summarise the reasons for that?

Secondly, do you have third-party support? Are there other people who hold a view similar to your own? I am happy for you to take that on notice because, rather than just you having this view, I would like to know whether there are other people who hold the view that this human right does apply not just to the born, or children after birth, but also to the unborn.

Response:

Senator, the answer to "Do human rights apply to the unborn?" is "Yes" and the evidence is incontrovertible. Any view to the contrary cannot have taken properly into account the definite rules and principles set down to resolve any doubts about meaning. The answer to this question must take full account of both

(a) the historical records of what was agreed in the seven Human Rights Conventions; and
(b) the defining principles of human rights as set out in the Universal Declaration and codified in law in these Conventions.

Views are invalid if they contradict the historical facts

- that the Universal Declaration recognized *the need for…special safeguards and care, including legal protection before as well as after birth*[1]
- that **these rights belong to "all members of the human family"[2] and especially to all children "without any exception whatsoever"[3] and "without discrimination of any kind"[4];** and
- that the International Covenant on Civil and Political Rights confirms that for all members of the human family, every human being,

[1] UN Declaration on the Rights of the Child, Preambular paragraphs III & IV

[2] Inherency and inalienability are core values at the heart of the International Bill of Rights:
"…recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."
This appears in the Preamble of all three instruments and was characterized by the Commission of Human Rights as "a statement of general principle which was independent of the existence of the United Nations and had an intrinsic value of its own." GAOR, A/2929 Chapter III para. 4.

[3] UN Declaration on the Rights of the Child, Principle 1: "Every child without any exception whatsoever is entitled to these rights …"

[4] UN Convention on the Rights of the Child, Article 2.

> including the unborn child[5], has the inherent right to life, to be protected by law from arbitrary deprivation[6], and that this right is non-derogable.[7]

Views are also invalid if they abrogate any of the defining principles of human rights—inclusion, inherency, inalienability, equality and indivisibility. Given these most basic defining principles as the agreed philosophical foundation of international human rights Conventions, it would seem more useful perhaps to ask the question "What evidence do you have that the unborn child was excluded from human rights protection?"

Human rights for the unborn children, having been recognized right from the beginning cannot now be de-recognized. They certainly can't be de-recognized by re-interpretation through a 21st century ideological bias seeking to justify current laws that accommodate the appalling notion that mothers have ownership and disposal rights over their unborn children. To claim that the international community, in drawing up the Convention on the Rights of the Child, excluded the child before birth from the human rights protections of the Convention is to ignore the historical roots of the great mid-century human rights initiative that brought into being the International Bill of Rights and led on to the Convention. It is to intimate that, on the original commitment to protect the unborn child, the Convention broke with the Bill of Rights in order to resurrect and reinstate Nazi concepts condemned by the international community at Nuremberg: "…protection of the law was denied to the unborn children...Abortion was encouraged…" [8] Such a regression is inconceivable—certainly, it remains entirely unsubstantiated in the drafting records.

Nor can human rights protection originally awarded unborn children in the foundation human rights instruments be deleted today by pointing to current liberal abortion legislation or to widespread cultural practices that now treat unborn children as though they have no rights.

The principles of inclusion, indivisibility, non-discrimination and the inherent and inalienable dignity of all members of the human family are binding on all individual States. These core principles can neither be abandoned nor made optional by leaving decisions as to the form and scope of legal protection of the child before birth to individual States, not even in order to accommodate existing individual State's laws that allow for abortion of 'unwanted' children before birth. This discretionary open-endedness purported to have been conceded contravenes an important international human rights legal principle that no permissible limitation on a right may entail the total denial of that right:

> …the exercise of a right may be regulated, limited, or conditioned, but in no circumstances may it be converted into a mere illusion on the pretext of its limitation.[9]

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[5] International Covenant on Civil and Political Rights (ICCPR), Article 6(5).

[6] International Covenant on Civil and Political Rights (ICCPR), Article 6(1).

[7] ICCPR Article 4(2).

[8] *Nuremberg Trials Record*: "The RuSHA Case", March 1948, Volume IV, p 1077. Available at: http://www.mazal.org/archive/nmt/04a/NMT04-T1076.htm

[9] Inter-American Court of Human Rights *Annual Report 2002*, IV of Chapter VI, para. 99.

The raw statistics measuring some forty to fifty million unborn children aborted each year under the domestic laws of individual States add up to "a mere illusion" of human rights protection for the child before birth—a mockery of **States parties' obligation under the Convention on the Rights of the Child to provide "special safeguards and care including appropriate legal protection before as well as after birth."**

The notion of abrogating decisions as to the form and scope of legal protection of the child before birth to individual States in order to accommodate a State Party's internal laws which make liberal allowances for aborting unwanted children also contravenes another important international human rights principle. Article 27 of the Vienna Convention on the Law of Treaties provides:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

It is a cruel irony that the main thrust of the 20th century human rights movement was precisely to eliminate "provisions of internal law" that made convenient concessions for various degrees of human rights abuses such as slavery, child labor, child marriage and child soldiers. The object and purpose of the Conventions was always to universalize the rule of law on human rights protections. According to Johannes Morsink, in his study of the original intent of the drafters of the Universal Declaration principles, they indeed recognize human rights as "logically antecedent to the rights spelled out in various systems of positive law" and that human rights "are seen as inherent and inalienable… and thus are held independent of the state". [10] This continued to be acknowledged at the 5th Session (1949) and the 6th Session (1950) of the Commission on Human Rights, as the commissioners drafted the codification of the Declaration rights into the Conventions:

