

**CHILD SEXUAL EXPLOITATION AND THE LAW:
A REPORT ON THE INTERNATIONAL LEGAL FRAMEWORK AND CURRENT
NATIONAL LEGISLATIVE AND ENFORCEMENT RESPONSES**

TABLE OF CONTENTS

Executive Summary 5

Introduction: The urgent need for progress 7

Chapter 1 : International legal instruments 8

- Hague Convention on the Protection of Children 8
- Rome Statute of the International Criminal Court 8
- ILO Convention 182 on the Worst Forms of Child Labour 9
- Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 9
- Optional Protocol on the Involvement of Children in Armed Conflicts 10
- UN Convention on Transnational Organized Crime 10
- UN Protocol to Prevent, Suppress and Punish Trafficking in Persons 11
- The challenge of incorporation 12

Chapter 2: International bodies and monitoring mechanisms 12

- Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography 12
- Security Council Resolutions 1261 and 1314 13
- Office of the High Commissioner for Human Rights 13

**Chapter 3: Remaining priorities for international law,
international bodies and civil society 13**

- International-level recommendations 14

Chapter 4: National legislation and enforcement developments 15

- Trafficking of children for sexual purposes 15
- Child prostitution 15
- Children of prostitutes 15
- Sex tourism 16
- Repatriation 16
- Extradition 16
- Extraterritoriality and evidence 16
- Child pornography 17

- Recovery and reintegration 17
- Statutes of Limitations and impunity of offenders 17
- National Plans of Action 17

Chapter 5: Child-friendly legal procedures 17

Chapter 6: Remaining priorities for national law, national bodies and civil society 18

- Social welfare legislation 18
- Community-based enforcement 18
- Public awareness 18
- National-level recommendations 19

Conclusion 20

Acknowledgements 21

EXECUTIVE SUMMARY

The primary purpose of the 1996 Stockholm World Congress against Commercial Sexual Exploitation of Children was to create awareness and to draw international attention to the problems of commercial sexual exploitation of children.¹ Additionally, the Congress would promote the development of national plans to combat all forms of such abuse in the specific contexts in which they occur. Regrettably, very few national plans have been prepared in time for consideration during the 2nd World Congress in Yokohama, Japan, 17-20 December 2001. However, since 1996 there has been much welcome legislative action on child² sexual exploitation both at the national and international levels.

This report has been prepared to review the legislative framework established to address child sexual exploitation. While it focuses largely on progress since Stockholm, it necessarily reflects on the importance of the 1989 United Nations Convention on the Rights of the Child, and the specific provisions of the Convention relating to sexual exploitation of children. It looks into the wider legislative context that increases children's vulnerability to sexual exploitation. Finally, it suggests recommended actions to be taken at the national and international levels to prevent and combat sexual exploitation of children.

Introduction: The urgent need for progress

The first World Congress against Commercial Sexual Exploitation of Children which was held in Stockholm, Sweden, 27-31 August 1996, was organized to draw the attention of the international community to the problems of commercial sexual exploitation of children and to develop strategies to combat this fundamental violation of children's rights.

Despite the good will and efforts of Stockholm and the elaboration of important national and international legal instruments, children still lack the power and support structures that enable them to effectively defend themselves against sexual exploitation. Reviews of existing legislation suggest that many are limited to consideration of specific violations and actions against the offender. However, the most beautifully crafted laws cannot succeed unless they reflect all the fundamental facets of the social, cultural and economic context in which child sexual exploitation occurs, including poverty.

In many cases, children do not have access to complaint procedures either in their own country or abroad. Where they have such access, they may be reluctant to proceed out of fear or shame. Local attitudes to the law and law enforcement are also critical. If there is a tendency to neglect cases of child sexual exploitation, there may be sound reasons for cynicism and for underreporting.

The impact of poverty and the consequences of structural adjustment, including limited access to educational opportunities and the development of particularly exploitative forms of tourism, also contribute significantly to the sexual exploitation of children. Additionally, children's vulnerability to sexual exploitation may be enhanced by discrimination against them as children; as a result of their gender, race, religion, descent or occupation (or that of their parents); or by factors which leave them as the family's primary breadwinner, such as HIV/AIDS or armed conflict. While both boys and girls are victims of sexual exploitation, discrimination is further heightened if law enforcement bodies are improperly equipped to address the high proportion of girls affected by sexual exploitation. This detail must be emphasized so that both resources and action can be tailored to meet the gender dynamics of child sexual exploitation. Sexual exploitation also is likely to exacerbate a child's sense of powerlessness felt in times of conflict and post-conflict situations.

It is useful here to review the relevance of the United Nations Convention on the Rights of the Child (CRC) to preventing and combating child sexual exploitation. In 1989, the CRC became the first international treaty to place a comprehensive duty on States to ensure the rights of children and protect them from all forms of abuse, exploitation and violence. Articles of the CRC relate specifically to the sexual exploitation of children and its consequences. A fundamental premise of the CRC is that no single article or group of articles can be interpreted independently and that the entire Convention must be seen as indivisible. The CRC suggests an integrated and comprehensive approach to action that can guide and unify priorities, policies and programmes.

