

# **The International Legal Framework and Current National Legislative and Enforcement Responses<sup>1</sup>**

## **EXECUTIVE SUMMARY**

In adopting a succession of treaties throughout the XXth Century, the international community has demonstrated long-standing concern about sexual exploitation and connected issues such as trafficking and certain aspects of slavery, in general or with specific reference to children. These instruments have been drawn up in various contexts - human rights, humanitarian law, refugee law, labour standards, etc. - and have also instigated the development of a number of regional treaties tackling the issues involved.

Examination of this body of international law shows that it has concentrated more especially on protection from exploitation in prostitution as opposed to exploitative use in pornography, a field in which clear definitions - and hence a clear basis for consensus and cooperation - are lacking.

The degree of adherence to these international treaties ranges widely. However, the most significant instrument for efforts in this sphere - the Convention on the Rights of the Child - has achieved almost universal ratification. Furthermore, no State Party has notified a reservation on article 34, the main provision concerned. Implementation of this Convention is facilitated by the existence of the other instruments which indicate the scope covered and, in addition, often give guidance as to the interpretation of the relevant provisions.

These texts have variously generated and been inspired by measures taken at national level, whether of a legislative, administrative or other nature. In both industrialised and developing countries, preoccupation over the growing incidence of sexual exploitation of children and the increasingly international character of several of its manifestations has triggered a spate of new legislation during the Nineties in particular. This paper discusses national measures taken in the areas of child prostitution, trafficking, pornography, sex tourism, extra-territorial legislation and problems relating to child witnesses and the rights of the accused.

Whilst gaps in legislation still exist, law enforcement now poses the major challenge. This and the prevention aspect, including forms of punishment and deterrence, are addressed in the paper, as are the goals of international cooperation in this regard.

It is recommended, *inter alia*, that governments and non-governmental organizations (NGOs) use the Convention on the Rights of the Child as the basis for reviewing and monitoring legislative provisions and law enforcement. The paper also suggests the establishment of an intersectoral task-force and a monitoring system (e.g. Ombudsperson) in every country as necessary elements of a coherent effort to combat the commercial sexual exploitation of children.

## **PART I: THE INTERNATIONAL LEGAL FRAMEWORK**

### **Introduction**

International concern over phenomena more or less closely associated with sexual exploitation - slavery, forced labour, trafficking, financial gains from the prostitution of others, obscene publications, etc. - has been reflected in a relatively large number of treaties drawn up since the beginning of this century, within the framework of the global development of international human rights law.

The following were the main treaties adopted prior to the founding of the United Nations (excluding International Labour Organisation (ILO) Conventions - see 2 below):

1904 International Agreement for the Suppression of the White Slave Traffic (amended by Protocol of 3 December 1948)

1910 International Convention for the Suppression of the White Slave Traffic (amended by Protocol of 3 December 1948)

1919 Convention of Saint-Germain-en-Laye (to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea)

1921 International Convention for the Suppression of the Traffic in Women and Children (amended by Protocol of 20 October 1947)

1923 Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications (amended by Protocol of 12 November 1947)

1926 Slavery Convention (amended by Protocol of 23 October 1953)

1933 International Convention for the Suppression of the Traffic in Women of Full Age (amended by Protocol of 20 October 1947)

Those amended by protocols were taken on board by the United Nations; the 1919 convention has lapsed.

The following sections focus more especially on binding texts, but also cover selected components of "soft law" dealing explicitly or implicitly with the subject. These sections are: (1) United Nations texts that are currently in force or valid, (2) ILO instruments, (3) refugee law, (4) humanitarian law, (5) international texts in preparation, (6) regional treaties which contain provisions relevant to the protection of children from commercial sexual exploitation, and (7) extracts from comments by the Committee on the Rights of the Child. Section 8 is a short commentary.

## **1. UNITED NATIONS TREATIES IN FORCE**

### **1.1. 1923 Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications (amended by Protocol of 12 November 1947)**

This Convention as amended had been ratified by 53 countries as at 31 December 1994. The ratification rate in recent years has, however, been extremely low: the most recent ratification apart from the succession of the Czech Republic and Slovakia in 1993 dates back to 1983 (Cuba). Only one other country (Solomon Islands, 1981) ratified during the Eighties, and only three countries ratified during the Seventies (Fiji in 1971, Zambia in 1974 and Lesotho in 1975).

Interestingly, two countries that had been States Parties since 1949 subsequently notified denunciation: Denmark in 1967 (no motive recorded) and the Netherlands in 1985 which motivated the decision by saying that the provisions of the Dutch Criminal Code had been amended to concern only production, possession or trade relating to "the portrayal of - or any medium of information which portrays - sexual activity involving persons under the age of 16 (i.e. child pornography)" or the sending of any pornographic materials "unsolicited through the mail or to supply, offer or show them to children".

The treaty indeed covers all forms of pornography, notably making it a punishable offence in States Parties "[f]or purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects". Also punishable are export, import, conveyance, advertising and taking part in a business concerned with any such "obscene matters or things".

Offenders are in principle to be brought to trial in the State Party "in whose territories the offence, or any of the constitutive elements of the offence, was committed" but, when the laws of the country so permit,

they may alternatively (not additionally) be prosecuted in the State Party of which they are nationals "if they are found in its territories, even if the constitutive elements of the offence were committed outside such territories".

## **1.2. 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others**

This Convention had been ratified by 70 countries as at 31 December 1994. It was designed to consolidate the above-mentioned treaties of 1904, 1910, 1921 and 1933 which were in force at the time it was adopted and which thereby became obsolete. Essentially, it obliges States Parties to punish any person who, "to gratify the passions of another, [p]rocures, entices or leads away another person for purposes of prostitution" or "exploits the prostitution of another person", even with the latter's consent. Also punishable is the running of a brothel and renting accommodation for the purpose of the prostitution of others. Under the treaty, such offences are to be regarded as extraditable or, in States where extradition is not permitted, nationals who have returned to their own State after the commission

abroad of any such offence are to be prosecuted in and punished by the courts of their own State. The Convention then sets out procedures for combating international traffic in persons (especially women and children) for the purpose of prostitution.

## **1.3. 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery**

This Convention had been ratified by 114 countries as of 31 December 1994. It was designed to complement, not to replace, the 1926 Slavery Convention. For the purposes of this paper, the most pertinent provision of this treaty is Article 1, which obliges States Parties to "take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of", *inter alia*, "[a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour".

## **1.4. 1979 Convention on the Elimination of All Forms of Discrimination against Women**

This Convention, in force since 1981, had been ratified by 131 countries as of 30 June 1994. Article 6 directs States Parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."

## **1.5. 1989 Convention on the Rights of the Child**

This Convention (CRC) had been ratified by 187 countries as of 15 April 1996. It defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". It contains several provisions relevant to the issues under consideration.

Article 19 stipulates that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from [...] maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".

Under Article 32, "States Parties recognise the right of the child to be protected from [...] performing any work that is likely to be hazardous or [...] to be harmful to the child's health or physical, mental, spiritual, moral or social development". A minimum age or ages for employment are to be set (cf. ILO Convention 138, under 2.2. below) and States are bound to "[p]rovide for appropriate penalties or other sanctions to

ensure the effective enforcement of the present article."