> …it was argued that the rights of man appertained to him as a human being and could not be alienated and that they constituted a law anterior and superior to the positive law of civil society.[11]

It is historical fact that the whole architecture of modern international human rights law is deontologically based – that means **based on human rights principles that are permanent and immutable**. Human rights protection was created most carefully to ensure "inner consistency", according to Charles Malik, eminent philosopher, President of the Economic and Social Council and Rapporteur of the Commission on Human Rights in 1948. Withdrawal of legal protection of the human rights of unborn children and destruction of their human rights recognized by the Universal Declaration is not permissible—under any circumstances. This is made clear in Article 30:

> 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.

Charles Malik called the last article of the Universal Declaration "the article of inner consistency":

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[10] Morsink, Johannes, *The Universal Declaration: Origins, Drafting and Intent*, Philadelphia: University of Pennsylvania Press, 1999, pp.333-4.

[11] United Nations, *Official Records of the General Assembly* (GAOR) , *Tenth Session, Annexes*, (1955) A/2929 Chapter III para. 6.

> …it states that nothing should flow from this Declaration that can contradict or nullify its effect. Thus no person aiming at the destruction of the fundamental rights can take cover under any of the freedoms granted by this Declaration…[12]

International human rights protection is not "a patchwork quilt" but rather a fire blanket woven on principles that can be deepened and strengthened over time to give more protection but never ruptured to give less protection to any members of the human family. You can't cut out human rights protection for the unborn child (as attempted by the ACT Human Rights Act 2004, or cut out conscience rights protections for doctors who refuse to abort children or to refer them to be aborted (as the Victorian Bill of Rights has attempted) and patch the holes with a 'new' right to abortion for women. To do so is to try to move the whole of modern international human rights law across to a different philosophical basis, utilitarianism or consequentialism, a system in which expediency trumps principles such as indivisibility, inclusion and inherency.

In ratifying the *Vienna Convention on the Law of Treaties*, the Australian parliament agreed to abide by Article 31 General rule of interpretation of the Vienna Convention on the Law of Treaties:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, its preamble…

Also Article 32 Supplementary means of interpretation is relevant:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
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> (b) leads to a result which is manifestly absurd or unreasonable.

So this Senate Committee will of course test the views submitted to you against these rules of interpretation. For example, the Committee may test and reject:

Any view that denies "the ordinary meaning" of "before as well as after birth"

- that denies irrationally 'the ordinary meaning' of the terms in "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…". It is not valid to replace the international human rights legal terms 'child…before birth' with a medical textbook term 'the foetus' and then claim that 'the foetus' has no right to legal protection. Such a device is deployed illegitimately to contravene one of the founding principles of modern international human rights law—that unborn children are entitled to the protection of the law. To exclude the child before birth from the protection of human rights law is to return to Nazi concepts condemned by the international community at Nuremberg:

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[12] Malik, Charles, "International Bill of Human Rights", *United Nations Bulletin*, July, 1948.

"…protection of the law was denied to the unborn children…"[13]

As one of the Nuremberg judgments, this principle was mandated to be codified in the *International Bill of Rights*.[14]

Any view that ignores evidence of clear and consistent intention to protect "unborn children" in the preparatory work of the treaty

- that claims falsely that Article 6 of the ICCPR and Article 6 of the Convention on the Rights of the Child do not protect the rights of the unborn child because they are 'deliberately silent' on when life commences and when protection of life commences for the unborn child. **Recourse to supplementary means of interpretation, including the preparatory work of the treaty furnishes not 'silence' but conclusive evidence that the right to life of the unborn child is to be protected from the State's first knowledge of the child's existence.** Marc Bossuyt's scholarly work *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht, Martinus Nijhoff Publishers, 1987) provides a substantial historical record. Careful reading of Bossuyt's history reveals that there were absolutely no indications that the drafters in removing "from the moment of conception" were completely removing all protection of the right to life of the unborn child until after birth. The only two objections to "from the moment of conception" were very limited and practical ones:

  That it was impossible for the State to determine the moment of conception and hence, to undertake to protect life from that moment;[15] and

  That the proposed clause would involve the question of the rights and duties of the medical profession in different countries where legislation on the subject was based on different principles.[16]

  The first problem, as pointed out above in para 11 of my Submission, was addressed effectively in ICCPR Article 6(5) prohibiting execution of pregnant women, where it was acknowledged that the child, from the

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[13] *Nuremberg Trials Record*: "The RuSHA Case", March 1948, Volume IV, p 1077. Available at : http://www.mazal.org/archive/nmt/04a/NMT04-T1076.htm.

[14] UN Resolution 95(1): Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal. Resolution 95 (1) of the United Nations General Assembly**,** 11 December 1946. The UN committee on the codification of international law was directed to establish a general codification of "the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal". These became the foundation of modern international human rights law.

[15] A/C 3/SR.817 para. 37.

[16] A/C. 3/SR 815 para. 37; and A/C.3/SR.818 para. 13.

State's first knowledge of that child's existence (if not *precisely* from the moment of conception), is to be protected.