States that have ratified the CRC are required to take appropriate action to protect children from 'all forms of physical or mental violence, injury or abuse, including sexual abuse' by parent(s), guardian(s) or caretaker(s) [Art 19]; from 'economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development' [Art 32]; from the 'inducement or coercion of a child to engage in any unlawful sexual activity', 'the exploitative use

of children in prostitution or other unlawful sexual practices’, the exploitative use of children in pornographic performances and materials’ [Art 34]; and from ‘the abduction of, sale of, or traffic in children for any purpose’ [Art 35].

The CRC protects the rights of children in conflict with the law, ensuring that ‘no child shall be deprived of his or her liberty unlawfully or arbitrarily’ [Art 37]; it provides for the ‘physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse’ [Art 39]. It recognizes the right of every accused child ‘to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society’ [Art 40].

Chapter 1: International legal instruments

In the five years since the Stockholm Agenda for Action, there has been a remarkable flow of new international instruments focusing on standard setting and enforcement. Chief among these instruments are the Rome Statute of the International Criminal Court (1998); ILO Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999); the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000); and the UN Convention on Transnational Organized Crime (2000).

Hague Convention on the Protection of Children and Cooperation with Respect to Inter-Country Adoption, 1996

The Hague Convention is an important tool in preventing the international trafficking³ of children. It is designed to ensure that inter-country adoptions are made in the best interests of the child and with respect for his or her fundamental human rights, and to prevent the abduction, the sale of or traffic in children. Importantly, the Hague Convention prohibits improper financial gain from inter-country adoption, specifying that ‘only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid’ [Art 32].

Rome Statute of the International Criminal Court, 1998⁴

When it is in operation, the International Criminal Court will have jurisdiction for war crimes and crimes against humanity. Included in the category of crimes against humanity is enslavement [Art 7 (1) (c)] which includes trafficking 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. [Art 7 (1) (g)]. Rape, sexual slavery and enforced prostitution may also constitute war crimes.[Art 8 (xxii)]. Such crimes should not be subject to any statute of limitation.[Art 29].

Ultimately, the power of the Court will lie in its jurisdiction over the most serious crimes of concern to the international community. Hence, it is significant that the Court has, by extension

8 Child sexual exploitation and the law

of its definition of enslavement, included widespread or systematic sexual exploitation of children in this categorization.

ILO Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999⁵

The ILO Worst Forms of Child Labour Convention (C 182) requires, ‘as a matter of urgency’, States to prohibit and eliminate the worst forms of child labour. These include the sale and trafficking of children, the use, procuring or offering of a child for prostitution, the production of pornographic materials or for pornographic performances, and any work which is likely to harm the health, safety or morals of the child. [Art 3].

Article 7 emphasizes the importance of free basic education and, where possible, appropriate vocational training, both as a preventative measure and as a means of reintegration.

Convention 182 is important because it has a horizontal effect by obliging States to consult with employers and workers’ organizations to establish or to designate monitoring mechanisms. By involving civil society, C 182 helps raise awareness of the sexual exploitation of children and is particularly valuable as a tool to help prevent child sex tourism that directly promotes the sale of children, child prostitution and child pornography.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000⁶

The Optional Protocol covers the same ground as articles 1, 11, 21 and 32 to 36 of the CRC. As in the CRC, the Protocol calls on States Parties to prohibit the sale of children, child prostitution and child pornography. However, in its detail, the Optional Protocol makes significant improvements in the enforcement of law and in creating child-centred proceedings. It also focuses States’ attention on the disproportionate number of girls who are sexually exploited [Preambular para 5].

The Protocol provides States with a central point for explanation of key terms. It defines the sale of children as an ‘act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration’ [Art 2(a)]. Child prostitution is defined as the use of children in sexual activities for remuneration or other consideration. Child pornography includes any representation by any means of a child engaged in ‘real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes’ [Art 2(c)].

At a minimum, States Parties are obliged to criminalize child sexual exploitation offences whether committed nationally or transnationally [Art 3]. Because of the transnational nature of many of these child rights violations, States Parties should also establish and claim jurisdiction for offences committed on ships or aircraft registered in the State [Art 4(1)].

The Protocol usefully clarifies that it is necessary for a State to exercise extraterritorial jurisdiction [Art 4]. This means that criminal laws need to be developed or strengthened to criminalize the acts of nationals or residents of a State when they abuse children in another country. Extraterritorial jurisdiction is essential, as it limits opportunity for offenders to escape prosecution. Because of the transnational nature of the abuses, countries will risk becoming safe havens for child traffickers unless the principle of extra-territorial jurisdiction is widely

recognized and applied to all aspects of the sexual exploitation of children.

Equally important is extradition. Extradition is essential, so that a person who exploits or trafficks a child in one country is prosecuted either in their home country or in the country where the violation occurs. According to the Protocol, offences concerning the sale of children, child prostitution and child pornography are deemed extraditable. Where a request for extradition is received from a State that has no extradition treaty, the requested State may usefully consider the Protocol as the legal basis for such extradition [Art 5].⁷

The Protocol is particularly valuable in its focus of government responsibility on the creation of child-friendly legal proceedings. Article 8 of the Protocol 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; of the role and scope, timing and progress of the proceedings and provide 'appropriate support services to child victims', including the protection of the child's privacy.

