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The University of Nottingham

School of Law

**THE RIGHT TO LIFE
IN THE
INTERNATIONAL LAW
OF HUMAN RIGHTS:
LOOKING BEYOND
THE HORIZONS**

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for the degree of Doctor of Philosophy

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ABSTRACT

There is a 'right to life' Article in a number of international and regional human rights treaties which is not currently being employed to give the full potential effect to the right. There are issues arising 'beyond the horizons', particularly with regard to the identity of the rights-bearer, the 'human' in the international law of human rights, that fail to be addressed by a restrictive interpretation. For instance, a failure to recognise the human represented by human genetic material and to record it the respect called for by an expanded notion of human dignity has implications for the future, when 'new humans' – clones, hybrids, chimera – might enter the realm of created beings, with, it is argued here, a valid claim to respect for their human rights entitlements, including that their right to life shall be protected by law. In order to establish the potential scope of the right to life treaty provision, the texts are introduced and a case is made for the validity of a dynamic and evolving interpretation of the right, the 'living instrument' approach, within the international legal framework established by the Vienna Convention on the Law of Treaties. The human identity is then examined across a number of disciplines, as well as in law, in order to challenge an interpretation that places any requirements on the rights-bearer of 'personhood'. The proposed solution is to argue for broader definitions, both of the human and of the life protected, than is currently the case, and for a greater realisation of what is at stake in human rights jurisprudence regarding the right, involving issues of the moral nature of the protecting law. A failure to realise and act upon the issues raised will allow intolerable injustice to be perpetrated.

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¹ For reasons of space there are no references given in the footnotes throughout the text. All references will be found in these tables, and in the Bibliography at the end of the document.

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³ I have endeavoured to report the law as stated on 01/05/2006.

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ACRONYMS AND ABBREVIATIONS

(SELECTED)

ACHPR	African Charter on Human and Peoples' Rights	CAAU	Constitutive Act of the African Union
ACHR	American Convention on Human Rights	CAS	Council of Arab States
AComHPR	African Commission on Human and Peoples' Rights	CAT	Committee against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
ACRWC	African Charter on the Rights and Welfare of the Child	CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
ACT	Advanced Cell Technology, Massachusetts	CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
ACtHPR	African Court of Human and Peoples' Rights	CCELS	
ADI	American Declaration of Independence	CCRF	Canadian Charter of Rights and Freedoms
ADRDM	American Declaration on the Rights and Duties of Man	CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
AGS	American Geriatric Society	CETS	Council of Europe Treaty Series
AI	Amnesty International	CHR	Commission on Human Rights (United Nations)
AIDS	Acquired immunodeficiency syndrome	CLAS	Council of the League of Arab States
AJIL	American Journal of International Law	COE	Council of Europe
AMRC	Association of Medical Research Charities	CORE	Centre on Reproductive Ethics
AP	Associated Press	CONADEP	Argentine National Commission on the Disappeared
ArCHR	Arab Charter on Human Rights	CRC	Committee on the Rights of the Child
ARGC	Assisted Reproduction and Gynaecology Centre	CRC	Convention on the Rights of the Child
ASIL	American Society of International Law	CRR	Center for Reproductive Rights
AU	African Union	C-SAFE	Consortium for Southern Africa Food Security Emergency
BHC	Bangladeshi High Court	CSCE	Conference on Security and Co-operation in Europe
BIICL	British Institute of International and Comparative Law	CUP	Cambridge University Press
BMA	British Medical Association	DALY	Disability adjusted life year
CA	Appeal Court (several jurisdictions)	DEVAW	Declaration on the Elimination of Violence against Women
		DNA	Deoxyribonucleic acid
		DPIC	Death Penalty Information Center
		DPPED	Declaration on the Protection of all Persons from Enforced Disappearance
		EC	European Community
		ECHR	European Convention on Human Rights and Fundamental Freedoms
		ECJ	European Court of Justice (Court of

Justice of the European Communities)	HUP Harvard University Press
EComHR (former) European Commission of Human Rights	IACoMHR Inter-American Commission on Human Rights
ECSR European Committee of Social Rights	IACtHR Inter-American Court of Human Rights
ECtHR European Court of Human Rights	IBC International Bioethics Committee of UNESCO
EEC European Economic Communities	IBC Iraq Body Count Project
EFGA Ethiopia Family Guidance Association	ICC International Criminal Court
EJIL European Journal of International Law	ICCPR International Covenant on Civil and Political Rights
EPO European Patent Office	ICESCR International Covenant on Economic, Social and Cultural Rights
ESC European Social Charter	ICJ International Commission of Jurists
ETS European Treaty Series	ICJ International Court of Justice
EU European Union	ICJ Rep International Court of Justice Reports
GA Res General Assembly Resolution	ICPD International Conference on Population and Development, Cairo, 1994
GA General Assembly (United Nations)	ICPD+10 International Conference on Population and Development Ten-year review, 2004
GDR German Democratic Republic [<i>Deutsche Demokratische Republik</i> (DDR)]	ICPD+5 International Conference on Population and Development Five-year review, 1999
GEO Global Environmental Outlook	ICRC International Committee of the Red Cross
GIG Genetic Interest Group	ICTR International Criminal Tribunal for Rwanda
GJL German Law Journal	ICTY International Criminal Tribunal for the former Yugoslavia [International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991]
GMC General Medical Council (UK)	IGBC Intergovernmental Bioethics Committee of UNESCO
GSS General Security Services (Israel)	IGS Institute of Governmental Studies
HCC Hungarian Constitutional Court	IGO Intergovernmental Organisation
HFE Act Human Fertilisation and Embryology Act (United Kingdom)	IHR Institute for Historical Review
HFEA Human Fertilisation and Embryology Authority (United Kingdom)	IHRR International Human Rights Reports
HGC Human Genetics Commission	IILC International Law Commission
HIV Human Immunodeficiency Viruses	IILM International Legal Materials
HRA Human Rights Act (UK)	ILO International Labour Organisation
HRC Human Rights Committee	
HRC Human Rights Committee (United Nations)	
HRLR Human Rights Law Review	
HRW Human Rights Quarterly	
HRW Human Rights Watch	

ILR	International Law Reports	PGD	Pre-implantation genetic diagnosis
IMF	International Monetary Fund	PLA	Pro-Life Alliance
INGO	International Non-Governmental Organisation	PPAC	Planned Parenthood Affiliates of California
IPPF	International Planned Parenthood Federation	PPSP	Planned Parenthood of Southeastern Pennsylvania
IPPF/WHR	International Planned Parenthood Federation / Western Hemisphere Region	PRB	Population Reference Bureau
IRIN	Integrated Regional Information Networks (part of OCHA)	PRC	People's Republic of China
ISC	Indian Supreme Court	PTO	Patent and Trademark Office (United States)
IUCN	World Conservation Union	PVS	Persistent vegetative state
IVF	In-vitro ('in glass') fertilisation	QALY	Quality adjusted life year
LJ	Law Journal	rDNA	Ribosomal deoxyribonucleic acid
LJIL	Leiden Journal of International Law	RHR	Department of Reproductive Health and Research, World Health Organization
LR	Law Report	RNA	Ribonucleic acid
LR	Law Review	rRNA	Ribosomal ribonucleic acid
MDGs	Millennium Development Goals	SACC	South African Constitutional Court
mDNA	Mitochondrial deoxyribonucleic acid	SARS	Severe acute respiratory syndrome
MMR	Maternal mortality ratio	SCC	Supreme Court of Canada
MNC	Multinational corporation	SCI	Supreme Court of India
MUP	Manchester University Press	SCR	Supreme Court Reports (Canada)
NGO	Non-Governmental Organisation	SG	Secretary-General (United Nations)
NHS	National Health Service (United Kingdom)	SHRO	Sudan Human Rights Organisation
OAS	Organisation of African States	SIPCs	Severely indebted poor countries
OAU	(former) Organisation of African Unity	SPTL	Society of Public Teachers of Law
OCHA	UN Office for the Coordination of Humanitarian Affairs	SUP	Stanford University Press
OSCE	Organisation for Security and Co-operation in Europe	TAC	Treatment Action Campaign
OUP	Oxford University Press	UDDA	Uniform Determination of Death Act
PAS	Physician-assisted suicide	UDHR	Universal Declaration of Human Rights
PCF	Pro-Choice Forum	UK	United Kingdom
PDS	Pre-implantation genetic determination / selection	UKHL	House of Lords (United Kingdom)
PET	Progress Educational Trust	ULC	Uniform Law Commissioners
PGC	'Principle of Generic Consistency' [Gewirth]	UN	United Nations
		UNAIDS	United Nations Joint AIDS Programme
		UNAMIR	United Nations Mission to Rwanda

UNCESCR United Nations Committee on Economic, Social and Cultural Rights
 UNCHR United Nations Commission on Human Rights
 UNCRC United Nations Committee on the Rights of the Child
 UNDHA United Nations Department of Humanitarian Affairs
 UNDP United Nations Development Programme
 UNEP United Nations Environment Programme
 UNESCO United Nations Economic, Social and Cultural Organisation
 UNFPA United Nations Population Fund
 UNGA United Nations General Assembly
 UNHCHR United Nations High Commissioner for Human Rights
 UNHRC United Nations Human Rights Committee
 UNICEF United Nations Children's Fund
 UNPR United Nations Press Release
 UNRISD United Nations Research Institute for Social Development
 UNTS United Nations Treaty Series
 UNUP United Nations University Press
 UNW UN Wire
 USA United States of America
 USAID United States Agency for International Development
 USIP United States Institute of Peace
 USSC United States Supreme Court
 VAE Voluntary active euthanasia

 VCCR Vienna Convention on Consular Relations

 VCLT Vienna Convention on the Law of Treaties

 VDPA Vienna Declaration and Programme of Action of the World Conference on Human Rights
 WB World Bank
 WCHR World Conference on Human Rights
 WHO World Health Organisation

CHAPTER one

INTRODUCTION

‘Human rights are much more than ideas. Human rights are not constrained by law.

Human rights are both lived dreams and denied realities ...’.

Robert McCorquodale⁴

1.1 GENERAL INTRODUCTION

There is a ‘right to life’ provision in a number of treaties in human rights jurisprudence, but its meaning is far from clear and its interpretation may allow individual lives to be threatened, often mortally, in situations in which just and equitable law is available and should be used to protect them. In the spring of 2006, over sixty years after the ending of the Second World War with its concomitant Holocaust, there are some threats to human life which are as old as history, and others which are newer, or, being old, such as war, threaten more lives than they did in the past, by virtue of what is called ‘advances’ in technology. Sixty years ago, when the human rights treaties began to be formulated, it was at least (reasonably) clear who was alive and who was dead; who was human and who was not; who was pregnant and who was not; who was ready for burial and who was

⁴ Introduction, p. xi, *Human Rights* (Ed.) (2003).

not.⁵ Future generations could not be affected by manipulation⁶ of their germline, and infertile people remained as non-biological parents. At that time, Franklin D. Roosevelt, in his ‘Four Freedoms’ speech, considered that:

The fourth [freedom] is freedom from fear – which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor – anywhere in the world.⁷

At that time war was seen as the most likely destroyer of the human race, in part or in total. There are other threats now, undreamt of by Roosevelt, and it seems in keeping with the concept of human rights law as a ‘living instrument’ to re-assess the right to life provision, present in a number of international and regional instruments, in the light of current technologies and other threats, and to ascertain its basic scope. That is, what is, or should be, meant by the Article known as the ‘right to life’; whose life is intended to be, or should be, protected, to what extent, and by what law?

The intention of this thesis is to bring to the reader’s attention some of the issues which have arisen, or may foreseeably arise in the (possibly very near) future, with regard to the right to life provision in international and regional human rights treaties, and to begin to examine a prescription for addressing them that is both moral and just, and which satisfactorily expresses a State’s deontological obligation. A foundational value for the

⁵ Regarding recognition of death, a certainty of the past, and less certain now, see Friedman (1990), querying whether an anencephalic child, proposed as an organ donor, would be considered as yet ready for burial. See also Singer, *infra* n.33; and, for the assurance that was certain in the past, and is now lost, see *In The Room* by James Thomson (1834-1882): ‘I know what is and what has been; / Not anything to me comes strange, / Who in so many years have seen / And lived through every kind of change. / I know when men are good or bad, / When well or ill,’ he slowly said; / When sad or glad, when sane or mad, / And when they sleep alive or dead.’

⁶ ‘Manipulation’ is a standard scientific term for work with genetic material, and does not carry any value-laden implications when used in this context. On a values debate regarding the implications of germline manipulation, see Habermas (2003).

⁷ ‘Address to Congress’ 06/01/1941, Chapter 36: *Congressional Record*, 1941, Vol.87, Pt.I

international law of human rights would help both to justify law's involvement in matters relating to procreation, birth and death,⁸ and to answer questions about abortion,⁹ euthanasia,¹⁰ the death penalty,¹¹ and other, wider themes, such as genocide,¹² the right to life in armed conflict,¹³ the right to development including healthcare and education, the right to an uncontaminated environment.¹⁴ Beyond even these complex situations are more difficult ones still, including the possible breakdown of barriers between species, with a less certain concept of the human than has previously scientifically and philosophically prevailed, and the possibility of human material being created solely for the purpose of being engineered into other humans, or for other reasons than bringing a

⁸ See Dworkin (1993); and Chapter 4, following.

⁹ See the website of the Alan Guttmacher Institute for specialist information and statistics on reproductive health generally, including abortion: www.agi-usa.org (Accessed 29/12/2004).

¹⁰ See, for a pro-euthanasia stance, Magnusson (2001 and 2002); Hope (2004). See for other views Amarasekara and Bagaric (2002); de Haan (2002); Scott Peck (1997). See generally Moreland and Geisler (1990). For moral arguments, arising from the UK jurisdiction decision in the *Airedale NHS Trust v Bland* case see Kcown (1993, 1997); Jennet (1993) (pro-euthanasia in cases of persistent vegetative state [PVS], a term which he coined); Gormally (1993); and citing *Bland* with approval, the views of Harris (e.g. 1999).

¹¹ Whilst the debate regarding the death penalty is of obvious relevance to any thesis considering the right to life, there is not scope here to give more than a cursory introduction to some of the issues. The major text is Schabas (2002) and reference should be made to that for any comprehensive analysis. See also Hood (2002). For current information, see the Amnesty International [AI] Death Penalty site, which gives updated country reports, statistics, and a list of the present status of ratification of international and regional treaties to abolish the death penalty. (The Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty; the Protocol to the ACHR to Abolish the Death Penalty; Protocols 6 and 13 ECHR.) <http://web.amnesty.org/rmp/dplibrary.nsf/index?openview> (accessed 02/08/2002).

¹² There is not scope here for a broad-ranging discussion of the crime of genocide; the term was coined by Raphael Lemkin, who was also the instigator and the prime mover behind the *Genocide Convention*: Lemkin, (1944). See generally, Schabas, (2000); Stein, *Genocide* website, based at the University of the West of England, UK: <http://www.ess.uwe.ac.uk/genocide/> (Accessed 24/04/2006). See also Gordon, (2002). For a geopolitical analysis of the role of the US in the twentieth century's genocides, see Power (2002). For a juridical discussion of the nature of genocide, see the International Criminal Tribunal for Ruanda [ICTR] first conviction for genocide, *Prosecutor v. Jean-Paul Akayesu*, 02/09/1998 and Appeal, 01/06/2001; and Jørgensen's analysis of the definition of genocide and of sentencing patterns in the former Yugoslavia in respect of the International Criminal Tribunal for the Former Yugoslavia [International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991], [ICTY], "*Keraterm Case*", *Prosecutor v. Duško Sikirika, Damir Došen, Dragan Kolundžija*, when compared with the reasoning of the differently constituted Court in respect of *Prosecutor v. Radislav Krstić*: Jørgensen (2002).

¹³ See Paust (2002).

¹⁴ See, e.g. Shelton, *infra* n.853, and Atapattu and Fitzmaurice, *supra* n.63.

life into being.

In laying claim to a right to life, and assessing whether it includes a right to have the necessary conditions of life protected, it is important to be able to determine the boundaries of life – to establish when the life protected by law begins and when it ends, and at what stages or in which circumstances its natural progression may be validly interfered with, either to create life or to terminate it, or to affect its viability. Steven Potter explains the problem:

The word 'life' has probably been around ever since mankind began using language. It is a word of fundamental importance to all of us, and seldom do we make it through an entire day without putting it to use. We do so, however, with only a sketchy and subjective idea of what life actually means. This is because, until recently, within the last century or so, it has been easy for people to distinguish between what they call living and what they call non-living. There has been no need to define life precisely; its meaning is intuitively understood.¹⁵

Dependent upon the answers to the 'questions of life' lies an understanding of what conditions are required to maintain life, and to whom the responsibility for the maintenance of those conditions devolves, and within what moral framework the answers should be constructed.

1.1.1 THREATS TO THE HUMAN BEING: 'LOOKING BEYOND THE HORIZON'

It was mentioned, above, that there are new threats to the human, which may require the protection of the human rights bodies. The need to be open to as yet unforeseen situations is a matter of which the human rights bodies themselves are conscious, as shown in the discussions surrounding the future of the European Convention on Human Rights [ECHR] system:

¹⁵ Biomedical Engineer, Professor Steve M. Potter (1986). Quotation taken from the Introduction to a student work, which Professor Potter is still happy to endorse (personal e-mail, April 9, 2002).

The overriding concern with the present reform process is to ensure that the Convention system is in a position to cope with future problems, some of them by definition as yet unforeseen. It has to look not just to the horizon, but beyond it. This is particularly true since, even on an optimistic view, any new Protocol is unlikely to enter into force before two or three years.¹⁶

This comment recognises two things. First, that there are present horizons drawing a line across our vision of the future; of the problems that societies may face, and human rights systems may have to deal with, possibly quite soon. Secondly, it indicates that responsiveness is important but it is slow. Human rights discourse, it is to be argued here, is demonstrably and defensibly a ‘living instrument’¹⁷ that has already worked to make a great deal of difference to many people’s lives, and ability to live, by a valid and dynamic interpretative theory. Yet it could do more, and failure to do more might help to permit injustice, in all sorts of situations, some known, some theoretically but not yet practically possible, some with vast potential for good, and some which may destroy the human race. One of the first things to be done is to establish what is to be understood by the life that is to be protected; whose life, when it begins, and when it ends, as a basis for an analysis of when the protection of the law begins and ends in relation to those parameters, currently, and whether improvements and advances can be suggested in the light of new understandings and new possibilities.

1.1.2 LIFE’S ‘BOUNDARY MOMENTS’

The article under examination in this thesis states that it is the right to life that is protected

¹⁶ Adapted from Response of the European Court of Human Rights to the CDDH (Steering Committee for Human Rights) Interim Activity Report: *Response to the Drafting Group on the Reinforcement of the Human Rights Protection Mechanism* (CDDH–GDR). Prepared following the 46th Plenary Administrative Session on 02/02/2004, para.5.

¹⁷ See *infra*, s.2.3.4.iii.

by law, and as it is human rights which are under discussion, the assumption is that that is human life.¹⁸ The protected life is the ‘property’ of a living human;¹⁹ without life, there is a human corpse, not a human being.²⁰ The protection of the article, whilst it is expressed as being of ‘life’, is intimately bound up with the human bearing that life. So the life protected is a human life, from the beginning of that human until its end – neither of which states of being is as straightforward as it may first appear.

The issues are complex. Life is at its most fragile at ‘boundary moments’²¹ – conception, birth, severe illness or trauma, death – but the determination of a ‘legal bright line’²² in what may in fact be more of an ongoing process than has been generally recognised in law, whilst necessary, is controversial and problematic. Advances in biotechnology are making it even more so, particularly in determining the living and the dead, and in deciding what is human at all; although it could be claimed that the determination of what is ‘human’ was problematic in law even before the development of genetic technologies, with some legal systems not identifying the human being as a legal subject unless it was born alive – and that concept can be found in Roman Law.²³

Human rights bodies have continued in this tradition, and the preborn human has not been

¹⁸ Regarding possible rights of non-human life, see *infra*, n.513, and accompanying text; DeGrazia 92005).

¹⁹ Regarding the issue of property rights in human beings, see Davies and Naffine (2001).

²⁰ See DeGrazia (2005), pp.54-56; and generally Roach (2004).

²¹ ‘Boundaries of life’ is a phrase used also by Williams, (1997, ch.3), although the expression is used less broadly in Williams’ work than is the case here where it is intended to denote not only the moment of birth and death, but also moments when life is more fragile or threatened, including conception, when under sentence of judicial execution, in time of war or famine, etc.

²² Plomer (2002), at p.135.

²³ See Melville (1915), at p.83. ‘In order that a child should be invested with personality and acquire the position of a legal “person”, the Roman Law required that a child should have been born alive; in other words, live birth was a pre-requisite [which] involved complete separation from the body of the mother, followed by breathing.’ This requirement has been translated in some modern instruments to involve a requirement of live birth for the recognition of the born child as ‘a human being’, not only as a ‘legal person’. See *infra*, n.593, n.600, and accompanying texts.

recognised as a human rights-bearer;²⁴ although, intriguingly, future generations are beginning to find a place, recognised in case law as possible victims of rights violations.²⁵ And so there is a lacuna, in that those not yet conceived enjoy rights and the obligations of the State towards them, as do those surviving birth, whereas human genetic material which is actually in being, either manipulated *in vitro*²⁶ or growing *in utero*, is not accorded any recognition. Or at least, not a consistent form of recognition; a pregnant woman convicted of a capital crime in countries where the death penalty persists will not be executed, for instance, suggesting some recognition of another human life, separate from the life of the condemned mother.²⁷

Jolly has written about the nursing care of those whose children have died before, during, or soon after birth, addressing grief for the death of those lost 'before life has been established'.²⁸ This is a helpful concept; there are bound to be situations where a balancing of lives to be protected may be required. Support for a position that calls for the protection of established lives as a priority before those not-yet-established ones can be drawn from Rawls, who wrote about our duties to future generations, but said that the

²⁴ HRC, *Queenan v Canada*, *infra*, n.593 and accompanying text.

²⁵ HRC, *E.H.P. v. Canada*, para.8a: The question of standing of future generations was mentioned by the HRC as 'an expression of concern'.

²⁶ External to the body, in an artificial environment.

²⁷ Safeguards guaranteeing protection of the rights of those facing the death penalty are set out in Economic and Social Council [ECOSOC] Resolution 1984/50 of 25 May 1984; ECOSOC Resolution 1989/64 of 24 May 1989 includes steps for the implementation of those safeguards. See also the quinquennial Report of the UN Secretary-General [SG] to the Commission on Human Rights [CHR] on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, with its annual supplements, e.g.: 'Promotion and Protection of Human Rights: Status of the International Covenants on Human Rights. The question of the death penalty: Report of the Secretary-General.' E/CN.4/2006/83, 10 February 2006. See also for general discussion, e.g. Amnesty International, 'The Death Penalty and Women under the Nigeria Penal Systems', 10 February 2004; Hood (2002); the Death Penalty Information Centre [DPIC], <http://www.deathpenaltyinfo.org/> (accessed 28/04/2006).

²⁸ See Jolly (1987), p.1. On such grief, see Williams (2005).

burden on this generation does not need to be overly onerous.²⁹ We do have to live somewhat in the service of the lives to come, as previous generations did, we hope, for us; but their interests do not prevail over our reasonable ones. This is not repudiating their interests; it is simply saying that in a balancing of interests, the ‘established life’s’ interests will prevail. Our interests do mean, of course, for moral reasons – because it is good and right; and for communitarian utilitarian reasons – for the health of society – that we give large importance to the interests of those future generations.

Regarding life’s boundaries, and the related concept of the living human, apart from the issues surrounding fertilisation and conception, and genetic matters,³⁰ when does one stop being human, or at least having human life that is protected by law – when the brain is dead (if so, how much brain?³¹), or when cardio-respiratory function stops? The major

²⁹ Rawls (1971, 1999 rev.ed.), *infra*, n.1028, and accompanying text.

³⁰ Such as so-called ‘cloning’, or, more accurately, somatic cell nuclear transfer. See generally Mattei (Ed.) (2002). See Plomer (2002) for analysis of the problems related to legislation in this area. See further *infra*, n.535 and accompanying text.

³¹ See World Medical Association Declaration on Death, adopted by the 22nd World Medical Assembly Sydney, Australia, August 1968, and amended by the 35th World Medical Assembly Venice, Italy, October 1983; Harvard Protocol, *Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death*, the now widely-accepted USA 1980 Uniform Determination of Death Act [UDDA], of which the Uniform Law Commissioners [ULC] noted that ‘The purpose of the UDDA is a minimum one. It recognizes cardiorespiratory and brain death in accordance with the criteria the medical profession universally accepts. The act does not authorize euthanasia or “death with dignity”, and does not enact any sort of living will. The current state of medical decision-making as it relates to death, termination of life, or other related issues remains unchanged. These issues are left to other law. The UDDA simply attempts to relieve one relatively small problem in law and medicine, before it becomes a larger one’. http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-udoda.asp (accessed 28/04/2006). See particularly, for a clear discussion of the history of legislative determination of death, and the philosophical implications, DeGrazia (2005); on brain death as a ‘social’ term, Hughes, (1996); on transplant, Machado, (1998); and on brain death in connection with PVS, Jennett and Plum (1972); Jennett (2002). D.A. Jones (1995), and Evans and Hill (1989) express the Catholic viewpoint, normally seen as one of the staunchest so-called ‘pro-life’ stances in the global ethic, asserting the preservation of life above most other considerations. See, e.g., Magisterium of the Catholic Church, Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day* (Feb. 22, 1987), reprinted in 16 *Origins* 697 (1987). Such a position is summarised in D.A. Jones, ‘The UK definition of death’, *The Linacre Quarterly*, (date not given, accessed 30/10/2005), http://www.lifeissues.net/writers/jon/jon_01death.html, in which the much wider questions of what actually constitutes death, and whether what is being acted upon in the context of brain-stem death as the determinant of freedom to harvest organs is the death of the ‘person’ (as in the brain, mind, rationality aspects of the living body) and not the human being – a matter to be entered into in greater detail as this thesis progresses.

question here can be encapsulated in the notion of ‘personhood’; that is, a requirement of some kind or level of consciousness. For some commentators, the permanent ending of this attribute of the human personality is sufficient to assert that the human is dead, and therefore ready for burial or for giving the gift of life to others through donation of essential organs. Certain organ transplants are better performed from beating-heart donors, that is, people not yet certified as dead.³² Yet a woman in apparent whole-brain death will continue to support a pregnancy if respiratory, nutrition and other functions are assisted, demonstrating that hormonal levels are still being regulated.³³ It is obviously necessary to make a much more careful assessment of what constitutes the human in the international law of human rights than has previously been the case.

1.2 THE TREATIES’ UNDERSTANDING

The law has to be able to make judgements regarding who is the protected subject, the rights-bearer, but it is difficult to find enlightenment in the treaties that offer protection of the right to life. For instance, the American Convention on Human Rights [ACHR] ‘[r]ecognizing that the essential rights of man are not derived from one’s being a national of a certain state, but are based upon the attributes of the human personality’³⁴ continues by clarifying that ‘[f]or the purposes of this Convention, ‘person’ means every human being’.³⁵ Further, ‘[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No-one shall be

³² Such as heart, liver, and kidneys, in order to reduce to a minimum the duration of ‘warm anoxic’ time undergone by the organs (time in the body without oxygen and before rapid cooling, during which cells will begin to die). See generally Machado (1998); Morris (Co-ordinator) (2002).

³³ See Singer (1995), ‘Is the Sanctity of Life Ethic Terminally Ill?’ in Kuhse (Ed.) (2002), pp.246-261, at pp.250-251. Originally published in *Bioethics* 9, no. 3-4 (1995), pp.307-343, and citations and discussion, *supra* n.31.

³⁴ Preamble, ACHR.

³⁵ Article 1.2, ACHR.

arbitrarily deprived of his life.’³⁶ There are a number of inadequacies in this statement, unlikely to be apparent at the time of its drafting,³⁷ and it is the aim of this thesis to clarify the new challenges facing human rights discourse in its aspiration to offer protection to life, and where possible suggest some potential futures for that provision. But the questions go beyond defining ‘human’, ‘person’, and ‘life’; when those have been determined, it is still necessary to establish the extent of protection, to know what situations and risks are to be protected by law, and the scope of that protection and of that law; and further, to understand what the human rights bodies’ interpretation will be, or could be, or should be, of their own treaty provisions.

1.3 A MORAL LAW FOR LIFE

In order to reach a position where life is effectively protected by law, it is necessary to confirm the relationship between the substantive law which purports to protect life and the procedural devices which allow its articulation. For example, there is little point having a statute prohibiting murder on the statute books if no prosecutions are brought, or if there are a wide-ranging and apparently arbitrary class of exceptions to situations which are classed as culpable homicide, or if it is declared that no agent of the State may be prosecuted for any killing carried out whilst on duty.³⁸ Further, it is necessary to define clearly the distinction between that which can and that which cannot be ‘violated’ in respect to life; when can a moral case be made for protecting to the uttermost, or failing to protect, human life? Which conversations are operative in the debate about the value (and,

³⁶ Article 4, ACHR.

³⁷ See discussions surrounding the drafting of UDHR, where Mr. Vanistendael, of the *International Federation of Christian Trades Unions*, suggested that the right to life provision should include the individual’s acquisition of rights ‘from the first moment of his physical development,’ a moment which could not at that time take place *in vitro*, or be ‘frozen’ indefinitely. UN Doc E/CN.4/AC.2/SR/3, at p.7.

³⁸ See *infra*, n.781 and accompanying text.

therefore, the degree of protection) of life – the value of which lives, and the value to whom,³⁹ including a possible monetary value?⁴⁰ And what risks must be protected against, at what cost?

‘Protection of life’ is a misunderstood phrase. Some arguments, and particularly in the context of abortion, or end-of-life interventions, understand ‘protection’ to mean that life may never be lawfully taken; that it must be prolonged to the uttermost. Such an interpretation dismisses the possibility of sacrifice as an acceptable mode of dying,⁴¹ except when that sacrifice is in the service of the State, in which case it might be exerted upon both the willing⁴² and the reluctant.⁴³ This is in addition to the more obvious interpretation, that a human’s life is never to be wilfully lost if there is anything that could be done to save it, whatever the cost in resources or suffering, or if, in the face of

³⁹ On the value of the life of a severely malformed and stillborn child, to her family and to the wider community, see Williams (2005).

⁴⁰ See e.g. ACHR, *Trujillo Orozco v. Bolivia* Reparations, 27/02/2002, para.62: ‘With regard to violation of the right to life ... since *restitutio in integrum* is not possible and in view of the nature of the right violated, the reparation is made, *inter alia*, pursuant to the practice of international jurisprudence through fair monetary compensation, to which should be added the positive measures taken by the State to ensure that there is no repetition of offending acts, such as those in this case.’ [Footnote omitted]. See also Hope (2004).

⁴¹ See D’Amato, [fictional] ‘Opinion of Professor Tieu’: ‘the most immoral act that we could conceive of would be to take the life of a group. Conversely, one of the highest acts of morality is to save the life of a group [by personal sacrifice]’. D’Amato (1980), p.479

⁴² ‘I know that I shall meet my fate / Somewhere among the clouds above; / Those that I fight I do not hate / Those that I guard I do not love; / My country is Kiltartan Cross, / My countrymen Kiltartan's poor, / No likely end could bring them loss / Or leave them happier than before. / Nor law nor duty bade me fight, / Nor public men, nor cheering crowds, / A lonely impulse of delight / Drove to this tumult in the clouds; / I balanced all, brought all to mind, / The years to come seemed waste of breath, / A waste of breath the years behind / In balance with this life, this death.’ W.B. Yeats, *An Irish Airman Foresees his Death* (1919).

⁴³ Whilst people may be reluctant for many reasons to give their lives in the service of the State, including fear, the reason most likely to be heard in human rights discourse is that of conscientious objection. To be afraid is not enough; to be unafraid but have reasons of belief for not wishing to be involved in violence or to kill (rather than not wishing to be killed) is considered valid. On recognition of conscientious objection, see UN CHR, Fifty-eighth session: Item 11(g), *Civil and Political Rights, Including the Question of Conscientious Objection to Military Service*. See also Council of Europe: *Exercise of the Right of Conscientious Objection to Military Service in Council of Europe Member States*: Recommendation 1518 (2001), recalling Assembly Resolution 337 (1967), Recommendation 816 (1977); and Recommendation No. R(87)8 of the Committee of Ministers. For background, see Doc.8809, *Report by the Committee on Legal Affairs and Human Rights*.

whatever provocation, life is threatened in defence of the self or other.

Otherwise, life might only be protected within certain limits. However, what those limits might be, the reasons for them and their expression in national legal systems, must be a matter of careful thought and drafting; the consequences are death, and the death of a living being is a matter which might be contemplated for both acceptable moral reasons, and for amoral ones. Previous generations, and many contemporaneous generations around the world, had their own ways of dealing with circumstances which inspired fear, or loathing, or were regarded as having the potential to weaken the society, or to compromise its ability to survive: the answer was often death. 'In many cultures ... particular diseases and disabilities earned a social death definition before the physical death had occurred'.⁴⁴ One such cause was the perceived and fabricated potential to 'weaken the blood' in the case of the demonized Other, the Jew in Nazi-occupied Europe.⁴⁵ Law and medicine together provided the answer to the threat: 'Leading constitutional lawyers wrote text books underlining the importance of a scientific/legal approach to the protection of the Volk.'⁴⁶ That 'protection' was achieved by, with, and through the law; determination of who was citizen or non-citizen, who would live and who would die, was according to who was seen as the Other.

Whether such determinations are being made today, and if so how the international law of human rights is addressing the issues, will be considered in this thesis. The basis for assessment of the substantive law for its ability or otherwise to protect human rights and inherent human dignity, that is to recognise those circumstances where life ought to be

⁴⁴ Hughes, (1996).

⁴⁵ Fraser, in Cheah, Fraser and Grbich (Eds.) (1996), pp. 63-79, at pp.65-66.

⁴⁶ *Ibid*, p.66.

absolutely protected, and to be able to discern situations where it may be both lawfully and morally brought to an end, or not protected, will be measured in this thesis by the yardstick presented by a leading German legal philosopher, Radbruch, and known as the *Radbruch Formula*.

1.3.1 RADBRUCH AND THE INTERESTS OF JUSTICE

The object and purpose of the human rights treaties can generally be found in their ‘obligation to secure rights’ article; the requirement to respect, protect and fulfil the treaty rights and freedoms to those within the jurisdiction. It is to be argued here that this is a Radbruchian obligation, in that the key is adjudication of courses of action which could lead to intolerable injustice. Briefly, Gustav Radbruch asserted an argument that, for law to serve the interests of justice, it has to both possess the qualities of legal certainty and to reflect certain moral values. This is not the place to enter into the arguments in detail – see below for that debate – but the point must be made at an early stage, that the basis for human rights discourse is a moral one, and that in the context of the right to life in particular the interests of justice – both legal certainty and the avoidance of the betrayal of equality – are reflected in a requirement of a ‘bias towards the protection of life’⁴⁷ in national legislation and in the outworking of the human rights jurisprudence itself, and that this bias demands a wider recognition of potential rights-bearers. It is intended here to draw principles from Radbruch’s work to provide scaffolding for a discussion of the content and nature of law in national legal systems, particularly, in the context of this thesis, law which impacts upon life and the ability to live.

⁴⁷ Quinot (2004).

In an era when human rights have been described as ‘values for a godless age’⁴⁸ it is difficult to find a strong foundation for those values – Baxi has decried the lack of a ‘social theory of human rights’.⁴⁹ If the rules are not those of a god – and in the international, cross-cultural jurisdiction of international human rights law, it is difficult to see how they can be the precepts of one religion or another – then they must have some other basis, or a basis which is fundamental to all understandings of the divine, and also to moral standards which reject a theistic basis.⁵⁰ The concept of human dignity is the key; that which affronts human dignity must justify itself.

It is helpful here to reiterate the uncertainty about what constitutes facts in respect of human life, and again to note that what constitutes facts, in this field particularly, is a very Western concept.⁵¹ It is, for instance, impossible to state that such-and-such a moment, a day or week, or number of cells, or a physical characteristic such as a beating heart, or supposed sentience (psychological or to pain) – the beginnings of a personality – represent a transience into being-ness.⁵² It must be decided if human rights are only for the sentient, those described by Nino as ‘moral persons’,⁵³ or if those who are human beings, but still only potential persons, (if such a distinction can be made) can have rights. The hypothesis is that human dignity can be recognised, and acted upon, where human

⁴⁸ Klug (2000).

⁴⁹ Baxi (2002), at p.112.

⁵⁰ Wilson (1998); *infra*, n.695 and accompanying text.

⁵¹ A noteworthy example of a non-Western way of approaching ‘facts’ was given by the President of Nigeria, Olusegun Obasanjo, in an interview with the Sunday Times, 24 October 2004: ‘In Africa we normally don’t count the number of our children. It’s superstition, really. When people ask you if you have one, you say: ‘Many.’ If you have none you say: ‘Many.’ And if you have many you say: ‘Many.’ It is not that the facts are unknown, but that there is something more important, a belief system, to be acted upon. This is in contrast to a Western mindset, which prefers its beliefs to be supported by facts where possible; and if facts seem to contradict the beliefs, then it is the beliefs that are discarded, and not the facts.
<http://www.timesonline.co.uk/article/0,,2099-1311325,00.html>. (Accessed 09/11/2004).

⁵² See Martin (2000); see generally *What is it to be Human? Conversations in Print*, Institute of Ideas, (2001).

⁵³ Nino, (1991), p.34.

genetic material is found; which is not the same as granting rights to human DNA, as will be seen.

As that which affronts human dignity almost inevitably causes suffering in one form or another, so Baxi's proposition, 'I take it as axiomatic that the historic mission of 'contemporary' human rights is *to give voice to human suffering*, to make it visible and to ameliorate it'⁵⁴ provides an answer to the search for a philosophic foundation for rights. It will be argued that avoiding 'unbearable injustice' by rejecting preventable human suffering leading to avoidable deaths, together with recognition of human dignity, makes a sufficient *raison d'être* for the discipline, and assessing the situations in which violations of rights are alleged by that determination provides a more defensible criterion for decisions than most others.

1.3.2 A 'BIAS OR PRESUMPTION IN FAVOUR OF LIFE'

This phrase, a 'bias or presumption in favour of life', formulated by Quinot in the context of a comparative analysis of the 'right to die' in United States [US] and South African [SA] constitutional law, represents a probable culmination of a 'legal-philosophical question which will have to be answered[, which] is the extent to which the whole concept or system of human rights carries a bias towards life'.⁵⁵ Quinot suggests that '[t]he South African Constitutional Court has hinted at something to this effect (in the context of the 'right to die' debate) in stating that life is one of the core/most important rights/values in the 1996 Constitution.'⁵⁶ He sees the difficulty as one of decisions having to be made

⁵⁴ Baxi (2002), p.103.

⁵⁵ Quinot (2004), at p.172, footnote 200.

⁵⁶ *Ibid.*

regarding freedom of choice *contra* the protection or promotion of life.⁵⁷ Whilst this aspect (of exercise of freedom of choice) is, of course, of profound importance in the context of the euthanasia and abortion debates, it is less so with regard to what will be seen as other threats to life, where the life not protected was lost in ways other than at the person's choice; indeed, where there were readily available interventions that would have saved that life, and possibly many others. The role of international law in preventing violations, or perhaps in failing to do so, must be examined; are victims being given a voice, and are they being heard – or are they silenced by law as well as by circumstance?

1.3.3 SILENCED VOICES

It is of course the nature of the subject, the violation of the right to life, to mean eternal silence; failure to protect life means death. Yet we have to look beyond that silence, and beyond the horizons;⁵⁸ there other means of silencing, with three – at least – silences at work in the context of the right to life in international law. Failure to give a voice, or to listen to a voice, equals a silencing, as referred to by Charlesworth, the possibly inevitable drawback in that 'all systems of knowledge depend on deeming certain issues as irrelevant or of little significance'.⁵⁹ Another is the silencing of those who are not privileged to be given a voice in the international legal order, except by being recognised as a 'victim' (or otherwise having standing) and needing appropriate resources of knowledge, advice and finance, to be able to bring a challenge against States' (or non-

⁵⁷ *Ibid.*

⁵⁸ See *supra*, n.16.

⁵⁹ Charlesworth (1998) p.381.

State actors') abuse of power.⁶⁰ Failure to do so allows voices to be silenced, dying unheard before any tribunal that could have made a difference, and without a right of representation or redress, or the possibility that in the future others' voices will have the opportunity to speak and to be heard.

Some voices are not silenced, but are silent, unwilling or unable to participate in a discourse that denies them identity. For Kemshall, a definition of 'discourse' implies relations of power,⁶¹ and the power relations implicit in human rights discourse may themselves serve to silence some voices. Many have been, and continue to be, silenced by a system that does not give a voice to the Other, whether that Other is of a different gender, or age, or race, or physical or mental ability. As Wright claims, in a discussion of the problems of understanding the history of international law:

The voices of the silent are usually described as not being heard because of imbalances in economic and political power. On a deeper level they may also not be heard because the very nature of historical and legal discourse in the international arena makes their voices unintelligible within the 'malestream' of time and history.⁶²

What must also be remembered, in the case of life-challenging violations, is that it is not only the violated person – the silenced one – who suffers. Bereavement is a grief most profoundly borne, but, again, it is not the only way in which a person's family, friends, neighbourhood, community and State are affected by the loss of a life (and, again they may be 'silenced' by the lack of opportunity available to make a case). To clarify, the loss may be of a not-yet-established life; the degradation of the environment may affect the

⁶⁰ See Lacey in 'Feminist Legal Theory and the Rights of Women' in Knop (Ed.) (2004) pp.13-55, at pp.20-21, where she describes a criticism of liberalism's emphasis upon the individual, which can obstruct the realisation of rights in those who are 'differently situated'. Lacey's argument can be read as meaning that the voices of women who do not, for instance, enjoy access to resources, or do not even wish to 'enjoy' such access, are thereby silenced.

⁶¹ Kemshall, (2002) at p.132.

⁶² Wright (2002) pp.217-218.

ability of future generations, yet unconceived, to live a safe, and healthy, life.⁶³ It may be that life cannot adequately be lived, because of lack of food, or work, or medicine. The manner of dying may be harmful to a population, in terms of its collective morality; for instance, by the carrying out of judicial execution,⁶⁴ the South African Constitutional Court [SACC] in *State v. Makwanyane and Another* having noted the State's responsibility to teach the value of life and dignity, and respect for them.⁶⁵ Even after death, there may be a contingent moral and emotional disequilibrium, if the body is not treated in line with the rites that it is felt should be accorded.⁶⁶ Punishment may be further inflicted on the body of a person, tortured and executed, to make a harsher point, even, for those who believe in it, denying bodily resurrection because the body has been dismembered.⁶⁷

There are also questions to be asked about the cultural relativity of international human rights law, which could raise issues of certain groups being silenced by, and within, the

⁶³ See Shelton, *infra* notes 308 and 853, and Atapattu (2002), on the emerging right to a healthy environment; and Fitzmaurice (1999), on a child's right to such an environment.

⁶⁴ See, for instance, on the death penalty and its outworking in Texas, Dieter (1994); on the cruelty of the execution of the penalty, Denno (1994); on the possible alternatives, Bedau (1989-1990); on the participation of health professionals in lethal injection executions, LeGraw and Grodin (2002); on interventions by an outraged international society and the role of transnational public litigation in US death penalty cases, Babcock (2002); on a developing international understanding of the inappropriateness of the 'supreme penalty' and the Rome Statute of the International Criminal Court, see Schabas (2000). See Garland (1996), where he 'examines the *Makwanyane* judgment itself in order to assess whether any attempt by the government to pander to public demand, and to pass legislation resulting in a return to capital punishment, would be regarded by the Constitutional Court as constitutional' assessing 'the legitimacy of the public outcry for a return to capital punishment' (p.2). For an argument in favour of the death penalty, dismissing abolitionists' disposition 'not to hold defendants fully responsible' as stemming from 'the long-ago sociology course (or any course in the less disciplined disciplines) [that] continues to rattle around in many a judge's head' see van den Haag (1989-1990) at p.503. On the (allegedly) possible place of the death penalty in modern society, see Ryan (2001) and Hicks (1990-1991). See also Suber (1998) on the range of possible jurisprudential approaches to capital offences.

⁶⁵ Para.222. For discussion see Garland, (1996).

⁶⁶ *Supra*, n.1053.

⁶⁷ See, e.g., Foucault, (1977 ed., tr. Alan Sheridan), Chapter 1.

law.⁶⁸ In all cultures there may be matters which are, officially, outside the law, but on which the society, the society outside the law and the society within it, the people and the lawyers, agree to keep silent. Abortion and infanticide may be representative of such silences of law. LaFleur, writing on Japanese Buddhist attitudes to abortion, notes: ‘Buddhist womens’ silence – or could it more accurately be called silencing? – again presents us with one of those cases where the absence of a voice may, in fact, say a great deal.’⁶⁹ The absence of certain voices in human rights discourses is indeed saying a great deal.

1.4 SOME SCENARIOS

In order to appreciate the scope of the perceived problems with regard to the current working-out of the right to life Article, and the likely impact of the suggested solution, some scenarios will be referred to throughout this thesis. They are necessarily limited in the extent to which they may be described and discussed, but are chosen to represent some of the possible aspects of human life and its protection at law which are currently inchoate, and which may be helped by a ‘new’ (or rather, more certain) reading of the Article, as it is found in major human rights treaties. These scenarios are chosen to represent four aspects of life: the human before birth; the creation of ‘new humans’; the creation of new beings who may or may not be ‘human’; and the misuse/misrepresentation of human DNA.⁷⁰

The first category is that of human life before birth, and whether a human being is indeed

⁶⁸ For an introduction to some of the issues within the ideological conflict between ‘universalism’ and ‘cultural relativity’, see Wright (2002) for issues of cultural relativity and gender; An Na’im (2001) for an Arabic perspective on human rights; Englehart (2000) on the place of rights in the ‘Asian Values’ debate.

⁶⁹ LaFleur (1995), p.9.

⁷⁰ Deoxyribonucleic acid. For further scientific information, see section 3.4.1.i, *infra*.

a human person enjoying rights before birth. Both abortion and the possibility of there being a crime of homicide of the preborn, as well as other issues surrounding the manipulation of human embryonic material, are issues related to the 'human' status of the preborn. The argument here is that it is both counterintuitive and biologically wrong to dismiss the humanity of the unborn child of human parents, although legal abortion is both necessary and desirable on national statute books. The legal denial of the humanity of the preborn has been used as a semantic device to protect the possibility of legal abortion, but consequently an unborn child who is the victim of murder/manslaughter is not recognised as a victim and the perpetrator is not punished. This is, it is to be argued here, unbearable injustice.

The second category is that of the creation of 'new humans'. Such beings may be those known colloquially as 'clones', where the embryo has been created by somatic cell nuclear transfer rather than natural, *in utero*, identical twinning, which takes place when an embryo splits post-fertilisation and pre-implantation. It will be seen, below, that it has been suggested that clones are not humans but are 'activated eggs', 'a new kind of being never before seen'. New kinds of beings, whether they are clones or others, are, it is argued, going to be seen, and it is necessary to be very clear in advance whether these new beings are human, and human rights-bearers. It is to be argued here that such beings, where human genetic material is present,⁷¹ should be included in human rights protection, specifically in the contest of this discussion, the protection of the right to life. Whilst banning cloning is favoured, the chances are that it will happen somewhere; the consequent creations must be accorded human rights-bearing status.

⁷¹ A point obviously in need of further debate and definition: see section 3.4.1.iii, *infra*.

Slightly more difficult is the third category suggested above, that of those creations which may be less obviously ‘human’, such as part-human hybrids or chimera. Cyborgs⁷² are a possible issue of the future, and the question will then be how much artificial replacement can be made to a human body for it to be no longer human, to no longer qualify as a human rights-bearer. Two prosthetic legs, two prosthetic arms ... a heart, lungs, liver, kidneys; perhaps only a brain remaining, sustained entirely by machinery. Is this a human, any more or less than a non-sentient being who is in that form of coma (with associated apparent unresponsive wakefulness) known as a persistent vegetative state [PVS]⁷³ and who is sustained entirely by the interventions of others? The situation of permanently⁷⁴ unconscious people, those described as being in PVS, is Steinbock alleges, different. She refers to the American Academy of Neurology *amicus curiae* brief in the American State case, *Paul Brophy v. New England Sinai Hospital, Inc.*:⁷⁵

No conscious experience of pain and suffering is possible without the integrated functioning of the brainstem and cerebral cortex. Pain and suffering are attributes of consciousness, and PVS patients like Brophy do not experience them. Noxious stimuli may activate peripherally located nerves, but only a brain with the capacity for consciousness can translate the neural activity into an experience. That part of Brophy’s brain is forever lost.⁷⁶

This viewpoint of PVS is not without its detractors;⁷⁷ but more pertinent to the current

⁷² Part-human, part-machine (or construction); it could be claimed that a person with a pacemaker, or a cochlear implant, or an artificial hip, is a cyborg, and that the age of cyborgs is already here. Kevin Warwick ‘has been successful with the first extra-sensory (ultrasonic) input for a human and with the first purely electronic communication experiment between the nervous systems of two humans.’ <http://www.kevinwarwick.com/> (Accessed 16/12/2004).

⁷³ See Jennet and Plum, ‘Persistent Vegetative State after Brain Damage; A Syndrome in Search of a Name’, (1972): ‘the criteria needed to establish that prediction [of irrecoverability] reliably have still to be confirmed. Until then “persistent” is safer than “permanent” or “irreversible”’.

⁷⁴ As Steinbock (1992) acknowledges, some people in PVS have been restored to a degree of sentient life.

⁷⁵ 1986, and in Steinbock, *supra* n.74, at p.27.

⁷⁶ Cited in Cranford, ‘The Persistent Vegetative State: The Medical Reality (Getting the Facts Straight)’ *Hastings Centre Report* 18 (February/March 1988), p.31, and in Steinbock, *supra* n.74, at p.223, footnote 32.

⁷⁷ See *supra*, n.74.

discussion, are they human rights-bearers?

The final category to be addressed is that of the misuse/misrepresentation of human DNA. Can 'new humans' be grown from discarded DNA; is there a 'right to life' of corpses? It is suggested here that the taking of DNA from a corpse to closely re-create that biological being (who will not be the same person, nor exactly the same biologically because of the impact of mitochondrial DNA) should be the subject of effective legal regulation, prohibiting the practice. Bound up in this debate is the status of 'personhood' with respect to the human being, inhabiting the living human body.

These four categories are not clear-cut and distinct, but are bound up in each other; whatever happens to new embryos, whether they are straightforwardly human or possibly something else, falls outside the remit of human rights if the preborn human, and therefore the human embryo, is not counted as a human rights-bearer, and so the abortion argument is of relevance, for instance. These matters will become clearer as this thesis progresses; for the present, the questions have been introduced.

1.5 APPROACH

1.5.1 ASPECTS OF PREVIOUS SCHOLARSHIP

Whilst existing work on the subject of the right to life itself⁷⁸ is limited, works covering the theories and practice of human rights generally contribute to the analysis of specific

⁷⁸ See Ramcharan, (Ed.)(1985); Ramcharan (1983); Przetacznik (1976); and reviews of Ramcharan and contributors, Bedau, (August 1988) and van Aggelen, (July 1986); Orlin, 'The Right to Life / The Right to Die: The Rights, their Interrelationship and the Jurisprudential Problems' in Orlin, Rosas and Scheinin (Eds.) (2000); Prémont and Montant, (Eds.) (1993).

rights, whilst other texts focus on a particular aspect of the right⁷⁹ (such as capital punishment⁸⁰ or the life of the unborn⁸¹). The right to life is presented, in the main, with the civil and political rights. The general view of writers has been that such rights are negative obligations, requirements for States to refrain from action that violates the right concerned, the reasoning being that such requirements do not involve much in the way of expenditure;⁸² this view is losing force in the light of evolving understandings of human rights, their function and attendant obligations, and in the recognition of the positive obligations to be found attached to ‘even’ the civil and political rights.⁸³ The only major work on *The Right to Life in International Law* is that edited by Ramcharan in 1985,⁸⁴ which contributed to an expansion of the earlier accepted scope of the provision.⁸⁵

1.5.2 MATTERS INCLUDED AND EXCLUDED

The issues involved in analysing a matter generally abbreviated to four short words – ‘the right to life’ – but better paraphrased as ‘the right to life shall be protected by law’⁸⁶ are formidable, the fields cross-disciplinary and the arguments circular. This thesis will, at an early stage, provide a general overview of the treaty provision found in, for instance, Article 6 of the International Covenant on Civil and Political Rights [ICCPR], Article 2 of the ECHR, Article 4 of the ACHR and Article 4 of the African Convention on Human and

⁷⁹ Joyce (1961); See also St.John-Stevás (1963); Williams (1997); Prémont, Tom, and Mayenzet, (Eds.) (1998); Okechukwu (1990); Plowman (1942); Keen (1992). See also texts such as *The Bossuyt Report: The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights* (2000).

⁸⁰ See *supra*, n.11.

⁸¹ See Ibegbu (2000).

⁸² Joseph, Introduction, para.1.55 in Joseph, Schultz, and Castan (2000).

⁸³ See Mowbray, (2004).

⁸⁴ Including Ramcharan, (1985) ‘The Concept and Dimension of the Right to Life.’

⁸⁵ See n.305, *infra*, and accompanying text.

⁸⁶ To be discussed further, below; but see, for instance, the Concurring Opinion of Sir Stephen Sedley in ECtHR, *Keenan v. United Kingdom*, 03/04/2001, para.2. ‘Article 2 contains not a general assertion of the right to life but a specific obligation of states signatories to protect that right by law.’

Peoples' Rights [ACHPR],⁸⁷ the concept that is 'the right to life shall be protected by law'. Excluded, as being beyond the scope of this thesis, will be discussion of the right in its wider context, that which has come to be known as a 'right to living' and which was first presented in a major context in Ramcharan's edited text of 1986, *The Right to Life in International Law*.

1.5.3 METHODOLOGY

It is not possible to see how any attempt to define 'life', or what it means 'to have life', or to be a 'human' or a 'person' or to have not achieved these states or to have lost them in some respect or another, can be addressed without canvassing a wider field of knowledge than that found within the confines of a single academic field, and so the approach to this thesis is cross-disciplinary.⁸⁸ However, whilst philosophy, religion, biology, medicine, physics, psychology and history are amongst the disciplines called upon to some extent or another, the focus is that of international human rights law, and therefore the full available scope will be used to clarify positions within international law. Whilst the reader may be pointed to sources on relevant matters, much descriptive and analytical detail of other

⁸⁷ For general texts, see e.g.: Alston, (Ed.) (1996); Craven (1995); Dinstein, 'The Right to Life, Physical Integrity, and Liberty' in Henkin (Ed.) (1981); Dixon and McCorquodale (4th ed., 2003); Harris, O'Boyle, and Warbrick (1995); McCorquodale, (Ed.) (2003); Newman and Weissbrodt, (2nd ed., 1996); Rehof in Alfredsson and Eide (1999), pp.89-101; Steiner and Alston (1996).

⁸⁸ Methodological note: it is incumbent upon me here to state some limitations of the research which follows. As a lawyer, and not trained in the study of philosophy, medicine, biology, anthropology, psychology, religion, economics and history – all of which receive some mention in this thesis – I have had to rely upon the scholarship of others in order to arrive at sufficient knowledge of a particular field. This I have done by consulting relevant literature including dictionaries, encyclopaedias, and commentaries, and making internet searches, initially, and where appropriate using these as pointers to original works. Current journals have been of particular help (such as the *BMJ*). Following this, I have checked the understandings at which I have arrived by interview with one or more people skilled in the field, (as noted throughout the text) and whilst I am grateful to these, and others, the final choice of sources, and the conclusions that I have drawn, remain mine.

disciplines' knowledge base will not be entered into unless there is some particular point to be served by so doing, or unless there is particularly great controversy surrounding an important contribution. Additionally, there is not space to enter into a thoroughgoing analysis of some of the major themes even in law; readers will, again, be pointed to more authoritative references as appropriate.

The task of this thesis is to establish and define in international law terms that there is a 'special spark', something that makes humans capable of acting with dignity, and worthy of being treated with respect for their inherent dignity, and that this immaterial aspect places an obligation upon States to recognise its presence in human life and to work to promote and sustain that life in wellbeing.

To that end, the thesis will take the following form. Following this introductory first chapter, there are four substantive chapters of this thesis, and a Conclusion, drawing together the issues presented. The right to life article itself, as set out in international and regional treaties, will be considered in Chapter Two. Under examination will be aspects of the right gleaned from the texts – who the relevant right to life articles cover, how they have evolved over time, and how they should be interpreted, particularly in the light of human rights' law's relationship to the general canon of public international law.

This will lead into an examination of the subject matter of international human rights law, the human, in Chapter Three, and an analysis of inherent dignity, the quality which entitles that human to be singled out as a rights-bearer. Included in this, a case will be made for acknowledging the need to show respect for an extended notion of human dignity in dealings with human genetic material. A justification for this broad class will be made, and a definition suggested of what is meant by human genetic material in this

context.

The treaty provisions are re-addressed, in Chapter Four, in order to establish whether the paraphrase briefly introduced in the first substantial chapter, that of the right to life being ‘protected by law’, is a valid conclusion to draw from the right to life provisions, which is then discussed more fully in the light of an interpretation based on the ‘Radbruch formula’. In this interpretation, the notion of ‘unbearable injustice’ is assessed against a framework of ‘preventable human suffering’ and recognition of inherent human dignity, as a standard for analysis of the substantive law.

The work done in earlier chapters is then applied in Chapter Five to the offered definition of a rights-bearer, the human represented in the narrow sense by human genetic material, more generally by individual living humans, and in the broader sense by human populations at risk (including future generations). The issues briefly introduced in the first chapter will be examined in the light of the work done, particularly in the context of the work that could be accomplished by human rights discourses to protect the human’s right to life from unbearable injustice, such as may be perpetrated by an interpretation that places any requirements on the rights-bearer of ‘personhood’. The proposed solution is to argue for broader definitions, both of the human and of the life protected, than is currently the case, and for a greater realisation of what is at stake in human rights jurisprudence regarding the right, involving issues of the moral nature of the protecting law at national level.

1.6 CONCLUSION

There is a ‘right to life’ Article in a number of international and regional human rights treaties which is not currently being employed to give the full potential effect to the right.

There are issues arising ‘beyond the horizons’, particularly with regard to the identity of the rights-bearer, the ‘human’ in the international law of human rights, that fail to be addressed by a restrictive interpretation of the right, and consequently may permit intolerable injustice to take place with impunity. For instance, a failure to recognise the human represented by human genetic material and to record it the respect called for by an expanded notion of human dignity has implications for the future, when ‘new humans’ – clones, hybrids, chimera – might enter the realm of created beings, with, it is argued here, a valid claim to respect for their human rights entitlements, including that their right to life shall be protected by law.

The aim of this thesis is to promote a more effective interpretation of the right to life provision, by means of a dynamic and evolving interpretative theory which is both legally and morally valid in international law. This teleological approach, drawing on the ‘living instrument’ analogy which has been widely accepted by the courts and tribunals in order to best promote the object and purpose for the human rights treaties, is necessary as the horizons of the future become the realities of today. Any failure to realise the impact of those technologies on the lives of humans will be to deny those realities for whole classes of beings who should, morally and in the pursuit of justice, have a claim to be classed as human rights-bearers.

CHAPTER TWO

TREATIES, INTERPRETATION, AND THE RIGHT TO LIFE

‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’

The right enshrined in this article is the supreme right of the human being.
Human Rights Committee, *Baboeram-Adhin et al. v. Suriname*⁸⁹

2.1 GENERAL INTRODUCTION

The nature of human rights treaties, described by the ECtHR as ‘[u]nlike international treaties of the classic kind’,⁹⁰ is more than an undertaking which establishes ‘mere reciprocal engagements between Contracting States’.⁹¹ What the nature of that undertaking is, and how they should be best interpreted (with particular reference, in this context, to their right to life provisions) is the subject of examination in this chapter. The aim is to secure a sound basis for an exploration of issues, currently ‘at or beyond the horizon’, which require addressing by human rights discourse, in order that the provision, ‘the right to life shall be protected by law’ shall be given full effect.

The ideal of the recognition and protection of human rights by the development of treaties

⁸⁹ *Baboeram-Adhin and Kamperveen et al. v. Suriname*, Views, para.14(3), citing Article 6, ICCPR.

⁹⁰ ECtHR, *Loizidou v. Turkey* (Preliminary Objections), 23 March 1995, paras.71–72.

⁹¹ *Ibid.*

was facilitated by the establishment of the United Nations,⁹² and the work that was then undertaken to formulate a regime of international human rights protection⁹³ served to establish the proposition that there was – and is – a justiciable concept of human rights, including a right to life. As Colon-Collazo⁹⁴ points out, ‘the first proclamation in the Western Hemisphere of every human being’s inherent right to life was made in 1776, in the June 12 Declaration of Virginia⁹⁵ and the July 4 United States Declaration of Independence,⁹⁶ where it was manifested that every man had inalienable rights to ‘life, liberty and the pursuit of happiness’.

The task of this chapter is to clearly articulate the right to life provision as it is now included in major international and regional treaties, establishing where the ‘protection of life’ proposition can be found in law, and the appropriate method of interpretation. The world is now a very different place from that envisaged at the inception of the treaties, and ensuring that the object and purpose of the treaties is established and promoted will, it

⁹² Although it took some time; the Council of Europe’s [COE] ECHR was adopted in 1950, 16 years before the UN’s ICCPR. For a record of the creation of human rights systems as an ‘ideological response to war’, see Simpson, (2001), Chapter 4.

⁹³ See, for instance, *Yearbook of the United Nations*, 1947-1948, Section G.1.a, p.572: ‘At its fourth session, the Economic and Social Council established a procedure and a timetable for the formulation of an International Bill of Human Rights (resolution 46(IV)).’ See also Henkin (1981). Shue suggests the following list as including the necessary material for an International Bill of Rights: UN Charter, Preamble and Articles 1, 55, and 56; UDHR; ICESCR; ICCPR; ICCPR [First] Optional Protocol. Shue, (1980) *Introduction*, endnote 1, p.181.

⁹⁴ Colon-Collazo, ‘A Legislative History of the Right to Life in the Inter-American Legal System’, in Ramcharan (ed.)(1985) at p.33.

⁹⁵ George Mason, Author; adopted by the Virginia Constitutional Convention on June 12, 1776: Section 1: ‘That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.’

⁹⁶ Thomas Jefferson, Author (June, 1776) In Congress, July 4, 1776. *The unanimous Declaration of the thirteen United States of America*.

‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, ...’.

will be argued, require a flexible interpretive theory, in order to meet the demands of issues and situations, such as the scenarios introduced earlier, which are currently ‘beyond the horizon’ but which may not stay out of reach for long.

This will then pave the way for an examination in the next chapter of the concept of the rights-bearer – who is ‘the human’ who has their life protected by law? The fourth chapter will consider more deeply the nature of that protecting law, but for the present it is important to place human rights protection in its normative context, and to consider its claim to development as a ‘living instrument’, in order to consider the validity of a dynamic interpretation of the right to life provision in those treaties, meeting the need of ‘looking beyond the horizons’.

2.2 HUMAN RIGHTS IN TREATIES AND OTHER INSTRUMENTS

Under consideration throughout this thesis will be the United Nations Charter, and those universal human rights treaties, Conventions and Declarations that specifically refer to a right to life; those regional human rights treaties, and protocols thereto, that include a right to life, or intend the protection of life; certain documents that are not yet in force, or that are not legally binding at the international or regional level, but that contain formulations of the right to life; and some national Constitutions and Bills of Rights. Other examples of the many occasions when the right to life is mentioned, directly or obliquely, or its protection is intended, by an instrument in force or not, enforceable or not, aspirational or justiciable or not, include those international and regional instruments that prohibit criminal violations of life, although they may not specifically express it, or

may enjoy the status of declarations rather than treaties.⁹⁷ For instance, the Convention on the Prevention and Punishment of the Crime of Genocide, ('Genocide Convention') whilst not specifically mentioning a 'right to life', has as its whole aim the protection of life by the criminalisation of mass violations of the right to life.⁹⁸ Similarly, the COE's document, *Guidelines on Human Rights and the Fight against Terrorism*, expresses a State 'obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life.'⁹⁹ Even the unlikely-sounding Vienna Convention on Consular Relations [VCCR] has been used to good effect in death penalty cases: 'the recent decision of the ICJ in *LaGrand*, which represents a new phase of litigation over Article 36 [of the VCCR] violations, has already prevented one execution'.¹⁰⁰ These texts will be mentioned but not covered in detail.

The aim, therefore, of this chapter is to analyse the right to life provision as found in the major international and regional texts, focusing upon its development from the Universal Declaration of Human Rights [UDHR], and the influence of that development in other texts, initially by looking at those specific right to life provisions. It is, however, not

⁹⁷ E.g., Article 3(a) of the Declaration on the Elimination of Violence Against Women [DEVAW].

⁹⁸ See the Preamble to the Genocide Convention.

⁹⁹ COE, H(2002)004, adopted by the Committee of Ministers at its 804th Meeting (11 July 2002), Article I.

