SUPPLEMENTARY SUBMISSION

25 OCTOBER 2011

PART I: Core Arguments

1. Introduction

Although in complying with admissibility requirements, we have named individuals in our initial submission, we have intentionally placed significant emphasis on the New Zealand Government's responsibility to *prevent* [1] genocide (as opposed to pursuing primarily the prosecution of individuals), especially with our section on warning signs that may lead to genocide.

Our most urgent concerns are to raise awareness of the genocidal nature of the policy and practice of genetic identification of Down syndrome, Spina Bifida and other conditions leading to routine selective prevention of births within the group; and to put an end to this practice and policy that at this present time continues to be implemented with legal impunity through the New Zealand Government's *Antenatal Screening for Down syndrome and other conditions - Quality Improvements* ("*the Programme"*) and the New Zealand health system.

2. Understanding Genocide: Intent, Means and Consequences

When the world finally named what had happened in Rwanda in 1994 a genocide, UN Secretary-General Boutros Boutros-Ghali explained that *"for us, genocide was the gas chamber - what happened in Germany. We were not able to realize that with the machete you can create a genocide."* [2]

To paraphrase: for us, here in New Zealand, genocide was the gas chamber –what happened in Nazi Germany. We did not realize that with an ante-natal screening programme and a health system to provide routine abortion on identification of Down syndrome, Spina Bifida and other conditions we can create a genocide. The medical technology for screening may be new and advanced but the ultimate intention for which it is being put to use is old and barbaric.

The emphasis of our complaint is on *consequences* and *intent*, with genetic screening and selective abortion being the *means*. The situation now is that the group can be targeted through their identification *in utero* and births prevented through selective abortion. Today's technologically sophisticated form of screening for selection for prevention of birth was not available when the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) (*Genocide Convention*) was written, but the intent and consequences are the same as pertained during the Nazi genocide.

The *intent* is to identify unborn children with Down syndrome, Spina Bifida and other conditions so that births to the group can be prevented. The *consequence* is that a substantial part of the group is being systematically destroyed. The screening programme

facilitates genocidal acts against the group, with abortion being the means of perpetrating those acts:

> Whether prompted by legislation, or overseen by politicians, doctors, lawyers, or cruel camp commanders, these are acts of genocide. Like massive extermination or killings, the intent to suppress a group prior to its birth and reduce or decimate the membership to a designated purpose is a fundamental crime, one that the Genocide Convention, as recognized in Article II(d), seeks to prevent or punish.[3]

3. Understanding Genocide: Domestic Lawfulness No Defence

Essentially what we are confronted with here in New Zealand is yet another case of what Hanna Arendt named "the banality of evil"[4]—a genocidal practice and policy that masquerades as ordinary, good health care. The crime of imposing measures intended to prevent births within the group has become 'banal' precisely because it is being committed in a daily way, systematically, without being adequately named and opposed. It has become for the perpetrators "accepted routinised and implemented without moral revulsion and political indignation and resistance".[5]

New Zealand public officials, medical practitioners and pregnant women who take part in this policy and practice do so under the misconception that it is legal. As far as domestic law applies, the policies and practices appear to be legal. In the light of international law, however, current New Zealand law must be examined for failure to protect the right to existence of the group targeted by New Zealand's Antenatal Programme for detection of Down syndrome and other conditions.

New Zealand domestic law at present may tolerate identification and selection for prevention of birth on these grounds but so did Nazi domestic law. The 'racial hygiene'/medical policies of the Nazis appeared to be legal: "Legislators codified policies into law…They were careful to construct racial policies in accordance with the rule of law."[6] Hitler himself guaranteed legal impunity for doctors carrying out abortions on the grounds of suspected 'hereditary taints'.[7]

Thus, right from the beginning of the drafting history of the Genocide Convention, it was agreed that:

> domestic law could never be invoked as a defense for non-fulfillment of an obligation under an inter-national convention. Therefore, if under a convention a State undertook certain international obligations, the domestic law would not be a defense for failure to fulfill such obligations. [8] (E/AC.25/SR.18)

Nevertheless, the New Zealand Human Rights Commission, in their letter to us (1st March, 2011) cited New Zealand domestic law (*Right to Life New Zealand Inc. v Abortion Supervisory Committee* (2008) and the *New Zealand Bill of Rights Act* (1990) and concluded :

> The fact that the Commission is not pursuing your complaint against the Ministry of Health for introducing antenatal testing to identify <u>foetuses</u> with Down Syndrome is because there are <u>no legal grounds for</u> <u>us to do so</u>. [Emphasis added]

We would point out that right from the first drafting of the international human rights instruments, the legal language of human rights included repeatedly and consistently the terms "unborn children" and "the child…before as well as after birth".[9] It is not valid to replace these international human rights legal terms with 'foetuses' and then claim that

these children have no right to "appropriate legal protection before as well as after birth". Dehumanizing language cannot legitimize human rights violations. Giving the human child at the early stages of development medical nomenclature does not alter the child's human nature or the child's entitlement "by nature" to the "inherent dignity and inalienable rights of all members of the human family".

4. Children are to be protected before birth: ICCPR and CRC

In the same letter, the New Zealand Human Rights Commission claims categorically that "legally protected status as a human being begins at birth. This is the case both internationally and domestically" [emphasis added]. However, internationally, this has never been conceded[10] and is even now being challenged.[11]

The Commission claims, falsely, that:

> The preparatory debates on amendments to the International Covenant on Civil and Political Rights clearly indicate that the member states of United Nations decided not to protect the right to life from the moment of conception. The Convention on the Rights of the Child protects children from the moment of birth.

The UN Convention on the Rights of the Child, however, read in the light of its Preamble, reaffirms what was agreed in the 1959 *Declaration on the Rights of the Child* that the States parties have a specific obligation to recognize the human rights entitlement of the child *before* as well as after birth:

> 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…the need for such special safeguards has been…recognized in the Universal Declaration of Human Rights…[12]

The International Covenant on Civil and Political Rights (ICCPR) also recognizes the unborn child as a member of the human family. The State, in order to protect the child's inherent right to life, must prohibit and prevent the death penalty for the unborn child's mother. The child, from the State's first knowledge of that child's existence, is to be protected:

> 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. [ICCPR Article 6(5)]

This article was formulated precisely "in order to save the life of an innocent unborn child" when the child's life is at risk.[13] In the drafting history of the Convention on the Rights of the Child also, "(t)he focus was always on "the rights of the unborn child"[14]; and it was observed (significantly, without contradiction) that:

> …no State was manifestly opposed to the principles contained in the Declaration of the Rights of the Child and, therefore, according to the Vienna Convention on the Law of Treaties, the rule regarding the protection of life before birth could be considered as *jus cogens* since it formed part of the common conscience of members of the international community.[15]

5. Selective abortion: "a serious violation of human rights"

In 2005, the UN Committee on the Rights of the Child (CRC Committee) signalled a reaffirmation of the Universal Declaration's recognition of the need to provide legal

protection for all children before as well as after birth. In its *General Comment No 7*, entitled *Right to Non-discrimination*, the CRC condemns selective abortion as discrimination against children and as a serious violation of their rights, affecting their survival. The Committee denounces not only selective abortion of girl children on the grounds of sex discrimination, but also goes on in the same paragraph to condemn "multiple discrimination (e.g., related to ethnic origin, social and cultural status, gender and/or disabilities)". [16]

Nehemiah Robinson, in his definitive work on the drafting history of the Genocide Convention, "*The Genocide Convention: A Commentary*" (1960), explains that not only must the destruction of the group 'as such' be intended but also that "there must be a specific motive for the act, deriving from the peculiar characteristics of the group."[17] One specific motive for the early screening Programme to identify the peculiar characteristics of the group with Down syndrome is so that births to the group can be prevented. As pointed out in our original ICC application, one of the purposes of the Programme is to abort unborn children diagnosed with Down syndrome. Item 14 of the Memorandum to (New Zealand) Cabinet, dated 23 October 2007, details the purposes of the Programme as:

> *Down syndrome occurs in approximately 1 in 700 births. The purpose of screening is to provide women with information about their pregnancy to enable them to make informed choices. This information may help women to:....*
>
> *.... (Second bullet) decide whether to continue with or terminate the pregnancy.*

6. Establishing the meaning of 'group'

Again its letter to us (1 March, 2011), the Commission claims that: "People with Down Syndrome are <u>not a national, ethnic, racial or religious group so the [Genocide] Convention does not apply to them</u>." [Emphasis added]

Nehemiah Robinson points out that genocidal acts differ from "ordinary violations of the criminal code" primarily in "recognition of the necessity of international protection for power-less minority groups" where "such protection cannot be provided by domestic law: …the perception of this truth inspired the drafting of the Genocide Convention and its description of various acts as international law crimes."[18] There can be few more "power-less" minority groups than the group being targeted through the New Zealand Programme as having "Down syndrome and other conditions".

Doubts about 'group' status can be resolved in accord with Article 31(c) of the *Vienna Convention on the Law of Treaties (1969) (Vienna Convention)* which states that in interpreting a treaty, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account. Regarding 'group' status, the International Court of Justice (ICJ) in its 1951 Advisory Opinion has a pertinent clarification, reaffirmed in this excerpt from a recent ICJ judgment (26 February, 2007):

> The drafting history of the Convention confirms that a positive definition must be used. Genocide as "the denial of the existence of entire human groups" was contrasted with homicide, "the denial of the right to live of individual human beings" by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as

> an object of the Convention the safeguarding of "the very existence of certain human groups" (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.

That the NZ Ante-Natal Screening Programme operates on the very practical premise that 'positive identification' of Down syndrome, Spina Bifida and the other conditions as a group can be sought and achieved is itself a tacit admission that positive identification of specific, distinguishing, well-established and immutable characteristics of this group is already recognized by the New Zealand Government.

7. Establishing "a special meaning" for the term 'racial' in accordance with the Vienna Convention Articles 31 and 32

Moreover, we shall examine the meaning and scope of the term 'racial' in Article II of the Convention and seek to apply the rules of interpretation set out in the *Vienna Convention* Articles 31(1,2 & 4) and 32, which specify that treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context [both the text and the preamble] and in the light of its object and purpose", that "a special meaning" shall be given to a term "if it is established that the parties so intended", and that supplementary means of interpretation, especially the preparatory work of the treaty, may be used to confirm the meaning.[19]

We shall contend that our group with "Down syndrome and other conditions" being targeted for measures intended to prevent births within the group was included in the meaning of 'racial' in its original context of the then very recent and still raw atrocities of the Nazi genocide and in the light of the Convention's object and purpose (**—"**in order to liberate mankind" from the "odious scourge" of genocide) expressed in the Preamble. Indeed, the 'special' meaning of 'racial' at the time of drafting is not to be constricted by the "ordinary" meaning of 'racial' today. The special meaning as understood at the time related specially to the actual acts of genocide against groups that were targeted on 'racial' grounds, the meaning given as understood at that time.

