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LAWASIA Children and the Law Conference: Trafficking in Unborn Children

1. INTRODUCTION:

I initially spoke on this topic at the International Conference on Child Labour and Child Exploitation in Cairns last year and a detailed analysis will be presented, in conjunction with UNICEF, at the 5th World Congress on Family Law and Children's Rights in Nova Scotia in August this year.ⁱ As today's conference is organised by LAWASIA, I will speak on this topic in the context of the Asia-Pacific region where I believe it to be of growing importance.

Firstly, I want to share with you an excerpt from a report by the UN Special Rapporteur on the Sale of Children:

“In September 2003 a fishing boat from the Indonesian island of Tanjung Balai Kaimun was allegedly intercepted heading towards Malaysia. According to information received, eight babies were found on this boat, packed in Styrofoam in fish boxes punctured in order to allow the babies to breath [sic].”ⁱⁱ

When a baby's life is being supported by little more than holes punctured in a styrofoam box we begin to see the true nature of this crime. Through a process of de-humanisation, these babies essentially become little more than commodities, packaged and sold for the right price.

Trafficking is a big business, estimated by the UN to have a total market value of US\$32 billion. The initial sale of individuals amounts to approximately \$10 billion, with the remainder the profits produced from the activities or goods made by the victims.ⁱⁱⁱ

Child trafficking, including child selling, is driven by economics.

Trafficking networks have realised the need to ensure the highest market value for these babies. In order to do so, they have identified pregnant women as the means by which babies can best be moved. The movement of unborn babies in utero ensures the child will be in the best possible care whilst in transit and without detection by local authorities.

In this regard, as recently as November last year, Malaysian authorities raided two houses following reports that they were being used to foster illegal immigrants from Indonesia. Two women, both in an advanced stage of pregnancy were arrested. Also in the house were two babies whose mothers were no longer there. In the other house, five Indonesian women were arrested together with two Indonesian men. Inside, were several identity certificates, birth certificates, child adoption forms and other documents for the creation of fraudulent identities.^{iv}

Why Traffic the Unborn

The motives for trafficking or moving pregnant women across international borders are varied. Anecdotal evidence indicates the reasons include sexual exploitation, forced labour or services, slavery or practices similar to slavery, or begging.

However the majority of cases that have been reported relate to illegal inter-country adoption. I note there is some concern as to whether this is in fact trafficking, and I will discuss this later. The movement of unborn children provides a scarce 'resource' as the demand for young children, who do not know any parent other than the adoptive parent(s), is high. More importantly, the children have no official identity or proven nationality and therefore an identity can be easily forged to suit the purpose for which they are intended. This includes the ability to forge paperwork for adopting parents who could easily be deemed the child's biological parents. Alternatively, as the children are born outside of any formal health clinics, there may be no need for any paperwork at all. There would be no official documentation at any point to indicate the baby was not the child of the adoptive parents or indeed that the child even exists.

2. IMPORTANCE TO THE ASIA-PACIFIC

Why is trafficking of the unborn of importance in the Asia-Pacific region? There are various reasons, but the primary one is inter-country adoption. If we look at one of the highest adopters globally, America, the highest rate of intercountry adoptions during the 2008 American fiscal year was from Asia with 6853 adoptions^v. The next major continent was North America with 4661 adoptions^{vi}. Data from 2005 indicates that in America only 3% of children adopted from the local public welfare system were under the age of one, whilst 40% of children adopted from other nations were under a year old^{vii}. Children were adopted at younger ages from Asia, North America, and South America^{viii}.

The majority of inter-country adoptions have always been from developing countries to developed countries. Figures on inter-country adoption indicate that formal and legal adoptions from Asia to abroad are occurring on a significant scale. However, these figures do not shed any light on the occurrence of illegal inter-country adoptions without official approval, both between neighbouring countries and farther destinations.

A report of the International Labour Organization on the social consequences of globalisation indicated that the majority of participants surveyed in the Asian region held the view that globalisation worked 'selectively', that is, it was beneficial for some countries and people but not for others^{ix}. The Report indicated that there was a growing movement of people across national borders. It is not hard to extrapolate that the widening gap between two separate countries or regions and the growing movement of people looking for a better life for themselves or for their children will further fuel the illegal movement of pregnant women and babies in the Asia-Pacific region.

This becomes particularly important when there have been irregularities in adoption procedures in these regions. As more countries sign the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption and adoption laws become tighter, legal channels to officially adopt a child decrease dramatically.

