



## FEDERAL MAGISTRATES COURT OF AUSTRALIA

Monday 4 August 2008

### **International Conference on Child Labour and Child Exploitation: Trafficking in Unborn Children**

#### **1. INTRODUCTION:**

*In July 2004 Italian police arrested six people who had recruited pregnant Bulgarian women in hope of trafficking their babies. The mothers were taken to the destination country while still pregnant and were accommodated in places owned by the recruiters for several months, or the duration of their pregnancy. Some mothers had been genuinely deceived, lured by the promises of money. Others seem to have been semi-aware of what was to take place, were apparently complicit in the trafficking, aware of the purpose of their journey.<sup>1</sup>*

It is naïve to think that case studies like this are isolated to particular instances in Eastern Europe. The very nature of this type of trafficking makes it almost impossible for national or international organisations to compile any sort of empirical data on what exactly is occurring. This is because the children may never realise what has happened, the mothers are unlikely to speak of what has happened either through shame or fear. As a result, the traffickers simply move onto their next victim unnoticed. The biggest shame in all this is that the newly born child is unlikely to ever be recovered. The silence that surrounds trafficking, in any form, is why this crime against humanity is now such big business; recent estimates indicate that it is a \$5-7 billion US dollar industry<sup>2</sup>.

We now know that pregnant women are being identified as attractive targets in the movement of children (albeit unborn) across borders so that the child can be taken from the mother after birth. These women travel and give up their child for various reasons: they may be coerced through debt bondage, have themselves become trafficked victims and become pregnant during their servitude, been offered monetary compensation and free maternity care for their child, or it may be that traffickers prey on their maternal instincts with promises of a better life for the child. Whatever the reason for the movement of the pregnant mother, one must have grave concerns that the child will not be born into a better life, but taken from the mother and forced into a life of exploitation which may also be quite short.

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<sup>1</sup> Rebecca Surtes, *Other Forms of Trafficking in Minors: Articulating Victim Profiles and Conceptualizing Intervention*, NEXUS Institute to Combat Human Trafficking, International Organization for Migration, 2005.

<sup>2</sup> UNDP Regional HIV and Development Programme for Asia Pacific, *Human Trafficking and HIV: Exploring vulnerabilities and responses in South Asia*, UNDP Regional Centre in Colombo, 2007.

## **Why Traffic the Unborn**

The motives for trafficking or moving pregnant women across national borders usually involve using the soon to be born child for:

- Prostitution or other forms of sexual exploitation.
- Forced labour or services, including slavery or practices similar to slavery
- Illegal international adoption – I note there is some concern as to whether this is regarded as trafficking, and I will discuss this later.
- The removal of organs<sup>3</sup> not for organ transplant but the use of fetal tissue for restorative or “health” purposes especially anti-aging;
- Recruitment as child soldiers,
- For begging or as athletes.

What are the benefits of exploiting the unborn or newly born child?

1. The child is not connected to any past, they have no memory and will therefore resign themselves to a culture of exploitation more easily;
2. They can from the moment of birth be groomed to perform specific tasks (see for example camel jockeys in the UAE);
3. Some may believe the unborn child is free of disease or infection<sup>4</sup> (e.g for sexual exploitation purposes is free of HIV/AIDS);
4. For the purposes of illegal international adoption, the demand for young children, who do not know other parents, is high.
5. More importantly, the children have no official identity or proven nationality. An identity can be easily forged to suit the purpose for which they are intended.
6. The movement of children in utero enables traffickers to manipulate and exploit inconsistencies in anti-trafficking laws and laws relating to birth registration and border security that focus only on the child after birth. This will be addressed in more detail later.

## **Conceptual issues**

Because Governments have viewed trafficking from different perspectives, such as a problem of crime, migration and/or prostitution it has never truly been seen as a fundamental human rights

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<sup>3</sup> “Although information on [organ harvesting] trafficking exists, there is lack of evidence that can prove that the babies are used as organ donors”: Save the Children Italia ONLUS, *A report on child trafficking in Bulgaria, Denmark, Italy, Romania, Spain, United Kingdom*, European Network Against Child Trafficking Project, March 2004 at p 35.