That the concept of 'race' was extremely troublesome (even ambiguous or obscure)[20] at that time is confirmed in that UNESCO was moved to attempt to clarify it in a special statement in 1950, even suggesting that 'racial' be abandoned for 'ethnic'. Appealing to "the conscience of all mankind", UNESCO declared:

> Racism is a particularly vicious and mean expression of the caste spirit. It involves belief in the innate and absolute superiority of an arbitrarily defined human group over other equally arbitrarily defined groups…Concern for human dignity demands that all citizens be equal before the law, and that they share equally in the advantages assured them by law, no matter what their physical or intellectual differences may be. The law sees in each person only a human being who has the right to the same consideration and to equal respect.[21]

From the drafting history and from the historical records of the genocidal persecution carried out in Nazi Germany and the Occupied territories, we shall show that the drafters of

the Genocide Convention may be said to have established "a special meaning on the grounds that the parties so intended".

8. Original intent of the parties: a broad understanding of 'racial'

The parties so intended to leave room for interpretation of a 'racial' group in broad, inclusive, rather than exclusive, terms. In the context of this Convention, a 'racial' group is a convenient short-hand description of a group of human beings identified and targeted for genocidal actions on racial grounds i.e. the intent to destroy in whole or in part the existence of this group of human beings because of their "offending" racial characteristics. The adjectival term 'racial' pertains to race and race-like—it does not stipulate a particular race. Thus it was for 'racial' reasons, for reasons pertaining to race – the concept of a 'master race' – that the group of Jewish children and the group of 'mongoloid' children were identified and targeted for genocidal acts perpetrated precisely on a very specific ground that both groups threatened the "racial purity" of the "master race".

As Professor Paola Gaeta, Director of the Geneva Academy of International Humanitarian Law and Human Rights, has observed:

> In spite of …definitional discrepancies, the inclusion of the three adjectives [racial, national and religious]—which had been referred to in the proceedings of the International Military Tribunal at Nuremberg (IMT)—within Article II was apparently self-evident to the drafters who endorsed it without a vote.[22]

The drafters were content to leave 'racial' undefined, no doubt because many of those present in the drafting sessions (as well as the IMT at Nuremberg) understood all too well the multiplicity of permutations of lethal discrimination that guided the selection criteria for groups targeted in Nazi genocidal programmes carried out with the intention of maintaining "racial hygiene". Both children with "mongolism" (Down syndrome) and "severely defective closure of the vertebral column" (Spina Bifida) were among the conditions listed by Nazi decree to be 'selected' for 'euthanasia'.[23] These children with "conditions considered a basis for killing" were subjected to genocidal attack in the name of "racial hygiene". [24] Indeed, "handicapped children", according to historian Henry Friedlander, was the very first group – the original "group" – and the genocidal measures developed in the "child killing programmes" became the prototype for the later genocidal programmes against adults with hereditary or congenital conditions and then against Jewish people.[25]

In 1939 Hitler authorized the execution of handicapped children and then extended it to include handicapped adults. From his in-depth study of the origin of Nazi genocide, Friedlander concluded: "Auschwitz was only the last, most perfect Nazi killing center. The entire killing enterprise had started in January 1940 with the murder of the most helpless human beings, institutionalized handicapped patients".[26] It would thus make no sense for the drafters of the Genocide Convention or the IMT at Nuremberg to have excluded this group from those groups selected for genocide on 'racial' grounds.

We need not be surprised that the drafters of the Genocide Convention failed to spell out more clearly the meaning of 'racial' groups—to them it was still horribly self-evident. They had a still immediate and graphic understanding of just how appallingly broad was the scope of the biological genocide exercised by the Nazis in the name of 'scientific racism' and 'racial hygiene'. Both the Nazi medicalised child killing programmes and the Nazi selective abortion programmes directed towards members of a group with suspected or recognizable

hereditary or congenital impairments were still fresh in the collective memory of many of the drafters of the Genocide Convention:

> …a denial of the right of existence of entire human groups… shocks the conscience of mankind… and is contrary to moral law and to the spirit and aims of the United Nations. [27]

Details of the atrocities were revealed to the world in the Nuremberg Trials; the *Ulrich Greifelt/ RuSHA Case* and the *Doctors' Trial* were well publicized. The prosecution in the *Ulrich Greifelt/ RuSHA Case* stated that "racial theory coordinated everything in public and private life according to the tenets of nazism" and on "the question of sifting and selecting the young…(t)he first consideration…will be whether the child is racially perfect".[28] Prosecutor McHaney concluded that the Nazi abortion programme "was nothing more than another technique in furtherance of the basic crime of genocide".[29]

9. Locating "in the preparatory work" of the Genocide Convention and "in their context" the terms 'group', 'genocide', 'crimes against humanity' and 'abortion'

In the preparatory work of the treaty, a special concern was expressed to protect "those groups whose membership was inevitable" as distinct from "those of which membership was voluntary…the destruction of the first type appeared more heinous in the light of the conscience of humanity, since it was directed against human beings whom chance alone had grouped together..."[30] And again, "Those who needed protection most were those who could not alter their status".[31] Certainly there is here an understanding of the extreme vulnerability of members of the group with Down syndrome, Spina Bifida and other conditions which are 'inevitable'—they are grouped together through no choice of their own but "by chance alone".

The term 'groups' is to be interpreted both in the context of the text, i.e. "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" and in the context of the Preamble, i.e. "the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world".

To be understood more clearly, UN General Assembly resolution 96 (I) in turn must be set in the context of UN General Assembly resolution 95 (I) passed on the same day (11 December 1946). In the *Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, Resolution 95* (*1) of the United Nations General Assembly*, the UN committee on the codification of international law was directed to establish a general codification of "the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal". The Genocide Convention was drafted on the foundation and in the immediate light of Nuremberg principles and judgments such as those enunciated in "*the Doctors' Trials*" and the *Greifelt/RuSHA Trial*.

10. Establishing meaning "in the light of its object and purpose"—the historical background to the Genocide Convention

Establishing the meaning of terms and phrases such as 'racial' and 'imposing measures intended to prevent births within the group' in the light of the object and purpose of the Genocide Convention requires an appreciation of the historical background in which the Convention had its genesis. It was painfully honest confrontation of the record of Nazi atrocities that led after World War II to a clear condemnation of abortion as "a crime against

humanity". This condemnation was made by the international community through *inter alia* the United Nations, the Nuremberg War Crimes Tribunals and the World Medical Association.[32]

During the first Trial of German Major War Criminals by the International Tribunal at Nuremberg (18 February, 1946) , a precedent was set to include crimes against unborn children: Soviet Counselor, Colonel L. N. Smirnov, submitting as evidence Exhibit USSR 92, a directive from the Administration of Food and Agriculture, entitled "Treatment of Pregnant Women of Non-Germanic Origin", explained: "I refer this document to the Tribunal because, in their hatred of the Slav race, the German fascist criminals even attempted to murder the babe in the womb." The document affirmed that the birth rate was too high and asserted:

> Because of this difficulties have arisen, not only as to the use of these people for labour but, to a greater extent, because of the sociological menace which should not be under-estimated….(t)hese institutions must compel the women to get rid of their children by resorting to abortion.[33]

Historian Dr. John Hunt, researching the Nuremberg Trials involving abortion, has established that condemnation of abortion was not simply limited to the practice of forced abortions but included all abortions in the Nazi abortion programme.[34] James McHaney, the Nuremberg prosecutor of the *RuSHA/Greifelt Case* declared that abortion is an "inhumane act" and an "act of extermination" and established that even if a woman's request for abortion was voluntary, abortion was still "a crime against humanity". McHaney sought and attained recognition of the unborn as children entitled to legal protection and it is now part of the Nuremberg record of the trial testimony that: "…protection of the law was denied to the unborn children".

As part of the Nuremberg judgments, this principle of legal protection for unborn children at risk of abortion was mandated to be codified in the International Bill of Rights. [UN Resolution 95(1)[35]].

11. Depenalization of abortion: evidence at Nuremberg for the count of crimes against humanity

The Nazi record of depenalizing abortion in Poland and the Eastern Territories was still fresh in the public perception when the Genocide Convention was drafted. At the Nuremberg Trials, Prosecutor McHaney stated:

> The Nazi theories of race led logically to a concern with pregnancies among Eastern women working in Germany and the incorporated Polish territories. As a means of biologically weakening the Eastern nations and of keeping the women available as labor, an abortion program was decided upon.[36]

Instructions by Nazi authorities issuing directives to decriminalize abortion were furnished as evidence for the count of crimes against humanity:

> Abortion must not be punishable in the remaining territory… Institutes and persons who make a business of performing abortions should not be prosecuted by the police.[37]

Eastern women workers were induced or forced to undergo abortions. In addition to the charge of “compelling” abortions, there was also the charge of “encouraging” abortions among Polish women by removing abortion from prosecution in Polish courts:

> Abortions on Polish women in the General Government were also encouraged by the withdrawal of abortion case from the jurisdiction of the Polish courts. The defendants Greifelt, Creutz, Meyer-Hetling, Schwarzenberger, Hofmann, Hildebrandt, Schwalm, Huebner, Lorenz, and Brueckner are charged with special responsibility for and participation in these crimes.[38]

Depenalization of abortion was judged and condemned at Nuremberg as encouraging abortions. The fact that the Nazi authorities had removed abortion from Polish domestic law did not nullify the fact that abortion was still judged “a crime against humanity”. This was in accord with the working definition:

> Crimes against humanity: namely, murder, extermination…and other inhumane acts committed against any civilian population, before or during the war... whether or not in violation of the domestic law of the country where perpetrated. [39]

SS Lieutenant General Richard Hildebrandt, under direct examination by his attorney, protested that, "Up to now nobody had the idea to see in this interruption of pregnancy a crime against humanity." His protest was rejected. The Nuremberg Judgments broke new ground. Both Hildebrandt and Otto Hofmann were given a 25-year sentence.[40]

Regarding the term ‘compelling abortions’, it is important to note that it is the abortion itself that is judged an atrocity against human life, against the lives of unborn children, not “racially perfect”, who should have been given “protection of the law”. Compulsion is an additional factor of rights violation, but it is clear from the Nuremberg Judgments that it does not constitute the whole violation.[41]

12. Merging “Hippocratic ethics and human rights into a single code”

The Hippocratic Oath with its age-old condemnation of doctors who perform abortions was still the yardstick of universal medical ethics both at the time of the Nuremberg Trials, and in 1947-9 when the *Geneva Doctors’ Oath* and the *International Medical Code of Ethics* were being drafted more or less contemporaneously with the Genocide Convention (1948). Evelyne Schuster has perceived a critically important truth:

> The key contribution of Nuremberg was to merge both Hippocratic ethics and the protection of human rights into a single code.[42]

Hippocratic medical ethics were referenced many times in the Nuremberg record. Brigadier-General Telford Taylor in his opening statement at the *Doctors’ Trial* (December 9, 1946) described the 20 physicians in the dock as ranging from leaders of German scientific medicine, with excellent international reputations, down to the dregs of the German medical profession. He went on to say:

> All of them violated the Hippocratic commandments which they had solemnly sworn to uphold and abide by, including the fundamental principles never to do harm – "primum non nocere." [43]

Although Hippocratic ethics specifically precluded under this principle the practice of abortion, the medical profession cooperated in programmed evil and perpetrated arbitrary

deprivation of life against selected unborn children. For the Nazi leadership, depenalization of abortion was a significant tool in the genocidal program to prevent births in particular groups that were deemed “racially non-valuable”.