The relationship between neighbouring countries becomes important. Stories of baby selling, baby abductions and irregular practices involving orphanages in Asia have been widely reported. Most recently, a gang abducting migrant workers' children in China were arrested in January 2009^x. In 2007 baby sellers from Vietnam taking children across the border from Vietnam not only bought babies from mothers for re-sale in China but also brought an eight-month pregnant woman with them across the border to give birth so her newly born child could then be sold^{xi}.

Another area of importance to the Asia-Pacific region is exploitation of child labour. In forging identity documents, the age of the child can be changed to bypass minimum age requirements for labour. The forging of identity documents, from the very beginning, means there is very little chance the child's true age can be discovered and the child will be robbed of a childhood and state protection.

Further, there is a failure to identify health problems and protect the special needs of the child. For example, in one case of child selling from Indonesia to Singapore, four women running a baby trafficking network in West Jakarta were arrested because one of the babies tested HIV-positive. The babies were bought in Indonesia and sold to couples in Singapore who were unaware of the babies' HIV status.^{xii}

The causes of this type of trafficking in the Asia-Pacific

Various population laws, for example the restrictions on family size in China, and strict adoption laws fuel the demand from people who wish to adopt children through illegal means. For example in Malaysia, there is a shortage of legal channels for adoption and only a small number of babies available for adoption^{xiii}. Adding to the complexity are cultural issues such as a preference for boys rather than girls. Anecdotal evidence exists on the kidnapping of boys from as far as away as Burma to live with 'adopting families' in China.

The lack of laws or ad hoc laws regarding movement between neighbouring countries can facilitate trafficking. For example, trafficking from areas such as West Kalimantan in Indonesia to Malaysia is facilitated by the ease with which people can cross the land border undetected^{xiv}. A visa-exemption agreement between Vietnam and Malaysia also facilitates trafficking between those two countries^{xv}.

The inadequate management of adoption agencies allows traffickers and abductors to pass abducted children into the mainstream market for legal adoption. For example, irregularities with the MSS adoption agency in India allowed two children to be ‘sold’ to the agency without agreement from their mother. The agency indicated that the children’s father and a woman, who was not verified as the children’s mother, said that due to personal sickness they had to give up their children and signed desertion papers. Indian lawyers have stated there were no government checks and the papers seemed inadequate.^{xvi}

More recently, irregularities with orphanages in Vietnam not only indicate mismanagement of orphanages as a problem, but government policies may actually encourage irregularities. For example, the receipt of commissions for each child adopted encourages orphanages to ‘source’ children who are healthy and thus more attractive for inter-country adoption where the highest commissions are paid, rather than attempt to facilitate adoption of children already available or adoption by parents in that country.^{xvii} In 2008, at least 24 arrests in Vietnam were made for the creation of fraudulent documents and child trafficking. These cases involved children in orphanages where foreign nationals were adopting children.^{xviii}

3. WHY THE UNBORN NEED FURTHER PROTECTION

The movement of pregnant women across borders whereupon the children are sold and separated from their birth mothers should be seen as a human rights violation. Inherent in the activity is the possible breach of various Articles of the 1989 United Nations Convention on the Rights of the Child.

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.^{xix}

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.
- 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.^{xx}

This act of moving the mother inherently contravenes the to-be-born child’s human rights regardless of the purpose of the movement.

Where children are moved for inter-country adoption, this is regulated by Article 21(b) of the Convention on the Rights of the Child, which provides for the possibility of inter-country adoption on the proviso that suitable care in the child’s country of origin cannot be found. The preamble to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption states that “*each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin*”. Article 3 of the 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of

Children^{xxi} provides that, “*The first priority for a child is to be cared for by his or her own parents*”.

Without recourse to official channels regulating inter-country adoption, the movement of pregnant women over international borders breaches the principles which lie at the core of these Articles. It deprives the unborn child of its heritage, firstly of care by its own parents and secondly the chance to be adopted by suitable carers in the country of its true origin.

As the babies are often dependent on those very adults who are compromising their rights, it should be the State’s obligation to ensure that those rights are protected. Distinguished from abortion debates, these children are *intended* by the mother to be born.

At the international level the unborn child is inadequately protected and its status as a legal person is inconsistent between nation states.

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*”^{xxii}. 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 abortion^{xxiii}.

Those nations against imbuing the unborn child with rights drew attention to the concept that the unborn is not a person and therefore incapable of holding rights.