Article 34 provides that "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse" and to "take all appropriate national, bilateral and multilateral measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or any other unlawful sexual practices; (c) the exploitative use of children in pornographic performances and materials." It is worth noting that this, the key provision in the Convention relating to commercial sexual exploitation, has not been the subject of a reservation by any of the States Parties.

Similarly, Article 35 obliges States Parties to take "all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."

Finally, Article 39 requires States Parties to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of... any form of ... exploitation... in an environment which fosters the health, self-respect and dignity of the child".

## **2. ILO INSTRUMENTS**

The conclusions of the *United Nations International Seminar on the ways and means of achieving the elimination of the exploitation of child labour in all parts of the world* (28 October-8 November 1985) include the following reference: "the exploitation of child labour takes many forms, and certain types of exploitation, for example child prostitution [...], are particularly abhorrent". Thus, the interpretation is clearly that child prostitution at least is considered, at the international level, to be a form of exploitative child labour. Whilst ILO treaties were not drawn up with the phenomenon of sexual exploitation in mind - no more than they were drafted as a means of combating the participation of children in armed conflict - certain ILO standards can nonetheless be deemed of relevance in these regards.

### **2.1. ILO Conventions 29 (Forced labour, 1930) and 105 (Abolition of Forced Labour, 1957)**

ILO Conventions 29 and 105 were explicitly referred to in an amendment proposed by Nigeria to the chapter on "implementation of existing instruments" of the revised French proposal for an optional protocol on the subject at hand (see E.2. below). Whilst they do not seem to be of significant direct value as a legal tool for combating commercial sexual exploitation of children on the threshold of the third millennium, Convention 29 (ratified by 136 countries as at 1 June 1995) at least lends weight to the thesis that any form of forced or compulsory labour undertaken by children has long been the target of prohibition. This Convention sets out a number of conditions under which forced or compulsory labour may be exacted - such as compulsory military service, normal civic obligations, as a consequence of conviction in a court of law, emergency situations, etc. - but in so doing it anyway restricts such labour to "able-bodied males who are of an apparent age of not less than 18 and not more than 45 years..." (Art. 11).

### **2.2. ILO Convention 138 (Minimum Age, 1973) and Recommendation 146 (Minimum Age, 1973)**

ILO Convention 138, currently the flagship treaty on child labour, is reflected, and implicitly referred to, in CRC Article 32 (see 1.5. above). However, it suffers from a relatively poor ratification record: just 46 countries as at 1 June 1995. The thrust of the Convention is the regulation of admission to employment in "branches of economic activity or... undertakings" listed in its Art. 5, para. 3. Not unnaturally, these are all sectors of formal and recognised enterprise, and the treaty deals with neither self-employment or "non-lucrative" work. As a result, it has no direct application in the field of commercial sexual exploitation. It

does serve, however, as a further indication of the international community's attitude towards activities that jeopardise the health and development of children. Also, presuming that applicants for admission to employment take that step of their own

free will, the fact that the treaty requires that a 16-year-old be denied access to employment reserved for those over 18 is a further demonstration of the irrelevance of consent as a factor in determining exploitation.

The Minimum Age Recommendation of 1973 supplements Convention 138 by giving more precise policy guidelines for optimal implementation of the treaty at national level.

### **3. REFUGEE LAW**

#### **3.1. 1951 Convention and the 1967 Protocol Relating to the Status of Refugees**

The number of States Parties to one or both instruments was 130 as at 20 October 1995. Whilst the instruments contain no special provision on protection from sexual exploitation, Article 24 of the 1951 Convention is potentially relevant to the present paper in that it reaffirms obligations regarding child labour, stating that "[t]he Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of (...) minimum age of employment (...) and the work of young persons...".

The United Nations High Commissioner for Refugees (UNHCR) has a general supervisory function under Art. 35 of the 1951 Convention in addition to its mandate to provide international protection to refugees contained in the Statute of the Office.

#### **3.2. Executive Committee of the High Commissioner's Programme: Conclusion No. 47 (XXXVIII) of 1987 on Refugee Children**

Although not, of course, binding law, this Conclusion is of interest in that it specifies UNHCR's concern about sexual exploitation of children, condemning "the exposure of refugee children to physical violence and other violations of their basic rights, including through sexual abuse, trade in children [...]" and calling for "national and international action to prevent such violations and assist the victims".

### **4. INTERNATIONAL HUMANITARIAN LAW**

Humanitarian law determines what acts are lawful in the course of an armed conflict. The applicable rules depend on whether the conflict is considered international (e.g. an inter-State conflict) or non-international (e.g. a civil war).

#### **■ *International armed conflicts***

#### **4.1. Regulations Respecting the Laws and Customs of War on Land Annexed to the 1907 Hague Convention IV ("The Hague Regulations")**

All prisoners of war, including children, "must be humanely treated" (article 2). Rape or sexual abuse of the

inhabitants of a territory under occupation is prohibited under Article 46: "Family honor and rights [...] must be respected." As affirmed in the judgement of the International Military Tribunal at Nuremberg, the Hague Regulations represent customary international law and as such are binding on all States whether or not they have adhered to the Convention itself.

#### **4.2. 1949 Geneva Convention III Relative to the Treatment of Prisoners of War ("The 1949 POW Convention")**

The 1949 POW Convention developed protection afforded by the 1929 Geneva Convention on POWs based on the experiences of the Second World War. A POW includes all members of the armed forces; the civilians accompanying those forces, and civilians spontaneously taking up arms to resist an invader. Article 14 of the Convention provides that "Prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex...". Under Article 52, except for volunteers, no prisoner of war may be employed in labour which is of an unhealthy or dangerous nature. The Convention had been ratified by 186 countries as at 24 April 1996.

#### **4.3. 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War**

The 1949 Geneva Convention IV was the first international agreement addressing exclusively the treatment of civilians in armed conflict, although there had been certain provisions to protect civilians included in the Hague Regulations of 1907. It is mainly confined to the protection of civilians in occupied territory or in internment and its provisions have been extensively supplemented by Additional Protocol I of 1977. Article 27 of Geneva Convention IV states: "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights... Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

Furthermore, under Article 51, an Occupying Power may not compel protected persons to work unless they are over 18 years of age. Children are considered protected persons if they are civilians in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State not bound by the Convention are not protected persons nor are nationals of a neutral state or co-belligerent State as long as normal diplomatic representation exists in the State in whose hands they are.

The Convention had been ratified by 186 countries as at 24 April 1996, and many of its provisions represent customary international law.

#### **4.4. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)**

Under article 75, all children who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions of the Protocol shall be treated humanely in all circumstances. Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault are prohibited. Article 77 provides that "[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault."

This Protocol had been ratified by 143 countries as at 24 April 1996 and many of its provisions represent customary international law.

#### **■ *Non-international armed conflicts***

#### **4.5. Article 3 Common to the Four Geneva Conventions of 1949 ("Common Article 3")**

In an internal armed conflict, each party to the conflict is obliged to treat humanely all persons taking no active part in hostilities. Outrages upon their personal dignity, in particular humiliating and degrading treatment are prohibited as are violence to life and person. The International Court of Justice affirmed in the Nicaragua case that Common Article 3 represents customary international law.