Elements in the New Zealand programme today echo rather disturbingly the original Nazi concept of "a life unworthy to be lived" that was used to establish what Dr Tessa Chelouche describes as the "biomedical paradigm [which] provided the theoretical basis for allowing those sworn to the Hippocratic principle of nonmaleficence to kill in the name of the state".[44]

This conceptual shift culminated in a medicalized killing programme that still today generates moral revulsion in all decent human beings. The medical profession in Nazi Germany, like the Courts, were too easily seduced into accepting that the value of life is differential, and not equal, inherent and inalienable, as was subsequently recognized in the Universal Declaration principles and codified in all the human rights Covenants.

The international medical community at the time of drafting the Genocide Convention was scandalized by these Nazi medical atrocities. In 1947, the British Medical Association (BMA) had no qualms about condemning abortion, stating that the trials of medical war criminals had shown that the doctors who were guilty of these crimes against humanity lacked both moral and professional conscience and had “departed from the traditional medical ethic which maintains the value and sanctity of every individual human being”. The BMA went on to insist: “Although there have been many changes in Medicine, the spirit of the Hippocratic Oath cannot change.” The international medical profession was urged to reaffirm:

> the duty of curing, the greatest crime being co-operation in the destruction of life by murder, suicide and abortion…[45]

13. Disability cannot change the dignity of every human being

And so the Covenants recognize that every human being has an immutable dignity, a dignity that does not change with external circumstances such as levels of ability or disability, independence, or prognoses of quality of life, or functionality or wantedness. For the group with Down syndrome and other conditions, it is their essential and irrevocable humanity that entitles them to 'recognition of the inherent dignity and inalienable rights of all members of the human family'. It is this recognition that obliges us to travel in human solidarity with them, to be attentive to their needs, to provide them with the best attainable care, in their homes, in local communities, in education and health facilities, in places of employment; and to correct, rather than encourage, entrenched attitudinal prejudice that condones prevention of births to the group.

PART II

Additional arguments establishing that the group identified in the NZ Programme by the presence of 'Down syndrome and other conditions' is a protected group under the Genocide Convention

1. The United Nations Charter affirms a commitment to human rights protection and to the importance of the rule of law. The second preambular paragraph of the UN Charter of Human Rights promises "…to reaffirm faith in fundamental human rights, in the dignity and worth of the human person."[46] The UN Charter Article 55(c) requires States to promote "universal respect for, and observance of, human rights". The Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Genocide Convention) is integral to the pursuit of these aims—to the role of the rule of law in protection of universal human rights and in maintaining universal "recognition of the inherent dignity and the equal and inalienable rights of all members of the human family…the foundation…of justice…in the world"[47] . Children with "Down syndrome and other conditions" are included in "all members of the human family" and are entitled to "appropriate legal protection before as well as after birth". [48]

2. Programmes that enable and facilitate a 'legal choice' to eliminate before birth some "members of the human family" on grounds of detection of the possible presence of "Down syndrome and other conditions" are deeply and irrevocably offensive against human dignity and worth. Programmes that tolerate and affirm a subjective choice by individuals and their doctors to project prematurely a "negative value" [49] onto the lives of members of this group on these grounds are "contrary to the purposes and principles of the United Nations". [50]

(i) Firstly, they offend against the inclusion principle: "the principle of the unity of the human race".[51] The antithesis of this founding premise of international law is to be seen in the New Zealand Programme's reintroduction of the Nazi concept of 'selection' for elimination of members of a group vilified as expendable on grounds of biological 'inferiority'. The exclusion in principle of the idea of humanity which constitutes the sole regulating idea of international law is the prerequisite for all race doctrines .[52] In both purpose and consequence, the NZ Programme is mired in the 'scientific racism' and 'racial hygiene' of biological 'selection'. Both in one of its purposes (identifying Down syndrome and other conditions in order to offer the 'choice' [the Nazi term was 'selection'] to prevent birth) and in one of its ultimate consequences (the prevention of significant numbers of births within the group), the Programme is in direct contravention of the founding premise of human rights protection in international law: 'the fundamental principle of the unity of the human race'.

(ii) Secondly, such programmes facilitating selection for prevention of birth offend against the other foundation human rights principles of equality[53], inherency[54], inalienability[55] and indivisibility[56]. The NZ Programme is based on a consequentialist/utilitarian philosophy in which selection for prevention of birth is predicated on concepts of biological or genetic 'inferiority' and the prevention of associated 'problems' by preventing birth. This is contrary to the deontological basis of the UN Conventions.

(iii) Detection of the presence of Down syndrome and other conditions and subsequent selection for genocidal 'treatment' such as the prevention of birth on these grounds contravenes the principle of equality. "The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with the notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character." [57]

3. Genocide, defined by the United Nations General Assembly in 1946 as "a denial of the right of existence, of entire human groups", was understood at the time of drafting and completing the Convention to include the group identified to have Down syndrome as a 'human' group. The detailed historical records of World War II atrocities that motivated the Genocide Convention reveal that this group had a well-defined and documented place in that set of groups whose humanity was denied or discounted by the Nazi authorities and subjected to biological genocide. Raphael Lemkin, one of the chief architects of the Genocide Convention, placed great emphasis on "the biological aspect" of genocide, observing that Hitler's conception of genocide was "based…upon biological patterns".[58] Lemkin described the Nazi concept of 'race' as "from the vantage point of biological superiority"—the NZ authorities today may be said to deal with antenatally identified members of the group with Down syndrome and other conditions from just such a vantage point. Lemkin in delineating the concept of 'biological genocide' includes the adoption of measures calculated to decrease the "birthrate of the undesired group".[59] In 1945, Lemkin, working as foreign affairs advisor to the War Department, assisted Robert Jackson in London with the drafting of the London Charter. The indictment issued on 6 October 1945 incorporated genocide via the third category of crimes: crimes against humanity. All 24 defendants were indicted for conducting 'deliberate and systematic genocide, viz., the extermination of racial and national groups, against civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, particular Jews, Poles and Gypsies and others'.[60]

4. Nazi authorities justified selective abortions as "racial emergency situations": Lemkin, one of three experts on international law chosen to construct the first draft of the Genocide Convention, wrote at the time of the drafting about the "recent Nuremberg proceedings against Nazi doctors who experimented on human beings in concentration camps", and verified the understanding of abortion at that time as a form of killing: "… the defendants practiced experiments in order to develop techniques for outright killings and abortions." [61] In the trial of Adolf Eichmann, "artificial abortion in every case and in all stages of pregnancy" at Theresienstadt and at Kovno Ghetto was identified in Count 4 of the indictment as one of the measures intended to advance the "Final Solution of the Jewish Question."[62] Selective abortion was included in the Nazi genocidal measures calculated to decrease the birthrate of the group stigmatized as 'undesired' on the grounds of possible hereditary 'defects': such abortions were classified by the Nazi authorities as "racial emergency situations". As early as September 1934, the Reich physician leader, Gerhard Wagner, had issued a circular advising physicians that the Fuhrer would grant them "amnesty for any abortions performed to prevent births of children with hereditary taints".[63] Henry Friedlander in

his study *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* observes that with a legal amendment which "required the consent of the pregnant woman", the selective abortion 'procedure' was 'regularized': "Thus the law requiring sterilization for the so-called unfit had been expanded into a law permitting abortion of the proscribed group."[64]

5. Under the biological genocidal 'health' programmes of the Nazis, children were 'scientifically' classified by the Nazi administrators and doctors as "racially valuable" or "non-valuable". Members of one of the 'racially non-valuable' groups were identified has having the physical traits associated with Down syndrome and were subjected to lethal abuse of their human rights, precisely because of their membership in this distinctive group. Dr Lifton documents the health administrators and professionals' active participation in "a criminal aspect of positive eugenics known as *Lebensborn*, or "Spring of Life." Heinrich Himmler had created this institution as part of his plan "to breed the SS into a biological élite ..." [65] The biological genocidal 'health' programmes involved killing, seriously harming, or interfering with the life continuity (by preventing births or forcibly transferring children) of biologically inferior groups.[66]

6. The biological focus of "scientific racism" enabled the Nazi genocidal programmes to extend to a readily identifiable victim group—children and adults with Down syndrome. "Making widespread use of the Darwinian term 'selection', the Nazis sought to take over the functions of nature (natural selection)… in orchestrating their own 'selections', their own version of human evolution. In these visions the Nazis embraced… a newer (nineteenth- and twentieth-century) claim to 'scientific racism'." [67] Newborn infants with Down syndrome were identified at birth and placed on a register for lethal medical treatment after a perfunctory examination by a board of 'specialist' doctors: the Reich Committee for the Scientific Registering of Serious Hereditary and Congenital Illnesses (*Reichsausschuss zur wissenschaftlichen Erfassung erb- und anlagebedingter schwerer Leiden*), headed by Karl Brandt, Hitler's personal physician.[68] On August 18, 1939, the committee issued a decree that required reporting of all newborns and infants under the age of three with suspected "serious hereditary diseases." These "diseases" included Down's syndrome, deformities, paralysis, deafness, blindness, and others. While physicians had been unofficially killing babies "unfit to live" since at least 1933, the creation of this committee officially authorized such killings. Dr. Karl Brandt explained the aim: "The objective was to obtain possession of these abortions and destroy them as soon as possible after they had been brought into the world."[69]

7. The acts of genocide perpetrated by the Nazi regime against children with Down syndrome (the term 'mongolism' was commonly used, as were other more gross and intentionally dehumanizing descriptions) were clearly and repeatedly characterized in terms of a 'faulty' biological/racial profile. Biologically, these children were perceived to be racially inferior, identified by their distinctive 'inferior' physical appearance and traits rendering them 'unworthy' of membership in the 'master' race. In effect, these children were targeted as an inferior racial group to be consigned to special programmes the purpose of which was "to destroy, in whole or in part, a … group as such".