Where necessary, provision should be made for the safety of the child victims and their families and witnesses. Importantly, there should be no unnecessary delay in the disposition of cases or in the provision of compensation to child victims, and uncertainty as to the actual age of the victim should not prevent the initiation of a criminal investigation.

Training obligations also are included in the Optional Protocol, particularly legal and psychological training for those working with children who have been sexually exploited. States Parties should encourage community participation and in particular child participation and, where they consent, the participation of children who have been sexually exploited, in prevention, education and training programmes.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2000

The sexual exploitation of children is not expressly included in the Armed Conflicts Protocol. Nevertheless, it is relevant as articles 2 and 4 prohibit the compulsory recruitment into armed forces of all those under 18, and this would include those pressed into service for the purposes of sexual exploitation. Article 7 is also of potential benefit as it obliges States Parties to rehabilitate and socially integrate all child victims, including those who have been sexually exploited in the conflict. Article 7 also imposes a preventative duty.

United Nations Convention on Transnational Organized Crime, 2000

For the purposes of the sexual exploitation of children, the UN Convention on Transnational Organized Crime establishes a link between trafficking in persons and the obligation of States Parties to promote cooperation to prevent and combat organized criminal activity across borders. The Convention usefully obliges States Parties to give each other the 'widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings'. However, it is important to realize that the Convention will only be applicable in relation to child sexual exploitation if the offences carry a penalty of four or more years of imprisonment [Art 2(b)] or if it relates to the ancillary offence of obstruction of justice [Arts 3(1)(a) and 23].

The Convention provides for mutual legal assistance among States Parties. Mutual legal assistance is defined in the broadest of terms and covers the taking of evidence and statements,

10 Child sexual exploitation and the law

the effective servicing of judicial documents, the carrying out of searches, seizures and the freezing of assets, and any other type of assistance which is in accordance with the law of the requested State Party. Bank secrecy is not a ground for refusal.[Art 18(8)]

States Parties are obliged to adopt legislative and other necessary measures to criminalize the use of force, threats, intimidation or promise to induce false testimony or to interfere with the exercise of official duties by a justice or law enforcement official.[Art 23]

States Parties are also obliged to take appropriate measures, within their means, to provide effective protection for all witnesses and to allow witness testimony to be given in a manner which ensures the safety of witnesses, such as by video link.[Art 24]

The Convention strengthens the claim of child victims of sexual exploitation for compensation.[Art 25] Training and technical assistance that facilitates extradition and mutual legal assistance is also included.[Art 29]

The United Nations Convention on Transnational Organized Crime has two optional Protocols. The most significant for child sexual exploitation is the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children.

The Convention and its Protocols demonstrate that the importance of a child-centred approach to sexual exploitation of children still has not percolated through to implementing bodies, such as law enforcement agencies, which do not focus exclusively on children. Most of the provisions relating to the protection and assistance of child victims are not incorporated in the main Convention but only in the Protocol. In other words, inherent in the Convention is an artificial and unsustainable distinction between the States' interest in prevention and punishment, and the protection and assistance of child victims.

United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, requires a comprehensive international approach in the countries of origin, transit and destination which includes measures to prevent trafficking, punish the traffickers and protect the victims, including the protection of their human rights. This Protocol is the first universal instrument to address all aspects of human trafficking.

The Protocol defines trafficking as 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force, or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation' [Art 3(a)]. Exploitation is defined by the Protocol as including 'the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery'. In such cases, the consent of the child is irrelevant. These are necessarily very broad definitions encompassing forced recruitment into armed conflicts, sexual exploitation and other forms of slavery.

The Protocol provides much valuable detail on 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; and educational and training opportunities [Art 6(3)(a-d)]. As provided in the Protocol, compensation is not considered discretionary because States are obliged to ensure that trafficking victims are offered the possibility of obtaining compensation.[Art 6(7)] Importantly, States Parties should establish comprehensive policies that prevent children, in particular, from revictimization.[Art 9(a)(b)]

Article 6(l) of the Protocol risks muddying the waters in respect of the right to privacy of child victims, by limiting such rights to 'appropriate cases and to the extent possible under its domestic law'. This is clarified only by article 14(l), which provides, 'Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law'. Thus making it clear that child victims' right to privacy is absolute, as the CRC takes precedence.

It is disconcerting that all of the duties in relation to law enforcement are in the main Convention, while all of the provisions that relate to protection and assistance to victims are only in the Protocol. This leads to a false distinction. Effective law enforcement of the sexual exploitation of children is only possible where there is proper protection and assistance to children. Prosecutions fail if children cannot or will not testify due to feelings of fear either of reprisal or of court procedures that are not child-friendly. This means there will need to be follow-through, particularly from civil society, to ensure that States become party to the Protocol and that the provisions in the Protocol to protect and assist children are incorporated into national law.