When the second practical obstacle to protecting the right to life from the moment of conception was raised by the USSR and Pakistan, it was given short shrift. It was seen as less than convincing in the light of the fact that the World Medical Association seemed to have had no difficulty in getting international agreement from doctors in all parts of the world across many different jurisdictions on the need to protect life from the moment of conception. The Geneva Declaration (1948) was agreed by the World Medical Association (an association of national medical bodies) only three months before the UN General Assembly adopted the Universal Declaration:

> I will maintain the utmost respect for human life from the time of conception, even under threat; I will not use my medical knowledge contrary to the laws of humanity.

The concept of a duty to protect the child before birth was well established and included a solemn duty to maintain respect for human life "from the time of conception" and to protect human life "from the time of conception…according to the laws of humanity".

This promise was reaffirmed *verbatim* by the World Medical Association in the Declaration of Geneva (1968), thus verifying that from three months before the Universal Declaration until two years after the ICCPR, this understanding of human rights to include the child before birth ("from the time of conception" if not from the exact moment of conception) was indeed universally established and agreed.

Any view that misreads "everyone" as excluding every group of human beings not mentioned specifically by name

- that argues from the fact that the term "from the moment of conception" was dropped from the final text of Article 6 of the *ICCPR*, that human rights begin "only from birth", another term dropped from the text.[17] Recourse to supplementary means of interpretation, including the preparatory work of the treaty reveals that 'persons from the moment of conception', along with 'incurables', 'mental defectives', 'the insane' and even 'women' were all deleted for the very good reason of the stated intention of the drafters to keep to the broadest, simplest expression of the principle in order to produce a more concise text.[18] Peter Heyward, the

[17] For assessment and refutation of these theories, see Rita Joseph: *"Human Rights and the Unborn Child"* (Leiden & Boston, Martinus Nijhoff Publishers, 2009) Chapter 3: "Fundamentals of the Universal Declaration's Human Rights Protection", pp. 31-46

[18] See Rita Joseph:*"Human Rights and the Unborn Child"* (Leiden & Boston, Martinus Nijhoff Publishers, 2009) Chapter 6:The Inaugural human Right—To Be Born Free and Equal, pp.47-62

Australian member of the drafting team that enunciated the first principles of the Universal Declaration, affirmed that **their intention in the deliberate use of the terms "every person" or "everyone" throughout the Declaration was to extend the prohibition of discrimination in the application of every human right in the Declaration to every human being.**[19]

Any view that attempts to deny the significance of the Preamble to the Convention on the Rights of the Child

- that argues speciously (as in a recent letter to me from that the Office of International Law in the Attorney Generals Department)[20], that the Australian Government has no need to honour the principles and commitments made in the *Preamble* to the *Convention on the Rights of the Child* (CRC) on the grounds that "an obligation to apply the rights in the Convention to unborn children was not included in the operative articles of the CRC". The theory that preambular paragraphs do not entail legally binding obligations on States parties to a Convention is a direct contradiction of Article 31 General rule of interpretation of the Vienna Convention on the Law of Treaties:

  > 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
  > 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, its preamble…

  In other words, the operative provisions within the Convention on the Rights of the Child (i.e., in the text) shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context (i.e., in the context of its preamble in addition to the text). Clearly, operative provisions must be read *consistently* with the preambulatory paragraphs, which set out the themes and rationale of the Convention.

Re Third Party support for the human rights of the unborn child

The most significant third party support for the human rights of the unborn child, including the right to life, is provided by all States parties who have signed, ratified or acceded to the UN Convention on the Rights of the Child (1990). The Convention's Preamble reaffirms that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth…" This need for special safeguards and care and appropriate legal protection for the child before birth, it was agreed in the Declaration on the Rights of the Child, was "recognized" in the Universal Declaration of Human Rights. All States parties to the Convention on the Rights of the Child also agreed in Article 6:

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[19] See Johannes Morsink: "Women's rights in the Universal Declaration", *Human Rights Quarterly*, Vol. 13, p.230.

[20] 10/880; MC10/6680, June 7, 2010.

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Australia signed this Convention 22 August 1990 and the only reservation was in regard to Article 37 (c) on the obligation to separate children from adults in prison — there was no reservation to the effect that Australia intended to exclude the child before birth from appropriate legal protection of "every" child's inherent right to life or from our duty to "ensure to the maximum extent possible the survival and development of the child".

Some unsuccessful attempts were made during the drafting of the Convention to remove any reference to the child before birth from the preamble and to exclude unborn children specifically from the broad Article 1 definition of a child as "every human being below the age of 18". Both were decisively rejected.

1. Most significantly, the wording proposed in Article 1 of the 1979 *Draft Convention on the Rights of the Child*, "from the moment of his birth" was, in fact, rejected. [21]

2. The **representative of Italy** observed (significantly without contradiction) 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. [22]

3. **Representatives from Malta and Senegal** were satisfied that it was not necessary for the words "from conception" to be included in Article 1 as it was taken as understood that **the rights of the child before birth were adequately covered by inclusion of the phrase "before as well as after birth" in the Preamble.** Their proposal to insert the phrase "from conception" was withdrawn "in light of the text of preambular paragraph 6 as adopted…" [23]

4. In an attempt to quarantine Article 1 from this preambular commitment to provide legal human rights protection for the child before birth, a statement was placed by a small number of delegations in the *travaux préparatoires:*

> In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by States Parties.[24]

   This attempt was, in effect, quashed by the subsequent **Legal Counsel requested by the representative of the United Kingdom and**

[21] Discussion and adoption by the Working Group (1980), paras. 30-31 from E/CN.4/L.154.
[22] 1989 Report of the Working Group to the Commission on Human Rights, E/CN.4/1989/48, para. 40.
[23] Ibid., paras.76 & 77.
[24] Ibid., para. 43.

annexed to the report. Legal Counsel, requested by the representative of the United Kingdom at the time of negotiation, gave fair warning that such an attempt was inconsistent with the rules of interpretation as set out in the *Vienna Convention on the Law of Treaties*.