<sup>4</sup> These myths perpetuate regardless of the fact that a mother who is HIV Positive can give birth to baby who is also HIV positive.

violation<sup>5</sup>. The illegal movement of the unborn child into an unfamiliar country separated from its birth ties places the child in a position where its human rights can be violated at the point of birth. This trafficking must, therefore, be an issue of human rights.

There is a direct causal relationship between the pre-birth stage and a newly born child's rights because events that affect the child when it is not yet born can directly obstruct the child's access to its universal rights at birth. Intervention is necessary at the time the child is still in utero because by the time the child is born it may be too late for protection of the child's rights. For example, women who have been trafficked, forced into prostitution and give birth to a child often have the child forcibly removed and never see it again.

Breaches to the 1989 United Nations Convention on the Rights of the Child are possible at the very point of birth if the child has been moved and separated from its mother; these include:

- Article 7: birth registration, nationality and, as far as possible, ability to be cared for by their parents
- Article 8: preservation of identity, including family relations
- Article 9: non-separation from their parents against their will<sup>6</sup>

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<sup>5</sup> Ann D. Jordan, "Human Rights or Wrongs? The Struggle for a Rights based Response to trafficking in Human beings", in *Gender, Trafficking, and Slavery*, Rachel Masika (ed.), Oxfam Focus on Gender Studies.

<sup>6</sup> The full text of the cited Articles are as follows:

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide

Additionally, particular attention should also be given to the following Articles:

- Article 6: “*the right to life*” – in situations where the child may not survive the physical life conditions or is murdered, such as through organ harvesting or has exhausted the youthful requirements of its exploitation.
- Article 11: “*combat the illicit transfer and non-return of children abroad*” – the child could have been born in a transit country and scheduled for travel to another final destination country.<sup>7</sup>

To be effective currently, therefore, any definition of trafficking must cover the circumstances of the unborn child.

Historically, the movement of people has been very hard to address and the conceptual nuances in the word trafficking have made a universal definition difficult. The previous Special Rapporteur on violence against women, its causes and consequences, noted in 2000 that:

*“Trafficking is a dynamic concept, the parameters of which are constantly changing to respond to changing economic, social and political conditions”*.<sup>8</sup>

A current universal definition of trafficking can be found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children which supplements the United Nations Convention against Transnational Organized Crime.

The Protocol in essence indicates that for trafficking to have occurred, exploitation or an intention to exploit must exist<sup>9</sup>. In the framework of what I am addressing today, there are

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the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

<sup>7</sup> The complete text of these Articles are:

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

<sup>8</sup> UN Economic and Social Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44*, 29 February 2000, E/CN.4/2000/68 at [12]. [Available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/e29d45a105cd8143802568be0051fcfb?Open>] (last accessed 1 August 2008)

many situations involving the movement of the unborn child that would currently be considered trafficking, for example, a mother who is a trafficking victim forced to give up her child whilst in a position of subordination or a mother who is coerced into selling her child through debt bondage, as there is some form of duress and/or exploitation involving the mother.

On the other hand, I note there are situations that may not fit into the current framework of trafficking. 'People smuggling' is not considered trafficking because there is no exploitation of the migrant. However, from the perspective of the unborn child exploitation is inherent in the whole concept of movement across state boundaries to be separated from the mother at birth and on taking away the rights it would otherwise have when born.

This is particularly relevant in instances of child selling and illegal inter-country adoption where the mother volunteers to give up the child (for her own reasons) without coercion. The rights of the mother, to movement and to make decisions for her child, come into conflict with the rights of the to-be-born child and it is this which causes tensions in these debates. This is especially so where the mother may be ignorant as to the future for the child.

I note that there are uncertainties as to whether illegal inter-country adoption is considered trafficking<sup>10</sup>. However, the very nature of illegal adoptions is exploitative of the child because the protections that are afforded to it by legal adoption systems are removed. From the voiceless unborn child's perspective, it is being placed in danger. Its universal rights such as a right of birth registration, knowledge and non-separation from family are being violated. Children certainly should not be prevented from migration in search of a better future, however, the use of illegal means such as illegal adoption does not necessarily facilitate the chances of a better life and increases the susceptibility of the child to exploitation. After all, a child is not a handbag to be ordered at random, picked up and discarded at will.

Characterised as a trafficking issue, the exploitative possibilities to the unborn child and future violation of human rights, are then brought into the foreground of discussion.