#### **4.6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)**

Under the fundamental guarantees in Article 4, all persons not taking a direct part in hostilities or who have ceased to take part in hostilities are entitled to respect for their person and honour and must be protected from "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" and "slavery and the slave trade in all their forms". The threshold for applicability of Protocol II is often deemed to be higher than for Common Article 3. This Protocol had been ratified by 135 countries as at 24 April 1996.

#### **■ Enforcement**

In *international* armed conflicts, rape and sexual abuse of protected persons as far as they involve "wilfully causing great suffering or serious injury to body or health" constitute grave breaches of the 1949 Geneva Conventions. States Parties are obliged to prosecute, or extradite for prosecution, anyone suspected of committing grave breaches. In relation to all other breaches of the Conventions and Protocols including in *internal* armed conflicts, governments are obliged to "take measures necessary for the suppression" of these breaches.

### **5. INTERNATIONAL INSTRUMENTS IN PREPARATION**

#### **5.1. Revised 1961 (Hague) Convention on the Protection of Children**

The second reading of the draft revised text of this private international law treaty was effected in September 1995. The final revision should be ready for approval at the Diplomatic Conference scheduled for October 1996. This instrument will deal with the attribution of jurisdiction, the determination of applicable law, and the establishment of a system of international cooperation to provide protection for children who are not in their "country of habitual residence". In particular, and in somewhat simplified form, it will mean that a child in need of protective measures while outside that country - such as in the case of a child taken abroad for the purposes of commercial sexual exploitation - may benefit from appropriate measures at the initiative of the authorities of the country where he or she is present, whether or not the authorities of the country of habitual residence request this and whether or not he or she is a national of either country concerned.

#### **5.2. Proposed Optional Protocol to the Convention on the Rights of the Child**

By its resolution of 8 March 1995, the Commission on Human Rights decided that "the open-ended inter-sessional working group of the Commission [...] for the elaboration of guidelines on a possible optional protocol on the sale of children, child prostitution and child pornography, shall elaborate [...] a draft optional protocol" on these issues. Proposed drafts already exist, but it is currently difficult to estimate the likely timescale for the formulation and approval of a final text. The protocol will almost certainly deal only with national obligations within the framework of international cooperation to implement relevant rights in the Convention; it will not comprise substantive standard-setting.

## 6. REGIONAL TREATIES

### 6.1. 1981 African Charter on Human and Peoples' Rights

The treaty entered into force in 1986, and as of 1 January 1996, had been ratified by 50 States. Article 5 prohibits "all forms of exploitation and degradation", including in particular slavery and the slave trade.

In addition, Article 18.2 obliges States Parties to "ensure the elimination of every discrimination against women and... the protection of the rights of the woman and the child as stipulated in international declarations and conventions." The implication here is that States that are also parties to the Convention on the Rights of the Child would be obliged to implement the provisions of CRC Article 34 as part of their obligations under the Charter.

### 6.2. 1990 African Charter on the Rights and Welfare of the Child

The Charter, having been ratified to date by only six Member States of the OAU, has not yet entered into force (15 ratifications are required for this). It contains provisions on exploitation of child labour, sexual exploitation and sale and trafficking. They are essentially

similar in effect to their counterparts in the CRC, but contain a number of additional facets.

The Charter's Article XV (Child labour) specifies that the provision "covers both the formal and informal sectors of employment" and makes explicit rather than implicit reference to "the International Labour Organisation's instruments relating to children" as a consideration in establishing "minimum ages for admission to *every* employment" (our italics).

Article XXVII of the Charter, in addition to requiring States Parties to "protect the child from all forms of sexual exploitation and sexual abuse", obliges them to "take measures to prevent: (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials". In comparison with the counterpart provision in the Convention on the Rights of the Child, therefore, the Charter adds "encouragement" under sub-paragraph (a), removes the qualification of "unlawful" sexual activity or practices in sub-paragraphs (a) and (b), adds pornographic "activities" in sub-paragraph (c), and removes the word "exploitative" before "use" in sub-paragraphs (b) and (c), presuming that any "use" of the child will in itself be exploitative. In principle, therefore, and subject to interpretation, the Charter provides for protection from a somewhat wider range of acts than does the Convention.

Finally, Article XXIX specifies that States are to combat sale and trafficking "by any person including parents or legal guardians of the child".

### 6.3. 1969 American Convention on Human Rights

This Convention entered into force in 1978, and as at 1 January 1996 had been ratified by 25 States. Article 5 stipulates that "[e]very person has the right to have his physical, mental and moral integrity respected." Article 6 specifies that "[n]o one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women." The Convention further provides (Article 19) that "every minor child has the right to the measures of protection required by his condition as a minor, on the part of his family, society and the state."

In the 1988 Protocol to this Convention (not in force by January 1996), all work which "jeopardizes health, safety or morals" is prohibited for persons under 18 years of age.

### 6.4. 1994 Inter-American Convention on International Traffic in Minors

This treaty was adopted at the Fifth Inter-American Specialised Conference on Private International Law convened by the Organization of American States (OAS). It is designed to regulate civil and penal aspects of the international traffic in minors through international cooperation. It covers "any human being below the age of eighteen" who is the victim of "abduction, removal or retention, or attempted abduction, removal or retention [...] for unlawful purposes or by unlawful means". The term "unlawful purposes" is then defined to include "prostitution, sexual exploitation, servitude...". It is as yet too early to foresee the impact of this treaty whose ratification will necessarily be limited to OAS members.

#### **6.5. 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms**

This Convention was the first regional agreement on human rights to be adopted after the Universal Declaration of Human Rights, and has been in force since 1953. It had been ratified by 31 countries as at 1 January 1996. Its main relevant provision is Article 4 which declares that "[n]o-one shall be held in slavery or servitude" and "no-one shall be required to perform forced or compulsory labour".

#### **6.6. 1961 European Social Charter**

The Charter, covering the development and protection of social and economic rights, is a complementary instrument to the European Convention on Human Rights. It came into force in 1965, and had been ratified by 20 countries as at 24 April 1996.

States Parties to the Charter accept as the aim of their policies the attainment of conditions in which certain rights and principles may be effectively realised. These include (Part I, 7): "Children and young persons have the right to special protection against the physical and moral hazards to which they are exposed." States further undertake to be bound by certain obligations, including (Part II, Art. 7[10]): "To ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting... from their work."

#### **6.7. 1991 Recommendation No. R(91)11 of the Committee of Ministers to Member States of the Council of Europe**

This Recommendation, made under Article 15(b) of the Statute of the Council of Europe, is worth highlighting because it emanates from an organ of the Council which specifically addresses "Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults". It urges Member States to review legislation and practice with a view to implementing a comprehensive programme of measures to combat the sexual exploitation of children.

### **7. COMMENTS BY THE COMMITTEE ON THE RIGHTS OF THE CHILD**

As its contribution to the Open-ended Working Group of the 52nd Session of the Commission on Human Rights concerning the question of the drafting of an Optional Protocol to the Convention on the Rights of the Child (cf. 5.2. above), the Committee on the Rights of the Child submitted a paper from which the following elements are extracted:

"[T]he importance of [the issues of child prostitution and child pornography and the sale of children for these purposes] as well as the need to draw urgent attention and encourage concerted action to prevent and combat them, are illustrated by the attention paid to them in the course of the dialogue held with States parties on the implementation of the Convention, as well as the decision of the Committee to devote, in

1993, its second thematic debate to the topic 'economic exploitation of children'.