8. Mongolism, no less than Jewishness, became the basis for a group identified as 'racially inferior' and destined for genocidal acts. The term 'racial' netted 'Mongoloid' and Jewish children alike and condemned them to the same fate with the same intention.

"…Conditions considered a basis for killing also expanded and came to include mongolism (not listed at the beginning...Jewish children could be placed in the net primarily because they were Jewish." [70] In Nazi Germany, "sterilization courts could rule that **pregnancy could be interrupted for eugenic reasons in a 'racial emergency' situation: that is, if the future child was likely to inherit certain defects** or (in all probability) had mixed (Jewish and non-Jewish) parentage."[71] [Bold type added] In Friedlander's chapter entitled "Killing Handicapped Children", he observes that the euthanasia killings proved to be the opening act of Nazi genocide: "The mass murder of the handicapped precede that of the Jews and Gypsies; the final solution followed euthanasia…No substantive difference existed, however, between the killing operations directed against the handicapped, Jews, and Gypsies." [72]

9. The genocidal atrocities of World War II—the inspiration for the Genocide Convention—were the product of an ideology that tolerated and encouraged lethal contempt for groups whose physical characteristics identified them with biological/racial inferiority. Nazi perceptions of genetic inferiority and racial inferiority, both separately and operating together, provided the rationale for the "the eugenic and racial-biological measures of the National Socialist people's state".[73] The genocide sought "physical perfection" and selected for both genes and race which were, of course, inextricably intertwined. Newborns, from all races including the German race, identified to have Down syndrome (or mongolism as it was called in the Nazi programmes) were considered genetically inferior and were eliminated on those grounds. The Nazi process of 'selection' has chilling similarities to what occurs in New Zealand today, where each member of the group at risk has to qualify biologically through antenatal testing for the individual right to exist, which becomes in the system a tentative right conditional on the pregnant woman's subjective attitude towards members of the human group identified as having Down syndrome, Spina Bifida or other conditions sought out by the Programme.

10. The Nazi directors of the German genocidal programmes embraced the concept of 'life unworthy of life'.[74] The history of propagation of this concept in Germany is revealing and essential to an understanding of what the Nazi leadership called 'scientific racism'. In 1920, Hoche and Binding argued that "…the principle of 'allowable killing' should be extended to the incurably sick… The right to live must be earned and justified…Theirs is not a life worth living; hence their destruction is not only tolerable but humane."[75] In a 1930s publication *The Face of the Germanic Doctor over Four Centuries*, contemporary German scientists were hailed as having "created the foundation for the eugenic and racial-biological measures of the National Socialist people's state."[76] The crucial work — "The Permission to Destroy Life Unworthy of Life" (*Die Freigabe der Vernichtung lebensunwerten Lebens*) — was published in 1920 and written jointly by two distinguished German professors: the jurist Karl Binding, retired after forty years at the University of Leipzig, and Alfred Hoche, professor of psychiatry at the University of Freiburg. Carefully argued in the numbered-paragraph form of the traditional philosophical treatise, the book included as "unworthy life" not only the incurably ill but large segments of the mentally ill, the feebleminded, and "retarded and deformed" children. More than that, the authors professionalized and medicalized the entire concept. And they stressed **the therapeutic goal** [i.e. the intention] of that concept: destroying life unworthy of life is "purely a healing treatment" and a "healing work."[77] [78]

11. While selection for abortion was a Nazi tool for biological genocide, for prevention of births for eugenic reasons in ‘a racial emergency situation’, the selection process was far from scientific.[79] When no genetic cause for a condition could be found, the term "congenital" was substituted for "hereditary."[80] "The actual order to kill a child was issued by the Reich Committee. An official-looking document printed on the stationery of the fictitious Reich committee but signed by an official of the KDF, this killing order was euphemistically called an ‘authorization’ to ‘treat’ the child. The term ‘authorization’ [Ermachtigung] was used because the myth of euthanasia as ordered by Hitler was based on the deception that in implementing the program the state only facilitated and authorized an action a physician wished to take for humane reasons but which the archaic penal code prohibited....the physicians involved in the program assumed that the disabilities listed as warranting inclusion [in the euthanasia program] would prevent the infant from functioning independently in the adult world. But even the chief physician of adult euthanasia found the procedures for making such a determination faulty; pointing to the case of the blind and deaf Helen Keller, he argued that infancy was much too early to reach a definitive conclusion about a child's future ability."[81]

12. Yet, in New Zealand today, pregnant women are pressured to reach just such a conclusion, to make ‘choices’ (eugenic selections) trying to guess the future quality of life for the human beings *in utero* who, as identified by the NZ Programme, would be born with Down syndrome or other conditions if their births are not ‘prevented’. Many of their doctors, no doubt aware of the possibility of future litigation for “wrongful birth”, are telling us that they must be “careful” to urge participation in the Programme, in further testing, and must provide full information on the benefits of “the abortion option”. The attitudinal prejudice of many doctors today against honouring what Lemkin, writing in 1947, recognized as “a natural right to existence” [82] for all groups as such must raise doubts about the claim by the NZ Ministry of Health that the NZ Programme is “voluntary”. The Programme, with what promises to be a relentless attrition of births to this group, threatens over time to change for the worse the lives of the group with Down syndrome and other conditions and the community attitudes towards this group. Already our members have gathered a large quantity of anecdotal evidence that mothers who “choose” to bring to birth a child of this group are confronted with offensive questions such as “Didn’t you have the test?” and even more offensive judgments: “Well, it’s your own fault—don’t expect taxpayers to help with the costs—you could have aborted the child”. Insidiously, this accusatory tone arises in encounters with those with disabilities who have survived the prenatal selection process.[83] And survivors of this selection process are becoming fewer:

> …almost only Moslems and people with strong religions, who are not allowed to have abortions, are giving life to their babies with Spina Bifida and Hydrocephalus.
> The consequence of these actions is that hospitals are cutting down their budgets and closing interdisciplinary Spina Bifida teams.
> In the near future the small group of young survivors will not have access any more to the services for Hydrocephalus & Spina Bifida where our organisations fought for.
> We, the Spina Bifida and Hydrocephalus population, are like the Incas: a dying population.
> We are eliminated totally, probably because people have been influenced by the hidden message of primary prevention: that they should not been born anymore.[84]

PART III

Additional arguments establishing that "Imposing measures intended to prevent birth within the group" includes both "direct" and "indirect" pressure

1. Intention is the key element in recognizing as genocide the imposition of measures for enabling and facilitating the prevention of births within the group.The term 'imposing' in *"Imposing measures intended to prevent births within the group"*[85] did not exclude those measures intended to prevent birth which were exercised with less than absolute coercion in Nazi Germany and in Poland and the Eastern Occupied Territories. From the argument of the prosecution in the *RuSHA/Greifeldt Case*: "The Nazis paid lip service to the idea that all abortions were voluntary but this was obviously not the case. These unfortunate women…found themselves subjected to all manner of pressure, both direct and indirect.[86] The 'intent' was always the critical factor[87] while overt coercion was not always necessary to enact the intent**.**

2. Thus in the crime of genocide, under the Genocide Convention it is not necessary that the imposition of measures have an element of compulsion—compelling measures intended to prevent births within the group is an additional offence against the group—it does not constitute the core offence, which is the intention. Nazi authorities understood that coercion was not necessary where careful shaping and manipulation of the attitudes of pregnant women towards (voluntary) abortion of the targeted group could serve the intention adequately if not quite as effectively. As Robinson observed: "Subparagraph [II](d) may in practice give rise to the problem of whether the prevention of births within the whole group or only in a part was intended. Although this subparagraph speaks not of restriction but prevention, it may be granted that the intent of partial prevention suffices, since the requirement of total prevention would conflict with the definition of Genocide as relating not only to a whole group but also to a part of it."[88] It is the prevention of births that is the measure, not the "restriction", and partial prevention suffices. Voluntary screening and selective abortion prevents births – based on the group's identity.

3. In the drafting history of the Genocide Convention, it should be noted that the term "imposing" was introduced specifically to assuage concerns that "birth control programmes" might be misconstrued as genocidal.[89] The Nazi abortion programmes, however, were not accepted by the international community as "birth control" at time of drafting of the Genocide Convention.[90]

4. In relation to the absence of overt coercion in the Nazi genocidal programmes, Robert Proctor in his study "Racial Hygiene: Medicine Under the Nazis" (1988) makes a pertinent point: "The individuals involved in the "euthanasia" (read: 'murder':) of 'lives not worth living' were never ordered to kill their patients. They were simply empowered to do so". Lifton also cites evidence that "[The Nazi doctors] agree to euthanasia and its implementation. It is a 'can' and not a 'must order'."[91]

5. Initially, at least, abortions to prevent births of children suspected to have 'hereditary taints' were voluntary: "In September 1934, the Reich physician leader, Gerhard Wagner, had issued a circular advising physicians that the Fuhrer would grant them amnesty for any abortions performed to prevent births of children with hereditary taints...The amendment, which **required the consent of the pregnant**

woman, regularized the procedure...Thus the law requiring sterilization for the so-called unfit had been expanded into a law permitting abortion of the proscribed group."[92] [Bold type added]

6. Just as in the Nazi Genocide, as Friedlander points out, "(t)he killing system depended on the cooperation of bureaucrats, physicians, and parents" [93], so cooperation, not coercion, characterizes the genocidal acts against the group with Down syndrome and other conditions being facilitated today through identification in the New Zealand Antenatal Screening Programme and perpetrated through the follow-up abortion programme offered through both private and public health facilities.

PART IV

Evidence that the Nazi authorities understood that "encouraging" abortion can be an effective measure intended to prevent births within the group; the measures need not be restricted to "compelling" abortions.