¹⁰⁰ Babcock (2002), p.387. Babcock points out that post-*Furman*, the USA 'has executed seventeen foreign nationals from thirteen different countries' (as of 09/01/2002) and that 'in virtually every case' the USA 'had failed to notify the detainees of their rights to consular notification and assistance under article 36 of the VCCR'. Babcock, (2002) at p.368, and referencing at footnote 5 the DPIC, *Foreign Nationals and the Death Penalty in the United States*. As of 01/05/2006 this number had risen to 21 executed persons (and one death in custody): <http://www.deathpenaltyinfo.org/article.php?scid=31&did=582#executed>. (Accessed 01/05/2006). See ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)* 31/03/2004, para.21. See further United States Court of Appeals for the Fifth Circuit: *Plata v. Dretke and the Texas Department of Criminal Justice, Institutional Division*, 16/08/2004, regarding the (unfavourable) outcome of one of the appeals from Avena. On the role of transnational public litigation in US death penalty cases, including discussion on the workings of VCCR, see Babcock (2002); Deen-Racsmany (2002). The execution prevented was that of Gerardo Valdez; Karl and Walter La Grand, German nationals, were both executed (24 February and 3 March 1999, respectively, and despite the ICJ's expression of provisional measures). Valdez' death sentence was vacated, and substituted with life without parole, following Mexico's intervention on the grounds of Oklahoma's violation of Article 36 VCCR. (AP, 23 November 2003, and reported on DIPC, 1 January 2004). See Feria-Tinta (2001). On the ICJ and provisional measures, see Yoshiyuki Iwamoto (Lee) (2002).

assumed that they contain the entirety of what is needed to protect or nurture what Scott terms the ‘full development of personhood’,¹⁰¹ that which will be argued here as the ‘right to live’.¹⁰² The following discussion, in which the right to life provisions of a number of international and regional instruments will be introduced, represents the key expression of the treaty (and other) commitments of States which may have an impact on the right to life itself, and are the core aspects of the right to life in international law.

2.2.1 THE RIGHT TO LIFE IN TREATY – *SINE QUA NON*

The formulation of a formal, treaty-based right to life in the international arena has often been more eloquent in the aspiration than in the practice. As a treaty provision, an endowment of a right to life has a number of controversial elements, not least in terms of whether it is a *sine qua non*, as asserted by Colonel Hodgson of Australia during the debates surrounding the formulation of the UDHR:

In his opinion certain rights listed ... were quite obvious, and already guaranteed. That applied, for example, to the right to existence which was, so to speak, a *sine qua non*. It was a right which was already assured by the laws of all countries¹⁰³

Without life there is nothing, and therefore no need to enact Bills of Rights, as no provision has any meaning for the dead. To make ‘life’ expressly the subject of an Article was, it was argued, superfluous.¹⁰⁴ In the Inter-American Commission of Human Rights

¹⁰¹ Scott (1999), at p.634, and citing Scott, (1989), at 786; although note that it will become clear that ‘personhood’ is not argued here as a necessary attribute of a life that is to be protected. See Finnis (1980), notes on s.VII4, pp.194–195.

¹⁰² *Infra*, s.2.3.4.iv.

¹⁰³ UDHR *travaux préparatoires*: UN Doc. E/CN.4/SR.13, p.7, and discussed further in Schabas, (2002) at p.28. See also joined cases *Edwards et al. v. The Bahamas*, 4 April 2001, para.109: ‘The right to life is widely recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights’.

¹⁰⁴ See also the debate between Belgium’s Lebeau and France’s Cassin on whether there needed to be a specifically right to life provision: Lebeau argued that the wording needed to be ‘Everyone has the right to protection of his life’. UN Doc. E/CN.4/SR.53, pp.1-3.

[IACommHR] *'Baby Boy'* case, Monroy Cabra expressed the same principle somewhat differently when he stated that:

Life is the primary right of every individual. It is the fundamental right and the condition for existence of all other rights. If existence is not recognized, there is no subject upon which to predicate the other rights. It is a right that antecedes other rights and exists by the mere fact of being, with no need for the state to recognize it as such.¹⁰⁵

Commissioner Monroy Cabra was relating the pre-existence of the right to the ability of a specific provision to give force to its protection. However, if one accepts its place in the treaties, as those who drafted them eventually did,¹⁰⁶ the difficulties are only just beginning; what is the scope of this right and the other rights to be included?

i Formulation in UDHR

The formulation of the right to life provision in international human rights treaties developed from that articulated in UDHR, Article 3: 'Everyone has the right to life, liberty and security of person'. William Schabas has traced the arguments involved in the formulating of the right to life article in UDHR, noting that early suggestions were wider in scope than major world powers were prepared to envisage. At one stage in the drafting procedure for UDHR, the proposed rights were divided into three sections; the status of liberty, the status of equality, and the status of security. 'Life' was the first title in the status of liberty,¹⁰⁷ although in an earlier working paper, entitled 'survival', a right to life was not included.¹⁰⁸ UDHR's *travaux préparatoires*¹⁰⁹ reveal seeds of Cold War

¹⁰⁵ Para.9.

¹⁰⁶ Although as Schabas, (2002) at p.11, footnote 70, points out, the idea had been mooted in international law as early as 1910, in an article by Rougier, *'La théorie de l'intervention d'humanité'*. [1910] *Revue général de droit international public* 468, at pp.517-518. 'Rougier considered the question from the standpoint of humanitarian intervention, which he considered would be justified where a State violated the right to life of its subjects by wholesale massacres or even negligence in the provision of basic healthcare during an epidemic.'

¹⁰⁷ UN Doc. E/CN.4/W.18.

¹⁰⁸ UN Doc. E/CN.4/W.4, p.12.

dissent,¹¹⁰ UK and USA disinclination to spend any more than they absolutely had to on anything that they did not absolutely have to, and a (largely) major-power/Latin American split on issues of morality.¹¹¹ These included the humanity of the preborn,¹¹² the humaneness of the death penalty,¹¹³ and the requirement to provide welfare rights to one's people.¹¹⁴

Schabas shows that the debate regarding the scope of the right to life was vibrant during the drafting of the article in UDHR:

Participants in the debate attempted to breathe meaning into the provision ... for example by emphasizing an economic and social content for the right to life, or in other words the right to live, the right to a certain quality of life ... in the end, prudence dictated a less precise statement, one which neither excluded the more radical approaches to the right to life nor

¹⁰⁹ N.b.: The more common term *travaux préparatoires* will be used to include the situations where *procès-verbaux* might otherwise be employed with regard to non-treaty international instruments.

¹¹⁰ UN Doc. A/C.3/R.105, p.2; Schabas describes the debates in the Third Committee of the General Assembly as being 'lengthy and heated ... sometimes degenerat[ing] into the tense polemics which characterized the dawn of the Cold War'. Schabas (2002), p.35, footnote 104 and accompanying text. See also UN Doc. E/CN.4/SR/35, pp.3-5. For comment on the 'birth of UDHR [as] nothing less than a political event', see Waltz (2001).

¹¹¹ UN Doc. See, for instance, the following suggestions, to amend UN Doc E/800: 'Everyone has the right to life, liberty and security of person'.

UN Doc A/C.3/220: Panama: 'Every human being has the right to exist and to maintain, develop, protect and defend his existence.'

UN Doc A/C.3/224: Cuba: 'Every human being has the right to life, liberty, and security and integrity of the person.'

UN Doc A/C.3/268: Uruguay: 'Everyone has the right to life, honour, liberty, and to legal, economic and social security.'

¹¹² See generally Schabas, *infra* n.110.

¹¹³ See the Draft Chilean Declaration, *infra*, n.131 and accompanying text; see also Ecuador: *Draft Charter of International Rights and Duties*, UN Doc E/CN.4/32: 'Article 1(1) *Right to Life*: There shall be no death penalty. Mutilation, flogging, and other tortures and degrading procedures are categorically forbidden, whether as penalties, corrective measures, or means of investigating offences. Everyone, including incurables, imbeciles and the insane, has the right to life from the moment of conception. Persons unable to support themselves by their own efforts have the right to sustenance and support, and the State has the corresponding duty of seeing to it that such support is made available.' Schabas (2nd ed., 1997) notes that this text 'was the first to openly proclaim abolition of the death penalty.' (p.32, footnote 72 and accompanying text.)

¹¹⁴ E.g., UN Doc A/C.3/266: Mexico: 'Add, as a second paragraph, [to amend UN Doc E/800] the following: "The right to maintenance, health, education and work, is considered essential in order to obtain an increase in the standard of living of the individual, as well as to secure the full existence of social justice and the full development of the human being".'

endorsed them. In this way, it accurately served the purposes of the Declaration, which was to be a manifesto whose scope could evolve over time, and not a detailed statement riddled with awkward exceptions.¹¹⁵

Regarding the sanctity of human life, issues surrounding the death penalty and abortion were of great import in the discussions, but were left out of the final reckoning. Schabas remarks that: '[m]any delegates to the United Nations would have preferred some mention that the right to life began 'from conception', thereby protecting the foetus. On this point, too, compromise dictated silence.'¹¹⁶

Yet the aspirational nature of the UDHR was emphasised from the beginning. It was not intended to create law:¹¹⁷ '[The Universal Declaration of Human Rights] is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of human rights and freedoms to serve as a common standard of achievement for all peoples of all nations.'¹¹⁸ France and Belgium had been the only states to assert legal force intrinsic within the Declaration; the Belgian representative (M. Dehousse) proclaimed that '[t]here will be, therefore, very great moral prestige and moral authority attaching to this Declaration. Therefore the man in the street claiming certain rights would not simply be an isolated voice crying in the wilderness; it will be a voice upheld by all the peoples of the world represented at this Assembly'.¹¹⁹ However, as Lauterpacht goes on to point out, 'it was a voice to which those who proclaimed it were as yet unwilling to give the dignity and force of an obligation binding

¹¹⁵ *Supra*, n.110, at p.41.

¹¹⁶ *Ibid.*, at p.25.

¹¹⁷ See Lauterpacht, (1948) for discussion: Lauterpacht's work in Britain is cited by Simpson as being 'the most significant contribution in the later years of the war' towards an 'International Charter of Human Rights'. Simpson (2001), p.205. See also Kunz (1949).

¹¹⁸ Eleanor Roosevelt, Chairman of the Commission on Human Rights and Principal Representative of the United States on the Third Committee, 9 December 1948: Statement to the UN General Assembly.

¹¹⁹ UN Doc. A/PV. 181, p.47, and quoted in Lauterpacht, *supra*, n.117, at p.355.

upon them in the sphere of law as well as that of conscience.’¹²⁰ Yet there is a case for claiming that after fifty years it has attained the status of customary international law,¹²¹ and that it is standard-setting within international society; indeed, as will be shown, that UDHR expresses a legal obligation with regard to some rights, including the right to life. Its eventual formulation, whilst failing to reflect the potential richness of some of the suggestions, mentioned above, did not overemphasise a ‘criminal justice flavour’, as Eleanor Roosevelt remarked that the United Kingdom was trying to do in its proffered drafts,¹²² and in that sense, it is a stronger document for the protection of rights than it otherwise might have been.

ii Global Regimes

The eventual form of the international human rights protection did not reflect the original intention, which was that there should be a Declaration (not normative), an all-encompassing Covenant expressing binding principles, and a Protocol of Implementation, ‘translating the maxims of the Charter into binding norms of positive international law’.¹²³ The outcome was, of course, three-fold, plus the Optional Protocols; but the form was far from the best of the visions which had initiated the process. Whilst the first part, the Declaration, went according to plan, the envisaged Covenant became two, the ICCPR and the ICESCR.

¹²⁰ Lauterpacht, *supra*, n.117, at p.355. See Simpson e.g. pp.404-430, on the fight Eleanor Roosevelt – at odds with her own State officials – became involved in, regarding whether there should be a declaration or a binding Covenant, which at one stage had the USA in an ‘unholy alliance with the Soviet bloc’. Simpson (2001), at p.431.

¹²¹ See Franck (1995), p.98: ‘As a mere resolution, it did not claim binding force, yet it was passed with such overwhelming support, and such prestige has accrued to it in recent years, that it may be said to have become a customary rule of state obligation’. See Schachter (1991) for critique.

¹²² UN Doc. A/C3/SR.103.

¹²³ Kunz, (1949) at p. 322

Article 3 of the UDHR text, whilst providing a basis for the concept of a right to life article in ICCPR, evolved into something reflecting more of the ‘criminal justice flavour’ challenged by Eleanor Roosevelt in the earlier instrument, for instance by including an acknowledgement of the reality of the death penalty in a number of states’ legal systems.¹²⁴ The concepts of liberty and security were taken into a separate Article, and the right to life provision was expanded, in Article 6 of the ICCPR:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death shall be available in all cases.

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.

6. Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covenant.

It is interesting to note the United Kingdom draft of the right to life provision for ICCPR; it made additions, themselves expanded upon suggestions made by the United States, which referred to loss of life in consequence of deterring intrusion to, trespass on, or

¹²⁴ *Supra*, n.122.

burglary from private property, arson, etc.,¹²⁵ relating, and trying to restrict, the right to life to a context of defence of property and criminal justice. This anchors the ‘right to life’ provision firmly to ‘liberty and security of the person’, as discussed above, and to the arbitrary deprivation of life, including by State use of lethal force. This may be considered as scene-setting, for the way that life, and the right to it, was to be interpreted.¹²⁶

The UN, in the formula of rights protection in Article 6 of the Convention on the Rights of the Child, [CRC], made an assertion regarding the ‘inherent’ right to life of the child:

6. (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.

The right to life is also specifically recognised in Article 9 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: ‘The right to life of migrant workers and members of their families shall be protected by law’. This is an example of the human rights bodies taking advantage of the occasion of a Convention which is designed to protect a particular group, whose members may experience discrimination in their enjoyment of rights, to emphasis the applicability of human rights to all groups, no matter from whence they come, nor what their constituents may be. The right to life of specific groups has also been emphasised in other texts, for instance in Article 6 of the United Nations Draft Declaration on the Rights of Indigenous Peoples:

Indigenous peoples have the collective right to live in freedom, peace and security as

¹²⁵ In relation to which, see SACC case, Minister of Safety and Security et al. (ex parte) in Re. The State v. Walters and Walters, 21 May 2002.

¹²⁶ Conversely, the Indian Supreme Court have taken the association of protection of the right to life with liberty and security of person (Article 21, Indian Constitution) to expand the scope of reference of the Article; see further Deshta and Deshta (2002).

distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* recognizes a number of possible violations of the right to life, including straightforward ‘denial’, and murder, genocide, lack of basic living essentials, and discrimination. The Convention relates the definition of *apartheid* to the denial of the right to life:

For the purpose of the present Convention, the term “the crime of apartheid”, which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person: ...

...

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; ...

These latter texts, in their recognition of, and emphasis upon the ‘right to rights’ of groups who may be seen as being the Other, show the trend of human rights thinking in a manner which is of importance in the context of the current discussion. If human rights can declare the maleficence inherent in ‘establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them’, then, it might be argued, a similar case can be made against one ‘genetic group’ (so to speak) acting in a similar fashion towards another genetic group; perhaps in establishing a colony of so-called ‘clones’ in order to create organs for

transplant, a theme which may not be so far-fetched as it sounds at present.¹²⁷ This argument will be taken up below.

iii Regional regimes

a. *Europe*

Some of the ‘criminal justice’ issues in the UK proposed draft for UDHR, which had led at one stage to the Drafting Committee considering enforcement procedures under the Declaration, resurface in the Council of Europe arena where the UK’s influence was more overriding¹²⁸ than it was within that particular debate in the United Nations. This can be seen in Article 2 of the ECHR:

1. Everyone’s right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a) in defence of any person from unlawful violence;
- b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c) in action lawfully taken for the purpose of quelling a riot or insurrection

Discernible within the wording of ECHR are the concerns of the UK, reflected in Article 2(2). The UK had sought to place an emphasis upon provisions described as ‘negative obligations’, ie. those that avoided (apparently) imposing too great a burden upon governments; this was the same approach as had been taken to the global regime by both the UK and USA, ultimately, although there were earlier proposals for a broader, more

¹²⁷ Although this projected scenario has been the theme of at least two films: *The Island*, (Warner Bros and DreamWorks, 2005), allegedly itself ‘cloned’ from *The Clonus Horror* (Clonus Associates, 1978). J. Schossler, ‘Filmmakers Fail to Beach “The Island”’, (08/11/2005).

¹²⁸ See Simpson, (2001); Lester, (1984 and 1998); Marston, (1993); and Wicks, (2000). Wicks comments that ‘[a]s with most other rights, the final right to life in Article 2 ECHR is firmly based upon the United Kingdom’s draft.’ (p.439).

liberal regime, rather than that known as ‘minimalist’, which saw ‘the inclusion of social and economic rights as “positively harmful”.’¹²⁹

It should be noted that Protocol No.6 of the ECHR was the first international instrument aiming at the abolition of the death penalty, although it was limited in its application.¹³⁰ In 2003, with the entry into force of Protocol No.13, there is now an obligation on State parties to abolish the death penalty in all circumstances, including in time of war. This Protocol noted, in the Preamble, that ‘everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings’.

b. The Americas

One of the rejected early drafts of UDHR, promoted by Chile,¹³¹ was based on discussions being undertaken contemporaneously for the 1948 American Declaration on the Rights and Duties of Man [ADRDM]. Article 1 of ADRDM finally settled on: ‘Every human being has the right to life, liberty and the security of his person’.¹³² Chile’s draft had the following right to life provision,¹³³ including ‘the first specific mention of the issue of capital punishment in international human rights law’:¹³⁴

¹²⁹ Warren Seavey, quoted in Simpson (2001) at p.198. Simpson cites the work of the American Law Institute in creating a draft human rights Bill: American Law Institute, *Report to the Council of the Institute and Statement of Essential Human Rights by a Committee of Advisers, Representing the Principal Countries of the World 1944*. Reprinted in *Annals of the American Academy of Political and Social Science* 243 (1946) 18.

¹³⁰ Article 2: A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. ...

¹³¹ Francisco Campos, F. Nièto del Rio, Charles G. Fenwick and A. Gómez Robledo; 31 December 1945. Schabas, (2002), p.27

¹³² Very similar to UDHR’s Article 3, although in that case the rights-bearer is noted as ‘everyone’, instead of ‘every human being’.

¹³³ See analysis in *Edwards et al. v. The Bahamas*, 04/04/2001, paras.125-130.

¹³⁴ Schabas, (2002), p.27, note 30.

Every person has the right to life. This extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane. It includes the right to sustenance and support in the case of those unable to support themselves by their own efforts; and it implies a duty of the state to see to it that such support is made available. The right to life may be denied by the state only on the ground of a conviction of the gravest of crimes, to which the death penalty has been attached.¹³⁵

The discrepancy between the two, the brief final formulation as opposed to the wide-ranging aspirational proposal, indicates the depth of difference between States in their contemplation of the potential of the new human rights regimes. The ACHR went somewhat further than the ADRDM in its expression of the protection to be afforded to life, and is indeed the only human rights treaty to express the moment of the beginning of the protection; although its qualification, ‘in general’, rather mitigates against the effect.

Article 1.2

For the purposes of this Convention, ‘person’ means every human being

Article 4

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No-one shall be arbitrarily deprived of his life.

The Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty was adopted in 1990, stating in its Preamble that ‘everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason’ and making a provision to exclude judicial execution from the panoply of State punishment in the broadest possible terms.¹³⁶

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, in its Article 4 rather oddly states that:

Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments.

¹³⁵ UN Doc. A/C.1/38; UN Doc. E/CN.4/2.

¹³⁶ This text makes a concession to States that wish to retain the death penalty in wartime in its Article 2.

These rights include, among others:

The right to have her life respected; ...

Whether ‘respect’, without anything further, equates with ‘protection’ is problematical, and will be discussed further, below.

c. Africa

The African Charter on Human and Peoples’ Rights, however, equates the respect for life with its dependence upon bodily integrity, in Article 4: ‘Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No-one may be arbitrarily deprived of this right.’ In 2003, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa was formulated in the context of integrity and security of the person, in Article 4(1):

Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The 1999 African Charter on the Rights and Welfare of the Child also relates the right to life to survival and development in its Article 5:

5. (1) Every child has the inherent right to life. This right shall be protected by law.
- (2) States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
- (3) Death sentence shall not be pronounced for crimes committed by children.

Abass and Baderin comment that Article 4(o) of the 2000 Constitutive Act of the African Union, in its affirmed ‘respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities’ in conjunction with ‘promotion of gender equality’ and ‘respect for human rights, the rule of law and good governance’ commit to not only ‘a clear expression of in respect of good governance, rule of law and the respect for the sanctity of human life that is remarkable in

the AU, but also because these rights have now become issues to be focused in the process of maintaining peace and security in Africa'.¹³⁷ Further, a twofold obligation can be derived from Article 3(h) of the Constitutive Act, the objective 'to promote and protect human and peoples' rights', and that both the obligations are positive ones 'that would demand positive action on the part of the AU to fulfil, and thereby ensuring an effective guarantee of human rights within the continent'.¹³⁸ One can read into the close proximity of the respect for the sanctity of life article, outlined above, to those 'protect and promote' obligations, a concomitant commitment to the view that sees an inherent requirement within a right to life article to positive action on the part of States, in this case African States, a concept to be discussed further, below.

d. Other Provisions

There is no Asian regional or Islamic human rights treaty yet in force, but there have been a number of instruments drafted, either by groups of States, or interested parties such as NGOs. These include the 1981 Universal Islamic Declaration of Rights, with a 'right to life' provision in Article I:¹³⁹

Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the law.

Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of believers to see that a deceased person's body is handled with due solemnity.

The 1990 Cairo Declaration of Human Rights in Islam, states in Article 2:

(a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to safeguard this right against any violation, and it is prohibited to take away life except for a Shari'ah-prescribed reason.

¹³⁷ Abass and Baderin, (2002), *passim*.

¹³⁸ *Ibid*.

¹³⁹ See *The Arab Judicial Forum White Papers*, Theme 2: 'The Judicial Role in Human Rights Protection', http://www.arabjudicialforum.org/ajf_wp_2.html (Accessed 13/11/2004).

(b) It is forbidden to resort to any means which could result in the genocidal annihilation of mankind.

(c) The preservation of human life throughout the term of time willed by Allah is a duty prescribed by Shari'ah.

(d) Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari'ah-prescribed reason.

The 1995 Arab Charter of Human Rights, Article 5, provides that:

Every individual has the right to life, liberty and security of person. These rights shall be protected by law.

In 1998, a non-binding document was created by the non-governmental Asian Human Rights Commission and a number of NGO's. The Asian Human Rights Charter¹⁴⁰ has as part of its right to life provision:¹⁴¹

Foremost among rights is the right to life, from which flow other rights and freedoms. The right to life is not confined to mere physical or animal existence but includes the right to every limb or faculty through which life is enjoyed. It signifies the right to live with basic human dignity, the right to livelihood, the right to a habitat or home, the right to education and the right to a clean and healthy environment for without these there can be no real and effective exercise or enjoyment of the right to life. The state must also take all possible measures to prevent infant mortality, eliminate malnutrition and epidemics, and increase life expectancy through a clean and healthy environment and adequate preventative as well as curative medical facilities. It must make primary education free and compulsory ...

Wilde finds this Charter '[an] interesting document because it illustrates how human rights discourse has evolved since foundational documents like the ICCPR was drafted. It reflects current human rights issues such as the role of non-state actors, the public/private divide, and the impact of globalization.'¹⁴²

Harris describes the document as 'embod[ying] universally applicable human rights that

¹⁴⁰ See Wilde (1998) and Harris (2000).

¹⁴¹ Article 3.2. See Harris, *Ibid.*, at p.17.

¹⁴² Wilde (1998), p.138.

arise from an ‘Asian’ perspective and incorporates many of the rights supported by most Asian states under various other treaties.’¹⁴³ Harris finds the ‘primary utility of the Charter ... in its strict description of rights. This definite statement of rights can be used as a lobbying point for the peoples of Asia and a voice to espouse their needs and concerns.’¹⁴⁴ The right to life statement is certainly all of that; but how is it to be understood and acted upon?

2.2.3 ‘PROTECTED BY LAW’ AS AN EFFECTIVE PARAPHRASE OF THE RIGHT TO LIFE ARTICLES

It has been suggested, above, that the phrase ‘the right to life shall be protected by law’ presents a helpful and semantically comprehensible paraphrase of the States’ obligations in respect of this right. This section will examine the texts to clarify this obligation, with specific reference to their right to life Articles.

i Instruments including ‘Protected by Law’

The ICCPR, Article 6, inserted an assertion (not present in the ‘parent’ Declaration, UDHR) that the right to life should be ‘protected by law’, as did Article 2 of the ECHR: ‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law’. Article 9 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families declares that: ‘The right to life of migrant workers and members of their families shall be protected by law.’ Article 5 of the African Charter on the Rights and Welfare of the Child is

¹⁴³ Harris, (2002) p.2. [Footnote omitted].

¹⁴⁴ *Ibid.*, p.3.

similarly phrased in the relevant aspects: ‘Every child has the inherent right to life. This right shall be protected by law’. Article 4 of the ACHR calls for the protection of law: ‘Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No-one shall be arbitrarily deprived of his life.’ Other instruments, non-binding or not yet in force, also mention the protection of the law.¹⁴⁵

ii Other Instruments

Some texts simply express a right to life, as in the UDHR and the ADRDM. Article 4 of the ACHPR declares that ‘[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right’.¹⁴⁶ This wide-ranging aspiration is more directly stated in the CRC, Article 6: ‘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.’ Other texts include an obligation of ‘respect’, as in the Protocol to the ACHPR on the Rights of Women in Africa,¹⁴⁷ and Article 4 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women: ‘Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others: (a) The right to have her life respected.’ Article 4(o) of the 2000 Constitutive Act of the African Union calls for ‘respect for the sanctity of human life,

¹⁴⁵ E.g., Article I(c) of the Universal Islamic Declaration of Rights; Article 2(a) of the Cairo Declaration of Human Rights in Islam; Article 5 of the Arab Charter of Human Rights; Article 3 of the UN DEVAW.

¹⁴⁶ Likewise, Article 6 of the UN Draft Declaration on the Rights of Indigenous Peoples.

¹⁴⁷ Article 4(1) Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.

condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities’. ‘Protection’ envisages some form of State action in the exercise of State obligations, implying a positive, active obligation, whereas ‘respect’ suggests a more passive form of recognition, an attitude rather than an action.

2.3 INTERPRETATION OF TREATIES

‘There are few topics in international law which have given rise to such extensive doctrinal debate as treaty interpretation.’¹⁴⁸ So begins Sinclair, author of a major work, *The Vienna Convention on the Law of Treaties*, in his section on ‘Interpretation of Treaties’. That doctrinal dispute, in its greater complexities, is beyond the scope of this thesis, but some aspects of it must be addressed. The interpretation of the right to life provision in human rights treaties presents two challenges; firstly, that it is indeed a provision of human rights treaties, and there are a number of arguments surrounding the proper interpretive light to shed on such treaties – should it be the same light as illuminates the general run of public international law treaties, or should it be of a special kind, reflecting human rights as a form of *lex specialis*?¹⁴⁹ Here it is important to characterize a ‘human rights’ treaty, something done effectively by Toufayan in exploring this same question.¹⁵⁰ Having discarded human rights’ protection of the individual, either

¹⁴⁸ Sinclair (1973), p.69.

¹⁴⁹ See definition in World Trade Organization [WTO], Report of the Panel, 02/07/1998, Indonesia - Certain Measures Affecting the Automobile Industry: Complaint by Japan, European Communities, and the United States: 5.129 ‘... Sinclair describes *lex specialis* as “the concept that a specific norm of conventional international law may prevail over a more general norm”. *Lex specialis* is “widely supported in doctrine” and extends back to Grotius. “Among agreements that are equal in respect to the qualities mentioned, that should be given preference which is more specific and approaches more nearly to the subject in hand: for special provisions are ordinarily more effective than those that are general”. Furthermore, GATT panels have recognized *lex specialis*.’ [Footnotes and citations omitted].

¹⁵⁰ Toufayan, (2005), pp.3-4.

*in personam*¹⁵¹ or as a bearer of legal rights,¹⁵² as being insufficiently differentiating from other kinds of treaties, he focuses on the non-reciprocal nature of human rights treaties as ‘the key to this riddle’;¹⁵³ his analysis mirrors that of Craven.¹⁵⁴ Toufayan offers a definition of human rights treaties as ‘a limited category of treaties whose purpose is to recognize and protect individual human rights in a way that is independent of the question of nationality link, or of the acceptance of similar obligations by any other state party’, and this is the sense in which the term ‘human rights treaty’ will be used here.

The second problem, mentioned above, is more closely focussed on the specific terms used, ‘right’ and ‘life’, and how they should be interpreted, and the answer to this question depends upon the approach taken, and the conclusion reached, in considering the first problem posed. This will, therefore, be addressed first. How are treaties in general interpreted, and is this appropriate for human rights treaties?

2.3.1 VIENNA CONVENTION ON THE LAW OF TREATIES

Treaty texts are normally interpreted in the light of the provisions of the 1969 Vienna Convention on the Law of Treaties [VCLT]. The aim behind VCLT was that it should apply across the board for all inter-State treaties, with no difference being made between general public international law treaties of reciprocal obligation, and others such as international human rights and international humanitarian law treaties, where the

¹⁵¹ Protection of the individual would include, for example, international labour conventions, international humanitarian law, and diplomatic and consular protection treaties. *Ibid.*, p.3, footnotes 10, 11, and 12.

¹⁵² *Ibid.*, p.3, footnote 13. Toufayan suggests in this context the Charter of the United Nations, Article 230 of the Treaty on European Union, and a UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998.

¹⁵³ *Ibid.* Toufayan cites in this context Craven (2000) 489, at p.497; Provost, *BYIL*, (1994) 383, at pp.383-385.

¹⁵⁴ Craven (2000).

obligation is from States towards those in their own jurisdiction. At an early stage of the development of international law, in 1930, McNair had regarded an all-encompassing approach as being possibly over-reaching:

[These] remarks are prompted by the belief that inadequate attention has been given by students of international law to the widely differing functions and legal character of the instruments which it is customary to comprise under the term “treaty”. It is suggested that this branch of law would be in a more advanced state if more writers on the subject would study these essential differences and endeavour to provide for them instead of attempting to lay down rules applicable to treaties in general.¹⁵⁵

McNair had discerned the development of ‘a body of international public law possessing a peculiar sanctity and degree of permanence’.¹⁵⁶ These treaties were ‘not abrogated by the outbreak of war’ and also showed ‘a tendency ... to produce exceptions to the rule that a treaty cannot confer burdens or impose benefits upon third parties: *pacta tertiis nec nocunt nec prosunt*.’¹⁵⁷ He predicted the evolution of many more ‘disputes arising from treaties’,¹⁵⁸ and preferred that rules should be framed relevant to ‘the differing legal character of the several kinds of treaties’.¹⁵⁹ In his *pacta tertiis* example, he did not envisage the conferring of rights upon citizens and others within the jurisdiction; but still, it is rather a pity that the framers of VCLT did not bear his warning in mind. One of the reasons for the insistence upon what might be considered as the branches of the public international law ‘tree’ being covered by the same umbrella of rules and principles (to somewhat mix metaphors) is the concern, raised by Toufayan in the context of the ILC’s

¹⁵⁵ McNair (1930), *BYIL*, pp.100-118, at p.100.

¹⁵⁶ *Ibid.*, p.112.

¹⁵⁷ *Ibid.*, p.113.

¹⁵⁸ *Ibid.*, p.118.

¹⁵⁹ *Ibid.*

work in this area, regarding the possible ‘fragmentation’¹⁶⁰ of international law. The stance therefore taken has caused particular difficulties in the field of reservations to human rights treaties, where the lack of reciprocal obligation has created a *lacuna*, which will be discussed further, below, in the context of reservations to the right to life provision as found in, for example, ICCPR. However, the role of the Vienna Convention has been acknowledged as pertaining to human rights treaties, including by the human rights treaty bodies,¹⁶¹ and so it is appropriate to analyse its application.

i General rule of interpretation

Article 31 of the VCLT is of particular relevance to the present discussion:

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, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Further to the quest for an ‘authentic’ (however that may be defined or understood – see

¹⁶⁰ Toufayan, p.5. See the ‘Study on the “Function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’: Preliminary Report by Mr. Martti Koskenniemi, Chairman of the Study Group”, (ILC(LVI)/SG/FIL/CCCRD.1/Add.1) (unpublished text; on file with the Codification Division of the UN Office of Legal Affairs), cited in Toufayan, p.5, footnote 20. See also Craven (2000).

¹⁶¹ See *infra*, notes 162 to 164 and accompanying text.

below) interpretation of terms, Article 32 of the VCLT declares that:

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
- (b) leads to a result which is manifestly absurd or unreasonable.

The role of the Vienna Convention has been recognized by the human rights bodies;¹⁶² indeed, the Articles in question here, Articles 31 and 32 of the VCLT, were acknowledged even before the entry into force of the Convention as being indicative of customary international law, in the ECtHR case of *Golder v. UK*.¹⁶³ The ECtHR in *Loizidou v Turkey* discussed a number of questions relating to interpretation of the text of the European Convention, including the application of Article 31(1) and (3)(b) of the VCLT:

To determine whether Contracting Parties may impose restrictions on their acceptance of the competence of the Commission and Court under Articles 25 and 46 ... the Court will seek to ascertain the ordinary meaning to be given to the terms of these provisions in their context and in the light of their object and purpose (see, ... Article 31 para.1 of the Vienna Convention of 23 May 1969 on the Law of Treaties). It shall also take into account, together with the context, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” (see Article 31 para.3(b) of the above-mentioned Vienna Convention).¹⁶⁴

The Inter-American Court has also acknowledged the role of the Vienna Convention: ‘the Inter-American Court reiterates that when interpreting the American Convention in accordance with the general rules of treaty interpretation enshrined in Article 31(1) of the

¹⁶² E.g., IACtHR, *Hilaire, Benjamin, Constantine et al. v. Trinidad and Tobago* (June 21, 2002), paras.18 & 19. See also at ICTY, *Prosecutor v. Tadić*, Appeals Judgement, paras.300 and 303; at the ECSR, *International Federation of Human Rights Leagues (FIDH) v France*, 15/07/1999, para.26, and in Dissenting Opinion of Mr Stein Evju joined by Mrs Polonca Koncar and Mr Lucien Francois, and Dissenting Opinion of Mr Rolf Birk.

¹⁶³ Paras.29-30.

¹⁶⁴ Para.73.

United Nations Convention on the Law of Treaties ...'.¹⁶⁵ It can be seen that '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', is, therefore, the overarching principle behind the interpretation of treaties. This immediately presents a threefold possibility; a textual element – 'ordinary meaning' – and a teleological element – 'object and purpose' – as well as a contextual element, involving the preamble and annexes of the text, and any agreements or instruments agreed by the parties in connection with the conclusion of the treaty (Article 31(2) of the VCLT). Account is to be taken of Article 31 para.3(b) of the VCLT, which looks to State practice for further enlightenment. Subsequent agreements between the parties, (Article 31(3)(a)), relevant rules of international law, (Article 31(3)(c)), and whether a special meaning was intended for the terms under discussion are also to be considered, (Article 31(4)), although not in a hierarchical sense. There is no suggestion that any of these aids are of any lesser or greater import in the task before the Court; in fact, the International Law Commission, in its 1966 Report, denied absolutely the possibility of a hierarchy operating in the provisions of what was then Articles 27 and 28 of the draft Convention:

[Observations of Governments] appeared to indicate a possible fear that the successive paragraphs of article 27 [now 31] might be taken as laying down a hierarchical order for the application of various elements of interpretation in the article. The Commission, by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be

¹⁶⁵ Hilaire, Benjamin, Constantine, et al. v. Trinidad and Tobago, 21/06/2002, para.19.

thrown into the crucible, and their interaction would give the legally relevant interpretation.¹⁶⁶

So, if not hierarchically, what approach to treaty interpretation is to be taken, and by whom?

ii Why interpret?

Sinclair describes the ‘aim and goal’ of treaty interpretation as being problematical: ‘even on this preliminary issue, there is a measure of disagreement among publicists’.¹⁶⁷ He categorizes three schools of thought as ‘reflect[ing] the subjective (or “intentions of the parties”) approach, the objective (or “textual”) approach and the teleological (or “object and purpose”) approach’.¹⁶⁸ The textual reason appears to be favoured by VCLT: Articles 31 and 32 of the VCLT are seen as ‘clearly based on the view that the text of a treaty must be presumed to be the authentic expression of the intentions of the parties’, not including ‘an investigation *ab initio* into the intentions of the parties’,¹⁶⁹ according to the International Law Commission [ILC]. Sinclair’s opinion is that:

Every text, however clear on its face, requires to be scrutinised in its context and in the light of the object and purpose which it is designed to serve. The *conclusion* which may be reached after such a scrutiny is, in most instances, that the clear meaning which originally presented itself is the correct one, but this should not be used to disguise the fact that what is involved is a process of interpretation.¹⁷⁰

The obvious point needs to be made; even an apparently straightforward reading of a text is in fact an interpretation, a textual one, and being that interpretation and only that, it

¹⁶⁶ Report of the International Law Commission on the work of its eighteenth session. Geneva, 4 May–19 June 1966, at p.219.

¹⁶⁷ *Ibid.*, p.70.

¹⁶⁸ *Ibid.* Note that Sinclair is here using these three approaches as *reasons* for interpreting a treaty, and not as *methods*; however, they correspond to the the thematics that will be discussed, *infra*, as approaches to the interpretation of the treaties themselves.

¹⁶⁹ *Ibid.*, p.71.

¹⁷⁰ *Ibid.*, pp.72-73 [emphasis in original].

denies other possibilities. Decisions must be made – but by whom?

iii Who interprets?

Texts, in this instance human rights treaties, could be interpreted either by the bodies that created them, or those set up under them, by the State parties in some other forum, or by the judges, Commissioners or Committee members to whom applications are brought under the treaties' terms, where a right of individual or State-on-State application is allowed and accepted.¹⁷¹ Further, States will apply the terms of international treaties in their national courts. In practice, there is a mixture of all of these. For example, in the case of the first suggestion, the bodies that created the treaties having the ability to make interpretations, the Human Rights Committee issues General Comments [GCs] on particular Articles of ICCPR,¹⁷² and on aspects of interpretation itself,¹⁷³ and State Reports (Summary Records, Concluding Observations, Comments) can also be used as a forum for interpreting treaty terms.¹⁷⁴ In respect of the second suggestion, the bodies set up under the treaties may themselves interpret them: for example, the Inter-American

¹⁷¹ Or, in the case of the European Social Charter and Revised Charter [ESC], a system of Collective Complaints, heard by the European Committee on Social Rights [ECSR].

¹⁷² See GCs 6 and 14 on aspects of Article 6 of the ICCPR.

¹⁷³ E.g., HRC GC 24, Issues relating to reservations made upon ratification or accession to the [International] Covenant [on Civil and Political Rights] or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant. (Fifty-second session, 1994).

¹⁷⁴ Other UN Treaty Bodies act similarly. See the UN website, Treaty Bodies Database, for the proceedings of the Committee on Economic, Social and Cultural Rights [CESCR]; the Committee on the Elimination of Racial Discrimination [CERD]; the Committee on the Elimination of Discrimination Against Women [CEDAW]; the Committee against Torture [CAT]; the Committee on the Rights of the Child [CRC]; the Committee on Migrant Workers [CMW]. All of these bodies may make comments on the protection of life within their relevant jurisdictions, e.g., CRC Summary of the Second Part (Public) of the 98th Meeting: Rwanda, 11/10/1993, CRC/C/SR.98/Add.1 (Summary record); the State Party was questioned regarding the Rwandan practice of 'the obligation of children to feed their parents and ascendants, if they are in need'.

Court [IACtHR] has issued a number of effective and useful Advisory Opinions.¹⁷⁵ State parties to most treaties, unless the treaty specifically provides otherwise, are free to issue declarations and reservations,¹⁷⁶ when ratifying or acceding to a treaty, explaining their understanding of terms used, scope of jurisdiction etc. Finally, and perhaps most importantly, there is the interpretation that happens in commissions, courts, tribunals, and other decision-making bodies, both national and international, where treaty terms arise for adjudication.

iv States as interpreters: the problem of reservations to human rights treaties

An example of States being involved further in the interpretation of the treaty at the time of, or after, its conclusion, is that they may issue declarations and reservations,¹⁷⁷ a possibility defined in Article 2(d) of the VCLT as:

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

Articles 19, 20, 21, 22, and 23 of the VCLT further comprehensively discuss the ability to formulate reservations (Article 19) and acceptance (Article 20) of reservations, the position of the States concerned with regard to other States who do (or do not) accept the reservation (Article 21), the withdrawal of reservations (Article 22), and the formulation of reservations and objections to them (Article 23); the possibility of reservations and their impact on treaty interpretation is taken into account implicitly in Article 31(2)(b) of the VCLT. That is, VCLT addresses reservations ‘comprehensively’ except that no

¹⁷⁵ Article 64 of the ACHR. See also Article 65(1) of the Statute of the ICJ, and Article 47 of the ECHR. Note that the capacity to issue Advisory Opinions under Article 47(2) of the ECHR is more restrictive than that under ACHR, and consequently ineffective.

¹⁷⁶ On reservations to human rights treaties, see *supra* n.173; Baylis, (1999); Goodman, (2002).

¹⁷⁷ On the distinction between declarations and reservations, see ECtHR, *Belilos v. Switzerland*, 20/04/1988.

mention is made of the unique position of human rights treaties.

For instance, in declarations and reservations to the ICCPR, some States have made reference to reproductive issues, suggesting that the term ‘inherent’ should not be taken to mean ‘before birth’: France, for instance, stated that ‘The Government of the French Republic declares that this Convention, particularly article 6, cannot be interpreted as constituting any obstacle to the implementation of the provisions of French legislation relating to the voluntary interruption of pregnancy.’¹⁷⁸

The pragmatic precept at play is that reservations encourage participation; States who cannot agree to all the terms, or who suspect that an interpretation of a particular term may run against their perceived interests, might thereby be encouraged to assume the majority of the treaty obligations. However, it can readily be seen that too many reservations, or even a few reservations to some fundamental aspect of a treaty, will undermine its effective implementation. Where a treaty, such as ICCPR, does not address the question of reservations¹⁷⁹ the test of the reservation’s validity is both that it should not conflict with norms of *jus cogens*, and, according to Article 19(c) of the VCLT, its ‘compatibility with the object and purpose of the treaty’. The HRC, in its General Comment 24 on reservations to ICCPR, lists these rights: they include the provision that ‘a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of

¹⁷⁸ See also Luxembourg: ‘The Government of Luxembourg declares that article 6 of the present Convention presents no obstacle to implementation of the provisions of Luxembourg legislation concerning sex information, the prevention of back-street abortion and the regulation of pregnancy termination.’ Tunisia made a Declaration: ‘The Government of the Republic of Tunisia declares that the Preamble to and the provisions of the Convention, in particular article 6, shall not be interpreted in such a way as to impede the application of Tunisian legislation concerning voluntary termination of pregnancy.’ Available at UN Treaty Collection, *Reservations and Declarations to the Convention on the Rights of the Child*, http://www.unhchr.ch/html/menu3/b/treaty15_asp.htm (accessed 28/04/2005).

¹⁷⁹ Except in Article 2 of the Second Optional Protocol.

their lives, ...¹⁸⁰ It is not usually permissible to reserve on non-derogable rights or on the provisions which guarantee the enforcement of rights obligations.¹⁸¹ The principle of reciprocity presents the complex aspect for human rights treaties, making the fundamental give-and-take of obligations and benefits which underpins the VCLT's envisaged reservations framework ineffective. The HRC considers the problem in paragraphs 16 and 17 of the General Comment and although accepting that in non-human rights treaties the reaction of other states to a reservation may indicate its validity, it draws this decision upon itself, seeing itself as not motivated by the same self-interest as states. However, this still leaves the problem of how to react to an invalid reservation. The answer is that it will be 'severable' – ie. the treaty will continue to be in full force for that state and the reservation will be meaningless.

Paust, in an assessment of the right to life in war, asserts that: '... the fact that a person is killed does not necessarily mean that the human right to life has been violated, and the fact that the right is nonderogable is not determinative of whether or not the right applies to prohibit a killing in the first place.'¹⁸² HRC General Comment 24 considers reservations to non-derogable provisions, and the offence they may do to the treaty and to the rule of law itself:

some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the prohibition

¹⁸⁰ General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant. 04/11/94, CCPR/C/21/Rev.1/Add.6, para.8.

¹⁸¹ paras.11-12.

¹⁸² Paust (2002), at p.414

of torture and arbitrary deprivation of life are examples. ... While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.¹⁸³

The right to life is indeed nonderogable, as shown in the major treaties, such as Article 4(2) of the ICCPR,¹⁸⁴ although it must be noted that Article 15 of the ECHR states that ‘No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, ... shall be made under this provision’.¹⁸⁵ As Paust states, the fact that there has been a killing does not necessarily mean that there has been a violation of the right to life; and there does not need to have been a derogation to what is a non-derogable right to make that killing ‘legitimate’, as envisaged in Article 15(2) of the ECHR.

v Human rights bodies as interpreters

Human rights treaties lay claim to being a form of *lex specialis*, with a responsibility to inform other fields of law. This point was made by Judge Lukas Loucaides of the European Court of Human Rights in his dissenting judgement in *McElhinney v. Ireland* in which he also showed that national law should itself derive certain principles, such as

¹⁸³ HRC General Comment 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 04/11/94. CCPR/C/21/Rev.1/Add.6, para.10. [Footnote omitted].

¹⁸⁴ (4)1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Article[s] 6, ... may be made under this provision. ...

¹⁸⁵ Article 15. Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, ... shall be made under this provision. ...

impartiality and fairness, from ‘the field of human rights’:

[... N]owadays judicial institutions, at least in the countries where the Convention is applicable, are bound to secure the safeguards of fairness and impartiality provided therein and protect States accordingly.

In a case like the one before the Court, the *lex specialis* is the European Convention of Human Rights. General principles of international law are not embodied in the Convention except insofar as reference is expressly made to them by the Convention ... Therefore, one should be reluctant to accept restrictions on Convention rights derived from principles of international law such as those establishing immunities which are not even part of the *jus cogens* norms.¹⁸⁶

This application of a *lex specialis* can be seen at its most specialised in the European Court exercise of the margin of appreciation,¹⁸⁷ for instance; this is not a concept known generally to international law. The COE had declared in the Preamble to ECHR that the (original ten) Member States were ‘resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration’, and yet the Court was able to formulate a doctrine of the ‘margin of appreciation’. This concept, originating in French administrative law in the context of judicial review, has been developed to allow a supervised national discretion in the exercise of Convention rights. The margin of appreciation is defined by Benvenisti as being ‘based on the notion that each society is entitled to certain latitude in resolving the conflict between individual rights and national interests or among different moral convictions.’¹⁸⁸ This is in contrast to the later reaffirmation in the Vienna Declaration and Programme of Action [VDPA] of ‘the

¹⁸⁶ Dissenting Opinion of Judge Loucaides

¹⁸⁷ First articulated by the ECtHR in the 1976 case of *Handyside v. UK*, paras.48-49. See Bailey, Harris & Jones (1995) pp.12-14.

¹⁸⁸ Benvenisti, (1999) p.844

importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.¹⁸⁹ The suggestion was clearly articulated by the ECtHR in the *Handyside v. UK*¹⁹⁰ case, that local justice may be more pertinent in certain cases than the decisions of a distant judiciary, and that considering the supranational nature of the Convention, some discretion must be allowed, as a concession to national sovereignty and a tool of distributive justice. Detractors such as Higgins¹⁹¹ regard the exercise of such a discretion as no less than an abrogation of duty, and even some of the more fervent admirers of the doctrine are forced to admit that its use in the past has been a convenient vehicle for the failure of the Court to give sufficient or adequate reasons for its variation from the claims of a particular standard,¹⁹² or to address controversial issues in certain contexts.¹⁹³ The margin of appreciation is clearly not a general principle of international law: to what extent are such principles applicable in the interpretation of human rights treaties?

The sources of international law are often presumed as those stated in Article 38 of the Statute of the International Court of Justice.¹⁹⁴ Of these, Article 38(1)(d) is of particular

¹⁸⁹ VDP, para.32.

¹⁹⁰ 1976 A 24.

¹⁹¹ Higgins, (1976-77), p.315.

¹⁹² See generally Mahoney (1998).

¹⁹³ See *Johnston v. Ireland*, (1987) which distinguished Article 12 of the Convention from its basis in Article 16 of the UDHR, in allowing Ireland to continue its constitutional ban on divorce. A pan-European right to divorce would have been seen by many, even at that time, as a common fundamental standard.

¹⁹⁴ Article 38:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

relevance to the point under discussion: ‘subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’ Article 59 provides: ‘The decision of the Court has no binding force except between the parties and in respect of that particular case.’ This refutes the application of the principle of *stare decisis*; there is no binding precedent, either from preceding judgements of the Court or from other sources.¹⁹⁵ Yet Article 38(2), Statute of the ICJ, allows for a broad interpretation where appropriate: ‘This provision [Article 38(1)] shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto’. Further, the ICJ, in the *Namibia Case*, stated that an ‘international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation.’¹⁹⁶

vi Human rights principles as interpretive principles

Human rights principles themselves can also lay claim to being interpretive principles in the canon of other treaties, and in national law. It is instructive in that regard to consider the most recent international treaty to enter into force, for which the protection of human life is a primary aim: the Rome Statute of the International Criminal Court, which for instance does allow for (although not compel) the exercise of precedent, in its Article 21(2): ‘The Court may apply principles and rules of law as interpreted in its previous decisions.’ *Human Rights Watch* made recommendations, prior to the final draft of the

¹⁹⁵ For a thorough discussion of the role of precedent in the ECtHR’s decisions, and the difficulties which would be attendant upon an insistence upon being bound in different situations and changing societal circumstances, see Williams and Rainey (2002), pp.13-14.

¹⁹⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, p.16.

Rome Statute, regarding the appropriate guiding principles for all aspects of an international criminal court, including choice of applicable law. In their report,¹⁹⁷ reference is made to legality, ‘encompassing the requirement of certainty as to the law’ and to ‘the principles of equality and universality’;¹⁹⁸ such principles may be seen as underpinning justice. The report recognises the evolving nature of international law (which indeed has contributed to the establishment of an International Criminal Court, something that could not have been successfully undertaken prior to this) for instance, in the comment:

In the area of international criminal law, customary international and treaty law may not be sufficiently developed at the present time to provide legal guidance on all possible matters concerning the application of the statute. General principles, derived from practice in a range of national legal systems, should be drawn upon to fill any potential *lacuna*. The International Court of Justice has relied upon this source of law in the exercise of its judicial function, as has the International Tribunal for the Former Yugoslavia.¹⁹⁹

The eventual article of the Rome Statute of the ICC dealing with applicable law, Article 21, included the provisions that the Court:

shall apply ... general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

Further, section 3 of Article 21 adds that: ‘The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights’, and includes an anti-discrimination clause. HRW’s report made the comment that ‘It will be essential to the ICC's credibility and legitimacy that the Court observe the highest

¹⁹⁷ Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court, (June 1998).

¹⁹⁸ HRW, *Ibid*, section G, *Introduction*, citing Article 26 of the ICCPR, at footnote 208.

¹⁹⁹ HRW, *Ibid*, section G, [footnotes omitted].

standards of international human rights law.²⁰⁰

It is suggested here that the human rights tribunals and other bodies are similarly at liberty to work out their manner of deciding cases, and that in fact, as the principles of human rights can be seen as informing other areas of law, both national and international, this freedom to decide in the interests of justice is an essential element, and is recognised in their own constituting acts. The Statute of the Inter-American Court describes that body as ‘autonomous’, and its purpose as being ‘the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.’²⁰¹ Further, ‘The Court shall exercise adjudicatory and advisory jurisdiction’,²⁰² something which has been reiterated in the case law:

[...] The Inter-American Court reiterates that when interpreting the American Convention in accordance with the general rules of treaty interpretation enshrined in Article 31(1) of the United Nations Convention on the Law of Treaties ..., and considering the object and purpose of the American Convention, the Tribunal, in the exercise of the authority conferred on it by Article 62(3) of the Convention, must act in a manner that preserves the integrity of the provisions of Article 62(1) of the Convention. It would be unacceptable to subordinate these provisions to restrictions that would render inoperative the Court’s jurisdictional role, and consequently, the human rights protection system established in the Convention ... The Court has the inherent authority consistent with the imperative of judicial certainty to determine the scope of its own jurisdiction.²⁰³

Article 5 of the ICCPR suggests a form of negative interpretation, a requirement not to interpret in a particular way or so as to achieve a particular end, an end which may be seen as being in contradiction of the principles of human rights:

²⁰⁰ *Ibid.*

²⁰¹ Statute of the Inter-American Court of Human Rights, Article 1: Nature and Legal Organization.

²⁰² Article 2. Jurisdiction.

²⁰³ Hilaire, Benjamin, Constantine, et al. v. Trinidad and Tobago, 21/06/2002, para.19.

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

This does not imply, however, a complete *laissez-faire* attitude, or that human rights tribunals are at liberty to dismiss the application of any general principles of arbitration, or the exercise of precedent. Yet, even having accepted that the human rights treaty bodies, and others as relevant, they will interpret the treaties in a manner which preserves rights and freedoms, that they will not necessarily be bound by precedent, by the decisions of other bodies or even by ‘the general principles of international law’, although they will take account of the VCLT, that they will if they wish formulate their own principles, such as the margin of appreciation, or not,²⁰⁴ does not answer the ultimate question; *how* to interpret the treaties.

vii How to interpret?

Whilst VCLT, in particular its Articles 31 and 32, might appear at first glance to offer a guide on how treaties should be interpreted,²⁰⁵ Sinclair suggests that ‘the Convention rules on interpretation reflect an attempt to assess the relative value and weight of the elements to be taken into account in the process of interpretation rather than to describe the process

²⁰⁴ *Supra*, notes 187-193 and accompanying text.

²⁰⁵ Koskenniemi comments that ‘it is frequently noted that Article 31 of the Vienna Convention is of the nature of a compromise: it refers to virtually all thinkable interpretive methods.’ See Koskenniemi, (1989), p.292, footnote 89 for a thorough discussion of this point.

of interpretation itself.’²⁰⁶ Brownlie emphasizes the need for there to be some general principles operating within the international arena as aids to interpretation, rather than the kind of rules which are ‘general, question-begging and contradictory’.²⁰⁷ He suggests that the ILC ‘in its work confined itself to isolating “the comparatively few general principles which appear to constitute general rules for the interpretation of treaties”’.²⁰⁸ Further, ‘what matters is the intention of the parties *as expressed in the text*, which is the best guide to the more recent common intention of the parties’.²⁰⁹ Whether that is true in the context under discussion here, the right to life provision of international and regional human rights treaties, remains to be seen. There needs to be some theoretical approach to the problem, some reason for deciding on specific principles and applying them; different approaches can lead to different decisions, or, as Fitzmaurice puts it, with more emphasis, ‘radically divergent results’.²¹⁰ The ICJ have faced such an interpretive difficulty, in the *LaGrand Case*,²¹¹ with regard to the scope and interpretation of Article 41 of the Statute of the ICJ; indeed, as Orakhelashvili notes,²¹² one view – that of Fitzmaurice²¹³ – would indicate that the Court has jurisdiction to prescribe binding provisional measures, whereas another view – that of Thirlway²¹⁴ – suggests the opposite. The following section will therefore consider possible interpretive theories, and offer a taxonomy for application in

²⁰⁶ Sinclair, (1973), at p.73.

²⁰⁷ Brownlie (6th ed., 2003), p.602.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ Fitzmaurice (1951), p.2. See also Williams and Rainey, *supra*, n.195, for a discussion of this point in the context of the ECtHR’s judgements in respect of language and education rights.

²¹¹ *LaGrand Case (Germany v. USA)*, 27/06/2001. The details of this particular case are beyond the scope of the present discussion: see Babcock (2002); Orakhelashvili (2002); Yoshiyuki Iwamoto (Lee) (2002).

²¹² Orakhelashvili (2002), p.116.

²¹³ Citing G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* 542 (1986), at 548.

²¹⁴ Citations including H. Thirlway, *Indication of Provisional Measures by the International Court of Justice*, in R. Bernhardt (Ed.) *Interim Measures Indicated by the International Courts* 28 (1994). [Other citations omitted]. See also Yoshiyuki Iwamoto (Lee) (2002), in support of Thirlway’s position.

the present context.

2.3.2 INTERPRETIVE THEORIES

Interpretive theories abound: Koskenniemi suggests that there is a possibility of either a subjective or objective approach to the interpretation of treaties. A subjective one seeks to ascertain the will of the parties – what was it that States agreed to do? – involving the ‘question-begging perspective’ of ‘whether or not to give effect to a “normal” meaning’ of the terms;²¹⁵ whereas an objective one ‘assumes that [treaties] bind because considerations of teleology, utility, reciprocity, good faith or justice require this’.²¹⁶ However, as he points out, the ‘normal’ textual interpretation, ‘which seems to be supported both by the subjective as well as the objective understanding’ (what was agreed and expressed is most likely to be in the interests of justice) fails in logic, as it ‘assumes what was to be proved; that the expression has a certain meaning instead of another one’.²¹⁷ The fact that a matter concerning this has come to adjudication proves that ‘the ascertainment of the “normal” requires interpretation ...’.²¹⁸ Further, ‘if intent is to be the *goal* of interpretation, it cannot be used as a *means* for attaining it’.²¹⁹ An objective approach cannot be employed to discover what it was that was consented to, either; ‘the system simultaneously denies there to be such a thing as an “objective normality” or any other non-subjective criterion by which the contractual relationship could be evaluated’. Because ‘it tells us only that we cannot proceed beyond our subjective views about such

²¹⁵ Koskenniemi (1989), p.293.

²¹⁶ *Ibid.*, p.291. For further discussion of the concept of justice and the role of interpretation in achieving this, see Koskenniemi, *Ibid.*, p.293, footnote 90; and s.4.2.2, *infra*.

²¹⁷ *Ibid.*, p.292.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*, p.294.

matters and that nobody has any duty to defer to another's subjective views'.²²⁰

The imperfect answer in the end is to look again to VCLT, to examine the matters which are supposed to be held in tension, and to consider them together, as the ILC argued was to be the case at the time of VCLT's drafting. That is, to take into account the text, the context, the object and purpose; plus an aspect which may be the sum of these parts, or may go beyond them – effectiveness. Sinclair argues the fine difference which takes 'effective' beyond 'object and purpose',²²¹ citing the ILC:

When a treaty is open to two interpretations one of which does and one of which does not enable the treaty to have appropriate effects, good faith and the objects and purpose of the treaty demand that the former interpretation should be adopted.²²²

The question is, therefore, what may be considered to be 'appropriate effects' in the context of a human rights treaty, and what interpretive theories it is valid to deploy. The HRC considered this problem in *Dias v. Angola*, noting that Article 9 of the ICCPR protects the right to security of person also outside the context of formal deprivation of liberty, otherwise the Covenant guarantees would be rendered ineffective.²²³

Toufayan suggests five bases of interpretation; (1) the treaty text, (2) the legislative history, (3) the context, (4) the object and purpose, (5) logic. It is suggested that his (2), the legislative history, is covered in the discussion above by the term 'context', and that Toufayan's use of 'context', which he 'associate[s] with the *contextual* or *systematic* method which appreciates the meaning of terms in their nearer or wider context' is confusing in the light of VCLT's own use of the term 'context' (Article 31(2)); and that

²²⁰ This point is raised, below, in the context of moral intuition and the search for justice: see text accompanying n.700, *infra*.

²²¹ See Sinclair (1973) pp.74-76.

²²² 1966 ILC Reports, p.50, and in Sinclair (1973) at p.75.

²²³ Para.8.3. See also *Delgado Paez*, para.5.5.

(5), ‘the *logical* method which favours rational techniques of reasoning and such abstract legal principles as *per analogiam, a contrario, contra proferentem, ejusdem generis, etc.*’, is a merging of the ‘ordinary meaning’ of the terms used, and ‘the object and purpose’, and for the present purposes, that is the interpretation of one specific term, the right to life, in one particular kind of treaty, human rights, it is sufficient to address the issues by the three approaches given above, with their somewhat different interpretations from those understood by Toufayan as being a ‘classification [which] corresponds to a large extent with the current state of international law on the subject’.²²⁴

2.3.3 AN INTERPRETIVE TAXONOMY

Three approaches to interpretation were suggested, above: textual, teleological, and contextual. The taxonomy used here will take three of Toufayan’s bases and adapt them to those three categories:

Textual: ‘associated with the *textual* or *grammatical* method which focuses on the expression of the common will of the parties’²²⁵ and to include relevant logic: ‘which favours rational techniques of reasoning’,²²⁶ and ‘the *contextual* or *systematic* method which appreciates the meaning of terms in their nearer and wider context’.²²⁷

Teleological: ‘the object and purpose, associated with the *teleological* or *functional* method which concentrates on the object and purpose of the treaty and will, if necessary, transcend the confines of the text’²²⁸ and which may also includes aspects of logical

²²⁴ Toufayan, *supra* n.150, p.7, and footnote 30.

²²⁵ *Ibid.*, p.7, point (1).

²²⁶ *Ibid.*, p.7, point (5).

²²⁷ *Ibid.*, p.7, point (3).

²²⁸ *Ibid.*, p.7, point (4).

application.²²⁹

Context: Article 31 of the VCLT's provisions, which include the text itself, its preamble and annexes, and agreements or instruments made 'in connection with the conclusion of the treaty' or subsequently; and, in light of Article 31(4): 'A special meaning shall be given to a term if it is established that the parties so intended', also the legislative history 'associated with the *subjective* or *historical* method which seeks to extract the "real" intentions of the drafters and, consequently, encourages recourse to *travaux préparatoires*'.²³⁰

There is necessarily some overlap between these, plus some additional points to take into account, but these matters will become apparent as they are now further considered in respect of human rights in general, and specifically with regard to the right to life provision in treaty texts.

i Textual approach

Klabbers has described a 'concept of treaty', which he bases upon the works of Hart, Thirlway and Fitzmaurice;²³¹ states have entered into treaties and 'as soon as there is some form of agreement, international legal rights and/or obligations are created'.²³² That obligation may well be felt to go beyond the 'letter of the law'; consider the phraseology of the Additional Protocols to the Geneva Conventions, which state that 'in cases not

²²⁹ *Ibid.*, p.7, point (5). Sinclair, *supra* n.206, p.75, suggests that a true teleological approach may 'diffe[r] from an approach based on effectiveness, since it can be argued that the effective interpretation of a treaty is a matter of necessity based upon the presumed interest of the authors to make the treaty provision effective rather than ineffective, whereas interpretation by reference to the object and purpose of a treaty requires a subjective appreciation by the would-be interpreter of what were the aims of the parties.' However, he counters this by the reflection that the true object and purpose of the treaty is to be gained from its own terms, particularly its preamble, and therefore the 'danger of an excessive departure from the text is minimised'. Further, 'the object and purpose is only one element of the general rule, and a subsidiary element at that'.

²³⁰ *Ibid.*, p.7, point (2).

²³¹ Klabbers (1996)

²³² *Ibid.*, at p.13.

covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience'.²³³ It is obviously envisaged that protecting 'the human person' is an overriding principle, and that even where there is not specifically a law that can be applied, life should be preserved where at all possible. This suggestion is open to all sorts of riders and caveats, and will be considered further, in the next chapter; the present question is the interpretation of the law that is there. It is suggested that a broad focus of interpretation ought to be accepted as a basis for protecting life; if, as asserted by the Geneva Conventions, above, 'the principles of humanity and the dictates of the public conscience' apply even where the law does not, then where there is law, it is envisaged that it should not be hampered in its application by a rigorous and restrictive interpretation.

Such an interpretation would immediately run into some difficulties, anyway, with respect to those treaty texts which, rather grandly, proclaim that 'the right to life shall be protected by law'. The semantic limitations of the phrase must be borne in mind. The 'right to life' is not an entity; the expression does not even include the full formulation of the right in any article, nor make linguistic sense in the way that a 'right to be free from torture' or 'right to a fair trial' might do.²³⁴ It is instructive to note here the debate between Belgium's Lebeau and France's Cassin, recorded in the UDHR *travaux*, on whether there needed to be a specifically right to life provision: Lebeau argued that the wording needed to be 'Everyone has the right to protection of his life'.²³⁵ There is no 'right' to life; Vasseleu writes, in the context of patent law, of life as a gift, that the gift of life is given

²³³ Preamble, Protocol II, and Article 1(2), Protocol I, 1977, Geneva Conventions.

²³⁴ See UDHR *travaux* regarding the 'right to life' as a 'right to existence': UN Doc. E/CN.4/AC.1/3.

²³⁵ See also UN Doc. E/CN.4/SR.53, pp.1-3, and p.35 in Schabas.

by an unknowable other.²³⁶ From wherever life comes, it is not in the panoply of State obligation to bestow it, though it may be in the State's power to take it away.

The Article which is the subject of this thesis is usually expressed in a less than useful fashion as 'the right to life'; an expression that suggests that the right to life is protected, as a human right, rather than the life of the individual being protected as of right by law.²³⁷ This is a fundamental difference. The point being made here is that one can have a right to have one's *life* protected – as is seen in Article 1 of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency: 'The States Parties shall cooperate between themselves and with the International Atomic Energy Agency ... to facilitate prompt assistance in the event of a nuclear accident or radiological emergency to minimize its consequences and to protect life, property and the environment from the effects of radioactive releases',²³⁸ but protecting one's *right* to life is a rather different, more metaphysical, question. It will be seen that the emphasis of the texts is variable across the relevant human rights treaties, and it has been expressed in different terms: sometimes as a simple assertion of the individual's right, as in ADRDM, sometimes more specifically.²³⁹

ii Teleological approach

To reiterate what was noted above regarding the teleological (or functional) approach to treaty interpretation, this method concentrates on the object and purpose of the treaty, 'if necessary, transcend[ing] the confines of the text', possibly including 'aspects of logical

²³⁶ Vasseleu, 'Patent Pending: laws of invention, patent life forms and bodies as ideas' in Cheah, Fraser and Grbich (eds.) (1996), p.113.

²³⁷ See *supra*, n.235.

²³⁸ Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, International Atomic Energy Agency.