> The preamble to a treaty serves to set out the general considerations which motivate the adoption of the treaty. Therefore, it is at first sight strange that a text is sought to be included in the travaux préparatoires for the purpose of depriving a particular preambular paragraph of its usual purpose, i.e., to form part of the basis for the interpretation of the treaty.[25]

As further pointed out by Legal Counsel:

> Also, it is not easy to assess what conclusions States may later draw, when interpreting the treaty, from the inclusion of such a text in the travaux préparatoires. Furthermore, seeking to establish the meaning of a particular provision of a treaty, through an inclusion in the travaux préparatoires may not optimally fulfil 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.

In other words, Legal Counsel warned that inclusion of the statement is not sufficient to ensure its "intended purpose". Its purpose was a devious one: to empty of significance the international community's re-commitment in the Preamble to the long-held understanding that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth..." **Dr. John Fleming and Dr. Michael Hains** explored these proceedings in depth and confirmed the invalidity of the ploy in their study published in the Australian Bar Review, Vol.16 (2), December 1997, "What Rights, If Any, Do the Unborn Have Under International Law?". The ploy lacked sufficient validity to exclude the child before birth from "the interpretation of Article 1" and subsequently from the operative protective provisions of the Convention.

Given that the international community in the founding documents of modern international human rights law reached a formal agreement that the Universal Declaration on Human Rights recognized the need for safeguards and care including legal protection for the child before birth[26] and in view of the testament in ***Legislative History on the Convention on the Rights of the Child*** **issued by the Office of the High Commissioner for Human Rights (Geneva, 11th June 2007)**

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[25] Response of the Legal Counsel (Carl August Fleischhauer) 9 December 1988, Annex to the 1989 report of the Working Group to the Commission on Human Rights. E/CN.4/1989/48.

[26] In the UN Declaration on the Rights of the Child, the UN General Assembly, November 20th, 1959, reaffirmed explicitly the UDHR's "recognition" of the rights of the child before birth. The concept of formal universal recognition of the child before birth as a legitimate subject of inherent and inalienable human rights including entitlement to legal protection is critical for it is the nature of inherent and inalienable human rights that they can never be de-recognized by courts of law or legislatures.

that a valid alternative consensus to the contrary was not reached,[27] the original consensus must remain in effect.

5. **Cynthia Price Cohen of the Child Rights International Research Institute** in her study of the travaux preparatoires for the Convention, has affirmed that "the rights of the unborn child" were included and reaffirmed in extensive discussions by the working group:

> In fact, the word "abortion" was never used in the drafting of the substantive articles of the Convention; it appears in only three paragraphs of the 1980 Working Group Report in reference to an ultimately rejected proposal to include the words "before as well as after birth" in preambular paragraph 6. Even when this proposal was reintroduced during the second reading of the convention causing heated debate, the word "abortion" itself was not part of the discussion. **The focus was always on "the rights of the unborn child**".[28]

The second most significant third party support for the human rights of the unborn child (including the right to life) is the **UN Committee on the Rights of the Child** (CRC Committee) which is the body monitoring the UN Convention on the Rights of the Child .

The UN Committee on the Rights of the Child recently issued *General Comment on the Rights of Children with Disabilities* which **reaffirms that children before birth are 'children' not just 'foetuses'—they are children with rights, and specifically with a right to prenatal care**.

> The Committee recommends that States parties introduce and strengthen prenatal care for children…[29]

Moreover, the Committee insists that each and every child's right is not a "favour" to be bestowed or withheld by the State but rather "a clear legal obligation".[30] In addition, the Committee has condemned selective abortion as discrimination against children and as "a serious violation of their rights, affecting their survival".[31] The

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[27] "Other delegations, including Norway, the Netherlands, India, China, the Union of Soviet Socialist Republics, Denmark, Australia, Sweden, the German Democratic Republic and Canada, however, opposed what in their view amounted to reopening the debate on this controversial matter which, as they indicated, had been extensively discussed at earlier sessions of the Working Group with no consensus achieved." Legislative History, p. 295, para. 36.

[28] Cohen, Cynthia Price, " Review", *The American Journal of International Law*, Vol. 89 (4), October, 1995, pp. 852-855. Cohen's footnote (p.853) on this: "See UN Doc. E/CN.4/L.1543, 1980, paras. 6, 10 & 18. The word 'abortion' does not appear anywhere else in the travaux préparatoires."

[29] UN Committee on the Rights of the Child, General Comment No 9 (2006), para. 46.

[30] UN Committee on the Rights of the Child, General Comment No 5 (2003) para 9 "The Committee emphasizes that, in the context of the Convention, States must see their role as fulfilling clear legal obligations to each and every child. Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children."

[31] UN Committee on the Rights of the Child (CRC), General Comment No 7 (2005), "Right to Non-discrimination".