The challenge of incorporation

There is a dual challenge for non-monist States: becoming party to a treaty, and incorporation. Incorporation of provisions on the sexual exploitation of children into national law is as important as ratification. The incorporation of treaty provisions directly into domestic legislation would mean that governments would be placed under binding legal duties which could be enforced in national courts and child victims would be entitled, as a matter of national law, to support services and a range of other remedies.

Chapter 2: International bodies and monitoring mechanisms

There has been additional progress within international bodies and monitoring mechanisms to protect children from sexual exploitation.

The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography

In 1990, the Commission on Human Rights (CHR) appointed a Special Rapporteur on the sale of children, child prostitution and child pornography. The Special Rapporteur has a mandate to collect and analyse comprehensive data and to recommend measures aimed at eliminating the sale of children, child prostitution and child pornography at the international, regional and national levels.

In addition to carrying out specific country missions and receiving reports, in recent years the

12 Child sexual exploitation and the law

Special Rapporteur has chosen to focus annually on a different theme. These have included the roles of the justice system, the media and education, trafficking, domestic violence and the private sector.

Security Council Resolutions 1261 (1999) and 1314 (2000)

These resolutions of the Security Council on the use of children in armed conflict address the sexual exploitation of children and are extremely significant because they are binding on all Member States of the United Nations. While resolutions 1261 and 1314 both urge all parties to armed conflict to ensure the protection of all children in situations of conflict, they also have individual provisions for the vulnerabilities of girls.

In Resolution 1261, all parties to armed conflicts are urged to ‘take special measures to protect children, in particular girls, from rape and other forms of sexual abuse and gender-based violence in situations of armed conflict and to take into account the special needs of the girl child throughout armed conflicts and their aftermath, including in the delivery of humanitarian assistance’. Similarly, Resolution 1314 ‘underlines the importance of giving consideration to the special needs and peculiar vulnerabilities of girls affected by armed conflict, including, *inter alia*, those heading households, orphaned, sexually exploited and used as combatants, and urges that their human rights, protection and welfare be incorporated in the development of policies and programmes, including those for prevention, disarmament, demobilization and reintegration’.

Office of the High Commissioner for Human Rights

The Office of the United Nations High Commissioner for Human Rights (UNHCHR) services the Committee on the Rights of the Child with technical and substantive support. UNHCHR also plays the role of catalyst between partners with the view to strengthening the implementation of children’s rights at the country level. In this regard, UNHCHR develops technical assistance and advisory services programmes in a wide range of countries. Additionally, the UN High Commissioner for Human Rights launched in 1996 a Plan of Action to strengthen the implementation of the CRC. The purpose of this plan is to provide substantive support to the Committee's work with the States Parties’ reporting process and assist where necessary in transforming recommendations into reality through the provisions of adequate resources, coordination and follow-up.⁸

UNHCHR is currently developing guidelines for the integration of human rights into national, regional, and international trafficking initiatives.⁹

Chapter 3: Remaining priorities for international law, international bodies and civil society

Sexual slavery is a crime against humanity. So ruled the International War Crimes Tribunal in the Hague in a judgement delivered 22 February 2001. This emphasizes the urgency of preventing and combating effectively the sexual exploitation of children. Originally the emphasis was on policing and law and order, but protecting the human rights of children -- including in the civil, political, economic, social and cultural spheres -- is a precondition for preventing and combating

child sexual exploitation. The appropriate mechanisms have been established and detailed international laws are now in place. What remains is the unwavering need for accountability and follow-through.

The 2nd World Congress in Yokohama is particularly welcome as it 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 their implementation of the CRC. Detail is lacking as to the legislative measures taken, the date the measures were taken and where precisely such provisions can be found. This is a lost opportunity, as the Committee on the Rights of the Child is the principal legal mechanism that can persuade governments of the necessity of this information.

Further compounding the problem is the absence of examples of good legislative practices which are not readily available to assist States in identifying weakness in their own legislation and to prompt them to make changes where necessary. States Parties should be legally obliged to provide statistical and case law information on how the law is being enforced. States should come prepared for detailed questioning by the Committee on the loopholes and what further action needs to be taken. Without such information, it is not possible to assess accurately the progress made and the difficulties to be overcome.

Additionally, the Committee on the Rights of the Child does not have in place a child-accessible petitioning mechanism that would support children when presenting complaints. Such mechanisms have been identified as among the most effective methods available for preserving and protecting human rights.

International-level recommendations

- States Parties to the CRC should be encouraged to provide the Committee with detailed information on legislation, case law, and enforcement policies that address child sexual exploitation.
- Since the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography is a supplementary instrument, States Parties to the CRC should be questioned on the law enforcement and child-centred provisions of the Optional Protocol, regardless of whether they are party to the Protocol.
- States Parties to the CRC should furnish the Committee with copies of national plans of action that could then be published along with the State's national report.
- Serious and urgent consideration should be given to the incorporation of an innovative child-friendly petitioning system into the CRC so that petitions could be directly presented to the Committee in sexual exploitation 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.
- In its periodic reviews of the implementation of the Convention, the Conference of Parties to the Convention on Transnational Organized Crime should also review the implementation of the protection and assistance provisions for children.
- To combat commercial child sexual exploitation, measures are needed that provide for the

14 Child sexual exploitation and the law

seizure and confiscation of goods, the closure, either temporary or permanent of premises used in connection with the offence, and the confiscation of the proceeds derived from the activity.