"But it is important to stress that the Convention has not only identified such situations in an autonomous manner, it has further set up a holistic approach for the consideration of the human rights of children. In the light of such an approach, all rights are recognised as inherent to the human dignity of the child, and the implementation of one right will only be effective when taking into consideration the implementation of, and respect for, all the other rights of the child. In a word, the Convention reaffirms the indivisibility and interdependence of human rights.

"The protection of the child from all forms of exploitation, including from sale, prostitution or pornography should therefore not be seen simply in isolation but in the broader context of the realisation of children's rights and taking in due consideration the international obligations arising from the Convention.

"These [obligations] show the decisive importance attached by the Convention, as a human rights instrument, to the national process of implementation of children's rights. It further stresses the special responsibility of States in this regard. These realities were in fact also emphasised by the final document of the World Conference on Human Rights, which called on States to integrate the Convention on the Rights of the Child into their national action plans.

"[T]he reporting system established by the Convention is an essential tool for States parties to ensure a periodic assessment and evaluation of progress achieved in its implementation. It further allows for the improvement of the situation of children and the prevention of violation of their fundamental rights. At the same time, the dialogue held between States and the Committee on the Rights of the Child plays an important catalytic role in this regard, allowing for the formulation of specific suggestions and recommendations to States parties, identifying priority areas for action and encouraging programmes of technical assistance or advice in cooperation with United Nations and other competent bodies.

"[T]hrough the activities of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and of its Working Group on Contemporary Forms of Slavery, important and comprehensive strategies have been envisaged to ensure the implementation of the different existing legal instruments and to give guidance in relation to specific areas where action should be undertaken, such as legal reform, information, education, social assistance, reintegration and international cooperation. Special reference should be made in this regard to the two programmes of action adopted by the Commission on Human Rights for the Prevention of the Sale of Children, Child Prostitution and Child Pornography and for the Elimination of Child Labour. Presently under preparation is a new Programme of Action on the Prevention of Traffic in Persons and the Exploitation of the Prostitution of Others.

"The progress achieved in the implementation of these programmes of action is periodically evaluated both by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Commission on Human Rights. The Commission further considers the important activities of thematic Rapporteurs, as the Special Rapporteur on Violence against Women or the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography who has adopted important recommendations on ways to address the areas covered by her mandate.

"It is also interesting to note that the issues of sale and trafficking in children, child prostitution and child pornography deserve a special attention within the United Nations system-wide action. Mention could be made in this regard to ILO [...] or to the activities developed by UNICEF in the framework of the implementation of the Declaration and Plan of Action adopted by the World Summit for Children.

"At the same time, in the area of crime prevention and criminal justice, important steps have also been taken. In fact, the Ninth Congress on Crime Prevention and Criminal Justice, held last year [1995] in Cairo, called on States to adopt necessary measures aiming at the prevention, protection and rehabilitation of children victims of any form of violence, including sexual violence and sexual exploitation. It further invited the Commission on Crime Prevention and Criminal Justice to consider drafting an international convention on the illicit traffic in children which may embody the necessary elements to effectively combat this form of

transnational organised crime.

"The Commission soon ensured a follow-up to this invitation and at its fourth session requested the Secretary-General to initiate the process of requesting views of Member States on the elaboration of such an international convention [...]. An important standard-setting activity is therefore already under way within the United Nations system in this area.

"It is interesting to note that the Commission further decided to request the Secretary-General to organise a meeting of an expert group on the prevention of the sexual exploitation of children for commercial purposes within the context of international travel (sex tourism)."

## 8. COMMENTARY

The review of the main international instruments covering commercial sexual exploitation of children reveals that, whilst State obligations to combat the phenomenon are relatively clear, it may be useful to make a certain number of comments and clarifications.

- a) Article 34 of the Convention on the Rights of the Child, the provision central to the present discussion, firstly provides for protection from "unlawful" sexual activity; in so doing, it deliberately leaves each State to enact legislation determining what kinds of activity are to be outlawed and, where appropriate, until what age. The absence of the word "exploitation" in sub-paragraph (a) of this article reflects the fact that the focus in this case is more especially "abuse", and in this context the age of consent is clearly of major significance. It would mean that, in a country where age of consent is 16 years, a girl of 17 who is induced (though presumably not "coerced", to the extent that this involves obtaining consent by force or manipulation) into sexual intercourse will not be the subject of protection under this article, whereas a girl of 15 will be. In other words, this provision derogates, by implication, from the overall definition of a "child" for the purposes of this Convention. Sub-paragraphs (b) and (c), on the other hand, are dealing explicitly with "exploitative use". If we recall the 1949 Convention which provides for protection against *exploitation* through prostitution *regardless of whether or not consent has been given*, and the 1956 Supplementary Convention which sets a flat age of 18 years, it seems clear that in the cases of these two sub-paragraphs, the general definition of the child holds and the question of consent is of no relevance in determining whether or not exploitation has taken place and whether or not the child concerned is covered by these provisions.
- b) International law provides no definition of the term "pornography" (the same applies to "prostitution" but the meaning of this term is more generally accepted and is more amenable to the application of objective and factual criteria and verification).
- c) Pornography has not received the level of attention that international legislators have accorded to protection from prostitution. The amended 1923 Convention covers all obscene or pornographic materials but has been virtually dormant for the past two decades at least. Current national legislation, practice and attitudes towards adult pornography in many countries mean that it is unlikely to receive significant additional support in the foreseeable future. It is in fact surprising that more countries have not followed the example of the Netherlands and denounced it. The explanation perhaps lies in the *de facto* lack of reference that is made to obligations under the treaty and/or the development of a more restrictive view of what constitutes "obscenity" and could therefore be deemed to be covered by the treaty. Thus, the international legal framework provides only a crude basis for taking initiatives to combat the distribution of child pornography, whether in the form of publications or via new technology.

## **PART II: NATIONAL LEGISLATIVE AND ENFORCEMENT RESPONSES**

### **Introduction**

The international norms which emerge from the Conventions and other international instruments described in Part I of this paper establish the obligations under international law on States parties in relation to the protection of children from commercial sexual exploitation. These obligations then have to be translated into national legislation and into the enforcement mechanisms in each country. Article 34 of the Convention on the Rights of the Child (“the CRC”), for example, as has been pointed out in Part I, provides for protection from “unlawful” sexual activity, leaving it to each State to enact legislation determining what kinds of activity are to be outlawed.

Part II of this paper examines specific national legislative and procedural provisions by which some countries have sought to protect children. Such provisions do not exist in a vacuum, but depend for their efficacy on the capacity and will of the executive and of the law enforcement personnel in each jurisdiction to implement them. This Part will therefore also point to problems of enforcement and some solutions. Finally, commercial sexual exploitation of children is part of a complex web of factors. A major part takes place on the national scene. Increasingly it is flourishing in the context of tourism and trans-border activities. It calls for multidisciplinary solutions and cooperation between agencies at the national and international levels. The nature and effectiveness of such cooperation is, therefore, an important issue of concern and discussion in this paper and for follow-up on the national level of the work at the World Congress.