Committee denounces not only selective abortion of girl children on the grounds of gender discrimination, but also goes on in the same paragraph to condemn "multiple discrimination (e.g. related to ethnic origin, social and cultural status, gender and/or disabilities)".
These General Comments (which are the most authoritative statements that can be issued by the UN Committee on the Rights of the Child) reaffirm that the operative provisions of the Convention include the child before birth.

From various General Comments issued by the different treaty monitoring bodies, there are emerging some very serious logical inconsistencies that cannot be resolved as long as ideology prevails over truth. One of the most serious discrepancies has emerged between the CEDAW[32] Committee's General Comment No 24 advocating the removal of laws restricting reproductive services (abortion) and the Committee on the Rights of the Child's General Comment No 7 which calls for States parties to provide equal protection against violence for all children and asserts that selective abortion is *discrimination against girl children* and is *a serious violation of rights affecting their survival*.

In any conflict between the directives of the CRC Committee (condemning selective abortion and infanticide as violence against children) and the directives of the CEDAW Committee (advocating the removal of all laws against abortion), the CRC Committee must prevail. The 'best interests of the child principle' is universally recognized in international human rights law, and is articulated in both the *Convention on the Rights of the Child* and the *Convention on the Elimination of all Discrimination against Women*.[33]

The Commission on the Status of Women is bound to uphold the best interests of the child principle and therefore cannot legitimately reject any resolution on selective abortion that reaffirms exactly what the CRC Committee has already formally expounded and endorsed in General Comment No 7 (2005). Even as state-sanctioned procedures, abortion is never in the best interest of the child being aborted. It flatly contradicts the very nature of human rights for anyone to judge that a violation of the right to life of a child is in the best interests of that child. To make such a judgment, even at the very earliest stage of existence, on the discriminatory grounds of disability, age, 'wantedness' and/or birth status is indefensible.

At the heart of the best interests of the child principle is the truth that children's rights are adults' duties. The UN Committee on the Rights of the Child in General Comment No 9 (2006) again provides formal recognition of the human rights of children before birth—specifically that children with disabilities are entitled to "prenatal care", and this right follows on from the "right to life, survival and development". **It is under this right that the Committee condemns 'the systematic**

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[32] The CEDAW Committee monitors the UN *Convention on the Elimination of all Discrimination against Women* (CEDAW) (1979).

[33] *Convention on the Rights of the Child* Articles 3, 9, 18, 20, 21, 37 and 40; *Convention on the Elimination of all Discrimination against Women* Article 6 (2b) & (2c); Also *UN Declaration of the Rights of the Child*, Principle 2.

killing of children because of their disability".[34] Again, it is clear that prenatal care is not just for mothers but also for their unborn children who are recognized as 'children' in their own right (not just 'foetuses'). It is a vitally important recognition that children before birth are already rights-holders.

Specifically in regard to the Convention on the Rights of the Child, the UN Committee on the Rights of the Child has recently reaffirmed that the *Convention* does not permit violation of the child's rights on the grounds that local or customary law or common practice tolerates such violations.[35] Furthermore, the Committee insists:

> In case of any conflict in legislation, predominance should always be given to the Convention, in the light of Article 27 of the Vienna Convention on the Law of Treaties.[36]

Domestic abortion laws must be changed where they conflict with the Convention on the Rights of the Child Article 6(2) which requires that

> State Parties will ensure to the maximum extent possible the child's right to life, survival and development.

CRC General Comment No 5 (2003), para.10 states:

Article 6 of the Convention on the Rights of the Child [affirms] the child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the survival and development of the child. The Committee expects States to interpret "development" in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.(Underlining not in the original)

I know of no credible scientist, obstetrician or paediatrician who claims that a child's development begins 'at birth'.

Other examples of support for inclusion of the child before birth in human rights protections:

1. **Dr Jakob Cornides of the European Commission**, in a recent issue of the *International Journal of Human Rights*, criticizes the European Court's re-interpretation of the human rights Conventions to attempt to exclude the unborn child from human rights protection. Proponents of a right to abortion rely on "inventing and distorting reality" and they "manipulate" human rights language precisely because it is so unlikely that a new treaty recognizing abortion as a fundamental human right could ever be adopted.[37] Cornides argues.

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[34] UN Committee for the Convention on the Rights of the Child, General Comment No 9 (2006), para. 17.

[35] CRC General Comment No 5 (2003) *General measures of implementation of the Convention on the Rights of the Child*, para. 20.

[36] Ibid.

[37] Cornides, Jakob, "Human rights pitted against Man", *International Journal of Human Rights*, Vol.12, Issue 1, 2008, pp. 107 – 134.

> Instead of saying that they want to impose new laws (like abortion on demand) on society, they pretend that international law obliges them to do so, and that the new laws they are making represent the true and original sense of the relevant Conventions.[38]

Cornides makes a careful thorough analysis of two recent examples of how European bureaucracies are overstepping their mandates and pushing a pro-abortion ideology using language, supposition and selectivity to usher in a right to abortion by "the backdoor." He concludes that nations have naively "handed over too much power to self-styled 'human rights experts'" which is seriously damaging, perhaps even destroying, the credibility of the concept of human rights.