- Peacekeeping missions must further develop their mandates to ensure that there is effective prevention, monitoring and reporting of sexual exploitation of children including abduction, prostitution and trafficking as well as the impact of HIV/AIDS. The two Special Rapporteurs on the sale of children and of children in armed conflict could enhance inter-agency cooperation by serving as joint focal points for such action.
- Post-conflict demobilization agreements should guarantee access to children who have been sexually exploited.
- All other international provisions need to be imaginatively and constructively harnessed to prevent and combat the sexual exploitation of children including through the provision of formal and informal education and sexual health education.
- As a matter of priority, States should be encouraged to sign, ratify or accede to all international instruments addressing the sexual exploitation of children.

Chapter 4: National legislation and enforcement developments

Trafficking of children for sexual purposes

Children are trafficked both across international borders and within States. New legislation and amendments to existing law aimed specifically at the prevention of trafficking¹⁰ and of the commercial sexual exploitation of children,¹¹ have been introduced in a number of countries.¹² Within States, penalties can range from a minimum of four¹³ to a maximum of 20¹⁴ years' imprisonment. In some countries, witnesses to the trafficking of children for sexual purposes have been granted special residency permits while criminal prosecutions are under way.¹⁵ Countries are also encouraging public debate to inform the legislative process.¹⁶

Child prostitution

A significant development in some States is the distinction being made between the prostitution of women and of children. Although some focus was placed previously on girls, quite often the sexual exploitation of boys was ignored.¹⁷ Other countries have put in place national guidelines to instruct law enforcement officers to treat prostituted children as victims of crime rather than as offenders.

Children of prostitutes

Research has shown that establishing separate schools to segregate children of prostitutes from other children is not in the best interests of the child or of society.¹⁸ Innovations like child development and care centres are being tested to provide services that meet the needs of children in red light districts. In order to protect and serve the best interests of the child, such

centres must operate with close cooperation between the judiciary and the State.

Sex tourism

Progress continues to be made in preventing sex tourism.¹⁹ Countries have recognized this sector as one requiring extreme vigilance.²⁰ Hence, inter-agency commissions have been set up for the prevention and the care of child and adolescent victims of prostitution in tourist centres.²¹ Protocols have been signed by representatives of various sectors related to tourism including the media, police, transport, hotels, and restaurants with the participation of UNICEF, other intergovernmental agencies and NGOs.²²

Among countries, penalties for organizing or publicizing trips aimed at child prostitution²³ range from prison sentences of six to 12 years and can include large monetary fines.²⁴

Repatriation

There is also great potential for courts to assist in repatriating child victims of sexual exploitation.²⁵

Extradition

Extradition, or the surrender of a national or resident of a State accused of an offence to the competent authorities in the requesting State in which the offence occurred, is conditional on the existence of a treaty or agreement between the States.²⁶ A number of countries adopt the double criminality approach to extradition. For the purposes of child sexual exploitation, double criminality means that a person can only be extradited to a State if the elements of sexual exploitation amount to an offence in both countries. Consequently, because of a lack of legislation or incomplete legislation in a number of States, alleged exploiters sometimes fall through the net. Some States have dropped the double criminality requirement while others are still reviewing it.

While double criminality operates as a basis for extradition, additional efforts have to be employed to ensure that the domestic legislation prohibiting all aspects of child sexual exploitation covers all possible offences and protects all children under the age of 18.

However, serious questions have arisen as to the continuance of the double criminality rule in relation to extradition for child sexual exploitation.²⁷ Sexual exploitation is so fundamental a violation of children's rights that it is difficult to argue that an individual will be liable to prosecution for an offence which was not contrary to law. In some instances, the method of sexual exploitation is akin to degrading and inhuman treatment.²⁸

Extraterritoriality and evidence

Extraterritoriality differs from extradition in that it extends the jurisdiction of a State by allowing the prosecution of nationals for offences committed abroad.²⁹ Extraterritoriality is a necessary tool in combating the sexual exploitation of children but it is not a substitute for a trial in the State in which the offence occurred.³⁰ As Muntarhorn observes, extraterritoriality 'should not be seen as a substitute for effective laws, policies and law/policy enforcement'.³¹ Trials in the State in which the offence occurred are preferable because of the difficulties in obtaining

16 Child sexual exploitation and the law

evidence from abroad, the additional associated costs, sometimes complications of language and the additional strain on child victims and child witnesses.