### **1. NATIONAL LEGISLATIVE AND PROCEDURAL PROVISIONS**

Domestic legislation protective of children may be found in a wide variety of instruments, such as provisions for health care, social welfare, housing, obscenity laws, guardianship and custody. The CRC now provides, for the first time, a comprehensive set of international legal norms for the protection and well-being of children. Ratifying States may have to initiate new legislation or revise existing legislation to achieve these norms and comply with their obligations. It would appear that the Convention has encouraged States to examine their protective provisions in a more comprehensive manner than before, but their responses towards enforcement of its provisions will inevitably depend on the maturity of their existing domestic provisions vis-à-vis child care, their own stage of economic development, and the cultural and economic criteria which inform their approach to the care of the nation’s children.

#### **1.1. Offences Involving Children**

In the Philippines, Republic Act 7610, which came into force in 1992, specifically addresses the “Special Protection of Children against Child Abuse, Exploitation and Discrimination” including Child Prostitution and other Sexual Abuse (Art.III), Child Trafficking (Art.IV) and Obscene Publications and Indecent Shows (Art.V). The Act also requires the formulation, by the Departments of Justice and of Social Welfare and Development, of a comprehensive programme to protect children against commercial sexual exploitation. Regulations under the Act provide for the reporting and investigation of child abuse cases, and for measures to prevent the trafficking of children. What is highly significant about this legislation is that it was originally prepared by a non-governmental group consisting of child protection experts and activists. Through their grass-roots experience, they were able to address the specific problems of Filipino children in the overall context of the government’s obligations under the CRC. The Philippine government, having requested non-governmental assistance, and having enacted the legislation, achieved as a result concrete legislative provisions and a national policy for the protection of children against commercial sexual exploitation.

On the other hand, Brazil's Law No. 8069 of 13 July 1990 entitled "Statute of the Child and Adolescent", which is intended to provide for the "full protection of the child and adolescent", has no specific provisions for addressing the commercial sexual exploitation of children. Rather the Act is like a Charter for children, outlining fundamental rights and duties, with policies for enforcement and guidelines for their implementation. It is a matter for the individual State governments to translate the charter into regulations at local State level.

In Sri Lanka, ratification of the CRC engendered the formulation of a policy document in 1992 on the rights of children, intended to lead to comprehensive legislation protective of children. A Technical Committee, appointed to consider legislation directed at child abuse, identified certain areas for reform. However, rather than suggesting a separate Act dealing with sexual offences against children, the Committee recommended amendments to the existing Penal Code and to the Code of Criminal Procedure. Thus, the age of consent was raised from 12 to 16 years, new offences of sexual exploitation of children and of trafficking as well as new offences relating to the use of children in pornography were created. Significantly, here again, the Technical Committee had included non-governmental representatives who had been actively engaged in combatting the sexual exploitation of children in Sri Lanka. Through the amendments to the Penal Code, their concerns have been legislatively addressed in a pragmatic and comprehensive manner.

In Thailand, the approach to protective legislation has also involved amendments to the Penal Code. There has been a firm governmental commitment since 1993 to eliminate child sexual exploitation. Amendments to the Code at that time provided serious penalties for those who engaged in the sexual abuse of children and updated the laws on pornography. New amendments this year (1996) will mean that while prostitution *per se* will no longer be a crime in Thailand, soliciting and publicising for the purposes of prostitution will be punishable. Engaging in prostitution with a person under the age of 18 will be punishable if the act takes place "in a place of prostitution". However, if the act takes place elsewhere, the age of consent is 15. Boy children continue to lack adequate protection in that rape and unlawful sexual intercourse cannot be committed against male children, by virtue of a judicial interpretation of the provisions of the Code.

## **1.2. Pornography**

The relevance of pornography to the protection of children against commercial sexual exploitation is not always recognised in legislation despite the specific injunction of Art.34(c) of the CRC that States must take measures to prevent the exploitative use of children in pornographic performances and materials. New technologies being used for the production and transmission of pornography have been so rapid in development, and sometimes so difficult to penetrate, that the law has not been able to keep up with them. The experience of police officers in this area has led the Standing Working Party on Offences Against Minors of INTERPOL (the SWP) to recommend (1995/96) that member countries enact legislation which would make it an offence to produce, distribute or possess child pornography in its present and potential future forms. In January 1995 the Netherlands government passed legislation, amending the Penal Code (Art.240b), and making it an offence to distribute, make, import or possess pornographic material depicting children manifestly under the age of 16; transfer or possession of such material on a data carrier is included in the offence. In July 1994 the Austrian parliament passed an amendment (section 207a) to the Penal Code to outlaw the trade in child pornography and sanction even the possession of such material. Possession of child pornography is also an offence in Canada, in Germany and in the United States. In 1994 the US Penal Code was amended to allow federal authorities to prosecute persons involved in the production overseas of child pornography, if that pornography is intended for importation into the United States. In many countries, however, the penalties for offences relating to child pornography are not severe and do not reflect the fact that such pornography is a manifestation of the sexual exploitation of a minor.

## **1.3. Reporting**

An issue for national legislatures concerned with child sexual abuse, whether commercial or otherwise, is that of reporting. The Philippine Regulations under Republic Act 7610 encourage the reporting of cases of sexual abuse, and impose mandatory reporting provisions on hospitals, doctors, nurses, teachers and law enforcement officials. In some countries there is a reluctance to impose mandatory reporting duties; experience in the United States showed that a high percentage of cases reported on foot of an imposed duty were unfounded. The SWP, however, has urged the implementation of legislation which would require individuals and specifically professionals and others having the care, custody or control of children to report suspected abuse to the relevant investigative authorities.

#### **1.4. Extraterritorial Legislation**

While domestic legislation on child commercial sexual exploitation is normally directed to the protection of the State's own children against abuse by nationals, this type of abuse has international aspects. Sexual exploitation resulting from tourism and foreign visitors, trafficking of young people across borders to supply brothels in other countries, abductions from one country to another, abuses of intercountry adoption, and even the transfer of pornography via computer networks or simply across borders are all issues which involve other jurisdictions. Responses within national legislatures are varied, depending on how the specific problems affect each jurisdiction. Several countries from which large numbers of tourists are believed to travel to exploit children abroad have responded by introducing legislation to give their domestic courts extraterritorial jurisdiction in respect of offences committed against children abroad. In New Zealand, the Crimes Amendment Act which came into force in April 1995 makes it an offence for a New Zealand citizen or permanent resident to engage in conduct outside of New Zealand with a child under the age of 16 if such conduct would be an offence in New Zealand. Australia's Crimes (Child Sex Tourism) Amendment Act of 1994 specifies (in section 50BA) that "a person must not, while outside Australia, engage in sexual intercourse with a person who is under 16". In March 1996 an Australian was convicted under the new legislation of offences committed against children in the Philippines. Extraterritorial jurisdiction for offences committed against children abroad became law in Belgium (April 1995), in France (February 1994) and in Germany (September 1993), all by amendments to each country's Penal Code. The Australian Act and the French and German amendments enable prosecutions to be taken against nationals of those countries even if the crime alleged is not a crime in the jurisdiction in which it was committed; thus, there is no double criminality requirement - the national legislative provisions will protect foreign children.

The Penal Codes in the Scandinavian countries already enabled citizens of those countries to be prosecuted at home for crimes committed abroad, without specifying the crimes in detail. Under such provisions, three men were convicted in August 1990 in Norway for sexual abuse of boys in the Philippines and in Thailand, and a Swedish national was convicted in Stockholm in June 1995 for offences committed in Thailand.