2. **Albert Verdoodt** sheds a great light on this issue of human rights for the unborn in his authoritative 1964 work on the birth and significance of the Universal Declaration.[39] Verdoodt had the advantage of personal consultation with many of the original drafters, especially with René Cassin who wrote the preface to Verdoodt's work.[40] Certainly, Verdoodt casts doubts on the legality of all legislation that permits abortion, even abortion permitted only in "certain cases". This was noted by **Lars Adam Rehof** in an essay on UDHR Article 3 ("Everyone has the right to life, liberty and security of person.") in a volume marking the fiftieth anniversary of the Universal Declaration, in which he says:

> Verdoodt concludes that the interpretation of article 3 leaves a certain amount of doubt as to the legality of (all) provoked abortions and that it is not settled when exactly the protection starts.[41]

However, Verdoodt's comment regarding no exact commencement of legal protection has an added significance that Rehof overlooks. Verdoodt maintains that the right to life in Article 3 of the Universal Declaration as it relates to abortion and euthanasia, the death penalty, and legal protection by the State from criminal attacks, is to be understood "only in the context of the entire Declaration"[42].

Regarding the laws that permit abortion "in certain cases", Verdoodt says that from the *travaux préparatoires* one can interpret Article 3 as "Each individual has the right to physical existence".[43] He then goes on to emphasize:

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[38] Ibid.

[39] Verdoodt, Albert, *Naissance et Signification de la Déclaration Universelle des Droits de l'Homme*, Société d'Etudes Morales, Sociales et Juridiques, Louvain-Paris: Editions Nauwelaerts, 1964.

[40] Verdoodt had extensive consultations with many of the drafting committee and the Third Committee that were present at the negotiations, including Cassin, Malik, Santa Cruz, Garcia Bauer, Austregesilo de Atheida—also Verdoodt listened to tape recordings of the critical sessions, so he was able to distinguish the nuances of the debate.

[41] Rehof, Lars Adam *: Article 3* in Alfredsson, Gudmundur & Eide, Ashjorn (eds.): *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague, Martinus Nijhoff, 1999, p.92.

[42] « De même aucune condamnation explicite n'est portée contre l'euthanasie des incurables et des faibles d'esprit, ni contre la condamnation légale pour crime grave à la peine capitale ou contre le manque de protection de l'Etat contre les tentatives criminelles. Chaque individu a droit à la liberté et à la sureté de sa personne, comme cela est précisé dans les articles suivants. » ibid., p.99.

[43] « Chaque individu a droit à l'existence physique. » ibid., p.100.

> It was not stated precisely when this existence commences. In the same way any explicit condemnation of euthanasia against the incurable and the mentally disabled was not pronounced…. [44]

What is Verdoodt's real point here? He is saying that there was no need for specifying when the physical existence of the child being considered for abortion begins. Just as, he implies, there was no need for any explicit condemnation of euthanasia against the incurable and the mentally disabled … for these and for the unborn he concludes that each individual has the right to liberty and security of person, as this right is spelled out in the articles of the Universal Declaration that follow.

Verdoodt understands protection for all of these—the unborn child, the incurable, and the mentally disabled—to be lawful, as affirmed by Article 5, which prohibits cruel, inhuman, or degrading treatment, and to include the right to "physical integrity" in the "right to physical existence". Verdoodt asserts that these rights are "explained" in the articles that follow Article 3, i.e., "in the context of the entire declaration".

3. **Jakob Pichon of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany**, in a recent paper entitled *Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France* asserted that the Court "did not give satisfactory reasons for its decision to stay silent on this point" while ignoring there are strong arguments that the fetus, at least a *viable* one[45], is in fact covered by "everyone" within the meaning of Article 2:

> First, neither the ECtHR nor the former Commission has ever completely excluded the possibility of application of Article 2 to the fetus. Instead, the ECtHR has repeatedly applied the "even assuming" formula which would not have been necessary if Article 2 had been considered to be entirely inapplicable.
> Second, there is no crucial difference between a fetus and a child already born, because both are similarly dependent upon their mother…specific laws on voluntary abortion existing in all the Contracting States would not have been necessary if the fetus did not have a life to be protected. [Pichon cites here the dissenting opinion of Judge Ress]
> Third…it is not possible to ignore the major debate that has taken place on the national and international level in recent years on the subject of bioethics and the desirability of introducing or reforming legislation on medically assisted procreation and prenatal diagnosis, in order to prohibit techniques such as the reproductive cloning of human beings and provide a strict framework for techniques with a proven medical interest.[46]

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[44] « Il n'est pas précisé quand cette existence commence eu égard à des législations permettant l'avortement dans certains cas. » ibid., pp. 99-100.

[45] The idea of 'viability', however, as a reliable marker for the beginning of recognition of a right to human rights protection is both philosophically and scientifically flawed. Britain's Cardinal Cormac Murphy-O'Connor discerns the fundamental problem here : "The idea of 'viability'… is a concept dependent on the availability of resources and technology; not one that is able to found a moral distinction between a life that is worth our respect and protection and one that is not." Cardinal Cormac Murphy-O'Connor: "The abortion debate is only just beginning", *Telegraph* (UK), 23 May, 2008.