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<sup>9</sup> See Art. 3. Compare with migration-related child labour which is not considered trafficking even where the child still ends up in labour exploitation: "Note on the definition of 'child trafficking'", Towards the Elimination of the worst forms of Child Labour (TECL) of International Labour Organisation (1 March 2007) [Accessible at [http://www.unicef.org/southafrica/SAF\\_pressrelease\\_notetrafficking.doc](http://www.unicef.org/southafrica/SAF_pressrelease_notetrafficking.doc)] (last accessed 1 August 2008).

<sup>10</sup> For example, the interpretive notes indicate the Trafficking Protocol addresses the issue of illegal adoption but limit the scope to that: "Where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery it will also fall within the scope of the protocol"; United Nations Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, United Nations, New York, 2006 at 347.

## **Is the law capable of protecting the unborn child?**

From this perspective, it follows that there is an imperative to address the rights violation of the unborn child caused by trafficking. As children are often dependent on those adults who are removing their rights, in the context of trafficking it should be the State's obligation to ensure that children's rights are protected. Distinguished from abortion debates, these children are *intended* by the mother to be born.

Let us look at the position at common law. Although the unborn child is not a legal person<sup>11</sup> and has very limited protection, they are capable of holding contingent rights realisable upon their birth, in particular under equity and succession. The Victorian Supreme Court in the matter of *Yunghanns v Candoora*<sup>12</sup>, determined that the rights of the unborn, but intended to be born child, as a beneficiary of a trust, could be protected by an interlocutory injunction because, "*the status quo should be preserved until birth [where] there is a serious question to be decided*"<sup>13</sup>. There were other factors in that matter, such as the fact there was no prejudice to the trustee or trust but it indicates the law is capable of intervening at the pre-birth stage to protect rights attainable at birth.

In that matter, Gillard J commented:

*"[N]o civilised legal system which is fair and just could permit the destruction or interference with the rights of the unborn to acquire an interest in property upon birth and survival, prior to the child becoming a legal person to protect its own rights".*<sup>14</sup>

Could this reasoning be applied to protect universal children's rights? In my view the answer is "yes". In particular, universal human rights such as birth registration and identity can commence at birth much like property rights – and acts whilst the child is in utero can have consequences on their ability to enforce their rights when they are born.

One of the difficulties with the ascribing of rights to the unborn child in this area is whether its rights will conflict with the rights of its mother, in particular, her right to freedom of movement. Professor Arthur Leff, an American legal academic, in looking at the rights of the foetus emphasised that regardless of the social and scientific view of the nature of the foetus:

*"A legal decision will still have to be made to whom the law ought to give protection and at what cost, paid by who[m]..."*<sup>15</sup>

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<sup>11</sup> For example see: *Paton v British Pregnancy Advisory Service Trustee* [1979] QB 276.

<sup>12</sup> *Yunghanns v Candoora No 19 Pty Ltd* [1999] VSC 524.

<sup>13</sup> *Ibid* at [152].

<sup>14</sup> *Ibid* at [114].

To focus on the unborn child, and to contemplate the ascribing of rights to them, enables the law to intervene at the pre-birth stage to provide further guarantees for rights at birth. The mother is restricted only to the extent necessary to protect the rights of the unborn child.

## **2. THE CURRENT FRAMEWORK FOR PROTECTING UNBORN CHILDREN**

Now that we have established ways in which the law can work effectively to protect the unborn child, it is important to realise that the law does not currently offer this protection in the context of trafficking.

### **International law is ambiguous as to whether the unborn child is a legal person**

At the international level, the status of the unborn child as a legal person is inconsistent. The nature of the unborn child has been vigorously debated in law mainly in relation to abortion with various countries expressing different views, even opposing views, as to the legal personhood status of the unborn child. For example, the 1969 American Convention on Human Rights (mainly signed by non-English speaking countries in the Americas) respects the right to life “*from the moment of conception*”, however in common law jurisdictions and many Western civil law jurisdictions, legal rights and personhood are only attained at birth<sup>16</sup>.

The United Nations Convention on the Rights of the Child defines a child to mean “*every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*”<sup>17</sup>. There is no definition as to what is a human being. Although the Preamble of the Convention refers to safeguarding the care of the child “*before as well as after birth*’...” the meaning of whether a child can constitute an unborn child was left open to individual state parties for fear of the impossibility of consensus, in particular on the issue of

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<sup>15</sup> Arthur Allen Leff, “The Leff Dictionary of Law: A Fragment” (1985) 94 Yale Law Journal 1855, cited in Dawn E. Johnsen, “The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection” (1986) 95 Yale Law Journal 599.

