

Press kit background paper 5

The weight of the law: legal frameworks and action against CSEC¹

What is the major challenge in relation to laws and CSEC?

There is no shortage of reports and reviews of international and national legal frameworks relating to the commercial sexual exploitation of children (CSEC). Almost all of them, however, limit their scope to those laws and provisions that specifically relate to the criminal act of CSEC and to sanctions on the offender. Few consider the much wider questions that need to be addressed in law and implementation, and that relate to the context in which CSEC occurs.

These relate to the social, economic, cultural and religious constraints whose impact on the child at risk and the abused child, his/her family and community and, indeed, the offender, needs to be taken into account. For example, the place of the girl child in some traditions may mean that a girl does not in practice enjoy the protections that the law might give. Where a minimum age for marriage is set in law, for example, the child may nevertheless be handed over in marriage before she reaches that age with little chance of this being reported in a community where custom dictates that it can happen.

Children often do not have access to complaint procedures, for example, both in their own country and in foreign countries to which they may be moved. Where they have such access they may be reluctant to proceed out of fear or shame. There may be a lack of awareness or acceptance of CSEC compounded by religious and cultural factors that make it difficult to research or discuss the issue.

Despite much good will, the impetus of the first World Congress in 1996, and a new body of much needed international law, girls lack the power and support structures to be able to resist sexual exploitation. Boys are also sexually exploited but the high proportion of girls means that frameworks and action need to be tailored to meet the age and gender dynamics of CSEC.

In short, the most beautifully crafted laws cannot succeed unless they reflect all these fundamental facets of the context of CSEC. A cultural change of consciousness and effort is needed to shift law enforcement to the local community level as well as the national government. Too often law enforcement resources expended on CSEC resemble an inverted pyramid when the majority of resources should be expended at the base.

Effective measures to prevent and combat CSEC must begin with the perspective of the sexually exploited child. Then the application of the law will not be approached from a superficially narrow viewpoint. The law cannot only be approached from a court and legislation perspective; the wider legal responsibility for the impact of poverty and the consequences of structural adjustment, including limited access to education, and particular types of tourism development, also have to be included in any programmes of action.

What progress has been made in setting international legal standards?

Since 1996 several new international instruments have been introduced that focus on international standard setting and enforcement.

The *Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2000) covers the same ground as Articles 32 to 36 of the United Nations *Convention on the Rights of the Child* but in its detail introduces improvements in the enforcement of the law and in promoting child-centred proceedings. It also focuses States' attention on the disproportionate number of girls who are sexually exploited.

As a minimum, States Parties are obliged to criminalize CSEC offences whether committed nationally or transnationally. The Protocol usefully clarifies that it is necessary for a state to exercise extraterritorial jurisdiction. This allows abusers to be brought to justice in their home state for crimes committed in other countries and reduces the risk that a country will be seen as a 'safe haven' for those

who travel elsewhere to exploit. Extradition is also important, so that someone who exploits a child in another country is prosecuted either in the home country or the country where the exploitation took place. The Protocol deems offences concerning CSEC as extraditable and means that, where a request for extradition is received from a state which has no extradition treaty, the requested state may consider the Protocol as the legal basis for such extradition.

The Protocol is particularly valuable in its focusing of government responsibilities on the creation of child-friendly legal proceedings. Article 8 seeks to protect the rights of child victims and witnesses without prejudicing the rights of the accused to a fair trial. States should inform child victims of their rights, role and scope, timing and progress of the proceedings, and provide 'appropriate support services to child victims', including protection of the child's privacy. Provision should also be made for the safety of the child, family and witnesses.

ILO *Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (1999) requires states to prohibit and eliminate the worst forms of child labour 'as a matter of urgency'. The worst forms include the sale and trafficking of children, the use, procuring or offering of a child for prostitution or pornography or pornographic performances, and any work which is likely to harm the health, safety or morals of the child.

Article 7 emphasizes the importance of free basic education and, where possible and appropriate, vocational training both as a preventative and reintegration measure. States parties are required to provide 'necessary and appropriate' assistance for the removal of children from sexual exploitation.