However, in these limited circumstances, a law affording the unborn protection, can and should be provided. The *travaux préparatoires* to the Convention on the Rights of the Child indicate

that those delegates supporting the rights of the unborn child argued that all national legal systems had laws of some type to protect the unborn child. The delegate for Italy observed that, *“no State was manifestly opposed to the principles contained in the Declaration on 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”*^{xxiv}.

The unborn child is capable of holding various types of rights even without being a legal person. In 2007, the Maharashtra State Commission in India awarded an insurance claim to a grandmother whose pregnant daughter was involved in an accident and the unborn child which was injured was considered a victim^{xxv}. Many jurisdictions, both in common law and civil systems in the Asia-Pacific, provide that an unborn child who survives its birth is also considered as if he/she is already born for the purposes of inheritance and is entitled to inherit under the law even though the defining event occurred when the child was “in utero”.^{xxvi} It would seem incongruous if the unborn child’s rights to property were protected but its rights to physical safety and survival were not.

Not all these rules to protect the unborn child are necessarily grounded on the concept of rights. In the law of negligence, there is a ‘contingent retrospective duty’ to the unborn child, that is, there is a duty to the child which arises prior to legal rights being available. Although Australian jurisprudence by inheriting the English common law system does not consider the unborn child as a legal person^{xxvii}, some Australian state parliaments have legislated to allow welfare officers to intervene at pre-birth where “the child may be in need of protection after he or she is born” or to “reduce the risks to the baby at the time of birth”^{xxviii}.

These laws indicate that the unborn are vulnerable and should be protected.

4. LEGAL FRAMEWORK REGARDING UNBORN CHILDREN

Sadly, as unborn children are not consistently recognised as legal persons, or at least there is no ability to protect and crystallise their human rights until after birth, 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^{xxix};
- Laws against people smuggling^{xxx};
- Laws facilitating the movement of children for example inter-country adoption and child abduction^{xxxi};

Post-birth:

- Laws against the trafficking of children, including newborns^{xxxii};
- Laws prohibiting the sale of children^{xxxiii};
- Laws relating to universal children's rights and protection of their rights^{xxxiv}.

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 trans-national trafficking; the latter can be shortened to the "Trafficking Protocol". The delegates drafting these instruments left open the meaning of child. In effect however, even the Trafficking Protocol in reality only protects the unborn child through protection of the pregnant mother or the child after birth.

The current universal definition of trafficking is found in the Trafficking Protocol. The Protocol in essence indicates that for trafficking to have occurred, exploitation or an intention to exploit must exist^{xxxv}. The Trafficking Protocol provides a similar definition of child^{xxxvi} and therefore also leaves open the meaning to be defined by state parties^{xxxvii}.

I note that there are uncertainties as to whether illegal inter-country adoption is considered trafficking^{xxxviii}. However, the very nature of illegal adoptions is exploitative of the child because the protections 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 does not necessarily facilitate the chances of a better life and increases the susceptibility of the child to exploitation.

The Child Welfare League of America indicates that over the past 30 years, more than 250,000 children have been brought to America for adoption, but little is known of the children's backgrounds prior to their arrival and there is limited research on the parents adopting them.^{xxxix}

Characterised as a trafficking issue, the exploitative possibilities to the unborn child and future violation of human rights, are brought into the foreground. After all, a child is not a handbag to be ordered at random, picked up and discarded at will.

The difficulty with trafficking, of both the pregnant woman and the unborn child is that it can utilise gaps in the current laws. In relation to the Asia-Pacific, two areas need to be addressed: a concerted regional effort and an emphasis on compulsory birth registration.

Problems with Current Laws

Without consistent and complementary legislation in place (from ratifying nation states) efforts to combat trafficking in persons is significantly undermined. 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.

In the South-East Asian region, the countries that are parties to the Trafficking Protocol are: Thailand, Myanmar, Laos, and Cambodia, and with accession by Malaysia in February this year. However, neighbouring countries such as China, Vietnam, and Singapore are not signatories.^{xi} With regard to the Hague Convention on Intercountry Adoption, China, India, Mongolia, the Philippines, Thailand and Cambodia are signatories. Although Cambodia is a signatory, due to concerns about adoption fraud many countries have issued alerts to cease adoptions from Cambodia. This leaves neighbouring countries such as Malaysia, Indonesia, Singapore, South Korea, Vietnam and Laos, not covered by the Convention.^{xii}

In 2003, prior to Cambodia signing the Hague Convention on Intercountry Adoption, Australia did not allow direct adoptions from Cambodia but there were always loopholes: a number of Australian couples were able to adopt due to living in Cambodia or third countries such as Singapore which allowed direct adoptions^{xiii}.