[46] Pichon, Jakob: "Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France", *German Law Journal*, Vol. 07 (04), 2006, pp. 439-440. Pichon cites the debate in the European Parliament about the legal protection of biotechnological inventions, available at:
http://www.europarl.eu.int/news/expert/background_page/008-1777-300-10-43-901-20051024BKG01776-27-10-2005-2005--false/default_p001c012_en.htm;
Pichon directs us further to *Vo*, para. 32 with a summary of the debates in and Laws of the French

Consequently with these new developments, Pichon says, interpretation of Article 2 now requires "the inclusion of the right to life of the fetus".[47] It should be noted, he concludes, that a number of recent conventions and the prohibition on the reproductive cloning of "human beings" under the *Charter of Fundamental Rights of the European Union* show that the protection of life extends to the initial phase of human life. Consequently, the ECtHR must take such a development into account in order to define in accordance with the *Vienna Convention on the Law of Treaties Article 31*, the "ordinary meaning" of the right to life.

Pichon's arguments are a valuable supplement to the case made in my book that European law makers must recognize the historical truth: that the right to life was always applicable to the child before as well as after birth.

4. **Australian Dr Stephen Hall, Senior Lecturer in the Faculty of Law at the University of NSW and Director of the European Law Centre**, writing in the *European Journal of International Law*, has argued cogently:

> …states are not free to transform moral wrongs into human rights with complete juridical effect; i.e., with the positive law's usual moral obligation of observance attached. The establishment of a human or fundamental right to abortion under the positive law would be an example of an attempt to transform a moral wrong into a human right. Laws authorizing abortions, and buttressing access to abortions, are radically unjust (and radically immoral) in that they permit choosing directly against a self-evident form of human flourishing; i.e., life. This has certainly occurred at the level of international law partly as a result of such widespread practice. The temptation to turn moral wrongs into human rights arises when, unmindful of the richness of the common good under the natural law, every person's desire or preference is a potential candidate for promotion to the ever-expanding pantheon of positive human rights. [48]

Indeed, no international, regional or domestic human rights court can withdraw legal protection of natural law human rights from the child at risk of abortion. The International Court of Justice has found quite rightly that

> rules concerning the basic rights of the human person in international law are *erga omnes* in nature: they are considered to be 'the concern of all States'. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection. [49]

5. **Justice Borrego Borrego of the European Court of Human Rights**, in a dissenting opinion on *Tysiac v Poland* , argues "it is not the task of the Court to… advance a decision that favors 'abortion on demand' ". He reveals the

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National Assembly; to the results of the European Group on Ethics in Science and New Technologies at the European Commission, *Vo* para.40; and to summaries of the parliamentary debate in the *Deutscher Bundestag* (German Federal Parliament) about Law and Ethics of modern medicine and biotechnology, available at:
http://www.berlinews.de/archiv/1997.shtml .

[47] Ibid., p.441.

[48] Hall, Stephen: "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism", *European Journal of International Law*, Oxford: Vol. 12 (2), 2001, p. 269.

[49] *Barcelona Traction, Light and Power Company, Ltd.* (*Belgium v. Spain*) [1970] Imternational Court of Justice.

logical inconsistencies between this decision and a previous decision D. v. Ireland (July 5, 2006):

…in the Polish case all the debate is focused on the State's positive obligation of "effective respect" for private life in protecting the individual against arbitrary interference by the public authorities... No reference is made to "the complex and sensitive balancing of equal rights to life ... of the mother and the unborn" mentioned in D. v. Ireland… In D. v. Ireland, everything must be objective. In the present case, everything is subjective…[50]

Justice Borrego Borrego deplores the implication that any consideration of the right to life of an unborn child at risk of abortion can be ignored, and he accuses the European Court's majority judgment of having gone too far in urging a more permissive approach to facilitating abortion.[51]
He concludes:

All human beings are born free and equal in dignity and rights. Today the Court has decided that a human being was born as a result of a violation of the *European Convention on Human Rights*. According to this reasoning, there is a Polish child, currently six years old; whose right to be born contradicts the *Convention.*
I would never have thought that the *Convention* would go so far, and I find it frightening.[52]

6. **Professor Robert P. George**, a member of the US President's Council on Bioethics and a professor of jurisprudence at Princeton University and Christopher Tollefson, a philosophy professor at the University of South Carolina, have supported inclusion of the unborn in human rights protection in their recent book: "Embryo: A Defense of Human Life" (Doubleday, 2008).

7. **Professor John Finnis of Oxford** has written extensively on the inclusion of unborn children in human rights protection. He affirms that the right to life, because it is inalienable, rules out procured abortion. The natural law principles relevant here are that a human entity should be allowed to persist in being and that one must not directly attack any basic good in any person, not even for the sake of avoiding bad consequences. This last principle, that the basic aspects of human well-being are never to be directly suppressed, is cited by Professor John Finnis as the principle of natural law that provides the rational basis for *absolute* human rights, for those human rights that prevail *semper at ad semper* (always and on every occasion), and even against the most specific human enactment and commands.[53]

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[50] *Tysiac v. Poland* Judgment– Dissenting Opinion of Justice Borrego Borrego, paras. 8, 9.

[51] European Court of Human Rights, *Tysiac v Poland* Judgment 2007, Dissenting Opinion by Justice Borrego Borrego,:

> The Court appears to be proposing that the High Contracting Party, Poland, join those States that have adopted a more permissive approach with regard to abortion. It must be stressed that "certain State Parties" referred to in paragraph 123 allow "abortion on demand" until eighteen weeks of pregnancy. Is this the law that the Court is laying down to Poland? I consider that the Court contradicts itself in the last sentence of paragraph 104: "It is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion." para. 13.