The Penal Code in Japan has extraterritorial effect in relation to certain crimes including sexual crimes with violence against children under the age of 13 or persons unable to resist such an attack.

#### **1.5. Sex Tourism Legislation**

Tourism for the purposes of sex with minors has been dealt with by legislative changes in several countries. In the United States, the 1994 Violent Crime Control and Law Enforcement Act criminalises domestic or foreign travel with intent to engage in sexual acts with a juvenile. The 1994 Australian legislation creates the offence of benefitting from or encouraging such travel; the 1995 New Zealand legislation makes similar provisions.

A different approach is offered in the United Kingdom where a Sexual Offences (Conspiracy and Incitement) Bill was referred in February 1996 by Parliament to a Standing Committee for consideration. The proposed legislation would make it an offence to conspire with or to incite a person to commit certain

sexual offences abroad.

## 1.6. Trafficking or Sale of Children

The issue of child trafficking has been addressed in the Philippines in Republic Act 7610 (Art.IV) by provisions which control foreign travel by children and the adoption of children in return for a consideration, as well as any acts of trading and dealing with children for money. In Thailand, proposed amendments to the Penal Code will penalise guardians who sell children in their care. Selling, buying, transporting of persons under the age of 18 years for the purposes of unlawful sexual gratification will be criminalised by an update to an Act of 1928 (the Trafficking of Women and Girls Act), even if the young person has consented. A feature of the new provisions is that the trafficked person is recognised as a victim and not as an offender. In Sri Lanka, recent amendments to the Penal Code create the offence of “trafficking” in section 360c in terms very similar to those of the Philippine legislation.

In the industrialised countries, the issue of trafficking is addressed often in the context of immigration. Intercountry adoptions, intercountry marriages, entry of foreign workers, all may involve trafficking. The Council of Europe has suggested<sup>2</sup> that the activities of artistic, marriage and adoption agencies be supervised, that travel abroad by children be the subject of surveillance by immigration authorities and that young victims of trafficking be assisted and protected. In recent changes to Belgium’s Penal Code (April 1995), the traffic in human beings was criminalised. The European Union has responded to the problem of trafficking by expanding the mandate of its Drug Unit (March 1995) to enable that unit to monitor traffic in human beings. The SWP has made several relevant recommendations designed to protect children from being trafficked. These include a recommendation that member countries impose greater supervision and control on intercountry adoptions, and that a data base be established with records of persons and organisations who have been found to be involved in the traffic of children. Reflecting the Council of Europe Recommendation, the SWP also recommends increased surveillance by immigration authorities and assistance to the victims of trafficking.

## 1.7. Procedures and the Child Witness

It is generally accepted that there is considerable difficulty in prosecuting cases with an international dimension. Differences in language, legal systems, procedural requirements, and the expense of bringing witnesses from abroad are some of the problems. In the context of legislating to protect children against sexual exploitation by nationals abroad, these difficulties have been relied upon by the British government in refusing to accept a Bill which would give UK courts extraterritorial jurisdiction for offences committed against children abroad. On the other hand, certain governments have adopted creative responses to the difficulties, such as the Australian government. The Australian courts are empowered under the Crimes (Child Sex Tourism) Amendment Act 1994 to take evidence by video link, and can even administer oaths and affirmations by video link.

Procedural difficulties are endemic in any case involving sexual exploitation of a child, and not only those with an international dimension. The Children in Trouble: Expert Group Meeting<sup>3</sup> in November 1994 in Vienna addressed some of the issues, and particularly in Part V of its report, dealing with the Exploitation of Children, urged that sanctions for sexual exploitation of children be applied against the adults rather than the child victims, and that sexually exploited children be given access to the mechanisms of justice, such as legal aid, safe housing and support services. In Canada, reforms in the criminal law have recognised that children can be just as credible and reliable witnesses as adults; the special needs of child victims/witnesses have also been accommodated in the criminal justice system. Delays in getting a case to trial, the lack of family or institutional support, the age of the child and his or her lack of education may all conspire to undermine the quality of a child’s evidence. The provision of a guardian *ad litem* for a child witness could ease the burden on the child and protect his or her interests. In the Philippines, under the Rules and Regulations on the Reporting and Investigation of Child Abuse cases, a guardian *ad litem* must be appointed

by the court as soon as a complaint of child abuse has been filed.

Some interesting changes are envisaged in the Thai Criminal Procedure Code which would ease the burden on the child of giving evidence. The proposed changes include the video-taping of a child's statement to police officers and the use of that video as evidence in court. Cross-examination of the child on the contents of the video will only be allowed through a psychiatrist. Provision is also proposed for pre-trial depositions by victims who may be vulnerable to delays in the proceedings, such as street children. Once the deposition has been taken, and the alleged offender has had an opportunity to confront the witness, the deposition can be used in court. The problems of undue influence on the child and of detaining the child until the trial may thus be avoided.

The Evidence Act in New Zealand was amended in 1989 to provide some flexibility to judges in the taking of evidence in child sex abuse cases. The judge can take the advice of relevant qualified persons as to the effect on the child of giving evidence, and can direct the admission of video-tape evidence, or the giving of evidence by closed-circuit television. Other jurisdictions have similar provisions; it appears to be generally accepted that child witnesses need to be protected from the trauma of court proceedings and of confronting their abuser. Where the abused child is a street child or a trafficked child, the proof of his or her age can be a problem. The Australian Crimes (Child Sex Tourism) Act 1994 makes provision for alternative methods of proving the age of a person under the age of 16, such as by appearance or from medical opinion.

### **1.8. Rights of the Accused**

There are difficulties in reconciling the rights of the accused with the rights of the child to protection. In relation to bail, for example, it has been seen that child exploiters arrested in a foreign jurisdiction are very likely to jump bail; yet to refuse them bail would be to infringe their basic right to be presumed innocent until proved guilty. Either the offence has to be categorised as serious enough to automatically deprive the accused of bail, or the prosecution has to oppose bail on the grounds that the accused is foreign and therefore very likely to leave the jurisdiction. In relation to proof of an offence, and given the difficulty of actually finding a criminal in the very act of abusing a child, there appears to be merit in shifting the burden of proof when the protection of a child is at issue, and in so framing the laws that the onus is on the accused to justify his being in the company of a child who is not a relative. Thus in the Philippines, under the provisions of Republic Act 7610, merely to be found alone with a child who is not a relative inside a hotel or vehicle or other place constitutes an attempt to commit prostitution, and an offence under Article III, section 6. Under section 5(a), the mere verbal offer of a child for the purposes of prostitution constitutes the offence of sexual abuse.

## **2. ENFORCEMENT AND PREVENTION ON THE NATIONAL LEVEL**

Legislation and procedural measures are not enough in themselves to protect children from commercial sexual exploitation. The laws must be enforced. The principal agencies for their enforcement will be the police and immigration officials, and the prosecution and judicial authorities. How effectively these authorities function will depend not only on the resources made available to them, but also on the extent to which the society in which they carry out their duties regards the protection of children as important. Why is it, for example, that many child exploiters will travel to another country and feel themselves immune from prosecution for acts which they would be afraid to commit in their own jurisdictions? Why is it that in some societies there is a high level of tolerance of adults securing sexual gratification from children? Why is it that in some countries the police seem not even to know that there are laws against sexual exploitation of children, or do not know what those laws say? In some countries, children are available to be exploited by

foreigners because they are already abused on a massive scale by their own nationals. If society does not place a high value on the nation's children and demand that the law is enforced in their interests, then public officials will not be effective.