²³⁹ *Supra*, s.2.2.1.

application'.²⁴⁰ Addo and Grief, in the context of a discussion of Article 3 of the ECHR,²⁴¹ draw attention to the relative brevity of the text, which 'masks the volume and variety as well as the complexity of the issues engendered by its terms'.²⁴² The same could certainly be said of the right to life Article, in that treaty and in the others where it finds a place, and Addo and Grief's proposition regarding the conclusions that must be drawn from the failure to provide more detail is illuminating also in the current context. They expect that 'skeletal norms will be fleshed out through subsequent State practice, the adoption of more specific treaties ... and especially judicial elaboration'.²⁴³ What States believe they are expected to do, and what human rights bodies and others make of the texts, will provide the meat on the bare bones of the text, in order that the object and purpose of the treaty may be fulfilled.

The ECtHR referred to the 'object and purpose' of the Convention in the context of Article 2 in *Tahsin Acar v. Turkey*:

Article 2 of the Convention ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The object and purpose of the Convention as an instrument for the protection of individual human rights requires that these provisions be interpreted and applied so as to make its safeguards practical and effective²⁴⁴

The question to be considered, of course, is how to make 'the object and purpose' of the right to life Article, wherever and in whatever form it is found, 'practical and effective',²⁴⁵

²⁴⁰ *Supra*, n.229 and accompanying text.

²⁴¹ The Article relating to the prohibition of torture, inhuman or degrading treatment.

²⁴² Addo and Grief (1998), p.510.

²⁴³ *Ibid.*

²⁴⁴ Para.209.

²⁴⁵ ECtHR, *Airey v. Ireland*, 09/10/1979, para.24: 'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.

and raises the debate introduced above by Sinclair, the connection between respecting and achieving the ‘object and purpose’ of the treaty, and the need to make the treaty effective in a current context that may be very different from anything ever envisaged during the creation of the treaty. Sinclair’s understanding drew from the ILC to add ‘good faith’ to the ‘object and purpose’ requirement in order to enable the treaty to have ‘appropriate effects’.²⁴⁶ It is suggested here that effectiveness for the right to life Articles can be achieved in part by allowing a dynamic and evolutive interpretation, in keeping with a concept of the treaties as ‘living instruments’,²⁴⁷ and making an autonomous definition of the terms ‘human’ and ‘life’, and that this interpretation can be supported by reference to Article 31(1), (3)(b), and (4) of the VCLT. An autonomous interpretation can be recognised within the contextual approach, which will now be addressed.

iii Contextual approach

The contextual approach includes, as well as the text itself, its preamble and annexes, and agreements or instruments made ‘in connection with the conclusion of the treaty’ or subsequently. Article 31(4) of the VCLT also allows for an autonomous definition of terms: ‘A special meaning shall be given to a term if it is established that the parties so intended’. Contextual interpretation in the taxonomy being employed here would include recourse to the *travaux préparatoires*, seeking what it was that the parties intended, and ascertaining if that is helpful in view of the other contextual elements to be taken into consideration. The contextual approach involves a number of elements, rather than being driven by one aspect to the exclusion of all others.

In other disciplines, interpretation has employed very similar methods to good effect: for

²⁴⁶ *Supra*, n.222.

²⁴⁷ See *infra*, s.2.3.4.iii.

instance Edwards and Townshend²⁴⁸ present, in the historical forum, interpretive theories including ‘political, economic, and social context’.²⁴⁹ It is an intrinsically robust approach, taking the treaty text under review in its wider context, which in the current case would mean not only taking into account wider issues regarding the particular Article itself, but also means not examining the right to life provision separately from the other substantive rights that surround it, or from the articles designed to give effect to those rights. The preambles would also be included; ECHR and ACHPR include reference to UDHR, and the motives and principles driving that global instrument are therefore of relevance in the context of these regional instruments also.

Other instruments signed at the time or subsequently are of import, which, it is suggested, brings the Genocide Convention into play. Unusually, the Genocide Convention is specifically mentioned in another Convention, Articles 6(2) and (3) of the ICCPR, and with the intention of giving the fullest possible effect to the Genocide Convention. The matter of genocide, it is suggested, was at the forefront of the drafters’ and signatories’ minds, when concluding the major international human rights instruments. The preamble to the UN Charter confirms this worldview:

We, the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under

²⁴⁸ Further, ‘[... others focus] on psychological motivation, or more exclusively on the text itself.’ Edwards and Townshend explain the ‘Cambridge School’s’ contribution to political philosophy, in setting the works of the great political thinkers in their historical context: ‘Laslett traced Locke’s *Two Treatises of Government* back from their publication in 1690 to their composition at least ten years earlier. ... At a stroke, the reading of a central but always troublesome text was transformed; it had been mistaken by interpreters in a fundamental sense. A text of this kind, written post-1688, after the Glorious Revolution, was a cosy justification of the *status quo*. The same text, now identified as written much earlier, became a revolutionary call to arms. This most basic assertion of historical fact helped to turn the study of political thought towards a more contextualist focus.’ Edwards and Townshend (2002) at p.3; and citing Laslett, (1998).

²⁴⁹ (2002), at p.5.

which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom ...²⁵⁰

The Charter, UDHR, the Genocide Convention and ICCPR can all be read together, at least in the respect of gaining ‘a contextualist focus’²⁵¹ of the overriding object and purpose of the human rights treaties in general, and the right to life provision in particular. Mass loss of life was a driving force in the establishment and practices of the UN, and of the regional bodies who seek to confirm respect for human rights as a fundamental basis for inter- and intra-State action.²⁵²

The national picture is of major relevance also in working towards a coherent theory of treaty interpretation. Choudhry offers a theory of comparative constitutional interpretation which analyses constitutional jurisprudence in three modes, which he refers to as universalist, dialogical and genealogical.²⁵³ The first aims to inform by the determination of universal principles; the second, by considering judgements from other jurisdictions and deciding whether or not they are of relevance to the current jurisdiction and context, ‘engaging in a process of justification’.²⁵⁴ Choudhry explains the final mode: ‘The starting point for the genealogical use of comparative case law is a family relationship between two legal systems, one of which is the source of comparative insight for the other’.²⁵⁵ The point is made here that there is such a ‘family relationship’ between the international and regional human rights systems, and that the principles which they strive to apply are

²⁵⁰ Preamble, UN Charter, entered into force October 24, 1945. For an interpretation of ‘We, the Peoples’ in the context of current human rights discourses, see McCorquodale (2004).

²⁵¹ Edwards and Townshend, *supra* n.248.

²⁵² See Charter of Paris, *infra*, n.684 and accompanying text.

²⁵³ Choudhry (1999).

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*, p.866.

universal, so that there is a *de facto* dialogue between the bodies which is entirely for the good of the ultimate aim, a universal standard of human rights protection.²⁵⁶ This point was well made by the President of the IACtHR, Judge Trindade, whose position is that:

Human rights treaties such as the European and American Conventions have, ... by means of such interpretative interaction, reinforced each other mutually, to the ultimate benefit of the protected human beings. Interpretative interaction has in a way contributed to the universality of the conventional law on the protection of human rights. This has paved the way for a *uniform* interpretation of the *corpus juris* of contemporary International Human Rights Law.²⁵⁷

As noted earlier, the nature of human rights treaties, are *sui generis*: they create, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a “collective enforcement”.²⁵⁸

2.3.4 EVOLVING TREATY INTERPRETATION

i Changing context

In terms of an evolving interpretation, there is the age-old problem of defining understandings. Drafters may have put a word into a treaty without adding an ‘explanation of terms’, because they believed that they, and everyone else, understood what it meant; and, either at the time or later, problems may become apparent. In the case of the right to life, this is well demonstrated by the current understanding of what it is to be alive, to have life, as opposed to the understanding of half a century ago, before assisted reproduction, ventilators, and brain death protocols, as well as some of the more metaphysical change in understandings and beliefs regarding such matters as eternal life came about. Those who drafted UDHR knew who was alive and who was dead; they

²⁵⁶ See *infra*, n.858 and accompanying text.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

might not be so certain if faced with an *in vitro* embryo, or a beating-heart donor of organs for transplant, waiting to be ‘harvested’. Law needs to be able to determine life’s boundaries for its own autonomous purposes, and those purposes may be different from the doctor’s, or the priest’s, or the relative’s, or the community’s, or the State’s; the purposes of human rights may be different from those of municipal law in general or international law in particular. How legitimate is it to develop a particular definition of a term, specific to a single discipline, in order to give effect to that discipline’s objectives? The terms in question here are ‘human’ and ‘life’, terms not known for being amenable to specific definition in any discipline. It is necessary, in some instances, to consult the preparatory works of treaties in order to find out what it was that was intended, and where necessary, it may be appropriate to move on.

ii **Recourse to *travaux préparatoires***

Where the treaty terms are either obscure *ab initio*, or have become insufficiently definite due to the treaties’ presence in a changing world²⁵⁹ – points to be addressed in the next chapter in respect of the identity of the rights-bearer – it is suggested here that recourse may be had to ‘supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion’.²⁶⁰ This could help, not only in a positive sense of confirming an approach, or a definition of terms, as being intended for the treaty, but also in what might be seen as a more negative sense, in that reference to drafting materials, *procès-verbaux* or *travaux préparatoires*, could show clearly that the situation now prevailing was not envisaged, as could also be confirmed by reference to the circumstances of the treaty’s conclusion.

²⁵⁹ See Hart (1949).

²⁶⁰ Article 31 of the VCLT.

Sinclair argues that although ‘the question of recourse to *travaux préparatoires* has often been regarded as the touchstone which serves to distinguish the adherents of the ‘textual’ approach from the adherents of the ‘intentions approach’,²⁶¹ the coherence of this suggestion is ill-founded. Those who are looking for elucidation of the text of a treaty will be approaching the *travaux* in a different manner from those who seek to find the intentions of the parties ‘independently of the text’.

Schabas points out, in considering the scope of right to life provisions in international human rights law based on *travaux préparatoires* (specifically in this instance, of what became Article 3 of the UDHR) that care must be taken; the exercise goes beyond treaty interpretation.

Resort to the *travaux préparatoires* is less appropriate in the context of international human rights law than with respect to other types of treaties, because the former merits an interpretation that goes beyond the intention of its drafters. By its very nature, international human rights law must be dynamic, adapting and evolving with progress in social thought and attitudes.²⁶²

The ECtHR has commented upon a developing interpretation with regard to what might have been intended at the time of drafting in *Loizidou v. Turkey*, where, in respect of the Court’s enforcement machinery provisions, it was stated that ‘... these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.’ That is, the author’s intentions need not be the guiding principle now: ‘[a]ccordingly, even if it had been established, which is not the case, that restrictions, other than those *ratione temporis*, were considered permissible under Articles 25 and 46 ... at a time when a minority of the present Contracting Parties adopted the

²⁶¹ *Ibid.*, p.72.

²⁶² Schabas, (2002), at p.40.

Convention, such evidence could not be decisive.’²⁶³ The idea of justifying an evolving and dynamic interpretation will be returned to throughout this thesis, but the scene can be set by reference to a case brought under the Canadian Charter of Rights and Freedoms:

[T]he Charter is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?²⁶⁴

One approach in international law places heavy reliance on positions clearly expressed in *travaux préparatoires*, as indicators of the drafters’ intentions. For instance in *Chitat Ng v. Canada*, a HRC communication involving extradition to face the death penalty, an argument in favour of close adherence to States’ original presumed consensus was strongly affirmed by the extraditing State, Canada, who submitted that:

[A] decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto, would stretch the principles governing the interpretation of human rights instruments in unreasonable and unacceptable ways. It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation.²⁶⁵

For others, taking a narrow viewpoint, restricted to what it is believed the drafters intended, could be, in Campbell’s terms, an example of the limitation of human rights by ‘particularisation’, which ‘often leads to a limiting of the concept of rights, as

²⁶³ *Supra*, n.90

²⁶⁴ Supreme Court of Canada [SCC], *Re B.C. Motor Vehicle Act*, In the matter of the Constitutional Question Act, R.S.B.C. 1979, c.63, and in the matter of the Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c.288, as amended by the Motor Vehicle Amendment Act, 1982, 1982 (B.C.), c.36, para.51. Cited by Chaskalson P., in the Constitutional Court of the Republic of South Africa [SACC] *The State v. T. Makwanyane and M. Mchunu*, 06/06/1995, para.18.

²⁶⁵ *Ibid*, para.9.2.

compromises, exceptions and restrictions are made to these rights.²⁶⁶ Whilst there may be some arguments for remaining true to the historical context of their drafting, this proposition was refuted by counsel for the applicant in *Chitat Ng v. Canada*.²⁶⁷ Unfortunately the HRC at that time sidestepped the issue raised by the State party, that '[t]he absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation',²⁶⁸ by focussing on Canada's responsibility to secure the protection of the human rights of those within its territory.²⁶⁹ Whilst this is a reasonable focus *per se*, an interpretation which accepted an 'absence' from the Articles of a treaty as 'an express limitation' could, as attempted in this case, be used to defeat the object and purpose of the treaty. Such a defeat would have great significance for those whose human rights in general, and right to life in particular, can only be protected by reliance upon an evolving and dynamic interpretation.²⁷⁰ The HRC were to recognise this subsequently: see *Judge v. Canada*.²⁷¹ The IACtHR have

²⁶⁶ Campbell (1986), 'Introduction: Realizing Human Rights' in Campbell *et al.* (Eds.) (1986) at p.1, and in McCorquodale, (Ed.) (2003) Introduction, p.xii; see also Plomer, (2002), for analysis of the problems caused by 'particularisation' in a UK statute, the 1990 HFE Act.

²⁶⁷ Para.11.5.

²⁶⁸ *Ibid.*, para.9.2.

²⁶⁹ On the history of extradition from Canada to face the death penalty, see also HRC, *Kindler v. Canada*, 30/07/1993; *Cox v. Canada*, 31/10/1994; *Judge v. Canada*, *infra*, n.279, and accompanying text.

²⁷⁰ There is not scope here to enter into this subject in detail. See generally ECtHR, *Sigurjonsson v. Iceland* (1993) paras.33-35. See also the concurring Individual Opinion by Messrs. Kurt Herndl and Waleed Sadi in HRC, *Cox v. Canada*, which expressed the matters to be taken into consideration: Views of 31/10/1994, citing Oppenheim, *International Law*, 1992 edition, Vol.1, p.1271. Herndl and Sadi's viewpoint is that 'the ascertainable will of the drafters' should be taken fully into account in any interpretation of a human rights treaty, but that 'since the primary beneficiaries of human rights treaties are not States or governments but human beings, the protection of human rights calls for a more liberal approach than that normally applicable in the case of ambiguous provisions of multilateral treaties'.

²⁷¹ *Supra*, n.279. Further, the HRC noted (para.10.3): 'Significantly, the Committee notes that since *Kindler* the State party itself has recognized the need to amend its own domestic law to secure the protection of those extradited from Canada under sentence of death in the receiving state, in the case of *United States v. Burns*. There, the Supreme Court of Canada held that the government must seek assurances, in all but exceptional cases, that the death penalty will not be applied prior to extraditing an individual to a state where he/she faces capital punishment. It is pertinent to note that under the terms of this judgement, "Other abolitionist countries do not, in general, extradite without assurances".' [Footnote omitted: emphasis in original].

issued an Advisory Opinion in which a case is made for moving on from the drafter's intention:

The American Declaration has its basis in the idea that 'the international protection of the rights of man should be the principal guide of an evolving American law'. ... This American law has evolved from 1948 to the present; international protective measures, subsidiary and complementary to national ones, have been shaped by new instruments. As the International Court of Justice said: 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation'... That is why the Court finds it necessary to point out that to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.²⁷²

It is 'appropriate to look', also, to the world of today in the light of all that has passed, and all that has changed, since the first formulation of human rights instruments, over half a century ago. If the UDHR was being drafted now, it would be a very different Declaration.

iii 'Living Instrument'

The evolution of human rights was first discerned by the ECtHR in *Tyrer v. UK*, when the Convention was described as a 'living instrument, which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions';²⁷³ it is a theme has been taken up by the IACtHR, as an expression of global legal practice, for instance being raised in the *Mayagna (Sumo) Awas Tigni Community Case*: 'Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the

²⁷² Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion of 14/07/1989, (Requested by the Republic of Colombia), para.37, citing ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Rep. 1971, p.16 at 31.

²⁷³ Para.31.

times and, specifically, to current living conditions.²⁷⁴ The living instrument theme has been taken up as a principle pervasive across the boundaries of regional and international human rights law and public international law,²⁷⁵ something also noted by the European Committee of Social Rights [ECSR],²⁷⁶ who have observed that:

27. The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights.²⁷⁷

The ECSR commented in *World Organisation against Torture (OMCT) v. Greece* that:

The Committee furthermore recalls that the Charter is a living instrument which must be interpreted in light of developments in the national law of member states of the Council of Europe as well as relevant international instruments.²⁷⁸

The evolving nature of human rights jurisprudence has been explicitly commented upon by the human rights bodies, for instance the HRC in *Judge v. Canada*:

[T]here may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights – the right to life – and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised ... The Committee considers that the Covenant should be interpreted as a living instrument and

²⁷⁴ Para.146. See also Solemn Hearing of the ECtHR, on the occasion of the opening of the judicial year, 22/01/2004: Speech by Judge Trindade, President, IACtHR, *The development of international human rights law by the operation and the case-law of the European and the Inter-American Courts of Human Rights*, para.6.

²⁷⁵ The ICJ in the Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), 25/09/1997, para.112, noted that ‘because as the Court recalled in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”’, States must be prepared to recognise an evolving obligation in international law. [Citation omitted]. See also Gabcikovo, paras.53, 140. Other jurisdictions have made use of the development; the Treaty of Waitangi, concluded on the 6 February 1840, between the Maori of New Zealand and the British Crown, has been described late in the twentieth century as being a ‘living instrument’. See *Te Runanga O Muriwhenua v Attorney-General* [1990] at 655.

²⁷⁶ Committee of Independent Experts established under Article 25 of the ESC.

²⁷⁷ ECSR, *International Federation of Human Rights Leagues (FIDH) v France*, para.27.

²⁷⁸ Para.31, 7/12/2004. See also *OMCT v. Ireland*, para.63; *OMCT v. Italy*, para.41; *OMCT v. Portugal*, para.34; *OMCT v. Belgium*, para.38.

the rights protected under it should be applied in context and in the light of present-day conditions.²⁷⁹

The HRC have commented in *Pohl et al. v. Austria* that ‘the Covenant must be interpreted in the light of changing social standards and perceptions’.²⁸⁰ Further, see the ECtHR in *Selmouni v. France*:

The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture ... However, having regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present-day conditions”..., the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.²⁸¹

The ‘living instrument’ theme may be observed as being applicable not only to the substantive provisions of human rights treaties, but also to procedural aspects.²⁸² However, Mowbray points out the European Court’s failure to theoretically justify its development of what has become an important thesis, with ramifications stretching across all the human rights jurisdictions:

... the Court generally eschews abstract theorising²⁸³ and favours the incremental evolution of its principles. Nevertheless, and given the benefit of hindsight, as the doctrine was to become the basis of considerable judicial creativity, it would have been beneficial if the Court in *Tyrer* had expanded upon the reasons for its adoption of such a doctrine.²⁸⁴

²⁷⁹ *Judge v. Canada*, 05/08/2002, para.10.3.

²⁸⁰ HRC, *Pohl et al. v. Austria*, endnote 10. Citing *Broeks v. The Netherlands*, 09/04/1987, at para.14; *Zwaan-de Vries v. The Netherlands*, 09/04/1987, at para.14.

²⁸¹ *Selmouni v. France*, 28/07/1999, para.101.

²⁸² *Loizidou v. Turkey*, Preliminary Objections, para.71.

²⁸³ ‘For example, it has refused to offer a general theory of the positive obligations upon States arising under the Convention: *Plattform ‘Ärzte für das Leben’ v Austria*, A 139 (1988); (1991) 13 EHRR 204 at para.31.’ Mowbray (2005), footnote 20.

²⁸⁴ *Ibid.*, p.61.

The argument of this thesis is that there have indeed been ‘notable factual and legal developments and changes in international opinion’ in the case of ‘that most fundamental right’, and that therefore human rights treaties must be ‘interpreted in light of developments in the national law of member states of the Council of Europe as well as relevant international instruments’. Such ‘developments in ... relevant international instruments’ can be noted in both substantive and procedural aspects: for example, treaties now are often drafted differently. It would not be appropriate to expect that a straightforward textual interpretation, to whatever extent such a thing is possible, can be exercised in the same manner with the older generation of treaties as it is with the new.

To take an example, the Optional Protocol to the UN CRC, on the Sale of Children, Child Prostitution, and Child Pornography, is a text of much later date than the initial human rights instruments, having entered into force on 18 January 2002.²⁸⁵ It represents a newer generation of international treaties,²⁸⁶ in that it takes care to define terms²⁸⁷ and to clearly articulate the nature of the obligations which States are undertaking by becoming parties to the treaty. States will put effective national law in place in respect of the obligations covered by the treaty, ‘civil, criminal, or administrative’;²⁸⁸ ‘appropriate penalties’²⁸⁹ will

²⁸⁵ See also Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, entered into force on 12 February 2002.

See also the *Apartheid* Convention, Article IV:

The States Parties to the present Convention undertake:

(a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime;

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.

²⁸⁶ See for instance the definitions texts of the Convention on Biodiversity, the Cartagena Protocol to that Convention, on Biosafety.

²⁸⁷ Article 2.

²⁸⁸ Article 3(1,2,4); Article 9. See Article 4 on jurisdiction.

punish infringements of that law, ‘tak[ing] into account their grave nature’.²⁹⁰ These measures are subject to the provisions of national law and national legal principles, and to the requirements of international law.²⁹¹ Whilst a clear definition of terms and obligations can itself present difficulties,²⁹² it is generally to be welcomed when carefully drafted.

The earlier treaties, not enjoying the benefits of such clarity, therefore present a different interpretive challenge. Given that, as Koskenniemi noted, there is a ‘question-begging perspective’ in attempting to give ‘a “normal” meaning’ to any treaty term,²⁹³ the lack of definition – in the current context, of either the rights-bearer, the ‘human’, (and its associated terms, ‘everyone’, ‘person’, etc.²⁹⁴) or of the nature of the right protected, ‘life’, means that some kind of interpretation is required, other than a very straightforward textual one. Both teleological and contextual approaches, as described above, can legitimately be employed to justify an evolving and dynamic interpretation, that which has been described as accepting that the treaties are ‘living instruments’. A ‘living instrument’ interpretive approach, not only applies in such matters as understanding what is the field of application of the text, but in the standards applied, as shown by the ECtHR in *Selmouni v. France*:

having regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present-day conditions” ... the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could

²⁸⁹ Article 3(3).

²⁹⁰ *Ibid.*

²⁹¹ Article 6.

²⁹² ‘Particularisation’, in Campbell’s terms: *supra*, n.266 and accompanying text. See e.g. Article 3 of the Charter of Fundamental Rights of the European Union, n.373, *infra*, which prohibits some very specific actions, such as ‘reproductive cloning’ (not an exact scientific term) and ‘selection for eugenic purposes’, without offering definitions – what is a ‘eugenic purpose’? – or considering the possibility of problems arising, related to similar but unlisted practices.

²⁹³ Koskenniemi (1989), p.293; see discussion, *supra* at n.215 and accompanying text.

²⁹⁴ See s.3.2.1, *infra*, for a discussion of these terms as found in the treaties.

be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.²⁹⁵

The assertion that the treaties ‘must adapt to the evolution of the times and, specifically, to current living conditions’, and also that their provisions must be seen ‘in the light of changing social standards and perceptions’, views reiterated in one form or another by all the human rights bodies cited above, show that an approach which accepts the need for a dynamic and evolving response to challenges, unknown in the past,²⁹⁶ is accepted across the board, and indeed legitimated by an understanding of textual, teleological and contextual treaty interpretation.

iv Autonomous definition of terms

It is not unknown for human rights discourse to present an autonomous definition of a particular situation. For instance, the ECtHR has developed its own understanding of what constitutes a criminal charge, in order to effectively adjudicate fair-trial guarantees,²⁹⁷ as there is not a European-wide consensus (where seeking consensus is itself an interpretive doctrine).²⁹⁸ In *Engel et al. v. The Netherlands*, the Court made it clear that the purpose of its intervention in disputing the status – essentially, the definition – of an offence in the national legal system was in order to promote the object and purpose of the Convention.

States were allowed discretion, but it was affirmed that ‘the “autonomy” of the concept of

²⁹⁵ 28/07/199, para.101. [Citations omitted].

²⁹⁶ The right to life is intimately bound up with the right to marry and found a family, and with the right to respect for private and family life, as variously expressed in the treaties. It was not envisaged at the time of drafting that a situation such as that experienced by the Drewitt Barlow family, *infra*, n.655, could or would ever be possible.

²⁹⁷ First articulated in a case involving military disciplinary charges, *Engel et al. v. Netherlands*, (1976), para.81. See also Harris, O’Boyle and Warbrick (1995), pp.166-73.

²⁹⁸ For a discussion of the ‘living instrument’ theme in respect of a European consensus doctrine, see Erdman (2003), Benvenisti (1999).

“criminal” operates, as it were, one way only.’²⁹⁹ That is, States are free to classify any infringement as criminal, but not to classify anything which the Court has included in its understanding of a criminal offence – generally in relation to the penalty to be extended – as civil or disciplinary, thereby sidestepping fair trial guarantees which apply only to criminal offences.³⁰⁰ It seems logical therefore that States ought to be able to extend the protection of the right to life as broadly as they wish in determining to whom it should refer, and establishing the scope of the life protected, in order to promote an object and purpose of the Convention, as provided in Article 2, but not any more narrowly than the Court has determined.

v Reference to National Application

A ‘living instrument’ interpretive approach can also take into account the jurisprudence built upon the Bills of Rights which are included in a number of Constitutions, and which are equally vehicles of the same universal principles, either finding their own basis in UDHR or in some cases providing the genealogical roots of the rights themselves,³⁰¹ facilitating therefore a dialogue between the human rights jurisprudence of the international and regional bodies and the Constitutional and Supreme Courts as being entirely in order. The supremacy of human rights observance can be seen in many instances in constitutional materials, such as this comment taken from the IACoMHR deliberations in the case of *Oswaldo Antonio López*: ‘..., immediately after assuming its duties on December 10, 1983, the Argentine Constitutional Government adopted several

²⁹⁹ *Supra* n.297, end para.81.

³⁰⁰ See also *Ezeh and Connors v. United Kingdom*, 09/10/2003, on reference to the Grand Chamber of the ECtHR from its 15/07/2002; and *The Competition Commission of South Africa v. Federal Mogul Aftermarket Southern Africa (Pty) Ltd. et al.*, 21/08/2003, paras.31-51, for a critique of Engel, esp. para. 51(3) ‘Yet, even within the European jurisprudence there is a history of strong dissents that suggest that the expansive notion of what is criminal is problematic for nation states.’

³⁰¹ See Colon-Collazo, *supra*, n.94, at p.33.

provisions aimed at full restoration of the rule of law and unrestricted enjoyment of basic human rights and freedoms.’³⁰²

Constitutional jurisprudence is also prepared to draw from the work of human rights bodies, as the SACC has shown in *Makwanyane*. In a discussion of customary international law and the ratification and accession to international agreements under the Constitution of South Africa, ‘decisions of bodies dealing with comparable instruments’, such as the HRC, the IACtHR, the ECommHR and ECtHR could all be used to ‘provide a framework within which [aspects of the Constitution] can be evaluated and understood’.³⁰³

vi The right to life as a right to live

Evolving interpretation of the human right to life can be claimed as a basis for a new and dynamic understanding of the right; that is, that it includes the right ‘to live’, i.e. to have life’s necessities supported. This is something which has been most strongly supported in the national cases introduced above: the right to housing, for instance, in India, in *ISC Olga Tellis et al. v. Bombay Municipal Corporation et al.*, in Bangladesh in *Ain O Salish Kendro (ASK) et al. v Government of Bangladesh et al.*, and in South Africa, in *Grootboom*.³⁰⁴ If the wording of the right to life texts is seen as representing a negative obligation (a ‘narrow view’) the hypothesis is that there is a positive aspect of that obligation, a requirement to promote life, which has been interpreted (in terms of a ‘broad view’) as a ‘Right to Living’.³⁰⁵ MacKay’s work³⁰⁶ offers an example of how the

³⁰² 30/6/1987, para.11.

³⁰³ *S. v. Makwanyane and Another*, 06/06/1995, para.35.

³⁰⁴ *Government of Republic of South Africa et al. v Grootboom et al.*

³⁰⁵ See, e.g. Ramcharan, and Przetacznik, *supra*, n.78.

³⁰⁶ MacKay (1998).

contribution of Ramcharan *et al.*, introduced above,³⁰⁷ has developed in practice:

In 1985, the IACHR examined the rights of the Yanomami people in the context of the construction of the Trans-Amazonia highway in Brazil, invasion of their territory by small-scale gold miners and devastating illnesses brought in by the miners. ... The IACHR found, due to Brazil's failure to take "timely measures" to protect the Yanomami, that violations of, *inter alia*, the right to life and the right to preservation of health and well-being under the American Declaration had occurred ... In reaching this conclusion, the IACHR reiterated the widely held conclusion that the right to life has broad application beyond intentional or arbitrary deprivation of life (Ramcharan 1985). It also requires that governments take affirmative steps to protect life by ensuring environmental integrity and promoting policies that guarantee basic survival of persons subject to state jurisdiction.³⁰⁸

This point of view has been criticised, earlier in the drafting of the UDHR,³⁰⁹ the seminal text, and later, for instance by Bedau,³¹⁰ who criticises the idea of a right to living, particularly for its lack of a sound philosophical basis, in seeking to broaden the remit of the right to life; Ramcharan submits that the narrow approach is no longer adequate.³¹¹ He disagrees in this with Dinstein,³¹² who questions whether there is an 'inherent' right to life couched in nature and customary international law. That argument in its wider aspects is beyond the scope of this thesis, and is therefore only briefly introduced, although there is one aspect which will be seen to be of relevance, below: that of the concept of arbitrary deprivation of life.

The slight re-emphasis in nomenclature in the current hypothesis, in placing the right to

³⁰⁷ *Supra*, n.78, and accompanying text.

³⁰⁸ *Ibid.*, p.11, citing IACtHR, *Yanomami v. Brazil*, 5 March 1985. See also IACoMHR, *The Human Rights Situation of the Indigenous People in the Americas*, Chapter III, 'Doctrine and Jurisprudence of the IACHR on Indigenous Rights' (1970-1999), para.1. Rights to life, personal liberty, and humane treatment; and 'Affidavit Of Dinah L. Shelton', Key affidavit on the alien tort claims act issue in *Aguinda, et al. v. Texaco, Inc.*, regarding 'international law relating to the rights of persons abroad who complain of illnesses which they attribute to severe environmental contamination'.

³⁰⁹ See Kunz (1949).

³¹⁰ *Supra*, n.78.

³¹¹ *Supra*, n.84.

³¹² Yoram Dinstein, 'The Right to Life, Physical Integrity, and Liberty' in Henkin (1981) at p.115.

life as understood in early texts and adjudication into a framework described as a ‘right to live’ serves to signify a major contextual difference, in that the right to live represents a totality of which the negatively-seen obligation – the right not to be arbitrarily deprived of life, represents only a part. The point is not that a right to live is a broader view of the right to life, but that the right to life cannot exist without a right to live. It is essential that the necessary conditions of life are protected before a situation in which the arbitrary deprivation of life, whether in a criminal justice or State use of lethal force context, becomes relevant.

Contemporaneously with the drafting of UDHR, there was taking place in Paris, in July, 1947 a meeting of a Committee of UNESCO,³¹³ with a mandate to consider the theoretical bases of human rights. Philosophers and writers were consulted, including Mahatma Gandhi, Teilhard de Chardin, and Aldous Huxley. The result of the enquiry had the following to say on the right to live:

The right to live is the condition and, as it were, the foundation of all other rights. It is the condition of other rights since it is the minimum human right. It is inseparably involved in the very existence of man. But to live is more than barely to exist, and it is therefore the right which makes specific all other rights since they mark the degree of well-being which man may achieve. All rights derive, on the one hand, from the nature of man as such and, on the other, since man depends on man, from the stage of development achieved by the social and political groups in which he participates.³¹⁴

The commentary to the UNESCO draft remarks that: ‘[o]ne group of rights is essentially connected with the provision of means for subsistence, through his own efforts or, where

³¹³ Edward H. Carr, Chairman; P. McKeon, Rapporteur; Pierre Auger; Georges Friedmann; Harold J. Laski; Chung-Shu Lo; and Luc Somerhausen.

³¹⁴ *Human Rights*, UNESCO (Ed.) (1947); Appendix II, p.268.

they are insufficient, through the resources of society.’³¹⁵ This is a reflection of the rejected Chilean offering to the General Assembly’s first session, in drafting UDHR, with a text that had been offered also as a draft for the ADRDM.³¹⁶ It can be seen, however, that although there was a groundswell of opinion in favour of an expanded concept of the right to life, the formulation of UDHR and the subsequent human rights treaties did not include within the right to life provision the wide-ranging matters that had been raised as being, in the view of some delegates and commentators, essential elements of such an obligation. Can a sufficiently strong case be made for moving on from the very narrow interpretation of that specific time, which was not even necessarily a consensus of the drafters’ intentions, but rather a reflection of the stance of prevailing political power?

A strong case for a deeper understanding of the right to life as a right to live was made by the Indian Supreme Court (ISC) in 1985. In *Olga Tellis v. Bombay Municipal Corporation*, slum dwellers argued successfully that their right to a livelihood was an aspect of their Article 21 (of the Indian Constitution) right to life, and therefore the removal of their pavement huts was a violation of that right. The Court held that: ‘If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.’³¹⁷ The court there recognised the consequences of not making a wide interpretation of the right to life; the whole gamut of protection afforded by a situation being accorded recognition under the auspices of the right would be denied to a whole class of actions, those which deprived a person of their right to a

³¹⁵ *Ibid.*

³¹⁶ Francisco Campos, F. Nièto del Rio, Charles G. Fenwick and A. Gómez Robledo; 31 December 1945. Schabas (2002) p.27

³¹⁷ Para.2.1.

livelihood, that which enables life. Any deprivation of life would not fall under the scrutiny of ‘a procedure established by law’, and in whatever other form such action might be challenged, it would not have the power of a constitutional challenge, or similarly one under the treaty bodies’ jurisdiction. ‘That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life’.³¹⁸

2.5 CONCLUSION

The question addressed in this chapter was how the right to life was first formulated as a treaty right, and how that right has been developed in other international instruments as time has gone on. Interpretive theories and a taxonomy have been introduced, and the validity of an evolutive and dynamic interpretive approach demonstrate. Further, it has been shown that appropriate use of valid interpretive tools can form a basis of a developing ‘broader view’ of the right to life’s substantive scope, which is as ‘a right to live’. The claim here is that a developing broader view of the rights-bearer is both legitimate and necessary in order to address the likely problems of the future, exemplified here in some limited scenarios but likely to be intrinsic to issues arising ‘beyond the horizons’ or in the test tube today, but on the doorstep, in the street, before the courts and tribunals tomorrow.

The protection of life as a right was addressed in the committees, chaired by Eleanor Roosevelt, which worked towards the formulation of the UDHR. The eventual phrasing of the ‘right to life’ Article and its base within what was termed the ‘status of liberty’ represented a ‘criminal justice’ provision, in protecting against the arbitrary deprivation of

³¹⁸ *Ibid.*

life. This may be considered to be a lowest common denominator approach in terms of what states, particularly the powerful interests represented and led by the USA and the UK, would accept. The claim that the right to life is universal and inalienable, that it is a right inherent in all human beings simply by the nature of their humanity, is seen as the basis of this, generally non-derogable, right. This shared value is proclaimed as a standard for all humanity.

The proposal for this chapter was, therefore, to document the protection of life in human rights discourses in the context of the post-Second World War treaties, and regional instruments. Those chosen were determined by either their status – as a major international or regional treaty – or their specific relevance in the context of the protection of life. The chapter traced some of the discussion and eventual decisions and formulations regarding the place of a right to life in international and regional treaties, and whilst this is a useful starting-point, it represents only a fraction of the issues which are immediately apparent upon any consideration of the protection of life in international law.

The aggressive use of force against non-combatants, including a State's own civilians, may have prompted the moves which resulted in the Universal Declaration of Human Rights and the Covenants, and consequent developments, but other issues are at stake. Much must revolve around the definition of life itself, to be considered in the next chapter; major aspects of life, including determining whether a person was living or dead, were less complex before the medical developments of the latter half of the twentieth century. This and other matters are, unsurprisingly, not considered in the main body of treaty law with right to life provisions; for instance, it is not until the Charter of

Fundamental Rights of the European Union³¹⁹ that the trade in organs is included as a prohibited factor.³²⁰ Even then, it is included under Article 3, the right to integrity of the person, and not Article 2, the right to life.

These scenarios mentioned above will now be briefly returned to in order to show the relevance of the issues addressed within this chapter. They were, it will be recalled, chosen to represent four aspects of life: the human before birth; the creation of 'new humans'; the creation of new beings who may or may not be 'human'; and the misuse/misrepresentation of human DNA. Whilst the preborn human was a known issue at the time of the drafting of the treaties, the other three aspects were, to a greater or lesser extent, unknown. A brief introduction to the expanding concept of a right to life as a 'right to live' has been given above, showing how an evolving notion of the substance of the right is emerging. In order to address the scenarios which are very real possibilities of the future, it is essential that there should be, also, an evolving understanding of the rights-bearer.

Given the implications of some of the issues outlined above, and of the many others which are also relevant, it is, therefore, not surprising that the most eloquent perceptions of a right to life are not to be found in active treaty form; DNA was not yet discovered, and so the idea that it might be used to isolate and used to create new beings matching its progenitors was unknown. The *travaux préparatoires* of the Universal Declaration of Human Rights include draft Articles to protect life which are both powerful and moving and which were, ultimately, not adopted; they would have made a stronger basis for

³¹⁹ Proposed by the Praesidium at Nice, 2000, and issued in Brussels, 28 July 2000. Article 3, Right to the Integrity of the Person.

³²⁰ See also Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, Chapter VI, Article 21: Prohibition of Financial Gain.

meeting the challenges of today. However, a flexible interpretative theory, which incorporates a dynamic impetus, is available to the treaty bodies, and to the national courts which are, in some cases, taking the lead in developing a responsive jurisprudence. The treaty provisions, particularly if interpreted according to the 'living instrument' principle, are available; what, exactly, are the challenges which must be addressed? The next chapter will consider matters related to the defining and creating of life, in order to promote a better understanding of who is, or could be, the 'human' in the international law of human rights.

CHAPTER THREE

Who is the ‘Human’ in the International Law of Human Rights?

The past provides many instances where the law refused to see a human being
when it should have.

The future may provide instances where the law may be asked to see a human
when it should not.

The challenge for future generations will be to define what is most essentially human.

Jeffrey L. Amestoy, Chief Justice, Vermont Supreme Court.

*Baker v. State.*³²¹

3.1 GENERAL INTRODUCTION

3.1.1 ADVANCING HORIZONS

In the quotation above, Chief Justice Amestoy has miscalculated the timescale; the challenge is not for future generations ‘to define what is most essentially human’, but for this generation. It is also a question for rights discourse: Crawford points out that ‘the notion of a right presupposes identification of a subject of the right.’³²² It is a question which the treaties and human rights bodies have avoided in the past and are avoiding now, and that avoidance is exposing lacunae in law’s coverage, and illogicality in argument is permitting injustice. Some of the problems with a full and effective implementation of the

³²¹ Vermont Supreme Court, *Baker v. State*, at p.889.

³²² Crawford (1979) at p.88.

right in the circumstances now prevailing are ‘beyond the horizons’ of what was known and understood at the time of drafting of the treaties, and some may still be ‘beyond the horizons’ of what is feasible, scientifically, now. Some may have been, if not beyond the horizons, then certainly beyond the pale, morally, and have now become acceptable in moral terms, reflecting a changing consensus.³²³

3.1.2 EXERCISING THE WISDOM OF SOLOMON: DETERMINING LIFE’S

BOUNDARIES

Determining the boundaries of life for the purposes of international law is a complex problem, and well illustrated by the famous dilemma in which King Solomon, acting in his capacity as judge, was called upon to decide to whom a child belonged.³²⁴ The story, and the need for exercise of wisdom in a seemingly irresolvable situation, where nevertheless the law had to reach a resolution, can be used to draw other analogies in the many complex questions which surround determination of the living and the dead. Whilst it may be valid to consider that modern technology and the welfare state between them have made redundant such apparently simple decisions as Solomon’s now appears to be, there is a case for arguing that the questions are no different; one must simply be clearer about the logic behind the answers. The questions are, however, more complex, and the consequences of the answers arrived at more far-reaching.

³²³ *Supra*, n.298.

³²⁴ Narratives of the life and work of King Solomon, famed for his wisdom, are found in the religious traditions of Islam (Chapters 2, 4, 6, 21, 27, 34 and 38 of the Qu’ran), Judaism and Christianity (1 Kings, Proverbs, Song of Songs and Ecclesiastes in the Old Testament). For those unfamiliar with this story, it can be found in 1 Kings Chapter 4, Old Testament (King James Version; this particular story is not related in the Qu’ran). See further: Kassis (1983); Werblowsky and Wigoder, (Eds.) (1997); and Metzger and Coogan (1993).

The ‘scenarios’ presented in the Introduction to this work³²⁵ will be seen here to play a part in illustrating and illuminating some of the concerns, in discovering just who is the ‘human’ in the international law of human rights? This is not as clear-cut a concept as may be expected; one might readily assume that the right to life is a human rights provision, and therefore directed at humans. As indicated in the illustrative scenarios, however, the status of the human is now less certain. Four areas of uncertainty were indicated: the human before birth; the creation of ‘new humans’; the creation of new beings who may or may not be ‘human’; and the misuse/misrepresentation of human DNA.

When the treaties were themselves first conceived, the concept of the identity of the rights-bearing person was certainly less of an issue than it is now, largely for reasons which will become clearer as this chapter progresses, but which include the impact of the new biotechnologies,³²⁶ and also because of an aspect of postmodern thinking which may best be described as the loss of a firm societal knowledge of what is right and wrong in dealings with living human material. Abandonment of the widespread practice of religious belief has as a consequence the much wider freedom for the newly-recognised and emphasized individual to make her or his own decisions about matters affecting life and death, both their own and those of other people.³²⁷ It is harder to know what is morally right to do, and what is wrong and should never be done. Ramsey expresses the concerns

³²⁵ See text accompanying n.70, *supra*.

³²⁶ These will be discussed further, below, but some of the concerns felt by those who see new biotechnological advances as a moral threat can be found in Sullivan *et al.*,(1999), particularly for the authors’ concerns regarding those who are defined or catalogued as ‘less than human’ as, the authors note, were Jews in Nazi Germany, and for the discussion regarding ‘when protectable human life begins’. (p.81).

³²⁷ See Menski (2003) for a discussion of tradition and modernity in which Hindu law is contrasted with Western beliefs on this point; see also *infra*, n.1038.

which spring from the ‘issues facing mankind’:

We need to raise the ethical questions with a serious and not a frivolous conscience. A man of frivolous conscience announces that there are ethical quandaries ahead that we must consider before the future catches up with us. By this he often means that we need to devise a new ethic that will provide the rationalization for doing in the future what men are bound to do because of new actions and interventions science will have made possible. In contrast, a man of serious conscience means to say in raising urgent ethical questions that there may be some things that men should never do. The good men do can be made complete by the things they refuse to do.³²⁸

As Yamin asserts, ‘[p]art, if not the core, of the modernist underpinnings of human rights is an unwavering belief in the existence of an ascertainable truth that cannot be decoupled from justice’.³²⁹ That is the point towards which this argument is proceeding; the discoverable truth regarding the right to life and its protection at law, and part of that truth is to establish a truth of what it means to be human, and to have life. This cannot be claimed to be the only truth, the definitive approach; the argument is centuries, or even millennia, old, and ongoing. But it will be seen that the approach to be presented here is a legally and morally defensible, logical approach.

To begin this chapter there will be a further examination of the treaties, in order to find out how the rights-bearer has been identified in them – ‘human’, ‘person’, ‘everyone’, etc. The identity of the rights-bearer will be established, which will clarify some of the problems that have arisen over the past half-century, followed by a necessarily brief discussion of what other disciplines have to offer on the understanding of what constitutes human life. Definitions (or understandings that are more diffuse than an actual definition)

³²⁸ Ramsey (1985) at p.37, citing Ramsey, (1970) with emphasis newly added by the author himself.

³²⁹ Alicia Ely Yamin, ‘Ethnic Cleansing and Other Lies: Combining health and human rights in the search for truth and justice in the Former Yugoslavia’, in Mann *et al.*, (Eds.) (1999), pp.82-105, at p.82; reprinted from *Health and Human Rights* 2(1) (1966).

will be sought in biology, medicine, psychology, and philosophy, and include an investigation cross-culturally, and in the field of bioethics, into what is meant in rights by ‘dignity’.

Even in the practice of medicine, the boundaries of human life – the beginning of being a human, with a right to life protected by law,³³⁰ and the ending of that state of being,³³¹ and the formulation of criteria necessary to qualify as human – are not only uncertain but are considered to be a matter for individual conscience and belief. For instance, as Cook and Dickens point out:

The World Medical Association’s equivalent [of the Hippocratic Oath], the 1948 Declaration of Geneva, as amended, has graduates on admission to the medical profession solemnly pledge to practice the profession ‘with conscience and dignity,’ and to maintain ‘respect for human life from its beginning,’ leaving each member conscientiously to determine the meaning of ‘human life’ and the moment of its beginning.³³²

The moment of human life’s ending is equally indeterminate, equally a cause of struggle and conscience, as will be seen, and is a problem not addressed within the treaties because that problem did not exist at the time of their drafting: ‘brain death protocols’ and ‘beating-heart transplants’ were as yet unknown, and vital signs were breaths and a heartbeat, and not brain waves.³³³ We are already ‘beyond the horizons’ as those horizons were seen at the time of the treaties; possibilities considered feasible, if not now in the very near future, such as transgenic beings, or clones, were strictly of the realms of science fiction. In the search for a definition of the ‘human’ that meets the present needs,

³³⁰ See comments at *supra*, n.326.

³³¹ To be considered in depth, below; but for a pro-euthanasia stance, see Magnusson (2001 and 2002); Hope (2004). See for other views Amarasekara and Bagaric (2002); de Haan (2002); Scott Peck (1997). See generally Moreland and Geisler (1990). For moral arguments, arising from the UK jurisdiction decision in the *Airedale NHS Trust v Bland* case of see Keown (1993, 1997); Jennet (1993) (pro-euthanasia in cases of PVS, a term which he coined); Gormally (1993); and citing *Bland* with approval, the views of Harris (e.g. 1999).

³³² Dickens and Cook (2000), at p.73.

³³³ *Supra*, n.5 and n.31.

as well as those of the future, the chapter will conclude with a further biomedical investigation into the suggested framework of accepting ‘human genetic material’ as a basis for the recognition of the human rights-bearer in the international law of human rights.

Criticism of defining human genetic material into human rights is provided by Jürgen Habermas: ‘we cannot, from the premise of pluralism, ascribe to the embryo “from the very beginning” the absolute protection of life enjoyed by persons who are subjects possessing basic rights. On the other hand, there is the intuition that prepersonal human life must not simply be declared free to be included in the familiar balancing of competing goods.’³³⁴

3.2 THE TREATIES AND THE IDENTITY OF THE RIGHTS-BEARER

As noted above, progressing understandings and changed social circumstances operating alongside the effects, beneficial and otherwise, of advancing biotechnologies, raise issues regarding the exact nature of the individual rights-bearer,³³⁵ meaning that that state of being must be more clearly defined than it was in the treaties.³³⁶ Newer international legal instruments are more apt to have a section defining terms than the earlier ones, and so the human rights treaties, written before there was a possibility (beyond the imagination) of a need to define ‘human’ or ‘life’, have not benefited from this advance in practice. The previous chapter has argued for a dynamic and evolutive interpretation of the right to life

³³⁴ Habermas (2003) at pp.42-43.

³³⁵ Or those who have their rights limited for some reason; see, e.g., Article 22(2) of the ICCPR, regarding the imposition of lawful restrictions on the freedom of association of members of the armed forces and the police.

³³⁶ The gender-specificity, which was common to the era of drafting of the early human rights instruments, will be ignored though not condoned in this discussion.

texts, in the light of changing social conditions, taking its interpretative basis from VCLT and suggesting the use of textual, contextual and teleological interpretive theories in order to make the treaty terms as effective as they can be; that is, using the ILC's terms, to fulfil the object and purpose of the human rights treaties in good faith.³³⁷ Whilst this debate is not yet complete within this thesis, and will be continued in the next chapter in the context of a discussion of 'protected by law', the current stage of debate is to clarify what the problems are regarding the issues of definition mentioned, the human and the life, as illustrated by the chosen scenarios. First, there will be an examination of some significant examples from the relevant intergovernmental texts in order to see how the identity of the rights-bearer is expressed.

3.2.1 EXAMPLES FROM INTERNATIONAL TEXTS

i Universal Declaration of Human Rights

UDHR refers to 'everyone' in its right to life article,³³⁸ although in the discussions surrounding the drafting of UDHR, there was much debate regarding the identity of the rights-bearer.³³⁹ Chile's draft for UDHR speaks of the right to life of '[e]very person' 'from the moment of conception', including 'incurables, imbeciles and the insane', and also 'those unable to support themselves by their own efforts',³⁴⁰ whilst the contemporaneous ADRDM refers to '[e]very human being' in the context of the right to life, liberty and the security of person. The formulation finally settled upon, 'everyone', represents (as so much about UDHR) a lowest common denominator position.

³³⁷ See Sinclair, *supra* n.222.

³³⁸ Article 3, VCLT.

³³⁹ *Supra*, n.37.

³⁴⁰ UN Doc. A/C.1/38; UN Doc. E/CN.4/2.

ii International Covenant on Civil and Political Rights

ICCPR's right to life article mentions 'every human being'³⁴¹ and '[n]o one'³⁴² (in the sense of prohibiting violations of rights) and additionally, in respect of capital punishment, 'anyone sentenced to death'³⁴³ and 'persons below the age of eighteen years'³⁴⁴ and 'pregnant women'.³⁴⁵ Elsewhere in the Covenant, reference is made as rights-bearer to '[a]ll peoples',³⁴⁶ 'the/all individual/s',³⁴⁷ combinations of 'person/s',³⁴⁸ sundry nouns,³⁴⁹ including [a]dults',³⁵⁰ etc.,³⁵¹ and variations on 'one'.³⁵² There does not seem to be any particular pattern in the use of one interchangeable word or phrase or another, for instance, 'all persons', 'everyone', or 'anyone'. 'Human', however, is only used in the context of the right to life and with reference to the 'inherent dignity of the human person' in the Preamble and in Article 10, the article which expresses the right to liberty, and the right to be treated with humanity. The human family is also mentioned in the Preamble, as is the 'ideal of free human beings'. Torture is, in its lesser form,

³⁴¹ Article 6(1).

³⁴² Article 6(1).

³⁴³ Article 6(4).

³⁴⁴ Article 6(5).

³⁴⁵ Article 6(5).

³⁴⁶ Article 1(1,2). A 'people' has been defined by UNESCO as: '[a] group of individual human beings who enjoy some or all of the following common features: A common historical tradition; Racial or ethnic identity; Cultural homogeneity; Linguistic unity; Territorial connection; Common economic life.' *Final Report and Recommendations of an International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, 22 February 1990, SNS-89/CONF.602/7. 27-30 November 1989. See also 1989 ILO Convention Concerning Indigenous and Tribal Persons in Independent Countries. (No. 169), Article 3.

³⁴⁷ Preamble, Article 2(1).

³⁴⁸ Article 8(3)(c)(i), 14(6), Articles 10(1), 14, 26; also, qualified by terms such as 'juvenile', 'accused', Article 10(2), Article 14(1) (this paragraph also refers to the 'guardianship of children', but the children are not here the rights-bearers); Article 14(4).

³⁴⁹ Article 10(1).

³⁵⁰ Article 10(2).

³⁵¹ Article 3, 23(2), Article 23(1) and 'human family' in the Preamble, Article 23(3,4), Article 24(1,2,3), Article 19(3), 21, 22.

³⁵² Article 18(3), Articles 7, 8, 9(1), 11, 12(4), 14(7), 15, 17(1), 18(2), Articles 9(1), 12(1,2), 14(2,3,5), 16, 17(2), 18(1), 19(1,2), 22(1), Article 9(2,3,4,5).

‘inhuman treatment or punishment’.³⁵³ Thus the notion of ‘human’ is only employed in certain narrowly defined contexts; with regard to the protection of life and liberty, and in recognition of dignity.

iii **Convention on the Rights of the Child**

The 1989 Convention on the Rights of the Child, refers to ‘every child’ as enjoying the ‘inherent’ right to life.³⁵⁴ The Preamble to that Convention reiterates the 1959 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.’ This recognises the preborn human as a human rights-bearer.

3.2.2 **EXAMPLES FROM REGIONAL TEXTS**

i **American Convention on Human Rights; American Declaration on the Rights and Duties of Man**

The Preamble to ACHR ‘[r]ecognizing that the essential rights of man are not derived from one’s being a national of a certain state, but are based upon the attributes of the human personality’. This is clarified in Article 1(2): ‘[f]or the purposes of this Convention, ‘person’ means every human being’. Further, ‘[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No-one shall be arbitrarily deprived of his life.’³⁵⁵ Hearing the the “*Baby Boy*” Case, it was noted by the IACommHR that: ‘[i]t was recognized in the drafting sessions in San José that [the phrase “in general”] left open the possibility that states parties to a future Convention could include in their domestic legislation “the most

³⁵³ Article 7.

³⁵⁴ Article 6.

³⁵⁵ Article 4.

diverse cases of abortion”.³⁵⁶ This is the only Convention to define a ‘person’ as a human being (although the CRC defines a child as a human being³⁵⁷). Further, the definition is from the moment of conception, which is now complicated by the development of *in vitro* fertilisation techniques, where fertilisation takes place *ex utero*, and problems regarding, for instance, frozen embryos may arise.³⁵⁸ It also raises issues in the context of abortion, something noted by the signatories and also commented upon in *Baby Boy*: ‘The United States and Brazil interpret the language of paragraph 1 of Article 4 as preserving to State Parties discretion with respect to the content of legislation in the light of their own social development, experience and similar factors.’³⁵⁹ This is similar to comments made in respect of ICCPR, such as those by France, Luxembourg, and Tunisia, noted above.³⁶⁰

ii African Charter on Human and Peoples’ Rights

Generally, the African Charter on Human and Peoples’ Rights employs the term ‘[e]very individual’³⁶¹ as the rights-bearer, except when speaking of ‘peoples’,³⁶² and ‘the family’³⁶³ and in the case of electoral and public service rights, when the term used is ‘[e]very citizen’.³⁶⁴ The assertion, however, with respect to the right to life, is that ‘[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person ...’. Here, the human being’s life which is to be respected

³⁵⁶ Conferencia Especializada Interamericana sobre Derechos Humanos, OEA/Ser.K/XVI/1.2, at 159; and cited in “Baby Boy” Case, para.14(c).

³⁵⁷ Article 1 of the CRC.

³⁵⁸ See the dispute arising regarding the withdrawal of consent by a woman’s partner to the implantation of frozen embryos, after the relationship broke down before the embryos could be implanted: *Evans v. United Kingdom*

³⁵⁹ *Supra*, n.356.

³⁶⁰ *Supra*, n.178 and accompanying text.

³⁶¹ Articles 2, 3, 5, 6, 7, 9, 10, 11, 12, 15, 16, 17.

³⁶² Article 19, 20, 21, 22, 23, 24, 25.

³⁶³ Article 18(1,2). This Article also refers to ‘the woman and the child’ (18(3)) and ‘the aged and disabled’ (18(4)).

³⁶⁴ Article 13.

seems to be a separate entity from the bodily person, whose integrity is to be maintained. This formula is repeated in the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: '[e]very woman shall be entitled to respect for her life and the integrity and security of her person', the only difference being in the change from 'human being' to 'woman'. This suggests that women are seen as a subset of the genus 'human beings'. Extrapolating, women, men, and children – all of those to whom the treaties and specialist protocols refer – are subsets of the species, and the right to life which is to be protected is not on all fours with the physical body whose integrity is to be respected; respect for the woman's life, the human's life, the child or man's life, is asserted independently of respect for a person's bodily integrity.

iii European Convention on Human Rights and Fundamental Freedoms

The ECHR assigns its right to life provision to '[e]veryone',³⁶⁵ *toute personne* in the French language version,³⁶⁶ rather than to 'humans'; '[e]veryone',³⁶⁷ 'no-one',³⁶⁸ (in the sense of 'no-one being deprived of rights'³⁶⁹), and 'person[/]s',³⁷⁰ are the rights-bearers throughout the text, (apart from 'men and women' having 'the right to marry and found a family',³⁷¹) and there is no mention of 'humans', other than in the term 'human rights'.³⁷²

³⁶⁵ Article 2.

³⁶⁶ 'All people'; *toute personne* is literally 'all persons'; 'everyone' would be *toute le monde*. Each is equally authentic: see Article 33 of the VCLT.

³⁶⁷ Articles 1, 2(1), 3, 4(1,2); Article 4(3)(b) mentions 'conscientious objectors'; Articles 5(1,2,3), 6(1,2,3), 8(1), 9(1), 10(1), 11(1), 13.

³⁶⁸ Articles 4(1,2), 5(1), 7(1).

³⁶⁹ Although Article 11(2) allows 'the imposition of lawful restrictions on the exercise of these rights [to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions] by members of the armed forces, of the police or of the administration of the State'.

³⁷⁰ Articles 2(2)(a,b), 5(1)(a,b,c,e,f); Article 5(1)(d) refers to 'minors'; Article 7(2).

³⁷¹ Article 12.

³⁷² See also Article 1 of Protocol No.1: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. ...

iv Charter of Fundamental Rights of the European Union

This twenty-first century Charter³⁷³ refers in its right to life article to '[e]veryone' as having the right to life, and 'no-one' being 'condemned to the death penalty, or executed'.

It is Article 3 which is, however, of most interest to the current analysis:

- (1) Everyone has the right to respect for his or her physical and mental integrity.
- (2) In the fields of medicine and biology, the following must be respected in particular:
 - the free and informed consent of the person concerned, according to the procedures laid down by law,
 - the prohibition of eugenic practices, in particular those aiming at the selection of persons,
 - the prohibition on making the human body and its parts as such a source of financial gain,
 - the prohibition of the reproductive cloning of human beings.

The selection is of 'persons', persons being, for instance, those able to give consent (and presumably, by implication, the 'person concerned' is the consent-giver in respect of those who are unable to consent for themselves, and not the person unable to consent). The 'human body' cannot be traded in whole or in part,³⁷⁴ although it is not stated whether a 'part' is to include gametes³⁷⁵ and blood (including the now important and valuable umbilical-cord blood), DNA from whatever source, aborted fetuses and their stem cells, etc., nor does it state whether it is only the live human body that may not be traded, ie. whether it is ever permissible to pay for organs from a dead or brain-dead

³⁷³ Nice, 7 December 2000.

³⁷⁴ Trading and trafficking in human body parts is an offence under a number of national penal codes, as noted by the UN Committee Against Torture (ComAT):

³⁷⁵ Sperm and ova. Whereas gamete donations have been paid for in the past, some laws are now prohibiting payments: e.g. the Canadian Assisted Human Reproduction Act, s.7(1), available at <http://www.laaws.justice.gc.ca/en/A-13.4/2389.html> (accessed 20/09/2005). See also e.g., *National Gamete Donation Trust*, <http://www.ngdt.co.uk> (accessed 20/09/2005).

donor.³⁷⁶ It is ‘human beings’ who cannot be reproductively cloned,³⁷⁷ that is, a new embryo cannot be created from one human being’s DNA in order to replicate that human being as closely as possible. The use of the term ‘human being’ here, where ‘person’ has been used elsewhere, is intriguing, suggesting there may be a perceived qualitative difference.

3.2.3 EXAMPLES FROM BIOMEDICAL TEXTS

Mainly created during the last two decades, there are one hundred and fifty documents of relevance to the interrelationship of bioethics and human rights.³⁷⁸

i International

Of major interest here are the discussions surrounding the United Nations Declaration on Human Cloning, which was adopted on 8 March 2005.³⁷⁹ It failed to attract consensus as a hoped-for Convention, and so became a Declaration; the lack of consensus was in itself seen by some states as a reason for voting against the measure or abstaining from voting.³⁸⁰ The Declaration as finally agreed calls on Member States to adopt all measures necessary to prohibit all forms of human cloning to the extent that they are incompatible with human dignity and the protection of human life³⁸¹ – a very ambiguous proposition –

³⁷⁶ The Islamic tradition respects the right to pay for transplant organs in order to preserve life.

³⁷⁷ ‘Cloning’ is an inaccurate scientific term; ‘somatic cell nuclear transfer’ would be better used here. See *infra* n.535.

³⁷⁸ There are 170 texts listed by the University of Minnesota Human Rights Library under the heading ‘All Bioethics and Human Rights Instruments’. <http://hejunige.ch/humanrts/instree/allbioethics.html> (accessed 11/04/2006).

³⁷⁹ UN Fifty-Ninth General Assembly, Plenary, 82nd Meeting, 8 March 2005, UN Doc. A/RES/59/280; also see Press Release GA/10333.

³⁸⁰ E.g. Mr. Lovald, Norway. UN Doc A/59/PV.82, p.8

³⁸¹ Para.(b).

and to protect adequately human life in the application of life sciences;³⁸² to prohibit the application of genetic engineering techniques that may be contrary to human dignity;³⁸³ to prevent the exploitation of women in the application of life sciences;³⁸⁴ and to adopt and implement national legislation in connection with those aims.³⁸⁵ A number of States voted against or abstained from the Declaration,³⁸⁶ which was widely seen as an unsatisfactory instrument, either because it failed to discriminate between reproductive and therapeutic cloning, or because it insufficiently emphasized what Uganda termed the sanctity³⁸⁷ – according to Nigeria, the primacy³⁸⁸ – of human life. Yet for the Republic of Korea, the alleviation ‘of pain, suffering and misery of millions of people’ that might be a consequence of therapeutic cloning was of paramount importance.³⁸⁹ The Declaration was not in line with Islamic understanding, either, according to the representative of Mali³⁹⁰ Spain commented that the term ‘human life’ contained in the text was imprecise and should be replaced by the term ‘human beings’ as ‘usually employed in scientific and political debates on cloning and related subjects’.³⁹¹ In the context of the current

³⁸² Para.(a).

³⁸³ Para.(c).

³⁸⁴ Para.(d).

³⁸⁵ Para.(e).

³⁸⁶ Vote of 84 in favour to 34 against, with 37 abstentions.

³⁸⁷ Ms. Katungye, UN Doc A/59/PV.82, p.9.

³⁸⁸ Nigeria’s representative, Mr. Isong, was not present for the vote. UN Doc A/59/PV.82, p.9.

³⁸⁹ Mr. Ha, UN Doc A/59/PV.82, p.5.

³⁹⁰ Press Release GA/10333. In accordance with the common position of the Organization of the Islamic Conference. For a general discussion of possible Islamic positions on human cloning, see Abdulaziz Sachedina, University of Virginia, *Cloning in the Qur’an and Tradition: Islamic Perspectives on Human Cloning*, available at <http://www.people.virginia.edu/~aas/article/article4.htm> (accessed 19/09/2005). Sachedina’s conclusion suggests caution, but also counsels that ‘since we do not will unless God wills’, there may indeed be a divinely inspired opportunity in the science and discoveries related to human cloning; ‘another opportunity for moral training and maturity’. Indeed, Sachedina finds authority in the Qur’an to suggest that ‘embryo splitting is just that opportunity for our over all maturity as members of the global community under God’. It is fair to suggest that this is probably a relatively liberal interpretation, and one not necessarily shared by other scholars. See Mohsin Ibrahim (2001 / 1421 H); Zawawi (2001); Abdul Majeed (2002).

³⁹¹ Mr. De Palacio España, UN Doc A/59/PV.82, pp.5-6. He also pointed out that the term ‘human beings’ ‘appear[ed] in the title of agenda item 150 of the current session of the General Assembly’.

discussion, Hungary's comments are of interest; a strong message was sent by the Declaration, 'that the birth of cloned human beings is not acceptable.'³⁹² There is an emphatic cross-cultural message being expressed by the Member States of the General Assembly that the preborn human is, indeed, a human being.

ii European

The Council of Europe's Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine³⁹³ (Oviedo Convention) begins by expressing its title in respect of the human being. However, as its Explanatory Report acknowledges, it does not define the term 'everyone' as found in Article I (Purpose and Object):

The Convention does not define the term 'everyone' (in French '*toute personne*'). These two terms are equivalent and found in the English and French versions of the European Convention on Human Rights, which however does not define them. In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention.³⁹⁴

Failing to reach agreement on the most fundamental aspect of the human condition is not a laudable achievement; nor is the following paragraph's provision particularly helpful, avoiding as it does the fundamental question of when life does begin for the purposes of the Convention:

The Convention also uses the expression 'human being' to state the necessity to protect the dignity and identity of all human beings. It was acknowledged that it was a generally accepted principle that human dignity and the identity of the human being had to be respected as soon as

³⁹² Mr. Simon, UN Doc A/59/PV.82, p.5.

³⁹³ ETS no.164.

³⁹⁴ Explanatory Report, para.18.

life began.³⁹⁵

In Plomer's view, there is an apparent, almost intractable, difficulty in reconciling these two paragraphs:

Paragraphs 18 and 19 thus contain an apparent contradiction between the ascription of human dignity 'as soon as life begins' and the deferral to contracting parties to determine who should count as 'everyone'. What 'life' precisely is supposed to be referring to (for example, live unfertilised egg, fertilised egg, enucleated egg, zygote, unborn foetus, person already born) and when precisely 'life' is taken to begin (for example, conception, fertilisation, birth) are not defined. Further, para 19 makes sense only if it is assumed that a zygote is 'a human being' (as opposed perhaps to a form of human life). But if a zygote is a human being, then how could there be disagreement as to whether it could count as someone or 'everyone'? One can make sense of there being a disagreement as to whether 'everyone' covers every stage or form of human life. But the same doubt cannot reasonably arise in relation to human beings. As commonly understood, 'everyone' includes 'every human being'.³⁹⁶

An explanation which partly covers the query as posed by Plomer could be that 'everyone' may, in some opinions, be every 'person', a state of being which it is argued here is not necessarily the same as 'every human being'. However, as the Convention claims in its title to be a 'Convention for the Protection of Human Rights and Dignity of the Human Being ...' the explanation is not only partial but is also self-defeating.