Child pornography

Both child pornography and particularly its distribution via the Internet have become major concerns for countries.³² While some States have initiated penalties for the publication of information aimed at sexually exploiting children under the age of 18,³³ others are being careful not to draw legislation that may be seen as disproportionate and over-broad, thereby challenging the right to freedom of expression.³⁴ Despite this interpretation, some countries have reasoned that images of child pornography should be criminalized and those maintaining electronic bulletin boards are legally obliged to prevent any further distribution of messages that contain child pornography.³⁵

Recovery and reintegration

Some States are able to provide assistance, including psychological assistance for the recovery and reintegration of children. This also applies to children who are not citizens of the State but who may become victims of child prostitution, pornography or trafficking.³⁶

Statutes of Limitations and impunity of offenders

In several countries the period of limitation begins to run only once the victim reaches majority. By letting periods of limitations run only from the age of majority, impunity is reduced. Many child victims are unable to speak until years after the event either because of psychological trauma or because there is a practical dependency on the offender who still has the power to exact pressure on the child.

National Plans of Action

Countries have developed national plans of action in partnership with civil-society encompassing various dimensions of child sexual exploitation including: protection, recovery and reintegration; awareness raising; training and capacity building; prevention and youth and child participation.³⁷ Many of these plans of action incorporate the principals of the Stockholm Agenda for Action. Importantly, several countries choose to adapt the Stockholm Agenda to reflect national and regional priorities.³⁸ Some countries have set up task forces and committees at the local and district levels that would be responsible for policy formulation, follow-up and monitoring.

Chapter 5: Child-friendly legal procedures

Where trans-frontier problems amount to a breach of the criminal law, it will be a disincentive for law enforcement officers if a significant proportion of prosecutions fail. There is the risk of failure unless children are regarded as credible witnesses. This can only happen if child-centred proceedings are initiated. The concepts of culture and tradition are broad, embracing not only religious and customary traditions, but also institutional values. Throughout the world many institutions maintain an adult exclusive culture.

Child-centred proceedings are rare. Officials in decision-making institutions, ranging from courts to immigration services and other law enforcement agencies, are on the whole unaccustomed to listening to children. The importance of listening to children is undervalued, often being regarded as too time-consuming. Hence, children's statements either at the initiation of complaints or in trial proceedings are often disregarded and may provide international child traffickers with great incentives.

In most law enforcement and judicial situations, children are expected to adopt adult patterns of reasoning and, if they do so, they are considered sufficiently mature. It is on the whole the adult, and the adult's powers and capacities, that are taken as the norm. This approach centres on the potential listener and not on the child. Judges and lawyers need to be sensitive to the special needs of children as victims and as witnesses. It is essential to avoid language that is too complex or questions that are too complicated and open-ended. Children are more capable of reasoned judgement if they are given the social support to make that judgement.

Trial procedures need to be examined to ensure they are considerate to the child and take into account the child's age and abilities, so that the child feels able to give evidence properly either directly or indirectly. This means there must be sufficient training of lawyers, judges and law enforcement officials to properly obtain, weigh and present the evidence. Another way to address this breakdown in communication is by allowing the use of audio-visual evidence and evidence by closed-circuit television. Mirrored glass and audiophonic equipment has also been used in some cases.³⁹

Chapter 6: Remaining priorities for national law, national bodies and civil society

Social welfare legislation

In addition to the need for national legislation addressing sexual exploitation of children, there is also a need for legislation concerning family support and social security in those countries where a social welfare system exists. The problem is that information on these important ancillary areas has not been forthcoming, not even in answer to a specially designed questionnaire. This points to the need to raise awareness of the important impact social welfare legislation has in creating safety nets and in helping prevent the sexual exploitation of children.

Community-based enforcement

The enforcement of protection against child sexual exploitation is not just for lawyers and police officers. Community based initiatives such as local cross-border committees on trafficking can allow scope for developing or improving alternative dispute mechanisms. Legitimate community-based enforcement would be based upon human rights principles, including gender equality and operate under the presumption of innocence.

Public awareness

Protecting children against sexual exploitation is one of the fundamental duties of the State.

18 Child sexual exploitation and the law

Effective law reform is a democratic process that should encourage community participation including that of children. In order for laws to be effective, public awareness of those laws is required along with strict enforcement by the relevant authorities. Some States may ensure that the law against child sexual exploitation makes express reference to both the CRC and the Stockholm Declaration and identifies the protection of children against sexual exploitation as a primary objective.⁴⁰ Thus, the ability to protect children against sexual exploitation is seen as one of the identifying elements of the State.

Public awareness is important within the country; and where, despite government action, the problem remains, international awareness and action is necessary.⁴¹

National-level recommendations

- It is essential to develop and widely disseminate model legislation covering all the essential elements of the different aspects of child sexual exploitation.
- There is a need to raise awareness of the important impact social welfare legislation has in creating safety nets and in helping prevent the sexual exploitation of children.
- Community-based initiatives, including alternative dispute resolution procedures, need to be explored and supported based on human rights principles including gender equality.
- Legislation, particularly immigration and criminal procedure legislation, needs to be scrutinized to ensure that there is no detrimental effect on children affected by sexual exploitation.
- Legislation needs to be made widely available in locally accessible formats.
- 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 CRC and should be entitled to 'special protection and assistance'.
- Judicial colloquia on the sexual exploitation of children should be organized. These should be targeted at judges and magistrates at both the local and national levels.
- There should be an institutional dialogue between the judiciary and the State in achieving the objective of protecting and reintegrating children who have been affected by sexual exploitation.
- The sexual exploitation of children may require a rethinking of extradition policy. States that do not permit the extradition of their own nationals should pay particular attention to this policy in light of the additional difficulties and costs in bringing child victims/witnesses to give evidence in foreign courts.
- States that do not permit the extradition of their own nationals 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 in the extradition policy of some States should be discarded.
- Bar Associations and other professional legal associations should offer *pro bono* services to assist sexually exploited children.⁴²