[52] Ibid., para. 15.
[53] Finnis, John: *Natural Law and Natural Rights*, Oxford; Clarendon Press, 1980; and *Aquinas: Moral, Legal and Political Theory*, Oxford University Press, 1998, pp.164-171.

8. **Professor John Keown of Georgetown University's Kennedy Institute of Ethics** in a review of "*Human Rights and the Unborn Child"*(Leiden & Boston, Martinus Nijhoff Publishers, 2009) has supported my arguments:. "In Human Rights and the Unborn Child, Rita Joseph argues cogently and clearly that an unborn child's right to life is far more plausibly grounded in those instruments than is a right to abortion… Her argument is impressive, demonstrating an informed grasp of the textual and contextual development of the relevant instruments…No less important than the wording of the international instruments that explicitly or implicitly include the unborn child is their philosophical basis. As Joseph contends, their basis is not feminism, utilitarianism, or relativism, but natural law. Human rights are grounded in respect for human nature. According to Charles Malik, rapporteur to the Commission on Human Rights, which drafted the Universal Declaration: "The doctrine of natural law is woven…into the intent of the Declaration." If rights were merely products of positive law, he wrote, they could change but if they "express my nature as a human being, then there is a certain compulsion about them: they are metaphysically prior to any positive law."

Joseph cites Johannes Morsink's research into the drafting history of the Universal Declaration, which shows that the drafters held that human rights were "inherent and inalienable." Morsink comments that when all prohibited discriminations are eliminated:

> what we have left is just a human being without frills. And the Declaration says that the human rights it proclaims belong to these kinds of stripped down people, that is to everyone, without exception.

("International Human-Rights Law and the Unborn Child", National Review Online, September 24, 2010).

Travaux préparatoires not silent on when protection of life begins for unborn child

The *International Covenant on Civil and Political Rights* (ICCPR), Article 6 (5) asserts:

> 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.

Juxtaposition in the one sentence of concern to protect the right to life (remember this is the human right being articulated in Article 6) of "persons below eighteen years of age" with the protection of "pregnant women" signifies that the child before birth is entitled to the rights of "persons below eighteen years of age". It signifies that the pregnant woman does indeed carry within her womb another human being, a new member of the human family who is entitled, by reason of the child's physical and mental immaturity (an immaturity that distinguishes every person below eighteen years of age) to special protection from the death sentence. Articles prohibiting execution of pregnant women acknowledge that the child, from the State's first knowledge of that child's existence, is to be protected.

So this article is a single right, not two separate rights, in a single sentence. This article focuses powerfully on the child and in it every child is recognized to have a right to life. Every child, i.e., every child before birth, every child after birth, every person below the age of 18 years, has a right to State protection from capital

punishment: "sentence of death…shall not be carried out on pregnant women". The child before birth is recognized as being innocent of any crime and so the right to life of that child is to be preserved and protected by the State in circumstances where the right to life of the child's mother was to have been forfeited.

During the 5th Session (1949), 6th Session (1950), and 8th Session (1952) of the UN Commission on Human Rights, the *travaux préparatoires* for the ICCPR refer specifically to the intention to save the life of the unborn child in recognition of the human rights principle that protection should be extended to all unborn children.

> The provisions of paragraph 4(5) of the draft article aimed at the protection of the life of the unborn child whose mother was sentenced to death; that protection should be extended to all unborn children. [54]

Again in the 12th Session (1957) of the Third Committee, the right to life of "an innocent unborn child" is recognized:

> 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'. [55]

It is important to understand here that this intention was not just a fleeting one-off expression of concern for the right to life of the unborn child. It was in fact the culmination of a long constant and consistent concern and commitment to protecting the unborn child, a concern arising out of the Nuremberg judgments, finding expression in the Geneva Conventions and impacting on the very earliest drafting sessions of the ICCPR, specifically in the Draft Committee's 1st Session (1947):

> It shall be unlawful to deprive any person, from the moment of conception, of his life or bodily integrity, save in the exercise of the sentence of a court following on his conviction of a crime for which this penalty is provided by law.[56]

The only recorded attempt to introduce abortion as an exception to the right to life Article 4 (now Article 6) of the ICCPR Draft occurred in the Working Group's 2nd Session (1947):

> It shall be unlawful to procure abortion except in a case in which it is permitted by law and is done in good faith in order to preserve the life of the woman, or on medical advice to prevent the birth of a child of unsound mind to parents suffering from mental disease, or in a case when the pregnancy is the result of rape.[57]

It was put to a vote in the Commission on Human Rights and was resoundingly defeated. A principle was adopted in which the only exception to the unlawfulness of deprivation of life was to be as follows:

> It shall be unlawful to deprive any person of his life save in the execution of the sentence of a court following on his conviction of a crime for which the penalty is provided by law.[58]

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[54] Bossuyt, *op. cit.*, p. 121. A/C.3/SR.810 para. 2; A/C.3/SR.811 para. 9; A/C 3/SR.812 para. 7; A/C.3/SR.813 para. 36; A/C 3/SR 815 para. 28.

[55] A/C.3/SR.819 para. 17 & para. 33.

[56] E/CN.4/21 This was one of the two original texts for Article 1 (now Article 6) of the ICCPR.

[57] E/CN.4/SR.35, p.16.

[58] Ibid.