Indonesian human rights law recognises the child's rights from the time of conception^{xliii}, but those unborn children who are moved to Malaysia (where although physical harm to an unborn child is criminalised^{xliiv}) do not receive the benefit of laws recognising all their rights from the time of conception^{xliv}.

All of this is compounded by the fact it may be easier to move an unborn child than a born child. Since the unborn child is generally not recognised as a person, movement is much harder

to detect. Although the authorities may have the ability to check birth certificates of a child, such as powers held by police in Vietnam, or the provision of a child's identity card, such as the Mykid in Malaysia, moving an unborn child is not susceptible to such detection.

When a country has not signed or ratified the Trafficking Protocol, it may not have laws against trafficking, and in the event that it does, may not address all situations in which the unborn child can be trafficked. The laws on trafficking must be broad enough to cover the many different ways people are being exploited whilst specific enough to address the process of trafficking^{xlvi}. 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^{xlvi}. The Singaporean *Children and Young Persons Act* criminalises the movement of children for a consideration^{xlvi} but allows a defence in that “*the transfer took place in contemplation of or pursuant to a bona fide marriage or adoption and that at least one of the natural parents of the child or the legal guardian was a consenting party*”^{xlvi}. Bona fide adoption is not defined and Singapore is not a party to the Hague Convention.

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.

One of the distinguishing aspects of this type of trafficking is that it overlaps with the point of birth which is crucial to various areas of children's rights.

In particular, I note the ability to tamper with birth registration and any links with the child's heritage and family. A child who is trafficked in utero is potentially susceptible to a failure to ensure birth registration and thus an unofficial existence, i.e. no official recognition.

Although there have been great improvements in the Asia-Pacific the number of registered children under 5 years of age is estimated to be 81%¹. Additionally, this figure varies between countries – for example 99% in Thailand but only 66% in Cambodia^{li}. Generally, difficulties as a stateless person, such as lack of rights to health and education are a very real possibility for an unborn child being moved in utero. The Annotated guide to the Trafficking Protocol criticises the Protocol for failing to provide guidance in situations where a trafficking victim is stateless^{lii}.

In 2006, although the Committee on the United Nations Conventions on the Rights of the Child commended Malaysia on its efficient birth registration system, including mobile birth registration units, it still had concerns that there were risks that non-Malaysian children, such as those born to undocumented migrant workers in Malaysia, were not being registered^{liii}.

Traffickers may forge the child's identity documents and accord guardianship to the exploiter. This may be facilitated by the mother's lack of understanding of birth or adoption documents she has signed often because they are in a foreign language. This occurs in various adoption situations and allows people to bypass legitimate adoption processes regardless of any moratorium on inter-country adoption.

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.

5. CONCLUSION

In order to truly protect the child at birth there must be recognition of the link with the unborn child. I recommend that the unborn child should have rights in limited circumstances, whether through absolute rights as a legal person or by extending the law on children to protect the unborn. Protection of the unborn child from trafficking and later, child selling, is in my view not only tenable within the current jurisprudence but is in fact a logical extension of it, and this is regardless of the unborn's legal personhood status. For example, in the matter of *Yunghanns v Candoora*^{liv}, the Victorian Supreme Court in Australia 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*"^{lv}.

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".^{lvi}

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.

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 guarantees of rights at birth. The mother is restricted only to the extent necessary to protect the rights of the unborn child.

I acknowledge that much work has been and still is being done to protect children in the Asia-Pacific region with regards to trafficking and illegal adoption. Currently there are various regional coordination projects such as the six-country Coordinated Mekong Ministerial Initiative against Trafficking process^{lvii}; and the International Labour Organization's Human Trafficking Prevention in the Greater Mekong Sub-region. More broadly, there is the Asian Regional Initiative against Trafficking in Persons, Especially Women and Children; and the Association of Southeast Asian Nations' Plan of Action to Prevent and Combat Trafficking in women.

I commend the current work being done but seek to highlight the problems associated with the movement of the intended to be born child.

It is only through recognising the problem and actively working to ensure an adequate legal framework across the region that we can protect the most vulnerable – and give a voice to those who cannot speak for themselves and must rely on our humanity and commitment to human dignity and the rights of all.