<sup>16</sup> However, they are holders of a number of limited rights and protections. For example in Australian common law there is a duty of care to an unborn child in the law of negligence: o[1972] VR 353. Unborn children are also recognised in succession and inheritance: *Wallis v Hodson* (1724) 2 Atk 117; 26 ER 472. Additionally, statute may digress from the common law to afford child protection.

<sup>17</sup> Art. 1.

abortion<sup>18</sup>. The Trafficking Protocol provides a similar definition of child<sup>19</sup> and therefore also leaves open the meaning to be defined by state parties.<sup>20</sup>

Proponents of each side of the debate on the personhood status of the unborn child point to various articles of other International Treaties to support their claim<sup>21</sup> although with no consensus this is why the unborn child is largely unprotected in the current international legal framework. There are even divergent opinions within common law jurisdictions.<sup>22</sup>

### Current law

International law circumnavigates this difficulty by protecting universally recognisable subjects: the pregnant mother and the born child. Consequently international law divides the unborn child's life into the pre-birth stage and the post-birth stage.

At the pre-birth stage:

- Laws against the trafficking of women, which include pregnant women<sup>23</sup>
- Laws against people smuggling<sup>24</sup>
- Laws facilitating the movement of children for example inter-country adoption and child abduction<sup>25</sup>;

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<sup>18</sup> David Johnson, "Rights of the Child and Cultural and Regional Pluralism in the Drafting of the UN Convention on the Rights of the Child", in Michael D. A. Freeman and Philip E. Veerman, *The Ideologies of Children's Rights*, Dordrecht: Martinus Nijhoff Publishers, 1992, 95-114 at pp 108-109.

<sup>19</sup> Art. 3(d).

<sup>20</sup> The different views of each State party are highlighted in some of the reservations to the Convention on the Rights of the Child. Argentina and Guatemala made specific declarations that Art. 1 of the Convention was applicable to human life from conception. The Holy See and Ecuador in their reservations approved the reference to the unborn child in the preamble. On the other hand, the United Kingdom of Great Britain and Northern Ireland, and the Government of the People's Republic of China on behalf of the Hong Kong Special Administrative Region, made declarations that the Convention was only applicable "following a live birth".

<sup>21</sup> For example Article 6(1) of the 1966 International Covenant on Civil and Political Rights states: "every human being has the inherent right to life". On the other hand the Universal Declaration of Human Rights (1948) states that "all human beings are born free and equal in dignity and rights" which implies birth is required for rights. Although Article 6 of the Convention on the Rights of the Child (1989) states the child has "the inherent right to life", Article 24 grants the right to family planning education.

<sup>22</sup> In *Ly and Minister for Immigration and Multicultural Affairs* [2000] AATA 339 the Tribunal Member found the Convention on the Rights of the Child did not apply to unborn children in Australian migration law. The converse was found in *Griffiths v Minister for Immigration* [2003] FMCA 249 (20 June 2003). Although an appeal was allowed from the decision in *Griffiths v Minister for Immigration*, the discussion relating to the unborn child was not challenged: *Minister for Immigration and Multicultural and Indigenous Affairs v Griffiths* [2004] FCAFC 22. The unborn child is covered by the Convention in New Zealand: *Re an Unborn Child* [2003] 1 NZLR 115.

<sup>23</sup> See UN Protocol on Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

<sup>24</sup> See the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

Post-birth:

- Laws against the trafficking of children, including newborns<sup>26</sup>
- Laws prohibiting the sale of children<sup>27</sup>
- Laws relating to universal children's rights and protection of their rights<sup>28</sup>

There are various overlaps, but in effect, most if not all of these provisions target the basis upon which a pregnant mother is moved or why and how she gives up her child.

The United Nations Convention against Transnational Organized Crime, supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children is the major international instrument for the combating of transnational trafficking; the latter can be shortened to the "Trafficking Protocol". The delegates in drafting these instruments left open the meaning of child in relation to the unborn child. In effect, even the Trafficking Protocol in reality only protects the unborn child through protection of the pregnant mother or the child after birth.