The Additional Protocol to the Oviedo Convention, on the Prohibition of Cloning Human Beings expresses an explicit prohibition on human reproductive cloning, banning 'any intervention seeking to create a human being genetically identical to another human being, whether living or dead'.³⁹⁷ The Explanatory Report to the Protocol notes:

In conformity with the approach followed in the preparation of the Convention on Human Rights and Biomedicine, it was decided to leave it to domestic law to define the scope of the

³⁹⁵ Explanatory Report, para.19.

³⁹⁶ Plomer (2005a), p.76.

³⁹⁷ ETS no.168, Article 1.

expression 'human being' for the purposes of the application of the present Protocol.³⁹⁸

In line with this, the ECtHR, in *Vo v. France*,³⁹⁹ expressed what may be seen as the Council of Europe standard viewpoint on a matter of such fundamental importance:

At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus ... although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. *At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race.* ... The Oviedo Convention on Human Rights and Biomedicine, indeed, is careful not to give a definition of the term 'everyone' and its explanatory report indicates that, in the absence of a unanimous agreement on the definition, the member States decided to allow domestic law to provide clarifications for the purposes of the application of that Convention ... The same is true of the Additional Protocol on the Prohibition of Cloning Human Beings and the draft Additional Protocol on Biomedical Research, which do not define the concept of 'human being'.⁴⁰⁰

These texts are beginning to engage with some of the issues which have now surfaced with regard to the identity of the rights-bearer. However, the response is not a satisfactory one. The Court in *Vo* declined to decide whether a foetus was included in the term 'everyone', finding that even if it were the case that Article 2 applied, there were sufficient accessible administrative remedies available in France, and so there was no need to address the point of the status of the foetus. This was a clumsy sidestepping of a difficult issue, the need to rule on something controversial and where there is a lack of a European consensus.⁴⁰¹ These and other issues, which are a subject of concern, will now be considered in greater detail.

3.3 LIFE AND HUMANITY IN OTHER DISCIPLINES

³⁹⁸ Explanatory Report, para.6.

³⁹⁹ 08/07/2004.

⁴⁰⁰ *Ibid.*, para.84. (Emphasis added).

⁴⁰¹ See Plomer, (2005b). For discussion on a European consensus doctrine, see Erdman (2003).

3.3.1 LIFE IN BIOMEDICAL SCIENCE⁴⁰²

In biological terms, life is found in four categories, viruses, bacteria, archaea, and eukaryotes. Plants, birds, reptiles and mammals, and therefore humans, are catalogued in the latter. Potter offers a mainstream definition of life: ‘In general, life has been traditionally characterised in terms of growth, reproduction, metabolism, motion and response (through homeostasis and evolution).’⁴⁰³ What form the organic being takes depends upon the arrangements of its genes; if it is to be human, then its deoxyribonucleic acid [DNA] will be arranged in a human-specific manner.

Whilst this is a basic biological understanding, it does not necessarily mean that life is defined by all biologists as having machine-like properties – collect the appropriate parts, put them together, and there is a working organism.⁴⁰⁴ Rosen⁴⁰⁵ finds the roots of this concept in the work of the philosopher René Descartes, he who said ‘*Cogito, ergo sum*’ – ‘I think, therefore I am’,⁴⁰⁶ and who had concluded from observing a life-like automaton, that life itself was automaton-like.⁴⁰⁷ Rosen’s challenge is to the statement ‘What is life?’ being answered, ‘Life is a machine.’⁴⁰⁸ The Cartesian machine-metaphor, is, he believes, ‘a way of anchoring biology in physics by de-mystifying it, and subsuming it entirely into

⁴⁰² I am grateful to Dr. Edward Hollox (Geneticist, University of Nottingham) and Oliver Bridle (University of Leicester) for their assistance here; any errors are my own.

⁴⁰³ *Supra*, n.15.

⁴⁰⁴ See generally Smith (1976).

⁴⁰⁵ Rosen (1991), at p.40.

⁴⁰⁶ René Descartes, *Discourse on Method* Part IV, and in C.U.M. Smith (1976), at p.160: ‘Descartes concluded that the one indubitable thing in the world was that he was something, a substance ‘the whole essence, or nature of which it is to think, and that for its existence there is no need of any place, not does it depend on any material thing; so that this ‘me’, the soul by which I am what I am, is entirely distinct from the body and is even more easy to know than is the latter; and even if the body were not, the soul would not cease to be what it is.’

⁴⁰⁷ Vasseleu finds in Cartesian dualism support for the concept in patent law that ‘the body exists as an idea, and as such, can be an object of knowledge ... patent law ... authorises the use of the idea, not its embodiment.’ Cathryn Vasseleu, ‘Patent Pending: laws of invention, patent life forms and bodies as ideas’ in Cheah, Fraser and Grbich (Eds.) (1996), p.107.

⁴⁰⁸ *Supra*, n.405, at p.23.

physics'.⁴⁰⁹ He is also not satisfied with an evolutionary concept, 'the province of history and not science at all.'⁴¹⁰ This is because, whilst it is possible to conceive of life without evolution, one cannot hold the tenable supposition of evolution without life, and evolution is therefore a corollary to life, 'a property of particular realisations of life, and not life itself'.⁴¹¹

Rosen goes on to discuss another possibility; vitality. 'Vitalism', the life force, is an 'additional principle, missing from the rest of nature, which made organism *in principle* inexplicable via inanimate nature alone.'⁴¹² It is a concept invoked to assert 'that whatever made organisms alive was forever out of the reach of inanimate nature'⁴¹³ and which as a theory, has had its day, according to Rosen: '[i]n the past, the only perceptible alternative to this vitalism was mechanism'.⁴¹⁴ Rosen asserts that evolution has come to take the place of vitalism and mechanism; he finds none of them adequate. He enters the realms of physics, mathematics, quantum mechanics and computational biology to conclude, from supported premises, that 'an organism is a material system that (1) is complex, and (2) admits a certain kind of relational description.'⁴¹⁵ The practice of medicine may employ vitalism as an additional, exceptional criterion when defining specifically human life (as indeed would some scientists).⁴¹⁶ Some practitioners of medicine are content with a

⁴⁰⁹ *Ibid.*, p.255.

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² *Ibid.* See Erlingsson (2002) for a complex analysis of the Icelandic naturalist, Thorvaldur Thoroddsen's 'transformation from 'mechanist' to 'vitalist'.' Erlingsson uses Thoroddsen's change of position from being a follower of Haeckelian Monist theory, 'to throw light on the social shaping of scientific knowledge' (p.444).

⁴¹³ *Supra*, n.551.

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*, p.xvii

⁴¹⁶ Erlingsson, *supra* n.412.

definition in line with the one Potter offers, above,⁴¹⁷ whilst others go a little further.⁴¹⁸ One text, whilst separating the life-force, vitality or energy which enables life from the abilities which characterise it, also defines what it is to be human:

Life: The energy that enables organisms to grow, reproduce, absorb and use nutrients, evolve, and in some organisms achieve mobility, express consciousness, and demonstrate a voluntary use of the senses. Human: A member of the genus *Homo* and particularly of the species *H. sapiens*⁴¹⁹

That definition of ‘human’, at first reading apparently tautological, has inherent within it greater depths than may be initially assumed. In the following discussion, an argument will be advanced which relates the life which is recognised by international law to the entrance requirement for being human; membership of the human race, that is, a being composed of human genetic material.

Deconstructing the biological and medical understandings suggests that there is something further needed than a particular arrangement of chemicals to make any organic matter live, and that a being cannot be constructed by getting the formula and laboratory conditions right. Some vitality, energy or life-force, or some evolutionary tool, or a created soul, may be essential.⁴²⁰ This point will be further considered by reference to a psychologist’s interpretation of ‘life’. How does wo/man differ from machine?

⁴¹⁷ ‘Life: Vitality, the essential condition of being alive; the state of existence characterised by such functions as metabolism, growth, reproduction, adaptation, and response to stimuli’ *Steadman’s Medical Dictionary* (26th ed., 1995).

⁴¹⁸ ‘Life: The aggregate of vital phenomena; a certain peculiar stimulated condition of organised matter; that obscure principle whereby organised beings are peculiarly endowed with certain powers and function not associated with inorganic matter. Generally, living things share, in varying degrees, the following characteristics: organisation, irritability, movement, growth, reproduction and adaptation.’ *Dorland’s Illustrated Medical Dictionary* (29th ed., 2000).

⁴¹⁹ Mosby’s *Medical, Nursing and Allied Health Dictionary* (5th ed., 1998).

⁴²⁰ See also an *Oxford English Dictionary* definition, ‘The cause or source of living; the vivifying or animating principle; he who or that which makes or keeps a thing alive (in various senses); ‘soul’; ‘essence’’. <http://dictionary.oed.com>, accessed 19/04/2002.

3.3.2 PSYCHOLOGICAL LIFE: ON BEING AND HUMAN-NESS

An understanding in which something ‘extra’ is required in terms of comprehending functioning human life is advanced by the psychologist, Andy Clark.⁴²¹ For Clark, the ‘extra’ is not the ‘chemical plus’ propounded by the above definitions, but ‘electrical plus’. Clark investigates why artificial intelligence – robotic human life – has not been invented or created.

‘Where are the artificial minds promised by 1950s science fiction and 1960s science journalism? Why are even the best of our ‘intelligent’ artifacts still so unspeakably, terminally dumb? One possibility is that we simply misconstrued the nature of intelligence itself. We imagined mind as a kind of logical reasoning device coupled with a store of explicit data – a kind of combination logic machine and filing cabinet. In so doing, we ignored the fact that minds evolved to make things happen ... Minds are not disembodied logical reasoning devices.’⁴²²

Clark’s project is to rescue the brain/mind/intelligence from the ‘Descartean dustbin’; he sees Descartes as propounding ‘a vision of mind as a realm quite distinct from body and world’.⁴²³ How much the mind is inextricably woven with the essential elements of human life is a problematical question. The grasp of what reality is in terms of defining life can be assessed as ontological, (that is an *a priori* argument which seeks by reason alone to ascertain what exists), or else by an epistemological understanding. What role does human understanding play in the defining of itself? Clark⁴²⁴ suggests that this understanding is cumulative, and that ‘advanced reason is ... the realm of the scaffolded brain: the brain in its bodily context, interacting with a complex world of physical and

⁴²¹ Clark (1997).

⁴²² *Supra* n.421, p.1.

⁴²³ *Ibid.*

⁴²⁴ *Supra* n.421, Chapter 9.

social structures'.⁴²⁵ Clark's comments about his project are relevant to this one also:

The present discussion thus barely scratches the surface of a large and difficult project; understanding the way our brains both structure and inhabit a world populated by cultures, countries, languages, organisations, institutions, political parties, e-mail networks, and all the vast paraphernalia of external structures and scaffoldings which guide and inform our daily actions.⁴²⁶

The consequence of all of this, I would suggest, for the protection of the right to life in international law is that if in some human beings the brain or intelligence or rationality is seen as failing or inadequate for the full assumption of personhood, then this failure is not intrinsic to being human, any more or less so than if it were an arm, or a liver, or a heart, failing. The brain or mind is a functioning part of a human body, as is any other part, and a processing inability on its part does not make the body which contains it any more or less human. In my opinion, this understanding does not deny the possibility of a soul, of something Other or beyond the embodied brain; but *ensoulement*⁴²⁷ is beyond the scope of international law's field of reference.

3.3.3 THE PHILOSOPHY OF LIFE: ON BEING AND WORTHINESS

The most obvious expression of this concept in the context of determining life's boundaries is in the understandings of political and moral philosophy and their conception of personhood as a requisite to the recognition of being a human in society, in contrast to a definition of the human that may be termed legal.

The positions which have been illustrated so far are, firstly, that life is something

⁴²⁵ He offers as an example of the external structures classical economics, owing its success to the interwoven dynamics of responses of institutional or organisational structures, which have 'evolved as a result of selective pressure to maximize rewards of a certain kind.' The external scaffoldings are 'themselves the products of individual and collective human thought and activity'.

⁴²⁶ *Supra* n.421, p.191.

⁴²⁷ See Ford, (1988).

chemical, with nothing before and nothing after. A development of that idea would require a life-force, some energizing vitality to initiate life as lived. Secondly, that the human embodied brain is not a mental ‘realm distinct from the realm of the body’,⁴²⁸ but that this understanding does not preclude the possibility of a soul. Thirdly, there may be more to human life than this life, so that death is not all for which we live, nor is it the ultimate evil to be avoided at all costs, and that there is meaning and purpose to this life because of an expectation afterwards. The concept that human life and being is more than an arrangement of chemicals is advanced by some philosophers and discarded by others. Life in terms of philosophy is defined by whether it has meaning, which may or may not be related to value. Some philosophers, such as Schopenhauer, Russell and Tolstoy – described by Paul Edwards as ‘the pessimists’⁴²⁹ – see life as valueless and death as an emptiness. The point to be reached here is that any understanding of life that does not address issues relating to death, the cost of avoiding it or compensating for its premature visitation, cannot provide an effective basis for the formulation of a law that protects the right to life.

No discussion, however abbreviated, of the philosophy of life would be complete without considering the work of Kant, for whom every human being is an ‘end in himself’.⁴³⁰ James Boyd White points out that ‘[o]ne basic question about this formula is what it means, not as a matter of conceptual explication but as a matter of moral experience.’⁴³¹ He uses Sophocles’ play, *Philoctetes*, to work out the problems involved in this

⁴²⁸ Adapted from Clarke’s view of Descartes, *supra* n.423.

⁴²⁹ Paul Edwards, ‘Meaning and Value of Life’ in Edwards (Ed.) (1967) Volume 4, pp.467-477, at pp.467-469. See, for instance, Bertrand Russell’s short story, ‘The Mathematician’s Nightmare’, appearing in *Nightmares of Eminent Persons* (1962) Harmondsworth, Penguin, at pp.48-53; and in Monk (1997) at pp.56-58.

⁴³⁰ Kant’s belief was that: ‘man and generally any rational being exists as an end in himself, not merely as a means to be arbitrarily used by this or that will, but in all his actions, whether they concern himself or other rational beings, must be always regarded at the same time as an end.’ Kant (1785, J. W. Ellington trans., 3rd ed., 1993), Second Section: ‘Transition from Popular Moral Philosophy to the Metaphysic of Morals’.

⁴³¹ White (1985), at p.5.

distillation of Kant's thought;⁴³² in the current context, of protecting the right to life, it can be illustrated by thinking about the anencephalic child.⁴³³

Anencephalic children, developing with an intact brainstem but without scalp, skull, and cortex, and with the possibility of other neural and non-neural damage, will never 'live', although they can sometimes breathe independently. They have in some circumstances been respirated when necessary, and otherwise medically supported, in order to provide organs for transplant; or else this process has been requested by the parents, and refused by the medical teams or the courts.⁴³⁴ Parents have hoped to find some comfort, and a sense of purpose in their child's unexpectedly short and tragic life, in being able to help another child to live. Another moral maze; because the anencephalic infants, normally dying very quickly after birth, have thrived unexpectedly when offered intensive care in order to preserve their organs for transplant.⁴³⁵ The illustration of the anencephalic children is directly referential to the debates surrounding stem-cell research and somatic cell nuclear transfer techniques; do the individual embryos used in these processes have a value and worth of their own and for their own ends, or is it morally and legally

⁴³² *Ibid.*, Chapter One, 'Persuasion and Community in *Philoctetes*'. See also *infra*, n.618 and accompanying text.

⁴³³ See Justice (1993-1994), p.1278, n.366.

⁴³⁴ See for instance the case of Theresa Ann Campo Pearson, whose parents unsuccessfully challenged the Florida Supreme Court to review legislation that denied the possibility of transplant from their child, who breathed independently (and did not meet 'brain-death' protocols) until she died at the age of 9 days in 1992. For discussion see Casenote, J. Justice (1993-1994). There have been suggestions that such infants should be reclassified as 'brain-absent', an equivalent status to brain-dead: see M.R. Harrison, (1986) 'The Anencephalic as an Organ Donor' *Hastings Center Report* 16:21, and in Diamond (2003), endnote 10 and accompanying text. See also HRC, *Huamán v. Peru*, 22/11/2005, in which the the author, denied an abortion whilst carrying an anencephalic foetus, claimed 'a violation of article 2 of the Covenant, since the State party failed to comply with its obligation to guarantee the exercise of a right. The State should have taken steps to respond to the systematic reluctance of the medical community to comply with the legal provision authorizing therapeutic abortion, and its restrictive interpretation thereof. This restrictive interpretation was clear in the author's case, in which a pregnancy involving an anencephalic foetus was considered not to endanger her life and health. The State should have taken steps to ensure that an exception could be made to the rule criminalizing abortion, so that, in cases where the physical and mental health of the mother was at risk, she could undergo an abortion in safety' (para.3.1).

⁴³⁵ See J.S. Justice, (1993-1994), p.1237, n.67; Friedman, (1990); Anspach, (1993).

permissible to ‘use’ them for others’ ends? One can see that an earlier comment, that ‘the questions are no different; one must simply be clearer about the logic behind the answers’ has an inherent truth. Can Kant’s answers accommodate today’s questions?

The debate over anencephalic infants – whether to allow the harvesting of organs from a living but very soon to die child whose current capacities possibly do not even include the ability to feel pain⁴³⁶ – encapsulates the paradox. Following from the argument introduced above, regarding Clark’s work, one can see that it ought to be possible to recognise fully the identity of the child as human, disregarding any question of ‘personhood’ where that requires some degree of sentience or rationality, and to move from there. The question of ‘where to?’ is for later in this thesis.

At its grimmest, therefore, life is explained as only pointless suffering; at its best, it has value, purpose and worth, whether or not that is related to a belief in divinely-inspired morality and a hope of life to come. The concept of ‘value’ is multi-faceted, being related to the value of an individual, inseparable from a theme of moral values.⁴³⁷ The offered basis for that value is here given as dignity, and before turning more fully to the concept of human genetic material as a suitable criterion for identifying the human rights-bearer, it is necessary to undertake a short exploration of dignity as a values framework, and the consequence of its recognition for the practical application of a right to life provision, in terms of equality and autonomy.

3.3.4 STANDARDS OF LIFE IN GREATER DIGNITY

⁴³⁶ See *In re T.A.C.P.*, at 589; also *Letters to the BMJ*: Derbyshire S.W.G., *et al.* ‘Do fetuses feel pain?’ *BMJ* 1996; 313: 795-9 (28 September); McCullagh P., ‘Do fetuses feel pain?’ 1997; 314: 302-3 (25 January); Saunders P.J., ‘We should give them the benefit of the doubt.’ *BMJ* 1997; 303 (25 January). See also American Academy of Pediatrics, Committee on Fetus and Newborn; Canadian Paediatric Society, Fetus and Newborn Committee: ‘Prevention and Management of Pain and Stress in the Neonate’, *Pediatrics* (February 2000).

⁴³⁷ Rosen, *supra* n.405, and Clark, *supra* n.421.

The right to life has been defined in the SACC case of *The State v. T. Makwanyane and M. Mchunu* as being something more than the mere biological:

It is not life as a mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. ... The right to life ... incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished.⁴³⁸

These words can be taken as expressing what the human rights bodies are seeking to affirm also; but what exactly is dignity? How is it understood, and what is meant by it?

i Truths as constants

One of the issues to be resolved, therefore, is whether there are certain truths to be known and acted upon, constants that can inform law and act as a primary source. Such a truth might be that the human being is endowed with intrinsic, or inherent dignity, whether this is recognised or not within their societies. The norms developed within the law of human rights must reflect a theoretical position, and that position must find its basis, either in those truths that might lay claim to being self-evident, that is Kantian *a priori* propositions established purely from reason. Otherwise, they must stem from human experience, that is, in Kantian terms, *a posteriori*⁴³⁹ However, in natural law terms, does that mean that those truths that are established are forever the same?

The answer is yes; it is axiomatic within the concept of *a priori* truths that, known by reason alone, they are unchanging. It is not, however, axiomatic that human understanding

⁴³⁸ Paras.326-327, *per* O'Regan J.

⁴³⁹ Kant, *Critique of Pure Reason* (2nd ed., 1787), Section I, at B2 in Kant (1787) and pp.42-43 in Kemp Smith (1963).

of them does not change, or evolve.⁴⁴⁰ This proposition may be understood more clearly by considering the constants of fundamental physics. Such constants – the velocity of light, for instance – would seem, by definition, to be unchanging. However, human understanding of them is not, (there is a current debate in physics regarding the possibility of change in the velocity of light⁴⁴¹) and Barrow illustrates the process of developing and interpreting the place of constants in the universe of physicists.⁴⁴² A constant is discovered, found to be more significant than at first thought, and then its value is determined by the values of other known constants. In a process of elucidation, it is discovered that an observed phenomenon is governed by a new combination of constants. Then a quantity believed to be a constant is found to be not truly constant, and by calculating the value of a constant from first principles, it is shown that its value is fully understood. In a final stage described by Barrow as ‘transmogrification’, supposed constants are admitted to be a small part of a deeper, more universal structure.

There are certain precepts in human rights discourse, such as inherent dignity and worth, equality, and, in the case of the right to life (and, it will be argued, the other allegedly ‘absolute’ rights⁴⁴³), inalienability, which have attained the status of constants in

⁴⁴⁰ For an analysis of Kant’s *a priori* methods for recognizing and understanding necessary truth see Brook (1992)

⁴⁴¹ See e.g. Webb (2003).

⁴⁴² Barrow, (2002) at p.32.

⁴⁴³ The extent to which any right is absolute can be argued; the prohibition on torture is supposed to be absolutely so, whereas the right to life incorporates some qualifications. See generally Addo and Grief, (1998) at p.513, where the authors state that: ‘In practice, the tendency has been for practitioners and academic writers to assume that the absence of permissible limitations, exceptions or derogations provides a sufficient basis for the conclusion that the prohibitions are absolute’ [Footnote omitted]. For discussion of whether the right to be free from torture should be absolute or not, in the context of the GSS interrogation practices in Israel, see ‘Symposium on the Report of the Commission of Enquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity’, *ILR*, (1989).

physics.⁴⁴⁴ And indeed, if they are *a priori* truths, then in universal terms they are the same. Therefore, it is arguable that they are susceptible to a similar process to that outlined by Barrow, above, with respect to constants in physics, in order to understand their true nature and interpretative value to international human rights law. How do the concepts of dignity, liberty and equality, which will be seen to be of particular relevance to this discussion, fit (if at all) into a wider picture of international and national legal systems, cultures, and society? How are they recognised, granted status, ascribed value?

ii An etymology of dignity and rights

In seeking to arrive at an understanding of what is meant, in human rights terms, by ‘dignity’,⁴⁴⁵ an etymology can take account of President Roosevelt’s ‘Four Freedoms’⁴⁴⁶ speech, which, together with the Atlantic Charter,⁴⁴⁷ concluded with Winston Churchill, contributed to the Charter of the United Nations. The Charter picks up the themes of inherent dignity and equality: ‘We, the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and ... to promote social progress and better standards of life in larger freedom ...’⁴⁴⁸

A number of points can be drawn from this, relative to the aims of the international

⁴⁴⁴ Otto describes the precepts that I have called ‘constants’ here as ‘universals’, in a work which seeks to reconceptualise them, as having been fundamentally flawed from inception. Otto (1997).

⁴⁴⁵ There is a wide literature on the concept of dignity throughout all disciplines; for a text on *Dignity and Human Rights*, in more depth than can be addressed in the context of this discussion, see Kretzmer and Klein (Eds.) (2002).

⁴⁴⁶ Franklin D. Roosevelt, Speech to the 77th Congress of the USA, 6 January 1941. The ‘Four Freedoms’ are freedom from want, freedom from fear, freedom of speech, freedom of religion.

⁴⁴⁷ 14 August, 1941, including the following provision: Sixth: after the final destruction of the Nazi tyranny, they [UK and USA] hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want; ...’

⁴⁴⁸ Preamble.

community in its combined efforts. One, that ‘fundamental human rights’ are at the core of the proposed mission; two, that humans (allegedly) possess, equally, dignity and worth, and entitlement to those rights; and three, that ‘larger freedom’ is the basis for ‘social progress and better standards of life.’ Additionally, these aims, of economic and social advancement, are to be pursued in an international framework, and by combined efforts. The contingency of rights, one upon another, was asserted. Also, with reference to the Charter, the expressions, ‘fundamental human rights’ and ‘the dignity and worth of the human person’ imply a quality, described elsewhere as ‘inherent’,⁴⁴⁹ which suggest that human rights law acknowledges the normative force of moral values.⁴⁵⁰ Recognising the dignity of others includes, in Kantian understanding, promoting the conditions for others to develop as morally autonomous human beings.⁴⁵¹ There is a sense in its usage of ‘respect’, in that acknowledging the inherent dignity of the human person involves respecting their mental and physical integrity,⁴⁵² and realising that there is something within the essence of humanity which endows a person with ‘the quality of being worthy or honourable; worthiness, worth, nobleness, excellence’.⁴⁵³ By finding for an inherent dignity, the discourse of human rights is, to adapt Tony Carty’s expression, doing the

⁴⁴⁹ See Morsink (1999), Section 8.2, pp.290-296, on the inclusion in UDHR of ‘words and phrases [‘inherent’, ‘inalienable’, and ‘inborn’, and ‘by their nature’] that indicated that people have these rights by virtue of their humanity and not from any other external causes, like acts of governments, courts, legislatures, or international assemblies.’ (p.290).

⁴⁵⁰ See Morsink, *supra* n.449, for analysis of the place of a moral understanding of the basis of rights in the formulation of Article 1, UDHR: ‘All human beings are born free and equal in dignity and rights’. As this is transparently not true in an empirical sense, it can be strongly argued that the Declaration was expressing a moral view: ‘[The drafters] did not mean the phrase ‘born free and equal’ in a legal way. They had in mind a moral equality or an equal possession of moral rights and their attendant duties. They saw this moral birth as a rider to the physical births that people have,’ although it does not make clear at what stage of development a human attains the ‘moral birth’ which is attested.’

⁴⁵¹ *Supra*, n.430.

⁴⁵² See SACC, *State v Williams et al.*, [1995] ICHRL 35 (09/06/1995), paras.38, 39; HRC, *Errol Pryce v. Jamaica* Communication No. 793/1998, 15/03/2004, paras.3.2, 6.2.

⁴⁵³ *Oxford English Dictionary Online*, <http://dictionary.oed.com> (Accessed 18/10/2002).

work of human rights.⁴⁵⁴ That which might have to be, in human terms, earned, is granted as of right, and from it springs the right to rights.

iii **Universality, dignity and rights**

The offered value here is dignity, inherent in every human being; the moral criterion is equality. None of these require any sentience, performance of societal duties, or self-esteem, to entitle a person to the ‘right to rights’, ie. to be recognised as a rights-bearer. Should society wish to limit access to services, for instance, then if necessary the action must be taken as a lawful qualification of a particular right. From Simon Lee’s perspective, ‘where rights conflict or otherwise fail to resolve the dispute, a deeper approach to ethics is needed, grounding rights talk in a broader understanding of the human condition’.⁴⁵⁵ It is argued here that rights talk is grounded in a truly universal ‘understanding of the human condition’, that is, inherent human dignity. This does not mean that in many of the specific issues that are faced in respect of the right to life, particularly in determining what human life is at all, there is one truly obvious answer with which all cultures would feel comfortable. As Gatewood notes, ‘even when people of similar cultural and personal backgrounds are trying to solve very similar problems, we should expect to find intracultural variability, manifest as inter-individual differences and/or cognitive pluralism.’⁴⁵⁶

Pheng Cheah refers to three voices operating within human rights discourse: ‘The first voice is the position of governments in constitutional democracies in the economically hegemonic North or West. The second voice refers to the position of Asian governments.

⁴⁵⁴ Carty, (1996) at p.45: ‘The discourses of colonialism do the work of colonialism’.

⁴⁵⁵ Lee, (2003) at pp.46-47.

⁴⁵⁶ Gatewood (1993), Abstract.

The third voice refers to the position of human rights NGO's in the South.⁴⁵⁷ Cheah's concern 'is with the universal validity of human rights in general, the normative force claimed by the three voices of human rights'.⁴⁵⁸ He finds in all three voices a recognition of human dignity, not as a source of rights nor as a normative force, but rather as 'some contentless human attribute that is the basis of freedom in the world'.⁴⁵⁹ Dignity is the progenitor of the right to rights, 'not contestable because it has no specific historical, political or cultural content'.⁴⁶⁰

This point is debatable: consider the example of the post-War Japanese constitution. The American re-writing of the Japanese Constitution, under the aegis of General MacArthur, took place in February 1946. The history and details of this undertaking can be found in Inoue's work,⁴⁶¹ in which it is explained that the Americans, in Article 24 of the new Constitution, asserted that '[in] other matters pertaining to marriage and the family, laws have to be enacted from the standpoint of *individual dignity and the essential equality of the sexes*'.⁴⁶² Apart from the ideal of establishing equality between the sexes as a consequence of acknowledging individual dignity, a concept which the Americans, and the West generally, understood and accepted⁴⁶³ whilst the Japanese did not (it 'destroyed

⁴⁵⁷ Cheah (1997) pp.240-241.

⁴⁵⁸ *Ibid.*, p.241.

⁴⁵⁹ *Ibid.*, p.242.

⁴⁶⁰ *Ibid.*, p.241.

⁴⁶¹ Inoue, (2002) 'From Individual Dignity to respect for *Jinkaku* – Continuity and Change in the Concept of the Individual in Modern Japan', in Likosky, (2002), p.295.

⁴⁶² *Supra*, n.461, at p.296. Inoue's translation and emphasis.

⁴⁶³ See CEDAW General Recommendation 21, Report of CEDAW, Thirteenth session: A/49/38 Sessional/Annual Report of Committee, 12 April 1994.

Equality in marriage and family relations:

[CEDAW] (General Assembly resolution 34/180, annex) affirms the equality of human rights for women and men in society and in the family. The Convention has an important place among international treaties concerned with human rights.

the legal basis of the Meiji household system⁴⁶⁴), the Japanese did ‘have a deeply rooted Buddhist idea of equality (*byodo*) which means that all people are equally endowed with the ability to cope with life.’⁴⁶⁵ But it was not so much the concept of gender-equality, difficult though that was to accept, that was to cause problems of comprehension, but the translation of the meaning behind the term, individual dignity. Inoue goes on to discuss in detail what the Americans thought they meant, and what the Japanese thought they had agreed to, in Article 24. In Japanese hierarchical society, respect for *jinkaku*, the word chosen to explain individual dignity,⁴⁶⁶ was involved with respect for an individual’s moral character and their place in society; ‘individuals of high *jinkaku* were entitled to greater respect than those with low *jinkaku*. ... [There was] thereby created a significant difference in meaning between the English and Japanese version of Article 24’.⁴⁶⁷ The former reflects a natural law position, and can be considered, for example, as relating to the American – and other-Western – concept of individual dignity described above. Whereas the latter, a positivist, empirical viewpoint, can be understood in Japanese terms by their (effective) translation of individual dignity as *jinkaku*, a reflection of a person’s moral character, and involving earned respect, either on account of a man’s (and originally only men’s) place in society, or because of high achievement and moral standing.

⁴⁶⁴ *Supra*, n.461, at p.297.

⁴⁶⁵ *Supra*, n.461, at p.297, fn.7.

⁴⁶⁶ Although ‘individual dignity’ was translated literally as *kojin-no songen*, it was explained by Government officials as ‘respect for *jinkaku*.’ *Supra* n.461 at p.297, and fn.4; and reference to K. Inoue, (1991), *MacArthur’s Japanese Constitution: A Linguistic and Cultural Study of its Making*.

⁴⁶⁷ *Supra*, n.461, at p.296.

iv **Dignity and bioethics**

Beyleveld and Brownsword⁴⁶⁸ offer a thorough analysis, starting with the vagueness – Mohammed Bedjouai describes it as ‘fragility’⁴⁶⁹ – of the use of the term ‘dignity’ generally in discourses of rights.⁴⁷⁰ They ‘isolate two seminal notions of human dignity, one, the notion that human beings, having intrinsic value, must not be treated simply as a means, the other the idea that dignified conduct is a virtue’.⁴⁷¹ The finding is that a ‘generally accepted principle that human dignity and the identity of the human being had to be respected as soon as life began’ has been understood to mean the protection of potential life, from the provisions of Article 1 of the COE Convention on Human Rights and Biomedicine.⁴⁷² Beyleveld and Brownsword suggest that:

[A]lthough this drafting device is designed primarily to contain divisive questions concerning the regulation of abortion, it indicates how some might seek to deploy the concept of human dignity to protect human life forms that are not yet eligible for human rights protection.⁴⁷³

That is, indeed, the aim of this thesis. Regarding human dignity, Beyleveld and Brownsword conclude that ‘the concept ... has a legitimate place in the debates about human genetics’,⁴⁷⁴ although they warn against its ‘loose cannon’ characteristics; ‘it can oversimplify complex questions; and it can encourage a paternalism that is incompatible

⁴⁶⁸ Beyleveld and Brownsword (1998). See also generally Baxi, (2002) and Petchesky (2003).

⁴⁶⁹ *Proceedings of the Third Committee of the International Bioethics Committee of UNESCO, September 1995: Volume 1*, at p.144, and Beyleveld and Brownsword, *supra* n.468, p.661, footnote 5 and accompanying text.

⁴⁷⁰ *Ibid.*, pp.661-662. See also Brownsword, (2003, 2004), and Aurora Plomer, ‘Embryonic Stem Cell Research, Human Dignity and the Right to Life’ (forthcoming, 2005, copy on file with author).

⁴⁷¹ *Ibid.*, p.662.

⁴⁷² Explanatory Report to the Council of Europe, Article 1, Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, DIR/JUR (97)1 Strasbourg, Directorate of Legal Affairs, January 1997, para.9, and in Beyleveld and Brownsword, *supra* n.468, p.663, footnote 13 and accompanying text.

⁴⁷³ Beyleveld and Brownsword, *supra* n.468, pp.663-664.

⁴⁷⁴ *Ibid.*, p.662.

with the spirit of self-determination that informs the mainstream of human rights thinking'.⁴⁷⁵

Andorno has said that '[t]he enterprise of setting common standards in the biomedical field, although difficult, is possible because international human rights law presupposes that some basic principles transcend cultural diversity.'⁴⁷⁶ Andorno finds one such principle to be human dignity, which he defines elsewhere as 'basic' dignity and 'extended' dignity: 'The basic meaning of dignity, which is the primary and stronger expression of this idea, refers to the intrinsic worthiness of human beings, irrespective of age, sex, physical or mental ability, religion, ethnic or social origin.'⁴⁷⁷ He uses 'intrinsic' here where others refer to the 'inherent dignity and worth of the human person', to explain that 'such a dignity does not rely on a particular feature or capacity of persons but only on their human condition'.⁴⁷⁸

'Extended dignity' is a wider and more nebulous concept, referring to the dignity of the human species. This is a dimension of the understanding of dignity that encompasses the whole of humanity, including future generations, and for which Andorno finds a basis in Kant: 'the Kantian imperative already contains this extended notion of dignity because it literally says that it is *humanity* in us (*die Menschheit*, the human essence) that should never be used only as a means'.⁴⁷⁹ That 'only' is important: Beyleveld and Brownsword point out that in Kantian terms people may be used as a means – otherwise no altruistic action could ever take place, but not solely as an end. This could be the answer to the

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.* See also Cheng (1997).

⁴⁷⁷ Andorno (2003) at p.2. (Emphasised in original).

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*, p.3. (Emphasis in original).

question of the anencephalic children; they were not deliberately created that way, but their lives can be used to give the gift of life to an unknown Other.

Andorno's question is whether human rights are applicable to humanity as a whole. UNESCO, in their formulation of a Declaration on the Responsibility of the Present Generations to Future Generations,⁴⁸⁰ as Andorno points out, 'avoid[ed] any reference to the 'rights' of future generations';⁴⁸¹ but this document does call for ensuring 'the maintenance and perpetuation of humankind with due respect for the dignity of the human person. Consequently, the nature and form of human life must not be undermined in any way whatsoever.'⁴⁸²

A consequence of the human rights understanding of dignity, as described here, is equality, in that all human beings, having value simply by the fact of their humanity, are equally thus endowed, and must be treated with equality.⁴⁸³ This is an empirical concept, as equality is only expressed in terms of treatment of one person, or group of persons, by another. It is a necessary consequence of human dignity, not a prerequisite. A human person would have dignity, if accepted as inherent, no matter whether that essential quality was recognised by others or not. To take the alternative position, in not recognising inherent human dignity but accepting that human rights discourse has introduced the concept as a given, proponents of that viewpoint are achieving the same outcome.

⁴⁸⁰ Declaration on the Responsibilities of the Present Generations Towards Future Generations adopted on 12 November 1997, by the General Conference of UNESCO at its 29th session.

⁴⁸¹ *Supra*, n.478.

⁴⁸² Article 3.

⁴⁸³ Not necessarily a straightforward proposition; see D'Amato (1983). On equality as an empirical right, see also Fukuyama (2003), pp.9-10.

Equality is, however, a different matter. The requirement to treat all human beings equally, and in fulfilment of the right to life to promote and sustain their conditions of life disinterestedly and with full respect for their value and worth as a human being, is a requirement for action by others consequent upon that which each person possesses either, as argued above, inherently or because human rights discourse has made it so. Equality of all human beings is not an inherent condition, as it is proposed dignity is, nor indeed can it be found supported in history, or religion; although Jonathan Sacks⁴⁸⁴ suggests that ‘Judaism represents a highly distinctive approach to the idea of equality, namely that it is best served not by equality of income or wealth, nor even of opportunity.’⁴⁸⁵ The answer is not even in ‘equal standing before God’ or the law; it is that ‘a society must ensure equal dignity – the Hebrew phrase is *kavod habriyot*, ‘human honour’ – to each of its members.’⁴⁸⁶ Whilst all created beings might be equal in the sight of their creator God, it has never, until the arrival of human rights discourse, been the habit of society in general or law in particular to treat people equally. The term now in use is discrimination; in the past it would have been difference. The most fundamental accepted difference was that between man and woman; others included white/black, freeborn/slave, master/servant.⁴⁸⁷ Human rights practice needs to work, therefore, to assert equality as a consequence of dignity.

⁴⁸⁴ Sacks (2003).

⁴⁸⁵ *Ibid.*, p.120.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ See *Dred Scot, Plaintiff in Error v. F.A. Sanford*, December Term 1856 decision of the USSC.

3.4 HUMAN GENETIC MATERIAL: THE PROFFERED CONCEPT

A claim of genetic determinism⁴⁸⁸ might be supported in respect of a thesis, which seeks to postulate that the subject of human rights, in being outside and beyond all categorisation by rationality, sentience, or identification with self and others, is determined solely by the presence of human genetic material in its composition. Douzinas finds the essential elements of humanity to have been stripped down to an ‘empty nature deprived of substantive characteristics’ in the beliefs of humanism, the ‘man of the rights of man’ being the species laid bare of ‘all those traits and qualities that build human identity.’⁴⁸⁹ Yet in appearing to impoverish the human subject by taking away what Nino describes as that ‘minimum of humanity’ which is what ‘allows man to claim autonomy, responsibility and legal subjectivity’, the discourse of human rights would, in fact, by accepting this criterion for the recognition of the identity of the rights-bearer, be enriching beyond measure wo/man’s humanity to wo/man.

3.4.1 GENETIC SCIENCE

i The building blocks

Whilst DNA [deoxyribonucleic acid] is often described as ‘the building block of life’, the ‘immortal coil’, the famous double helix of James Watson’s and Francis Crick’s

⁴⁸⁸ See Habermas (2003), on the philosophical implications for the individual of parents having ‘created’ their own image of a child. For a critique of anti-deterministic concepts, including a call that ‘governments should invest in education and communication strategies that are aimed at cutting through the ‘genohype’ that pervades much of current popular culture’, see Caulfield (2001) at p.403. And for a lyrical account of ‘the potentially devastating social consequences of the new genetics’, see Katz Rothman (1998, 2001).

⁴⁸⁹ Douzinas (2000), at p.187.

discovery in 1953⁴⁹⁰ is in itself one of the building blocks of a language, the language of genetics, which is, as commented upon by Ridley, a complex jargon.⁴⁹¹ Whilst a thorough survey of even the basics of genetics is beyond the scope of this thesis, some information is necessary.⁴⁹² Analogies to ‘books’ and ‘architectural plans’⁴⁹³ are made to describe the function and situation of the makeup of human cells, and the role each part or substance plays in the continuation of each and every form of life; all metaphors break down eventually,⁴⁹⁴ but the ‘book’ one works quite well – indeed, Ridley claims that it is not a metaphor at all to describe the human genome as a book, it is ‘literally true. A book is a piece of digital information, written in linear, one-dimensional and one-directional form and defined by a code that transliterates a small alphabet of signs into a large lexicon of meanings through the order of their groupings. So is a genome’.⁴⁹⁵

As Ridley explains it, if the human genome, (‘all the genes contained in a single set of chromosomes’,⁴⁹⁶) is a book, there are twenty-three chapters – chromosomes; each chapter contains several thousand stories, called genes.⁴⁹⁷ Exons are the paragraphs in the story, ‘interrupted by advertisements called introns’; words are codons, and the letters that make up the words are bases.⁴⁹⁸ The bases of DNA and RNA each consist of only four

⁴⁹⁰ For the story of the discovery of DNA, see Watson (2003). See also Appleyard (1991), at p.1, who notes that Crick ‘winged into the Eagle [pub] to tell everyone within hearing distance that [they] had found the secret of life’; citing James Watson (1968) *The Double Helix; A Personal Account of the Discovery of the Structure of DNA*, London: Weidenfeld and Nicolson.

⁴⁹¹ Ridley (1999), pp.5-6.

⁴⁹² The information given here is taken from Lodish, Berk, Matsudaira, Kaiser, Krieger, Scott, Zipursky and Darnell (2003, 5th ed.); Agar (2002); Appleyard (2000); Dawkins (1989, 2nd ed.); Ho (1999, revised ed.); McLaren (Co-ordinator, 2002); Rees (2003); Ridley (1996, 1999, 2003), Watson (2003); and the *Oxford Dictionary of Biology* (2004, 5th ed.) [hereafter *Oxford Biology*].

⁴⁹³ See e.g. Ridley (1999) and Dawkins, *supra*, n.492.

⁴⁹⁴ As pointed out by Dawkins, *supra*, n.492, p.23.

⁴⁹⁵ Ridley, *supra* n.493, p.6.

⁴⁹⁶ *Oxford Biology*, p.276.

⁴⁹⁷ Ridley, *supra* n.493, pp.6-7.

⁴⁹⁸ *Ibid.*

nucleotides; adenine [A], guanine [G], cytosine [C], thiamine [T] and uracil [U]. ‘T is found only in DNA, and U only in RNA.’⁴⁹⁹ The book is written only in three-letter words, ‘on long chains of sugar and phosphate called DNA molecules [rather than pages] to which the bases are attached as side rungs’.⁵⁰⁰ The genome is in each and every cell nucleus; in fact two copies are in every cell, one from the mother and one from the father, except for ova and spermatozoa [egg and sperm, ie. reproductive] cells, which each have only one.⁵⁰¹

Lodish *et al.*⁵⁰² point out that what used to be the accepted ‘central dogma’, that DNA directed the synthesis of RNA [ribonucleic acid], which then directed the assembly of proteins – the constituent factors of cells – is oversimplified; proteins themselves play a role in the synthesis of nucleic acids, ‘regulating gene expression, the entire process whereby that information encoded in DNA is decoded into the proteins that characterize various cell types’.⁵⁰³ Further, ‘[r]ecombinant DNA – rDNA – is ‘DNA that contains genes from different sources that have been combined by the techniques of genetic engineering rather than by breeding experiments.’ This means that ‘[g]enetic engineering is therefore also known as rDNA technology. Recombinant DNA is formed during gene cloning or in the creation of genetically modified organisms.’⁵⁰⁴

This brief scientific overview shows why it is no longer easy, if it ever was, to define a living being by their species.

⁴⁹⁹ Lodish *et al.*, *supra*, n.492, p.103.

⁵⁰⁰ Ridley, *supra* n.493, p.7.

⁵⁰¹ Ridley, *supra* n.493, pp.6-7.

⁵⁰² *Supra*, n.492, p.101.

⁵⁰³ *Ibid.*

⁵⁰⁴ Oxford Biology, p.548.

ii Defining 'human genetic material'; the cellular level

'For the purpose of this survey, genetic material is defined as both human organic material (ie. blood, hair, etc.) as well as extracted genetic information stored electronically (DNA sequences, etc.).'⁵⁰⁵ Whilst that definition, presented by the Genetic Privacy Working Group of the Canadian Biotechnology Strategy, is helpful, it does not go far enough at the cellular level.

The definitions text of the Convention on Biodiversity defines 'genetic material' as meaning 'any material of plant, animal or microbial origin containing functional units of heredity.' The Cartagena Protocol to that Convention, on Biosafety, defines a 'living organism' as meaning any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids; and 'living modified organism' as meaning 'any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology'. 'Modern biotechnology', in its turn, means the application of either *in vitro* nucleic acid techniques, including recombinant DNA [rDNA] and direct injection of nucleic acid into cells or organelles, or fusion of cells beyond the same taxonomic family.

From these definitions, it is possible to extrapolate the following as deserving of being defined as human genetic material for the purposes of protecting the human life which both intrinsic to that material, and upon which the health and viability of future generations may depend, by regulating its use and misuse. The definition here offered of human genetic material is:

Any material of human origin containing functional units of heredity, including a living

⁵⁰⁵ *The Human Genetic Material Survey*, sponsored by the Genetic Privacy Working Group of the Canadian Biotechnology Strategy.

modified human organism that possesses a novel combination of genetic material which includes human genetic material, obtained through the use of modern biotechnology, for instance by the application of *in vitro* nucleic acid techniques, including rDNA and direct injection of nucleic acid into cells or organelles, or fusion of cells beyond the taxonomic family, ie. *homo sapiens*.

This position is open to debate, as seen in Oliver Bridle's comments:

It is the case that human genes, such as the insulin gene, have been cloned into microorganisms in order to supply a safe, cheap and hypoallergenic source of insulin (as an alternative to say porcine insulin). Here is a clear modification of a piece of human genetic material, and yet I do not see that the presence of human genetic material in the microorganism implies the presence of human life in either a narrow or broad sense. By a narrow sense I mean the notion that the presence of the gene in the microorganism implies that it is somehow human. By broad sense, I mean that the presence of human genetic material in the organisms implies that humans must be around to supply the genetic material. But, we can see that this is not so if we imagine a devastating plague that succeeds in wiping out all humans, but not bacteria, by next Wednesday. Human genes may then persist in the organisms entirely independently of the persistence of actual human beings.⁵⁰⁶

Bridle's point is a good one, and the specific definition of the human genetic material, which is protected by law as an aspect of the right to life, is of course open to debate and discussion with the scientific community. However, it represents a fundamental misunderstanding of the thesis on offer here. The point is not whether human genetic material is present as an end-product in bacteria, as in his example (or otherwise in animals) but rather that at the moment when it was taken from, say, a human stem cell, and infiltrated into a bacterium, the activity was covered by some kind of regulation; what kind is a subject for the next chapter – what kind of protection by law? The aim would be to protect the right to life of the human race, of individual humans that might be affected by such bacteria, by recognising that human life is implicit in the building blocks that make it up, and the protection of one requires the

⁵⁰⁶ Oliver Bridle, University of Leicester, personal email, 16/11/2004.

protection of the other.

iii Defining human genetic material; 'speciesism'

Defining 'human genetic material' is not an easy task on a number of planes; one of the arguments is about 'speciesism', which is privileging humans above other sentient creatures. In the human rights context, that means 'why only humans?' As Ryder, who coined 'speciesism', recalls, in an article entitled 'All beings that feel pain deserve human rights: Equality of the species is the logical conclusion of post-Darwin morality':

The word speciesism came to me while I was lying in a bath in Oxford some 35 years ago. It was like racism or sexism - a prejudice based upon morally irrelevant physical differences. Since Darwin we have known we are human animals related to all the other animals through evolution; how, then, can we justify our almost total oppression of all the other species? All animal species can suffer pain and distress. Animals scream and writhe like us; their nervous systems are similar and contain the same biochemicals that we know are associated with the experience of pain in ourselves.⁵⁰⁷

To genetically define a human rights-bearer is to exclude those who do not qualify as humans, which at the moment is largely animals. Yet animals might well suffer from, for instance, pain inflicted in a manner akin to torture, but they are not protected by the human rights prohibition on torture, inhuman and degrading treatment. So why privilege humans? Steinbock, writing in 1978 in answer to Singer's 1975 proposal that to be 'speciesist' is similar to being sexist or racist, produces a case for privileging humans: simply that to feed a starving dog before a starving child 'feels' wrong.⁵⁰⁸ She admits the weakness of this argument, and examines a number of reasons why, for instance, there may be a moral case made for perhaps conducting necessary medical experiments on a

⁵⁰⁷ R. Ryder, *The Guardian*, Saturday August 6, 2005. This raises interesting questions regarding the possibility of fetal pain: see Derbyshire *et al.*, *supra*, n.436. If a fetus can be shown to experience pain, then it would become a rights-bearer by default. ECtHR, *Boso v. Italy*, *infra* n.958, and accompanying text, would therefore have to be reconsidered.

⁵⁰⁸ Steinbock, (1978), p.246, citing Peter Singer, *Animal Liberation* (A New York Review Book, 1975).

chimpanzee but not on a severely retarded human.

Singer's strongest point in this regard, (in conjunction with Kuhse), is in respect of life which is sentient to pain and suffering being disregarded by legal rights protection mechanisms, whilst people fight for the preservation from suffering and death of the unsentient, such as the unborn or the handicapped newborn.⁵⁰⁹ Tooley makes a similar point,⁵¹⁰ as does Beauchamp:

Perhaps we can find some justification of our traditional practices other than a justification based on status as person or nonpersons. However, if we cannot find a compelling alternative justification, we either should not be using animals as we do, or we should be using humans as we do not.⁵¹¹

Steinbock's argument culminates in the conclusion that:

[W]e are morally obliged to consider the interests of all sentient creatures, but not to consider those interests equally with human interests. Nevertheless, even this recognition will mean some radical changes in our attitude toward and treatment of other species.⁵¹²

This debate, in all of its complexities, is outside the scope of this thesis, which is concerned with the international law of human rights, and therefore, despite the strong arguments of some authorities that there should be no difference, animals' rights claims, particularly with regard to deliberately inflicted suffering, will not be addressed.⁵¹³ That

⁵⁰⁹ Kuhse and Singer, *Should the Baby Live? The Problem of Handicapped Infants* (1985) Oxford: Oxford University Press, version in Kuhse, (Ed.) (2002) at p. 231. See the critique of Singer in Finnis (1980), notes on s.VII4, p.194-195. See also Diamond's critique of Singer's philosophy, (1991) at pp.319-334; and Oderberg's (2001) impassioned criticism of Singer's disregard for the right to life of what he classifies as non-persons, which includes all babies under the age of one month, whatever their physical condition. See also Tushnet and Seidman (January, 1986), and Steinbock's response to an earlier formulation of the argument, *supra* n.508.

⁵¹⁰ (1978), p.65.

⁵¹¹ (1999) at p.319. [Footnote omitted].

⁵¹² Steinbock, *supra* n.508, p.256.

⁵¹³ For challenges to this position, see, e.g., Singer, 'All Animals are Equal' *Philosophic Exchange* (1974) pp.103-106; Jeremy Bentham, 'A Utilitarian View', first published c.1820, from *An Introduction to the Principles of Morals and Legislation*, section XVIII, IV; both in Kuhse, and Singer, (Eds.) (1999); and, generally, see Zimmerman, Callicott, Sessions, Warren, and Clark, (Eds.) (1993).

includes a refutation of the claim, at least for the time being, that chimpanzees,⁵¹⁴ because of their genetic make-up, should be re-classified as in genus *homo*, or alternatively that humans be re-classified as *pan sapiens*. There is, however, one important respect in which the problem raises issues in human rights: what if we cannot tell whether a living being is indeed human or not?

iv The Blurring of Species Boundaries

One of the very real possibilities for the future considered by some critics of biotechnological advance, such as Rifkin⁵¹⁵ and Mae-Wan Ho,⁵¹⁶ to be a threat, is the blurring of boundaries between species: ‘To begin with, the entire notion of a species as a separate recognizable entity with a unique nature becomes an anachronism once we begin recombining genetic traits across natural mating boundaries.’⁵¹⁷ The threat is new: ‘For the first time in history we become the engineers of life itself. We begin to programme the genetic codes of living things to suit our own cultural and economic needs and desires.’⁵¹⁸ The scientific outline given above indicates that it is now a theoretical, if not yet a practical possibility (as far as is known), to ‘reprogramme’ human genetic material. Genetic choices can be made, and pre-implantation diagnosis and selection of embryos is commonly practiced.

In a discussion of a ‘theory of constitutional personhood for transgenic humanoid beings’,

⁵¹⁴ ‘A genus of African apes (*Anthropopithecus*), bearing the closest resemblance to man of any of the anthropoids. The name originally belonged to *A. Troglodytes* (formerly *T. niger*), which was long the only species recognized; but at least one other species is now known. (See *Nature* 1889, 254.)’ *Oxford English Dictionary Online*, <http://dictionary.oed.com>, accessed 19/04/2002.

⁵¹⁵ Rifkin (1998).

⁵¹⁶ Ho (1999).

⁵¹⁷ Rifkin, *supra* n.515, p14.

⁵¹⁸ *Ibid.*, p.15.

Rivard⁵¹⁹ offers an argument based on the illegitimacy of ‘speciesism’ to deny the plausibility of a genetic definition of humans in the prescription of rights. He argues by means of an analogy to the racism and denial of rights under the American Constitution in the past against the denial of rights now and in the future to other beings, including transgenic persons, on the grounds of genetic makeup: ‘[i]n the future, constitutional personhood should not be arbitrarily limited to members of our own species.’⁵²⁰ Further, ‘[t]he intuitive conclusion that speciesism is wrong likely follows from the fact that, positions reversed, we would want other species to respect our rights’.⁵²¹

Although human rights discourse, as has been addressed above, is a living and dynamic discourse, it is not yet ready to address straightforward animal rights claims on an equal footing with human rights. There is difficult terrain yet to travel; this thesis may be seen as a step in that direction, in asking for recognition of transgenic beings as human rights-bearers. That might represent a logically fallacious ‘slippery slope’ proposition, or else it may represent the only logical consequence of a world in which moral arguments regarding the prevention of suffering, of both sentient and non-sentient beings, are increasingly being recognised and given the force of law. It is not the time to make an all-out claim for recognising the rights of all living beings, however, even for all living beings in which human DNA may play some part. The quest is to recognise that which is called here inherent human dignity,⁵²² in the human race and in individual living human

⁵¹⁹ Rivard (1991-1992).

⁵²⁰ *Supra*, n.519, p.1469.

⁵²¹ *Ibid.*, p.1469, footnote 176.

⁵²² A quality not recognised by Steinbock and Singer in the context of the current argument: Steinbock cites Singer: Faced with a situation in which they see a need for some basis for the moral gulf that is commonly thought to separate humans and animals, but can find no concrete difference that will do this without undermining the equality of humans, philosophers tend to waffle. They resort to high-sounding phrases like ‘the intrinsic dignity of the human individual’. They talk of ‘the intrinsic worth of all men’ as if men had some worth that other beings do not have or they say that human beings, and only human beings, are ‘ends in themselves’,

organisms, and to treat with respect that human genetic material, the necessary *sine qua non* for life, and therefore that which must be protected by law in order to protect life. Therefore a definitive definition of what is meant by human genetic material is needed

The ideal is that human material should not be used for anything without thought for how that activity might affect humanity, today's living humans, and the developing ones (foetuses are very susceptible to harmful environmental factors, such as teratogenic substances⁵²³), and the as yet-unconceived future generations. It is the right to life of all of these which is the subject of concern; and if, as Bridle posits, the whole human race has been wiped out by next Wednesday, the destroying force may well have been someone's carelessness, or even deliberate malevolence, with biotechnology.⁵²⁴ The definition is posited here as a starting-point, a basis for further discussion and debate, and it is of course not claimed that human genetic material, when not functioning as a material part of a living being, possesses dignity. Here the concept is, rather, that the human manipulating that material will do so in dignity, and with respect for the human life represented by the DNA there present. This includes due consideration for future humans, whose lives and ability to live might be affected by the manipulation taking place.⁵²⁵

while 'everything other than a person can only have value for a person'... Why should we not attribute 'intrinsic dignity' or 'intrinsic worth' to ourselves? Why should we not say that we are the only things in the universe that have intrinsic value? Our fellow human beings are unlikely to reject the accolades we so generously bestow upon them, and those to whom we deny the honor are unable to object. Steinbock, *supra* n.

⁵²³ E.g. alcohol, and thalidomide; the period of greatest risk is mid-term in the first trimester. It is also now being demonstrated that genetic changes may take place in embryonic material simply because it has been cultured *ex utero*. It has been noted that 'genetic or epigenetic defects in the cluster, associated with the fetal overgrowth and cancer condition – Beckwith-Wiedemann syndrome', present an increased incidence in children born as a result of IVF interventions. Reik, the Babraham Institute Laboratory of Developmental Genetics and Imprinting; and BBC2 *Horizon*, 03/11/2005.

⁵²⁴ See Rees (2003).

⁵²⁵ The stance taken is not at the extreme of what Brownsword has termed the 'dignitarian alliance'. See Brownsword (2003)

Such humans might be those referred to generally as ‘clones’, ie. beings created by somatic cell nuclear transfer.⁵²⁶ With regard to somatic cell nuclear transfer, reference has already been made to an eminent ethicist, Ronald Green,⁵²⁷ whose claim is that:

[A] cloned embryo is not the result of fertilisation of an egg by a sperm. It is a new type of biological entity never before seen in nature ... although board members understood that some people would liken this organism to an embryo, we preferred the term ‘activated egg,’ and we concluded that its characteristics did not preclude its use in work that might save the lives of children and adults.⁵²⁸

The value-laden terms – ‘activated egg’, ‘work that might save the lives’ – used in that extract are of interest here, particularly with respect to Kant’s teleological stance, that every human being is an end in him/her self.⁵²⁹ Either the activated egg, being activated from human genetic material, is human or it is not. If it is human, then it must be forcefully argued that being formed from human genetic material, whether activated or not, it deserves legal protection of its use, in recognition of the dignity of humanity described above as being accepted both as inherent in the human condition and as a basis for the international law of human rights; that which requires the right to life to be protected by law. However, the *Declaration on Human Rights and the Human Genome*⁵³⁰ that UNESCO has formulated does not specifically define the rights-bearers of the rights covered by the declaration. Jean-François Mattei, in discussing genes and patents, contends that:

⁵²⁶ See *infra*, n.535.

⁵²⁷ Ronald M. Green, Director, Ethics Institute, Dartmouth College; Chair, Advisory Board, ACT, Worcester, Massachusetts. ACT is the privately owned biotechnology company which has claimed to have cloned a human embryo to six cells, and assembled a board of outside ethicists to ‘weigh the moral implications of therapeutic cloning research’ before going ahead. Green, *Scientific American* January 2002, pp.46-48.

⁵²⁸ *Ibid.* Green’s contribution on ‘The Ethical Considerations’ appears in a report that human cloning had taken place; Cibelli, Lanza, West, with Ezzell, ‘The First Human Cloned Embryo’, pp.42-49.

⁵²⁹ *Supra*, n.430. In this regard also see Munzer, (1993).

⁵³⁰ Adopted by the General Conference of UNESCO at its 29th session on 11 November 1997.

Man, as a person endowed with dignity, cannot be traded, which is why organs, tissues and cells are not marketable and do not come within the terms of the normal market. The gene, as the smallest component part of the human being, cannot to my mind be treated otherwise than the human being and enter directly or indirectly into a business rationale.⁵³¹

The case is not necessarily that the use of any human tissue, cell or part of a cell should not be permitted, but that such material should not be euphemistically defined as ‘not human’ in order that justification should be found for its creation and manipulation, and destruction (by dubious logic). Several arguments in the use of stem cells debate suggest that using embryos surplus to IVF requirements, and otherwise destined only for destruction, is morally permissible, whereas creating them for research and therapy purposes is not. This seems casuistic, but the problem is not confined to linguistic definition.⁵³² Each human being has, in the past, been formed from an amalgamation of the DNA (human genetic material) of two parents, male and female. Future humans may be created from the genetic material from two parents of the same sex,⁵³³ from three parents,⁵³⁴ or from one.⁵³⁵ That genetic material, from wherever or whoever it might

⁵³¹ Mattei (2001) ‘Conclusion’ in *Ethical Eye: The Human Genome* at p.133.

⁵³² See Dickens and Cook (1999), pp.57-58, for a discussion of the issues surrounding the disposal of ‘unwanted’ embryos. They cite *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. Sup. Ct. 1992), where ‘[t]he Tennessee Supreme Court has ruled that embryos are neither persons nor property, but governed separately’. See also the UK domestic jurisdiction case, *Evans v Amicus Healthcare Ltd (Secretary of State for Health and Another Intervening)*, CA: 25/06/2004.

⁵³³ A technique known as parthenogenesis, and not yet fully achieved in mammals (although there has been a disputed claim with regard to mice.) See *The Scientist*, 01/04/2004, and critique by Jaenisch. <http://www.biomedcentral.com/news/20040421/01/> (Accessed 06/10/04).

⁵³⁴ This would happen in a surrogacy with an embryo created from two other people being implanted in a surrogate mother; the mitochondrial DNA of the surrogate would not be eliminated. See generally Neill Howell, <http://www.hbcg.utmb.edu/faculty/howell/content.html> (Accessed 21/04/2002)

⁵³⁵ The technique known, somewhat vaguely, as ‘cloning’, or somatic cell nuclear transfer. See Vogelstein, Alberts and Shine, (2003) at p.1237: ‘In scientific parlance, cloning is a broadly used, shorthand term that refers to producing a copy of some biological entity – a gene, an organism, a cell – an objective that, in many cases, can be achieved by means other than the technique known as somatic cell nuclear transfer. ... a procedure that can be used for many different purposes. Only one of these purposes involves an intention to create a clone of the organism (for example, a human).’ See Meyer’s challenge to this article on other grounds, *infra* n.564 and accompanying text.

come, is living material and represents the life of its progenitor. All humans shed DNA each day, and the future possibility is that a child could be created using that DNA, without the consent or involvement of the ‘parent’.⁵³⁶ Further, those parents may not both, or all, be human. Future possibilities include transgenic beings; those created using DNA from two different species, forming a hybrid, (such as a mule – a donkey and a horse) or a chimera, a single embryo made by fusing two fertilised embryos from different zygotes, of either the same or different species – a human and a chimpanzee, for instance. Human rights discourse has to have the courage to ‘look beyond the horizon’.

Gregory Stock announces that ‘few have yet grasped that we are on the cusp of profound biological change, poised to transcend our current form and character on a journey to destinations of new imagination. ... Never before have we had the power to manipulate our biology in meaningful, predictable ways.’⁵³⁷

Habermas proposes another argument, with regard to genetic engineering and its possible effect on the individuals involved, and this line is supported by the Council of Europe.⁵³⁸

This is ‘whether later generations will come to terms with the fact that they may no longer see themselves as the undivided authors of their life – nor will be called upon as such’.⁵³⁹

Silver’s comment on Huxley’s classic, *Brave New World*, warns that parents, not governments, will be the driving force in utilising the possibilities: they ‘will seize control

⁵³⁶ See, e.g., Harris (1999), p.298. See generally Skene (2003) at p.9. Skene, in discussing whether there should be a new criminal offence created regarding theft of DNA, concludes that: ‘On balance, it may be wise to expand the potential civil actions for wrongful taking and testing of genetic material and also to create a new criminal offence. The civil actions might be in conversion; equitable claims for breach of confidence; or complaints under privacy legislation. I have argued that the criminal offence should consist of more than mere taking and testing of genetic material but I acknowledge the difficulty of drafting such an offence.’

⁵³⁷ Stock (2003) at p.1.

⁵³⁸ See COE Assembly Debate on 26 January 1982, 21st and 22nd Sittings. Docs. 4832 and 4833, reports of the Legal Affairs Committee, and of the Committee on Science and Technology, *Recommendation on Genetic Engineering* 934 (1982), para.4.

⁵³⁹ Habermas, (2003) pp.67.

of these new technologies.’⁵⁴⁰ The consequences for the future of the human race could be dire.

They will use some to reach otherwise unattainable reproductive goals and others to help their children achieve health, happiness and success. And it is in pursuit of this last goal that the combined actions of many individuals, operating over many generations, could give rise to a polarized humanity more horrific than Huxley’s imagined Brave New World.⁵⁴¹

certain gene manipulation techniques that may prove detrimental further down the generational line.⁵⁴² The Association of Reproductive Health Professionals makes the following claim, supporting embryonic selection and possible disposal of affected embryos rather than allowing manipulation of the germline:

The only situation in which germline engineering would be required over pre-implantation selection is one in which a couple would like to endow their child with genes that neither member of the couple possesses. This is the ‘enhancement’ scenario, which we believe would lead to a dystopic human future if it were allowed. ... engineering the genes by means of germline modification would allow novel forms of human life to be created within one generation.⁵⁴³

This is a conclusion that Andorno confirms, emphasising both the rights of future generations and the possible consequences to the human involved of their genetic modification at the hands of their parents or others, a point that is essential to the argument which Habermas advances, and which began this section:

Regarding germ-line interventions, the UNESCO Declaration’s ban is also in conformity

⁵⁴⁰ Silver (1997) *Cloning and Beyond in a Brave New World* New York: Avon Books at p.9, in Reinders (2000) at p.76.