John H Pascoe
Chief Federal Magistrate

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ⁱ I acknowledge the research contribution of my research associate Ms Thu-Ha Nguyen.

ⁱⁱ UNCHR, “Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Juan Miguel Petit, Addendum, Communications sent to Governments and replies received”, 8 March 2005, UN Doc E/CN.4/2005/78/Add.3, at para 120; and UNCHR, “Report of the Special Rapporteur on Violence against women its causes and consequences, Yakin Erturk, Addendum, Communications to and from Governments”, 18 March 2005, UN Doc E/CN.4/2005/72/Add.1, at para 195.

ⁱⁱⁱ --, “UNODC launches Global Initiative to Fight Human Trafficking”, *Human Rights Tribune*, Geneva, 28 March 2007, {<http://www.humanrights-geneva.info/UNODC-launches-Global-Initiative,1404>} accessed 30 April 2009; and --, “Human Trafficking a horrible business”, *Economist.com*, London, 14 June 2008, {http://www.economist.com/world/international/displaystory.cfm?story_id=11561082} accessed 30 April 2009.

^{iv} --, “Baby-for-sale syndicate’s ‘centres’ raided”, *New Straits Times*, Kuala Lumpur, 15 November 2008.

^v Office of Children’s Issues, “Fiscal Year 2008 Adoption Statistics”, United States Department of State, {<http://adoption.state.gov/pdf/total.pdf>} accessed 30 April 2009.

^{vi} Ibid.

^{vii} National Data Analysis System, “International Adoption: Trends and Issues”, Child Welfare League of America, November 2007, {http://ndas.cwla.org/include/pdf/InterntlAdoption_Final_IB.pdf} accessed 30 April 2009.

^{viii} Ibid.

^{ix} World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for all*, International Labour Organization, 2004, at p 16.

^x --, “Police crack China baby sale gang”, *BBC News*, 14 January 2009, {<http://news.bbc.co.uk/2/hi/asia-pacific/7827800.stm>} accessed 30 April 2009.

^{xi} --, “Vietnam gang ‘smuggled 30 babies’”, *BBC News*, 9 April 2008, {<http://news.bbc.co.uk/2/hi/asia-pacific/7338008.stm>} accessed 30 April 2009.

^{xii} Powell, S., “HIV alert exposes baby trafficking”, *The Australian*, 15 June 2004.

^{xiii} Leslie Lau, “For Sale: China students’ Babies: The Big Demand for Babies among Infertile Couples Has Fuelled a Lucrative but Illegal Adoption Racket in Malaysia,” *Straits Times* (Singapore), 2 December 2002 cited in The Protection Project, “Human Rights Report: Malaysia”, Foreign Policy Institute at the Johns Hopkins University School of Advanced International Studies, Washington DC {http://www.protectionproject.org/human_rights_reports/index.htm} accessed 30 April 2009.

^{xiv} --, “Women and Children Trafficking in W. Kalimantan Worst in Indonesia,” *Antara*, 22 September 2003 cited in The Protection Project, *supra*.

^{xv} --, “Malaysian National Jailed in Vietnam for Trafficking Prostitutes,” *Agence France Presse*, 26 September 2003 cited in The Protection Project, *supra*.

^{xvi} Sara, S., “Stolen and Sold”, Foreign Correspondent, ABC News, Sydney, 24 February 2009, {<http://www.abc.net.au/foreign/content/2009/s2493505.htm>} accessed 30 April 2009.

^{xvii} Adopted Children Immigrant Visa Unit, “Summaries of Irregularities in Adoptions in Vietnam”, Embassy of the United States, Hanoi, Vietnam, 25 April 2008, {http://vietnam.usembassy.gov/irreg_adoptions042508.html} accessed 30 April 2009.

^{xviii} Office of Children’s Issues, “Vietnam: Adoption Alert”, United States Department of State, 1 October 2007, {<http://adoption.state.gov/news/vietnam.html>} accessed 30 April 2009.

^{xix} 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 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.

^{xx} 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.

^{xxi} [W]ith special reference to Foster Placement and Adoption Nationally and Internationally.

^{xxii} Art. 1.

^{xxiii} 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.

^{xxiv} UNCHR, "Report of the Working Group on a draft convention on the rights of the child", 2 March 1989, UN DOC E/CN.4/1989/48 at para 40.

^{xxv} Gai, J.B., "State Panel asks insurance co to pay claim for death of foetus", *Times of India*, 6 March 2007 {<http://timesofindia.indiatimes.com/articleshow/1727127.cms>} accessed 30 April 2009.