### **3. GAPS THAT NEED TO BE ADDRESSED**

I now turn to some gaps that need to be addressed.

#### **Problems with Current Laws**

As a trans-national issue trafficking needs to be addressed through concerted international effort and cooperation. Without consistent and complementary legislation in place (from ratifying nation states) efforts to combat trafficking in persons is significantly undermined. In the South-East Asian region, the countries that are parties to the Trafficking Protocol are: Thailand, Myanmar, Laos and Cambodia. However, neighbouring countries such as China, Vietnam, Singapore and Malaysia are not signatories to it.<sup>29</sup> This is noteworthy when the US State Department Trafficking in Persons Report, June 2007, indicated that numerous Thai Nationals

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<sup>25</sup> In relation to adoption see the *1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*; and child abduction is covered by the *1980 Hague Convention on the Civil Aspects of International Child Abduction*.

<sup>26</sup> See above at n 23.

<sup>27</sup> See the *UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.

<sup>28</sup> For example child labour is covered by the *1999 UN Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.

<sup>29</sup> See signatures on the UNODC website: <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> (last accessed 1 August 2008)

had been trafficked to various nations, and made specific reference to both Singapore, and Malaysia<sup>30</sup>.

One of the alarming dangers where countries have inconsistent laws, especially between neighbouring countries, is that as unborn children are not recognised as people, traffickers may move an unborn child from a country with strict laws to be exploited in a country with more relaxed laws. An example is the movement of pregnant women in Bulgaria, mainly from the Roma gypsy minority to Greece for inter-country adoption, which appeared to take advantage of unregulated private adoptions in Greece<sup>31</sup>. This is compounded by the fact it is easier to move an unborn child than a child; as demonstrated by reports that women in European countries with strict abortion laws utilise the open borders policy and obtain abortions abroad<sup>32</sup>.

Problems may arise in the implementation stage of the Protocol where ratifying countries provide a narrow implementation and interpretation of instruments. Sri Lanka's Penal Code under the previous Article 360C before the 2006 amendments<sup>33</sup> addressed the pre-birth stage and criminalised various roles involved in the moving of children, both before and after birth, including criminalising the recruitment of women or couples to bear children for selling or adoption. Even though this section was drafted in broad terms, in practice it had been limited by legal practitioners to trafficking for adoption<sup>34</sup>.

When a country has not signed or not ratified the protocol, it may not have laws against trafficking and in the event that it does, it may not address all situations in which the unborn child can be trafficked. The laws on trafficking must be broad enough to cover the different ways people are being exploited whilst specific enough to address the process of trafficking<sup>35</sup>. For example, China does not have comprehensive trafficking laws, and although it may prohibit some forms, such as commercial sexual exploitation involving coercion or fraud, it does not prohibit trafficking that relates to debt bondage<sup>36</sup>.

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<sup>30</sup> Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2007*, US Department of State, Washington DC, 2007.

<sup>31</sup> Niki Kitsantonis and Matthew Brunwasser, "Baby Trafficking is thriving in Greece", International Herald Tribune (18 December 2006). [Available at <http://www.iht.com/articles/2006/12/18/news/babies.php>] (last accessed 1 August 2008).

<sup>32</sup> Diana Fong, "Common Abortion Policy Remains Out of Reach in EU", Deutsche Welle (21 October 2007) [Available at <http://www.dw-world.de/dw/article/0,2144,2832904,00.html>] (last accessed 1 August 2008)

<sup>33</sup> Penal Code (Amendment) Act, No. 16 of 2006 (Sri Lanka)

<sup>34</sup> Centre for Policy Alternatives Legal and Constitutional Unit, National Legislation on Trafficking in Children, Centre for Policy Alternatives, April 2002, at p 8. Additionally, "[P]enal provisions are limited by the adoption of a restrictive approach to the interpretation of the law by members of the legal community. It appears that even prosecutors unduly restrict the interpretation of sections as opposed to adopting a broad interpretation, which would ensure a successful prosecution and the fullest use of existing provisions in the law"; *ibid* at executive summary p 2.

<sup>35</sup> "Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation", The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna.

<sup>36</sup> Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2007*, US Department of State, Washington DC, 2007, at p 80.