There follow a number of suggestions arising from the experiences in various countries of enforcing the law to protect children from sexual exploitation which point to ways in which enforcement could be improved.

## **2.1. Central Authority**

In the Philippines there is an inter-agency Task Force against Child Abuse under the Department of Justice with responsibility for the prosecution of child abuse cases. As a result, there have been a number of successful prosecutions, and this has in turn increased public confidence in the office and has increased the level of reporting. In Thailand, a Child Rights Protection Division has been established within the office of the Attorney General to monitor child sexual abuse cases.

## **2.2. Special Child Care Units in the Police Force**

In the United Kingdom, a special Paedophile Unit at New Scotland Yard tracks down offenders against children. It has a mandate to be proactive for the protection of children, and therefore has a considerable amount of flexibility in finding ways to prevent abuse, rather than only reacting to actual complaints. Unfortunately, it is the only unit for the entire country.

In this context, it can be noted that the Beijing Rules<sup>4</sup> recommend specialisation within national police forces of police officers who frequently or exclusively deal with juveniles, and that the Economic and Social Council requested the Secretary General of the United Nations (Res.1989/66) in May 1989 to "ensure effective programme interlinkages within the United Nations system between juvenile justice, within the framework of the Beijing Rules, and situations of 'social risk', especially....child abuse, child sale and trafficking, child prostitution and street children."

## **2.3. Status, Training and Resources of Police Authorities**

In many countries the laws cannot be effectively enforced because the police forces are corrupt. The reasons for this may be partly to do with a society which places a low value on respect for the law, but they are also to do with poor pay, poor working conditions and promotional structures which are not based on merit or ability. In Sri Lanka, the emphasis by the government on economic development through tourism is said to have made the police reluctant to implement the laws against child abusers in case this would have a negative impact on the country's economy and thus weaken their chances of promotion. In the Philippines, child abusers have "escaped" from police custody in circumstances which indicate that bribery of police officials had occurred. There are many such reports about many countries. Sexual offences against children must be treated as serious crimes, and police officers must be recognised and rewarded for detection of such crimes in the same manner as they would be for the detection of any other serious crimes.

Adequate training of police and prosecuting officers is essential for the handling of child sexual abuse cases. Some industrialised countries such as the United Kingdom, Sweden, Australia and New Zealand have given overseas aid to developing countries in the form of training for police officers.

Finally, the police must be adequately resourced in terms of manpower, equipment and back-up services to enable them to do their job properly. They will not be encouraged to rescue children from brothels if they have nowhere to bring them or no means to return them to their families; they cannot track down exploiters unless they have adequate means of transport and communication.

## **2.4. Missing Children Registries**

Missing children may not always be identified as the possible victims of sexual exploitation. The role of the police forces has been to find such children and restore them to their families. However, it is now being recognised that such children may have been running away from abuse or exploitation, and that they should not be returned without some investigation of the reasons for their disappearance. The SWP has recommended the establishment of specialised centres in every country where such children may be debriefed and cared for before the question of return to their families is settled. The SWP has also recommended that children missing for more than 6 months should be made the subject of international Missing Persons Notices at INTERPOL headquarters.

## **2.5. Customs Surveillance**

The valuable role which the Customs Services can provide in detecting and preventing child exploitation is gaining recognition. In cases in which the customs services have worked with the police in following up on a seizure of illegally imported pornographic material, important finds have been made, even leading to the cracking of whole paedophile networks. In New Zealand, a Customs Child Pornography Project was established in 1992. The work of the Project involves the interception of child pornography or other child exploiter-related intelligence in the process of normal customs' surveillance, and then following up on those interceptions in cooperation with the police. The US Customs Service has a Child Pornography and Protection Unit which has been operating effectively for many years. The Paedophile Unit in the UK police force works in close cooperation with the customs authorities.

## **2.6. Telephone Help Lines**

Telephone Help Lines for children are increasingly recognised as a valuable way in which children can seek help against sexual abuse and exploitation. The SWP has recommended that all member countries institute such Help Lines.

## **2.7. Interdisciplinary Approach to Law Enforcement**

It is not unusual for several government agencies to become involved with an exploited or abused child. Police, social welfare, education and health authorities may all have a responsibility, and liaison between them would occur. In Britain, liaison between such bodies is mandatory. What is not the norm, however, is cooperation between official bodies and NGOs. Thailand is experimenting with such cooperation through its Child Rights Division in the Attorney General's office, which has developed a network that includes non-governmental representatives. In Canada, provincial/territorial governments, police and non-governmental organisations have been working on improving the sharing of information between the authorities and NGOs in relation to child sexual abuse. (This was particularly aimed at enabling NGOs, and other employers who hire people to care for children, to screen out known sex offenders.)

Experience has shown that state authorities have neither the resources nor the time to monitor situations in which there may be sexual exploitation of children. While they should in no way replace the national law enforcement authorities, child-care NGOs are uniquely capable not only of caring for abused children, but also of detecting abuse and of gathering evidence on which an offence may be successfully prosecuted. Several successful prosecutions in the Philippines and in Thailand have been based on evidence gathered or detected by NGOs. Unfortunately, in most cases, the financial resources of NGOs caring for sexually abused and exploited children are woefully inadequate.

The UN Expert Group Meeting developed a series of recommendations to combat the use of children for criminal activities and the exploitation of children which went beyond law enforcement. Among these recommendations are suggestions for engaging the mass media in awareness-raising activities, the

development of educational programmes and multi-disciplinary training programmes, the development of “community watch” programmes, and the engagement of the tourist industry and the business sector in protecting the rights of children. In Australia and New Zealand, the tourist industry has participated in the distribution of information leaflets which warn travellers that sexual exploitation of children abroad is a serious offence.

### **3. PUNISHMENT AND DETERRENCE**

The penalties for child sexual abuse and exploitation are quite severe in most countries. In cases involving extraterritorial jurisdiction there is a question of whether the crimes should be classified as minor, thereby making them more susceptible to being successfully prosecuted, or as serious, thereby making them more susceptible to the imposition of a heavy penalty. In France, in February 1994, extraterritorial jurisdiction was extended to the offence of engaging in sexual conduct with a person under the age of 15 by an amendment to the French Penal Code; it is the only offence which can be tried as a misdemeanour under France’s extraterritorial jurisdiction. As a misdemeanour, successful prosecution is likely to be easier than for an act classified as a serious offence.

On the other hand, there is a risk that offences against foreign children will be seen as less serious than the same offences committed against nationals if the penalties are less severe for a crime committed abroad. In Norway, three men convicted in 1990 of offences committed against foreign children received custodial sentences; the Supreme Court of Norway rejected a defence argument that the punishment should be less severe than it would be for crimes against Norwegian children. In Sweden in 1995, a man received a custodial sentence of 3 months and had to pay compensation to the foreign child he had abused; it has been suggested in relation to that case that the penalty would have been greater if the abused child had been Swedish. In the same year, in Thailand, a British Guyana citizen was sentenced to a total of 50 years in prison for offences committed against 5 Thai boys.