Convention 182 is important because it has a horizontal effect by obliging states to consult with employers' and workers' organizations to establish or designate monitoring mechanisms. By involving civil society, it helps raise awareness of CSEC and is particularly valuable as a tool to help prevent child sex tourism.

The United Nations *Convention on Transnational Organized Crime* (2000) has two additional Protocols or treaties. The most significant for CSEC is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*. The Convention usefully obliges States Parties to give each other 'the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings', but it is important to realize that the Convention is only applicable in relation to CSEC if the offences carry a penalty of four years or more imprisonment, or if it relates to the ancillary offence of obstruction of justice. Mutual legal assistance is defined in the broadest terms and covers the taking of evidence and statements, the effective servicing of judicial documents, the carrying out of searches, seizures and the freezing of assets and any other type of assistance in accordance with the law of the requested State Party. Bank secrecy is not a ground for refusal.

Other elements include the obligation to adopt measures to criminalize the use of force, threats, intimidation or promise; to take appropriate measures to provide effective protection for all witnesses; and the strengthening of claims of child victims of CSEC for compensation.

The Protocol contains valuable detail of what is needed for the physical, psychological and social recovery of child victims of trafficking, including the provision of appropriate housing, counselling and information including on legal entitlements, medical, psychological and material assistance and employment, educational and training opportunities. The Protocol also obliges States Parties to establish comprehensive policies to prevent children in particular from revictimization.

It is a matter of concern that all the duties in relation to law enforcement are in the main Convention but all the provisions relating to the protection of and assistance to victims are in the Protocol. This leads to a false distinction, since effective law enforcement is only really possible where children feel safe to testify and feel protected not victimized.

Among several other instruments and mechanisms introduced since 1996, the *Rome Statute of the International Criminal Court* (1998) is perhaps the most eagerly awaited by general observers. When it is in operation, the International Criminal Court will have jurisdiction for war crimes and crimes against humanity. Included in this latter category are enslavement and 'rape, sexual slavery, enforced

prostitution...or any other form of sexual violence of comparable gravity' if knowingly committed as part of a widespread or systematic attack. Enslavement includes trafficking. Rape, sexual slavery and enforced prostitution may also constitute a war crime.

What are child-friendly legal procedures?

Unless children are regarded as credible witnesses, they will be reluctant to appear and indeed may not even be called. A significant proportion of prosecutions fail as a result, and this is a severe disincentive to law enforcement officers. Child-centred legal proceedings are vital if efforts to pursue offenders are to be supported. Throughout the world many institutions maintain an adult exclusive culture. Trial procedures must be considerate to the child and take into account the child's age and abilities, so that s/he feels able to give evidence properly either directly or indirectly. This may require appropriate training of lawyers, judges and law enforcement officials to properly obtain and weigh up evidence.

In most law enforcement and judicial situations, children are expected to adopt adult patterns of reasoning and, if they do, are considered sufficiently 'mature'. This focuses on the adult's powers and capacities of reasoning, not the child's; judges and lawyers need to be sensitive to this. Avoiding unnecessarily complex language and open-ended, complicated questions is important, and children are more capable of reasoned judgement if they are given social support and context to make such judgement.

Research has shown that children respond differently from adults to repeat questioning. They infer that their first response has not been believed and they may thus change their response. As a result, children are often seen as 'unreliable' witnesses who 'make up' stories under pressure. In response to this, some countries tape or video record the first questioning of a child and this has validity as evidence in court.

Similarly, in some courts children may be questioned through a mirror glass, or by closed circuit television so that the child does not have to appear in court and confront the person accused of abuse.

What priorities remain for international law, international bodies and civil society?

The 2nd World Congress against Commercial Sexual Exploitation of Children provides an opportunity to measure progress made and the work that still needs to be done. In making such assessments, the measurement of progress has been considerably impeded by the lack of specific detail provided in States Parties' reports on implementation of the *Convention on the Rights of the Child*. Detail is lacking both on legislative measures taken, the date they were taken and where they can be found.