## Post-Birth

After the child is born, there are international instruments which attempt to ensure protection of rights. However, there are various practical problems with enforcing child protection laws, including identifying trafficking at the stage when the child has been born and separated from its birth mother. The United Nations Office of Drug and Crime which administers the Palermo Protocol admits that “*translating it [the protocol] into reality remains problematic. Very few criminals are convicted and most victims are probably never identified or assisted*”<sup>37</sup>. In 2006 whilst baby traffickers between Bulgaria and France were caught, including identification of the mothers, the location of the nine babies that were sold was never discovered.

Children who are trafficked in utero are potentially susceptible to the following problems:

- Lack of birth registration and an unofficial existence; for the hill tribe women in Thailand, lack of citizenship can be the single greatest factor in vulnerability to trafficking<sup>38</sup>.
- Traffickers may forge the child’s identity documents and accord guardianship to the exploiter. This maybe facilitated by the mother’s lack of understanding of birth or adoption documents she has signed because they may be in a foreign language. An extreme example of abuse to the system was in Guatemala where a woman had provided for adoption 33 children over two and a half years – she had claimed they were all her own<sup>39</sup>.
- In forging identity documents, the age of the child could be changed to bypass minimum age requirements for labour;
- Additionally, the child is brought up by the traffickers or persons they are exploited by and know no other world. They maybe scared into submission and taught to fear enquiring adults or police. This exacerbates the problems in identifying trafficking victims, especially if they were trafficked as unborn children or newborns.
- The possibility of re-exploitation may occur, especially where the child is released back to the traffickers who are considered their family members;<sup>40</sup>
- The movement of the unborn child into countries with restrictive movement laws, compounded with their lack of official papers, entrenches the exploitation and inability of the child to escape.

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<sup>37</sup> United Nations Office on Drugs and Crime, “UNODC and human trafficking”, [Available at <http://www.unodc.org/unodc/en/human-trafficking/index.html>] (last accessed 1 August 2008).

<sup>38</sup> David A. Feingold, “*Human Trafficking*”, (2005) *Foreign Policy*, Sept/Oct, 26.

<sup>39</sup> International Federation Terre des Hommes, *Kids as Commodities? Child trafficking and what to do about it*, Terre des Hommes Foundation, Lausanne, Switzerland and Terre des Hommes Germany, May 2004 at 26.

<sup>40</sup> For examples of the disappearance of rescued child trafficking victims, including victims reclaimed by traffickers posing as close relations to the child, see: Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2008*, US Department of State, Washington DC, 2008 at p 30. In particular, the Trafficking in Persons Report indicated that a report conducted in the United Kingdom in 2007 indicated that out of a sample of 80 child trafficking victims that had been rescued, 52 had later disappeared.

- In fact, they may end up being considered an illegal migrant worker or detained as illegal immigrants and imprisoned without being identified as a trafficking victim.
- Difficulties as a stateless person, such as lack of rights health and education, are a very real possibility for an unborn child. The Annotated guide to the Trafficking Protocol criticises the Protocol for failing to provide guidance in situations where a trafficking victim is stateless<sup>41</sup>.

A restorative approach after the child is born does not address these practicalities and the only logical step for prevention is to address the causative activities occurring at the pre-birth stage but with a view to protecting the child's rights once born.

## **CONCLUSION**

Trafficking in unborn/newly born children is one of the most blatant abuses of the human rights of those who are most powerless. It is also one of the most difficult to expose and to eliminate. However we cannot do nothing. South Asia is the area where there is the greatest number of unregistered children – approximately 22.5 million children were unregistered in the year 2000 alone<sup>42</sup>. It is therefore easy for such children to be trafficked from birth on. We in Australia, can play a role if motivated to do so. It is pleasing that Australia has ratified the Palermo Protocol and the Attorney has signalled the Government's intention to play a constructive role internationally.

This is an issue which goes to our own humanity. In doing nothing when the rights of others, especially those who have no voice are debased, we debase ourselves.

John H Pascoe  
**Chief Federal Magistrate**

4 August 2008

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<sup>41</sup> Ann D. Jordan, "*The Annotated Guide to the Complete UN Trafficking Protocol*" (Unofficial Annotations), International Human Rights Law Group, Washington DC, 2002.

<sup>42</sup> UNICEF, *Birth Registration Right From the Start*, Innocenti Research Centre, Florence Italy, 2002.