^{xxvi} For example the Civil Code of the Republic of China in effect Taiwan, at Article 1166 provides: "*Where one of the heirs is an unborn child, partition of the deceased's property by the other heirs shall not take place unless the entitled portion of such child has been reserved. In regard to such partition of inheritance, the mother acts as agent of the unborn child.*"

^{xxvii} For example see: *Paton v British Pregnancy Advisory Service Trustee* [1979] QB 276.

^{xxviii} Bromfield, L. and Higgins, D., "National comparison of child protection systems", *Child Abuse Prevention Issues*, Australian Institute of Family Studies, No. 22 Autumn 2005 at p 13.

^{xxix} See UN Protocol on Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

^{xxx} See the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

^{xxxi} 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.

^{xxxii} See supra citation xxix.

^{xxxiii} See the UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

^{xxxiv} 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.

^{xxxv} See Art. 3; Note however that migration-related child labour is not considered trafficking even where the child still ends up in labour exploitation: Towards the elimination of the worst forms of child labour, “Note on the definition of ‘child trafficking’”, International Labour Organisation, Pretoria, 1 March 2007. {http://www.unicef.org/southafrica/SAF_pressrelease_notetrafficking.doc} accessed 30 April 2009.

^{xxxvi} Art. 3(d).

^{xxxvii} 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 Island, 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”.

^{xxxviii} For example, the interpretive notes indicate the Trafficking Protocol addresses the issue of illegal adoption but limits 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 p 347.

^{xxxix} National Data Analysis System, *supra*.

^{xl} See United Nations, “Multilateral Treaties Deposited with the Secretary-General: Status of Treaties”, Treaty Collection. {http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en} accessed 30 April 2009.

^{xli} See Hague Conference on Private International Law, “Status Table: Convention on 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption” {http://www.hcch.net/index_en.php?act=conventions.status&cid=69} accessed 30 April 2009.

^{xlii} --, “Babies for sale: no warranty”, *The Sydney Morning Herald*, 16 December 2003.

{<http://www.smh.com.au/articles/2003/12/15/1071336884728.html>} accessed 30 April 2009.

^{xliii} Republic of Indonesia Legislation Number 39 of 1999, *Concerning Human Rights*, Article 52(2).

^{xliv} For example s 315 of the Penal Code (Act No. 574) [Malaysia]: “Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive, or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act is not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment for a term which may extend to ten years, or with fine, or with both”.

^{xlv} See preamble to the Child Act 2001 (Act No. 611) [Malaysia] which indicates the child requires care and assistance “after birth”. See *Chin Yoke Teng & Anor* [2005] 1 CLJ 819 where the unborn child does not have a legal personality and therefore no right to sue.

^{xlvi} United Nations Global Initiative to Fight Trafficking, “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.

^{xlvii} Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2007*, US Department of State, Washington DC, 2007, at p 80.

^{xlviii} Section 12.

^{xlix} Section 12(3).

ⁱ UNICEF, *The ‘Rights’ Start to Life: 2005 Statistical Analysis of Birth Registration*, New York, February 2005, at p 3 ‘Table A: Extent of the Problem: Proportion of annual unregistered births, by region’.

ⁱⁱ UNICEF, “Percentage of children below the age of 5 whose birth was registered”, ChildInfo, Statistics by Area / Child Protection, January 2009, {http://www.childinfo.org/birth_registration_tables.php} accessed 30 April 2009.

ⁱⁱⁱ Ann D. Jordan, “*The Annotated Guide to the Complete UN Trafficking Protocol*” (Unofficial Annotations), International Human Rights Law Group, Washington DC, 2002.

ⁱⁱⁱⁱ Olson, C., “Malaysia: Undocumented Children in Sabah Vulnerable to Statelessness”, *Bulletin*, Refugees International, Washington, 13 June 2007,

{ http://www.refugeesinternational.org/sites/default/files/Malay_stateless0614.pdf } accessed 30 April 2009.

^{liv} *Yunghanns v Candoora No 19 Pty Ltd* [1999] VSC 524.

^{lv} *Ibid*, at para 152. It should be noted that other factors were considered, such as the fact there was no prejudice to the trustee or trust, but generally it indicates the law is capable of intervening at the pre-birth stage to protect rights attainable at birth.

^{lvi} *Ibid*, at para 114.

^{lvii} Organised by the United Nations Inter-Agency Project on Human Trafficking overseas.