1. Encouraging abortion was condemned by the international community at Nuremberg: "…protection of the law was denied to the unborn children...Abortion was encouraged…" [94] As with Nazi programmes of identification and selection for possible elimination, the NZ programme does not operate in a vacuum but rather in a culture of prejudice that begins before birth.[95] This cultural environment professing 'good' motives for preventing births within the group is tolerated and condoned by law and even encouraged and defended by authorities such as the New Zealand Human Rights Commission (as a 'legal choice' and as "the right of prospective parents to make an informed choice whether to proceed with a pregnancy"[96]). As Dr. Lifton concludes from his study of the psychology of "The Killing Professionals": "Genocidal projects require the active participation of educated professionals — physicians, scientists…lawyers, clergy, university professors and other teachers — who combine to create not only the technology of genocide but much of its ideological rationale, moral climate, and organizational process…." [97]

2. To ensure that the intention of the New Zealand Programme is adequately served, the mere provisioning of measures intended to prevent birth is sufficient. This is especially true given that this 'non-judgmental' Programme has been designed not only to identify members of the group with Down syndrome and other conditions but also to enable lethal prejudice to be enacted blamelessly, to 'offer' the 'choice' to request abortion because of membership of the 'undesired' group, such abortions being provided by accredited health professionals and in pleasant clinical surroundings. Genocidal 'selection' is sanitized. As with the charge at the Nuremberg Trials of "compelling and encouraging abortions" among women workers from Poland and the Occupied Territories, it may be judged not strictly necessary that an element of compulsion be applied. Himmler's March 1943 decree coined the euphemism that "the pregnancy is being interrupted for reasons of social distress".[98] Abortion of "racially substandard offspring of Eastern workers and Poles" was presented as a benign measure:

   > A pregnancy interruption should go off without incidents and the Eastern worker or Pole is to be treated generously during this period in order that this may get to be known among them as a simple and pleasant affair.[99]

3. The line between coercion and voluntarism can be blurred. Both the intent and the consequences of the abortion programme were adequately served by making abortion "a simple pleasant affair". Just as with the New Zealand Programme's careful use of euphemism for selective abortion on grounds of membership of an 'undesired' group, Nazi propaganda too was deviously persuasive. In Poland, Russia and the Eastern Occupied Territories, Nazi ideologues had set about "encouraging" abortion of the unwanted:

…the press, radio, and movies, as well as pamphlets, booklets, and lectures, must be used to instill… the idea that it is harmful to have several children. We must emphasize the expenses that children cause, the good things that people could have had with the money spent on them. We could also hint at the dangerous effect of child-bearing on a woman's health... It will even be necessary to open special institutions for abortion, and to train midwives and nurses for this purpose. The population will practice abortion all the more willingly if these institutions are competently operated. The doctors must be able to help out, there being any question of this being a breach of their professional ethics. [100]

PART V

Why Genocidal intention may be served by "imposing measures" and/or "facilitating measures"

1. Whether individuals ("official capacity" is "irrelevant"[101]) are *"imposing measures intended to prevent births within the group"* or are merely "*facilitating*" measures intended to prevent births within the group, both acts of "*genocide*" and acts of "*complicity in genocide*" are punishable (and to be prevented). [Genocide Convention Article III (a) & (e) and Rome Statute Article 25 (3)(c)]

2. The NZ Programme leading as it does ultimately to the prevention of births within the group identified though the Programme to have Down syndrome and other conditions abrogates the principle of the State's duty to protect. Nehemiah Robinson affirms that the term 'complicity' was taken over from the Ad Hoc Committee's draft of the genocide Convention, in which it was understood to refer to accessorship before and after the act, and to aiding and abetting in the commission of any of the crimes enumerated in the Convention.[102] [103] Article 25(3) (c) of the Rome Statute is relevant:

   > In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person…For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

3. Persons within the New Zealand Ministry of Health are implicated in genocide by "providing the means for its commission":

   - providing a programme for ante-natal identification of members of the group and thus "facilitating the commission of such a crime"—an intended prevention of births within the group—a crime against the group;
   - providing (i.e. establishing, regulating and presiding over) a nationwide health system comprised of both public and private health facilities and personnel who, upon ante-natal identification of conditions such as Down syndrome and Spina Bifida, continue to offer and enact routine prevention of births within the group; in effect, the Health Ministry presides over a system where medical personnel are enabled to act *as if* [104] it were perfectly reasonable and ethical to perform abortions to prevent births of persons with Down syndrome and other conditions;
   - providing conditions such as an amoral environment conducive to the ongoing commission of the crime of "destroying in part" the group at risk: clever dog-whistling sends subliminal messages in the Programme as follows:

     (i) no guilt is to be attached to the seriously discriminatory practice of preventing births within the group; neither the abortionists providing the destructive 'service' nor the pregnant woman requesting the destructive 'service' is to bear any guilt in the

prevention of births within the group; the Health Ministry supports these destructive 'services' and condones the grounds for their commission. Dr Gerhard Wagner, head of the Nazi physicians in the 1930s, used the health of the adults to justify medical termination of the lives of their children who were deemed burdensome. He asserted that it is the duty of the state to protect the people's health through legal measures:

> Allow us to form our German state according to our laws and needs… it is irresponsible that the state must provide the money for some genetically ill families who may have several family members in institutions costing thousands of marks annually. The National Socialist state cannot repair the failings of the past, but through the "Law for the Prevention of Genetically Ill Offspring," it has seen to it that in the future the inferior will not be able to produce more inferior children, saving the German people from a steady stream of new moral and economic burdens resulting from genetic illnesses…we prevent unhealthy life from being propagated, saving children and their children from new and enormous misery.[105]

In authorizing the medicalized destruction of selected children (before as well as after birth), Nazi ideologues insisted there could be no guilt:

> This is necessary for the preservation and development of all that lives on this earth…I believe that we have a good conscience before the world when we eliminate life that is unworthy of life…[106]

The *Nuremberg Trials Record* shows that even when confronted with the enormity of the crimes against humanity, there was stubborn denial of any crime:

> The activity of Lebensborn, however one may understand it, consisted of care for other people. Mistakes may have occurred, errors which one may only be able to judge today in retrospect. The basic motives, however, the basic motive for helping and assisting other people was predominant in every case. I personally at no time had any other motive, nor did I at any other time follow any other intentions.[107]

Similarly, defendants insisted that their 'work' of terminating lives was only to 'help' women and children:

> I did not help women and children in order to be praised for it. I helped them because I wanted to help them, and because I had to help them. I never expected any thanks for that; but that I would be placed before a court because of my helping activities — that is something I never comprehended and I still cannot understand it — at the end of this trial. In the future it will never be comprehensible to me because I cannot believe that my work was ever a crime.[108]

Fundamentally, in the New Zealand Programme, approval is being given with the same two broad justifications that were proffered in Nazi Germany.

The genocidal purpose of the Nazi abortion programme was rationalized as a 'humane' measure: to prevent births to a group because it would be cruel to give them birth as their lives are "not worth living"; and secondly because they are "a terrible, heavy burden upon their relatives and society as a whole."[109]

(ii) deeply entrenched attitudinal prejudice against the birth of persons with Down syndrome is excused and condoned in the name of "freedom to make informed choices"; pregnant women's 'discrimination' on grounds of identification of Down syndrome and other conditions is deliberately endorsed as their 'right' to make "informed choices"; the language sanitizes the selective abortion 'choice' being made possible by the knowledge provided by the Programme with the express purpose of providing that 'choice'. The quality or validity of that 'informed choice' remains unquestioned: no attempt is made to ascertain whether 'choices' resulting in selective abortions on the grounds of having identified Down syndrome and other conditions are 'informed' with prejudice or fear. There is no questioning of the objective rationality of such 'choices'—subjective prejudice leading to lethal discrimination in pre-natal treatments is presented as above reproof.

(iii) a subtle invitation is extended (perhaps even a subversive incitement) to seriously consider the 'choice' to prevent births on the grounds of identification of Down syndrome and other conditions; the clear implication is that the possibility of abortion on these specific grounds is deemed by the Ministry of Health to be reasonable, unobjectionable and perhaps even desirable in the interest of advancing the range of women's 'choices'.

(iv) the Ministry of Health's recommendation for 'non-directive counselling' would appear to signal undifferentiated levels of approval for both 'choices'. The Ministry of Health is careful to maintain a pretence of indifference to either outcome; the prevention of births within the group is just as easily tolerated as successful births within the group—both 'choices' have moral equivalence. To prevent births within the group is just as good as to give birth; the only proviso is that the 'choice' be 'informed'. In effect, the Ministry of Health discounts the very real possibility that an 'informed' choice may also be a gravely 'discriminatory' choice in that the information makes possible the exercise of a destructive discrimination against births within the group.

PART VI

Conclusion: the urgent need to break the nexus between the Programme and genocide

The current nexus between the Programme and the health system's provision for the prevention of around 90% of the births of those identified to have Down syndrome or the other conditions targeted by the Programme is already very strongly established.

The *2011 Convention on the Rights of the Child Status Report* requires States parties to implement measures to prevent and eliminate all forms of discrimination against children with disabilities, that include: (i) prohibiting discrimination on grounds of disability in constitutional provisions and in specific anti-discrimination laws or legal provisions; and taking all appropriate measures, including legislation, to modify customs and practices that constitute discrimination against persons with disabilities. [57(b)(i)]

Concerning legislative reform, the CRC Committee some time ago made a very significant recommendation which the New Zealand legislature continues to ignore:

> States should review and amend laws affecting disabled children which are not compatible with the principles and provisions of the Convention, for example legislation which denies disabled children an equal right to life, survival and development, including—in those States which allow abortion— discriminatory laws on abortion affecting disabled children… (CRC/C/69).

As long as extremely liberal abortion laws in New Zealand operate to allow the current generation of abortion providers to continue to offer unrestricted abortions on the grounds of identification through the Programme of members of the group at risk of genocide, then that genocide will continue.

The current absence of any due legal process whereby the genocide can be halted under New Zealand law is at the very core of our complaint to the ICC. The victims (the targeted group) have at present no recourse to legal representation and, in the current deeply entrenched culture of discrimination, no realistic chance of success to stop the genocide through New Zealand courts. In this respect, domestic remedies have been exhausted.

Nehemiah Robinson, in his invaluable history of the drafting of the Genocide Convention, points out that the draft of the Secretariat contained in Article IX an obligation of the parties to commit persons guilty of Genocide for trial to an international tribunal:

> in the event they were unwilling to try them in domestic courts…or if the acts of Genocide were committed by individuals acting as organs of the State, or with the support or toleration of the State.[110]

What we have in New Zealand is a genocide which the State party is "unwilling to try…in domestic courts" and "acts of genocide…committed by individuals [abortion providers in public hospitals] acting as organs of the State, or [abortion providers in private practice or facilities] with support or toleration of the State".