⁵⁴¹ *Ibid.*

⁵⁴² See also Andorno (2003): ‘At the international level, UNESCO *Universal Declaration on the Human Genome and Human Rights* provides that germ-line interventions “could be contrary to human dignity” (Article 24). Similarly, the *European Convention on Human Rights and Biomedicine* states that “an intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants” (Article 13).

⁵⁴³ <http://www.arhp.org/patienteducation/onlinebrochures/cloning/index.cfm?ID=282> (Accessed 14/11/2004). [Emphasis omitted].

with most ethical and legal regulations and guidelines on the topic. It is important to stress that, unlike the alteration of the genes in the somatic cells, which affects only the individual treated, any alteration in the germ cells (gametes) or in the early embryo would be passed to the next generation. This fact raises enormous concerns about the risks of irreversible harm to future generations. In addition, in the case of genetic engineering for enhancement purposes, the objections against this procedure are based on the idea that we do not have the right to predetermine the characteristics of future individuals.⁵⁴⁴

3.5 ISSUES ARISING REGARDING THE IDENTITY OF THE RIGHTS-BEARER

The identity of the rights-bearer might be described as ‘human being’, or ‘person’, ‘everyone’, ‘individuals’, etc. Often it seems as if the terms are being used interchangeably, but the meaning behind them is not strictly analogous, and it is the aim of this section to discuss the terms ‘human’ and ‘person’ in relation to the issues arising from the inclusion, or otherwise, of them in the treaties. Following, there will be a brief discussion of the concept of ‘future generations’, and a concluding section in which the importance of a redefinition of the understanding of the term ‘human’ in the context of human rights will be presented, and a proffered solution introduced.

3.5.1 ‘EVERY HUMAN IS ... LIKE SOME OTHER HUMANS’⁵⁴⁵

In the quotation cited at the beginning of this chapter,⁵⁴⁶ Jeffrey L. Amestoy, Chief Justice of the Vermont Supreme Court, used the opportunity of a lecture reflecting on a recent decision⁵⁴⁷ to explore the concept, in a meditation on ‘our common humanity,’ of what it means to be a human in today’s world, and what it might mean in tomorrow’s.⁵⁴⁸ He cites

⁵⁴⁴ Andorno, (November 2003) at p.9.

⁵⁴⁵ Gatewood, *infra*, n.555, and accompanying text.

⁵⁴⁶ *Supra*, text accompanying n.321.

⁵⁴⁷ *Baker v. State*, Vermont Supreme Court, 744 A.2d 864 (Vt.1999).

⁵⁴⁸ Amestoy (2003).

Kass, who intimated that judges are, in the twenty-first century, at ‘the intersection of biology and biography.’⁵⁴⁹ This is a confusing intersection, with no clear way forward.

Nino suggests that:

The statement that the only condition for possessing fundamental moral rights is being human seems quite plausible, since it satisfies a deeply rooted egalitarian aspiration. This is so because the property of being human seems to be of the ‘all-or-nothing’ kind, unlike other properties – such as those of being tall, rich, or clever.⁵⁵⁰

The property of being human may not be quite as straightforward as Nino suggests; it is to be argued here, however, that it is indeed the definitive criterion for possessing ‘fundamental moral rights’, dismissing any criteria based on quantifiable properties, which are usually ascribed in what has become a debate about ‘personhood’. Biology itself has no determinable domain,⁵⁵¹ and the following discussion will refute a conclusion of determinable limits of life based on premises which purport to set express moments for life’s beginning and its ending. Even science does not have the answer, according to Rosen:

[T]he ultimate question of ‘What is life?’ is perhaps the hardest of all. But there is one more circumstance which is not without an irony of its own ... there should be at least some explicit, tangible, categorical test for distinguishing between a material system that is an organism and one that is not. Indeed, many people have tried very hard to produce such criteria for separating the quick from the dead. Put briefly, they have all failed.⁵⁵²

He then explains that ‘[t]here is no property of an organism that cannot at the same time be manifested by inanimate systems. Conversely, a dead organism is as inanimate as

⁵⁴⁹ Kass, (2002) Foreword, *Human Cloning and Human Dignity: The Report of the President’s Council on Bioethics* at xviii, and in Amestoy, *supra* n.548, at p.1583.

⁵⁵⁰ Nino (1991).

⁵⁵¹ Rosen (1991) at p.19: ‘We thus do not know the scope or domain of biology, for it has as yet no objectively definable bounds.’ I am grateful to Professor Steve M. Potter, Georgia Institute of Technology and Emory University, for directing me to this work.

⁵⁵² *Supra* n.551, p.18.

anything.⁵⁵³ Yet what may be animate, that is respirated and displaying measurable vital signs, is a body which is being prepared to donate organs for transplant;⁵⁵⁴ a body that will not be certified as dead until after the organs have been ‘harvested’. Should animation be the deciding factor in human life, or should there be some degree of sentience? Are humans more, or something different from, the mind, even a mind which functions with reference to brain, body and world? ‘Mind’ can be equated with ‘personhood’; the idea that to be fully human requires something more than biologically functioning body parts. Whether to be fully human can also be fully and necessarily equated with being a ‘person’, and *vice versa*, is an important question.

i Whose human?

The question of whose view of what it means to be a human, and which decisions about the issues surrounding human life should prevail, is indirectly addressed by Gatewood when he offers his favourite anthropological aphorism:

Every human is in certain respects:

- a) like all other humans.
- b) like some other humans.
- c) like no other human.

The correct answer, of course, is ... d, all of the above. It is the second line, however, that we focus on most of the time. How is it that every human is in certain respects like some other humans (and not like some others)?⁵⁵⁵

But in what respect is every human like every other, and therefore categorisable as human? Any statement about any aspect of what constitutes human life is not without its detractors. Should law, however, feel able to make the determination of life’s beginning

⁵⁵³ *Ibid.*, p.19.

⁵⁵⁴ Machado, (1998).

⁵⁵⁵ Gatewood (1993), *Introduction*.

and ending, where biology cannot, even to state that the human's life begins at birth⁵⁵⁶ can provoke intercultural interpretational disagreements. Different societies postulate at least four different moments when birth might be considered to be accomplished.⁵⁵⁷ Even then, the born child may not become, in the eyes of his or her society, fully rights-bearing. For example, a child born in the English jurisdiction would have to survive for forty-eight hours after birth in order to be able to claim damages in negligence for prenatal harm.⁵⁵⁸ In some societies,⁵⁵⁹ infanticide of the newborn would be countenanced in the case of extreme disability, economic hardship or simply for being the 'wrong' sex (usually female), a lethal discrimination which lasts throughout life.⁵⁶⁰

For some cultures, beings belonging to other cultures are not human, as they are

⁵⁵⁶ A less contentious proposition than conception, which may or may not be at fertilisation. Conception is defined as 'the act of becoming pregnant; fertilization of an ovum by a spermatozoon', and fertilisation as 'creation by the physical union of male and female gametes; of sperm and ova in an animal'. <http://www.wordreference.com/definition/> (Accessed 20/12/2004). This leaves uncertain the moment when 'conception' might be recognised in a case of IVF, where fertilisation has taken place *ex utero*. For a discussion of the notion of implantation, fourteen days after conception, as a widely-accepted view of when life begins (because the embryo does not split thereafter if twinning is to take place, and therefore the individual soul must be present by that point but not necessarily earlier) see Ford (1998).

⁵⁵⁷ The start of labour, partial delivery, total delivery, total delivery plus respiration. Other belief systems include delivery of the placenta. See Williams (1997).

⁵⁵⁸ *Congenital Disabilities (Civil Liability) Act* 1976; although, as Mason and McCall Smith (1999), point out at pp.125-126, the infant's common law rights are not affected by that Act: *Burton v Islington Health Authority; de Martell v Merton and Sutton Health Authority* [1992] 3 All ER 833, (1993) 10 BMLR 63.

⁵⁵⁹ Some societies have no problem with disposal of the unwanted newborn: see, for instance, Mead's description of a tribe in New Guinea, the Mundugumor, who threw the dirty bodies of unwanted infants into the river. Mead, (1928) *Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilisation* New York: William Morrow, at p.148, and in Watson, (2000) p.279. This is something that may also be happening in the postmodern West: Wolf, (1995) comments that 'Stories surface regularly about 'worthless' babies left naked on gratings or casually dropped out of windows, while 'valuable', genetically correct babies are created at vast expense and with intricate medical assistance for infertile couples.' Indeed, some contemporary ethicists advocate infanticide for the severely compromised newborn: Kuhse and Singer, *supra* n.513. See also Westermarck, (1924). See Pinker (1997) on neonaticide in modern American society, and Tooley's early work on abortion and infanticide (first in article form in 1972) and 'A Comment on Tooley's Abortion and Infanticide', by Tushnet and Seidman (January 1986).

⁵⁶⁰ A practice that has become known as 'Gendercide'; see Charlotte Bunch, 'The Intolerable Status Quo: Violence against Women and Girls': 'Women Commentary' UNICEF, *The Progress of Nations, 1997*: 'Roughly 60 million women who should be alive today are 'missing' because of gender discrimination, predominantly in South and West Asia, China and North Africa'. See also Jones (June 2000).

themselves. Amongst certain tribespeople, homicide of any person from another tribe is not condemned (in whatever terms the customary law of the tribe chooses to condemn and punish homicide) as everyone who is not of the tribe is the Other, a different kind of being. For the Gumuz of Ethiopia, every non-Gumuz is the enemy, known as *Shunamitan*, ‘man is one and the same’.⁵⁶¹ There are situations also in the supposedly advanced West, where recognition is not afforded equally to all human beings as fully human and fully worthwhile, such as that recorded by Pukë as persisting still in Albania:

Under the ancient code, if a man finds his wife with another man, he has the right to shoot them both, but only with one bullet. If a woman in his family is killed, he must kill a woman in the enemy family, or their dog. Both are considered worth half a man.⁵⁶²

The relatively easy case for inclusion as a human is the baby, conceived naturally, wanted, delivered completely, breathing independently, and without illness or disability, including pathogenic genetic mutation. This is (almost unarguably) a paradigmatic human, under the protection of law, and will remain so whilst living a fulfilled and dignified life, until death.

Now the scenario can be expanded, until the certainty about humanity becomes fuzzy. The first term, ‘baby’, introduces the debate. Whether the neonate was a human baby at the moment before delivery, or three or six or nine months – or at any time – before, is a determinant of its legal status. If it was not, its ability to benefit from human rights legislation, as a rights-bearer, is uncertain. And if it should be one of the beings introduced in the scenarios about life that have been referred to above, its status may be still more uncertain. Perhaps it is a clone, grown for use as body parts and not to lead any

⁵⁶¹ Donovan and Assefa (2003) at p.516.

⁵⁶² See Pukë (2003) ‘Blood feuds trap Albania in the past: Thousands forced to take refuge as medieval code targets fathers and sons’.

kind of life of its own; perhaps a chimera, perhaps created to add human intelligence or language to a beast of burden; perhaps a hybrid, made to test medicines or perform routine robotic tasks. And at the other end of life, there might be some dispute about the being's status as a person, even if it has lived an established human life, for instance, if entered into a state of PVS. Once that status has gone, it may be that the humanity recognised there is not sufficient for the being that remains to be treated with dignity.

ii The indefinite human

Meyer contextualises the semantic difficulties well, in his assertion that other scientists were wrong in their refutation of human-ness in the embryo, in respect of the debate on cloning. 'We can all agree that a preimplantation embryo is not sentient and that it is not viable to survive without assistance'.⁵⁶³ Yet, as he points out, 'making distinctions about the 'humanness' of genetically human organisms on the basis of their developmental stage falls within the realm of opinion, not scientific fact'. Some scientists in the field of cloning put forward an argument that their research does 'not involve production of human beings' and are 'relying on semantics to justify its exclusion from [relevant] regulations'. Meyer's point is that '[s]upporting stem cell research and holding to philosophical distinctions between the rights of human beings from different developmental stages are quite a different thing from arguing that human embryos are not human'. From Meyer's viewpoint, the cause of scientific research in controversial fields 'is only weakened by relying on such arguments to support it'.⁵⁶⁴

What was an issue centred on abortion is rapidly becoming a much wider area of debate, as Meyer's comments indicate. The whole field of genetics is advancing rapidly, with a

⁵⁶³ Meyer, (2002).

⁵⁶⁴ *Ibid.*

number of interventions and manipulations which should be of interest to human rights discourses, but which fall outside the field because the human rights bodies do not wish to be involved in anything affecting the preborn, in case they are seen to be getting involved in the area of abortion. Many campaigners for women's reproductive rights see the ascription of any rights to the preborn as inevitably affecting the availability of legal abortion. Because this would be a step backwards in reproductive rights terms, and indeed possibly fatal to many women who may then well feel compelled to seek 'backstreet' (illegal) abortions, the response has been that denying the humanity of the preborn immediately takes all such beings, and whatever might happen to them, or whatever they might become, out of the powerful protective field of human rights.

Yet there are those whose instincts and beliefs are to allow legalised abortion, but who are prepared to argue the case for the humanity of prepersonal human life. Wolf wrote an emotive article on the subject, challenging second-wave feminists who have 'reacted to the dehumanization of women by dehumanizing the creatures within them',⁵⁶⁵ instead of accepting the woman and the child within her as both human, but 'acknowledging that sometimes, nonetheless, the woman must choose her life over the fetus's'.⁵⁶⁶ Again, the argument from interests is to practice semantics to achieve a particular end, and the case is no better in the field of abortion than it is in stem cell research. Sometimes hard things have to be done and they have to be named as being done; 'develop[ing] a rhetoric that defined the unwanted fetus as at best valueless: at worst an adversary, a "mass of

⁵⁶⁵ Wolf (1995).

⁵⁶⁶ *Ibid.*

dependent protoplasm”,⁵⁶⁷ is not the moral answer, or even a logical one.

The argument supporting recognition of the preborn human *qua* human, in some of its aspects, has been offered by others, such as Sanger⁵⁶⁸ and Shrage,⁵⁶⁹ although the nature of that humanity is still challenged, for instance by Lee.⁵⁷⁰ She agrees that ‘[p]regnant women who have abortions (and those of us who unreservedly support their right to do so) do know that fetuses are human ... (in a genetic and biological sense)’⁵⁷¹ but bases her argument for legalised abortion on a human/person distinction, assessing ‘the failure to make this distinction’ as ‘the major flaw in the arguments of anti-abortionists’,⁵⁷² whilst Shrage acknowledges that ‘it’s important to establish laws that grant women decision-making authority when it comes to their reproductive lives, [but] this authority need not be absolute, canceling out all other interests, including all of our interest in not trivializing the destruction of human life’.⁵⁷³ Responding to an argument of Shrage’s,⁵⁷⁴ Brown concedes that ‘pregnancy involves a developing human’,⁵⁷⁵ whilst being able to affirm that ‘that developing human is inside, and is in most respects very fundamentally a part of, a developed and autonomous human, a legally recognized subject, a woman.’⁵⁷⁶

Brown and Shrage are agreeing on the same ends (although they see different political

⁵⁶⁷ *Ibid.*, citing others who ‘have wrestled with this issue: Camille Paglia, who has criticized the “convoluted casuistry” of some pro-choice language; Roger Rosenblatt, who has urged us to permit but discourage abortion; Laurence Tribe, who has noted that we place the fetus in shadow in order to advance the pro-choice argument. But we have yet to make room for this conversation at the table of mainstream feminism.’ For other views, see Sanger (2004), pp.13-15; Eberstadt, (2001).

⁵⁶⁸ Sanger (2004).

⁵⁶⁹ Shrage (2003).

⁵⁷⁰ Lee, ‘The trouble with ‘smiling’ fetuses’, September 13, 2003

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*

⁵⁷³ Shrage, ‘*Pro-Choice or No Choice’ ... and Other Alternatives*, Annual *Roe v. Wade* Lecture, Center for the Study of Women, UCLA, 20/01/2004.

⁵⁷⁴ Shrage, ‘Electoral Politics and Abortion’ *Dissent*, (Fall 2003) and responses, *infra* notes 575 and 577.

⁵⁷⁵ Brown, ‘Argument’, *Dissent*, (Fall 2003). See also Petchesky’s ‘Argument’, *Ibid.*

⁵⁷⁶ *Ibid.*

means of achieving it), and Shrage's response to criticisms is a helpful summary of this argument, in showing why there is a polarized opinion on the acknowledgement of the otherwise unarguable humanity of the preborn:

I think that we need to take our opponents at their word and argue with the reasons they give. Many of them simply oppose taking human life, even fetal human life. Those who favor unrestricted abortion need to defend the taking of fetal life, not avoid the issue by *ad hominem* attacks.⁵⁷⁷

It seems unlikely that the strongest advocates of anti-abortion policies, who do not even favour the late Ronald Reagan's acceptance of it to save the life of the mother,⁵⁷⁸ would respond to reasoned debate; that is not a good reason, however, to reject Shrage's preferred depolarisation.⁵⁷⁹

iii The embodied human

Is there some essential quality to the 'ordinary' human life, which makes people both of the class 'human' – in some respects like every other human – and individually human, like no other?⁵⁸⁰ Locke offered an analysis of the essence of beings in his *Essay Concerning Human Understanding*.⁵⁸¹ His conclusion was that there is nothing which is essential to being human in a person's bodily shape or form:

It is necessary for me to be as I am; God and nature has made me so: but there is nothing I have, is essential to me. An accident, or disease, may very much alter my colour, or shape; a fever, or fall, may take away my reason, or memory, or both; and an apoplexy leave neither sense nor understanding, no nor life. Other creatures of my shape, may be made with more, and better, or

⁵⁷⁷ Shrage, 'Arguments – Laurie Shrage Responds', *Dissent*, (Fall 2003).

⁵⁷⁸ Spitzer (1987), p.62.

⁵⁷⁹ See Spitzer, *op.cit.*, on the strength of the extremism and political violence inspired by the debate about abortion in the USA. For an expression of the understandings prompting a strong anti-abortion view, (although it is not meant to infer that it is either extremist or violent) see Bohan (1999). Bohan cites Wolf's article, *supra*, n.565, in an impassioned plea for the aborted unborn. (p.211). Bohan also makes a case for the acknowledgment of preborn life as human.

⁵⁸⁰ To paraphrase Gatewood, *supra*, n.555.

⁵⁸¹ Locke (1690, 1947 ed.)

fewer, and worse, faculties than I have: and others may have reason, and sense, in a shape and body very different from mine. So that if it be asked, whether it be essential to me or any other particular corporeal being to have reason, I say, no; no more than it is essential to this white thing I write on to have words in it.⁵⁸²

Cyborgs⁵⁸³ are a possible issue of the future, and the question will then be how much artificial replacement can be made to a human body for it to be no longer human, to no longer qualify as a human rights-bearer. Two prosthetic legs, two prosthetic arms ... a heart, lungs, liver, kidneys; perhaps only a brain remaining, sustained entirely by machinery.⁵⁸⁴ For Locke, for whom the possibilities of cyborgs had not yet arisen, the essential – ‘nominal essence’ – element of being human was membership of the human race:

Indeed, as to the real essences of substances, we only suppose their being, without precisely knowing what they are: but that which annexes them still to the species, is the nominal essence of which they are the supposed foundation and cause.⁵⁸⁵

Rivard wrote in 1992 that within ten to thirty years ‘advances in genetic technology should allow scientists to intermingle the genetic material of humans and animals to produce human-animal hybrids’.⁵⁸⁶ His argument was in respect of a theory of constitutional personhood for transgenic beings; ten years later, James McCartney pointed out that it has ‘proven difficult, if not impossible, to develop a philosophical theory of

⁵⁸² *Ibid.*, Book III, Chapter VI, 4; p.224 (1947 ed.).

⁵⁸³ Part-human, part-machine (or construction); it could be claimed that a person with a pacemaker, or a cochlear implant, or an artificial hip, is a cyborg, and that the age of cyborgs is already here. See Warwick: ‘he has been successful with the first extra-sensory (ultrasonic) input for a human and with the first purely electronic communication experiment between the nervous systems of two humans.’ <http://www.kevinwarwick.com/> (Accessed 16/12/2004).

⁵⁸⁴ See DeGrazia, (2005), for a thorough discussion of such possibilities.

⁵⁸⁵ *Supra* n.581, Book III, Chapter VI, 6; p.226 (1947 ed.).

⁵⁸⁶ Rivard (1992) was one of the early writers considering the possibilities of transgenic beings in the current biotechnological context (rather than, for instance, the mythical Gods/humans/beasts of Ancient Greece), and the law’s ability to address the issues involved. He offers ‘a ‘personhood presumption theory’ [which] holds that if the average, mature member of a species has the capacity for self-awareness, then all members of that species are entitled to a rebuttable presumption of personhood.’ (p.1509). He suggests that ‘[t]his theory may be used to solve the problem of constitutional personhood for nonhuman species.’ (*Ibid.*)

personhood.’ His answer to that problem within the context of law’s need to meet the current challenges is to:

[B]egin with the assertion – perhaps an intuition – that a person, in a non-metaphysical sense, is an individual of a living species, some of whose members demonstrate the capacities to think, choose, reason, and possess inalienable rights. Individuation within the human species is a necessary and sufficient condition for personhood, which alone is sufficient to claim fundamental human rights.⁵⁸⁷

It is suggested here that whilst ‘individuation’ might be necessary and sufficient for personhood, it is neither necessary nor sufficient for identification as a human rights-bearer. Although McCartney’s definition is a broad and generous one, it would not include those whose being transgresses species, and may not include clones, and does not mention future generations; it would not offer the protection of the law to human genetic material, nor to those who may be ‘defined out’ of personhood. The argument must now shift bases, and discuss the concept of ‘person’ and why that is not a comprehensive definition of the rights-bearer, able to allow the treaty texts protecting the right to life to be most effective in their application.

3.5.2 THE ‘PERSON’ IN CONTEXT

Locke’s definition of ‘person’ was mentioned above; it has been taken up in many fora, but most especially in the debates surrounding abortion, and euthanasia of those in persistent vegetative state [PVS]. There are three aspects to the concept of ‘person’, to be briefly considered here; one being a bodily entity, frequently mentioned in the treaty texts as a rights-bearer. Another is the idea of ‘personhood’, which has been defined⁵⁸⁸ as the ability to

⁵⁸⁷ McCartney (2001-2002) at p.604.

⁵⁸⁸ On the subject of ‘personhood’ in law see generally, and particularly with regard to property rights in people and their bodies, Davies, and Ngaire Naffine (2001); and Grear (2003). Regarding the subject of the unborn as

relate to the world beyond oneself; to have some understanding of others and one's relationship with them; to have some kind of life plan.⁵⁸⁹ Finally there is the term 'legal personality', which can refer to corporations as well as people.

i The Embodied Person

The 'person' of the treaty texts is ascribed rights-bearing capacity as a matter of course; and this person is a living being, situated somewhere between (Western) birth and (Western) death. Locke, cited above, continues by detailing the necessity of a being named 'man' to have reason; that the paper he writes on has to have words to be called a treatise, and so for a human being to be named 'man', 'then reason is essential to it; supposing reason to be a part of the complex idea the name man stands for'.⁵⁹⁰ Locke's suggestion was that 'as soon as [any one] supposes or speaks of *essential*, the consideration of some *species*, or the complex idea, signified by some general name, comes into mind'.⁵⁹¹ Locke's gendered 'man' is the 'person' of this discussion; the person has reason.

A person is the kind of being who can own property, marry, found a family; who can vote, and be elected; who can be protected against torture and freed from slavery, and assured of a fair trial, and whose freedom to exercise rights and liberties is not in any way diminished by race, gender, disability, or poverty. Such is the accepted *dictum*, and it is

a person and extrapolating from that to equate abortion with murder, see Ibegbu (2000) and Smits (1992).

Regarding the personhood of the mentally disabled, see Reinders (2000). Challenging the personhood of the unborn and those in persistent vegetative state, see Steinbock, (1992). Generally, and especially with regard to the personhood of 'defective' neonates, see Moreland and Geisler (1990); on the latter point see *infra*, n.513.

⁵⁸⁹ See Higginson's critique of McCormick on an approach to life-saving interventions on defective neonates which focuses on their likely ability to develop meaningful relationships, and to recognise and participate in the 'qualities of justice, respect, concern, compassion and support that surround them'. Higginson (1987), pp.45-48, esp. p.46, citing R.J. McCormick 'To save or let die: the dilemma of modern medicine' *How Brave a new World*, SCM, 1981, p.386.

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*

the qualities of being inherent, in some cases inalienable, in all cases universal, which characterise the human rights enjoyed by the person as rights-bearer. The person has a bodily form, either now or in the future; future generations, whose bodies will need breathable air and drinkable water, are beginning to be included in the class of rights-bearers, as shown above. Where the person cannot speak for themselves, others are often granted standing. However, there is no-one who can speak for the already conceived but as yet unborn person-to-be; there must be a person's body present. The body need not be alive; violations have been found in respect of the missing⁵⁹² as well as the present dead. But there must at least have been a body that has been born, and, it appears, must have lived though not necessarily breathed. This will be considered, below, in a discussion of human rights discourse and morality. The case was made by the HRC in *Queenan v. Canada*,⁵⁹³ where the author 'as a Canadian citizen, [presented] his communication on behalf of Canadian unborn children, because they cannot present the complaint themselves'.⁵⁹⁴ His complaint was against Canadian abortion laws, and included comment on the Canadian Criminal Code, which explicitly states that a child becomes a human being after a live birth; a stillborn child was never human, a finding which had incidentally already been made with respect to s.7 of the Canadian Charter of Rights and Freedoms, and s.11, of the Quebec Charter of Human Rights and Freedoms, in *Tremblay v. Daigle*, where the status of a foetus as a 'person', 'human being', 'juridical personality' or concomitant of the mother was debated. It was held that a human being begins at birth, in view of Québécois legislators, who otherwise would have specifically drafted the

⁵⁹² The leading case is the ACHR *Velasquez Rodriguez v. Honduras*.

⁵⁹³ Communication No. 1379/2005, 26 July 2005.

⁵⁹⁴ Para.2.1.

legislation to include the foetus.⁵⁹⁵ The relevant section of the Criminal Code of Canada reads as follows:

Part VIII, Section 223:

(1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not

- (a) it has breathed;
- (b) it has an independent circulation; or
- (c) the navel string is severed.

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.⁵⁹⁶

The author in *Queenan* claimed that there was nothing in the Covenant which led one to believe that the preborn human was anything less than human, and that non-inclusion in the class of human beings or persons was discriminatory.⁵⁹⁷ Few parents or members of the wider community would disagree with him; there is seldom debate on whether a wanted foetus is human or not.⁵⁹⁸ His argument failed without the HRC considering this fundamental point; their response was in the nature of avoiding the issue, with echoes of the ECtHR in *Vo*:

The Committee notes that the author does not claim that he is a victim of the alleged violations of the Covenant by the State party. The author states that he is submitting this communication on behalf of all unborn children in the State party in general. The Committee notes that, in accordance with Article 1 of the Optional Protocol, communications must be submitted by or on behalf of 'individuals' who claim 'that any of their rights enumerated under the Covenant' have been violated. The Committee considers that in the absence of specific claimants who can be individually identified, the author's communication amounts to an *actio*

⁵⁹⁵ Pp.551-55.

⁵⁹⁶ R.S. 1985, c. C-46.

⁵⁹⁷ *Supra*, n.593, para.3.2.

⁵⁹⁸ See Jolly (1987) on the nursing care of those who grieve the loss of someone 'before life has been established'. It seems better to consider this as appropriate phraseology; life, as such, is not 'established', although it is present, but 'humanity' is not in doubt. See also Williams (2005).

popularis and is therefore inadmissible under article 1 of the Optional Protocol.⁵⁹⁹

There are good reasons for permitting legalised abortion, but failure to allow a voice to the unborn is not the answer which should be promoted by a human rights tribunal; it is not the moral answer. The Canadian Criminal Code may well be perpetuating an injustice; it is argued here that it is.⁶⁰⁰

ii 'Personhood': a Lockean critique

The definition of a person in the sense of 'personhood' is often extrapolated from Locke's description: 'a thinking, intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing in different times and places'.⁶⁰¹ Hughes and Keown comment that:

When they specify which elements of sentience and neurological integrity create the illusion of personhood, Western bioethicists begin to sound remarkably Buddhist: 'the awareness of the difference between self and other; the ability to be conscious of oneself over time; the ability to engage in purposive actions'.⁶⁰²

The Buddhist aspect is not apparent in Tooley's conclusion that it will usually become obvious soon after birth that a newborn is severely compromised, and that '[s]ince it is virtually certain that an infant at such a stage of its development does not possess the concept of a continuing self, and thus does not possess a serious right to life, there is excellent reason to believe that infanticide is morally permissible in most cases where it is otherwise desirable.'⁶⁰³ If a human rights-bearer is to be defined *only* as a 'person', with

⁵⁹⁹ *Ibid.*, para.4.2.

⁶⁰⁰ This is similar to other formats such as that enacted in section 159 of the New Zealand Crimes Act of 1961: Killing of a child: (1) A child becomes a human being within the meaning of this Act when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not. (2) The killing of such child is homicide if it dies in consequence of injuries received before, during, or after birth.

⁶⁰¹ *An Essay Concerning Human Understanding*, Book II, Chapter XXVII, 'Of Identity and Diversity'.

⁶⁰² Hughes and Keown (1995) Section 3, 'Moral Personhood'.

⁶⁰³ Tooley, *supra* n.559, p.64.

the necessary context of a mind that meets the personhood criteria described, what are the consequences for those whose minds are unformed (the unborn), unaware (the ill or damaged), or un sentient (the comatose)?

Some commentators have confused the definition of the person with that of the human: Locke himself did not do this, considering three states of identity. The first is the ‘Unity of Substance’;⁶⁰⁴ the second, the ‘identity of vegetables and brutes’, being an identity attributed to things having a common ‘Organization of Life’.⁶⁰⁵ This includes the identity of a ‘Man’, which is what is being referred to in this thesis as a human. It is only Locke’s third criterion of identity which looks to the personhood requirements, cited above.⁶⁰⁶ The first state of being is that of the same assemblage of atoms; the second identifies whether the being-in-evidence has genetic membership of the human species. This is the identity which is argued for here as a human rights-bearer, but which is often confused with the personhood criteria which require something more in order to recognise the identity of the atoms (‘substance’) than that they should either be the same as they themselves were at some time in the past, or that they should possess similar characteristics to either themselves at some past or future date, or to others of the same classification/species (‘organisation of life’).

One such set of identity criteria which confuse humanity and personhood is Fletcher’s.⁶⁰⁷ Higginson points out that Fletcher has ‘a highly specific and circumscribed idea of what a human person is.’⁶⁰⁸ Fletcher’s criteria of what he terms as ‘indicating humanhood’ are:

Minimal intelligence (a minimum IQ of 40), self-awareness, a capacity for self-control, a

⁶⁰⁴ Locke, *supra* n.601, para.3.

⁶⁰⁵ *Ibid.*, para.7,8.

⁶⁰⁶ Text accompanying n.601.

⁶⁰⁷ Fletcher, (1979).

⁶⁰⁸ See also Ford (2005); *cf.* Harris (2005).

sense of time, a sense of the future, a sense of the past, a capacity to relate to others, a capacity for a concern for others, the ability to communicate, control of one's existence, curiosity, a capacity to adapt to and initiate change in one's life, a balance of reason and emotion in one's life, idiosyncrasy or distinctiveness, and a functioning neocortex.⁶⁰⁹

Higginson notes that these are a demanding, rule-based Utilitarian set of qualifications for what he prefers to consider as 'personhood'.⁶¹⁰

There is another approach to the recognition of individual identity, not centred on the Lockean relational and participatory requirements, offered by Loewy as a 'Bio/Psycho/Social Perspective'.⁶¹¹ This is much more focused on the interpersonal and community relationships and interdependence which are features of everyone's lives, to some degree or another, and regrets the emphasis upon autonomy as an oppositional factor to dependence itself, 'rather than its relative increase or decrease'.⁶¹² The consequence of bringing autonomy to the fore (as Fletcher's criteria would) as the default mode is to 'reinforc[e] a presumption that persons are not normally dependent but, rather, complete and self-contained entities that exist independently from the rest of their environment unless or until they become functionally compromised'.⁶¹³ The belief that individuals are in control of their own lives and the integration of those lives with the lives of others means that 'autonomy comes to be treated as the "default mode" of human existence and is defined in terms of atomistic isolation: persons are self-contained, self-sufficient, self-defining and completely self-determined'.⁶¹⁴ Loewy challenges the view that such autonomy is either possible or the preferable default mode; 'actual living'

⁶⁰⁹ Higginson (1987), p.46.

⁶¹⁰ *Ibid.*

⁶¹¹ Loewy (2002).

⁶¹² *Ibid.*, p.53.

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*

depends itself upon ‘co-operative interdependence’⁶¹⁵ which need ‘not be viewed as a defect, even when it is increased or modified as a result of illness or injury; it is already a fundamental fact of human existence.’⁶¹⁶ This is in line with Mertus’s sense of community: she reminds us that ‘We draw our meaning through our connection with others ... our communities in turn exist only through their synergistic relationship with us.’⁶¹⁷ Boyd White underlines the shifting nature of our communion with our communities, particularly at time of crisis;⁶¹⁸ certainly those times described as ‘boundary moments’ within this thesis, which tend to stretch and divide loyalties. When we act, we do not act alone. Life, for a human, is human life, and to be human is, to return to an earlier definition,⁶¹⁹ to be a member of the genus *homo*, species *homo sapiens*. To be a member of the human race not only confirms value in an individual life, but recognises the importance and place of society, which in the context of the right to life is the contribution each person in society requires from others in order to survive, and can give to others in order to aid their survival and that of the race as an ongoing entity. Mertus offers a re-assessment of individual rights in view of the ‘collapse’ of *Roe v. Wade*,⁶²⁰ asserting that:

The ultimate focus on the individual reflects an impoverished and imaginary vision of self – the solitary self. No theory based upon such a distorted view of society can withstand the test of time, at least not without great sacrifice, particularly the stunting of both individual and community development.⁶²¹

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*, p.54.

⁶¹⁷ Mertus (1992), *Prologue*, p.247.

⁶¹⁸ White (1985), pp.3-4.

⁶¹⁹ *Supra*, n.419

⁶²⁰ See Shapiro, (2001) on the history of abortion decisions in the US Supreme Court. See also Mertus, *supra* n.617, pp.248-251.

⁶²¹ Mertus, *supra* n.617, p.251.

That is, Mertus suggests, acknowledging an individual-in-community, protecting the rights of the individual not only *qua* individual, but also because otherwise the community is harmed, both in principle (morally) and in practice. ‘Perhaps ... an individual rights analysis provides neither the proper tools for fully recognizing the centrality of reproductive freedom, nor an adequate means by which to ensure its survival.’⁶²² For Boyd White:

Our practical and moral lives are radically communal ... and this means that our thoughts about what we want and who we are must reflect the freedom and power of others, without whose free co-operation we can have nothing of value, be nothing of value. This in turn means that hardheaded practical thought and sound ethical thought alike require us to recognize the existence of others and our dependence upon them.⁶²³

Mertus’s and Boyd White’s insights contribute to an understanding of personhood such as that described by Loewy, and is the preferred view, to be adopted here, offering a richer and more generous interpretation of the human person as participant in a world of others, and a broader understanding of the human condition, and of those who might be counted as human rights-bearers. Human rights are not only for the sentient, the rational, the patiently enduring, the sane or the innocent.⁶²⁴ ‘The life of the good man and the bad stand equal, because how a man has led his life may not affect his claim to continued life’.⁶²⁵ As Andorno has shown, recognition of inherent human dignity does not require the meeting of any personhood-capacity requirements.⁶²⁶

⁶²² *Ibid.*, p.272.

⁶²³ *Supra*, n.618, p.25.

⁶²⁴ See Dressler, *infra* n.796, for a defence of the right to life of the violently abusing husband, e.g. in *State v. Norman*. In explaining the ‘forfeiture principle’, ‘by acting as a monster for years, the abuser forfeited his right to life’, Dressler cites Bedau: [he] ‘no longer merits our consideration, any more than an insect or stone does’. Dressler, p.270, citing H. Bedau, ‘The Right to Life’, *Monist* 550, at 570.

⁶²⁵ S. H. Kadish, ‘Respect for Life and Regard for Rights in the Criminal Law’ (1976) 64 *California Law Review* 871, at 880, and in Dressler, *infra* n.796, at p.271.

⁶²⁶ *Supra*, n.478.

For some, such as Harris, quality of life arguments are equated with subjective judgements regarding the life-as-lived: how do we ‘explain the positive value of life’, even for those who on an objective assessment have little or no value in their experience of *bios*? Also to be resolved is ‘the problem that the more rich we make our account of the value of life, and hence the nature of the wrong done by killing someone, seems to vary with the quality of life of the person concerned’.⁶²⁷ Indeed, for Harris, a person ‘is a unified complex being’, but this is not sufficient to qualify in life; ‘that complexity is part of what it is to possess the radical capacities of intelligence and autonomy – in short, the capacity to value existence. *When these are lacking the person has ceased to exist (or has not yet come into being)*’.⁶²⁸

Society depends for survival on those who can live positively and creatively, as amply shown in gulags and other orders of terror throughout the world. What does that imply, however, for the dependent spirits? Veneration of the life of thought is good; it cannot, however, be linked to a right to life, and may be seen as constructing a boundary between the sentient (rights-holders by right) and the non-sentient (rights-holders by default or forbearance). Agamben eloquently illustrates the richness of community:

... human politics is distinguished from that of other living beings in that it is founded, through a supplement of politicity [*politicità*] tied to language, on a community not simply of the pleasant and the painful but of the good and the evil and of the just and the unjust.⁶²⁹

iii The Disabled Human

Abortion and embryo selection for expected disability is now the largest category of pre-

⁶²⁷ Harris, ‘Life and Death’, in Craig (Ed.) (1998) pp. 625-630, at p.625.

⁶²⁸ Harris, ‘The Philosophical Case Against the Philosophical Case Against Euthanasia: A Reply to John Finnis,’ in Keown (ed.)(1997), at p. 41, and cited by Latkovic, (2003), footnote 8. [Emphasis Latkovic’s].

⁶²⁹ Agamben, (1998), at pp.2-3.

birth termination. It is also the most widely accepted, being actively promoted particularly by means of routine testing to detect potential malformation. There are a number of associated consequences; including that health and life are seen as being valued over disease and death, but how viable is the first, and how inevitable the second? Pain and suffering are to some extent inevitable as part of the human condition, and death certainly is. Should a child born disabled instead not exist at all – another, at onset perfect, child, in its place in the family? That, somewhat metaphysical, question is beyond the scope of human rights; the related issue of promotion of eugenic practices is not, and is particularly close to the heart of modern human rights discourse which found its impetus partly in Nazi promotion of the Aryan race. Ettore,⁶³⁰ recording an interview with a lawyer, makes the point:

“The more instruments you have in your hands to prevent disability, the less you come to accept it. It’s [disability] something that can be avoided. It’s preventative medicine but you don’t know how far it will go ... You do all of this testing to prevent disabled babies being born with defects ... Will this turn to eugenics or not in the long run? ... How far can preventative health go? Prevention [in] the extreme can become a sort of eugenics if you’re preventing things more and more”.⁶³¹

A further consideration is, of course, what constitutes disability. Katz Rothman⁶³² points out that in Western societies it is now acceptable to terminate pregnancy for potential disorders which a mother feels society is not equipped to deal with adequately, even though the condition is in itself not incompatible with life or a reasonable quality of life. She may assume – and with some reason – that the child’s suffering will not only be the physical or mental pain and anguish associated with the disabling illness itself, but with the way society at large will treat the person, or care for the family and the individual

⁶³⁰ Ettore (2002).

⁶³¹ *Ibid.*, p.48 (omissions and insertions in the original).

⁶³² Seminar, University of Nottingham, 2003.

involved. Yet those same Western societies would seriously condemn a mother in, for instance, rural India, who kills her girlchild at birth or soon after, because she is a third daughter, and the woman herself in her great toil and struggle cannot see any kind of future for this little one, other than suffering.⁶³³ Preventing human suffering in this context is, therefore, equivalent to denying existence to a whole class of people – the disabled. Ettore appreciates the putative potential benefits of the reproductive genetic technologies:

They create possibilities for medical advances and opportunities to make choices about the health of future generations. But, these technologies are value laden and experts are making moral verdicts about fetuses. When looking at genetic technologies generally, Nicholas [⁶³⁴] contends that these technologies are constructing a new moral landscape and culture. They are disrupting long-established social understandings of how the world 'is', the meaning of the family, the place of humans in the biosphere and the role and responsibilities of the authorised knowledge makers of western culture.⁶³⁵

The technologies are creating new possibilities for choice and destruction of humans,⁶³⁶ unconsidered since *Zyklon B*.⁶³⁷ Declassifying potentially disabled fetuses as human, or erecting a human/person distinction, is neither logically nor morally tenable as a proposition at law.

⁶³³ See Bunch, 'The Intolerable Status Quo: Violence against Women and Girls': 'Women Commentary' UNICEF, *The Progress of Nations, 1997*: 'Roughly 60 million women who should be alive today are 'missing' because of gender discrimination, predominantly in South and West Asia, China and North Africa. [...].

⁶³⁴ Citing Nicholas (2001) 'Exploring a moral landscape: genetic science and ethics' *Hypatia* 16, 1:45–63.

⁶³⁵ Ettore, *supra*, n.630, p. 48.

⁶³⁶ See McGuigan (1999), at pp.45-46, where he comments on Bauman's work, *Modernity and the Holocaust* (1989) Cambridge: Polity Press. 'Bauman ... contests the view not only that the Holocaust was just 'something that happened to the Jews' but also that it represented an irrational disruption of modern civilization and is explicable as a distinctly modern cultural and technical phenomenon.'

⁶³⁷ Insecticide carrier for the gas Hydrocyanic Acid used in the extermination chambers, e.g. in Auschwitz-Birkenau, Majdanek, Mauthausen, Neuengamme, Sachsenhausen, and Stutthof; its formulation and production helped to make the extermination of large numbers of people in a short time possible. See Kogon, Langbein and Rüdiger (1993); and *Institut Fuer Zeitgeschichte*, Summary of the Camps, Munich, 1992: *The killing of people through gas in the extermination and concentration camps under the Nazi power*.

Sheldon and Wilkinson⁶³⁸ construct a strong argument for the indefensibility of a clause in UK abortion legislation allowing abortion solely on the grounds of expected disability in the foetus, emphasising that it is maternal choice which is the only logically tenable deciding factor.⁶³⁹ Reinders⁶⁴⁰ also constructs a critique of liberal thinking in this field, making the point that ‘[p]opular culture sends the message that life is more worth living the less trouble it takes. Only people who know this myth to be utterly distortive of human life will be capable of accepting lives with limited capacities as valuable and worthwhile in their own right.’⁶⁴¹ His particular concern is with the mentally disabled, and again the subtraction of personality from human life is displayed in his perception of others’ views regarding the status of those with limited mental capacity:

Mentally disabled human beings do not function well as persons, that is to say, if we take ‘persons’ to mean what it is often taken to mean in liberal society: rational, self-conscious beings who are capable of determining their own plan of life. To prevent the lives of those who are lacking this capacity – or have it only in a diminished sense – is to prevent lives that in an important sense cannot succeed. Or so, many people in liberal society presumably believe[⁶⁴²].⁶⁴³

This focus upon the idea of success in life as a collateral to liberal democratic thought also tends to include an emphasis upon suffering and its avoidance, possibly with an undercurrent of avoiding cost to society (in a matrix that ascribes suffering to society by supporting the disabled) and can most clearly be seen in a medical ethic that ‘insists’ on prenatal screening, not clearly indicating choice and consequence to a pregnant woman

⁶³⁸ Sheldon and Wilkinson (2001).

⁶³⁹ See Scott (2005) on the role that, she argues, parental reproductive autonomy should be allowed to play in pre-implantation genetic diagnosis and selective abortion.

⁶⁴⁰ Reinders (2000).

⁶⁴¹ *Ibid.*, p.xi.

⁶⁴² Reinders see this as the dominant view of liberal bioethics, ‘classically’ held by such writers as Tooley, Singer and Kuhse. Reinders, *Ibid.*, n.16, p.222.

⁶⁴³ Reinders, *Ibid.*,p.44.

whose normal condition is treated as an illness.⁶⁴⁴ In the context of life, if protection by law were read to mean *prevention* by law, the consequence could be the eradication of the Other; if one were to try to prevent those situations in which the protection of law is called for, such as disability or illness, or starvation. Here again the need is for a moral law; one which works to eradicate the problem and not the human, however much that human might be objectively assumed to be better off not living. Weiner and Morse describe strategies to ameliorate the problems associated with foetal alcohol syndrome, demonstrating how an interventionist policy can work to mitigate the effects of a mother's heavy drinking on the developing foetus. This can be seen in distinction to those policies which would call for harsh strategies denying civil liberties to pregnant women who suffer from addictions, in order to protect the developing foetus. Such strategies may be self-defeating in encouraging women who otherwise might not do so to seek abortions rather than seek treatment; for instance, in the USA, where there is a strong right-wing 'pro-life' movement, this could well be seen as a drawback. Too many of the situations in which life is at its boundaries are seen by activists and policymakers as black/white, either/or, when in fact there is a middle way; effective palliative care instead of euthanasia, for instance. Health and welfare benefits and child care facilities can help pregnant women to keep their children, if that is their wish.⁶⁴⁵ Crime control and prevention policies can intervene to prevent rape, as a cause of unwanted pregnancies; and to deter murder. Punishment regimes that include rehabilitation and education can make

⁶⁴⁴ See generally Ettore, *supra* n.630.

⁶⁴⁵ See van Zyl Smit on the German model proposed at re-unification.

of a murderer a different kind of person,⁶⁴⁶ someone they might not become if the State murders them first. State policies can be, and are, self-defeating in this way; they are, if not the root cause of many of the problems, certainly counter-productive in addressing them.

iv Legal Personality

The dichotomy apparent in recognition of a right to participate in the international legal system as an individual is highlighted by McCorquodale, who points out that the nature of international legal personality is such that:

[I]f it can be shown that individuals are exercising and enjoying 'in fact' (to use the ICJ's words) certain rights, privileges, powers or immunities in the international legal system then they can be assumed to be acting as international legal persons.⁶⁴⁷

International legal persons are not defined by having been granted rights; the enjoyment of rights itself confers international legal personality, and a power to act. As has been shown above, rights are inherent in the human person, recognised as inherent with human dignity. Therefore, all humans are international legal persons, empowered to act under the international human rights treaties, although within the parameters determined still by States.⁶⁴⁸ Article I(2) of the Declaration on the Protection of all Persons from Enforced Disappearance [DPPED] states that:

Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be

⁶⁴⁶ [SUNDAY TIMES DAY IN THE LIFE OF MAGAZINE ARTICLE FEW WEEKS AGO USA PRISONER]

⁶⁴⁷ McCorquodale (2003) 'The Individual and the International Legal System' in Evans, (2003), pp.299-325, at p.304, and citing (p.301) the *Reparations for Injuries Opinion*, ICJ Reports 1949, p.174 at pp.178-179.

⁶⁴⁸ See McCorquodale, *supra* n.647.

subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

This is one of many texts in which ‘recognition as a person before the law’ is separated from mention of the right to life. Life, and legal personality, are distinct categories; to have life is not necessarily to have legal personality, nor *vice versa*.

v The Post-Human Challenge

Before conception, and often entirely without the intention to facilitate conception, genetic material can be manipulated for a number of reasons. Professor Keith Campbell, working in animal physiology, lists them as including ‘methods (both *in vivo* and *in vitro*) for increasing the production of embryos of high genetic merit, for selection or production of embryos of defined sex and for the preservation of both embryos and sperm.’⁶⁴⁹ Campbell adds that other possibilities of this technique are genetic modification of (farm animal) species, for purposes specifically related to livestock production. The following passage describes some of the uses to which transgenic animals are currently put:

Transgenic animals are used: in the basic biological study of regulatory gene elements; in medical research, to identify the functions of specific factors in complex homeostatic systems through over- or under-expression, as models of human disease; in toxicology as responsive test animals; in biotechnology as producers of specific proteins; and in agriculture and aquaculture to improve yields of meat and other animal products. This list is not inclusive; the use of transgenic animals is likely to expand in the future’⁶⁵⁰

Many of these procedures, having been developed in the animal world for reasons of

⁶⁴⁹ <http://www.nottingham.ac.uk/biosciences/anphy/academic/campbell.html> (Accessed 19/04/ 2002). See COE, *Ethical eye: Cloning*, (2002) pp.55–61, at p.64, for Keith Campbell’s views on human cloning, which he sees as only useful in a specialised case of adjusting the germline for a genetic defect, whilst creating a unique individual human. However, his colleague in cloning ‘Dolly the Sheep’, Ian Wilmut, has applied for permission to clone a human embryo, not with the intention of taking it to term but in order to assist motor neurone disease research, (reported Wednesday, 21 April, 2004 <http://news.bbc.co.uk/1/hi/health/3645037.stm>, accessed 12/05/2004) and despite having earlier expressed his views regarding the ethical and practical implications of human cloning, e.g. in an article, ‘Don’t Clone Humans!’ (2001, with Rudolf Jaenisch).

⁶⁵⁰ Canadian Council on Animal Care, Guidelines on: animals (1997). *Supra*, n. 1041.

agricultural husbandry, then find their way into the human world, particularly that of human reproductive technologies. Whilst this might be seen as a public good/not good *per se*, Jones highlights a problem in argument, illustrated by an example from gender selection:

The debate over the prohibition of sex (or gender) selection (also known as 'preselection' or 'predetermination'), has focused almost exclusively on the context of aborting a 'wrong-sex' fetus after a fetal gender-identification procedure. Despite the fact that sex selection abortions represent only a small subset of sex selection procedures, attitudes toward the former are driving general policy approaches to the latter. However, the issues are analytically distinct, and only during the former infancy of the pre-conceptive (and non-abortive post-conceptive) technology for sex selection were members on both sides of the debate afforded the economy of using one logic to support views on two issues. Consequently, the subsequent dramatic advances in sperm separation and artificial insemination technology challenge this unstable consolidation of views and require the context-specific division of the emotional reactions, analytic reasoning, and societal responses.⁶⁵¹

There are a number of possible implications of others⁶⁵² extending present, acceptable genetic manipulations to human life; for instance, with regard to Campbell's (and others') work on gender selection⁶⁵³ (mentioned in the passage quoted above as a specific aim of the technique) and eugenic arguments, as well as problems of status and relationships. The Association of Reproductive Health Professionals⁶⁵⁴ asks the question:

Who is the clonal child's genetic mother or father? As we understand those terms, a clonal child wouldn't have a genetic mother or father; it would have a single 'nuclear donor'. If a man cloned himself, would the child be that man's son or his twin brother? It would be neither, it

⁶⁵¹ Jones (1992), at p.1.

⁶⁵² A claim already made (but not yet with substantiation) by the religious group, the Raëlian Movement. The website, Clonaid, of their business arm, (name not given), stated that by 22/10/2004, 13 live babies had been cloned. There is no available peer review of the process. <http://www.clonaid.com/news.php> . On 16/09/2005, the website no longer made any claims regarding the alleged thirteen births, and its most recent news article was dated 21/10/2003.

⁶⁵³ *Supra*, n.XXX

⁶⁵⁴ ARHP: <http://www.arhp.org/> (Accessed 11/11/2004).

would be a new category of biological relationship: his clone.⁶⁵⁵

Harris recommends the adoption of a measure allowing foetal ovarian tissue to be donated, even if harvested from an aborted foetus, and also to allow the use of cadaveric ovarian tissue; he envisages a situation in which a mother may wish to give birth to her dead daughter's 'child', proposing a possible relationship of mother/grandmother to the resultant offspring.⁶⁵⁶ A chimera would have two or more parents; maybe four parents – two from each species. What exists only in the mind or the laboratory today may be walking the streets, petitioning the courts, in fifty years' time; what would the standing of these creatures be?

Further, the proposition has been made that the cloned life form itself is different from those previously known. An attempt was made in New Jersey to pass a bill, S.1909⁶⁵⁷ of 2003, which would have permitted (by omission) the implantation and gestation of a human cloned embryo but not its live birth. Some commentators suggest that this could have involved abortion at nine months:

The pending legislation expressly authorizes the creation of new human beings by cloning and, perhaps unintentionally, their cultivation from the zygote stage through the newborn stage

⁶⁵⁵ *Supra*, n.543. 'The new categor[ies] of biological relationship[s]' are bringing new familial relationships into being, suggesting that human rights discourse must be prepared to enter more fully into the implications of the new medical technologies for all rights, including the right to marry and found a family. Consider the relationships involved in the contemporaneous situation of Aspen and Saffron, twins born in December 1999 to two male parents, Tony and Barrie Drewitt Barlow, by the implantation into a surrogate mother of embryos grown from an egg donor and sperm from each partner of the homosexual couple. Subsequently another child, Orlando, was born, Aspen's identical twin from half of an embryo split and frozen at the time of implantation of the first children, but from a different surrogate. Tremlett, 8 February 2004, *The Observer* <http://www.guardian.co.uk/spain/article/0,2763,1143623,00.html> (Accessed 09/10/2004).

⁶⁵⁶ See Harris (June 2003). See also Keown (1993).

⁶⁵⁷ Bill Number: S-1909, P.L. 2003, c.203 January 2, 2003 'Permits human stem cell research; creates crime of third degree for sale or purchase of fetal tissue for research; creates first degree crime for engaging in cloning of human being.' New Jersey Department of Criminal Justice, http://www.njdcc.org/codification/S-1909_010804.pdf. See the President's Council on Bioethics website for detail of other similar bills going through the legislature: *Monitoring Stem Cell Research*, Appendix E by Lori B. Andrews, 'Legislators as Lobbyists: Proposed State Regulation of Embryonic Stem Cell Research, Therapeutic Cloning and Reproductive Cloning,' January 2004. http://bioethicsprint.bioethics.gov/reports/stemcell/appendix_e.html (accessed 21/12/2004).

for the purpose of harvesting what the bills themselves refer to as ‘cadaveric’ fetal tissue. Please pause to consider *whose* cadaver the tissue is to be derived from. It is the cadaver of a distinct member of the species homo sapiens — a human being — who would be brought into being by cloning and, presumably, implanted and permitted to develop to the desired stage of physical maturation for the purpose of being killed for the harvesting of his or her tissues.⁶⁵⁸

With regard to somatic cell nuclear transfer, reference has already been made to an eminent ethicist, Ronald Green,⁶⁵⁹ whose claim is that:

[A] cloned embryo is not the result of fertilisation of an egg by a sperm. It is a new type of biological entity never before seen in nature ... although board members understood that some people would liken this organism to an embryo, we preferred the term ‘activated egg,’ and we concluded that its characteristics did not preclude its use in work that might save the lives of children and adults.⁶⁶⁰

The value-laden terms – ‘activated egg’, ‘work that might save the lives’ – used in that extract are of interest here, particularly with respect to Kant’s teleological stance, that every human being is an end in him/her self.⁶⁶¹ Either the activated egg, being activated from human genetic material, is human or it is not. If it is human, then it must be forcefully argued that being formed from human genetic material, it deserves legal regulation of its use, in recognition of the dignity of humanity described above as being accepted both as inherent in the human condition and as a basis for the international law of human rights; that which requires the right to life to be protected by law.

⁶⁵⁸ President’s Council on Bioethics Members, Robert P. George; Alfonso Gomez-Lobo; William Hurlbut; Gilbert C. Meilaender, ‘State of Cloning: A letter to the New Jersey Governor’, available online <http://www.nationalreview.com/script/printpage.asp?ref=/document/document020303c.asp>, January 27, 2003. (Accessed 21/12/ 2004).

⁶⁵⁹ Ronald M. Green, Director, Ethics Institute, Dartmouth College; Chair, Advisory Board, ACT, Worcester, Massachusetts. ACT is the privately owned biotechnology company which has claimed to have cloned a human embryo to six cells, and assembled a board of outside ethicists to ‘weigh the moral implications of therapeutic cloning research’ before going ahead. Green, *Scientific American* January 2002, pp.46-48.

⁶⁶⁰ *Ibid.* Green’s contribution on ‘The Ethical Considerations’ appears in a report that human cloning had taken place; Cibelli, Lanza, West, with Ezzell, ‘The First Human Cloned Embryo’, pp.42-49.

⁶⁶¹ *Supra*, n.430. In this regard also see Munzer, (1993).

However, the Declaration on Human Rights and the Human Genome⁶⁶² that UNESCO has formulated does not specifically define the rights-bearers of the rights covered by the declaration. Mattei, in discussing genes and patents, contends that:

Man, as a person endowed with dignity, cannot be traded, which is why organs, tissues and cells are not marketable and do not come within the terms of the normal market. The gene, as the smallest component part of the human being, cannot to my mind be treated otherwise than the human being and enter directly or indirectly into a business rationale.⁶⁶³

The case is not necessarily that the use of any human tissue, cell or part of a cell should not be permitted, but that such material should not be euphemistically defined as ‘not human’ in order that justification should be found for its creation and manipulation, and destruction (by dubious logic). Several arguments in the use of stem cells debate suggest that using embryos surplus to IVF requirements, and otherwise destined only for destruction, is morally permissible, whereas creating them for research and therapy purposes is not. This seems casuistic, but the problem is not confined to linguistic definition.⁶⁶⁴ Each human being has, in the past, been formed from an amalgamation of the DNA (human genetic material) of two parents, male and female. Future humans may be created from the genetic material from two parents of the same sex,⁶⁶⁵ from three

⁶⁶² Adopted by the General Conference of UNESCO at its 29th session on 11 November 1997.

⁶⁶³ Mattei (2001) ‘Conclusion’ in *Ethical Eye: The Human Genome* at p.133.

⁶⁶⁴ See Dickens and Cook (1999), pp.57-58, for a discussion of the issues surrounding the disposal of ‘unwanted’ embryos. They cite *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. Sup. Ct. 1992), where ‘[t]he Tennessee Supreme Court has ruled that embryos are neither persons nor property, but governed separately’. See also the UK domestic jurisdiction case, *Evans v Amicus Healthcare Ltd (Secretary of State for Health and Another Intervening)*, CA: 25/06/ 2004, and its culmination in ECtHR, *Evans v. United Kingdom*.

⁶⁶⁵ A technique known as parthenogenesis, and not yet fully achieved in mammals (although there has been a disputed claim with regard to mice.) See *The Scientist*, 01/04/2004, and critique by Jaenisch. <http://www.biomedcentral.com/news/20040421/01/> (Accessed 06/10/04).

parents,⁶⁶⁶ or from one.⁶⁶⁷ That genetic material, from wherever or whoever it might come, is living material and represents the life of its progenitor. All humans shed DNA each day, and the future possibility is that a child could be created using that DNA, without the consent or involvement of the ‘parent’.⁶⁶⁸ Further, those parents may not both, or all, be human. Future possibilities include transgenic beings; those created by combining DNA from two different species, forming a hybrid, (such as a mule – a donkey and a horse) or a trans-species chimera, such as one made by fusing two fertilised embryos from different species – a human and a chimpanzee, for instance.

vi Future Generations

Stock announces that ‘few have yet grasped that we are on the cusp of profound biological change, poised to transcend our current form and character on a journey to destinations of new imagination. ... Never before have we had the power to manipulate our biology in meaningful, predictable ways.’⁶⁶⁹ Silver’s comment on Aldous Huxley’s classic, *Brave New World*, warns that in the future it will be parents, not governments, will be the driving force in utilising the possibilities: they ‘will seize control of these new

⁶⁶⁶ This would happen in a surrogacy with an embryo created from two other people being implanted in a surrogate mother; the mitochondrial DNA of the surrogate would not be eliminated. See generally Howell, <http://www.hbcg.utmb.edu/faculty/howell/content.html> (Accessed 21/04/2002)

⁶⁶⁷ The technique known, somewhat vaguely, as ‘cloning’, or somatic cell nuclear transfer. See Vogelstein, Alberts and Shine, (2003) at p.1237: ‘In scientific parlance, cloning is a broadly used, shorthand term that refers to producing a copy of some biological entity – a gene, an organism, a cell – an objective that, in many cases, can be achieved by means other than the technique known as somatic cell nuclear transfer. [...] a procedure that can be used for many different purposes. Only one of these purposes involves an intention to create a clone of the organism (for example, a human).’ See Meyer’s challenge to this article on other grounds, *infra* n.564 and accompanying text.

⁶⁶⁸ See, e.g., Harris (1999), p.298. See generally Skene (2003) at p.9. Skene, in discussing whether there should be a new criminal offence created regarding theft of DNA, concludes that: ‘On balance, it may be wise to expand the potential civil actions for wrongful taking and testing of genetic material and also to create a new criminal offence. The civil actions might be in conversion; equitable claims for breach of confidence; or complaints under privacy legislation. I have argued that the criminal offence should consist of more than mere taking and testing of genetic material but I acknowledge the difficulty of drafting such an offence.’

⁶⁶⁹ Stock (2003) at p.1.

technologies.’⁶⁷⁰ The consequences for the future of the human race could be dire.

‘They will use some to reach otherwise unattainable reproductive goals and others to help their children achieve health, happiness and success. And it is in pursuit of this last goal that the combined actions of many individuals, operating over many generations, could give rise to a polarized humanity more horrific than Huxley’s imagined Brave New World.’⁶⁷¹

‘Operating over many generations ...’: does the yet-to-be-conceived person have a right to life? This might seem an odd concept, but it has relevance, for instance, in situations of enforced sterilisation for population control or eugenic purposes,⁶⁷² and in respect of certain gene manipulation techniques that may prove detrimental further down the generational line.⁶⁷³ The ARHP makes the following claim, supporting embryonic selection and possible disposal of affected embryos rather than allowing manipulation of the germline:

The only situation in which germline engineering would be required over pre-implantation selection is one in which a couple would like to endow their child with genes that neither member of the couple possesses. This is the ‘enhancement’ scenario, which we believe would lead to a dystopic human future if it were allowed. ... engineering the genes by means of germline modification would allow novel forms of human life to be created within one generation.⁶⁷⁴

⁶⁷⁰ Silver (1997) *Cloning and Beyond in a Brave New World* New York: Avon Books at p.9, in Reinders (2000) at p.76.

⁶⁷¹ *Ibid.*

⁶⁷² See, for a general discussion of coerced or enforced sterilisation, the BMA Report, *The Medical Profession and Human Rights: Handbook for a Changing Agenda* (2001) at pp.348–354. This work suggests that ‘key ethical principles in this field have been identified as liberty, utility and justice’ (p.349).

⁶⁷³ See also Andorno (2003): ‘At the international level, UNESCO Universal Declaration on the Human Genome and Human Rights provides that germ-line interventions “could be contrary to human dignity” (Article 24). Similarly, the European Convention on Human Rights and Biomedicine states that “an intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants” (Article 13).

⁶⁷⁴ <http://www.arhp.org/patienteducation/onlinebrochures/cloning/index.cfm?ID=282> (Accessed 14/11/2004). [Emphasis omitted].

So far, there has been developed a theme of ‘being human’ as not coinciding, necessarily, with being ‘a person’ as such, or at least as far as personhood is understood in Lockean terms. To be recognised as enjoying personhood is not the same as being a rights-bearer, that is, as holding international legal personality. International legal personality is, therefore, a separate concept from ‘personhood’. This can be seen easily from the fact that States and organisations can hold international legal personality, and, as shown above, all human rights-bearers can, whether or not they meet the criteria for personhood. Others who can hold this status are increasingly ‘future generations’.

It is intellectual property law which is in some instances, particularly those involving the breakdown of barriers between species, at the forefront of developments with regard to the recognition of legal challenges to human identity. The Patent and Trademarks Office, USA [PTO] has already issued a disclaimer, that it ‘would not consider human beings to be patentable subject matter, citing restrictions on property rights in human beings.’⁶⁷⁵ Walter⁶⁷⁶ challenges the appropriateness of patent law as a proper forum to decide the fundamental questions of the science of biotechnology, such as transgenic animals, and human gene sequences, as does Brownsword,⁶⁷⁷ who sees the patent regime as ‘informed by a pragmatic utilitarian approach’ – not necessarily desirable, particularly as Brownsword suggests that the ‘European patent regime has been working hard to

⁶⁷⁵ Regarding the application of intellectual property law to the issues under discussion, see e.g. Eisenberg (1997), pp.6-16, especially endnote 4. On patents and genetic engineering, see Tokar (Ed.) (2001); and Vasseleu, ‘Patent Pending: laws of invention, patent life forms and bodies as ideas’ in Cheah, Fraser and Grbich (1996), pp.119.

⁶⁷⁶ Walter (1998).

⁶⁷⁷ See Brownsword, (2004a); and ‘Biotechnology and Human Rights: Where are we Coming From, and Where are we Going?’ in Klang and Murray (Eds.) (2004), Chapter 17. I am grateful to Roger Brownsword for pre-publication sights of these papers. See also Beyleveld, and Brownsword, (1998); and Fukuyama (2002).

marginalize the morality question'.⁶⁷⁸ The morality question is, and always must be, at the root of any attempted answers to what are increasingly complex and difficult questions.

3.6 CONCLUSION

The distinctions which have been drawn are between being a human and being a person. A relational understanding of personhood, *qua* Locke's third category rather than his second, ascribes value rather than accepting it as inherent, and if personhood criteria are necessary to qualify as a member of the human race rather than mere humanity as such, then those who have never enjoyed those abilities, or have lost them (even if they are set at a lower standard than Fletcher's demanding list) would not enjoy the protections of human rights, including the right to have their lives protected by law; their status as rights-bearers is called into question.