The degree of injury to the child would normally be a consideration for any court which prepares to sentence a convicted offender. But does a court have to be actually presented with evidence of physical or psychological injury - a requirement with which it would be difficult to comply if the child is a foreigner? Should there instead be a judicial presumption that all sexual exploitation of a child is damaging to the child? If the abuse has resulted in a child being infected with the HIV or AIDS virus, should this be an additional aggravating circumstance justifying increased penalties? The payment of financial compensation to a child victim has the positive advantage of permitting the child a fresh start in life, particularly if the child has been driven by poverty into prostitution.

There is a serious problem of recidivism particularly in relation to offenders who could be classified as paedophiles (i.e. persons for whom children are the preferred sexual partner). When discussing penalties for such offenders, the question arises as to whether penalties on them should continue after the service of their sentence and/or the payment of their fines. The SWP has recommended that countries consider whether persons who have been convicted of sexual offences against minors should be subjected to registration and restriction of their activities if the latter place them in contact with children. It is a matter of concern that paedophile abusers will often insert themselves in employment or social situations which allow them to have access to children. In Canada, amendments to the Criminal Code (section 161) in August 1993 enable a court to impose a prohibition order on a convicted sex offender which will prohibit him from attending places where children congregate, or from seeking employment which involves being in a position of trust or authority towards children.

Indeed, paedophiles have even been known to establish their own “child care” organisations as a front for their unlawful activities. It is therefore important that institutions which care for children should themselves

require to be registered and supervised by a competent authority. Furthermore, it has been suggested that persons applying for positions of employment in institutions which are responsible for the care of children should be required to produce a clean police record as part of their job application. Volunteers for work with child-care agencies in developing countries should be required to produce references which can be checked with domestic agencies in their countries of origin.

#### **4. ENFORCEMENT AND PREVENTION THROUGH INTERNATIONAL COOPERATION**

Given the international dimensions of sexual exploitation of children in today's world, cooperation between governmental law enforcement agencies and cooperation through the inter-governmental police agency INTERPOL, is vitally important. Such cooperation should develop simplified procedures so that the problems of language and differing legal systems can be minimised.

##### **4.1. Information Sharing via INTERPOL and Bilateral Contacts**

INTERPOL already maintains a database of criminals, and the SWP has recommended increased and improved sharing of information for the database in respect of individuals and organisations involved in the traffic of children, child pornography and the sexual exploitation of children.

The extent to which extraterritorial legislation is being extended to cover sexual offences against children committed in another country has been detailed above. Its effective application requires cooperation between prosecuting authorities in relation to the gathering and presentation of evidence.

Bilateral contacts between police forces and customs authorities have already proved effective in identifying paedophile networks with worldwide connections.

##### **4.2. Mutual Assistance Treaties**

Mutual assistance treaties are a vehicle for more formal methods of communication. By reducing into the form of a written agreement the rules which will be observed for such things as the taking of statements from witnesses, the provision of records and other evidence, the service of documents etc., the evidential quality of the material is assured, and the delays inherent in diplomatic channels of communication are avoided. The UN Crime Prevention and Criminal Justice Branch has drafted a Model Treaty on Mutual Assistance which was adopted by the General Assembly in December 1990<sup>5</sup> and is available as a resource to all states. National laws can also provide unilaterally for the conditions under which mutual assistance will be extended to other states in criminal matters. Thai Law BE2535 entitled 'The Act on Mutual Assistance in Criminal Matters' sets out the conditions under which assistance may be extended to requesting states, even without a treaty.

##### **4.3. Extradition**

Extradition is another vehicle for international cooperation in criminal matters. Some countries would prefer to extradite a child exploiter back to the country in which the offence was committed. It is generally believed that a treaty is necessary between two countries before a national of one can be extradited to the other. However, this is not the case for many European states which have national laws determining the conditions under which nationals will be extradited to face charges in another State. A Model Treaty on Extradition, again drafted by the UN Crime Prevention and Criminal Justice Branch and also adopted by

the General Assembly in December 1990<sup>6</sup>, is available as a resource to all States. In Germany, extradition to States with which there is no bilateral extradition treaty is streamlined by the use of “agreements” which require only a fraction of the input necessary in the negotiation of a treaty. For each individual case it is then only necessary to refer to the terms of the agreed arrangements.

#### **4.4. Police Liaison Officers**

A cooperative method of preventing or assisting in the detection of crimes of sexual exploitation of children is the placement by States of Police Liaison Officers in countries to which their nationals travel in large numbers. Liaison officers have been used in the fight against drug trafficking for some time, and there is a strong demand from the non-governmental sector that such officers be placed for the purposes of combatting child sexual exploitation. There is a view that officers placed to combat child sexual exploitation must be specialised for that field of enquiry, and should not be also combatting the drugs trade or other serious crime. The UK National Crime Intelligence Service (NCIS) has suggested that “Crime” Liaison Officers be placed in certain countries, available for all criminal investigations. The SWP has, however, recommended the posting of specialised officers.

#### **4.5. Development Aid**

International cooperation via development aid to promote child protection has also already been mentioned. Such assistance, if used for training, can have long-term effects on the capacity and understanding of law enforcement officials in combatting sexual crimes against children.

### **5. CONCLUSION**

It must be realised that the legal environment reflects the political environment, and that unless a State and its society give priority to the protection of children, the laws will not protect them. The will to protect children must first be there.

This Paper has attempted to identify the legal norms which have set the standards to be observed, and to look in a general way at the responses from national legislatures, also taking into account the enforcement and implementation mechanisms which are available.

It is hoped that States, in formulating their own national plans, will be able to draw on the experiences outlined in this paper and find solutions in the interests of their own and the world’s children.

#### **In order to foster the most effective implementation of the CRC in this sphere, the following proposals are made:**

It is suggested that the reporting obligations in Article 44 of the CRC be used by States, not just to fulfill their legal obligations under the Convention, but as an opportunity for a thorough analysis and review of their national legislative provisions for the protection of children. This work should be done with the active participation of non-governmental organisations who are involved in the care of children, as well as with those departments of state which have responsibilities affecting children, and those that ensure compliance with international treaty obligations. Through such an interdisciplinary review, legislative gaps in child protection could be identified. A national plan could then be prepared to address in a comprehensive way, through legislation, the needs of children in each State.

Secondly, it is suggested that a Task Group, again including NGOs as well as law enforcement personnel

and child care authorities, be established in each State to identify or propose effective mechanisms within the jurisdiction to monitor and combat sexual exploitation of children. Monitoring of children at risk, care of abused children, evidence-gathering against child abusers, protection of child witnesses - all these are tasks for which mechanisms must be devised to respond to local problems and local needs.

Finally, it is suggested that in each State, an Ombudsman for children, or an institution or body fulfilling similar functions, be appointed with responsibility not only to receive and deal with complaints from children, but also to advise the government on problems affecting children in general within the jurisdiction and to recommend solutions.

These are some ways by which a practical start could be made in securing better implementation of the provisions of the Convention on the Rights of the Child.

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1 Submitted by ECPAT.

2 Recommendation R(91)11 of the Committee of Ministers

3 Under the auspices of the UN Crime Prevention and Criminal Justice Branch

4 UN Standard Minimum Rules for the Administration of Juvenile Justice. General Assembly Resolution 40/33 of 29 November 1985.

5 GA 45/117

6 GA 45/116