We understand that ultimately it is the New Zealand government, as a State party to the relevant Conventions and the Rome Statute, who has responsibility to protect groups at risk of genocide. Article 25 (4) of the Rome Statute declares:

> No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

New Zealand's domestic law, however, is denying human rights and legal protection to those at risk of genocidal treatment, where the distinction in treatment (procured abortion rather than giving birth safely) arises from a prohibited ground, the material ingredient for the acts of genocide being identification of membership in the group targeted for selective abortion by reason of their distinguishing biological characteristics. Through the Programme and through extremely liberal abortion laws, the New Zealand government is facilitating, financing, tolerating and allowing to go unchecked and unpunished measures intended to prevent births. Thus, it is implicated in the making of a genocidal policy.

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[1] Morton and Singh observe that "While prevention shares an equal status with punishment in the Convention's title, there are no direct prevention provisions in the treaty's articles". They posit the reason for this as "absent of a compelling theory that reveals the necessary and sufficient causes of genocide, the treaty could not provide explicit prevention measures". Jeffrey S. Morton and Neil Vijay Singh, "The International legal Regime on Genocide", *Journal of Genocide Research* 5, No. 1 (2003). We would point however to the obligation to enact necessary legislation in Article V of the Genocide Convention: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3." Article 3 includes both (a) genocide and (e) complicity in genocide. The New Zealand's government's duty as a Contracting party to the Convention to prevent and punish genocide is articulated in Article 1: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

[2] Front-line Interview, PBS (January 21, 2004).

[3] Patricia Visieurs Sellers served from 1994-2007 with the UN International Criminal Tribunal for the Former Yugoslavia (ICTY), Office of the Prosecutor (The Hague, The Netherlands). The quotation can be found at http://www.enotes.com/genocide-encyclopedia/reproduction.

[4] Hannah Arendt: *The Origins of Totalitarianism* (1951).

[5] "So if a crime against humanity had become in some sense "banal" it was precisely because it was committed in a daily way, systematically, without being adequately named and opposed. In a sense, by calling a crime against humanity "banal", she was trying to point to the way in which the crime had become for the criminals accepted, routinised, and implemented without moral revulsion and political indignation and resistance." Judith Butler: "Hannah Arendt's challenge to Adolf Eichmann", *The Guardian*, Monday 29 August 2011. Hannah Arendt's "banality of evil" was the subject of a recent series of articles in *The Guardian*.

[6] Robert Proctor: *Racial Hygiene: Medicine under the Nazis* (Harvard University Press, 1988), p. 285 from Chapter 10: "The politics of knowledge".

[7] Cited in Henry Friedlander: *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill: University of North Carolina Press, 1995) p.30.

[8] See also Nehemiah Robinson: *The Genocide Convention: A Commentary* (New York, Institute of Jewish affairs, 1960) p.73.

[9] From the first drafting session of Universal Declaration the drafters expressed concern for "unborn children", UN Doc.E.CN.4/21. First Draft of the International Covenant (1947)—"any person from the moment of conception".

- Draft American Declaration of the International Rights and Duties of Man (1948)—"…the right to life from the moment of conception"
- Declaration of Geneva (1948) World Medical Association —"the utmost respect for human life from the time of conception..."
- International Code of Medical Ethics (1949): "…the importance of preserving human life from the time of conception until death"
- American Declaration of the International Rights and Duties of Man (1948)—" Every person has the right to life, including those who are not yet born as well as the incurable, mentally defectives, and the insane." was changed to "Every human being has the right to life…"

- International Code of Medical Ethics (1949)—"the importance of preserving human life from the time of conception"
- Draft Declaration on the Rights of the Child (1950)—human rights "even from before birth"
- Draft Covenant on Civil and Political Rights (1950)—"Every human being from the moment of conception has the inherent right to life."
- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)—"…the European Convention for the Protection of Human Rights and Fundamental Freedoms was modelled on the draft of the Covenant on Civil and Political Rights as it existed in 1950." John P. Humphrey, a prominent Canadian professor of international law who was appointed by the UN to oversee to oversee legal consistency across the drafting of all the foundational human rights instruments drafting affirmed this in his Preface to Marc J. Bossuyt: *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*", Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1987, p.xv.
- Draft Declaration on the Rights of the Child (1957) –"special care and protection shall be provided both to him and to his mother, including adequate prenatal and post-natal care".
- UN Declaration on the Rights of the Child (1959)—"…legal protection before as well as after birth
- Draft Inter-American Convention on Human Rights (1959)—"protected by law from the moment of conception"
- Drafting history of Article 6(5) International Covenant on Civil and Political Rights (1966)—"to save the life of an unborn child"
- Inter-American Convention on Human Rights (1969)—"in general, from the moment of conception".

[10] See, for example, Rita Joseph: *Human Rights and the Unborn Child* (Leiden & Boston, Martinus Nijhoff Publishers, 2009) especially Ch.1*: UDHR Recognition of Child before Birth: the Historical Context*, Ch.2: *UDHR Recognition of the Child before Birth: Analysis of the Texts* and Ch 5: *What is Appropriate Legal Protection Before Birth?*

[11] See, for example, the just released San Jose Articles at www.sanjosearticles.org . See also the recent October 18, 2011 Judgment of the European Court of Justice (Grand Chamber) banning patents of stem-cell technologies based on destruction of human embryos. The judgment reaffirms the entitlement of unborn human life "at all stages of development" to international legal protection and acknowledges that each human being commences "development" at the fertilisation stage. Noting that "the definition of human embryo is a very sensitive social issue in many Member States, marked by their multiple traditions and value systems" (Para.30), the judgment nevertheless goes on to assert: "...any human ovum must, as soon as fertilised, be regarded as a 'human embryo'... since that fertilisation is such as to commence the process of development of a human being" (para.35). The Court rules against patenting based on "destruction of human embryos...whatever the stage at which that takes place" and places emphasis in this decision on respect for "human dignity" (paras. 33, 34, 38).

[12] A general misconception identifies the "special safeguards…before as well as after birth" language as concepts newly-coined in the Preamble to the *Declaration on the Rights of the Child* (1959). A more careful reading of this Preamble reveals that on November 20th, 1959, the UN General Assembly agreed in this Preamble that the Universal Declaration of Human Rights (1948) *had already* "recognized" the human rights of the child before birth. Significantly, this General Assembly of November 1959, among whom were a considerable number of the original drafters of the Universal Declaration of 1948, provided incontrovertible evidence that the Universal Declaration was understood to have recognized the child before birth as a juridical personality entitled to legal protection. Formal universal recognition of the child before birth as a legitimate subject of inherent and inalienable human rights including entitlement to legal protection is critical for it is the nature of inherent and inalienable human rights that they can never be de-recognized by courts of law or legislatures.

[13] The *travaux préparatoires* stated this explicitly: "The principal reason for providing in paragraph 4 [now Article 6(5)] of the original text that the death sentence should not be carried out on pregnant women was to save the life of an innocent unborn child." Marc J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff Publishers, 1987, A/C.3/SR.810 para 2; A/C.3/SR.811 para 9; A/C 3/SR.812 para 7; A/C.3/SR.813 para 36; A/C 3/SR 815 para 28. The child before birth is recognized as being innocent of any crime and so the right to life of that child is to be preserved and protected by the State in circumstances where the right to life of the child's mother was to have been forfeited. This protection emerged as the culmination of a long constant and consistent concern and commitment to protecting the unborn child, a concern arising out of the Nuremberg judgments, finding expression in the Geneva Conventions and impacting on the very earliest drafting sessions of the ICCPR, specifically in the Draft Committee's 1st Session (1947):

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

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

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

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

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

[14] Cohen, Cynthia Price, "Review", *American Journal of International Law*, Vol. 89 (4), October, 1995, pp. 852-855. "In fact, the word 'abortion' was never used in the drafting of the substantive articles of the Convention; it appears in only three paragraphs of the 1980 Working Group Report in reference to an ultimately rejected proposal to include the words 'before as well as after birth' in preambular paragraph 6. Even when this proposal was reintroduced during the second reading of the convention causing heated debate, the word 'abortion' itself was not part of the discussion. The focus was always on 'the rights of the unborn child.'" Cohen's footnote (p.853) on this: "See UN Doc. E/CN.4/L.1543, 1980, paras 6, 10 & 18. The word 'abortion' does not appear anywhere else in the travaux préparatoires."

[15] 1989 Report of the Working Group to the Commission on Human Rights, E/CN.4/1989/48, para 40.

[16] UN Committee on the Rights of the Child (CRC) Comment No 7 (2005), Right to Non-discrimination, para 11.

[17] Nehemiah Robinson : *The Genocide Convention : A Commentary* (New York, Institute of Jewish affairs, 1960) p.60

[18] Ibid pp.33-4

[19] Article 31:General rule of interpretation

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

…

4. A special meaning shall be given to a term if it is established that the parties so intended.

[20] Vienna Convention Article 32: Supplementary means of interpretation: "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..."

[21] UNESCO Statement: *The Race Question* (1950).

[22] Paola Gaeta: "The UN Genocide Convention: a commentary" p.115.

[23] Henry Friedlander : *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill: University of North Carolina Press, 1995) p. 45

[24] Robert Jay Lifton:"*The Nazi doctors: medical killing and the psychology of genocide*" (1986) p.56

[25] Henry Friedlander asserts that that the methods used to dispatch the handicapped served as a model for the so-called "final solution" to the "Jewish question" because they convinced Nazi leadership that mass killing was a feasible enterprise. (Friedlander, 1995: pp. 39, 62, 284).

[26] Ibid, p. 302.
[27] *UN Resolution on Genocide*, 11th December, 1946.

[28] The argument of the prosecution in the RuSHA case, taken from the Opening Statement of the Prosecution in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10. Vol. 4: United States of America v. Ulrich Greifelt, et. al. (Case 8: 'RuSHA Case'), US Government Printing Office, District of Columbia: 1950. pp. 622-93. Part 1[Tr. pp. 24-125, 10/20/1947.]

[29] Ibid

[30] "Iran saw a distinction between groups whose membership was inevitable, such as those based on race, religion or nationality, and those of which membership was voluntary. ' it must be admitted that the destruction of the first type appeared more heinous in the light of the conscience of humanity, since it was directed against human beings whom chance alone had grouped together..." UN Doc.A/C.6/SR.74 (Abdoh, Iran)

[31] Manfred Lachs of Poland (UN Doc. A/C.6/SR.75)

[32] The World Medical Association's Geneva Declaration of September 1948 proclaims:
"I will maintain the utmost respect for human life from the time of conception, even under threat; I will not use my medical knowledge contrary to the laws of humanity."