Some words of Andorno serve to end this dimension of the argument of this thesis:

In spite of all its weaknesses, however, the current human rights system is the only mechanism available to protect people. This is why the integration of some principles relating to biomedicine into a human rights framework seems fully justified. It should not be forgotten that what is at stake in some bioethical issues, such as human genetic engineering and reproductive cloning, is nothing less than the preservation of the identity of the human species. Thus, it is not an exaggeration to say that we are confronted here with "the most important decision we will ever make."⁶⁷⁹

Rehof, in acknowledging that '[q]uestions of life and death – as they are posed today, thanks to developments in modern medical technology – are not met by easy answers',⁶⁸⁰ asks that we should not 'diminish our efforts to find contemporary solutions in international human rights law.' He finds 'a need for legal protection of early human life,

⁶⁷⁸ Brownsword, *supra* n.677, text accompanying footnotes 12 and 13.

⁶⁷⁹ Andorno, (2003).

⁶⁸⁰ Rehof in Eide and Alfredsson (1999) pp.89-101, at p.101.

human genetic material and the early stages of individual human life in the embryo or fetus.’ This plea is in the context of a chapter on Article 3 of the UDHR, the Article which first stated that ‘Everyone has the right to life, liberty, and security of the person’. The protection of human genetic material cannot be achieved in the context of the current human rights praxis; it cannot be done whilst the jurisprudence of human rights bodies and other fora does not recognise the humanity of the preborn. Without an adequate definition of what it means to be human, and consequentially to be a rights-bearer under the terms of international human rights treaties, responsible preparation cannot be made for the future that has already begun. This is particularly so with regard to the possible creation of a new form of beings, who ought to be considered as human and to have the rights and protections ascribed to them as they are to all other humans, in dignity and equality. A clone, if grown to a person, would look no different from any other person; would, in genetic terms, not be expressed differently; would some futuristic identity card – a microchip, a tattooed number? – be necessary for official society to be able to recognise this being as not a human being – not entitled to human rights protection?⁶⁸¹ Green asserts that:

Those who believe that human life begins at conception – and who also regard activated eggs as morally equivalent to human embryos – cannot ethically approve therapeutic cloning research. For them, such research is equivalent to killing a living child in order to harvest its organs for the benefit of others ... therapeutic cloning remains totally unacceptable to such people because it involves the deliberate creation of what they deem to be a human being in order to destroy it.⁶⁸²

This point is challenged. It is possible to believe that human life is found where human genetic material is found, yet still be able to accept the arguments that do not consider

⁶⁸¹ See, for instance, the PLA website for alternative views to Green’s: *CORE pages on Human Cloning*.

⁶⁸² *Supra*, n.527.

such life sacrosanct, but open to use and destruction in a framework of legal regulation. Perhaps, ultimately, such uses of human genetic material are more than unpalatable and are ethically and morally wrong. If they were, would law have the power to stop them taking place, or is regulation a more pragmatic option?⁶⁸³ However, technology will continue to advance, and it appears to be neither appropriate nor particularly helpful, nor even possible, to draft detailed law to meet each new development, and nor is an outright outlawing likely to be respected. What is required is a general precept, which will meet the objectives of international human rights law with regard to the protection of the individual; that is, that in times and places when life is at boundary moments or fragile or otherwise threatened, effective legal regulation will be in place to protect the interests of those involved, not necessarily the preservation to the utmost of their lives. The concept of 'protected by law' is, therefore, the subject of the next chapter.

⁶⁸³ For a critique of pragmatism in such a field, see Lee, (2003), at p.13.

CHAPTER FOUR

‘Protected by Law’

Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government. Respect for them is an essential safeguard against an over-mighty State. Their observance and full exercise are the foundation of freedom, justice and peace.

Charter of Paris for a New Europe⁶⁸⁴

4.1 GENERAL INTRODUCTION

The Charter of Paris for a New Europe is one of the instruments that articulate the responsibility of government as being its obligations in respect of human rights, and this chapter will focus on the proposition that the right to life shall be protected by law, as an aspect of that responsibility. The scope of what it means to have life protected by law has been addressed by the human rights bodies across a wide range of situations, and has included consideration of what ‘law’ itself means, and of stratagems that might be employed by the State to frustrate the object and purpose of the treaty term, and, likewise, stratagems that could be legitimately invoked by the tribunals themselves in order to best

⁶⁸⁴ *Charter of Paris for a New Europe*, Meeting of the Heads of State or Government of the Participating States of the Conference on Security and Co-operation in Europe (CSCE, now OSCE): Austria, Belgium, Bulgaria, Canada, Cyprus, Czech and Slovak Federal Republic, Denmark, Finland, France, Germany, Greece, Holy See, Hungary, Iceland, Ireland, Italy-European Community, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, Union of Soviet Socialist Republics, United Kingdom, United States of America and Yugoslavia. Paris, 19-21 November 1990.

give effect to those terms.⁶⁸⁵

The approach to this chapter will be to present the quest for a moral basis for law first. Treaty texts will then be re-introduced and examined at an early stage in order to see how it was envisaged that the obligation under the right to life provision was to be recognised by States, and in order to discern whether the offered paraphrase ‘the right to life will be protected by law’ is a valid one; is that what was stated in the right to life Articles? It then proves necessary to analyse the concept of law; what kind of law should be in place in national legal systems to protect life, and what are the consequences of such a law either not being present, or being arbitrary in its application, either to the violation or to the procedure which is established to bring that law to fulfilment? It is here that the ‘Radbruch formula’, mentioned in the introduction to this text, comes into play. The quest is for a ‘moral law’ to protect life, and the assertion is that failure either to enact or apply such a law leads to ‘unbearable injustice’.

The obvious law to protect life is one that prohibits, punishes and deters homicide, and law relating to homicide will therefore be discussed; the requirements that human rights bodies have placed upon States with reference to the investigation, trial and punishment of such crimes will be briefly assessed. What is of particular relevance is that there should be effective national law in place, and that it should be acted upon, and the human rights bodies will be seen to have enforced some regional and international standards upon this, including a dynamic concept, the reversal of the burden of proof where a ‘disappeared’ person was last

⁶⁸⁵ For instance, in the *Godínez Cruz Case*, one of the first contentious cases submitted to the IAmCt, the Court took into account the deaths of witnesses in suspicious circumstances (paras.41-52), and the standard of proof required to establish the alleged facts (paras. 127-52). See also the *Velásquez Rodríguez* and *Garbi & Corrales* cases.

seen in the hands of agents of the State.⁶⁸⁶ Human rights discourse has been able to ensure recognition, in such cases, of the crime of homicide having taken place, and of the recognition of the ‘disappeared’ as a murder victim, with all that that entails for that person and their family.⁶⁸⁷ The human rights bodies, however, have been unwilling to afford the same recognition to the preborn victims of homicide⁶⁸⁸ (as opposed to lawful abortion) and, with the developing possibilities in the field of biotechnology, this refusal has much wider implications, as will be seen.

There are two fields of enquiry, here, therefore; the protection by law afforded at national level, (both in substance and procedure) and the protection which is required by human rights bodies, acting upon their interpretation of the right to life treaty articles, as their jurisdiction allows.⁶⁸⁹ This discussion will follow in the next chapter.

4.2 MORAL LAW AND INTOLERABLE INJUSTICE

4.2.1 THE CASE: MORAL LAW

The argument about what constitutes ‘moral law’ is, in its wider scope, beyond the space available in this thesis; the theme which is of essential importance here is the question of the laws, present in most legal systems of the world, which fall within the scope of the protection of life; are they ‘moral’ laws? A further question would be, if they are not moral, are they law at all? If a law allows for an intolerable injustice, either in its

⁶⁸⁶ First articulated in *Velásquez Rodríguez v. Honduras*, 29/07/1988.

⁶⁸⁷ See Declaration on the Protection of All Persons from Enforced Disappearances, date of adoption 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, (1989) and supplementary Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, (1991); Inter-American Convention on Forced Disappearance of Persons, entered into force March 28, 1996.

⁶⁸⁸ See *Vo v. France*, and discussion *infra*, text accompanying n.399.

⁶⁸⁹ See IACtHR interpretation of their jurisdiction under ADRDM: “*Other Treaties*” *Subject To the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*: Requested by Peru.

substantive provisions or in the procedures that spring from it, and that injustice affects someone's life, or inability to live, does that invalidate the law? That will not be the focus of discussion here; the vast majority of national legal systems are not operating that kind of special case. What is in question is generally only one or two laws – an amnesty law, for instance, allowing that those State agents who have murdered citizens are not subject to trial and prosecution.⁶⁹⁰ It might appear, therefore, that the point is not of relevance to the majority of human rights jurisprudence regarding the right to life – most States do not have laws allowing State use of lethal force with absolute impunity, or indeed other laws which discriminate against a particular group, and arbitrarily kill, or allow to be killed, some of their citizens and others. The nature of the substantive law that is in place and of the procedures that spring from it may present other, less obviously amoral, problems.

i The straightforward case

There are some laws regarding the protection of life with which few would argue as being necessary and proportionate; these are the laws relating to homicide, and their absence would be looked upon as a moral failure, in that homicide would go unchecked. The ECtHR, in *Keenan v. United Kingdom*, offered a base-level and straightforward view of what was entailed in national legal systems in order for States to meet the requirements of obligation called for, in this instance, by Article 2 of the ECHR; that the State should not only refrain from the intentional and unlawful taking of life, but also take appropriate steps to safeguard the lives of those within its jurisdiction.⁶⁹¹ It is not difficult to categorise the safeguarding of life from homicidal attacks as a necessary law and suitable exercise of sovereign power. The Court in *Keenan* also argued for 'a positive obligation

⁶⁹⁰ See IACtHR, *Barrios Altos Case*, 14/03/2001; IAComHR, *Ruiz Dávila (Estiles) v. Peru*, 19/02/1998.

⁶⁹¹ *Keenan v. United Kingdom*, para.89.

on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual', when appropriate,⁶⁹² and this aspect of the protection of life becomes a little more difficult, raising as it does availability and allocation of resources, a point addressed, again by the ECtHR, in *Osman v. UK*.⁶⁹³ There are some matters, however, which are less straightforward, and it can be difficult to say exactly why some act or another, possibly with life-affecting consequences, is moral or not.

As a final point here, consideration of what it would mean to die is important when defining the protection to be given to life (if it is to pass on to Paradise, then an early death may be more 'affordable' than if this life is all that a person expects ever to experience⁶⁹⁴), and for those not accepting the latter argument above, Wilson argues for empiricism over transcendentalism as a guiding force in respect of moral values.⁶⁹⁵ That is, that there can be meaning and purpose to this life without reference to a deity (who has created the moral values), and without necessarily an expectation of life after death to make this life worthwhile.

ii The less straightforward case

An example of a 'less straightforward case' is the sale of children, child prostitution, and

⁶⁹² *Ibid.*
⁶⁹³

⁶⁹⁴ Religious belief in itself may be sufficient for its adherents to be unafraid of death, but for some believers, martyrdom is sought. The veneration of martyrs is a practice known in many societies and religions, and the promise of recognition now and hope of rewards in the hereafter may encourage martyrdom. As well as the more well-known practice of venerating the martyrs of religious traditions, those who fight for a cause, whether as lawful combatants, freedom fighters or terrorists, are often placed in high standing in their societies. See for instance, the Sri Lankan *Peace Secretariat of Liberation Tigers of Tamil Eelam* website, where it is noted that 'Respect, awe, inspiration, veneration and more so the sense of gratefulness permeates the nooks and corners of Tamil Eelam today. Tamil people have started commemorating the fallen fighters who attained martyrdom in their war of independence from oppression and inequality'.
http://www.lttepeacesecretariat.com/mainpages/n25114_11.html (accessed 30/12/2004).

⁶⁹⁵ E.g. Wilson (1998).

child pornography; we recoil from these practices intuitively as immoral, but why? Does justice require their prohibition? Stamatis, in an examination of the ‘postmodern paradox’ of ‘justice without law’,⁶⁹⁶ challenges the postmodern ‘radically subjectivist ethical theory’ of Costas Douzinas and Ronnie Warrington, expressed by them as “A Well-Founded Fear of Justice”,⁶⁹⁷ which ‘challenges the idea that there can be a clear demarcation between right and wrong because such a position would necessarily derive from a rationalist and cognitivist metaethical theory’;⁶⁹⁸ and that ‘it is no longer possible to found ethical action upon knowledge, reason or any a priori conception of the Good’.⁶⁹⁹ Their introduction of the ‘personal moral feelings’ of each individual is a ‘not less extreme solution’,⁷⁰⁰ according to Stamatis. He accepts that ‘spontaneous or intuitive moral responses may lead perhaps to right solutions’,⁷⁰¹ a stance with which Steinbock would agree,⁷⁰² yet she would also agree that ‘intuition on its own is unable to justify these solutions’.⁷⁰³ Justification requires something more: ‘justification’ and ‘justice’ are intertwined,⁷⁰⁴ and Stamatis’ solution is to state that ‘[e]thical or legal norms can be

⁶⁹⁶ Stamatis (1994), p.267.

⁶⁹⁷ Stamatis’ critique is of Costas Douzinas and Ronnie Warrington, ‘A Well-Founded Fear of Justice: Law and Ethics in Postmodernity’ *Law and Critique* 2 (1991), 115-47.

⁶⁹⁸ Stamatis, *supra* n.696, p.268.

⁶⁹⁹ *Ibid.*, p.266.

⁷⁰⁰ *Ibid.*

⁷⁰¹ *Ibid.*, p.268.

⁷⁰² Steinbock, *supra* n.508 and accompanying text.

⁷⁰³ Stamatis, *supra* n.696, p.268.

⁷⁰⁴ See Kelsen’s refutation, in his discussion of ‘Law and Justice’, of ‘classical, conservative natural law theory’ (as challenged by his Pure Theory of Law) in which, he claims, ‘what matters there is less the cognition of prevailing law than a justification of it, a transfiguration, achieved by showing that the positive law is simply the emanation of a natural or divine order or of a system of reason – the emanation of an absolutely “right”, just order’. Kelsen (1934, 1992 ed., trans. B. L. and S. Paulson), § 8, pp.17-18. For a defence of natural law theory as ‘buttressing the claims of the indestructible human rights’ see, amongst many others, H. Lauterpacht, (1950), e.g. pp.111-126. Lauterpacht finds the ‘rationalist foundations’ of natural law as the only reason to explain why, ‘when the international recognition of human rights has become to a substantial extent part of the positive law and when attempts are made, through an International Bill of Human Rights and otherwise, to make that recognition more effective, there is no inclination to jettison the appeal to the natural rights of man and to the law of nature conceived as the justification and the measure of all man-made law’. Lauterpacht, *Ibid.*, p.113.

justified solely through the exchange, actual or potential, of persuasive arguments about what we ought to do'.⁷⁰⁵ The ultimate persuasiveness must rest, it is argued here, in the knowledge or belief that there are some things which are good and just, and which can be known and acted upon.

The international community of States having determined that the sale and prostitution of children, and their use in pornography, represent harms, the Optional Protocol to the CRC, on the Sale of Children, Child Prostitution, and Child Pornography, sets out the procedures that will work to obviate that. Yet this instrument does not show how or why it has been decided that the sale of a child's organs is a harm that should be prevented, deterred and punished by law. As Steinbock comments, we say that some things are wrong because they 'feel' wrong;⁷⁰⁶ for most people, the involvement of children in pornography 'feels' wrong; for some, it does not.⁷⁰⁷ Stamatis' rejection of 'spontaneous and intuitive moral responses' as the only basis for just and justifiable solutions comes into play here, and his reasoning can be applied as a reason for treating each child involved with dignity and respect, 'a logical principle of prime importance since the Enlightenment'⁷⁰⁸ which is 'institutionally recognised in bourgeois societies only partly and sometimes perversely',⁷⁰⁹ would be based in Kant's categorical imperative, reformulating it from its 'formalistic' present to a 'substantive commitment to overcome the social conditions under which self and others demean ourselves, as exploiting or

⁷⁰⁵ *Ibid.*

⁷⁰⁶ Steinbock, *supra* n.508 and accompanying text.

⁷⁰⁷ Paedophiles frequently argue that to allow children to participate fully in sexual lives brings them fulfilment and joy, which should not be denied to them. On this form of paedophilia, see Wyre's definition of the 'non-predatory paedophile', in the Royal Commission into the NSW Police Service Final Report, The Paedophile Inquiry, ('The Wood Report'), 05/01/1997. Vol.IV, p.63, text accompanying footnote 240.

⁷⁰⁸ Stamatis, *supra* n.696, pp.268-69.

⁷⁰⁹ *Ibid.*

exploited, and as alienated and dehumanized human beings'.⁷¹⁰

The theme of the Protocol is that effective national law will be in place to keep children safe, and it is from what is generally accepted as abuse, possibly leading to death – the selected text from Article 3(1)(a)(i)b above refers to selling a child's organs – that they are to be protected. Yet if, somewhere, there are two very rich parents, endowed with everything but with only one precious child, a child that is dying for the want of a transplanted heart, why is it wrong to buy somebody else's tenth child, a 'street child' perhaps, one with little future, apparently surplus, apparently not so precious, apparently unloved?⁷¹¹ Would it be wrong if it were for a kidney, not something quite as life-threatening as a heart? Would it be wrong to take the heart of a child who was extremely disabled and not able to participate fully in life? Would it be wrong to take the still-beating heart of a child that was braindead? We accept that the answers to most of those questions is yes, it would be wrong; yet the agreed position of most States and medical facilities, where such things can be undertaken, is that the answer to the last question is 'no, it would not be wrong'; and regarding taking the organs of a disabled child, there is an ongoing debate, which has been heard in the courts, regarding the use of the organs of an anencephalic child before death has been established.⁷¹²

'Harvesting' organs from beating-heart donors is an accepted and widespread practice.⁷¹³

What is more, it is argued here that it is moral, or that it can be, although formulating a moral protocol to choose the recipient of a scarce donated organ is problematical.⁷¹⁴

⁷¹⁰ *Ibid.* p.269. See Kant, *supra*, n.430 and accompanying text.

⁷¹¹ On the recognition of the life plans of 'street children' and their families, see IACtHR, "*Street Children*" (*Villagrán Morales et al. v. Guatemala*) Case, Reparations (Art. 63(1) ACHR), 26/05/2001, para.85.

⁷¹² *In re T.A.C.P.*, *supra*, n.434, and accompanying text.

⁷¹³ Machado (1998).

⁷¹⁴ See Rutecki (25/06/2004); Caplan (1992).

Dickenson contrasts the Italian and British system for making such determinations: ‘Under the Italian first-come, first-served system a ninety-year-old patient with terminal renal cancer gets the kidney if she comes before the thirty-year-old with no other clinical symptoms than renal failure’.⁷¹⁵ The British system relies on QALY [quality adjusted life years⁷¹⁶] assessments and would give the kidney to the younger person, with presumably more years of active life ahead, barring accidents. The Italians argue their method to be moral: “Why should their shorter lives be measured against lives that would have been longer from no merit of their own?”⁷¹⁷ It is difficult in such circumstances to declare one answer to be moral over the other answer; for the patient who dies for the lack of the donated organ, the difference is not hypothetical.

It is obviously envisaged that the national law will be of a particular kind, and will include substantive and procedural measures; but what kind of law can or should be in place to ensure Stamatis’ desired ‘substantive commitment to overcome the social conditions under which self and others demean ourselves, as exploiting or exploited, and as alienated and dehumanized human beings’,⁷¹⁸ especially, in the context of this thesis, where life is threatened, must now be examined.

⁷¹⁵Dickenson (2002), p.110.

⁷¹⁶ See *The World Health Organization Quality of Life Instruments* (The WHOQOL-100 and the WHOQOL-BREF). On QALY measurement, and its associated questions and problems, see Carr, Higginson and Robinson (Eds.) (2003). In the right to life context, it is interesting to note that ‘Studies have not indicated any objective way of clearly identifying patients who would feel that life is not worth living. Patients may even find quality in life when imminently dying, when their quality of life assessed by current measures is abysmal.’ Farsides and Dunlop, ‘Is there such a thing as a life not worth living?’ in Carr, Higginson and Robinson, pp.113-120, at p.116, footnote omitted. Further, it is difficult to avoid relating QALY indicators to an economic model: ‘[Economic] methodologies can result in a different but profound interpretation of “life not worth living”, namely that particular lives may have a detrimental economic worth.’ (Farsides and Dunlop, p.118).

⁷¹⁷ *Supra*, n.715, citing Calabresi and Bobbitt (1978) *Tragic Choices* New York: W.W. Norton, at p.184; and noting that since Calabresi and Bobbitt published their work, on which Dickenson’s comparison is based, a ‘more evidence-based’ model is operating in Italy. ‘The usefulness of the Italian model is now not so much as an up-to-date description of actual practice as an alternative conceptual model stressing equality above clinical criteria.’ Dickenson, p.110, endnote 8 on p.226.

⁷¹⁸ Stamatis, *supra* n.696, p.269. See text accompanying n.710, *supra*.

iii Any kind of law?

The HRC has made clear what is not meant by ‘law’, in *de Guerrero v. Colombia*.⁷¹⁹

[Therefore] it is the Committee's view that the action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life ... Inasmuch as the police action was made justifiable as a matter of Colombian law by Legislative Decree No. 0070 of 20 January 1978, the right to life was not adequately protected by the law of Colombia as required by article 6(1).⁷²⁰

Law which allowed State deprivation of the life of one of its citizens, in actions disproportionate to any threat involved, is not ‘good’ law: the right to life of Mrs. Maria Fanny Suarez de Guerrero ‘was not adequately protected by the law of Colombia’. The Law of human rights, therefore, is not the law of the Nuremberg laws;⁷²¹ not the kind of law which enabled the ‘lawful barbarism’ of the Holocaust, in Fraser’s terms.⁷²² He notes that ‘Auschwitz’, in all of its barbarity,

[W]as lawful, it was full of law – lawful prescriptions of ‘Aryan’ and ‘Jew’, lawful sterilisations and euthanasia to protect the blood, lawful orders, from lawyers and doctors, for the extermination of those enemies of the state, those parasites who would infect the Volksgemeinschaft.⁷²³

Law was used to determine and destroy the perceived Other. The mere existence of law is not enough. It must be a certain kind of law, a moral law; but what is ‘moral’, in the questions of life? For some, lawful abortion is immoral, and indeed thoroughly evil, as is

⁷¹⁹ See HRC, *de Guerrero v. Colombia*, 05/02/1979, at 137 (1982).

⁷²⁰ *Ibid.*, para.13.3.

⁷²¹ See the comments of Mr. Easterman, representative of the World Jewish Congress, in the discussions surrounding the formulation of UDHR: he suggested the use of the phrase ‘laws in conformity with the principles of the United Nations’, rather than simply ‘law’, drawing on the actions of the Nazis to illustrate his point. UN Doc. E/CN.4/AC.2/SR/3, p.9.

⁷²² Fraser, in Cheah, Fraser and Grbich (Eds.) (1996)

⁷²³ *Ibid.*, at p.74.

lawful euthanasia;⁷²⁴ such laws do not deserve the appellation ‘law’, whereas for others, it is the absence of legal recourse to abortion and euthanasia which presents the greater evil.⁷²⁵ Examination of the basis for this argument means that analysis must now turn to the whole question of law, moral values, and justice, and the role that *Radbruch’s Formula* can play in determining ‘what kind of law’; must the law serve justice?

4.2.2 JUSTICE

The question of what constitutes justice can of course be given no more than cursory treatment in a work of this size; the aspect to be considered here is solely with regard to discovering what may be the just obligation upon States in the prevention of intolerable injustice with respect to the protection, or failure of protection, of human life. As has earlier been commented upon, the most straightforward expression of State responsibility with regard to the right to life has been the requirement to protect, generally seen as a bipolar obligation; that States will neither condone arbitrary use of lethal force on the part

⁷²⁴ On each of these as immoral law, see Keown (Abortion, 1993; euthanasia, 1997a and 1997b).

⁷²⁵ On abortion, see particularly Ghouri’s commentary on the consequences of the US ‘Mexico City Policy’ (colloquially, the ‘Gag Rule’): ‘it states that the US will not allow its overseas aid money to be used to fund any organisations that provide advice, information or counselling about abortion’. There are no longer free birth control pills and condoms available from the clinics run by NGOs who refuse to sign the Gag Rule, such as the Marie Stopes clinics, and national family planning clinics. This is leading to a higher incidence of unwanted pregnancies, and greater incidence of transmission of disease such as HIV/AIDS. Ghouri, *The Big Issue*, June 30 – July 6 2003, 546, 10–12. See, for judicial considerations of national laws relating to the availability of abortions and abortion advice, ECtHR, *Brüggenmann and Scheuten v. Federal Republic of Germany*, judgement of 12/07/1977 (held: German national laws regarding the regulation of abortion did not constitute, *per se*, a violation of Article 8 rights to the respect for private life); *Open Door Counselling and Dublin Well Women v. Ireland*, judgement of 29/10/1992 (held: the absolute nature of the restraint on imparting information about the availability of abortions abroad, and assisting women to travel outside the Irish jurisdiction in order to obtain abortions, constituted a breach of Article 10, freedom to impart and receive information); and ECJ, *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, [1991] (held: where there is no commercial link between a provider of information and a clinic providing abortion services abroad, there is not a violation of EC law in the prohibition of distributing information regarding the availability of such services). On EC law in this context, and that of reproductive rights generally, see Hervey (1998); on Irish law, see *Attorney General v. X et al.*, [1992].

of their agents,⁷²⁶ nor allow homicide within the general population to take place with impunity. This was a principle recognised early in international law; Tomuschat⁷²⁷ points out that both Grotius⁷²⁸ and Vattel⁷²⁹ refuted the dogma that suggested the citizen's lives were in the power of the ruler, to do with as he wished. That is, that people should not, either deliberately or by avoidable accident, have their lives taken from them except in a narrowly prescribed set of circumstances, that is, circumstances 'prescribed by law'. The question is, what if the law fails to meet the standards of morality? What if the enacted law allows the taking of life in what is seen to be an amoral fashion – what if the law itself is evil?

i The *Radbruch Formula* and intolerable injustice

The argument, at its simplest seen as the defining tension between positivism and natural law theories – should legal certainty or moral validity prevail in the search for a just decision? – was creatively addressed by Radbruch, in what has come to be known as 'the *Radbruch Formula*' (or two formulae). Gustav Radbruch was a German legal philosopher

⁷²⁶ Failure by those agents to exercise their responsibility to protect those who are threatened by others will also incur liability. See ICTR, *Prosecutor v. Paul Bisengimana*, 16/04/2006, where the Accused acknowledged that:

68c). Despite his position as *bourgmestre*, and his knowledge of the facts that the refugees at Musha church had been attacked on 13 April 1994, he took no active steps to protect the Tutsi refugees who sought refuge at Ruhanga Complex between 10 and 15 April 1994.

The Chamber's response was:

182. The Chamber considers that, in the circumstances of the case, Paul Bisengimana's official position as *bourgmestre* is an overwhelmingly aggravating circumstance. ... that despite knowing that Tutsi civilians had taken refuge at Musha Church and Ruhanga Complex and that weapons had been distributed to be used to attack them, and despite having the means to oppose the killings, Paul Bisengimana did nothing to stop the killings.

183. ... The Chamber considers that the Accused's presence is a very serious form of participation even if it is not alleged or established that he was a co-perpetrator or that he directly committed a criminal act during the massacre. The Chamber recalls that more than a thousand Tutsi civilians died as a result of the massacres at Musha Church and Ruhanga Complex.

⁷²⁷ Tomuschat (2003) at p.11.

⁷²⁸ Citing Hugo Grotius, (1625) (trans. F. W. Kelsey, 1964) *De Jure Belli ac Pacis Libri Tres*, New York and London: Oceana and Wildy, Book I, chapter IV, VIII

⁷²⁹ Citing Eméric de Vattel, (1758) (trans. C. G. Fenwick, 1916) *The Law of Nations or the Principles of Natural Law*, Washington: Carnegie Institution, Book I, chapter IV, para.54.

who, in his early work, is claimed to have espoused legal positivism, and later to have ‘converted’ to natural law theory.⁷³⁰ Paulson notes that:

Radbruch never shared the ‘positivist’ doctrine’ as Hart understands that doctrine, namely, in terms of the separation of law and morality, and so Radbruch could not have been ‘converted’ from legal positivism thus understood. In his earlier period, Radbruch had already defended a basal criterion to the effect that ‘law is the reality whose meaning (*Sinn*) is to serve justice.’⁷³¹

Radbruch suffered under the Nazi regime,⁷³² and in 1949 set forth his views on the reconciliation of the requirement for legal certainty and the need to secure justice in the face of enacted evil law. He wrote that:

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, [1.] unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’ (*unrichtiges Recht*), must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: [2.] Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely ‘flawed law’, it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.⁷³³

Radbruch’s work was intended at first by him to refer only to situations in which law becomes so evil that it is no longer law, drawing on his experience and understanding of the Nazi era, but from it principles can be drawn to provide scaffolding for a discussion of

⁷³⁰ This interpretation of Radbruch’s position is most clearly seen in the exchange of views on positivism, natural law and the place of morals, known as the ‘Hart/Fuller Debate’. Ward, however, clearly makes the case that Hart and Fuller misrepresented Radbruch, both pre- and post-Nazi era; that his positivism was always infused with ‘the moral argument’ and that positivist legal theory imbued his later argument.

⁷³¹ Paulson, (2006), p.19.

⁷³² For a history, see Ward (1992); this work sets Radbruch in the historical and political context of National Socialism and contrasts his views with those of Heidegger and Schmitt. See also Paulson, *supra* n.731.

⁷³³ Paulson (2006b) at p.26, citing Radbruch’s work in which the *Formula* was first included as: ‘[f]irst published as ‘Gesetzliches Unrecht und übergesetzliches Recht’ in *Süddeutsche Juristen-Zeitung* 1 (1946) 105-8. See the English-language translation, ‘Statutory Lawlessness and Supra-Statutory Law’ (2006) 26 *OJLS* 1(11)’.

the content and nature of law in national legal systems, particularly, in the context of this thesis, law which impacts upon life and the ability to live. *Radbruch's Formula* brings into creative tension the roles of legal certainty and justice, and in those respects is an epitome of human rights jurisprudence; yet what is meant by 'justice'? Radbruch's *Third Minute of Legal Philosophy* explains the concept in context:

Third Minute

Law is the will to justice. Justice means: To judge without regard to the person, to measure everyone by the same standard.

If one applauds the assassination of political opponents, or orders the murder of people of another race, all the while meting out the most cruel and degrading punishment for the same acts committed against those of one's own persuasion, this is neither justice nor law.

If laws deliberately betray the will to justice – by, for example, arbitrarily granting and withholding human rights – then these laws lack validity, the people owe them no obedience, and jurists, too, must find the courage to deny them legal character.⁷³⁴

Paulson shows the later basis for a purposive legal interpretation from radbruch's work, in establishing what is understood by equality: it has a values basis, the values there springing from a political reality. Whereas prposiveness, however, is relative, justice is not: justice has an absolute value, and can be established in legal certainty without reference to purposiveness.⁷³⁵ Radbruch gives an example of such justice: 'Equality under the law, say, or the prohibition of extraordinary courts (*Ausnahmeegerichte*) rests on the requirements not of purposiveness but solely of justice'.⁷³⁶ Substantive and procedural requirements are necessary foundations of such an understanding of justice.

ii Foundations of Justice

The requirements upon States when they undertake human rights obligations (or when

⁷³⁴ Radbruch (1945) and in Paulson's translation, (2006a).

⁷³⁵ Paulson (2006b), p.32.

⁷³⁶ Radbruch, §9, *Legal Philosophy*, in Wilk, (trans.) (1950), and in Paulson (2006b), at p.32 (trans. altered).

customary law obligations are established) are that national laws and practice will meet both substantive and procedural standards. Those standards are interrelated and interdependent; one is of no use without the other, but such standards do not exist in a vacuum, and they reflect the prevailing understanding of morality, and their expression ensures justice. Scherer argues that justice is so fundamental to human society that there was no need for revolutionary orders to proclaim it, along with ‘equality, liberty, fraternity’,⁷³⁷ because ‘no system of government, no matter how despotic or tyrannical, could have survived for very long by openly admitting injustice as a principle of treating its subjects or for regulating relations and interactions between the members of the society’.⁷³⁸ Further, ‘since so far no culture has been identified in which the concern with justice is totally absent, we may presume that a very primitive sense of justice is part of human nature as it has developed during biological and cultural co-evolution’.⁷³⁹ It can readily be assumed that the human rights bodies will be concerned with a firm foundation of justice; it was injustice of a terrible nature with precipitated their own creation, and the avoidance of intolerable injustice is at their heart: ‘[t]heir observance and full exercise are the foundation of freedom, justice and peace’.⁷⁴⁰

iii Perspectives of Justice

Scherer’s interdisciplinary work on perspectives of justice suggests that the central place in a quest for justice would be held by social philosophy, ‘trying to develop theoretically homogenous prescriptions for a universal justice principle that corresponds to universally

⁷³⁷ As in the French Revolution and the American Declaration of Independence. K.R. Scherer, ‘Issues in the study of justice’ in Scherer (Ed., 1992), pp.1-14, at p.2. Scherer admits that ‘equality’ might express a ‘strictly egalitarian’ aspect of justice.

⁷³⁸ *Ibid.*

⁷³⁹ *Ibid.*, p.3. [Citations omitted].

⁷⁴⁰ Charter of Paris for a New Europe, *supra*, n.684.

held moral ideals'.⁷⁴¹ Such normative systems require a basis of ethical and moral principles, and logical consistency,⁷⁴² in which legal and political systems overlap in their own seeking after justice by means of both practical concerns, such as certainty and efficiency, and by procedural rules.⁷⁴³ Scherer's understanding of the practice of law is that 'lawyers are more concerned with procedural justice than distributive justice'⁷⁴⁴ (the concern of economists⁷⁴⁵). Regarding justice, there are additional (although arguably less important) concerns for lawyers, he suggests,⁷⁴⁶ such as unequivocal and efficient administration of the law.⁷⁴⁷ This immediately raises the issue addressed by Radbruch: what if the law itself is immoral? Bowring observes that 'Systems of law, of rules, actual or projected ... as well as notions of human rights, in particular the right of non-discrimination, require, it may be argued, a sense of justice based on shared ethical foundations'.⁷⁴⁸ He cites Gearty as finding 'a central theme of procedural fairness' in the European Convention system, and uses this as an example of the kind of system of law to which he is referring.⁷⁴⁹

⁷⁴¹ Scherer, *supra* n.737, p.11.

⁷⁴² *Ibid.*, Fig.1.1., p.12. There is not scope here for a thoroughgoing discussion 'what makes morality normative'; see Delacroix (2004) for a contrast of Hart's and Kelsen's concepts of normativity, during which she explores Korsgaard's four different accounts of that problem: '[a]ccording to voluntarism, "normativity springs from a legislative will," while the moral realists hold that "moral claims are normative if they are true, and true if there are intrinsically normative entities or facts which they correctly describe." A third alternative is provided by the "reflective endorsement" method, grounding morality in human nature and thinking of moral properties as projections of human dispositions. Appeal to autonomy constitutes the fourth and final alternative, according to which "the capacity for selfconscious reflection about our own actions confers on us a kind of authority over ourselves, and it is this authority which gives normativity to moral claims".' Delacroix, p.503, citing C. Korsgaard in Korsgaard, C. M. *et al.*, *The Sources of Normativity*, (Cambridge: CUP, 1996), 19-20.

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*, p.12. Institute of Governmental Studies [IGS] Public Affairs Report, *Global Poverty: The Gap Between the World's Rich and Poor is Growing, and the Dying Continues*.

⁷⁴⁵ *Ibid.*, pp.12-13.

⁷⁴⁶ Citing J. Bell, 'Justice and the Law', in Scherer, (ed., 2002), pp.114-142.

⁷⁴⁷ *Ibid.*, p.13.

⁷⁴⁸ Bowring (1994), p.70.

⁷⁴⁹ Gearty, (1993), pp.89-127.

iv Moralities of Justice and Human Rights

The exercise of human rights discourse can be seen as a form of morality, in Thomas Pogge's⁷⁵⁰ terms. He talks of a perspective which ascribes to moralities, in one sense defined as 'a more or less unified set of moral beliefs, attitudes and conduct dispositions characteristic of particular persons or groups'⁷⁵¹ the ability to have real effects, which 'may themselves be made the subject of evaluation'.⁷⁵² This perspective of morality, the ability to effect social change and be evaluated in so doing, is one which Pogge seeks 'to extend ... to both key domains of morality';⁷⁵³ ethics, the personal, and justice, 'concerned with institutions which regulate and structure human interactions.'⁷⁵⁴ His judgment of a morality is not abstract and retrospective, but seeks to judge it 'by its own standards: have we organized our moral commitments in a way that reflects, and helps effectively achieve, what by their own lights matters?'⁷⁵⁵ Whilst this is necessarily an oversimplification of an argument, about which he specifically addresses one aspect: 'cases where a code is *counterproductive* by giving *incentives* toward conduct that is *regrettable* by the code's own lights,'⁷⁵⁶ it may be that the perspective taken by human rights discourse is having such a counterproductive effect, in some respects. These might include failure to hold States accountable because of lack of evidence which States refuse to give encourages a continuing lack of co-operation, and this has been recognised in the case law.⁷⁵⁷ Gordon interprets Plato as offering a similar assessment: 'Perfect injustice

⁷⁵⁰ Pogge (2002).

⁷⁵¹ *Ibid.*, p.71.

⁷⁵² *Ibid.*

⁷⁵³ *Ibid.*, pp.71-72.

⁷⁵⁴ *Ibid.*, p.72.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ *Ibid.* [Emphasis in original].

⁷⁵⁷ See, e.g., *Sarma v. Sri Lanka*, para. 8.9: 'The author argues ... [that] it is indeed the State party, not the author, that is in a position to access relevant information and therefore the onus must be on the State to refute the

occurs ... when principles of morality and legality have been successfully invoked as authorisation for unlimited human damage, of unbounded duration.⁷⁵⁸

Provisos are attached to Pogge's argument; some moralities may not be 'in the business of producing anything',⁷⁵⁹ rather expressing 'moral truth or God's law',⁷⁶⁰ and therefore not seeking to produce positive societal consequences, but possibly even remaining true to themselves if that should lead to their own extinction, or that of the human race. This is not the aim of the human rights tribunals; several rights are qualified, for instance, by 'measures necessary in a democratic society',⁷⁶¹ or in the interests of public health, order, or morals.⁷⁶² However, the guiding principles are moral ones, based on recognising dignity in the individual and in the wider aspect of the human race's communal dignity, and on a requirement of actors themselves behaving with dignity, human rights discourse is a form of morality in which accomplishing societal change is a *sine qua non*.

This point, regarding a cultural specificity to understandings of dignity, is supported by

presumption of responsibility.' See also *Sendic Antonaccio (Raul) v. Uruguay*, paras.18-19, where the State duty to provide information is equated with the victim's right to be heard. See also HRC, *Hiber Conteris v. Uruguay*, No. 139/1983, paras.182-186.

⁷⁵⁸ See Plato in Gordon, (2002) at pp.82-83, where Gordon refers to Plato's concept of "perfect injustice": "There are those who engage in single acts of force or fraud; Thrasymachus says, those "who do such wrong in particular cases are called ... burglars and swindlers and thieves," and when they are detected they are "punished and incur great disgrace." But there is a form of tyranny in which the robbery occurs "not little by little but wholesale;" and when, in addition to taking the citizens' money, a man has made slaves of them as well, "then, instead of ... names of reproach, he is termed happy and blessed, not only by the citizens but by all who here of his having achieved the consummation of injustice".' Citing Plato, Book 1, Republic, 27-28, (B. Jowett trans., Random House 1991)

⁷⁵⁹ *Supra*, n.750, p.72.

⁷⁶⁰ *Ibid*.

⁷⁶¹ E.g., Articles 8-11, ECHR. However, in the context of the right to life, note that the burden of necessity is greater: e.g., *McCann et al. v. the United Kingdom*, *supra*, n.851, at para.149: "In this respect the use of the term "absolutely necessary" in Article 2 para.2 ... indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 ... of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in [Article 2]".

⁷⁶² *Ibid*.

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the arguments of commentators, such as Otto and Grovogui, in challenging the universality, and therefore the universal justice, of international law prescriptions.⁷⁶³ Otto argues that the basis of dignity in human rights discourse is flawed, writing in the context of a project that seeks to ‘explore the effects of the innocent ideal of universal human dignity as it is presently constituted by the economy of Truth of human rights discourse and argue that the coherence and determinacy attributed to dignity is distinctly modern’.⁷⁶⁴ She ‘highlight[s] the relationship between the individual and her/his society that is assumed by the human rights paradigm’, and argues ‘that it erases many women’s experiences and is anathema to non-European communitarian traditions’. Her conclusion, ‘that the claim of human rights law to innocent universal foundations must be rejected’, is not one that is disputed here, but it is argued that a broader understanding of the respect to be conferred on all humans, *qua* humans and not as meeting some complex personhood criteria, promotes an understanding of the recognition to be conferred on humans which demonstrates both a wider cultural universality and a more moral concept of what is due to that human, in order that vast injustice may not be perpetrated under colour of law. Grovogui’s contention is that:

It is my perception that European perceptions of the self and their metaphysical representations have been crucial to the structure of international law. They have enabled Western Christendom (and, later, the West) to create juridical instruments with which to maintain exploitative relations with other continents within presumed universal orders.⁷⁶⁵

Dignity, in all of its aspects, cannot be equated, for instance, with watching people starve to death; nor with being the person starving.⁷⁶⁶ There cannot be health without sufficient

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⁷⁶³ Grovogui (1996); Otto (1997). See also generally Baxi, (2002) and Petchesky (2003).

⁷⁶⁴ Otto (1997), p.5.

⁷⁶⁵ Grovogui (1996) p.16.

⁷⁶⁶ See Powell in Likosky (ed.) (2002).

and adequate food; there is present in the world sufficient food for every person to be able to eat the necessary calorific value every day, and the cause of starvation is, at its most simplified, not one of production, but of distribution,⁷⁶⁷ which can easily be understood as unjust. A 2003 report has noted that almost eleven million children under five years old are dying each year, ‘most from preventable causes, and almost all in poor countries ...’

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Undernutrition is the underlying cause of a substantial proportion of all child deaths, and better information on its determinants is needed’.⁷⁶⁸

Everyone’s death is their own; the most intensely personal undertaking that will ever be experienced by a human being. To that extent, every death is private, even if it has causes or consequences beyond the individual. Few deaths are, however, entirely private, and nearly all involve in some measure the more public domain,⁷⁶⁹ some more than others; the deaths not of accident but of terrorism, or being accident are ‘adverse incidents’⁷⁷⁰ in the public sector, or the consequence of avoidable but generally accepted risk. Those where there is an element of involvement of some others, either in causing, or failing to alleviate, the terminal harm, might be described as ‘national public deaths’. Then there are the ‘international public deaths’ – those which are a consequence of, for example, poverty,⁷⁷¹ global pollution, war, cross-border terrorist activity, or epidemic disease.⁷⁷² The extent to

⁷⁶⁷ See generally, ‘Consumption for Human Development’, *Background Papers: Human Development Report 1998* New York: UNDP, [and Pogge \(2002\)](#).

⁷⁶⁸ Black, Morris and Bryce (2003), at p.2226, 2233.

⁷⁶⁹ See Martin (1993) and his discussion of ‘black deaths as political deaths’ in the Australian Aboriginal context.

⁷⁷⁰ Such as medical accidents: see Dickens, (2003).

⁷⁷¹ ‘One-third of all human deaths are due to poverty-related causes, such as starvation, diarrhoea, pneumonia, measles, and malaria, which could be prevented or cured cheaply through food, safe drinking water, vaccinations, rehydration packs, or medicines.’ Institute of Governmental Studies Public Affairs Report, *Global Poverty: The Gap Between the World’s Rich and Poor is Growing, and the Dying Continues* (2001). See Population Information Program, ‘*Solutions for a Water-Short World*’. See also Pogge (2002).

⁷⁷² Such as Severe Acute Respiratory Syndrome [SARS]: see Fidler, (April 2003, June 2003, 2004); Dute, (2004); Martin, (2004). See also Cliff, Haggert and Smallman-Raynor (2004), at pp.154, 182-183, and 194. ‘SARS:

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which the public domain of individual deaths, or mortal risk, is the subject of national law, or international human rights law, is problematical.

v Themes of Justice

Recurring themes here are distributive justice, legal certainty, procedural fairness, and non-discrimination, all of which can also be drawn from Radbruch's work.⁷⁷³ Bowring's case, in his essay on the then newly-emergent independent Latvia, was that the situation there 'call[ed] for forms of legal regulation and resolution which are adequate and are consciously formulated (and which do not yet exist) particularly in relation to recent arrivals who may also constitute a "minority".'⁷⁷⁴ He notes, in citing Gearty, that Gearty's concept of due process 'means, in ascending order of generality: first, the trial situation; second, the protection of minorities; and third, the fairness of the political process itself'.⁷⁷⁵

The points to be drawn from this to aid the present discussion are, firstly, that it is the political process which creates the law, and the law must itself be a moral law in order for the interests of justice to be served. Second, procedure counts 'across the board'; in the creation and the exercise of the law. Third, minorities must have a voice. Regarding the present debate, distributive justice in its wider economic terms will not be covered in this thesis, although its concerns – the saving of lives that will be lost because of lack of food and healthcare – is a logical extension of this work, even if beyond its scope in the current

a fatal lung disease that first appeared in China in late 2002, and spread rapidly through air travel to 30 countries.' (Figure 12.1., p.154.)

⁷⁷³ See Paulson, (2006b): 'Radbruch argues, purposiveness qua component of the idea of law is clearly and inevitably relativistic. The political decision on ultimate values provides, *inter alia*, a standard for applying

the principle of justice, and – underscoring the obvious – a standard for, say, distributive justice is indispensable'.

⁷⁷⁴ Bowring, *supra* n.748, p.71.

⁷⁷⁵ *Ibid.*, p.70, n.4, citing Gearty, *supra* n.749.

context.

The themes which are of particular import are therefore the substantive law; the procedure which springs from it; and the protection of minorities. So that there may be no confusion, it is emphasized that the minorities in question are not only those usually included in such a descriptor, but the ‘new minorities’ of ‘new humans’; those whose identity was discussed in the last chapter – the humans who may not be persons, and the humans who may, at first sight, not be humans at all.

4.3 SCOPE OF THE PROTECTING LAW

4.3.1 THE SUBSTANTIVE LAW

The most obvious requirement of a national legal system, in protecting the right to life by law, is that homicide (by State and non-State actors) should be adequately prevented, deterred, investigated and punished, within the criminal justice system, and as appropriate accidents should be treated likewise.⁷⁷⁶ That is not as straightforward a requirement as it would at first appear,⁷⁷⁷ and raises issues of relevance to the whole concept of the scope of the right to life provision, involving cross-cultural and procedural matters.

i States of Homicide: Unlawful Taking of Life

It can be firmly stated that long before the concept of a ‘right to life’ was formulated, all societies and all cultures have, in whatever way is known to them, prohibited some form

⁷⁷⁶ See e.g. ECtHR, *Keenan v. United Kingdom*, para.89.

⁷⁷⁷ See the SACC case, *ex parte Minister of Safety and Security et al. in Re. The State v. Walters and Walters*, for a comparative discussion (para.39) on the defence of justifiable homicide, with related analysis of State use of lethal force in the context of Constitutional interpretation of limitations on guaranteed rights (para.37), the limiting of potentially deadly force to most serious cases (para.44), and the exercise of proportionality (para.47).

of the unlawful taking of life.⁷⁷⁸ Issues lie within the definition of life itself (and this is an area in which modern technical skills are broadening the field from that which was known to ancient societies), in questions of identity, including enfranchisement or caste,⁷⁷⁹ and ownership, and in concepts of unlawful killing. What constitutes unlawful killing is a subject universally variable and universally unsatisfactory.⁷⁸⁰ Legal systems and other less formalised codes have recognised the need to differentiate between ‘unlawful’ killing and killing in what may be deemed a ‘lawful’ manner. Directly ‘lawful’ would be, for instance, judicial execution, or killing in self-defence, where these exceptions have found their way onto statute books, and been accepted in international law.⁷⁸¹ Regarding ‘unlawful killing’, however, in human rights terms, where it is the State responsibility which is at issue (possibly also for the actions of non-State actors) the obligation is primarily twofold: having appropriate legislation in place, and acting upon it.

What was deemed ‘unlawful’ varied; the killing may be classed as first-, second-, or third-degree murder, or manslaughter, in different jurisdictions and depending upon factors variously known as ‘malice aforethought’, premeditation, or intention; whether the loss of life takes place during the commission of another crime, such as rape or theft; and also upon factors recognised by the human rights bodies as the level of heinousness of the

⁷⁷⁸ See Westermarck (1924) pp.383-90, and generally Falk Moore (2005).

⁷⁷⁹ See Dahiya (1985), pp.17-19, for discussion of the law of homicide in Hindu law in India: ‘homicide was divided into various degrees sometimes on the basis of the circumstances of each case but usually on the basis of the caste of the murderer and the person murdered. ... the use of criminal force by a person belonging to a lower caste to one belonging to a higher caste being regarded as a graver offence than in other cases.’ [Footnote omitted].

⁷⁸⁰ A detailed discussion of homicide is beyond the scope of this thesis. See UK Law Commissioners Paper, *The Law of Murder: Overseas Comparative Studies* (2006): analysis of the law of murder in the jurisdictions of Australia (pp.2–21), Canada (pp.22–65), France (pp.66–74), Germany (pp.75–86), Scotland (pp.87–105), and USA (pp.106–117). See also Vasdev (1978), and Mahmoud (1996), Sudan; Bajwa (1996), Dahiya, (1985), Deshta and Deshta, (2003), Yeo (2003), India; Donovan and Assefa (2003), Ethiopia; Eames, (2003), and Martin (2003), Australian Aboriginal homicide; Stroud (1968), early Athenian homicide; Melville (1915), Roman law.

⁷⁸¹ See HRC, *de Guerrero v. Colombia*, 05/02/1979, at 137 (1982), para.13.3

crime. In some societies, it would be incumbent upon a man to kill someone who had, for instance, killed his brother, or violated his wife.⁷⁸² Such would not be unlawful killing. And killing one's own slave, ie. the destruction of one's own property, has rarely been the subject of sanction.⁷⁸³ Many cultures throughout history have not made death following social exclusion,⁷⁸⁴ (whether or not the exclusion was voluntary)⁷⁸⁵ the subject of law. When the time comes for a person to die, either because they are old, or ill, they simply walk away, or are left, or are killed. The survival of the group depends upon this willingness to sacrifice one's self or one's family members (usually parents).⁷⁸⁶ The wide range of cultural difference in what is considered 'lawful' and 'unlawful' killing⁷⁸⁷ raises

⁷⁸² See, e.g., Dorothy Whitelock (Ed.) *English Historical Documents I* (1955), p.380, in Hayashi, (1990) p.182: 'in the ninth century King Alfred had to stipulate that "a man may fight without incurring a vendetta if he finds another man with his wedded wife, within closed doors or under the same blanket".' Hayashi suggests that the seducer may have escaped with his life by paying *wergelde* 'and supplying the husband with a new wife'. (p.181).

⁷⁸³ See Stroud (1968), at pp.39-40, for a discussion of early Athenian criminal law. Stroud shows that a slave-owner had a right to prosecute a homicide; the only other ground of right to prosecute was to be a member of a victim's family (whether the victim was freeborn or slave).

⁷⁸⁴ See Konner (1993) p.157.

⁷⁸⁵ Although, as noted above, the deaths were not always at the wish or instigation of the victim; sometimes in terms of local law such killings were murder, that is parricide, a deeply condemned act leading to particularly vicious forms of capital punishment, such as that practised by the Ossetes where the perpetrator would be enclosed in his/her house, and, with the whole community looking on, be burnt alive together with all her/his possessions. In other societies, such killings of elderly and ill dependants, found necessary for the survival of society, were expected, accepted, and carried out by prescribed methods, with no condemnation by law or neighbour. Westermarck, (1924).

⁷⁸⁶ For instance, 'Ubasuteyama', noted by Macer as a practice 'which could be translated as "Grand-mother throwing mountain"'. This practice was relatively well known before the Meiji era, and involves the son carrying the mother up to the mountain to leave her there to die ... The reason was usually the shortage of food. This unpleasant practice is reported to still occur in Korea, and is also shared with Siberian tribes such as the Yakuits and Mongolians'. Darryl Macer, Closing Address, UNESCO ABC and the Third International Tsukuba Bioethics Roundtable (2000), *Bioethics in Asia*, C5, pp. 299-300. See also Westermarck, *Ibid*.

⁷⁸⁷ See Levy on the Inuit and the Spartans, and their practices of infanticide of weak children; the Inuit were unable to survive as a society in their harsh living conditions if burdened with infants who were sick; the Spartans chose to end the lives of less strong children in order to preserve the group as physically strong, not a necessary condition in Sparta, but a chosen one – a form of Nazi Aryan argument. The reasons for hastening the death of ill children are, on first sight, the same; to prevent the weakening of the group. The moral approach is fundamentally different. Levy suggests that 'among the Inuit, we saw that they had a justification for their actions that we could accept; in their circumstances, we might act in just the same way. But this does not seem to be the case for the Spartans. They did not face starvation if they allowed such a child to survive.' Levy's opinion is that the Spartan approach 'is more directly moral' as the Spartan honour system requires the sacrifice

issues regarding the fundamental basis of moral argument with regard to the preserving or ending of lives. A major fundamental difference between then and now appears to be the value given to life; in Anglo-Saxon and Germanic culture, a monetary price, varying according to status in society, the *wergild*,⁷⁸⁸ was assigned to men, and this provision was – and in some circumstances still is⁷⁸⁹ – echoed in other cultures across the world. The price for a woman’s death was generally less than for that of a man, and can be taken as an early example of ‘life’ being related to ‘gender’ and being valued differently for men and for women, emphasising the notion of value and worth as defining factors in life, particularly when assessed against the rules of warfare, described above, and the price to be paid for the dishonourable killing of an equally-born man.

Yet what is an unlawful taking of life and deserving of the most stringent penalties is not quite as simple as it may at first appear; what should be a relatively straightforward expectation, that homicide should be prevented, punished, and deterred, is in fact a maze of complex variables, with wide-ranging cultural understandings of the nature of the crime and the degree of culpability of the perpetrator and contribution of the victim to their fate; even debate and changing understandings of the identity of victims of murder *qua* ‘victims’. Was the person a member of a different – and ‘outcast’ – caste, or a slave? Had the person committed a crime for which the punishment was judicial execution, had a

of such children for an ideal rather than a necessity, although it is a moral system which is very alien to the ones we know and are comfortable with. Levy (2002) pp.100-104.

⁷⁸⁸ ‘In Anglo-Saxon and Germanic law, a price set upon a person’s life on the basis of rank and paid as compensation by the family of a slayer to the kindred or lord of a slain person to free the culprit of further punishment or obligation and to prevent a blood feud’. Also *wergeld*, *wergelde* or *weregild*. American Heritage Dictionary of the English Language (4th ed., 2000).

⁷⁸⁹ See Pukë (2003) ‘Blood feuds trap Albania in the past: Thousands forced to take refuge as medieval code targets fathers and sons’. Note particularly: ‘Under the ancient code, if a man finds his wife with another man, he has the right to shoot them both, but only with one bullet. If a woman in his family is killed, he must kill a woman in the enemy family, or their dog. Both are considered worth half a man.’

price been paid, was a body found, was the perpetrator of sound mind? A victim of homicide is someone who has been unlawfully killed; however, that ‘someone’ may not be the preborn, however malicious the attack upon a pregnant woman. In the case discussed above, *Vo v. France*,⁷⁹⁰ the ECtHR’s decision that the unborn could not be subject to unintentional (or intentional) homicide means a failure to protect by law, to allow identity as a murder victim, to permit prosecution of the perpetrator. If even this question, of ‘is there a murder victim’, is open to such wide complexities, it is apparent that there is a great challenge for the international law of human rights in determining and establishing universal standards for the protection of life.

Risks which some societies are prepared to accept, and others are not, influence whether a death which might be seen as accident, or lawful killing, in one time and place, is homicide in another. Justifiable homicide is when one person dies at the hands of another, but there is a reason present which removes blame; for instance, a legitimate act of war, or judicial execution where the death penalty remains upon the statute books. Some jurisdictions allow lawful medical intervention in death,⁷⁹¹ when a person nearing the end of life is given medication to hasten that end, or artificial respiration or hydration and

⁷⁹⁰ *Supra*, text accompanying n.399.

⁷⁹¹ There is some confusion regarding the use of terms, ‘euthanasia’ being generally employed for all such interventions. The American Geriatric Society [AGS] definitions are helpful:

Physician-assisted suicide [PAE]: When a physician provides either equipment or medication, or informs the patient of the most efficacious use of already available means, for the purpose of assisting the patient to end his or her own life.

Voluntary active euthanasia [VAE]: When, at the request of the patient, a physician administers a medication or treatment, the intent of which is to end the patient's life.

Withholding or withdrawing treatment: When a medical intervention is either not given or the ongoing use of the intervention is discontinued, allowing natural progression of the underlying disease state.

AGS Ethics Committee, Position Statement: Physician-Assisted Suicide and Voluntary Active Euthanasia, (November 1994 / May 1998 / November 2002).

For critical comment on one jurisdiction permitting legal VAE, the Netherlands, (*Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding* (Termination of Life on Request and Assisted Suicide Act)) see Amarasekara and Bagaric, (2002).

nutrition are withdrawn, perhaps because of unbearable pain or suffering, or because the enjoyment of all faculties has come to an irreversible end. Self-defence,⁷⁹² and state use of lethal force in order to achieve legitimate ends, such as the protection of others,⁷⁹³ are also accepted as justifiable homicide; although there are concomitant duties, such as that to plan and carry out operations with great care, and also to mitigate against loss of life in the use of force, by, wherever possible, employing what are termed less-lethal technologies.⁷⁹⁴ In these circumstances, there may be an intention to kill or to cause grievous bodily harm; there are other situations, such as death during medical treatment, when there is not such an intention, although the possibility of death may be very high, even one hundred percent certain, as was the case in the separation of conjoined twins “Jodie” and “Mary”, when it was known that the operation needed to save Jodie’s life would kill Mary.⁷⁹⁵ Societies have been creative in finding ways of ‘defining out’ some of the situations of one person’s death at the hands of another, often because the societies themselves did not want to bear the pain of the retribution which their legal systems deemed necessary for murder. The crime of ‘infanticide’ is one such creative device.⁷⁹⁶

⁷⁹² On ‘battered woman syndrome’ [BWS] as a defence to a charge of murder, see the debate between Dressler and Horder in Shute and Simester (eds., 2002), pp.259-82, and 283-297.

⁷⁹³ See United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Force and Firearms Principles), para.9: ‘intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life’. Raised in ECtHR, *Hugh Jordan v. UK*, para.88.

⁷⁹⁴ Patten Report Recommendations 69 and 70 Relating to Public Order Equipment, Annex to the Report of the Independent Commission on Policing for Northern Ireland (the Patten Report of September 1999), para.23: ‘Article 2 of the ECHR places an obligation on the State positively to promote the right to life. The provision and use of less lethal weapons and options provide a means of fulfilling that obligation, and protecting the lives of the public and police officers, in violent confrontations.’ (April 2001). See also Police Complaints Authority, *Safer Restraint* (Report of the conference held in April 2002 at Church House, Westminster).

⁷⁹⁵ *Re A (Separation of Conjoined Twins)(Minors)*, 22/09/2000.

⁷⁹⁶ On a similar situation where the defendant is ‘pathologized’, see Dressler on ‘Battered Woman Syndrome’ [BWS], when severely traumatized women kill their abusing partners, commenting on the American case of *State v. Norman*: ‘The conceptual – and even practical – effect of BWS evidence is to pathologize the Judy Normans of the world. It replaces the stereotype of the hysterical woman with the battered one. BWS marks the woman as a “collection of behavioural abnormalities” who lacks the psychological capacity to remove herself from her

Ward,⁷⁹⁷ in an article exploring ‘the sad subject of infanticide’ in Britain in the century or so prior to the Second World War, describes the perceived need then to find a way ‘to distinguish the killing of newborn babies by their distressed mothers from other murders’, although this perceived need is in itself problematical – why not other children, why not killings by fathers?⁷⁹⁸ Previous ‘solutions’ included ‘defining violent deaths as concealed births’ or the piteously cruel imposition ‘of a death sentence that was never intended to be carried out’, categorised as farcical by Ward.⁷⁹⁹ The answer was found, not in ‘a simple replacement of a legal by a medical model of crime’, but in ‘the Infanticide Acts [which] involved a *reconstruction* of medical concepts to fit the needs of the law.’⁸⁰⁰ There was, at that time, no medical understanding of puerperal insanity,⁸⁰¹ but the 1922 Infanticide Act approximated an invention of such a state by providing a partial defence to murder where the mother of a ‘newly born child ... had not fully recovered from the effect of giving birth to such a child, and by reason thereof the balance of her mind was then disturbed’.⁸⁰²

abusive partner’. [Footnotes omitted; citing A.M. Coughlin, ‘Excusing Women’, (1994) 82 *California Law Review* 1, at 76]. Dressler, ‘Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life while Killing Moral Monsters’, in Shute and Simester (eds., 2002), pp.259-82, at p.268. See response by Horder, ‘Killing the Passive Abuser: A Theoretical Defence’ at pp.283-97.

⁷⁹⁷ Ward (1999).

⁷⁹⁸ See Pinker, (1997); and Ward, *supra* n.797, p.176, where he notes that ‘rather than seeking to punish infanticidal women in the name of equality, we should perhaps ask why the blurring of boundaries between offenders and victims which is a feature of the courts’ attitude to some women cannot be extended to some men’. See also discussion in Ormerod, *Smith and Hogan*, (2005) at pp.497-9.

⁷⁹⁹ *Ibid.*, p.174.

⁸⁰⁰ *Ibid.* See Terry Threadgold, ‘Black man, white woman, irresistible impulse: media, law and literature making the black murderer’ in Cheah, Fraser, and Grbich (1996) at pp.163-186, especially p.166, where Threadgold draws on Foucault to suggest that the development of ‘the theory of limited responsibility and the introduction of all the degrees of insanity into the concept of responsibility before the law ... made it possible for not only psychiatry but all the social and human sciences to intervene in judicial procedure and to reduce ... the power of the judiciary.’ Citing Foucault, (Ed.) (1975). *I, Pierre Riviere, having slaughtered my mother, my sister, and my brother ... A Case of Parricide in the 19th Century*, University of Nebraska Press, Lincoln and London.

⁸⁰¹ Similarly, ‘In the USA, BSW is not now recognised as a mental disease’, although it may be a precursor to symptoms related to post-traumatic stress disorder’. Dressler, *supra*, n.792, at p.268, footnote 45, and citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., Washington, 1994).

⁸⁰² *Supra*, n.797, p.170. Similar terminology was included in other jurisdictions: *Infanticide Act (Northern Ireland)* 1939, Article1; Fiji Islands, Penal Code (Cap. 17), para.205 (see *Ilibera Verebasaga v. The State*, C.A. Fiji Islands:

‘Newly born’ was replaced by ‘under the age of twelve months’ in the 1938 Infanticide Act, in recognition of the possible effects of lactation on the woman’s mind. This change further reflects the working of law as including its own construction of a socio-medical not-quite-reality, the (allegedly) disturbed mind of the mother of a neonate being sufficient to exonerate the killing of that newborn or infant, but only of that child;⁸⁰³ a kind of focussed mental disturbance. Steven Pinker relates this concession to a confusion regarding the value or worth of the infant’s life, compared with the lives of those whose potential for personhood was more nearly accomplished by virtue of being older;⁸⁰⁴ a state remarked upon by Ward, in a comment upon a work written in 1902, as ‘the tragedy [portrayed] as befalling the ‘home’, rather than the ‘identityless’ infant victim’.⁸⁰⁵

Whatever the reason, society could not be comfortable with the usual penalties being visited upon the mother responsible (or not ‘responsible’) for filicide.⁸⁰⁶ ‘Far from law being an institution which ‘thinks’ autonomously, a consistent application of legal theories to cases of infanticide became *unthinkable* when it clashed too starkly with general social ideas and values ... It was this which created the anomaly which law’s reconstruction of medical knowledge was called upon to solve.’⁸⁰⁷

As demonstrated in the case of infanticide, such a thorough silencing – the child, the

Criminal Appeal No. AAU0042 of 2000S (High Court of Fiji Islands Criminal Case No. HAC000800S), 22 November 2001).

⁸⁰³ Although see the *Crimes Act* (1961) / 43 of New Zealand, section 178 (providing that the killing of any child under 10 shall not be counted as murder, if the mother is found to be suffering from the effects of childbirth or lactation in respect of that or any other child).

⁸⁰⁴ Pinker (1997).

⁸⁰⁵ *Supra*, n.797, p.167, and citing Baker (1902) ‘Female Criminal Lunatics: A Sketch’ *Journal of Mental Science* 47: 13-26, and Jonathan Andrews (1998) ‘The Boundaries of Her Majesty’s Pleasure: Discharging Child Murderers from Broadmoor and Perth Criminal Lunatic Department c.1860-1920’. Unpublished paper, School of Humanities, Oxford Brookes University.

⁸⁰⁶ Pinker, *supra* n.804, cites Resnick as arguing that ‘neonaticide’ should be used to denote the killing of a child of less than one day old, and filicide, the killing of a child older than one day.