- An expectation ought to be established that States Parties are legally obliged to provide statistical and case law information on how the law is being enforced and that the Committee on the Rights of the Child can require detailed information on legislation, case law, and enforcement policies, and undertake detailed questioning on them.
- As a matter of international law, States Parties ought to be questioned on the law enforcement and child-centred provisions of the Optional Protocol, regardless of whether they are party to it. This is because the Protocol supplements but does not exceed the ambit of Articles 34, 35 and 36 of the Convention and so provides the detail to obligations to which 91 governments are already legally committed.
- Each State Party to the Convention on the Rights of the Child ought to be required to furnish copies of the relevant legislation, leading case law and national plans of action, and these should be published with the state reports. This would provide valuable data for any state wishing to strengthen its legislation, by providing access to good legislative practice.
- The Committee on the Rights of the Child has not so far produced General Comments identifying the ambit of each of the rights. General Comments on Articles 34, 35 and 36 would greatly assist in the implementation of these articles and of the Stockholm Declaration and Agenda for Action.
- Serious and urgent consideration needs to be given to the incorporation of a petitioning system into the *Convention on the Rights of the Child* so that petitions could be directly presented to the

Committee in CSEC cases.

- Concerted action, including from civil society, needs to be taken to ensure that the provisions in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, are incorporated into national law.
- The Conference of Parties to the *Convention on Transnational Organized Crime*, that will review periodically the implementation of the Convention, should also review the implementation of the protection and assistance provisions for children.
- All other international provisions need to be imaginatively and constructively harnessed to prevent and combat CSEC including the duty to provide formal and informal education and sexual health education, and the duty to have equal ages for both genders for consent to sexual relationships and to marriage.

What priorities remain for national law, national bodies and civil society?

- Protecting children against sexual exploitation is one of the fundamental duties of the state. Drafting and making available model legislation covering all the essential elements of the different aspects of sexual exploitation of children is essential.
- There is a need to raise awareness of the important impact social welfare legislation has in creating safety nets and in helping prevent CSEC.
- The enforcement of protection against CSEC is not only the responsibility of lawyers and police officers. Community-based initiatives including alternative dispute resolution procedures need to be explored and supported, based on human rights principles including gender equality.
- Legislation needs to be scrutinized to ensure that laws, particularly immigration and criminal procedure legislation, do not have a detrimental effect.
- Legislation needs to be made widely available in locally accessible forms.
- Children who claim to have been sexually exploited across borders should not come under general immigration legislation but should be protected under humanitarian provisions in accordance with Article 20 of the *Convention on the Rights of the Child* as entitled to ‘special protection and assistance’.
- There should be institutional dialogue between the judiciary and the state in achieving the objective of protecting and reintegrating children who have been sexually exploited. Judicial colloquia should also be organized on sexual exploitation of children, targeted at judges and magistrates at both local and national level.
- Some state policies on extradition were formulated long before a globalized world. The sexual exploitation of children may require a rethinking of extradition policy.
- States which do not permit the extradition of their own nationals to other states must take suitable measures to ensure prosecution in the national state.
- The sexual exploitation of children involves such fundamental violations of their human rights that the double criminality requirement of some states’ extradition policies should be discarded.
- Bar Associations and other professional legal associations should offer *pro bono* services to help sexually exploited children.
- There should be closer liaison between the law enforcement agencies and the ministries responsible for tourism.
- In national plans of action, realistic timetables are essential for the implementation of each of the required activities, and details should be included on who is responsible for the implementation of each section of the plan.
- National legislation should place airlines and airports under a legal duty to notify the public about

child sex tourism.

- National legislation should enshrine minimum ages for marriage, which should be in accordance with international resolutions; it should be the same for both sexes.
- Regardless of the age of consent, the age of protection against sexual exploitation ought to extend to all those under 18 in both national and extraterritorial legislation.
- Law reform is essential, but adequate resources have to be made available to make the laws effective.

¹This summary is based in part on: *Child Sexual Exploitation, Poverty and the Law*, one of six theme papers prepared as background reading for participants at the 2nd World Congress against Commercial Sexual Exploitation of Children, Yokohama, Japan, 17 – 20 December 2001. The paper was written by Geraldine Van Bueren. Note that all references to research and other source documents are given in the original paper.