[33] The Trial of German Major War Criminals, Sitting at Nuremberg, Germany 14th February to 26th February, 1946, Sixty-First Day: Monday, 18th February, 1946, p.99. At www.nizkor.org/hweb/imt/.../tgmwc-07-61-05.shtml.

[34] Hunt, John, "Out of Respect For Life: Nazi Abortion Policy in the Eastern Occupied Territories*", Journal of Genocide Research*, Vol. 1(3), 1997, pp.379-385; and "Abortion and the Nuremberg Prosecutors: A Deeper Analysis", *Life and Learning*, Vol. VII, Proceedings of the Seventh University Faculty for Life Conference, June, 1997.

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

[36] *Nuremberg Trials Record*: *Trial of Ulrich Greifelt and Others Indictment* [Tr. pp. 1-18, 7/1/1947.] Vol. IV, p.685-6 at http://www.mazal.org/archive/nmt/04a/NMT04-T0613.htm

[37] *Nuremberg Trials Record*: *Trial of Ulrich Greifelt and Others Indictment* [Tr. pp. 1-18, 7/1/1947.] Vol.V. at pp.95-6. http://www.mazal.org/archive/nmt/05/NMT05-T0095.htm

[38] *Nuremberg Trials Record*: *Trial of Ulrich Greifelt and Others Indictment* [Tr. pp. 1-18, 7/1/1947.] Vol. IV, para 12, at pp.613-4. http://www.mazal.org/archive/nmt/04a/NMT04-T0613.htm

[39] *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, London, 8 August, 1945. Charter II: Jurisdiction and general principles Article 6(c).

[40] Richard Hildebrandt was Higher SS and Police Leader at Danzig-West Prussia from October 1939 to February 1943, and simultaneously he was leader of the Administration District Danzig-West Prussia of the Allgemeine SS and deputy of the RKFDV. From 20 April 1943 to the end of the war, he was chief of RuSHA. Also Otto Hofmann, as chief of *RuSHA* from 1940 to 1943. See *Nuremberg Trials Record*: "The *RuSHA* Case", Opinion and Judgment, "War Crimes and Crimes Against Humanity", Vol.V, pp.152 to 154) and pp.160-2

[41] Historian John Hunt, after extensive research of Nazi abortion programs and the Nuremberg prosecution's evidence, concludes that the Nazis saw abortion as "an act of killing" and that Nuremberg condemned both the violations of liberty and the violations of life as far as abortion was concerned:*"* Like the kidnapping of children and the seizing of newborns also prosecuted at this trial, abortions were seen as wrong at any time, not just when done for racial-genocidal reasons*."* Hunt, John: "Abortion and the Nuremberg Prosecutors: A Deeper Analysis", *op.cit*., p. 205.

[42] Schuster, Evelyne: "The Nuremberg Code: Hippocratic ethics and human rights", *Lancet*, Vol. 351, 1998, pp. 974-978.

[43] Opening statement by Brigadier General Telford Taylor, December 9, 1946, p.67. Available at: http://www.ushmm.org/research/doctors/telfptx.htm (United States Holocaust Memorial Museum).

[44] Chelouche, Tessa: "Doctors, Pregnancy, Childbirth and Abortion during the Third Reich", *Israel Medical Association Journal,* Vol. 9, March 2007, p.202.

[45] Statement by the Council of the British Medical Association to the World Medical Association, June 1947 (re-issued by The Medical Education Trust and reproduced at http://www.donoharm.org.uk/leaflets/war.htm).

[46] "Preamble to the Charter of the United Nations submitted by the South African Delegation", *UNCIO*, Vol. III, p. 476, document 2, G/14 d(1), May 3, 1945.

[47] From the opening sentence in the Preamble to the *Universal Declaration of Human Rights* (1948). This appears also in the Preamble of the *International Covenant on Civil and Political Rights* (1966) and was characterized by the Commission of Human Rights as "a statement of general principle which was independent of the existence of the United Nations and had an intrinsic value of its own." (GAOR, A/2929 Chapter III para 4.) The intended complementarity of the *Genocide Convention* (1948), the *Universal Declaration* and the *ICCPR* is further strengthened by the fact that many of the drafters were doing double duty at the time in the drafting of all three instruments.

[48] The *Preamble* to the *Convention on the Rights of the Child (1990)* reaffirmed what was agreed in the *Declaration on the Rights of the Child (1959)* "…the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth..." Understanding this in the context of Principle 1 of the *Declaration* ("Every child without any exception whatsoever is entitled to these rights …"), it is clear that the degree of this immaturity is not to be allowed to diminish in any way the child's inherent humanity: human rights are equally valid for the child before birth as for the child after birth *without any discrimination whatsoever.* For historical evidence that the *Universal Declaration of Human Rights (1948)* and the *Convention on the Rights of the Child* recognized the child before birth as entitled to human rights protection, see Rita Joseph: *Human Rights and the Unborn Child* (Leiden & Boston, Martinus Nijhoff Publishers, 2009) especially Chapter 2: *UDHR Recognition of the Child before Birth: Analysis of the Texts*, Chapter 8: *Rights of the child before birth—Legislative History of the Convention on the Rights of the Child*.

[49] The term was used by German jurist Karl Binding to describe 'beings' or 'existences' with impairment ('incurable idiots') in the influential 1920 publication authored jointly with Alfred Hoche: *Die Freigabe der Vernichtung Lebensunwertem Lebens* (*Permission for Destroying Lives Not Worth Living*); cited and translated as "beings who are not only worthless but even manifest negative value" in Henry Friedlander: *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill: University of North Carolina Press, 1995) p. 15; also cited and translated as "not merely worthless but actually existences of negative value" in Burleigh, Michael: *Death and Deliverance: Euthanasia in Germany 1900-1945* (Cambridge, England: Cambridge University Press, 1994) pp.17-8. The 'negative value' is calculated as "a terrible heavy burden upon their relatives and society as a whole".

[50] *Universal Declaration of Human Rights* Article 29(3).

[51] René Cassin, one of the principal drafters of the human rights architecture, affirmed that the Universal Declaration was indeed drafted on the principle of universal inclusion, on **"the fundamental principle of the unity of the human race"**, and this was necessary because Hitler had started "by asserting the inequality of men". Quoted in Morsink, Johannes: *The Universal Declaration: Origins, Drafting and Intent*, Philadelphia: University of Pennsylvania Press, 1999, p.39.

[52] Hannah Arendt understood the Nazi policy of racism as a denial of universal inclusion of "all members of the human race". In exploring the origins of "race thinking" of Nazi Germany, Arendt understood Hobbes to have "provided political thought with the prerequisite for all race doctrines, that is, the exclusion in principle of the idea of humanity which constitutes the sole regulating idea of international law". (*The Origins of Totalitarianism* (1951) p. 157)

[53] The human rights principle of equality: in modern human rights law, there can be no concept of some human beings being "more equal" than others. Thus the unborn child at risk has the same right to life as every other member of the human family. Appropriate legal protection must be in accord with Article 7 of the Universal Declaration:

> "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and

against any incitement to such discrimination."

This entitlement to equal protection before the law and by the law, without any discrimination, is a fundamental principle conditioning the entire field of international human rights law. Human rights entitlement is not scaled according to stage of development, size, viability, competence, independence or wantedness.

[54] The human rights principle of inherency: human rights are seen as inherent in each human being, not granted by external government. The child's rights pre-exist birth; they "inhere" in the child's humanity. The child's "immaturity…before as well as after birth" is not to be allowed to diminish in any way his or her inherent humanity. To be eligible for membership of the human family, one has only to be human. Morsink, from his immense knowledge of the drafting history of the Universal Declaration, observes that when all prohibited discriminations are eliminated:

> "…what we have left is just a human being without frills. And the Declaration says that the human rights it proclaims belong to these kinds of stripped down people, that is to everyone, without exception." *Women's rights in the Universal Declaration*, Human Rights Quarterly, Vol. 13, 1991, p.230.

From conception to birth, children are 'human beings without frills', without the extras that come with maturity, stripped down certainly but yet possessing all the essentials of a new human life. Lacking much in physical size, weight, age, and independence, without a voice, without the power to fend off attacks on their tiny human bodies, our children *in utero* are, nevertheless, human beings with the same inherent human rights as all human beings.

[55] The human rights principle of inalienability: The right to legal protection "before as well as after birth" is one of the equal and inalienable rights of all members of the human family. No one may destroy that right, nor deprive any human being of that right, nor transfer that right, nor renounce it—that's what inalienable means. Human beings cannot be deprived of the substance of their rights, not in any circumstances, not even at their own or their mothers' request.

[56] The human rights principle of indivisibility: the indivisibility principle requires human rights protection of both the mother and her unborn child; and prohibits the individual state from abandoning laws that protect the unborn child on the excuse that it has a priority obligation to protect "the reproductive rights" of the child's mother. When the indivisibility principle is applied, the individual state's misperceived duty to provide expectant mothers with abortion "services" cannot be performed at the neglect of the more fundamental duty to uphold the rights of their children to "special safeguards and care including appropriate legal protection before as well as after birth". The right to life is "the supreme right"[UN Human Rights Committee General Comment 6 (1) & (3)] ; and "basic to all human rights. (*Jailton Neri Da Fonseca v. Brazil*, Case 11.634, Report No. 33/04, Inter-American Court of Human Rights**.**, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 845 (2004), para. 68) It is a "non-derogable" right. [ICCPR Article 4(2)]

[57] I-A Court HR, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A, No. 4, p. 104, para. 55.

[58] Raphael Lemkin : *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress*, (Washington, D.C.: Carnegie Endowment for International Peace, 1944) pp. 80-1

[59] Lemkin, p.86.

[60] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, November 14, 1945–October 1, 1946 (42 vols., 1947–1949), i, pp. 11–30.

[61] Lemkin, Raphael, "Genocide as Crime under International Law", *American Journal of International Law*, Vol. 41(1), Jan. 1947, pp. 145-151 at (pp.147-8).

[62] Shofar FTP Archive File: people/e/eichmann.adolf/transcripts/Sessions/Session-001-01, 11 April, 1961.

[63] Cited in Henry Friedlander: *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill: University of North Carolina Press, 1995) p.30.

[64] Ibid.

[65] Robert Jay Lifton: *The Nazi doctors: medical killing and the psychology of genocide* (New York: Basic Books, 1986) p.43.