⁸⁰⁷ *Supra*, n.797, p.175.

mother, the father – in an attempt to achieve a ‘good’, highlight the importance and relevance of Edwards’ and Townshends’ positing of a ‘contextualist focus’.⁸⁰⁸ An understanding must take account of the situations in which people find themselves, their location in place and culture and time. The strength of these positions becomes apparent in the search for identity, the identity of the individual rights-bearer. The human rights-bearer may be defined out of proprietorship of self and rights not by any inherent difference, but by location.

iii *The Radbruch Formula and substantive law*

Radbruch’s work has had some impact on recently decided human rights cases, where the human rights bodies were examining the substantive law in place in a particular national legal system, that of the German Democratic Republic, in order to ascertain whether it was ‘law’ at all; was it perpetuating intolerable injustice? These and other issues regarding the fundamental nature of the law on the statute books were analysed by human rights bodies in the *Border Guard Cases*: before the HRC, *Baumgarten v. Germany*,⁸⁰⁹ and in the ECHR forum, *K.-H. W. v. Germany*⁸¹⁰ and *Streletz, Kessler and Krenz v. Germany*.⁸¹¹ In *Baumgarten*, the situation giving rise to these cases was described by the Committee:

Between 1949 and 1961, approximately two and a half million Germans fled from the German Democratic Republic to the Federal Republic of Germany, including West Berlin. To stop this flow of refugees, the GDR started construction of the Berlin Wall on 13 August 1961 and reinforced security installations along the inner-German border, in particular by installing landmines, later replaced by SM-70 fragmentation mines. Hundreds of persons lost their lives attempting to cross the border, either because they set off mines, or because they were shot by

⁸⁰⁸ Edwards and Townshend (2002) at p.3.

⁸⁰⁹ Views of 31/07/2003.

⁸¹⁰ 22/03/2001.

⁸¹¹ 22/03/2001.

East German border guards.⁸¹²

The cases brought were instigated by those responsible both for the policy and more directly, as border guards, for the deaths, challenging whether they had received fair trials, as their actions were, they argued, compatible with law in place at the time.⁸¹³ The relevant point here is the nature and scope of that national law, and the extent to which it met international and regional standards with specific reference to the right to life. The author's and applicants' contentions were that they were acting within the prevailing national law, in preventing people from leaving their country 'unlawfully'; particularly at issue in these cases was *ex post facto* criminal responsibility. The State's response was that 'the legal justification in section 27, paragraph 2, of the *Border Act*, as applied in the GDR's state practice, had to be disregarded in the application of the law because it violated basic notions of justice and humanity in such an intolerable manner that the positive law must give way to justice (so-called *Radbruch formula*).'⁸¹⁴

iv Retribution for Homicide

Retribution for homicide can take a number of forms; a determinate length of imprisonment is common now in the Western world, although either an indeterminate term, or life without parole, is potentially available to the sentencing court.⁸¹⁵ Other

⁸¹² *Supra*, n.809, para.3.1.

⁸¹³ See Geiger (1998); Miller (2001); Mertens (2003); Fraser (2003); *GLJ* Case Comment, Vol.2, No.6, 01/04/2001.

⁸¹⁴ *Supra*, n.809, para.6.2. Citing Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristen-Zeitung* (1946), p.105, at p.107. On the Radbruch formula, and the Hart-Fuller debate generally, see Fraser, (2003), pp.59-68.

⁸¹⁵ See SACC, *State v. Makwanyane*, para.218, on the constitutionality of life imprisonment in Germany; similarly *Decision No. 23/1990 (X.31.) AB* of the Hungarian Constitutional Court, of 24 October 1990; van Zyl Smit (2002) for discussion of the moral, legal and constitutional issues which life imprisonment without possibility of parole poses.

cultures have accepted a ‘blood price’; in some societies, the relatives (‘heir’ in Islam⁸¹⁶) could, and still can, accept the payment of blood money,⁸¹⁷ if they wished to exercise mercy and not insist on the giving of a life in return for the taking of a life, but by far the most common punishment for murder throughout history has been judicial execution. The notion of a ‘life for a life’ is one that can be traced back to the oldest documents, such as the Code of Hammurabi;⁸¹⁸ the evolution of the idea that the death penalty is both inhumane and ought to be unlawful is one that has been developing over the past few centuries, but only as a pan-European concept since the inception of the human rights treaties. Amnesty International report that ‘more than half the world’s countries have now abolished the death penalty for all crimes’.⁸¹⁹

With respect to cultural difference, it can be seen that a criminal justice system in which the State takes on the sole responsibility for prosecution of alleged offenders is a very Western concept.⁸²⁰ Tribal customary law still maintains some of these distinctions: Donovan and Assefa describe systems extant in Ethiopia, such as the killing of alleged witches, or revenge killings (a situation also persisting still in Europe, for instance

⁸¹⁶ Dahiya, *supra* n.779, at p.19. Murder, being an offence against man, is a private offence, and consequently the question of retribution falls to the heirs to determine.

⁸¹⁷ *Diyab. Kisa* is the concept of ‘a life for a life, a limb for a limb’; Dahiya, *supra* n.779, p.26, footnote 16, and accompanying text, pp.19-21.

⁸¹⁸ 1700 B.C.E. Duhaime.org, *The Timetable of World Legal History*. This source also quotes the world’s earliest recorded legal decision, from 1850 BC, as concerning the death penalty for murder.

⁸¹⁹ Abolitionist for all crimes: 86; Abolitionist for ordinary crimes only: 11; Abolitionist in practice: 24; Total abolitionist in law or practice: 121; Retentionist: 75. AI, <http://web.amnesty.org/pages/deathpenalty-countries-eng> (accessed 25/10/2005). See AI, ‘Constitutional prohibitions of the death penalty’, AI Index: ACT 50/009/2005, 5 April 2005, <http://web.amnesty.org/library/Index/ENGACTION500092005>, (accessed 14/04/2006) in which it is noted that ‘at least’ 42 of the abolitionist states had, by February 2005, included abolition in their constitutions. See also Terry Davis, Secretary General of the Council of Europe, writing in *Isvestia*, 27/10/2005, ‘Abolish the death penalty because of Beslan’; calling on the Russians to establish *de jure* as well as *de facto* abolition.

⁸²⁰ “*Arbuacos Case*”, at para.8.8, where the HRC held that private individuals do not have right to demand the criminal prosecution of another; however, the State has a duty to investigate alleged violations of the right to life, ‘particularly enforced disappearances’. See also ECtHR *Calvelli and Ciglio v. Italy*, 17/01/2002.

Albania⁸²¹), and point out the problems with ‘a competing legal authority endorsing radically different norms relating to the taking of human life’.⁸²² As Eames discusses,⁸²³ it may not be considered unreasonable in Australian Aboriginal custom for a man to kill his wife whilst disciplining her (for instance for disobedience, disrespect, or neglect of familial duties), by beating or ‘cutting’;⁸²⁴ but the courts cannot be seen to accept or condone such practice, nor to make their sentences more lenient in recognition of the fact that Aboriginal society may itself extract some form of ‘payback’ (discipline) upon the perpetrator.

4.3.2 PROCEDURE ESTABLISHED BY LAW

As shown in *de Guerrero*, what matters in the current and very specific context of assessing the kind of law which is in place in national jurisdictions in protecting the right to life,⁸²⁵ is whether the law involved is proportionate; that it is not arbitrary, either in its formulation or in its practice. The law must be, it is argued here, moral, in that it recognises inherent human dignity, protects the interests of those involved, and that it carries ‘some sort of bias or presumption in favour of life’.⁸²⁶ There must be appropriate substantive law in place, so that the procedures which spring from it are effective in the exercise of justice.

⁸²¹ *Supra*, n.789.

⁸²² Donovan and Assefa, (2003) at p.507.

⁸²³ Eames (1992).

⁸²⁴ Although the fact that there is a regrettably high incidence of such crimes is not as acceptable to Aboriginal society (or certainly to Aboriginal women, most often the victims of homicide at the hands of their partners) as defendants in homicide trials might like to plead. ‘Submissions on behalf of Aboriginal men have mis-stated Aboriginal customary laws and traditions’. Eames, *supra* n.823, at p.165.

⁸²⁵ Fair trial and retroactive criminal liability are not being argued here.

⁸²⁶ Quinot (2004), at p.172, footnote 200.

i Procedural Justice

The importance of procedural justice, and its roots in the substantive law, was addressed by the Indian Supreme Court in *Olga Tellis v. Bombay Municipal Corporation*,⁸²⁷ in assessing to what extent a death must be foreseeable and predictable for a State's duty of care to be engaged,⁸²⁸ and to what extent is it reasonable for that duty of care to be enforced. In this case pavement slum-dwellers were forcibly evicted, thus losing their 'homes', close to small jobs, which otherwise they had no means of transport to reach, and thus losing also their means of livelihood, with consequences for their very lives. The judgement, ruling in favour of the applicants, has overtones of Radbruch's formula:

The Constitution does not put an absolute embargo on the deprivation of life or personal liberty. It is far too well settled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Article 21^[829] must be fair, just and reasonable. Just as a *mala fide* act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. *It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, must conform to the means of justice and fair-play.* Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it.⁸³⁰

This judgement brings into play the question of justice, contrasted with a legal certainty that springs from an unjust law. The Court takes the position that 'a *mala fide* act has no existence in the eye of law'; unjust procedure 'vitiat[es] the law which prescribes that procedure and consequently, the action taken under it'. Further, States must apply two tests to laws which they create; is 'the action ... within the scope of the authority conferred by law', and is it reasonable? If not, the Court argues, 'it must mean that the

⁸²⁷ *Olga Tellis et al. v. Bombay Municipal Corporation and State of Maharashtra*, para.3.1.

⁸²⁸ See ECtHR, *L.C.B. v. United Kingdom*, 09/06/1998, paras. 36-41.

⁸²⁹ Article 21 of the Indian Constitution: Protection of life and personal liberty

No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁸³⁰ para.3.1, [83 E, 85 F-H, 86 A]. [Emphasis added].

procedure established by law under which that action is taken is itself unreasonable’, because ‘how reasonable the law is, depends upon how fair is the procedure prescribed by it’.⁸³¹ Where the death penalty persists, for instance, there is an overwhelming importance to its being exercised only subject to the most stringent procedures; some of these are included in ICCPR’s right to life text.⁸³² Some procedures might have the effect of being equivalent to limitations of the right, as will now be discussed.

ii Measures with Equivalent Effect to Limitations

It must be noted that the enjoyment of rights may also be limited by measures pertaining within national legal systems, such as amnesty laws on the statute books,⁸³³ or the failure to exercise a prerogative of mercy,⁸³⁴ or the lack of effective availability of legal aid⁸³⁵ or counsel;⁸³⁶ or else by sentencing protocols, for instance where there is no judicial discretion available (as has been noted in death penalty cases where there is no opportunity of mitigation⁸³⁷) or by failure to ensure the adequacy of counsel.⁸³⁸ Such

⁸³¹ *Ibid.*

⁸³² E.g., ICCPR, Article 6(4): Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. See also UN ‘Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’ (1991); United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65, (UN Principles on Extra-Legal Executions).

⁸³³ In *S.E. v. Argentina* and *R. A. V. N. et al. v. Argentina*, cases relating to the disappeared and heard on the same day by the HRC, the compatibility of the Argentinian Finality Act and Due Obedience Act (exoneration for those presumed to have been acting under superior orders) were challenged with respect to ICCPR obligations. Declared inadmissible *ratione temporis* (relating the date of the alleged violations to the entry into force of ICCPR for Argentina) and *ratione materiae* (no right to require criminal prosecution of another). On the Argentinian Amnesty Laws, see the helpful outline of events in Oren, Spring 2001, esp. pp.131-2.

⁸³⁴ See e.g. HRC, *Lubuto v. Zambia*, where the State party claimed that the Prerogative of Mercy was available to a condemned man. On the exercise of the power to grant pardons, see Sarat, (2005).

⁸³⁵ ECtHR, *Airey v. Ireland*.

⁸³⁶ ECtHR, *Daud v. Portugal*; HRC, *Pratt and Morgan v. Jamaica*, *Reid v. Jamaica*; IAComHR, *McKenzie et al. v. Jamaica*.

⁸³⁷ See ICCPR, Article 6(2): ‘In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime ...’.

measures with equivalent effect to limitations are addressed carefully by the human rights bodies, in order to ensure that the requirement of Article 26 of the VCLT, to execute treaty obligations in good faith, is met, and the object and purpose of the treaty is fulfilled: to ‘guarantee not rights that are theoretical or illusory but rights that are practical and effective’,⁸³⁹ ensuring that governments meet the responsibility outlined by the Charter of Paris.⁸⁴⁰

iii ‘Arbitrary’

An arbitrary substantive law, or an arbitrary procedure prescribed by it, could have the effect of depriving someone of their life, in violation of the treaty provision, rendering the right ‘theoretical or illusory’. Article 6(1) of the ICCPR states that: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’ Article 4(1), ACHR, to recap, in the relevant part states that: ‘No one shall be arbitrarily deprived of his life’. Loss of life should not be as the result of arbitrary action, whether at the hands of another or by arbitrary judicial action. ‘Arbitrary’ is variously defined as ‘based on or subject to individual discretion or preference or sometimes impulse or caprice’;⁸⁴¹ ‘uncertain; random; accidental; discretionary; outside of central relevance to the methodology, law or principle, therefore accepting of individual choice and subjectivity’;⁸⁴² ‘determined by chance, whim, or impulse, and not by necessity, reason, or principle’.⁸⁴³

The IACoMHR have considered the use of the term ‘arbitrary’, in the context of the

⁸³⁸ ECtHR, *Dand v. Portugal*.

⁸³⁹ ECtHR, *Airey v. Ireland*, para.24.

⁸⁴⁰ *Supra*, n.684 and accompanying text.

⁸⁴¹ <http://wordnet.princeton.edu/perl/webwn?s=arbitrary> (accessed 21/04/2006).

⁸⁴² <http://www.bioscience-bioethics.org/a.htm> (accessed 21/04/2006).

⁸⁴³ Dictionary.com, <http://66.161.12.81/search?q=arbitrary> (accessed 21/04/2006).

mandatory death penalty for all crimes of capital or multiple non-capital murders in *McKenzie et al. v. Jamaica*,⁸⁴⁴ finding that ‘this process eliminates a reasoned basis for sentencing a particular individual to death, and fails to allow for rational and proportionate connections between individual offenders, their offenses, and the punishment imposed on them’. This implementation ‘results in the arbitrary deprivation of life, within the ordinary meaning of that term and in the context of the object and purpose of Article 4(1) of the Convention’. The IACoMHR, in their analysis in *Edwards, et al. v. The Bahamas*⁸⁴⁵ under the ADRDM, similar-fact cases in the relevant respects to *McKenzie et al.*, noted that:

The ordinary meaning of the term “arbitrary” connotes an action or decision that is based on random or convenient selection or choice rather than on reason or nature. The UN Human Rights Committee suggested a similar meaning for the term arbitrary in the context of Article 6(1) of the ICCPR, in the case of *Kindler v. Canada*. ‘... the extradition of Mr. Kindler would have violated Canada’s obligations under article 6 of the Covenant, if the decision to extradite without assurances had been taken arbitrarily or summarily’. ... The Committee has therefore suggested that an arbitrary decision includes one that is taken in the absence of a reasoned consideration of the circumstances of the case in respect of which the decision is made.⁸⁴⁶

The procedure prescribed by law must not be arbitrary, either, as noted in *Olga Tellis*: ‘Procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some instinctual check on arbitrary action on the part of the public authorities’.⁸⁴⁷

As mentioned earlier, it can also be ‘arbitrary’ to confine the protection of the right to life

⁸⁴⁴ Report of 13/04/2000.

⁸⁴⁵ *supra* n.103.

⁸⁴⁶ *Ibid.*, paras.139-141. [Citations omitted].

⁸⁴⁷ Para.3.4.

to certain situations, such as active use of force,⁸⁴⁸ and to exclude others, such as hunger, genocide, and lack of healthcare.⁸⁴⁹ In the general view, the State's duty was to protect a human's 'right to life' by protecting people from intentional deprivation of life, not arbitrarily depriving them of it, not using lethal force unless necessary (in whatever terms that may be understood⁸⁵⁰). Violations must be seen to be effectively investigated.⁸⁵¹ In the hypothesis presented here, the state's duty also incorporates other factors that are required to promote and sustain life. Whilst this concept has been understood, as seen above by Ramcharan, as a 'broader view'⁸⁵² of the previously held 'narrow view' – and described as a right to living as an expansion upon the right to life – this hypothesis goes further in reinterpreting the right to life *per se*. The premise is that the right to life can only be logically, legally and morally understood as a 'right to live', and that the formerly held 'narrow view' is in fact contingent upon that right to live. Arbitrary deprivation can include starvation, lack of shelter and healthcare, and it is in itself arbitrary to limit the understanding of deprivation to areas linked to homicide; environmental factors, for instance, can play an important part. Dinah Shelton has observed that '[i]ndividuals are arbitrarily deprived of life by poisoned water and lack of sanitation just as surely as if they are summarily shot. These are avoidable deaths.'⁸⁵³

⁸⁴⁸ ECHR notes the situations in which deprivation of life is not in violation of the right to life Article: Article 2(1) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a. in defence of any person from unlawful violence;
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection.

⁸⁴⁹ See *supra*, n.304 *et seq.* and accompanying text.

⁸⁵⁰ See SACC, *ex parte Minister of Safety and Security et al. in Re. The State v. Walters and Walters*, 21/05/2002.

⁸⁵¹ See ECtHR, *McCann et al. v United Kingdom*, 27/09/1995, and *Kelly et al. v. United Kingdom*, 04/05/2001.

⁸⁵² See also Przewetacznik (1976).

⁸⁵³ Shelton, (2002).

4.4 CONCLUSION

This chapter has examined the concept of ‘protected by law’ within both a moral, and a substantive and procedural framework. The concept of justice has been examined, in order to assist in the argument regarding the accrual – or not – of rights to those humans whose status as humans, or as humans ‘deserving’ of rights protection, might be found wanting. Bowring, discussed above, was writing about ethnic Russians present and oppressed in Latvia: the suggestion of one commentator, Palley, was that rights could accrue to the minorities ‘as a result of the passage of time, by some form of prescription’.⁸⁵⁴ After perhaps thirty years’ peaceful residence, the rights accrued might not be equivalent to those of citizens, but would be at least those of lawful immigrants. Bowring’s critique of this plan is of relevance to much of the debate about embryos and the unborn:

There is a logical problem with such a notion, however, in the context of human rights: how can a right accrue after 30 years and not after 10 or 5? In a world of emigration and immigration of great movements of refugees across international frontiers and within states, are rights to be denied on grounds of recent arrival? Surely these conditions [in Latvia] demand a consciously⁸⁵⁵ drawn-up framework of law, in which rights may be enjoyed which are both rooted in and protective of the community, and the individuals who constitute that community.⁸⁵⁶

Recognising the possibilities and consequences of defining of the Other out of full rights-bearing status is an essential pre-requisite to the conferring of rights. Scaperlanda sees a similar problem to that discussed by Bowring in the USA’s treatment of non-citizens:

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⁸⁵⁴ Bowring, *supra* n.748, p.90, footnote 60 and accompanying text, citing Claire Palley, ‘Population transfers’ in D. Gomien, (ed., 1993) *Broadening the Frontiers of Human Rights* Oslo: Scandinavian University Press, at p.246.

⁸⁵⁵ ‘In this context, conscious not only of the failure of law, but of the failures of most varieties of universalising theory. But surely a theory of sufficient universality to achieve legitimacy is what is required’. Bowring, *supra* n.748, p.90, footnote 61.

⁸⁵⁶ Bowring, *supra* n.748, p.90.

In some respects pre-born children and would be immigrants share a similar position in the America of the late 1990's. In *Roe v. Wade*, the Court concluded that “the unborn have never been recognized in the law as persons in the whole sense.”⁸⁵⁷ Justice Stevens, in *Planned Parenthood v. Casey*, draws the parallel between abortion and immigration in a rather startling footnote, suggesting that Haitians “have risked the perils of the sea in a desperate attempt to become ‘persons’ protected by our laws.” Both immigrants and the pre-born are knocking at membership's door, with neither guaranteed admission into the American community. These days the pre-born also have the additional burden of clamoring for recognition as members of the larger human family.⁸⁵⁷

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Arguing for some moment of sentience or viability – a passage of time requirement – in order for a human fetus to become a human rights-bearer can also present problems of apparent injustice, in a similar fashion to Palley’s ‘thirty years’ residence requirement does for minorities. Needing to pass some kind of test – good citizenship, or personhood – can do likewise for other minorities, such as those in PVS, the ill or disabled, the unsentient, even the evil ones. A moral protecting law has to protect all those in the class human; and the definition of human has to be broad, and generous, for otherwise the moral basis of the law is compromised, and intolerable injustice may be perpetrated.

The moral basis of the law must, it has been shown, be reflected in both the substantive law and in the procedure that springs from it. Justice might both require that a teleological stance is taken in the interpretation of the law, and that the object and purpose of the treaties is borne in mind when considering whether to allow a dynamic interpretation of terms, or an autonomous interpretation for the right to become real and effective, not artificial and illusory. Attention will now be drawn to what the human rights bodies have made, and could make, of the right to life provision.

⁸⁵⁷ Scaperlanda, (no date given), *Life and Learning IX*, at p.2.

CHAPTER FIVE

Aspects of Human Rights Adjudication of the Right to Life

5.1 GENERAL INTRODUCTION

As has earlier been acknowledged, it is not the intention of this thesis to offer a comprehensive overview of the right to life as it has been adjudicated; such would be beyond the scope of a document of this size. Instead, the intention is to focus on situations in which human rights discourses could have a part to play in the avoidance of intolerable injustice, by the effective working out of the right to life treaty provision. The argument will proceed with an analysis of how rights in general, and the right to life in particular, can be limited in their application, either by exceptions or qualifications; are any of these of relevance to the right to life? Continuing with the theme of ‘protected by law’, and having established if there are any exceptions or qualifications which may be of relevance to the application of the right to life, four cases in particular will be used to highlight the issues: in the IACtHR, *Velásquez Rodríguez v. Honduras*; the HRC case of *De Guerrero v. Colombia*; from the ECtHR, *Vo. v. France*, and the Indian national jurisdiction case of *Olga Tellis v. Bombay Municipal Corporation*. The latter’s place is to show what can happen when a State’s highest court is prepared to apply human rights principals dynamically, and is an example of Choudhry’s ‘genealogical mode’ of constitutional interpretation, where legal

systems benefit from each other's practice.⁸⁵⁸ Human rights thinking has informed the Indian Supreme Court's decisions, and such decisions can then inform human rights discourses themselves,⁸⁵⁹ in the quest for a moral law.

5.2 LIMITATIONS

The treaty provision, as has been shown, is that the right to life shall be protected by law. Circumstances, in which life might be lawfully lost, or taken, must be narrowly or carefully defined. Again, and as in so much of the discussion surrounding the right to life, to have a 'bias towards the protection of life' is not as straightforward a proposition as it might be felt it should be. The practice of law must be able to determine the narrow boundary between what a 'permissible' deprivation of life is, and what is not. A point to be clarified at an early stage of this discussion is to what extent life can and should be protected by law – to the uttermost, at all times (ie., what is known as an 'absolute' right) or is the scope of the protection allowed to be limited or circumscribed in any way? Common sense would suggest that there should be some limits, some cut-off point of resources, risk, or balancing of rights; each and every life cannot be protected to the very furthest extent, cannot have money and other resources directed endlessly at its preservation, cannot be saved from danger always, in the face of danger to many others in that effort, or expense. However, before discussing what those limitations might be, it is necessary to examine the texts themselves and see what might be included in the form of limitations there. This will be briefly introduced by a short discussion of qualified rights, before moving into the category of so-called 'absolute' rights, where the right to life belongs.

⁸⁵⁸ *Supra*, n.253-255 and accompanying text.

⁸⁵⁹ See also *Makwanyane*, for the SACC's reflections upon this matter.

5.2.1 TEXTUAL LIMITATIONS

Before examining what should be included in the scope of life's protection in law, it is helpful to know whether the right itself is intentionally circumscribed in the texts in any way; is it stated in 'absolute' terms, which may be limited by exceptions, or by qualifications? A brief overview of the qualified rights will be given, before a more thorough discussion of the 'absolute' rights.

i Qualified Rights

Human rights provisions themselves may be – and often are – limited within their own texts. The category of rights thus limited is that of the 'qualified rights', where limitations are put upon the unfettered exercise of the rights, such as considerations which are deemed necessary in a democratic society for others to be able to enjoy their rights. The point regarding the difference between exceptions and qualifications may be more clearly grasped by reference to one of the so-called 'qualified rights', such as freedom of expression, as found in ICCPR:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; ...
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Generally speaking, there is a right to express one's self freely, but it may be limited by the rights and interests of others, and by the particular social and national circumstances prevailing. This is a variable standard, and one upon which judgement must be made in

the context of each case and each national legal system.⁸⁶⁰ Thus, the rights-bearer is limited in the unalloyed enjoyment of the right.

Fettering of the freedom to enjoy rights is, however, also subject to limitations;⁸⁶¹ any restriction imposed must be proportional to the legitimate aim pursued, and certain rights – not including the right to life – may be derogated from in times of public emergency, ‘threatening the life of the nation’.⁸⁶² Chaskalson P., in the SACC case, *State v. Makwanyane*, made a comparative study of the exercise of the proportionality principle across several jurisdictions, those of Canada, Germany, and the ECtHR, and in US courts in scrutinising governmental action, concluding that although different approaches to proportionality were employed, it was recognised across the board as ‘an essential requirement of any legitimate limitation of an entrenched right’.⁸⁶³ States make an undertaking to respect rights, such as in ACHR:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.⁸⁶⁴

Such limitations which fetter rights, as have been discussed here, however, are only available to the State under the power of law;⁸⁶⁵ the nature of that law of course meeting

⁸⁶⁰ See discussion of limitations in IACoMHRP, Constitutional Rights Project, Civil Liberties Organisation v. Nigeria, 01/01/1998.

⁸⁶¹ See IACtHR, The Word “Laws” in Article 30 of the American Convention on Human Rights, OC-6/86, Advisory Opinion (1986), paras.17-18.

⁸⁶² Article 4, ICCPR. See also Article 15, ECHR; Article 27, ACHR. (There is no derogation clause in ACHR). See *supra*, n.184, 185 and accompanying text. See also conceptual study of the ‘State of Exception’ made by Agamben, (2005), especially chapter 2.

⁸⁶³ Para.105. See paras.105-109 for the comparison.

⁸⁶⁴ Article 1, ACHR. See also Article 1, ECHR; Article 2, ICCPR; Article 1, ACHR.

⁸⁶⁵ See IACtHR, Advisory Opinion, *supra*, n.861.

the requirements of justice and adherence to human rights, as discussed, above.

ii Absolute Rights

Just because a right is deemed to be ‘absolute’, and does not include in its text a list of qualifications which may limit its unfettered enjoyment, does not mean that there may not be circumstances which are, so to speak, ‘defined out’ of the protection. Such situations are exceptions to the general enjoyment of the right; they do not make the right any more or less absolute (whatever that may mean, a point to be addressed below) but simply list situations in which it does not apply. For instance, although no person may be taken into slavery, work which is imposed in the context of military service or imprisonment does not fall into the category of ‘forced or compulsory labour’, an element of the right, and so the right is not engaged.⁸⁶⁶ With respect to the right to life provision, it is absolute in respect of not being a formally qualified right, but there are certain limited and narrowly permissible exceptions, situations defined out of the protection.

An ‘exception’ is a situation or an act which may always be considered as not being included in the protection afforded by a particular treaty article; the early treaties included the death penalty, where it persisted, in the permitted exceptions, whereas a ‘qualification’ means that in some situations a particular act or situation is included within the remit of the right, and in some cases, it is not. Chaskalson P., giving judgement in the SACC case of *Makwanyane*, noted that:

When challenges to the death sentence in international or foreign courts and tribunals have failed, the constitution or the international instrument concerned has either directly sanctioned capital punishment or has specifically provided that the right to life is subject to exceptions

⁸⁶⁶ See ECHR, Article 4.

sanctioned by law.⁸⁶⁷

This confirms that within national legal systems, it is recognised that exceptions to the protection of life may be sanctioned by law. Such exceptions are listed with some of the right to life Articles, especially in ECHR, which has confirmed that use of lethal force may be condoned in a situation recognised as one of ‘absolute necessity’⁸⁶⁸ (a more stringent test than ‘necessary in a democratic society’⁸⁶⁹).

Gewirth has made a philosophical analysis of the notion of ‘absolute’ in the context of rights, seeking to establish whether or not there are any rights which can be rated as absolute: as he points out, if any rights were to be regarded as such, ‘the most plausible candidate’ would be the right to life.⁸⁷⁰ Arguing from Hohfeldian first principles, the contention is that ‘[a] right is *absolute* when it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions’.⁸⁷¹ Consequently, there are two normative bases for an absolute right; in Hohfeldian claim-right terms, one aspect is that of ‘a justified claim or entitlement to the performance or non-performance of certain actions’, but also what Gewirth describes as ‘an exceptionless justifiability’ of performance: this analysis is based on his previously formulated ‘Principle of Generic Consistency’ [PGC], a principle demanding ‘of every agent that he act in accord with the generic rights of his recipients as well as himself’. The rights so marked as ‘generic’ are those ‘to the necessary conditions of action, freedom and

⁸⁶⁷ Para.38.

⁸⁶⁸ McCann et al. v. UK, para.149.

⁸⁶⁹ One of the listed limitations of the qualified rights, generally e.g. Articles 8-11 ECHR.

⁸⁷⁰ Gewirth, (1981), p.1.

⁸⁷¹ *Ibid.*, p.2. Gewirth’s use of ‘exceptions’ here must equate, at least partially, to the idea of qualifications, as described above, as ‘a right is *overridden* when it is justifiably infringed’. [Emphases in original].

well-being'.⁸⁷²

The PGC in its entirety is too complex to enter into here, but the conclusion drawn supports the argument which underpins this thesis. That is, that '[a]gents and institutions are absolutely prohibited from degrading persons, treating them as if they had no rights or dignity'. This benefit is for 'all persons, innocent or guilty'. Further,

... since the principle requires of every agent that he act in accord with the generic rights of his recipients as well as of himself, specific rights are absolute insofar as they serve to protect the basic presuppositions of the valid principle of morality in its equal application to all persons.⁸⁷³

The PGC is a principle in accord with Andorno's concept of extended dignity, as described above, which has been employed in this thesis as a basis for the claim that the fulfilment of rights requires of an actor that s/he act with respect for the dignity represented in that person's own being, and in the being signified, for instance, by human DNA being manipulated, as well as for the possible impact on the human race.

Addo and Grief have applied Gewirth's analysis to the right to be free from torture, which is the right most commonly held to be, so to speak, 'absolutely absolute',⁸⁷⁴ in that there is no possibility of derogation, exception, or limitation; the prohibition against torture cannot be in any way overridden, to use Gewirth's phraseology.⁸⁷⁵ However, the protection of the right to life is different, as it does not involve solely a duty to refrain from acting, as not torturing someone does. Protection of the right to life requires both

⁸⁷² Gewirth, *Ibid.*, p.2, and citing A. Gewirth, *Reason and Morality* (Chicago, 1978) pp.135 *et seq.*, 197-198, 343-44.

⁸⁷³ *Ibid.*, p.16.

⁸⁷⁴ Gewirth suggests that, in most people's opinion there are no absolute rights, an point of view which is disputed here; the right to be free from torture must be absolute, as Gewirth himself would agree. Gewirth, *Ibid.*, pp.1,2.

⁸⁷⁵ See, e.g., the ECHR case of *Aktaş v. Turkey*, 24/04/2003, para.310. 'The Court recalls that Article 3 enshrines one of the fundamental values of a democratic society. Even in the most difficult of circumstances, such as the fight against terrorism, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. No provision is made, as in other substantive clauses of the Convention and its Protocols, for exceptions and no derogation from it is possible under Article 15.' [Citations omitted].

positive action, and a balancing of rights.

Regarding the right to life, and whether it should be considered as absolute, Plomer suggests that:

... [i]n international Treaties, the right to life has never been claimed to be absolute, even less guaranteed. Even in the case of individuals who are already born, international treaties and domestic law recognise that there are circumstances in which it is lawful to take another person's life, for example by a lawful act of self-defence or (in the days when capital punishment was lawful in our society) by lawful execution.⁸⁷⁶

It is of course not possible that each individual's life should be protected at all times and in all places to the maximum extent. The human rights bodies have made this comment in a number of different situations;⁸⁷⁷ for instance, medical resources are often at issue, such as in the ECHR case of *Taylor et al. v. UK*.⁸⁷⁸ Policing resources were addressed by the ECtHR in *Osman v. UK*, where the Court recognised that

[t]he first sentence of Article 2§1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction ... that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions ... Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.⁸⁷⁹

The interpretation of this obligation, however, 'bearing in mind the difficulties involved in

⁸⁷⁶ Plomer (2002), Review of R.G. Lee and D. Morgan, *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (London: Blackstone, 2001), at p.106. [Citations omitted].

⁸⁷⁷ See HRC, *Plotnikov v. Russian Federation*, 25/03/1999, para.4.2. The Committee agreed that incidences of hyperinflation, 'or the failure of the indexing law to counterbalance the inflation' leaving the author within insufficient money to buy medicine, did not represent a violation 'of any of the author's Covenant rights for which the State party can be held accountable'.

⁸⁷⁸ 30/08/1994; Admissibility.

⁸⁷⁹ Para.115, citing *L.C.B. v. UK*, para.36.

policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources',⁸⁸⁰ must be undertaken:

... in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.⁸⁸¹

The notion of the right to life not being 'absolute', therefore, operates both in terms of a so-called negative obligation, in that there are exceptions defined out of the right to life provisions with respect to use of lethal force, and also in terms of the positive obligation; resources, risks, the problems of policing, might all pose threats to life, and whilst these threats are avoidable, they are not *reasonably* avoidable 'in a way which does not impose an impossible or disproportionate burden on the authorities'.⁸⁸² Such decisions must not, however, be made in an arbitrary manner.⁸⁸³ As so often, avoiding injustice will mean that there must be a moral basis for the decisions made. What those decisions are is not necessarily as important (without belittling in any way the importance to the individuals involved) as is having the opportunity to be heard. The opportunities granted within human rights discourses for those, otherwise silenced, to be heard will now be examined.⁸⁸⁴

5.2.2 HUMAN RIGHTS HURDLES

For an applicant to the human rights bodies there are hurdles to overcome within human

⁸⁸⁰ *Ibid*, para.116.

⁸⁸¹ *Ibid*.

⁸⁸² *Ibid*.

⁸⁸³ See s.4.3.2.iii, *supra*.

⁸⁸⁴ For an introduction to the concept of 'the silenced' see *supra*, s.1.3.3.

rights discourse themselves, hurdles which may be seen to be ‘silencing voices’. Some of these with particular relevance to the thesis proffered here will now be addressed.

i General Admissibility Requirements

General admissibility requirements can be especially problematical with respect to the right to life, remembering that victims of the ultimate violation of the right will never bring their own case, nor may they be in much of a position to do so whilst they are under threat of death from one cause or another – a risk or fact of ‘disappearance’, subnutrition that weakens the body, the terror of incipient genocide.⁸⁸⁵ Generally, individuals who can show that they are ‘victims’ of alleged rights violations, or that they stand in a particular relationship to a victim, can bring cases, although consent to act must be shown. The HRC has been strict on issues of standing, noting that there is not a right to speak for others as a group;⁸⁸⁶ that individuals within a group must show how they are personally affected by an alleged violation;⁸⁸⁷ that a person purporting to act for another must show relationship or consent;⁸⁸⁸ and that an individual cannot claim to be a victim of an alleged violation of a right of peoples (self-determination).⁸⁸⁹ In *Hartikainen v. Finland*,⁸⁹⁰ regarding the teaching of religious education in Finnish schools, and the question whether this violated the rights of children whose parents are atheists, the status of parents in bringing the case was disputed, as they were challenged as ‘not victims’ in view of the extent to which they were held not to be personally affected. This is an important point with respect to the right

⁸⁸⁵ On the situation in Ruanda prior to the 1994 genocide, see Gourevitch (1998): *We wish to inform you that tomorrow we will be killed with our families*, describing the situation that led to the ICTR joined cases, Judgement of 21/02/2003, *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T.

⁸⁸⁶ *Atkinson v. Canada*, 30/05/1993.

⁸⁸⁷ *Disabled and Handicapped Persons in Italy v. Italy*, (10/04/1984).

⁸⁸⁸ *U.R. v. Uruguay*, *infra* n.899.

⁸⁸⁹ *A.D. v. Canada*, 29/07/1984.

⁸⁹⁰ Para.10.3.

to life, as very often someone else – perhaps only an interested party, without any particular familial relationship or apparently otherwise valid reason for concern, may attempt to speak for a rights-bearer alleging violations and unable to bring a complain themselves. Such was the case in the HRC Communication, *U.R. v. Uruguay*, in which there was a failure by L.A., a doctor, to substantiate authority to act on behalf of an individual.⁸⁹¹

The HRC also held that alleged discriminatory employment practices in an international organisation, the EPO, could not be considered. The case, *H.d.P. v. the Netherlands*, was declared inadmissible as an international organisation is not under the jurisdiction of a State party.

ii Issues of particular relevance to the exercise of the right to life

In the wider context, the extent of the positive obligation upon States has been considered by the tribunals. The HRC has expressed Views that a failure to allow travel for medical treatment to a victim of beating by soldiers, who then died three days later, constituted a right to life violation; this does not appear to be an extension of the positive obligation, as the causality of death as a consequence of State use of lethal force is established.⁸⁹² However, in *Fabrikant v. Canada*,⁸⁹³ although acknowledging that ‘at any rate the State party remains responsible for the life and well-being of its detainees,’⁸⁹⁴ the HRC did not address ‘the issue whether a detainee has a right to choose or refuse medical treatment’ where the author claimed a right to have the specific medical treatment he felt he required made available to him by a move between prisons in order to access it (at his own cost),

⁸⁹¹ Views of 06/04/1983.

⁸⁹² *Mulezi v. Democratic Republic of the Congo*, 08/07/2004, para.5.4.

⁸⁹³ 06/11/2002.

⁸⁹⁴ *Ibid.*, para.9.3.

issuing a finding of inadmissibility on other grounds when the State party complied with the author's request before Views were adopted. The lost opportunity to consider such a point, and clarify States' obligations in this regard, is to be regretted.

The human rights bodies may demonstrate an unwillingness to challenge powerful States on matters of great importance, where there is at least a possibility of abuse or failure of public power. Such a failure can be read into the case of *Taylor et al. v. UK*,⁸⁹⁵ heard before the EComHR, where the question of National Health Service resources was deemed by the Court to be outside the scope of Article 2 and the provisions of the Covenant, being 'matters for public and political debate', and therefore the case was declared inadmissible (also on other grounds).⁸⁹⁶ It is important to remember always that victims of the ultimate violation of the right will never bring their own case,⁸⁹⁷ the dead do not petition courts of law,⁸⁹⁸ nor do those denied the standing⁸⁹⁹ to participate.⁹⁰⁰

⁸⁹⁵ 30/08/1994; Admissibility.

⁸⁹⁶ In that case, an under-qualified and ill-supervised nurse, Beverley Allitt, had been convicted of the murder of four children, the attempted murder of three children, and causing grievous bodily harm to six children. The parents of some of the murdered and damaged children argued, amongst other assertions, that the ward on which she worked, Ward 4 at Grantham Hospital, should have been closed down due to a lack of experienced staff, both nurses and doctors; but closing it would have meant the loss of the hospital's status as a District General Hospital and the consequent loss of two consultants.

⁸⁹⁷ See ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)* 31 March 2004, para.21.

⁸⁹⁸ It is, in this respect, illustrative to note Shelton's comment: 'Most of the cases filed at the Inter-American Commission concern deprivations of the right to life, disappearances, and other violations where responsibility is denied by the state and evidence must be ascertained. Not until the *Loayza Tamayo* case in 1997 (19 HRLJ 203 (1998)) did the Inter-American court have a victim alive at the time of the judgement.' Shelton, (2001), at p.169, fn.3. (I am grateful to Israel Butler for this material and for that pertaining to the standing of NGO's, *supra* n.899).

⁸⁹⁹ For the status of NGO's with regard to standing before international and regional bodies, see Butler, (2004).

⁹⁰⁰ See Okechukwu (1990) at pp.213–215, for 'participation' as an element in a triad including political liberty and equality, and 'constitut[ing] an aspect of the right to life because it enables the maximum exercise of the rights of liberty and equality, and promotes human dignity in which the right to life is rooted'. (p.215). Although Knop (2002) and Okechukwu are using 'participation' in different frames of reference here, each emphasis contributes to the current discussion; Okechukwu's in terms of understanding the scope of the right to life, and Knop's in placing the outworking of that right in the context of its potential for justiciability in international law.

5.3 THE RIGHT TO LIFE: SUBSTANCE, AND PROCEDURAL GUARANTEES

5.3.1 THE RIGHT TO LIFE CONTESTED

Whilst it might be misleading to suggest that there is a ‘normal’ adjudication of the right to life in the human rights bodies (or hearing of Communications in the case of the Human Rights Committee), effort will now be made to find how the right is being interpreted, in terms of the risks and threats to life accepted within the jurisprudence, and who has the standing – identity – and voice (recognition) to participate in human rights discourse, as author or claimant, NGO or relative or friend, always remembering that victims of ultimate violation of the right will never bring their own case. The quest is for reassurance that the treaty bodies and regional jurists are realising the implications of some of their decisions for the unknown but probably difficult future for the human race that lies just beyond the horizon.

i A *caveat* on case law

A *caveat* must be entered here, with regard to a focus on case law. What might be seen as a reflection on theoretical activism, and certainly is a reflection on judicial activism, is made by Campbell⁹⁰¹ who analyses the ought-to-be-permitted scope of discretionary practice in human rights: *sed quis custodiet ipsos custodias?*⁹⁰² As Campbell points out, although a traditional source-centred legal process⁹⁰³ might be construed as ‘rendering [human rights] more specific and justiciable’ (a process he describes as ‘moves to

⁹⁰¹ Campbell, (1999).

⁹⁰² “Who is to guard the guardians themselves?” Juvenal, *Satire VI*. For discussion related to this point, see Campbell, *supra* n.901, at p.21.

⁹⁰³ Campbell cites Raz in this regard: Raz, (1979) *The Authority of the Law: Essays on Law and Morality* Oxford: Clarendon Press, at p.47 *et seq.* *Supra*, n.901, p.9.

concretize or positivize human rights’), ‘this same process may also be seen as a way of weakening the capacity of courts to develop human rights law in accordance with enduring or emerging moral ideals.’⁹⁰⁴ In considering the case for ‘having human rights law expressed only in the form of vague prescriptions which invite moral deliberation and textually unfettered discretionary decision-making’⁹⁰⁵ he notes the ‘powerful body of opinion’ which tends to the view that ‘[t]he development of case law snares human rights in the tangled web of precedent and legal authority, thus threatening to devitalize its moral force’.⁹⁰⁶ Campbell takes this discussion further, debating the extent to which there is ‘accessible knowledge of objective universal values available to courts’,⁹⁰⁷ but for the moment, the point is to approach an adjudicatory methodology in the context of the human rights bodies with caution.

The requirement that the right to life be ‘protected by law’ has now been scrutinised over a large number of cases by the human rights bodies. The earliest adjudicated cases on the right to life reflected the general principles that States should neither themselves sponsor, nor condone the use of lethal force against their population through the acts of their agents, most usually in this context police and armed forces, nor should homicide be allowed to be carried out with impunity by others. There are a number of groups well represented in right to life litigation: those under sentence of judicial execution,⁹⁰⁸ or victims of State use of lethal force⁹⁰⁹ or State failure of an enhanced duty of care, for

⁹⁰⁴ *Supra*, n.901, p.9. (footnote omitted).

⁹⁰⁵ *Ibid.*

⁹⁰⁶ *Ibid.*

⁹⁰⁷ *Ibid.*, p.10.

⁹⁰⁸ E.g. *Edwards et al. v. Bahamas*, *supra* n.103.

⁹⁰⁹ E.g. *McCann et al. v. the United Kingdom*, *supra*, n.851; see also Interim Resolution DH (99) 434 *Human Rights Action of the Security Forces in Turkey: Measures of a General Character*, Adopted by the [Council of Europe] Committee of Ministers on 9 June 1999 at the 672nd meeting of the Minister’s Deputies.

instance to prisoners.⁹¹⁰

Radbruch's principle has been acknowledged, even if not in specific terms, in cases where the nature of the protecting law has been at issue. In *Hector Perez Salazar v. Peru*, the IACoMHR noted that:

Peru is not a State Party to the Forced Disappearance Convention but the mere elaboration of the definition of a "forced disappearance" by the drafters of the Convention is useful for the purposes of identifying the distinct elements of the same. What is crucial is that the individual be deprived of his freedom by agents of the state or under the color of law, followed by a refusal or incapacity of the State to explain what has happened to him or to give information about his whereabouts.⁹¹¹

'Under color of law' is very apt phraseology to describe the kind of laws that were exactly what Radbruch had in mind: laws which allowed intolerable injustice to be perpetrated in their name. Further, the importance of the meeting of procedural obligations arising therefrom is seen in Commission's condemnation of the refusal of the State to disclose the whereabouts of its prisoners. Whilst the State obligation under Article 2 was originally seen as a negative one, not to arbitrarily deprive people of their life, the test has been one of the meeting of procedural requirements, such as the duty to make a prompt,⁹¹² independent,⁹¹³ public⁹¹⁴ and effective⁹¹⁵ investigation of deaths in State custody, or by State use of lethal force. This can therefore be argued as a positive obligation,⁹¹⁶ as indeed can most of the so-called negative obligations.

As has been indicated at an earlier stage of this thesis, there is a defensible case for the

⁹¹⁰ E.g. HRC, *Barbato v. Uruguay*, para.9.2; held, Article 6 ICCPR violation for failure to protect from/prove suicide.

⁹¹¹ *Salazar v. Peru* (1997) para.14.

⁹¹² See ni Aolain (2001), footnotes 60, 61.

⁹¹³ *Gulec v. Turkey*

⁹¹⁴ *Kaya v. Turkey*

⁹¹⁵ *Ergi v. Turkey*

⁹¹⁶ See Mowbray (2004).

human rights bodies' practice of treating the human rights treaties as 'living instruments', promoting a broader base of protection of fundamental rights as time goes by, and standards change.⁹¹⁷ That change can be shown in action in the jurisprudence of the ECtHR, where one commentator on the nature of the State's positive obligations has noted (in the context of a rape case, *M.C. v. Bulgaria*) that:

[I]t may not be enough for the State to establish that a criminal offence is recognised and effectively prosecuted, as the Court may also examine whether the content of the law and the elements of the offence are in conformity with the wider requirements of the Convention.⁹¹⁸

The finding has been most obviously, that the right to life should be protected by effective anti-homicide legislation, exercised without discrimination; this includes discrimination by an alleged perpetrator of a violation as well as with regard to 'choice' of victim, and the non-discrimination aspect acknowledges the need to afford equal protection to the life of terrorists, prohibiting a 'shoot to kill' policy.⁹¹⁹ National legislation must not allow the arbitrary taking of life by those acting in service of the State, as well as by non-State actors. Article 2, ECHR, has been accepted as a 'positive' obligation, requiring that States take affirmative action to protect those whom they are forewarned are at obvious, identified, and imminent risk of being killed.⁹²⁰ The State's duty is seen as more than a requirement to put in place '[e]ffective criminal law provisions to deter the commission of offences against the person, backed up by the law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provision'.⁹²¹

The ECtHR has exercised a broad-ranging jurisprudence in respect of the right to life. In

⁹¹⁷ As shown in ECtHR, *Selmouni v. France*. *Supra*, n.281 and accompanying text.

⁹¹⁸ COE, ECtHR, 'Short survey of cases examined by the Court in 2003', reprinted in 14 HRCD [2003], p.5

⁹¹⁹ *McCann et al. v. UK*.

⁹²⁰ *Osman v. UK*.

⁹²¹ *Supra*, n.920, para.115.

the earliest case to find for a violation of this right, *McCann v. UK*, certain tests were articulated by the Court in assessing whether State use of lethal force operations could be justified or not. The tests include a requirement that Article 2 provisions are to be strictly construed, with a ‘use of force no more than ‘absolutely necessary’’. This test, ‘absolutely necessary’, is stricter and more compelling than the ‘necessary in a democratic society’ test in respect of the ‘qualified’ rights, Articles 8–11. The State organs must subject deprivations of life to the most careful scrutiny, reading Article 1, the obligation to ensure rights, *juncta* Article 2, the positive duty on States to protect life. This means that national law must strictly control and limit the circumstances in which a person may be deprived of his life by agents of the State; the mere existence of a law is not enough. The proportionality of the States’ response is at issue here, and again there is a procedural requirement, of adequate investigation both by the police, and where the agent is a member of the police forces, investigation of the police. There must be an inquest, with an independent Coroner or judge, and jury, where applicable, and an inquiry where necessary. This includes equality of representation and disclosure, and appropriate availability of legal aid.

ii Earliest cases: State use of lethal force

The first right to life cases to reach judgement (or Views in the case of the HRC) on right to life issues concerned State use of lethal force. It had taken just over six years from the beginning of its mandate under the Optional Protocol⁹²² for the HRC to hear a communication brought by an individual⁹²³ alleging violation of Article 6 of the ICCPR, the

⁹²² (First) Optional Protocol to the ICCPR: Adopted 16/12/1966. Entry into force 23/03/1976.

⁹²³ Article 1.

right to life.⁹²⁴ *Bleier v. Uruguay* was a case brought on 23 May 1978 before the HRC.⁹²⁵ The fact that no earlier right to life cases were successfully heard suggests immediately a problem in the system; people were dying in exactly the situations envisaged by the drafters of the earliest right to life provision, Article 3 of UDHR, and in Article 6 ICCPR, as being pertinent to a claim of violation. This was state use of lethal force, without enormous expenditure involved in its prevention and alleviation, therefore not engaging the argument posited by some that the right to life is a ‘negative obligation’, requiring States to refrain from action, rather than a ‘positive obligation’, requiring expenditure for its fulfilment. *Bleier* and other similar cases brought against Uruguay at about the same time⁹²⁶ were criminal justice situations, and therefore a question of civil and political obligations rather than anything that might be construed as possibly costly economic or social ones, and the alleged perpetrators were State agents. For many distraught relatives, no certainty of death was available; no bodies were found. The victims became known as ‘the disappeared’,⁹²⁷ and it is a tradition of political violence which continues around the world.⁹²⁸ Whilst it is not

⁹²⁴ There had been an earlier case, *Sentic Antonaccio v. Uruguay*, in which originally a violation of the right to life had been alleged; but the victim had been discovered in prison, and therefore the Article 6 violation was not heard, although others, including torture, were upheld.

⁹²⁵ In *Bleier*, the HRC, whilst not outright declaring a right to life violation, did state that there were ‘serious reasons to believe that the ultimate violation of article 6 has been perpetrated by the Uruguayan authorities’. (para.14.)

⁹²⁶ From *Massera et al. v. Uruguay*, Communication No. R.1/5, 15 August 1979, through *Weismann and Perdomo v. Uruguay*, Communication No. 8/19773, April 1980; *Ramirez v. Uruguay*, Communication No. R.1/4, 23 July 1980; *Grille Motta et al. v. Uruguay*, Communication No. 11/1977, 29 July 1980; *Weinberger v. Uruguay*, Communication No. 28/1978, 29 October 1980; *Carballal v. Uruguay*, Communication No. 33/1978, 27 March 1981; *de Bouton v. Uruguay*, Communication No. 37/1978, 27 March 1981; and *Burgos v. Uruguay* Communication No. 52/1979, 29 July 1981; to *Sentic Antonaccio (Raul) v. Uruguay*. Article 7 violation was also established in *Bleier v. Uruguay*. In some of these cases, e.g. *Grille Motta*, Article 6 violations were alleged also but not examined.

⁹²⁷ On ‘the disappeared’ e.g. in Argentina, see Feitlowitz (1998); Guest (1990); *Report of the National Commission of the Disappeared, Argentina* (1986) published as *Nunca Mas [Never Again]*; see especially Dworkin’s Introduction to this work.

⁹²⁸ See, for instance, *UNW*, issue of 18/04/2003, in which separate allegations and calls for action were made in respect of human rights violations including disappearances, unfair detention and trial, and extrajudicial execution in Cuba, the Democratic Republic of Congo, Belarus, Burundi and Somalia.

too difficult to accept that ‘the right to life shall be protected by law’ does mean that security forces should not murder the citizens and hide the evidence, including the bodies, it may be more challenging legally to accept that it must mean that the State should be able to prove its innocence, or otherwise accept guilt. The HRC declared in *Herrera v. Columbia* that the burden of proof does not rest solely on an alleged victim; due weight must be given to allegations when the State is in possession of undisclosed material facts.⁹²⁹

The reversal of the burden of proof⁹³⁰ in the case of the alleged ‘disappeared’ was first articulated in IACtHR *Velásquez Rodríguez v. Honduras*⁹³¹ in 1988, by the HRC in 1994 in *Mojica v. The Dominican Republic*, and followed eventually – eleven years after *Velásquez Rodríguez* – by the ECtHR in *Çakici v. Turkey*, concluding that there was evidence beyond reasonable doubt of death at the hands of the security forces.⁹³² In *Timurtaş v. Turkey*, the (former) European Commission of Human Rights [EComHR], in deciding admissibility, had considered that:

there was indeed a strong probability that Abdulvahap Timurtaş had died whilst in unacknowledged detention. Nevertheless, it held that in the absence of concrete evidence that Abdulvahap had in fact lost his life or suffered known injury or illness, this probability was

⁹²⁹ Para. 105.

⁹³⁰ See generally Kazazi (1996) and Kokott (1998).

⁹³¹ Kazazi, *supra* n.930, p.244, footnote17, points out the relevant text, Article 42 of the regulations of the IACoMHR which were referred to in the *Velásquez Rodríguez* judgement as a ‘legal presumption’: ‘Because the Government did not object here to the use of this legal presumption in the proceedings before the Commission and since the Government fully participated in these proceedings, Article 42 is irrelevant here.’ Similar arguments were expressed by the HRC in adopting their Views on 15/07/1994 in the case of *Mojica v. Dominican Republic*; on that occasion, unlike in *Bleier v. Uruguay*, the Committee were unequivocal in their expression of a right to life violation.

⁹³² On evidentiary matters before an international tribunal, see e.g. ICTR, *Prosecutor v. Jean-Paul Akayesu*, *supra*, n.12, s.4, including: ‘The Chamber notes that it is not restricted under the Statute of the Tribunal to apply any particular legal system and is not bound by any national rules of evidence. In accordance with Rule 89 of its Rules of Procedure and Evidence, the Chamber has applied the rules of evidence which in its view best favour a fair determination of the matter before it and are consonant with the spirit and general principles of law.’

insufficient to bring the facts of the case within the scope of Article 2.⁹³³

This was in line with a particularly strongly argued case before the Court as late as 1998, that of *Kurt v. Turkey*,⁹³⁴ where four and a half years after a disappearance the presumption of death – and therefore assumption of State liability of violation of the right to life – was not made. The Court, however, in *Timurtaş*, was disinclined to follow the Commission's lead, finding that: '... Timurtaş must be presumed dead following an unacknowledged detention by the security forces. Consequently, the responsibility of the respondent State for his death is engaged.'⁹³⁵

Making a determination of the sort described in *Velásquez Rodríguez*, *Çakici*, and *Timurtaş* is an exercise of legal presumption, an exercise that is not without its critics in the international arena.⁹³⁶ This was a beginning; a beginning to answer Fraser's articulation of the revisionists'⁹³⁷ claim in the context of the Holocaust:

Where are the bodies? Zyklon B was a disinfectant, not a mass extermination weapon. Six million did not die. Where are the bodies? Where is the proof? Without proof, no trial. No trial, no justice. The laws of evidence will not permit the judgement of the Law.⁹³⁸

The laws of evidence may not permit assumption of guilt of murder in the absence of the usual proofs; the Law of human rights might be different. It does, however, require willingness, and a legal justification, on the part of the human rights bodies to exercise a

⁹³³ *Supra* n.932, para.78.

⁹³⁴ *Supra* n.932.

⁹³⁵ Para.86.

⁹³⁶ See Kazazi, *supra* n.930, p.241, where he quotes Sandifer, *Evidence Before International Bodies* (rev. ed., Charlottesville, 1975), 141-142: 'By its very nature the law of presumptions belongs primarily to the realm of municipal law, rather than to international law ... Presumptions cannot ... in the present stage of the development of international law, occupy a role comparable to that which they play in municipal law.' See also Szászy, *International Civil Procedure* (Budapest, 1967), pp. 285-287, and in Kazazi, *supra* n.930, p.240, footnote 7.

⁹³⁷ See, e.g., the website of *The Institute for Historical Review*, <http://www.ihr.org/index.html> (Accessed 02/01/2004).

⁹³⁸ *Supra*, n.723, at p.74.

dynamic interpretation of the texts. The exercise of the presumption of death in the case of the disappeared, and the need to exercise that presumption because of failure of co-operation on the part of the authorities,⁹³⁹ was reiterated by the European Court in April 2003, when it issued its judgement in the case of *Aktas v. Turkey*. Buckley finds in the Court's jurisprudence with regard to Turkey's disappeared an effective expression of human rights discourse, suggesting that the requirement upon the Turkish authorities to make 'a commitment to securing the right to life that requires the reform of the very structure and *modus operandi* of its institutions',⁹⁴⁰ is an effective interpretation of Article 2, imposing, as it does, on States 'obligations to prevent, account for and investigate violent deaths and disappearances, despite the inability to find direct State responsibility and security considerations notwithstanding'.⁹⁴¹ Either such an interpretation is not only an effective interpretation of the right to life provision, it is the only possible interpretation to make the provision itself effective, a legitimate aim of treaty interpretation, as already shown; it renders the Article effective, and fit for its intended purpose. Otherwise this is a 'cas[e] where a code is *counterproductive* by giving *incentives* toward conduct that is *regrettable* by the code's own lights',⁹⁴² as Pogge has argued; failure to hold States accountable because of lack of evidence which States refuse to give encourages a continuing lack of co-operation, and this has been recognised in the case law.⁹⁴³ To argue for any other interpretation would be to accept what Gordon said

⁹³⁹ The requirement to furnish all necessary assistance can be found currently in Article 38, ECHR.

⁹⁴⁰ Buckley, (2001) at p.65; see generally for a detailed review of the Turkish right to life cases before the ECtHR.

⁹⁴¹ *Ibid.*

⁹⁴² *Ibid.* [Emphasis in original].

⁹⁴³ See, e.g., *Sarma v. Sri Lanka*, para. 8.9: 'The author argues [... that] it is indeed the State party, not the author, that is in a position to access relevant information and therefore the onus must be on the State to refute the presumption of responsibility.' See also *Sendic Antonaccio (Raul) v. Uruguay*, *supra*, paras.18-19, where the State

Plato condemned: using ‘principles of morality and legality ... as authorisation for unlimited human damage ...’.⁹⁴⁴ The human damage of the disappeared undoubtedly falls into that category, and condemning the intolerable injustice of those lost lives produces a situation that falls neatly into *Radbruch’s Formula*. Legal certainty, the normal overriding principle, should not prevail where it would allow intolerable injustice, and this is sufficient cause here for the reversal of the burden of proof which renders the treaty terms effective.

The identity of the disappeared as murdered persons has now become acknowledged – even accepted as routine – and their participation has been allowed in successful allegations of right to life violations. However it has taken a very long time, which is something of a condemnation of the ability of the tribunals to respond quickly and effectively to troubling situations, in the light of advances made in other jurisdictions. The European Court was reluctant, even as recently as 1999,⁹⁴⁵ to presume State-sponsored or condoned death in the absence of a body. The consequences of that recognition across the jurisdictions have been far-reaching, and can be seen for instance in the decisions of the Supreme Council of the Armed Forces in Argentina and the civilian review body, the Federal Chamber of Appeal, empowered under Law 23.049 of 1984 to bring charges of criminal responsibility for the disappeared.⁹⁴⁶

duty to provide information is equated with the victim’s right to be heard. See also HRC, *Hiber Conteris v. Uruguay*, No. 139/1983, paras.182-186.

⁹⁴⁴ Gordon, (2002).

⁹⁴⁵ *Kurt v. Turkey*, 25/05/1998, para.108.

⁹⁴⁶ See references to Law 23.049, regarding Appeals Filed in the ACHR case concerning *Oswaldo Antonio López v. Argentina*, 18/10/1985, and the 30/06/1987 Annual Report of the IACoMHR 1987-1988, Resolution No. 25/88, Case 9635/ Argentina of 13/09/1988. In the context of Argentina and Law 23.049, see also Nino (June 1991), putting the ‘duty selectively to prosecute past violations of human rights’ ‘into a factual context’ (p.2619).

iii Abortion and fetal homicide: Separate and different?

Not only may certain situations, such as the ‘right to livelihood’ described by the Court in *Olga Tellis*, be at risk of being ‘defined out’ of the protection of the “right to life” treaty or Constitutional provision, but certain classes of persons, or humans, may also be excluded. Different standards and ideals prevail across cultures and across time; for instance, a pre-born child in the West is not recognised as human, in order to protect the ideal of available legalised abortion,⁹⁴⁷ under the false premise that recognising the humanity of the pre-born would automatically rule out the possibility of countenancing abortion.⁹⁴⁸ Whereas, Japanese Buddhist parents may recognise and revere⁹⁴⁹ an infant who cannot yet be received into the family, and sadly therefore must be aborted, but whose birth will come later; such a stance possibly being facilitated by a belief in reincarnation.⁹⁵⁰

⁹⁴⁷ The Alan Guttmacher Institute reports that ‘Approximately 26 million legal and 20 million illegal abortions were performed worldwide in 1995, resulting in a worldwide abortion rate of 35 per 1,000 women aged 15–44. Among the subregions of the world, Eastern Europe had the highest abortion rate (90 per 1,000) and Western Europe the lowest rate (11 per 1,000). Among countries where abortion is legal without restriction as to reason, the highest abortion rate, 83 per 1,000, was reported for Vietnam and the lowest, seven per 1,000, for Belgium and the Netherlands. Abortion rates are no lower overall in areas where abortion is generally restricted by law (and where many abortions are performed under unsafe conditions) than in areas where abortion is legally permitted ... Of all pregnancies (excluding miscarriages and stillbirths), 26% were terminated by abortion’. Henshaw, Singh and Haas (1999), and available at <http://www.guttmacher.org/pubs/journals/25s3099.html> (Accessed 03/01/2004).

⁹⁴⁸ See e.g. Tooley, *supra* n.559.

⁹⁴⁹ Reverence in this context is by the practice of *mizuko kuyō*, and is considered by Tanabe (1997) in reviewing Helen Hardacre’s *Marketing the Menacing Fetus in Japan*, Berkeley and Los Angeles: University of California Press. ‘The terms *mizuko*, literally “water child,” and *mizuko kuyō*, the religious rites performed for them, are most often linked to abortion’, although it is a ritual best explained in the context of ‘fetuses, infants, and young children who die from any number of causes, only one of which is abortion’. There is a suggestion that the act is to propitiate the fetus’s spirit, although the fear of spirit attacks is not the only reason for performing the rite: ‘The *mizuko kuyō* practiced in the new religion *Bentenshō* is not just for *mizuko*, which consist of the souls of aborted, stillborn, and miscarried fetuses, but for the salvation of humanity and this-worldly benefits as well.’ (p.379).

⁹⁵⁰ A point made by LaFleur (1992 and 1995), although he recognises a number of possible perspectives, within Buddhism itself and throughout Japan (1995, p.8) and particularly historically contextualised; see Tanabe’s response to LaFleur (1995), in which he acknowledges the power of LaFleur’s conceptualisation of abortion as ‘not sin but suffering’. For an overview of Buddhist bioethics, including other potential Buddhist positions on abortion, and a useful bibliography, see Hughes and Keown (1995).

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To what extent should conflicting ideologies of rights affect the substantive content of rights discourse? Ayton-Shenker explains that ‘[t]he argument of cultural relativism frequently includes or leads to the assertion that traditional culture is sufficient to protect human dignity, and therefore universal human rights are unnecessary. Furthermore, the argument continues, universal human rights can be intrusive and disruptive to traditional protection of human life, liberty and security.’⁹⁵¹ However, ‘[t]raditional culture is not a substitute for human rights; it is a cultural context in which human rights must be established, integrated, promoted and protected. Human rights must be approached in a way that is meaningful and relevant in diverse cultural contexts.’⁹⁵² The same jurisdiction that produced the Infanticide Acts, discussed above, incorporated into the Abortion Act of 1967 the proviso that allowed a pregnancy to be terminated if its continuation would cause a greater threat to the health of the mother than termination.⁹⁵³ This is something of a self-defeating clause, as the continuation of pregnancy to term is inherently dangerous, but it was intended to give a ‘let-out’, a way of legitimising abortion by focusing on a medical model, rather than making more profound investigation into the necessary implications of a State involvement in life’s boundaries. The ‘medical model’ may be seen as an attempt to avoid responsibility, including whatever responsibility the State, and individuals within the state, not only the mother, have for the perceived need to allow or refuse an abortion. Other solutions may be harder to achieve – welfare benefits, child care, a change in society’s attitude to the disabled;⁹⁵⁴ a more effective criminal justice

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⁹⁵¹ Ayton-Shenker (1995).

⁹⁵² *Ibid.*

⁹⁵³ Abortion Act 1967, Section 1, as amended by Sec. 1, Sub-sec. (1): paras (a)-(d) substituted for paras (a), (b) as originally enacted by the Human Fertilisation and Embryology Act 1990, s 37(1).

⁹⁵⁴ See van Zyl Smit (1992).

procedure for the deterrence, detection, and punishment of rape, a better availability of, and education regarding, contraceptive use. Petchesky affirms that:

I have always maintained that abortion access for all who need it would never be won unless abortion itself, as both a political issue and a medical procedure, is embedded in a much larger political frame that addresses health care, child care, housing, jobs, education, and the whole cluster of social rights and needs that make having wanted and healthy children possible.⁹⁵⁵

Finding the abortion question to be a ‘sensitive area’, the attitude of the human rights tribunals has been timid. For instance, in *H(R) v. Norway*⁹⁵⁶ the ECtHR has stated that the Convention does not define the terms ‘everyone’ and ‘life’, relying on *Paton v United Kingdom*.⁹⁵⁷ Further, the national law regulating abortion was at the discretion of the State ‘which the Commission considers it has in this sensitive area’, and so was not subject to the scrutiny of the Court in respect of standards which ought to be maintained. For instance, in *Boso v. Italy*,⁹⁵⁸ the question of whether the foetus suffered pain, and that therefore anaesthetic should be used, was held not to be an Article 3 ECHR⁹⁵⁹ matter. Also in *Boso*, as in *H(R) v. Norway*, the child’s father was recognised only as a ‘potential father’, whereas the mother’s status, as an actual mother, whether she had any already-born children or not, was not questioned. It may be that there are good and sufficient reasons for refusing the involvement of the male parent in abortion decisions, but such reasons are not best served by denying identity. In *Boso*, the father’s interest was held to

⁹⁵⁵ Petchesky, *Dissent*, (2003), and *infra* n.573. See also Wolf (1995), including the comment that rape should merit ‘serious jailtime’.