- Cooperation should be strengthened between law enforcement agencies and the private sector, and standards, procedures and codes of conduct should be developed for relevant professions including judges, lawyers and law enforcement personnel.
- There should be closer liaison between law enforcement agencies and the ministries responsible for tourism.
- In National Plans of Action, it is essential that realistic timetables for implementation are set and that details on accountability are included 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 and which should be the same for both sexes.
- Regardless of the age of consent, the age of protection against sexual exploitation should be extended to all those under 18 in both national and extraterritorial legislation.
- Law reform is essential but sufficient resources have to be made available to make the laws effective.

Conclusion

Participants at the first World Congress made a commitment which included the criminalization of all forms of sexual exploitation; the enforcement of laws, policies and programmes to protect children from sexual exploitation; and the adoption, implementation and dissemination of laws, policies and programmes supported by relevant regional, national and local mechanisms against the commercial sexual exploitation of children.

Not all of the post-Stockholm legislation and enforcement measures are looked upon from the perspective of the sexually exploited child. A significant proportion of prosecutions fail because children are either reluctant to appear or are not regarded as credible witnesses.

Law and law enforcement cannot be approached only from a court and legislative 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, as these have direct impact on the type of legislation and enforcement needed. A cultural change of consciousness and effort must take place so that law enforcement can also be concentrated on the local, town or village level.

The Yokohama Congress is the critical next step in reviewing progress since Stockholm. Yokohama provides an opportunity to analyse the challenges that remain and initiate concrete and practical recommendations for further action. The 2nd World Congress will focus on four main outcomes: a review of progress in implementing the Stockholm Agenda for Action; enhanced political commitment to implementing the Agenda for Action and strengthened follow-up; identification of major problem areas or gaps in the protection of children from sexual exploitation; and the sharing of expertise and good practices. This report and the recommendations it contains, are designed to contribute to that process.

20 Child sexual exploitation and the law

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¹ Throughout this report, the term sexual exploitation is used as shorthand to cover all forms of child sexual exploitation including the sale of children, child prostitution, child pornography, trafficking and traditional forms of sexual exploitation.

² For the purposes of this report, and in accordance with Art 1 of the CRC, a child is defined as ‘every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier’.

³ Trafficking in children is defined as the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation. For other child sexual exploitation definitions see Van Bueren, *The International Law on the Rights of the Child*, Kluwer 1998.

⁴ As of 8 October 2001, it had 139 signatures and 43 ratifications (see www.un.org/law/icc/index.html). In accordance with Art. 126, the Statute will enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession.

⁵ The Convention entered into force in November 2000.

⁶ The Optional Protocol received its tenth ratification 18 October 2001 and will therefore come into force and become a legally binding instrument 18 January 2002.

⁷ A similar provision is found in Art. 16 of the UN Convention against Transnational Organized Crime.

⁸ See www.unhchr.ch/html/50th

⁹ UN Doc. E/CN.4/2001/72

¹⁰ Measures of Prevention and Suppression of the Trafficking in Women and Children Act (Thailand, 1997); Child Trafficking and Pornography Act (Ireland, 1998)

¹¹ Amendment to The Child Care Act (South Africa, 1999) defines commercial sexual exploitation as ‘The procurement of a child to perform a sexual act for financial or other reward payable to the child, the parents or guardian of the child, the procurer or any other person.’ Section 50A provides for the prosecution of any person directly involved in children’s sexual exploitation as well as any person linked to a property where the exploitation occurs. The section does not expressly include those facilitating and enabling sexual exploitation through trafficking.

¹² Summarized in *Human Rights Internet, Canadian Component of the Protection Project: A socio-legal analysis of international jurisprudence on the commercial sexual exploitation of women and children* at 35:- (Cambodian Criminal Court, Aug. 1999) A young girl was found in a brothel in Cambodia where her mother worked as a cook. She was placed in the care of a child protection agency and following NGO intervention, reunited with her mother. Her mother then sold her to another brothel. The family was relocated and reunited and the child was

again trafficked. The mother was found guilty of violating the Law on Human Trafficking and sentenced to 15 years imprisonment.

Ibid at 58, 59: In Taiwan the biological mother of a child forced her daughter to have intercourse with a man in return for a fee. On one occasion the child's brother restrained her and both the man and the brother sexually assaulted her. The mother could not be prosecuted under the existing legislation. The brother was sentenced to imprisonment.