[66] "Doctors were central to *Lebensborn*; its medical director, Gregor Ebner, was an "old medical fighter" said to have been personally close to Himmler…he applauded the kidnappings, signed orders for sterilizing "nonvaluable" (insufficiently Nordic) children, and supervised a "medical" sequence in which some of those children judged "nonvaluable" were shipped to their deaths in concentration camps….while a few doctors resisted, and large numbers had little sympathy for the Nazis, *as a profession* German physicians offered themselves to the regime. So also did most other professions; but with doctors, that gift included using their intellectual authority to justify and carry out medicalized killing. Doctors promoted the idea that collective German existence was a medical matter, and many succumbed to the temptation articulated as early as 1922 by the popular writer Ernst Mann. Mann, in defending direct medical killing, considered illness "a disgrace to be managed by health control." His principle was that "misery can only be removed from the world by painless extermination of the miserable!" The entire process, moreover, was to be taken over by the physician — at which point, "doctors could be the true saviors of mankind" (Lifton pp.43-4).

[67] Lifton, p.17.

[68] Lifton, p.52. Also see Burleigh, M: *Death and Deliverance: Euthanasia in Germany 1900-1945* (Cambridge, England: Cambridge University Press, 1994). "All physicians were required to register every case of genetic pathology with the courts and failure to do so was punishable. The reports were filed in specially created data banks. Public health officials, teachers, and social workers were also required to report children suspected of having a disability..." p.17

[69] *Forgotten Crimes: The Holocaust and people with Disabilities.* A Report by Disability Rights Advocates, California, 2001 pp 13-14.

[70] Lifton, p.56.

[71] Lifton, p.42.

[72] Friedlander, p.22.

[73] Lifton, p.31.

[74] Gerhard Wagner: Head of the Nazi Physicians in Wagner, Gerhard: "Rasse und Bevölkerungspolitik," *Der Parteitag der Ehre,* vom 8, bis 14, September 1936. *Offizieller Bericht über den Verlauf des Reichsparteitages mit sämtlichen Kongreßreden*, Munich: Zentralverlag der NSDAP., 1936, pp.150-60. Available at: http://www.calvin.edu/academic/cas/gpa/pt36rasse.htm.

[75] Robert Proctor: "Racial Hygiene: Medicine under the Nazis", p. 178.

[76] Lifton, p.31.

[77] Lifton, p.46.

[78] On 1 July 1940, the RMdl circulated a decree...Continuing to hide the real intent of the program, it informed public health officials that "under expert medical supervision, the psychiatric children's ward at Gorden near Brandenburg on the Havel will provide all available therapeutic interventions made possible by recent scientific discoveries." (Friedlander, p.47)

[79] "A questionnaire was prepared in which the attending physician provided a detailed history. The doctors also made predictions about the baby's future quality of life. The questionnaires were then sent to a committee of physicians who determined whether to give the child a mark of "+", which recommended extermination." *Forgotten Crimes: The Holocaust and people with Disabilities.* A Report by Disability Rights Advocates, California, 2001 pp 13-14.

[80] Sally M. Rogow: *Hitler's Unwanted Children: The Story of Children with Disabilities in Nazi Germany (1999)*.

[81] Friedlander, pp 57-8.

[82] Raphael Lemkin: "A]s in the case of homicide, the natural right of existence for individuals is implied: by the formulation of genocide as a crime, the principle that every national, racial and religious group has a natural right of existence is claimed." 'Genocide', *The American Scholar* (1947) p.229.

[83] In October 2007, the House of Commons Committee on Science and Technology examining Britain's 1967 Abortion Act, was warned by Britain's Guild of Catholic Doctors that eugenic abortion is degrading public perception of people with disabilities: "We remain deeply concerned about the use of screening tests to identify children with disabilities before birth when the usual outcome is that the children be killed."

[84] Pierre Mertens is President of the International Federation for Spina Bifida and Hydrocephalus *(*IF*)*. His article "A Future With Purpose, A Future With Choice" is available at: http://www.perso.ch/dupuism/AFutureWithPurpose3.pdf.

[85] Article II (d) *Genocide Convention.*

[86] Opening Statement of the Prosecution in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10. Vol. 4: United States of America v. Ulrich Greifelt, et. al. (Case 8: 'RuSHA Case'), US Government Printing Office, District of Columbia: 1950. pp. 622-93.

[87] Robinson: pp. 58-9. Also, "Thus the destruction of the group "as such" must be intended… besides the intention of destruction, there must be a specific motive for the act, deriving from the peculiar characteristics of the group." p.60

[88] Nehemiah Robinson: The Genocide Convention (1960), p. 64.

[89] See also Nehemiah Robinson: The Genocide Convention (1960): Footnote 25 on p.64. **"**The apprehension of Frank R. Holman ("Liberty under Law," *Cleveland Bar Association Journal,* 1949 pp. 107 ff.) that organizations advocating birth control may fall under the Convention is unfounded because the basic requirement (intent to destroy a special group) is missing."

[90] For contemporary attitudes to abortion around the time of drafting and completion of the Genocide Convention , see the following:

- The British Medical Association's June 1947 submission *War Crimes and Medicine* reaffirmed, under the "Ethics" heading, "the duty of curing, the greatest crime being co-operation in the destruction of life by murder, suicide and abortion".
- The World Medical Association's Geneva Declaration of September 1948 proclaims: "I will maintain the utmost respect for human life from the time of conception, even under threat; I will not use my medical knowledge contrary to the laws of humanity"; and the *International Code of Medical Ethics* in 1949 concurs: "A doctor must always bear in mind the importance of preserving human life from the time of conception until death".

Even at this present time the international community insists that**:** "In no case should abortion be promoted as a method of family planning." ICPD Programme of Action, para 8.25. This consensus was reached by the 184 UN member states at the Cairo Conference. The ICPD Programme of Action (1994) specifically excluded abortion from the term "family planning": this same paragraph also required governments "to reduce recourse to abortion". This was reaffirmed in the Beijiing Platform for Action (1995) para 106(k).

[91] Lifton: *The Nazi doctors: medical killing and the psychology of genocide* (1986) p.56.

[92] Friedlander, p.30.

[93] Friedlander p. 48.

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

[95] This culture of prejudice before birth is not restricted to New Zealand. See, for, example, Dr Arthur Caplan's response to the positive research findings in Skotko, B. G., Levine, S. P. and Goldstein, R. (2011), Having a son or daughter with Down syndrome: Perspectives from mothers and fathers. (American Journal of Medical Genetics Part A, 155: 2335–23): "Still, as heartening as these findings are, I don't think they will make a bit of difference to parents deciding to end pregnancies once Down syndrome is discovered in a fetus...Down syndrome is almost universally seen as something to be avoided. There is little research on this issue, but genetics clinics report that the vast majority of expectant women who find out their fetus has the extra chromosome end the pregnancy."

Caplan's article "Inspiring portrait of Down syndrome at odds with perfect baby pursuit" at http://www.msnbc.msn.com/id/44708270/ns/health-health_care/t/inspiring-portrait-down-syndrome-odds-perfect-baby-pursuit/. Dr Caplan is Director of the Center for Bioethics at the University of Pennsylvania.

[96] Decision issued by the Director of the New Zealand Office of Human Rights proceedings 2 May, 2011, p.2.

[97] Robert Jay Lifton: *The Nazi doctors: medical killing and the psychology of genocide* (New York: Basic Books, 1986). In his chapter "The Killing Professionals", Lifton goes on to say: "The susceptibility of professionals to extreme environments, including genocidal ones, is suggested by the sequence now familiar to us in one German profession: from ordinary doctors (before 1933), to Nazi doctors (1933-45), to ordinary doctors (after 1945). Doctors reflect the more general tendency to claim virtue for maintaining under duress the function of a profession, especially a healing profession, even when that duress includes participating in genocide" (pp.489-90).

[98] *Nuremberg Military Trials, Vol. 5*, p.109. Available at: http://www.mazal.org/archive/nmt/04a/NMT04-T0687.htm

[99] "On 18 February 1944, a letter went out from the SD office in Koblenz to the branch offices…" *Nuremberg Military Trials, Vol IV*, p. 687. Available at: http://www.mazal.org/archive/nmt/04a/NMT04-T0687.htm

[100] Dr. Erich Wetzel, Director of the Nazi Central Advisory Office Memorandum: "Stellungnahme und Gedanken zum Generalplan Ost des Reichsführers SS" (Opinion and ideas Regarding the General Plan for the East of the Reichsführer SS), 27 April, 1942. (Presented as evidence in the RuSHA/Greifelt Case). This excerpt is quoted in Poliakov, Léon: *Harvest of Hate: The Nazi Program for the Destruction of the Jews of Europe*. New York: Holocaust Library [distributed by Schocken Books,], 1979, p. 274.

[101] Rome Statute Article 27 (1); also Genocide Convention Article IV.

[102] Nehemiah Robinson: *The Genocide Convention: A Commentary* (New York, Institute of Jewish affairs, 1960) p. 69.

[103] Ibid, p.73. Robinson clarified the question of command of law: "As pointed out during the Ad Hoc Committee's meetings [E/AC.25/SR.18], domestic law could never be invoked as a defense for non-fulfillment of an obligation under an international convention. Therefore, if under a convention a State undertook certain international obligations, the domestic law would not be a defense for failure to fulfill such obligations."

[104] Robert Jay Lifton: *The Nazi doctors: medical killing and the psychology of genocide* (1986). In the section entitled "Medical "As If": "Everyone proceeded as if these children were to receive the blessings of medical science, were to be healed rather than killed. The falsification was clearly intended to deceive--the children's families...and the general public. But it also served psychological needs of the killers in literally expressing the Nazi reversal of healing and killing...It is quite possible that Dr Heinz not only was consciously lying, but was enabled by medicalization of the murders partly to deceive himself: to come to believe, at least at moments, that the children were being given some form of therapy, and that their deaths were due to their own abnormality" (p.54).

[105] Wagner, Gerhard: "Rasse und Bevölkerungspolitik," *Der Parteitag der Ehre,* vom 8, bis 14, September 1936. *Offizieller Bericht über den Verlauf des Reichsparteitages mit sämtlichen Kongreßreden*, Munich: Zentralverlag der NSDAP., 1936, pp.150-60. Available at: http://www.calvin.edu/academic/cas/gpa/pt36rasse.htm

[106] Ibid.

[107] Defendant Guenther Tesch, *Nuremberg Trials Record*, *Vol.V*. p. 87. Available at: http://www.mazal.org/archive/nmt/05/NMT05-T0087.htm.

[108] Defendant Inge Viermetz, *Nuremberg Trials Record*, *Vol.V*, p. 87. Available at: http://www.mazal.org/archive/nmt/05/NMT05-T0087.htm .

[109] Quote from Binding cited in Michael Burleigh: *Death and Deliverance: Euthanasia in Germany 1900-1945* (Cambridge, England: Cambridge University Press, 1994) p.17.

[110] N. Robinson, pp. 22-23.