⁹⁵⁶ *H(R) v. Norway*, Application No.17004/90, 19 May 1992.

⁹⁵⁷ *Paton v. United Kingdom*, Application No. 8416/78, 3 Eur.H.R. Rep. 408 7-9 (1980) (ECHR), where the word “everyone” is held to not include foetuses.

⁹⁵⁸ *Boso v. Italy*, Application No.00050490/99, 5 September 2002.

⁹⁵⁹ The right to be free from torture, inhuman and degrading treatment. On foetal and neonatal capacity to feel pain, see *supra*, n.436.

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be in his own right to respect for his family life and not on behalf of his unborn child. This reinforces the earlier case of *H.(R.) v. Norway*, in which a Jewish father was denied the right to inter the remains of his child according to the precepts of his religion. This denial of identity extending not only to the father but the child, is apparent also in modern Western constitutions; for instance, in *Tremblay v. Daigle*⁹⁶⁰ the SCC approved the notion, in discussing the status of the foetus as a 'person', 'human being', 'juridical personality', or a concomitant of the mother, that human beings begin at birth, in the view of Quebecois legislators, who otherwise would have specifically drafted the Quebec Charter of Human Rights and Freedoms to include the foetus.

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Yet in cases involving frozen pre-embryos, such as that in an English domestic jurisdiction case, *Evans v. Amicus Healthcare Ltd. (Secretary of State for Health and Another Intervening)*:

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*[Counsel for the Claimant] recognises that an embryo has no right to life in the sense that a human being has such a right. He submits that an embryo has a qualified right to life, that is a right to life which is consistent with his mother's wishes. Neither convention jurisprudence nor English law provides a clear cut answer to the question: at what point does human life attain the right to protection by law? For many purposes, the viability of a foetus is taken as the benchmark for determining the legal status of a child. ... We do not have any scientific detail and so I proceed on the basis that while an embryo has the potential to become a person it is not itself that person: further changes must take place. ... In my judgment, an embryo has no qualified right to life. This court rejected the argument that a foetus had a right to life protected by art 2 in *Re F (in utero)*....⁹⁶¹*

What the Court was in fact rejecting was not that a foetus has a right to life, but that it has a right to life that is protected by law; whereas in fact the pre-embryos concerned were

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⁹⁶⁰ [1989] 2 SCR., 8 August 1989.

⁹⁶¹ Joint judgment of Thorpe and Sedley LJJ., paras. 106 and 107, citing *Re F (in utero)* [1988] 2 All ER 193, [1988] Fam 122. [Emphasis added]. This case has now been heard, and the applicant's petition denied, by the ECtHR: *Evans v. United Kingdom*.

made the subject of Court proceedings in which the relevant interests of all those concerned were weighed, and the father's right not to become a parent against his continuing will was confirmed. That is, their right to life was protected by law.⁹⁶²

In the ECtHR case of *Vo v. France*,⁹⁶³ mentioned above, the question of the humanity of the preborn also arose. The case was brought by a young woman whose baby had to be aborted after she was negligently given treatment intended for another woman, leading to irreversible harm to her five-month pregnancy. Mme. Vo wanted a charge of homicide to be brought against the negligent doctor, but because the preborn is not regarded as a person before the law, this was not possible under French law. The Court considers matters regarding the embryo and foetus to be issues for the exercise of State discretion,⁹⁶⁴ and confined itself to commenting, as noted earlier, that the minimum European consensus is that the embryo/foetus can be assumed as belonging to the human race. Further,

The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom ... – require protection in the name of human dignity, without making it a 'person' with the 'right to life' for the purposes of Article 2.⁹⁶⁵

Oddly, this decision seems to be suggesting that although the foetus belongs to the human race, it does not enjoy Article 2 protection; that status, as rights-bearer, is reserved for 'persons'.

The reason for this stance, producing this apparent dichotomy, is to be found in a logical fallacy regarding the existence on the statute books of a law legalising abortion. The false reasoning can be seen in the comments of Laura Katzive, Legal Adviser to the Center for

⁹⁶² See Plomer, *supra*, n.470, [for detailed analysis of these cases.](#)

⁹⁶³ *Supra*, n.399.

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⁹⁶⁵ *Supra*, n.399, para.84.

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Reproductive Rights, [CRR] which filed an *amicus curiae* brief in the case. Katzive claimed that if ‘the Court had gone the other way, abortion laws in thirty-nine countries across Europe would have been rendered invalid. The facts in this case were extremely sad, but a woman’s right to make her own decisions about her life and body were at stake.’⁹⁶⁶ This position represents a fundamental misconception; to legislate for homicide of the unborn would only affect legal abortion if it were, in fact, homicide, and not a lawful intervention. Abortion can be defined out of the protection,⁹⁶⁷ as self-defence is; Katzive’s claim is making exactly the opposite point from that which she would wish to advocate, by suggesting that legal abortion can be equated with homicide merely by recognising the humanity of the preborn. The logical fallacy is a material fallacy, categorical syllogism. Killing human beings is not always murder; it could be occasioned by use of lethal force which is no more than absolutely necessary in defence of one’s self or another, or where the killing is deliberately engineered by the victim of police use of force: ‘suicide by cop’.⁹⁶⁸ Active killing as not-murder is a proposition to be returned to, that instantly undermines Katzive’s argument, which relies upon its own (invalid) premise as a basis for the proposition which is to be proved. Legal abortion would of course not be homicide because it would be legal taking of human life; homicide is illegal taking of human life. The CRR themselves recognize that there can be such a distinction, in their mid-term resumé of the 2005 legislative session in the USA. Five states enacted foetal

⁹⁶⁶ CRR Press Release ‘Court Rejects Use of European Human Rights Law to Establish Fetal Rights’, July 08/11/2004.

⁹⁶⁷ Matters raised within the case will be discussed further in the next chapter, in the context of ‘protection by law’; for the moment, the issue is that of the human-ness or otherwise of the foetus.

⁹⁶⁸ ‘A colloquial term used to describe a suicidal incident whereby the suicidal subject engages in a consciously life-threatening behavior to the degree that it compels a police officer to respond with deadly force’. Stincelli (2004).

homicide laws – West Virginia, Florida, Oklahoma, Arizona, and Maryland; only in Maryland was it explicitly stated that the ‘the newly enacted measure should not be construed to confer personhood on the fetus. ... *All of the laws passed this session contain exceptions for legal abortion*’.⁹⁶⁹

The ECtHR’s decision that it was not a necessary aspect of the Article 2 obligation that the unborn could be subject to unintentional (or intentional) homicide, and that therefore there should be effective national law in place, means a failure to protect by law, to allow identity as a murder victim, to permit prosecution of the perpetrator; not necessarily in medical negligence cases, where there is a lack of intention, but in situations of premeditated murder.

Habermas’s view is that ‘[f]rom a philosophical perspective, extending the argument for human rights to cover human life “from the very beginning” is not at all conclusive. On the other hand, the legal distinction established between the human dignity of the person, which is unconditionally valid, and the protection of the life of the embryo, which may on principle be weighed against other rights, by no means opens the way to a hopeless controversy over conflicting ethical goals.’⁹⁷⁰ However, although the right to life after birth may be absolute in terms of prohibition on arbitrary deprivation, it is not in terms of limited resources, where the distinction, ‘which may on principle be weighed against other rights’, attributed by Habermas to the status of the embryo, is also relevant. See, for instance, the South African Supreme Court decision in *Soobramoney v. Minister of Health (Kwazulu-Natal)*⁹⁷¹ where it was found that the applicant did not have a right to the use of

⁹⁶⁹ CRR, 2005 Mid-Year Report, IV.A. p.8.[Emphasis added].

⁹⁷⁰ *Supra*, n.334, pp.66–67.

⁹⁷¹ Judgment of 27/11/1997, paras.30, 39–43, 52–58.

scarce medical resources (kidney dialysis) on an ongoing, as opposed to emergency, basis.⁹⁷²

Rather than limiting the concept of ‘human’ by not including the human preborn, an expanded view of the ‘human’ is more likely to achieve the object and purpose of human rights protection, which in the case of the right to life provision means protecting life by law; for instance, where democracies have decided on the availability of legal abortion, that means that the law in place must effectively protect the interests of those involved. The obligation at issue is the State obligation to promote and sustain life, and there is much to argue for in van Zyl Smit’s portrayal of the choices that threatened to undermine the new German Constitution, post-reunification.⁹⁷³ It would be better to look beyond the black/white, yes/no, pro-/anti-choice rhetoric and see instead what is available to States to ensure that abortions need to be sought less often. Reproductive healthcare, education, health and welfare benefits, childcare, sufficient support for the poor, disabled and ill; these are the kind of things which make a difference, and which could be read as the State’s positive obligation with respect to protecting life, the life of the mother, child and family.

iv A Right to Life as a Right to Die? A ‘Paradox of Objectives’

Koskenniemi⁹⁷⁴ describes the ‘paradox of objectives’,⁹⁷⁵ in a work seeking the *raison d’être* of international law – what is it for? – and asks, ‘But what if advancing human

⁹⁷² For comment on this case see ‘Report of the Expert’s Roundtable Concerning Issues Central to the Proposed Optional Protocol to the ICESCR’, hosted by the IComJ, 26–27 September 2002 Geneva, Switzerland, para.II.(c) ‘The Obligation to “Fulfil” Under the ICESCR: Employing a Judicial Review Approach.’

⁹⁷³ Van zyl Smit (1994).

⁹⁷⁴ Koskenniemi, (2003) ‘What is International Law For?’ in Evans, (Ed.) (2003) at pp.89-114.

⁹⁷⁵ *Supra*, n.974, at p.89.

rights would call for the destruction of an unjust peace?’⁹⁷⁶ What if advancing human rights would call for allowing the self-destruction of life at another’s hands? This was held to be outside the remit of the right to life provision in the ECHR – no freedom being considered to be that fundamental – in *Pretty v. United Kingdom*.⁹⁷⁷ The right to life was not a right for a terminally ill person to commit suicide with the aid of another, on the understanding that the other person could then be guaranteed freedom from prosecution.⁹⁷⁸

Singer has challenged what he sees as the ‘traditional view that all human life is sacrosanct’ as being ‘simply not able to cope with the array of issues that we face.’⁹⁷⁹ Singer, it is argued here, goes too far in throwing out the physical baby with the metaphysical bathwater,⁹⁸⁰ his beliefs including ‘throwing out’ or otherwise disposing of babies for any reason, but particularly physical handicap, up to one month after birth.⁹⁸¹ Whilst such a position is firmly denied here as immoral, the freedom of sacrifice, of ones’ self⁹⁸² or possibly even the suffering other, is a freedom that must be maintained. Death is

⁹⁷⁶ *Supra*, n.974, at p. 90.

⁹⁷⁷ *Pretty v United Kingdom*, *supra* n.993

⁹⁷⁸ See also *supra*, n.990; and ECHR Steering Committee For Human Rights, report of the 52nd Meeting, 6-9 November 2001: *Recommendation 1418 (1999) on the protection of the human rights and dignity of the terminally ill and the dying*.

⁹⁷⁹ Singer (1994), p.189.

⁹⁸⁰ Expression adapted from Wacks (1999) at p.254: ‘is it possible to preserve a broadly Kantian moral system of universal rights without adopting Kant’s transcendental idealism? Keep the moral baby and throw out the metaphysical bathwater?’

⁹⁸¹ Singer, *supra* n.513. See Oderberg’s accusation of Singer (Winter 2001). On the ultimate, horrifying possibilities of such a wide-ranging challenge to human dignity, see W. Smith (2003).

⁹⁸² See Kuhse (1999) and Quante (1999) on the difficulties related to respecting the Advance Directives (“Living Wills”) of those who may subsequently suffer from dementia, or some other condition, which changes their personality, capacity or freedom to choose, and whether in such cases the expression of previous autonomy should be respected.

not the ultimate wrong;⁹⁸³ torture is, and modern medicine can subject to torture those whose lives it is preserving, against all odds, through years of suffering.⁹⁸⁴ Martin Luther King is widely quoted as saying, on the evening before his assassination, “No-one is truly free to live until one is free to die”.⁹⁸⁵

The State interest here is that life is to be preserved for teleological (in the sense of useful purposiveness) and not moral ends, keeping alive those who can ‘contribute to society and enjoy life.’⁹⁸⁶ At a deeper level, given that many of the people who are kept alive under such ordinances may not in any intrinsically obvious way be fulfilling either of those criteria, the benefit to society may be seen in its protection of its own health by not permitting the killing of the ill and incapacitated. This is a powerful argument, and not one to be dismissed lightly, but it is arguable that a certain respect for individual autonomy might counter its universal force. It is, additionally, an intriguing argument, coming as it does from a society, the USA, which permits the death penalty; one of the prevailing arguments against judicial execution is its consequence for society’s moral health.⁹⁸⁷ Dworkin categorises this teleological interest as an instrumental value, and as such one of three ways in which human life is valuable, alongside its subjective (personal)

⁹⁸³ Sachs J., concurring in the SACC case, *Soobramoney v. Minister of Health (KwaZulu-Natal)*, 27 November 1997, para.57. However the right to life may come to be defined in South Africa, there is in reality no meaningful way in which it can constitutionally be extended to encompass the right indefinitely to evade death. As Stevens J put it: dying is part of life, its completion rather than its opposite.

⁹⁸⁴ *Compassion in Dying, Jane Roe, John Doe, James Poe, Harold Glucksberg, v. State Of Washington, Christine Gregoire*. [Footnotes omitted]. In this judgement, the decision was that: ‘We hold that a liberty interest exists in the choice of how and when one dies, and that the provision of the Washington statute banning assisted suicide, as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors, violates the Due Process Clause.’ The Supreme Court overruled in *Washington v. Glucksberg*, upholding the constitutionality of Washington State’s assisted suicide ban. See also Manning, (1996); Santner (2005).

⁹⁸⁵ E.g. *SMACA*, St Matthew-in-the-City Anglican Church, Auckland, Aotearoa, New Zealand, ‘Euthanasia’. This quote is not included in the Martin Luther King Project papers on the Stanford University website, and may therefore be apocryphal.

⁹⁸⁶ *Washington v. Glucksberg*.

⁹⁸⁷ *Supra*, n.64.

value and its intrinsic value;⁹⁸⁸ that which is inherent and described within human rights as the concept of dignity. Kant offers a quite different teleology and *raison d'être*:

[A]s regards the concept of necessary duty to oneself, the man who contemplates suicide will ask himself whether his action can be consistent with the idea of humanity as an end in itself. If he destroys himself in order to escape from a difficult situation, then he is making use of his person merely as a means so as to maintain a tolerable condition till the end of his life. Man, however, is not a thing and hence is not something to be used merely as a means; he must in all his actions always be regarded as an end in himself. Therefore, I cannot dispose of man in my own person by mutilating, damaging or killing him.⁹⁸⁹

The case relating dignity, suffering, and the preservation of life as not being the ultimate good, was made by Manuela Sanlés Sanlés, the heir of a tetraplegic person, Ramón Sampedro Cameán, who committed suicide (two and a half years after instituting proceedings pleading a right to die with dignity) with the assistance of others.⁹⁹⁰ She described his suffering to the HRC, and the State's alleged responsibility for an Article 6 violation:

[A]rguing that life as protected by the Covenant refers not only to biological life, under any circumstances, but to a life of dignity, ... She maintains that the right to life does not mean the obligation to bear torment indefinitely, and that the pain suffered by Ramón Sampedro was incompatible with the notion of human dignity.⁹⁹¹

In this case, both Manuela Sanlés Sanlés and Ramón Sampedro Cameán became “silenced voices”; the case was declared inadmissible, in that he was not held to be a victim of a violation of a Convention right, and she was not able to continue the case on his behalf.⁹⁹²

The interest identified by Rehnquist, apart from being a State one, was an interest in life itself, life as not-death and not in any sense of quality or of conditions needed to maintain

⁹⁸⁸ Dworkin (1993) pp.72-73.

⁹⁸⁹ Kant *supra*, n.430, para.429.

⁹⁹⁰ HRC, Manuela Sanlés Sanlés (Ramón Sampedro Cameán) v. Spain, 28/04/2004, paras.2.1-4.

⁹⁹¹ *Ibid.*, paras.3.3-4.

⁹⁹² *Ibid.*, paras.6.2-3.

life – even if that life seemed unbearable to the one who lived it.

The ECtHR had, prior to the HRC case of *Ramón Sampedro Cameán*, faced a similar situation regarding a woman suffering from motor neurone disease, in *Pretty v UK*.⁹⁹³

Diane Pretty, becoming progressively disabled, was afraid of a death by suffocation, and wanted her husband to be allowed to help her to die at a time of her choosing before breathing difficulties became acute; she was physically unable to take the steps she saw as necessary by herself. Further, she wanted the Director of Public Prosecutions [DPP] for England and Wales to agree in advance that her husband would not be prosecuted for rendering her assistance to die. Neither the English courts⁹⁹⁴ nor the ECtHR were prepared to permit her request, and she did indeed die as a consequence of breathing difficulties, suffering as she had most feared that she would.⁹⁹⁵

Kant's teleological position differs from USA Supreme Court Chief Justice Rehnquist's view of the State's, defining the interest to be served as one's own, and not the State's, but must still be contrasted with the claimed 'liberty interest' in the right to death that Rehnquist also identified as having been conclusive in the *Washington v. Glucksberg* Court of Appeal decision⁹⁹⁶ which was being challenged:

Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy'.⁹⁹⁷

This point is fundamental to the discussion in *R. v. Morgentaler*, when the SCC debated

⁹⁹³ *Pretty v United Kingdom*, 29 April 2002

⁹⁹⁴ *The Queen on the Application of Mrs. Diane Pretty (Appellant) v. The DPP (Respondent) and Secretary of State for the Home Department (Interested Party)*, 29/11/2001.

⁹⁹⁵ Dyer, 'Free at last - Diane Pretty dies'. *Guardian*, 13/05/2002

⁹⁹⁶ *Washington v. Glucksberg: Compassion in Dying, Jane Roe, John Doe, James Poe, Harold Glucksberg, v. State Of Washington, Christine Gregoire*.

⁹⁹⁷ *R. v. Morgentaler*. at 813-814

the constitutionality of s.251 of the Criminal Code of Canada. Madam Justice Wilson,⁹⁹⁸ concurring, expressed an opinion which takes into account beliefs about human worth and dignity ('the *sine qua non* of the Charter'⁹⁹⁹), concluding (in a deeply compassionate judgement) that the 'right to liberty contained in s.7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives'.¹⁰⁰⁰ Should these decisions include that to bring one's own life, or that of another, sentient or non-sentient, to a premature end, where its continuation is thought of as unbearable?

There is not scope here to give a full analysis of all the arguments relating to euthanasia and assisted dying; the point is to give due consideration to the notion of the place that individual liberty, in the sense of autonomy, can or should be allowed to play in the determination of what constitutes defensible action in the name of dignity. Would a truly moral law allow, or not allow, the deliberate infliction of death on a suffering person, even at their own (apparent) request?

The most often quoted principles of bioethics are justice, beneficence, non-maleficence, and autonomy,¹⁰⁰¹ and the determination of life's boundaries is most seen to challenge those principles in the field of euthanasia, involving dilemmas of whether to legalise, regulate or prosecute, or to continue to allow what Magnusson¹⁰⁰² has documented as an underground, a world where illegally precipitated deaths are assisted, often by health care

⁹⁹⁸ *Ibid.*, at p.171.

⁹⁹⁹ Citing the Chief Justice in *R. v. Big M Drug Mart Ltd.* (Citation omitted.)

¹⁰⁰⁰ *Supra*, n.998. See also *Godbout v. Longueuil (City)*, where LaForest J. stated: 'the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.' [1997] 3 S.C.R 844.

¹⁰⁰¹ First stated in Beauchamp and Childress (1979).

¹⁰⁰² Magnusson (2002).

workers, on a regular and frequent basis. The critical thing for national law is to be able to draft legislation in terms that protect the right to life, as required by the treaties.¹⁰⁰³ Whether that means the legal availability of euthanasia is a case strongly argued for by Magnusson.¹⁰⁰⁴ And it is, of course, the argument of this thesis that ‘the right to life shall be protected by law’ means that there should be effective legal regulation in place at moments when life is at its boundaries, and that regulation permitting euthanasia is more likely to protect the interests of those involved than either pretending or wishing it did not need to happen. Such a matter is, again, for democratic governance, but the stance of the ECtHR, in holding that the right to life does not incorporate a right to die, misses the point.¹⁰⁰⁵

Lord Goff of Chieveley in an English jurisdiction case, *Airedale NHS Trust v Bland*, regarding withdrawal of nutrition and hydration from a person in PVS, commented that ‘the fundamental principle is the principle of the sanctity of human life – a principle long recognised not only in our own society but also in most, if not all, civilised societies throughout the modern world’. However, ‘this principle, fundamental as it is, is not absolute. ... there is no absolute rule that the patient's life must be prolonged by such treatment or care, if available, regardless of the circumstances’.¹⁰⁰⁶ The decision has been

¹⁰⁰³ See ní Aoláin, (1995) commenting on HRC, *de Guerrero v. Colombia*, (1982), where there were deaths as a result of shooting by police: ‘The [HRC] unequivocally concluded that there had been a violation of the right to life protected under Article 6(1) [ICCPR]. As a matter of law the consensus of the Committee was that inasmuch as the police action was made justifiable as a matter of Colombian law by Legislative Decree No. 0070 of 20 January 1978, the right to life was not adequately protected by the law of Colombia as required by article 6(1)’.’ The argument here is that, in contrast to the *de Guerrero* decision, effective legal regulation of euthanasia would provide greater protection of the right to life than outright prohibition, the current position in most states.

¹⁰⁰⁴ See for other views Amarasekara and Bagaric (2002); de Haan (2002); Peck (1997).

¹⁰⁰⁵ *Pretty v. UK*, *supra* n.993.

¹⁰⁰⁶ *Airedale NHS Trust v Bland*, at p.864.

criticised, for instance by Finnis¹⁰⁰⁷ and Keown,¹⁰⁰⁸ but Paust suggests that ‘overreaching domestic laws’ do not address the ‘contextual complexities’¹⁰⁰⁹ in which people in many different situations might seek to end their own lives, or the lives of those dear to them, ‘when fragile lives seem broken’.¹⁰¹⁰ In respect of the oft-quoted ‘slippery slope’ argument, he cites Bender, who claims that:

[T]he social and ethical price of gearing our laws and rules to the bad actors is significant suffering and indignity to innocent, humane people because of unnecessary restraints on their freedom to act out of care in a manner responsive to particular circumstances of need.¹⁰¹¹

The questions involved in assisted suicide and euthanasia are complex, and beyond the scope of this thesis to enter into in detail, but the principle which is affirmed is that, as Paust puts it, ‘legal decision should not be blind to context’.¹⁰¹² There are indeed circumstances, contexts of fragile, broken lives, when the law’s protection of the interests of those involved is denied by the law’s criminalisation of heroic compassion; when unbearable injustice is perpetrated in the name of a higher law. But can ‘unbearable injustice’ be perpetrated against humans as yet unconceived, the generations of the future?

5.4 ADDRESSING THE SCENARIOS

5.4.1 AVOIDING INTOLERABLE INJUSTICE AS A RIGHT TO LIFE FRAMEWORK

¹⁰⁰⁷ Finnis, (1995).

¹⁰⁰⁸ Keown (1997).

¹⁰⁰⁹ Paust (1995), p.464.

¹⁰¹⁰ *Ibid.*, p.466.

¹⁰¹¹ Bender, ‘A Feminist Analysis of Physician-Assisted Dying and Voluntary Active Euthanasia’, 59, *Tennessee Law Review* 519, at p.532, and cited in Paust, *supra* n.1009, at p.467.

¹⁰¹² Paust, *supra* n.1009, p.467.

i Effective Interpretations to Meet Past, Present, and Future Realities

It has been argued that an exercise of *Radbruch's Formula* in the current context requires a recognition of the effectiveness of human rights treaties being fulfilled by interpretations that allow the treaty terms to achieve their object and purpose in good faith, and thus is 'intolerable injustice' avoided. The question of what constitutes justice with regard to the right to life has been argued as including a number of facets, amounting to taking action which recognises a bias or presumption in favour of life, particularly in the fields where decisions are made that are going to affect the ability of others to live. In this section, the scenarios presented at an early stage of this thesis will be re-introduced in the context of some fields of enquiry in which human rights discourses have, or have not, been active to make a difference to 'who is to live and who is to die'. As indicated in the introduction, 'discourse' implies relations of power, and it is the relations of power implicit in the decisions about who lives and who dies that will end this discussion.

ii Future Generations

The concept of 'future generations' as a recognised entity of potential rights-bearers is a relatively new one in human rights discourse. The 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights [VDPA] expressed the beneficiaries of developmental policies as 'present and future generations'.¹⁰¹³ Further, '[t]he World Conference on Human Rights recognises that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone.'¹⁰¹⁴ Who that 'everyone' might be was recognised in the 1994 Agenda for Development: '[d]evelopment has to be oriented towards each person in

¹⁰¹³ Para.11.

¹⁰¹⁴ *Ibid.*

the world. Beyond this must arise a recognition that this human community includes the generations yet to come ...'.¹⁰¹⁵ The Organisation for Economic Co-operation and Development Nuclear Energy Agency have issued a collective report, *The Environmental and Ethical Basis of Geological Disposal of Long-Lived Radioactive Waste*,¹⁰¹⁶ which states that:

Radioactive waste shall be managed in such a way that predicted impacts on the health of future generations will not be greater than relevant levels of impact that are acceptable today.¹⁰¹⁷

Radioactive waste shall be managed in such a way that will not impose undue burdens on future generations.¹⁰¹⁸

And UNESCO in the Declaration on the Responsibilities of the Present Generations towards Future Generations declared:¹⁰¹⁹

The present generations should strive to ensure the maintenance and perpetuation of humankind with due respect for the dignity of the human person. Consequently, the nature and form of human life must not be undermined in any way whatsoever.¹⁰²⁰

It is sobering to realise just how the 'nature and form of human life' can so easily be undermined. It has been shown that being malnourished at certain times of development can affect the life expectancy of an individual's grandchildren;¹⁰²¹ and exposure to environmental toxins causing cancer leads to genetic changes in all generations of

¹⁰¹⁵ Para.233.

¹⁰¹⁶ International Atomic Energy Authority, Safety Fundamentals: The Principles of Radioactive Waste Management.

¹⁰¹⁷ Principle 4.

¹⁰¹⁸ Principle 6.

¹⁰¹⁹ Preamble: 'Recalling that the responsibilities of the present generations towards future generations have already been referred to in various instruments such as the Convention for the Protection of the World Cultural and Natural Heritage, ..., the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, ..., the Rio Declaration on Environment and Development, ..., the [VDPA ...] and the United Nations General Assembly resolutions relating to the protection of the global climate for present and future generations adopted since 1990, ...'

¹⁰²⁰ Article 3 - Maintenance and perpetuation of humankind.

¹⁰²¹ BBC2 *Horizon*, 03/11/2005: *The Ghost in your Genes*. See also the work of Wolf Reik and the Laboratory of Developmental Genetics and Imprinting, The Babraham Institute, Cambridge:

<http://www.babraham.ac.uk/research/developmental%20genetics/imprinting.htm> (accessed 04/11/2005)

descendants, who then all can show a genetic predisposition to that cancer.¹⁰²² The future world and future beings within it are more fragile than we may realise, bringing to mind Rawls' *Theory of Justice*,¹⁰²³ in which he complements his total scheme by looking to the need for 'justice between generations'.¹⁰²⁴ For future generations, this requires the exercise of the 'just savings principle',¹⁰²⁵ similar to the 'difference principle'¹⁰²⁶ which he advocates for the current generation, who of course (under the Rawlsian 'veil of ignorance') do not know which generation they are: the first, or the last, or in between.¹⁰²⁷

The principle shows

that persons in different generations have obligations to one another just as contemporaries do. The present generation cannot do as it pleases but is bound by the principles that would be chosen in the original position to define justice between persons at different moments of time.¹⁰²⁸

Whilst expressed primarily in economic terms, justice, as Rawls points out, is not only financial: 'capital is not only factories and machines, and so on, but also the knowledge and culture, as well as the techniques and skills, that make possible just institutions and the fair value of liberty'.¹⁰²⁹ The ramifications of enduring justice through the generations could be construed as concerning matters such as nuclear waste, which has been brought to the attention of the HRC. In *E.H.P. v. Canada*, the Committee listened to a Communication regarding the right to life of future generations in connection with nuclear

¹⁰²² A relatively recently discovered field of study, known as 'epigenetics': 'the study of heritable changes in genome function that occur without a change in DNA sequence. ... Epigenetics impacts on our understanding of human disease, cancer, ageing and stem cells, as well as on agriculture.' The Epigenome Network of Excellence [NoE], <http://www.epigenome-noe.net/index.php> (accessed 04/11/2005).

¹⁰²³ Rawls (1971, 1999 rev.ed.)

¹⁰²⁴ *Ibid.*, §44, pp.251-258.

¹⁰²⁵ *Ibid.*

¹⁰²⁶ *Ibid.*, §13, pp.65-73

¹⁰²⁷ *Ibid.*, p.254.

¹⁰²⁸ *Ibid.*, p.258.

¹⁰²⁹ *Ibid.*, p.256.

waste dumpsites, declaring it inadmissible for non-exhaustion of domestic remedies. However, the question of standing of future generations, raised as potential victims by the author: ‘E. H. P. ... on her own behalf and, as chairperson of the Port Hope Environmental Group, on the behalf of the present and future generations of Port Hope, Ontario, Canada, including 129 Port Hope residents who have specifically authorized the author to act on their behalf’ was not exactly dismissed by the HRC, but nor was it addressed either:

The Committee considers that the author of the communication has the standing to submit the communication both on her own behalf and also on behalf of those residents of Port Hope who have specifically authorized her to do so. Consequently, the question as to whether a communication can be submitted on behalf of “future generations” does not have to be resolved in the circumstances of the present case. The Committee will treat the author’s reference to “future generations” as an expression of concern purporting to put into due perspective the importance of the matter raised in the communication.¹⁰³⁰

The ICJ have also recognised the possible claims of ‘generations unborn’ in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, cited also in the *Gabcikovo Dams Case*,¹⁰³¹ asserting a developing customary law of environmental protection with future generations as potential beneficiaries, and protection of the environment recognised as an ‘essential interest’ of a State.¹⁰³²

iii Implications of the recognition of future generations

‘Future generations’ as a subject of the recognition of law raises an interesting lacuna.

¹⁰³⁰ Para.8(a).

¹⁰³¹ *Supra* n.275 and accompanying text.

¹⁰³² *Gabcikovo Dams Case*, para.53: ‘The [ILC], in its Commentary, indicated that one should not, in that context, reduce an “essential interest” to a matter only of the “existence” of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, “a grave danger to . . . the ecological preservation of all or some of [the] territory [of a State]” (*Ibid.*, p. 35, para. 3); and specified, with reference to State practice, that “It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an ‘essential interest’ of all States.” (*Ibid.*, p. 39, para. 14.)’

The status as rights-bearers of those who have already been born is not disputed (although whether that includes a requirement to have breathed is not clear¹⁰³³). The status of future generations, presumably meaning those not yet conceived, is now being recognised. The preborn, that is the already conceived, whether *in* or *ex utero*, are not currently rights-bearers. The genetic material that forms them is recognised as requiring the protection of law.¹⁰³⁴ Environmental harms can affect developing embryos and their gametes, both in their own case and in the case of the future descendants from those gametes, and developing gametes in the case of the female are present in ovarian tissue being formed whilst the female child is in the womb. Yet the preborn human is not recognised as a rights-bearer, meaning that whilst that human was still a ‘future generation’ rights were ascribed; they are considered not present whilst it is *in utero*; and they return at live birth. This legal fiction about the human identity of the preborn has been created in order to preserve the right of access to legal abortion, a right which does not have to be lost by removing the euphemisms and treating the human identity of the developing being as a continuum, and it is an expression of Western liberal thought. Cross-cultural insights could well inform human rights thinking in this regard.

iv Cross-cultural insights

Something which could be read as an expansionist view is offered by Traer,¹⁰³⁵ in a discussion in which he finds the roots of an Indian human rights tradition within the sacred texts, and based on a notion of *dharmā*: ‘an ethic of community, responsibility and

¹⁰³³ See *Queenan v. Canada*, where the HRC dismissed the Communication on admissibility grounds without considering the appropriateness of the legislation to which attention was being drawn. *Supra*, n.593 and accompanying text.

¹⁰³⁴

¹⁰³⁵ Traer (1991).

loyalty,¹⁰³⁶ cites Panikkar who argues that:

the Hindu notion of *dharma* requires, [firstly,] that human rights are not only the rights of individuals or even humans, [and second,] that human rights involve duties and relate us to the whole cosmos. [Finally,] that human rights are not absolute but are relative to each culture.¹⁰³⁷

Menski offers a critical approach to rights arguments that fail to recognise the ideals of rights springing from other cultures,¹⁰³⁸ and that point of Pannikar's regarding human rights as possibly being ascribed beyond the notion of 'human' is important in the context of the current discussion; both because it implies a possibility of rights for those who are not only outside the parameters of an understanding of what it is to be persons, but those whose humanity may also be in question: clones or chimera, for example, although these are almost certainly not what Panikkar had specifically in mind, even if he might be prepared to extend his argument to these new creations in the cosmos.

Baxi asserts the right of human rights discourse to challenge the politics of identity, where those politics allow the imposition of suffering on the grounds of perceived or ascribed difference:

As an untouchable, no matter how you perceive your identity (as a mother, wife, or daughter), you are still liable to be raped; still will be denied access to water in the high caste village well; still will be subjected to all kinds of forced and obnoxious labor; still have your huts set ablaze; still have your adult franchise regularly confiscated at elections by caste Hindu

¹⁰³⁶ Juergensmeyer, 'Dharma and the Rights of the Untouchables,' unpublished essay, 8 March 1986, p.28. Cited in Traer, *supra* n.1035.

¹⁰³⁷ Traer, *supra* n.1035, n.3. Citing Panikkar, 'Is Human Rights a Western Concept? A Hindu/Jain/Buddhist Reflection,' *Breakthrough* 10, nos. 2-3 (Winter/Spring 1989), pp.33-34.

¹⁰³⁸ See Menski (2003), regarding Hindu law: 'Issues that keep coming to the fore are 'honor killings', female 'circumcision' for many African Women, and consent in marriage. Whilst all of these problems pose real challenges and endanger some women, the issues are used as tools to denigrate everything non-Western as primitive, misogynist, and inherently discriminatory. The issue of consent in marriage ... serves to legitimize immigration-related agenda and controls in Britain and the [EU ... and] to teach 'immigrants' ... that they should adopt the values of their host country by marrying among themselves, rather than 'importing' spouses. Human rights arguments are here used selectively to deny certain human rights.' Menski, (2003), p.582, footnote 101.

militia.¹⁰³⁹ Human rights logic and rhetoric, fashioned by historic struggles, simply and starkly assert that such imposition of primordial identities is morally wrong and legally prohibited. ... it is the mission of human rights logics and paralogics to dislodge primordial identities that legitimate the orders of imposed suffering, socially invisible at times even to the repressed.¹⁰⁴⁰

Perhaps the embryo/foetus is the new 'untouchable', denied identity and protection of the law for cultural reasons. However one sees the preborn, as fully human, as potentially a person, as a bundle of cells, possibly even as a transgenic¹⁰⁴¹ bundle of cells, it is possible to ascribe the protection of rights, and indeed to recognise the need for some protection before the embryonic stage, to the genetic material that has developmentally preceded it.

v Recognition of present realities

Because preborn life is not established life, and it is the established lives that, it has been argued, can and do take precedence over the not-yet-established ones, it is possible thereby to defend legitimate legal abortion¹⁰⁴² without denying the humanity of the preborn; the argument is that they are not potential persons, they are not-yet-established lives, and the bias towards life can, legitimately and morally, preferentially protect those lives that are already *in situ*, so to speak. Inflicting a Foucauldian 'biological caesura'¹⁰⁴³ at this point – the was-person becomes the non-person (the capital convict, the PVS sufferer) and therefore no longer *homo sapiens* but now *homo sacer*,¹⁰⁴⁴ eligible to be killed without the protection of law – is, in human rights discourse, an arbitrary act; and to

¹⁰³⁹ Citing Chantal Mouffe, *The Return of the Political* 97, 100 (1993).

¹⁰⁴⁰ Baxi (2002) 'Voices of Suffering, Fragmented Universality, and the Future of Human Rights' in Weston and Marks, (1999) pp.101-157, at p.120.

¹⁰⁴¹ Canadian Council on Animal Care, Guidelines on: Transgenic Animals (1997): 'By definition, the term 'transgenic animal' refers to an animal in which there has been a deliberate modification of the genome – the material responsible for inherited characteristics – in contrast to spontaneous mutation'.

¹⁰⁴² On global abortion practice, see UNPD, *Abortion Policies: A Global Review*, Vols.I,II,III, (2001/2002); see also Eser and Koch (2005); Cook, Dickens, and Bliss, (1999).

¹⁰⁴³ Foucault (1997) at p. 227; see also discussion in Agamben, (1999) at p.84.

¹⁰⁴⁴ A concept thoroughly explored by Agamben, particularly in the context of the Holocaust. Agamben, the *Homo Sacer* trilogy, (1998, 1999, 2004a).

kill is not the same as to allow to die. Protesting against killing with impunity does not mean necessarily continuing to preserve any life by what has been termed ‘heroic efforts’, particularly in express opposition to the wishes of the person concerned.

5.4.1 THE POWER TO ORDAIN LIFE AND DEATH

It could be asserted that ‘avoiding intolerable injustice’ in the context of the right to life means addressing arbitrary exercise of the power to ordain who will live and who will die, Mbembe having seen ‘the power and the capacity to dictate’ this as being where ‘the ultimate expression of sovereignty resides’:

Hence, to kill or to allow to live constitute the limits of sovereignty, its fundamental attributes. To exercise sovereignty is to exercise control over mortality and to define life as the deployment and manifestation of power. One could summarize in the above terms what Michel Foucault meant by *biopower*: that domain of life over which power has taken control. But under what practical conditions is the right to kill, to allow to live, or to expose to death exercised? Who is the subject of this right? What does the implementation of such a right tell us about the person who is thus put to death and about the relation of enmity that sets that person against his or her murderer? ... What place is given to life, death, and the human body (in particular the wounded or slain body)? How are they inscribed in the order of power?¹⁰⁴⁵

So writes Mbembe, in an exploration of ‘necropolitics’, the subjugation of life to the power of death.¹⁰⁴⁶ His essay explores the empirical and philosophical underpinnings of the political actions, particularly war, which exercise sovereign power over life by the distribution of death; colonialism, and the choice of life and death held in the whip of the slave-owner; the body of the suicide bomber in Palestine; the state of exception that was

¹⁰⁴⁵ Mbembe (2003), p.11-12.

¹⁰⁴⁶ See Santner’s essay on the power implications of the fight for/against the ‘state of exception’ that was Terri Schiavo’s life and dying. (2005).

the Nazi concentration camps.¹⁰⁴⁷

There are a number of circumstances in which societies have permitted the taking of the lives of those within their number, for reasons which may or may not be considered moral from the perspective of recognition of human dignity and human rights. Some of those in the ‘not moral’ category have involved the ‘defining out’ of one group or another, excluding them from the protection of law that is granted to the ‘common people’. Kelly, in a discussion of State racism, which ‘involves the idea of the nation as race, of a people as which is racially homogenous, for which internal and external racial others are dangers’¹⁰⁴⁸ takes a Foucauldian biopolitical slant on the decisions of the State in this regard:

In the context of Foucault’s final lecture of 1976 then, we can define state racism as whatever “justifies the death-function in the economy of biopower by appealing to the principle that the death of others makes one biologically stronger insofar as one is a member of a race or population.”... The word ‘biological’ in this definition is (I think) used rather loosely, such that there is no implication that the discourse of the strength of the population needs to be couched in explicitly biological terms to be biologically racist – there simply needs to be an understanding of the population as something that is threatened by internal and external agents, and which can grow stronger by the elimination of those threats.¹⁰⁴⁹

This thesis set out to explore the legal and philosophical response of the discourses of human rights to threats to life and purveyors of death, to the sovereign decisions of who is to live and who is to die. ‘What place is given to life, death, and the human body (in particular the wounded or slain body)?’¹⁰⁵⁰ Is such a body, for instance, recognised as a

¹⁰⁴⁷ On the ‘state of exception’ and relating it, in modern ‘biopolitics’, to the concentration camps, see Agamben (1999).

¹⁰⁴⁸ Kelly (2004), p.59.

¹⁰⁴⁹ *Ibid.*, p.61, citing Michel Foucault, *Society Must Be Defended*, trans. David Macey (London: Penguin, 2003), at p.258.

¹⁰⁵⁰ *Supra*, n.1045.

murder victim, not merely ‘lost’? Human rights discourse has worked to ensure that the ‘disappeared’ are acknowledged as victims of State use of lethal force,¹⁰⁵¹ even where there is no body present; and, where possible, has required the finding and reburial of corpses,¹⁰⁵² according to rites that will bring comfort to the families,¹⁰⁵³ of those slain in such circumstances. The same discourse has, however, denied the compulsory provision in national law of a crime of homicide against the unborn,¹⁰⁵⁴ judging (incorrectly, as it was argued in this thesis) that such a provision would interfere with the possibility of permitting legal abortion.

Brysk challenges the ‘accountability for private wrongs’¹⁰⁵⁵ of global civil society; in this field as in others, the present and future causes of avoidable early deaths, or failure of human rights to recognise the suffering human, can be addressed within the current framework. Recognising that ‘[t]ransnational networks have introduced new standards of accountability for private actors’,¹⁰⁵⁶ and in the context of bodily integrity, Brysk suggests that the ‘standard human rights repertoires have been the key vehicles for progress on medical rights’.¹⁰⁵⁷ ‘New medical phenomena [are being] reframe[ed] as human rights issues’.¹⁰⁵⁸ Brysk sees this as a countering force to Foucault’s biopolitical agenda,¹⁰⁵⁹ sovereign power, whether of the State or of ‘scientific and medical knowledge as

¹⁰⁵¹ The primary case is IACtHR, *Velásquez Rodríguez v. Honduras*.

¹⁰⁵² This finding has been made in a number of IACtHR cases, including *Bámaca Velásquez*.

¹⁰⁵³ The IACtHR has been particularly strong on finding a violation of the right to be free from torture in respect of the relatives of the ‘disappeared’; see, for instance, *Bámaca Velásquez Case*, para.61; and also HRC, e.g. *Quinteros v. Uruguay*; ECtHR, e.g. *Timurtas v. Turkey*.

¹⁰⁵⁴ *Vo v. France*.

¹⁰⁵⁵ Brysk (2005), *passim*, e.g. p.125.

¹⁰⁵⁶ *Ibid.*, p.92.

¹⁰⁵⁷ *Ibid.*

¹⁰⁵⁸ *Ibid.* Note that Brysk’s study is taking ‘human rights’ as a broader frame of action than this thesis, which is focussing on the legal regime, whereas Brysk ‘refers to a normative discourse and and resulting struggles to change political behaviour and institutions ... *not* legal rights or justiciable norms ...’ Brysk, endnote 2, p.129.

¹⁰⁵⁹ Brysk cites Foucault, 1970, 1979, 1994.

power'¹⁰⁶⁰ can be challenged by the discourses of rights. It is for this that this thesis has argued. Human rights discourses themselves have the power to ordain who will live and who will die.

5.5 CONCLUSION

This chapter has presented the role that human rights has been playing with regard to the protection of life ordained by the treaties in their several 'right to life shall be protected by law' articles, and the role that human rights could play as agents of the future. Wilkie has warned that:

[h]uman reproduction ... and the course of human lives ... will be profoundly affected by the new human genetics. To eat of this tree of knowledge may not, quite, fulfil the serpent's promise that 'your eyes will be opened and ye shall be as gods', but with this knowledge will inescapably come power also. How is this power to be exercised and who is to wield it?¹⁰⁶¹

And who is to yield to it? What should be the role of human rights in the unknown future? Unless the discourses of rights are prepared to look 'beyond the horizons' and make plans now for circumstances as yet unforeseen – but not necessarily unforeseeable – there could be a danger of human rights forever being a reactionary force and not a proactive one, declining to participate as an agent in the creation of new futures and struggling to pick up the pieces after the event. The consequence could be one of intolerable injustices perpetrated against many human beings, their right to life violated without recourse to the help that human rights could give. Veitch makes the point succinctly:¹⁰⁶² he questions

¹⁰⁶⁰ *Ibid.*

¹⁰⁶¹ Wilkie, (1993), *Preface*, p.x.

¹⁰⁶² Although it must be noted that Veitch is writing in terms of national/common law, and the reference to judges must be taken in the current context as applying also to Commissioners and Committee Members, who take on roles with equivalent effect to justices in human rights jurisprudence (although in the context of the Human Rights Committee and the Inter-American and (former) African Commissions, not legally binding, although this position may be developing in customary international law).

how, given the liberal premise of tolerance towards *incommensurable* values, the common law can operate so smoothly to produce the ‘community standards’ by reference to which it justifies its decisions. And the issues that need addressing are not simply how the judges produce such standards (the problem to which traditional legal scholarship devotes so much time) but what is the meaning and significance of their doing so? In particular, what effects do the institutional setting and dynamic of law within the community have in turn *back* on the varied values and social forms of that community?¹⁰⁶³

The argument here is that there could be greater (as in, both more profound and more effective) ‘meaning and significance’ flowing from the interpretations of human rights discourses; that, in Pogge’s terms, they represent a form of morality, and that from morality springs both a power and a duty to act in the way that Dworkin would describe as ‘making the developing story as good as it could be’. Failure to do so allows intolerable injustices to be perpetrated, sometimes in the name of rights.

In a sense, as time goes by, Radbruch’s formula, in its original concept, is of less relevance to human rights discourse. The majority of cases are not addressing situations in which an obviously evil law is at play; the moral complexities are more nuanced.¹⁰⁶⁴ Law that allows genocide is not prevalent in most States parties to human rights treaties. There is the occasional case where something such as an amnesty law, preventing the bringing to criminal trial of someone who has killed in the name of the State, may be at issue; or situations such as the ‘*Border Guards*’ can challenge past laws. As shown in the examples taken from the CRC Optional Protocol, above, however, although sometimes we

¹⁰⁶³ Veitch (1999) p.5. [Emphases in original].

¹⁰⁶⁴ Although see Bajwa (1996), at pp.285-291, where she enumerates, in the context of the Indian political system, ‘Black laws at the Central and State levels *vis-à-vis* violation of the right to life’, including in that category National Security Amendment Ordinances, No.5 and No.6 of 1984; The Armed Forces (Special Powers) Act of 1958; The Armed Forces (Punjab and Chandigarh) Special Powers Act of 1983; The Terrorist Affected Areas (Special Courts) Act of 1984; The Terrorist and Disruptive Activities (Prevention) Act of 1985; and the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act of 1986. These laws generally give to the armed forces and the police wide-ranging powers, to detain, search, and hold without warrant, to bring to trial in Special Courts, to shoot to kill, and to otherwise afford civil liberties and fundamental rights a secondary position in what is seen as the pursuit of good order.

recognise something as evil, we cannot necessarily say why; and sometimes, many times, there are situations which for some people are utterly evil, and for others, are not. The questions for human rights today concern challenging moral questions that are incredibly difficult philosophically to answer; the polarised ongoing debates about abortion, euthanasia, the death penalty; the present and future debates about the recognition of the human rights-bearer. The heart of *Radbruch's Formula* must be invoked: is national law permitting intolerable injustice? Are the practices of human rights discourse themselves doing likewise? Some questions are for national democracies to answer; some are for judges. The deepest injustice, it is argued here, is allowing a voice to die unheard, and without the possibility of being heard.

CHAPTER SIX

CONCLUSION: LOOKING BEYOND THE HORIZONS

What though these reasonings concerning human nature seem abstract, and of difficult comprehension? This affords no presumption of their falsehood. On the contrary, it seems impossible, that what has hitherto escaped so many wise and profound philosophers can be very obvious and easy. And whatever pains these researches may cost us, we may think ourselves sufficiently rewarded, not only in point of profit but of pleasure, if, by that means, we can make any addition to our stock of knowledge, in subjects of such unspeakable importance.

David Hume

*An Inquiry Concerning Human Understanding*¹⁰⁶⁵

6.1 GENERAL INTRODUCTION

The human right to have one's right to life protected by law has two clear implications; that the right is ascribed to all humans, and the protection of law shall be there when that right is threatened. Yet what it means to be human is no longer clear – if it ever was; biotechnologies are doing now what prejudice and tribalism did in previous years, that is in defining the Other out of being human. It appears that human rights discourses are neither prepared nor ready for the challenges of the future, nor are they meeting adequately the needs of today. Although there is much to be proud of and much to take heart from in the current system, there is an omission in the recognition of the Other as part of the discourse and not as its object, external and without a voice, except when

¹⁰⁶⁵ Hume, (1751) (Hendel, Ed., & Introduction) (1995) *An inquiry concerning human understanding; with a supplement 'An abstract of a treatise of human nature'*, Section I Of the Different Species of Philosophy. New York : Liberal Arts Press.

permitted.

Perhaps the human rights treaty system, the way it was originally formulated and the way it has evolved, is not the best way to address the problems. David Kennedy offers one view of the process: ‘These people [human rights advocates] began the process of treaty-drafting and bureaucracy-building which has been carried out by subsequent enthusiasts, bureaucrats and politicians’.¹⁰⁶⁶ Yet it is too simplistic to dismiss it out of hand, to point to the extent of the world’s suffering and recognise both the vested interests that are protected, and those that are not. Kennedy encapsulates concerns also expressed by others, such as Baxi.¹⁰⁶⁷

Activists in the international human rights community try to develop a “right not to be tortured” or a “right to health” in order to reach out with empathy, assistance and protection to people who are tortured and sick. They think of their work as a response of civilized society, the response of reason to that which it cannot comprehend. Although it seems obvious to think of human rights work as responsive to a preexisting irrationality, it is far from clear that the world presents itself to human rights advocates neatly divided into realms of reason and chaos. Indeed, human rights discourse plays an important role in sustaining the very image of irrationality to which it purports to be merely responding.¹⁰⁶⁸

One of those irrationalities could be that people are dying of preventable causes and that the protection of their lives by law to which their States and external states are committed by treaty and by norms of customary international law is not being adequately and sufficiently challenged, either by legitimate legally justifiable international action, or in the courts and tribunals which ought to be concerned. The authors of the system are largely outside that suffering and have not written in the voices that would have been heard if the authorship of the discourse had lain elsewhere. Whilst some of the unheard

¹⁰⁶⁶ Kennedy, (1985), p.1414.

¹⁰⁶⁷ See generally Baxi, (2002).

¹⁰⁶⁸ *Supra*, n.1066, p.1414.

(before human rights tribunals) suffering is in the Western world, such as the deaths from gun crime in the USA,¹⁰⁶⁹ and from adverse medical incidents in countries that ought to be able to deal better with their sick and suffering ones,¹⁰⁷⁰ most is in the less-developed countries, and the power to make a difference is not centred there. ‘As human rights activists, we can touch the barbaric and return unscathed’.¹⁰⁷¹ As human rights activists, can we touch the barbaric and break down the barriers that separate the authors of the solution from those who suffer the barbarisms?

It needs only a brief cognisance of the case law to realise how deeply barbaric the suffering can be: *Prosecutor v. Jean-Paul Akayesu*¹⁰⁷² springs immediately to mind, with its description of the history of the Rwandan genocide, and the stories of witnesses who survived; yet the horrors of Rwandan genocide are neither the beginning nor the ending of lethal suffering wrought before a watching world. As widely reported on the occasion of the tenth anniversary of that genocide, the suffering is not at an end for the ‘genocide widows’, women whose husbands were killed and who were themselves repeatedly raped, and now, infected with HIV/AIDS, find themselves denied retroviral drugs.¹⁰⁷³ Is there any claim that people such as these women can make to argue that their lives and those of their families should have been protected from genocide ten years ago, and should be protected now by equitable distribution of drugs, otherwise available only to those with

¹⁰⁶⁹ *US Bureau of Justice Statistics*, ‘Homicide by weapon type, 1976-2002’: ‘For handguns, the number of victims begins at 8,651 in 1976 and rises to 10,552 in 1980. Then it decreases ... It increased to 8,286 in 2002. ... For other guns, the number of victims begins at 3,328 in 1976 and increases to 3,834 in 1980. ... It was 2,538 in 2002.’ [Graph descriptor.] This represents 10,825 gun deaths in 2002, not including accidents and suicide.

¹⁰⁷⁰ See Dickens, (April 2003). See also *Learning from Bristol: the report of the public inquiry into children's heart surgery at the Bristol Royal Infirmary 1984–1995*.

¹⁰⁷¹ *Supra*, n.1066 p.1414.

¹⁰⁷² *Supra*, n.12. See particularly the heartrending witness statements relating to Charges 12A and 12B of the Indictment.

¹⁰⁷³ As reported e.g. by IRIN, Kigali, 08/10/2003

<http://www.irinnews.org/report.asp?ReportID=37064>, (Accessed 06/04/04).

money to pay?

So much for the situations in which life deserves respect and protection; but what about the subject of that protection? It has been argued strongly in the preceding pages that the protection of the international law of human rights, and specifically the protection of the right to life, should be extended to all human genetic material. This has not been asserted to mean that life is sacrosanct, but rather that it is sacred, and that in circumstances in which life is at its boundaries, or threatened, legal regulation should be available to protect the interests of those involved. This goes beyond any requirement of rationality, sentience or even good citizenship; it does not require that any of the demands of personhood made in political and moral philosophy should be met.

6.2 THE ARGUMENT OF THE THESIS

The first substantive chapter, ‘Human Rights in Treaties and Other Instruments’ aimed to support the main argument of the thesis, that an expanded understanding of the ‘right to life’ treaty term is both necessary, and valid under customary international law rules of treaty interpretation, and the VCLT regime. It is necessary because the rights-bearer has not been sufficiently precisely identified and advances both in biotechnology, which open up new questions about what it means to be human and to have life, and changing societal understandings of the scope and possibilities of rights protection, mean that the right may not be being interpreted in a manner which can give full force to both the possibilities inherent in the treaty term, and to the perceived needs which could be met by an expansivist interpretation. Before addressing the issues in the next chapter, and the current and possible responses of human rights discourse to a requirement that ‘the right to life shall be protected by law’ the groundwork must be laid by supporting the posited dynamic

interpretation, with reference to the general customary international law rules on treaty interpretation under the regime of the Vienna Convention on the Law of Treaties, and to any special regimes that might pertain to human rights treaties, as a form of *lex specialis*. The chapter set out therefore to detail the right to life provision as found in human rights treaties and other instruments, both global and regional, before offering, in its second section, an analysis of the rules of treaty interpretation under the VCLT, and how these are applied to human rights treaties. The ‘rules analysis’ aspect of the section includes discussion of why treaty texts require interpreting, and who does it, as well as how it is done. The final parts of that section addresses human rights bodies as interpreters of their own texts, and introduces the notion of human rights principles as interpretive principles. The section is then linked to the next one, in which some interpretive theories are discussed, before an interpretive taxonomy is introduced. This employs textual, contextual and teleological measures in order to render the treaty terms ‘effective’, a notion which has been understood by the ILC as meaning fulfilling the object and purpose of the treaty in good faith.

The chapter then concludes by confronting the issue of evolving treaty interpretation; is it valid? Examined are the changing context of the treaties; how understandings that pertained up to sixty years ago may not be valid now. It was simpler to tell, for instance, who was alive and who was dead before the concept of a beating-heart donor became possible, something that would not have been envisaged by those who drafted the treaties. This leads to a discussion of the validity of recourse to the *travaux préparatoires*, and the circumstances in which what was said or understood at the time of drafting the treaty is, or should be, of relevance now. The concept of ‘changing understandings’ introduces the

now well-established idea of human rights instruments as ‘living instruments’, a theme that was introduced by the ECtHR and taken up by all of the treaty bodies, recognising changing societal understandings and concerns by applying higher standards of State conduct in meeting their obligations. It is also a theme understood in the national jurisprudence where human rights principles are applied under the provisions of Constitutions and Bills of Rights. These national tribunals have been particularly strong in a dynamic interpretation of the right to life provision as ‘a right to live’, and that expansivist interpretation ends the chapter.

Therefore, by the end of the chapter, the place of human rights treaties in the lexicon of public international law, and the validity of a particularly dynamic theme of interpretation, has been shown. The interpretive scheme has built on a foundation of human rights treaty articles that express a notion of a ‘right to life’, but it is not yet clearly understood whose is the ‘right to life’ referred to; who is the human in the international law of human rights? This provides the theme for the next chapter.

The first section of this next chapter, on the treaties and the identity of the rights-bearer, examines the treaty texts – the global and regional ones introduced in the previous chapter, plus some biomedical instruments – in order to find out how the rights-bearer is identified. This then provides a background for a cross-disciplinary examination of the notions of life and humanity in other disciplines; how has life, and the human that lives it, been identified or understood in biology and medicine, philosophy and psychology? This leads into a discussion of the place of constants in our knowledge and understanding of the human life, and the notion of ‘dignity’ as an inherent concept, fundamental to the concept of all humans as equally of value. The problem then shifts to a micro-level

definition; exactly what is the human life that is protected?

The proffered concept is to respect the human life represented by human genetic material, and an argument is advanced to support this claim, suggesting a definition and showing the inadequacies and consequences of failing to define the human in any other way. This is done by introducing, in the next section, a debate on the human/person distinction, and offering a critique of what is generally accepted as a understanding of personhood, based on the works of Locke. The common understanding and development of this theory of personhood fails to take into account his other other subsets of identity, one of which can be read as the human species – or, as offered here, human genetic material. Human rights, it is argued, are for humans, and not those who meet ‘personhood’ criteria, however defined; human rights are not only for the sentient, the sane, the innocent. We must be prepared to ‘look beyond the horizons’ in the debate about human life, and understand some of the fundamental issues that are failing to be addressed.

Yet if this is accepted as the human life of the human rights treaties, how is it to be protected? What kind of law will make the treaty provision, the right to life shall be protected by law’ effective? The next chapter takes up the moral argument, which has so far pervaded the thesis as a call for a ‘bias or presumption in favour of life’. Here, a basis is found for the paraphrase ‘the right to life shall be protected by law’ as an effective expression of the treaty provisions, and examines some limitations on the exercise of that right; whether it is absolute, or in some ways qualified. The emphasis is on the substantive law and the procedure that springs from it, for example in a discussion of the term ‘arbitrary’, as used in the exercise of the right.

The discussion in the next section then turns to what has been shown to be at the heart of

the issue – what kind of law is it that protects life? It has to be a moral law, it is argued; but what constitutes a moral law? The works of Radbruch are drawn on to illustrate an approach that can best support an aim which goes back to the treaties and their interpretation; that the treaty provisions should be rendered effective by a form of law which recognises their object and purpose in good faith; it is argued that law which allows for ‘intolerable injustice’, as argued by Radbruch, is not good law. The law that ‘protects by law’ must be able to make determinations about those circumstances in which the right to life is subject to the protection of law, and the case law of the human rights bodies is then examined in order to discover just how this is being done, and whether the working out of the jurisprudence meets the moral aim of avoiding ‘unbearable injustice’. Human rights are for humans, both present and future generations, and not only for those who qualify as persons, and avoiding intolerable injustice is the key.

Some scenarios were chosen, and introduced at an early stage of the thesis, to represent four aspects of life: the human before birth; the creation of ‘new humans’; the creation of new beings who may or may not be ‘human’; and the misuse/misrepresentation of human DNA. Throughout the thesis, aspects of these scenarios have illustrated possible problems arising both now and in the future, in that the right to life provision may not be able to offer full protection to those who are ‘uncertain humans’. Having shown that neither embodiment nor personhood qualifications are necessary to qualify as a rights-bearer, the aim has been to establish respect for human dignity as a basis for a broad interpretation of the right to life. Respect for human dignity has been referred to throughout the thesis as a basis for the inevitable decisions that must be made, risks that must be taken, circumstances which cannot or should not be avoided, in making choices about life, and

its protection at law; choices that are not arbitrary, that recognise inherent human dignity, that render the treaty provisions as effective as they may be by fulfilling the object and purpose of the treaties in good faith.

6.3 CONVERSATION

The answer to the silenced ones' challenge to international law is a conversation; a one-way monologue will not achieve the necessary ends, and no matter how good or right the cause, it has no future if not communicated. A political or social or moral claim has to be translated into law's terms for law to play its part. Anton Schutz has said that:

the practice of such fields as political and moral philosophy is ... subject to the predicament that any incidence, any 'difference' – any difference that makes a difference – is obtained through communication, or not at all'. Further, that 'within the borders of contemporary society ... all order possibly hoped for is of the precarious, future-exposed, contingent, and ultimately uncontrollable kind: order produced by noise. Why are communications that important, and not, for example, convictions? Because, if they are to have social consequences, convictions must be communicated – by whatever means.¹⁰⁷⁴

That includes the conviction that the 'new humans' and other subjects raised in the scenarios above have a voice which ought to be heard before the human rights tribunals; that in their special power they have a part to play in the prevention of abuse of others' power. And the voice which should be heard is not necessarily that of a victim, because victims of the ultimate violation of this right are silenced, and for that reason or others – disability; imprisonment; the voice interpreted by Louis MacNiece as saying:

I am not yet born; O fill me
With strength against those who would freeze my
humanity, would dragoon me into a lethal automaton,
would make me a cog in a machine, a thing with
one face, a thing, and against all those
who would dissipate my entirety, would

¹⁰⁷⁴ Anton Schutz, 'The Twilight of the Global Polis' in Teubner, (ed.) (1997) p.286.

blow me like thistledown hither and
thither or hither and thither
like water held in the hands would spill me.¹⁰⁷⁵

These human beings may never have the power to speak, and need someone else to be allowed to speak for them. Limited rules on standing have no place in this jurisprudence.

According to Jonathan Sacks, Chief Rabbi of the United Hebrew Congregations of the Commonwealth, ‘Bad things happen when the pace of change exceeds our ability to change, and events move faster than our understanding.’¹⁰⁷⁶ He traces a path through the consequent anxiety to fear and then to anger and violence, and finds ‘the greatest single antidote to that fear is conversation, speaking our fears, listening to the fears of others, and in that sharing of vulnerabilities discovering a genesis of hope’.¹⁰⁷⁷ For some, there will never be a world free from fear, and how much each individual struggles with the ultimate fear of death is a personal matter, contingent often upon a belief in fundamental values. The proper field of human rights is in affirming the dignity, equality and worth of each person, and ensuring the measures required by treaty and customary international law are effectively in place and practised by states, and interpreted dynamically in offering that protection to life, which ought reasonably to be expected and relied upon.

6.4 CONCLUDING REMARKS

The practice of human rights has its own constraints, its own fears and threats to its credibility and power. It cannot justify a free-for-all, a massive explosion of unfettered rights claims. But it can listen to the voices of those who represent the silenced, or are

¹⁰⁷⁵ *Prayer Before Birth*, in Martin, Chamberlin, and Wieler, (Eds.) *Man's Search for Values*, (1996), at p.313.

¹⁰⁷⁶ Sacks (2003), at p. 2.

¹⁰⁷⁷ *Ibid.*

themselves in danger of being silenced, and take appropriate action, as and where possible. There are a number of factors to recognise with regard to the right to life provision in the international human rights treaties, which have been brought to attention in the preceding pages. These include the recognition that human rights law is not static, and that some of the judgements are making unfortunate rulings regarding what it means to be human; that there is no arguable distinction in use of term 'arbitrary' to mean deprivation of life by homicide or by other possible and more probable means, and that protection of life by law has to mean protection of conditions of life.

The lived future is dependent upon agency now, and although some scenes of that agency are in technology, or politics, or the natural world, others are in the hands of international lawyers. One scene in particular which calls for immediate recognition is that of defining 'human' in a manner that will offer the protection of life by law to all human genetic material. To protect life does not mean to treat it as sacrosanct, but to fail to protect it is to fail to recognise that it is sacred, and deserving of the recognition of dignity.

The forum of human rights is to allow the conditions of the ordinary life to be met; the extraordinary belongs elsewhere, with the individual, and in society; with families and friends and divinity. The ordinary is the task of law – to allow a life to be lived without fear of being taken from one's ordinary days by abuse, or failure, of power. Those whose ordinary lives are not lived in fulfilment to their natural end are the silenced, and their suffering must be granted the recognition of law, and the right to involvement in that law not as victims, but as equals in authorship, in suffering, and in rights. The need is to look beyond the horizons; the power of law is there, and all it requires is the will.

*Once upon a time, tomorrow never came. Safely projected into the reaches of distant times and faraway galaxies, the future was science fiction and belonged to another world. Now, it is here, breaking through the endless deferral of human horizons, short-circuiting history, down-loading its images into today.*¹⁰⁷⁸

¹⁰⁷⁸ S. Plant (1996) On the matrix – cyberfeminist simulations, in R. Shields (ed.) *Cultures of Internet: Virtual Spaces, Real Histories, Living Bodies* London & Thousand Oaks, CA: Sage, at p. 181, and in McGuigan, *supra*, n.636, at p.85.

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