¹³ Ley Contra la Explotacion Sexual de Las Personas Menores de Edad No 7899 (Costa Rica, August 1999)

¹⁴ Art. 9 Law No. 269, Italy

¹⁵ Section 10(4) Alien Act (Austria, 1997)

¹⁶ In 1998 the Irish Department of Justice issued a Discussion Paper on the Law of Sexual Offences to inform public debate on law reform.

¹⁷ Human Rights Internet, *The Canadian Component of the Protection Project, A socio-legal analysis of international jurisprudence on the commercial sexual exploitation of women and children*, at 139

¹⁸ Juvenile Justice Act, 8 SCC 114 (India, 1997)

¹⁹ By amendments to the Federal Penal Code and Code of Penal Procedures, sex tourism became a crime in Mexico in January 2000.

²⁰ Article 167 of the Code of Girls, Boys and Adolescents obliges owners or administrators of hotels, residences and other accommodation, to communicate to the competent authority whenever they receive a child alone or with someone who is not a parent or guardian (Bolivia, Oct. 1999).

²¹ The Dominican Republic has established a National Inter-Agency Commission for the Prevention and Eradication of Child Prostitution in Tourist Centres.

²² Protocol of Intentions signed in Bahia, Brazil 20 August 1996.

²³ Art. 16, Law of 3 August 1998, NR 269 (Italy), provides that tourist agencies organizing collective or individual trips to foreign countries are obliged for a minimum of three years to include the following: 'Mandatory communication: Italian law punishes with prison sentence the offence inherent to child prostitution and child pornography, even if these are committed abroad.' There is a fine for non-compliance.

(Die Presse 13/3/99) - In 1999, the European Union funded a programme in Brazil to educate about the dangers of sex tourism. The Brazilian transport sector used part of this programme, which included the creation of videos to be shown on airplanes, as part of its awareness-raising campaign on the issue of trafficking.

²⁴ Art 6, Law of 3 August 1998, NR 269, Italy

²⁵ High Court of Bangladesh - Case No 4031, 14 August 1997

²⁶ In Germany, the extradition of German citizens to an international tribunal or to a member State of the European Union is permitted.

²⁷ This is also the view of Muntabhorn, the first Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography (see *Extraterritorial Criminal Laws op cit* at 8).

²⁸ Van Bueren, "Protection against Child Sexual Abuse and Exploitation: A Suggested Human Rights Approach", *International Journal of Children's Rights* 1994, 45-61

²⁹ (ECPAT Newsletter, Dec. 2000) - The first French citizen accused of raping a child while in Thailand

22 Child sexual exploitation and the law

was successfully prosecuted in France. The victim, then 12 and now 18, was questioned *in camera* to protect her privacy.

³⁰ In Germany there has been an improvement in criminal prosecution procedures by allowing the prosecution of sexual exploitation abroad, even if the alleged perpetrator is permanently resident abroad. However, jurisdiction is limited in that Article 5 of the Penal Code extends jurisdiction over citizens who commit sexual offences against children but it is only provided under the heading of ‘offences against German goods committed abroad’ (see also Arts. 176-177B, 235 and 236 of the Penal Code, which entered into force 1 April 1998).

³¹ See Muntarhorn, *Extraterritorial Criminal Laws Against Child Sexual Exploitation* (UNICEF, 1998).

³² Die Presse, 30/09/1999 - The Government of Austria established a reporting point in its Ministry of Internal Affairs for child pornography on the Internet. Personnel are overstretched, having reported 78 cases in 1997, 174 in 1998 and 166 in the first six months of 1999.

In 1999, in the Russian Federation, there were 295 convictions for distributing child pornography, which represented a 13.5 per cent increase over 1998 (See UN Doc. E/CN.42001/78/Add.2).

³³ Art 3, Law 269, Italy *op cit*.

³⁴ R v Sharpe, Judgement of the Canadian Supreme Court, 2000

³⁵ As from May 1 1998 see UN Doc CRC/C/SR 522.

³⁶ Law 269, Italy *op cit*.

³⁷ Plan de Accion para Prevenir, Atender y Erradicar la Explotacion Sexual Comercial de Menores (Mexico, 1998)

³⁸ Togo has adopted a national plan of action on child labour and the trafficking of children which focuses on three groups vulnerable to sexual exploitation: children exploited through employment; child victims of trafficking, and street children. The plan seeks to create a database on trafficking and exchange information on trafficking with Benin, Ghana and Burkina Faso; improve education opportunities for street children; conduct awareness raising campaigns; and promote recovery and reintegration (ECPAT, *Looking Back, Thinking Forward* at 22).

³⁹ Art 13 Law No 269, Italy

⁴⁰ Art 1, Law of 3 August 1998, NR 269, Italy

⁴¹ Save the Children’s report *Child Trafficking in Albania* is the first detailed study of trafficking in Albania with information on recruitment methods and routes and trafficking hot-spots. It relays that up to 90 per cent of girls over the age of 14 no longer attend school in some rural areas for fear of being trafficked. The report calls on the government and international bodies to take the necessary steps to deal with the widespread trafficking.

⁴² See UN Doc. E/C.4/1997/95/Add.2, Recommendation of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography in the report of the mission to the United States on the issue of the commercial sexual exploitation of children.

